Appendix A

Notice of Intent

furtherance of 43 U.S.C. 1457 and provisions of the Fish and Wildlife Act of 1956 (16 U.S.C. 742a-742j), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et. seq*), the National Wildlife Refuge System improvement Act of 1997 (16 U.S.C. 668dd-668ee), and the National Forest Management Act of 1976 (16 U.S.C. 1600 *et.seq*) and in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2. The Secretary of the Interior and Secretary of Agriculture certify that the formation of the WFEC is necessary and is in the public interest.

The purpose of the WFEC is to provide advice on coordinated national-level wildland fire policy and to provide leadership, direction, and program oversight in support of the Wildland Fire Leadership Council. Questions related to the WFEC should be directed to Shari Eckhoff (Designated Federal Officer) at *Shari_Eckhoff@ios.doi.gov* or (208) 334–1552 or 300 E. Mallard Drive, Suite 170, Boise, Idaho, 83706–6648.

Meeting Agenda: The meeting agenda will include: (1) Welcome and introduction of council members; (2) Review and Approval of the Cohesive Strategy National Action Plan; (3) public comments; (4) Develop recommendations to go forward to the Secretary of the Interior and Secretary of Agriculture through the Wildland Fire Leadership Council; and (5) closing remarks. Participation is open to the public.

Public Input: All WFEC meetings are open to the public. Members of the public who wish to participate must notify Shari Eckhoff at *Shari_Eckhoff@ios.doi.gov* no later than the Friday preceding the meeting. Those who are not committee members and wish to present oral statements or obtain information should contact Shari Eckhoff via email no later than the Friday preceding the meeting. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

Questions about the agenda or written comments may be emailed or submitted by U.S. Mail to: Department of the Interior, Office of the Secretary, Office of Wildland Fire, Attention: Shari Eckhoff, 300 E. Mallard Drive, Suite 170, Boise, Idaho 83706–6648. WFEC requests that written comments be received by the Friday preceding the scheduled meeting. Attendance is open to the public, but limited space is available. Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Ms. Eckhoff at (202) 527–0133 at least seven calendar days prior to the meeting.

Dated: January 31, 2014.

Shari Eckhoff,

Designated Federal Officer.

[FR Doc. 2014–02638 Filed 2–6–14; 8:45 am]

BILLING CODE 4310–J4–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R2–ES–2013–0134: FXES11120200000F2–145–FF02ENEH00]

Notice of Intent To Prepare an Environmental Impact Statement for a Habitat Conservation Plan for Commercial Developments, Including Energy Developments, and Agricultural and Conservation Activities Within Six States

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; announcement of public scoping meetings; request for comments.

SUMMARY: We, the Fish and Wildlife Service, as lead agency, intend to prepare an environmental impact statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP), under the Endangered Species Act of 1973, as amended (ESA). The potential ITP is directed to the lesser prairie-chicken, a species currently proposed to be listed as threatened pursuant to the ESA. The potential ITP includes activities that cover regional construction, operation, and maintenance associated with multiple commercial energy facilities and agricultural activities (e.g. farming, ranching) and conservation management activities within portions of six States (Colorado, Nebraska, Kansas, New Mexico, Oklahoma, and Texas). We provide this notice to (1) describe the proposed action; (2) advise other Federal and state agencies, potentially affected tribal interests, and the public of our intent to prepare an EIS; (3) announce the initiation of a 30-day public scoping period; and (4) obtain suggestions and information on the scope of issues and possible alternatives to be included in the EIS.

DATES: *Comments:* We will accept comments received or postmarked on or before March 10, 2014. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered.

Scoping Meetings: We will hold public meetings within the proposed permit area. Written comments will be accepted at each meeting.

Notice of the exact meeting dates, times, and locations will be published at least 2 weeks before the event in local newspapers and on the Service's Web site, *http://www.fws.gov/southwest/*.

ADDRESSES: You may submit written comments by one of the following methods:

- *Electronically:* Go to the Federal e-Rulemaking Portal: *http://www.regulations.gov*. In the Search box, enter FWS–R2–ES–2013–0134, which is the docket number for this notice. On the left side of the screen, under the Document Type heading, click on the Notices link to locate this document and submit a comment.
- *By hard copy:* Submit by U.S. mail or hand-delivery to Public Comments Processing, Attn: FWS–R2–ES–2013–0134; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM, Arlington, VA 22203.

Please note that your comments are in regard to the EIS for the Stakeholder Conservation Strategy/American Habitat Center Habitat Conservation Plan.

We request that you send comments only by one of the methods described above. We will post all information received on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Availability of Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Allison Arnold, at 512–490–0057, ×242 (telephone), or *Allison_Arnold@fws.gov* (email). Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8337 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Introduction

Under the National Environmental Policy Act (42 U.S.C. 4321, et seq.; NEPA) of 1969, as amended, we, the U.S. Fish and Wildlife Service (Service), as lead agency, advise the public that we intend to prepare an environmental impact statement (EIS) on a proposed application for an incidental take permit (ITP), including a Habitat Conservation Plan (HCP) under section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.; ESA), and seek public input prior to developing a draft EIS for the potential issuance of an ITP.

The potential ITP is directed to the lesser prairie-chicken (*Tympanuchus pallidicintus*) a species currently proposed to be listed as threatened pursuant to the Endangered Species Act of 1973, as amended (ESA). The potential ITP would include activities that cover regional construction, operation, and maintenance associated with multiple commercial energy facilities and agricultural activities (e.g. farming, ranching), and conservation management activities within portions of six States (Colorado, Nebraska, Kansas, New Mexico, Oklahoma, and Texas). The lesser prairie-chicken has some likelihood of being affected by the applicant's activities within the proposed permit area.

The intended effect of this notice is to gather information from the public to develop and analyze the effects of the potential issuance of an ITP that would facilitate development and agricultural production within the planning area, while minimizing incidental take and mitigating the effects of any incidental take to the maximum extent practicable.

Reasonable Accommodations

Persons needing reasonable accommodations in order to attend and participate in the public meetings should contact the Service at the address above no later than 1 week before the public meeting. Information regarding this proposed action is available in alternative formats upon request.

Background

Section 9 of the ESA and its implementing regulations prohibit take of animal species listed as endangered or threatened. The definition of take under the Act includes the following activities: To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or attempt to engage in such conduct (16 U.S.C. 1538). Section 10 of the ESA, 16 U.S.C. 1539, establishes a program whereby persons seeking to pursue activities that are otherwise legal, but could give rise to liability for unlawful take of federally protected species, may receive an ITP, which provides incidental take authorization to the ITP holder. To obtain an ITP, an applicant must submit an HCP containing measures that would minimize incidental take, including avoidance, and mitigate for the effects of any incidental take to the maximum extent practicable, and ensure that the taking is incidental to, and not the purpose of, an otherwise lawful activity (16 U.S.C. 1539(a)(1)(B) and 1539(a)(2)(A)).

Applicant's Proposed Habitat Conservation Plan

A diverse group of stakeholders representing energy, agricultural, and conservation industries and organizations (Stakeholders) across five States within the occupied range of the lesser prairie-chicken, as well as Nebraska, have come together to develop a range-wide conservation plan: The Stakeholder Conservation Strategy for the lesser prairie-chicken. The Strategy contains three primary components: The Habitat Exchange (''Exchange'') for the lesser prairie-chicken, the Habitat Quantification Tool (HQT) and the Regional Habitat Conservation Plan for the lesser prairie-chicken (HCP). The HCP will reference the HQT as the means for determining debits and will identify the Exchange as the primary means of meeting mitigation obligations.

The HCP and associated permit, if approved, would have sufficient ''take'' authorization to allow agriculture, energy industry development, and other activities to continue should the lesser prairie-chicken become listed. The ITP is being sought by a group of energy industry companies and agricultural and conservation organizations formed in 2013 to develop the Stakeholder Conservation Strategy (SCS) for the lesser prairie-chicken. Member entities include: Colorado Cattlemen's Association, Kansas Farm Bureau, Oklahoma Farm Bureau, Texas and Southwestern Cattle Raisers Association, Texas Farm Bureau, Plains Cotton Growers, Texas Wheat Growers Association, Texas Watershed Management Foundation, Environmental Defense Fund, The Nature Conservancy, Oklahoma State University, United States Department of Agriculture/Agricultural Research Service, Colorado Parks and Wildlife, British Petroleum, Chesapeake, Chevron, SandRidge, and, XTO Energy/ExxonMobil. Additional companies or organizations may become involved as the planning process proceeds. Entities wishing to gain regulatory assurances and coverage under an incidental take permit may enroll in the HCP.

The HCP will contain a multifaceted approach, including but not limited to take avoidance, minimization of take (e.g., through proven and defined best management practices), and mitigation of the impacts of take through habitat preservation, restoration, and enhancement measures. The applicant must also ensure that adequate funding for implementation, including biological and compliance monitoring, is provided.

Currently, the HCP contemplates effects from covered activities to the lesser prairie-chicken, currently proposed for listing as a threatened species. The final list of covered species may include additional species based on the outcome of this planning process.

The proposed planning area is defined as the occupied range of the lesser prairie-chicken, including portions of New Mexico, Colorado, Kansas, Oklahoma, and Texas. In addition, the planning area includes areas outside of the occupied range where populations could expand with appropriate conservation initiatives attempting to accomplish population expansion. This would extend the planning area beyond the five States listed above to include portions of Nebraska.

Environmental Impact Statement

The Service will be the lead Federal agency in the preparation of the EIS to satisfy the requirements of NEPA. With this notice of intent (NOI), we ask other Federal, State, tribal, and local agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EIS. Agencies that would like to request cooperating agency status on the EIS should follow the instructions for filing comments provided under the **ADDRESSES** section, above.

The EIS will consider the proposed action (the issuance of a section 10(a)(1)(B) ITP, as supported by an HCP), no action (no HCP/no ITP), and a reasonable range of alternatives that accomplish the Service's purpose and need in reviewing this proposal. A detailed description of the proposed action and alternatives will be included in the EIS. The alternatives currently considered for analysis in the EIS may include, but are not limited to, modified lists of covered species, differing land-coverage areas, activities that may be covered, and a variety of permit structures under consideration for the conservation program, described below in the Public Comment section. The EIS will also identify potentially significant impacts on biological resources, land use, air quality, water quality, water resources, economics, and other environmental/historical resources that may occur from issuance of the ITP; indirect impacts as a result of implementing a proposed HCP, including any of the alternatives; and cumulative impacts. Various strategies for avoiding, minimizing, and mitigating the impacts of incidental take will also be considered.

Environmental review of the EIS will be conducted in accordance with the requirements of NEPA, its implementing regulations (40 CFR 1500–1508), other applicable regulations, and our procedures for compliance with those regulations. We furnish this notice in accordance with 40 CFR 1501.7 and 1508.22 to obtain suggestions and information from other agencies and the public on the scope of issues and alternatives they believe need to be addressed in the EIS. We invite comments from interested parties to ensure that the full range of issues related to the proposed permit application is identified.

Public Comments

We are requesting information from other interested government agencies, Native American Tribes, the scientific community, industry, or other interested parties concerning the following areas of analysis: Vegetation, Wildlife and Aquatic Resources, Special Status Species, U.S. Wetlands and Waters, Archeology, Architectural History, Sites of Religious and Cultural Significance to Tribes, Noise and Vibration, Visual Resources and Aesthetics, Economics and Socioeconomics, Environmental Justice, Air Quality (including greenhouse gas emissions and climate change), Geology and Soil, Land Use, Transportation, Infrastructure and Utilities, Hazardous Materials and Solid Waste Management, and Human Health and Safety.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not provide information useful in determining the issues and the impacts to the human environment in the draft EIS. The public will also have a chance to review and comment on the draft EIS when it is available (a notice of availability will be published in the **Federal Register**).

You may submit your comments and materials by one of the methods described above under the **ADDRESSES** section at the beginning of this notice. Written comments will also be accepted at the public meetings, although these public meetings are primarily intended to provide additional information and provide a chance for the public to ask specific questions concerning the proposed HCP and EIS.

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that the entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will not consider anonymous comments. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 et seq.) and its implementing regulations (50 CFR 17.22) and the National Environmental Policy Act (42 U.S.C. 4721 et seq.) and its implementing regulations (40 CFR 1506.6).

Joy E. Nicholopoulos,

Acting Regional Director, Southwest Region, Albuquerque, New Mexico.

[FR Doc. 2014–02637 Filed 2–6–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[DR.5B711.IA000814]

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of approved Tribal-State Class III Gaming Compact.

SUMMARY: This notice publishes the approval of an amendment to the Class III Tribal-State Gaming Compact (Amendment), between the Crow Tribe of Montana (Tribe), and the State of Montana (State).

DATES: *Effective Date:* February 7, 2014.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA) Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. On December 18, 2013, the Amendment was submitted for review and approval. The Amendment includes all lands contiguous to the Crow Reservation and extends the term for 15 years from the date the Amendment becomes effective. The Tribe is authorized to operate 925 gaming devices, increase the prize value, and wager limits. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary, and pursuant to 25 U.S.C. 2710(d)(3)(B), an approved compact or amendment takes effect when notice of its approval is published in the **Federal Register**.

Dated: January 30, 2014.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2014–02594 Filed 2–6–14; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CACA 048811, LLCAD01500, L51010000.LVRWB13B5340.ER0000]

Notice of Availability of the Draft Environmental Impact Statement for the Proposed Right-of-Way Amendment for the Blythe Solar Power Project, California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Palm Springs—South Coast Field Office, Palm Springs, California, has prepared a Draft Environmental Impact Statement (EIS) for the proposed right-of-way (ROW) grant amendment for the Blythe Solar Power Project (BSPP), Riverside County, California, and by this notice is announcing a 45-day public comment period on the EIS.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Draft EIS within 45 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: You may submit comments related to the proposed ROW

Appendix B

Copies of Notices as

Published in Newspapers

Amarillo Globe News
Feb 11, 2014

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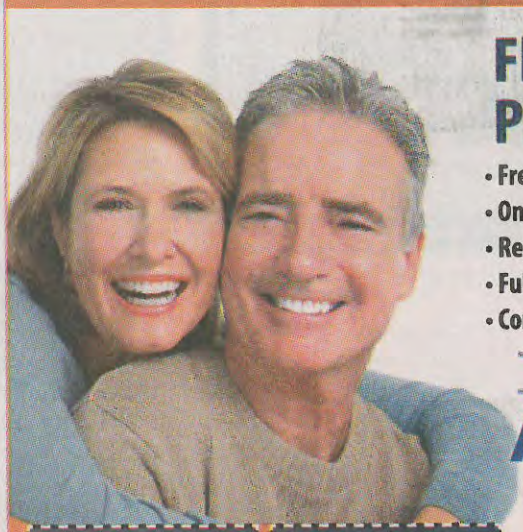

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NOTICE OF PUBLIC SCOPING MEETINGS

Stakeholder Conservation Strategy for the Lesser Prairie-Chicken

The U.S. Fish & Wildlife Service (Service) proposed the lesser prairie-chicken (LPC) for listing as threatened under the Endangered Species Act (ESA) on December 11, 2012. The American Habitat Center proposes to develop a regional, multi-state stakeholder conservation strategy (Proposed SCS) that is intended to provide conservation benefits to the LPC. The Proposed SCS consists of three components: a habitat conservation plan (known as the Stakeholder Conservation Plan); a Habitat Exchange Agreement; and a Habitat Quantification Tool. The Proposed SCS is likely to consider a hybrid Candidate Conservation Agreement with Assurances (CCAA)/ Habitat Conservation Plan (HCP) in order to provide regulatory certainty in the event the LPC is listed (HCP) or remains a candidate for listing (CCAA). The SCS is intended to support the issuance of an incidental take permit (ITP) by the Service if the LPC is listed as threatened under the ESA. The ITP would provide "incidental take" coverage from activities listed within the Proposed SCS including future construction, operation, and maintenance of oil and gas operations and agricultural uses. The Proposed SCS would apply to lands in eastern Colorado, southwestern Nebraska, western Kansas, western Oklahoma, eastern New Mexico and the Texas Panhandle.

The National Environmental Policy Act (NEPA) establishes a planning process that federal agencies are required to follow. The Service intends to prepare a draft Environmental Impact Statement (EIS) as part of that process. Through public scoping meetings and consultations with other agencies, the Service intends to gather information necessary to prepare the draft EIS. We also will use this process to obtain suggestions and information from agencies and the public on the scope of issues to be addressed in this document. The Service invites you to share any thoughts and concerns that you may have about the proposed SCS.

The Service is holding three public scoping meetings during February 2014. Scoping meetings will be organized in an open house format. Information on the dates, time and locations for the public scoping meetings is below

February 25, 2014	February 26, 2014	February 27, 2014
Garden City Community College	High Plains Technology Center	Cochran County Activity Center
801 Campus Drive	3921 34th St.	200 W Taylor
Garden City, KS 76846	Woodward, OK 73801	Morton, TX
6:00-8:00pm	6:00-8:00pm	6:00-8:00pm

To ensure that your comments are fully considered, we should receive them no later than March 10, 2014.
Send written comments or requests for additional information to:
Public Comments Processing, Attn: FWS–R2–ES–2013–0134; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Comments and requests for additional information may also be sent electronically to:

Go to the Federal e-Rulemaking Portal: http://www.regulations.gov. In the Search box, enter FWS–R2–ES–2013–0134, which is the docket number for this notice. On the left side of the screen, under the Document Type heading, click on the Notices link to locate this document and submit a comment.

A link to the Notice of Intent for this project is available at: www.fws.gov/southwest

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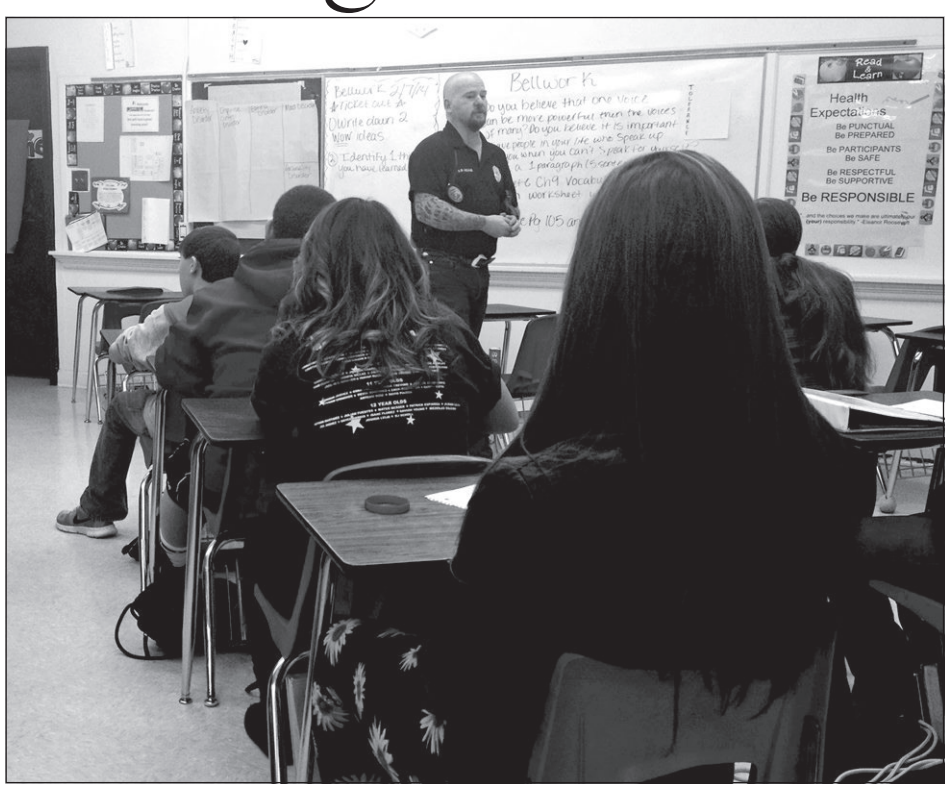
SCHOOLS

Teens get schooled about online safety



PHOTOS BY JESSICA ONSUREZ — CURRENT-ARGUS

Carlsbad Police Department Detective Blaine Rennie addresses P.R. Leyva students about the dangers of risky online behavior and consequences of posting revealing photos.

By Jessica Onsurez
jonsurez@currentargus.com
@JussGREAT on Twitter

CARLSBAD » Think no one but your friends are interested in what you post online? Think again. That's the message that Carlsbad Police Det. Blaine Rennie gave to students at P.R. Leyva Middle school.

Partnering with Zelma Lopez of the Eddy County Kid's Safehouse, the two were there to deliver a wake up call for students who haven't considered the consequences of the daily selfie.

Predators, said Rennie, are no longer just looking for vulnerable targets but using unsecured content in ways the poster never meant.

A number of students' hands went up in response to Rennie's questions about online risky behavior. Access to social media including Facebook and smart phones has placed children in the path of potential online predators.

"We're here to help you."

— Zelma Lopez of the Eddy County Kid's Safehouse

What you put online, he said, can be dangerous.

It's a scary reality. The internet is no longer an anonymous way to connect; photos contain geo-tagging information, emails and user names connect a single user even when they use different websites.

The National Center for Missing and Exploited Children published "Six Degrees of Information," a project which is meant to show the facility of retrieving data online. In six clicks a predator can mine online information which allows him to target the most vulnerable.

But not only sexual predators are using the internet to do harm. Peer to peer bullying and harassment via electronic devices and online has increased, and so have the consequences for those children who choose to participate in that kind of activity.

Elise Kriste, the health teacher at P.R., said several of her students had written research papers on bullying, emotionally connecting to the story of Amanda Todd, a 15-year-old Canadian student, who was bullied and ultimately committed suicide.

Todd's ordeal began when she sent a nude photo of herself to an online acquaintance, which lead to blackmail and bullying. It was an escalating situation that any teen might find themselves in according to Lopez.

"We're here to help you," said Lopez.

Rennie urged students to be vocal about any uncomfortable situation."Tell someone, call me, and it will stop," Rennie urged students.

Reporter Jessica Onsurez may be reached at (575)491-4682.

COMMUNITY

San Jose Plaza dedicated in honor of Ray Anaya

By Jessica Onsurez
jonsurez@currentargus.com
@JussGREAT on Twitter

JESSICA ONSUREZ — CURRENT-ARGUS

Mayor Dale Janway, left, watches over the dedication of San Jose Plaza in memory of the late Ray Anaya.

CARLSBAD » A small gathering of friends and family was on hand Saturday afternoon to honor the legacy of Ray Anaya, who died Din ecember, with the rededication of San Jose Park in his name.

"I believe we've sent a message — a hundred years, 200 years from now — that Ray Anaya was an amazing person," said Carlsbad Mayor Dale Janway.

Anaya is best known for his work with Christmas Anonymous, which he cofounded in 1963, but Anaya was also a U.S. veteran, former Eddy County Sheriff, and spent 22 years as a juvenile probation officer.

"The true legacy of Ray Anaya is the people all around you right now," said Janway.

Councilman Nick Salcido spoke briefly at the dedication stating that he wishes to honor Anaya's memory through his service as a city council member.

"I am honored to be able to participate in renaming this park for a great friend of ours, Ray Anaya," he said.

Anaya's son, Benny Anaya spoke on behalf of the family thanking the community and sharing a few personal memories of his father.

"My dad always said 'make things better than how you found them'", Benny Anaya said.

"Now it (the plaza) is given a name, a figure, that means something and hopefully one day instead of saying 'the plaza' they'll say 'Ray Anaya plaza, over at Ray Anaya's place'."

Anaya's daughter, Geraldine praised the efforts of those who worked to have the park renamed in her father's memeory.

"Our father left behind a legacy. Though he is no longer with us, thanks to your hard work and your generosity, you assure generations to follow that once stood a man whose heart and spirit was so grand that his name and his memory will never be forgotten."

Reporter Jessica Onsurez may be reached at (575)491-4682.

NM legislature » Roundup

Days remaining in session: 9

REP. JEFF SPEAKS OUT » Rep. Sandra Jeff says she has been the target of bullying since her vote last week against the state budget proposal backed by fellow Democrats.

"When did it stop being OK for members to vote their conscience?" Jeff said during a five-minute speech Monday on the floor of the House of Representatives.

She said certain legislators — she did not name names — even threatened to undercut legislation for casinos on the Navajo Nation because of her vote on the budget.

Jeff, D-Crownpoint, joined the 33 Republican members Friday in voting against the House budget bill. That created a 34-34 tie, meaning the budget remains unsettled.

SKANDERA AWAITS A VOTE » Hanna Skandera, secretary-designate of public education, has been on the job for more than three years but still has not received a confirmation vote from the state Senate.

Will senators make a decision on Skandera before the 30-day session ends Feb. 20?

"I have no idea," Skandera said Monday. "You'll know sooner than I do."

Sen. Linda Lopez, D-Albuquerque, chairs the Rules Committee, where confirmation votes start before moving to the full 42-member Senate. Lopez has said she will call the vote on Skandera's nomination this session.

But at least two senators, Democrats John Arthur Smith of Deming and Daniel Ivey-Soto of Albuquerque, say there is no point to voting on Skandera now.

If Gov. Susana Martinez is re-elected this fall, another confirmation hearing on Skandera would have to be held in next year's 60-day session anyway, so a delay is in order, Ivey-Soto said. Smith said the confirmation hearing would steal time from budget issues this session.

Skandera would remain in office with full powers if the Senate again does not vote on confirming her.

GIVING FOSTER KIDS A CHANCE » The Senate Education Committee gave a "do pass" to Senate Bill 206, introduced by Sen. George Muñoz, D-Gallup, to waive tuition and fees at public colleges for students who have aged out of the state's foster-care system.

Muñoz told the committee that many of those children might not be eligible for the state's Lottery Scholarship fund and might not have familial support to pay for college. Likewise, many of these students might have to work to pay bills, he said.

Sen. Michael Padilla, D-Bernallilo, told the committee that he was a foster child and that, "85 percent of foster kids can't start college for various reasons and this will provide them with a life-line."

E-CIGARETTE BAN » A prohibition on minors buying or possessing electronic cigarettes advanced through the House Judiciary Committee on Monday, but anti-smoking crusaders complained that it doesn't go far enough.

House Bill 15 sponsor Rep. Paul Bandy, R-Aztec, talked members of the panel out of an amendment backed by the American Cancer Society and others that would have classified the devices as a tobacco product.

The battery-powered devices vaporize liquid capsules, often containing nicotine, for smoking.

The federal government could settle that question. The U.S. Food and Drug Administration is considering whether to classify e-cigarettes as tobacco products.

Currently, neither state nor federal law regulates the sale of e-cigarette to people younger than 18. House Bill 15 would change that in New Mexico.

— The New Mexican

Corrections

A story that ran on the front page of the Saturday, Feb. 8 edition of the Current-Argus incorrectly spelled the last name of German engineer Ulrich Bergmann.

***

A story in the Friday, Feb. 7 edition referring to Cathrynn Brown's House Bill 315 said oil and gas companies in Eddy County reached $4.8 million in profits last year.

The number is incorrect. The figure represents the companies' production value, not their profits.

NOTICE OF PUBLIC SCOPING MEETINGS

Stakeholder Conservation Strategy for the Lesser Prairie-Chicken

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Benedict's announcement changed church

❑ One year later, pontiff's retirement still affects church.

By Nicole Winfield
THE ASSOCIATED PRESS

VATICAN CITY — It was the quietest of announcements that had the effect of a thunder-clap on the Catholic world: A year ago Tuesday, Pope Benedict XVI said in a voice so soft that cardinals strained to hear (and in a Latin not all could easily follow) that he was becoming the first pontiff to resign in more than half a millennium. On the eve of the anniversary, Benedict's longtime private secretary credited his boss' stunning decision with opening the way to the "enormous impact" Pope Francis is having on the church and world at large.

Monsignor Georg Gaenswein's comments sent out a message of continuity between the awkward, bookish Benedict and his charismatic, super-star successor, the first Jesuit pope and the first pontiff from Latin America. It also may suggest that Benedict approves of the dramatic changes that Francis is bringing about within the church — even if many seem to go against the grain of his more restrained papacy.

"We are all seeing the impact that Pope Francis is having on the world, not just the faithful in the church but in the world — it's an enormous impact — and this impact was also facilitated by Pope Benedict in resigning," Gaenswein told Vatican Television. "He opened a possibility that until then wasn't there, and we can see that Pope Francis has taken this situation in hand and we're delighted."

Gaenswein is in the historically unique situation of serving two popes: While he remains Benedict's secretary, lives with him in his retirement home in the Vatican gardens and takes daily walks with him each afternoon, Gaenswein is also the head of Pope Francis' household, arranging his schedule and appearing regularly with him at his Wednesday general audiences and other public events.

> "We are all seeing the impact that Pope Francis is having on the world ... this impact was also facilitated by Pope Benedict resigning."
>
> ◆ Monsignor Georg Gaenswein
> Benedict's private secretary

Gaenswein was by Benedict's side on that Monday morning, Feb. 11, 2013 when, during the course of a routine announcement of new saints on a Vatican holiday, Benedict announced that he no longer had the "strength of mind and body" to be pope and would retire at the end of the month.

Francis was elected about a month later and has dazzled the world with his simple style, message of mercy over moralizing and a tone of welcoming that has thrilled progressive Catholics and troubled conservatives. He has since been named "Person of the Year" by Time magazine and has injected new life into an institution that was crumbling following a decade of scandal over sexual abuse, and more recently over the theft of Benedict's private papers by his own butler.

As the anniversary of that momentous day approached, Vatican officials have sought to stress Benedict's generosity, courage and service to the church in deciding to step down as they battle to preserve his legacy amid the increasing temptation to contrast his often problematic papacy and reserved personality with his crowd-pleasing successor.

It's no easy feat when no one ever made a "Super Pope" wall painting of Benedict or created a life-sized chocolate statue of him — as has been the case with Francis.

Recently, the Vatican spokesman felt the need to defend Benedict when Rolling Stone magazine put Francis on the cover and compared his "gentle revolution" to the "disastrous papacy" of his predecessor.

Benedict's longtime deputy recently issued a mea culpa for not having been able to better protect his boss from the "ruthless criticism" lobbed his way over sexual abuse and the leaks of confidential papal documents. And over the weekend, Benedict's personal theologian, Cardinal Georges Cottier, said the REAL Benedict really only came to be known once he resigned.

World Roundup

Authorities probe disappearance

MORELIA, Mexico — Mexican authorities are investigating the disappearance of a U.S. man traveling across Latin America by motorcycle who went missing after visiting a friend in Mexico's western state of Michoacan, where rural vigilantes are battling a cult-like drug cartel.

Michoacan state prosecutors' spokeswoman Magdalena Guzman Rosas says officials began investigating Harry Devert's disappearance Wednesday, when a Mexican friend reported him missing.

Guzman said Monday that Devert arrived at the friend's home in Zitacuaro on Jan. 22 and spent three days there. She says the friend told investigators that Devert left on Jan. 25, saying he was headed to the Pacific resort city of Zihuatanejo.

Devert wrote earlier about the planned trip on his blog, "A New Yorker Travels," saying he hoped to go to Brazil for the World Cup.

Erroneous quote irks officials

BUENOS AIRES, Argentina — A purported remark by U.S. Sen. Mario Rubio has ignited a national furor in Argentina. The only problem is that Rubio never said it.

The false report in the newspaper La Nacion on Friday was due to a "transcription error," the newspaper's Washington correspondent later said.

The newspaper incorrectly quoted Rubio as saying Argentina "does things that not even North Korea" does, when in fact the senator never mentioned North Korea in his remarks during a confirmation hearing for President Barack Obama's nominee for ambassador in Buenos Aires.

Other newspapers and the Argentine state-run Telam news agency, apparently following La Nacion's lead, reported the remark as well with some changes and embellishments.

The Associated Press, which accurately covered the hearing, checked a video and written transcript. Rubio's only reference to Korea came when he reminded the nominee that Timerman violated diplomatic protocol in 2011 by personally breaking into classified U.S. equipment that had been flown to Argentina for a training session previously authorized by the Argentine government.

Man brain-dead following protest

RIO DE JANEIRO — A Brazilian television station said one of its cameramen was declared brain-dead Monday after being injured during a violent protest last week in Rio de Janeiro.

Band TV said in a statement that Santiago Andrade, 49, remained in a coma on life support, but that doctors declared him brain-dead.

Andrade was hit in the head by a powerful flare fired during a Thursday protest against a 10-cent hike in bus fares in Rio.

Video footage seems to show that the flare was shot by protesters. A demonstrator has since turned himself into police, saying he didn't shoot the flare but provided it to another young man who did. Police are investigating.

— Wire reports

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Peak to Plains Weather

La Junta's Forecast

Tonight: Partly cloudy and dry. Lows near 20.

Wednesday: Partly cloudy skies, near average temperatures. Highs mid 40s, lows mid 20s.

La Junta's Extended Forecast

Thursday	Friday	Saturday	Sunday
56 / 30	55 / 31	63 / 32	62 / 32

La Junta's Almanac for February 11, 2014

Temperature(valid 6 a.m.):		Precipitation(valid 6 a.m.):	
Yesterday's High/Low:	22 / 13	Yesterday's:	0.03"
Normal High/Low:	47 / 19	Month to Date:	0.10"
Record High:	78 in 1999	Normal Month to Date:	0.13"
Record Low:	-7 in 2011	Year to Date/Avg.:	0.19" / 0.46"

Moon Phases

Full	Last	New	First
Feb. 15	Feb. 22	Mar. 1	Mar. 8

Sunrise and Sunset

Today	7:17 AM	5:39 PM
Wednesday	7:15 AM	5:41 PM
Thursday	7:14 AM	5:42 PM
Friday	7:12 AM	5:43 PM

Agricultural Information:

Regional Snowpack Percent of Normal

Apishapa River:	60 % of Normal
Arkansas River:	107 % of Normal
Rio Grande River:	82 % of Normal
South Platte River:	125 % of Normal

Wind Forecast for: February 12, 2014
Morning: W at 5 to 15
Afternoon: SE at 5 to 15

Regional Forecast

Location	Today Hi	Today Lo	Today W	Tomorrow Hi	Tomorrow Lo	Tomorrow W	Thursday Hi	Thursday Lo	Thursday W
Alamosa	39	3	pc	35	9	pc	41	14	pc
Colorado Spgs.	44	19	pc	45	30	pc	55	30	pc
Denver	45	27	pc	52	37	pc	61	38	pc
Durango	43	19	pc	46	24	pc	53	26	pc
Fort Collins	42	22	pc	49	33	pc	56	33	pc
Grand Junction	42	25	pc	47	29	mc	51	31	mc
Lamar	36	16	pc	43	22	pc	54	27	pc
Leadville	28	6	pc	30	17	ls	34	18	ls
Pueblo	45	20	pc	47	28	pc	60	31	pc
Sterling	40	17	pc	42	27	pc	54	27	pc

Forecast Discussion

A mild and dry ridge of high pressure will be moving over eastern Colorado in the next couple of days. This will once again allow for temperatures to warm to well above average readings. We will also see lots of sunshine and very dry conditions. A change in the weather pattern may not occur until late next week.

National Forecast

Location	Today Hi	Today Lo	Today W	Tomorrow Hi	Tomorrow Lo	Tomorrow W	Thursday Hi	Thursday Lo	Thursday W
Albuquerque, NM	57	27	pc	61	33	pc	67	35	pc
Atlanta, GA	38	30	mx	32	29	mx	48	29	pc
Chicago, IL	12	4	su	24	12	ls	33	19	mc
Dallas, TX	34	26	mx	47	31	pc	60	39	pc
Las Vegas, NV	66	45	pc	71	48	pc	76	51	pc
Miami, FL	81	70	pc	81	70	sh	76	54	sh
Minneapolis, MN	18	10	su	21	15	pc	34	5	ls
New York City, NY	26	14	su	26	26	su	35	29	sn
Philadelphia, PA	25	6	su	26	24	pc	35	26	ls
Phoenix, AZ	79	49	pc	82	50	pc	85	53	su
San Francisco, CA	58	49	pc	60	52	r	61	51	r
Seattle, WA	48	45	r	50	42	r	51	43	r
Washington, DC	29	17	pc	30	25	ls	34	25	sn

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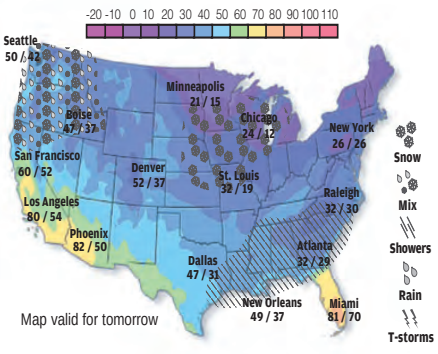
Cheyenne, WY
www.dayweather.com

W: su-sunny, pc-partly cloudy, mc-mostly cloudy, c-cloudy, sh-showers, fl-snow flurries, sn-snow, r-rain, th-thunderstorm,w-wind



Map valid for tomorrow

DELTA KAPPA GAMMA

Loretta Kerr, president of Phi Chapter of Delta Kappa Gamma, is pictured standing between two initiates: Terry Kitch, Rocky Ford, left, and Dianna Remick, La Junta, right. COURTESY PHOTO

Two initiated at Jan. meeting

Kathy Parker

The January meeting of Delta Kappa Gamma, with the initiation, was held at the Fowler Golf Course. The new initiates are Terry Kitch of Rocky Ford and Dianna Remick of La Junta.

The program was on Reflections and President Loretta Kerr had an old hand mirror that she used and spoke of how DKG and it members both here and in Kansas had influenced her life. She invited others to share as well and Sandy Dell, Kay Russell and Kathy Parker also spoke.

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■ Go to www.irs.gov. On the right side of the home page find Where's My Refund? When you click that link be prepared to give your social security number (or the first number on your return if you filed a joint return), filing status and the exact amount of your refund.

■ Are you missing tax forms?

■ Unemployment? Form 1099-G is used to report unemployment income. You can access your form online at https://myui.coworkforce.com

■ You should have received all of your W-2s from employers by Jan. 31. If not, call your employer first. If you do not have your W-2 by Feb. 16 and you have your final pay stub for 2013, you may use that to create a substitute W2 and file your return. If you do not have that and you have tried to contact your employer, you can call the IRS after Feb. 14 at 800-829-1040. Be prepared for l-o-n-g hold times.

■ If you have investments, your 1099-B is not due until Feb. 18. Wait another week for the mail and check your email.

■ If you sold real estate, your 1099-S is not due until Feb. 18. Wait another week for the mail and check your email.

■ If you receive another W-2 or 1099 after filing your original return, you need to file an amended return: 1040-X. Locally, Fulcircle employees are receiving 3 W-2s. Two are exactly the same.

DO NOT file a return until you have all of your forms. The IRS has a rule that prohibits filing returns without all the forms you know you will receive. Paid preparers can lose their license and you could be flagged for an audit just to get a refund a few weeks early.

More news and sports at
www.lajuntatribunedemocrat.com

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SERVICE TIMES

Friday, February 14, 2014

Sarlo, Lydia Xenia *— Funeral services will be at 2 p.m. at Our Lady of Guadalupe/St. Patrick's Catholic Church, with Msgr. James Koenigsfeld officiating. The family will be present to receive visitors on Thursday from 6:30 to 7:30 p.m. at Peacock Memorial Chapel. Memorial contributions may be made to the Koshare Indian Museum (PO Box 580, La Junta, CO 81050) and Picketwire Players (PO Box 912, La Junta, CO 81050). Online condolences may be made at www.PeacockFH.com. Peacock-Larsen Funeral Home & Arkansas Valley Crematory is in charge of arrangements.*

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Sundown Roughnecks fall to Tahoka 55-47

BY DEREK LOPEZ

The Sundown Roughnecks varsity basketball team hosted the Tahoka Bulldogs on Friday, as they continue to battle for a playoff spot.

After keeping the game tight for three quarters Sundown saw things begin to slip away at the midway point in the fourth quarter.

The Roughnecks suffered a tough blow when senior guard Kyler Rabel fouled out with 3:28 to play in the game.

Sundown called a timeout with 2:37 remaining in the game, trailing by eight points, 50-42.

Tim Rodriguez knocked down a three-pointer with 42-seconds left, as they tried to fight their way back into the game.

Keshawn Hood was fouled immediately, with the score 53-47 in favor of Tahoka.

Hood was fouled again with 27.10-seconds to play; he made both free throws to make it an eight-point game, 55-47.

Sundown called a full timeout trying to set something up to get a quick score.

Drew Berry attempted a three-pointer with 14-seconds left, it was no good and rebounded by the Bulldogs.

Sundown fouled Tahoka with 9.20-seconds to play; the Bulldogs missed both free throws and a last second three-pointer was off the mark as the Roughnecks fell to the Bulldogs, 55-47.

Rabel got things going for Sundown in the first quarter as he took a feed from Berry and dropped it in for the first two points of the game.

Tahoka answered to tie the game up 2-2, with 6:28 to play in the quarter.

Sundown, playing good team basketball never let the ball touch the ground from just beyond the half court line all the way to the basket.

Mo Sanchez tossed it across the half court line to Berry, who passed to Casey Easterwood just inside the three-point arc, who sent it to Tim Rodriguez for the finish at the basket, with 5:52 remaining in the quarter.

Hood drew a shooting foul with 5:11 to play in the quarter; he made both to knot the game up at 4-4.

Carlos Moralez drew a shooting foul on Rabel with 4:34 to play in the quarter; he split the free throws to give the Bulldogs the lead, 5-4.

Sanchez passed the ball to Rabel on the three-point arc, who gave it right back to Sanchez as he bolted to the basket for a lay-up off the give-and-go, giving Sundown a 6-5 lead with 4:13 to play in the first quarter.

Sanchez got it done on the defensive end of the floor as well, drawing a charge on Hood, with 3:41 on the clock in the first quarter.

Tim Rodriguez picked up an assist when he dished it to a cutting Rabel, who laid it in for two-points, making the lead 8-5.

Easterwood left the game with an apparent foot injury with 2:20 in the first quarter, (he would return later in the game).

On their next offensive possession, Rabel played the assist man as he hit Sanchez, who was cutting to the basket for a lay-up with 1:44 to play in the first quarter.

Tahoka called a timeout with 1:40 left in the first quarter, with Sundown leading by five points, 10-5.

Sanchez picked up a bad pass from Tahoka and on the other end tossed it up to Berry who caught it in mid air and laid it in for the Alley-oop lay-up.

Berry picked another lay-up with 50-seconds to play, but Tahoka quickly answered to make the game 14-7.

The Roughnecks led at the end of the first quarter, 14-9.

Sundown wasted no time getting started in the second quarter as Rabel drew a shooting foul with 7:46 to play in the first half; he split the free throws to make the score 15-9.

Hood answered with a three-pointer for the Bulldogs, to make it a one-possession game, 15-12.

Eddie Rodriguez drew a shooting foul on Hood with 7:18 to play; he split the free throws.

Rabel got a finger roll lay-up to drop in with 7:03 to play in the half. He drew a foul and made the free throw to convert the three-point play and make the score, 19-12.

Easterwood returned to the game with 5:46 to play in the first half, as he was subbed in for Eddie Rodriguez.

Rabel ended the Tahoka scoring run when he dropped in a lay-up with 3:58 to play in the half.

Rabel tied the game at 24-24, with a three-pointer from the right elbow with 3:31 remaining in the half.

Alex Perez found Easterwood in the lane for a lay-up with 2:29 to play in the game.

Tahoka got called for a travel and Sundown took advantage when Rabel took the feed from Tim Rodriguez and dropped in a baby hook shot to take the lead, 28-26.

Hood buried a lay-up with 24-seconds remaining in the half to tie the game at 28-28.

The teams went back and fourth early in the third quarter but Tahoka began to create seperation late in the quarter.

Berry threw up a prayer, buzzer beater that swished to send the Roughnecks into the fourth quarter down by four points, 43-39.

Sundown played hard until the end, but could not recover as they dropped the district contest to the Bulldogs, 55-47.

Rabel had a team-high 15 points. Sanchez, Easterwood and Tim Rodriguez each chipped in eight points. Berry contributed seven points while Eddie Rodriguez added one point.

Sundown concluded the regular season on Tuesday against the Forsan Buffaloes. Results were not available at press time.

Mules kick Panthers, 75-29

The Whitharral Panthers varsity basketball team traveled to Muleshoe on Friday for a non-district contest with the Mules.

The Mules defeated the Panthers 75-29.

The Panthers now get ready to battle the Amherst Bulldogs this Friday if Amherst was able to beat Hart Tuesday night.

The game Friday night would be used to determine who takes the district's third spot.

The Mules got out to a quick start and really never took their foot off of the gas.

They led by 10 points, 15-5 at the end of the first quarter.

They piled on 22 more points before halftime to make it a 37-9 game at the break.

Whitharral had their biggest quarter of the game in the third, where they netted 12 points, to make the game 55- 21 heading into the fourth quarter.

The Mules added 20 points in the fourth quarter, to finish the route, 75-29.

Austin Price and Chris Rodgers led the team in scoring with eight points each. Price also added three rebounds and an assist, while Chris Rodgers also had a rebound and an assist.

Stone chipped in six points and three rebounds, while Kordell Doshier netted four points.

Chad Moore contributed two points and six rebounds while Kevin Albus added one points, three rebounds and an assist.

Doran Rodgers added two rebounds and a steal.

Ropes Eagles defeat Lorenzo, 48-21

The Ropes Eagles varsity basketball team defeated Lorenzo on Friday, ending their season on a high note as they get ready for the post season.

The Eagles routed Lorenzo, 48-21, ending their season with a district record of 8-4.

The Eagles led 8-4 at the end of the first quarter, but busted things wide open in the second quarter.

They scored 16 points to take a 24-8 lead into the locker room at halftime.

They opened the second half with a huge 20-point third quarter, to take a commanding 44-12 lead into the final quarter of play.

Lorenzo could not recover from the early scoring barrage of the Eagles.

Hunter Yandell led the way for the Eagles with 11 points and three rebounds.

Wesley Hancock finished the game with eight points and five rebounds, while Caleb Richardson netted seven points, to go along with one rebound.

Zack Mendez netted six points, to go along with one assist and six rebounds.

Jovan Molina contributed five points, one assist and three rebounds, while AJ Mendez chipped in four points, an assist and two rebounds.

Justin Luna added three points and two rebounds, TJ Medrano also added three points and five rebounds and Ben Waller added one points and two rebounds.

The Eagles will await their seed and playoff draw.

The playoffs start Monday for the boys.

SPC Texans clip Thunderbirds, 72-53

Andre Spight led all scorers with 18 points while Ryan Martin and Roderick Lawrence chipped in with 17 and 13, respectively, and the fifth-ranked South Plains College Texans completed a season sweep of the New Mexico Junior College Thunderbirds with a 72-63 victory Monday night at the Texan Dome.

Spight hit three 3s in the first four minutes of the game to get the Texans off to a quick start in a game they never trailed in following the first two minutes of the contest.

South Plains (22-3, 9-2 WJCAC) led by as many as nine before heading to the locker room up five, 32-27.

Just like the beginning of the game, Spight started the second half with a 3 to put SPC up eight.

South Plains controlled much of the second half and led by as many as 15 and also 14 on two occasions.

New Mexico would do enough to make the game interesting.

Following a 3 by Spight that put the Texans in control 66-52, New Mexico went on a 9-0 run to get within five points in the final minute.

That's as close as the T-Birds would get as Billydee Williams converted a three-point play moments later and the Texans held on for the victory that keeps them a half-game ahead of Odessa for first place in the Western Junior College Athletic Conference standings.

The victory also puts behind what could be considered the toughest part of the schedule for the Texans as they recently faced four of the top five teams in the conference. South Plains' next four games will be against teams that have a combined 11-35 record in WJCAC competition.

The first of those four games will be at Clarendon College Thursday, Feb. 13 with tipoff scheduled for 7:45 p.m. Fans can watch live video of the contest at www.spctexans.com. Thursday's game can also be found on the radio at KLVT 1230 AM and online at www.klvtradio.com.

Anton Lady Dogs secure top spot

The Anton Lady Dogs concluded their regular season on the road against Cotton Center on Feb. 4.

The Lady Dogs finished as co-district champions with the Lazbuddie Lady Horns and met on Feb. 7 in Hart for the district seeding game.

The Lady dogs beat the Lady Horns, 54-47, to secure the number one seed for district 4-IIA.

The first two quarters of Anton's game with Lazbuddie ended with Anton up by one possession including a 16-14 lead heading into the locker room at halftime.

The Lady Dogs created some separation in the third quarter, outscoring the Lady Horns, 18-13 to take a 34-27 lead into the fourth quarter.

The lead built by Anton in the third quarter proved to be the difference in the game as the teams scored 20 points apiece in the final quarter.

Mariah Jimenez led the way for the Lady Dogs with 15 points; she was two-of-two from beyond the three-point arc and three-of-four from the free-throw line.

Layna Clardy was two-of-three from the three-point arc, as she finished with 12 points and Britni Parker added 10 points.

"Parker also took two huge charges for the Lady Dogs, including one late in the game," said Head Coach Colton Martin.

In their game against Cotton Center Layna Clardy led the way with 19 points, including five-of-eight from beyond the three-point arc.

Parker added 15 points and was five-of-six from the free-throw line as the Lady Dogs routed the Lady Elks, 78-23.

Anton will play the winner of Miami and Hedley at Amarillo River Road on Friday Feb. 14. Tipoff is scheduled for 6 p.m.

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NOTICE OF PUBLIC SCOPING MEETINGS

Stakeholder Conservation Strategy for the Lesser Prairie-Chicken

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6:00-8:00pm	6:00-8:00pm	6:00-8:00pm

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Lubbock Avalanche - Journal
Feb 11, 2014

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Lubbock Avalanche-Journal

THE STATE OF TEXAS, COUNTY OF LUBBOCK

Before me **Melissa Keller** a Notary Public in and for Lubbock County, Texas on this day, personally appeared **Brek Young** of the Morris Communication Corporation, LLC, publishers of the Lubbock Avalanche-Journal, Sunday through Monday, who being by me duly sworn did depose and say that said newspaper has been published continuously for more than fifty-two weeks prior to the first insertion of this **Legal Notice** in Lubbock County, Texas and the attached printed copy of the **Legal Notice** is a true copy of the original and was printed in the Lubbock Avalanche-Journal on the following date(s): 2.9.14 3x6 Display ad in Main $1523.88.

Brek Young

Inside Sales Manager
LUBBOCK AVALANCHE-JOURNAL
Morris Communication Corporation, LLC

Melissa Keller

NOTARY PUBLIC in and for the State of Texas

My commission expires: June 28, 2017.

MELISSA KELLER
Notary Public, State of Texas
My Commission Expires 06-28-2017

Subscribed and sworn to before me this 10 day of February, 2014.

Best friend's past abuse haunts family gatherings

DEAR ABBY: My best friend of 20 years, "Claire," has suffered bouts of depression ever since I have known her. She recently confided to me that her brother had repeatedly sexually abused her as a child.

When she went to her mother for help, her mother told her she needed to "thank God that it was happening because it would make her a stronger person." Her mother is dead now, but her father is still alive. I am furious at him for allowing the abuse to happen under his roof.

Abby, the family acts like it never happened! Claire invites her dad to events we plan together like birthdays. How do I attend knowing what I know? I don't want to sit across a table from him.

My husband is an abuse survivor and feels even more strongly than I do. It has made get-togethers miserable for us. Should we just smile and pretend we don't know because we can't fight my best friend's fight for her? How do we get over the anger? — **CONFUSED IN OKLAHOMA**

DearAbby

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DEAR CONFUSED: Years ago, someone explained to me that depression is anger turned inward. Your friend is enduring these bouts of depression because she was never allowed to express her anger where it belonged — at her brother and her mother. Whether the mother ever told her husband what was going on, or whether it was the continuation of a long family tradition of sexual abuse, is something we don't know. But if you haven't suggested to Claire that she could benefit from counseling, you should.

As to you and your husband participating in these family gatherings, my advice is to stop doing it. Celebrate special occasions with your friend right before or after these occasions; many people have pre- or post-birthday get-togethers, and that's what I recommend in a case like this.

DEAR ABBY: I recently became involved with a longtime female friend of mine when she was in town. I have always loved "Miranda" as a friend, but now I also feel attracted to her as a potential perfect match.

The problem is she lives far away. We keep in touch almost daily. I love that, but it makes me miss her, and I end up thinking about her all day, which doesn't help. She says she has feelings for me, too, but "the timing isn't in our favor."

What can I do to go about my day without letting thoughts of Miranda rule my brain? I am 27 and haven't felt like this about anyone before. We'll see each other in a couple of months and the time couldn't be crawling by any slower.

Abby, are long-distance relationships even worth trying? — **ANXIOUS IN COLORADO**

DEAR ANXIOUS: Of course they are. As the saying goes, "nothing ventured, nothing gained." Years ago, couples who were separated by distances courted via the mail. In fact, some of them wrote beautiful poetry and love letters that are classics. (Check out the letters of Victorian writers Elizabeth Barrett and Robert Browning.) Couples separated by war before the invention of the Internet also managed to nurture relationships that led to marriage.

So consider yourself lucky that you and Miranda can be in touch every day, even though at this point it's frustrating. As to the problem of her dominating your thoughts all day, a way to deal with it is to STAY BUSY.

Dear Abby is written by Abigail Van Buren, also known as Jeanne Phillips, and was founded by her mother, Pauline Phillips. Write Dear Abby at www.DearAbby.com or P.O. Box 69440, Los Angeles, CA 90069.

To receive a collection of Abby's most memorable — and most frequently requested — poems and essays, send your name and mailing address, plus check or money order for $7 U.S. funds) to: Dear Abby — Keepers Booklet, P.O. Box 447, Mount Morris, IL 61054-0447.

Dramatic improvements in vision can be seen in LASIK surgery

DEAR DOCTOR K: I've just scheduled LASIK surgery. Can you explain what will happen during the procedure?

DEAR READER: To understand LASIK surgery, you first need to know a few things about the eye and what it does. Basically, your eye is like a camera: It focuses the light coming into it to make a sharp image. That image then is captured on a kind of film (or, in digital cameras, a sensor).

ASK DR. K
ANTHONY L. KOMAROFF, M.D.

©2013 The President and Fellows of Harvard College

The parts of the eye that focus the image are primarily the cornea and the lens. The part that captures the image is the retina, a flat layer of nerve cells at the back of the eye. The cells of the retina then send the image to the back of the brain — the part that allows us to see and interpret the images.

During LASIK surgery, your doctor uses a laser to reshape your cornea. The cornea is the clear, round "window" of tissue that allows light to enter the front of the eye. By reshaping the cornea, the surgeon adjusts the focus of light on the retina. LASIK can improve vision in people who are nearsighted, farsighted or have astigmatism.

You will meet with your surgeon and his or her team before your procedure. During this exam, the team will take precise measurements of your eyes, including the shape and thickness of your cornea.

On the day of your procedure, your doctor may give you a mild sedative to help you relax. You will lie down in a reclining chair. You'll be given numbing eye drops so you will not feel pain or discomfort. An instrument will be positioned to keep your eyelids open, and a ring-like suction device will be placed on the front of your eyes to hold your cornea in place.

The surgeon will use a delicate instrument to slice a tiny, hinged flap of tissue from the front of your cornea. You will not see or feel the instrument cutting your cornea. The surgeon will remove the suction ring from your eye and fold back the hinged flap of cornea.

At this point, the surgeon will use the laser to reshape the underlying protein fibers of your cornea. This reshaping is based on the precise measurements made during your pre-surgery exam. Finally, the doctor will reposition the hinged flap of cornea. No stitches are necessary. (I've put an illustration of the LASIK procedure on my website, AskDoctorK.com.)

LASIK is an outpatient procedure; it generally takes 10 to 15 minutes for each eye. Some surgeons work on both eyes at one sitting, while others operate on only one eye per sitting.

The cornea heals quickly. You may notice dramatic improvements in vision almost immediately following your surgery.

Bet you're eager to know the full medical name for which LASIK is the abbreviation. It's: Laser-Assisted in situ Keratomileusis. If you already knew that, you're smarter than I am: I had to look it up.

Dr. Komaroff is a physician and professor at Harvard Medical School. To send questions, go to AskDoctorK.com, or write: Ask Doctor K, 10 Shattuck St., Second Floor, Boston, MA 02115.

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Keep pets safe in cold weather

Many pet owners enjoy taking their four-legged friends with them when running errands. But when the weather is especially cold and harsh, pet owners may want to leave their pets behind in the warmth and comfort of indoors. There are other tactics to keeping pets safe when the winter arrives in earnest.

Keep pets away from antifreeze

Antifreeze emits a sweet smell, which is often inviting to dogs and cats. But antifreeze is lethal in small doses, so it's best to keep pets out of your garage and away from your driveway, where antifreeze may leak. Antifreeze can prove especially harmful to pets if it contains ethylene glycol as the main ingredient. There are safer alternatives, but even the safest antifreezes can be lethal when consumed in high quantities.

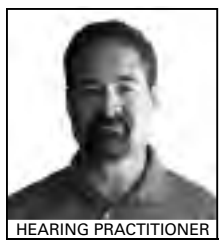
Protect their paws

Rock salt on sidewalks can effectively melt ice and snow. But rock salt also can be very irritating to pets' paws. Remember to wipe your pet's feet when coming indoors after walking on surfaces treated with salt or another melting agent. This will help to remove excess particles and prevent your pet from getting ill when the animal licks its paws clean.

Keep pets indoors on cold days

Don't allow pets outside when the temperature falls below 20 F, as pets are at risk of frostbite or hypothermia when exposed to such temperatures. Puppies, kittens and short-haired pets may be more susceptible to the cold and should be kept in when temperatures dip below 40 F.

When you talk about your hearing loss. . . Do you feel like you are being ignored?



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Nation and World

NATION BRIEFS

NEW HAMPSHIRE

Blast hurts 15

PETERBOROUGH, N.H. — Firefighters say an explosion that injured 15 people at a New Hampshire ball bearings plant doesn't appear to have caused any environmental damage.

Hazardous-materials teams responded after Monday afternoon's explosion at the New Hampshire Ball Bearings Inc. plant in Peterborough.

The cause has not been determined.

MILITARY PENSIONS

Reversal eyed

WASHINGTON (AP) — House Republican leaders Monday unveiled a plan to reverse a recently passed cut to military pensions as the price for increasing the government's borrowing cap, but it received a rocky reception from skeptical conservatives.

GOP leaders briefed rank-and-file GOP lawmakers at a meeting in the Capitol on Monday evening in hopes of passing it on Wednesday before departing Washington for a weeklong vacation. It's unclear whether the vote would still go forward after it was rejected by many conservatives.

CALIFORNIA

Drought not over

The storm system that soaked much of Northern California over the weekend didn't end the state's punishing drought. But it just may have kept it out of the record books.

A pineapple express of tropical moisture from the Pacific Ocean dumped up to 10 inches of rain on the Sierra Nevada foothills, dropped about 20 inches on a couple of spots north of San Francisco and coated high elevations of the northern Sierra with 2 to 4 feet of snow.

It was enough to prompt scattered flash-flood warnings, boost the state's dismal snowpack and increase lake levels.

GAY MARRIAGE

Churches urge ban

SALT LAKE CITY — A coalition of religious organizations has come together to urge a federal appeals court to uphold same-sex marriage bans in Utah and Oklahoma, saying unions between a man and woman are best for children, families and society.

The argument was made in a 42-page brief filed Monday afternoon to a Denver-based court reviewing cases that could reverse gay-marriage bans in Utah and Oklahoma.

Lawyers for The Church of Jesus Christ of Latter-day Saints and the U.S. Conference of Catholic Bishops wrote the brief, which was signed by the Ethics and Religious Liberty Commission of the Southern Baptist Convention and the Lutheran Church — Missouri Synod.

Shannon Minter, legal director for the National Center for Lesbian Rights, said that religions will always be free to choose which marriages they perform.

MILITARY POLICY

Drone strikes weighed

What if American abroad plans attack?

BY KIMBERLY DOZIER
THE ASSOCIATED PRESS

AP PHOTO/FILE

A drone flies over Kandahar Air Field in southern Afghanistan in January.

WASHINGTON — The case of an American citizen and suspected member of al-Qaida who is allegedly planning attacks on U.S. targets overseas underscores the complexities of President Barack Obama's new stricter targeting guidelines for the use of deadly drones.

The CIA drones watching him cannot strike because he's a U.S. citizen.

The Pentagon drones that could are barred from the country where he's hiding, and the Justice Department has not yet finished building a case against him.

Four U.S. officials said the American suspected terrorist is in a country that refuses U.S. military action on its soil and that has proved unable to go after him.

And Obama's new policy says American suspected terrorists overseas can only be killed by the military, not the CIA, creating a policy conundrum for the White House.

Two of the officials described the man as an al-Qaida facilitator who has been directly responsible for deadly attacks against U.S. citizens overseas and who continues to plan attacks against them that would use improvised explosive devices.

The officials said the suspected terrorist is well-guarded and in a fairly remote location, so any unilateral attempt by U.S. troops to capture him would be risky and even more politically explosive than a U.S. missile strike.

White House press secretary Jay Carney said Monday he would not comment on specific operations and pointed to Obama's comments in the major counterterrorism speech last May about drone policy.

WORLD BRIEFS

SYRIA

Truce renewed

BEIRUT — Aid officials rushed to evacuate more women, children and elderly from rebel-held areas that have been blockaded by government troops for more than a year in Syria's third-largest city, Homs, after a U.N.-brokered cease-fire in the city was renewed for three more days Monday.

PAKISTAN

Bomber kills 4

PESHAWAR, Pakistan — A suicide bomber's explosive vest went off in the house of a pro-government tribal elder in the northwestern Pakistani city of Peshawar on Monday, killing four women, police said.

It was not clear if the attacker set the vest off deliberately. Police chased him after he ran into the home of an elder.

MEXICO

Remains found

MEXICO CITY — Mexican officials have discovered hundreds of skeletal remains scattered on ranches in a stretch of towns along the U.S.-Mexico border as they carried out a wide search to locate missing people.

Coahuila state prosecutors' spokesman Jesus Carranza said Monday that the remains were burned and extremely hard to identify.

News of the grisly finds came at the same time 12 bodies were unearthed from clandestine graves in the southern Mexico state of Guerrero and about two months after 67 bodies were found in western Mexico. Such discoveries remain common despite government claims that the number of killings has gone down in the past year.

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NOTICE OF PUBLIC SCOPING MEETINGS

Stakeholder Conservation Strategy for the Lesser Prairie-Chicken

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Garden City Community College	High Plains Technology Center	Cochran County Activity Center
801 Campus Drive	3921 34th St.	200 W Taylor
Garden City, KS 76846	Woodward, OK 73801	Morton, TX
6:00-8:00pm	6:00-8:00pm	6:00-8:00pm

To ensure that your comments are fully considered, we should receive them no later than March 10, 2014.
Send written comments or requests for additional information to:
Public Comments Processing, Attn: FWS–R2–ES–2013–0134; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Comments and requests for additional information may also be sent electronically to:

Go to the Federal e-Rulemaking Portal: http://www.regulations.gov. In the Search box, enter FWS–R2–ES–2013–0134, which is the docket number for this notice. On the left side of the screen, under the Document Type heading, click on the Notices link to locate this document and submit a comment.

A link to the Notice of Intent for this project is available at: www.fws.gov/southwest

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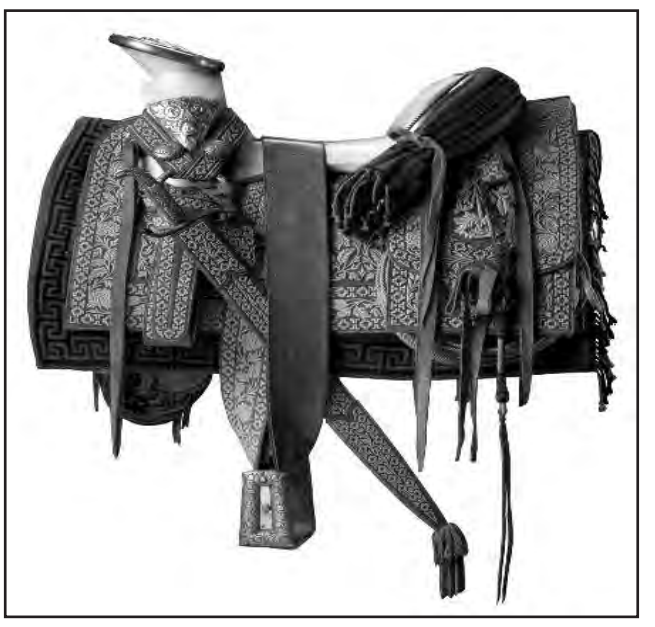

AP Photos

These undated images released by 33PHOTO and Arte en la Charrería show a silver inlaid spur, left, and an ornate saddle, above, on display at the Albuquerque Museum as part of the exhibition "Arte en la Charreria: The Artisanship of Mexican Equestrian Culture."

Museum highlights culture of Mexican horsemen

ALBUQUERQUE (AP) — There's no mass production here, just evidence of the slow and patient work that went into handcrafting the costumes and tools behind one of Mexico's most important traditions.

From fine embroidery to ornate saddles and silver inlaid spurs, more than 150 pieces are on display at the Albuquerque Museum as part of the exhibition "Arte en la Charreria: The Artisanship of Mexican Equestrian Culture," which is on display through March 30.

The artifacts, some dating to the 1800s, were culled from prestigious collections throughout Mexico. Each item reflects different elements of the culture of the legendary charro — the Mexican horseman.

"Too often, we in the West get lost in the stories of cowboy culture, unwary of its foundation," said museum director Cathy Wright. "'Arte en la Charreria' gives our visitors a chance to experience the beauty, color and expressiveness of this wonderful Mexican tradition, which continues to inform Southwestern fashion and material culture today."

The roots of the charreria culture first emerged centuries ago with the arrival of the Spanish conquistadors and their horses. By the 19th century, celebrations similar to rodeos were being organized around Mexico in which charros would compete, showing off their skills. In the early 1930s, the colorful equestrian style was declared the national sport of Mexico.

Museum curators say there's meaning behind every component of the costumes worn by charros and charras. In some cases, layers of leather are applied to fabric and then adorned with intricate silver buttons. Embroidery, sequins and beading often provide another layer. Even the sculptural iron spurs are decorated with tooled and stamped silver.

All the leather, velvet and suede make for an exploration of texture and detail, not just a history lesson.

It would be impossible to pick a favorite from the items in the exhibition, said Deb Slaney, the museum's curator of history.

"There is no best example. They're all fabulous," she said.

———

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ALBUQUERQUE MUSEUM: 2000 Mountain Road, Albuquerque; albuquerquemuseum.org or 505-243-7255. Tuesday-Sunday 9 a.m.-5 p.m. Adults $4; teens $3; seniors $2; and children 4-12, $1.

Assault

Continued from Page A1

reduced to lesser charges. Suspects were unlikely to serve time even when military authorities agreed a crime had been committed. In two rape cases, commanders overruled recommendations to court-martial and dropped the charges instead.

Gillibrand, who leads the Senate Armed Services personnel panel, wrote Monday to Defense Secretary Chuck Hagel asking for "all reports and allegations of rape, forcible sodomy, sexual assault, sex in the barracks, adultery and attempts, conspiracies or solicitations to commit these crimes," for the last five years.

She said AP's investigation is "disturbing evidence" that some commanders refuse to prosecute sexual assault cases and the Pentagon should have provided the records more quickly.

The documents may build momentum for legislation she has introduced that would strip senior officers of their authority to decide whether serious crimes, including sexual assault cases, go to trial. The bill would place that judgment with trial counsels who have prosecutorial experience and hold the rank of colonel or above. The legislation, expected to be voted on in coming weeks, is short of the 60 votes needed to prevent a filibuster.

Defense Department officials have acknowledged the problem of sexual assaults in the ranks and said they are taking aggressive steps to put a stop to the crimes.

"This isn't a sprint," said Jill Loftus, director of the Navy's sexual assault prevention program. "This is a marathon and it's going to take a while."

Col. Alan Metzler, deputy director of the Defense Department's Sexual Assault Prevention and Response Office, said numerous changes in military law and policy made by Congress and the Pentagon are creating a culture where victims trust that their allegations will be taken seriously and perpetrators will be punished. Defense officials noted that the cases in Japan preceded changes the Pentagon implemented in May.

The information acquired by AP through the open records law consists of more than 1,000 reports of sex crimes involving U.S. military personnel between 2005 and early 2013. Although AP sought the full investigative file for the cases, to include detail-rich exhibits, the Pentagon mainly provided summaries of cases from the U.S. Naval Criminal Investigative Service.

That service, which handles the Navy and Marine Corps, excised the names of U.S. commanders from the records, affording senior officers the same degree of privacy as the alleged victims. But with their identities kept secret, commanders can't be held publicly accountable for how they handled the cases.

Gillibrand's request doesn't seek the exhibits for cases. She is asking for reports and recommendations made in Article 32 proceedings, the military's version of a grand jury, and the results of all courts-martial that were convened to adjudicate rapes and other serious sex crimes.

She said it's been a struggle to get timely and accurate data from the Defense Department about sexual assault cases.

"They are maintaining a closed system when what we really need is sunshine," Gillibrand said in an AP interview. "What we really need is light and transparency so we can get to the root of the problem and then find the right solutions."

But Metzler cautioned that too much openness could result in fewer victims stepping forward to report crimes.

"To suggest that we need to be very public about what's going on in each individual case risks the trust that we want to build with those victims," Metzler said. Such information, however, is publicly available in the civilian justice system.

The top U.S. officer in Japan, Lt. Gen. Salvatore Angelella, was unable to make a scheduled appearance Monday at the Japan National Press Club in Tokyo due to heavy snow. Angelella took questions submitted in advance over Skype but did not respond to AP's question about the adjudication of sexual assault cases involving U.S. personnel in Japan.

In an earlier statement to AP, Angelella said the military takes the issue of sexual assault "very seriously."

"Sexual assault is a crime and a contradiction to everything we stand for," he said.

E.T. Day

Continued from Page A1

or alien autopsies.

"My suspicion is that they will stay quiet about that for a long, long time," said Roswell UFO researcher Don Burleson, who is also area director of the national Mutual UFO Network.

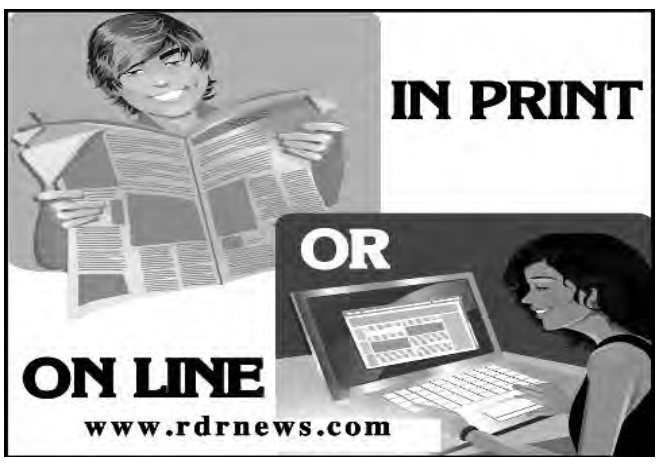
Today's Extraterrestrial Culture Day, proposed in 2003 by Rep. Dan Foley, R-Roswell, is meant to "celebrate and honor all past, present and future extraterrestrial visitors" to New Mexico."

Yes, many of the creatures remain in surgery under heat lamps in the downtown museum. And their distant cousins have reduplicated in astounding numbers as neon-green blow-up toys.

A born-again, praying alien statue had even become victim of a burglary earlier this month, only to be recovered by the local police.

But, last year's UFO Festival drew more than 1,350 visitors in its first day to the museum for its lectures and authors. The museum's and Roswell's popularity is proof that Roswell celebrates every day, said Executive Director Mark Briscoe.

"The rest of the country is just catching up with us," Briscoe said.



Lawsuit

Continued from Page A1

court order and knowing that the mother was a transient and did not have the means to care for the girl.

"This is not a case of an overwhelmed system allowing a child to fall through the cracks. This is a case of poorly trained and poorly supervised government agencies flagrantly disobeying a court order and placing a child in danger," the lawsuit states.

The girl's grandparents hired a private investigator to find her. She was found with strangers in a mobile home in Espanola and her mother's whereabouts were unknown, according to the lawsuit.

While in her mother's custody, the father and grandparents claim the girl was often left unattended, did not go to school and was abused by strangers.

Belen Police Chief Dan Robb said he was unaware of the case.

Children, Youth and Families Department spokesman Henry Varela called the lawsuit frivolous, noting that the child had never been in the agency's custody.

"Because the state of New Mexico never had legal custody of the child, CYFD never had any legal authority to decide where a child should be placed," he said, without addressing the allegations against the investigator.

Gov. Susana Martinez has acknowledged the agency has had a "revolving door" largely because of employee burnout and the difficult nature of the job. She has said she's been trying to turn that around, but critics say caseloads have risen to unmanageable levels and the lack of follow-up is concerning.

In the case of Omaree Varela, critics have said the child welfare agency and Albuquerque police failed the boy by not removing him from his home.

Hunter said his clients are angry that their granddaughter was removed from a safe environment and placed in danger.

"I don't know the cause or the reason, and it's not that I don't think people don't care over there, but something has to change," he said, referring to the agency. "These jobs are just too important."

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WASHINGTON

Reports detail pilots heading to wrong airports

By Joan Lowy
Associated Press

WASHINGTON — At a time when a cellphone can guide you to your driveway, commercial pilots attempt to land at the wrong airport more often than most passengers realize or government officials admit, according to an Associated Press search of government safety data and news reports since the early 1990s.

On at least 150 flights, including a Southwest Airlines jet last month in Missouri and a jumbo cargo plane last fall in Kansas, U.S. commercial passenger and cargo planes have either landed at the wrong airport or started to land and realized their mistake in time.

A particular trouble spot is San Jose, Calif. The list of landing mistakes includes six reports of pilots preparing to land at Moffett Field, a joint civilian-military airport, when they meant to go to Mineta San Jose International Airport, about 10 miles to the southeast. The airports are south of San Francisco in California's Silicon Valley.

"This event occurs several times every winter in bad weather when we work on Runway 12," a San Jose airport tower controller said in a November 2012 report describing how an airliner headed for Moffett after being cleared to land at San Jose. The plane was waved off in time.

In nearly all the incidents, the pilots were cleared by controllers to fly based on what they could see rather than relying on automation. Many incidents occur at night, with pilots reporting they were attracted by the runway lights of the first airport they saw during descent. Some pilots said they disregarded navigation equipment that showed their planes slightly off course because the information didn't match what they were seeing out their windows — a runway straight ahead.

"You've got these runway lights, and you are looking at them, and they're saying: 'Come to me, come to me. I will let you land.' They're like the sirens of the ocean," said Michael Barr, a former Air Force pilot who teaches aviation safety at the University of Southern California.

Using NASA's Aviation Safety Reporting System, along with news accounts and reports sent to other federal agencies, the AP tallied 35 landings and 115 approaches or aborted landing attempts at wrong airports by commercial passenger and cargo planes over more than two decades.

The tally doesn't include every event. Many aren't disclosed to the media, and reports to the NASA database are voluntary. The Federal Aviation Administration investigates wrong airport landings and many near-landings, but those reports aren't publicly available. FAA officials turned down a request by The Associated Press for access to those records, saying some may include information on possible violations of safety regulations by pilots and might be used in an enforcement action.

NASA, on the other hand, scrubs its reports of identifying information to protect confidentiality, including names of pilots, controllers and airlines. While the database is operated by the space agency, it is paid for by the FAA and its budget has been frozen since 1997, said database director Linda Connell. As a result, fewer incident reports are being entered even though the volume of reports has soared, she said.

The accounts that are available paint a picture of repeated close calls, especially in parts of the country where airports are situated close together with runways similarly angled, including Nashville and Smyrna in Tennessee, Tucson and Davis-Monthan Air Force Base in Arizona, and several airports in South Florida.

"Nashville and Smyrna is interesting," said Kevin Hiatt, a former Delta Air Lines chief pilot. As a plane approaches from the southeast, "there's three airports right in a row that are pointed almost exactly the same."

Continental Airlines regional carriers flying from Houston to Lake Charles Regional Airport on the Louisiana Gulf Coast have at least three times mistakenly landed at the smaller, nearby Southland Executive field. Both airports have runways painted with the numbers 15 and 33 to reflect their compass headings. Runways are angled based on prevailing winds.

The recent wrong airport landings by a Southwest Airlines Boeing 737 in Missouri and an Atlas Air Boeing 747 freighter in Kansas have heightened safety concerns. The Southwest pilots stopped just short of a ravine at the end of the short runway in Hollister, Mo., when they meant to land on a runway twice as long at nearby Branson. Of the 35 documented wrong landings, at least 23 occurred at airports with shorter runways.

FAA officials emphasized that cases of wrong airport landings are rare. There are nearly 29,000 commercial aircraft flights daily in the U.S., but only eight wrong airport landings by U.S. carriers in the last decade, according to AP's tally. None has resulted in death or injury.

"The FAA reviews reported wrong-airport incidents to determine whether steps such as airfield lighting adjustments may reduce pilot confusion," the agency said in a statement. However, officials didn't reply when the AP requested examples of steps taken in response to specific incidents. FAA officials also said they would share their data on landings and almost landings with the AP, but produced only one number for use on the record, which appears to be an undercount of landings over the last decade.

Concerned about the potential for wrong airport landings, some airlines include warnings on flight plans provided to pilots about pairs of airports that are easily confused, said Hiatt, president of the Flight Safety Association in Alexandria, Va.

John Goglia, a former National Transportation Safety Board member and aviation safety expert, says the FAA and the NTSB should be concerned. Air crashes are nearly always the result of a string of safety lapses rather than a single mistake, he noted. Attempts to land at wrong airports represent "another step up the ladder toward a riskier operation," he said.

Runway condition is also a worry when a plane makes a mistaken approach. When an air traffic controller clears a plane to land on a specific runway, "you know you pretty much have a clear shot at a couple of miles of smooth concrete," said Rory Kay, a training captain at a major airline. "If you choose to land somewhere else, then all bets are off. There could be a bloody big hole in the middle of the runway. There could be a barrier across it. There could be vehicles working on it."

Another concern is that a plane attempting to land at the wrong airport could collide with a plane taking off from that airport. Several pilots who reported aborting wrong airport landings said they crossed the airport's "centerline" — the path planes would follow during takeoff. A few reported receiving warnings of other planes nearby.

In some reports, pilots said they were saved from making a wrong airport landing by an alert controller. That was the case for an MD-80 captain who nearly landed his mid-sized airliner at Page Field, a small airport in Fort Myers, Fla., used mainly by private pilots, instead of the much larger Southwest Florida International Airport nearby. A controller caught the mistake in time and suggested the captain explain the detour by telling passengers the flight was "touring downtown" Fort Myers.

"I was pretty shaken as to what could have happened and was very glad to have an understanding, helpful (controller)," the captain said. "They (controllers) said there would be no problem with (the FAA) and that this was a common occurrence."

DAILY RECORD

From Page A2

damage to property, domestic battery (reckless bodily harm)

Ricardo Corral, 50, aggravated sexual battery (force)

Luiz Fernando Lopez-Barbosa, 24, Abuse of a child (cause great bodily harm <18), aggravated battery (bodily harm with a deadly weapon)

Adel Ivan Cruz-Ramos, 27, aggravated battery (cause great bodily harm)

Reuben Mac, 33, aggravated battery (cause great bodily harm), aggravated battery (unknown circumstances), criminal threat (unknown circumstances), battery

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Hoefl-Riesch wins gold in super-combined; American Mancuso 3rd

SOCHI, Russia (AP) — Different American, same result for Maria Hoefl-Riesch — another Olympic gold in the super-combined.

Just as she did four years ago at the Vancouver Games, Hoefl-Riesch found herself trailing an American after the downhill leg before using her slalom skills to vault into first place and successfully defend her Olympic title in the dual-run event.

The German finished less than a second ahead of both silver medalist Nicole Hosp of Austria and Julia Mancuso of the United States, who won the bronze. Mancuso won silver in the event in Vancouver.

Lindsey Vonn had the fastest downhill time in Vancouver, but when Vonn skied out on the slalom, Hoefl-Riesch roared back to claim gold. This time, Vonn is out with an injury, and Mancuso replaced her at the top the standings after the downhill.

Also on Day 4 of the Sochi Olympics, Charles Hamelin of Canada raced to the 1,500-meter short track speedskating gold, and Viktor Ahn earned the bronze to give Russia its first-ever short track medal; Michel Mulder of the Netherlands earned the 500-meter speedskating gold; Martin Fourcade won the 12.5-kilometer biathlon pursuit; and Alex Bilodeau won his second consecutive gold medal in men's moguls.

ALPINE SKIING: Hoefl-Riesch was fifth fastest in the opening downhill leg, trailing Mancuso by 1.04 seconds. The German's two-run time of 2 minutes, 34.62 seconds was 0.40 seconds faster than Hosp. Mancuso, who finished 0.53 behind Hoefl-Riesch, won her fourth career Olympic medal in Alpine skiing. No other American woman has won more than two.

SHORT TRACK SPEEDSKATING: At 29, Hamelin was the oldest skater in the first final of the short track competition. The wily veteran maintained a top-three position throughout most of the 14-lap race, leaving enough at the end to defeat a loaded field, including Ahn and silver medalist Han Tianyu of China. .

SPEEDSKATING: Mulder's 500-meter speedskating victory earned him the title of fastest man on skates. Teammate Jan Smeekens was 0.01 seconds behind for silver, and twin Ronald Mulder took bronze in a Dutch sweep.

BIATHLON: Fourcade's win earned France its first medal. Ondrej Moravec of Czech Republic took the silver, and Jean Guillaume Beatrix of France earned bronze. Ole Einar Bjoerndalen of Norway finished fourth, missing out on a record 13th Winter Olympic medal.

Associated Press

Women's super combined medalists, from left, Nicole Hosp of Austria, silver, Maria Hoefl-Riesch of Germany, gold, and Julia Mancuso of the United States, bronze, pose with their medals at the 2014 Winter Olympics in Sochi, Russia, on Monday.

MEN'S MOGULS: Bilodeau became the Olympics' first repeat winner in men's moguls. Canadian teammate Mikael Kingsbury won the silver, giving the Canadians a 1-2 finish in both men's and women's moguls.

CURLING: The Norwegian men, curling's fashion kings of cool, made their Sochi debut with another snazzy pattern on their pants -- a mixture of red, white, blue and gray squares and rectangles. Norway dazzled the U.S. 7-4, but the surprise of opening day was Switzerland's upset of defending champion Canada. On the women's side, Sweden defeated Britain 6-4 in a matchup of two favorites for the women's curling gold.

ICE HOCKEY: The United States romped to a 9-0 victory over Switzerland to all-but clinch a spot in the Olympic women's hockey semifinals. Canada topped Finland 3-0 to ensure its spot in the semifinals.

Mizzou applauds Sam's courage

COLUMBIA, Mo. (AP) — Missouri coach Gary Pinkel said Monday that Michael Sam revealed he was gay at one of the football team's get-acquainted dinners last summer.

The next day, Sam told the entire team.

Realizing the enormity of the situation, Pinkel left the next move up to the senior who blossomed into one of the best defensive ends in the country — and one surrounded by teammates who didn't worry one bit about sexual orientation or reveal his secret until he came out on Sunday.

Pinkel, athletic director Mike Alden and other school officials applauded Sam's courage Monday at Faurot Field. As a backdrop, the first two letters of Sam's last name were etched in snow to join the giant "M" just beyond the north end zone.

"Pretty cool," Pinkel said.

Coaches and Sam agreed that making an announcement during the season might be a distraction. It was Sam's call to skip all of the weekly media days and postgame news conferences, too, the better to avoid the risk of the topic coming up. Sam broke his silence prior to the Cotton Bowl and the conversation stayed on football, just like he wanted.

Associated Press

Missouri outside linebacker Michael Sam runs on to the field before the Senior Bowl game on Jan. 25 in Mobile, Ala.

Sam was prompted to make his decision to come out after the Senior Bowl, where it became apparent the player's sexual orientation was widely known. This meant a declaration just a matter of days before the NFL combine and shouldering the pressure that will come with perhaps being the first openly gay player in the history of the league.

"It's very clear that everybody in the NFL knew," said Howard Bragman, a consultant hired by Sam's agent to help manage the announcement on ESPN, in The New York Times and Outsports.

The NFL and many others, including the White House, publicly applauded Sam's decision. President Barack Obama's spokesman, first lady Michelle Obama and Vice President Joe Biden all called him a courageous and inspirational athlete.

But now, after a few high-profile interviews, it's back to silent Sam. The fifth level of the stadium was jammed with dozens of reporters for Monday's news gathering but there was no sign of the star attraction. Bragman said Sam was traveling Monday to a camp at an undisclosed location where he'll prepare for the combine.

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230385

In The Shadow of Evil

Written By: Eunice Boeve

Illustration By: Julie Peterson-Shea

KANSAS NIE Newspapers In Education

The Garden City Telegram

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"In The Shadow of Evil" will run every Tuesday & Thursday from January 7th thriugh February 27th. The teacher's guide may be found @ KansasNIE.com under the "Teachers" tab.
Questions may be directed to Stephanie Flanagan, 785.822.1470 or sflanagan@salina.com

Chapter Eleven

Mrs. Melton Digs a Grave

Friday, August 21

The story so far: A friend told Mrs. Melton that her husband and sons have been killed. She gives him a dress and a bonnet to wear, so he can pass for a woman. An old neighbor woman is also welcomed into the home. The surviving men and boys have started gathering the bodies and laying them out on the floor of the Methodist church.

They moved Becky's cot out into the kitchen against a sidewall for the old woman, whose name Becky now knew was Susanne Stillman. Mrs. Melton helped her into bed and she was soon asleep. "I guess you can sleep upstairs with Mrs. Porter and Hannah tonight," she told Becky, a wan smile on her face. "Though the Lord only knows how many others we're going to be sheltering before this day is done."

A few homes like Mrs. Melton's remained untouched, and a few buildings on the main street of town had somehow missed being burned, but they had not escaped being looted by Quantrill's men, the goods hauled away on stolen horses and mules. There was virtually no food in town or money to buy food if there had been any. All but one of the 3 banks had been robbed of every cent and only the third escaped being robbed because the raiders could not blow open the vault.

Mrs. Melton, Mother, and Mrs. Porter went through the cupboards and the jars of canned goods in the outside storm cellar and made an inventory of every bit of food from the smallest potato to a crock half full of venison preserved in heavy salt.

The man who had borrowed Mrs. Melton's dress and bonnet returned with them folded over his arm. He told her he was helping to locate the dead and transporting them to the Methodist church. "When the ashes have cooled," he told her, "I will personally see that your husband and sons' remains are removed."

"Please," she said. " I want to bury them here."

"Why not the cemetery, ma'am?" he asked.

"No. I want them close to me. I shall start digging their grave, a single one for them to be in together."

"I can dig it for you ma'am," the man said.

"No. You need to help the others. I can do this myself."

As soon as he left, she got a shovel and went around back, shaking off all offers from Hannah and Becky's mother to help.

Later, Becky took her out a drink of water and for some reason, she wasn't sure why herself, unless it was the loneliness of a woman digging a grave for her husband and sons, she sat down and waited until she had finished. Together they walked back into the house.

Mother had filled a washbasin and set it in the sun to warm for Mrs. Melton to wash and then led her like a child to her bedroom, pulled off her shoes, and put her to bed.

An hour later, Mick was back at the door. Mother let him and those who accompanied him inside. Becky recognized Mrs. Nelson, Old Mrs. Richards' daughter, the black girl, Ivory, and her mother, Bella Johns.

"My mama's heart couldn't take it," Mrs. Richards' daughter said. "My husband hid in the well, but he fell and couldn't get out and he drowned. Some men, who escaped by hiding in a cornfield, came and pulled his body out and they buried him and Mama in the back of where the house used to be. I didn't know what to do, so we just started walking."

She sighed heavily and Mick finished speaking for her.

"They need a place to stay." He looked around Mother at Mrs. Melton who had come up behind her. "I thought there might still be room here."

"Of course there's room," she said as cheerily as if she were greeting regular guests who might have come for dinner or some other normal activity. "Come, Mrs. Nelson, you look exhausted. Come lie down on my bed until you are rested some." She turned to Bella Johns and Ivory. "I am out of beds, but I can put down some quilts on the floor in the kitchen." She smiled again that slight smile, "My neighbor has a cot in there, but there is room for you."

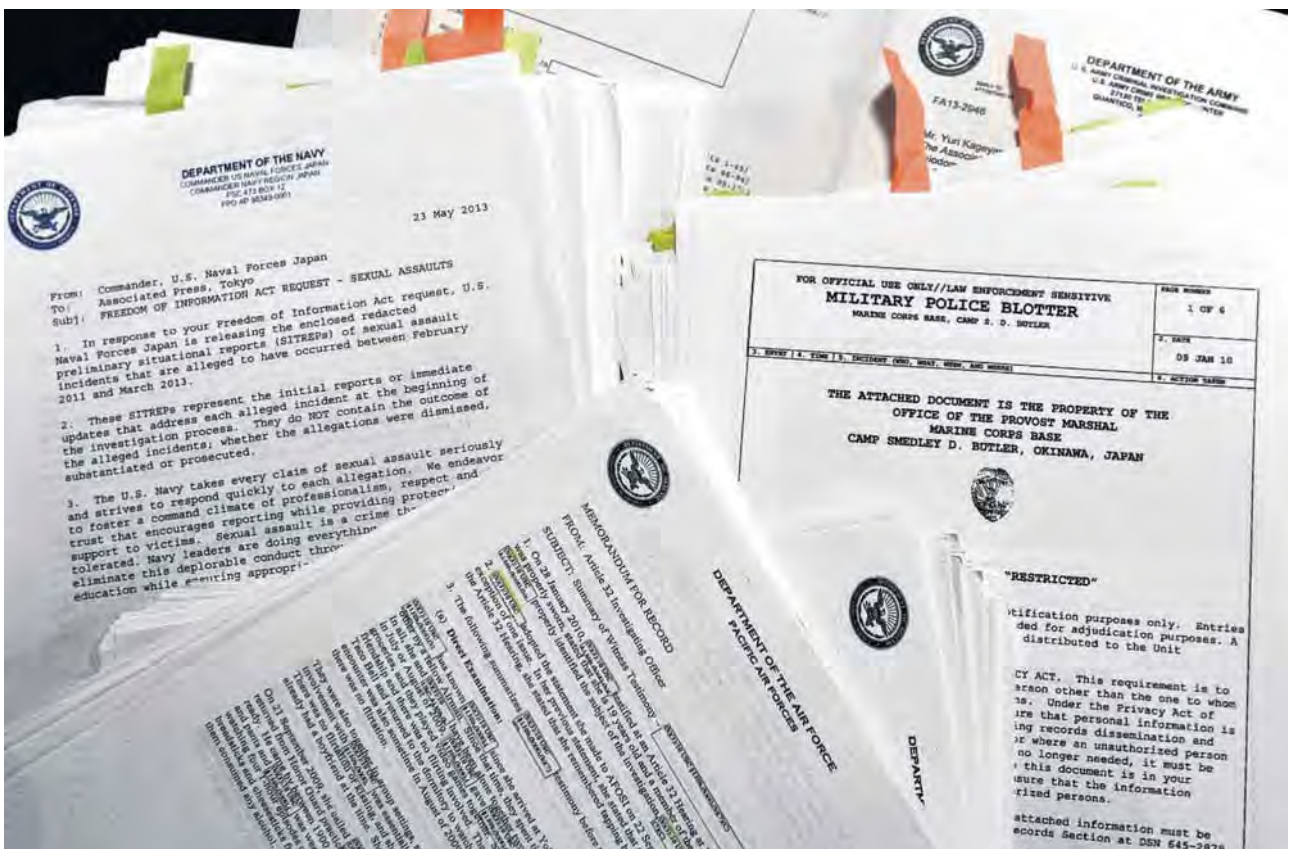
By late afternoon, farmers from the outlying countryside who had escaped the wrath of Quantrill and his men, came to town in their wagons with fruit and vegetables from their orchards and gardens to give away, along with loaves of bread, jars of milk, butter, and what other food their families could spare. Again it was Mick who brought them the news. Mrs. Melton, Mother and Becky and Hannah stood in line for the food. Few words were spoken as the people waited in line, with the exception of the many expressions of thanks and God bless you words as the people left with food in their arms.

For supper that night, Mrs. Melton, with help from Hannah, Becky, and Mother set out fried potatoes and onions, venison, boiled squash, and bread and butter with a glass of milk for the five little Porter children.

Even as they ate, the Porter children kept an eye on their mother, the little girls clinging to her, the little boys on either side of Hannah, the smallest one on her lap.

They took turns going to the outhouse before bed and Mrs. Melton found several chamber pots and other pots that would serve the purpose so no one would have to go outside later in the night when it was pitch dark. Hannah and Becky went out together. Overhead a few stars twinkled in a dark sky now clearing of smoke and all over town, the dying embers of house fires gave off an eerie glow. Although their lights were too tiny to help at all, a dozen or more fireflies flitted about as if trying to help light their way. Mrs. Melton's husband and sons had not yet been brought to her and Becky shivered as she and Hannah skirted the black, empty hole.

To Be Continued.



Above are some of the more than 1,000 summaries of sex-crime cases involving U.S. military personnel stationed in Japan, which The Associated Press obtained after Freedom of Information Act requests filed with the Army, Navy, Air Force, Marines and Naval Criminal Investigative Service. An Associated Press investigation into the military's handling of sexual assaults in Japan has found a pattern of random and inconsistent judgments in which most offenders are not incarcerated.

AP FILE PHOTOS

Senator seeks records on military sex crimes

BY RICHARD LARDNER AND YURI KAGEYAMA
Associated Press

Sen. Kirsten Gillibrand, D-N.Y., chairwoman of the Senate Armed Services subcommittee on personnel, discusses her proposed reforms for prosecuting sexual assaults in the military, during a Jan. 21 interview with The Associated Press in her Capitol Hill office in Washington.

AP PHOTO

WASHINGTON — The Pentagon is coming under pressure to give Congress detailed information on the handling of sex crime cases in the armed forces following an Associated Press investigation that found a pattern of inconsistent judgments and light penalties for sexual assaults at U.S. bases in Japan.

Democratic Sen. Kirsten Gillibrand of New York, who's led efforts in Congress to address military sexual crimes, is pressing the Defense Department to turn over case information from four major U.S. bases: Fort Hood in Texas, Naval Station Norfolk in Virginia, the Marine Corps' Camp Pendleton in California, and Wright-Patterson Air Force Base in Ohio.

Such records would shed more light on how military commanders make decisions about court martials and punishments in sexual assault cases and whether the inconsistent judgments seen in Japan are more widespread.

AP's investigation, which was based on hundreds of internal military documents it first began requesting in 2009, found that what appeared to be strong cases were often reduced to lesser charges. Suspects were unlikely to serve time even when military authorities agreed a crime had been committed. In two rape cases, commanders overruled recommendations to court-martial and dropped the charges instead.

Gillibrand, who leads the Senate Armed Services personnel panel, wrote Monday to Defense Secretary Chuck Hagel asking for "all reports and allegations of rape, forcible sodomy, sexual assault, sex in the barracks, adultery and attempts, conspiracies or solicitations to commit these crimes," for the last five years.

She said AP's investigation is "disturbing evidence" that some commanders refuse to prosecute sexual assault.

The documents may build momentum for legislation she has introduced that would strip senior officers of their authority to decide whether serious crimes, including sexual assault cases, go to trial.

The bill would place that judgment with trial counsels who have prosecutorial experience and hold the rank of colonel or above.

The legislation, expected to be voted on in coming weeks, is short of the 60 votes needed to prevent a filibuster.

Defense Department officials have acknowledged the problem of sexual assaults in the ranks and said they are taking aggressive steps to put a stop to the crimes.

"This isn't a sprint," said Jill Loftus, director of the Navy's sexual assault prevention program. "This is a marathon and it's going to take a while."

Col. Alan Metzler, deputy director of the Defense Department's Sexual Assault Prevention and Response Office, said numerous changes in military law and policy made by Congress and the Pentagon are creating a culture where victims trust that their allegations will be taken seriously and perpetrators will be punished. Defense officials noted that the cases in Japan preceded changes the Pentagon implemented in May.

The information acquired by AP through the open records law consists of more than 1,000 reports of sex crimes involving U.S. military personnel between 2005 and early 2013. Although AP sought the full investigative file for the cases, to include detail-rich exhibits, the Pentagon mainly provided summaries of cases from the U.S. Naval Criminal Investigative Service.

That service, which handles the Navy and Marine Corps, excised the names of U.S. commanders from the records, affording senior officers the same degree of privacy as the alleged victims. But with their identities kept secret, commanders can't be held publicly accountable for how they handled the cases.

Gillibrand's request doesn't seek the exhibits for cases. She is asking for reports and recommendations made in Article 32 proceedings, the military's version of a grand jury, and the results of all courts-martial that were convened to adjudicate rapes and other serious sex crimes.

FDA reconsiders heart safety of common pain pills

BY MATTHEW PERRONE
AP Health Writer

Federal health experts are taking a second look this week at the heart safety of pain medications — like Aleve — used by millions of Americans to treat arthritis and other everyday aches and pains.

AP FILE PHOTO

WASHINGTON — Federal health experts are taking a second look this week at the heart safety of pain medications used by millions of Americans to treat arthritis and other everyday aches and pains.

The Food and Drug Administration is having a two-day meeting that began Monday to examine the latest research on anti-inflammatory medicines called NSAIDS, which serve as the backbone of U.S. pain treatment.

The key question is whether naproxen — the key ingredient in Bayer's Aleve and many other generic pain pills — carries a lower risk of heart attack and stroke than rival medications such as ibuprofen, sold as Advil by Pfizer and Motrin by Johnson & Johnson, among others.

Debate about whether one drug is safer than others in the class has waged for more than a decade without a clear answer, underscoring the lingering questions that hang over even the most established medicines.

The FDA is asking its panel of medical experts to review a massive analysis published last year suggesting that naproxen does not increase the risk of heart problems as much as its peers. The finding came from Oxford University researchers who reviewed results from more than 700 NSAID studies involving roughly 350,000 patients.

On Tuesday, panelists will vote on whether naproxen has a lower risk of heart problems than other NSAIDs. Panelists also will discuss whether naproxen should be relabeled based on the latest safety data. The FDA is not required to follow the group's advice, though it often does.

If implemented, the labeling change could reshape the multibillion-dollar market for drugs used to treat muscle pain, arthritis and headaches. Last year, U.S. consumers bought more than 275 million boxes of over-the-counter NSAIDs, representing $1.7 billion in sales, according to retail tracker IRI. Prescription NSAIDs brought in billions more, led by the Pfizer's blockbuster Celebrex, with sales of $2.9 billion.

Continued review

This week's FDA meeting is the latest chapter in an ongoing safety review that stretches back to 2004, when Merck & Co Inc. pulled its blockbuster pain reliever Vioxx off the market due to links to heart attack and stroke.

Vioxx had been heavily advertised as a new kind of NSAID that was supposed to be easier on the stomach. But its withdrawal shook the medical establishment and ushered in a new era of drug safety at the FDA.

The FDA panel also will vote Tuesday on whether over-the-counter NSAID labeling should be changed to warn patients of the short-term risks.

MANY THINGS CONSIDERED

Before any changes can be made, FDA advisers must consider reams of data that are often riddled with complicating factors:

- The Oxford analysis is difficult to interpret because it combines information from hundreds of unrelated studies. While this approach is useful in getting a broad view of rare events — such as heart attacks — it is not considered the strongest form of medical evidence.
- Almost all of the data under discussion come from studies of prescription NSAID pain relievers, which are taken at higher doses and for longer periods than over-the-counter NSAIDs. But panelists will be asked to make recommendations on the use of nonprescription drugs, as well.
- Panelists will also be asked to make recommendations for narrow subgroups of patients, including those with a history of heart problems.

Letter: Lawmakers criticize NFL's defense of team name

FROM PAGE 1A

"But if you look at the numbers, including Native American communities, nine out of 10 supported the name," Goodell said at the news conference last month. "Eight out of 10 in the general American population would not like us to change the name."

Cole and Cantwell responded that the polling was a decade old. The National Congress of American Indians, which represents 250 tribes, considers the name racially offensive and wants it changed, the lawmakers said. They also noted that the U.S. Patent and Trademark Office determined late last year that the term Redskin is "derogatory slang."

"The National Football League can no longer ignore this and perpetuate the use of this name as anything but what it is: a racial slur," the letter states.

"It is time for the National Football League to formally support and push for a name change for the Washington football team."

The team also has defended the name. According to NFL.com, a team spokesman on Monday cited "almost 200" recent letters and emails of support from people who identified themselves as American Indians or family members of American Indians.

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Another delay in health law's employer requirement

WASHINGTON (AP) — Angling to avoid political peril, the Obama administration Monday granted employers another delay in a heavily criticized requirement that larger firms cover their workers or face fines.

In one of several concessions in a complex Treasury Department regulation of more than 200 pages, the administration said companies with 50 to 99 employees will have an additional year to comply with the coverage requirement, until January 1, 2016.

For businesses with 100 or more employees the requirement will still take effect in 2015. But other newly announced provisions, affecting technical issues such as the calculation of working hours, may help some of those firms.

More than 90 percent of companies with 50 or more employees already cover their workers without the government telling them to do so, but the debate has revolved around the potential impact on new and growing firms. Most small businesses have fewer than 50 workers and are exempt from the mandate. However, employer groups were also uneasy with a requirement that defines a full-time worker as someone averaging 30 hours a week.

Republicans trying to take control of the Senate in the November elections have once again made President Barack Obama's health care law their top issue, casting it as job killer. They want to use the employer mandate to build that case, with anecdotes of bosses reluctant to hire a 50th worker, or slashing the hours of low-wage workers who need to pay household bills. Monday's moves by the administration seemed calibrated to reduce that risk.

The reaction of business groups was mixed.

"These final regulations secured the gold medal for greatest assistance to retailers, and other businesses, and our employees," said Neil Trautwein, a vice president of the National Retail Federation.

The U.S. Chamber of Commerce was unimpressed, calling it more of a respite than a fundamental change.

"This short-term fix also creates new problems for companies by moving the goalposts of the mandate modestly when what we really need is a time-out," president Thomas Donohue said in a statement.

The administration still hasn't issued rules for reporting requirements on business and insurers, the nitty-gritty of how the coverage requirement will be enforced.

Administration officials and the law's supporters said the concessions were the sorts of reasonable accommodations that regulators make all the time when implementing major new legislation. The Treasury department said Secretary Jack Lew was well within his legal authority in making the changes.

"This common sense approach will protect employers already providing quality insurance, while helping to ensure that larger employers are prepared to meet their responsibility to their hard-working employees," said House Minority Leader Nancy Pelosi, D-Calif.

But Republicans said they smelled fear.

"It is clear Democrats don't think they can survive politically if Obamacare is allowed to fully go into effect," said Rep. Dave Camp, R-Mich., who as chairman of the Ways and Means Committee oversees the tax penalties enforcing the mandate.

The law passed in 2010 required employers with more than 50 employees working 30 or more hours a week to offer them suitable health coverage or pay a fine. The coverage requirement was originally supposed to have taken effect this year.

But last summer the the administration announced a one-year delay, the first sign of potential problems with the rollout of the health care law.

Since then it's been a gigantic crisis management drill. The new online signup system at HealthCare.gov was crippled by technical problems for the better part of two months last fall. Separately, millions of people who were already buying health insurance individually had those policies cancelled because the plans did not meet the law's requirements.

With the online system mostly fixed, supporters of the law are hoping to turn around public opinion.

When it comes to the impact on jobs, "the big concerns that have been raised by opponents of the Affordable Care Act amount to very little because large employers already think it is in their best interest to provide coverage to their workers," said Ron Pollack, executive director of Families USA, a liberal advocacy group.

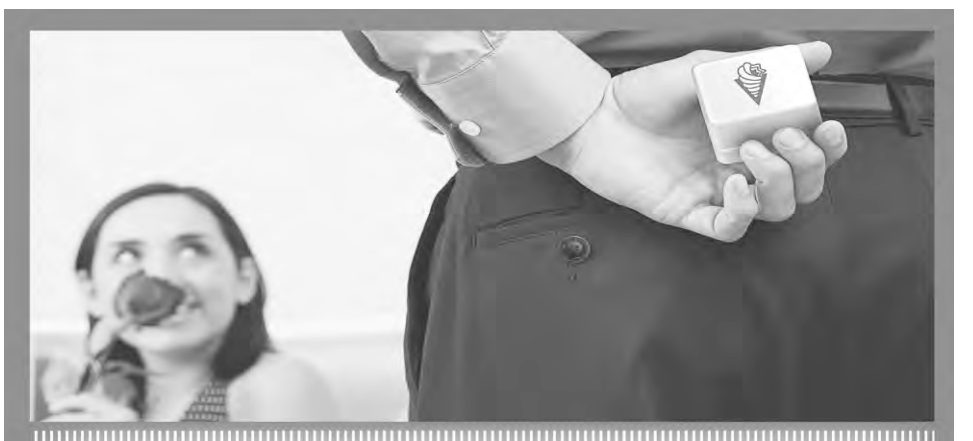
In other provisions announced Monday, the administration said:

— Companies will not face fines if they offer coverage to 70 percent of their full-time employees in 2015, although they will have to ramp that up to 95 percent by 2016. The law defines "full time" as people working an average of 30 hours a week per month. That concession is expected to help firms who have a lot of workers averaging right around 30 hours.

— Volunteer firefighters and others who give of their time will not be considered employees for under the law. Some volunteer fire departments worried they might have to shut down if forced to provide health insurance.

— Adjunct faculty members at colleges will be deemed to have worked 2 hours and 15 minutes for each hour of classroom time they are assigned to teach. Officials said that means someone teaching 15 hours a week in the classroom would be considered "full time" and eligible for coverage, but someone teaching 12 hours may be considered part-time.

— A one-year delay in a requirement that employers offer coverage to dependents of full-time workers. Companies that are working to meet the goal will have until 2016 to comply.



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Oklahoma Briefs

OKLA. HOUSE PANEL OKS STEEP CUT TO INCOME TAX RATE

OKLAHOMA CITY (AP) — A plan to deeply slash the state's income tax from 5.25 percent to 4 percent during the next four years has cleared its first hurdle.

The House Appropriations Subcommittee on Revenue and Taxation voted 10-3 Monday to approve the bill, which now heads to the full Appropriations Committee for consideration.

The bill by Mustang Republican Rep. Leslie Osborn would cut the tax rate to 4.75 percent in 2015, then reduce the rate by .25 percent each year until it reaches 4 percent in 2018.

A fiscal analysis of the bill shows it would cost the state about $844 million annually when fully implemented.

Gov. Mary Fallin has called for a .25 reduction in the state's income tax in 2015.

OKLAHOMA SENATE PANEL OKS CHANGE TO PENSION SYSTEM

OKLAHOMA CITY (AP) — A Senate committee has approved a bill to move newly hired state workers from the current defined-benefit pension into a 401(k)-style retirement system.

The Senate Committee on Pensions approved the bill Monday, sending it to the full Senate for a vote. A similar bill has been introduced in the House.

The Senate author of the bill, Owasso Republican Rick Brinkley, says it would only apply to state employees hired after Nov. 1, 2015. It does not apply to teachers or to hazardous duty employees such as police officers, firefighters and prison guards.

Supporters of the bill say it will help reduce the state's roughly $11.6 billion unfunded pension liability.

The bill is opposed by the Oklahoma Public Employees Association.

BILL GIVES TAX BREAK TO OKLA. COUPLES WHO STAY WED

OKLAHOMA CITY (AP) — Oklahomans who stay married would earn the benefit of an income tax deduction based on the length of their marriage under a bill approved by a House subcommittee.

The House Appropriations Subcommittee on Revenue and Taxation voted 7-6 on Monday for the bill that is projected to cost the state about $11.6 million each year. The bill now heads to the full House Appropriations Committee.

NOW OPEN

Orthopedic Sports Medicine and Neurosciences Center

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NOTICE OF PUBLIC SCOPING MEETINGS

Stakeholder Conservation Strategy for the Lesser Prairie-Chicken

The U.S. Fish & Wildlife Service (Service) proposed the lesser prairie-chicken (LPC) for listing as threatened under the Endangered Species Act (ESA) on December 11, 2012. The American Habitat Center proposes to develop a regional, multi-state stakeholder conservation strategy (Proposed SCS) that is intended to provide conservation benefits to the LPC. The Proposed SCS consists of three components: a habitat conservation plan (known as the Stakeholder Conservation Plan); a Habitat Exchange Agreement; and a Habitat Quantification Tool. The Proposed SCS is likely to consider a hybrid Candidate Conservation Agreement with Assurances (CCAA)/ Habitat Conservation Plan (HCP) in order to provide regulatory certainty in the event the LPC is listed (HCP) or remains a candidate for listing (CCAA). The SCS is intended to support the issuance of an incidental take permit (ITP) by the Service if the LPC is listed as threatened under the ESA. The ITP would provide "incidental take" coverage from activities listed within the Proposed SCS including future construction, operation, and maintenance of oil and gas operations and agricultural uses. The Proposed SCS would apply to lands in eastern Colorado, southwestern Nebraska, western Kansas, western Oklahoma, eastern New Mexico and the Texas Panhandle.

The National Environmental Policy Act (NEPA) establishes a planning process that federal agencies are required to follow. The Service intends to prepare a draft Environmental Impact Statement (EIS) as part of that process. Through public scoping meetings and consultations with other agencies, the Service intends to gather information necessary to prepare the draft EIS. We also will use this process to obtain suggestions and information from agencies and the public on the scope of issues to be addressed in this document. The Service invites you to share any thoughts and concerns that you may have about the proposed SCS.

The Service is holding three public scoping meetings during February 2014. Scoping meetings will be organized in an open house format. Information on the dates, time and locations for the public scoping meetings is below

February 25, 2014	February 26, 2014	February 27, 2014
Garden City Community College	High Plains Technology Center	Cochran County Activity Center
801 Campus Drive	3921 34th St.	200 W Taylor
Garden City, KS 76846	Woodward, OK 73801	Morton, TX
6:00-8:00pm	6:00-8:00pm	6:00-8:00pm

To ensure that your comments are fully considered, we should receive them no later than March 10, 2014.
Send written comments or requests for additional information to:
Public Comments Processing, Attn: FWS–R2–ES–2013–0134; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Comments and requests for additional information may also be sent electronically to:

Go to the Federal e-Rulemaking Portal: http://www.regulations.gov. In the Search box, enter FWS–R2–ES–2013–0134, which is the docket number for this notice. On the left side of the screen, under the Document Type heading, click on the Notices link to locate this document and submit a comment.

A link to the Notice of Intent for this project is available at: www.fws.gov/southwest

Stir It Up

Take that, polar vortex!

By Marialisa Calta

If ever there has been a winter for soup, this is it. Unfortunately, we seem to be too busy -- shoveling snow, chipping ice, jump-starting cars, bundling children, chopping wood or calling for a fuel delivery -- to make any.

But making soup does not need to be a labor-intensive, all-day affair. Yes, the very best soups involve the long, slow simmering of organic meats and vegetables, the careful use of fresh herbs and top-quality seasonings. But there are some good soups that can be made in less than an hour, and they will more than do the trick. And while they may contain quite a few canned items, you will find them so much more satisfying than canned soup itself.

The editors of Better Homes and Gardens magazine knew what they were talking about when they included a good many soup recipes in their new cookbook, "365 Comfort Foods: Inspiring Meals for Every Day of the Year." Just looking at the pictures of the broths and chowders gives you a warm glow inside.

This is "half-scratch" cooking, to borrow a term from cookbook authors Linda West Eckhardt and Katherine West DeFoyd. The trick is to use the best ingredients you can find. Seek out organic broths and vegetables, even if they are from cans. Don't rush: It is especially important, when making soup, to take the time to cut onions, celery, carrots and the like into pieces that will fit easily on a spoon, and doing so will take only a few minutes more than carelessly whacking them into unwieldy chunks. To add a little pizzazz, you can always use fresh herbs as a finishing touch.

These recipes can be one more weapon in your arsenal in the fight against the polar vortex. Ready ... aim ... soup!

KANSAS CITY STEAK SOUP

Yield: 6 servings

1 1/2 pounds lean ground beef

1 large onion, peeled and finely chopped

2 stalks celery, trimmed and finely chopped

2 (14.5-ounce) cans lower-sodium beef broth

1 (28-ounce) can diced tomatoes, with juices

1 (10-ounce) package frozen mixed vegetables

2 tablespoons bottled steak sauce, plus more for serving

2 teaspoons Worcestershire sauce

1/4 teaspoon salt

1/4 teaspoon ground black pepper

1/4 cup all-purpose flour

In a large Dutch oven set over medium-high heat, cook the ground beef, onion and celery 7 to 10 minutes, until meat is brown and onion and celery are tender. Use a wooden spoon to break up the meat as it cooks. Drain any fat.

Stir in one can of the broth, tomatoes, frozen vegetables, 2 tablespoons steak sauce, Worcestershire sauce, salt and pepper. Bring to a boil, then reduce heat to a simmer; cover and cook for 20 minutes.

In a medium bowl, whisk together the remaining can of broth and flour; stir into the soup. Cook until thickened and bubbly; this will take only a few minutes. Give a good stir and serve with additional steak sauce, if desired.

CHICKEN AND WILD RICE SOUP

Yield: 4 servings

3 tablespoons butter, at room temperature

1 medium carrot, peeled and finely chopped

1 medium onion, peeled and finely chopped

1 stalk celery, trimmed and finely chopped

4 cups chicken broth

3/4 cup uncooked wild rice, rinsed and drained

12 ounces boneless, skinless chicken breast, cut into 3/4-inch pieces

2 tablespoons all-purpose flour

2 cups half-and-half or light cream

Salt and ground black pepper to taste

In a Dutch oven set over medium heat, melt 1 tablespoon of the butter. Add the carrot, onion and celery and cook, stirring occasionally, until tender, 5 to 7 minutes. Add the broth and rice and stir. Bring to a boil, reduce heat to a simmer, and cover and simmer 30 minutes. Stir in the chicken. Simmer, covered, for 20 to 25 minutes more or until rice is tender.

In a medium heat-proof bowl, combine the remaining 2 tablespoons softened butter with the flour and stir to make a smooth paste. Add a few spoonfuls of the hot chicken broth from the soup into the bowl and stir. Then, using a spatula, scrape the flour-butter-broth mixture into the soup pot. Cook for 1 minute, stirring. Add the half-and-half (or cream). Cook and stir over medium heat until heated through. Season to taste with salt and pepper.

(Recipes from "Better Homes and Gardens 365 Comfort Foods"; Houghton Mifflin Harcourt, 2014.)

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Kansas City Steak Soup is a warm and satisfying answer to frigid winter temperatures. Credit: Better Homes and Gardens magazine, from "365 Comfort Foods"; Houghton Mifflin Harcourt, 2014.

Eat, drink, floss with bacon at festival

ATLANTIC CITY, N.J. (AP) — Get ready for bacon like you've never eaten, drunk or worn it before.

Bacon milkshakes. Chocolate-covered bacon shaped like roses. Bacon-flavored toothpaste, dental floss and lip balm. Bacon bourbon, margaritas, beer and vodka. Bacon ice cream sundaes. A BLT sandwich with a full pound of bacon.

They're all on the menu this week as one Atlantic City casino stretches the bounds of good taste and cardiovascular health with Bacon Week. The festival at the Tropicana Casino and Resort gives new meaning to the term "pigging out."

The idea of a bacon festival is not as far-fetched as it might sound. Americans eat about 1.5 billion pounds of bacon a year, according to the National Pork Board. And the website baconto-day.com counted nearly 30 bacon festivals around the country from late April through December 2013, many of whose tickets sold out in minutes.

"Bacon is like heaven," said Nadina Fornia, of Egg Harbor Township. "If you're going to die, die with bacon on your lips and a BLT in each hand."

She was drawn to the casino Monday by the promise of bacon in far-out forms, including milkshakes and beer (not in the same glass, thankfully.) She also heard about the bacon-infused vodka.

"That is my quest today," she said.

Fornia tried a bacon bloody Mary mixed with a smoky bacon beer. Despite the overwhelming salty taste and the small strip of bacon floating in the glass, it tasted mostly like sharp tomato juice, she said.

Nearby were chocolate covered pretzels with crumbled bacon bits; chocolate-drizzled potato chips with bacon, two kinds of pasta dishes with bacon, bacon cupcakes, and bacon wrapped around a fake green stem to form roses, which were then dipped in chocolate.

"The first taste is chocolatey, then it's all bacon," said Melissa Ehrke, of Egg Harbor Township. "I was a little surprised I liked it, 'cause I was afraid to try it. It's that whole sweet and salty thing."

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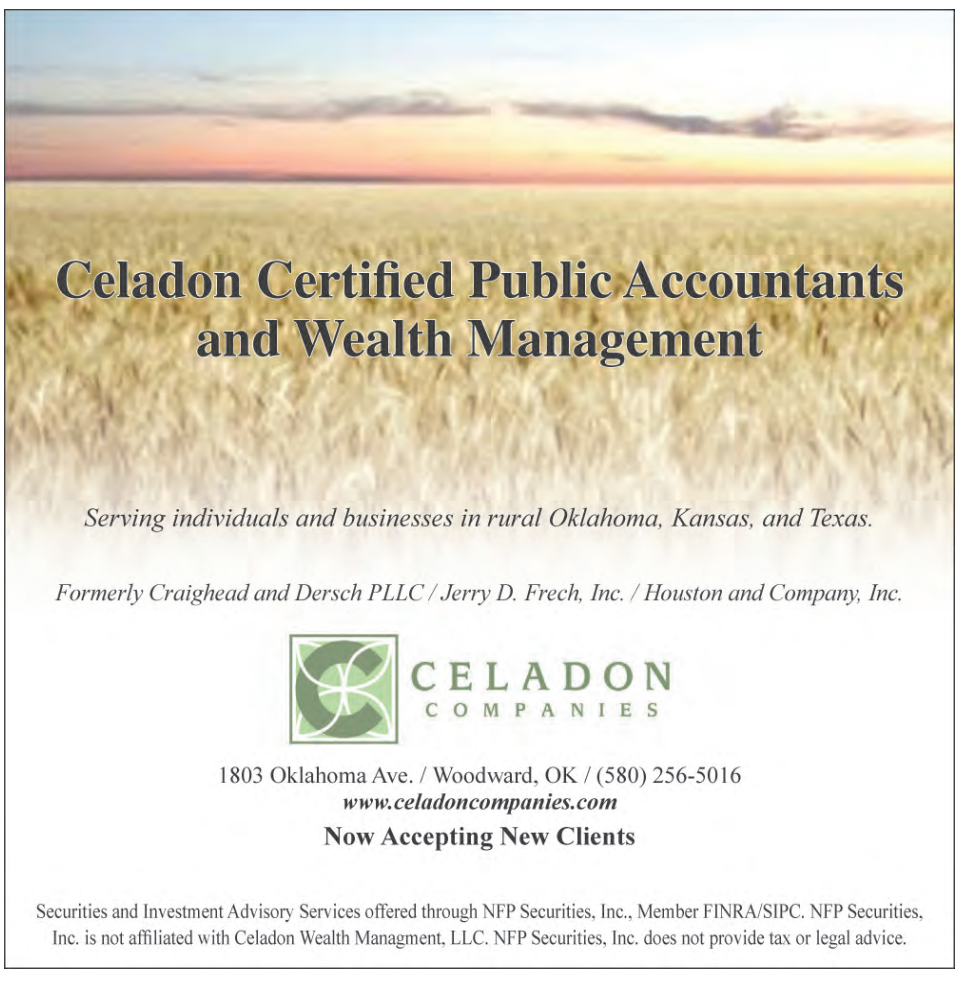

Appendix C

Press Release and

List of Media Outlets

U.S. Fish & Wildlife Service

Bulletin

February 10, 2014

Contact: Lesli Gray
(972) 569-8588, Lesli_Gray@fws.gov

Service to Host Three Public Scoping Meetings on the American Habitat Center Proposed Stakeholder Conservation Strategy for the Lesser Prairie-Chicken

The U.S. Fish and Wildlife Service in cooperation with the American Habitat Center (AHC) will host three public scoping meetings on the AHC Stakeholder Conservation Strategy for the Lesser Prairie-Chicken. Scoping meetings will be held in Garden City, Kansas; Woodward, Oklahoma; and Morton, Texas.

On February 7, 2014, the Service published a Notice of Intent to prepare a draft Environmental Impact Statement to evaluate the impacts of, and alternatives to, the proposed AHC Stakeholder Conservation Strategy for the Lesser Prairie-Chicken. The three scoping meetings are intended to gather information from the public on the scope of issues that might be addressed in a draft Environmental Impact Statement. The Service's draft Environmental Impact Statement will consider the proposed issuance of an Incidental Take Permit, supported by a Habitat Conservation Plan; no action; and a reasonable range of other alternatives.

The scoping meetings will be organized in an open house format and are scheduled from 6:00 p.m. – 8:00 p.m. at each of the following locations:

Tuesday, February 25, 2014
Garden City Community Center
801 Campus Drive
Garden City, KS 76846

Wednesday, February 26, 2014
High Plains Technology Center
3921 34th Street
Woodward, OK 73801

Thursday, February 27, 2014
Cochran County Activity Center
200 W Taylor
Morton, TX 79346

Information on the February 7, 2014, *Federal Register* notice is available at http://www.fws.gov/southwest/, or you may contact Allison Arnold, Austin Ecological Services Field Office, 10711 Burnett Road, Suite 200, Austin, TX 78758-4460; telephone 512/490-0057; fax 512/490-0974; or email *allison_arnold@fws.gov*.

The mission of the U.S. Fish and Wildlife Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. For more information on our work and the people who make it happen, visit www.fws.gov. Connect with our Facebook page at www.facebook.com/usfws, follow our tweets at

twitter.com/usfwshq, watch our YouTube Channel at www.youtube.com/usfws and download photos from our Flickr page atwww.flickr.com/photos/usfwshq/.

http://www.fws.gov/southwest/

First Name	Last Name	Outlet	Contact Topic
		ABQjournal.com	
Pablo	Mora	The Pueblo Chieftain	Regional
Alyssa	Dizon	Lubbock Avalanche-Journal	Regional; Agriculture Industry
		Associated Press	
Tim	Cato	KEYU-TV	Public Service
David	Bradley	This Week in Texoma - KSWO-TV	
Joe	Fry	KTXS-TV	News Assignment
Steve	Johnson	KFOR-TV	News Assignment
		Albuquerque Journal	
Brian	Brus	The Journal Record	Agriculture & Farming; Finance; Local Governments; Transportation
		Associated Press	
		Associated Press	
		Portales News-Tribune	
Kevin	Welch	Amarillo Globe-News	Business; Energy; Agriculture & Farming; Water & Sanitation
Ted	Streuli	The Journal Record	Business; News
		The Daily Times	
		Associated Press	
		Associated Press	
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		The Daily Times	
		Las Cruces Sun-News	
Trish	Choate	Abilene Reporter-News	Washington (US)
Beth	Myers	Oklahoma News Network	News
Conrad	Easterday	Pratt Tribune	
Kay	Boren	KJTV-TV	News Assignment
Kay	Boren	KXTQ-TV	News Assignment
		Midland Reporter-Telegram	
Dave	Witham	Good Morning Texoma - KSWO-TV	
Kelly	Dyer Fry	NewsOK.com	News
		Current-Argus	
		Alamogordo Daily News	
Jason	Frederick	Benkelman Post	
Jason	Frederick	The Hitchcock County News	
Bob	Sands	KETA-TV	News Assignment; Public Affairs
		El Paso Times	
		Artesia Daily Press	
Dave	Schroeder	KRVN-AM	
Pat	Attebery	KLST-TV	Community News
		Roswell Daily Record	
Bert	Zuniga	KZIP-AM	Public Service
Joe	Sherwood	KLBK-TV	News Assignment
		Current-Argus	
Larry	Phillips	High Plains Daily Leader	
Brett	Brewer	KWFX-FM	
Jeff	Mullin	Enid News and Eagle	Community News
Scott	Willoughby	The Denver Post	Fishing; Hunting; Outdoor Recreation

Bonnie	Clark	Express-Star	Circulation
		Union County Leader	
Evonne	Naden	Franklin County Chronicle	
		Associated Press	
Gordon	Fiedler	Salina Journal	News
Carlos	Toledo	KTUZ-TV	News
Terre	Gables	KOKH-TV	News Assignment
Danny	Gruber	Clipper-Herald & People Plus Newspapers	Community News
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Dave	Koester	KOCO-TV	News Assignment
Carolyn	Cole	The Herald Mustang News	Community News
Steve	Webber	Outdoor Oklahoma - Oklahoma Network	Fishing; Outdoor Recreation
Brent	Lansden	The Herald-Democrat	
Jan	Rahn	Grant Tribune Sentinel	
Robert	Griffin	The Oklahoman	News
Shajia	Ahmad	Garden City Telegram	Local Governments
Jack	Krier	Harlan County Journal	
Stan	Nelson	The Pueblo Chieftain	News
Steve	Kelton	Livestock Weekly	Agriculture & Farming; Cattle & Livestock; Rural Living/Farm Life; Sheep
Rhonda	Hogeland	Republican Valley Review	
Tory	Tedder	Oklahoma Electric Cooperative Co-Op News	Regional General Interest; Consumer General Interest
Chris	Woodka	The Pueblo Chieftain	Environment
Johnny	McMahan	Woodward News	Sports
Tracy	Overstreet	The Grand Island Independent	Local Governments; Politics
Bob	Brogan	KRVN-FM	News Assignment
Robert	Pore	The Grand Island Independent	Agriculture & Farming
Sam	Kaufman	Andrews County News	News
Kevin	Hassler	Enid News and Eagle	
Megan	Rossman	Oklahoma Today	Consumer General Interest; Regional General Interest
Kaley	Conner	The Hays Daily News	Community News
Debbie	Taylor	KSWO-TV	News Assignment
Larry	Thornton	Muleshoe Journal	
Mike	Strand	Salina Journal	News
Ron	Fields	The Hays Daily News	
Michael	Bergin	Outdoor Oklahoma	Environment
Ken	McEwen	The Norman Transcript	Circulation
Betsy	Blaney	Associated Press	Collegiate Sports; Agriculture & Farming; Breaking News; Animal Farming; Water Conservation; Energy & Environment
Justin	Patterson	KFDA-TV	News Assignment
Dorothy	Ellington	The Lawton Constitution	Wire Services
De Ann	Patterson	The Lawton Constitution	News
Job	Vigil	The North Platte Telegraph	
News	Department	Hereford Brand	News

Brenda	Callaway	Northwest Oklahoman & News	News
Rick	Green	The Oklahoman	Local News
Greg	Jaklewicz	Abilene Reporter-News	News
Diane	Wetzel	The North Platte Telegraph	Community News
Rina	Gonzales	KMID-TV	News Assignment
Bruce	Finley	The Denver Post	Environment
Robby	Trammell	The Oklahoman	Investigative News; News
Dustin	Wright	Seminole Sentinel	
Derek	Thompson	Garden City Telegram	Business; News
Dan	Speirs	Kearney Hub	
Gale	Rose	Pratt Tribune	Community News
Peter	Strescino	The Pueblo Chieftain	
Cathy	Ricketts	Canadian Record	Community News
Maria	Oliver	KRBC-TV	News Assignment
Maria	Oliver	KTAB-TV	News Assignment
Kory	Oswald	The Shawnee News-Star	News
Jessica	Kokesh	Kearney Hub	Regional
Gail	Banzet	Oklahoma Country	Agriculture & Farming
Nancy	Calderon	Dodge City Daily Globe	News
Phil	Taylor	Greenwire	Environment; Energy Policy
Scott	Streater	Greenwire	Regional; Natural Resources
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Aimee	Acker	Plainsman Herald	
		New Mexico Telegram	
Shawndra	Roberts	Guthrie News Leader	Community News
Bette	McFarren	La Junta Tribune-Democrat	Community News
Craig	Vaughn	KQIZ-FM	Public Service
Zee	Zepeda	KZIP-AM	Public Service
Sharon	Friedlander	Colby Free Press	
Timothy	Howsare	The Pampa News	
Julia	Kazar	Dodge City Daily Globe	Local News
Monique	Ching	San Angelo Standard-Times	Local Governments; Regional
Jennifer	Lindsey	The Daily Ardmoreite	Community News; Education
Tim	Farley	Oklahoma Gazette	Local News
Neena	Satija	Texas Tribune	
April	Reese	Turquesa	
Robert	Pierce	High Plains Daily Leader	
Rachel	Vanhorn	Woodward News	

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Daily Newspaper	pmora@chieftain.com	+1 (719) 544-3520 ext. 431	http://www.chieftain.com	Colorado
Daily Newspaper	alyssa.dizon@lubbockonline.com	+1 (806) 766-8795	http://www.lubbockonline.com	Texas
News Service/Syndicate Bureau	aptexas@ap.org	+1 (972) 991-2100		Texas
Television Station	tcato@newschannel10.com	+1 (806) 383-6397	http://www.newschannel10.com/category/221444/telemundo	Texas
Television Show	dbradley@kswo.com	+1 (580) 355-7000	http://www.kswo.com	Oklahoma
Television Station	fry@ktxs.com	+1 (325) 672-5897	http://www.ktxs.com	Texas
Television Station	steve.johnson@kfor.com	+1 (405) 478-6397	http://www.kfor.com	Oklahoma
Daily Newspaper	journal@abqjournal.com	+1 (505) 823-3800	http://www.abqjournal.com	New Mexico
Magazine	brian.brus@journalrecord.com	+1 (405) 278-2837	http://www.journalrecord.com	Oklahoma
News Service/Syndicate Bureau	apoklahoma@ap.org	+1 (405) 525-2121	http://www.apoklahoma.org	Oklahoma
News Service/Syndicate Bureau	apoklahoma@ap.org	+1 (918) 584-4346	http://www.apoklahoma.org	Oklahoma
Daily Newspaper	pnt@yucca.net	+1 (575) 356-4481	http://www.pntonline.com	New Mexico
Daily Newspaper	kevin.welch@amarillo.com	+1 (806) 345-3371	http://amarillo.com	Texas
Magazine	ted.streuli@journalrecord.com	+1 (405) 278-2845	http://www.journalrecord.com	Oklahoma
Daily Newspaper		+1 (505) 325-4545	http://www.daily-times.com	New Mexico
News Service/Syndicate Bureau	ausstaff@ap.org	+1 (512) 472-4004		Texas
News Service/Syndicate Bureau	apalbuquerque@ap.org	+1 (505) 822-9022	http://www.apnewmexico.org	New Mexico
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Television Station	aeuresti@kcbd.com	+1 (806) 761-4261	http://www.kcbd.com	Texas
Online Version		+1 (505) 325-4545	http://www.daily-times.com	New Mexico
Online Version		+1 (575) 541-5400	http://www.lcsun-news.com	New Mexico
Daily Newspaper	choatet@shns.com	+1 (202) 408-2709	http://www.reporternews.com	District Of Columbia
Radio Network	bethmyers@clearchannel.com	+1 (405) 858-1458 ext. 294		Oklahoma
Daily Newspaper	editor@pratttribune.com	+1 (620) 672-5511	http://www.pratttribune.com	Kansas
Television Station	kboren@ramarcom.com	+1 (806) 745-4545	http://www.myfoxlubbock.com	Texas
Television Station	kboren@ramarcom.com	+1 (806) 745-4545		Texas
Daily Newspaper		+1 (432) 682-5311	http://www.mrt.com	Texas
Television Show	dwitham@kswo.com	+1 (580) 355-6397	http://www.kswo.com	Oklahoma
Online Version	kfry@opubco.com	+1 (405) 475-3247	http://www.newsok.com	Oklahoma
Daily Newspaper		+1 (575) 887-5501	http://www.currentargus.com	New Mexico
Online Version	communitynews@alamogordonews.com	+1 (575) 437-7120	http://www.alamogordonews.com	New Mexico
Community Newspaper	jfred@gpcom.net	+1 (308) 423-2337		Nebraska
Community Newspaper	jfred@gpcom.net	+1 (308) 334-5226		Nebraska
Television Station	bsands@oeta.tv	+1 (405) 841-9256	http://www.oeta.tv	Oklahoma
Daily Newspaper Bureau		+1 (505) 820-6898		New Mexico
Daily Newspaper	news@artesianews.com	+1 (575) 746-3524	http://www.artesianews.com	New Mexico
Radio Station	dschroeder@krvn.com	+1 (308) 324-2371 ext. 154	http://www.krvn.com	Nebraska
Television Station	pattebery@klst.net	+1 (325) 659-2409	http://conchovalleyhomepage.com	Texas
Online Version	editorial@rdrnews.com	+1 (575) 622-7710	http://www.rdrnews.com/	New Mexico
Radio Station	bzuniga@tejasbroadcasting.com	+1 (806) 355-1044 ext. 120		Texas
Television Station	jsherwood@klbk.com	+1 (806) 745-2828	http://www.everythinglubbock.com	Texas
Online Version		+1 (575) 887-5501	http://www.currentargus.com	New Mexico
Daily Newspaper	larry@hpleader.com	+1 (620) 626-0840	http://www.hpleader.com	Kansas
Radio Station	cciradio@sbcglobal.net	+1 (580) 256-0935	http://www.woodwardradio.com	Oklahoma
Daily Newspaper	jmullin@enidnews.com	+1 (580) 233-6600 ext. 8123	http://www.enidnews.com	Oklahoma
Daily Newspaper	swilloughby@denverpost.com	+1 (303) 954-1993	http://www.denverpost.com	Colorado

Daily Newspaper	bjclark@cnhi.com	+1 (405) 224-2600 ext. 230	http://chickashanews.com	Oklahoma
Community Newspaper	ucleader@plateautel.net	+1 (575) 374-2587		New Mexico
Community Newspaper	frcochron@gtmc.net	+1 (308) 425-3481		Nebraska
News Service/Syndicate Bureau	apkansascity@ap.org	+1 (785) 234-5654	http://www.apkansascity.org	Kansas
Daily Newspaper	gfiedler@salina.com	+1 (785) 822-1407	http://www.salina.com	Kansas
Television Station	carlos.t@tylermedia.com	+1 (405) 429-5070	http://www.ktuztv.com	Oklahoma
Television Station	news@okcfox.com	+1 (405) 475-9100	http://www.okcfox.com	Oklahoma
Community Newspaper	danny.gruber@lexch.com	+1 (308) 324-5511 ext. 130	http://www.lexch.com	Nebraska
Daily Newspaper	editor@stwnewspress.com	+1 (405) 372-5000 ext. 201	http://www.stwnewspress.com	Oklahoma
Television Station	dkoester@hearst.com	+1 (405) 478-6632	http://www.koco.com	Oklahoma
Community Newspaper	herald@riolink.com	+1 (575) 894-2143	http://www.heraldpub.com	New Mexico
Community Newspaper	ccole@mustangnews.info	+1 (405) 376-4571	http://www.mustangnews.info	Oklahoma
Television Show	swebber@odwc.state.ok.us	+1 (405) 521-3855	http://www.wildlifedepartment.com/outdoor_oklahoma.htm	Oklahoma
Community Newspaper	bvrnews@ptsi.net	+1 (580) 625-3241	http://www.beavercowchipnews.com	Oklahoma
Community Newspaper	grantrib@gpcom.net	+1 (308) 352-4311	http://www.granttribune.com	Nebraska
Daily Newspaper	rgriffin@opubco.com	+1 (405) 475-4178	http://www.newsok.com	Oklahoma
Daily Newspaper	sahmad@gctelegram.com	+1 (620) 275-8500 ext. 232	http://www.gctelegram.com	Kansas
Community Newspaper	journal@frontiernet.net	+1 (308) 928-2143		Nebraska
Daily Newspaper	snelson@chieftain.com	+1 (719) 544-3520 ext. 417	http://www.chieftain.com	Colorado
Magazine	skelton@livestockweekly.com	+1 (325) 949-4611	http://www.livestockweekly.com	Texas
Community Newspaper	republicanreview@yahoo.com	+1 (308) 928-9982		Nebraska
Magazine	oecnews@okcoop.org	+1 (405) 217-6726	http://www.okcoop.org	Oklahoma
Daily Newspaper	cwoodka@chieftain.com	+1 (719) 544-3520 ext. 415	http://www.chieftain.com	Colorado
Daily Newspaper	editor@woodwardnews.net	+1 (580) 256-2200	http://www.woodwardnews.net	Oklahoma
Daily Newspaper	tracy.overstreet@theindependent.com	+1 (308) 381-5420	http://www.theindependent.com	Nebraska
Radio Station	bbrogan@krvn.com	+1 (308) 324-2371 ext. 162	http://www.krvnfm.com	Nebraska
Daily Newspaper	robert.pore@theindependent.com	+1 (308) 381-5422	http://www.theindependent.com	Nebraska
Community Newspaper	sam@basinbroadband.com	+1 (432) 523-2085	http://www.andrewscountynews.com	Texas
Daily Newspaper	enidnews@enidnews.com	+1 (580) 233-6600 ext. 8143	http://enidnews.com	Oklahoma
Magazine	megan@oklahomatoday.com	+1 (405) 230-8450	http://www.oklahomatoday.com	Oklahoma
Daily Newspaper	kconner@dailynews.net	+1 (785) 628-1081 ext. 138	http://www.dailynews.net	Kansas
Television Station	dtaylor@kswo.com	+1 (580) 355-6397	http://www.kswo.com	Oklahoma
Community Newspaper	editor@muleshoejournal.com	+1 (806) 272-4536	http://www.muleshoejournal.com	Texas
Daily Newspaper	mstrand@salina.com	+1 (785) 822-1418	http://www.salina.com	Kansas
Daily Newspaper	rfields@dailynews.net	+1 (785) 628-1081 ext. 140	http://www.hdnews.net	Kansas
Magazine	mbergin@odwc.state.ok.us	+1 (405) 521-3856	http://www.wildlifedepartment.com	Oklahoma
Daily Newspaper	kmcewen@normantranscript.com	+1 (405) 366-3570	http://www.normantranscript.com	Oklahoma
News Service/Syndicate Bureau	bblaney@ap.org	+1 (806) 765-0394		Texas
Television Station	jpatterson@newschannel10.com	+1 (806) 383-1010	http://www.newschannel10.com	Texas
Daily Newspaper	dellington@lawton-constitution.com	+1 (580) 585-5153	http://www.swoknews.com	Oklahoma
Daily Newspaper	dpatterson@lawton-constitution.com	+1 (580) 585-5159	http://www.swoknews.com	Oklahoma
Daily Newspaper	job.vigil@nptelegraph.com	+1 (308) 532-6000 ext. 252	http://www.nptelegraph.com	Nebraska
Daily Newspaper	editor@herefordbrand.com	+1 (806) 364-2030		Texas

Community Newspaper	nwopaper@pldi.net	+1 (580) 938-2533		Oklahoma
Daily Newspaper	rmgreen@opubco.com	+1 (405) 475-3360	http://www.newsok.com	Oklahoma
Daily Newspaper	jaklewiczg@reporternews.com	+1 (325) 676-6736	http://www.reporternews.com	Texas
Daily Newspaper	dwetzel@nptelegraph.com	+1 (308) 532-6000 ext. 247	http://www.nptelegraph.com	Nebraska
Television Station	rgonzales@kmid.tv	+1 (432) 563-4421	http://permianbasin360.com	Texas
Daily Newspaper	bfinley@denverpost.com	+1 (303) 954-1700	http://www.brucefinley.com	Colorado
Daily Newspaper	rtrammell@opubco.com	+1 (405) 475-3221	http://www.newsok.com	Oklahoma
Community Newspaper	sentinel@crosswind.net	+1 (432) 758-3667	http://www.seminolesentinel.com	Texas
Daily Newspaper	dthompson@gctelegram.com	+1 (620) 275-8500 ext. 231	http://www.gctelegram.com	Kansas
Daily Newspaper	dan.speirs@kearneyhub.com	+1 (308) 233-9721	http://www.kearneyhub.com	Nebraska
Daily Newspaper	reporter@pratttribune.com	+1 (620) 672-5511	http://www.pratttribune.com	Kansas
Daily Newspaper	city@chieftain.com	+1 (719) 544-8631	http://www.chieftain.com	Colorado
Community Newspaper	news@canadianrecord.com	+1 (806) 323-6461	http://www.canadianrecord.com	Texas
Television Station	moliver@krbc.tv	+1 (325) 692-7372	http://www.bigcountryhomepage.com	Texas
Television Station	moliver@krbc.tv	+1 (325) 695-6397	http://bigcountryhomepage.com	Texas
Daily Newspaper	kory.oswald@news-star.com	+1 (405) 214-3934	http://www.news-star.com	Oklahoma
Daily Newspaper	jessica.kokesh@kearneyhub.com	+1 (308) 233-9723	http://www.kearneyhub.com	Nebraska
Magazine	gail.banzet@okfb.org	+1 (405) 523-2346	http://okfarmbureau.org	Oklahoma
Daily Newspaper	ncalderon@dodgeglobe.com	+1 (620) 408-9910	http://www.dodgeglobe.com	Kansas
News Web Site	ptaylor@eenews.net	+1 (202) 446-0439	http://www.eenews.net/gw	District Of Columbia
News Web Site	sstreater@eenews.net	+1 (719) 264-0923	http://www.eenews.net/gw	District Of Columbia
Community Newspaper	plainsmanherald@hotmail.com	+1 (719) 523-6254		Colorado
Community Newspaper	plainsmanherald@hotmail.com	+1 (719) 523-6254		Colorado
Blog			http://www.nmtelegram.com	New Mexico
Community Newspaper	gnlnews@yahoo.com	+1 (405) 282-2222	http://www.newsleader.net	Oklahoma
Daily Newspaper	bette@ljtdmail.com	+1 (719) 384-1428	http://www.lajuntatribunedemocrat.com	Colorado
Radio Station	craig.vaughn@cumulus.com	+1 (806) 342-5200	http://www.931thebeat.com	Texas
Radio Station	zee@tejasbroadcasting.com	+1 (806) 355-1044		Texas
Daily Newspaper	sfriedlander@nwkansas.com	+1 (785) 462-3963	http://www.nwkansas.com/cfpwebpages/cfpmain.html	Kansas
Daily Newspaper	thowsare@thepampanews.com	+1 (806) 669-2525 ext. 212	http://www.thepampanews.com	Texas
Daily Newspaper	julia.kazar@dodgeglobe.com	+1 (620) 408-9913	http://www.dodgeglobe.com	Kansas
Daily Newspaper	mching@gosanangelo.com	+1 (325) 659-8200	http://www.gosanangelo.com	Texas
Daily Newspaper	jennifer.lindsey@ardmoreite.com	+1 (580) 221-6536	http://www.ardmoreite.com	Oklahoma
Community Newspaper	tfarley@tierramediagroup.com	+1 (405) 528-6000	http://www.okgazette.com	Oklahoma
News Web Site	nsatija@texastribune.org			
Freelancer	areeseturquesa@hotmail.com			
Daily Newspaper	robert@hpleader.com			
Daily Newspaper	reporter3@woodwardnews.net			

Appendix D

Letter mailed to Federal, State, and Local Agencies and Organizations

United States Department of the Interior

U.S. FISH AND WILDLIFE SERVICE
Ecological Services
P.O. Box 1306, Room 6034
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/ES-ARD/056558

Mr John Doe
12345 Driveway Lane
City, State zip

Dear xx:

The U.S. Fish & Wildlife Service (Service) proposed the lesser prairie-chicken (LPC) for listing as threatened under the Endangered Species Act (ESA) on December 11, 2012. The American Habitat Center proposes to develop a regional, multi-state stakeholder conservation strategy (Proposed SCS) that is intended to provide conservation benefits to the LPC. The Proposed SCS consists of three components: a habitat conservation plan (known as the Stakeholder Conservation Plan); a Habitat Exchange Agreement; and a Habitat Quantification Tool. The Proposed SCS is likely to consider a hybrid Candidate Conservation Agreement with Assurances (CCAA)/ Habitat Conservation Plan (HCP) in order to provide regulatory certainty in the event the LPC is listed (HCP) or remains a candidate for listing (CCAA). The SCS is intended to support the issuance of an incidental take permit (ITP) by the Service if the LPC is listed as threatened under the ESA. The ITP would provide "incidental take" coverage from activities listed within the Proposed SCS including future construction, operation, and maintenance of oil and gas operations and agricultural uses. The Proposed SCS would apply to lands in eastern Colorado, southwestern Nebraska, western Kansas, western Oklahoma, eastern New Mexico and the Texas Panhandle.

The National Environmental Policy Act (NEPA) establishes a planning process that federal agencies are required to follow. The Service is preparing a draft Environmental Impact Statement (EIS) as part of that process. Through public scoping meetings and consultations with other agencies, the Service intends to gather information necessary to prepare the draft EIS. We also will use this process to obtain suggestions and information from agencies and the public on the scope of issues to be addressed in this document. The Service invites you to share any thoughts and concerns that you may have about the proposed SCS.

The Service is holding three public scoping meetings during February 2014. Scoping meetings will be organized in an open house format. Information on the dates, time and locations for the public scoping meetings is below.

February 25, 2014	**February 26, 2014**	**February 27, 2014**
Garden City Community College Fouse Building, Room 1104 801 Campus Drive Garden City, KS 76846 6:00-8:00pm	High Plains Technology Center 3921 34th St. Woodward, OK 73801 6:00-8:00pm	Cochran County Activity Center 200 W Taylor Morton, TX 6:00-8:00pm

In addition, we are available if you would like to discuss the proposed SCS with us directly. If you have questions, please do not hesitate to contact us. The Service values the knowledge and insight you bring to the table. Your comments will help us produce an EIS that accurately identifies the issues and assesses the effects of the proposed SCS. We look forward to hearing from you.

Sincerely,

Michelle Shaughnessy

Assistant Regional Director
Ecological Services

Texas and Southwestern Cattle Raisers Association
1301 W. 7th Street, Ste. 201
Fort Worth, TX 76102

Ben Weinheimer
Texas Cattle Feeders Association
5501 I-40 West
Amarillo, TX 79106, TX 79106

Gene Richardson
Texas Farm Bureau
P.O. Box 2689
Waco, TX 76702-2689

Plains Cotton Growers
4517 W Loop 289
Lubbock, TX 79414

Jennifer Blackburn
National Sorghum Producers
4201 Interstate 27
Lubbock, TX 79414

Texas Wheat Growers Association
5405 W Interstate 40
Amarillo, TX 79106, TX 79106

Texas Watershed Management Foundation
409 Highway 36 Bypass N #E
Gatesville, TX 76528

Texas Sorghum Producers
P.O. Box 905
Salado, TX 76571

Texas Grain and Feed Association
1701 River Run
Fort Worth, TX 76107

David Wolfe
Environmental Defense Fund
301 Congress Avenue, Suite 1300
Austin, TX 78701

Courtney Taylor and Sara Brodnax
Environmental Defense Fund
1875 Connecticut Ave NW #600
Washington, DC 20009

Eric Holst
Environmental Defense Fund
1107 9th St, Ste 1070
Sacramento, CA 95814

David Bezanson
Texas Nature Conservancy
318 Congress Avenue
Austin, TX 78701

Playa Lakes Joint Venture
2575 Park Lane Suite 110
Lafayette, CO 80026

Defenders of Wildlife
1130 17th Street, NW
Washington, DC 20036

National Wildlife Federation
11100 Wildlife Center Drive
Reston, VA 20190

Wayne Walker
Common Grounds Capitol
11112 Autumn Rd
Edmond, OK 73013

Kansas Livestock Association
6031 SW 37th St
Topeka, KS 66614

Kansas Corn Growers Association
PO Box 446
Garnett, KS 66032

Kansas Wheat
1990 Kimball Avenue
Manhattan, KS 66502

Kansas Agribusiness Retailers Association
816 SW Tyler, Suite 100
Topeka, KS 66612

Sam Fuhlendorf and Dwayne Elmore
Oklahoma State University
008C Agricultural Hall
Stillwater, OK 74078

David Augustine
USDA, ARS, NPA
Crops Research Laboratory
1701 Center Ave.
Fort Collins, CO 80526

Michelle Shaughnessy and Dr. Benjamin Tuggle
U.S. Fish & Wildlife Service – Southwest Region 2
P.O. Box 1306
Albuquerque, NM 87103-1306

U.S. Fish & Wildlife Service – Mountain Prairie Region 6
PO Box 25486 - DFC
Denver, CO 80225

Bill Van Pelt
Western Association of Fish and Wildlife Agencies
522 Notre Dame Court
Cheyenne, WY 82009

Carter Smith
Texas Parks and Wildlife Department
4200 Smith School Rd
Austin, TX 78744

Richard Hatcher
Oklahoma Department of Wildlife Conservation
PO BOX 53465
Oklahoma City, OK 73152

New Mexico Department of Game and Fish
One Wildlife Way
Santa Fe, NM 87507

Colorado Division Wildlife
1313 Sherman Street, Suite 618
Denver, CO 80203

U.S. Congresswoman Lynn Jenkins
1027 Longworth HOB
Washington , DC 20515

U.S. Congressman Mike Pompeo
107 Cannon HOB
Washington , DC 20515

Landon Fulmer & Jon Hummel
Governor Brownback
Capitol, 300 SW 10th Ave., Ste. 241S
Topeka, KS 66612-1590

Stanton County Board of Commissioners
P.O. Box 190
Johnson, KS 67855

Morton County Clerk's Office
Morton County Commissioners
1025 Morton St.
Elkhart, KS 67950-1116

Seward County Commissioners
515 N Washington
Suite 206
Liberal, KS 67901

Janna Frydendall
Meade County Commissioner
P.O. Box 1092
Meade, KS 67864

Comanche County Commissioners
P.O. Box 268
Coldwater, KS 67029

Stevens County Commissioners
200 E. 6th Street #1
Hugoton, KS 67951

City of Syracuse
Hamilton County Commissioners
PO Box 148,
Syracuse, KS 67878

Ellis County Commissioners
1204 Fort St.
Hays, KS 67601

Wallace County Commissioners
Post Office Box 70
Sharon Springs, KS 67758-0070

Rush County Commissioners
715 Elm Street
La Crosse, KS 67548

Grant County Commissioners
108 S Glenn
Ulysses, KS 67880

Haskell County Commissioners
300 S Inman St
Sublette, KS 67877

Mark E. Busch
Gray County Commissioner, District #1
15405 E Road
Cimarron, KS 67835

Glenn Oyler
Gray County Commissioner, District #2
P.O. Box 833
Cimarron, KS 67835

David Loucks
Gray County Commissioner, District #3
28104 2 Road
Copeland, KS 67837

Ness County Commissioners
202 W. Sycamore St.
Ness City, KS 67560

Barton County Commissioners
1400 Main St. Rm. 107
Great Bend, KS 67530

Ford County Commissioners
100 Gunsmoke St
Dodge City, KS 67801

Kiowa County Commissioners
211 E Florida
Greensburg, KS 67054

Pratt County Commissioners
300 S Ninnescah
Pratt, KS 67124

Edwards County Commissioners
312 S Massachusetts Ave
Kinsley, KS 67547

Stafford County Commissioners
209 North Broadway, 2nd Floor
P.O. Box 296
St. John, KS 67576

Pawnee County Commissioners
715 Broadway, 2nd Floor
Larned, KS 67550

Lane County Commissioners
135 N. Lane
Dighton, KS 67839

Hodgeman County Commissioners
PO Box 247
Jetmore, KS 67854

James Minnix
Scott County Commissioners, District #1
8101 West Road 40
Scott City, KS 67871

Jerry Buxton
Scott County Commissioners, District #2
1206 Steele Avenue
Scott City, KS 67871

Kearny County Commissioners
P.O. Box 86
Lakin, KS 67860

Finney County Commissioners
311 N. 9th St.
Garden City, KS 67846

Logan County Commissioners
710 W 2nd
Oakley, KS 67748

Gove County Commissioners
520 Washington St
Gove City, KS 67736

Trego County Commissioners
216 N Main Street
WaKeeney, KS 67672

Sherman County Commissioners
813 Broadway
Goodland, KS 67735

Barber County Commissioners
120 E Washington Ave
Medicine Lodge, KS 67104

Clark County Commissioners
913 Highland
Ashland, KS 67831

U.S. Senator Tom Coburn
172 Russell Senate Office Bldg.
Washington, DC 20510

U.S. Senator Jim Inhofe
205 Russell Senate Office Building
Washington, DC 20510-3603

U.S. Congressman Frank Lucas
2311 Rayburn HOB
Washington, DC 20515

U.S. Congressman Markwayne Mullin
1113 Longworth House Office Building
Washington, DC 20515

Governor Mary Fallin
2300 N. Lincoln Blvd., Room 212
Oklahoma City, OK 73105

Alfalfa County Commissioners
300 South Grand
Cherokee, OK 73728-8000

Beaver County Commissioners
111 West 2nd Street
Beaver, OK 73932

Carl Don Campbell
Beckham County Commissioner, District 1
P.O. Box 67
Sayre, OK 73662

Carl Simon
Beckham County Commissioner, District 2
P. O. Box 67
Sayre, OK 73662

Johnny Davis
Beckham County Commissioner, District 3
P. O. Box 67
Sayre, OK 73662

Mark Sharpton
Logan County Commissioner, District #1
2315 S.W. 19th
Guthrie, OK 73044

Michael Pearson
Logan County Commissioner, District #2
1550 N. Midwest Blvd.
Guthrie, OK 73044

Monty Piearcy
Logan County Commissioner, District #3
P.O. Box 661
Crescent, OK 73028

James E. Covey
Custer County Commissioner, District #1
9960 US HWY 183
Arapaho, OK 73620

Kurt Hamburger
Custer County Commissioner, District #2
23927 E 1010 Road
Weatherford, OK 73096-3136

Lyle K. Miller
Custer County Commissioner, District #3
PO Box 25
Butler, OK 73625

Dewey County Commissioners
Broadway
Taloga, OK 73667

Ellis County Commissioners
100 S Washington St
Arnett, OK 73832

Brent York
Greer County Commissioner, District #1
P.O. Box 207
Magnum, OK 73554

Jerald Gifford
Greer County Commissioner, District #2
P.O. Box 207
Magnum, OK 73554

Steven Fite
Greer County Commissioner, District #3
P.O. Box 207
Magnum, OK 73554

Harmon County Commissioners
114 W Hollis Street
County Courthouse
Hollis, OK 73550-3053

Cary Carrell
Jackson County Commissioner, District #3
101 N. Main, Room 101
Altus, OK 73521

Kiowa County Commissioners
316 S Main St
Hobart, OK 73651

Roger Mills County Commissioners
PO Box 708, County Courthouse
Cheyenne, OK 73628-0708

Ted Keeling
Texas County Commissioner, District #1
RT 2 Box 92
Hooker, OK 73945

Richard Bryan
Texas County Commissioner, District #2
501 S. Main
Guymon, OK 73942

Jack Strain
Texas County Commissioner, District #3
HWY 95 N - HCR 4 Box 1C
Texhoma, OK 73949

Washita County Commissioners
111 E Main St # 3
New Cordell, OK

Woods County Commissioners
PO Box 386
County Courthouse
Alva, OK 73717-0386

Woodward County Commissioners
1600 Main Street Suite #9
Woodward, OK 73801

U.S. Senator Michael Bennet
458 Russell Senate Office Building
Washington, DC 20510

U.S. Senator Mark Udall
Hart Office Building Suite SH-730
Washington, DC 20510

U.S. Congresswoman Diana DeGette
2368 Rayburn House Office Building
Washington, DC 20515

U.S. Congressman Cory Gardner
213 Cannon HOB
Washington, DC 20515

U.S. Congressman Doug Lambron
2402 Rayburn House Office Building
Washington, DC 20515

U.S. Congressman Scott Tipton
218 Cannon HOB
Washington, DC 20515

Governor John W. Hickenlooper
136 State Capitol
Denver, CO 80203-1792

Baca County Commissioners
741 Main Street
Springfield, CO 81073

Bent County Commissioners
P.O. Box 350
Las Animas, CO 81054

Cheyenne County Commissioners
P.O. Box 567
Cheyenne Wells, CO 80810

Crowley County Commissioners
603 Main Street Suite 2
Courthouse Annex
Ordway, CO 81063

Kiowa County Commissioners
PO Box 100
Eads, CO 81036

Kit Carson County Commissioners
P.O. Box 160
Burlington, CO 80807

Las Animas County Commissioners
Las Animas County Courthouse
200 East First Street
Trinidad, CO 81082

Lincoln County Commissioners
PO Box 39
Hugo, CO 80821

Yuma County Commissioners
Yuma County Courthouse
310 Ash, Suite A
Wray, CO 80758

Otero County Commissioners
Otero County Courthouse
13 West Third Street, Room 212
La Junta, CO 81050

Phillips County Commissioners
221 S Interocean Ave
Holyoke, CO 80734

Washington County Commissioners
150 Ash Avenue
Akron, CO 80720

U.S. Senator John Cornyn
517 Hart Senate Office Bldg.
Washington, DC 20510

U.S. Senator Ted Cruz
Dirksen Senate Office Bldg
Suite 185
Washington, DC 20510

U.S. Congressman Mike Conaway
2430 Rayburn H.O.B.
Washington, DC 20515

U.S. Congressman Bill Flores
1030 Longworth HOB
Washington, DC 20515

U.S. Congressman Pete Gallego
431 Cannon House Office Building
Washington, DC 20515

U.S. Congressman Louie Gohmert
2243 Rayburn HOB
Washington, DC 20515

U.S. Congressman Gene Green
2470 Rayburn HOB
Washington, DC 20515

U.S. Congressman Ralph Hall
2405 Rayburn H.O.B.
Washington, DC 20515-0001

U.S. Congressman Randy Neugebauer
1424 Longworth HOB
Washington, DC 20515

U.S. Congressman Pete Olson
312 Cannon HOB
Washington, DC 20515

U.S. Congressman Mac Thornberry
2329 Rayburn House Office Building
Washington, DC 20515-4313

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Austin, TX 78711-2428

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Andrews, TX 79715

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Dimmitt, TX 79027

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Dimmitt, TX 79027

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Dimmitt, TX 79027

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Dimmitt, TX 79027

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Spearman, TX 79081

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Channing, TX 79018

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Dalhart, TX 79022

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Dalhart, TX 79044

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Lubbock, TX 79408

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Lynn County Commissioners
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Wilson, TX 79381

John Hawthorne
Lynn County Commissioners
1940 CR BB
Tahoka, TX 79373

Don Blair
Lynn County Commissioners
RR 2
O'Donnell, TX 79351

Danny Martin
Lynn County Commissioners
P.O. Box 1898 FM 211
Wilson, TX 79373

Jesus Garza
Martin County Commissioners
P. O. Box 1303
Stanton, TX 79782

Valentino Sotelo
Martin County Commissioners
P. O. Box 1125
Stanton, TX 79782

Bobby Holland
Martin County Commissioners
P. O. Box 46
Stanton, TX 79782

Bryan Cox
Martin County Commissioners
3467 CRD 3301
Stanton, TX 79782-4026

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Dumas, TX 79029

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P.O. Box 719
Matador, TX 79244

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Oldham County Commissioners
P. O. Box 399
Vega, TX 79092

Clay Crist
Oldham County Commissioners
P. O. Box 104
Vega, TX 79092

Roger Morris
Oldham County Commissioners
P. O. Box 23
Vega, TX 79092

Billy Don Brown
Oldham County Commissioners
P.O. Box 98
Adrian, TX 79001

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2462 FM 1162
Friona, TX 79035

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Parmer County Commissioners
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Bovina, TX 79009

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Amarillo, TX 79101

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Amarillo, TX 79101

Alphonso Vaughn
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Amarillo, TX 79101

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Roberts County Commissioners
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Tulia, TX 79088

Terry County Commissioners
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Wheeler, TX 79096

Yoakum County Commissioners
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Plains, TX 79355

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U.S. Senator Mike Johanns
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U.S. Congressman Lee Terry
2266 RHOB
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U.S. Congressman Jeff Fortenberry
1514 Longworth House Office
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U.S. Congressman Adrian Smith
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Scott Hogeland
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Haigler, NE 69030

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Santa Rosa, NM 88435

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Lovington, NM 88260

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Amarillo, TX 79101-3545

Carlsbad Field Office
Bureau of Land Management
620 E. Greene St.
Carlsbad, NM 88220

Farmington Field Office
Bureau of Land Management
6251 College Blvd. Suite A
Farmington, NM 87402

Las Cruces District Office
Bureau of Land Management
1800 Marquess Street
Las Cruces, NM 88005-3370

Oklahoma Field Office
Bureau of Land Management
7906 E. 33rd Street, Suite 101
Tulsa, OK 74145-1352

Rio Puerco Field Office
Bureau of Land Management
435 Montano Road, NE
Albuquerque, NM 87107-4935

Roswell Field Office
Bureau of Land Management
2909 W. Second Street
Roswell, NM 88201-2019

Socorro Field Office
Bureau of Land Management
901 S. Highway 85
Socorro, NM 87801-4168

Taos Field Office
Bureau of Land Management
226 Cruz Alta Road
Taos, NM 87571-5983

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Bureau of Reclamation, Upper Colorado Region
555 Broadway NE, Suite 100
Albuquerque, NM 87102-2352

Denver Federal Center
Bureau of Reclamation
6th & Kipling, Bldg 67
Denver, CO 80225

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2021 4th Avenue North
Billings, MT 59101

Bureau of Reclamation, Great Plains Regional Office
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Billings, MT 59107-6900

Great Plains Regional Office
Bureau of Indian Affairs
115 4th Avenue Southeast, Suite 400
Aberdeen, SD 57401

Navajo Regional Office
Bureau of Indian Affairs
P.O. Box 1060
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Rocky Mountain Regional Office
Bureau of Indian Affairs
2021 4th Avenue North
Billings, MT 59101

Southern Plains Regional Office
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WCD Office Complex
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Anadarko, OK 73005

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Bureau of Indian Affairs
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Albuquerque, NM 87104

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Air and Waste Management Division
U.S. EPA, Region 7
11201 Renner Boulevard
Mail Code: AWMDSTOP
Lenexa, KS 66219

U.S. EPA, Region 8
1595 Wynkoop Street
Mail Code: 8P2-W-GW
Denver, CO 80202-1129

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4101 Jefferson Plaza NE
Albuquerque, NM 87109

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U.S. Army Corps of Engineers
819 Taylor Street
Fort Worth, TX 76102

Tulsa District Public Affairs
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1645 S 101 E Ave
Tulsa, OK 74128-4609

Kansas City District
U.S. Army Corps of Engineers
601 E. 12th Street
Kansas City, MO 65106

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1400 Independence Ave., SW
Washington, DC 20250-0003

Southern Region (R8)
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1720 Peachtree Road, NW
Atlanta, GA 30309

Southwestern Region
US Forest Service
333 Broadway SE
Albuquerque, NM 87102

Rocky Mountain Region
US Forest Service
740 Simms Street
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101 South Main Street
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6200 Jefferson NE
Albuquerque, NM 87109

NRCS Oklahoma State Office
100 USDA, Suite 206
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NRCS Kansas State Office
USDA Natural Resources Conservation Service
760 South Broadway
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NRCS Colorado State Office
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Austin, TX 78735-8931

Nebraska-Kansas Area Office
Bureau of Reclamation
1706 West Third
McCook, NE 69001

Eastern Oklahoma Regional Office
Bureau of Indian Affairs
P.O. Box 8002
Muskogee, OK 74401-6201

Appendix E

Sign-in Forms from

Scoping Meetings

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Garden City, KS			Location: Garden City Community College	
Date: February 25, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
Lynn Freese	Wheatland Electric	2041 W Rd 230 Scott City 67871	620-874-4345	lfreese@wecinet
Ryan Flickner	Kansas Farm Bureau	2627 KFB Plaza, Manhattan, KS	66503 785-537-6327	flicknerr@kfb.org
Andrea Severson	Nebraska-Kansas area office Bureau of Reclamation	1706 W 3rd St, McCook, NE 69001	308-345-1026	aseverson@usbr.gov
Perry Smith	Wheatland Electric	P.O. Box 953 Garden City KS	67846 620-271-4424	psmith@wecinet
Rockie Gottsponer	Sunflower Electric	1501 Rowland Rd	620-290-6300	rgottsponer@sunflower.net
Paul Resley	Sunflower Electric	2907 Horaine Rd GC KS	620-640-3827	presley@sunflower.net
Ken Klemm	Kansas Natural Resource Coalition	7580 RD 25 Goodland	785-899-5804	Ken@thehuffalocompany.com
Laurie Klemm		7580 Rd. 25 Goodland, KS	785-899-5804	Laurie@thehomesteadranch.com
Mel Thompson	Sen. Pat Roberts	155 N. mkt. Suite 120, Wich, Ks.	316-263-0416	mel_thompson@roberts.senate.gov
Donna Carlson	Self	PO Box 93 GC KS 67846	620 275 8320	none
Lynn Ballinger	Congr. Tim Huelskamp	100 Military #205 Dodge City	225-0172	lynn.ballinger@mail.house.gov
Jim Roberts	Common Good Capital	620 E 4th Elmwood, OK 73034	405-650-0007	jroberts319@aol.com
Wayne R. Keller	OakLec Land & Cattle, LLC	12241 Valley Rd, Ford, KS 67842	620-225-7777	maynardreecebyrd@gmail.com
Heather Whitlaw	FWS	2609 Anderson Ave. Manhattan, KS	785-539-3474	heather_whitlaw@fws.gov
Mike Mitchener	KS wildlife parks & tourism	PRATT KS 67124	620-672-5911	mike.mitchener@ksoutdoors.com

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Garden City, KS			Location: Garden City Community College	
Date: February 25, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
Kevin Campbell	Kearny Co B of Comm.	P.O. Box 86, 304 N. Main	Lakin Ks 67860	620-355-7848 kecoco@pld.com
Jim Sires	Kansas Farm Bureau	12900 S. Rd X Manter KS 67862	620-443-4667	SiresJ@KFB.ORG
Donny Worthington	XTO ENERGY	810 Houston St., Ft. Worth TX	817 885-288	donny_worthington@xtoenergy.com
David Bender	KDWPT	625 SE 25th Avenue, Pratt, KS	620-672-0788	david.bender@ksoutdoors.com
Sheila Ellis	Scott/Logan Landowner	2670 W Rd 230	620-872-2056	
Ed Wiltse	Lane-Scott Electric	410 S. High, Dighton, KS	620-397-8228	ed.wiltse@lanescott.coop
Suzi Holland	Chevron	6534 Concho Bay Dr. Houston TX 77041	281 5465406	Suzi.Holland@chevron.com
Wayne Walker	Common Ground	11112 Autumn Rd, Elma Bluff	405-546-4134	wayne@commonground
Jim Pitman	KDWPT	PO Box 1525, Emporia, KS 66801	620-342-0658	jim.pitman@ksoutdoors.com

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Garden City, KS			Location: Garden City Community College	
Date: February 25, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
Clint Pearson	1st National Bank, Coop Farms	509 Alvyn, Scott Cty		

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Morton, TX			Location: Cochran County Activity Center	
Date: February 27, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
Bob Gruner	TSSWCB	15501 S. Georgia Amarillo 79118	806-336-1051	bgruner@tsswcb.state.tx.us
Jack Foote	TSSWCB	Box 1147 - Idalou TX 79329	806-241-3329	
Butch Davis	Southwest Gin			
John Synatschk	me	1100 US 385 Springlake TX 79082	806-638-2856	johnsynatschk@gmail.com
Grant Beauprez	NMDGF	513 New York Dr. Portales, NM	575-478-2460	grant.beauprez@state.nm.us
J.J. Thomas	self	185 St. Hwy 214 morton	806-997-5477	
Ray Holland	self	4701 Bali Ct NE Alb NM 87111	505-486-2762	
John Rigg	News Press	711 Austin Lubbock	894-3121	
JC Adams Jr.	self.	109 W. Washington Ave Morton TX 79346	806 264 5582	donthickmuch@yahoo.com
Mark Patton	self			
Ray Grappe	self	143 S. State Rd 3261 Levelland	806-773-0339	ngkennels@aol.com
Tammie Bowman	self	1435 CR 240 Morton	806-525-4350	
Doug Sims	Self	3105 76th St. Lubbock TX 79423	817-505-5962	
Charles Dixon	NMACD	PO BOX 416 ALTO, NM 88312	575 808 1271	wildlifeplus@gmail.com
Jude R Smith	FWS	PO Box 549, Muleshoe Tx	8066746369	jude_smith@fws.gov

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Morton, TX			Location: Cochran County Activity Center	
Date: February 27, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
MEL DAVIS	TXST SOIL & WATER CONS BD	PO BOX 658 TEMPLE, TX 76503	254-773-2250	mdavis@tsswcb.texas.gov
ERNEST Brown	Brown N FARM	1009 FM 1058 Friona 79035	806-344-5995	BCFI@WTAT.net
James L. Brown	CRP	Box 321 Muleshoe TX. 79015	806-946-8888	dbrown@fuemail.com
Jenny Pluhar	Taylor Ranches	Box 784, Canyon, TX	806-679-8729	jennyopluhar@gmail.com
Jake Timmons	–	505 State Hwy 114 Morton TX 79346	806-927-5504	timmons@tivecorp.com
Ron + Pat Howell		3800 Coronado Big Spring	432 263-4922	RPHowell@suddenlink.net
Johnny + Judy Timmons		470 CR 155 Morton, Tx	806-927-5343	
Russell Castro	NRCS	101 South Main Temple Tx	(254) 742-9912	russell.castro@tx.usda.gov
Everett Harrel	self			
Jimmy Lewis	"	1580 CR 250 Morton, Tx	806-525-4316	
Dave Bowman	"	1435 CR 240 Morton, Tx	806-525-4350	
Bill Albus	CC Slaughter Farms	616 St Hwy 214 Morton TX	805 523-5957	
Tish McDaniel	TNC	109 Tanning Way, Cloris NM 88101	575-762-6997	pmcdaniel@tnc.org

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Morton, TX			Location: Cochran County Activity Center	
Date: February 27, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
Janice Brumley		1710 FM 1058 Hereford	806-289-5829	brumley@wtrt.net
Mike Brumley		"	"	"
Seth Williams		602 East Harding	806-266-0514	Williams5715@yahoo.com

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Morton, TX			Location: Cochran County Activity Center	
Date: February 27, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
Joe Barbour	Texas Farm Bureau	2733 80th Lbk TX 79423	806-231-3929	jbarbour@txfb.org
Jordan Sterling	Sterling Ranches	52 Starmill Rd Tatum, NM	575-390-3835	brett_j_sterling@yah
Roddy [illegible]	Williams Land & Cattle	602 E Harding Morton TX	806 224-7499	

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Woodward, OK			Location: High Plains Technology Center	
Date: February 26, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
Keith White	Chaparral Energy	701 Cedar Lake Blvd	405 255 4360	Keith.white@chaparralenergy.com
Marla Peek	OK Farm Bureau	2501 N. Stiles, OKC 73105	405 523 2737	marla.peek@okfb.org
Greg Whiteley	MEWBOURNE OIL CO.	6535 ST HWY 15	580-256-3101	
Suzi Holland	Chevron	6334 Conchо Bay Dr Houston, TX	281 546 5402	suzi.holland@chevron.com
David Bowser	Livestock Nutrition	Box 9112 Amarillo TX 79105	806 358 1878	davidbowser@sudden link.net
Clay Cooper	Hemphill Farmbureau/Landowner	16701 Co Rd Y Higgins TX	806 898 9883	claycooper91@hotmail.com
DEIRDRE SHEPHERD	DEVON	333 W. SHERMAN OKC, OK	405.552.4565	DEIRDRE.SHEPHERD@DVN.COM
Jeff Ammons	TFB	131 Rattlesnake Road Blanco TX	806-664-1133	jammons@txfb.org
Andrew Ward	ENERCON SERVICES	6525 N. Meridian Suite 400 OKC 73116	405-722-7693	award@enercon.com
Allan Janus	OPWC	1801 N Lincoln Blvd OKC 73801	405 249 7366	allan.janus@hotmail.com opwcwa.org
JORDAN SHEARER	OACD	Rt 1 Box 60 Laverne, OK 73848	405-612-2843	jordanshearer@hotmail.com
Andrea Hutchison	Landowner	Rt 1 Bx 161 Canton, OK 73724	580 886 2417	bossybovine@yahoo.com
Ron Jarman	Apex Co	10001 S. Penn Ave, OKC, OK	405-378-0560	rjarman@apexcos.com
Terri Ashinhurst	—	Boulder, CO	—	—

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Woodward, OK			Location: High Plains Technology Center	
Date: February 26, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
Grayson Rutelonis	BP	6900 I-40 West, Ste 300 Amarillo, TX 79119	405-923-0980	grayson.rutelonis@BP.com
Brad Hutchison	CR,	RR1 Box 161 Canton Okla	580 886 5002	
Deborah London		22496 Greely Rd Freedom, OK 73842	580-571-1100	
Richard Fields	BLM	Tulsa	918 621 4128	rafields@BLM.gov
Cory D. Pyle	—	TULSA	918 607 6735	—
Andrew Wernsdorfer	Berrendo Energy	1871 Folsom St, 104 Boulder, Co 80302	303 415 0140	andy@berrendoenergy.c
Danny Davis	North Fork REC	20425 E1150 Rd Elk City OK 73644	580-243-9474	flyingdcotl@me.com
Charles Hickey	WFEC	9111 W 1690 Rd Elk City OK	580 497 6240	chickeyeclz@hotmail.c
Steve Conrady	ODWC	3014 Lakeview Woodward OK	580/334-3345	s.conrady25@att.net

Scoping Meeting Sign-in Record

Name of Meeting: Scoping – Woodward, OK			Location: High Plains Technology Center	
Date: February 26, 2014	Start Time: 6:00pm		End Time: 8:00pm	Length:
Name	**Representing**	**Complete Address**	**Telephone Number**	**E-mail Address**
JR Sprague		Box 6 Darrouzett TX 79026	806-624-2209	h-sprague@TAMU.edu
Linda McDonald	SandRidge	123 Robt S Kerr OKC, OK 73102	405.429.6085	lmcdonald@sandridgeenergy.com
Charles Martin	Mewbourne Oil Co.	6535 St. Hwy 15, Woodward, OK 73801	580 256-3101	cmartin@mewbourne.com
Steve Bridge	Mewbourne	PO 1222 Woodward OK 73802	580 254 1786	—
Erica McLamb	Energon	6525 N. Meridian Suite 400 73116	405-722-7693	emclamb@energon.com
Ronnie Howell	MEWBOURNE OIL	6535 St. HWY 15, WW 73801	580-256-3101	rhowell@mewbourne.com
Alva Gregory	ODWC	1014 Lake Dr. W.W. 73801		
Ron McDaniel	Okla. Dep of Transportation	3402 willow west 73801	580 735 2561	rmcdaniel@odot.org.
Wesley Crain		43836 SCR 196	580 256-3786	
Ron Carver	ONEGAS	100 W 5 Tulsa	9187321315	
Don & Tracey Cole	Thurmond Ranch	600 E. Cedar Gage OK 73843	580-334-6462	

Appendix F

Handouts, Slides, and Posters

Presented at Scoping Meetings

Regional Lesser Prairie-Chicken Stakeholder Conservation Strategy

Environmental Impact Statement – Public Scoping Meeting

About Today's Public Scoping Meeting **February 2014**

Welcome to today's public scoping meeting!

The U.S. Fish & Wildlife Service (Service) proposed the lesser prairie-chicken (LPC) for listing as threatened under the Endangered Species Act (ESA) on December 11, 2012. The American Habitat Center is seeking the approval of an incidental take permit should the LPC become listed as threatened under the ESA. The permit is part of an overall regional, multi-state stakeholder conservation strategy (Proposed SCS) that is intended to provide conservation benefits to the LPC. The Proposed SCS was developed by a broad group of stakeholders and consists of three components:

- Habitat conservation plan (known as the Stakeholder Conservation Plan);
- Habitat Exchange Agreement; and
- Habitat Quantification Tool.

The Proposed SCS is likely to consider a hybrid Candidate Conservation Agreement with Assurances (CCAA)/Habitat Conservation Plan (HCP) to provide regulatory certainty in the event the LPC is listed (HCP) or remains a candidate for listing (CCAA).

The SCS is intended to support issuance of an incidental take permit (ITP) by the Service if the LPC is listed as threatened under the ESA. The ITP would provide "incidental take" coverage from activities listed within the Proposed SCS including future construction, operation, and maintenance of oil and gas operations and agricultural uses. The Proposed SCS would apply to lands in eastern Colorado, southwestern Nebraska, western Kansas, western Oklahoma, eastern New Mexico and the Texas Panhandle.

The National Environmental Policy Act (NEPA) establishes a planning process that federal agencies are required to follow. The Service intends to prepare a draft Environmental Impact Statement (EIS) as part of the NEPA process. Through public scoping meetings and consultations with other agencies, the Service intends to gather information necessary to prepare the draft EIS. We also will use this process to obtain suggestions and information from agencies and the public on the scope of issues to be addressed in the EIS. The Service invites you to share any thoughts and concerns you may have about the Proposed SCS.

Meeting Format

Five stations intended to provide information about the Proposed SCS are set up around the room. Technical staff are available at these stations to answer your questions about the project:

- Why Are We Here Tonight?
- NEPA and the EIS
- EIS Timeline
- The Proposed Action
- Comment Table

Some of the words and phrases you will see tonight may be unfamiliar – definitions for some of these are provided on the back of this handout.

You are encouraged to provide comments!

Thank you for taking the time to join us tonight.

Providing Your Comments

There are several ways to provide comments. We encourage any of these methods; all methods are equally considered, but must be written. For comments to be considered in the analysis and become part of the public record, you must submit your comment through one of these methods:

- **Written Comment Forms—**You can write comments today on the forms provided. If you prefer, use the form attached to this handout and return it by regular mail or email.
- **Electronically—**Go to the Federal e-Rulemaking Portal: http://www.regulations.gov. In the Search box, enter FWS–R2–ES–2013–0134, which is the docket number for this notice. On the left side of the screen, under the ***Document Type*** heading, click on the ***Notices*** link to locate this document and submit a comment.
- **US Mail—**Public Comments Processing, Attn: FWS–R2–ES–2013–0134; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Comments and suggestions should be received **no later than March 10, 2014** to be fully considered in the Draft EIS.

Your comments are important to the successful analysis of the Proposed SCS.

For more information on the Regional Lesser Prairie-Chicken Stakeholder Conservation Strategy Environmental Impact Statement, please visit www.fws.gov/southwest.

Key Terms

CCAA: Candidate Conservation Agreement with Assurances, are voluntary formal agreements for providing conservation benefits to species on private lands. CCAAs are available to private landowners and provide assurance that if conservation practices are followed, additional restrictions will not be applied if the species becomes listed (64 Federal Register, pages 32726-32735).

CP: Certificate of Participation or a document signed by a Participant Property Owner to participate in the HCP portion of the SCS.

Conservation Program: The program developed by the SCS to support issuance of ESA Section 10 enhancement of survival and incidental take permits that, to the maximum extent practicable, avoids, minimizes, and mitigates the impacts of any incidental taking and ensures that such taking does not reduce the likelihood of the survival and recovery of the LPC.

EIS: An Environmental Impact Statement is a tool used for decision making. It is a detailed document required by NEPA when an agency proposes a major federal action that could have environmental consequences. The EIS provides a discussion of those consequences and reasonable alternatives (including a No Action alternative) that would avoid or minimize adverse impacts or enhance the quality of the human environment.

Exchange: A rangewide LPC credit trading system developed using an advisory committee structure comprised of stakeholders representing conservation, agricultural, farming, and energy interests and includes a Science Committee and a Policy Committee. This system is established by implementation of the Habitat Exchange Agreement (HEA) for the LPC.

HCP: A habitat conservation plan prepared pursuant to § 10(a)(2)(A) of the ESA (16 U.S.C. § 1539(a)(2)(A)).

HQT: Habitat Quantification Tool: A process that uses a set of science-based metrics and calculations to quantify the value or quality of existing habitat conditions for a species and quantify changes to these conditions due to impacts to a species and its habitat and conservation actions.

LPC or LEPC: Lesser prairie-chicken (*Tympanuchus pallidicinctus*).

NEPA: The National Environmental Protection Act is federal legislation that establishes environmental policy for the nation. It requires that federal agency decision makers be informed of the potential impacts to the human environment resulting from their decisions. In addition, it requires agencies to make efforts to provide meaningful public involvement in the process.

Stakeholder Conservation Strategy for the LPC (SCS): The three components (HCP, HEA, HQT) comprising the overall conservation strategy developed for the LPC by a diverse group of stakeholders representing agriculture, conservation, and oil and gas interest.

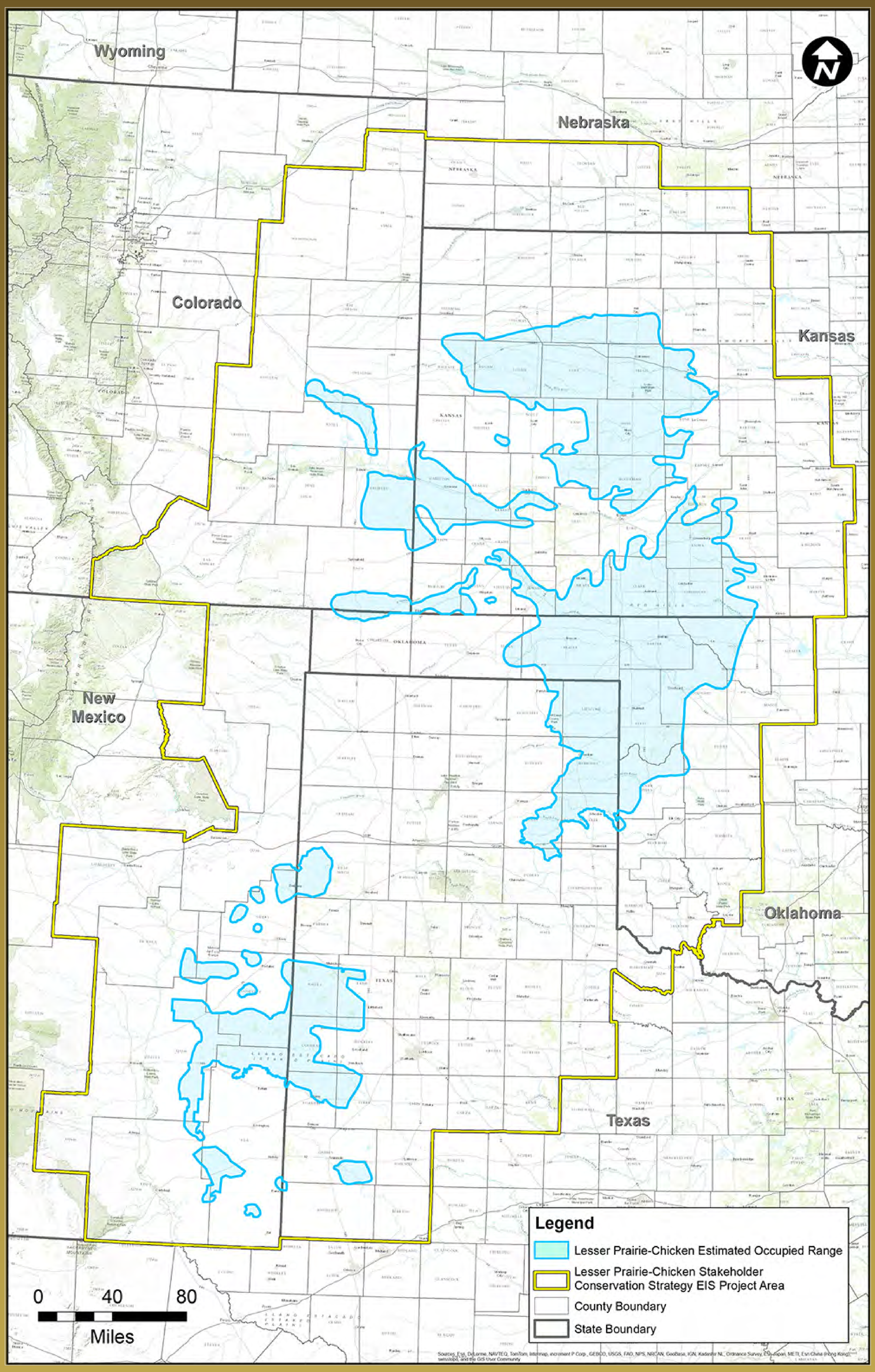
U.S. Fish and Wildlife Service

Lesser Prairie-Chicken Stakeholder Conservation Strategy EIS

Public Scoping Meeting

6:00 to 8:00 p.m.

Area to be Analyzed Under NEPA



Why Are We Here Tonight?

- Educate the public on the Stakeholder Conservation Strategy for the Lesser Prairie-Chicken (Proposed Action)
- Explain the National Environmental Policy Act (NEPA) planning process
- Answer questions about the Proposed Action and planning process
- Solicit comments on potential concerns or issues for use in the NEPA process

Purpose of Scoping

Scoping is a planning tool to:

- Identify relevant issues
- Identify potential impacts
- Determine appropriate level of analysis
- Inform the overall permit decision process

Goal is full disclosure to:

- Provide the public with a clear understanding of the Proposed Action and NEPA process

We also need your input; we encourage public participation and comments

Stakeholder Conservation Strategy

If the LPC is listed then the Service will evaluate the plan proposal and determine if it is appropriate to support issuance of an incidental take permit

Developed by stakeholders

Habitat Exchange Agreement

Developed by industry and agriculture

HCP / Section 10 Permit Application

Developed by scientific experts

Habitat Quantification Tool (Metrics)

Stakeholder Conservation Strategy

Proposed Action

Habitat Conservation Plan / Section 10 Permit Application

Non-Federal Participants will be allowed to conduct Covered Activities under an incidental take permit

- Covered activities include:
  - Agricultural and Ranching Activities
  - Oil and Gas Activities
  - General Activities
    - Conservation Activities
    - Hunting
    - Off-Highway Vehicle Use
    - General Construction
    - Other Land Management Activities

Habitat Conservation Plan must:

- Contain measures to minimize incidental take including avoidance
- Mitigate for effects of incidental take to maximum extent practicable
- Ensure that take is incidental to, and not the purpose of, an otherwise lawful activity

Funding for implementation (including biological and compliance monitoring) must be ensured by applicant

Stakeholder Conservation Strategy

Habitat Exchange Agreement

Transactions

- Landowners contract either directly with the Exchange Administrator or through a third party
- Contracts range from 10 to 30 years
- Enrollment process similar to the Conservation Reserve Program (CRP)
  - Credit assessment based on habitat quality
  - Verification of credit assessment
  - Credits available for sale

Elements of the Exchange

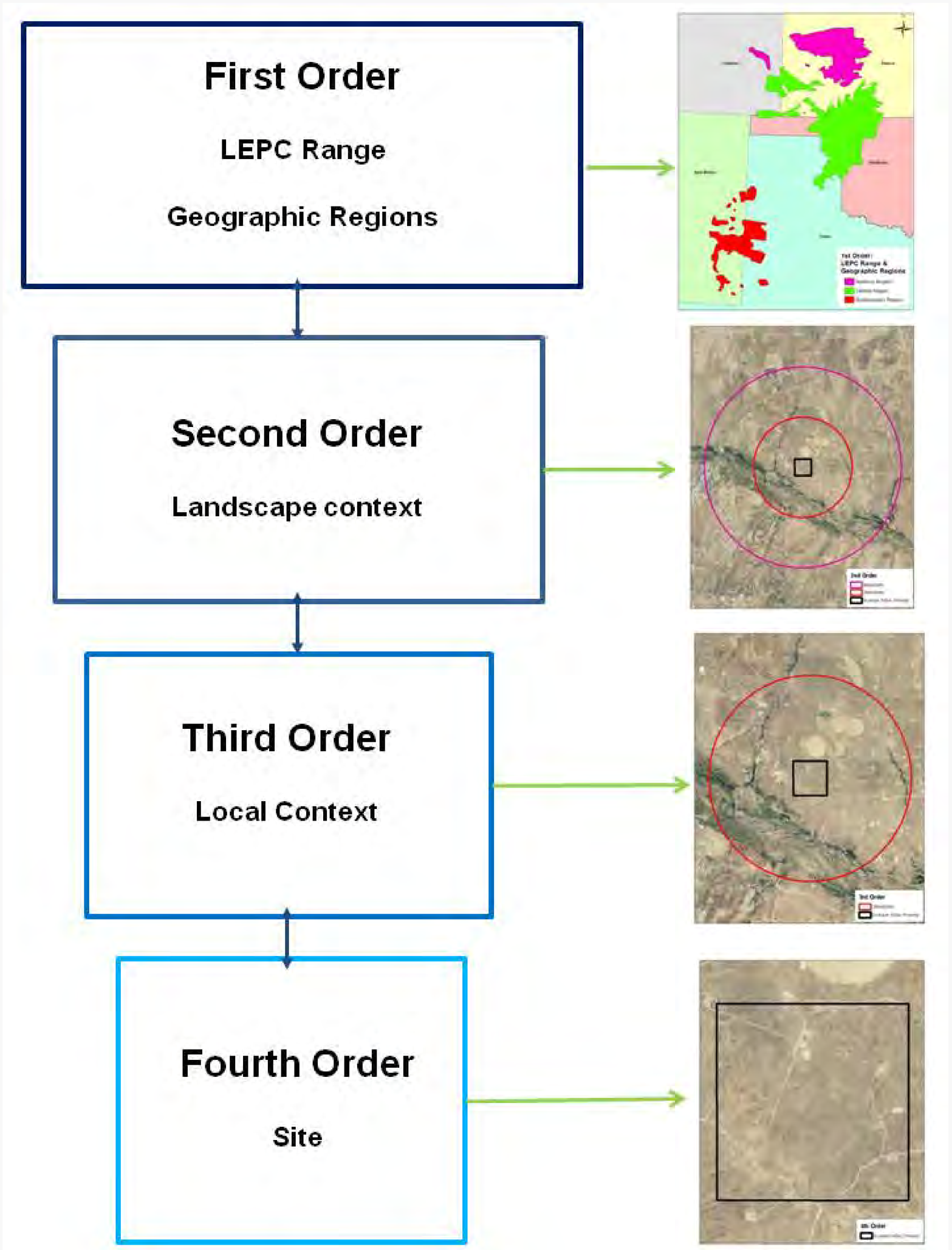
- Net benefit
- Habitat Quantification Tool (HQT)
- Independent verification
- Reserve Account
- Monitoring
- Adaptive management
- Three conservation offset options:
  - Term
  - Static permanent
    - Mitigation that is perpetual in nature both over time and location
  - Dynamic permanent
    - Mitigation that is permanent over time but shifts in location

Stakeholder Conservation Strategy

Habitat Quantification Tool

A system of measurements to quantify credits and debits

- Simple
- Standardized for repeatability
- Incorporates adaptive management
- Meets FWS regulations



Scale Order Approach

Stakeholder Conservation Strategy

Possible Alternative Stakeholder Conservation Plan / Section 10 Permit Application

Stakeholder Conservation Plan (SCP)	=	Habitat Conservation Plan (HCP)	+	Candidate Conservation Agreement with Assurances (CCAA)

Property Owners can participate in SCP by entering into an Enrollment Agreement. Encourages Participants to enact conservation measures prior to proposed LEPC listing and provides regulatory certainty and a compliance mechanism if LEPC is listed.

Prior to LEPC listing decision:

- Non-Federal Participants encouraged to manage property in exchange for coverage under an enhancement of survival permit
- Under a CCAA, non-Federal Participants who sign a Certificate of Inclusion are only responsible for voluntary conservation activities they agreed to and are not responsible for additional requirements if LEPC is later listed

After LEPC listing decision (if listed):

- Non-Federal Participants will be allowed to conduct Covered Activities under an incidental take permit

Habitat Exchange Agreement & Habitat Quantification Tool would be the same as for the Proposed Action

NEPA and the EIS Process

- Federal agencies are required by NEPA to analyze, document, and disclose the potential environmental and socio-economic impacts of a Proposed Action and its alternatives before any Federal action is taken
- An Environmental Impact Statement (EIS) is a document that describes:
  - Current resource conditions
  - Potential impacts of the Proposed Action (LPC SCS) and alternatives, including the no action alternative
  - Plans to mitigate the impacts
  - Public review and opportunities for comment on the Draft EIS are required by law

Resources to be Evaluated in the EIS

- The existing condition of each resource is described in the EIS.
- Anticipated effects (impacts), both adverse and beneficial, are assessed:
  - **Intensity** (negligible, minor, moderate, or major)
  - **Duration** (short-term, long-term)

Resources Expected to be Evaluated
(can change during scoping)

- **Soils/Geological**
- **Paleontological**
- **Water (surface and ground)**
- **Wetlands/Riparian**
- **Wildlife/Special Status Species**
- **Vegetation/Rangelands**
- **Agricultural Production**
- **Cultural/Historical**
- **Socioeconomics**
- **Environmental Justice**
- **Urban Development**
- **Energy Development**
- **Recreation**
- **Transportation**

Public and Stakeholder Participation

- NEPA requires solicitation of public and stakeholder participation
  - Engage the public in the decision-making process
  - Written comments are the most effective form of public and stakeholder participation
- Public involvement opportunities include:
  - Initial scoping comments (requested by March 10, 2014)
  - Review and comment on the Draft EIS (July through October 2014)
  - Review the Final EIS (December 2014)

Approximate Schedule

LPC Stakeholder Conservation Strategy EIS

Notice of Intent for EIS
January 2014

Scoping Process
February 2014

Service conducts scoping and identifies key issues

Public attend scoping meetings and provide comments by March 10, 2014

Draft EIS
March – July 2014

Service prepares Draft EIS

Public Comment on Draft EIS
July – October 2014

Service releases Draft EIS

Public attend Draft EIS public meetings and provide comments

Final EIS
November 2014

Service prepares Final EIS and releases Final EIS for review

Record of Decision
December 2014

Service makes decision and releases Record of Decision

U.S. Fish and Wildlife Service

Regional Lesser Prairie-Chicken Stakeholder Conservation Strategy

Environmental Impact Statement
Public Scoping Meeting

February 2014

Purposes of this Presentation

- Introduce organizational roles
- Describe regulatory process
- Explain Environmental Impact Statement (EIS)
- Describe proposed project

Why are We Here Tonight?

- Help you understand the Proposed Lesser Prairie-Chicken Stakeholder Conservation Strategy (Proposed Action)
- Explain National Environmental Policy Act (NEPA) planning process
- Collect comments from you for use in the NEPA process

Who is Here Tonight?

- United States Fish and Wildlife Service (Service)
  - Lead Federal Agency
- American Habitat Center, Represented by Natural Resources Solutions, LLC
  - Project Proponent
- ARCADIS U.S., Inc.
  - EIS Third-Party Contractor

NEPA and the EIS Process

National Environmental Policy Act

- Requires federal agencies to analyze, document, and disclose potential environmental and socioeconomic impacts of the Proposed Action and its alternatives before any action is taken
- Analysis made available to public in an EIS
- NEPA requires that the public be part of the decision-making process

Purpose of Scoping

- Effective Planning Tool
  - Identify relevant issues
  - Identify potential impacts
  - Determine appropriate level of analysis
- Ensure public disclosure
  - Provide the public with a clear understanding of the Proposed Action
- Solicit public participation

Environmental Impact Statement

- An EIS document describes:
  - Existing conditions of each resource to be analyzed
  - Anticipated effects (impacts), both adverse and beneficial to each resource
  - Plans to mitigate any impacts
- Resources to be evaluated, potential concerns / issues for each resource, and potential impacts all determined through scoping

Approximate Schedule

Notice of Intent for EIS
January 2014

Scoping Process
February 2014

Service conducts scoping and identifies key issues
Public attend scoping
meetings and provide comments by **March 10, 2014**

Draft EIS
March – July 2014

Service prepares Draft EIS

Public Comment on Draft EIS
July – October 2014

Service releases Draft EIS
Public attend Public Meetings and provide comments

Final EIS
November 2014

Service prepares Final EIS and releases Final EIS

Record of Decision
December 2014

Service makes decision and releases Record of Decision

Public Review & Comment Opportunities

- **Initial scoping** (comments needed by March 10, 2014)
- **Review and comment on Draft EIS** (July - September 2014)
- **Review of the Final EIS** (December 2014)
- *Written comments are most effective participation*

Stakeholder Conservation Strategy

The Lesser Prairie-Chicken

Components of Stakeholder Conservation Strategy

Developed by Stakeholders

Habitat Exchange Agreement

Developed by Industry & Agriculture

HCP/Section 10 Permit Application

Developed by Scientific Experts

Habitat Quantification Tool (Metrics)

Operating Structure of Stakeholder Conservation Strategy

**Note: This is a different Science Committee than the one used to develop the Exchange.*

Overview of Stakeholder Committee Process

Resolution Committee

6 Seats:
- 2 Agriculture
- 2 Environment
- 2 Oil and Gas

Support Staff

- Parametrix (EDF)
- Environmental Incentives (EDF)
- NRS (Oil and Gas)

Policy Committee

- Agriculture
- Environment
- Oil and Gas
- State and Federal Agencies

Science Committee

- Academia
- Agriculture
- Environment
- Oil and Gas
- State and Federal Agencies

Habitat Exchange

for the Lesser Prairie-Chicken

Elements of Exchange

- Net benefit
- Habitat Quantification Tool (HQT)
- Independent verification
- Reserve Account
- Monitoring
- Adaptive management
- 3 conservation offset options:
  - Term
  - Static permanent
  - Dynamic permanent

Transactions

- Landowners contract directly with the Exchange Administrator or through a Third Party
- Contracts range from 5 to 30 years
- Enrollment process similar to Conservation Reserve Program
  - Credit assessment based on habitat quality
  - Verification of credit assessment
  - Credits available for sale

Habitat Quantification Tool (HQT)

A system of measurements used to quantify credits and debits

Development of HQT

- Simplicity is key
- Standardized to ensure repeatability
- Incorporate adaptive management
- Function within framework of Endangered Species Act (ESA) and meet Service regulations

Scale Order Approach

1st Order

LPC Range

Geographic Regions

2nd Order

Landscape Context

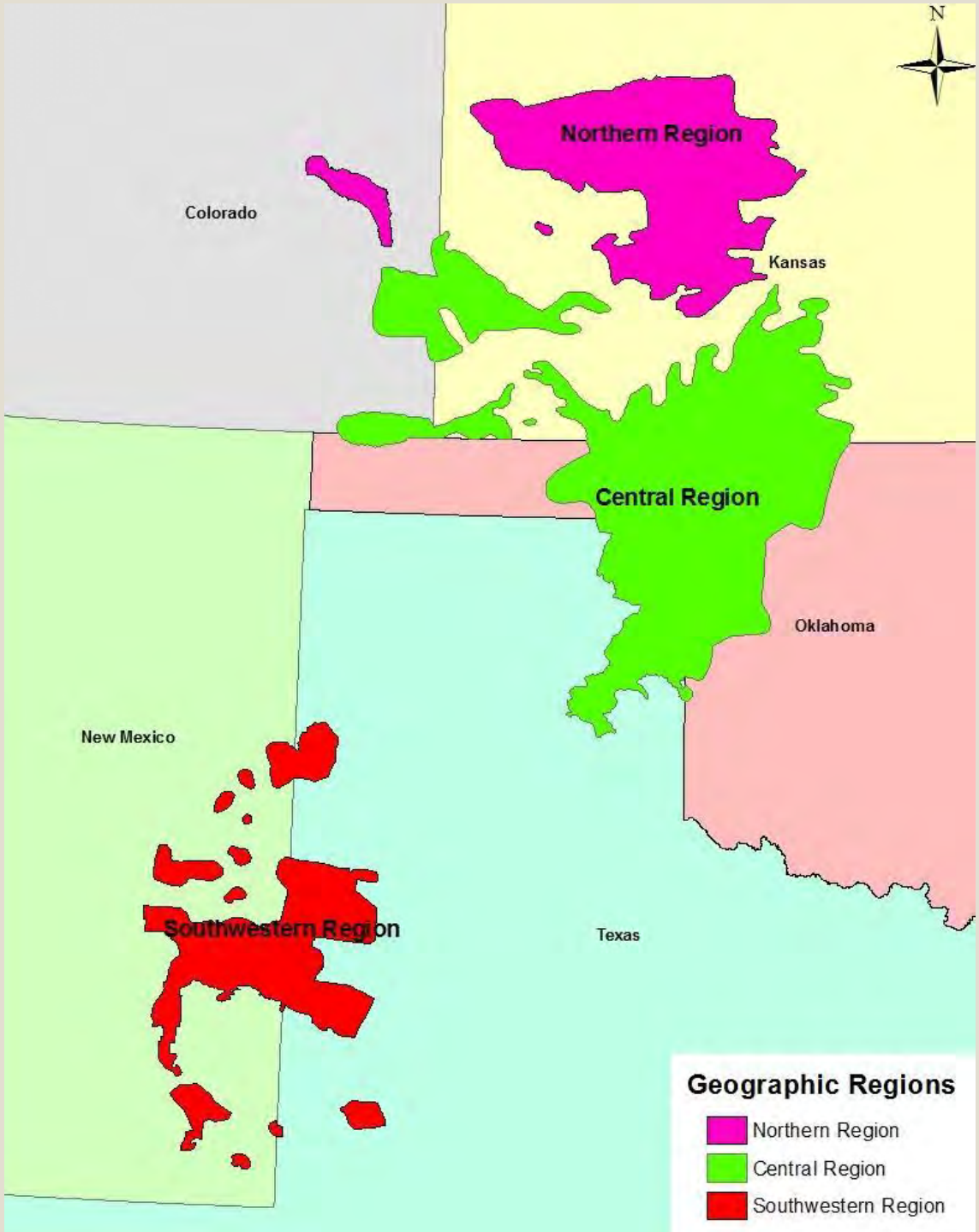
3rd Order

Local Context

4th Order

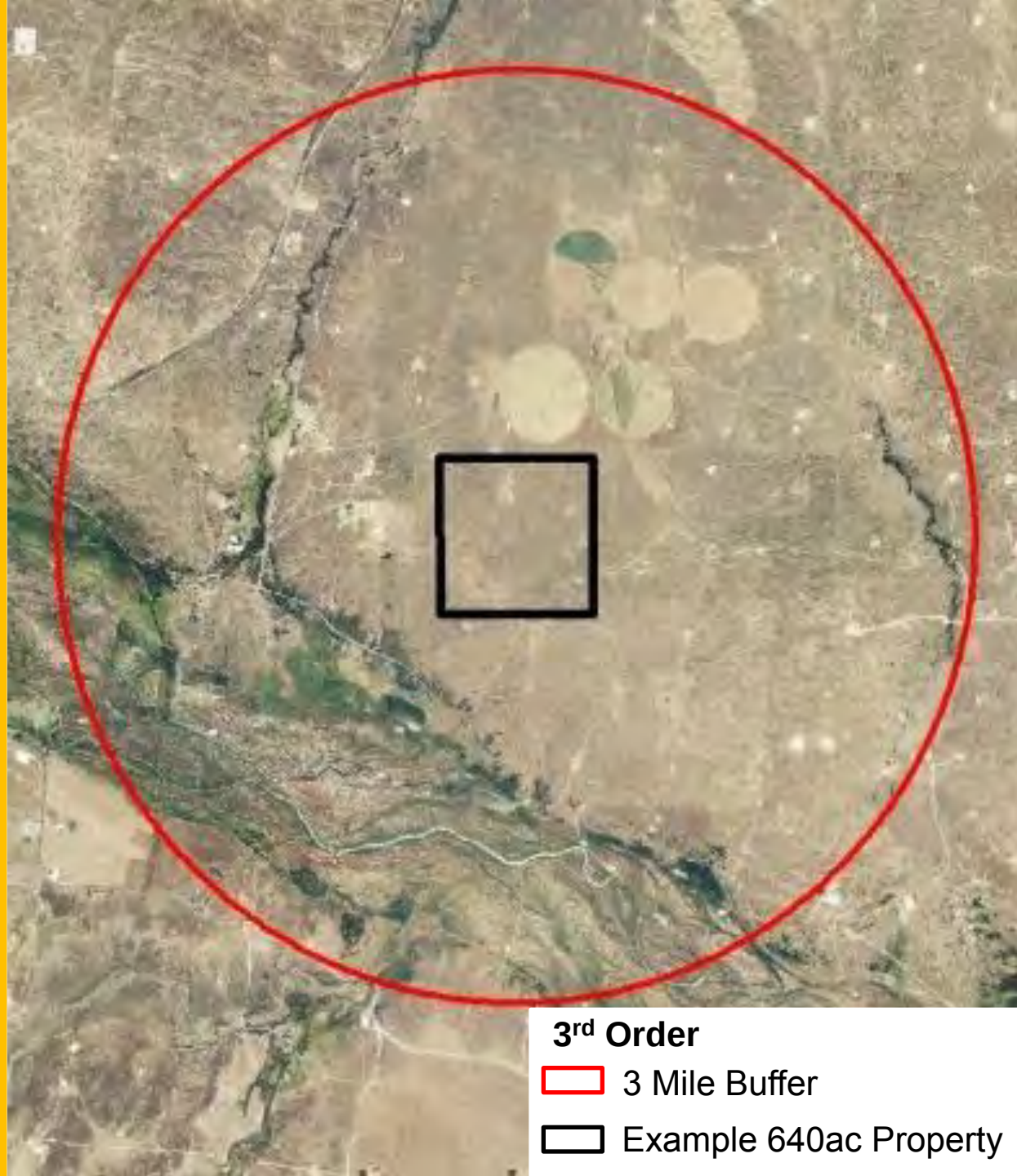
Site

Geographic Regions
(1st Order)



Landscape Context
(2nd Order)

Local Context
(3rd Order)

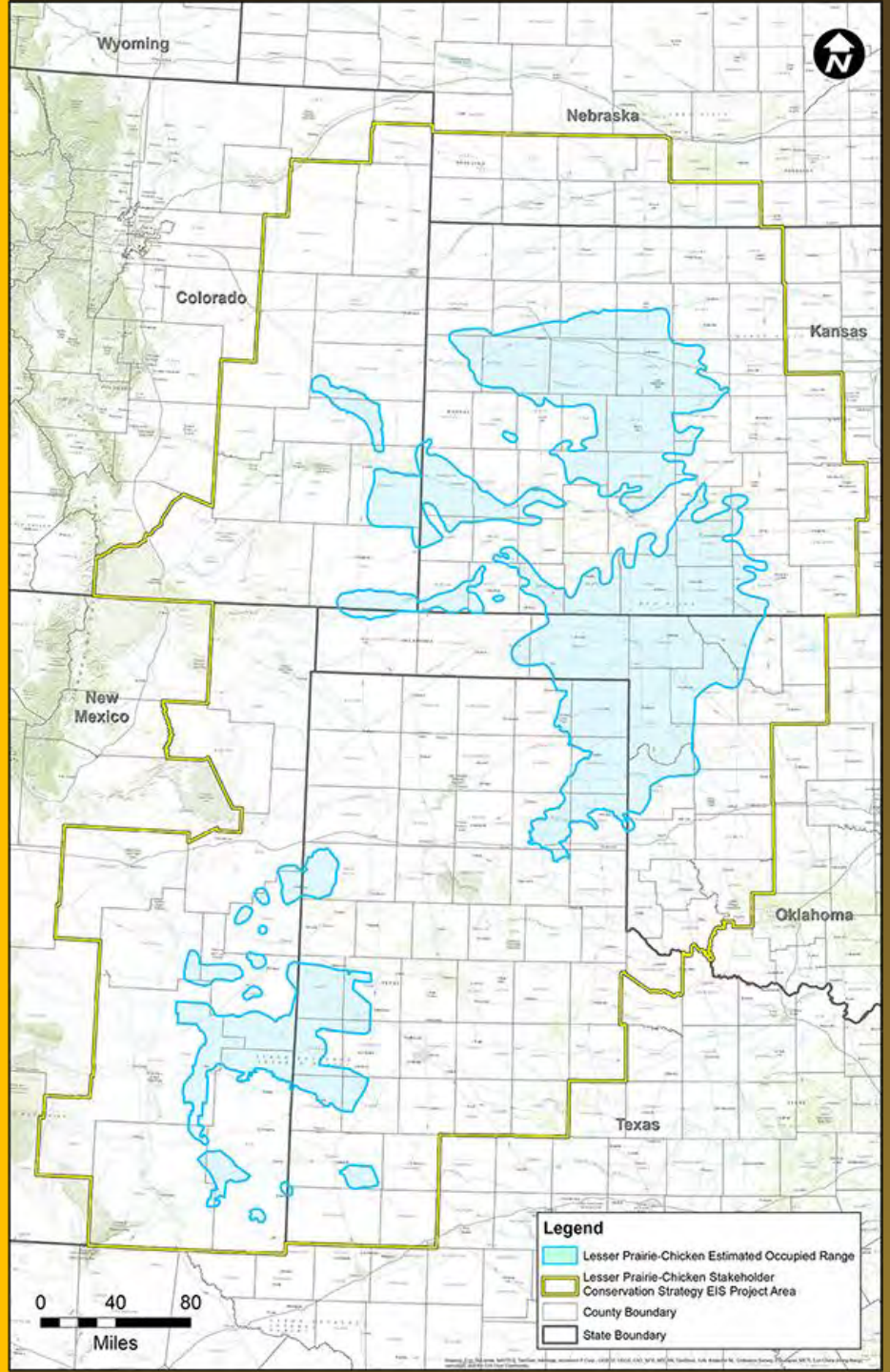


Site
(4th Order)

Habitat Conservation Plan

Conservation Plan for the Lesser Prairie-Chicken

Area to be Analyzed Under NEPA



Plan Administration

- American Habitat Center
  - Regional non-profit with field offices
- Implementing Agreement
- Committee driven decision-making process
- Enrollment
  - Commitment to avoidance and minimization measures in Conservation Plan
  - Project specific mitigation assessments

Incidental Take

- Calculated incidental take for 30 years
- 3 categories of take
  - Oil and gas
  - Agriculture
  - General
- Accounts for impacts
  - Estimates of future development
  - Estimates of direct and indirect impact

Funding

- Support from companies with almost 4 million acres of LPC habitat (20% of acreage)
- Cost per year of $1.5 million in Year 3
  - $500,000 annually dedicated to research
- Fees
  - Participation, Assessments, Verification
- Funding assurances
  - Cost per well (~$80)
  - Cost per acre (~$0.75)

Consistent Components of Exchange and HCP

- Use of the Habitat Quantification Tool
- Third-party verification of credit generation and impact assessments
- Monitoring of credit generation and impacts over time to ensure sufficiency of offsets

What Now?

- The Service, NRS and ARCADIS are available to help you
- Posters present additional details
- Ask questions
- Provide written comments

Thank you for taking the time to join us tonight!

Websites

- All 3 components of the Stakeholder Conservation Strategy are posted and available for downloading at: lepcstakeholderstrategy.com

- Posters will be available on the U.S. Fish and Wildlife Service's website at: www.fws.gov/southwest

Appendix G

Communications Received in Response to Project Scoping

PUBLIC COMMENT FORM

Environmental Impact Statement to Analyze the Potential Impacts of the Stakeholder Conservation Strategy for the Lesser Prairie-Chicken

Thank you for your interest in this project. Please complete the appropriate sections of this form to be included on the project mailing list and to provide any comments or questions you would like addressed. You may submit your comments by writing in the space provided below and submitting them at the open house or by mail to the address specified on the back of this form.

Comments may also be submitted electronically: Go to the Federal e-Rulemaking Portal: http://www.regulations.gov. In the Search box, enter FWS–R2–ES–2013–0134, which is the docket number for this notice. On the left side of the screen, under the Document Type heading, click on the Notices link to locate this document and submit a comment.

PLEASE PRINT

James Adams
Name

self
Organization (optional)

109 W. Washington Ave
Street Address

806 266 5582
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See attached comments
& 2 exhibits.
Tragedy of Commons
& bio of Hegel.

comment 1jy-8aoh-vj6q - Feb 27, 2014.

As one Texas state wildlife biologist working on the lesser prairie chicken project explained to me, Garrett Hardin's Tragedy of the Commons might be a little communistic but, in his opinion, it was sound policy. I still don't know how the part about human activity being artificial fits into Hardin's resurrection of discredited Hegelian philosophy, and would like to know.

The Endangered Species Act, when used as suggested in this plan, denies the priority of the individual embodied in the US Constitutional prohibition against takings without just compensation. It's called the endangered species act, not the endangered habitat act. And we all know how animals especially l. p. chicken and pheasants adapt to human activity and, in fact, thrive in greater numbers than they do in the unmanaged wild where there is no natural balance, only a roller coaster of plenty, then starvation. Sequestering our natural resources impoverishes us. History repeatedly proves that only business development (private property and economic freedom, the source of our exceptionalism from Marx' suggestion that Communism is inevitable) adds wealth to the nation. Natural balance is untrue.

On the other hand, man's maize production allows them to winter over in great numbers. They live successfully in the oil patch near Bledsoe Texas and fly into the maize patches for food.

The government plan focuses on unconstitutionally vague notions of "take" in relation to habitat conditions in derogation of private property rights and economic freedom that do not track the statutory definition of the word take. For every instance of the take of the animal, us humans are deprived of just compensation because of the illegitimate taking of control of our private property. The plan acts as an extra-judicial condemnation but without compensation of our private property and threatens us with excessive fines and prison and even worse for resistance to federal authority. We bought the property so we could have unfettered control, absolute dominion over it, to use it the way we see fit, for our exclusive use and enjoyment and that is how our deeds read. By putting the human on the same level as the animal's habitat de-humanizes us. To adapt what J. Roberts said in the dog fighting and animal crush videos cases, the ad hoc (made for a special purpose) balancing test (that Kagan advocated) that denies our sacred individual right to just compensation is startling and dangerous. Whether the ad hoc test appears in court argument or in statute, the constitution sets out fundamental law that neither may violate, no matter how tortured the form and sketchy the reasoning.

Hegelian economics are discredited world-wide and won't work in the US either. And talking debits, but not credits, without any numbers lends no economic credibility whatsoever to the plan. In my view, public officials who push Hegel's 200 year history of discredited views should be shown the door.

When activists inside and outside the government put an animal and its habitat in direct conflict with our federally protected human rights to use our property the way we see fit, the activists lower all the many millions of Americans to the level of the animal. That de-humanizes us. And we are then made subhuman by the overarching administrative state that maintains us in that less-than-human relationship. Hitler and other followers of Hegel proved that the power to force people to do "good" is the same power to force people to do bad.

The specific intent to de-humanize us can be seen in the fact that the Chinese ring necked pheasant was introduced through propagation thereby generating revenues consistent with our 200 year tradition of private property rights and became an unqualified economic success that increased the wealth of the nation. Yet, those proven methods are not being tried here.

Instead, by use of Hegel's illegitimate and brutal concept of mutual coercion, the Tragedy of the Commons, promises economic failure on the same scale as the 20 year old spotted owl fiasco which should be cleaned up before the agency is allowed to commit another major economic blunder during this our current economic crisis.

We know Hegel's views lead to brutality for the reason that his views engender an attitude of scarcity, where individual rights must be denied for the greater communist good. Watching the Germans and Russians brutalize each other justified by their competing Hegelian views during World War II should be ample warning that the American attitude of abundance, faith in God and government's unqualified duty to protect our sacred individual private property rights and economic freedoms yields a far gentler nation than the Nazis or Communists ever managed to create.

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The Tragedy of the Commons

Science #13, December 1968:
Vol. 162 no. 3859 pp. 1243-1248
DOI: 10.1126/science.162.3859.1243

This has been translated into Polish here:
http://www.autoteiledirekt.de/science/tragedia-usuniecia-garrett-hardin-1968

"The Tragedy of the Commons," Garrett Hardin, Science, 162(1968):1243-1248.

At the end of a thoughtful article on the future of nuclear war, J.B. Wiesner and H.F. York concluded that: "Both sides in the arms race are...confronted by the dilemma of steadily increasing military power and steadily decreasing national security. *It is our considered professional judgment that this dilemma has no technical solution.* If the great powers continue to look for solutions in the area of science and technology only, the result will be to worsen the situation." [1]

I would like to focus your attention not on the subject of the article (national security in a nuclear world) but on the kind of conclusion they reached, namely that there is no technical solution to the problem. An implicit and almost universal assumption of discussions published in professional and semipopular scientific journals is that the problem under discussion has a technical solution. A technical solution may be defined as one that requires a change only in the techniques of the natural sciences, demanding little or nothing in the way of change in human values or ideas of morality.

In our day (though not in earlier times) technical solutions are always welcome. Because of previous failures in prophecy, it takes courage to assert that a desired technical solution is not possible. Wiesner and York exhibited this courage; publishing in a science journal, they insisted that the solution to the problem was not to be found in the natural sciences. They cautiously qualified their statement with the phrase, "It is our considered professional judgment...." Whether they were right or not is not the concern of the present article. Rather, the concern here is with the important concept of a class of human problems which can be called "no technical solution problems," and more specifically, with the identification and discussion of one of these.

It is easy to show that the class is not a null class. Recall the game of tick-tack-toe. Consider the problem, "How can I win the game of tick-tack-toe?" It is well known that I cannot, if I assume (in keeping with the conventions of game theory) that my opponent understands the game perfectly. Put another way, there is no "technical solution" to the problem. I can win only by giving a radical meaning to the word "win." I can hit my opponent over the head; or I can falsify the records. Every way in which I "win" involves, in some sense, an abandonment of the game, as we intuitively understand it. (I can also, of course, openly abandon the game -- refuse to play it. This is what most adults do.)

The class of "no technical solution problems" has members. My thesis is that the "population problem," as conventionally conceived, is a member of this class. How it is conventionally conceived needs some comment. It is fair to say that most people who anguish over the population problem are trying to find a way to avoid the evils of overpopulation without relinquishing any of the privileges they now enjoy. They think that farming the seas or developing new strains of wheat will solve the problem -- technologically. I try to show here that the solution they seek cannot be found. The population problem cannot be solved in a technical way, any more than can the problem of winning the game of tick-tack-toe.

What Shall We Maximize?

Recognition of Necessity

Perhaps the simplest summary of this analysis of man's population problems is this: the commons, if justifiable at all, is justifiable only under conditions of low-population density. As the human population has increased, the commons has had to be abandoned in one aspect after another.

First we abandoned the commons in food gathering, enclosing farm land and restricting pastures and hunting and fishing areas. These restrictions are still not complete throughout the world.

Somewhat later we saw that the commons as a place for waste disposal would also have to be abandoned. Restrictions on the disposal of domestic sewage are widely accepted in the Western world; we are still struggling to close the commons to pollution by automobiles, factories, insecticide sprayers, fertilizing operations, and atomic energy installations.

In a still more embryonic state is our recognition of the evils of the commons in matters of pleasure. There is almost no restriction on the propagation of sound waves in the public medium. The shopping public is assaulted with mindless music, without its consent. Our government has paid out billions of dollars to create a supersonic transport which would disturb 50,000 people for every one person whisked from coast to coast 3 hours faster. Advertisers muddy the airwaves of radio and television and pollute the view of travelers. We are a long way from outlawing the commons in matters of pleasure. Is this because our Puritan inheritance makes us view pleasure as something of a sin, and pain (that is, the pollution of advertising) as the sign of virtue?

Every new enclosure of the commons involves the infringement of somebody's personal liberty. Infringements made in the distant past are accepted because no contemporary complains of a loss. It is the newly proposed infringements that we vigorously oppose; cries of "rights" and "freedom" fill the air. But what does "freedom" mean? When men mutually agreed to pass laws against robbing, mankind became more free, not less so. Individuals locked into the logic of the commons are free only to bring on universal ruin; once they see the necessity of mutual coercion, they become free to pursue other goals. I believe it was Hegel who said, "Freedom is the recognition of necessity."

The most important aspect of necessity that we must now recognize, is the necessity of abandoning the commons in breeding. No technical solution can rescue us from the misery of overpopulation. Freedom to breed will bring ruin to all. At the moment, to avoid hard decisions many of us are tempted to propagandize for conscience and responsible parenthood. The temptation must be resisted, because an appeal to independently acting consciences selects for the disappearance of all conscience in the long run, and an increase in anxiety in the short.

The only way we can preserve and nurture other and more precious freedoms is by relinquishing the freedom to breed, and that very soon. "Freedom is the recognition of necessity" -- and it is the role of education to reveal to all the necessity of abandoning the freedom to breed. Only so, can we put an end to this aspect of the tragedy of the commons.

hedonism [hee'-duhn-izm]

Hedonism from the Greek *Hēdonē*, "pleasure," is the name of two related views about pleasure as a good in human life. The main tenet of psychological hedonism is that all actual choices are made in order to obtain pleasure. That of ethical hedonism, a normative theory of the good, is that pleasure is the only intrinsically valuable thing; choices should be made to get as much pleasure as possible. The ethical theory was defended by ancient thinkers such as Aristippus (see CYRENAICS) and EPICURUS as well as by such modern thinkers as the utilitarians Jeremy BENTHAM, John Stuart MILL, and Henry SIDGWICK.

Hedonists differ about the greatest pleasures and about whether there are irreducible, qualitative differences among pleasures. Hedonism is appealing as a theory of rational choice, because it offers a single, apparently omnipresent value by which people can choose among competing alternatives. But the hedonist must then provide an account of pleasure, showing that it is actually a single thing (for example, a kind of sensation or feeling) that varies only quantitatively. Hedonism is also called eudaemonism by moral philosophers.

MARTHA C. NUSSBAUM

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Heemskerck, Maarten van [hayms'-kairk, mar'-ten vahn]

Dutch painter Maarten van Heemskerck, b. 1498, d. Oct. 1, 1574, owes his present-day reputation more to his architectural sketchbooks than to his paintings. After studying in Haarlem under Jan van SCOREL, Heemskerck journeyed (*c.*1532–35) to Rome, where he perfected his Italianate style and filled at least two sketchbooks with drawings of Roman architecture. Heemskerck's Italian-influenced paintings, such as his *Entombment Triptych* (*c.*1559–60; Musées Royaux des Beaux-Arts, Brussels), were highly esteemed during his lifetime, but today they seem somewhat derivative. More interesting to modern observers are his two surviving sketchbooks (Kupferstichkabinett, Museum Dahlem, West Berlin), which constitute an invaluable record of Roman Renaissance architecture, in particular his sketches of SAINT PETER'S BASILICA.

CHARLES I. MINOTT

Bibliography: Cuttler, C. D., *Northern Painting* (1968).

Hefner, Hugh [hef'-nur, hyoo]

Hugh Marston Hefner, editor and publisher of *Playboy* magazine, was born in Chicago, Apr. 9, 1926, of strict Methodist parents. Hefner graduated from the University of Illinois and, after a semester of postgraduate study in psychology at Northwestern University, went into publicity and promotion. The first issue of *Playboy*, which Hefner produced with $10,000, appeared in December 1953, with a now-famous nude photograph of Marilyn Monroe as its centerfold. In 1979, by then a publication with regular articles on dining, wines, and good living, and with contributions by major writers, *Playboy* ranked twelfth among U.S. periodicals, with a circulation of 5 million.

RICHARD HIXSON

Hegel, Georg Wilhelm Friedrich [hay'-gul]

Georg Wilhelm Friedrich Hegel was a German idealist philosopher, who has influenced most facets of modern PHILOSOPHY. Hegel was born in Stuttgart on Aug. 27, 1770, the son of a minor government official. He studied theology at the University of Tübingen, and his theological background decisively influenced his philosophy, which tends to develop along religious lines. After serving as a tutor at Bern (1791–96) and Frankfurt (1796–1800), he was a lecturer, then a professor at the University of Jena (1801–06), headmaster of a school in Nuremberg (1808–16), and professor at Heidelberg (1816–18) and Berlin (1818–31). He died in Berlin, during a cholera epidemic, on Nov. 14, 1831.

Seeking to comprehend all knowledge within a single system, Hegel extended his efforts to virtually every philosophical topic. Such system building is particularly ironic since it follows immediately upon the attempt of Immanuel KANT to limit the pretensions of so-called speculative reason. As part of his extensive critique of reason, however, Kant had argued that reason was a creative, active force and that its a priori categories and concepts are crucial in the formation of experience. On this concept of reason Hegel built his system.

The German philosopher Georg Wilhelm Friederich Hegel was one of the principal figures in the development of modern philosophy. In his earliest philosophical work, The Phenomenology of the Spirit *(1807), Hegel advanced the concept of Geist, or spirit, which became one of the central elements of his philosophical system. Hegel's philosophical tenets and interpretations of history influenced such 20th-century movements as Marxism-Leninism, pragmatism, and existentialism.*

Reality and the Rational Process. According to Hegel, reality is Absolute Mind, Reason, or Spirit, which manifests itself in both natural and human history. This Mind is universal and therefore cannot be identified with the mind of any particular person. Rather, each particular mind is an aspect of this World Mind (*Weltgeist*), and the consciousness and rational activity of each person is a phase of the Absolute itself. This activity of Mind is dialectical in nature. Hegel was preoccupied with triadic development, one phase demanding the next by an inner necessity. In this development, known as the Hegelian DIALECTIC, one concept, the thesis, is followed by its opposite, the antithesis; the ensuing conflict between the two is brought together at a higher level as a new concept, or synthesis, which becomes the thesis of yet another triad.

Hegel's famous dictum that "the real is rational and the rational real" can thus be understood as an expression of the identity of reality and the rational process. Because reality is rational, it acts in accordance with the laws of reasoning. At the same time, the laws of reasoning (dialectics) are real and not mere human conventions. To understand the nature of thought, then, is to understand the nature of reality as a whole. The science of LOGIC is the most nearly basic form in which the process of reason is to be apprehended. Even nature manifests the dialectical activity of Mind and is to be studied from a rational perspective rather than from a more limited empirical one.

Art, Religion, and Philosophy. The dynamic activity of Mind is also apparent in human affairs. Art is the immediate, sensuous expression of creative Reason as it represents itself to itself. Although the artist may not be aware of the ultimate rational process alive in the work of creation, the philosopher is, and thus the philosopher can study art for the representation of reality that it really is. Hegel also found that the philosopher could understand RELIGION as more than traditional, symbolic ritual. He held that in general religion is the highest nonrational manifestation of the Absolute. In Christianity, the highest evolution of religious expression, the concept of the INCARNATION symbolically reflects the truth that the infinite is manifest in the finite and not distinct from it.

For Hegel, the nature of Mind could most immediately and clearly be known in philosophy. Here Reason is truly revealed as reason and rational process. Through the concepts of philosophy, the philosopher may know Reason as it has been

and as it is in itself. The history of philosophy thus reveals the development of Mind itself in its quest for its own unification and actualization. The greater the historical perspective accorded the philosopher, the greater and richer the vision of the system and of Reason's own self-comprehension in the system. According to this view, Hegel's own system would seem to represent the ultimate achievement of Reason; yet philosophy can only contemplate the past and the immediate present, which is the swiftly changing result of the past. Philosophy "paints gray on gray," and Hegel generally refrained from predicting future manifestations of Mind in any area.

The Progress of History. Absolute Mind further manifests itself in the subjective consciousness of the individual, who undergoes a process of development from a purely materialistic and subjectivistic state to a state of universal and rational consciousness. At the same time, the individual passes through several objective phases—family, society, state—each of which represents a move from subjectivity to objectivity, from partiality to unity. Human history in general is the progressive move from bondage to freedom. Such freedom is achieved only as the partial and incomplete desires of the one are overcome and integrated into the unified system of the state in which the will of one is replaced by the will of all. In this doctrine of the priority of the state, Hegel rejected the individualism expressed in both the American and the French revolutions. Such individualism runs directly contrary to the nature of humanity and reality, for the individual has value and reality only as a part of a greater and unified whole.

This view of history and of the state ultimately contributed to sharp divisions among Hegelians. What began as disagreements about religion soon developed into left-wing and right-wing political theories. Among the most prominent left-wing, or radical, Hegelians was Karl Marx, who turned the dialectic of Spirit into a dialectic of economic conditions that would culminate in the revolutionary triumph of the working class. Right-wing Hegelians, on the other hand, tended to stress the necessity of the unified state and thus contributed directly to the growth of nationalism and the unification of Germany.

Influence. Hegel's influence on subsequent philosophy was extensive and varied and included the development of IDEALISM in Great Britain, the United States, and throughout Europe. A more negative influence was the reaction of Søren Kierkegaard against Hegel's objectivity and what he took to be a denial of the lived experience of the existing individual. From this reaction flows much of contemporary phenomenology and existentialism, which has also been more positively influenced by Hegel's ideas about the growth of individual consciousness and the confrontation with death.

Hegel wrote books on philosophy, religion, and history. His published works and material from his lectures were collected into 26 volumes after his death. Most of these were translated into English during the 19th century. Among new translations in recent years are *Reason in History* (1953), *Phenomenology of Spirit* (1977), *Hegel's Philosophy of Right* (1967), *Early Theological Writings* (1971), and *Encyclopedia of the Philosophical Sciences* (3 vols., 1971-75), an outline of his whole philosophy. J. T. MOORE

Bibliography: Avineri, Shlomo, *Hegel's Theory of the Modern State* (1973); Fackenheim, E. L., *The Religious Dimension in Hegel's Thought* (1967); Findlay, J. N., *Hegel: A Reexamination* (1958; repr. 1976); Hook, Sidney, *From Hegel to Marx* (1936; repr. 1962); Kaufmann, Walter, *Hegel: Reinterpretation, Texts, and Commentary* (1965); Marcuse, Herbert, *Reason and Revolution: Hegel and the Rise of Social Theory*, 2d ed. (1968); Norman, Richard, *Hegel's Phenomenology* (1976); Pelczynski, Z. A., ed., *Hegel's Political Philosophy* (1971); Rosen, Stanley, *Hegel* (1974); Taylor, Charles, *Hegel* (1975); Wiedmann, Franz, *Hegel: An Illustrated Biography*, trans. by Joachim Neugroschel (1968).

hegira [huh-jy'-ruh]

Hegira (from the Arabic *hijra*, which means breaking off relations, abandoning one's tribe, or migrating) refers to the departure of the Prophet MUHAMMAD from Mecca in AD 622. His criticism of the polytheism of the Meccan religion had angered the merchants of Mecca, who were reaping large profits from pilgrims. Forced into exile, Muhammad went to Yathrib (later renamed Medina) and became its ruler. The caliph Umar I (d. 664) proclaimed the start of the Muslim era (dated AH, *annus hegirae*) from the first day (July 16, 622, by the Julian calendar) of the lunar year in which the hegira occurred. The term is also applied to any Muslim emigration.

Heiberg, Johan Ludvig [hy'-bairg]

Johan Ludvig Heiberg, b. Dec. 14, 1791, d. Aug. 25, 1860, a Danish playwright, poet, and critic, introduced vaudeville, then a form of musical comedy, into Denmark after studying French vaudeville in Paris. Among the works he produced in this genre are *Aprilsnarrene* (April Fools, 1825) and *De Uadskillelige* (The Inseparable Ones, 1827). His romantic *Elvĕrhøj* (Elfinhill, 1828) is still Denmark's most frequently performed play, although the satire *En Sjoël efter Døden* (A Soul after Death, 1840) is considered his best. As a critic, Heiberg championed poetic realism, of which his own *Nye Digte* (New Poems, 1840) is an example.

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Heidegger, Martin [hy'-deg-ur, mahr'-teen]

The German philosopher Martin Heidegger, b. Sept. 26, 1889, d. May 26, 1976, was one of the most significant thinkers of the 20th century. He attended a Jesuit seminary, then earned (1914) his doctorate from the University of Freiburg, where he became the assistant to Edmund Husserl. Heidegger was affiliated with the University of Freiburg throughout his career except for a brief period as a professor at the University of Marburg. In 1933, under the Nazi regime, he was made rector of the University of Freiburg, but he resigned a year later because of his disillusionment with nazism. This association, however, caused his suspension from all teaching duties for a short time after World War II.

Heidegger's chief concern was ontology, or the study of being. His most important work, *Being and Time* (1927; Eng. trans., 1962), united two philosophical approaches—the EXISTENTIALISM of Søren Kierkegaard and Friedrich Nietzsche and the PHENOMENOLOGY of Husserl—in an inquiry into being (*Sein*), specifically, human being (*Dasein*).

Although sometimes considered gloomy and nihilistic because of his emphasis on anguish and death in *Being and Time*, Heidegger was concerned with these negative aspects of human existence because they shed light on the nature of being. Being is revealed most dramatically by experiences that show the gap between nonbeing and being. The most profound such experience is reflection of the prospect of one's own nonbeing, that is, death, because this "possibility of impossibility" reveals the finitude of human being as both a

The 20th-century German philosopher Martin Heidegger used the phenomenological method to analyze the problem of being and the transitory nature of human existence. In his masterwork, Being and Time *(1927), Heidegger addressed the problems of death and the communal nature of being human.*

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March 10, 2014

Dear USFWS:

Attached please find a white paper submitted as part of the public comment period on the EDF/American Habitat Center's Habitat Credit Exchange (HCEX) market system, as documented in the *Stakeholder Conservation Plan* (SCP), *Habitat Exchange Agreement* (HEA), and *Habitat Quantification Tool* (HQT). As researchers with a combined 13 years of experience studying wetland, stream, and habitat offset markets across the United States, we are submitting this document to express significant issues with the Habitat Credit Exchange as it is currently designed.

Thank you for your consideration of these comments.

Sincerely,

Todd BenDor
Associate Professor
Department of City and Regional Planning
University of North Carolina at Chapel Hill

Sierra Woodruff
Doctoral Candidate
Curriculum for the Environment and Ecology
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Comments on the Environmental Defense Fund and American Habitat Center Habitat Credit Exchange (HCEX)

Stakeholder Conservation Plan (SCP)
Habitat Exchange Agreement (HEA)
Habitat Quantification Tool (HQT)

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Summary

On February 12, 2014, the American Habitat Center (AHC) and the Environmental Defense Fund (EDF) released three draft documents describing a Habitat Credit Exchange (HCEX) for the Lesser Prairie Chicken (LPC). These draft documents included the *Stakeholder Conservation Plan* (SCP), the *Habitat Exchange Agreement* (HEA), and the *Habitat Quantification Tool* (HQT). We refer to these documents collectively as describing the operation of the HCEX.

In part, the SCP represents an unprecedented market structure that we believe, if implemented with appropriately qualified administrators and third-party verifiers, represents a significant advancement in ecosystem service trading. In particular, the role of a third-party verifier and an exchange administrator add potential layers of accountability that currently do not exist within contemporary Endangered Species Act (ESA) and Clean Water Act markets, at least not at such broad scales. However, as we discuss in detail below, the integrity of this novel structure is likely to be undermined by low mitigation standards and under-qualified participants. So while we are impressed with the proposed market exchange design, it is only a means of administration and verification of external standards. Conservation outcomes of the LPC cannot be controlled by administration and verification; these will instead be determined by the external mitigation standards.

The stakeholder conservation plan (SCP), if endorsed by the FWS, would provide a mechanism for property owners to achieve compliance with the ESA through Candidate Conservation Agreement with Assurances (CCAA). By agreeing to comply with the plan's mitigation rules, property owners are allowed to continue covered activities that may result in incidental take of the species. By including a CCAA and HCP the plan allows for property owners to enroll before or after listing of the species. Enrolling in the HCP portion of the plan following the potential listing of the species is much more efficient than applying for a permit from ESA (p. 100).

Similar to our recent evaluation of the Western Association of Fish and Wildlife Association's (WAFWA) range-wide plan (RWP), we conducted an evaluation of these documents from the standpoint of researchers who focus on sensitive ecological and environmental systems and were not involved in the conception of design of the HCEX. We have modeled this analysis off of our previous evaluation of the RWP.

Our evaluation found a number of problems with the HCEX as it is currently designed. To detail our concerns, we have organized our evaluation into 10 major critiques as summarized below. Many of these critiques are similar to those of the RWP, while several are substantially different:

1. Confidentiality provisions –The confidentiality provisions in the HCEX are not appropriate for a government-promoted environmental program. These provisions 1) are vague regarding the information that will be kept away from regulators and scientific auditors, 2) represent a major departure from previous habitat trading schemes, 3) limit the public's access to information about critical species protection mechanisms, and 4) continue a disturbing precedent for secrecy in

environmental protection programs that has been the subject of litigation.

2. Scientific advisory apparatus + concerns over conflicts of interest - The proposed HCEX scientific advisory apparatus is vague and necessitates additional policy and economics expertise. Furthermore, the actors engaged in running the HCEX (variously referred to as the 'Exchange Administrator', 'permit-holder') need to be clarified. It appears that the exchange administrator is slated to be the *American Habitat Center*, an oil and gas industry group with no previous role in any environmental market or organization. Installing a market administrator with a reputation lacking independence appears to be a clear conflict of interest and will create trust problems among LPC stakeholders.

3. Unclear goals and objectives – The SCP goals diverge substantially from RWP goals in lacking any population objective for the future. Instead, emphasis is placed entirely on habitat with no real habitat quality goals. Objectives are not quantifiable or measurable to determine if the SCP is successful or not.

4. Calculation of credits and mitigation ratios + the use of crucial habitat assessment tool (CHAT) - All data used to define habitat and CHAT function is publicly available remote sensing data that may be erroneous. The RWP habitat quality metrics may have definitional problems. Mitigation ratios and temporal relationships are not determined scientifically.

5. Unclear Enforceability – The HCEX structure is entirely voluntary, with no enforcement mechanisms to implement a mitigation hierarchy (avoidance and minimization) or ensure compliance.

6: Lack of Avoidance/Minimization criteria – The SCP seems designed to streamline habitat impacts and offsets, without considering avoidance altogether or minimization. There seems to be no emphasis on these steps in a 'mitigation hierarchy' to avoid unnecessary impacts.

7: Additionality and interactions with other markets – The SCP explicitly suggests that credits could be resold into other ecosystem markets, highlighting an inconsistency in treatment of additionality provisions required by the SCP for other LPC conservation programs (i.e., conservation banking). LPC conservation credits should not be 'stacked' (i.e. also sold as carbon credits into the California market, etc.) without explicit requirements in the HCEX structure.

8: The risks of dynamic permanent mitigation – The extensive use of temporary offset contracts 1) is not supported by ecological literature, 2) is almost entirely un-tested in habitat markets, and 3) will not likely lead to positive conservation outcomes for the LPC. The use of this approach should be exercised with extreme caution, and should not be a major component of the conservation strategy, as it may risk further declines for the LPC (BenDor and Woodruff 2014).

9: The fallacy of temporary impacts and mitigation – The SCP gives no evidence that impacts can be temporary, or should be treated as such. It also gives no indication of how credits should be budgeted for the period where 'temporary' impacts are remediated, if this is at all possible.

10: Lack of interagency coordination – Like the RWP, the SCP misses an important opportunity to establish the Exchange Administrator as a centralized planning and management authority that helps local, state, and federal authorities collaborate and prioritize LPC conservation efforts.

Report Details

#1: Confidentiality issues

While the SCP includes more discussion of confidentiality than the WAFWA plan, it does not appear to have more relaxed confidentiality rules. "Confidential data regarding private property, or which would identify or lead to the identification of any private property, will not be released under any circumstances without specific written agreement from the private property owner or their designee" (P. 12). Quite simply, it is imperative for regulators and auditors to understand the locations of habitat impact and offset sites to understand habitat dynamics and movements, limiting compliance verification and adaptive management.

Participants enroll land to produce credits through performance contracts and conservation easements (p. 10). A management plan will be developed for each participating property. This plan (Appendix B. Exhibit A) includes a description of the property rights, goals for the property management, a description of existing conditions including current management practices, and conservation actions. Conservation actions are divided into required practices, which must be implemented for credits to be realized.

Question: Why are these participant management plans not public information?

Instead, the exchange administrator summarizes LPC information in an annual report to FWS that specifies: "the number of participants; the amount of enrolled acreage by Service Area; accountings of Credits that have been registered but have not been Transferred, credits transferred, credits retired for the Net Benefit of the Covered Species and Covered Habitat, and Credits in the Reserve Account; an accounting of Credits and funds from the Restoration Fund used in Remedial Actions; recommendations developed by the Science Committee[…]" (P. 16)

Question: Will the HCEX information management structure give the USFWS enough information to determine the outcomes of the habitat-trading system?

The confidentiality provisions of the SCP are not well-defined. Although substantially better than the WAFWA RWP, it is not clear how regulators will determine that no net-habitat loss is occurring in given service areas as maps will not be given to the USFWS.

Like the RWP, the SCP has not made a strong case for blanket confidentiality for participating landowners. The case for confidentiality should override a strong prevailing interest from regulators, the public, and other stakeholders in knowing where and when habitat are being restored or preserved to offset LPC damage. It is not clear that blanket confidentiality will drive landowner participation. It is clear that blanket confidentiality has been problematic for any entity hoping to determine whether the habitat trading system is functioning well – i.e. the regulatory and environmental community (see sage brush lizard discussion in Tesauge 2013).

This type of confidentiality provision is not present in conservation banking instruments (USFWS 2003), nor is it present in many other, well-established trading markets, where landowners readily participate without a need for blanket confidentiality (likely based on market prices for participation). Finally, while the SCP and HEA reference state privacy laws, it is not clear whether this type of federal program falls under those jurisdictions.

Conclusion: The confidentiality provisions in the HCEX are not appropriate for a government-promoted environmental program. These provisions 1) are vague regarding the information that will be kept away from regulators and scientific auditors, 2) represent a major departure from previous habitat trading schemes, 3) limit the public's access to information about critical species protection mechanisms, and 4) continue a disturbing precedent for secrecy in environmental protection programs that has been the subject of litigation.

#2: Science panel + concerns over conflicts of interest

The proposed HCEX scientific advisory apparatus is vague in that it does not discuss how the appointment process is to be conducted in an open and transparent process.

Questions: Who appoints scientific advisors for the HCEX? Why is the USFWS member non-voting?

We note that both the RWP and the SCP attempt to take away any direct intervention in the system from regulators.

Another issue is that the science panel does not seem to have any role for habitat market or economics experts. Like the RWP, this suggests a potential source of some of the problems that we will point out throughout this analysis; while there is significant biological expertise around the LPC, there does not seem to be expertise in designing markets that structure incentives to accomplish the goals of the HCEX. The lack of this expertise may raise concerns over the ability to effectively create the appropriate incentive scheme for property owners to engage in credit creation.

Furthermore, the actors engaged in running the HCEX (variously referred to as the 'Exchange Administrator', 'permit-holder') need to be clarified. It appears that the exchange administrator is slated to be the AHC, an organization that appears to have no previous track record of any type. What is "AHC"? What qualifications are given for running a market that may grow to be quite large and complex?

Of particular concern is that the AHC has no previous role in any environmental market or organization. A basic Google search yields only two entries for "American Habitat Center," both of which are Texas news articles revealing the organization to have been created by oil and gas industry lobbying groups. (See: http://www.texastribune.org/2013/08/27/energy-lobbyists-set-sights-lesser-prairie-chicken/ and http://amarillo.com/news/local-news/2014-02-07/groups-

announce-prairie-chicken-programs).

Installing a market administrator with a reputation lacking independence appears to be a clear conflict of interest and will create trust problems among non-industry LPC stakeholders and the appearance of industry 'self-regulation'.

This immediately becomes apparent during the four-paragraph attempt to discuss an 'alternatives analysis' (Section 12.1 on Pg. 97), which dismisses ESA goals off hand in lieu of straw-man arguments like "[h]alting development as a result of a listing decision was thus not a reasonable alternative..." and discussions of the national role of the regions agricultural, ranching, and hydro-carbon sector. This conflict of interest continues in the HEA, wherein the goals of the HCEX appear to turn towards enabling continued habitat impacts in a seamless manner (see section below on lack of impact avoidance and minimization procedures).

A plan such as the SCP should include a strong discussion of the role of the ESA in mediating economic growth and sensitive endangered populations, including the role of market-mechanisms in providing economic incentives to find alternatives to destroying habitat (evidence from decades of research into wetland and stream markets, cap-and-trade, payments for ecosystem services, etc.). Given that plans have long been acknowledged to relay the values of those creating them (Berke et al. 2006), the SCP reveals much of the AHC as a potential future market manager. It is not clear how the AHC will be able to balance 1) its clearly stated goals of minimizing barriers to continued LPC habitat impacts with 2) its responsibilities as Exchange Administrator.

#3: Unclear goals and objectives

The plan includes a robust discussion of areas for further research. In fact, one of the stated goals is to "Enhance knowledge and comprehensive understanding of the LEPC" (pg. 52). Areas for further research the plan identifies includes: (1) assessing the actual impacts of human disturbances; (2) the effectiveness of habitat restoration; and (3) LEPC Biology (gp. 74). New scientific information and results from program monitoring will be reviewed every year for the first three years, and at least every three years thereafter, to recommend modifications to the program.

While the plan does a good job of discussing goals (Pg. 51), the objectives that they propose are not quantifiable. Plan objectives typically seek to be specific, benchmarked and measurable points (Berke et al. 2006). The plan's adaptive management discussion (p. 75-78) is relatively strong, but the lack of quantifiable objectives may hinder adaptive management efforts as it will be impossible to determine if goals are being met.

On page 69, the SCP discusses how "3% of all Credits will be retained to promote conservation of the LEPC". This 'Restoration Fund' is intended to be an insurance mechanism for unforeseen circumstances like credit failure. It is unclear, however, exactly how these credits will be retained – who will purchase these credits? Or will this simply be a surplus on the market causing delays in the economic return for credit producers?

The financial goals of the exchange are not clear. While there is a fee to put credits on the exchange (p. 96), there is no discussion of incentives for credits. What are the payoffs for credit production? Furthermore, what is the logic in restricting credit re-sales? We've never seen these types of terms in an ecosystem market structure, and can only surmise they are intended to control credit price increases, thereby keeping mitigation prices as low as possible.

The plan offers avenues for undercutting some of its own goals. For example, the plan states that credits must be generated in the same geographic region of the impact (p. 65). The exchange also allows for buyers to aggregate credits produced in multiple locations to offset a single impact (p. 31). However, there are several service area exemptions (pg. 16), such as the restoration goals in the area have already been met or offsets outside the service area provide adequate ecological value.

Question: What evidence is required to allow exemptions to same-service area offsets?

Like the RWP, perhaps most challenging is the dismissive way that the SCP treats the precipitous recent decline in LPC population (Pg. 32). The plan does note that the LPC has been subject to population fluctuations in the past, this being said recent survey results indicate a 56% decline between 2007 and 2013. While past fluctuations may in part be due to unstandardized methods, recent data collection has been standardized. While the plan supports using habitat as a proxy for LEPC, and intends on using available survey and density data to estimate takes (p.85), the SCP seems to treat this substantial decline as a natural feature of the long-term population fluctuations of the species. The plan should focus more on goals around species count and stability. Aiming to conserve specific amounts of habitat while taking a certain number of individuals implies that species counts will continue to shrink and habitat compression will continue to occur in the face of all conservation efforts.

#4: Calculation of credits and mitigation ratios + the use of crucial habitat assessment tool (CHAT)

In absence of a better existing tool, the SCP uses the WAFWA CHAT to assign mitigation ratios. The SCP then appears to simplify the mitigation ratio by removing the multiplier for credits, thereby creating a rather confusing system for calculating credits.

Overall, we find the HQT complicated and lacking discussion of how credits are produced and measured. Also important is that the plan does not have a strong discussion of <u>mitigation ratios</u>.

The habitat quantification tool is used to combine quantity and quality of habitat into a single metric – "functional acre". The authors recognize they do not have complete information and the tool will have to be improved through adaptive management.

Our Interpretation of the calculation of Functional Acres:

The HQT combines data from four scales. The second order scale is intended to quantify and evaluate conditions that may affect LEPC performance and may assist in strategic planning (p. 15). Currently, the actual conditions that are important at the landscape scale for LPC success are poorly understood. The HQT states that they will use data driven processes to identify these important conditions, but in the meantime will use CHAT categories. Including conditions at the landscape scale may also help create incentives credits in the most important places for LPC populations and dis-incentivize impacts (p. 17). Currently the HQT uses the CHAT mitigation ratios, although they recognize that "CHAT does not provide a rigorously LEPC data-driven approach that meets the SCS Science Committee criteria for standardization, adaptability, or transparency" (P. 18).

The third order scale includes surrounding conditions that may relate to LEPC performance such as extent of native vegetation, patch size, developed land cover, etc. (p. 18). At this scale there are three important factors: (1) developed land cover and tree cover reduce the suitability of the site (2) quality of open land – this is confusing, but the HQT uses something like a centered scale where 1 = average quality, thus they can reward sites located in high quality locations; and (3) human modifications such as transmission lines, roads, fences, etc. reduce site quality by a certain percentage dependent on the modification density.

The fourth order, or local scale, includes conditions for both nesting and brood rearing. To evaluate the conditions at a site, the site is divided into sampling squares, some number of squares (sufficient to provide thorough coverage, but unspecified in the HQT) are randomly selected for sampling, 5-10 points within the square are randomly sampled. At each sampling point the maximum height of obstruction (MHO) by grass, MHO by taller grass and shrub, as well as forb cover is recorded. Measurements are adjusted to a standardized scale and then averaged. Then all squares are averaged together. This standardized score is than multiplied by acres to get functional acres.

The final functional acres also accounts for deductions on local scale due to human modification, and the third order measurements. This is all very complicated, but the SCP does a relatively good job of being transparent.

Questions:

- ***What remains unclear is what constitutes a credit?***
- ***At what point following a credit project or impact will assessments be done?***
- ***The HQT also includes the length of time an impact will be present (we address this later in section 8 on temporary impacts), but will credits to offset the life of impact need to be purchased upfront?***

Our major criticism here is the same as for the RWP:

1. *All data used to define habitat and CHAT function is publicly available remote sensing data.*
2. *Habitat quality seems to have definitional problems.*
3. *Mitigation ratios and temporal relationships are not determined scientifically.*

Given the importance of the CHAT determinations on substantive market policies and procedures, it seems that extensive efforts should be made to verify and improve the data used by the CHAT. Therefore, we also pose the same questions as before:

Questions:

- ***Is there a means of determining whether the remote sensing data are accurate?***
- ***Have any verification procedures been used (Have any field studies been conducted?)?***

While the CHAT categorization certainly creates higher mitigation requirements for the most valuable conservation areas, it may not go far enough. It is surprising that the only adjustments to this ratio are given based on the CHAT category of impacts. While we understand the basic, underlying logic at play, this appears to be a completely unscientific way of establishing mitigation ratios. Many studies exist, including Moilanen et al. (2009) and Bruggeman and Jones (2008), which help to more rigorously support mitigation ratio choices.

Relating to our previous critique of the temporary nature of WAFWA offsets:

Questions:

- ***How can the HCEX provide mitigation in advance (as required under USFWS conservation banking guidance) when they are not planning ahead of time for major impacts?***[1]
- ***How do mitigation ratios account for any of the uncertainty and temporal delays incurred through habitat restoration?***

In addition, the HCEX/CHAT/RWP fails to fully describe how CHAT categories are calculated and how they will change in the future. The rules for defining different categories are not explicit; what exactly qualifies as priority LPC areas? How is corridor defined in CHAT 2? How good a predictor of available and potential habitat is the maximum entropy model used in CHAT 3? Without these explicit definitions and rules it is unclear how these areas may shift overtime and under changing conditions. Likewise, although HCEX states that CHAT categorizations will be updated, no timeline is provided.

#5: Unclear Enforceability

Like the RWP and unlike conservation banking or wetland mitigation, the plan does not create clear shifts in liability between parties, nor are the plan provisions legally enforceable. "Each party shall have all remedies otherwise available to enforce the terms of this Plan and the Permits, except that no party shall be liable in damages for any breach of this Plan, any performance of failure to perform an obligation under this Plan, or any other cause of action arising from this Plan" (p. 102).

[1] Like the RWP, the HCEX will suffer from temporal lags from landowners signing up to offset impacts. See Section 9 for a discussion.

Property owner's compliance with mitigation requirements is "documented through reporting, compliance checks, photos and remote sensing" (p. 66). Like the RWP, the Exchange Administrator may suspend the coverage of property owners if they fail to fulfill their obligations of mitigation. Discussion of the procedure for removing coverage is discussed in the appendices, appendix B-1 p. 4 (or 151 of 282)

Credits have a staged release schedule. Some credits may be released immediately on the market following third party verification of habitat quality. Following this initial release, credits are released when 25, 50, 75, and 100 percent of maximum habitat performance specified in the customized management plan is reached (HEA p. 14). To release these credits, the participant must also secure 25, 50, 75, and 100 percent of required financial assurances and performance guarantees respectively. These financial guarantees may include surety with a bonding company, collateral assignment of a certificate of deposit, certified or cashier's check, letter of credit, cash, or participation in an insurance pool (HEA p. 31). Verification is required before additional credits may be released and every five years since the most recent verification. The exchange administrator may also randomly select properties for periodic verification (HEA p. 13).

It is encouraging to see at least some penalties for defaulting on credit agreements, as well as the required financial assurances. The exchange also establishes a "reserve account" to hold credits that are not used for mitigation, except during specific situations. These extra credits are paid for with a percentage of credits transferred in each transaction (Pg. 19). In the first year, 7% of credits transferred in each transaction are put in reserve, in the second year the percentage decreases to 6%, in the third it drops to 5% and 4% in the fourth. Credits in the reserve account may replace: credits damaged by force majeure, credits that have been used for mitigation and then damaged as a result of split estate and development of minerals on the property, credits that have been sold and then discovered to not meet the required criteria, credits that have been sold and removed due to premature termination of contract, and to bridge gaps in the coverage between subsequent term agreements (Pg. 20). Credits used to replace credits lost for non-compliance must be replaced within one year after the credits are used for mitigation (Pg. 21).

"The exchange administrator is responsible for ensuring that sufficient financial resources are in place to cover in the event that a participant in the Exchange does not fulfill the Participant's obligation to the Exchange (Pg. 27)." The exchange additionally establishes a "restoration fund" to provide funding for restoration projects for credit production. On page 7, the agreement discusses restoration in more detail stating that the committee recognizes restoration is more costly, may have time lags until credits are available for release, and that they may be particularly important in the recovery of LPC. A fee of 2.5% of the cost of the credits transferred in each transaction is deposited in the restoration fund (p. 22). This fund is used for the development of credits on restoration sites. 20% of the fund is also reserved to assist participants in recovering habitat quality following damage by Force Majeure.

If the Exchange Administrator or FWS determines that the Exchange is operating at a credit deficit, credit transfers exceed the credits authorized for release, all transfer of credits will immediately

cease, with remedial actions will be determined by the FWS and Exchange Administrator (p. 25). Once a site has been restored, the property will be evaluated by a third party verifier to determine the number of credits generated by the site (Appendix B). If a property is found to be in non-compliance, no additional credits will be released (how often are permits verified? A monitoring timeline is given, but if credits are bought/sold yearly, are verifications completed yearly? If not, why not?). The Exchange Agreement specifies a remedial action plan if participants fail to meet performance standards (p. 24-25), however, it is not clear how these remedial action plans will be used to help participants that fail to achieve the contract performance; the SCP/HEA contain few details, and it appears that the SCP intends to deal with these failures on a case by case basis.

One possible problem – it is clear that property owners can terminate their contractual relationship with the HCEX at any time and only be subject to partial loss of credits, as well as a relatively small early-termination fee. (Pg. 31). Participants financially liable for terminating their contract (either voluntarily or because of poor performance) must return a percentage (100, 75 or 50% depending on time of contract less than 30, 30-60, or more than 60% respectively) of the payments received under the contract and an additional percentage (25, 15, or 5) of the total contract amount as an administrative penalty. These funds will be used to secure replacement credits; any excess funds will be used to purchase credits for the reserve account. This means that owners can immediately, and without extensive penalty, cancel credits with little notice to the HCEX.

Questions: What are the possible ecological 'bottleneck' effects of this (see permanent dynamic mitigation section for discussion)? What does the HCEX plan on managing this? Will the 'reserve account' be able to cover this dynamic?

It is not clear how the HCEX will identify landowners and get them to agree to enter the program, which is a notoriously difficult part of conservation and mitigation banking. Fee and simple acquisition of land can be challenging in this area due to decoupling of surface and mineral owners. In cases that property owners do have "unified interests" property can be enrolled in perpetual preservation, and sell the generated credits (P.50). The Exchange Administrator facilitates the transfer of credits via requests for proposals, bid rounds, reverse auctions, and other unspecified means (p.10). The SCP/HEA do not specify how this process is initiated.

Question: Does the HCEX create strong enough incentives to establish credits?

#6: Lack of Avoidance/Minimization criteria

An important issue in the protection of the LPC involves avoiding and minimizing unnecessary habitat impacts. The SCP requires avoidance, minimization, and mitigation of impacts on enrolled property (Pg. 2). While it provides guidelines for all covered activities (Pg. 55 – 60), like the RWP, there is no metric of success.

Question: Where/when/how are impacts minimized? What should impacts be minimized in comparison too? Who determines if the construction was in fact minimized?

At no point is there a regulatory authority such as the US Army Corps of Engineers (in wetland and stream mitigation) to intervene when participants want to enter the market and determine that impacts are happening unnecessarily.

#7: Additionality and interactions with other markets

We appreciate the SCP's attempt to consider 'additionality' in restoration efforts for the LPC. The HCEX attempts to prevent duplication of conservation effort by requiring participants to disclose other property commitments such as participation in other federal and state programs (appendix B). If more credits are produced on a property than previously verified, the participant may request reevaluation at their own expense. Additional credits, based on new analysis, may be released (HEA p. 15). However, where conservation values has already been protected and restored, the property is not eligible to receive credits.

However, while the SCP specifically prevents 'double dipping' (selling the same credits multiple times through the HCEX), Pg. 2 of participation contract (Section 5) specifically allows credit stacking – the act of selling restoration work as multiple forms of credits – and thereby creating the possibility of double dipping into additional environmental markets. Robertson et al. (2014, In Press) discusses the immense ecological, bio-geochemical, regulatory, information technology, and philosophical problems with credit stacking. It is surprising to see its explicit allowance in the SCP. The USFWS should heed the warning of Robertson et al. (2014) and ban the use of credit stacking in the face of huge uncertainty around its use and abuse (see documentation of credit stacking abuse by the NC Legislature:
http://www.ncleg.net/PED/Reports/documents/Wetlands/Wetland_Report.pdf).

We can see this problem when we look at how credits are verified by a "Qualified Third Party Contractor" (p. 68) prior to being released on to the exchange. It is unclear if there is any measure in place to prevent restoration projects supported through other projects from selling credits, this is a violation of additionality of credits. On page 103: "If the Participant has received funding from other sources, such as Partners for Fish & Wildlife or NRCS, they may need to repay other funding sources in accordance with agreements the participant makes with these funding sources."

#8: The risks of dynamic permanent mitigation

Like the RWP, the SCP relies on the year-old concept of 'Dynamic permanent mitigation,' wherein mitigation is achieved by the use of credits produced in a series of term agreements such that the duration of the mitigation is permanent, or in the case of the HCEX, at least 30 years long (although the SCP defines permanent as a duration of 100 years or more, the HCEX is only set to be permitted for 30 years). Buyers must mitigate impacts for the length of the impact plus the time required for the land to recover to the baseline level of habitat quality (pg. 30). Credits may be purchased yearly to offset long-term impacts (pg. 27).

It is unclear if the length of contract is built into the credits produced. HQT is a calculation of functional-acreage, but does it include time? If 25% of site credits are released, does this refer to 25% of the credits produced over the entire life of the contract?

As we discussed in our analysis of the RWP, and have recently published in the peer-reviewed journal *Sustainability* (BenDor and Woodruff 2014), the use of temporary, serial offsets is likely to pose major impediments to long-term LPC viability.

The background on the lesser prairie chicken includes very little discussion of fidelity to nest sites, juvenile dispersal, or other biological characteristics that are likely to play an important role in the design of effective credit exchange. Literature on the LPC note extensive return behaviors to previous habitat (see van Pelt 2013); this contrasts starkly with the heavily migratory[2], saiga antelope of Uzbekistan that was the subject of the Bull et al. (2013) study used to justify dynamic permanent mitigation in the first place.

The Exchange will establish a non-wasting endowment fund to provide assurance of managing the participating properties and a wasting endowment for the acquisition of new contracts to ensure there are no gaps in dynamic permanent mitigation (Pg. 27).

Question: While the Exchange endeavors to prevent gaps in dynamic permanent mitigation, how will the HCEX structure avoid ecological bottleneck effects, whereby species are forced into smaller and smaller habitat areas during contract transition periods (see Bedward et al. 2009)?

The temporal component of credits and debits also remains unclear. Credits must be purchased prior to impact; this should ensure no time lags between impact and mitigation. However, buyers can stockpile credits by purchasing credits and holding them for up to three years. What type of temporal dynamic would this create?

Credits may also be retired for non-mitigation purposes to benefit the LPC (HEA Pg. 17). Furthermore, the protocol for retirement is not entirely clear – how will credits be selected for retirement? How will these retired credits be paid for?

Finally, credits may be resold through the exchange (and they must be sold if they have not been used within 3 years of purchase), but the price of credits being resold cannot exceed 110% of the original purchase price (p. 17). We assume that this price control is to prevent speculation within the exchange. This is fairly unorthodox in environmental/ecosystem markets. What is the reasoning for this requirement? It seems to artificially increase supply of credits.

[2] The plan area is greater than the species existing range. To account for the potential shift northward of the LPC range in response to climate change and drought conditions, northern areas were included in the plan area and may in the future may be eligible to sell credits on the exchange (SCP Pg. 34, also discussed in HQT pg. 11). The plan sites Elmore et al. (2013) to support this argument.

#9: The fallacy of temporary impacts and mitigation

Overall, the treatment of time is probably the biggest issue that we find in this plan. What is the time component of credits? Are credits sold every year? If so, it seems that verifications should be completed every year. For example, HQT modifications are explicitly designed to not apply retroactively to past credit calculations (HEA Pg. 21). If this is the case, does the term accounting change? How can offsets be meaningful designed if they are inflexible for transactions, yet are set in stone for quantification.

We recommend readers reference our previous white paper on the temporary nature of habitat impacts, which is largely based on BenDor's (2009) exploration of the time delays necessary to create mitigation. Additional literature in this area includes Moilanen et al. (2009) and Bruggeman and Jones (2008).

While these questions mirror those that pose on the badly-designed 'dynamic temporary mitigation' system in both the RWP and the SCP, the SCP seems to provide no guiding logic suggesting that temporary mitigation or the HQT matches the life history, biological, or ecological characteristics of the LPC**.** Unlike the RWP, the SCP explicitly considers some types of impacts to be 'temporary' (it is not clear which; Pg. 30). We are not aware of any evidence that oil, gas, or infrastructure impacts can, in fact, be considered to be anything other than permanent; that is, ample evidence (see van Pelt et al. 2013) seems to suggest that physical habitat impacts drive away LPC more or less permanently. The idea, put forth in the HQT, that impacts can be for some small set period of time, is not supported by the literature.

That being said, the LCP and HEA do not define when impacts will be considered to be temporary or permanent. That is, while property owners can purchase credits to offset impacts (prior to their impact; Pg. 64) through the exchange or other FWS approved conservation banks or exchange programs, it is unclear if credits are required for the entire life of the impact or just for each year of the impact. The HQT gives a detailed (yet confusing) example of the credit accounting around a 30-year impact (Section 3.4.1), but no consideration is given to the amount of theoretical time that it would take to remediate/restore the habitat damaged. For example, much of this example discounts the landscape fragmentation issues associated with long, narrow impacts. It is evident that the HQT lends no consideration of style or form of impacts on species movement or fragmentation.

Questions: Where is the evidence that physical impacts to LPC habitat from oil, gas, and infrastructure can be 'temporary' and can be remediated after potentially decades of intensive use? How does the HQT account for the length of time for remediation?

#10: Lack of interagency coordination

Unfortunately, like the RWP, the SCP fails to promote interagency coordination needed among state and federal agencies. However, unlike the RWP, the HCEX does not bring the major state fish and

wildlife agencies to the table. Even issues like continued hunting will add additional complexity to LPC management in this scenario. We re-iterate the major points made in our analysis of the RWP here for the HCEX.

In this discussion, we offer suggestions to improve LPC conservation proposals by drawing on recent work that highlights the role of large-scale planning and inter-institutional coordination in improving the function of restoration markets. Large-scale planning should be incorporated in order to: (1) overcome "thin markets", (2) resolve tension between keeping offsets near impacts and providing the greatest conservation benefit, and (3) provide greater institutional collaboration in protecting the LPC.

Unlike the HCEX, which allows credits to be sold prior to full implementation (diverging from requirements in the 2003 USFWS Guidance on Conservation Banking), many markets have required full establishment before credits can be sold into offset markets. Unfortunately, in this situation Landry et al. (2005) and Salzman and Ruhl (2000) note that offset markets can become "thin" markets, where low supply and demand leads to an inactive market. As a result, the creation of offset credits may be inhibited by reluctance to invest under uncertain demand.

One solution to this problem has been implemented in North Carolina, where a state agency, known as the NC Ecosystem Enhancement Program (EEP), acts as a credit re-seller, purchasing credits from wetland mitigation sites and selling them to buyers in need of offsets. Although the "Exchange Administrator" in the HCEX provide a similar service, the SCP unfortunately does not call for any of the planning activities of the EEP. The EEP draws on local transportation plans to estimate long-term future demand for restoration credits (Dye Management Group 2007). The EEP then competitively bids out restoration far in advance of impacts, specifying the number and type of credits needed and setting specific conditions for choosing a winning bid. Theoretically, the bidding process encourages greater competition on price and quality (Landry et al. 2005). In addition, the EEP effectively assumes the risk of over- or under-estimating the demand.

By implementing a hierarchical and intensive planning program for wetland, stream, nutrient and riparian buffer offsets, the EEP has also resolved issues between localized offsets and incentivizing large-scale mitigation projects. Most offset programs require that mitigation benefits accrue to impact areas, although they differ in how proximate offsets must be (McKenney and Kiesecker 2010).

Originally, the US wetlands mitigation policy called for mitigation activities adjacent or contiguous to the impact site when practicable. This approach was criticized for creating piecemeal mitigation projects with high failure rates and no appreciation for the greater watershed context. Since it was established in 2003, the EEP has attempted to site projects in sub-watersheds that would benefit most from restoration efforts. BenDor and Stewart (2011) describe the EEP's planning program in detail, wherein large-scale river-basin restoration identifies targeted local watersheds for increased scrutiny, some of which undergo intensive local watershed planning processes to identify valuable areas for restoration.

While the operation of this system has been marred by numerous operational problems (e.g. Dye Management Group 2007; BenDor et al. 2009; Templeton et al. 2008), the system won several national awards (EEP 2009) and places North Carolina in a very strong position to strategically implement Army Corps of Engineers and EPA's new requirements to use a watershed approach in managing wetland mitigation markets (Corps and EPA 2008).[3] Under the watershed approach, mitigation sites should be located within the same watershed as impact sites, but sited to provide the most services and best benefit the entire system (McKenney and Kiesecker 2010).

We can apply the benefits and drawbacks of this system to proposed LPC conservation efforts. Under the USFWS (2003) conservation bank guidance, banks should choose locations that provide for the long-term conservation of habitat and species. In practice, however, bankers have discretion to locate banks as long as they are sited within a 'service area' defined by the US Fish and Wildlife Service. The HCEX similarly lacks a method for prioritizing areas for conservation.

The SCP uses the Core Habitat Assessment Tool (CHAT) to prioritize areas for conservation, by increasing the impact multiplier while simultaneously discouraging development and incentivizing mitigation efforts. While CHAT helps target offsets in focal areas, this tool is based almost entirely on publicly available remote sensing data. Planning efforts such as those by the EEP vastly augment this data (whose accuracy or adequacy is not discussed in the WAFWA RWP). In addition, it is unclear if the suggested mitigation ratio is in fact high enough to effectively incentivize avoidance and conservation (a further critique of the CHAT categorization is provided in Section H of this comment).

Van Pelt et al. (2013) and USFWS (2012) identify varying sources of LPC mortality, including habitat fragmentation and sub-population isolation, and locally- or state-permitted development, hunting efforts, and roadway mortality. It is evident that there is a great need to coordinate the efforts of agencies overseeing these aspects of the LPC. BenDor and Doyle (2010) argue that this coordination establishes important information feedback mechanisms whereby these agencies are able to take into account the location and landscape arrangement of offset sites into *their* planning and management efforts. For example, Glista et al. (2009) notes important factors connecting road planning with wildlife road mortality and habitat fragmentation, which long-range planning processes could help to coordinate, thereby improving state departments of transportation planning efforts for LPC purposes. Without this coordination, many regulators and institutions managing landscape change can be blind to the importance and location of LPC habitat offsets (e.g., see BenDor and Doyle 2010).[4]

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[3] NRC (2001) note that the Corps and EPA can use a portion of their budget for watershed planning in wetland markets; however, for largely political reasons, watershed planning was not made a requirement in the 2008 wetland mitigation regulations, and the 'watershed approach' (the use of increased watershed information) was instead made a standard requirement.

[4] We see this in Polansky et al.'s (2008) discussion of the difficulties in accounting for externalities associated with spatial habitat management. The ecological or conservation value of any given private property is dependent on neighboring properties. As a result, land use decisions can produce benefits and costs for neighboring landowners, or externalities (Hartig and Drechsler 2009). Land uses that lower the habitat

Conversely, institutional coordination must also direct information on the actions of local, state, and federal agencies towards efforts to conserve the LPC. In this case, where information flows from other institutions into the market, information on development and landscape change projections help to estimate demands for LPC offsets and help systems to establish them in advance of impacts. [5] BenDor and Doyle (2010) argue that the lack of this feedback is a major hindrance to the operation of a mitigation banking system; depending on the landscape level impacts (e.g., fragmentation, water quality degradation, etc.) that other governments can have, conservation banking systems for the LPC may exhibit similar long-term viability problems. The USFWS should require that any market-based mechanism include well-conceived projections for future supply and demand for habitat offsets.

In correspondence between Keith Sexson to Regional Director Benjamin Tuggle (June 2, 2012), WAFWA argued that:

> Accomplishing landscape-level management requires state of the art tools, as well as coordination and engagement of agencies, NGO conservation partners, and industry.

<u>We completely agree, and strongly suggest that any plan for LPC conservation (particularly those utilizing market-based tools) helps to coordinate all of these actors</u> (see BenDor and Doyle 2010). However, these reports and continued planning and adaptive management efforts actually suggested in the RWP completely miss the work of other important planning organizations (such as the BLM, which has established a resource management plan in Oklahoma that gives special species status to the LPC). Detailed planning efforts could be undertaken by the HCEX to support a trading program. The model for this is the NC Ecosystem Enhancement Program, an agency that has attempted to run its own market (with numerous problems), as well as provide planning support to restoration efforts throughout the state (BenDor and Stewart 2011). This widespread and innovative planning activity creates a framework for interfacing with state departments of transportation, oil and gas licensing organizations (e.g., Texas Railroad Commission), and federal agencies also engaged in LPC management.

Therefore, the SCP is missing an important opportunity to improve interagency coordination and act as a model for future habitat trading programs.

Recommendations: Market-based efforts to conserve the LPC should leverage the EEP's approach to implement a targeted planning system that will:

1) Insert information on LPC management actions into the actions of local, state, and federal agencies (beyond the state wildlife agencies that are already involved).

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quality in surrounding parcels (e.g., because they create noise or pollution), act to lower the credit value for neighbors. Likewise, enrolling land in conservation may increase the ecological value of neighboring land.

[5] This is evident in the fact that the EEP fails to draw on local development plans, leading to poor estimates of future aquatic ecosystem impacts (BenDor and Doyle 2010),

2) Insert information on the actions into the actions of local, state, and federal agencies into efforts to conserve the LPC.

Along with these institutional coordination aspects, we also recommend an incentive system such as that studied by Hartig and Drechsler (2009), who found that simple spatial incentives to encourage clustered or connected conservation produce positive effects relative to no spatial incentives, especially for species limited by dispersal. Essentially, markets that consider spatial connectivity of LPC habitat would likely result in much better conservation outcomes. This could come in the form of incentives to governments or partnering organizations that construct infrastructure in clustered manners so as not to disconnect conservation areas.

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March 10, 2014

Division of Policy and Directives Management
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RE: SCOPING ISSUES TO BE COORDINATED WITH CHAVES COUNTY DURING THE PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT FOR THE STAKEHOLDERS CONSERVATION STRATEGY / AMERICAN HABITAT CENTER HABITAT CONSERVATION PLAN

RE: Docket No. FWS-RS-ES-2013-0134

Dear Sir or Madame;

This letter is in response to the U.S. Fish and Wildlife Service (Service) Federal Register Notice requesting comments on the issues to be considered during the scoping process "for the preparation of an environmental impact statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP) under the Endangered Species Act ..." (FR 2-7-2014 page 7472). Chaves County has reviewed the "Stakeholder Conservation Plan for the Lesser Prairie-Chicken" (hereafter known as "Stakeholder Plan") submitted by the American Habitat Center February 2014. Following are issues critical to the County that should be considered by the Service and coordinated with our County during the EIS process.

1. **The Stakeholder Plan is Duplicative and Unnecessary**

There are already several conservation programs in place for landowners, commercial energy developers, agriculture interests and conservationists to participate in for the purpose of conserving the Lesser Prairie Chicken (LPC) and its habitat. These are acknowledged in section 2.2 of the Plan, "Existing Conservation Plans for the LEPC" (Stakeholder page 16-24). Notably, the Range-wide Conservation Plan for the LPC (hereafter Range-wide Plan) was recently approved by the Service and over 2.5 million acres have already been enrolled.

The Range-wide Plan was prepared with the assistance of major energy interests as well as other agriculture interests for the purpose of providing a systematic means for them to actively participate in the conservation of the LPC. These are the same interests the Stakeholders Plan is targeting. Already, these companies have contributed the essential funding for the program.

Importantly, the Range-wide Plan was prepared with the active participation of the five state agencies with management responsibility for the LPC and is to be managed by the Western Association of Fish and Wildlife Agencies (WAFWA). The Range-wide plan was prepared with complete transparency and heavy involvement of those interests that can directly impact the conservation of the LPC.

The Stakeholder Plan offers no new conservation measures or assurances that are not already being met by currently approved and active plans. The document states that its purpose is to (1) Conserve the LPC and, (2) allow uninterrupted economic development (page 24). A simple reading of the plans already active, as described in the previous section, demonstrate that these two purposes are currently being met. Preparing an EIS for the Stakeholder Plan is an unfortunate waste of taxpayer funds and agency time, as there is no compelling need for the Plan that is not already being met through other programs.

2. The Stakeholders Plan is Unrealistic

One of the key objectives of the Stakeholder Plan is to conserve 90% of the LPC habitat.

> *"The Plan will conserve nearly 90% of LEPC Habitat and will result in substantial enhancement of habitat through required avoidance, minimization and mitigation measures."* (page 50)

The devices they plan to utilize to conserve the habitat are through outright acquisition of the land or a permanent conservation easement.

> *"Many HCP's mitigate for loss of habitat through the preservation or permanent protection of similar habitat, sometimes in combination with other non-permanent measures. This preservation component is implemented through fee-simple acquisition of habitat or the use of perpetual conservation easements."* (page 49)

The total Estimated Occupied Range (EOR) of the LEPC as determined by the Service is 19,902,922 acres. The EOR range covers five states. It is a substantial area of land, and any program that boasts to be able to conserve 90%, or 17,912,623 acres of this area, should be questioned, especially when the vehicle to do so is through outright acquisition of the land or permanent easements. Massive buy-in from landowners and those who own property interests in this land must take place. Additionally, the idea that enough private landowners would voluntarily place a permanent easement or outright sell their land based on the assurances that they will not be further penalized if the LPC is listed, is a fantasy.

By their own acknowledgement, the Plan developers recognize that 95%, or 18,907,776 acres, of the LPC habitat is privately owned. "The EOR of the LEPC is spread over five states and is comprised of up to 95% private land ownership." (page 95) In order for them to own or permanently control 90% of this they are planning to obtain the "voluntary" commitment of the landowners. However, they know this objective is unattainable and even acknowledge that acquiring the various property rights necessary to ensure full conservation of the land is an impossible task.

> *"Ownership and occupancy of these lands is not always limited to a single entity, but may be expressed through a complex and severed relationship of surface estate, mineral*

estate and surface and mineral leasehold interests. Any effort to create a permanent set-aside of meaningful acreage for the LEPC will require the written agreement from all interest holders, which may be an insurmountable task due to the inability to identify and obtain agreement of all owners of the surface and mineral estates." (page 49)

And further;

> *"The establishment of a permanent preserve in most cases is a challenge due to the need to identify and acquire contractual commitments from both the surface owner and the mineral owner, which in this region are typically held by different people and entities. The task of determining who owns the interests and contact information for those property owners is a significant undertaking. Further,* ***the potential for property owners and other interest holders to delay or disrupt an acquisition program through reluctance or refusal to sell targeted or key properties*** *creates additional issues."* (page 49-50)

Clearly, the Plan developers know that acquiring 90% of the LPC habitat is an "insurmountable task." However, what is most disturbing is their acknowledgement that landowners may "delay," or "disrupt" the acquisition program through "reluctance" or "refusal" to sell the properties they have identified and targeted. The Plan claims to be a "voluntary" plan for landowners, yet, by their own admission, it is clear that this Plan will be utilized to "target" land within focal areas and that landowners will find themselves under immense pressure to enroll. Nowhere in the plan do they state that the species does not warrant listing, and the plan itself is not designed to "preclude" a listing. The Plan is designed to acquire 90% of the habitat through fee-simple acquisition or permanent conservation easements.

They benefit from the threat of listing the LPC in order to coerce landowners into "voluntarily" giving up their land.

The Plan developers know their objective of acquiring 90% of the habitat area is unrealistic and, therefore, have submitted a HCP that will fail. The Service should deny approving the plan based on the AHC's admission that landowners will be targeted and pressured into selling their land, an unconstitutional act.

3. The Plan's Minimum Goal of 20% Participation is also Unrealistic

As noted by the Plan developers above, acquiring agreement among the various owners of the property interests in any given parcel will be a dubious task, short of coercion. However, they claim to already have assurances from property interest holders that cover 20% of the habitat. In a footnote on page 95, they claim:

> *"The assumption that 20% of Total Habitat Acreage will enroll in the Plan drives the $0.36 per acre Participation Fee calculations and is conservative based on the commitments currently obtained from stakeholders to participate in the Plan."*

Who are these committed participants? They are not revealed in the Plan. Because this 20% participation is necessary to meet the funding requirement, more than just a footnote ought to be required to ensure this obligation can be met, especially given that the Plan developers

acknowledge how difficult it will be to get all property interests for any given parcel to agree to participate.

We can assume that the major oil and gas companies named in the cover letter that was submitted with the application might be these participants. What proof is being required that they will fulfill this obligation? Without this, the plan is meaningless and proper implementation is questionable.

4. The Stakeholder Plan Administrators and Benefactors are Not Transparent

The Plan has been submitted by the American Habitat Center (AHC), a non-profit entity, so they claim. However, there is no further detail as to who makes up the AHC. A number of questions are left open.

a. Who are the members of the Board of Directors for AHC?
b. Who are the "Stakeholders" that created the AHC and the Stakeholder Plan
c. Who will be appointed to the Oversight and Science Committees?
d. What type of non-profit entity is the AHC; a (c)(3),(4) etc?
e. In which state is the AHC incorporated?
f. Has the AHC provided the Service with its official Incorporation and Non-Profit Status documents?

Through press releases, the County has ascertained that several organizations have come together to create this plan, including the Environmental Defense Fund and some state cattlemen's and farming organizations. What is important for the Service to take into account is that these organizations can only make decisions that affect the Associations, not their members directly. Therefore, any commitment on behalf of the Associations that there will be widespread participation of its members should be discounted, unless proof is submitted by the AHC, whomever the actual members of this organization may be.

In addition, there are other non-transparent issues within the Habitat Exchange Agreement (HEA) attached to the Plan. The HEA is an agreement between the Habitat Exchange Administrator, whoever that is, and Region 2 and Region 6 of the U.S. Fish and Wildlife Service. Within the HEA, there will be an "Oversight Committee," a "Policy Committee," a "Resolution Committee," and a "Science Committee" all of which will be named at a later date.

Obviously, the AHC will carry a tremendous amount of influence determining who the "stakeholders" and representatives from the "conservation interests, industry, and agriculture" groups will be providing crucial oversight of the HEA and the Plan. This is totally unacceptable.

5. The AHC does not have Authority to Enforce the Stakeholders Plan Directly

Although we do not know who will ultimately govern the AHC, this entity is requesting to be approved as the permit holder of an Incidental Take Permit and enhancement of survival permit issued by the Service. Private groups can initiate an HCP without government participation, however, they must assure that they have the authority to enforce the permit. The Service Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 3-2 states that this is allowed "so long as the permittees have the authority to regulate or control all or

applicable parts of the HCP and the conditions of the HCP are enforceable." The Stakeholder Plan assures they have this authority.

> *"The Permit Holder will enforce the Plan. By entering into clear enforceable CIs and CPs, Participants will contractually agree to perform the obligations required of them under the Plan and consent to enforcement of those obligations by the Permit Holder. See Section 8.8. FWS will also have clear and defined enforcement responsibilities and mechanisms with respect to the Plan and the permit issued to the Permit Holder under the Implementing Agreement. See Appendix K. The mechanisms available to the FWS include access to properties enrolled under the Plan, approval rights with respect to Credit-generation and release activities, and representation on the Oversight Committee and Science Committee. In these ways, enforcement of the Plan and increased compliance with the ESA in the Permit Area can be assured."* (page 4-5)

In other words, the AHC does not have the authority outright to enforce the plan; the landowners who participate will give up their right to control their land and provide this authority to the AHC. The only enforcement authority the AHC will have is through the acquiescence of landowner's rights to the AHC. The AHC has stated they will acquire this when landowners "voluntarily" enroll their land in the program, however, there is reasonable concern that landowners will be targeted and pressured into participating.

A participant in this plan can either be a landowner, leaseholder or holder of other property interests. Land sold will presumably be protected until program administers determine the conservation need is no longer relevant. Land placed in a permanent conservation easement will be held in perpetuity. However, if a landowner is covered under the AHC permit, this protection will only be guaranteed for 30 years. So, a landowner, leaseholder or other property interest holder is being asked to permanently give up their rights when the protection they are trading these rights for is only offered for 30 years. It is highly suspect that landowners will flock to sign up under this program once the full details of their commitment are revealed.

6. Key Issues that should be Studied and Analyzed during the EIS process

a. The Environmental Impact Statement needs to rigorously analyze the impact on the local economies within the plan area where private land will be targeted for acquisition, and landowners refuse to sell. The direct, indirect and cumulative impact on the local economy needs to be analyzed when the targeted land is devalued by the action. Based on statements discussed earlier that are in the Stakeholder Plan, it is reasonable to presume that landowners will be targeted and pressured into selling key properties. This impact on the local economy must be studied. Additionally, the impact this will have on the culture of the community should be examined.

b. The Stakeholder Plan is relying solely on the science referenced in the Service's proposed rule to list the LPC as threatened. The Notice does not represent the best available science on the LPC as scientists have critically examined the notice and new data and studies have been brought forward. In the EIS analysis, two additional studies must be considered (documents attached):

i. "Data Do Not Support the Listing of the Lesser Prairie Chicken," prepared by the Center for Environmental Science, Accuracy and Reliability (released in 2013)
ii. Review of the Science Predicting Population Trends prepared by Darling Geomatics (March 2014)

Summary

We appreciate the Service giving strong consideration to the issues discussed above. It is our County's position that the application should be denied because the Stakeholder Plan provides no new conservation efforts that are not already being fulfilled through other plans.

Also, the preparers of the plan have not been transparent as to who they are and who will be governing the program. It concerns us greatly that the Service would be considering providing a non-existent entity with such a high responsibility as being a permit holder for a plan area that consists of six states.

Further, were are very concerned that landowners will be targeted by the group and coerced into participating in the Plan.

For these reasons the plan should be denied.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

Sincerely,

James W. Duffey, Chairman
Chaves County Board of Commissioners

March 9, 2014

RE: Review and comments on:

1. **"An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens" by Edward O. Garton (2012)**
2. **"Range-wide Population size of the Lesser Prairie-chicken: 2012 and 2013" by McDonald et al (2013) and**
3. **"The Predicted Influence of Climate Change on Lesser Prairie-Chicken Reproductive Parameters" by Grisham et al (2013)**

Background

The lesser prairie-chicken (*Tympanuchus pallidicinctus*) (LPC) is a species of prairie grouse that occupies a five-state range including portions of Texas, New Mexico, Oklahoma, Kansas and Colorado. The species is state listed as threatened in Colorado, and the U.S. Fish and Wildlife Service (USFWS) identified the species as a candidate for Federal listing in 1998.

Based on USFWS findings, lesser prairie-chicken populations need large tracts of relatively intact native grasslands and prairies to thrive. Over time, threats to the LPC have included habitat loss, modification, degradation, and fragmentation within its range. Predator cycles and weather also affect annual population numbers.

Over the past year, the USFWS has been analyzing the status of the LPC, threats to the species and conservation efforts resulting in a proposal to list the species. The USFWS will make a final determination whether to list the species by March 30, 2014.

Analysis of Flaws in Population Studies and Reports

Though the USFWS states that it will make a final determination about whether to list the LPC as threatened after a full assessment of the status of the bird, the problem is the fact that the USFWS does not have sufficient population data to determine status. Though LPC are at a lower level than their peak before agriculture, they may be stable, secure and on an upward trend since the concepts of sustainability and prairie grass conservation began in the 1980s.

USFWS is legally obligated under the Endangered Species Act, Information Quality Act and *Bennett vs Spear*, to make LPC decisions based on the best available scientific information that is applicable to the species. However, because the listing proposal process for the LPC is part of the terms of a multi-year listing work plan approved by the U.S. District Court for the District of Columbia on September 9, 2011 the USFWS may feel pressured to make a decision based on inadequate data regarding population numbers and trends. We recommend against a decision based on less than minimally acceptable scientific data.

The scientific information used must be legally consistent with standards of the Information Quality Act (Quality, Objectivity, Utility and Integrity). In contrast to the interpretation of the Act by some federal agencies, the objectivity and integrity requirements mean that the data collected by state and federal agencies, or used in published scientific research relied upon by those agencies, must be provided to the public.

Though the public was not provide with the raw data used in scientific research relied upon by USFWS, in violation of the Information Quality Act, the following is a list of flaws in the two most recent reports USFWS is using to assess LPC population trends as well as an analysis of some relevant information USFWS failed to use. The purpose of this letter is to point out the flaws in the two studies as well as missing information. We strongly recommend USFWS conclude listing is not warranted and further monitoring of populations, habitat quality and conservation measures is needed.

The only recent information USFWS appears to be using to base population numbers and trends on is a combination of archaic data that was not comparable to recent data and statistically invalid recent data.

What is known about LPC populations:

There was a widespread pattern of sporadic sampling for the first decade (mid-1960s to mid-1970s), more frequent but inconsistent sampling across regions for two decades (middle period of mid-1970s to mid-1990s) leading to sustained increased sampling effort over the past 18 years. However, survey protocols continue to vary between States, which makes even relatively recent data difficult if not impossible to compare from State to State.

Two years of helicopter surveying coupled with ground surveys during 2012 through 2013 across known LPC range has created the beginning of a new type of comprehensive survey data under a single methodology over 5 states. However, it will take 10 to 20 years of consistent data collection to even begin to truly determine the trend and limiting factors for the species, in light of weather cycles, predator cycles, and current land management.

Considering the fact that the LPC did not go extinct during the Dust Bowl Era when its habitat was at its worse, the LPC is wide spread and locally common in areas across five states, and all five states have significant positive LPC habitat conservation and habitat restoration programs in place, the LPC is not in danger of extinction.

These birds are a boom and bust species, adapted to fluctuations in weather. A downward trend in population number and/or lek numbers during poor weather conditions such as the recent drought in LPC habitat is normal and is not a reason to list the species as threatened under the ESA. Listing would harm the ability of the five states to manage LPC habitat in ways that benefit the species and would harm our national economy as well as the economies of the five affected states.

What isn't known about LPC populations:

USFWS personnel do not know population numbers and trends at this time in history. A significant amount of conservation of LPC habitat has been going on since the 1970s. Due to an overwhelming number of species to address in a very short amount of time, USFWS could not thoroughly analyze the best available science, which is the detailed long term raw data collected at the State level. Instead, USFWS relied on a few data summary reports that have significant flaws and USFWS missed other studies that have scientific validity. Even if USFWS had time to look at all raw data, the data was collected under too many different types of protocol to make meaningful comparisons. Until 2012, intensity, duration, timing, and methods of surveying LPC have varied too much over time and geographic region to compare.

There is no question that LPC population status, trend and limiting factor questions need to be studied in a more uniform manner for a longer period of time. A conclusion that listing is warranted would be premature and would harm potential habitat restoration efforts.

1. Review of Garton 2012

In a review of "*An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*" by Edward O. Garton (2012) there are a number of sound reasons to have reservations about the conclusions Garton reached.

Garton (2012) discussed many of the **limitations of the available population data** including the **limited number of leks surveyed** as one goes farther back in time, the **inconsistencies in the survey methods** used, the **assumptions** of observed males on leks to numbers of females, and the **minimum population sizes assumed** to be needed to maintain populations.

We are in full agreement with Garton that there were too many inconsistencies in the survey approach and a unified approach is necessary to assess trends across LPC range. The work done by McDonald et al. (2013), described below, may be a good start toward obtaining statistically valid data, but it will take 10 to 20 years or more to begin to gather the necessary statistical data to see real population trends and relate them to weather, predator cycles, habitat conditions, and conservation measures. In the mean time, any speculation that the bird will plummet toward extinction is unfounded.

Garton (2012) makes specific predictions about avian population persistence, 30 and 100 years into the future. There are sound reasons to have reservations about the conclusions of Garton et al. (2012). Briefly, the extinction prediction models used in Garton's paper contained invalid assumptions, methodological bias, improper accounting for the propagation of error in model predictions, and use of thresholds for extinction that lack a sound empirical basis. Collectively, those issues point to bird populations not being as threatened as reported.

In violation of the Information Quality Act, the raw and final data sets used in the Garton 2012 analysis are not publicly available. The absence of publicly available data is also contrary to the Department of Interior's Information Quality Guidelines (requiring that reproducibility "shall generally require sufficient transparency about data and methods that an independent reanalysis could be undertaken by a qualified member of the public," (Department of Interior 2002)) and

demonstrates a lack of adherence to key White House policy directives on scientific integrity (Obama 2009; Holdren 2010, 2011).

Moreover, Garton (2012) made errors and invalid assumptions that induced a negative bias in population trends. In the early decades of surveys, large and easy to find leks were primarily counted. In more recent decades, as more leks were added to surveys, they were often smaller in size. Thus, the average number of males attending leks has declined, in part, due to an artifact in how the data were collected (see Table 1 below).

Table 1. Lesser Prairie Chicken monitoring and population trends 1965-2012 summarized over 5-year periods for Range-wide Prairie Region (Garton 2012)

Parameter[1]	2005-12[2]	2000-04	1995-99	1990-94	1985-89	1980-84	1975-79	1970-74	1965-69
Leks counted	183	149	98	51	65	56	23	7	6
Average males/lek	8	13	8	12	19	32	85	195	137
Number of active leks	98	93	50	32	53	40	22	7	6
Percent active leks	53	62	51	68	82	71	94	100	100
Average males/active lek	16	21	15	17	24	45	88	195	137
Lambda - Annual rate of change	0.907	0.965	1.267	0.828	0.942	0.917	0.990	0.992	1.228
S.E.(Annual rate of change)	0.068	0.065	0.150	0.112	0.081	0.082	0.096	0.124	0.193

1 Averaged over years for each period.
2 Eight years of data in this period.

Even with this flaw in Garton's analysis, his research conclusion is that there is "*a general increase in lesser prairie chicken populations in the last half of the 1960s followed by a long term decline from the 1970s to mid 1990s when the population apparently stabilized at substantially lower abundance range-wide (50,000-100,000 compared to estimates around 200,000 during the 1970s and 1980s)...*"

It is likely that Garton is correct in stating that LPC populations have stabilized. However, Garton (2012) goes on to theorize catastrophic population failure based on insufficient data and the assumption that current conditions (severe drought throughout LPC) will continue unchanged:

*Parametric bootstraps of the probability of persistence of Lesser Prairie Chickens for each eco-regional population and the range-wide population reveal that only the sand sagebrush prairie region has a substantial likelihood of falling below quasi-extinction levels equivalent to effective population size of 50 (82 birds counted at leks) within 30 years but most eco-regional populations and the range-wide population have substantial likelihoods of falling below 500 (852 birds counted at leks) within 100 years as required for long term persistence" (*Garton 2012*).*

Garton (2012) showed "fu*ture projections of carrying capacity without substantial changes in key determinants of LPC population dynamics are slightly above 10,000 in 30 years and less than 1,000 in 100 years."*

Garton's projections are wrong.

Garton showed higher levels of short term risk and significant long term likelihood of dropping below the effective population thresholds for maintaining genetics of 50 and 500 individuals based on the above **assumption** of **no changes to key determinants of LPC population dynamics**.

What about the significant drought within LPC habitat within the recent past? Garton's projections were made during what Grisham et al. (2013) defines as the worst El Niño is history in portions of the LPC range. The recent El Niño climate phenomena disproportionately affecting LPC habitat during the LPC survey period Garton relied upon.

Garton's predictions were based on the incorrect assumption that there will be no change in a key determinant of LPC population dynamics – severe drought. Science does not support Garton's assumption.

Does Garton really believe that weather does not change and that the recent drought within LPC habitat will continue for the next 30 to 100 years?

Grisham et al. (2013) (see below) studied climate and its affect on LPC in New Mexico and Texas. Though those results contradict earlier publications including Garton (2012), Grisham's work appears to be ignored by USFWS. Could it be that USFWS feels too vested in their recent analysis and too pressured by court imposed time constraints to spend time to analyze Grisham's work?

Garton's analysis of LPC populations (2012) used short and long-term population viability targets based on the 50/500 rule as the basis for the quasi-extinction analyses, which is the effective population as it relates to genetic maintenance. As noted by Flather et al. (2011), **the 50/500 values are simply viability goals for maintaining genetically diverse populations; they provide "*little direct connection with extinction risk.*"**

Traill et al. (2010) attempted to determine a generalized minimum viable population number, much like the 50/500 rule, and reported that the evolutionary and demographic constraints on populations require minimum sizes to be at least 5,000 adults. However, Flather et al. (2011) reported on reviews they conducted of the viability analyses used by Traill et al. (2010) revealed that a huge range in minimum viable population estimations existed, finding that even estimates conducted within many populations varying by orders of magnitude.

They also reported on the limitations of population viability analyses (PVA's) to provide meaningful estimates of minimum population sizes. Flather et al (2011) stated that **estimates of extinction risk from PVA models were often imprecise, inaccurate, contingent upon threats currently acting, and affected by model structure, study duration and other uncontrolled factors** (Flather et al. 2011 referencing Beissinger and Westphal 1998). Flather et al. (2011) went on to note that PVA's were best used for ranking relative extinction risk, switching the focus of

these analyses away from the determination of a minimum viable population to emphasize the importance of PVAs for understanding the relative probability of persistence for populations in comparisons among management options.

Garton (2012) did not provide an estimated minimum viable population for LPC, but did provide the quasi-extinction probabilities for the range-wide population as well as for the ecoregional populations based on past population trends. They **projected continued losses** in population carrying capacity within the sand sagebrush and mixed grass ecoregions **if habitat impact conditions continue on their current trajectory. However,** we know that habitat impact conditions will change – they already have changed since Grisham, Garton and McDonald wrote their papers. During late 2013 and early 2014, the states with LPC began receiving above average rains and though the drought remains, **conditions are improving across parts of the LPC habitat (http://www.srh.noaa.gov/oun/?n=climate-drought).**

2. Review of McDonald et al. 2013

McDonald et al (2913) surveyed sage-grouse leks from helicopters over a 5 state region from sunrise until approximately 2.5 hours after sunrise between March 31 and May 3 in 2012 and between March 20 and April 21 in 2013.

McDonald et al. (2013) surveyed for LPC during one of the worst droughts in recent history as documented by Grisham et al. (2013). Grisham assessed the potential changes in clutch size, incubation start date, and nest survival for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico. Grisham stated that the "***2011 nesting season provides insight to how an extreme La Niña event and subsequent drought affects lesser prairie-chicken*** *reproductive ecology. From 15 October 2010 to 31 August* ***2011****, the total precipitation on the study site was only 2.46 cm (0.97 inches), constituting* ***the worst drought and warmest La Niña event on record****.*

The ***drought of 2011*** *was so severe that sand shinnery oak and grasses on the study site did not leaf out, eliminating nesting cover and subsequently delaying nest initiation (Li Z, Kafatos M , 2000) Interannual variability of vegetation in the United States and its relation to El Niño/Southern Oscillation. (Remote Sens Environ 3: 239–247. doi: 10.1126/science.242.4886.1640). Cover provides protection from predators and thermal stress, and when thermal cover is lacking, nests are exposed to the element (Grisham et al 2013).*

This is of concern, as ***lesser prairie-chickens appear to be particularly sensitive*** *to landscape alterations* ***(****Woodward et al. 2001); (Fuhlendorf et al. 2002) and* ***drought*** *Hamerstrom F, Hamerstrom F (1961).*

Drought is suspected to negatively influence prairie grouse through reduced growth of vegetation that provides nesting, roosting, and escape cover, and food (Merchant SS, 1982). Furthermore, there is evidence that home range sizes increase (Merchant SS, 1982 and Copelin, 1963) and ***recruitment is lower during drought years*** *(Merchant SS 1982). Home range size expansion during drought years may lead to localized abandonment, especially in fragmented landscapes. Furthermore, landscape alterations and management (e.g., herbicide treatment of shrubs, grazing systems) appear to influence resource selection, survival, and reproductive success of lesser prairie-chicken populations.*

For USFWS to use two years of McDonald's helicopter surveys with associated on-the-ground field verifications during a major drought as "trend" data violations the ESA, *Bennett vs Spear* and the Information Quality Act. Any conclusions USFWS reaches based on McDonald et al (2012) other than finding LPC populations need more study are arbitrary and capricious.

As Grisham et al. (2013) clearly shows – low LPC numbers in 2012-2013 were due to drought. Like many game birds, LPC are a boom and bust species.

The lek-count data reported in McDonald et al. (2013) is grossly inadequate to estimate population "trends" as a basis for management.

The lack of scientific validity in these data and the fact that LPC populations are known to fluctuate significantly over time makes a case for a long-term study but not the case for listing the LPC as threatened. It is impossible to discern any pattern in the data gathered by McDonald et al. (2013) that could be used to guide management actions at this time. **The data gathered by McDonald et al. (2013) during two years of field work is not scientifically defensible "trend" data**.

McDonald et al. 2013 qualified their report as follows:

"A*cquiring precise and unbiased estimates of population size requires either a complete census or probabilistic sample of subunits with which to infer population size (Johnson 2002); however, limited funding and staffing have often precluded implementation of these sampling designs. The result had been the development of population indices to monitor population trend or estimate a minimum population size.* ***The limitation of such data is its unknown relationship to population size*** *(emphasis added).* **..**

Population trends of LEPC have been monitored using spring lek counts since the 1940s. Survey effort and methods have varied over time, but lek data were the best available long term data set to assess trend. ***Breeding season sex ratio, detection probability, and lek attendance rates are not well understood*** *(emphasis added) (Behney et al. 2012). These factors, including variation in sampling methods, require several assumptions to be made when estimating the population size from lek count information (Walsh et al. 2004, Garton et al. 2011).*"

McDonald et al. (2013) recommend "that the 2013 survey design and methods be used for future monitoring of the size of LPC population and abundance of leks.

Population trend data for any game bird cannot be based on two years of data. The use of 2012 and 2013 LPC data collected by McDonald et al. to state the species is declining is bad science and bad public policy. What if the numbers where the opposite and 2013 population numbers were higher than 2012? Would USFWS stop the listing process?

Since LPC are cyclic, looking at a different set of years will show upward swings as often as the data shows downward swings (see Figure 2 below as an example of how game birds such as LPC fluctuate up and down over time). No one can look at two years of LPC data and state that they know the "population trend." Use of McDonald's 2012-2013 data as "population trend data" to

make any management of listing decisions would violate all scientifically accepted principles of population data analysis.

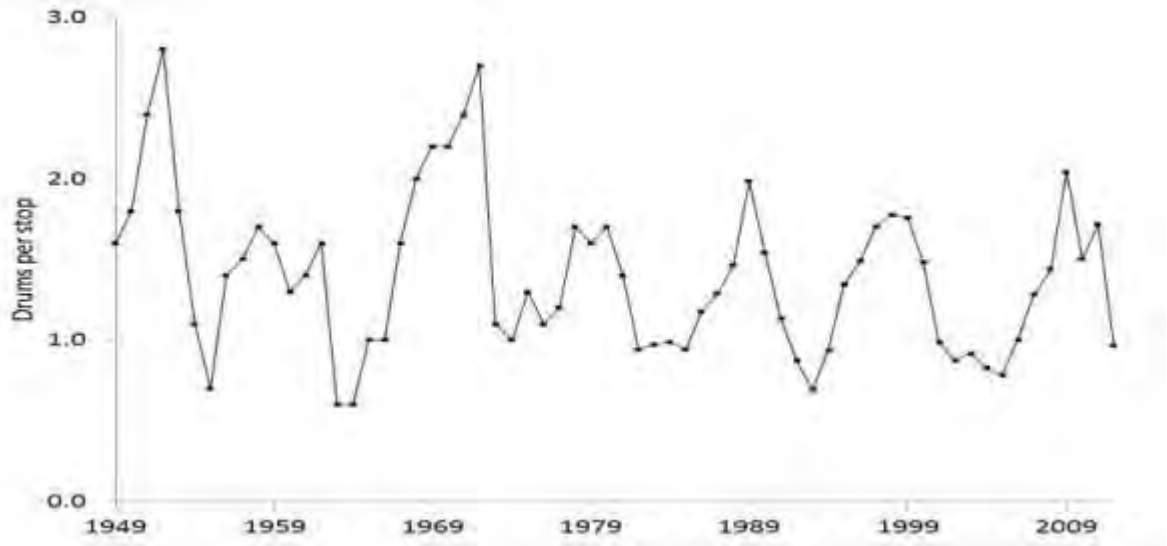

Figure 2. Example of peaks and valleys in game bird populations (based on rough grouse data)

Problems with McDonald et al. (2013)

- Lek and bird count data obtained by McDonald et al. (2013) were based on a single aerial survey each year for two years rather than the highest count obtained from 3 or more ground counts each year for two or more years. It has been shown that multiple counts are often required to ascertain a reasonable estimate of numbers of males attending leks (Beck and Braun 1980, Connelly et al. 2003, Walsh et al. 2004, Garton et al. 2011).
- McDonald et al. (2012) had a problem with one of the four ecoregions surveyed. The sand sagebrush prairie region ground count of leks gave a larger value than that obtained from the aerial surveys. McDonald et al. (2012) and Garton (2012) had to substitute the ground survey data for the aerial survey estimate.
- Garton (2012) made use of the 2012 aerial survey estimates of minimum population size for three of the ecoregions as the basis for reconstructing earlier population sizes.
- McDonald et al. (2013) surveys performed in 2012 and 2013 were completed during a severe drought throughout the area surveyed.
- The final year estimates form the starting points for all future projections of population abundance and as such could skew estimates of the probability of quasi-extinction (i.e., falling below a specified minimum abundance (50 adults or 500 adults under the classic 50:500 rule for short term and long term persistence from Franklin, 1980 and Soule, 1980). Garton (2012) noted that "*the shorter term "current" time period population estimates reported in the appendices and future projections using bootstrapping may have been more severely impacted by that final observation as they often give more pessimistic forecasts of probability of persistence when compared to those from the 3 long-term data sets.*"

3. Review of Grisham et al. (2013)

Grisham et al. (2013) assessed the potential changes in clutch size, incubation start date, and nest survival for LPC for the years 2050 and 2080 based on modeled predictions of climate change and reproductive data for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico.

Grisham et al. (2013) determined that "*the influence of drought and climate change on lesser prairie-chicken reproductive ecology has, to date, been largely overlooked. This is of concern, as lesser prairie-chickens appear to be particularly sensitive to landscape alterations and drought.*" They qualified their results to state that their "*assessment did not consider annual survival of adults, chick survival, or the positive benefit of habitat management and conservation, which may ultimately offset the potentially negative effect of drought on nest survival.*"

Grisham et al. (2013) noted that "*A key issue in conservation of lesser prairie-chickens in context of climate change is the lack of estimates for many specific vital rates and sufficient sample sizes.* ***Despite substantial efforts to conserve lesser prairie-chickens and their habitat, long-term studies that provide adequate <u>data to properly allow for predictive modeling</u> of the role climate change may have on the reproductive ecology of this species <u>are lacking</u>*** (emphasis added)."

<u>Conclusion</u>

A thorough analysis of LPC data collected to date clearly demonstrates that at this time in history there is inadequate data to scientifically predict LPC population trends or the probability of extinction. Garton (2012) and McDonald et al. (2013) both based the majority of their analysis on two years of helicopter surveys during a severe drought, underestimating LPC populations and overestimating the probability of extinction.

Conservation measures now in place will serve to increase LPC populations over time. In February 2014 the USFWS and the Western Association of Fish and Wildlife Agencies signed the Range-wide Oil and Gas Industry Candidate Conservation Agreement with Assurances for the LPC (LPC CCAA). The agreement is the result of longstanding cooperation between the Service and the five range states of the LPC—Texas, Oklahoma, Kansas, Colorado and New Mexico—to undertake conservation action for the species.

The Range-wide LPC Plan provides a comprehensive conservation strategy that is intended to conserve the species across its range. The Range-wide LPC Plan provides: 1) incentive-based landowner programs, and 2) a mitigation framework to reduce threats and provide resources for off-site conservation. The LPC CCAA incorporates the Range-wide LPC Plan's avoidance, minimization, and mitigation measures that address impacts from oil and gas activities on enrolled lands. Enrollment of lands into the LPC CCAA will generate mitigation fees, which will provide significant funds for the implementation of conservation actions under the Range-wide LPC Plan.

There is evidence of expansion of LPC into parts of the shortgrass ecoregion where they were not known to previously occur. In northwest Kansas, LPC have expanded back into some of their historical range and new areas where they were not known to previously occur due to the

establishing of Conservation Reserve Program (CRP) lands (Rodgers and Hoffman 2005). LPC populations are doing well in these planted fields with a generally expanding population (Garton 2012).

LPC usually experience either booms or busts in reproductive success (Hagen et al 2009). The "boom bust" reproductive strategy suggests that lesser prairie-chickens maximize reproductive efforts when conditions are optimal. For the Southern High Plains population, cooler, wetter springs maximize both food and cover for lesser prairie-chickens. Evidence suggests precipitation and temperature influence nest survival (Fields et al. 2006) and these variables will subsequently continue to influence nest survival in the future.

Until long term population trend data can be gathered and until the CCAA is monitored for 10 to 20 years, any consideration of listing the LEPC as threatened or endangered would be premature and based on a paucity of scientific data. A listing under the ESA would be scientifically and legally unsupported.

Darling Geomatics

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Literature citations available upon request

Center for Environmental Science, Accuracy & Reliability

DATA DO NOT SUPPORT THE PROPOSED LISTING OF LESSER PRAIRIE CHICKEN

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EXECUTIVE SUMMARY

CESAR'S review of the proposed listing of the Lesser Prairie chicken ("lesser prairie chicken" or "LPC") applies the clear direction of the Endangered Species Act (ESA) that listings be based solely on data and that the conservation efforts of states and local agencies be considered. We closely examined the references cited by the US Fish and Wildlife Service (FWS), published literature, regulatory documents, and readily available data. In addition, we performed an independent analysis of the past distributional history of the lesser prairie chicken to provide a deeper-time perspective, and commissioned independent peer reviews of the available population analyses.

Our review identified data that demonstrate lesser prairie chicken populations are increasing and are unlikely to be extirpated either locally or range wide in the foreseeable future. In addition, our review identified analyses that demonstrate lesser prairie chickens have not lost their genetic diversity and are not genetically isolated. These data offer empirical support for the conclusion that local and statewide conservation efforts are and will continue to be effective. **These two facts, both supported by data, are *prima facie* evidence that the lesser prairie chicken is not likely to become in danger of extinction in the forseeable future.**

Based on the information we developed, it appears that the FWS assumed population declines and loss of genetic diversity and used *post hoc* rationalizations to support listing based on speculative reasons for the non-existent declines. The best available data on population growth and genetic health demonstrate that the lesser prairie chicken is not in decline throughout all or a significant portion of its range.

In part, CESAR's mission, "…is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes…"[1] Accordingly, this report also addresses the threats identified in the proposed rule based on the FWS reliance on speculation, surmise and opinion. We believe that identifying those portions of the rule that fail to comply with the requirements of the ESA and related laws, regulations, and guidelines, will help improve this proposed rule as well as future rules.

In general, our review identified the following shortcomings in the proposed rule:

- The proposed rule fails to consider data and analyses demonstrating lesser prairie chicken populations are increasing and that genetic isolation has not occurred.

[1] http://www.bestscience.org/

- The conclusions in the proposed rule are not based solely on the best scientific and commercial data available as required by the ESA, but on an amalgam of opinion, speculation, and surmise.
- The proposed rule inaccurately implies that the states' ability to protect lesser prairie chicken through existing regulatory mechanisms is inadequate compared to that of the ESA.
- The proposed rule fails to accurately acknowledge the scope and importance of the voluntary conservation contributions made by states and local agencies
- The proposed rule is internally inconsistent; asserting that sufficient information on habitat needs is available to list the species but that there is insufficient data to identify the characteristics and location of the habitat essential for the conservation of the species.

The ESA is a powerful tool for conserving species. However, it has clearly articulated standards for decision-making, explicitly requiring data and consideration of local efforts in the listing process. This proposed rule fails to meet the basic requirements of a listing determination as articulated in the ESA.

BACKGROUND

ESA listing determination requirements

Instructions for listing determinations are included in Section 4 of the ESA. There are 3 primary requirements for a listing determination; the determination must be based *solely* on data,[2] the continued existence of the species must be threatened by one or more of the five listing factors enumerated in the ESA[3], and conservation actions of any State or political subdivision of that State must be considered.[4]

Data

The requirement that data support regulatory decisions is repeated throughout the ESA. This requirement includes listing, designation of critical habitat, and jeopardy determinations. The ESA does not require data for non-binding 90-day findings, allowing the use of 'information' rather than data. Neither does the Act require data for Recovery plans, which have no regulatory authority. However, the requirement for listing is specific, requiring that data be the *sole* determinant.

There is no provision in the Act that allows hypothesis, speculation, surmise, 'best professional judgment' or opinion to be substituted in the absence of data. The Supreme Court has affirmed this, stating:

"…The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise…"[5]

---

[2] Section 4(b) of the ESA states: "BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) **solely on the basis of the best scientific and commercial data available** to him after conducting a review of the status of the species ..." and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

3 Section 4 (a) GENERAL (1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence...

4 Section 4(b) of the ESA states: BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and **after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species**, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas

5 Bennett v. Spear (95-813), 520 U.S. 154 (1997)

Listing Factors

The proposed rule makes the determination that the lesser prairie chicken is likely to become in danger of extinction in the foreseeable future due to the following factors:

"…due to historical, ongoing impacts and probable future impacts of the cumulative habitat loss and fragmentation…"

"…The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events..."

"… Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels…"

"…These threats are currently impacting lesser prairie-chickens throughout their range and are projected to continue and to increase in severity into the foreseeable future…"

From these statements we conclude that the FWS identifies 3 of the five ESA listing factors as threatening the lesser prairie chicken:

(A) "*the present or threatened destruction, modification, or curtailment of its habitat or range*";

(C) "*disease or predation*"; and

(E) "*other natural or manmade factors affecting its continued existence*".

ANALYSIS

DATA

Analyses, based on data collected by the states, demonstrate that lesser prairie chicken populations are increasing and that the range-wide likelihood of extinction is very low. Further, published analysis demonstrates lesser prairie chickens maintain genetic diversity and do not demonstrate genetic isolation. The FWS had to rely on information other than data in order to list the lesser prairie chicken in view of the documented increasing populations and genetic health. As a result, the FWS failed to rely solely on data, instead using speculation, surmise, and opinion. The FWS failed to rely on the 5 factors enumerated in the Act instead using additional factors not intended by Congress to be used for listing determinations. The FWS failed to adequately consider the effectiveness of existing and planned conservation Finally, after discussing the habitat needs, and shortcomings of existing habitat for lesser prairie chickens at length and in depth in order to explain how habitat was the basis for declines in the species, the FWS claims it is not able to identify those physical and biological characteristics essential to the conservation of the lesser prairie chicken, and thus cannot designate critical habitat.

Data Demonstrate Lesser Prairie Chicken Populations are Increasing Range-wide with Low Extinction Probabilities

We identified two papers which examined the health of lesser prairie chicken populations. First is an *Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*[6]. Using population reconstruction from annual counts at leks, models of population growth can be fit and population parameters of growth and quasi-extinction probabilities can be estimated. The table below summarizes the findings of this analysis.

Habitat Type	Population Growth	Probability of Extinction
CRP-shortgrass	4.4% annually	2%
Mixed-grass prairie (KS, OK, TX)	7.0% annually	<0.0001%
Sand sagebrush prairie (KS and CO)	2.0% annually	48%
Sand shinnery oak (NM and TX)	5.1% annually	< 0.0001%
Range-wide	10.6% annually	< 0.0001%
Range-wide 2012.– Assuming a 50% decline in trend across the range	6.4% annually	3.3%

The best scientific data available indicate that range-wide there is a low probability of extinction within 86% of the species distribution. This population growth and high likelihood of persistence continues when 2012 population trends are assumed to decrease by as much as 50%.[7]

A peripheral examination of the data also demonstrates that population trends from 1980-1997 were declining at an average annual rate of 3.7%. After the species was made a candidate and significant conservation efforts were initiated, post candidate status population growth was 6.9% increase annually.

[6] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group*; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

7 See Appendix 2 for the complete analysis

The paper has not been peer reviewed, so CESAR engaged two independent academics to review the methods and conclusions. One reviewer opined that while the absolute numbers may not be precise, the populations are clearly increasing. The other reviewer did not offer an opinion. Both reviewers liked the idea of more data and more analysis which would provide more resolution as to what is actually going on with this species. The reviewers agreed that the analysis was useful, and neither reviewer identified fatal flaws in the analysis. Based on the agreement that the work was useful, and that no reviewer found fatal flaws, but rather suggested additional improvements, we believe that this site specific analysis is the best available science, and it is consistent with the requirements of the Act that data be the basis of listing determinations.

Lesser Prairie Chickens are not Genetically Isolated, and there is Evidence of Hybridization

A 2010 publication[8] examined the genetics of the Lesser Prairie-Chicken to assess whether habitat loss fragmentation and population declines were resulting in genetic isolation or loss of diversity. Populations across Kansas, Colorado, Oklahoma, and New Mexico were examined. Little genetic differentiation was found except for the population in New Mexico, which was significantly different from most other populations. There was, however, evidence of significant isolation by distance at the rangewide scale that could explain the divergence of the population in New Mexico, simply because it is geographically isolated. The study also found evidence for a post-glacial population expansion within the species, which is consistent with the historical niche model that we constructed.[9] What can also be gleaned from the genetic study is that despite an overall historic reduction in range size, and increase in degree of range fragmentation, there is as yet no evidence of decreased genetic variability, either among populations, or in the species as a whole, relative to other grouse, or to birds in general.

The proposed listing document acknowledges the existence of hybridization between greater and lesser prairie chickens. The level of hybridization at the junction of the two ranges identified in the rule is high enough to potentially lead to merging of the two species. Thus hybridization is indeed occurring and calls into question the validity of the two species. The two grouse are very similar genetically (Gutierrez et al. 2000) and grouse are well-known to easily hybridize. We suggest that the FWS has underestimated the importance of monitoring hybridization and the

[8] *Regional Variation In MTDNA Of The Lesser Prairie-Chicken*, Hagan et. al. (2010); The Condor 112(1):29–37

[9] See Appendix 3 and the discussion under climate change.

implications for the taxonomy of the greater and lesser prairie chickens.

Assuming Population Declines Is Inconsistent With the Data Requirements of the ESA

As discussed in the previous sections, the best available data demonstrate that the lesser prairie chicken is not likely to become in danger of extinction in the foreseeable future. While the FWS may prefer their expert opinion and interpretation of the information outlined in the proposed rule, the plain language of the Act does not allow the use of anything but the best available data.

However, even if the data demonstrating population increases were not available, the following discussion identifies the arbitrary nature of the threats determinations in the proposed rule as well as the failure to comply with Congressional direction that listing determinations be based *solely* on data.

Habitat Effects Are Not Based On DataFWS Admits there is a 'lack of data' on Prairie Chicken Habitat Requirements

The FWS states that designation of critical habitat is not prudent because there is insufficient information on habitat requirements and identifies:

"A specific shortcoming of the currently available information is the lack of data about:

(1) The specific physical and biological features essential to the conservation of the species;

(2) how much habitat may ultimately be needed to conserve the species;

(3) where the habitat patches occur that have the best chance of rehabilitation; and

(4) where linkages between current and future populations may occur. "

Further, the FWS states:

"Additionally, while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations."

We note that the lack of data supporting the listing decision and identified in this report is confirmed by the FWS in this statement. We agree with the FWS that there is insufficient data to identify the available and the specific habitat requirements of the lesser prairie chicken. The lack of data makes any pronouncement regarding the effect of particular activities and habitat configurations speculative. This lack of data also makes it difficult to determine the effects of habitat changes on the lesser prairie chicken and consequently impossible to determine what habitat is necessary to conserve the prairie chicken.

The proposed rule assumes the effects of habitat loss and fragmentation, and then presents a *post hoc* rationalization of other habitat related factors which the FWS surmises contribute to the decline of lesser prairie chicken.

The discussion on prairie chicken habitat changes is framed in the context of each 'threat' individually and independently. The reader is provided with a large array of discrete facts regarding prairie chicken behavior in relation to specific structures, but nowhere are there data that reveal the range wide effect of these identified threats. The rule isolates each potential threat to lesser prairie chickens and asserts population level effects for each of them but provides no data on the actual effect of the interaction of these perceived threats, and never provides the reader any context to assess the range-wide extent of the effects. That is, the actual effect of a potential threat is dependent on the particular context of the population in which it is being evaluated. FWS assumes that any threat, no matter what the additional circumstances might be, is the same throughout the range and across time. However, what might be a threat under some circumstances (e.g., during a drought) might not be a threat in a normal year. The FWS approach is not biologically defensible.

The proposed rule argues that anthropogenic[10] activities threaten the lesser prairie chicken with rampant local extirpation that threatens eventual extinction, with no data to support the assertion. The basis for the listing decision rests on two principal threats, habitat loss and fragmentation. With no supporting data or analysis, the proposed rule asserts that the principal habitat threats amplify the effect of myriad other anthropogenic activities. A number of other specific 'potential' anthropogenic threats are also identified as generically 'contributing' to the decline of the lesser prairie chicken due to its weakened state resulting from habitat loss and fragmentation. The FWS speculates these threats include conversion of grasslands to agricultural uses, encroachment by invasive woody plants, petroleum production, roads, and presence of manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings. Again, the listing is predicated on threats unsupported by data and despite that admission that:

"… while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations… '

This statement clearly acknowledges there are no data with respect to whether a particular feature is adverse, beneficial, or neutral.

The rule's treatment of the issue of avoidance of selected anthropogenic

[10] Human based

features is a good example. The proposed rule[11] states:

"…lesser prairie-chickens seldom nested or reared broods within approximately 177 m (580 ft) of oil or gas wellheads, 366 m (1,200 ft) of electrical transmission lines, 792 m (2,600 ft) of improved roads, and 1,219 m (4,000 ft) of buildings".

However, the proposed rule fails to acknowledge the citation that supports this observation of avoidance also notes that, **avoidance did not result in lowered nest success**[12], which is of course the underlying reason for concern. Implicit in the FWS identification of avoidance as a threat is the surmise that lesser quality habitat was used and nest failures resulted, causing harm across the range of the lesser prairie chicken. The omitted data demonstrate the danger in relying on surmise. The FWS failed to consider that the cited literature did not examine what contributing effect other factors interacting with the structures may have had. The ESA requires the FWS to provide or rely on data that demonstrate how populations are reduced by this behavior and how the results of the study apply to all (or essential or significant portions) of the various habitats in use by the species.

Thus, we suggest that it is premature to extend an individually identified and isolated threat to the entire species. That is, suggesting that one factor (e.g. vertical structures) is a threat, without any observed adverse effects and without consideration of other co-relevant factors, such as location or type of habitat, degree of isolation, population size, whether the population was recently impacted by drought, or any other pertinent factor, risks failing to accurately identify the real threats.

The following section discusses the specific and general threats related to habitat identified in the proposed rule, the data supporting the existence of the threat, and the data supporting its population level effects.

Habitat loss and Population

The lack of early data on lesser prairie chickens and their habitat makes it difficult if not virtually impossible to make valid comparisons of historic and present habitat. Fortunately, such historic comparisons are not a consideration in the assessment of threats for listing under the ESA. The ESA requires identification of:

*"the **present or threatened** destruction, modification, or curtailment of its habitat or range"*

The FWS takes the position that substantiating population declines is unnecessary to list a species. The FWS asserts that measurement of the threats is all that is necessary. It is, however, necessary to be able to measure, in terms of data, either habitat loss and its population level effects or population changes. In the case of the lesser

[11] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73853
[12] Pitman et al. (2005)

prairie chicken, precise ground and aerial surveys (e.g., the States and Western Assoc. of Fish and Wildlife agencies) are available. Furthermore, states have implemented new and more accurate survey techniques which facilitate understanding population level responses over time. There is little doubt that the current range of the lesser prairie chicken has changed from that of its historic range[13] [14] but whether it's 25%, 50% or 95% is irrelevant; we know approximately how many birds exist today and where most of them live. The goal of the listing determination is to determine whether the remaining populations are increasing decreasing, or stable, have adequate habitat, that the existing habitat is sufficiently stable, and if not, to assess the species and the threats to the habitat to determine whether the species qualifies as threatened under the factors identified by Congress.

In the case of the lesser prairie chicken we have access to a record of the near-term habitat amounts and population changes in occupied habitat thanks to the aforementioned aerial surveys supported by the states. These aerial surveys have provided increased accuracy in population and habitat monitoring. However, these changing survey techniques, while leading to more accurate estimates, inhibit direct comparisons across time, requiring instead that changes be measured using sophisticated statistical techniques.[15] The analysis of the current population data demonstrates increasing populations and low extinction probabilities.

Lesser Prairie Chickens are not Threatened by Habitat Fragmentation

The FWS own data and analysis, referenced in the rule, demonstrate that habitat beyond the minimum required to ensure the continued existence of the lesser prairie chicken is available. A FWS spatial analysis identified 71 patches that met the listing determination's arbitrary minimum size of 10,117 ha (25,000 ac)[16] within the five state estimated occupied range. This satisfies the statement in the proposed rule that a minimum of four strongholds of 10,117 ha (25,000 ac) distributed across the ecological diversity of the species are necessary. **These data demonstrate that despite the existing fragmentation throughout the occupied portion of the range, the rule's arbitrary minimum stronghold threshold is met. This is confirmed by the data showing population growth throughout the range**[17].

[13] See Appendix 1 for a discussion of the historic range figures used by the FWS and their applicability to the listing determination.

[14] The same could be said for virtually any species living in the United States at the time of European settlement.

[15] The Hagan 2012 analysis of lesser prairie chicken populations is one example; another, Garton et. al. 2010 was used by the FWS, it examined disparate sage grouse population measurements.

[16] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73836

[17] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser*

The discussion of habitat fragmentation included in the rule is confusing and misleading. The information is presented without context and without a discussion of population level effects. In the following paragraphs we elucidate habitat fragmentation in the context of lesser prairie chicken life history adaptations and their environment.

The FWS states in the conclusion of the proposed listing:

'…as a result of the significant reduction in numbers and range of lesser prairie-chickens resulting from cumulative ongoing habitat fragmentation, combined with the lack of sufficient redundancy and resiliency of current populations, we conclude that the lesser prairie-chicken is currently at risk of extinction or is likely to be in danger of extinction in the foreseeable future.'

The question of habitat fragmentation and its consequence is key to the FWS determination that listing of the greater prairie chicken is supported. However, the basis for the determination that the existing fragmentation is sufficient to have population level effects is not supported by the data cited by the FWS.

Specifically, the FWS makes several conflicting statements regarding area of habitat needed for successful lesser prairie chicken populations. First, the proposed rule states,

"…Although a minimum size has not been established, studies and expert opinion, including those regarding greater prairie-chickens, suggest that the minimum parcel size is likely to exceed 100 ha (250 acres)..."[18]

Later the[19] proposed rule concludes that,

"…conservation and eventual recovery of the lesser prairie-chicken should consist of the establishment of secure strongholds or core areas of high quality habitat that are at least 10,117 ha (25,000 ac) in size and support 6–10 active leks, each being used by at least 6 males..."

The proposed rule does not provide the data used to determine that a home range two orders of magnitude larger than the minimum is necessary. Home ranges for lesser prairie chickens vary by habitat type and environment. This is because each of the life history components of lesser prairie chicken vary greatly as the birds adapt to available habitat and other environmental aspects. Leks, or the display grounds of males where females come to mate, can be quite small. It would not be useful to consider the area needed for a lek by itself, as it does not include nesting, feeding and roosting sites. However, it is useful to note that, leks are also found on habitat the rule assumes is not available for lesser prairie chickens such as, "…abandoned

Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[18] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856)
[19] Id., p. 73836)

oil-drilling sites (oil pads) with little or no vegetation, unimproved roads with little traffic, areas treated with shrub-specific herbicide, recently burned areas, heavily grazed areas (e.g., stock tanks, mineral licks), and cultivated fields adjacent to grassland…"[20]. Hence, lek placement is adaptable and areas identified as unsuitable at present, may in fact be used in the proper circumstances. Because of the adaptability of lesser prairie chickens it is not advisable to make broad surmises about habitat availability and needs included in the proposed listing rule, in lieu of actual data.

There are different ways to estimate the area of habitat needed for successful lesser prairie chicken populations and no agreed-upon answer. This is due to the fact that there are separate areas for nesting, feeding and the lek itself, all of which might be fragmented by interspersed areas of unsuitable habitat (either natural or human made), in the native landscape. The proposed rule cites several studies that evaluate the area required for home range and a population. Home range estimates range from 21 ac to 4806 ac, with many values in between. The huge variance in range area is the result of reports of home range by season (i.e. breeding less than wintering), different drought conditions, and availability of food. At the population level, there is no evidence on how many birds or leks would be necessary to maintain population viability. As a consequence, estimates reported by FWS show enormous variation, from 1,012,140 ac to 2,530 ac. Other figures include 7,900 ac, 25,000 ac, 12,000 ac, 72,649 ac, and 24,710 ac. In violation of the requirements of the ESA, **the FWS does not include the data that support the determination to use the 10,117 ha (25,000 ac), nor does it explain the basis for the determination**.

The FWS references a spatial analysis they conducted to determine the extent of fragmentation within the estimated occupied range of the lesser prairie-chicken.[21] Infrastructure features such as roads, transmission lines, airports, cities and similar populated areas, oil and gas wells, and other vertical features such as communication towers and wind turbines were delineated. These features were buffered by known avoidance distances and compared with likely lesser prairie- chicken habitat. **The analysis revealed 71 patches that exceeded the minimum 10,117 ha (25,000 ac) range that exist within the five- state estimated occupied area**. Of the patches over 10,117 ha (25,000 ac), all were impacted by fragmenting features, just not to the extent that the patch was fragmented into a smaller sized patch. Thus, even if, as the rule states:

[20] Hagen et al. 2004

[21] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856; The analysis is referenced but not included in the citations, so it is not possible to assess its validity.

"… a minimum of four strongholds will be needed, distributed across the ecological diversity of the species, in order to secure the status of the species."[22]

There are several times that many patches currently in existence.

Edge Effects Due to Habitat Fragmentation

It is well known that in some ecosystems increasing linear amounts of habitat edge, as a consequence of habitat fragmentation, present threats to some species. For example, birds nesting in forests are negatively impacted by nearby open-country edges because it facilitates access by habitat-edge nest predators such as raccoons (*Procyon lotor*), and provides access to nests by avian brood parasites such as the ubiquitous brown-headed cowbird (*Molothrus ater*). The proposed rule contains numerous citations referencing the negative effects of edges that are apparently supposed to illustrate their danger to lesser prairie chickens; however, none of the citations address the effects of edges on lesser prairie chickens[23]. The proposed rule also states that typical native lesser prairie chicken habitat is a mosaic of different habitat patches. We note that each of the patches within the native mosaic creates an edge[24] [25]. Thus, the lesser prairie chicken's coexistence with edge effects in their native habitat indicates that they are part of the native landscape in which lesser prairie chickens evolved.

The FWS suggests that edges and habitat fragmentation will make it difficult for lesser prairie chicken individuals to find leks. The rule provides no data, and no evidence to support the statement. As such, it appears to be purely speculative. Further, given that leks are often used traditionally for years, and that breeding and feeding grounds are typically nearby, the notion that a lesser prairie chicken would be unable to find an active lek is scarcely credible. It is also worth noting that leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine the birds' selection of a new lek site. Surely a species would not have evolved a reproductive system that randomly makes it impossible for females and males to find each other at mating season.

[22] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[23] Id., pp. 73851-57
[24] Id., pp. 73852
[25] "Consequently, blocks of habitat that collectively or individually encompass multiple successional states that comprise tall grasses and shrubs needed for nesting, and are in proximity to more open grasslands supporting forbs for brood rearing, and are combined with smaller areas of short grass and bare ground used for breeding, support all of the habitat types used by lesser prairie- chickens throughout the year." Federal Register, Vol. 77, No. 238 , December 11, 2012, pp. 73852

Anthropogenic Changes to Lesser Prairie Chicken Habitat

This statement in the rule appears to be opinion.

'The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events…."[26]

The FWS provides no data or analysis to support the statement, and has earlier admitted there are no data on historic habitat or populations. Nevertheless, the proposed rule contains a list of activities which 'may' have an adverse effect on lesser prairie chicken, based on these assumed impacts. The information provided in the proposed rule consists of lists of areas where these 'threats' exist within lesser prairie chicken habitat and speculative mechanisms for their adverse effects. However, no data are provided to substantiate the assertions that the adverse effects attributed to these threats actually exist or how they affect lesser prairie chicken populations' extinction risk. We recognize that "extreme weather events" was intended to be only one possible example of a stochastic event, but an extreme weather event that would wreak such widespread damage would likely be destructive even to native species at peak abundances.

[26] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73883

Livestock Grazing, Water and Habitat Conversion

Livestock

The FWS surmises that because livestock grazing occurs over such a large portion of the occupied range, it must be a threat. Accepting the idea of adverse effects of livestock grazing on a species whose historic habitat included seasonal and widespread overgrazing by bison is counter-intuitive. The proposed rule implies that the pattern of grazing today is different, but does not quantify those differences or the adverse consequences. The rule also identifies other adverse effects such as nest trampling, but provides no information on the extent to which this occurs or the population level effects of such occurrences. Identification of livestock grazing as a threat to the species is purely speculative. In fact, the rule states:

"…Although documented, the significance of direct livestock effects on the lesser prairie-chicken is largely unknown. Detailed, range wide information is lacking on the extent, intensity, and forms of recent grazing, and associated effects on the lesser prairie-chicken. "

Additionally, the rule fails to account for the availability of water from stock tanks as a positive effect of grazing cattle. The rule cites research documenting the regular use of stock tanks by both male

and female lesser prairie chickens. The FWS suggests that stock tanks,

"…may be particularly important during periods of drought."[27]

The rule immediately discounts its importance stating that lesser prairie chickens do not require water speculating that dew is a 'likely' source:

"Lesser prairie-chickens likely rely on food sources and consumption of dew to satisfy their metabolic moisture requirement but will use surface water when it is available."

While the rule admits beneficial aspects of a ready source of water to the species, it fails to consider it in assessment of the effect of livestock grazing:

"Little is known regarding the specific water requirements of the lesser prairie chicken, but their distribution does not appear to be influenced by the presence of surface water."

"Total annual precipitation across the range of the lesser prairie-chicken varies, on average, from roughly 63 cm (25 in) in the eastern portions of the historical range to as little as 25 cm (10 in) in the western portions of the range. Consequently, few sources of freestanding surface water existed in lesser prairie-chicken historical range prior to settlement."

Agricultural conversion

The proposed rule states that agricultural conversion adversely affects lesser prairie chicken. However, the statement is only partially accurate. The cited research notes that lesser prairie chickens commonly forage in agricultural crops such as grain sorghum, corn, and other grain fields adjacent to native pasture from late autumn through early spring and that alfalfa is an important food source for pre-nesting females and lekking males in southwestern Kansas. The citations also reported that maximum numbers of lesser prairie chickens were found in areas in which 5-37% of the landscape was planted to grain sorghum using minimum-tillage techniques. The citations used by FWS in the proposed rule also note that recently, conversion of grass lands to agriculture has slowed, as the number of hectares per year converted has not increased. The proposed rule provides no data to substantiate the statement that increases in agricultural conversion continue to occur. Neither does the proposed rule make any attempt to assess or quantify the benefits to lesser prairie chickens of increased food sources from agricultural crops, the percentage of no-till agriculture or of the crops that provide food for lesser prairie chickens. The multiple variables involved in assessing the effect of agricultural conversion illustrate the speculative nature of sweeping assumptions about the effect of any activity on lesser prairie chicken habitat.

[27] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843

Human encroachment: energy production and transmission , fences, roads

The proposed rule lists several citations that report there are indications that human structures influence lek placement. The proposed rule includes wind turbines, energy transmission lines, power poles and lines, oil rigs, fences and roads in this category. The proposed rule posits that the vertical presence in the lesser prairie chicken landscape is in and of itself a threat. The threat is predicated on research that found lesser prairie chickens avoided these structures.

Specifically, Pitman says that leks are farther from anthropogenic structures than expected by chance. Pruett et al. (2009) found that lesser prairie chicken tended to avoid roads and power lines. Hagen (2011) noted that, "Monte Carlo simulations of expected distances indicated that the nearest 90% of lesser prairie chicken centers of use were farther from anthropogenic features than would be expected at random." However, as noted elsewhere, there are no data that this avoidance results in reduced nest success or reduced populations. Pitman et al. (2005) measured distances from nests to various anthropogenic features, and found:

"distances to the features were not substantial predictors of apparent nest success. Grass height, sagebrush plant density, and sagebrush height were the most important vegetation characteristics influencing nest success."

Further, based on the narrow reach of the supporting research, it is only surmise that structures have an adverse effect, since the effect of other interacting features, such as whether it was a drought year and the placement of the structures in relation to the lesser prairie chicken preferred activity for the site have not been evaluated.

The proposed rule speculates that human activities nearby leks might interfere with the transmission of male vocalizations ("booming") on the leks, thereby preventing females from finding the leks.[28] This speculation is inconsistent with what we know of lesser prairie chickens. First, as discussed above, leks are relatively long-lived, and it is unlikely that there are females or males in the local population who are unaware of their location and active status. Second, leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine their selection of a new lek site, but this behavior does not appear to affect the ability of leks to be found during mating season. Finally, a characteristic of lesser prairie chicken habitat is frequent wind, which abates sounds reducing the effects of surrounding noise. Nevertheless, the

[28] Federal Register, Vol. 77, No. 238 , December 11, 2012, p.73839

rule relies on the findings of a paper[29] which addresses the effect of noise on a flycatcher, warbler, sparrow and a vireo, all small songbirds, and no open country ground nesting game birds whose environmental requirements would more closely mirror those of lesser prairie chickens. Accordingly, the study, although important in its own right, is irrelevant to the lesser prairie chicken as the tremendous differences in the ecology of the species involved preclude drawing any inferences related to lesser prairie chickens. Thus, there are no scientific data to indicate that noise is a threat to the lesser prairie chicken.

Collision mortality

The proposed rule concluded that:

"power lines and unmarked wire fences are known to cause injury and mortality of lesser prairie-chickens, although the specific range wide impact on lesser prairie chickens is largely unquantified."[30]

The statement is based on a study which demonstrated that statistically, the effect of collisions was insignificant. [31] The rule identifies data from 1999 to 2004, in which researchers recovered 322 carcasses of radio-marked lesser prairie-chickens in New Mexico, Oklahoma, and portions of the Texas panhandle. The percentages of documented lesser prairie-chicken deaths from collision were estimated to be 42 percent in Oklahoma and 14 percent in New Mexico. Based on the information in Table 2 of the proposed rule, there were roughly 10,000 individuals in the three states during this time interval, and therefore, during this period, there were approximately 60,000 potential encounters. Therefore, the 14% to 42% of 322 birds (45 to 135) that died via collisions amount to less than 1/10 of one percent of the population (0.1%). Therefore, the available data indicate that although it would be highly useful to put markers on the top row of fences especially near leks, collision mortality is relatively insignificant factor.

Disease and Predation

The proposed rule states:

"The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events. Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels"

Predation

Although in the section on predators, FWS plays down the role of predators, throughout the proposed rule, there are repeated assertions that diverse threats increase predation. These discussions ascribe a role to predators that will result

[29] Francis et al. (2009)
[30] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73863
[31] Patten et al. (2005b)

from existing and planned towers serving as perches for raptors. For Example, FWS states that lesser prairie chickens avoid vertical structures as "presumably a behavioral response that serves to limit exposure to predation." The proposed rule cites a long term study in Oklahoma.[32] In that study, they identified roughly 43 carcasses out of a total lesser prairie chicken population of 3,000.attributable to raptor depredation.[33] Thus only a handful of birds were killed by raptors. The authors of this study stated "We have no reason to believe that lesser prairie chicken populations are being impacted severely by predation."[34] In a different study Behney et al. (2012, p. 294) "suspected that mammalian and reptilian predators had a greater influence on lesser prairie chicken mortality during the breeding season than raptors." Yet, in their conclusion the FWS ignores these data and opines that predation is a threat.

There are no data that support the speculative statements in the proposed rule that towers would provide roosts for ambush-style raptors. Most raptors such as large hawks, hunt from the air. A major avian predator, the Great Horned Owl, likely approaches low to the ground during crepuscular periods, and perching on a tower might make it visible. Only documented depredation where the species of raptor and hunting method were recorded would provide this information. Here again, the FWS lack sound or even reasonable scientific data on the effects of towers on increasing predator pressure. It requires observations over time, measuring the rate at which lesser prairie chickens are taken by avian predators at leks both with and without nearby towers or other vertical structures. And most importantly, one would have to demonstrate the assertion the depredation from raptors was additive and not compensatory. That is, as FWS noted, lesser prairie chickens evolved with a suite of mammalian and avian predators. Only if some new source of predation occurred that resulted in take of individuals over and above natural levels, would depredation be relevant, and the proposed rule presents no data empirical or otherwise to support this conclusion.

Disease

The FWS states in the proposed rule:

"…There is no information that indicates parasites or disease are causing, or contributing to, the decline of any lesser prairie-chicken populations, and, at this time, we have no basis for concluding that disease or parasite loads are a threat to any lesser prairie-chicken populations. Consequently, we do not consider disease or parasite infections to be a significant factor in the decline of the lesser prairie-chicken…"

[32] Wolfe et al. (2007) who conducted a long term study from 1999-2004.
[33] Table 2, FWS 2012
[34] Wolf et al. (2007: 101)

The proposed rule then goes on to state, that if populations continue to decline or become more fragmented, even small changes in habitat abundance or quality could have more significant consequences. The implication is that there would be a marginal increase in disease within the population driven by habitat changes. There are no data to support an assertion that disease will increase as habitat loss or fragmentation occurs, if the statement were supportable, the putative loss in habitat which this rule surmises, has already occurred and should have resulted in some measurable increase in disease over time. Such an increase is not recorded or even remarked. In any event, if populations decline or are sparse, diseases that are density dependent would have difficulty becoming a major threat.

Climate Change

The proposed rule identifies global warming and potential extreme weather events as a threat to the species. The rule assumes that warming will occur (as opposed to some unspecified climate change) and concludes that as a result, habitats will dwindle and further compound the putative negative effects of habitat fragmentation. However, many climate projections predict that species ranges will shift, not shrink and in fact, conditions for some species might improve.

Changes in species' range sizes are ubiquitous, and do not automatically imperil their continued existence. For example, during the last Ice age, known as the Last Glacial Maximum (LGM; 21,000 years before present), southward extending glaciers pushed many species into small southerly isolated habitat patches (refugia), where they survived for thousands of years, subsequently expanding as climate shifted again.

CESAR used a niche model to examine the current and past distribution of lesser prairie chicken (Appendix 3). Our work demonstrates that the lesser prairie chicken was one of those species which was distributed in a fragmented series of habitat patches south of the current range during the last glacial maximum, 21,000 years ago. Clearly the species survived this displacement and fragmentation, and as climate conditions ameliorated post glacial retreat, they followed their northward-moving habitats to where they are today. Thus the species has survived previous significant climate changes and has the potential to survive major, glacial-scale changes in earth's climate and still prosper. [35]

The FWS provides no data to substantiate a conclusion that a species which has weathered significant climate change and persisted over 21,000 years is not equipped to survive and adapt to current climate change.

[35] For a more in-depth discussion of the analysis, see Appendix 3

Adequate Regulatory Authority Exists to protect the Lesser Prairie Chicken at the State and Local Level

As part of our review of the proposed listing rule, CESAR lawyers examined the existing state and local protections for the lesser prairie chickens. We found that each state had its own comprehensive scheme for protecting species and their habitats. These protections, for the most part, went far beyond the narrow protections of the ESA encompassing wildlife and wildlife habitat protections.

Benefits of ESA Listing

The proposed rule states that the ESA provides protection beyond that which state and local agencies provide. This is only conditionally true. The ESA protects listed species by requiring federal agencies to avoid jeopardizing the continued existence of the species, prohibiting the 'take'[36] of listed species, and by protecting designated critical habitat. The FWS in the proposed rule implies that listing provides the ability to protect habitat on private property, is the only source for recovery planning and increases funding available for the conservation of lesser prairie chickens.

The habitat protections provided under the ESA largely flow from the designation of critical habitat. The protections apply only to that habitat which has been designated as 'critical'. The protections are further limited to the subset of critical habitat which is affected by a federal agency action. So while much private habitat can be designated as 'critical habitat', in fact it is not protected under the ESA unless a federal agency action has an effect on it. With respect to the lesser prairie chicken, this distinction is moot as the FWS has declined to designate critical habitat as 'not prudent", due to the lack of data related to the species habitat requirements.

The prohibitions against take protect the species immediate habitat if its modification or destruction leads to the death of an individual member of the species. The requirement that federal agencies consult with the FWS to ensure their actions do not 'jeopardize the continued existence of the species' allow for take as long as jeopardy does not result.

While listing of a species results in a requirement to develop a recovery plan, these plans are developed to the maximum extent practicable and there are no regulatory requirements attached to the plan. Recovery plans are aspirational documents, the ESA

[36] The Act defines take as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct..." The word harm has been interpreted to include habitat modification, which foreseeably causes the actual injury or death to a listed species. The FWS has asserted the ability to regulate habitat under this provision and consequently resists designating critical habitat. The courts have disagreed with this interpretation, pointing out that simply protecting against habitat alteration that actually kills a species is not preservation of the ecosystem upon which a species relies.

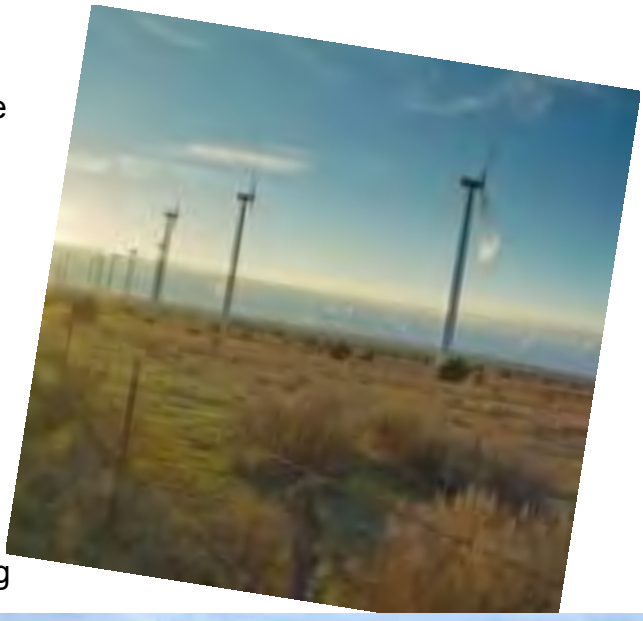
imposes no requirements for scientific rigor to their contents, such as requiring them to use the 'best scientific and commercial data available'. Further, any group can and has developed recovery plans. The FWS has developed Recovery plans, individual states have developed recovery plans, and working groups have developed recovery plans. The ESA is not the sole generator of a recovery plan.

The ESA provides no dedicated funding for listed species.[37] While it is possible to argue that if a species is listed the probability of funding increases, the evidence is unpersuasive. With nearly 1,500 listed species, one would expect all available wildlife research and conservation funds would be used to address those species. Instead, funding for wildlife conservation, recovery, and research is not devoted solely to endangered species, much is still available for unlisted and unregulated species.

Realistically listing of a species, assures federal agencies are required to review their actions in the context of the ESA, and to a limited extent those requirements extend to private lands affected by federal agencies.

Generally, a listing under the federal ESA listing does not necessarily:

- Protect habitat on private property;
- Provide access to dedicated federal funding;
- Result in a recovery plan



[37] We contrast this with the affected States which individually provide state funds for wildlife conservation.

Existing Federal Agency Regulatory Protections

The FWS admits that the lesser prairie chicken cannot be fully recovered on federal lands, which only support about four percent (4%) of the species' overall range. The five states where the majority of the lesser prairie chickens are found (primarily on private property, not federal lands) have significant state, county and local laws and regulations in effect to protect the lesser prairie chicken.

Where federal lands are involved, we note that in many cases federal agencies have taken voluntary actions to ensure that they consult with the FWS whether or not a species has been listed. These agencies include the Forest Service and the BLM. These two agencies have responsibility for managing millions of acres. These agencies have formally designated prairie chickens and their habitats as species for which their respective management plans will take special consideration. [38] These management plans are binding, and failure to adhere to their conditions can be challenged in court. [39] There is no evidence that the agencies are routinely ignoring the requirements of their management plans for lesser prairie chickens.

The voluntary consultation by federal agencies provide protections that go beyond what is required by the ESA as the agencies land use plans have a standard that manages the lands to recover or enhance wildlife and habitat. A consultation under the ESA requires only that the federal agency, avoid 'jeopardizing the continued existence of the species', or the 'destruction or adverse modification' of its critical habitat.

FEDERAL AGENCY PROTECTION[40]	ESA PROTECTION INCREASE
Bureau of Land Management • Environmental assessments required for all major activities; • Early consultation as to presence of species in project area;	None. BLM Land use plans[41] for the lesser prairie chicken habitat are complete. These plans are based on voluntary consultation with the

[38] The section on conservation actions includes details on the conservation actions undertaken by these land management agencies.
[39] Western Watersheds Project v. Ken Salazar, Secretary, Department Of The Interior, Case No. 4:08-CV-516-BLW, Document 131, Memorandum Decision And Order. http://www.advocateswest.org/sites/default/files/bulletin/Victory%20in%20First%20Round%20of%20BLM%20RMP%20Litigation/Order%20granting%20WWP%20Motion%20for%20Summary%20Judgment.pdf
[40] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[41] http://www.blm.gov/flpma/FLPMA.pdf

• Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Duty to protect and restore habitat from invasive species; • Guidelines for energy development; • Best management practices for energy development "approved" by FWS • Duty to create Resource Management Plans; • Duty to conserve "candidate" species and sensitive species designated by individual states; • Designated Area of Critical of Environmental Concern (ACEC) for lesser prairie chicken	FWS as though the lesser prairie chicken were listed under the ESA.[42] The requirements in the land use plans are based on a standard to restore or enhance habitat conditions, the ESA simply require that federal agencies: 1. Avoid jeopardy, 2. Avoid destruction or adverse modification of habitat. Federal lands controlled by BLM and the USFS managed under provisions that already provides lesser prairie chickens and their habitat enhanced protection. Federal lands controlled by BLM and the USFS have already agreed to voluntary consultation with the FWS on the lesser prairie chicken, whether it is listed or not; Current federal land management practices provide for management, enhancement, and recovery of habitats used by lesser prairie chicken, rather than just avoiding jeopardy. Each of the states with lesser prairie chicken habitat prohibit take either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[42] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

Department of Agriculture • Duty to protect and restore habitat from invasive species; • Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Environmental assessments required for all major activities;	No additional habitat protections would be provided, first because the listing does not designate critical habitat, second because the land management agencies manage to a restoration/enhancement standard which is higher than the ESA 'avoid jeopardy' and no destruction or adverse modification standard. USFS land use requirements for lesser prairie chicken are based on voluntary consultations with the FWS and a standard to improve habitat conditions[43]. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[43] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

State and Local Regulatory Protection

The five states with lesser prairie chicken habitat have significant protections in place for wildlife in general, allowing them to protect prairie chickens and their habitat without federal authority. Each state has its own Endangered Species Act and Colorado has listed the lesser prairie chicken. Some states have identified it more specifically with a designation indicating it is a species of special concern. All the states identify it as a game species and have statutes which provide for penalties for taking under anti-poaching laws. In addition, each of the States and their associated local government have the authority and expertise to protect wildlife habitat generally and specifically, whether it is on government or private land.

The following is a cursory review of applicable law which should be considered illustrative rather than a comprehensive list.

In making comparisons between the ESA and local protection it is important to note that ESA protections are limited to federal lands, and those critical habitat lands which are affected by a federal agency action. While the FWS may prefer their ability to protect the species, there is no indication that a lack of regulatory authority is hampering the states from protecting lesser prairie chickens. The states bring their own expert agency status to the protection of species within their jurisdiction, and each state has identified a commitment to protection, restoration, and enhancement of wildlife resources. There is no basis for asserting that state expertise or authority is lacking and, as noted earlier, increasing populations support a conclusion that state and voluntary conservation efforts are having a beneficial effect.

Colorado, Kansas, New Mexico, Oklahoma and Texas already have flexible laws and regulations in place to effectively deal with changing conditions to prevent depletion and waste of wildlife resources. Further, the documented policies of the federal land use agencies whose actions most impact the lesser prairie chicken and its habitat, currently identify the lesser prairie chicken as a species for which special management and protection is afforded even in the absence of an ESA listing. In light of the prohibitions of take under anti-poaching laws that apply to the lesser prairie chicken, listing under the ESA will only criminalize accidental take of lesser prairie chickens.

Existing laws at the state, county and local levels have the authority to protect and manage activities on state, public and private lands with the actual or potential benefit to the lesser prairie chicken. The service candidly admits that only about four percent (4%) of the species' overall range occurs on federal lands and that the lesser prairie chicken cannot be fully recovered on federal lands alone. Fortunately, there are adequate state, county and local laws and regulations currently available in Colorado, Kansas, New Mexico, Oklahoma and Texas to protect the lesser prairie chicken.

The following chart summarizes current protections provided to the lesser prairie chicken on a state-by-state basis and identifies any marginal increase in protection provided by the ESA[44].

STATE	ESA PROTECTION INCREASE
Colorado • Species listed under the state ESA and take is prohibited. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Prohibits unauthorized 'take' of wildlife, whether listed or not • Provides dedicated funding for wildlife and habitat. • Goal is for all wildlife to achieve self-sustaining population; • Wildlife laws are enforced with civil and criminal penalties.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Oklahoma • State has authority to enter private lands for purpose of controlling Red Cedar and other invasive plant species; • Dedicated funding for wildlife habitat restoration activities; • Protects all wildlife from illegal "take"; • Wildlife laws are enforced with civil and criminal penalties; • Provides classification for "sensitive species" such as lesser prairie chicken. • Provides protections intended to achieve self-sustaining wildlife populations. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Comprehensive regulation of energy development and natural resource development industries.	ESA provides no ability to control activity on private land unless it is affected by a federal agency action. The ESA would criminalize accidental take.

[44] A detailed chart can be found in Appendix 5.

• Classifies lesser prairie chicken as a game bird ad protects it with anti-poaching laws.	
New Mexico • Dedicated funding source for wildlife protection and promotion; • Conservation Services are available for management and enhancement (including research and conservation actions) of wildlife and habitat; • Educational publications on wildlife and habitat related conservation issues; • State requires studies to be conducted to determine the status and survival requirements of threatened or endangered species. • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Kansas • Established habitat acquisition and restoration programs; • Programs to ensure that all wildlife maintain or achieve “self-sustaining” populations; • Penalties for failure to adhere to wildlife laws; • Local governments have authority to create noxious weed programs; • Planning and zoning must be conducted in a manner that will consider all natural resources of the State; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Texas • Noxious weed control programs; • Dedicated funding for wildlife research; • Dedicated funding for wildlife and habitat conservation;	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in

• Civil and criminal penalties for violation of wildlife laws; • Wildlife laws protect all "indigenous" wildlife (not only listed species) from "take"; • Conservation incentive programs with dedicated funding; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it under anti-poaching laws.	protection by an ESA listing would be to criminalize accidental take.

COLORADO

Colorado has implemented rules, regulations and codes to ensure the protection of wildlife and to ensure a continuous operation of planning, acquisition and development of wildlife habitats and facilities for its indigenous wildlife populations. The protections available in Colorado include, but are not limited to, local governments, planning and zoning, land use and conservation and have included provisions for enforcement so as to promote consultation with other states and federal government for the purposes of increasing the number of individuals within the species and populations of wildlife up to the optimum on a statewide basis to ensure equitable and reasonable privileges of ownership along with the pursuit of wildlife resources.

NEW MEXICO

New Mexico has a comprehensive wildlife conservation strategy. The strategy focuses on actions intended to keep common species common while working to prevent wildlife from becoming endangered. Using rigorous science, New Mexico has constructed an ecological framework for identifying the species of greatest conservation need, the habitat necessary to sustain them and other members of their ecological communities with periodic review processes necessary to ensure citizen involvement and acceptance.

KANSAS

Kansas has enacted the Kansas Nongame and Endangered Species Conservation Act of 1975 which gives the Department of Wildlife, Parks and Tourism authority to identify and undertake appropriate conservation measures. In that regard Kansas has implemented recovery plans with an objective to guide research and management aimed at enhancing listed species populations with the ultimate goal of allowing species to recover. Kansas has taken great strides in creating, practices, plans and regulations

which provides incentives to plant and maintain prairie grasslands which have greatly benefited the lesser prairie chicken.[45]

TEXAS

As an example of the available protections, the Texas Agriculture Code allows the authority to determine critical wildlife habitat zones, create and regulate noxious weed control districts and to regulate range restrictions. Additionally, the Texas Natural Resources Code and Parks and WildlifeCode allow Texas to regulate and develop and administer programs to ensure continued agriculture production and water availability as well as wildlife habitat availability. Texas also has an administrative code whose purpose, in part, is to provide a comprehensive method for the conservation of an ample supply of wildlife resources on a statewide basis to insure reasonable and equitable privileges of ownership along with the pursuit of wildlife resources.

OKLAHOMA

Oklahoma has developed the Oklahoma Lesser Prairie-Chicken Conservation Plan (OLEPCCP) to "protect, enhance, and restore their habitat while also addressing other factors leading to their decline." This plan is intended to benefit the people, economy, and wildlife resources of Oklahoma by providing a framework for effective management and habitat improvement. Oklahoma is working to conserve the lesser prairie chicken while minimizing effects on human economies and developments. Appropriate habitat improvement/conservation goals and long-term management actions/strategies are being utilized to achieve these goals as well as coordinated strategies to implement management actions – including interagency coordination and incentives or other programs that will make restoration and maintenance of LEPC habitat economically viable for landowners and industries. While these efforts are underway, Oklahoma defines lesser prairie chickens as game birds and protects them under their anti-poaching statutes.

Table 1. Federal Lands By State[46]

State	Total Federal Land Acreage[47]	Total Acreage in the State	% of
Colorado (listed under CO ESA)	24,086,075	66,485,760	36.2%

[45] The anti-poaching laws protect the species at all time. Kansas offers limited hunting of LPC.
[46] Congressional Research Service, 7-5700, February 8, 2012, Federal Land Ownership: Overview and Data, http://www.fas.org/sgp/crs/misc/R42346.pdf
[47] Understates total; includes lands of the four major federal land management agencies and the Department
of Defense, but excludes lands administered by other federal agencies (e.g., Agricultural Research Service, Bureau of Reclamation, Department of Energy, National Aeronautics and Space Administration).

Kansas	301,157	52,510,720	0.6%
New Mexico	27,001,583	77,766,400	34.7%
Oklahoma	703,336	44,087,680	1.6%
Texas	2,977,950	168,217,600	1.8%

Federal Voluntary Conservation Actions

As noted earlier, particularly in the case of federal land management agencies, conservation actions undertaken voluntarily as part of a program of land management by the federal agencies, become enforceable once they are adopted. In a similar manner, once landowners enter into voluntary conservation programs with federal agencies, the provisions of the programs themselves become requirements.

Summary Chart of Federal Agency Ongoing Conservation Programs[48]

FEDERAL AGENCY CONSERVATION ACTIONS[49]

Department of Agriculture
 	
• Natural Resources Conservation Service:
  ○ Lesser Prairie Chicken Initiative: helping farmers and ranchers enhance, restore and protect habitat for lesser prairie chicken;
  ○ Conservation Reserve Program (CRP): one of the primary management tools for habitat restoration;
  ○ Wildlife Habitat Incentive Program: voluntary approach to improving wildlife habitat;
  ○ Working Land for Wildlife: FWS cooperative to combat the decline of seven specific wildlife species, including the lesser prairie chicken;
  ○ Grassland Reserve Program (GRP): a voluntary conservation program working with individuals to enhance plant and animal biodiversity, and protection of grassland;
  ○ State Acres for Wildlife Enhancement (SAFE): a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years;
  ○ The Environmental Quality Incentives Program (EQIP): a voluntary program that provides financial and technical assistance to agricultural

[48] A detailed chart can be found in Appendix 6
[49] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken

producers through contracts up to a maximum term of ten years in length.

Fish and Wildlife Service
 	
• Habitat Conservation Planning Assistance;
• Habitat Conservation Plan (HCP) Land Acquisition;
• Oklahoma and Texas have entered into CCCA's for the protection of the lesser prairie chicken. Candidate Conservation Agreements (CCAs) are voluntary conservation agreements between FWS and one or more public or private parties.[50]
  ○ Oklahoma CCCA: On March 4, 2013 Oklahoma's CCCA was finalized. FWS states that Oklahoma "has shown capability for and commitment to implementing all of the terms of the CCAA. The ODWC has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA".[51]
  ○ Texas CCCA: This CCAA pertains to lands in Texas encompassed by the current distribution of LPC, those lands that are unoccupied potential habitat, and those that could provide potential habitat if the current population and distribution of LPC should increase.[52] In Texas, TPWD holds a permit and issues Certificates of Inclusion to participating landowners who are voluntarily implementing management plans for lesser prairie-chickens. As of July 15, 2012, twenty-five Texas ranchers have 282,878 acres enrolled in the CCAA.[53]

BLM and USFS have entered into agreements to consult with the FWS voluntarily on candidate species and 'species of special concern.[54]

State and Local Voluntary Conservation Actions

The question of the effectiveness of voluntary versus regulatory conservation actions is difficult, and there is little literature that rigorously explores the issue. The argument for voluntary conservation is that regulatory conservation makes the species or its habitat a liability. Voluntary conservation removes the potential for the loss of property or its value and encourages behaviors that are beneficial to the species.

[50] The Service works with its partners to identify threats to candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements, and design and implement conservation measures and monitor their effectiveness. http://www.fws.gov/endangered/what-we-do/cca.html

[51] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf

[52] http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

[53] http://www.fws.gov/southwest/es/Documents/R2ES/LPC_FAQ_18July2012.pdf

[54] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

The population review we referenced earlier[55] noted declines in lesser prairie chicken populations in the decades prior to its designation as a 'candidate species' and increases after designation and the onset of voluntary conservation actions.

The 5 states in the lesser prairie chicken range have implemented a number of conservation actions over the past fifteen years. The FWS has articulated a policy for evaluating those conservation actions. This policy, known as the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy")[56], is particularly important for conservation actions that are ongoing or proposed for the future.

The FWS's PECE Policy requires during listing decisions that the FWS evaluate whether "formalized conservation efforts" [57] ("FCEs") "contribute to making it unnecessary to list a species". The purpose of the policy is to ensure consistent and adequate evaluation of future or recently implemented conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents when making listing decisions. The policy is expected to facilitate the development by States and other entities of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.[58]

This policy applies to those conservation efforts that "have not yet been implemented or have been implemented but have not yet demonstrated whether they are effective at the time of a listing decision."[59]

When evaluating an FCE that is not yet implemented, the FWS must make this evaluation based on the "certainty of implementing the conservation effort and the certainty that the effort will be effective." [60]

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[55] An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[56] 50 CFR Chapter IV, Federal Register / Vol. 68, No. 60 / Friday, March 28, 2003

[57] "conservation efforts as "specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species". Conservation efforts may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial actions." A formalized conservation effort is one "identified in a conservation agreement, conservation plan, management plan, or similar document." Id.

[58] http://www.sagebrushsea.org/esa/FWS_PECE_q&a.pdf

[59] Id.

[60] The PECE Policy states that the following factors will be considered: 1. Identified Parties, Funding and Resources necessary to implement the effort; 2. The legal authority of the parties to proceed with the FCE are described; 3. The legal procedural requirements (e.g. environmental review) necessary to implement the effort are described and within the means of the parties to accomplish; . 4. Authorizations (e.g., permits, landowner permission) necessary to implement the conservation effort are identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement

The majority the voluntary conservation actions could be considered ongoing, however, some such as the Interstate Working Group Range Wide Management Plan[61] and Oklahoma's CCCA have yet to be completed or implemented but would require a determination that there is high level of "certainty" of implementation given their near completion status and the large investment of resources.

In prior listing determinations, the FWS has declared that if a conservation plan cannot be demonstrated to be effective, it cannot be considered in a listing determination. This position is not supported by the plain language of the PECE policy. Further, it is demonstrably arbitrary in that most, if not all of the actions contemplated by these conservation plans are consistent with best management practices required by the FWS in their consultations with the federal land management agencies, in consultations which include the species and in documents sponsored by the FWS.[62]

Finally, we note that despite the assertions of the FWS as to efficacy of an ESA listing in protecting the species, the ESA provides very narrow protections, limited by the consultation process and the language of the ESA which does not provide regulatory requirements for enhancement or improvement, instead requiring that jeopardy of the continued existence of the species be avoided, and adverse modification and destruction of habitat be avoided.[63]

The limitations of the ESA in recovering species are aptly illustrated by the fact that of nearly 1,500 species listed less than 50 have recovered. Of that number only 20 actually recovered, the remainder were either extinct (9) or listed in error.[64] Voluntary conservation avoids the perverse incentives created by criminalization of accidental 'take' of

the effort will obtain these authorizations; 5. Voluntary participants are identified and methods (e.g. incentives) used to obtain necessary level of voluntary participation are described; 6. Regulatory mechanisms (e.g., laws, regulations, ordinances) necessary to implement the conservation effort are in place; 7. A high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding; 8. An implementation schedule (including incremental completion dates) for the conservation effort is provided; 9. The conservation agreement or plan that includes the conservation effort is approved by all parties to the agreement or plan.

[61] The type and level of voluntary participation (e.g., number of landowners allowing entry to their land, or number of participants agreeing to change timber management practices and acreage involved) necessary to implement the conservation effort is identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain that level of voluntary participation (e.g., an explanation of how incentives to be provided will result in the necessary level of voluntary participation). Id.

[62] Jamison, B. E., J. A. Dechant, D. H. Johnson, L. D. Igl, C. M. Goldade, and B. R. Euliss. 2002. Effects of management practices on grassland birds: Lesser Prairie-Chicken. Northern Prairie Wildlife Research Center, Jamestown, ND. 29 pages.

[63] The prohibition does not apply in the case of the lesser prairie chicken as the FWS has determined that designation of lesser prairie chicken habitat is 'not prudent' as there are no data to support a designation.

[64] http://www.ncpa.org/pub/st303?pg=5

species and harnesses the much broader power of states and local agencies to protect habitat on private lands. In the case of the lesser prairie chicken, where only 4% of its habitat is on federal land, the voluntary protection of habitat on private land is essential.

The fact that the affected states and landowners have been funding and participating in conservation activities beginning in 1996 with the formation of the lesser prairie chicken working group[65] and continuing to the present with the State of Oklahoma entering into a conservation agreement with the FWS demonstrates the commitment to species conservation. In the intervening 15 years, money time and effort have been expended to conserve the lesser prairie chicken.[66] If these efforts, which rely on the expert agency's recommendations, cannot be expected to succeed, then it brings into question the expertise the FWS brings to the discussion.

[65] http://www.wafwa.org/html/prairie_chicken.shtml

[66] See Appendix 7

Chart of Voluntary Conservation Actions[67]

VOLUNTARY CONSERVATION ACTIONS[68]
• Each State has prepared and/or participated in at least one conservation plan • Each State has prepared and/or participated preparation of at least one management plan • Each State has prepared and/or participated in development of at least one recovery plan • The five states participate in an Interstate Working Group to collaborate on conservation activities • Interstate Range Wide conservation plan • The states either individually and through the interagency group have funded or carried out research geared toward improving conservation techniques • All the affected states have a habitat restoration program • Several States have prepared guidelines and best management practices for natural resource development and some for the protection of the LPC specifically. • Each State has dedicated funding and multiple financial incentive programs to encourage habitat restoration on private lands, this can be used for lesser prairie chickens and other species as necessary.

Wind Industry Conservation Actions[69]

The FWS indicates wind power development is a primary concern with respect to the lesser prairie chicken. Their concern is based on the assumption that avoidance of vertical structures results in some as-yet unidentified threat to the species.[70] Because of the explicit statements in the proposed rule regarding concerns related to expansion of wind power and the lack of regulation related to that expansion, we examined regulation and voluntary conservation actions related to wind power explicitly.

[67] See Appendix 5 for a detailed list of voluntary conservation actions.
[68] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[69] See Appendix 7
[70] The studies cited found lesser prairie chickens avoided vertical structures, but did not identify any adverse effects resulting from that avoidance.

We identified a significant commitment to conservation in general by the industry. In a letter to the Secretary of the Department of Interior, the American Wind Energy Association expresses that the " final version of the Guidelines on March 23rd, 2012 was the culmination of over 5 years of a painstaking, but collaborative, process between representatives of the wind energy industry" and regulatory agencies.[71] This dedication to the process should provide a high level of certainty with regarding to this FCE.

Below is a summary chart of activities.[72]

Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.
Wind Energy Mapping Tools	Playa Maps for Colorado, Kansas, Nebraska, New Mexico, Oklahoma and Texas by county.
Southern Plains Wind and Wildlife Planner	Southern Plains Wind and Wildlife Planner for a set of species and ecosystems in Colorado and New Mexico.
Southern Great Plains Crucial Habitat Assessment Tool for Lesser Prairie-Chicken	Led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[73]
North American Landbird Conservation Plan-co-authored by the FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [74]

[71] http://awea.org/newsroom/pressreleases/upload/AWEA-and-Member-Company-Letter-to-Salazar-re-Wind-Energy-Guidelines-May-15-2012.pdf
[72] See Appendix 7
[73] http://kars.ku.edu/geodata/maps/sgpchat/
[74] http://www.partnersinflight.org/cont_plan/#Access

FWS Wind Energy Guidelines	FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [75] FWS in its guidance document states that it is issuing the guidelines pursuant to its authority under the ESA. FWS claims authority given its mandate to identify and protect endangered and threatened species and to "provide means to conserve" their ecosystems. FWS cites the ESA as the authority that directs federal agencies to "utilize their authorities to conserve listed species" and states that FWS and other federal agencies are encouraged to "do the same with respect to 'candidate' species". [76] Industry Adoption of Wind Energy Guidelines which address comprehensive wildlife and habitat considerations and best management practices. :
FWS	Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.
BLM	Interim Wind Energy Development Policy The Interim Wind Energy Development Policy (IM 2003-020), was issued October 16, 2002. This document ensures application of the BLM Wind Energy Development policies and best management practices (BMPs) in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on BLM managed public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan must comply with the IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[77]

[75] http://www.fws.gov/windenergy/docs/WEG_final.pdf
[76] Id.
[77] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf

BLM	Wind Energy Development Policy This IM further clarifies the BLM Wind Energy Development policies and best management practices (BMPs) provided in the Wind Energy Development Programmatic Environmental Impact Statement (EIS) of June 2005. Issuance of this IM ensures BLM-wide consistency in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on the public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan will comply with policy provided in this IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[78]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are developing best management practices (BMPs) that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy from renewable sources by 2020 in a wildlife friendly manner.[79]
Recommendations To Minimize Adverse Impacts Of Wind Energy Development On Wildlife 2012	There is no statewide permitting authority in New Mexico with regard to wind development. However, the state has developed guidelines for use by wind project developers, their consultants, local government and the general public. New Mexico Department of Game and Fish offers guidance for projects and guidelines in their Habitat Handbook.[80]
Multi-State	On April 22, 2009 Interior Secretary Salazar announced $57.8

[78] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf
[79] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml
[80] http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP. The planning proposal lands a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[81]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[82]

[81] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html
[82] http://kec.kansas.gov/reports/wind_siting_handbook.pdf

FERC Transmission Line Regulation	The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.[83]	
County Protections		
Union, New Mexico[84]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [85]
San Miguel, New Mexico	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [86]
Bent, Colorado	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.

[83] http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission.pdf
[84] http://nm-unioncounty.civiccities.com/directory.aspx
[85] http://www.unionnm.us/DocumentCenter/Home/View/9
[86] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf

CONCLUSION

The FWS has:

- limited or incomplete data on historic habitat loss,
- limited or incomplete data on the habitat requirements of the lesser prairie chicken and
- limited or incomplete data on the available habitat for the lesser prairie chicken.

The best available data find increasing populations across the range of the greater prairie chicken and low extinction probabilities. Genetic analysis demonstrates no loss in genetic diversity and no evidence of genetic isolation.

A review of the state and local efforts to conserve the lesser prairie chicken demonstrates robust statutory authority for protection of habitat on public and private land as well as legislative commitment to conservation of wildlife species and their habitat at the state level. These authorities exist whether the species is listed or even remains a candidate.

Voluntary conservation efforts are numerous and widespread, and range from individual land owners to developers of wind energy farms. These efforts are often developed in conjunction with the FWS and/or are consistent with the direction given in the publications sponsored or funded by the FWS which identify effective conservation measures. The effectiveness of these measures is provided support by the fact that increasing population numbers coincide with the advent of heightened awareness of the population declines of the lesser prairie chicken due to its identification as a 'candidate species' under the ESA.

There are no data that support the FWS assertion that habitat fragmentation and decline with related effects are threatening the lesser prairie chicken. There are data that demonstrate population growth, low extinction probabilities, and genetic robustness.

The FWS has failed to meet the requirements of the Act that listing be based solely on data showing that the species is adversely affected by one or more of the five factors enumerated inthe Act.

APPENDIX 1

The 84% reduction in the area historically occupied by lesser prairie chickens cited by the FWS is little more than a guess with an unknown error surrounding it. The FWS admits that "Very little information is available regarding the size of lesser prairie chicken populations prior to 1900." Robb and Schroeder (2005) stated: "Few records exist to verify the historical distribution of lesser prairie-chickens prior to European settlement because the geographic region that is generally regarded as historical range (southeastern Colorado, southwestern Kansas, western Oklahoma, northern Texas, and eastern New Mexico) was largely unexplored during the 1800s (Aldrich and Duvall 1955, Sharpe 1968). The first expeditions to explore Colorado tended to bypass the southeastern part of the state (Rockwell 1908), and it was not until 1914 that lesser prairie-chickens were recorded officially from Baca County (Lincoln 1918)."

As an example of the potential misuse of the uncertainty of the historical data, USFW wrote that "Litton (1978, p. 1) suggested that as many as two million birds may have occurred in Texas alone prior to 1900." Litton's paper was a non-peer reviewed article, and what Litton actually wrote was: "Records indicate there may have been as many as two million lesser prairie chickens in Texas prior to 1900, before exploitation by early-day sportsmen and market hunters". However, there is no reference by Litton as to what these "records" consisted of, and therefore it is not useful to repeat this number, as it is not verifiable and fails to meet the data standard of the ESA.

Even more potentially confounding is the apparent change in behavior of lesser prairie chickens. Jackson and DeArment (1963) stated that much of the range in southern Texas where maps show the bird as historically present were likely temporary wintering grounds; today the lesser prairie chicken is thought to be non-migratory. What percentage of this putative historic range includes temporary wintering or resting grounds? This lack of data makes it impossible to realistically reconstruct lesser prairie chicken behavior or range of over 100 years ago and extrapolate it to existing conditions.

APPENDIX 2

An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens

A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group

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Issue: Each state monitors spring populations of lesser prairie-chickens with similar (but not exact) methods to detect and count birds on leks. Additionally, sampling effort has varied overtime with generally more extensive efforts in recent years. Thus far, comparison between or among states has not been possible because of these facts.

Need: A unifying analytic method for assessing trend of lesser prairie chicken populations among states and geographic regions is needed to evaluate past and future population performance as a result of conservation actions or changes in land use.

A proposed method: There have been 3 range-wide assessments of greater sage-grouse population dynamics and persistence (Connelly et al. 2004, WAFWA 2008, Garton et al. 2010), and similar issues of data consistency and variation in sampling effort were common to all three studies. Garton et al. (2010) is the only peer reviewed published article from the three, and was largely based on the analytic methods in Connelly et al (2004). Using population reconstruction from annual counts at leks, density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) models of population growth can be fit and population parameters of growth ($\square_t$), population equilibrium, and quasi-extinction probabilities can be estimated.

In this example, data were pooled by 4 geographic regions, sand sagebrush (CO, KS), CRP-shortgrass prairie (KS), mixed grass prairie (SE KS, OK, TX-Panhandle), and shinnery oak (NM, TX west) in which to estimate annual rates of change ($\square_t$), average growth rate (trend from 1997-2011), variation of ($\square_t$), quasi-extinction probability (population drops to 25% of equilibrium), and population equilibrium. Data across all regions was pooled to assess trend and estimate population parameters for the entire lesser prairie chicken range. Finally, concern has been generated regarding declines in populations in 2012. To address this concern, a worked example assuming a 50% decline (2012 trends have not been finalized yet) in trend rangewide occurred is provided to demonstrate what affect it may have on the entire range.

Lesser prairie chicken lek counts reported by individual states were summarized within ecologic regions and used to reconstruct an index to the historical abundance of the population within each zone. We treated the number of lesser prairie chicken counted

at leks in the final year as an index to the minimum number of lesser prairie chicken attending leks. Lek counts in each year were a cluster sample of lesser prairie chicken and thus treated by standard finite population sampling procedures (Scheafer et al. 1996: 297).

Sampling effort devoted to counting leks has varied enormously from year to year and grown appreciably in the last 5 years. To standardize estimates and remove bias due to variable sample sizes we treated the number of lesser prairie chickens counted in the initial count (or another base year if final year counts were inadequate) as the standard for projecting later counts by applying a ratio estimator (Scheafer et al. 1996: 200) to estimate the finite rate of change (λ_t) for the population between successive years as follows. Beginning with the initial year of a route (1997 or more recent), lesser prairie chicken counted along each route censused in both 1997 and 1998 were treated as cluster samples of individual lesser prairie chickens in successive years. The ratio of lesser prairie chickens counted in a pair of successive years estimates the finite rate of change at each route in that one year interval (λ_t). These ratios were combined across routes within a region for each year to estimate the finite rate of change for the entire population within a zone to estimate the finite rate of change for that management zone between successive years (e.g. 1997 to 1998):

$$\lambda(t) = \frac{\sum_{i=1}^{n} M_i(t+1)}{\sum_{i=1}^{n} M_i(t)}$$, where $M_i(t)$ = number of LPEC counted along route *i* in year *t*,

across *n* routes counted in both years *t* and *t+1*,

Because methodologies were not exact, an average λ_t was calculated among routes and states for each region. Unlike previous methods, that reconstructed populations from the penultimate year backwards, in this method the index to population size was projected forward from 1997 to assess trend since LESSER PRAIRIE CHICKEN were classified as a candidate as a threatened or endangered species. This approach does not affect the rates of change or persistence estimates, but provides a baseline more meaningful to the conservation question at hand. Because population sizes were not well described in 1997, and the method is based on proportional changes of ratios, all trends were assessed as a percentage of the 1997 index which was set to 100% (See Connelly et al. 2004). The index to population size for subsequent years was then calculated by taking the number of LESSER PRAIRIE CHICKENs counted in the initial year (1997) as a baseline estimate of population size within a region and projecting the next year's minimum LESSER PRAIRIE CHICKEN abundance by multiplying the 1997 abundance by the ratio estimator of the finite rate of change from 1997 to 1998 (e.g. finite rate of change of 0.81 between 1998 and 1999 suggested that the 19% fewer

LESSER PRAIRIE CHICKEN were counted at leks in 2000 than in 1999). This process was repeated for the change from 2000 to 2001 (finite rate of change of 1.015) yielding a breeding population index for a given zone in 2001 and so on up to 2011. Repeating this process for each management zone yielded a population index for each zone stretching from 1997 to 2011 for populations in all regions. These population indices provided the basis for all further analyses and modeling.

Fitting population growth models

Using the time series of population indices for each region, 2 stochastic population growth models were fit including: (1) exponential growth with process error (EGPE, Dennis et al. 1991), (2) exponential growth state space (EGSS, Staples et al. 2004) which incorporates both process and sampling error, and most importantly allows for the parsing of these error rates for more precise estimates of population persistence.

Results:

CRP-shortgrass.—There were 3 routes established to monitor trends of LESSER PRAIRIE CHICKEN in the CRP grasslands north of the Arkansas River in Kansas beginning in 2000. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 4.4% annually (Figure 1A; Table 1). The equilibrium of a density dependent population was approximately 99% of the baseline in 2000, and the probability of extinction (declining to 25% of equilibrium) was 2%.

Mixed-grass prairie.– There were 6 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS, OK, and TX, 2 of which began in 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 7.0% annually (Figure 1B; Table 1). The equilibrium of a density dependent population was approximately 229% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was <0.0001%.

Sand sagebrush prairie.– There were 7 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS and CO both of which began prior to 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 2.0% annually (Figure 1C; Table 1). The equilibrium of a density dependent population was approximately 183% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 48%.

Sand shinnery oak.– There were 29 routes to monitor LESSER PRAIRIE CHICKEN in shinnery oak habitat of NM and TX. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 5.1% annually (Figure 1D; Table 1). The equilibrium of a density dependent population was approximately 196% of the baseline

in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide.– There were 45 routes to monitor LESSER PRAIRIE CHICKEN across the range. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 10.6% annually (Figure 1E; Table 1). The equilibrium of a density dependent population was approximately 276% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide 2012.–Assuming a 50% decline in trend across the range, the 10-yr average annual finite rate of population change (λ_t) indicated population growth of 6.4% annually (Figure 1F; Table 1). The equilibrium of a density dependent population was approximately 262% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 3.3%.

Summary.– Regionally populations continue to show significant signs of population growth, however, because of low rates of growth and large variation in estimates of lambda, sand sagebrush habitat (14% of species distribution) was one region that indicated the greatest likelihood of reaching 25% or less of the equilibrium population size. Thus, 86% of the species' distribution exhibits population growth (>2% annually) with low probability of extinction. Range-wide analysis indicates the species as whole has grown at a rate of 10.6% since 1997 with low probability of extinction. Lastly, if the range-wide population trends did decrease by as much as 50% in 2012, populations are projected to be 73% greater than in 1997, and likelihood of population persistence remains high (>96%).

A peripheral examination of population trends prior to the 1997 candidate status recommendation, indicates that on average populations from 1980-1997 were declining at an average annual rate of 3.7%, post candidate status population growth was 6.9% increase annually.

Further refinements: There are 3 recommendations to make this modeling approach more rigorous with the existing data: 1) to analyze the data on a lek by lek analysis rather than at the route or county scale, 2) where longer term data exist develop models for longer time periods that specifically identify significant transitions in trend (upwards or downwards), to better understand temporal factors that may be affecting different historic periods and changes in land use, and 3) once population estimates are available from aerial surveys in 2012 then trend analyses and PVA can be conducted relative to population size and trends

beginning in 2012 and projecting backwards. This approach would be almost identical to that of greater sage-grouse PVA conducted by Garton et al. (2010).

Literature cited.

Connelly, J. W., S. T. Knick, M. A. Schroeder, and S. J. Stiver. 2004. Conservation assessment of greater sage-grouse and their habitats. Western Association of Fish and Wildlife Agencies. Cheyenne, Wyoming.

Garton, E. O., J. W. Connelly, C. A. Hagen, J. S. Horne, A. Moser, and M. A. Schroeder. 2010. Greater Sage-Grouse population dynamics and probability of persistence. Studies in Avian Biology 38: 293-382.

Western Association of Fish and Wildlife Agencies. 2008. Greater sage-grouse population trends an analysis of lek databases. Unpublished report, Cheyenne, Wyoming.

Figures

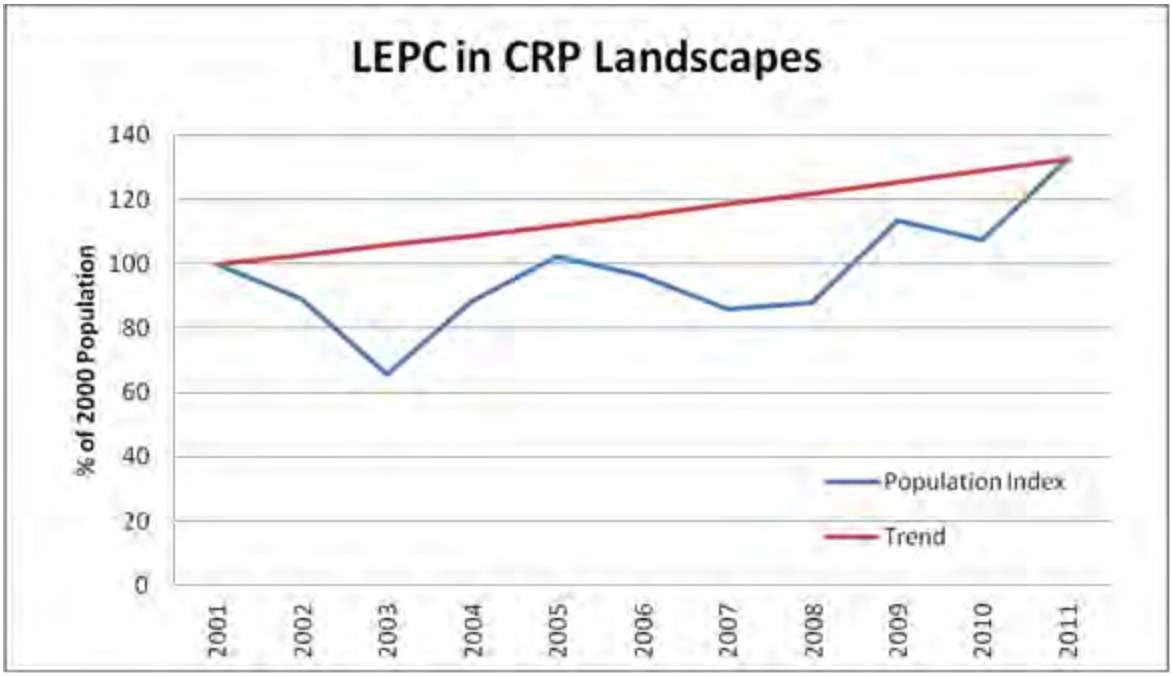


Figure 1A. Lesser prairie-population index for CRP Landscapes from 2001-2011, quantified as a percentage of the 2001 baseline population.

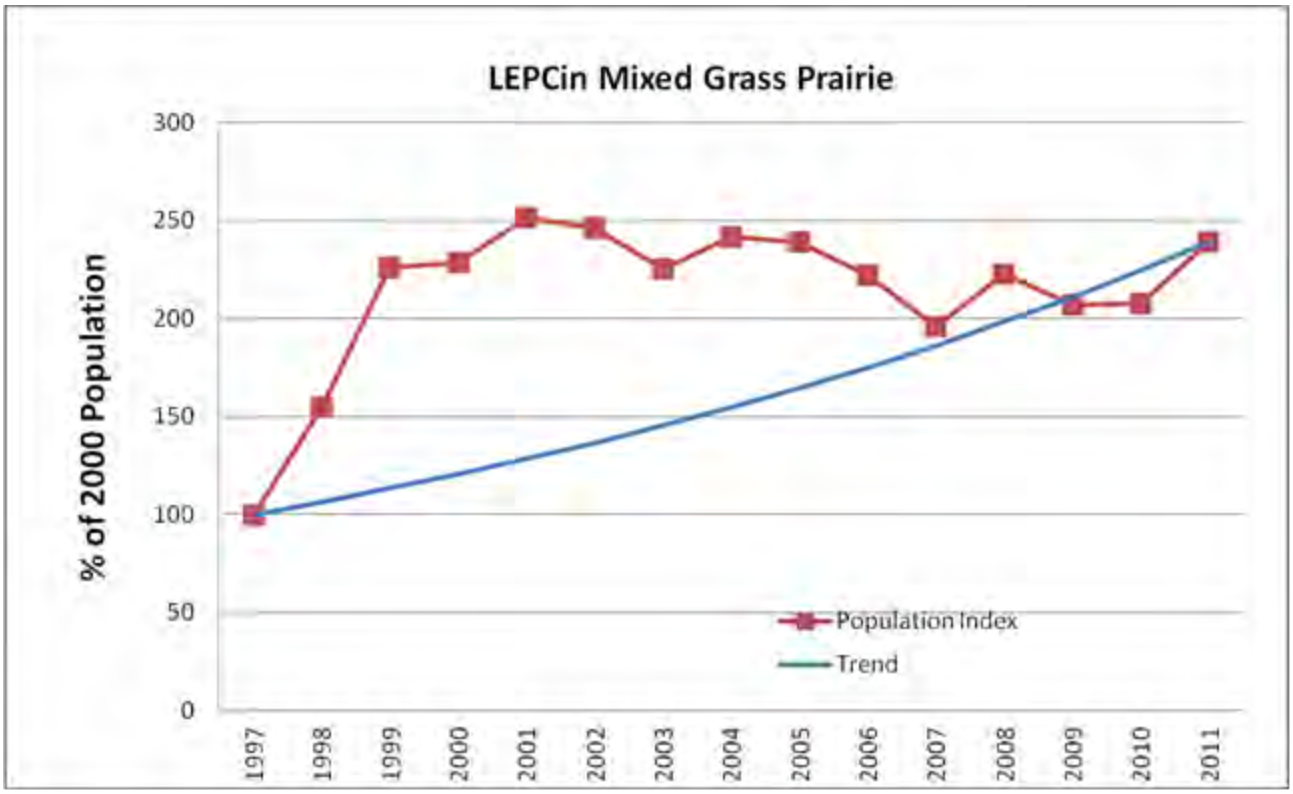


Figure 1B. Lesser prairie-chicken population index for mixed grass-prairie landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

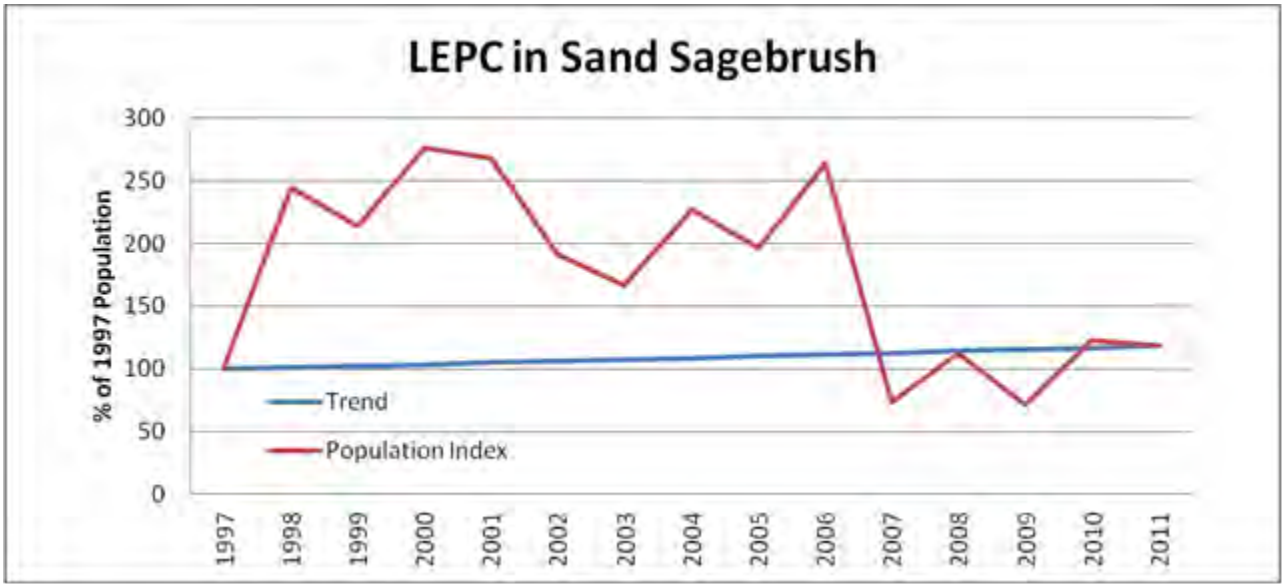


Figure 1C. Lesser prairie-chicken population index for sand sagebrush landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

Figure 1D. Lesser prairie-chicken population index for sand shinnery oak landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

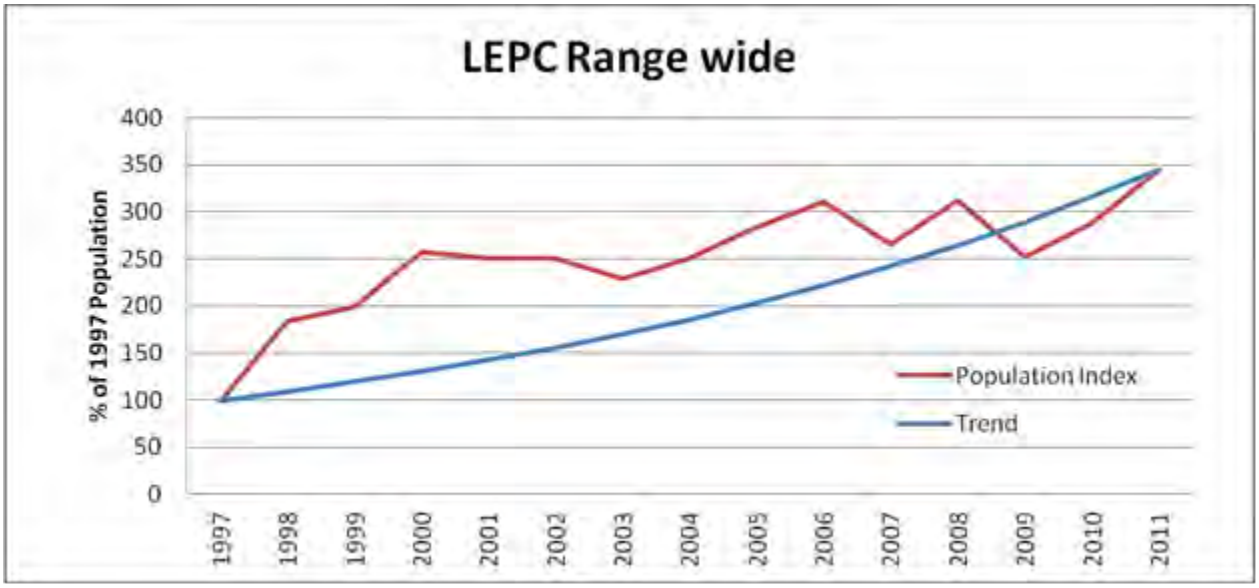


Figure 1E. Lesser prairie-chicken Range-wide population index from 1997-2011, quantified as a percentage of the 1997 baseline population.

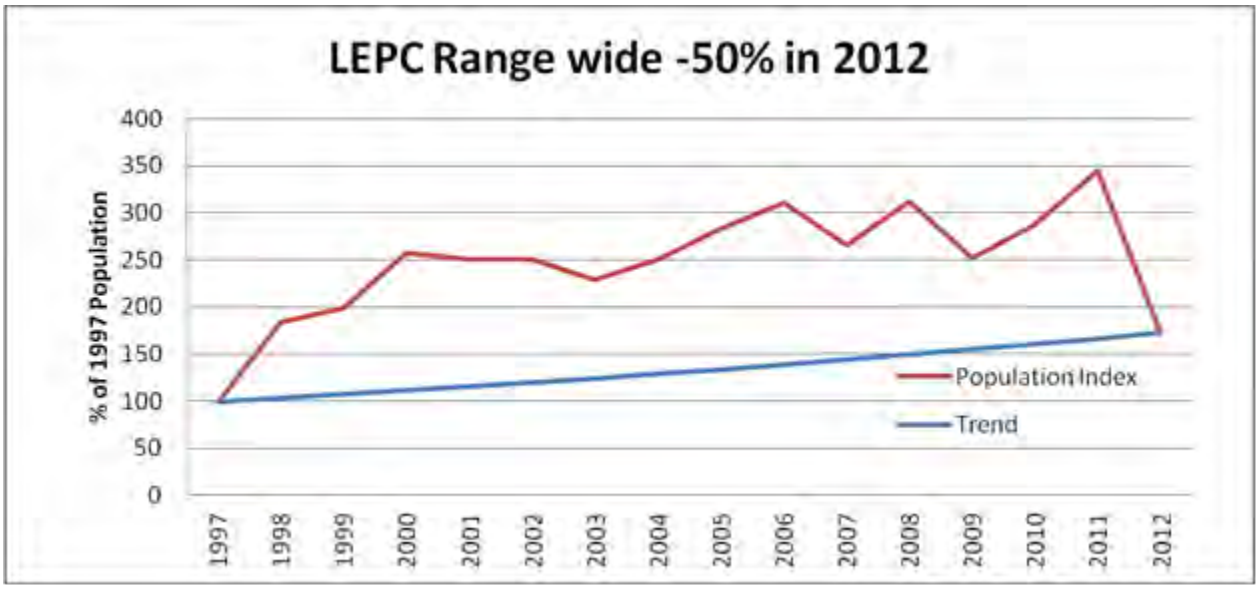


Figure 1F. Hypothetical lesser prairie-chicken Range-wide population index from 1997-2012 assuming a 50% decline from 2011-2012, quantified as a percentage of the 1997 baseline population.

Table 1. Parameter estimates from density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) population models for Lesser Prairie-Chickens in 4 regional areas 1997-2011. Range-wide estimates are provided for the same time period, and a hypothetical example demonstrating what a 50% decline in 2012 might forecast for the species. Where, r = instantaneous rate of growth adjusted for sampling variation, se(r) standard error of r, r' = unadjusted instantaneous rate of growth, lambda = finite rate of population growth (exp(r)), nq = population equilibrium under density dependent model, ne(nu) = quasi-extinction threshold (25% of of nq), pi = probability of population reaching ne(nu), theta = time in which ne(nu) would be reached if threshold was reached, and %EOR = percentage of the Estimated Occupied Range these trend results represent.

Region	r	se(r)	r'	lambda	nq	ne(nu)	pi	theta	%EOR
Mixed	0.074	0.005	0.101	1.077	229	57	0.000	18.8	44%
Sage	0.020	0.077	0.022	1.020	183	46	0.482	68.5	14%
Oak	0.051	0.022	0.062	1.052	196	49	0.002	27.2	19%
CRP	0.044	0.032	0.059	1.045	99	25	0.021	31.2	24%
Range	0.106	0.038	0.114	1.112	276	69	0.000	13.0	100%
2012**	0.064	0.052	0.068	1.066	262	66	0.033	21.8	100%

APPENDIX 3

An evaluation of the historic range changes that have occurred in the Lesser Prairie Chicken since the Last Glacial Maximum.

Species have niches in ecological time and space that can be defined in various ways. Currently, a commonly accepted scientific approach is to use a technique called Ecological Niche Modeling (ENM) or to others, Species Distribution Models (SDM). Today, these techniques are considered part of biodiversity informatics.j

The approach involves taking a set of georeferenced locality points for a species, and then using a computer algorithm to build a model that predicts these points using current information on climate, such as temperature, rainfall, or degree of seasonality. The model then generates a predicted distribution of the species that can be tested by seeing how well known locality points (that were not part of the original model) are predicted.

One can then predict where the niche space for the species occurred at different points in time. Currently, readily available climate data exist for the Last Glacial Maximum (LGM; 21,000 years before present [ybp]) and the Last Interglacial (120,000 ybp). This gives a view of the species' range during the maximum southward extent of the last major north temperate glacier, and shows how and where the species was displaced to (if displaced at all).

We obtained a georeferenced list of 110 occurrences for the lesser prairie chicken (Table 1) from an online source of museum and observation records (Ornis-2). These span many years and give an indication of where the species occurred historically (since museum specimens started being preserved). We used the program Maxent to model distributions. After a preliminary analysis involving 10 independent runs, we selected climate layers that provided over 5% to the model (

The predicted current distribution of the lesser prairie chicken (Fig. 1) agrees well with known and recent historical distribution, with the exclusion of what is considered the southern part of the range in Texas. This might be because, as discussed elsewhere, it was mainly a non-breeding area. Locality points omitted from the model were predicted with 93% accuracy suggesting that the model performs very well.

The contribution of the climate variables to the model were: Mean Temperature of Driest Quarter (43%), Precipitation of Warmest Quarter (16.5%), Precipitation Seasonality (Coefficient of Variation) (15.9%), Mean Temperature of Warmest Quarter (13.4%), Temperature Seasonality (8.7%), and Isothermality (BIO2/BIO7) (2.5%). It appears that

lesser prairie chickens are considerably influenced by the temperature at the driest part of the year.

We used the model to predict the distribution of the lesser prairie chicken at the LGM, assuming that the niche has not evolved and that the same environmental parameters were present at both time periods. As might be expected during a time of southerly range displacements owing to glacial advances, the range of the species was shifted south and west (Fig. 1, blue). It also can be seen that the predicted range was considerably more fragmented and reduced in areal extent. This suggests that lesser prairie chickens have survived extended periods of range fragmentation.

Table 1. Longitude (first number) and latitude (second number) for 110 localities for lesser prairie chickens obtained from Ornis2 (http://ornis2.ornisnet.org/).

-104.3247985,38.4328835; -98.32064,38.49836; -100.35,37.283; -100.2670064,37.0826239; -101.3473741,38.4817103; -100.3709181,37.2370813; -96.5981521,38.3051704; -100.7333333,37.85; -100.986,37.88333333; -100.0233333,37.855; -101.05,37.81666667; -100.05,37.85; -100.75,37.85; -100.0166667,37.85; -100.7666667,37.86666667; -100.8166667,37.86666667; -100.7666667,37.88333333; -101.0833333,37.88333333; -101.9833333,37.9; -101.9666667,37.9; -100.0666667,37.83333333; -100.0666667,37.86666667; -100.7333333,37.83333333; -99.5334,38.1087; -100.2358583,37.1402; -100.570589,37.1033548; -100.4666672,37.25; -100.0237999,37.7580571; -100.4662,37.09608; -100.8722222,37.97166667; -100.9888889,37.79444444; -101.1336803,37.8512936; -101.04,37.84; -101.05,37.844; -100.8654953,37.974823; -100.1661233,37.10322; -102.58177,42.06867; -100.407486,40.0407579; -103.18355,33.62926; -103.3396721,33.6428738; -103.0999985,35.34999847; -104.2283,32.4206; -104.2667,32.45; -103.183052,33.629166; -103.2804947,33.543606; -103.1650051,33.6407777; -103.59829,35.719908; -104.2283325,32.42055511; -103.2659912,33.5871673; -103.1835594,33.6292667; -104.2448044,32.4501; -104.2456627,32.4522729; -106.8189278,36.2283497; -103.1877136,33.6512083; -103.3049766,33.6428738; -103.4949646,34.0890633; -104.4119186,33.602314; -103.3401489,33.644349; -103.2234191,33.6420625; -103.1925201,33.5293753; -103.760376,35.1201894; -104.6245622,32.4628466; -103.3917154,33.6437204; -103.14,33.6565; -103.1536667,33.70766667; -103.1095833,33.69303333; -103.144,33.71993333; -103.1740667,33.6883; -106.0253796,34.1656598; -103.1451667,33.64996667; -103.1391667,33.695685; -103.1406,33.70101667; -103.1105667,33.68353333; -103.1404333,33.64923333; -103.172,33.69523333; -103.1381,33.65913333; -103.1395,33.65883333; -103.1497833,33.70505; -103.1715167,33.69496667; -103.312382,33.6428738; -103.1148167,33.68505; -103.1274667,33.68211667; -103.05038,33.75831; -103.12661,33.85024; -103.12695,33.85074; -103.27935,33.62703333; -103.1144444,33.68583333; -103.1451667,33.66856667; -103.6326599,34.3133827; -99.77119,36.02616; -99.77119,35.9899; -99.67005,36.0529; -99.765129,35.8848778; -99.77119,36.03342; 9628.12,3649.21; -96.6503334,36.9375441; -99.65741,36.04264; -99.6818,36.00441; -99.64477,36.03238; -99.66392,36.00441; -99.64604,35.85937; -99.77119,35.93189; -99.7792053,36.2254423; -99.2710876,36.433437; -98.7157861,35.3080899; -98.4933319,29.4238892; -100.2709541,35.4453278; -101.6632921,30.6870249; -100.193,36.071; -96.262207,43.084937;

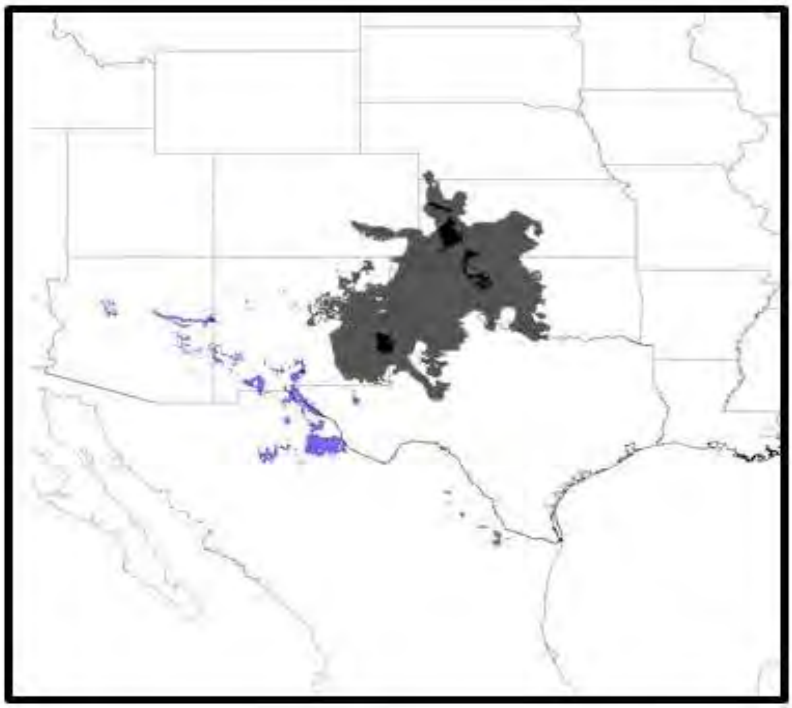


Figure 1. Predicted distribution of lesser prairie chicken at present (black, gray) and at Last Glacial Maximum (blue). For present distribution, black indicates area of highest predicted occurrence.

APPENDIX 4-- FEDERAL PROTECTIONS

Agency	Law/Mgt. Directive/Agreement	ESA Provisions
ALL	**National Environmental Policy Act of 1969 (NEPA) [(42 U.S.C. 4332(2)(C)** The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. By regulation, a Biological Assessment is prepared for "major construction activities". Under NEPA, those considered to be Federal actions significantly affecting the quality of the human environment as referred to meet NEPA requirements federal agencies prepare a detailed statement known as an Environmental Impact Statement (EIS). EPA reviews and comments on EISs prepared by other federal agencies, maintains a national filing system for all EISs, and assures that its own actions comply with NEPA.	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Take protection also provides limited habitat protection if the habitat alteration results in death of an individual. • In the case of the lesser prairie chicken, there no habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Protection of critical habitat is limited to habitat affected by a federal agency action,
	Federal Land Policy and Management Act of 1976", Sec. 101. [43 U.S.C. 1701 (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest; **…** (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat which are also affected by federal agency actions (moot, as

	atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;…(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;…[87]	the FWS is not designating for the lesser prairie chicken) • In Reviewing the activities of federal agencies, ESA limitations on take are only that it may not result in jeopardizing the continued existence of listed species, • IN the case of lesser prairie chicken, take is prohibited under state anti-poaching laws. • The ESA does not require comprehensive management plans.
ALL	**Executive Order 13112, February 3, 1999, "Invasive Species"** **Section 2. Federal Agency Duties** (a) Each Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, (1) identify such actions;(2) subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv)	Executive Order 13112 requires that all federal agencies prevent degradation of all habitat (not only lesser prairie chicken habitat) by ensuring that invasive species are prevented and/or controlled. This EO requires restoration of habitat. • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for

[87] http://www.blm.gov/flpma/FLPMA.pdf

	provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and (3) not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has pre-scribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions. (b) Federal agencies shall pursue the duties set forth in this section in consultation with the Invasive Species Council, consistent with the Invasive Species Management Plan and in cooperation with stakeholders, as appropriate, and, as approved by the Department of State, when Federal agencies are working with international organizations and foreign nations.	the lesser prairie chicken) • In reviewing the activities of federal agencies, the limitations on take are only that it may not result in jeopardizing the continued existence of listed species,
BLM and FS	**Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And**	No additional protection under the ESA. The MOU provides for "voluntary" consultation on candidate species, such as a lesser prairie chicken. The primary functions of the ESA

	Wildlife Service[88] This MOA establishes interagency commitment to and guidance for the following: (1) Early interagency communication, coordination, consultation, and conferencing on candidate, proposed, and listed species to take place prior to and during plan/program proposal development… The scope of this MOA includes Land and Resource Management Plans prepared by the FS pursuant to the National Forest Management Act of 1976 [16 U.S.C. 1601-1614] and Resource Management Plans and Management Framework Plans prepared by the BLM pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701-1784]. The MOA may also be applied to other programmatic level proposals. These may include, but are not limited to, a recreation or grazing program, riparian restoration strategy, multi-year forest management activities, recovery strategy or other proposals. The Service provides this information related to "programattic biological opinions": Developing a programmatic biological opinion. Once the biological assessment is completed, a determination on the need for formal consultation will be made by the Service. Formal consultation is required when a Federal action is likely to adversely affect listed species. When it is determined that an action may affect, but is not likely to adversely affect listed	are to prohibit "take" of the listed species (which is addressed by each States wildlife code) and the "consultation" on federal lands. BLM Management Manual already prescribes such protections for 'special status species' of which the lesser Prairie Chicken is one. Further, under the MOA, consultation has already occurred for the federal lands under BLM management. The ESA provides only for protection for listed species by : • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Does not require management plans • The ESA limits protection to listed species, their designated critical habitat where a federal

88 http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

	species, the consultation between the action agency and the Service may be handled informally (see 50 CFR §402.11 for further information on the informal or early consultation process). If formal consultation is necessary, a programmatic biological opinion will be developed by the Service in consultation with the Agencies. Attachment 3 gives a template for a programmatic biological opinion. This programmatic biological opinion will: (1) describe all of the potential projects; (2) contain suggested avoidance/minimization measures, placed in the project description, if appropriate; (3) describe the status and environmental baseline of listed, proposed, and candidate species in the project area; (4) reiterate potential effects of the project actions as evaluated in the biological assessment; and, (5) possibly describe limits to the amount of project impacts, take, and habitat affected and/or lost. A jeopardy analysis will be done to determine whether the programmatic process should proceed (see jeopardy discussion below).[89]	action is affecting them. • In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being designated. Given the limitations of the ESA and the voluntary actions and agreements by the agencies primarily involved in the activities the rule finds are "threatening" the lesser prairie chicken, the ESA provides no additional protections to the species.
BLM	**Special Status Species Management-Handbook 6840[90]** The stated purpose of BLM Handbook 6840 ("Special Status Species Management Handbook" is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special	The ESA requires that the FWS be consulted on actions affecting listed species on federal lands. • The ESA limits protection to listed species, their

[89] http://www.fws.gov/endangered/esa-library/pdf/pages7-18.pdf

[90] http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	status species are: (1) species listed or proposed for listing under the Endangered Species Act (ESA), and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s). All Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.[91] In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA. Any obligation to conserve proposed critical habitat under this section is terminated at the time the proposal becomes final or the habitat is no longer proposed for listing. All federally designated candidate species, proposed species, and delisted species in the 5 years following their delisting shall be conserved as Bureau sensitive species. A. Designation of Bureau Sensitive Species. State Directors shall designate species within their respective States as	designated critical habitat where a federal action is affecting them. • Does not require management plans, . The BLM's Special Status Species Management Handbook outlines a policy that is much more inclusive and relates directly to species that are considered "sensitive" at a state level. Each of the states referenced in the proposed rule currently consider the lesser prairie chicken to be sensitive, thus, the current policy provides more protection than the ESA.

91 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	Bureau sensitive by using the following criteria. For species inhabiting multiple States, State Directors shall coordinate with one another in the designation of Bureau sensitive species so that species status is consistent across the species' range on BLM-administered lands, where appropriate.	
FERC	**Transmission Line Regulation** The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.	The proposed rule emphasizes the potential adverse effect of increased transmission as a result of transmission lines and implies that the proposed listing is the only protection available for lesser prairie chicken and their habitat. However, FERC requires consideration of wildlife and their habitat in considering siting and construction of these lines. In addition, because the permitting is undertaken by FERC, NEPA applies which would necessitate a full review of the effects on the lesser prairie chicken.
BLM, AFWA, WAFWA, FS	**Memorandum Of Understanding Among Association Of Fish And Wildlife Agencies (AFWA) And Western Association Of Fish And Wildlife Agencies (WAFWA) And U.S. Department Of Agriculture Forest Service (FS) And U.S. Department Of The Interior Bureau Of Land Management (BLM)** "The purpose of this Memorandum of Understanding (MOU) is to promote cooperative conservation of fish and	This MOU provides that these federal agencies will engage in cooperative activities for the benefit of wildlife, particularly priority wildlife impacted by energy development issues. We note this includes wind power. The ESA provides only for protection for listed species by reviewing the activities of federal agencies. The

	wildlife resources by facilitating communications and enhancing success in resolving issues related to energy development and its effect on fish, wildlife, and habitat."[92] The Parties' joint objectives are to: 1. Identify and define the key fish and wildlife habitat/energy development issues at the species, habitat, and wildlife community levels across state, administrative and district lines. 2. Develop communication systems to keep state fish and wildlife agencies, federal land management/permitting agencies, and the energy industry informed about and involved in programmatic issues related to maintenance and enhancement of fish, wildlife and habitat resources during energy development.	limitations on take are only that it may not result in jeopardizing the continued existence of the species • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Protection of critical habitat is limited to habitat affected by a federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA regulatory provisions do not provide for enhancement of wildlife or its habitat.
DOT	**Department Of Transportation, Federal Highway Administration, 23 CFR Part 777, Mitigation of Impacts to Wetlands and Natural Habitat** The Federal Highway Administration (FHWA) provides stewardship over the construction, maintenance and preservation of the Nation's highways, bridges and tunnels. FHWA also conducts research and provides technical assistance to state and local agencies in	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • In the case of the lesser prairie chicken, no

92 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/ib_attachments/2009.Par.99939.File.dat/IB2009-072_att1.pdf

	an effort to improve safety, mobility, and livability, and to encourage innovation.[93] This regulation was developed to "provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal aid projects funded pursuant to provisions of title 23, U.S. Code." … In considering projects under this section, the following requirements must be met: (a) The reasonableness of the public expenditure and extent of Federal participation with title 23, U.S. Code, funds shall be directly related to: (1) The importance of the impacted wetlands and natural habitats; (2) The extent of highway impacts on the wetlands and natural habitats, as determined through an appropriate, interdisciplinary, impact assessment; and (3) Actions necessary to comply with the Clean Water Act, Section 404, the Endangered Species Act of 1973, and other relevant Federal statutes. (b) Evaluation of the importance of the impacted wetlands and natural habitats shall consider: (1) Wetland and natural habitat functional capacity; (2) Relative importance of these functions to the total wetland or natural habitat resource of the area; (3) Other factors such as uniqueness, esthetics, or cultural values; and (4) Input from the appropriate resource management agencies through interagency coordination. (c) A	habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Does not require management plans.

9393 https://www.fhwa.dot.gov/

	determination of the highway impact should focus on both the shortand long-term affects of the project on wetland or natural habitat functional capacity, consistent with 40 CFR part 1500, 40 CFR 1502.16, 33 CFR 320.4, and the FHWA's environmental compliance regulations, found at 23 CFR part 771.[94]	
BLM	**2008 Special Status Species Resource Management Plan Amendment (2008 RMPA)** Address land-use decisions affecting special status species, primarily the habitats of lesser prairie chickens and sand dune lizards. Established the Lesser Prairie-Chicken Area of Critical Environmental Concern (ACEC).[95] [96]	The Special Status Species Resource Management Plan Amendment by BLM identifies the requirement that BLM consult with the FWS on activities that may affect wildlife even if the species is not listed.
	2008 Designation of Area of Critical Environmental Concern[97] Area of Critical of Environmental Concern (ACEC) are special management areas designated by BLM to protect significant historic, cultural, or scenic values; fish and wildlife resources; natural process or systems; and/or natural hazards that:	• Any ESA habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken)

[94] http://www.gpo.gov/fdsys/pkg/FR-2000-12-29/pdf/00-33194.pdf#page=12
[95] http://www.blm.gov/nm/st/en/fo/Roswell_Field_Office/special_status_species.html
[96] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf
[97] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf

	• have more than locally significant qualities which give it special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource; • have qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change; • has been recognized as warranting protection in order to satisfy national priority concerns or to carry out the mandates of Federal Land Management and Practices Act (FLMPA); • has qualities which warrant highlighting in order to satisfy public or management concerns about safety and public welfare; and/or • poses a significant threat to human life and safety or to property.	
BLM	**Managing Structures for the Safety of Sage-grouse, Sharp-tailed grouse, and Lesser Prairie-chicken**[98] This Instruction Memorandum (IM) provides guidance to effectively address sage-grouse, sharp-tailed grouse, and lesser prairie-chicken collisions with fences and other structures on public land.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all lands managed by BLM.

98 http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-022.html

FWS	**FWS Wind Energy Guidelines** FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [99] Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all affected lands.
BLM	**Reclamation and Best Management Practices Best Management Practices "BMP" for the Lesser Prairie Chicken** In "Appendix 5 Reclamation And Best Management Practices" to BLM's 2008 RMPA, BLM states that it will "incorporate appropriate Best Management Practices (BMPs" for the lesser prairie chicken " into proposed Applications for Permit to Drill (APDs) and associated rights-of-way (ROW) approvals after appropriate National Environmental Policy Act (NEPA) evaluation." [100]	

[99] http://www.fws.gov/windenergy/docs/WEG_final.pdf

[100] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34869.File.dat/pdf_rmpa_final_document_11_07_app_5.pdf

APPENDIX 5-- STATE AND LOCAL PROTECTIONS

COLORADO

Applicable State Laws	Comparison to Applicable ESA provisions
WILDLIFE Colorado statutes provide intent to protect species and will require that "…, there shall be a continuous operation of planning, acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities."[101] There is no limitation on the wildlife or species this applies to.	The ESA provides for • No planning, acquisition or development of wildlife habitats • Protects only listed species and designated critical habitat. • Limits activities and protections to listed species and designated critical habitat.
LAND USE, CONSERVATION **Colorado has vested its local government with authority to regulate land use to consider wildlife habitat and species.** … Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;"[102]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
LOCAL GOVERNMENT, PLANNING AND	The ESA provides no authority to undertake such planning, aquisition,

[101] (Colorado Revised Statutes, Title 33, Article 1 http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[102] C.R.S. 29-20-104 (2012), Title 29. Government - Local, Land Use Control And Conservation, Article 20.Local Government Regulation of Land Use, Part 1. Local Government Land Use Control Enabling Act, 29-20-104. Powers of local governments. ... for local governments to regulate land use to protect wildlife habitat and wildlife species. Drostev. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003). http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

ZONING **Colorado law establishes a Commission with specific direction to consider protected species in municipality development.** (1) It is the duty of the commission to make and adopt a master plan for the physical development of the municipality. When a commission decides to adopt a master plan, the commission shall conduct public hearings, after notice of such public hearings …, prior to final adoption of a master plan …. Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall, after consideration of each of the following, where applicable or appropriate, show the commission's recommendations for the development of said municipality and outlying areas, including:… (II) The United States fish and wildlife service of the United States department of the interior and the parks and wildlife commission created in section 33-9-101, C.R.S., for locating areas inhabited by endangered or threatened species; [103]…	and management actions. Nor does the ESA require consultation on non-federal lands (absent a federal nexus).
WILDLIFE "(1) It is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors. It is further declared to be the policy of this state that there shall be provided a comprehensive program designed to offer the greatest possible variety of wildlife-related recreational opportunity to the people of this state and its visitors and that, to carry out such program and policy, there shall be a continuous operation of planning,	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a

[103] C.R.S. 30-28-106 (2012), Title 30. Government - County, County Planning And Building Codes, Article 28.County Planning And Building Codes, Part 1. County Planning, 30-28-106. Adoption of master plan

acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities. (2) All wildlife within this state not lawfully acquired and held by private ownership is declared to be the property of this state. Right, title, interest, acquisition, transfer, sale, importation, exportation, release, donation, or possession of wildlife is permitted only as provided in articles 1 to 6 of this title or in any rule of the parks and wildlife commission..[104]… Right to capture or kill exists only as permitted by statute."	federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. • Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE, ENDANGERED SPECIES **Colorado may protect species which do not qualify for federal ESA listing.** (1) On the basis of investigations of nongame wildlife provided for in section 33-2-104 and other available scientific and commercial data and after consultation with other state wildlife agencies, the Colorado water conservation board, the Colorado water and power development authority, water conservancy districts, and other water conservation districts of the state, and other water resource development agencies within the state, appropriate federal agencies, and other interested persons and organizations, the commission shall by regulation adopted pursuant to the procedures specified in sections 33-1-111 and 24-4-103, C.R.S., establish a list of those species and, where necessary, subspecies of wildlife indigenous to this state which are determined to be endangered or	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Colorado).

[104] C.R.S. 33-1-101 (2012), Title 33. Parks And Wildlife, Wildlife, Article 1.Wildlife - General Provisions, 33-1-101. Legislative declaration http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

threatened within this state, giving their common and scientific names by species and, where necessary, by subspecies…[105]	
WILDLIFE, ENDANGERED SPECIES, CONSERVATION (1) The division shall establish such programs including acquisition of land or aquatic habitat as are deemed necessary for management of nongame, endangered, or threatened wildlife. (2) In carrying out programs authorized by this section, the division may enter into agreements with federal agencies or political subdivisions of this state or with private persons for administration and management of any area established under this section or utilized for management of nongame, endangered, or threatened wildlife. (3) The commission may permit, under such terms and conditions as may be prescribed by regulation, the taking, possession, transportation, exportation, or shipment of species or subspecies of wildlife which appear on the state lists of endangered or threatened species for scientific, zoological, or educational purposes, for propagation in captivity of such wildlife, or for other special purposes.[106] ...	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
WILDLIFE, ENFORCEMENT **Colorado provides for criminal and civil**	The ESA provides protections only for species listed under its provisions.

[105] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-105. Endangered Or Threatened Species. http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-105&sessionyr=2013&Title=33&datatype=S&noheader=1&nojumpmsg=0

[106] C.R.S. 33-2-106 (2012), TITLE 33. PARKS AND WILDLIFE, WILDLIFE, ARTICLE 2. NONGAME AND ENDANGERED SPECIES CONSERVATION, 33-2-106. Management programs. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=23935&userid=PRODSG&cvfilename=&noheader=1&Interface=

penalties for all wildlife unlawfully 'taken', this provision would apply to lesser prairie chickens whether or not they are listed under the ESA Division action to recover possession and value of wildlife unlawfully taken : (1) The division may bring and maintain a civil action against any person, in the name of the people of the state, to recover possession or value or both possession and value of any wildlife taken in violation of articles 1 to 6 of this title. A writ of replevin may issue in such an action without bond. No previous demand for possession shall be necessary. If costs or damages are adjudged in favor of the defendant, the same shall be paid out of the wildlife cash fund. Neither the pendency of such civil action nor a criminal prosecution for the same taking shall be a bar to the other; nor shall anything in this section affect the right of seizure under other provisions of articles 1 to 6 of this title.[107]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES **Colorado can prohibit 'take' of any wildlife species they determine is in need of such protection;** **Colorado can manage any nongame wildlife they determine is in need of such management. Colorado also requires collection of biological and ecological data to prepare management actions.**	The ESA provides only for protection for listed species by : 1. Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, 2. In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being

[107] C.R.S. 33-6-110 (2012), Title 33. Parks And Wildlife, Wildlife, Article 6. Law Enforcement And Penalties - Wildlife, Part 1. General Provisions, 33-6-110. Division Action To Recover Possession And Value Of Wildlife Unlawfully Taken. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24001&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(1) The division shall conduct investigations on nongame wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully. On the basis of such determinations, the commission shall issue regulations and develop management programs designed to ensure the continued ability of nongame wildlife to perpetuate themselves successfully. Such regulations shall set forth species or subspecies of nongame wildlife which the commission deems in need of management pursuant to this section, giving their common and scientific names by species and, where necessary, by subspecies. The commission shall conduct ongoing investigations of nongame wildlife and may from time to time amend such regulations by adding or deleting therefrom species or subspecies of nongame wildlife. (2) The commission shall by regulation establish limitations relating to the taking, possession, transportation, exportation, processing, sale or offering for sale, or shipment as may be deemed necessary to manage nongame wildlife. (3) Except as provided in regulations issued by the commission, it is unlawful for any person to take, possess, transport, export, process, sell or offer for sale, or ship nongame wildlife deemed by the commission to be in need of management pursuant to this section. Subject to the same exception, it is also unlawful for any common or contract carrier to knowingly	designated. 3. Prohibiting “take” of the species. 4. Does not require investigations of biological and ecological data to determine management measures necessary 5. Does not require management plans, . Absent a federal nexus, the ESA cannot regulate activities on non-federal lands.

transport or receive for shipment nongame wildlife deemed by the commission to be in need of management pursuant to this section.[108]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES "1) "Management" means the collection and application of biological information for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels. The term includes the entire range of activities that constitute a modern, scientific resource program including, but not limited to, research, census, law enforcement, habitat acquisition and improvement, and education. Also included within the term, when and where appropriate, is the periodic or total protection of species or populations. "Management" may include artificial propagation to maintain threatened or endangered species populations, in concert with the exercise of water rights, and may also include restriction of stocking of species which are in competition with threatened or endangered species for the available habitat."[109]	The ESA • Only applies to listed species; • Does not require collection of information on listed species • Does not require the implementation of a scientific resource program, or any kind of organized management program. survival. The ESA cannot require participation of state and private actors in recovery activities on non-federal lands.
WILDLIFE, ENFORCEMENT Colorado prohibits 'take' of wildlife generally. Illegal sale of wildlife : (1) (a…, it is unlawful for	The ESA provides protections for listed species by prohibiting take only of listed species.:

[108] Colorado Statutes, Title 33. Parks And Wildlife, Wildlife, Article 2. Nongame And Endangered Species Conservation http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-104&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[109] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-103. Definitions http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=32-15-109&statecd=CO&sessionyr=2012&TOCId=23929&userid=GUEST9&cvfilename=&docname=&Interface=NLL&noheader=1

any person to knowingly sell or purchase, or knowingly offer for sale or purchase, wildlife or to solicit another person in the illegal hunting or taking of wildlife for the purposes of monetary or commercial gain or profit.[110] 2) Any person who violates this section: (a) With respect to big game, endangered species, or eagles, commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S. Upon such conviction, the commission may suspend any or all wildlife license privileges of the person for a minimum of one year to life. (b) With respect to all other wildlife, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and an assessment of twenty license suspension points.[111]	
PLANNING AND ZONING, LOCAL GOVERNMENT **Colorado regulates habitat destruction by mining operators:** (1) Every operator to whom a permit is issued pursuant to this article shall perform the reclamation prescribed by the reclamation plan adopted pursuant to this section….f) In those areas where revegetation is part of the reclamation plan, land shall be revegetated so that a diverse, effective, and long-lasting	1. The ESA provides protections for listed species by regulating activities of federal agencies 2. The ESA cannot require actors on Colorado public lands and private lands to engage in conservation actions.

[110] Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions
[111] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions 33-6-117. Willful Destruction Of Wildlife - Legislative Intent

vegetative cover is established that is capable of self-regeneration and is at least equal, with respect to the extent of cover, to the natural vegetation of the surrounding area. Species chosen for revegetation shall be compatible for the proposed post-extraction land use and shall be of adequate diversity to establish successful reclamation.[112]	
LAND USE, LOCAL GOVERNMENT **Protects public and private habitat of species from the actions of all operators.** Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (a) Regulating development and activities in hazardous areas; (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;…[113]	ESA protects only those habitats designated as critical habitat through regulation of only federal agencies.
WILDLIFE CONSERVATION, FUNDING **Colorado provides a dedicated funding stream for wildlife conservation.** (1)(a) Except as provided in subsections (7) and (8) of this section, sections 33-1-112.5 and 33-6-105, and in part 7 of article 22 of title 39, C.R.S., all moneys received from wildlife license fees, and all moneys from all other wildlife sources, and all interest earned on such	The ESA provides no dedicated funding.

[112] Title 34. Mineral Resources Mines And Minerals Article 32.5. Colorado Land Reclamation Act For The Extraction Of Construction Materials C.R.S. 34-32.5-116 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=PRODSG&interface=NLL&statecd=CO&codesec=34-32.5-116&sessionyr=2012&Title=34&datatype=S&noheader=1&nojumpmsg=0

[113] C.R.S. 30-28-121 Title 30. Government - County County Planning And Building Codes Article 28.County Planning And Building Codes Part 1. County Planning, http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

moneys shall be deposited in the state treasury and credited to the wildlife cash fund, which fund is hereby created, and such moneys shall be utilized for expenditures authorized or contemplated by and not inconsistent with the provisions of articles 1 to 6 of this title for wildlife activities and functions and for the financing of impact assistance grants pursuant to part 3 of article 25 of title 30, C.R.S…. (b) There is hereby created a wildlife habitat account in the wildlife for future generations trust fund, created in paragraph (a) of this subsection (7). The state treasurer shall deduct five million dollars from the wildlife cash fund, created in subsection (1) of this section, and transfer such sum to the wildlife habitat account. The interest earned on such five million dollars shall be continuously appropriated and shall be used solely for operation and maintenance of properties, leases, and easements owned by the division. (8) (a) There is hereby created in the state treasury the habitat partnership cash fund. The moneys in the habitat partnership cash fund shall consist of those moneys annually transferred from the wildlife cash fund in accordance with paragraph (e) of this subsection (8) for the partnership program and any gifts, grants, donations, and reimbursements made to the program from other sources. The moneys in the fund shall be used in accordance with the duties of the habitat partnership council as specified in section 33-1-110 (7) and (8), including, but not limited to, reasonable and necessary expenses incurred by council members in the fulfillment of their duties, as approved by the director. All interest derived from the investment of moneys in the habitat partnership cash fund shall be	

credited to the fund. Any balance remaining in the fund at the end of any fiscal year shall remain in the fund subject to the limitations provided…[114]	
FUNDING ...(4) (a) (I) <u>All moneys received pursuant to the issuance of the Colorado wildlife habitat stamp shall be used for the benefit of wildlife habitat or access to wildlife habitat,</u> including costs associated with the operation and maintenance, such as weed control and fencing, of lands under the Colorado wildlife habitat protection program administered by the division. Revenues collected from the sale of the stamp are subject to annual appropriation….[115]	The ESA provides no dedicated funding.
WILDLIFE, CONSERVATION, FUNDING **Colorado legislature has expressed the priority for funding for the preservation of species of concern, including the LPC.** (1) The general assembly hereby finds, determines, and declares that: (a) Protecting wildlife habitat and obtaining public access are important elements to preserving wildlife and wildlife-related recreational opportunities in Colorado; (b) The general assembly specifically recognizes that hunting of big game species is an activity that hundreds of thousands of residents and visitors to Colorado enjoy, which contributes significantly to state and local economies; and (c) <u>Priorities for the expenditure of funds</u>	The ESA provides no dedicated funding.

114114114 Title 33. Parks And Wildlife Wildlife Article 1.Wildlife - General Provisions C.R.S. 33-1-112 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-1-112&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

115 Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees

generated from the sale of habitat stamps and Colorado wildlife passports shall include protecting big game winter range and migration corridors, acquiring public access to wildlife-related recreation, including fishing, hunting, and wildlife viewing, protecting habitat for species of concern, and preserving the diversity of wildlife enjoyed by Coloradans...[116]	
WILDLIFE, ENFORCEMENT On lands controlled by the Colorado parks and wildlife division, damage to property or habitat (1) It is unlawful for any person to remove, damage, deface, or destroy any real or personal property or wildlife habitat under the control of the division. Any person who violates this subsection (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. In addition, the court may require the defendant to reimburse the division for any damages.[117]	
LAND USE, NATURAL RESOURCES **Colorado specifically protects all wildlife habitat from adverse impacts from all oil and gas operations.** 1) This section shall be known and may be cited as the "Colorado Habitat Stewardship Act of 2007".	The ESA protects only critical habitat from the effects of federal actions. No critical habitat is being designated for lesser prairie chicken so no federal protection will ensue

[116] Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-4-102.7&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[117] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions C.R.S. 33-6-129 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24023&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(2) The commission shall administer this article so as to minimize adverse impacts to wildlife resources affected by oil and gas operations. (3) In order to minimize adverse impacts to wildlife resources, the commission shall: (a) Establish a timely and efficient procedure for consultation with the parks and wildlife commission and division of parks and wildlife on decision-making that impacts wildlife resources;[118] (b) Provide for commission consultation and consent of the affected surface owner, or the surface owner's appointed tenant, on permit-specific conditions for wildlife habitat protection. Such conditions shall be discontinued when final reclamation has occurred....	
WILDLIFE CONSERVATION, LAND USE **Colorado requires that state lands be managed in a manner that protects wildlife habitat.** (1) The state board of land commissioners shall be composed of five members appointed by the governor,....(6) (a) The people of the state of Colorado have recognized in section 10 of article IX of the state constitution that the state school lands are an endowment of land assets held in a perpetual, intergenerational public trust for the support of public schools, which should not be significantly diminished; that the disposition and use of such lands should therefore benefit public schools including local school districts; and that the economic	The ESA only protects the designated critical habitat of a listed species from federal agency actions. No critical habitat is being designated for lesser prairie chickens.

[118] Title 34. Mineral Resources Oil And Natural Gas Article 60.Oil And Gas Conservation C.R.S. 34-60-128 (2012), http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=34-60-128&sessionyr=2010&Title=34&datatype=S&noheader=1&nojumpmsg=0

productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. In recognition of these principles, the state board of land commissioners shall be governed by the standards set forth in section 10 of article IX of the state constitution in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.[119]	

[119] Title 36. Natural Resources - General Public Lands And Rivers Article 1.State Board Of Land Commissioners, C.R.S. 36-1-101.5 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=35-49-104&statecd=CO&sessionyr=2012&TOCId=25658&userid=GUEST9&cvfilename=&docname=&Interface=&noheader=1

TEXAS

Applicable State Laws	Applicable ESA provisions
WILDLIFE **Texas requires a research program and funding to support it to develop wildlife research.** The Texas Agricultural Experiment Station, in consultation with the Agriculture and Wildlife Research and Management Advisory Committee established under Section 88.216, Education Code, shall develop and administer a program to finance agriculture and wildlife research that the Texas Agricultural Experiment Station determines to be of the highest scientific merit and to offer significant promise in providing new directions for long-term solutions to continued agriculture production, water availability, and wildlife habitat availability. [120]	The ESA does not require or fund a research program.
CONSERVATION **Texas protects Game Birds from catch, kill, or possession (dead or alive). Further protections are offered for the nest and eggs. Lesser prairie chickens are classified as Game Birds and are protected under the Texas statute.** GAME BIRDS. Wild turkey, wild ducks of all varieties, wild geese of all varieties, wild brant, wild grouse, wild prairie chickens, wild pheasants of all varieties, wild partridge, wild bobwhite quail, wild scaled quail, wild Mearn's quail, wild Gambel's quail, wild red-billed pigeons, wild band-tailed pigeons, wild mourning doves, wild white-winged doves, wild	. An ESA listing would provide only the limited additional protection of criminalizing accidental take.

[120] Agriculture Code Title 3. Agricultural Research And Promotion Chapter 50. Agriculture And Wildlife Research Program Sec.50.001. Program http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.50.pdf

white-fronted doves, wild snipe of all varieties, wild shore birds of all varieties, chachalacas, wild plover of all varieties, and wild sandhill cranes are game birds. … Sec. 64.003. DESTROYING NESTS OR EGGS. No person may destroy or take the nest, eggs, or young of any wild game bird, wild bird, or wild fowl protected by this code except as provided in this code. … Sec. 64.004. TRAPPING GAME BIRDS. No person may set a trap, net, or other device for taking game birds or take or snare a game bird by a device without obtaining a permit from the department. .. Sec. 64.005. PENALTY. A person who violates a provision of this subchapter commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … Sec. 64.007. POSSESSION OF LIVE GAME BIRDS. No person may possess a live game bird in this state except as authorized by this code.[121]	

[121] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation, Subtitle B. Hunting And Fishing, Chapter 64. Birds, Subchapter A. General Provisions. http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.64.htm#64.001

CONSERVATION, LOCAL GOVERNMENT **Texas requires control of noxious weeds [122] [123] and funding of that control.** "Board" means the board of directors of a district. (2) "District" means a noxious weed control district. … The legislature has determined that: (1) noxious weeds are present in this state to a degree that poses a threat to agriculture and is deleterious to the proper use of soil and other natural resources; and (2) reclamation of land from noxious weeds is a public right and duty in the interest of conservation and development of the natural resources of the state. The board may: (1)determine which noxious weeds are subject to control and what appropriate methods of control are to be used, including spraying, cutting, burning, tilling, or any other appropriate method; (2) prescribe specific areas in the district in which control measures are to be used; (3) prescribe the period during which control measures are to be used; and (4) incur expenses and take other actions necessary to carry out the purposes of this chapter.[124]	The ESA provides no authority or funding for control of noxious weeds.
PLANNING AND ZONING, LAND USE **Structures are listed as a threat to the LPC.**	

[122] Title 5. Production, Processing, And Sale Of Horticultural Products,Subtitle B. Horticultural Diseases And Pests, Chapter 78. Noxious Weed Control Districts http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.78.pdf

[123] http://plants.usda.gov/java/noxious?rptType=State&statefips=48

[124] Agriculture Code ,Chapter 78. Noxious Weed Control Districts, Subchapter A. General Provisions http://law.justia.com/codes/texas/2005/ag/005.00.000078.00.html

Zoning regulations affecting the building of structures and location in Texas are adopted in accordance with the States comprehensive plan which provides for protection of the State's natural resources. Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:…(7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements. … The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land. [125]	
WILDLIFE, CONSERVATION **Texas Department of Parks and Wildlife provides local agencies recommendations information on wildlife protection to all government agencies that approve, permit, license or construct development projects.** "The department is the state agency with primary responsibility for protecting the state's fish and wildlife resources. (b)The department's resource protection activities include: (1)investigating fish kills and any type of pollution that may cause loss of fish or wildlife	The ESA provides consultation only through section 7 to federal agency actions that may affect listed species or their critical habitat. In the case of the lesser prairie chicken, since no critical habitat is being designated, no habitat protection is provided.

[125] Local Government Code Title 7. Regulation Of Land Use, Structures, Businesses, And Related Activities Subtitle A. Municipal Regulatory Authority http://www.statutes.legis.state.tx.us/Docs/LG/pdf/LG.211.pdf

resources, taking necessary action to identify the cause and party responsible for the fish kill or pollution, estimating the monetary value of lost resources, and seeking restoration through presentation of evidence to the agency responsible for permitting or through suit in county or district court; (2) providing recommendations that will protect fish and wildlife resources to local, state, and federal agencies that 1approve, permit, license, or construct developmental projects; (3)providing information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources;… [126]	
ENDANGERED SPECIES **Texas provides for listing of species based on the same factors as the ESA. Like Colorado, Texas may protect species which are only threatened in a portion of their range.** **Texas prohibits take of state listed species.** The director shall file with the secretary of state a list of fish or wildlife threatened with statewide extinction. (b)Fish or wildlife may be classified by the director as threatened with statewide extinction if the department finds that the continued existence of the fish or wildlife is endangered due to: (1)the destruction, drastic modification, or severe curtailment of its habitat; (2)its overutilization for commercial or sporting purposes; (3)disease or predation; or (4)other natural or man-made factors.	The ESA limits listing protections to species only if the at risk of extinction occurs in a significant portion of their range. The ESA cannot must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Texas).if the species is at risk in only one portion of its range.

[126] Parks And Wildlife Code, Title 2. Parks And Wildlife Department, Chapter 12. Powers And Duties Concerning Wildlife, Subchapter A. General Powers And Duties http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.12.pdf

… No person may capture, trap, take, or kill, or attempt to capture, trap, take, or kill, endangered fish or wildlife. (b)No person may possess, sell, distribute, or offer or advertise for sale endangered fish or wildlife unless the fish or wildlife have been lawfully born and raised in captivity for commercial purposes under the provisions of this chapter. (c)No person may possess, sell, distribute, or offer or advertise for sale any goods made from endangered fish or wildlife[127]	
ENDANGERED SPECIES, CONSERVATION, FUNDING **Provides for dedicated funding of an endangered species account.** A peace officer who has arrested a person for a violation of this chapter may seize fish or wildlife or goods made from fish or wildlife taken, possessed, or made in violation of this chapter. (b) Property taken under this section shall be delivered to the department for holding pending disposition of the court proceedings. If the court determines that the property was taken, possessed, or made in violation of the provisions of this chapter, the department may dispose of the property under its regulations. The costs of the department in holding seized fish or wildlife during the pendency of the proceedings may, in appropriate cases, be assessed against the defendant. … . All revenue received under this chapter shall be deposited in the state treasury to the credit	The ESA provides no dedicated funding for ESA actions.

[127] Parks And Wildlife Code Title 5. Wildlife And Plant Conservation Subtitle B. Hunting And Fishing Chapter 68. Endangered Species http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf

of the special nongame and endangered species conservation account.[128]	
WILDLIFE, ENFORCEMENT **Texas may take action to refuse hunting or fishing licenses if outstanding violations of wildlife laws exist in other states.** On behalf of this state, the commission may enter into the Interstate Wildlife Violator Compact. (b) If necessary to protect the interests of this state, the commission may withdraw from the Interstate Wildlife Violator Compact in accordance with the terms of the compact. (c)The commission may take all actions necessary to implement this chapter, including the adoption of rules and the delegation of authority to the director.[129] (The Interstate Wildlife Violator Compact is an agreement that unresolved hunting and fishing violations in one state can affect a person's hunting or fishing privileges in other participating states. Any person whose license privileges or rights are suspended in a member state could also be denied future purchase of a license in Texas until they have satisfied suspension in the other state.)[130]	The ESA contains no regulatory provisions to protect wildlife generally.
WILDLIFE, ENFORCEMENT …, a person who violates a provision of Title 7 of this code commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … A person who violates any of the following	The ESA prohibition against "take" is limited to listed species.

[128] Id, http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf
[129] Parks And Wildlife Code Title 6. Compacts Chapter 92. Interstate Wildlife Violator Compact http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.92.pdf
[130] http://www.tpwd.state.tx.us/newsmedia/releases/?req=20091105g

provisions of Title 7 of this code commits an offense that is a Class B Parks and Wildlife Code misdemeanor: Section 131.011; 143.023; 229.021; 237.022; 334.041; or 350.021. [131]	
WILDLIFE, CONSERVATION **Texas law protects generally all indigenous species from collection, holding, possession, display, transport, release, or propagation.** In this subchapter, "protected wildlife" means all indigenous mammals, indigenous birds, indigenous reptiles, indigenous amphibians, indigenous fish, and other indigenous aquatic life the taking, collecting, holding, possession, propagation, release, display, or transport of which is governed by a provision of this code other than this subchapter or by a commission rule adopted under any provision of this code other than this subchapter and includes endangered species. … No person may collect, hold, possess, display, transport, release, or propagate protected wildlife for the purposes of this subchapter without a permit issued under this subchapter..[132]	The ESA protections are limited to listed species.
WILDLIFE, CONSERVATION, ENDANGERED SPECIES, LOCAL GOVERNMENT The criteria that the Texas Forest Service uses	The ESA authorizes the designation of critical habitat only for listed species.

[131] Parks And Wildlife Code, Title 7. Local And Special Laws, Chapter 355. Penalties For Violations Of Title 7, Parks And, Wildlife Code
http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.355.pdf
[132] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation Subtitle A. Hunting And Fishing Licenses Chapter 43. Special Licenses And Permits Subchapter C. Permits For Scientific Research, Zoological Collection, Rehabilitation, And Educational Display
http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.43.htm

in determining CWHZ [Critical Habitat Wildlife Zone] upon request from a chief appraiser or taxing unit is set out as follows. (1) The presence of qualified endangered or threatened animal or plant, as defined in paragraph (2) of this section, in the zone and the existence of a plan to protect it must be evidenced by a memorandum of understanding, conservation agreements, or other documentation pertaining to the protection of such animal or plant life with a federal, state, or private organization with recognized responsibility for protecting this species. (2) The animal or plant is listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. §1531 et seq.) and its subsequent amendments, or as endangered und er Parks and Wildlife Code, §68.002, …[133]	
NATURAL RESOURCES, ENDANGERED SPECIES, WILDLIFE, CONSERVATION, LAND USE **Texas requires that applications for mining and reclamation authority explain how adverse wildlife impacts will be minimized using the best technology available. Texas also requires enhancement of the wildlife and environmental values if possible.** Each application shall contain a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on	The ESA allows control of federal agency actions and imposition of requirements to avoid jeopardizing the continued existence of a species and adverse modification of critical habitat. In the case of the lesser praire chicken since no critical habitat is designated, habitat will not be protected.

[133] Title 4 Agriculture Part 12 Texas A&M Forest Service Chapter 215 Forest Zone Determination Procedure Rule §215.9 The Criteria For Determining Critical Wildlife Habitat Zone Upon Request From A Chief Appraiser Or Taxing Unit http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=72782&p_tloc=&p_ploc=&pg=1&p_tac=72782&ti=4&pt=12&ch=215&rl=9&dt=&z_chk=3841529&z_contains=habitat

fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. [134]	
NATURAL RESOURCES, LAND USE **Texas protects wildlife habitat generally from surface mining and reclamation activities.** The operator of all surface mining and reclamation operations not otherwise exempted or excluded shall as a minimum: … (1) conduct surface mining operations in a manner consistent with prudent mining practice, so as to maximize the utilization and conservation of the resource being recovered so that reaffecting the land in the future through surface mining can be minimized; (a) The permit application shall, if required by the Commission, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation. (b) When a map or aerial photograph is	The ESA can only protect designated critical habitat from federal agency actions. There is no designation of critical habitat proposed for lesser prairie chickens, so no habitat protection will exist.

[134] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 12 Coal Mining Regulations Subchapter G Surface Coal Mining And Reclamation Operations, Permits, And Coal Exploration Procedures Systems Division 6 Surface Mining Permit Applications--Minimum Requirements For Reclamation And Operation Plan Rule §12.144, Fish And Wildlife Plan http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=7940&p_tloc=&p_ploc=&pg=1&p_tac=7940&ti=16&pt=1&ch=12&rl=144&dt=&z_chk=3841534&z_contains=habitat

required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under §12.133 of this title (relating to Fish and Wildlife Resources Information).; [135]	

[135] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 11 Surface Mining And Reclamation Division Subchapter C Substantive Rules--Uranium Exploration And Surface Mining Division 6 Uranium Surface Mining Reclamation Rule §11.152 Surface Mining Reclamation Standardshttp://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=148942&p_tloc=&p_ploc=&pg=1&p_tac=148942&ti=16&pt=1&ch=11&rl=152&dt=&z_chk=3841530&z_contains=habitat

OKLAHOMA

Applicable State Laws	Applicable ESA provisions
WILDLIFE, ENDANGERED SPECIES Under Oklahoma law, no person may possess, hunt, chase, harass, capture, shoot at, wound or kill, take or attempt to take, trap, or attempt to trap any endangered or threatened species or sub-species without specific written permission of the director.[136]	ESA provides similar protections for listed species.
WILDLIFE **Oklahoma offers protections for all "game birds".** "Game bird" is a bird species normally sought after by sportsmen, and includes only all species of brant, cranes, doves, ducks, gallinules, geese, grouse, partridge, pheasant, quail, prairie chickens, rails, snipes, swans, tinamous, wild turkeys, woodcock, and any part thereof.[137]	Only listed species are protected under the ESA.
WILDLIFE, **Oklahoma prohibits unauthorized "take".** "Hunting or taking" is pursuing, killing, capturing, trapping, snaring and netting wildlife, and all lesser acts such as disturbing, harrying, worrying or placing, setting, drawing or using any net, trap or other device used to take wildlife and includes specifically every attempt	The ESA prohibition against "take" applies only to listed species.

[136] Title 29. Game and Fish. Chapter 1. Oklahoma Wildlife Conservation Code. Article V. Game. Part 4. Section 5-412 - Prohibitions with Endangered or Threatened Species or Subspecies. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77803

[137] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-114 - Game Bird, http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77660

to take and every assistance to other persons in taking or attempting to take wild animals, except that the definitions of "taking" and "hunting" wildlife shall not include disturbing, harrying or worrying wild game in field trials or performance tests of dogs nor the act of any person in participating as owner, handler, trainer, official or member of an audience observing such trials, whether resident or nonresident, where wild game is not killed.[138]	
CONSERVATION **Oklahoma does not permit "take" of game birds during its closed season.** "Closed season" is all other times than open season, and is the period during which protected wildlife may not be lawfully taken.[139]	The ESA prohibition against take applies only to listed species.
HABITAT RESTORATION, WEED CONTROL, INVASIVE SPECIES The Forestry Division, in connection with the enforcement of the Oklahoma Forestry Code, shall have the following powers, authority, and duties: … 10. <u>To plan and conduct prescribed burning at the request and expense of landowners on public or private lands for the purpose of controlling Eastern Red Cedar and other invasive species, for hazardous fuel reduction, wildlife habitat manipulation, ecosystem restoration</u>, or achieving silvicultural objectives.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[138] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-118 - Hunting or Taking. http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77665

[139] Title 29. Game and Fish , Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-104 - Closed Season. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77645

Forestry Division employees shall be protected under The Governmental Tort Claims Act and shall not be personally liable beyond the limits established therein for activities pursuant to this paragraph unless gross negligence is established in a competent court of law.[140]	
FUNDING, WILDLIFE CONSERVATION A. The Department of Wildlife Conservation is hereby authorized to issue an Oklahoma Wildlife Habitat Stamp to any person upon the voluntary payment of a fee of Ten Dollars ($10.00). Said fee shall be deposited in the Wildlife Land Acquisition Fund created in subsection C of this section. … C. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Land Acquisition Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received pursuant to the provisions of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such	• The ESA Provides no dedicated funding • The ESA has no authority to require States to participate in recovery activities.

[140] Title 2. Agriculture , Chapter 1 - Agricultural Code, Forestry Administration and Enforcement, Article 16 - Oklahoma Forestry , Code Section 16-8 - Powers of Division - Appointment of Forest Investigators and Rangers - Powers and Duties - Entry Upon Lands - Arrests, etc. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=465855&hits=1318+864+309+

investments shall be deposited in the Wildlife Land Acquisition Fund. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection D of this section. … D. The Wildlife Land Acquisition Fund shall be used by the Oklahoma Wildlife Conservation Commission for the acquisition on a willing-seller willing-buyer basis only, leasing, taking of easements, development, management, and enhancement of lands acquired pursuant to this section for the following purposes: Management of game animals, protected animals and birds, furbearing animals, game birds, fish, and their restoration, propagation, and protection; and Creation and management of public hunting, fishing, and trapping areas as places where the public may hunt, fish, or trap as authorized by law.[141]	
HABITAT, WILDLIFE, CONSERVATION A. In order to encourage wildlife habitat conservation on private lands, the Department of Wildlife Conservation shall establish a program for wildlife habitat maintenance, enhancement, development, preservation, restoration, and management on private lands. To implement the program, the Department shall enter into multiyear contracts for approved	The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. The ESA provides no protection for non-listed species and does not provide for the "restoration" or "development" of those non-listed

[141] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 4 – Licenses, Section 4-132 - Authority to Issue Oklahoma Wildlife Habitat Stamp - Rules and Regulations - Creation and Use of Wildlife Land Acquisition Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466381&hits=1386+783+726+629+70+15+

projects on privately owned lands detailing the landowners' responsibilities. B. The Department shall promulgate rules pursuant to the Administrative Procedures Act to implement the program. Such rules may provide for incentives to participate in the program.[142]…	species. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE Oklahoma law prohibits the knowing and willful killing or molestation of hawks, falcons, owls, or eagles, or their nests, eggs, or young. The only exceptions to this prohibition are the taking of a hawk or owl in the act of destroying domestic birds or fowl, or the use of hawks, owls, falcons, or eagles by licensed falconers. [143]	The ESA limits protection to listed species.
ENFORCEMENT, WILDLIFE, ENDANGERED SPECIES Oklahoma prohibits the possession of wildlife or parts during closed season, and any endangered or threatened species. Under these Oklahoma statutes, no person may possess any wildlife or parts thereof during the closed season, any endangered or threatened species or parts thereof at any time, or any native bear or native cat that will grow to reach the weight of 50 lbs. or more, with exceptions. A	The ESA limits protection only to listed species.

[142] Title 29. Game and Fish, Chapter 1, Oklahoma Wildlife Conservation Code, Article 3, Section 3-312 - "Program for Wildlife Habitat Development, Preservation, Restoration, and Management - Rules - Construction of Program.". http://www.oscn.net/applications/oscn/deliverdocument.asp?id=436091&hits=935+479+463+407+23+7+

[143] OK - Game Animals - Part 4. Protected Game. § 5-410. Hawks; falcons; owls; eagles

conviction could result in a fine of $100-$500 and/or by imprisonment up to 30 days. In addition, no person may buy, barter, trade, or sell all or any part of any fish or wildlife or the nest or eggs of any bird protected by law, with exceptions. A first violation could result in a fine of $100 to $500 and/or by imprisonment up to 60 days. [144]	
WILDLIFE, CONSERVATION, FUNDING A. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Heritage Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received from senior citizen lifetime licenses issued pursuant to the provisions of paragraphs 4 through 6 of subsection B of Section 4-114 of this title by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such investments shall be deposited in the Wildlife Heritage Fund. Only interest and dividends derived from the principle can be expended and are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection B of this section. Any monies withdrawn from said fund by the	The ESA provides no dedicated funding and is limited in its application to listed species.

[144] OK - Wildlife - Part 5. Possession of Wildlife. OK ST T. 29 § 7-501 to 504

Oklahoma Wildlife Conservation Commission for investment pursuant to this subsection shall be deemed to be for the purposes specified in subsection B of this section. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.[145]	
WILDLIFE, ENFORCEMENT, ENDANGERED SPECIES **Oklahoma prohibits transportation of any wildlife out of Oklahoma.** Under these Oklahoma statutes, no common carrier may transport any wildlife or endangered or rare species, with exceptions. A violation could result in a fine of $25 to $100. In addition, no person may transport into or out of Oklahoma any wildlife or parts thereof, nests of wildlife, their eggs or their young, or any endangered or threatened species, with exceptions. A violation could result in a fine of $50 to $200, and/or imprisonment of 10 to 60 days. [146]	The ESA applies only to listed species.
WILDLIFE, CONSERVATION, FUNDING A. The Oklahoma Tax Commission shall include on each state individual income tax return form for tax years beginning after December 31, 2001, and each state corporate tax return form for tax years beginning after December 31, 2001, an opportunity for the taxpayer to donate	The ESA provides no dedicated funding.

[145] Title 29. Game and Fish Chapter 1 - Oklahoma Wildlife Conservation Code Article 4 - Licenses Section 4-134 - Creation and Use of Wildlife Heritage Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466383&hits=1344+1343+1124+1123+1094+1093+1032+1031+934+933+866+865+844+843+786+785+757+756+752+751+687+686+608+607+437+436+409+408+347+346+255+254+189+188+167+166+109+108+80+79+75+74+17+16+

[146] OK - Wildlife - Transportation of Wildlife OK ST T. 29 § 7-601 - 602

from a tax refund for the benefit of the Oklahoma Wildlife Diversity Program. B. For purposes of this section, "nongame wildlife" means any species of wildlife not legally classified as a game species or furbearer by statute or by rule adopted pursuant to statute. C. Except as otherwise provided for in this section, all monies generated pursuant to subsection A of this section shall be paid to the State Treasurer and placed to the credit of the Wildlife Diversity Fund. D. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Diversity Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received under the provisions of paragraph 2 of subsection C of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. …[147]	
CONSERVATION, WILDLIFE	• The ESA has no authority to require States to participate in

[147] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-310 - Wildlife Diversity Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466370&hits=1486+1485+1480+1479+1020+1019+994+993+939+938+910+909+905+904+860+859+640+639+633+632+302+301+276+275+221+220+192+191+187+186+142+141+

A. The Wildlife Conservation Commission shall constitute an advisory, administrative and policymaking board for the protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of wildlife in this state as provided in the Oklahoma Wildlife Conservation Code. B. The Director shall consult with the Commission regarding the administration of the affairs of the Department of Wildlife Conservation. The Commission is authorized and empowered to require from the Director complete reports and information relative to the affairs of the Department at the time and in the manner the Commission may deem advisable. … D. In addition to the other powers and duties prescribed by law, the Commission shall: … 8. Supervise the establishment, extension, improvement, and operation of the wildlife refuges, propagation areas or stations, public hunting areas, public fishing areas, game management areas, and fish hatcheries; 9. Prescribe the manner of cooperation with the Oklahoma Tourism and Recreation Department, colleges and universities within the state, other state agencies, any agency of the federal government, and any city, town, school district, or any other agency or organization in study of conservation and propagation of wildlife and in the establishment, maintenance, and operation of visual educational facilities, recreational facilities, and hunting and fishing facilities, in the study and propagation of wildlife;	recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • The ESA requires only federal agencies consult and has no authority to require State or local governments to consult where there is no federal action. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and “enhanced”. • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

… 14. Publicize and encourage the conservation and appreciation of wildlife and all other natural resources; 15. Regulate the seasons and harvest of wildlife; 16. Promulgate rules to sell fishing and hunting licenses via the Internet;….[148]	
WILDLIFE, ENFORCEMENT A. Except as otherwise provided by law, <u>any person arrested for a violation of any section of the Oklahoma Wildlife Conservation Code shall be admitted to bail as follows:</u> <u>1. Whenever a person is charged for any violation of any of the wildlife laws of this state or rules adopted by the Wildlife Conservation Commission pursuant to law, which violation is punishable as a misdemeanor</u> and the person is not immediately taken into physical custody pursuant to state law, the officer shall prepare a written citation containing a notice to appear in court, the name and address of the person, the offense charged, the time and place where the person shall appear in court and any other pertinent information as may be necessary; 2. The arresting officer shall indicate on the citation the date of the arraignment. The person charged shall appear in person or by counsel at the stated time and place for arraignment.[149]	The ESA only provides protections for listed species.

[148] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103 - Functions, Powers, and Duties of the Commission. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466368&hits=1919+1918+1913+1912+991+990+968+967+936+935+872+871+865+864+57+56+36+35+4+3+

[149] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 9 - Wildlife Bail Procedure Act, Section 9-112 - Admission to Bail for Violations of Wildlife Conservation Code. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=462892&hits=1526+1525+1498+1497+814+813+779+778+686+685+679+678+54+53+21+20+

CONSERVATION, HABITAT Oklahoma provides for private lands fish and wildlife habitat conservation and improvement programs which include maintenance, protection, enhancement and restoration for habitat generally including aquatic, riparian, upland, wetland and forest habitat. … conservation improvement contract requirements [150] (a) The following projects may be approved for Private Lands Fish and Wildlife Habitat Conservation and Improvement Programs (1) Aquatic Habitat maintenance, protection, enhancement, or restoration, (2) Riparian Habitat maintenance, protection, enhancement, or restoration (3) Upland Habitat maintenance, protection, enhancement, or restoration (4) Wetland Habitat maintenance, protection, enhancement, or restoration (5) Forest Habitat maintenance, protection, enhancement, or restoration, (6) Any other project which is deemed appropriate by the Department.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

[150] 800:25-35-3. Approved projects and conservation improvement contract requirements http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_

KANSAS

Applicable State Laws	Applicable ESA provisions
CONSERVATION **Kansas requires programs, including land acquisition to conserve non-game and threatened and endangered species.** Same; programs for conservation. (a) The secretary shall establish such programs, including acquisition of land or aquatic habitat, as are deemed necessary for the conservation of nongame, threatened and endangered species. The secretary shall utilize all authority vested in the secretary by the laws of this state to carry out the purposes of this section with the exception that the secretary shall not utilize the power of eminent domain to carry out such programs unless a specific authorization and appropriation is made therefor by the legislature.[151]	The ESA provides no authority for establishment of programs or land adquisition for endangered species.
FUNDING, CONSERVATION **Kansas provides for species in need of conservation and allows tax credits for lands known to support populations of such species.** Tax credits for expenditures related to nongame (a) There shall be allowed two types of credits against the tax liability of a taxpayer imposed under the Kansas income tax act related to real property that is both: (1) Designated by the secretary of wildlife, parks and tourism pursuant to the nongame and endangered species conservation act as critical habitat for a threatened or endangered species	The ESA provides no tax credits and can only list species

[151] Article 9. - Licenses, Permits, Stamps And Other Issues 32-962.

or certified by the secretary of wildlife, parks and tourism as land known to support populations of species in need of conservation; and (2) included in management activities as part of a recovery plan, or an agreement identified in subsection (b) of K.S.A. 32-962 and amendments thereto, as approved by the secretary of wildlife and parks, for a species listed as threatened, endangered or in need of conservation pursuant to the nongame endangered species conservation act.[152]	
WILDLIFE, CONSERVATION **Kansas provides programs to allow species to sustain themselves, not recover. These protections are offered to non-listed species.** … (a) The secretary shall conduct investigations on nongame species in order to develop information relating to population, distribution, habitat needs, limiting factors and other biological and ecological data to determine conservation measures necessary for their continued ability to sustain themselves successfully. On the basis of such information and determinations, the secretary shall adopt rules and regulations pursuant to K.S.A. 32-963 which contain a list of the nongame species deemed by the secretary to be in need of conservation and shall develop conservation programs pursuant to K.S.A. 32-962 which are designed to insure the continued ability of such nongame species to perpetuate themselves	The ESA provides protections only for listed species and does not offer any program for species prior to their listing to ensure that they do not become endangered/threatened.

[152] Article 32. - Statute 79-32,203: Tax credits for expenditures related to nongame and endangered species.

successfully. The secretary shall conduct ongoing investigations of nongame species.[153]	
WILDLIFE (a) Commercialization of wildlife is knowingly committing any of the following, except as permitted by statute or rules and regulations: (1) Capturing, killing or possessing, for profit or commercial purposes, all or any part of any wildlife protected by this section; (2) selling, bartering, purchasing or offering to sell, barter or purchase, for profit or commercial purposes, all or any part of any wildlife protected by this section;[154]	The ESA provides protections only for listed species.
WILDLIFE, ENFORCEMENT Wildlife violator compact; enactment of compact. The wildlife violator compact is enacted into law and entered into by the State of Kansas with any and all jurisdictions legally joining therein in accordance with its terms.[155]	
WILDLIFE Unlawful possession of wildlife or wild turkey; refusal to allow inspection of property used in taking wildlife; penalties. (a) It is unlawful for any person to: ...	The Kansas statute provides penalties for any unlawful possession of wildlife, including wild turkey. The ESA only prohibits the "take" of listed species. Non-listed species are

[153] Article 9. - Licenses, Permits, Stamps And Other Issues 32-959.
[154] Article 10. - Enforcement , 32-1005. http://kslegislature.org/li/b2013_14/statute/032_000_0000_chapter/032_010_0000_article/032_010_0005_section/032_010_0005_k/
[155] Chapter 32 Article 10 »Section 61 » 32-1061. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0061_section/032_010_0061_k/

(4) possess any wildlife unlawfully killed or otherwise unlawfully taken outside this state;[156]	provide no protections.
LOCAL GOVERNMENT, WEED CONTROL Control and eradication of noxious weeds; payment of costs; sale of chemicals for use on private property, price. ... If the governing body of any political subdivision owning or supervising lands infested with noxious weeds within their jurisdiction fails to control such noxious weeds after 15 days' notice directing any such body to do so, the board of county commissioners shall proceed to have proper control and eradication methods used upon such lands,...[157]	Certain invasive species of plants are listed as potential threats to the habitat of the lesser prairie chicken. Kansas provides authority for its local governments to eradicate "noxious weeds" on private lands. The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
ENDANGERED SPECIES Nongame and endangered species conservation act; title. K.S.A. 32-957 through 32-963, 32-1009 through 32-1012, 32-1033 and K.S.A. 32-960a and 32-960b, and amendments thereto, shall be known and may be cited as the	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety

[156] Chapter 32 Article 10 »Section 4 32-1004. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0004_section/032_010_0004_k/

[157] Chapter 2 Article 13 Section 19 WEEDS

nongame and endangered species conservation act.[158] As used in the nongame and endangered species conservation act: (a) "Conserve," "conserving" and "conservation" mean the use of all methods and procedures for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such numbers. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, regulated taking and, when and where appropriate, the periodic or total protection of species or populations of wildlife. With respect to threatened species and endangered species, the terms mean the use of all methods and procedures, including but not limited to those described above, which are necessary to bring any threatened or endangered species to the point at which the methods, procedures and measures provided for such species pursuant to the nongame and endangered species conservation act are no longer necessary. (b) "Ecosystem" means a system of living organisms and their environment, each influencing the existence of the other and both necessary for the maintenance of life. (c) "Endangered species" means any species of wildlife whose continued existence as a viable component of the state's wild fauna	of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Kansas). • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a federal agency action.

[158] Chapter 32 »Article 9 Section 57 Article 9. - Licenses, Permits, Stamps And Other Issues

is determined to be in jeopardy. That term also includes any species of wildlife determined to be an endangered species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (d) "Nongame species" means any species of wildlife not legally classified a game species, furbearer, threatened species or an endangered species by statute or by rule and regulation adopted pursuant to statute. (e) "Optimum carrying capacity" means that point at which a given habitat can support healthy populations of wildlife species, having regard to the total ecosystem, without diminishing the ability of the habitat to continue that function. (f) "Threatened species" means any species of wildlife which appears likely, within the foreseeable future, to become an endangered species. That term also includes any species of wildlife determined to be a threatened species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (g) "Wildlife" means any member of the animal kingdom, including, without limitation, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof. ….[159]	

[159] http://kansasstatutes.lesterama.org/Chapter_32/Article_9/#32-958

PLANNING AND ZONING ...(b) The planning commission may adopt and amend a comprehensive plan as a whole by a single resolution, ... In the preparation of such plan, the planning commission shall make or cause to be made comprehensive surveys and studies of past and present conditions and trends relating to land use, population and building intensity, public facilities, transportation and transportation facilities, **economic conditions, natural resources and may include any other element deemed necessary to the comprehensive plan**. Such proposed plan shall show the commission's recommendations for the development or redevelopment of the territory including: (a) The general location, extent and relationship of the use of land for agriculture, residence, business, industry, recreation, education, ... (f) utilization and conservation of natural resources; and (g) any other element deemed necessary to the proper development or redevelopment of the area.[160]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
LAND USE, PLANNING AND ZONING …construction of public facility or utility in conformance with comprehensive plan. (a) Except as provided in subsection (b), whenever the planning commission has adopted and certified the comprehensive plan for one or more major sections or functional subdivisions thereof, no public improvement, public facility or public utility of a type embraced within the recommendations of the comprehensive plan or portion thereof shall be constructed without first being submitted to and being approved by the	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.

[160] Chapter 12 Article 7 Section 47 Article 7. - Planning And Zoning 12-747.

planning commission as being in conformity with the plan.[161]	
LAND USE, PLANNING AND ZONING Zoning of land outside city limits; conditions and limitations; notice to county commissioners. Cities are hereby authorized to adopt zoning regulations affecting all or any designated portion of the land located outside the city but within three miles thereof under the following conditions Except for flood plain regulations in areas designated as a flood plain, nothing in this act shall be construed as authorizing any city to adopt regulations applying to or affecting any land in excess of three acres under one ownership which is used only for agricultural purposes: (a) The city has established a planning commission under the provisions of K.S.A. 12-702, and amendments thereto, which provides for the appointment of two commission members who reside outside the city but within the area subject to the zoning regulations of the city, or the city has established a joint, metropolitan or regional planning commission in cooperation with the county in which such city is located pursuant to the provisions of K.S.A. 12-718, and amendments thereto.[162]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Fences composed of posts a In fences composed of posts and wires, the posts shall be of ordinary size for fencing purposes, and set in the ground at least two feet deep and not more	Local governments are permitted to regulate fence The ESA provides

[161] Chapter 12 Article 7 Section 48 Article 7. - Planning And Zoning
[162] Chapter 12 Article 7 Section 15b Article 7. - Planning And Zoning

than twelve feet apart, with holes through the posts or staples on the side not more than fifteen inches apart, to admit four separate strands of fence wire not smaller than No. 9, and shall be provided with rollers and levers, at suitable distances, to strain and hold the wire straight and firm.[163]	• No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
FUNDING, CONSERVATION Assent to wildlife restoration act; use of fees. (a) The state of Kansas hereby assents to the provisions of the wildlife restoration act (16 U.S.C. 669 et seq.), as amended. The secretary is hereby authorized and directed to perform such acts as necessary to the conduct and establishment of cooperative wildlife restoration projects, as defined in such act, in compliance with such act and with rules and regulations promulgated by the secretary of the interior thereunder. The state treasurer is hereby authorized to receive and disburse all money apportioned to the state in accordance with the provisions of such act.[164]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
FUNDING, CONSERVATION Conservation fee fund; authorized expenditures; accounting procedures; reduction of fees and assessments, when. (a) There is hereby created in the state treasury the conservation fee fund. All deposits credited to the conservation fee fund shall be for the use of the state corporation commission in administering the provisions of K.S.A. 55-172 through 55-184, 55-601 through 55-613, 55-701 through 55-713, 55-901 and 55-1201 through 55-1205.[165]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[163] Home Statute Chapter 29 Article 1 Section 3 Fencing
[164] Chapter 32 Article 8 Section 28 Article 8. - Department Of Wildlife, Parks And Tourism
[165] Chapter 55 Article 1 Section 43 Article 1. - Oil And Gas Wells; Regulatory Provisions

LAND USE, PLANNING AND ZONING Application of intent to drill wells, required information; notification of surface owner; fee and contents; information to department of health and environment and county clerk; approval of application, when; conditions; compliance with rules and regulations. (a) Prior to the drilling of any well, every operator shall file an application of intent to drill with the commission. Such application shall include such information as required by the commission, including the name and address of the surface owner, and shall be on a form prescribed by the commission. Such application shall also include non-binding preliminary estimates of the location of roads of ingress or egress, any tank battery and any pipeline or electrical line. The commission shall, upon receipt of such application, send a copy of such application to the named surface owner, as well as the contact information, including name, address, phone number, fax or email address, for a designated representative of the applicant.[166]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action. • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Removal of structures and abutments from lands after abandoning wells; exception. (a) Leaving the surface of lands with a part of the operating structure or other equipment intact after abandoning oil or gas wells is against public policy, and constitutes a public nuisance, and shall be hereafter prohibited. Whenever any lease operator abandons any oil or gas well, the lease operator, within six months thereafter, shall remove any rig, derrick or other operating structure, and all abutments and other obstacles of every kind or size used in the operation of such oil or gas lease, from the land upon which	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.

[166] Chapter 55 Article 1 Section 51 Article 1. - Oil And Gas Wells; Regulatory Provisions

the well was theretofore operated, and shall grade the surface of the soil in such manner as to leave the land, as nearly as practicable, in the same condition after the removal of such structures, equipment and obstacles as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise.[167]	

[167] Chapter 55 »Article 1 »Section 77 Article 1. - Oil And Gas Wells; Regulatory Provisions

NEW MEXICO

Applicable State Laws	Applicable ESA provisions
WILDLIFE The game animals and quadrupeds, game birds and fowl, and game fish as herein defined shall be protected and hunting, taking, capturing, killing or possession, or attempt to hunt, take, capture or kill of any or all species named herein shall be regulated by the state game commission under the authority of Chapter 117 of the 1931 Session Laws of the state of New Mexico.	The ESA provides protections against take for only for listed species.
WILDLIFE, ENFORCEMENT **New Mexico regulates the LPC under its game laws. Which prohibit the "take" of species, including the LPC, without a permit.** A. Except as permitted by regulations adopted by the state game commission or as otherwise allowed by law, it is unlawful to: (1) hunt, take, capture, kill or attempt to take, capture or kill, at any time or in any manner, any game animal, game bird or game fish in the state; or (2) possess, offer for sale, sell, offer to purchase or purchase in the state all or any part of any game animal, game bird or game fish….[168]	The ESA only provides protections against "take" for listed species.
PLANNING AND ZONING, HABITAT **New Mexico has stated a clear preference for avoidance of wildlife areas in its**	The ESA Provides: • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical

[168] NM Stat § 17-2-7 (1996 through 1st Sess 50th Legis)

development of utilities. Scenic enhancement: The following provisions for scenic enhancement shall apply for utility facility installation in cited areas: (1) The type and size of the utility facilities and the manner and extent to which they are permitted within areas of scenic enhancement and natural beauty may materially alter the scenic quality, appearance and view of highway roadsides and adjacent areas. Such areas include scenic strips, overlooks, rest areas, recreation areas and the rights-of-ways and adjacent highways. Also included are Sections of highways which pass through public parks, recreation areas, wildlife and waterfowl refuges and historic sites. Whenever possible, new utility installations within all such strips overlooks and areas shall be avoided.[169]	habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
HABITAT, CONSERVATION **New Mexico requires that its wildlife department regulate "vehicle travel" on habitat for certain classes of species.** New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species. … "To provide a description of lands closed to vehicle travel under the Habitat Protection Act and to describe prohibited activities on said lands. [170]	The ESA provides not authority to regulate activities on non-federal lands, absent a federal nexus.
WILDLIFE, CONSERVATION,	The ESA provides no authority to

[169] Title 17: Public Utilities And Utility Services Chapter 4: Utility Rights Of Way And Easements Part 2 , Requirements For Occupancy Of State Highway System Right-Of-Way By Utility Facilities
[170] http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0002.htm

ENFORCEMENT **New Mexico state game commission has authority to establish rules to acquire lands and to prevent damage to wildlife and wildlife habitat on lands owned or controlled by the department.** New Mexico state game commission with the authority to acquire land and to establish rules and regulations that it may deem necessary to carry out the purposes of Chapter 17, NMSA 1978[171]	acquire lands or to establish regulations necessary to protect species. The only protections offered by the ESA provide protections from "take", allow designation of critical habitat, and require federal agencies consult.
WILDLIFE **LPC are game birds in New Mexico, and as such, they are protected. No game bird may be hunted during a closed season or without a permit.** **New Mexico has also established areas of LPC habitat, where the LPC are protected and season is only open for quails.** Season and hours: Upland game may be hunted or taken only during open seasons and only during the period from one-half hour before sunrise to one-half hour after sunset, unless otherwise specifically allowed by rule…. (1) On wildlife management areas, the lesser prairie-chicken areas, and the Sandhills Prairie conservation area hunting hours shall be from one-half hour before sunrise to one-half hour after sunset	ESA only prohibits "take" of listed species.

[171] Title 19 Natural Resources And Wildlife, Chapter 34 Wildlife Habitat And Lands, Part 4 Protection Of Department Of Game And Fish Lands. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0004.htm

… **(e)** The state game commission owned lesser prairie-chicken areas shall be open for quail hunting during established seasons.[172]	
WILDLIFE, ENFORCEMENT **New Mexico also provides protections for wildlife and game animals on private lands.** It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on any private property that is in compliance with 30-14-1 and 30-14-6 NMSA 1978 posting requirements without possessing written permission from the landowner or person in control of the land or trespass rights, unless otherwise permitted in rule or statute. It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on private property if the consent to enter or remain has been denied or withdrawn by the owner or person in control of the land or trespass rights, per 30-14-1 NMSA 1978, unless otherwise permitted in rule or statute. … Any game animals, furbearers, game birds, or game fish taken in violation of this section shall be subject to seizure.[173]	The ESA provides protection against "take" only for listed species.
WILDLIFE, CONSERVATION, HABITAT New Mexico has designated the LPC as a	The ESA can only prohibit take and require federal agencies to consult on

[172] 19.31.5.9 Manner And Methods For Upland Game http://www.nmcpr.state.nm.us/nmregister/xxi/xxi15/19.31.5.htm

[173] Unlawful Taking Or Killing Of Game Animals, Furbearers, Game Birds, Or Game Fish On Private Land, [19.31.10.18 NMAC - N, 4-1-2009]. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.031.0010.htm

"Species of Greatest Conservation Need (SGCN)" in its wildlife conservation strategy. New Mexico's wildlife conservation strategy demonstrates New Mexico's concern for wildlife habitat resources to keep wildlife populations healthy and sustainable and fully addresses eight essential elements established by Congress. It focuses on strategic actions intended to keep common species common and work to prevent wildlife from becoming endangered with a constructed framework for identifying species of greatest conservation need, the habitat treatments necessary to sustain them and other members of their ecological community.[174]	actions on federal lands. The ESA cannot require States to undertake independent conservation activities.
WILDLIFE, FUNDING **New Mexico requires local government to undertake activities to "promote" the health, safety and welfare of the State's wildlife.** It is the intent of the legislature by the passage of the Pollution Control Revenue Bond Act to authorize municipalities to acquire, own, lease or sell projects for the purpose of reducing, abating or preventing pollution, including, but not limited to, removing pollutants, contaminants or foreign substances from land, air or water, or removing or treating any substance in a processed material which otherwise would cause pollution when such material is used, to protect and promote the health, welfare and safety of the citizens of this state and its and wildlife, with the resultant higher level of employment and economic activity and stability. It is not intended hereby to authorize any municipality itself to operate any	The ESA requires consultation by federal agencies on actions that may affect listed species. The ESA provides no authority to require local municipalities to undertake projects to protect wildlife, absent a federal nexus.

[174]New Mexico Department of Game and Fish. 2006. Comprehensive Wildlife Conservation Strategy for New Mexico. New Mexico Department of Game and Fish. Santa Fe, New Mexico. 526 pp + appendices.

manufacturing, industrial or commercial enterprise. The provisions of the Pollution Control Revenue Bond Act shall be liberally construed in conformity with this intent.[175]	
WILDLIFE, HABITAT, CONSERVATION **New Mexico has established conservation districts to "enhance" wildlife and habitat.** A. The "conservation services division" is created within the department of game and fish. B. The conservation services division is responsible for: (1) management, enhancement, research and conservation of public wildlife habitat ; (2) the lease, purchase, enhancement and management of state wildlife habitat ; (3) assisting landowners in improving wildlife habitats; (4) development of educational programs related to conservation of wildlife and the environment, including the expanded dissemination of wildlife publications; and (5) communication and consultation with federal and other state agencies, local governments and communities, private organizations and affected interests responsible for habitat, wilderness, recreation, water quality and environmental protection to ensure comprehensive conservation services for	The ESA does not have a provision for the "enhancement" of a listed species. Only a prohibition against take and for activities that may allow "recovery".

[175] 3-59-3. Legislative intent.

hunters, anglers and nonconsumptive wildlife users.[176]	
WILDLIFE, FUNDING, HABITAT The purpose of the Game and Fish Bond Act is to provide for use of revenues derived from fees for hunting and fishing licenses to issue bonds to provide for fish hatcheries and rearing facilities, game and fish at acquisition, development and improvement projects and other similar capital outlay projects.[177]	The ESA does not provide dedicated funding.
WILDLIFE, ENDANGERED SPECIES, HABITAT **Requires studies to be conducted to determine the status and survival requirements of threatened and endangered species.** In addition to other powers and duties, the director (of fish and game): A. may acquire land or aquatic habitat interests for the conservation, management, restoration, propagation and protection of threatened or endangered species; and B. shall conduct studies to determine the status and requirements for survival of threatened or endangered species.[178]	The ESA cannot require a State to undertake conservation activities.

[176] 17-6-1 to 17-6-11 NMSA 1978] may be cited as the "Habitat Protection Act"; 17-1-5.1. Conservation services division; duties.
[177] 17-1-17. Purpose of act.
[178] 17-2-44. Director; land or aquatic habitat interest acquisition.

COUNTY AND LOCAL LAW

County	Authority	Synopsis
BERNALILLO COUNTY, NEW MEXICO		The Bernalillo County Open Space Master Naturalist Program aims to instill the pursuit of life-long learning and promote environmental stewardship. Participants are activity engaged through education and service dedicated to the beneficial management of natural resources on Open Space properties.
BERNALILLO COUNTY, NEW MEXICO	Code of Ordinances, Art. II, Sec. 58-46,	The purpose of this article is to promulgate laws that preserve Bernalillo County open space for the purposes for which they were acquired, including the protection of natural areas, cultural and historical sites, agricultural lands, wildlife habitat, water resources and viewsheds, the promotion of environmental education, and the provision of resource-based recreation.
BERNALILLO COUNTY, NEW MEXICO [179]	Sec. 58-107	No person shall harm, hunt, pursue, molest, harass, trap, collect or remove any mammal, bird, reptile or amphibian animals or eggs or young of such animals on/from open space lands.
Union, NEW MEXICO [180]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [181]

[179] http://library.municode.com/index.aspx?clientId=13071&stateId=31&stateName=New%20Mexico&p_PageAlias=all-county-ordinances
[180] http://nm-unioncounty.civiccities.com/directory.aspx
[181] http://www.unionnm.us/DocumentCenter/Home/View/9

Quay, NEW MEXICO	Quay County Comprehensive Plan	Once adopted, the Comprehensive Plan becomes the official policy of the County. It is passed as a resolution rather than an ordinance in order to maintain its flexibility and change as conditions and priorities change.
Eddy, NEW MEXICO	Ordinance 41, Land Use	The Eddy County Land Use Policies and Procedures was developed by Eddy Government to guide the use of public lands and cooperation with County, State and Federal governments. [182]
Eddy, NEW MEXICO	Comprehensive Plan	Ensures compliance with environmental standards and advocates the use of environmental studies in planning (page. 53). ... County/city cooperation in managing growth and development in the PPJ could include one or more of the following measures: ...proximity to environmentally sensitive lands or farmland. (p. 23)[183]
Eddy, NEW MEXICO	Ordinance 19, Regulating, Controlling the Growth and Removal of Plants	Encourages native plant growth[184]
Chaves, NEW MEXICO	Art. V, Area 1 Regulations	Designation of Wildlife Habitat[185]

182 http://www.co.eddy.nm.us/Ordinance%20pdfs/landuseO-02-41.pdf
183 http://www.co.eddy.nm.us/EddyCty-FinalRPT10-08.pdf
184 http://www.co.eddy.nm.us/Ordinance%20pdfs/weedsgrowthcontrolandremovalO-91-19.pdf
185 http://co.chaves.nm.us/~cochaves/pdf/ZoningOrdinance.pdf

Chaves, NEW MEXICO	Chaves County Comprehensive Plan and Zoning Report, 4-1	Public Land Policy[186]
Chaves, NEW MEXICO	Chaves County Public Lands Advisory Committee	A committee that coordinates with federal and state agencies on public land related issues, including environmental regulation. [187]
De Baca, NEW MEXICO		
San Miguel, NEW MEXICO	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [188]
	Regulating The Permitting, Placement, Construction And Modification Of Oil And Gas Drilling And Production	The purpose of this Ordinance to: 1. Provide for a permitting process for responsible oil and gas operations and allow responsible economic development within the County; 2. Protect the water, air, environment, wildlife and other natural and economic resources within the County;..[189]
Colorado		

[186] http://co.chaves.nm.us/~cochaves/pdf/Comprehensive_Plan.pdf
[187] http://co.chaves.nm.us/index.php/2012-05-03-17-38-37/planning-zoning
[188] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf
[189] http://www.smcounty.net/Agenda/Oil%20and%20Gas%20Ordinance.pdf

Prowers, COLORADO		Utility and Development Permit Resolution and Prowers County Permitting & Development Guide including land use policy. [190]
Las Animas, COLORADO	Wildlife habitat analysis, special uses ect.	The Planning and Zoning Department is responsible for the administration and processing of applications for division of lands, subdivisions, rezoning and other land use cases.[191]
Bent, COLORADO	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.
Kiowa, COLORADO	Zoning and Planning	Approvals required from zoning and planning office commissioner
Otero, COLORADO	Areas having statewide impact or significance	Guidelines And Regulations For Areas And Activities Of State Interest County Of Otero State Of Colorado [192]

190 http://www.prowerscounty.net/Index.asp?HtAUNHADBcDIHwQ+NHADBcHt132i@330_DwVvZru3HhR7JKifAdCW2gmaUtOEnTljIqsXzyN8pcoB15YkQxe06bLFMSG49P+/

191 http://www.lasanimascounty.net/index.php/land-use-home

192 http://www.oterogov.com/images/LandUse/guidelinesregs20060814.pdf

Costilla, COLORADO		Comprehensive Plan outlines zoning, land use and environmental constraints.[193]
Pueblo, COLORADO	Rural land use plan, special uses	Title 17, Land Use and Zoning. The Rural Land Use process was adopted by Pueblo County to provide an alternative method of land division that encourages the clustering of single-family residential dwellings to maintain rural character, preserve open space, reduce the extension of roads and utilities, and offer landowners a new approach for developing the land without going through the full subdivision process. It provides a means of developing rural property while at the same time protecting wildlife habitat or critical areas, maintaining agricultural lands suitable for farming or ranching operations, and preserve and conserve water resources. In order to go through the Rural Land Use Process, the Cluster Development criteria must be met.[194] [195]
Oklahoma		
Roger Mills, OKLAHOMA	Zoning	Zoning permits and/or approval required for development
Greer, OKLAHOMA	Zoning	MAPC rezones for buildings , cell towers, and other structures. (Metropolitan action planning commission)

[193] http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Comprehensive+Plan+.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251756861482&ssbinary=true

[194] http://county.pueblo.org/government/county/department/planning-and-development/zoning

[195] http://county.pueblo.org/government/county/code/title17/chapter17-104

APPENDIX 6-- EXISTING CONSERVATION PROGRAMS

Name of program/Agency	Authority/Funding Source
FWS	
Four grant programs are available through the Cooperative Endangered Species Conservation Fund they include: Traditional" Conservation Grants, and; "Nontraditional" Grants: • Habitat Conservation Plan Land Acquisition • Habitat Conservation Planning Assistance • Recovery Land Acquisition Grants.)	ESA, Sec. 6 Support development of Habitat Conservation Plans (HCPs)federally listed threatened or endangered species, proposed and candidate species, and unlisted species proposed to be covered by the HCP.
USDA-	
Lesser Prairie Chicken Initiative	Prairie Chicken Initiative: The five states addressing Lesser Prairie Chicken habitat requested NRCS priority focus on improving habitat. NRCS and its conservation partners are helping farmers and ranchers enhance, restore and protect habitat for this sensitive and reclusive bird. For Fiscal Year 2013 Lesser Prairie-Chicken Initiative is funded under Wildlife Habitat Incentive Program.[196]
Wildlife Habitat Incentive Program	WHIP: The Food, Conservation, and Energy Act of 2008 reauthorized WHIP as a voluntary approach to improving wildlife habitat in our Nation. The Natural Resources Conservation Service administers WHIP to provide both technical assistance and up to 75 percent cost-share assistance to establish and improve fish and wildlife habitat..[197] In fiscal year 2011, the WHIP Program had a

[196] http://www.ks.nrcs.usda.gov/programs/lpci/index.html
[197] http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046975

<table>
<tr><td></td><td>U.S. total of 3,856 contracts, which represents 848,656 acres of land and a funding obligation of $60,580,860.

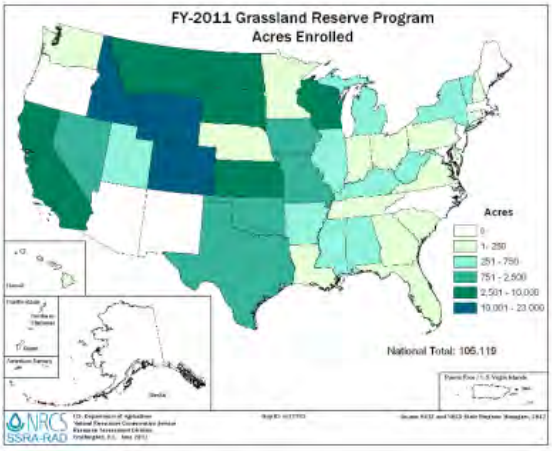
Contract Data for the impacted states[198]:
<table>
<tr><th>State</th><th># Contacts</th><th>Acres Enrolled</th><th>Funds Obligated</th></tr>
<tr><td>Colorado</td><td>12</td><td>15,655.9</td><td>$421,303</td></tr>
<tr><td>Kansas</td><td>119</td><td>23,799.1</td><td>$1,480,428</td></tr>
<tr><td>New Mexico</td><td>35</td><td>24,489.6</td><td>$779,789</td></tr>
<tr><td>Oklahoma</td><td>10</td><td>3,013.7</td><td>$185,084</td></tr>
<tr><td>Texas</td><td>283</td><td>317,448.9</td><td>$9,834,629</td></tr>
</table></td></tr>
<tr><td>Working Land for Wildlife</td><td>Working Lands for Wildlife is a new partnership between NRCS and the U.S. Fish and Wildlife Service (FWS) to combat the decline of seven specific wildlife species whose decline can be reversed and will benefit other species with similar habitat needs.

NRCS and FWS announced an agreement that will provide “long-term regulatory predictability for up to 30 years to farmers, ranchers and forest landowners participating in the U.S. Department of Agriculture's Working Lands for Wildlife (WLFW) Initiative.[199]

The agreement builds on a $33 million investment NRCS announced last spring dedicated toward producers who develop and implement conservation plans to manage and restore high-priority habitats for seven specific wildlife species across the country. The species are greater sage-grouse, New England cottontail,</td></tr>
</table>

198 http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046225

199 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

<table>
<tr><td></td><td>bog turtle, golden-winged warbler, gopher tortoise, lesser prairie-chicken and the Southwestern willow flycatcher."[200]</td></tr>
<tr><td>The Grassland Reserve Program (GRP)</td><td>GRP is a voluntary conservation program that emphasizes support for working grazing operations, enhancement of plant and animal biodiversity, and protection of grassland under threat of conversion to other uses.
2011 Easement Enrollment Data for impacted States:
<table>
<tr><th>State</th><th>Easements</th><th>Acres</th></tr>
<tr><td>Colorado</td><td>14</td><td>51,185</td></tr>
<tr><td>Kansas</td><td>74</td><td>42,133</td></tr>
<tr><td>Oklahoma</td><td>9</td><td>10,304</td></tr>
<tr><td>Texas</td><td>37</td><td>15,405</td></tr>
<tr><td>New Mexico</td><td>4</td><td>22,225[201]</td></tr>
</table>

</td></tr>
</table>

200 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

201 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/grassland/?cid=stelprdb1048273

State Acres for Wildlife Enhancement (SAFE) Approved Projects. SAFE is a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years.	In 2012, the SAFE Program identified the following priorities for the impacted States: [202] **Colorado Lesser Prairie Chicken SAFE** The goal of the Colorado Lesser Prairie Chicken SAFE is to restore and enhance 21,500 acres of short and midgrass sand sagebrush prairie to maintain and enhance lesser prairie chicken populations in Colorado. **Colorado Shortgrass Prairie SAFE** The goal of the Colorado Shortgrass Prairie SAFE is to preserve the integrity and expand the extent of shortgrass prairie managed for wildlife species in eastern Colorado. Project partners hope to accomplish this by enrolling 11,475 acres in CRP. **Kansas Upland Game Birds SAFE** The goal of the Kansas Upland Game Birds SAFE project is to improve populations of bobwhite quail and other grassland-associated wildlife by creating nesting/brood-rearing habitat on portions of crop fields. This SAFE effort will establish and maintain 30,100 acres in CRP consisting of diverse native grass and forb cover. Quail, pheasant and other grassland birds are species that will benefit from SAFE enrollments. **Kansas Lesser Prairie Chicken Habitat SAFE** The goal of the Kansas Lesser Prairie Chicken Habitat SAFE project is to enroll 30,000 acres in CRP to restore mixed-grass prairies to maintain and enhance lesser prairie chicken populations. The lesser prairie chicken is a candidate for federal listing as a threatened or endangered species. **New Mexico Lesser Prairie Chicken SAFE**

202 http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20110812_consv_en_safe.html

	The goal of the New Mexico Lesser Prairie Chicken SAFE project is to enroll 2,600 acres in CRP in the eastern part of the state to benefit the lesser prairie chicken by restoring native grasslands for breeding and brood-rearing. In eastern New Mexico, this bird and other species have been petitioned for listing under the Endangered Species Act. **Oklahoma Mixed Grass Prairie SAFE** The goal of the Oklahoma Mixed Grass Prairie SAFE project is to enroll 15,100 acres in CRP to restore mixed-grass prairie type associations in northwestern Oklahoma to benefit northern bobwhite, Cassin's sparrow and other grassland birds. **Texas Gulf Coast Prairies SAFE** The goal of the Texas Gulf Coast Prairies SAFE is to enroll 500 acres to restore grassland and shallow water habitats in the Gulf Coast Prairie region of Texas for a variety of bird species. **Texas Mixed Grass SAFE** The goal of the Texas Mixed Grass SAFE project is to enroll 78,400 acres in CRP to reconnect geographically and reproductively isolated populations of lesser prairie chickens by creating native mixed grass prairie and travel corridors. [203]

[203] ftp://ftp-fc.sc.egov.usda.gov/KS/Outgoing/Web_Files/Programs/lepc/2012/lpci_practices.pdf

APPENDIX 7 -- INDIVIDUAL, STATE AND REGIONAL VOLUNTARY ACTIONS

Name of program/Agency	Authority/Funding Source
The Western Governors Association Southern Great Plains Crucial Habitat Assessment Tool (SGP CHAT)	Range Wide 5 State Lesser Prairie Chicken Model – SGP CHAT is the result of phase one of a three-year WGA Wildlife Council project, led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken (LEPC) throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[204] [205]
Lesser Prairie Chicken Initiative Kansas Field Training	Educational seminars related to the lesser prairie chicken. [206]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[207]
Wildlife Habitat Evaluation Guide (WHEG)	The regionalized Wildlife Habitat Evaluation Guide (WHEG) for lesser prairie-chicken (LEPC) serves two functions: 1) use as a planning too lto identify limiting factors for LEPC; 2) and will be used to demonstrate what concerns/threats are most limiting range wide and how NRCS has addressed those on our LPCI contracts.[208]

[204] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[205] http://kars.ku.edu/geodata/maps/sgpchat/
[206] http://www.ksre.ksu.edu/doc13897.ashx
[207] http://kec.kansas.gov/reports/wind_siting_handbook.pdf
[208] http://www.ksre.ksu.edu/doc13898.ashx

	In 2000, the Association of Fish and Wildlife Agencies (AFWA) Teaming with Wildlife (TWW) coalition Representing more than 3,500 agencies, conservation groups and businesses led the passage of two important wildlife and fisheries conservation funding acts: Wildlife Conservation and Restoration Program(WCRP) and State Wildlife Grants(SWG) (TWW 2008 – 2011, see new TWW 2012). The following year, the United States' Congress required each state and territory to develop a "comprehensive wildlife conservation strategy" to guide the distribution of these funds(USFWS 2000). Eight elements of conservation success were identified by the US Fish and Wildlife Service (USFWS 2000) and a representative team from state fish and wildlife agencies and conservation organizations to guide the plans' development. The elements address species, habitats and communities, problems and issues, conservation actions, monitoring, plan reviews, coordination with conservation partners, and public involvement. SPECIES OF GREATEST CONSERVATION NEED (SGCN) Each state identified a list of species representative of the diversity, health and importance of the wildlife of their state. While the lists could include game and other state and federal regulated species, SGCN lists primarily focused on rare, declining, and vulnerable fish and wildlife species needing special attention for recovery, stability, and/or to prevent listings under state or federal regulation (e.g. Endangered Species Act). CONSERVATION ACTIONS AND MONITORING Conservation actions(e.g. research, survey, restoration, land or water protection, partnership-building) were defined to address the threats and issues which negatively affect species, habitats and systems. A baseline assessment of existing habitats was important for many states to define and prioritize where actions were most needed. For some states, this assessment could not be accomplished with the available data; therefore, baseline development itself became a conservation action. Actions were developed on

	the framework of existing conservation for each state: private landowner outreach, partnerships with other agencies and organizations, public involvement, legislative and regulatory support, to name a few. Measuring and reporting progress, lessons learned and successes ("effectiveness") is best accomplished through monitoring. This component is very important, yet frequently it is the most difficult to achieve due to very limited time, money and human resources. MOMENTUM 2005 – 2011 By 2006, 56 plans were created – one for each US state and territory – and approved by USFWS Regional review teams(TWW 2012). These plans were called State Wildlife Action Plans(SWAP) or Comprehensive Wildlife Conservation Strategies(CWCS). Since plans were approved, conservation partners and resource conservation agencies have seen the value in these plans grow as information resources, support or guidance for their conservation activities, and platforms for conservation practice improvement.[209]
Colorado Wildlife Action Plan	Submitted to the U.S. Fish and Wildlife Service on September 29, 2005, and it was finalized November 2, 2006. • 210 species were identified as Species of Greatest Conservation Need (SGCN). [210]
Interagency Group	W. Governor's Association Interstate Working Group
Upland Bird Grassland Habitat Strategy on the Eastern Plains	Grassland wildlife habitat conservation in eastern Colorado is implemented through a diverse mix of programs and efforts. Colorado Parks and Wildlife (CPW) has identified and prioritized areas of high upland wildlife habitat and population potential, which typically coincides with historic mid-grass or sand-sage prairie habitats.
Pheasant Habitat Improvement Program,	The Pheasant Habitat Improvement Program (PHIP) is a cooperative effort between the Colorado Parks and Wildlife,

[209] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_overview_2012.pdf
[210] http://wildlife.state.co.us/SiteCollectionDocuments/DOW/WildlifeSpecies/CWCS_FinalReport2006.pdf

(PHIP)	Pheasants Forever Inc., and local Pheasants Forever Chapters in Colorado. The program is designed to assist landowners in developing and enhancing habitat for ring-necked pheasants. PHIP is offered within the core pheasant range in Colorado, including the counties of Morgan, southeastern Weld, Logan, Phillips, Sedgwick, Yuma, Washington, Kit Carson, Cheyenne, Kiowa, Prowers and Baca.[211]
Private Lands Technical Assistance Programs	Private Landowner Assistance offers a wide variety of programs to assist private landowners on improving fisheries and wildlife on their property and can provide technical support and assistance on improving wildlife habitats.[212]
Habitat Partnership Program (HPP)	This grant is designed to encourage multiple entities to partner with the Habitat Partnership Program on large scale habitat improvement projects which, when completed, will provide benefits to livestock, private land owners, land managers, big game animals and other wildlife species. Habitat improvement projects include using mechanical and chemical tools to improve/increase available habitat and forage. Typical habitat improvement projects done by HPP include brush manipulation (hydroaxing, roller chopping, Lawson aerating, burning, etc), weed control using biological and chemical means, water developments (maintaining existing water sources and developing new ones), fertilizing and reseeding.[213]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are paving the way of our future by developing best management practices or BMPs that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy

[211] http://wildlife.state.co.us/LANDWATER/PRIVATELANDPROGRAM/PHIP/Pages/PHIP.aspx
[212] http://www.kdwpt.state.ks.us/news/Services/Private-Landowner-Assistance
[213] http://www.riparianrestorationconnection.com/component/content/article/193-habitat-partnership-program-hpp-habitat-improvement-grant

	from renewable sources by 2020 in a wildlife friendly manner.[214]
LESSER PRAIRIE-CHICKEN WILDLIFE MANAGEMENT PLAN	The Texas Parks and Wildlife Department(TPWD) provides free technical assistance to landowners and land managers interested in wildlife management through the private lands enhancement program. Local biologists work with land owners to develop and then meet the wildlife management goals and objectives for all species of land owner interest on a given property. A wildlife management plan (WMP) can provide numerous benefits for landowners. Once implemented it improves habitat, potentially increases wildlife numbers, and can improve grazing resources. Additionally, use of a WMP promotes aesthetic value, and therefore can raise property value. The lesser prairie-chicken is a candidate species for listing under the Endangered Species Act. This particular WMP (specific to protecting and improving lesser prairie-chicken habitat) will fulfill the requirements for entering into a Candidate Conservation Agreement with Assurances(CCAA. [215]
Texas Conservation Agreement	CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES FOR LESSER PRAIRIE-CHICKENS between TEXAS PARKS AND WILDLIFE DEPARTMENT and U. S. FISH AND WILDLIFE SERVICE[216]
TEXAS CONSERVATIONACTIO N PLAN State/Multi-Region	Through the Texas Conservation Action Plan (TCAP), ecologists and other stakeholders all across the state have identified 1311 Species of Greatest Conservation Need (SGCN), 232 Rare Plant Communities, the best examples of habitats and those at risk, issues affecting our resources, and potential solutions to continue to protect lands and water for future generations of

[214] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml

[215] v http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd_1046b_w7000_lesser_prairie_chicken_wmp.pdf

[216]http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

	people, fish and wildlife. The challenges are many, but the landscape of conservation partners and opportunities is extensive. This plan is designed to help interested folks connect and put into practice the most needed conservation actions. [217]
An Assessment of Herbicide Treatment and Grazing on Lesser Prairie Chicken Survival, Nest Site Collection[218]	Blake Grisham- Department of Natural Resources Management, Texas Tech University [219]
Candidate Conservation Agreement With Assurances -Oklahoma	The U.S. Fish and Wildlife Service (Service) has approved the Oklahoma Department of Wildlife Conservation's (ODWC) Candidate Conservation Agreement with Assurances (CCAA) for the lesser prairie-chicken. - approved 2/5/13[220]
Great Plains HCP	HCPs are an integral component of an application for an Incidental Take Permit (ITP) under the federal Endangered Species Act (ESA). ITPs are a voluntary tool that non-federal entities may use to receive authorization for "take" of federally-listed (i.e., officially recognized as endangered or threatened) species of wildlife that may occur in connection with otherwise lawful activity. "Take" is defined in the ESA as, "…to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" with respect to federally-listed endangered species.[221]

[217] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_statewide_multiregion_handbook.pdf
[218] http://www.ksre.ksu.edu/doc13892.ashx
[219] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1047721.pdf
[220] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf
[221] http://www.greatplainswindhcp.org/documents/fact_sheet.pdf ; http://www.greatplainswindhcp.org/aboutthehcp.cfm

Oklahoma Conservation Commission	Commission created to assist with state conservation and education efforts and is an authorized rulemaking entity. [222] [223] The Oklahoma Conservation Commission and conservation districts accomplish conservation of renewable natural resources through soil and water conservation, landuse planning, small watershed upstream flood control, abandoned mine land reclamation, water quality monitoring, environmental education and wetlands conservation.
Ecology and Management of the Lesser Prai rie-Chick en[224]	Oklahoma Cooperative Extension Service, Division of Agricultural Sciences and Natural Resources, Oklahoma State University
Wildlife Credits Program	Offers stewardship payments to agricultural producers for work done to protect and expand habitat for the rare upland bird. Is made possible with an agreement between the Wildlife Department, Oklahoma Conservation Commission and the Oklahoma Association of Conservation Districts. [225]
Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (Tympanuchus pallidicinctus) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.[226]
Oklahoma Lesser Prairie Chicken Conservation Plan (OLEPCCP	a conservation plan to address the decline of the lesser prairie chicken (LEPC) in Oklahoma. The conservation plan will identify management strategies to improve LEPC population viability through improvements to LEPC habitat emphasizing tools and incentives to encourage landowners to partner with agencies in conservation efforts while achieving their land use needs.[227]

[222] http://www.ok.gov/conservation/
[223] http://www.ok.gov/conservation/About_Us/Rules_and_Rulemaking/index.html
[224] http://www.environment.ok.gov/documents/OKWindEnergy/EcologyMgmtLesserPrairieChicken.pdf
[225] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[226] http://www.wildlifedepartment.com/lepcdevelopmentplanning.htm
[227] http://www.wildlifedepartment.com/wildlifemgmt/lepc/cons_plan.htm

Habitat Evaluation Guide for the Lesser Prairie-chicken[228]	Guide for Management and Habitat Restoration co-authored by Oklahoma State University, George Miksh Avian Research Center, and the Nature Conservancy.
Eastern Ceder Removal	NRCS is using new technology to enhance existing satellite images to identify redcedar growth and estimate the inventory available for harvest. Counties that are included in this Cedar Mapping project: Cimarron, Ellis, Murray, Okfuskee, Pottawatomie, and Woodward.[229]
Lesser Prairie Chicken Initiative Core Conservation Practices	NRCS Programs for habitat restoration include: Brush Management, Early Succession Habitat Development, Firebreak , Fence, Obstruction Removal, Prescribed Grazing, Prescribed Burning, Range Planting, Restoration of Rare and Declining Habitat, Watering Facility supporting programs. [230]
Kansas Comprehensive Wildlife Conservation Plan[231]	The theme of Kansas' Comprehensive Wildlife Conservation Plan (CWCP) is "Keeping Common Species Common." A major premise of Kansas' approach to developing the CWCP was to use existing information - not to start from scratch or conduct new studies. The process relied heavily on experts and interested parties participating in the process to bring the best available information into the plan.
LONG-RANGE PLAN For The Management of Lesser Prairie Chickens in New Mexico 2002-2006	The goal of the plan is to satisfy the public's lesser prairie-chicken related recreational and ecological interests and resolve related socio-economic issues. A three-fold approach will be integral in achieving this: 1) We will obtain a better understanding of LPC abundance, distribution and population trends. 2) We will continue to seek public involvement in and support of LPC management efforts. 3) We will work with private landowners and land management

[228] ftp://wiley.kars.ku.edu/windresource/Habitat%20Evaluation%20Guide%20for%20the%20LPC.pdf
[229] http://boisecitynews2.wordpress.com/2009/03/03/oklahoma-launches-plan-to-battle-eastern-redcedar/
[230] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcsdev11_023947.pdf
[231] http://kdwpt.state.ks.us/news/Services/Kansas-CWCP/Kansas-CWCP

	agencies to provide habitat necessary to ensure long-term conservation of LPC habitat.[232]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH[233]	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.
Southeast New Mexico Lesser Prairie-Chicken Working Group	NMDGF, as part of the Department's outreach efforts, NMDGF in collaboration with the USFWS, Bureau of Land Management (BLM), New Mexico State Land Office (SLO), and Wildlife Management Institute, proposed that a "Southeast New Mexico Lesser Prairie-Chicken Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LEPC in southeastern and east central New Mexico. The organizers hoped the various constituencies would be able to negotiate a collaborative plan that would, when implemented, improve the status of the species such that federal listing would no longer be warranted, while protecting the interests of the participating parties. In 2005, the Working Group adopted a conservation strategy and recommendations which laid out general approaches, priorities and parameters for achieving the goal of LEPC conservation and recovery while maintaining economic values and traditional land uses. The strategy document outlines and prioritizes a variety of recommended programs, projects, and practices for reducing threats to the LEPC while maintaining other uses of the land.
GIS habitat analysis for lesser prairie-chickens in southeastern New Mexico	Geographic Information System (GIS) habitat analyses for lesser prairie-chicken (LPCH, Tympanuchus pallidicinctus) conservation planning. The 876,799 ha study area included most of the occupied habitat for the LPCH in New Mexico. The objectives were to identify and quantify: 1. suitable LPCH habitat in New Mexico, 2. conversion of native

232 http://www.wildlife.state.nm.us/conservation/documents/PCLongRange.pdf

233 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	habitats, 3. potential for habitat restoration, and 4. unsuitable habitat available for oil and gas activities.[234]
Range-wide Population Estimation and Monitoring for LPC	A range-wide sampling framework and survey method is being developed to estimate total abundance of active leks for the population of LEPC. In addition, standard operating procedures are being developed for aerial surveys and ground truthing surveys.[235]
Interstate Collaboration Range Wide Conservation Plan	Lesser Prairie Chicken Interstate Working Group A focused conservation effort for LPC was described and approved by WAFWA through the Lesser prairie chicken conservation initiative (LPCCI) drafted by the Lesser Prairie Chicken Interstate Working Group (LPCIWG) in May 2008. The LPCIWG is one of the technical groups associated with the WAFWA Grassland Initiative and the 5 cooperating states have and continue to commit staff to this endeavor since it was formally established in 1996. The Lesser Prairie-Chicken (LPC) Interstate Working Group of the Western Association of Fish and Wildlife Agencies (WAFWA) is developing a range-wide conservation plan to increase the population of the LPC, in partnership within federal agencies and others. The states include Colorado, Kansas, New Mexico, Oklahoma and Texas. The conservation plan emphasizes tools and incentives to encourage landowners and others to voluntarily partner with agencies in LPC habitat conservation efforts, while also achieving their land use needs.236

[234] http://www.ksre.ksu.edu/doc13889.ashx
[235] http://www.wafwa.org/documents/Final_Study_Design_Appendices_12_8_2011.pdf
[236] http://www.wafwa.org/html/prairie_chicken.shtml

Memorandum Of Understanding For Conservation And Management Of Lesser Prairie-Chickens And Associated Species And Their Habitats	The purpose of this Memorandum of Understanding (MOU) is to provide, under auspices of the Western Association of Fish and Wildlife Agencies (WAFWA), for interagency cooperation in conservation and management of lesser prairie-chickens (Tympanuchus pallidicinctus) and associated species and their habitats across their current 5-state range (i.e. parts of Colorado, Kansas, New Mexico, Oklahoma, and Texas). The purpose of this MOU is also to provide for cooperation among participating agencies in the development and implementation of conservation programs for lesser prairie-chickens (LEPC) and their associated habitats. The participating agencies agree that cooperation is necessary to collect and analyze data on lesser prairie-chickens and their habitats, and to plan and implement actions necessary to establish and/or maintain viable LEPC populations that are sufficient to preclude present or future endangerment, within the constraints of approved budgets.[237]

[237] http://www.wafwa.org/documents/LPCCI_FINAL.pdf

New Mexico CCCA	This Candidate Conservation Agreement (CCA) for the LPC and the SDL represents a collaborative effort between the FWS, the Bureau of Land Management (BLM), and the Center of Excellence for Hazardous Materials Management (CEHMM). The CCA builds upon the BLMs "Special Status Species Resource Management Plan Amendment" (RMPA) (completed in April 2008) for southeast New Mexico. The RMPA established the foundational (minimum) requirements that will be applied to all future Federal activities, regardless of whether a permittee or lessee participates in this CCA. The strength of the CCA comes from the implementation of additional conservation measures that are additive, or above and beyond those foundational requirements established in the RMPA.[238] .As of July 15, 2012, thirty oil and gas companies are enrolled in the CCA/A for a total of 808,000 acres (the participating Federal agency in this case is the Bureau of Land Management (BLM)). In addition, forty-one New Mexico ranchers have enrolled a combined 1.5 million acres of rangeland in the CCA/A and the New Mexico State Land Office has enrolled 248,000 acres in the CCAA. Partners in the NM CCA/A include BLM, CEHMM (non-profit third party to manage funds and implement CCA/A's), New Mexico Department of Game and Fish (NMGF), New Mexico State Land Office and several oil-gas companies. The CCA/A includes the entire range of the lesser prairie-chicken in New Mexico.

[238] http://www.fws.gov/southwest/es/Documents/R2ES/LPC-SDL_CCA-CCAA_2008.pdf

North American Landbird Conservation Plan-co-authored by States, Industry and FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [239]
New Mexico LPC/SDL Working Group Conservation Plan	Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico In December, 2002, representatives of NMDGF, FWS, the Federal Bureau of Land Management (BLM), the New Mexico State Land Office (NMSLO), and the Wildlife Management Institute proposed that a "Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LPC and SDL.[240]
Land Acquisition for Habitat	In May 2008, following an extensive public planning process, the Bureau of Land Management (BLM) designated an Area of Critical Environmental Concern (ACEC) about 35 miles east of Roswell. The designation is meant to provide much-needed habitat for two species being considered for listing under the Endangered Species Act: the Lesser Prairie-chicken and the sand dune lizard. To conserve this high value habitat, the BLM requested The Conservation Fund's assistance in acquiring key lands in and around the special area. The Fund has worked on several projects that together have protected about 58,000 acres of land.

[239] http://www.partnersinflight.org/cont_plan/#Access
[240] http://nwcos.org/Resources/LPC_SDL_Conservation_Strategy_CD.pdf

Land Acquisition for Habitat	The Johnson Ranch in southeastern New Mexico has been purchased by The Nature Conservancy. The 9,170 acre property contains critical habitat for 25 Species of Greatest Conservation Need—as identified in the state's Comprehensive Wildlife Conservation Strategy (also known as Wildlife Action Plan)—including the lesser prairie-chicken.
POWERLINE PROJECT GUIDELINES NEW MEXICO DEPARTMENT OF GAME AND FISH	Recommendations for conservation and development without wildlife disturbances. [241]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.[242]
RECOMMENDATIONS TO MINIMIZE ADVERSE IMPACTS OF WIND ENERGY DEVELOPMENT ON WILDLIFE 2012	The New Mexico Department of Game and Fish (NMDGF) does not have regulatory authority specific to wind power development, nor is there any other statewide permitting authority in New Mexico. The information in this guideline is intended for use by wind project developers, their consultants, local government and the general public. Developers are encouraged to contact NMDGF for project-specific comments and recommendations. Specific locations of listed species will be kept confidential, however other information shared with NMDGF may be accessible to the public through the NM Inspection of Public Records Act. NMDGF Guidelines referred to herein may be found in the

241 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/2007POWERLINEGUIDELINES.pdf

242 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	Habitat Handbook, under the Conservation tab on the Department website.[243]
Oklahoma Conservation Easement	The Oklahoma Wildlife Conservation Commission and the Department of Wildlife Conservation shall not enter into or approve a setback or conservation easement that includes a setback related to energy or agricultural structures and regarding a threatened, endangered or candidate species that is more restrictive than those created pursuant to federal law, rules or guidelines. B. Prior to entering into or approving a conservation easement or setback pursuant to subsection A of this section, the Commission and the Department shall review all information and studies presented to the Commission or Department by a public or private entity affected by the proposed conservation easement or setback.[244]
Colorado Conservation Easements	"Conservation easement in gross", for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural,

243 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

244 Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103b - Setback or Conservation Easement Related to Energy or Agricultural Structures and Threatened or Endangered Species. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466365&hits=481+480+475+474+260+259+253+252+189+188+182+181+12+11+5+4+

	horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.[245]
Colorado Conservation Easements	Nature of conservation easements in gross. (1) A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in section 38-30.5-102 and transferable by any lawful method for the transfer of interests in real property in this state. (2) A conservation easement in gross shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding that it may be negative in character. (3) A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it. (4) The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating the easement. (5) A conservation easement in gross that encumbers water or a water right as permitted by section 38-30.5-104 (1) may be created only by the voluntary act of the owner of the water or water right and may be made revocable by the instrument creating it.[246]
Colorado Conservation Easements	The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary. Further, the general assembly finds and declares that it is in the public interest to determine who may receive such easements and for what purpose such easements may be received.[247]

[245] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[246] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[247] Title 38. PROPERTY - REAL AND PERSONAL, REAL PROPERTY, Interests in Land, Article 30.5. Conservation Easements.

Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	Interior Secretary Salazar announces $57.8 million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP- The planning proposal lands encompasses the whooping cranes migration route in the U.S. and their wintering grounds, along with containing a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[248]

http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=27609&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

[248] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html

APPENDIX 8-LITERATURE CITED

[Please note, where references are made to literature cited in the U.S. Fish and Wildlife Service's 2012 Proposed listing, for consistency, CESAR has adopted the abbreviated citation conventions used in that document.]

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2-18-14

620-582-2361

Office
Of

Comanche County Clerk

County Clerk
Alice Smith
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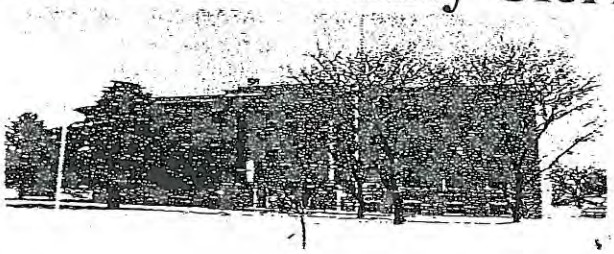
Coldwater, KS 67029-0776
(620) 582-2361



County Commissioners
Larry Harvey, Protection
Harlie Haas, Coldwater
Randy Unruh, Coldwater

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Comanche County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations

are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act*." The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law*." For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Harlie Haas

Larry Harvey

Randy Unruh

ConocoPhillips Company
3300 North A Street, Bldg. 6
Midland, TX 79710

March 10, 2014

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

Re: Docket No. FWS-R2-ES-2013-0134
Scoping Comments on Notice of Intent to Prepare an Environmental Impact Statement for a Habitat Conservation Plan for Commercial Developments, Including Energy Developments, and Agricultural and Conservation Activities Within Six States

Dear Sir or Madam:

ConocoPhillips Company ("ConocoPhillips") is the largest independent exploration and production company based on proven reserves and production of liquids and natural gas. ConocoPhillips is committed to protecting the environment and implements high environmental standards to help support sustainable ecosystems and wildlife habitats, minimize the impact of its operations, and foster the communities in which it operates to promote a sustainable environment for the future. ConocoPhillips conducts operations, has non-operating interests, and/or owns leasehold or mineral interests on private, state, and federal lands throughout the range of the lesser prairie-chicken ("LPC"), which includes portions of Colorado, Kansas, New Mexico, Oklahoma, and Texas.

ConocoPhillips would like to participate in and be kept informed of the Environmental Impact Statement ("EIS") on the proposed application for an Incidental Take Permit, including a Habitat Conservation Plan HCP, that if approved will authorize incidental take of the LPC. 79 Fed. Reg. 7472 (Feb. 7, 2014). We request that the U.S. Fish and Wildlife Service place ConocoPhillips on its mailing list for this project. If you

have any questions, please contact Eileen Dey at (432) 688-9042 or by email at Eileen.D.Dey@conocophillips.com.

Sincerely,

CONOCOPHILLIPS COMPANY

/s/ Eileen Danni Dey

Eileen Danni Dey
Manager Lower 48 Sustainable Development

Devon Energy Corporation
333 West Sheridan Avenue
Oklahoma City, OK 73102

405 235 3611 Phone
www.devonenergy.com

March 10, 2014

Uploaded to www.regulations.gov

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

Re: Docket No. FWS-R2-ES-2013-0134
Notice of Intent To Prepare an Environmental Impact Statement for a Habitat Conservation Plan for Commercial Developments, Including Energy Developments, and Agricultural and Conservation Activities Within Six States

Dear Sir or Madam:

Devon Energy Production Company, L.P. ("Devon") is an oil and gas exploration and production company with production concentrated in North America. Devon produces over 2.5 billion cubic feet of natural gas each day, about three percent of all the gas consumed in North America. Devon conducts operations, has non-operating interests, and/or owns leasehold or mineral interests on private, state, and federal lands throughout the range of the lesser prairie-chicken ("LPC"), which includes portions of Colorado, Kansas, New Mexico, Oklahoma, and Texas.

Devon would like to participate in and be kept informed of the Environmental Impact Statement on the proposed application for an Incidental Take Permit, including a Habitat Conservation Plan, that if approved will authorize incidental take of the LPC. 79 Fed. Reg. 7472 (Feb. 7, 2014). We request that the U.S. Fish and Wildlife Service place Devon on its mailing list for this project.

If you have any questions about this request, please contact Angie Burckhalter, Corporate EHS Policy Supervisor, at (405) 552-8069 or angie.burckhalter@dvn.com.

Sincerely,

Darren Smith, Manager
Corporate EHS Policy

Comments to USFWS on Stakeholder Conservation Plan for Lesser Prairie Chicken (LPC).

From Charles E Dixon, PhD, Wildlife Plus Consulting, PO BOX 416, 128 Silver Fox Lane, Alto, NM 88312

March 7, 2014

I have specifically monitored LPC and their habitat since 2000 and was the Principal Investigator on the longest continuous study of LPC in restored habitat conducted to date. My comments on this plan are from the literature and what I observed in the field for 14 years.

My professional opinion is that the Stakeholder Plan has to potential to be detrimental to LPC if implemented as it is written and should not be endorsed without major revision. Energy production, oil and gas (development and production with the associated roads and activity), transmission lines and wind turbines (with associate road network and activities), if sited in LPC habitat shrink the habitat available to LPC by at the minimum of the described in the LPC's 5 State Plan. When the density of these activities reach some yet to be quantified density the quality of the habitat no longer matters, it will no longer be used by LPC. Examples are common (ex. The Loco Hills and area near WHIP site in southern NM). The impacted areas around anthropomorphic features in the LPC's 5 State Plan is based on best available information and should not be reduced as in the Stakeholder plan no matter the quality.

The LPC's 5 State Plan was developed by a group of biologist, who attached their names to the plan, with extensive knowledge of LPC and their habitat. The Stakeholder Plan does not list authors and appear the authors lack this understanding, knowledge and/or experience dealing with and insight necessary to prepare a plan to boost long-term LPC numbers and enhance LPC habitat the biologist writing the LPC's 5 State Plan possess. The Stakeholder plan is excessively vague, providing minimal viable alternatives for the enhancement of LPC habitat and the potential exist for habitat to be destroyed or degraded.

I have a number of concerns with the proposal document, some centered on the fact that much new pertinent literature is not listed in literature cited. These would add significantly to the value and understanding of the management of LPC and their habitat. A great deal information is available in journal articles, thesis and dissertations recently published in the Department of Natural Resources Management at Texas Tech University (Grisham 2012, Zavaleta 2012 and others) that would add to the recommendations provided in the Stakeholder Plan.

Another concern with the Stakeholder plan is about fencing and their marking. Two documents produced by the Sutton Avian Research Center are cited, Patten *et al.* 2005 and Wolfe *et al.* 2007. These data and methodology behind these publications is so flawed that NM US Representative Steve Pierce used these publications as an example of flawed science at the Feb. 12, 2013 at the public input meeting held by the USFWS in Roswell, NM. The assumptions made when analyzing the data gathered, without being substantiated, are enough to question validity of these publications. LPCH primarily fly 10 feet or higher above the ground and are much more likely to hit power lines than a fence, especially when flying in large groups. Smaller groups or individuals appear to avoid power lines by easily fly over them. Removal of unnecessary fences is a valid and noble effort and fence marking may have some limited but

unproven utility. Marking fences for LPC has no proven utility, even in close proximity to leks. In addition, fence marking as proposed is a relatively short term fix at best as the markers tend to fall to the ground in the wind, some in a few months.

Another is that control of Shinnery Oak is detrimental to LPC habitat. To assume the current condition of a shinnery dominated landscape is an unaltered landscape is counter intuitive. This landscape burned often prior to settlement while since settlement fire has virtually been eliminated. Additionally, the grass portion of the landscape is used extensively by cattle that have almost continuously grazed the land while shinnery oak is utilized to a much lesser extent. That drastic changes have not occurred in shinnery oak landscape is counter to what is seen across the other parts of the west in big sagebrush, creosote brush, mesquite and numerous other habitats where grasslands changed to shurblands with grazing and cessation of fire. Restoration of the shinnery oak grasslands, or any other such altered landscape, requires external input, mechanical, herbicide, drastic change in management, change in livestock type, frequent fire, change of livestock type or other changes to restore the land to some sibilance of the former condition.

Tebuthiuron application to degraded Shinnery Oak grasslands can be an excellent way to improve LPC habitat. Application of Tebuthiuron to Shinnery Oak rangelands has changed drastically in recent years. Tebuthiuron applied at 0.5 to 0.75 pounds of active ingredient per acre, a control instead of an eradication rate, is more common with recent application. In addition, earlier studies generally covered complete blocks while current treatments avoid dunes and a buffer area. These recent treatments are a restoration effort to return the land to a condition more similar to a pre-cattle condition instead of an effort to eliminate Shinnery Oak as were early treatments. The results of treatments with reduced amounts of Tebuthiuron are markedly different than previous treatments. My observation of these restorative treatments is that Shinnery Oak begins to remerge in treated areas away from treatment edges after a dormant period but remains a subdominant component of the treated area while forbs thrive, density is greater and forbs are more productive. Along the edge of the treated areas Shinnery Oak begins to re-colonize from the plants there and become a more dominant component of the habitat in those areas. In addition, plant diversity and habitat for grassland birds is increased. The Stakeholder Plan does not address these differences in the amount of herbicide used, that the treatment results and response to the treatment by LPCH changes over time or include Grisham 2012, Zavaleta 2012.

Early Tebuthiuron studies are flawed, studying the treatment soon after the Tebuthiuron was applied instead of allowing time for the grasses and forbs to recover and provide the habitat structure LPC require. This would be similar to studying a controlled burn immediately after the fire instead of allowing time for recovery to access the changes.

I see a great deal of problem with the monitoring of LPC habitat associated with the Stakeholder Plan. First, the Daubenmire method of vegetation sampling is extremely flawed. First, this methodology is an estimate instead of an actual measure of what is present. Variation between observers can be extreme, it is highly possible that the difference between observers in greater than the differences between locations or years of sampling. In addition, how this methodology will be used is not described. The Stakeholder Plan is far too vague in this area.

Summary of concerns:

••This plan should be scrapped as it will not lead to an improvement in LPC Habitat or increase in LPC numbers. Any increase when this plan is implemented will be the result of favorable weather, i.e. adequate moisture during winter and early spring. The direct result will be lower numbers in good times and lower numbers in difficult times.

•What will be offered landowners is vague and not existent in the plan, no values provided

•Power lines are more of a problem (especially/given distance of each) and possibly kill more LPC than fences.

•Scoring of habitat is vague, specifically how will the value of habitat be determined.

•Monitoring of habitat is vague, what will be monitored and how?

•Buffering around roads, wells, power line, wind turbines is vague, other than in the meeting in Morton, TX no particular areas are mentioned. Spell it out

•Daubenmire is an estimate, not an actual measure. This is not an acceptable methodology for measuring changes in habitat quality.

•Impacted acres continue to be uses as mitigation after they are impacted according to the presentation in Morton, TX if the landowners sign up for extends beyond the time the impact is applied. How can an impacted area be used for mitigation?

•Cost to those impacting the habitat is not disclosed, disclose this and all portions of what is planned clearly!

Eddy County
Board of Commissioners

Glenn Collier
Susan Crockett
Tony Hernandez
Royce Pearson
Jack Volpato

Eddy County

Eddy County Manager
Rick J. Rudometkin

101 W. Greene St.
Suite 110
Carlsbad, NM 88220
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March 10, 2014

Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, NS 2042 – PDM
Arlington, VA 22203

RE: SCOPING ISSUES TO BE COORDINATED WITH EDDY COUNTY DURING THE PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT FOR THE STAKEHOLDERS CONSERVATION STRATEGY / AMERICAN HABITAT CENTER HABITAT CONSERVATION PLAN

RE: Docket No. FWS-R2-ES-2013-0134

Dear Sir or Madame;

This letter is in response to the U.S. Fish and Wildlife Service (Service) Federal Register Notice requesting comments on the issues to be considered during the scoping process "for the preparation of an environmental impact statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP) under the Endangered Species Act …" (FR 2-7-2014 page 7472). Eddy County has reviewed the "Stakeholder Conservation Plan for the Lesser Prairie-Chicken" (hereafter known as "Stakeholder Plan") submitted by the American Habitat Center February 2014. Following are issues critical to the County that should be considered by the Service and coordinated with our County during the EIS process.

1. **The Stakeholder Plan is Duplicative and Unnecessary**

There are already several conservation programs in place for landowners, commercial energy developers, agriculture interests and conservationists to participate in for the purpose of conserving the Lesser Prairie Chicken (LPC) and its habitat. These are acknowledged in section 2.2 of the Plan, "Existing Conservation Plans for the LEPC" (Stakeholder page 16-24). Notably, the Range-wide Conservation Plan for the LPC (hereafter Range-wide Plan) was recently approved by the Service and over 2.5 million acres have already been enrolled.

The Range-wide Plan was prepared with the assistance of major energy interests as well as other agriculture interests for the purpose of providing a systematic means for them to actively participate in the conservation of the LPC. These are the same interests the Stakeholders Plan is targeting. Already, these companies have contributed the essential funding for the program.

Importantly, the Range-wide Plan was prepared with the active participation of the five state agencies with management responsibility for the LPC and is to be managed by the Western Association of Fish and Wildlife Agencies (WAFWA). The Range-wide plan was prepared with complete transparency and heavy involvement of those interests that can directly impact the conservation of the LPC.

The Stakeholder Plan offers no new conservation measures or assurances that are not already being met by currently approved and active plans. The document states that its purpose is to (1) Conserve the LPC and, (2) allow uninterrupted economic development (page 24). A simple reading of the plans already active, as described in the previous section, demonstrate that these two purposes are currently being met. Preparing an EIS for the Stakeholder Plan is an unfortunate waste of taxpayer funds and agency time, as there is no compelling need for the Plan that is not already being met through other programs.

2. The Stakeholders Plan is Unrealistic

One of the key objectives of the Stakeholder Plan is to conserve 90% of the LPC habitat.

> *"The Plan will conserve nearly 90% of LEPC Habitat and will result in substantial enhancement of habitat through required avoidance, minimization and mitigation measures."* (Page 50)

The devices they plan to utilize to conserve the habitat are through outright acquisition of the land or a permanent conservation easement.

> *"Many HCP's mitigate for loss of habitat through the preservation or permanent protection of similar habitat, sometimes in combination with other non-permanent measures. This preservation component is implemented through fee-simple acquisition of habitat or the use of perpetual conservation easements."* (Page 49)

The total Estimated Occupied Range (EOR) of the LEPC as determined by the Service is 19,902,922 acres. The EOR range covers five states. It is a substantial area of land, and any program that boasts to be able to conserve 90%, or 17,912,623 acres of this area, should be questioned, especially when the vehicle to do so is through outright acquisition of the land or permanent easements. Massive buy-in from landowners and those who own property interests in this land must take place. Additionally, the idea that enough private landowners would voluntarily place a permanent easement or outright sell their land based on the assurances that they will not be further penalized if the LPC is listed is a fantasy.

By their own acknowledgement, the Plan developers recognize that 95%, or 18,907,776 acres, of the LPC habitat is privately owned. "The EOR of the LEPC is spread over five states and is comprised of up to 95% private land ownership." (Page 95) In order for them to own or permanently control 90% of this they are planning to obtain the "voluntary" commitment of the landowners. However, they know this objective is unattainable and even acknowledge that acquiring the various property rights necessary to ensure full conservation of the land is an impossible task.

"Ownership and occupancy of these lands is not always limited to a single entity, but may be expressed through a complex and severed relationship of surface estate, mineral estate and surface and mineral leasehold interests. Any effort to create a permanent set-aside of meaningful acreage for the LEPC will require the written agreement from all interest holders, which may be an insurmountable task due to the inability to identify and obtain agreement of all owners of the surface and mineral estates." (Page 49)

And further;

"The establishment of a permanent preserve in most cases is a challenge due to the need to identify and acquire contractual commitments from both the surface owner and the mineral owner, which in this region are typically held by different people and entities. The task of determining who owns the interests and contact information for those property owners is a significant undertaking. Further, ***the potential for property owners and other interest holders to delay or disrupt an acquisition program through reluctance or refusal to sell targeted or key properties*** *creates additional issues."* (Page 49-50)

Clearly, the Plan developers know that acquiring 90% of the LPC habitat is an "insurmountable task." However, what is most disturbing is their acknowledgement that landowners may "delay," or "disrupt" the acquisition program through "reluctance" or "refusal" to sell the properties they have identified and targeted. The Plan claims to be a "voluntary" plan for landowners, yet, by their own admission, it is clear that this Plan will be utilized to "target" land within focal areas and that landowners will find themselves under immense pressure to enroll. Nowhere in the plan do they state that the species does not warrant listing, and the plan itself is not designed to "preclude" a listing. The Plan is designed to acquire 90% of the habitat through fee-simple acquisition or permanent conservation easements.

They benefit from the threat of listing the LPC in order to coerce landowners into "voluntarily" giving up their land.

The Plan developers know their objective of acquiring 90% of the habitat area is unrealistic and, therefore, have submitted a HCP that will fail. The Service should deny approving the plan based on the AHC's admission that landowners will be targeted and pressured into selling their land, an unconstitutional act.

3. The Plan's Minimum Goal of 20% Participation is also Unrealistic

As noted by the Plan developers above, acquiring agreement among the various owners of the property interests in any given parcel will be a dubious task, short of coercion. However, they claim to already have assurances from property interest holders that cover 20% of the habitat. In a footnote on page 95, they claim:

"The assumption that 20% of Total Habitat Acreage will enroll in the Plan drives the $0.36 per acre Participation Fee calculations and is conservative based on the commitments currently obtained from stakeholders to participate in the Plan."

Who are these committed participants? They are not revealed in the Plan. Because this 20% participation is necessary to meet the funding requirement, more than just a footnote ought to be required to ensure this obligation can be met, especially given that the Plan developers acknowledge how difficult it will be to get all property interests for any given parcel to agree to participate.

We can assume that the major oil and gas companies named in the cover letter that was submitted with the application might be these participants. What proof is being required that they will fulfill this obligation? Without this, the plan is meaningless and proper implementation is questionable.

4. The Stakeholder Plan Administrators and Benefactors are Not Transparent

The Plan has been submitted by the American Habitat Center (AHC), a non-profit entity, so they claim. However, there is no further detail as to who makes up the AHC. A number of questions are left open.

a. Who are the members of the Board of Directors for AHC?
b. Who are the "Stakeholders" that created the AHC and the Stakeholder Plan
c. Who will be appointed to the Oversight and Science Committees?
d. What type of non-profit entity is the AHC; a (c) (3), (4) etc.?
e. In which state is the AHC incorporated?
f. Has the AHC provided the Service with its official Incorporation and Non-Profit Status documents?

Through press releases, the County has ascertained that several organizations have come together to create this plan, including the Environmental Defense Fund and some state cattlemen's and farming organizations. What is important for the Service to take into account is that these organizations can only make decisions that affect the Associations, not their members directly. Therefore, any commitment on behalf of the Associations that there will be widespread participation of its members should be discounted, unless proof is submitted by the AHC, whoever the actual members of this organization may be.

In addition, there are other non-transparent issues within the Habitat Exchange Agreement (HEA) attached to the Plan. The HEA is an agreement between the Habitat Exchange Administrator, whoever that is, and Region 2 and Region 6 of the U.S. Fish and Wildlife Service. Within the HEA, there will be an "Oversight Committee," a "Policy Committee," a "Resolution Committee," and a "Science Committee" all of which will be named at a later date.

Obviously, the AHC will carry a tremendous amount of influence determining who the "stakeholders" and representatives from the "conservation interests, industry, and agriculture" groups will be providing crucial oversight of the HEA and the Plan. This is totally unacceptable.

5. The AHC does not have Authority to Enforce the Stakeholders Plan Directly

Although we do not know who will ultimately govern the AHC, this entity is requesting to be approved as the permit holder of an Incidental Take Permit and enhancement of survival permit issued by the Service. Private groups can initiate an HCP without government participation; however, they must assure that they have the authority to enforce the permit. The Service Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 3-2 states that this is allowed "so long as the permittees have the authority to regulate or control all or applicable parts of the HCP and the conditions of the HCP are enforceable." The Stakeholder Plan assures they have this authority.

> *"The Permit Holder will enforce the Plan. By entering into clear enforceable CIs and CPs, Participants will contractually agree to perform the obligations required of them under the Plan and consent to enforcement of those obligations by the Permit Holder. See Section 8.8. FWS will also have clear and defined enforcement responsibilities and mechanisms with respect to the Plan and the permit issued to the Permit Holder under the Implementing Agreement. See Appendix K. The mechanisms available to the FWS include access to properties enrolled under the Plan, approval rights with respect to Credit-generation and release activities, and representation on the Oversight Committee and Science Committee. In these ways, enforcement of the Plan and increased compliance with the ESA in the Permit Area can be assured."* (Page 4-5)

In other words, the AHC does not have the authority outright to enforce the plan; the landowners who participate will give up their right to control their land and provide this authority to the AHC. The only enforcement authority the AHC will have is through the acquiescence of landowner's rights to the AHC. The AHC has stated they will acquire this when landowners "voluntarily" enroll their land in the program; however, there is reasonable concern that landowners will be targeted and pressured into participating.

A participant in this plan can either be a landowner, leaseholder or holder of other property interests. Land sold will presumably be protected until program administers determine the conservation need is no longer relevant. Land placed in a permanent conservation easement will be held in perpetuity. However, if a landowner is covered under the AHC permit, this protection will only be guaranteed for 30 years. So, a landowner, leaseholder or other property interest holder is being asked to permanently give up their rights when the protection they are trading these rights for is only offered for 30 years. It is highly suspect that landowners will flock to sign up under this program once the full details of their commitment are revealed.

6. Key Issues that should be Studied and Analyzed during the EIS process

a. The Environmental Impact Statement needs to rigorously analyze the impact on the local economies within the plan area where private land will be targeted for acquisition, and landowners refuse to sell. The direct, indirect and cumulative impact on the local economy needs to be analyzed when the targeted land is devalued by the action. Based on statements discussed earlier that are in the Stakeholder Plan, it is reasonable to presume that landowners

will be targeted and pressured into selling key properties. This impact on the local economy must be studied. Additionally, the impact this will have on the culture of the community should be examined.

b. The Stakeholder Plan is relying solely on the science referenced in the Service's proposed rule to list the LPC as threatened. The Notice does not represent the best available science on the LPC as scientists have critically examined the notice and new data and studies have been brought forward. In the EIS analysis, two additional studies must be considered (documents attached):

   i. "Data Do Not Support the Listing of the Lesser Prairie Chicken," prepared by the Center for Environmental Science, Accuracy and Reliability (released in 2013)
   ii. Review of the Science Predicting Population Trends prepared by Darling Geomatics (March 2014)

Summary

We appreciate the Service giving strong consideration to the issues discussed above. It is our County's position that the application should be denied because the Stakeholder Plan provides no new conservation efforts that are not already being fulfilled through other plans.

Also, the preparers of the plan have not been transparent as to who they are and who will be governing the program. It concerns us greatly that the Service would be considering providing a non-existent entity with such a high responsibility as being a permit holder for a plan area that consists of six states.

Further, we are very concerned that landowners will be targeted by the group and coerced into participating in the Plan.

For these reasons the plan should be denied.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

Sincerely,

Rick J. Rudometkin
County Manager on behalf of
The Eddy County Commission

March 9, 2014

RE: Review and comments on:

1. **"An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens" by Edward O. Garton (2012)**
2. **"Range-wide Population size of the Lesser Prairie-chicken: 2012 and 2013" by McDonald et al (2013) and**
3. **"The Predicted Influence of Climate Change on Lesser Prairie-Chicken Reproductive Parameters" by Grisham et al (2013)**

Background

The lesser prairie-chicken (*Tympanuchus pallidicinctus*) (LPC) is a species of prairie grouse that occupies a five-state range including portions of Texas, New Mexico, Oklahoma, Kansas and Colorado. The species is state listed as threatened in Colorado, and the U.S. Fish and Wildlife Service (USFWS) identified the species as a candidate for Federal listing in 1998.

Based on USFWS findings, lesser prairie-chicken populations need large tracts of relatively intact native grasslands and prairies to thrive. Over time, threats to the LPC have included habitat loss, modification, degradation, and fragmentation within its range. Predator cycles and weather also affect annual population numbers.

Over the past year, the USFWS has been analyzing the status of the LPC, threats to the species and conservation efforts resulting in a proposal to list the species. The USFWS will make a final determination whether to list the species by March 30, 2014.

Analysis of Flaws in Population Studies and Reports

Though the USFWS states that it will make a final determination about whether to list the LPC as threatened after a full assessment of the status of the bird, the problem is the fact that the USFWS does not have sufficient population data to determine status. Though LPC are at a lower level than their peak before agriculture, they may be stable, secure and on an upward trend since the concepts of sustainability and prairie grass conservation began in the 1980s.

USFWS is legally obligated under the Endangered Species Act, Information Quality Act and *Bennett vs Spear*, to make LPC decisions based on the best available scientific information that is applicable to the species. However, because the listing proposal process for the LPC is part of the terms of a multi-year listing work plan approved by the U.S. District Court for the District of Columbia on September 9, 2011 the USFWS may feel pressured to make a decision based on inadequate data regarding population numbers and trends. We recommend against a decision based on less than minimally acceptable scientific data.

The scientific information used must be legally consistent with standards of the Information Quality Act (Quality, Objectivity, Utility and Integrity). In contrast to the interpretation of the Act by some federal agencies, the objectivity and integrity requirements mean that the data collected by state and federal agencies, or used in published scientific research relied upon by those agencies, must be provided to the public.

Though the public was not provide with the raw data used in scientific research relied upon by USFWS, in violation of the Information Quality Act, the following is a list of flaws in the two most recent reports USFWS is using to assess LPC population trends as well as an analysis of some relevant information USFWS failed to use. The purpose of this letter is to point out the flaws in the two studies as well as missing information. We strongly recommend USFWS conclude listing is not warranted and further monitoring of populations, habitat quality and conservation measures is needed.

The only recent information USFWS appears to be using to base population numbers and trends on is a combination of archaic data that was not comparable to recent data and statistically invalid recent data.

What is known about LPC populations:

There was a widespread pattern of sporadic sampling for the first decade (mid-1960s to mid-1970s), more frequent but inconsistent sampling across regions for two decades (middle period of mid-1970s to mid-1990s) leading to sustained increased sampling effort over the past 18 years. However, survey protocols continue to vary between States, which makes even relatively recent data difficult if not impossible to compare from State to State.

Two years of helicopter surveying coupled with ground surveys during 2012 through 2013 across known LPC range has created the beginning of a new type of comprehensive survey data under a single methodology over 5 states. However, it will take 10 to 20 years of consistent data collection to even begin to truly determine the trend and limiting factors for the species, in light of weather cycles, predator cycles, and current land management.

Considering the fact that the LPC did not go extinct during the Dust Bowl Era when its habitat was at its worse, the LPC is wide spread and locally common in areas across five states, and all five states have significant positive LPC habitat conservation and habitat restoration programs in place, the LPC is not in danger of extinction.

These birds are a boom and bust species, adapted to fluctuations in weather. A downward trend in population number and/or lek numbers during poor weather conditions such as the recent drought in LPC habitat is normal and is not a reason to list the species as threatened under the ESA. Listing would harm the ability of the five states to manage LPC habitat in ways that benefit the species and would harm our national economy as well as the economies of the five affected states.

What isn't known about LPC populations:

USFWS personnel do not know population numbers and trends at this time in history. A significant amount of conservation of LPC habitat has been going on since the 1970s. Due to an overwhelming number of species to address in a very short amount of time, USFWS could not thoroughly analyze the best available science, which is the detailed long term raw data collected at the State level. Instead, USFWS relied on a few data summary reports that have significant flaws and USFWS missed other studies that have scientific validity. Even if USFWS had time to look at all raw data, the data was collected under too many different types of protocol to make meaningful comparisons. Until 2012, intensity, duration, timing, and methods of surveying LPC have varied too much over time and geographic region to compare.

There is no question that LPC population status, trend and limiting factor questions need to be studied in a more uniform manner for a longer period of time. A conclusion that listing is warranted would be premature and would harm potential habitat restoration efforts.

1. Review of Garton 2012

In a review of "*An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*" by Edward O. Garton (2012) there are a number of sound reasons to have reservations about the conclusions Garton reached.

Garton (2012) discussed many of the **limitations of the available population data** including the **limited number of leks surveyed** as one goes farther back in time, the **inconsistencies in the survey methods** used, the **assumptions** of observed males on leks to numbers of females, and the **minimum population sizes assumed** to be needed to maintain populations.

We are in full agreement with Garton that there were too many inconsistencies in the survey approach and a unified approach is necessary to assess trends across LPC range. The work done by McDonald et al. (2013), described below, may be a good start toward obtaining statistically valid data, but it will take 10 to 20 years or more to begin to gather the necessary statistical data to see real population trends and relate them to weather, predator cycles, habitat conditions, and conservation measures. In the mean time, any speculation that the bird will plummet toward extinction is unfounded.

Garton (2012) makes specific predictions about avian population persistence, 30 and 100 years into the future. There are sound reasons to have reservations about the conclusions of Garton et al. (2012). Briefly, the extinction prediction models used in Garton's paper contained invalid assumptions, methodological bias, improper accounting for the propagation of error in model predictions, and use of thresholds for extinction that lack a sound empirical basis. Collectively, those issues point to bird populations not being as threatened as reported.

In violation of the Information Quality Act, the raw and final data sets used in the Garton 2012 analysis are not publicly available. The absence of publicly available data is also contrary to the Department of Interior's Information Quality Guidelines (requiring that reproducibility "shall generally require sufficient transparency about data and methods that an independent reanalysis could be undertaken by a qualified member of the public," (Department of Interior 2002)) and

demonstrates a lack of adherence to key White House policy directives on scientific integrity (Obama 2009; Holdren 2010, 2011).

Moreover, Garton (2012) made errors and invalid assumptions that induced a negative bias in population trends. In the early decades of surveys, large and easy to find leks were primarily counted. In more recent decades, as more leks were added to surveys, they were often smaller in size. Thus, the average number of males attending leks has declined, in part, due to an artifact in how the data were collected (see Table 1 below).

Table 1. Lesser Prairie Chicken monitoring and population trends 1965-2012 summarized over 5-year periods for Range-wide Prairie Region (Garton 2012)

Parameter[1]	2005-12[2]	2000-04	1995-99	1990-94	1985-89	1980-84	1975-79	1970-74	1965-69
Leks counted	183	149	98	51	65	56	23	7	6
Average males/lek	8	13	8	12	19	32	85	195	137
Number of active leks	98	93	50	32	53	40	22	7	6
Percent active leks	53	62	51	68	82	71	94	100	100
Average males/active lek	16	21	15	17	24	45	88	195	137
Lambda - Annual rate of change	0.907	0.965	1.267	0.828	0.942	0.917	0.990	0.992	1.228
S.E.(Annual rate of change)	0.068	0.065	0.150	0.112	0.081	0.082	0.096	0.124	0.193

1 Averaged over years for each period.
2 Eight years of data in this period.

Even with this flaw in Garton's analysis, his research conclusion is that there is "*a general increase in lesser prairie chicken populations in the last half of the 1960s followed by a long term decline from the 1970s to mid 1990s when the population apparently stabilized at substantially lower abundance range-wide (50,000-100,000 compared to estimates around 200,000 during the 1970s and 1980s)...*"

It is likely that Garton is correct in stating that LPC populations have stabilized. However, Garton (2012) goes on to theorize catastrophic population failure based on insufficient data and the assumption that current conditions (severe drought throughout LPC) will continue unchanged:

*Parametric bootstraps of the probability of persistence of Lesser Prairie Chickens for each eco-regional population and the range-wide population reveal that only the sand sagebrush prairie region has a substantial likelihood of falling below quasi-extinction levels equivalent to effective population size of 50 (82 birds counted at leks) within 30 years but most eco-regional populations and the range-wide population have substantial likelihoods of falling below 500 (852 birds counted at leks) within 100 years as required for long term persistence" (*Garton 2012*).*

Garton (2012) showed "fu*ture projections of carrying capacity without substantial changes in key determinants of LPC population dynamics are slightly above 10,000 in 30 years and less than 1,000 in 100 years."*

Garton's projections are wrong.

Garton showed higher levels of short term risk and significant long term likelihood of dropping below the effective population thresholds for maintaining genetics of 50 and 500 individuals based on the above **assumption** of **no changes to key determinants of LPC population dynamics**.

What about the significant drought within LPC habitat within the recent past? Garton's projections were made during what Grisham et al. (2013) defines as the worst El Niño is history in portions of the LPC range. The recent El Niño climate phenomena disproportionately affecting LPC habitat during the LPC survey period Garton relied upon.

Garton's predictions were based on the incorrect assumption that there will be no change in a key determinant of LPC population dynamics – severe drought. Science does not support Garton's assumption.

Does Garton really believe that weather does not change and that the recent drought within LPC habitat will continue for the next 30 to 100 years?

Grisham et al. (2013) (see below) studied climate and its affect on LPC in New Mexico and Texas. Though those results contradict earlier publications including Garton (2012), Grisham's work appears to be ignored by USFWS. Could it be that USFWS feels too vested in their recent analysis and too pressured by court imposed time constraints to spend time to analyze Grisham's work?

Garton's analysis of LPC populations (2012) used short and long-term population viability targets based on the 50/500 rule as the basis for the quasi-extinction analyses, which is the effective population as it relates to genetic maintenance. As noted by Flather et al. (2011), **the 50/500 values are simply viability goals for maintaining genetically diverse populations; they provide "*little direct connection with extinction risk.*"**

Traill et al. (2010) attempted to determine a generalized minimum viable population number, much like the 50/500 rule, and reported that the evolutionary and demographic constraints on populations require minimum sizes to be at least 5,000 adults. However, Flather et al. (2011) reported on reviews they conducted of the viability analyses used by Traill et al. (2010) revealed that a huge range in minimum viable population estimations existed, finding that even estimates conducted within many populations varying by orders of magnitude.

They also reported on the limitations of population viability analyses (PVA's) to provide meaningful estimates of minimum population sizes. Flather et al (2011) stated that **estimates of extinction risk from PVA models were often imprecise, inaccurate, contingent upon threats currently acting, and affected by model structure, study duration and other uncontrolled factors** (Flather et al. 2011 referencing Beissinger and Westphal 1998). Flather et al. (2011) went on to note that PVA's were best used for ranking relative extinction risk, switching the focus of

these analyses away from the determination of a minimum viable population to emphasize the importance of PVAs for understanding the relative probability of persistence for populations in comparisons among management options.

Garton (2012) did not provide an estimated minimum viable population for LPC, but did provide the quasi-extinction probabilities for the range-wide population as well as for the ecoregional populations based on past population trends. They **projected continued losses** in population carrying capacity within the sand sagebrush and mixed grass ecoregions **if habitat impact conditions continue on their current trajectory. However,** we know that habitat impact conditions will change – they already have changed since Grisham, Garton and McDonald wrote their papers. During late 2013 and early 2014, the states with LPC began receiving above average rains and though the drought remains, **conditions are improving across parts of the LPC habitat (http://www.srh.noaa.gov/oun/?n=climate-drought).**

2. Review of McDonald et al. 2013

McDonald et al (2913) surveyed sage-grouse leks from helicopters over a 5 state region from sunrise until approximately 2.5 hours after sunrise between March 31 and May 3 in 2012 and between March 20 and April 21 in 2013.

McDonald et al. (2013) surveyed for LPC during one of the worst droughts in recent history as documented by Grisham et al. (2013). Grisham assessed the potential changes in clutch size, incubation start date, and nest survival for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico. Grisham stated that the "***2011 nesting season provides insight to how an extreme La Niña event and subsequent drought affects lesser prairie-chicken*** *reproductive ecology. From 15 October 2010 to 31 August* ***2011****, the total precipitation on the study site was only 2.46 cm (0.97 inches), constituting* ***the worst drought and warmest La Niña event on record****.*

The ***drought of 2011*** *was so severe that sand shinnery oak and grasses on the study site did not leaf out, eliminating nesting cover and subsequently delaying nest initiation (Li Z, Kafatos M , 2000) Interannual variability of vegetation in the United States and its relation to El Niño/Southern Oscillation. (Remote Sens Environ 3: 239–247. doi: 10.1126/science.242.4886.1640). Cover provides protection from predators and thermal stress, and when thermal cover is lacking, nests are exposed to the element (Grisham et al 2013).*

This is of concern, as ***lesser prairie-chickens appear to be particularly sensitive*** *to landscape alterations* ***(****Woodward et al. 2001); (Fuhlendorf et al. 2002) and* ***drought*** *Hamerstrom F, Hamerstrom F (1961).*

Drought is suspected to negatively influence prairie grouse through reduced growth of vegetation that provides nesting, roosting, and escape cover, and food (Merchant SS, 1982). Furthermore, there is evidence that home range sizes increase (Merchant SS, 1982 and Copelin, 1963) and ***recruitment is lower during drought years*** *(Merchant SS 1982). Home range size expansion during drought years may lead to localized abandonment, especially in fragmented landscapes. Furthermore, landscape alterations and management (e.g., herbicide treatment of shrubs, grazing systems) appear to influence resource selection, survival, and reproductive success of lesser prairie-chicken populations.*

For USFWS to use two years of McDonald's helicopter surveys with associated on-the-ground field verifications during a major drought as "trend" data violations the ESA, *Bennett vs Spear* and the Information Quality Act. Any conclusions USFWS reaches based on McDonald et al (2012) other than finding LPC populations need more study are arbitrary and capricious.

As Grisham et al. (2013) clearly shows – low LPC numbers in 2012-2013 were due to drought. Like many game birds, LPC are a boom and bust species.

The lek-count data reported in McDonald et al. (2013) is grossly inadequate to estimate population "trends" as a basis for management.

The lack of scientific validity in these data and the fact that LPC populations are known to fluctuate significantly over time makes a case for a long-term study but not the case for listing the LPC as threatened. It is impossible to discern any pattern in the data gathered by McDonald et al. (2013) that could be used to guide management actions at this time. **The data gathered by McDonald et al. (2013) during two years of field work is not scientifically defensible "trend" data**.

McDonald et al. 2013 qualified their report as follows:

"A*cquiring precise and unbiased estimates of population size requires either a complete census or probabilistic sample of subunits with which to infer population size (Johnson 2002); however, limited funding and staffing have often precluded implementation of these sampling designs. The result had been the development of population indices to monitor population trend or estimate a minimum population size.* ***The limitation of such data is its unknown relationship to population size*** *(emphasis added).* **..**

Population trends of LEPC have been monitored using spring lek counts since the 1940s. Survey effort and methods have varied over time, but lek data were the best available long term data set to assess trend. ***Breeding season sex ratio, detection probability, and lek attendance rates are not well understood*** *(emphasis added) (Behney et al. 2012). These factors, including variation in sampling methods, require several assumptions to be made when estimating the population size from lek count information (Walsh et al. 2004, Garton et al. 2011).*"

McDonald et al. (2013) recommend "that the 2013 survey design and methods be used for future monitoring of the size of LPC population and abundance of leks.

Population trend data for any game bird cannot be based on two years of data. The use of 2012 and 2013 LPC data collected by McDonald et al. to state the species is declining is bad science and bad public policy. What if the numbers where the opposite and 2013 population numbers were higher than 2012? Would USFWS stop the listing process?

Since LPC are cyclic, looking at a different set of years will show upward swings as often as the data shows downward swings (see Figure 2 below as an example of how game birds such as LPC fluctuate up and down over time). No one can look at two years of LPC data and state that they know the "population trend." Use of McDonald's 2012-2013 data as "population trend data" to

make any management of listing decisions would violate all scientifically accepted principles of population data analysis.

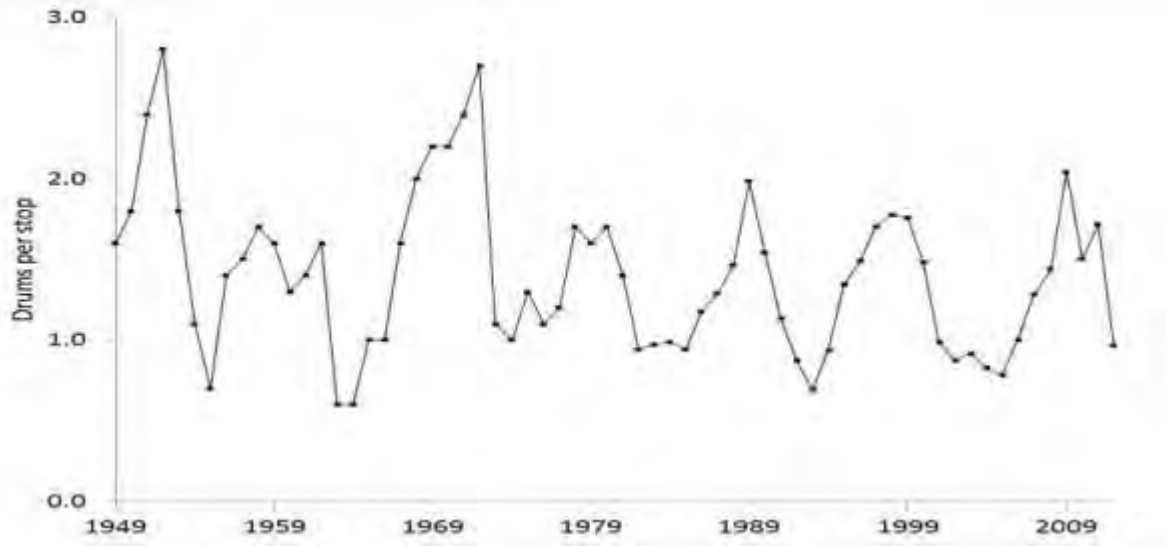

Figure 2. Example of peaks and valleys in game bird populations (based on rough grouse data)

Problems with McDonald et al. (2013)

- Lek and bird count data obtained by McDonald et al. (2013) were based on a single aerial survey each year for two years rather than the highest count obtained from 3 or more ground counts each year for two or more years. It has been shown that multiple counts are often required to ascertain a reasonable estimate of numbers of males attending leks (Beck and Braun 1980, Connelly et al. 2003, Walsh et al. 2004, Garton et al. 2011).
- McDonald et al. (2012) had a problem with one of the four ecoregions surveyed. The sand sagebrush prairie region ground count of leks gave a larger value than that obtained from the aerial surveys. McDonald et al. (2012) and Garton (2012) had to substitute the ground survey data for the aerial survey estimate.
- Garton (2012) made use of the 2012 aerial survey estimates of minimum population size for three of the ecoregions as the basis for reconstructing earlier population sizes.
- McDonald et al. (2013) surveys performed in 2012 and 2013 were completed during a severe drought throughout the area surveyed.
- The final year estimates form the starting points for all future projections of population abundance and as such could skew estimates of the probability of quasi-extinction (i.e., falling below a specified minimum abundance (50 adults or 500 adults under the classic 50:500 rule for short term and long term persistence from Franklin, 1980 and Soule, 1980). Garton (2012) noted that "*the shorter term "current" time period population estimates reported in the appendices and future projections using bootstrapping may have been more severely impacted by that final observation as they often give more pessimistic forecasts of probability of persistence when compared to those from the 3 long-term data sets.*"

3. Review of Grisham et al. (2013)

Grisham et al. (2013) assessed the potential changes in clutch size, incubation start date, and nest survival for LPC for the years 2050 and 2080 based on modeled predictions of climate change and reproductive data for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico.

Grisham et al. (2013) determined that "*the influence of drought and climate change on lesser prairie-chicken reproductive ecology has, to date, been largely overlooked. This is of concern, as lesser prairie-chickens appear to be particularly sensitive to landscape alterations and drought.*" They qualified their results to state that their "*assessment did not consider annual survival of adults, chick survival, or the positive benefit of habitat management and conservation, which may ultimately offset the potentially negative effect of drought on nest survival.*"

Grisham et al. (2013) noted that "*A key issue in conservation of lesser prairie-chickens in context of climate change is the lack of estimates for many specific vital rates and sufficient sample sizes.* ***Despite substantial efforts to conserve lesser prairie-chickens and their habitat, long-term studies that provide adequate <u>data to properly allow for predictive modeling</u> of the role climate change may have on the reproductive ecology of this species <u>are lacking</u>*** (emphasis added)."

<u>Conclusion</u>

A thorough analysis of LPC data collected to date clearly demonstrates that at this time in history there is inadequate data to scientifically predict LPC population trends or the probability of extinction. Garton (2012) and McDonald et al. (2013) both based the majority of their analysis on two years of helicopter surveys during a severe drought, underestimating LPC populations and overestimating the probability of extinction.

Conservation measures now in place will serve to increase LPC populations over time. In February 2014 the USFWS and the Western Association of Fish and Wildlife Agencies signed the Range-wide Oil and Gas Industry Candidate Conservation Agreement with Assurances for the LPC (LPC CCAA). The agreement is the result of longstanding cooperation between the Service and the five range states of the LPC—Texas, Oklahoma, Kansas, Colorado and New Mexico—to undertake conservation action for the species.

The Range-wide LPC Plan provides a comprehensive conservation strategy that is intended to conserve the species across its range. The Range-wide LPC Plan provides: 1) incentive-based landowner programs, and 2) a mitigation framework to reduce threats and provide resources for off-site conservation. The LPC CCAA incorporates the Range-wide LPC Plan's avoidance, minimization, and mitigation measures that address impacts from oil and gas activities on enrolled lands. Enrollment of lands into the LPC CCAA will generate mitigation fees, which will provide significant funds for the implementation of conservation actions under the Range-wide LPC Plan.

There is evidence of expansion of LPC into parts of the shortgrass ecoregion where they were not known to previously occur. In northwest Kansas, LPC have expanded back into some of their historical range and new areas where they were not known to previously occur due to the

establishing of Conservation Reserve Program (CRP) lands (Rodgers and Hoffman 2005). LPC populations are doing well in these planted fields with a generally expanding population (Garton 2012).

LPC usually experience either booms or busts in reproductive success (Hagen et al 2009). The "boom bust" reproductive strategy suggests that lesser prairie-chickens maximize reproductive efforts when conditions are optimal. For the Southern High Plains population, cooler, wetter springs maximize both food and cover for lesser prairie-chickens. Evidence suggests precipitation and temperature influence nest survival (Fields et al. 2006) and these variables will subsequently continue to influence nest survival in the future.

Until long term population trend data can be gathered and until the CCAA is monitored for 10 to 20 years, any consideration of listing the LEPC as threatened or endangered would be premature and based on a paucity of scientific data. A listing under the ESA would be scientifically and legally unsupported.

Darling Geomatics

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Literature citations available upon request

Center for Environmental Science, Accuracy & Reliability

DATA DO NOT SUPPORT THE PROPOSED LISTING OF LESSER PRAIRIE CHICKEN

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EXECUTIVE SUMMARY

CESAR'S review of the proposed listing of the Lesser Prairie chicken ("lesser prairie chicken" or "LPC") applies the clear direction of the Endangered Species Act (ESA) that listings be based solely on data and that the conservation efforts of states and local agencies be considered. We closely examined the references cited by the US Fish and Wildlife Service (FWS), published literature, regulatory documents, and readily available data. In addition, we performed an independent analysis of the past distributional history of the lesser prairie chicken to provide a deeper-time perspective, and commissioned independent peer reviews of the available population analyses.

Our review identified data that demonstrate lesser prairie chicken populations are increasing and are unlikely to be extirpated either locally or range wide in the foreseeable future. In addition, our review identified analyses that demonstrate lesser prairie chickens have not lost their genetic diversity and are not genetically isolated. These data offer empirical support for the conclusion that local and statewide conservation efforts are and will continue to be effective. **These two facts, both supported by data, are *prima facie* evidence that the lesser prairie chicken is not likely to become in danger of extinction in the forseeable future.**

Based on the information we developed, it appears that the FWS assumed population declines and loss of genetic diversity and used *post hoc* rationalizations to support listing based on speculative reasons for the non-existent declines. The best available data on population growth and genetic health demonstrate that the lesser prairie chicken is not in decline throughout all or a significant portion of its range.

In part, CESAR's mission, "…is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes…"[1] Accordingly, this report also addresses the threats identified in the proposed rule based on the FWS reliance on speculation, surmise and opinion. We believe that identifying those portions of the rule that fail to comply with the requirements of the ESA and related laws, regulations, and guidelines, will help improve this proposed rule as well as future rules.

In general, our review identified the following shortcomings in the proposed rule:

- The proposed rule fails to consider data and analyses demonstrating lesser prairie chicken populations are increasing and that genetic isolation has not occurred.

[1] http://www.bestscience.org/

- The conclusions in the proposed rule are not based solely on the best scientific and commercial data available as required by the ESA, but on an amalgam of opinion, speculation, and surmise.
- The proposed rule inaccurately implies that the states' ability to protect lesser prairie chicken through existing regulatory mechanisms is inadequate compared to that of the ESA.
- The proposed rule fails to accurately acknowledge the scope and importance of the voluntary conservation contributions made by states and local agencies
- The proposed rule is internally inconsistent; asserting that sufficient information on habitat needs is available to list the species but that there is insufficient data to identify the characteristics and location of the habitat essential for the conservation of the species.

The ESA is a powerful tool for conserving species. However, it has clearly articulated standards for decision-making, explicitly requiring data and consideration of local efforts in the listing process. This proposed rule fails to meet the basic requirements of a listing determination as articulated in the ESA.

BACKGROUND

ESA listing determination requirements

Instructions for listing determinations are included in Section 4 of the ESA. There are 3 primary requirements for a listing determination; the determination must be based *solely* on data,[2] the continued existence of the species must be threatened by one or more of the five listing factors enumerated in the ESA[3], and conservation actions of any State or political subdivision of that State must be considered.[4]

Data

The requirement that data support regulatory decisions is repeated throughout the ESA. This requirement includes listing, designation of critical habitat, and jeopardy determinations. The ESA does not require data for non-binding 90-day findings, allowing the use of 'information' rather than data. Neither does the Act require data for Recovery plans, which have no regulatory authority. However, the requirement for listing is specific, requiring that data be the *sole* determinant.

There is no provision in the Act that allows hypothesis, speculation, surmise, 'best professional judgment' or opinion to be substituted in the absence of data. The Supreme Court has affirmed this, stating:

"…The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise…"[5]

---

[2] Section 4(b) of the ESA states: "BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) **solely on the basis of the best scientific and commercial data available** to him after conducting a review of the status of the species ..." and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

3 Section 4 (a) GENERAL (1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence...

4 Section 4(b) of the ESA states: BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and **after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species**, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas

5 Bennett v. Spear (95-813), 520 U.S. 154 (1997)

Listing Factors

The proposed rule makes the determination that the lesser prairie chicken is likely to become in danger of extinction in the foreseeable future due to the following factors:

"…due to historical, ongoing impacts and probable future impacts of the cumulative habitat loss and fragmentation…"

"…The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events..."

"… Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels…"

"…These threats are currently impacting lesser prairie-chickens throughout their range and are projected to continue and to increase in severity into the foreseeable future…"

From these statements we conclude that the FWS identifies 3 of the five ESA listing factors as threatening the lesser prairie chicken:

(A) "*the present or threatened destruction, modification, or curtailment of its habitat or range*";

(C) "*disease or predation*"; and

(E) "*other natural or manmade factors affecting its continued existence*".

ANALYSIS

DATA

Analyses, based on data collected by the states, demonstrate that lesser prairie chicken populations are increasing and that the range-wide likelihood of extinction is very low. Further, published analysis demonstrates lesser prairie chickens maintain genetic diversity and do not demonstrate genetic isolation. The FWS had to rely on information other than data in order to list the lesser prairie chicken in view of the documented increasing populations and genetic health. As a result, the FWS failed to rely solely on data, instead using speculation, surmise, and opinion. The FWS failed to rely on the 5 factors enumerated in the Act instead using additional factors not intended by Congress to be used for listing determinations. The FWS failed to adequately consider the effectiveness of existing and planned conservation Finally, after discussing the habitat needs, and shortcomings of existing habitat for lesser prairie chickens at length and in depth in order to explain how habitat was the basis for declines in the species, the FWS claims it is not able to identify those physical and biological characteristics essential to the conservation of the lesser prairie chicken, and thus cannot designate critical habitat.

Data Demonstrate Lesser Prairie Chicken Populations are Increasing Range-wide with Low Extinction Probabilities

We identified two papers which examined the health of lesser prairie chicken populations. First is an *Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*[6]. Using population reconstruction from annual counts at leks, models of population growth can be fit and population parameters of growth and quasi-extinction probabilities can be estimated. The table below summarizes the findings of this analysis.

Habitat Type	Population Growth	Probability of Extinction
CRP-shortgrass	4.4% annually	2%
Mixed-grass prairie (KS, OK, TX)	7.0% annually	<0.0001%
Sand sagebrush prairie (KS and CO)	2.0% annually	48%
Sand shinnery oak (NM and TX)	5.1% annually	< 0.0001%
Range-wide	10.6% annually	< 0.0001%
Range-wide 2012.– Assuming a 50% decline in trend across the range	6.4% annually	3.3%

The best scientific data available indicate that range-wide there is a low probability of extinction within 86% of the species distribution. This population growth and high likelihood of persistence continues when 2012 population trends are assumed to decrease by as much as 50%.[7]

A peripheral examination of the data also demonstrates that population trends from 1980-1997 were declining at an average annual rate of 3.7%. After the species was made a candidate and significant conservation efforts were initiated, post candidate status population growth was 6.9% increase annually.

[6] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group*; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

7 See Appendix 2 for the complete analysis

The paper has not been peer reviewed, so CESAR engaged two independent academics to review the methods and conclusions. One reviewer opined that while the absolute numbers may not be precise, the populations are clearly increasing. The other reviewer did not offer an opinion. Both reviewers liked the idea of more data and more analysis which would provide more resolution as to what is actually going on with this species. The reviewers agreed that the analysis was useful, and neither reviewer identified fatal flaws in the analysis. Based on the agreement that the work was useful, and that no reviewer found fatal flaws, but rather suggested additional improvements, we believe that this site specific analysis is the best available science, and it is consistent with the requirements of the Act that data be the basis of listing determinations.

Lesser Prairie Chickens are not Genetically Isolated, and there is Evidence of Hybridization

A 2010 publication[8] examined the genetics of the Lesser Prairie-Chicken to assess whether habitat loss fragmentation and population declines were resulting in genetic isolation or loss of diversity. Populations across Kansas, Colorado, Oklahoma, and New Mexico were examined. Little genetic differentiation was found except for the population in New Mexico, which was significantly different from most other populations. There was, however, evidence of significant isolation by distance at the rangewide scale that could explain the divergence of the population in New Mexico, simply because it is geographically isolated. The study also found evidence for a post-glacial population expansion within the species, which is consistent with the historical niche model that we constructed.[9] What can also be gleaned from the genetic study is that despite an overall historic reduction in range size, and increase in degree of range fragmentation, there is as yet no evidence of decreased genetic variability, either among populations, or in the species as a whole, relative to other grouse, or to birds in general.

The proposed listing document acknowledges the existence of hybridization between greater and lesser prairie chickens. The level of hybridization at the junction of the two ranges identified in the rule is high enough to potentially lead to merging of the two species. Thus hybridization is indeed occurring and calls into question the validity of the two species. The two grouse are very similar genetically (Gutierrez et al. 2000) and grouse are well-known to easily hybridize. We suggest that the FWS has underestimated the importance of monitoring hybridization and the

[8] *Regional Variation In MTDNA Of The Lesser Prairie-Chicken*, Hagan et. al. (2010); The Condor 112(1):29–37

[9] See Appendix 3 and the discussion under climate change.

implications for the taxonomy of the greater and lesser prairie chickens.

Assuming Population Declines Is Inconsistent With the Data Requirements of the ESA

As discussed in the previous sections, the best available data demonstrate that the lesser prairie chicken is not likely to become in danger of extinction in the foreseeable future. While the FWS may prefer their expert opinion and interpretation of the information outlined in the proposed rule, the plain language of the Act does not allow the use of anything but the best available data.

However, even if the data demonstrating population increases were not available, the following discussion identifies the arbitrary nature of the threats determinations in the proposed rule as well as the failure to comply with Congressional direction that listing determinations be based *solely* on data.

Habitat Effects Are Not Based On DataFWS Admits there is a 'lack of data' on Prairie Chicken Habitat Requirements

The FWS states that designation of critical habitat is not prudent because there is insufficient information on habitat requirements and identifies:

"A specific shortcoming of the currently available information is the lack of data about:

(1) The specific physical and biological features essential to the conservation of the species;

(2) how much habitat may ultimately be needed to conserve the species;

(3) where the habitat patches occur that have the best chance of rehabilitation; and

(4) where linkages between current and future populations may occur. "

Further, the FWS states:

"Additionally, while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations."

We note that the lack of data supporting the listing decision and identified in this report is confirmed by the FWS in this statement. We agree with the FWS that there is insufficient data to identify the available and the specific habitat requirements of the lesser prairie chicken. The lack of data makes any pronouncement regarding the effect of particular activities and habitat configurations speculative. This lack of data also makes it difficult to determine the effects of habitat changes on the lesser prairie chicken and consequently impossible to determine what habitat is necessary to conserve the prairie chicken.

The proposed rule assumes the effects of habitat loss and fragmentation, and then presents a *post hoc* rationalization of other habitat related factors which the FWS surmises contribute to the decline of lesser prairie chicken.

The discussion on prairie chicken habitat changes is framed in the context of each 'threat' individually and independently. The reader is provided with a large array of discrete facts regarding prairie chicken behavior in relation to specific structures, but nowhere are there data that reveal the range wide effect of these identified threats. The rule isolates each potential threat to lesser prairie chickens and asserts population level effects for each of them but provides no data on the actual effect of the interaction of these perceived threats, and never provides the reader any context to assess the range-wide extent of the effects. That is, the actual effect of a potential threat is dependent on the particular context of the population in which it is being evaluated. FWS assumes that any threat, no matter what the additional circumstances might be, is the same throughout the range and across time. However, what might be a threat under some circumstances (e.g., during a drought) might not be a threat in a normal year. The FWS approach is not biologically defensible.

The proposed rule argues that anthropogenic[10] activities threaten the lesser prairie chicken with rampant local extirpation that threatens eventual extinction, with no data to support the assertion. The basis for the listing decision rests on two principal threats, habitat loss and fragmentation. With no supporting data or analysis, the proposed rule asserts that the principal habitat threats amplify the effect of myriad other anthropogenic activities. A number of other specific 'potential' anthropogenic threats are also identified as generically 'contributing' to the decline of the lesser prairie chicken due to its weakened state resulting from habitat loss and fragmentation. The FWS speculates these threats include conversion of grasslands to agricultural uses, encroachment by invasive woody plants, petroleum production, roads, and presence of manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings. Again, the listing is predicated on threats unsupported by data and despite that admission that:

"… while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations… '

This statement clearly acknowledges there are no data with respect to whether a particular feature is adverse, beneficial, or neutral.

The rule's treatment of the issue of avoidance of selected anthropogenic

[10] Human based

features is a good example. The proposed rule[11] states:

"…lesser prairie-chickens seldom nested or reared broods within approximately 177 m (580 ft) of oil or gas wellheads, 366 m (1,200 ft) of electrical transmission lines, 792 m (2,600 ft) of improved roads, and 1,219 m (4,000 ft) of buildings".

However, the proposed rule fails to acknowledge the citation that supports this observation of avoidance also notes that, **avoidance did not result in lowered nest success**[12], which is of course the underlying reason for concern. Implicit in the FWS identification of avoidance as a threat is the surmise that lesser quality habitat was used and nest failures resulted, causing harm across the range of the lesser prairie chicken. The omitted data demonstrate the danger in relying on surmise. The FWS failed to consider that the cited literature did not examine what contributing effect other factors interacting with the structures may have had. The ESA requires the FWS to provide or rely on data that demonstrate how populations are reduced by this behavior and how the results of the study apply to all (or essential or significant portions) of the various habitats in use by the species.

Thus, we suggest that it is premature to extend an individually identified and isolated threat to the entire species. That is, suggesting that one factor (e.g. vertical structures) is a threat, without any observed adverse effects and without consideration of other co-relevant factors, such as location or type of habitat, degree of isolation, population size, whether the population was recently impacted by drought, or any other pertinent factor, risks failing to accurately identify the real threats.

The following section discusses the specific and general threats related to habitat identified in the proposed rule, the data supporting the existence of the threat, and the data supporting its population level effects.

Habitat loss and Population

The lack of early data on lesser prairie chickens and their habitat makes it difficult if not virtually impossible to make valid comparisons of historic and present habitat. Fortunately, such historic comparisons are not a consideration in the assessment of threats for listing under the ESA. The ESA requires identification of:

*"the **present or threatened** destruction, modification, or curtailment of its habitat or range"*

The FWS takes the position that substantiating population declines is unnecessary to list a species. The FWS asserts that measurement of the threats is all that is necessary. It is, however, necessary to be able to measure, in terms of data, either habitat loss and its population level effects or population changes. In the case of the lesser

[11] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73853
[12] Pitman et al. (2005)

prairie chicken, precise ground and aerial surveys (e.g., the States and Western Assoc. of Fish and Wildlife agencies) are available. Furthermore, states have implemented new and more accurate survey techniques which facilitate understanding population level responses over time. There is little doubt that the current range of the lesser prairie chicken has changed from that of its historic range[13] [14] but whether it's 25%, 50% or 95% is irrelevant; we know approximately how many birds exist today and where most of them live. The goal of the listing determination is to determine whether the remaining populations are increasing decreasing, or stable, have adequate habitat, that the existing habitat is sufficiently stable, and if not, to assess the species and the threats to the habitat to determine whether the species qualifies as threatened under the factors identified by Congress.

In the case of the lesser prairie chicken we have access to a record of the near-term habitat amounts and population changes in occupied habitat thanks to the aforementioned aerial surveys supported by the states. These aerial surveys have provided increased accuracy in population and habitat monitoring. However, these changing survey techniques, while leading to more accurate estimates, inhibit direct comparisons across time, requiring instead that changes be measured using sophisticated statistical techniques.[15] The analysis of the current population data demonstrates increasing populations and low extinction probabilities.

Lesser Prairie Chickens are not Threatened by Habitat Fragmentation

The FWS own data and analysis, referenced in the rule, demonstrate that habitat beyond the minimum required to ensure the continued existence of the lesser prairie chicken is available. A FWS spatial analysis identified 71 patches that met the listing determination's arbitrary minimum size of 10,117 ha (25,000 ac)[16] within the five state estimated occupied range. This satisfies the statement in the proposed rule that a minimum of four strongholds of 10,117 ha (25,000 ac) distributed across the ecological diversity of the species are necessary. **These data demonstrate that despite the existing fragmentation throughout the occupied portion of the range, the rule's arbitrary minimum stronghold threshold is met. This is confirmed by the data showing population growth throughout the range**[17].

[13] See Appendix 1 for a discussion of the historic range figures used by the FWS and their applicability to the listing determination.

[14] The same could be said for virtually any species living in the United States at the time of European settlement.

[15] The Hagan 2012 analysis of lesser prairie chicken populations is one example; another, Garton et. al. 2010 was used by the FWS, it examined disparate sage grouse population measurements.

[16] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73836

[17] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser*

The discussion of habitat fragmentation included in the rule is confusing and misleading. The information is presented without context and without a discussion of population level effects. In the following paragraphs we elucidate habitat fragmentation in the context of lesser prairie chicken life history adaptations and their environment.

The FWS states in the conclusion of the proposed listing:

'…as a result of the significant reduction in numbers and range of lesser prairie-chickens resulting from cumulative ongoing habitat fragmentation, combined with the lack of sufficient redundancy and resiliency of current populations, we conclude that the lesser prairie-chicken is currently at risk of extinction or is likely to be in danger of extinction in the foreseeable future.'

The question of habitat fragmentation and its consequence is key to the FWS determination that listing of the greater prairie chicken is supported. However, the basis for the determination that the existing fragmentation is sufficient to have population level effects is not supported by the data cited by the FWS.

Specifically, the FWS makes several conflicting statements regarding area of habitat needed for successful lesser prairie chicken populations. First, the proposed rule states,

"…Although a minimum size has not been established, studies and expert opinion, including those regarding greater prairie-chickens, suggest that the minimum parcel size is likely to exceed 100 ha (250 acres)..."[18]

Later the[19] proposed rule concludes that,

"…conservation and eventual recovery of the lesser prairie-chicken should consist of the establishment of secure strongholds or core areas of high quality habitat that are at least 10,117 ha (25,000 ac) in size and support 6–10 active leks, each being used by at least 6 males..."

The proposed rule does not provide the data used to determine that a home range two orders of magnitude larger than the minimum is necessary. Home ranges for lesser prairie chickens vary by habitat type and environment. This is because each of the life history components of lesser prairie chicken vary greatly as the birds adapt to available habitat and other environmental aspects. Leks, or the display grounds of males where females come to mate, can be quite small. It would not be useful to consider the area needed for a lek by itself, as it does not include nesting, feeding and roosting sites. However, it is useful to note that, leks are also found on habitat the rule assumes is not available for lesser prairie chickens such as, "…abandoned

Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[18] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856)
[19] Id., p. 73836)

oil-drilling sites (oil pads) with little or no vegetation, unimproved roads with little traffic, areas treated with shrub-specific herbicide, recently burned areas, heavily grazed areas (e.g., stock tanks, mineral licks), and cultivated fields adjacent to grassland…"[20]. Hence, lek placement is adaptable and areas identified as unsuitable at present, may in fact be used in the proper circumstances. Because of the adaptability of lesser prairie chickens it is not advisable to make broad surmises about habitat availability and needs included in the proposed listing rule, in lieu of actual data.

There are different ways to estimate the area of habitat needed for successful lesser prairie chicken populations and no agreed-upon answer. This is due to the fact that there are separate areas for nesting, feeding and the lek itself, all of which might be fragmented by interspersed areas of unsuitable habitat (either natural or human made), in the native landscape. The proposed rule cites several studies that evaluate the area required for home range and a population. Home range estimates range from 21 ac to 4806 ac, with many values in between. The huge variance in range area is the result of reports of home range by season (i.e. breeding less than wintering), different drought conditions, and availability of food. At the population level, there is no evidence on how many birds or leks would be necessary to maintain population viability. As a consequence, estimates reported by FWS show enormous variation, from 1,012,140 ac to 2,530 ac. Other figures include 7,900 ac, 25,000 ac, 12,000 ac, 72,649 ac, and 24,710 ac. In violation of the requirements of the ESA, **the FWS does not include the data that support the determination to use the 10,117 ha (25,000 ac), nor does it explain the basis for the determination**.

The FWS references a spatial analysis they conducted to determine the extent of fragmentation within the estimated occupied range of the lesser prairie-chicken.[21] Infrastructure features such as roads, transmission lines, airports, cities and similar populated areas, oil and gas wells, and other vertical features such as communication towers and wind turbines were delineated. These features were buffered by known avoidance distances and compared with likely lesser prairie- chicken habitat. **The analysis revealed 71 patches that exceeded the minimum 10,117 ha (25,000 ac) range that exist within the five- state estimated occupied area**. Of the patches over 10,117 ha (25,000 ac), all were impacted by fragmenting features, just not to the extent that the patch was fragmented into a smaller sized patch. Thus, even if, as the rule states:

[20] Hagen et al. 2004

[21] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856; The analysis is referenced but not included in the citations, so it is not possible to assess its validity.

"… a minimum of four strongholds will be needed, distributed across the ecological diversity of the species, in order to secure the status of the species."[22]

There are several times that many patches currently in existence.

Edge Effects Due to Habitat Fragmentation

It is well known that in some ecosystems increasing linear amounts of habitat edge, as a consequence of habitat fragmentation, present threats to some species. For example, birds nesting in forests are negatively impacted by nearby open-country edges because it facilitates access by habitat-edge nest predators such as raccoons (*Procyon lotor*), and provides access to nests by avian brood parasites such as the ubiquitous brown-headed cowbird (*Molothrus ater*). The proposed rule contains numerous citations referencing the negative effects of edges that are apparently supposed to illustrate their danger to lesser prairie chickens; however, none of the citations address the effects of edges on lesser prairie chickens[23]. The proposed rule also states that typical native lesser prairie chicken habitat is a mosaic of different habitat patches. We note that each of the patches within the native mosaic creates an edge[24] [25]. Thus, the lesser prairie chicken's coexistence with edge effects in their native habitat indicates that they are part of the native landscape in which lesser prairie chickens evolved.

The FWS suggests that edges and habitat fragmentation will make it difficult for lesser prairie chicken individuals to find leks. The rule provides no data, and no evidence to support the statement. As such, it appears to be purely speculative. Further, given that leks are often used traditionally for years, and that breeding and feeding grounds are typically nearby, the notion that a lesser prairie chicken would be unable to find an active lek is scarcely credible. It is also worth noting that leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine the birds' selection of a new lek site. Surely a species would not have evolved a reproductive system that randomly makes it impossible for females and males to find each other at mating season.

[22] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[23] Id., pp. 73851-57
[24] Id., pp. 73852
[25] "Consequently, blocks of habitat that collectively or individually encompass multiple successional states that comprise tall grasses and shrubs needed for nesting, and are in proximity to more open grasslands supporting forbs for brood rearing, and are combined with smaller areas of short grass and bare ground used for breeding, support all of the habitat types used by lesser prairie- chickens throughout the year." Federal Register, Vol. 77, No. 238 , December 11, 2012, pp. 73852

Anthropogenic Changes to Lesser Prairie Chicken Habitat

This statement in the rule appears to be opinion.

'The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events…."[26]

The FWS provides no data or analysis to support the statement, and has earlier admitted there are no data on historic habitat or populations. Nevertheless, the proposed rule contains a list of activities which 'may' have an adverse effect on lesser prairie chicken, based on these assumed impacts. The information provided in the proposed rule consists of lists of areas where these 'threats' exist within lesser prairie chicken habitat and speculative mechanisms for their adverse effects. However, no data are provided to substantiate the assertions that the adverse effects attributed to these threats actually exist or how they affect lesser prairie chicken populations' extinction risk. We recognize that "extreme weather events" was intended to be only one possible example of a stochastic event, but an extreme weather event that would wreak such widespread damage would likely be destructive even to native species at peak abundances.

[26] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73883

Livestock Grazing, Water and Habitat Conversion

Livestock

The FWS surmises that because livestock grazing occurs over such a large portion of the occupied range, it must be a threat. Accepting the idea of adverse effects of livestock grazing on a species whose historic habitat included seasonal and widespread overgrazing by bison is counter-intuitive. The proposed rule implies that the pattern of grazing today is different, but does not quantify those differences or the adverse consequences. The rule also identifies other adverse effects such as nest trampling, but provides no information on the extent to which this occurs or the population level effects of such occurrences. Identification of livestock grazing as a threat to the species is purely speculative. In fact, the rule states:

"…Although documented, the significance of direct livestock effects on the lesser prairie-chicken is largely unknown. Detailed, range wide information is lacking on the extent, intensity, and forms of recent grazing, and associated effects on the lesser prairie-chicken. "

Additionally, the rule fails to account for the availability of water from stock tanks as a positive effect of grazing cattle. The rule cites research documenting the regular use of stock tanks by both male

and female lesser prairie chickens. The FWS suggests that stock tanks,

"…may be particularly important during periods of drought."[27]

The rule immediately discounts its importance stating that lesser prairie chickens do not require water speculating that dew is a 'likely' source:

"Lesser prairie-chickens likely rely on food sources and consumption of dew to satisfy their metabolic moisture requirement but will use surface water when it is available."

While the rule admits beneficial aspects of a ready source of water to the species, it fails to consider it in assessment of the effect of livestock grazing:

"Little is known regarding the specific water requirements of the lesser prairie chicken, but their distribution does not appear to be influenced by the presence of surface water."

"Total annual precipitation across the range of the lesser prairie-chicken varies, on average, from roughly 63 cm (25 in) in the eastern portions of the historical range to as little as 25 cm (10 in) in the western portions of the range. Consequently, few sources of freestanding surface water existed in lesser prairie-chicken historical range prior to settlement."

Agricultural conversion

The proposed rule states that agricultural conversion adversely affects lesser prairie chicken. However, the statement is only partially accurate. The cited research notes that lesser prairie chickens commonly forage in agricultural crops such as grain sorghum, corn, and other grain fields adjacent to native pasture from late autumn through early spring and that alfalfa is an important food source for pre-nesting females and lekking males in southwestern Kansas. The citations also reported that maximum numbers of lesser prairie chickens were found in areas in which 5-37% of the landscape was planted to grain sorghum using minimum-tillage techniques. The citations used by FWS in the proposed rule also note that recently, conversion of grass lands to agriculture has slowed, as the number of hectares per year converted has not increased. The proposed rule provides no data to substantiate the statement that increases in agricultural conversion continue to occur. Neither does the proposed rule make any attempt to assess or quantify the benefits to lesser prairie chickens of increased food sources from agricultural crops, the percentage of no-till agriculture or of the crops that provide food for lesser prairie chickens. The multiple variables involved in assessing the effect of agricultural conversion illustrate the speculative nature of sweeping assumptions about the effect of any activity on lesser prairie chicken habitat.

[27] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843

Human encroachment: energy production and transmission , fences, roads

The proposed rule lists several citations that report there are indications that human structures influence lek placement. The proposed rule includes wind turbines, energy transmission lines, power poles and lines, oil rigs, fences and roads in this category. The proposed rule posits that the vertical presence in the lesser prairie chicken landscape is in and of itself a threat. The threat is predicated on research that found lesser prairie chickens avoided these structures.

Specifically, Pitman says that leks are farther from anthropogenic structures than expected by chance. Pruett et al. (2009) found that lesser prairie chicken tended to avoid roads and power lines. Hagen (2011) noted that, "Monte Carlo simulations of expected distances indicated that the nearest 90% of lesser prairie chicken centers of use were farther from anthropogenic features than would be expected at random." However, as noted elsewhere, there are no data that this avoidance results in reduced nest success or reduced populations. Pitman et al. (2005) measured distances from nests to various anthropogenic features, and found:

"distances to the features were not substantial predictors of apparent nest success. Grass height, sagebrush plant density, and sagebrush height were the most important vegetation characteristics influencing nest success."

Further, based on the narrow reach of the supporting research, it is only surmise that structures have an adverse effect, since the effect of other interacting features, such as whether it was a drought year and the placement of the structures in relation to the lesser prairie chicken preferred activity for the site have not been evaluated.

The proposed rule speculates that human activities nearby leks might interfere with the transmission of male vocalizations ("booming") on the leks, thereby preventing females from finding the leks.[28] This speculation is inconsistent with what we know of lesser prairie chickens. First, as discussed above, leks are relatively long-lived, and it is unlikely that there are females or males in the local population who are unaware of their location and active status. Second, leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine their selection of a new lek site, but this behavior does not appear to affect the ability of leks to be found during mating season. Finally, a characteristic of lesser prairie chicken habitat is frequent wind, which abates sounds reducing the effects of surrounding noise. Nevertheless, the

[28] Federal Register, Vol. 77, No. 238 , December 11, 2012, p.73839

rule relies on the findings of a paper[29] which addresses the effect of noise on a flycatcher, warbler, sparrow and a vireo, all small songbirds, and no open country ground nesting game birds whose environmental requirements would more closely mirror those of lesser prairie chickens. Accordingly, the study, although important in its own right, is irrelevant to the lesser prairie chicken as the tremendous differences in the ecology of the species involved preclude drawing any inferences related to lesser prairie chickens. Thus, there are no scientific data to indicate that noise is a threat to the lesser prairie chicken.

Collision mortality

The proposed rule concluded that:

"power lines and unmarked wire fences are known to cause injury and mortality of lesser prairie-chickens, although the specific range wide impact on lesser prairie chickens is largely unquantified."[30]

The statement is based on a study which demonstrated that statistically, the effect of collisions was insignificant. [31] The rule identifies data from 1999 to 2004, in which researchers recovered 322 carcasses of radio-marked lesser prairie-chickens in New Mexico, Oklahoma, and portions of the Texas panhandle. The percentages of documented lesser prairie-chicken deaths from collision were estimated to be 42 percent in Oklahoma and 14 percent in New Mexico. Based on the information in Table 2 of the proposed rule, there were roughly 10,000 individuals in the three states during this time interval, and therefore, during this period, there were approximately 60,000 potential encounters. Therefore, the 14% to 42% of 322 birds (45 to 135) that died via collisions amount to less than 1/10 of one percent of the population (0.1%). Therefore, the available data indicate that although it would be highly useful to put markers on the top row of fences especially near leks, collision mortality is relatively insignificant factor.

Disease and Predation

The proposed rule states:

"The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events. Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels"

Predation

Although in the section on predators, FWS plays down the role of predators, throughout the proposed rule, there are repeated assertions that diverse threats increase predation. These discussions ascribe a role to predators that will result

[29] Francis et al. (2009)
[30] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73863
[31] Patten et al. (2005b)

from existing and planned towers serving as perches for raptors. For Example, FWS states that lesser prairie chickens avoid vertical structures as "presumably a behavioral response that serves to limit exposure to predation." The proposed rule cites a long term study in Oklahoma.[32] In that study, they identified roughly 43 carcasses out of a total lesser prairie chicken population of 3,000.attributable to raptor depredation.[33] Thus only a handful of birds were killed by raptors. The authors of this study stated "We have no reason to believe that lesser prairie chicken populations are being impacted severely by predation."[34] In a different study Behney et al. (2012, p. 294) "suspected that mammalian and reptilian predators had a greater influence on lesser prairie chicken mortality during the breeding season than raptors." Yet, in their conclusion the FWS ignores these data and opines that predation is a threat.

There are no data that support the speculative statements in the proposed rule that towers would provide roosts for ambush-style raptors. Most raptors such as large hawks, hunt from the air. A major avian predator, the Great Horned Owl, likely approaches low to the ground during crepuscular periods, and perching on a tower might make it visible. Only documented depredation where the species of raptor and hunting method were recorded would provide this information. Here again, the FWS lack sound or even reasonable scientific data on the effects of towers on increasing predator pressure. It requires observations over time, measuring the rate at which lesser prairie chickens are taken by avian predators at leks both with and without nearby towers or other vertical structures. And most importantly, one would have to demonstrate the assertion the depredation from raptors was additive and not compensatory. That is, as FWS noted, lesser prairie chickens evolved with a suite of mammalian and avian predators. Only if some new source of predation occurred that resulted in take of individuals over and above natural levels, would depredation be relevant, and the proposed rule presents no data empirical or otherwise to support this conclusion.

Disease

The FWS states in the proposed rule:

"…There is no information that indicates parasites or disease are causing, or contributing to, the decline of any lesser prairie-chicken populations, and, at this time, we have no basis for concluding that disease or parasite loads are a threat to any lesser prairie-chicken populations. Consequently, we do not consider disease or parasite infections to be a significant factor in the decline of the lesser prairie-chicken…"

[32] Wolfe et al. (2007) who conducted a long term study from 1999-2004.
[33] Table 2, FWS 2012
[34] Wolf et al. (2007: 101)

The proposed rule then goes on to state, that if populations continue to decline or become more fragmented, even small changes in habitat abundance or quality could have more significant consequences. The implication is that there would be a marginal increase in disease within the population driven by habitat changes. There are no data to support an assertion that disease will increase as habitat loss or fragmentation occurs, if the statement were supportable, the putative loss in habitat which this rule surmises, has already occurred and should have resulted in some measurable increase in disease over time. Such an increase is not recorded or even remarked. In any event, if populations decline or are sparse, diseases that are density dependent would have difficulty becoming a major threat.

Climate Change

The proposed rule identifies global warming and potential extreme weather events as a threat to the species. The rule assumes that warming will occur (as opposed to some unspecified climate change) and concludes that as a result, habitats will dwindle and further compound the putative negative effects of habitat fragmentation. However, many climate projections predict that species ranges will shift, not shrink and in fact, conditions for some species might improve.

Changes in species' range sizes are ubiquitous, and do not automatically imperil their continued existence. For example, during the last Ice age, known as the Last Glacial Maximum (LGM; 21,000 years before present), southward extending glaciers pushed many species into small southerly isolated habitat patches (refugia), where they survived for thousands of years, subsequently expanding as climate shifted again.

CESAR used a niche model to examine the current and past distribution of lesser prairie chicken (Appendix 3). Our work demonstrates that the lesser prairie chicken was one of those species which was distributed in a fragmented series of habitat patches south of the current range during the last glacial maximum, 21,000 years ago. Clearly the species survived this displacement and fragmentation, and as climate conditions ameliorated post glacial retreat, they followed their northward-moving habitats to where they are today. Thus the species has survived previous significant climate changes and has the potential to survive major, glacial-scale changes in earth's climate and still prosper. [35]

The FWS provides no data to substantiate a conclusion that a species which has weathered significant climate change and persisted over 21,000 years is not equipped to survive and adapt to current climate change.

[35] For a more in-depth discussion of the analysis, see Appendix 3

Adequate Regulatory Authority Exists to protect the Lesser Prairie Chicken at the State and Local Level

As part of our review of the proposed listing rule, CESAR lawyers examined the existing state and local protections for the lesser prairie chickens. We found that each state had its own comprehensive scheme for protecting species and their habitats. These protections, for the most part, went far beyond the narrow protections of the ESA encompassing wildlife and wildlife habitat protections.

Benefits of ESA Listing

The proposed rule states that the ESA provides protection beyond that which state and local agencies provide. This is only conditionally true. The ESA protects listed species by requiring federal agencies to avoid jeopardizing the continued existence of the species, prohibiting the 'take'[36] of listed species, and by protecting designated critical habitat. The FWS in the proposed rule implies that listing provides the ability to protect habitat on private property, is the only source for recovery planning and increases funding available for the conservation of lesser prairie chickens.

The habitat protections provided under the ESA largely flow from the designation of critical habitat. The protections apply only to that habitat which has been designated as 'critical'. The protections are further limited to the subset of critical habitat which is affected by a federal agency action. So while much private habitat can be designated as 'critical habitat', in fact it is not protected under the ESA unless a federal agency action has an effect on it. With respect to the lesser prairie chicken, this distinction is moot as the FWS has declined to designate critical habitat as 'not prudent", due to the lack of data related to the species habitat requirements.

The prohibitions against take protect the species immediate habitat if its modification or destruction leads to the death of an individual member of the species. The requirement that federal agencies consult with the FWS to ensure their actions do not 'jeopardize the continued existence of the species' allow for take as long as jeopardy does not result.

While listing of a species results in a requirement to develop a recovery plan, these plans are developed to the maximum extent practicable and there are no regulatory requirements attached to the plan. Recovery plans are aspirational documents, the ESA

[36] The Act defines take as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct..." The word harm has been interpreted to include habitat modification, which foreseeably causes the actual injury or death to a listed species. The FWS has asserted the ability to regulate habitat under this provision and consequently resists designating critical habitat. The courts have disagreed with this interpretation, pointing out that simply protecting against habitat alteration that actually kills a species is not preservation of the ecosystem upon which a species relies.

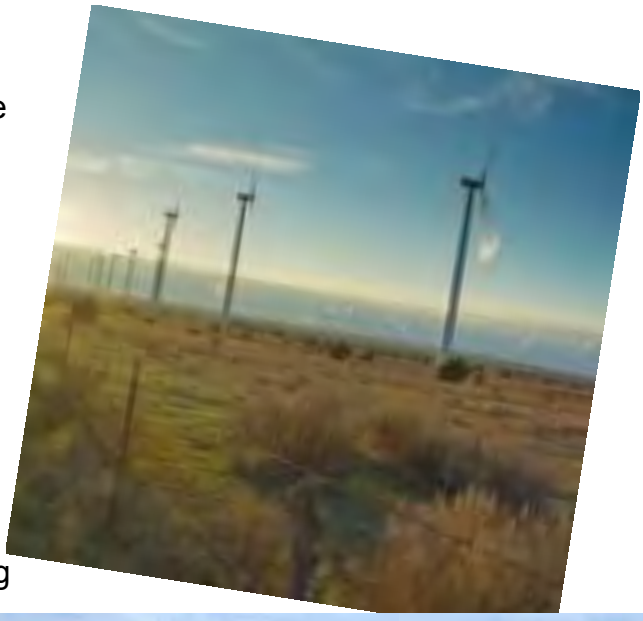
imposes no requirements for scientific rigor to their contents, such as requiring them to use the 'best scientific and commercial data available'. Further, any group can and has developed recovery plans. The FWS has developed Recovery plans, individual states have developed recovery plans, and working groups have developed recovery plans. The ESA is not the sole generator of a recovery plan.

The ESA provides no dedicated funding for listed species.[37] While it is possible to argue that if a species is listed the probability of funding increases, the evidence is unpersuasive. With nearly 1,500 listed species, one would expect all available wildlife research and conservation funds would be used to address those species. Instead, funding for wildlife conservation, recovery, and research is not devoted solely to endangered species, much is still available for unlisted and unregulated species.

Realistically listing of a species, assures federal agencies are required to review their actions in the context of the ESA, and to a limited extent those requirements extend to private lands affected by federal agencies.

Generally, a listing under the federal ESA listing does not necessarily:

- Protect habitat on private property;
- Provide access to dedicated federal funding;
- Result in a recovery plan



[37] We contrast this with the affected States which individually provide state funds for wildlife conservation.

Existing Federal Agency Regulatory Protections

The FWS admits that the lesser prairie chicken cannot be fully recovered on federal lands, which only support about four percent (4%) of the species' overall range. The five states where the majority of the lesser prairie chickens are found (primarily on private property, not federal lands) have significant state, county and local laws and regulations in effect to protect the lesser prairie chicken.

Where federal lands are involved, we note that in many cases federal agencies have taken voluntary actions to ensure that they consult with the FWS whether or not a species has been listed. These agencies include the Forest Service and the BLM. These two agencies have responsibility for managing millions of acres. These agencies have formally designated prairie chickens and their habitats as species for which their respective management plans will take special consideration. [38] These management plans are binding, and failure to adhere to their conditions can be challenged in court. [39] There is no evidence that the agencies are routinely ignoring the requirements of their management plans for lesser prairie chickens.

The voluntary consultation by federal agencies provide protections that go beyond what is required by the ESA as the agencies land use plans have a standard that manages the lands to recover or enhance wildlife and habitat. A consultation under the ESA requires only that the federal agency, avoid 'jeopardizing the continued existence of the species', or the 'destruction or adverse modification' of its critical habitat.

FEDERAL AGENCY PROTECTION[40]	ESA PROTECTION INCREASE
Bureau of Land Management • Environmental assessments required for all major activities; • Early consultation as to presence of species in project area;	None. BLM Land use plans[41] for the lesser prairie chicken habitat are complete. These plans are based on voluntary consultation with the

[38] The section on conservation actions includes details on the conservation actions undertaken by these land management agencies.
[39] Western Watersheds Project v. Ken Salazar, Secretary, Department Of The Interior, Case No. 4:08-CV-516-BLW, Document 131, Memorandum Decision And Order. http://www.advocateswest.org/sites/default/files/bulletin/Victory%20in%20First%20Round%20of%20BLM%20RMP%20Litigation/Order%20granting%20WWP%20Motion%20for%20Summary%20Judgment.pdf
[40] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[41] http://www.blm.gov/flpma/FLPMA.pdf

• Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Duty to protect and restore habitat from invasive species; • Guidelines for energy development; • Best management practices for energy development "approved" by FWS • Duty to create Resource Management Plans; • Duty to conserve "candidate" species and sensitive species designated by individual states; • Designated Area of Critical of Environmental Concern (ACEC) for lesser prairie chicken	FWS as though the lesser prairie chicken were listed under the ESA.[42] The requirements in the land use plans are based on a standard to restore or enhance habitat conditions, the ESA simply require that federal agencies: 1. Avoid jeopardy, 2. Avoid destruction or adverse modification of habitat. Federal lands controlled by BLM and the USFS managed under provisions that already provides lesser prairie chickens and their habitat enhanced protection. Federal lands controlled by BLM and the USFS have already agreed to voluntary consultation with the FWS on the lesser prairie chicken, whether it is listed or not; Current federal land management practices provide for management, enhancement, and recovery of habitats used by lesser prairie chicken, rather than just avoiding jeopardy. Each of the states with lesser prairie chicken habitat prohibit take either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[42] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

Department of Agriculture • Duty to protect and restore habitat from invasive species; • Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Environmental assessments required for all major activities;	No additional habitat protections would be provided, first because the listing does not designate critical habitat, second because the land management agencies manage to a restoration/enhancement standard which is higher than the ESA 'avoid jeopardy' and no destruction or adverse modification standard. USFS land use requirements for lesser prairie chicken are based on voluntary consultations with the FWS and a standard to improve habitat conditions[43]. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[43] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

State and Local Regulatory Protection

The five states with lesser prairie chicken habitat have significant protections in place for wildlife in general, allowing them to protect prairie chickens and their habitat without federal authority. Each state has its own Endangered Species Act and Colorado has listed the lesser prairie chicken. Some states have identified it more specifically with a designation indicating it is a species of special concern. All the states identify it as a game species and have statutes which provide for penalties for taking under anti-poaching laws. In addition, each of the States and their associated local government have the authority and expertise to protect wildlife habitat generally and specifically, whether it is on government or private land.

The following is a cursory review of applicable law which should be considered illustrative rather than a comprehensive list.

In making comparisons between the ESA and local protection it is important to note that ESA protections are limited to federal lands, and those critical habitat lands which are affected by a federal agency action. While the FWS may prefer their ability to protect the species, there is no indication that a lack of regulatory authority is hampering the states from protecting lesser prairie chickens. The states bring their own expert agency status to the protection of species within their jurisdiction, and each state has identified a commitment to protection, restoration, and enhancement of wildlife resources. There is no basis for asserting that state expertise or authority is lacking and, as noted earlier, increasing populations support a conclusion that state and voluntary conservation efforts are having a beneficial effect.

Colorado, Kansas, New Mexico, Oklahoma and Texas already have flexible laws and regulations in place to effectively deal with changing conditions to prevent depletion and waste of wildlife resources. Further, the documented policies of the federal land use agencies whose actions most impact the lesser prairie chicken and its habitat, currently identify the lesser prairie chicken as a species for which special management and protection is afforded even in the absence of an ESA listing. In light of the prohibitions of take under anti-poaching laws that apply to the lesser prairie chicken, listing under the ESA will only criminalize accidental take of lesser prairie chickens.

Existing laws at the state, county and local levels have the authority to protect and manage activities on state, public and private lands with the actual or potential benefit to the lesser prairie chicken. The service candidly admits that only about four percent (4%) of the species' overall range occurs on federal lands and that the lesser prairie chicken cannot be fully recovered on federal lands alone. Fortunately, there are adequate state, county and local laws and regulations currently available in Colorado, Kansas, New Mexico, Oklahoma and Texas to protect the lesser prairie chicken.

The following chart summarizes current protections provided to the lesser prairie chicken on a state-by-state basis and identifies any marginal increase in protection provided by the ESA[44].

STATE	ESA PROTECTION INCREASE
Colorado • Species listed under the state ESA and take is prohibited. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Prohibits unauthorized 'take' of wildlife, whether listed or not • Provides dedicated funding for wildlife and habitat. • Goal is for all wildlife to achieve self-sustaining population; • Wildlife laws are enforced with civil and criminal penalties.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Oklahoma • State has authority to enter private lands for purpose of controlling Red Cedar and other invasive plant species; • Dedicated funding for wildlife habitat restoration activities; • Protects all wildlife from illegal "take"; • Wildlife laws are enforced with civil and criminal penalties; • Provides classification for "sensitive species" such as lesser prairie chicken. • Provides protections intended to achieve self-sustaining wildlife populations. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Comprehensive regulation of energy development and natural resource development industries.	ESA provides no ability to control activity on private land unless it is affected by a federal agency action. The ESA would criminalize accidental take.

[44] A detailed chart can be found in Appendix 5.

• Classifies lesser prairie chicken as a game bird ad protects it with anti-poaching laws.	
New Mexico • Dedicated funding source for wildlife protection and promotion; • Conservation Services are available for management and enhancement (including research and conservation actions) of wildlife and habitat; • Educational publications on wildlife and habitat related conservation issues; • State requires studies to be conducted to determine the status and survival requirements of threatened or endangered species. • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Kansas • Established habitat acquisition and restoration programs; • Programs to ensure that all wildlife maintain or achieve “self-sustaining” populations; • Penalties for failure to adhere to wildlife laws; • Local governments have authority to create noxious weed programs; • Planning and zoning must be conducted in a manner that will consider all natural resources of the State; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Texas • Noxious weed control programs; • Dedicated funding for wildlife research; • Dedicated funding for wildlife and habitat conservation;	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in

• Civil and criminal penalties for violation of wildlife laws; • Wildlife laws protect all "indigenous" wildlife (not only listed species) from "take"; • Conservation incentive programs with dedicated funding; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it under anti-poaching laws.	protection by an ESA listing would be to criminalize accidental take.

COLORADO

Colorado has implemented rules, regulations and codes to ensure the protection of wildlife and to ensure a continuous operation of planning, acquisition and development of wildlife habitats and facilities for its indigenous wildlife populations. The protections available in Colorado include, but are not limited to, local governments, planning and zoning, land use and conservation and have included provisions for enforcement so as to promote consultation with other states and federal government for the purposes of increasing the number of individuals within the species and populations of wildlife up to the optimum on a statewide basis to ensure equitable and reasonable privileges of ownership along with the pursuit of wildlife resources.

NEW MEXICO

New Mexico has a comprehensive wildlife conservation strategy. The strategy focuses on actions intended to keep common species common while working to prevent wildlife from becoming endangered. Using rigorous science, New Mexico has constructed an ecological framework for identifying the species of greatest conservation need, the habitat necessary to sustain them and other members of their ecological communities with periodic review processes necessary to ensure citizen involvement and acceptance.

KANSAS

Kansas has enacted the Kansas Nongame and Endangered Species Conservation Act of 1975 which gives the Department of Wildlife, Parks and Tourism authority to identify and undertake appropriate conservation measures. In that regard Kansas has implemented recovery plans with an objective to guide research and management aimed at enhancing listed species populations with the ultimate goal of allowing species to recover. Kansas has taken great strides in creating, practices, plans and regulations

which provides incentives to plant and maintain prairie grasslands which have greatly benefited the lesser prairie chicken.[45]

TEXAS

As an example of the available protections, the Texas Agriculture Code allows the authority to determine critical wildlife habitat zones, create and regulate noxious weed control districts and to regulate range restrictions. Additionally, the Texas Natural Resources Code and Parks and WildlifeCode allow Texas to regulate and develop and administer programs to ensure continued agriculture production and water availability as well as wildlife habitat availability. Texas also has an administrative code whose purpose, in part, is to provide a comprehensive method for the conservation of an ample supply of wildlife resources on a statewide basis to insure reasonable and equitable privileges of ownership along with the pursuit of wildlife resources.

OKLAHOMA

Oklahoma has developed the Oklahoma Lesser Prairie-Chicken Conservation Plan (OLEPCCP) to "protect, enhance, and restore their habitat while also addressing other factors leading to their decline." This plan is intended to benefit the people, economy, and wildlife resources of Oklahoma by providing a framework for effective management and habitat improvement. Oklahoma is working to conserve the lesser prairie chicken while minimizing effects on human economies and developments. Appropriate habitat improvement/conservation goals and long-term management actions/strategies are being utilized to achieve these goals as well as coordinated strategies to implement management actions – including interagency coordination and incentives or other programs that will make restoration and maintenance of LEPC habitat economically viable for landowners and industries. While these efforts are underway, Oklahoma defines lesser prairie chickens as game birds and protects them under their anti-poaching statutes.

Table 1. Federal Lands By State[46]

State	Total Federal Land Acreage[47]	Total Acreage in the State	% of
Colorado (listed under CO ESA)	24,086,075	66,485,760	36.2%

[45] The anti-poaching laws protect the species at all time. Kansas offers limited hunting of LPC.
[46] Congressional Research Service, 7-5700, February 8, 2012, Federal Land Ownership: Overview and Data, http://www.fas.org/sgp/crs/misc/R42346.pdf
[47] Understates total; includes lands of the four major federal land management agencies and the Department
of Defense, but excludes lands administered by other federal agencies (e.g., Agricultural Research Service, Bureau of Reclamation, Department of Energy, National Aeronautics and Space Administration).

Kansas	301,157	52,510,720	0.6%
New Mexico	27,001,583	77,766,400	34.7%
Oklahoma	703,336	44,087,680	1.6%
Texas	2,977,950	168,217,600	1.8%

Federal Voluntary Conservation Actions

As noted earlier, particularly in the case of federal land management agencies, conservation actions undertaken voluntarily as part of a program of land management by the federal agencies, become enforceable once they are adopted. In a similar manner, once landowners enter into voluntary conservation programs with federal agencies, the provisions of the programs themselves become requirements.

Summary Chart of Federal Agency Ongoing Conservation Programs[48]

FEDERAL AGENCY CONSERVATION ACTIONS[49]

Department of Agriculture
 	
• Natural Resources Conservation Service:
  ○ Lesser Prairie Chicken Initiative: helping farmers and ranchers enhance, restore and protect habitat for lesser prairie chicken;
  ○ Conservation Reserve Program (CRP): one of the primary management tools for habitat restoration;
  ○ Wildlife Habitat Incentive Program: voluntary approach to improving wildlife habitat;
  ○ Working Land for Wildlife: FWS cooperative to combat the decline of seven specific wildlife species, including the lesser prairie chicken;
  ○ Grassland Reserve Program (GRP): a voluntary conservation program working with individuals to enhance plant and animal biodiversity, and protection of grassland;
  ○ State Acres for Wildlife Enhancement (SAFE): a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years;
  ○ The Environmental Quality Incentives Program (EQIP): a voluntary program that provides financial and technical assistance to agricultural

[48] A detailed chart can be found in Appendix 6
[49] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken

producers through contracts up to a maximum term of ten years in length.

Fish and Wildlife Service
 	
• Habitat Conservation Planning Assistance;
• Habitat Conservation Plan (HCP) Land Acquisition;
• Oklahoma and Texas have entered into CCCA's for the protection of the lesser prairie chicken. Candidate Conservation Agreements (CCAs) are voluntary conservation agreements between FWS and one or more public or private parties.[50]
  ○ Oklahoma CCCA: On March 4, 2013 Oklahoma's CCCA was finalized. FWS states that Oklahoma "has shown capability for and commitment to implementing all of the terms of the CCAA. The ODWC has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA".[51]
  ○ Texas CCCA: This CCAA pertains to lands in Texas encompassed by the current distribution of LPC, those lands that are unoccupied potential habitat, and those that could provide potential habitat if the current population and distribution of LPC should increase.[52] In Texas, TPWD holds a permit and issues Certificates of Inclusion to participating landowners who are voluntarily implementing management plans for lesser prairie-chickens. As of July 15, 2012, twenty-five Texas ranchers have 282,878 acres enrolled in the CCAA.[53]

BLM and USFS have entered into agreements to consult with the FWS voluntarily on candidate species and 'species of special concern.[54]

State and Local Voluntary Conservation Actions

The question of the effectiveness of voluntary versus regulatory conservation actions is difficult, and there is little literature that rigorously explores the issue. The argument for voluntary conservation is that regulatory conservation makes the species or its habitat a liability. Voluntary conservation removes the potential for the loss of property or its value and encourages behaviors that are beneficial to the species.

[50] The Service works with its partners to identify threats to candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements, and design and implement conservation measures and monitor their effectiveness. http://www.fws.gov/endangered/what-we-do/cca.html

[51] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf

[52] http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

[53] http://www.fws.gov/southwest/es/Documents/R2ES/LPC_FAQ_18July2012.pdf

[54] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

The population review we referenced earlier[55] noted declines in lesser prairie chicken populations in the decades prior to its designation as a 'candidate species' and increases after designation and the onset of voluntary conservation actions.

The 5 states in the lesser prairie chicken range have implemented a number of conservation actions over the past fifteen years. The FWS has articulated a policy for evaluating those conservation actions. This policy, known as the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy")[56], is particularly important for conservation actions that are ongoing or proposed for the future.

The FWS's PECE Policy requires during listing decisions that the FWS evaluate whether "formalized conservation efforts" [57] ("FCEs") "contribute to making it unnecessary to list a species". The purpose of the policy is to ensure consistent and adequate evaluation of future or recently implemented conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents when making listing decisions. The policy is expected to facilitate the development by States and other entities of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.[58]

This policy applies to those conservation efforts that "have not yet been implemented or have been implemented but have not yet demonstrated whether they are effective at the time of a listing decision."[59]

When evaluating an FCE that is not yet implemented, the FWS must make this evaluation based on the "certainty of implementing the conservation effort and the certainty that the effort will be effective." [60]

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[55] An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[56] 50 CFR Chapter IV, Federal Register / Vol. 68, No. 60 / Friday, March 28, 2003

[57] "conservation efforts as "specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species". Conservation efforts may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial actions." A formalized conservation effort is one "identified in a conservation agreement, conservation plan, management plan, or similar document." Id.

[58] http://www.sagebrushsea.org/esa/FWS_PECE_q&a.pdf

[59] Id.

[60] The PECE Policy states that the following factors will be considered: 1. Identified Parties, Funding and Resources necessary to implement the effort; 2. The legal authority of the parties to proceed with the FCE are described; 3. The legal procedural requirements (e.g. environmental review) necessary to implement the effort are described and within the means of the parties to accomplish; . 4. Authorizations (e.g., permits, landowner permission) necessary to implement the conservation effort are identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement

The majority the voluntary conservation actions could be considered ongoing, however, some such as the Interstate Working Group Range Wide Management Plan[61] and Oklahoma's CCCA have yet to be completed or implemented but would require a determination that there is high level of "certainty" of implementation given their near completion status and the large investment of resources.

In prior listing determinations, the FWS has declared that if a conservation plan cannot be demonstrated to be effective, it cannot be considered in a listing determination. This position is not supported by the plain language of the PECE policy. Further, it is demonstrably arbitrary in that most, if not all of the actions contemplated by these conservation plans are consistent with best management practices required by the FWS in their consultations with the federal land management agencies, in consultations which include the species and in documents sponsored by the FWS.[62]

Finally, we note that despite the assertions of the FWS as to efficacy of an ESA listing in protecting the species, the ESA provides very narrow protections, limited by the consultation process and the language of the ESA which does not provide regulatory requirements for enhancement or improvement, instead requiring that jeopardy of the continued existence of the species be avoided, and adverse modification and destruction of habitat be avoided.[63]

The limitations of the ESA in recovering species are aptly illustrated by the fact that of nearly 1,500 species listed less than 50 have recovered. Of that number only 20 actually recovered, the remainder were either extinct (9) or listed in error.[64] Voluntary conservation avoids the perverse incentives created by criminalization of accidental 'take' of

the effort will obtain these authorizations; 5. Voluntary participants are identified and methods (e.g. incentives) used to obtain necessary level of voluntary participation are described; 6. Regulatory mechanisms (e.g., laws, regulations, ordinances) necessary to implement the conservation effort are in place; 7. A high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding; 8. An implementation schedule (including incremental completion dates) for the conservation effort is provided; 9. The conservation agreement or plan that includes the conservation effort is approved by all parties to the agreement or plan.

[61] The type and level of voluntary participation (e.g., number of landowners allowing entry to their land, or number of participants agreeing to change timber management practices and acreage involved) necessary to implement the conservation effort is identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain that level of voluntary participation (e.g., an explanation of how incentives to be provided will result in the necessary level of voluntary participation). Id.

[62] Jamison, B. E., J. A. Dechant, D. H. Johnson, L. D. Igl, C. M. Goldade, and B. R. Euliss. 2002. Effects of management practices on grassland birds: Lesser Prairie-Chicken. Northern Prairie Wildlife Research Center, Jamestown, ND. 29 pages.

[63] The prohibition does not apply in the case of the lesser prairie chicken as the FWS has determined that designation of lesser prairie chicken habitat is 'not prudent' as there are no data to support a designation.

[64] http://www.ncpa.org/pub/st303?pg=5

species and harnesses the much broader power of states and local agencies to protect habitat on private lands. In the case of the lesser prairie chicken, where only 4% of its habitat is on federal land, the voluntary protection of habitat on private land is essential.

The fact that the affected states and landowners have been funding and participating in conservation activities beginning in 1996 with the formation of the lesser prairie chicken working group[65] and continuing to the present with the State of Oklahoma entering into a conservation agreement with the FWS demonstrates the commitment to species conservation. In the intervening 15 years, money time and effort have been expended to conserve the lesser prairie chicken.[66] If these efforts, which rely on the expert agency's recommendations, cannot be expected to succeed, then it brings into question the expertise the FWS brings to the discussion.

[65] http://www.wafwa.org/html/prairie_chicken.shtml

[66] See Appendix 7

Chart of Voluntary Conservation Actions[67]

VOLUNTARY CONSERVATION ACTIONS[68]
• Each State has prepared and/or participated in at least one conservation plan • Each State has prepared and/or participated preparation of at least one management plan • Each State has prepared and/or participated in development of at least one recovery plan • The five states participate in an Interstate Working Group to collaborate on conservation activities • Interstate Range Wide conservation plan • The states either individually and through the interagency group have funded or carried out research geared toward improving conservation techniques • All the affected states have a habitat restoration program • Several States have prepared guidelines and best management practices for natural resource development and some for the protection of the LPC specifically. • Each State has dedicated funding and multiple financial incentive programs to encourage habitat restoration on private lands, this can be used for lesser prairie chickens and other species as necessary.

Wind Industry Conservation Actions[69]

The FWS indicates wind power development is a primary concern with respect to the lesser prairie chicken. Their concern is based on the assumption that avoidance of vertical structures results in some as-yet unidentified threat to the species.[70] Because of the explicit statements in the proposed rule regarding concerns related to expansion of wind power and the lack of regulation related to that expansion, we examined regulation and voluntary conservation actions related to wind power explicitly.

[67] See Appendix 5 for a detailed list of voluntary conservation actions.
[68] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[69] See Appendix 7
[70] The studies cited found lesser prairie chickens avoided vertical structures, but did not identify any adverse effects resulting from that avoidance.

We identified a significant commitment to conservation in general by the industry. In a letter to the Secretary of the Department of Interior, the American Wind Energy Association expresses that the " final version of the Guidelines on March 23rd, 2012 was the culmination of over 5 years of a painstaking, but collaborative, process between representatives of the wind energy industry" and regulatory agencies.[71] This dedication to the process should provide a high level of certainty with regarding to this FCE.

Below is a summary chart of activities.[72]

Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.
Wind Energy Mapping Tools	Playa Maps for Colorado, Kansas, Nebraska, New Mexico, Oklahoma and Texas by county.
Southern Plains Wind and Wildlife Planner	Southern Plains Wind and Wildlife Planner for a set of species and ecosystems in Colorado and New Mexico.
Southern Great Plains Crucial Habitat Assessment Tool for Lesser Prairie-Chicken	Led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[73]
North American Landbird Conservation Plan-co-authored by the FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [74]

[71] http://awea.org/newsroom/pressreleases/upload/AWEA-and-Member-Company-Letter-to-Salazar-re-Wind-Energy-Guidelines-May-15-2012.pdf
[72] See Appendix 7
[73] http://kars.ku.edu/geodata/maps/sgpchat/
[74] http://www.partnersinflight.org/cont_plan/#Access

FWS Wind Energy Guidelines	FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [75] FWS in its guidance document states that it is issuing the guidelines pursuant to its authority under the ESA. FWS claims authority given its mandate to identify and protect endangered and threatened species and to "provide means to conserve" their ecosystems. FWS cites the ESA as the authority that directs federal agencies to "utilize their authorities to conserve listed species" and states that FWS and other federal agencies are encouraged to "do the same with respect to 'candidate' species". [76] Industry Adoption of Wind Energy Guidelines which address comprehensive wildlife and habitat considerations and best management practices. :
FWS	Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.
BLM	Interim Wind Energy Development Policy The Interim Wind Energy Development Policy (IM 2003-020), was issued October 16, 2002. This document ensures application of the BLM Wind Energy Development policies and best management practices (BMPs) in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on BLM managed public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan must comply with the IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[77]

[75] http://www.fws.gov/windenergy/docs/WEG_final.pdf
[76] Id.
[77] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf

BLM	Wind Energy Development Policy This IM further clarifies the BLM Wind Energy Development policies and best management practices (BMPs) provided in the Wind Energy Development Programmatic Environmental Impact Statement (EIS) of June 2005. Issuance of this IM ensures BLM-wide consistency in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on the public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan will comply with policy provided in this IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[78]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are developing best management practices (BMPs) that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy from renewable sources by 2020 in a wildlife friendly manner.[79]
Recommendations To Minimize Adverse Impacts Of Wind Energy Development On Wildlife 2012	There is no statewide permitting authority in New Mexico with regard to wind development. However, the state has developed guidelines for use by wind project developers, their consultants, local government and the general public. New Mexico Department of Game and Fish offers guidance for projects and guidelines in their Habitat Handbook.[80]
Multi-State	On April 22, 2009 Interior Secretary Salazar announced $57.8

[78] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf
[79] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml
[80] http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP. The planning proposal lands a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[81]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[82]

[81] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html
[82] http://kec.kansas.gov/reports/wind_siting_handbook.pdf

FERC Transmission Line Regulation	The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.[83]	
County Protections		
Union, New Mexico[84]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [85]
San Miguel, New Mexico	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [86]
Bent, Colorado	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.

[83] http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission.pdf
[84] http://nm-unioncounty.civiccities.com/directory.aspx
[85] http://www.unionnm.us/DocumentCenter/Home/View/9
[86] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf

CONCLUSION

The FWS has:

- limited or incomplete data on historic habitat loss,
- limited or incomplete data on the habitat requirements of the lesser prairie chicken and
- limited or incomplete data on the available habitat for the lesser prairie chicken.

The best available data find increasing populations across the range of the greater prairie chicken and low extinction probabilities. Genetic analysis demonstrates no loss in genetic diversity and no evidence of genetic isolation.

A review of the state and local efforts to conserve the lesser prairie chicken demonstrates robust statutory authority for protection of habitat on public and private land as well as legislative commitment to conservation of wildlife species and their habitat at the state level. These authorities exist whether the species is listed or even remains a candidate.

Voluntary conservation efforts are numerous and widespread, and range from individual land owners to developers of wind energy farms. These efforts are often developed in conjunction with the FWS and/or are consistent with the direction given in the publications sponsored or funded by the FWS which identify effective conservation measures. The effectiveness of these measures is provided support by the fact that increasing population numbers coincide with the advent of heightened awareness of the population declines of the lesser prairie chicken due to its identification as a 'candidate species' under the ESA.

There are no data that support the FWS assertion that habitat fragmentation and decline with related effects are threatening the lesser prairie chicken. There are data that demonstrate population growth, low extinction probabilities, and genetic robustness.

The FWS has failed to meet the requirements of the Act that listing be based solely on data showing that the species is adversely affected by one or more of the five factors enumerated inthe Act.

APPENDIX 1

The 84% reduction in the area historically occupied by lesser prairie chickens cited by the FWS is little more than a guess with an unknown error surrounding it. The FWS admits that "Very little information is available regarding the size of lesser prairie chicken populations prior to 1900." Robb and Schroeder (2005) stated: "Few records exist to verify the historical distribution of lesser prairie-chickens prior to European settlement because the geographic region that is generally regarded as historical range (southeastern Colorado, southwestern Kansas, western Oklahoma, northern Texas, and eastern New Mexico) was largely unexplored during the 1800s (Aldrich and Duvall 1955, Sharpe 1968). The first expeditions to explore Colorado tended to bypass the southeastern part of the state (Rockwell 1908), and it was not until 1914 that lesser prairie-chickens were recorded officially from Baca County (Lincoln 1918)."

As an example of the potential misuse of the uncertainty of the historical data, USFW wrote that "Litton (1978, p. 1) suggested that as many as two million birds may have occurred in Texas alone prior to 1900." Litton's paper was a non-peer reviewed article, and what Litton actually wrote was: "Records indicate there may have been as many as two million lesser prairie chickens in Texas prior to 1900, before exploitation by early-day sportsmen and market hunters". However, there is no reference by Litton as to what these "records" consisted of, and therefore it is not useful to repeat this number, as it is not verifiable and fails to meet the data standard of the ESA.

Even more potentially confounding is the apparent change in behavior of lesser prairie chickens. Jackson and DeArment (1963) stated that much of the range in southern Texas where maps show the bird as historically present were likely temporary wintering grounds; today the lesser prairie chicken is thought to be non-migratory. What percentage of this putative historic range includes temporary wintering or resting grounds? This lack of data makes it impossible to realistically reconstruct lesser prairie chicken behavior or range of over 100 years ago and extrapolate it to existing conditions.

APPENDIX 2

An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens

A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group

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Issue: Each state monitors spring populations of lesser prairie-chickens with similar (but not exact) methods to detect and count birds on leks. Additionally, sampling effort has varied overtime with generally more extensive efforts in recent years. Thus far, comparison between or among states has not been possible because of these facts.

Need: A unifying analytic method for assessing trend of lesser prairie chicken populations among states and geographic regions is needed to evaluate past and future population performance as a result of conservation actions or changes in land use.

A proposed method: There have been 3 range-wide assessments of greater sage-grouse population dynamics and persistence (Connelly et al. 2004, WAFWA 2008, Garton et al. 2010), and similar issues of data consistency and variation in sampling effort were common to all three studies. Garton et al. (2010) is the only peer reviewed published article from the three, and was largely based on the analytic methods in Connelly et al (2004). Using population reconstruction from annual counts at leks, density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) models of population growth can be fit and population parameters of growth ($\square_t$), population equilibrium, and quasi-extinction probabilities can be estimated.

In this example, data were pooled by 4 geographic regions, sand sagebrush (CO, KS), CRP-shortgrass prairie (KS), mixed grass prairie (SE KS, OK, TX-Panhandle), and shinnery oak (NM, TX west) in which to estimate annual rates of change ($\square_t$), average growth rate (trend from 1997-2011), variation of ($\square_t$), quasi-extinction probability (population drops to 25% of equilibrium), and population equilibrium. Data across all regions was pooled to assess trend and estimate population parameters for the entire lesser prairie chicken range. Finally, concern has been generated regarding declines in populations in 2012. To address this concern, a worked example assuming a 50% decline (2012 trends have not been finalized yet) in trend rangewide occurred is provided to demonstrate what affect it may have on the entire range.

Lesser prairie chicken lek counts reported by individual states were summarized within ecologic regions and used to reconstruct an index to the historical abundance of the population within each zone. We treated the number of lesser prairie chicken counted

at leks in the final year as an index to the minimum number of lesser prairie chicken attending leks. Lek counts in each year were a cluster sample of lesser prairie chicken and thus treated by standard finite population sampling procedures (Scheafer et al. 1996: 297).

Sampling effort devoted to counting leks has varied enormously from year to year and grown appreciably in the last 5 years. To standardize estimates and remove bias due to variable sample sizes we treated the number of lesser prairie chickens counted in the initial count (or another base year if final year counts were inadequate) as the standard for projecting later counts by applying a ratio estimator (Scheafer et al. 1996: 200) to estimate the finite rate of change (λ_t) for the population between successive years as follows. Beginning with the initial year of a route (1997 or more recent), lesser prairie chicken counted along each route censused in both 1997 and 1998 were treated as cluster samples of individual lesser prairie chickens in successive years. The ratio of lesser prairie chickens counted in a pair of successive years estimates the finite rate of change at each route in that one year interval (λ_t). These ratios were combined across routes within a region for each year to estimate the finite rate of change for the entire population within a zone to estimate the finite rate of change for that management zone between successive years (e.g. 1997 to 1998):

$$\lambda(t) = \frac{\sum_{i=1}^{n} M_i(t+1)}{\sum_{i=1}^{n} M_i(t)}$$, where $M_i(t)$ = number of LPEC counted along route *i* in year *t*,

across *n* routes counted in both years *t* and *t+1*,

Because methodologies were not exact, an average λ_t was calculated among routes and states for each region. Unlike previous methods, that reconstructed populations from the penultimate year backwards, in this method the index to population size was projected forward from 1997 to assess trend since LESSER PRAIRIE CHICKEN were classified as a candidate as a threatened or endangered species. This approach does not affect the rates of change or persistence estimates, but provides a baseline more meaningful to the conservation question at hand. Because population sizes were not well described in 1997, and the method is based on proportional changes of ratios, all trends were assessed as a percentage of the 1997 index which was set to 100% (See Connelly et al. 2004). The index to population size for subsequent years was then calculated by taking the number of LESSER PRAIRIE CHICKENs counted in the initial year (1997) as a baseline estimate of population size within a region and projecting the next year's minimum LESSER PRAIRIE CHICKEN abundance by multiplying the 1997 abundance by the ratio estimator of the finite rate of change from 1997 to 1998 (e.g. finite rate of change of 0.81 between 1998 and 1999 suggested that the 19% fewer

LESSER PRAIRIE CHICKEN were counted at leks in 2000 than in 1999). This process was repeated for the change from 2000 to 2001 (finite rate of change of 1.015) yielding a breeding population index for a given zone in 2001 and so on up to 2011. Repeating this process for each management zone yielded a population index for each zone stretching from 1997 to 2011 for populations in all regions. These population indices provided the basis for all further analyses and modeling.

Fitting population growth models

Using the time series of population indices for each region, 2 stochastic population growth models were fit including: (1) exponential growth with process error (EGPE, Dennis et al. 1991), (2) exponential growth state space (EGSS, Staples et al. 2004) which incorporates both process and sampling error, and most importantly allows for the parsing of these error rates for more precise estimates of population persistence.

Results:

CRP-shortgrass.—There were 3 routes established to monitor trends of LESSER PRAIRIE CHICKEN in the CRP grasslands north of the Arkansas River in Kansas beginning in 2000. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 4.4% annually (Figure 1A; Table 1). The equilibrium of a density dependent population was approximately 99% of the baseline in 2000, and the probability of extinction (declining to 25% of equilibrium) was 2%.

Mixed-grass prairie.– There were 6 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS, OK, and TX, 2 of which began in 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 7.0% annually (Figure 1B; Table 1). The equilibrium of a density dependent population was approximately 229% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was <0.0001%.

Sand sagebrush prairie.– There were 7 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS and CO both of which began prior to 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 2.0% annually (Figure 1C; Table 1). The equilibrium of a density dependent population was approximately 183% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 48%.

Sand shinnery oak.– There were 29 routes to monitor LESSER PRAIRIE CHICKEN in shinnery oak habitat of NM and TX. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 5.1% annually (Figure 1D; Table 1). The equilibrium of a density dependent population was approximately 196% of the baseline

in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide.– There were 45 routes to monitor LESSER PRAIRIE CHICKEN across the range. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 10.6% annually (Figure 1E; Table 1). The equilibrium of a density dependent population was approximately 276% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide 2012.–Assuming a 50% decline in trend across the range, the 10-yr average annual finite rate of population change (λ_t) indicated population growth of 6.4% annually (Figure 1F; Table 1). The equilibrium of a density dependent population was approximately 262% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 3.3%.

Summary.– Regionally populations continue to show significant signs of population growth, however, because of low rates of growth and large variation in estimates of lambda, sand sagebrush habitat (14% of species distribution) was one region that indicated the greatest likelihood of reaching 25% or less of the equilibrium population size. Thus, 86% of the species' distribution exhibits population growth (>2% annually) with low probability of extinction. Range-wide analysis indicates the species as whole has grown at a rate of 10.6% since 1997 with low probability of extinction. Lastly, if the range-wide population trends did decrease by as much as 50% in 2012, populations are projected to be 73% greater than in 1997, and likelihood of population persistence remains high (>96%).

A peripheral examination of population trends prior to the 1997 candidate status recommendation, indicates that on average populations from 1980-1997 were declining at an average annual rate of 3.7%, post candidate status population growth was 6.9% increase annually.

Further refinements: There are 3 recommendations to make this modeling approach more rigorous with the existing data: 1) to analyze the data on a lek by lek analysis rather than at the route or county scale, 2) where longer term data exist develop models for longer time periods that specifically identify significant transitions in trend (upwards or downwards), to better understand temporal factors that may be affecting different historic periods and changes in land use, and 3) once population estimates are available from aerial surveys in 2012 then trend analyses and PVA can be conducted relative to population size and trends

beginning in 2012 and projecting backwards. This approach would be almost identical to that of greater sage-grouse PVA conducted by Garton et al. (2010).

Literature cited.

Connelly, J. W., S. T. Knick, M. A. Schroeder, and S. J. Stiver. 2004. Conservation assessment of greater sage-grouse and their habitats. Western Association of Fish and Wildlife Agencies. Cheyenne, Wyoming.

Garton, E. O., J. W. Connelly, C. A. Hagen, J. S. Horne, A. Moser, and M. A. Schroeder. 2010. Greater Sage-Grouse population dynamics and probability of persistence. Studies in Avian Biology 38: 293-382.

Western Association of Fish and Wildlife Agencies. 2008. Greater sage-grouse population trends an analysis of lek databases. Unpublished report, Cheyenne, Wyoming.

Figures

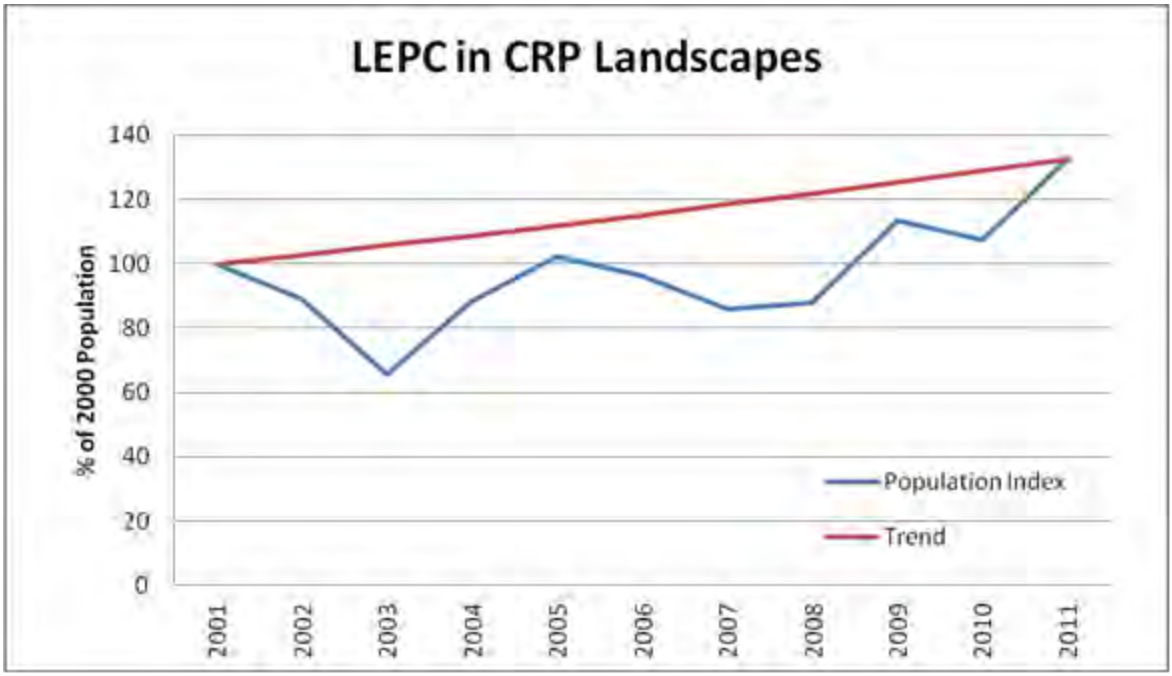


Figure 1A. Lesser prairie-population index for CRP Landscapes from 2001-2011, quantified as a percentage of the 2001 baseline population.

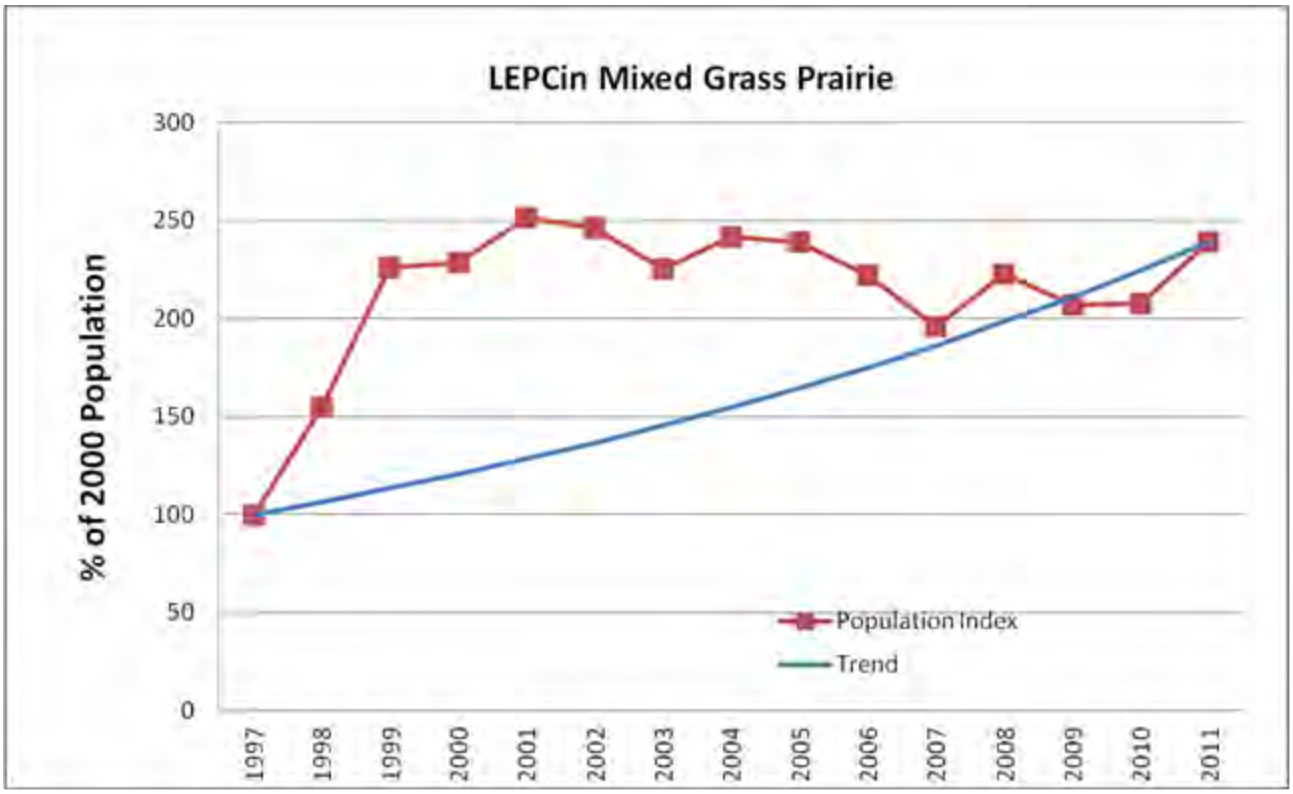


Figure 1B. Lesser prairie-chicken population index for mixed grass-prairie landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

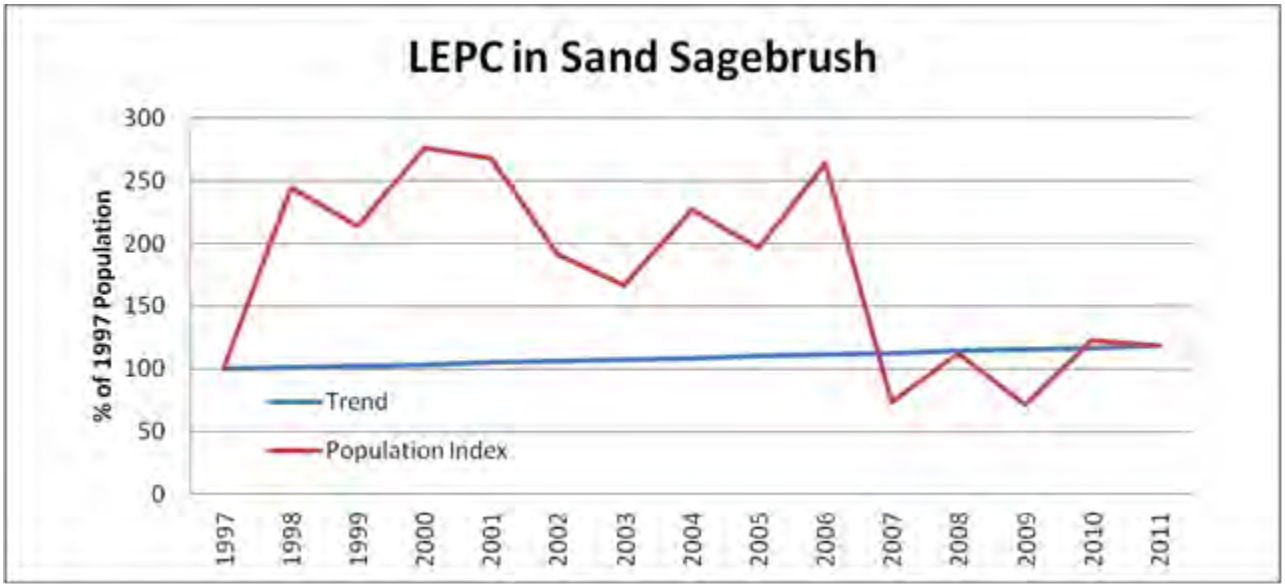


Figure 1C. Lesser prairie-chicken population index for sand sagebrush landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

Figure 1D. Lesser prairie-chicken population index for sand shinnery oak landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

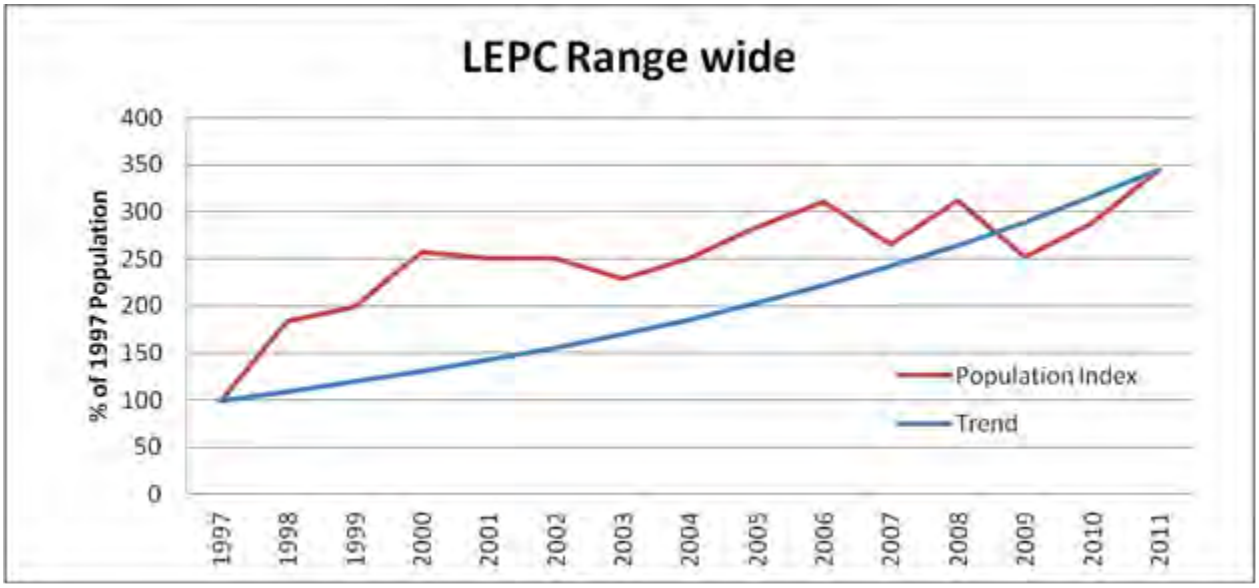


Figure 1E. Lesser prairie-chicken Range-wide population index from 1997-2011, quantified as a percentage of the 1997 baseline population.

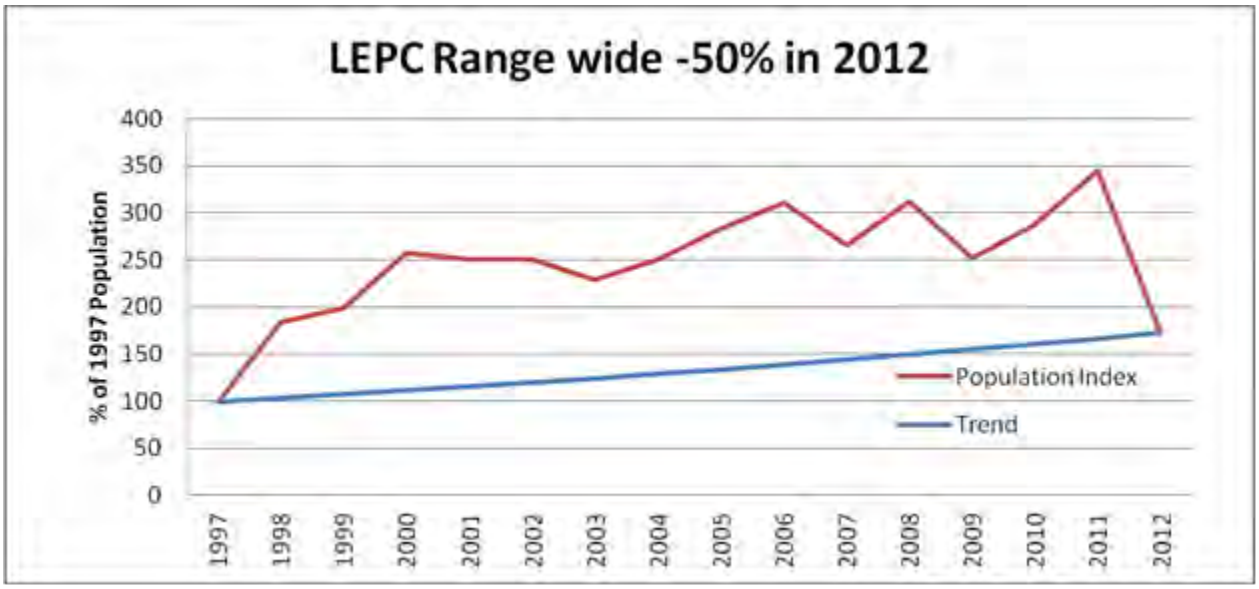


Figure 1F. Hypothetical lesser prairie-chicken Range-wide population index from 1997-2012 assuming a 50% decline from 2011-2012, quantified as a percentage of the 1997 baseline population.

Table 1. Parameter estimates from density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) population models for Lesser Prairie-Chickens in 4 regional areas 1997-2011. Range-wide estimates are provided for the same time period, and a hypothetical example demonstrating what a 50% decline in 2012 might forecast for the species. Where, r = instantaneous rate of growth adjusted for sampling variation, se(r) standard error of r, r' = unadjusted instantaneous rate of growth, lambda = finite rate of population growth (exp(r)), nq = population equilibrium under density dependent model, ne(nu) = quasi-extinction threshold (25% of of nq), pi = probability of population reaching ne(nu), theta = time in which ne(nu) would be reached if threshold was reached, and %EOR = percentage of the Estimated Occupied Range these trend results represent.

Region	r	se(r)	r'	lambda	nq	ne(nu)	pi	theta	%EOR
Mixed	0.074	0.005	0.101	1.077	229	57	0.000	18.8	44%
Sage	0.020	0.077	0.022	1.020	183	46	0.482	68.5	14%
Oak	0.051	0.022	0.062	1.052	196	49	0.002	27.2	19%
CRP	0.044	0.032	0.059	1.045	99	25	0.021	31.2	24%
Range	0.106	0.038	0.114	1.112	276	69	0.000	13.0	100%
2012**	0.064	0.052	0.068	1.066	262	66	0.033	21.8	100%

APPENDIX 3

An evaluation of the historic range changes that have occurred in the Lesser Prairie Chicken since the Last Glacial Maximum.

Species have niches in ecological time and space that can be defined in various ways. Currently, a commonly accepted scientific approach is to use a technique called Ecological Niche Modeling (ENM) or to others, Species Distribution Models (SDM). Today, these techniques are considered part of biodiversity informatics.j

The approach involves taking a set of georeferenced locality points for a species, and then using a computer algorithm to build a model that predicts these points using current information on climate, such as temperature, rainfall, or degree of seasonality. The model then generates a predicted distribution of the species that can be tested by seeing how well known locality points (that were not part of the original model) are predicted.

One can then predict where the niche space for the species occurred at different points in time. Currently, readily available climate data exist for the Last Glacial Maximum (LGM; 21,000 years before present [ybp]) and the Last Interglacial (120,000 ybp). This gives a view of the species' range during the maximum southward extent of the last major north temperate glacier, and shows how and where the species was displaced to (if displaced at all).

We obtained a georeferenced list of 110 occurrences for the lesser prairie chicken (Table 1) from an online source of museum and observation records (Ornis-2). These span many years and give an indication of where the species occurred historically (since museum specimens started being preserved). We used the program Maxent to model distributions. After a preliminary analysis involving 10 independent runs, we selected climate layers that provided over 5% to the model (

The predicted current distribution of the lesser prairie chicken (Fig. 1) agrees well with known and recent historical distribution, with the exclusion of what is considered the southern part of the range in Texas. This might be because, as discussed elsewhere, it was mainly a non-breeding area. Locality points omitted from the model were predicted with 93% accuracy suggesting that the model performs very well.

The contribution of the climate variables to the model were: Mean Temperature of Driest Quarter (43%), Precipitation of Warmest Quarter (16.5%), Precipitation Seasonality (Coefficient of Variation) (15.9%), Mean Temperature of Warmest Quarter (13.4%), Temperature Seasonality (8.7%), and Isothermality (BIO2/BIO7) (2.5%). It appears that

lesser prairie chickens are considerably influenced by the temperature at the driest part of the year.

We used the model to predict the distribution of the lesser prairie chicken at the LGM, assuming that the niche has not evolved and that the same environmental parameters were present at both time periods. As might be expected during a time of southerly range displacements owing to glacial advances, the range of the species was shifted south and west (Fig. 1, blue). It also can be seen that the predicted range was considerably more fragmented and reduced in areal extent. This suggests that lesser prairie chickens have survived extended periods of range fragmentation.

Table 1. Longitude (first number) and latitude (second number) for 110 localities for lesser prairie chickens obtained from Ornis2 (http://ornis2.ornisnet.org/).

-104.3247985,38.4328835; -98.32064,38.49836; -100.35,37.283; -100.2670064,37.0826239; -101.3473741,38.4817103; -100.3709181,37.2370813; -96.5981521,38.3051704; -100.7333333,37.85; -100.986,37.88333333; -100.0233333,37.855; -101.05,37.81666667; -100.05,37.85; -100.75,37.85; -100.0166667,37.85; -100.7666667,37.86666667; -100.8166667,37.86666667; -100.7666667,37.88333333; -101.0833333,37.88333333; -101.9833333,37.9; -101.9666667,37.9; -100.0666667,37.83333333; -100.0666667,37.86666667; -100.7333333,37.83333333; -99.5334,38.1087; -100.2358583,37.1402; -100.570589,37.1033548; -100.4666672,37.25; -100.0237999,37.7580571; -100.4662,37.09608; -100.8722222,37.97166667; -100.9888889,37.79444444; -101.1336803,37.8512936; -101.04,37.84; -101.05,37.844; -100.8654953,37.974823; -100.1661233,37.10322; -102.58177,42.06867; -100.407486,40.0407579; -103.18355,33.62926; -103.3396721,33.6428738; -103.0999985,35.34999847; -104.2283,32.4206; -104.2667,32.45; -103.183052,33.629166; -103.2804947,33.543606; -103.1650051,33.6407777; -103.59829,35.719908; -104.2283325,32.42055511; -103.2659912,33.5871673; -103.1835594,33.6292667; -104.2448044,32.4501; -104.2456627,32.4522729; -106.8189278,36.2283497; -103.1877136,33.6512083; -103.3049766,33.6428738; -103.4949646,34.0890633; -104.4119186,33.602314; -103.3401489,33.644349; -103.2234191,33.6420625; -103.1925201,33.5293753; -103.760376,35.1201894; -104.6245622,32.4628466; -103.3917154,33.6437204; -103.14,33.6565; -103.1536667,33.70766667; -103.1095833,33.69303333; -103.144,33.71993333; -103.1740667,33.6883; -106.0253796,34.1656598; -103.1451667,33.64996667; -103.1391667,33.695685; -103.1406,33.70101667; -103.1105667,33.68353333; -103.1404333,33.64923333; -103.172,33.69523333; -103.1381,33.65913333; -103.1395,33.65883333; -103.1497833,33.70505; -103.1715167,33.69496667; -103.312382,33.6428738; -103.1148167,33.68505; -103.1274667,33.68211667; -103.05038,33.75831; -103.12661,33.85024; -103.12695,33.85074; -103.27935,33.62703333; -103.1144444,33.68583333; -103.1451667,33.66856667; -103.6326599,34.3133827; -99.77119,36.02616; -99.77119,35.9899; -99.67005,36.0529; -99.765129,35.8848778; -99.77119,36.03342; 9628.12,3649.21; -96.6503334,36.9375441; -99.65741,36.04264; -99.6818,36.00441; -99.64477,36.03238; -99.66392,36.00441; -99.64604,35.85937; -99.77119,35.93189; -99.7792053,36.2254423; -99.2710876,36.433437; -98.7157861,35.3080899; -98.4933319,29.4238892; -100.2709541,35.4453278; -101.6632921,30.6870249; -100.193,36.071; -96.262207,43.084937;

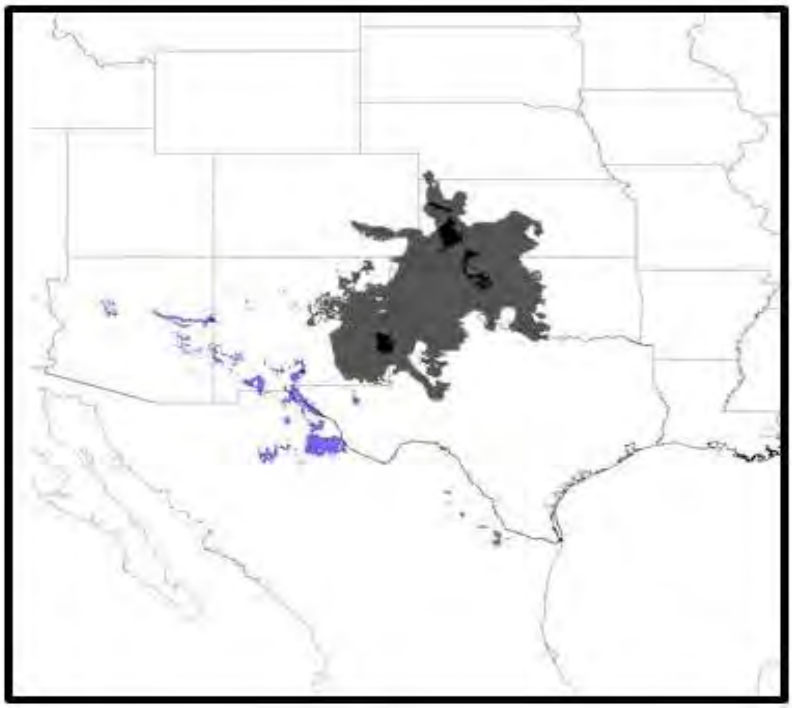


Figure 1. Predicted distribution of lesser prairie chicken at present (black, gray) and at Last Glacial Maximum (blue). For present distribution, black indicates area of highest predicted occurrence.

APPENDIX 4-- FEDERAL PROTECTIONS

Agency	Law/Mgt. Directive/Agreement	ESA Provisions
ALL	**National Environmental Policy Act of 1969 (NEPA) [(42 U.S.C. 4332(2)(C)** The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. By regulation, a Biological Assessment is prepared for "major construction activities". Under NEPA, those considered to be Federal actions significantly affecting the quality of the human environment as referred to meet NEPA requirements federal agencies prepare a detailed statement known as an Environmental Impact Statement (EIS). EPA reviews and comments on EISs prepared by other federal agencies, maintains a national filing system for all EISs, and assures that its own actions comply with NEPA.	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Take protection also provides limited habitat protection if the habitat alteration results in death of an individual. • In the case of the lesser prairie chicken, there no habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Protection of critical habitat is limited to habitat affected by a federal agency action,
	Federal Land Policy and Management Act of 1976", Sec. 101. [43 U.S.C. 1701 (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest; **…** (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat which are also affected by federal agency actions (moot, as

	atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;…(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;…[87]	the FWS is not designating for the lesser prairie chicken) • In Reviewing the activities of federal agencies, ESA limitations on take are only that it may not result in jeopardizing the continued existence of listed species, • IN the case of lesser prairie chicken, take is prohibited under state anti-poaching laws. • The ESA does not require comprehensive management plans.
ALL	**Executive Order 13112, February 3, 1999, "Invasive Species"** **Section 2. Federal Agency Duties** (a) Each Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, (1) identify such actions;(2) subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv)	Executive Order 13112 requires that all federal agencies prevent degradation of all habitat (not only lesser prairie chicken habitat) by ensuring that invasive species are prevented and/or controlled. This EO requires restoration of habitat. • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for

[87] http://www.blm.gov/flpma/FLPMA.pdf

	provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and (3) not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has pre-scribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions. (b) Federal agencies shall pursue the duties set forth in this section in consultation with the Invasive Species Council, consistent with the Invasive Species Management Plan and in cooperation with stakeholders, as appropriate, and, as approved by the Department of State, when Federal agencies are working with international organizations and foreign nations.	the lesser prairie chicken) • In reviewing the activities of federal agencies, the limitations on take are only that it may not result in jeopardizing the continued existence of listed species,
BLM and FS	**Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And**	No additional protection under the ESA. The MOU provides for "voluntary" consultation on candidate species, such as a lesser prairie chicken. The primary functions of the ESA

	Wildlife Service[88] This MOA establishes interagency commitment to and guidance for the following: (1) Early interagency communication, coordination, consultation, and conferencing on candidate, proposed, and listed species to take place prior to and during plan/program proposal development… The scope of this MOA includes Land and Resource Management Plans prepared by the FS pursuant to the National Forest Management Act of 1976 [16 U.S.C. 1601-1614] and Resource Management Plans and Management Framework Plans prepared by the BLM pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701-1784]. The MOA may also be applied to other programmatic level proposals. These may include, but are not limited to, a recreation or grazing program, riparian restoration strategy, multi-year forest management activities, recovery strategy or other proposals. The Service provides this information related to "programattic biological opinions": Developing a programmatic biological opinion. Once the biological assessment is completed, a determination on the need for formal consultation will be made by the Service. Formal consultation is required when a Federal action is likely to adversely affect listed species. When it is determined that an action may affect, but is not likely to adversely affect listed	are to prohibit "take" of the listed species (which is addressed by each States wildlife code) and the "consultation" on federal lands. BLM Management Manual already prescribes such protections for 'special status species' of which the lesser Prairie Chicken is one. Further, under the MOA, consultation has already occurred for the federal lands under BLM management. The ESA provides only for protection for listed species by : • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Does not require management plans • The ESA limits protection to listed species, their designated critical habitat where a federal

88 http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

	species, the consultation between the action agency and the Service may be handled informally (see 50 CFR §402.11 for further information on the informal or early consultation process). If formal consultation is necessary, a programmatic biological opinion will be developed by the Service in consultation with the Agencies. Attachment 3 gives a template for a programmatic biological opinion. This programmatic biological opinion will: (1) describe all of the potential projects; (2) contain suggested avoidance/minimization measures, placed in the project description, if appropriate; (3) describe the status and environmental baseline of listed, proposed, and candidate species in the project area; (4) reiterate potential effects of the project actions as evaluated in the biological assessment; and, (5) possibly describe limits to the amount of project impacts, take, and habitat affected and/or lost. A jeopardy analysis will be done to determine whether the programmatic process should proceed (see jeopardy discussion below).[89]	action is affecting them. • In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being designated. Given the limitations of the ESA and the voluntary actions and agreements by the agencies primarily involved in the activities the rule finds are "threatening" the lesser prairie chicken, the ESA provides no additional protections to the species.
BLM	**Special Status Species Management-Handbook 6840[90]** The stated purpose of BLM Handbook 6840 ("Special Status Species Management Handbook" is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special	The ESA requires that the FWS be consulted on actions affecting listed species on federal lands. • The ESA limits protection to listed species, their

[89] http://www.fws.gov/endangered/esa-library/pdf/pages7-18.pdf

[90] http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	status species are: (1) species listed or proposed for listing under the Endangered Species Act (ESA), and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s). All Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.[91] In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA. Any obligation to conserve proposed critical habitat under this section is terminated at the time the proposal becomes final or the habitat is no longer proposed for listing. All federally designated candidate species, proposed species, and delisted species in the 5 years following their delisting shall be conserved as Bureau sensitive species. A. Designation of Bureau Sensitive Species. State Directors shall designate species within their respective States as	designated critical habitat where a federal action is affecting them. • Does not require management plans, . The BLM's Special Status Species Management Handbook outlines a policy that is much more inclusive and relates directly to species that are considered "sensitive" at a state level. Each of the states referenced in the proposed rule currently consider the lesser prairie chicken to be sensitive, thus, the current policy provides more protection than the ESA.

91 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	Bureau sensitive by using the following criteria. For species inhabiting multiple States, State Directors shall coordinate with one another in the designation of Bureau sensitive species so that species status is consistent across the species' range on BLM-administered lands, where appropriate.	
FERC	**Transmission Line Regulation** The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.	The proposed rule emphasizes the potential adverse effect of increased transmission as a result of transmission lines and implies that the proposed listing is the only protection available for lesser prairie chicken and their habitat. However, FERC requires consideration of wildlife and their habitat in considering siting and construction of these lines. In addition, because the permitting is undertaken by FERC, NEPA applies which would necessitate a full review of the effects on the lesser prairie chicken.
BLM, AFWA, WAFWA, FS	**Memorandum Of Understanding Among Association Of Fish And Wildlife Agencies (AFWA) And Western Association Of Fish And Wildlife Agencies (WAFWA) And U.S. Department Of Agriculture Forest Service (FS) And U.S. Department Of The Interior Bureau Of Land Management (BLM)** "The purpose of this Memorandum of Understanding (MOU) is to promote cooperative conservation of fish and	This MOU provides that these federal agencies will engage in cooperative activities for the benefit of wildlife, particularly priority wildlife impacted by energy development issues. We note this includes wind power. The ESA provides only for protection for listed species by reviewing the activities of federal agencies. The

	wildlife resources by facilitating communications and enhancing success in resolving issues related to energy development and its effect on fish, wildlife, and habitat."[92] The Parties' joint objectives are to: 1. Identify and define the key fish and wildlife habitat/energy development issues at the species, habitat, and wildlife community levels across state, administrative and district lines. 2. Develop communication systems to keep state fish and wildlife agencies, federal land management/permitting agencies, and the energy industry informed about and involved in programmatic issues related to maintenance and enhancement of fish, wildlife and habitat resources during energy development.	limitations on take are only that it may not result in jeopardizing the continued existence of the species • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Protection of critical habitat is limited to habitat affected by a federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA regulatory provisions do not provide for enhancement of wildlife or its habitat.
DOT	**Department Of Transportation, Federal Highway Administration, 23 CFR Part 777, Mitigation of Impacts to Wetlands and Natural Habitat** The Federal Highway Administration (FHWA) provides stewardship over the construction, maintenance and preservation of the Nation's highways, bridges and tunnels. FHWA also conducts research and provides technical assistance to state and local agencies in	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • In the case of the lesser prairie chicken, no

92 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/ib_attachments/2009.Par.99939.File.dat/IB2009-072_att1.pdf

	an effort to improve safety, mobility, and livability, and to encourage innovation.[93] This regulation was developed to "provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal aid projects funded pursuant to provisions of title 23, U.S. Code." … In considering projects under this section, the following requirements must be met: (a) The reasonableness of the public expenditure and extent of Federal participation with title 23, U.S. Code, funds shall be directly related to: (1) The importance of the impacted wetlands and natural habitats; (2) The extent of highway impacts on the wetlands and natural habitats, as determined through an appropriate, interdisciplinary, impact assessment; and (3) Actions necessary to comply with the Clean Water Act, Section 404, the Endangered Species Act of 1973, and other relevant Federal statutes. (b) Evaluation of the importance of the impacted wetlands and natural habitats shall consider: (1) Wetland and natural habitat functional capacity; (2) Relative importance of these functions to the total wetland or natural habitat resource of the area; (3) Other factors such as uniqueness, esthetics, or cultural values; and (4) Input from the appropriate resource management agencies through interagency coordination. (c) A	habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Does not require management plans.

9393 https://www.fhwa.dot.gov/

	determination of the highway impact should focus on both the shortand long-term affects of the project on wetland or natural habitat functional capacity, consistent with 40 CFR part 1500, 40 CFR 1502.16, 33 CFR 320.4, and the FHWA's environmental compliance regulations, found at 23 CFR part 771.[94]	
BLM	**2008 Special Status Species Resource Management Plan Amendment (2008 RMPA)** Address land-use decisions affecting special status species, primarily the habitats of lesser prairie chickens and sand dune lizards. Established the Lesser Prairie-Chicken Area of Critical Environmental Concern (ACEC).[95] [96]	The Special Status Species Resource Management Plan Amendment by BLM identifies the requirement that BLM consult with the FWS on activities that may affect wildlife even if the species is not listed.
	2008 Designation of Area of Critical Environmental Concern[97] Area of Critical of Environmental Concern (ACEC) are special management areas designated by BLM to protect significant historic, cultural, or scenic values; fish and wildlife resources; natural process or systems; and/or natural hazards that:	• Any ESA habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken)

[94] http://www.gpo.gov/fdsys/pkg/FR-2000-12-29/pdf/00-33194.pdf#page=12
[95] http://www.blm.gov/nm/st/en/fo/Roswell_Field_Office/special_status_species.html
[96] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf
[97] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf

	• have more than locally significant qualities which give it special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource; • have qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change; • has been recognized as warranting protection in order to satisfy national priority concerns or to carry out the mandates of Federal Land Management and Practices Act (FLMPA); • has qualities which warrant highlighting in order to satisfy public or management concerns about safety and public welfare; and/or • poses a significant threat to human life and safety or to property.	
BLM	**Managing Structures for the Safety of Sage-grouse, Sharp-tailed grouse, and Lesser Prairie-chicken**[98] This Instruction Memorandum (IM) provides guidance to effectively address sage-grouse, sharp-tailed grouse, and lesser prairie-chicken collisions with fences and other structures on public land.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all lands managed by BLM.

98 http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-022.html

FWS	**FWS Wind Energy Guidelines** FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [99] Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all affected lands.
BLM	**Reclamation and Best Management Practices Best Management Practices "BMP" for the Lesser Prairie Chicken** In "Appendix 5 Reclamation And Best Management Practices" to BLM's 2008 RMPA, BLM states that it will "incorporate appropriate Best Management Practices (BMPs" for the lesser prairie chicken " into proposed Applications for Permit to Drill (APDs) and associated rights-of-way (ROW) approvals after appropriate National Environmental Policy Act (NEPA) evaluation." [100]	

[99] http://www.fws.gov/windenergy/docs/WEG_final.pdf

[100] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34869.File.dat/pdf_rmpa_final_document_11_07_app_5.pdf

APPENDIX 5-- STATE AND LOCAL PROTECTIONS

COLORADO

Applicable State Laws	Comparison to Applicable ESA provisions
WILDLIFE Colorado statutes provide intent to protect species and will require that "…, there shall be a continuous operation of planning, acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities."[101] There is no limitation on the wildlife or species this applies to.	The ESA provides for • No planning, acquisition or development of wildlife habitats • Protects only listed species and designated critical habitat. • Limits activities and protections to listed species and designated critical habitat.
LAND USE, CONSERVATION **Colorado has vested its local government with authority to regulate land use to consider wildlife habitat and species.** … Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;"[102]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
LOCAL GOVERNMENT, PLANNING AND	The ESA provides no authority to undertake such planning, aquisition,

[101] (Colorado Revised Statutes, Title 33, Article 1 http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[102] C.R.S. 29-20-104 (2012), Title 29. Government - Local, Land Use Control And Conservation, Article 20.Local Government Regulation of Land Use, Part 1. Local Government Land Use Control Enabling Act, 29-20-104. Powers of local governments. ... for local governments to regulate land use to protect wildlife habitat and wildlife species. Drostev. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003). http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

ZONING **Colorado law establishes a Commission with specific direction to consider protected species in municipality development.** (1) It is the duty of the commission to make and adopt a master plan for the physical development of the municipality. When a commission decides to adopt a master plan, the commission shall conduct public hearings, after notice of such public hearings …, prior to final adoption of a master plan …. Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall, after consideration of each of the following, where applicable or appropriate, show the commission's recommendations for the development of said municipality and outlying areas, including:… (II) The United States fish and wildlife service of the United States department of the interior and the parks and wildlife commission created in section 33-9-101, C.R.S., for locating areas inhabited by endangered or threatened species; [103]…	and management actions. Nor does the ESA require consultation on non-federal lands (absent a federal nexus).
WILDLIFE "(1) It is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors. It is further declared to be the policy of this state that there shall be provided a comprehensive program designed to offer the greatest possible variety of wildlife-related recreational opportunity to the people of this state and its visitors and that, to carry out such program and policy, there shall be a continuous operation of planning,	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a

[103] C.R.S. 30-28-106 (2012), Title 30. Government - County, County Planning And Building Codes, Article 28.County Planning And Building Codes, Part 1. County Planning, 30-28-106. Adoption of master plan

acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities. (2) All wildlife within this state not lawfully acquired and held by private ownership is declared to be the property of this state. Right, title, interest, acquisition, transfer, sale, importation, exportation, release, donation, or possession of wildlife is permitted only as provided in articles 1 to 6 of this title or in any rule of the parks and wildlife commission..[104]… Right to capture or kill exists only as permitted by statute."	federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. • Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE, ENDANGERED SPECIES **Colorado may protect species which do not qualify for federal ESA listing.** (1) On the basis of investigations of nongame wildlife provided for in section 33-2-104 and other available scientific and commercial data and after consultation with other state wildlife agencies, the Colorado water conservation board, the Colorado water and power development authority, water conservancy districts, and other water conservation districts of the state, and other water resource development agencies within the state, appropriate federal agencies, and other interested persons and organizations, the commission shall by regulation adopted pursuant to the procedures specified in sections 33-1-111 and 24-4-103, C.R.S., establish a list of those species and, where necessary, subspecies of wildlife indigenous to this state which are determined to be endangered or	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Colorado).

[104] C.R.S. 33-1-101 (2012), Title 33. Parks And Wildlife, Wildlife, Article 1.Wildlife - General Provisions, 33-1-101. Legislative declaration http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

threatened within this state, giving their common and scientific names by species and, where necessary, by subspecies…[105]	
WILDLIFE, ENDANGERED SPECIES, CONSERVATION (1) The division shall establish such programs including acquisition of land or aquatic habitat as are deemed necessary for management of nongame, endangered, or threatened wildlife. (2) In carrying out programs authorized by this section, the division may enter into agreements with federal agencies or political subdivisions of this state or with private persons for administration and management of any area established under this section or utilized for management of nongame, endangered, or threatened wildlife. (3) The commission may permit, under such terms and conditions as may be prescribed by regulation, the taking, possession, transportation, exportation, or shipment of species or subspecies of wildlife which appear on the state lists of endangered or threatened species for scientific, zoological, or educational purposes, for propagation in captivity of such wildlife, or for other special purposes.[106] ...	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
WILDLIFE, ENFORCEMENT **Colorado provides for criminal and civil**	The ESA provides protections only for species listed under its provisions.

[105] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-105. Endangered Or Threatened Species. http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-105&sessionyr=2013&Title=33&datatype=S&noheader=1&nojumpmsg=0

[106] C.R.S. 33-2-106 (2012), TITLE 33. PARKS AND WILDLIFE, WILDLIFE, ARTICLE 2. NONGAME AND ENDANGERED SPECIES CONSERVATION, 33-2-106. Management programs. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=23935&userid=PRODSG&cvfilename=&noheader=1&Interface=

penalties for all wildlife unlawfully 'taken', this provision would apply to lesser prairie chickens whether or not they are listed under the ESA Division action to recover possession and value of wildlife unlawfully taken : (1) The division may bring and maintain a civil action against any person, in the name of the people of the state, to recover possession or value or both possession and value of any wildlife taken in violation of articles 1 to 6 of this title. A writ of replevin may issue in such an action without bond. No previous demand for possession shall be necessary. If costs or damages are adjudged in favor of the defendant, the same shall be paid out of the wildlife cash fund. Neither the pendency of such civil action nor a criminal prosecution for the same taking shall be a bar to the other; nor shall anything in this section affect the right of seizure under other provisions of articles 1 to 6 of this title.[107]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES **Colorado can prohibit 'take' of any wildlife species they determine is in need of such protection;** **Colorado can manage any nongame wildlife they determine is in need of such management. Colorado also requires collection of biological and ecological data to prepare management actions.**	The ESA provides only for protection for listed species by : 1. Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, 2. In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being

[107] C.R.S. 33-6-110 (2012), Title 33. Parks And Wildlife, Wildlife, Article 6. Law Enforcement And Penalties - Wildlife, Part 1. General Provisions, 33-6-110. Division Action To Recover Possession And Value Of Wildlife Unlawfully Taken. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24001&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(1) The division shall conduct investigations on nongame wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully. On the basis of such determinations, the commission shall issue regulations and develop management programs designed to ensure the continued ability of nongame wildlife to perpetuate themselves successfully. Such regulations shall set forth species or subspecies of nongame wildlife which the commission deems in need of management pursuant to this section, giving their common and scientific names by species and, where necessary, by subspecies. The commission shall conduct ongoing investigations of nongame wildlife and may from time to time amend such regulations by adding or deleting therefrom species or subspecies of nongame wildlife. (2) The commission shall by regulation establish limitations relating to the taking, possession, transportation, exportation, processing, sale or offering for sale, or shipment as may be deemed necessary to manage nongame wildlife. (3) Except as provided in regulations issued by the commission, it is unlawful for any person to take, possess, transport, export, process, sell or offer for sale, or ship nongame wildlife deemed by the commission to be in need of management pursuant to this section. Subject to the same exception, it is also unlawful for any common or contract carrier to knowingly	designated. 3. Prohibiting “take” of the species. 4. Does not require investigations of biological and ecological data to determine management measures necessary 5. Does not require management plans, . Absent a federal nexus, the ESA cannot regulate activities on non-federal lands.

transport or receive for shipment nongame wildlife deemed by the commission to be in need of management pursuant to this section.[108]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES "1) "Management" means the collection and application of biological information for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels. The term includes the entire range of activities that constitute a modern, scientific resource program including, but not limited to, research, census, law enforcement, habitat acquisition and improvement, and education. Also included within the term, when and where appropriate, is the periodic or total protection of species or populations. "Management" may include artificial propagation to maintain threatened or endangered species populations, in concert with the exercise of water rights, and may also include restriction of stocking of species which are in competition with threatened or endangered species for the available habitat."[109]	The ESA • Only applies to listed species; • Does not require collection of information on listed species • Does not require the implementation of a scientific resource program, or any kind of organized management program. survival. The ESA cannot require participation of state and private actors in recovery activities on non-federal lands.
WILDLIFE, ENFORCEMENT Colorado prohibits 'take' of wildlife generally. Illegal sale of wildlife : (1) (a…, it is unlawful for	The ESA provides protections for listed species by prohibiting take only of listed species.:

[108] Colorado Statutes, Title 33. Parks And Wildlife, Wildlife, Article 2. Nongame And Endangered Species Conservation http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-104&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[109] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-103. Definitions http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=32-15-109&statecd=CO&sessionyr=2012&TOCId=23929&userid=GUEST9&cvfilename=&docname=&Interface=NLL&noheader=1

any person to knowingly sell or purchase, or knowingly offer for sale or purchase, wildlife or to solicit another person in the illegal hunting or taking of wildlife for the purposes of monetary or commercial gain or profit.[110] 2) Any person who violates this section: (a) With respect to big game, endangered species, or eagles, commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S. Upon such conviction, the commission may suspend any or all wildlife license privileges of the person for a minimum of one year to life. (b) With respect to all other wildlife, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and an assessment of twenty license suspension points.[111]	
PLANNING AND ZONING, LOCAL GOVERNMENT **Colorado regulates habitat destruction by mining operators:** (1) Every operator to whom a permit is issued pursuant to this article shall perform the reclamation prescribed by the reclamation plan adopted pursuant to this section….f) In those areas where revegetation is part of the reclamation plan, land shall be revegetated so that a diverse, effective, and long-lasting	1. The ESA provides protections for listed species by regulating activities of federal agencies 2. The ESA cannot require actors on Colorado public lands and private lands to engage in conservation actions.

[110] Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions
[111] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions 33-6-117. Willful Destruction Of Wildlife - Legislative Intent

vegetative cover is established that is capable of self-regeneration and is at least equal, with respect to the extent of cover, to the natural vegetation of the surrounding area. Species chosen for revegetation shall be compatible for the proposed post-extraction land use and shall be of adequate diversity to establish successful reclamation.[112]	
LAND USE, LOCAL GOVERNMENT **Protects public and private habitat of species from the actions of all operators.** Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (a) Regulating development and activities in hazardous areas; (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;…[113]	ESA protects only those habitats designated as critical habitat through regulation of only federal agencies.
WILDLIFE CONSERVATION, FUNDING **Colorado provides a dedicated funding stream for wildlife conservation.** (1)(a) Except as provided in subsections (7) and (8) of this section, sections 33-1-112.5 and 33-6-105, and in part 7 of article 22 of title 39, C.R.S., all moneys received from wildlife license fees, and all moneys from all other wildlife sources, and all interest earned on such	The ESA provides no dedicated funding.

[112] Title 34. Mineral Resources Mines And Minerals Article 32.5. Colorado Land Reclamation Act For The Extraction Of Construction Materials C.R.S. 34-32.5-116 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=PRODSG&interface=NLL&statecd=CO&codesec=34-32.5-116&sessionyr=2012&Title=34&datatype=S&noheader=1&nojumpmsg=0

[113] C.R.S. 30-28-121 Title 30. Government - County County Planning And Building Codes Article 28.County Planning And Building Codes Part 1. County Planning, http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

moneys shall be deposited in the state treasury and credited to the wildlife cash fund, which fund is hereby created, and such moneys shall be utilized for expenditures authorized or contemplated by and not inconsistent with the provisions of articles 1 to 6 of this title for wildlife activities and functions and for the financing of impact assistance grants pursuant to part 3 of article 25 of title 30, C.R.S…. (b) There is hereby created a wildlife habitat account in the wildlife for future generations trust fund, created in paragraph (a) of this subsection (7). The state treasurer shall deduct five million dollars from the wildlife cash fund, created in subsection (1) of this section, and transfer such sum to the wildlife habitat account. The interest earned on such five million dollars shall be continuously appropriated and shall be used solely for operation and maintenance of properties, leases, and easements owned by the division. (8) (a) There is hereby created in the state treasury the habitat partnership cash fund. The moneys in the habitat partnership cash fund shall consist of those moneys annually transferred from the wildlife cash fund in accordance with paragraph (e) of this subsection (8) for the partnership program and any gifts, grants, donations, and reimbursements made to the program from other sources. The moneys in the fund shall be used in accordance with the duties of the habitat partnership council as specified in section 33-1-110 (7) and (8), including, but not limited to, reasonable and necessary expenses incurred by council members in the fulfillment of their duties, as approved by the director. All interest derived from the investment of moneys in the habitat partnership cash fund shall be	

credited to the fund. Any balance remaining in the fund at the end of any fiscal year shall remain in the fund subject to the limitations provided…[114]	
FUNDING ...(4) (a) (I) <u>All moneys received pursuant to the issuance of the Colorado wildlife habitat stamp shall be used for the benefit of wildlife habitat or access to wildlife habitat,</u> including costs associated with the operation and maintenance, such as weed control and fencing, of lands under the Colorado wildlife habitat protection program administered by the division. Revenues collected from the sale of the stamp are subject to annual appropriation….[115]	The ESA provides no dedicated funding.
WILDLIFE, CONSERVATION, FUNDING **Colorado legislature has expressed the priority for funding for the preservation of species of concern, including the LPC.** (1) The general assembly hereby finds, determines, and declares that: (a) Protecting wildlife habitat and obtaining public access are important elements to preserving wildlife and wildlife-related recreational opportunities in Colorado; (b) The general assembly specifically recognizes that hunting of big game species is an activity that hundreds of thousands of residents and visitors to Colorado enjoy, which contributes significantly to state and local economies; and (c) <u>Priorities for the expenditure of funds</u>	The ESA provides no dedicated funding.

114114114 Title 33. Parks And Wildlife Wildlife Article 1.Wildlife - General Provisions C.R.S. 33-1-112 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-1-112&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

115 Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees

generated from the sale of habitat stamps and Colorado wildlife passports shall include protecting big game winter range and migration corridors, acquiring public access to wildlife-related recreation, including fishing, hunting, and wildlife viewing, protecting habitat for species of concern, and preserving the diversity of wildlife enjoyed by Coloradans...[116]	
WILDLIFE, ENFORCEMENT On lands controlled by the Colorado parks and wildlife division, damage to property or habitat (1) It is unlawful for any person to remove, damage, deface, or destroy any real or personal property or wildlife habitat under the control of the division. Any person who violates this subsection (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. In addition, the court may require the defendant to reimburse the division for any damages.[117]	
LAND USE, NATURAL RESOURCES **Colorado specifically protects all wildlife habitat from adverse impacts from all oil and gas operations.** 1) This section shall be known and may be cited as the "Colorado Habitat Stewardship Act of 2007".	The ESA protects only critical habitat from the effects of federal actions. No critical habitat is being designated for lesser prairie chicken so no federal protection will ensue

[116] Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-4-102.7&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[117] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions C.R.S. 33-6-129 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24023&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(2) The commission shall administer this article so as to minimize adverse impacts to wildlife resources affected by oil and gas operations. (3) In order to minimize adverse impacts to wildlife resources, the commission shall: (a) Establish a timely and efficient procedure for consultation with the parks and wildlife commission and division of parks and wildlife on decision-making that impacts wildlife resources;[118] (b) Provide for commission consultation and consent of the affected surface owner, or the surface owner's appointed tenant, on permit-specific conditions for wildlife habitat protection. Such conditions shall be discontinued when final reclamation has occurred....	
WILDLIFE CONSERVATION, LAND USE **Colorado requires that state lands be managed in a manner that protects wildlife habitat.** (1) The state board of land commissioners shall be composed of five members appointed by the governor,....(6) (a) The people of the state of Colorado have recognized in section 10 of article IX of the state constitution that the state school lands are an endowment of land assets held in a perpetual, intergenerational public trust for the support of public schools, which should not be significantly diminished; that the disposition and use of such lands should therefore benefit public schools including local school districts; and that the economic	The ESA only protects the designated critical habitat of a listed species from federal agency actions. No critical habitat is being designated for lesser prairie chickens.

[118] Title 34. Mineral Resources Oil And Natural Gas Article 60.Oil And Gas Conservation C.R.S. 34-60-128 (2012), http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=34-60-128&sessionyr=2010&Title=34&datatype=S&noheader=1&nojumpmsg=0

productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. In recognition of these principles, the state board of land commissioners shall be governed by the standards set forth in section 10 of article IX of the state constitution in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.[119]	

[119] Title 36. Natural Resources - General Public Lands And Rivers Article 1.State Board Of Land Commissioners, C.R.S. 36-1-101.5 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=35-49-104&statecd=CO&sessionyr=2012&TOCId=25658&userid=GUEST9&cvfilename=&docname=&Interface=&noheader=1

TEXAS

Applicable State Laws	Applicable ESA provisions
WILDLIFE **Texas requires a research program and funding to support it to develop wildlife research.** The Texas Agricultural Experiment Station, in consultation with the Agriculture and Wildlife Research and Management Advisory Committee established under Section 88.216, Education Code, shall develop and administer a program to finance agriculture and wildlife research that the Texas Agricultural Experiment Station determines to be of the highest scientific merit and to offer significant promise in providing new directions for long-term solutions to continued agriculture production, water availability, and wildlife habitat availability. [120]	The ESA does not require or fund a research program.
CONSERVATION **Texas protects Game Birds from catch, kill, or possession (dead or alive). Further protections are offered for the nest and eggs. Lesser prairie chickens are classified as Game Birds and are protected under the Texas statute.** GAME BIRDS. Wild turkey, wild ducks of all varieties, wild geese of all varieties, wild brant, wild grouse, wild prairie chickens, wild pheasants of all varieties, wild partridge, wild bobwhite quail, wild scaled quail, wild Mearn's quail, wild Gambel's quail, wild red-billed pigeons, wild band-tailed pigeons, wild mourning doves, wild white-winged doves, wild	. An ESA listing would provide only the limited additional protection of criminalizing accidental take.

[120] Agriculture Code Title 3. Agricultural Research And Promotion Chapter 50. Agriculture And Wildlife Research Program Sec.50.001. Program http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.50.pdf

white-fronted doves, wild snipe of all varieties, wild shore birds of all varieties, chachalacas, wild plover of all varieties, and wild sandhill cranes are game birds. … Sec. 64.003. DESTROYING NESTS OR EGGS. No person may destroy or take the nest, eggs, or young of any wild game bird, wild bird, or wild fowl protected by this code except as provided in this code. … Sec. 64.004. TRAPPING GAME BIRDS. No person may set a trap, net, or other device for taking game birds or take or snare a game bird by a device without obtaining a permit from the department. .. Sec. 64.005. PENALTY. A person who violates a provision of this subchapter commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … Sec. 64.007. POSSESSION OF LIVE GAME BIRDS. No person may possess a live game bird in this state except as authorized by this code.[121]	

[121] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation, Subtitle B. Hunting And Fishing, Chapter 64. Birds, Subchapter A. General Provisions. http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.64.htm#64.001

CONSERVATION, LOCAL GOVERNMENT **Texas requires control of noxious weeds [122] [123] and funding of that control.** "Board" means the board of directors of a district. (2) "District" means a noxious weed control district. … The legislature has determined that: (1) noxious weeds are present in this state to a degree that poses a threat to agriculture and is deleterious to the proper use of soil and other natural resources; and (2) reclamation of land from noxious weeds is a public right and duty in the interest of conservation and development of the natural resources of the state. The board may: (1)determine which noxious weeds are subject to control and what appropriate methods of control are to be used, including spraying, cutting, burning, tilling, or any other appropriate method; (2) prescribe specific areas in the district in which control measures are to be used; (3) prescribe the period during which control measures are to be used; and (4) incur expenses and take other actions necessary to carry out the purposes of this chapter.[124]	The ESA provides no authority or funding for control of noxious weeds.
PLANNING AND ZONING, LAND USE **Structures are listed as a threat to the LPC.**	

[122] Title 5. Production, Processing, And Sale Of Horticultural Products,Subtitle B. Horticultural Diseases And Pests, Chapter 78. Noxious Weed Control Districts http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.78.pdf

[123] http://plants.usda.gov/java/noxious?rptType=State&statefips=48

[124] Agriculture Code ,Chapter 78. Noxious Weed Control Districts, Subchapter A. General Provisions http://law.justia.com/codes/texas/2005/ag/005.00.000078.00.html

Zoning regulations affecting the building of structures and location in Texas are adopted in accordance with the States comprehensive plan which provides for protection of the State's natural resources. Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:…(7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements. … The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land. [125]	
WILDLIFE, CONSERVATION **Texas Department of Parks and Wildlife provides local agencies recommendations information on wildlife protection to all government agencies that approve, permit, license or construct development projects.** "The department is the state agency with primary responsibility for protecting the state's fish and wildlife resources. (b)The department's resource protection activities include: (1)investigating fish kills and any type of pollution that may cause loss of fish or wildlife	The ESA provides consultation only through section 7 to federal agency actions that may affect listed species or their critical habitat. In the case of the lesser prairie chicken, since no critical habitat is being designated, no habitat protection is provided.

[125] Local Government Code Title 7. Regulation Of Land Use, Structures, Businesses, And Related Activities Subtitle A. Municipal Regulatory Authority http://www.statutes.legis.state.tx.us/Docs/LG/pdf/LG.211.pdf

resources, taking necessary action to identify the cause and party responsible for the fish kill or pollution, estimating the monetary value of lost resources, and seeking restoration through presentation of evidence to the agency responsible for permitting or through suit in county or district court; (2) providing recommendations that will protect fish and wildlife resources to local, state, and federal agencies that 1approve, permit, license, or construct developmental projects; (3)providing information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources;… [126]	
ENDANGERED SPECIES **Texas provides for listing of species based on the same factors as the ESA. Like Colorado, Texas may protect species which are only threatened in a portion of their range.** **Texas prohibits take of state listed species.** The director shall file with the secretary of state a list of fish or wildlife threatened with statewide extinction. (b)Fish or wildlife may be classified by the director as threatened with statewide extinction if the department finds that the continued existence of the fish or wildlife is endangered due to: (1)the destruction, drastic modification, or severe curtailment of its habitat; (2)its overutilization for commercial or sporting purposes; (3)disease or predation; or (4)other natural or man-made factors.	The ESA limits listing protections to species only if the at risk of extinction occurs in a significant portion of their range. The ESA cannot must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Texas).if the species is at risk in only one portion of its range.

[126] Parks And Wildlife Code, Title 2. Parks And Wildlife Department, Chapter 12. Powers And Duties Concerning Wildlife, Subchapter A. General Powers And Duties http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.12.pdf

… No person may capture, trap, take, or kill, or attempt to capture, trap, take, or kill, endangered fish or wildlife. (b)No person may possess, sell, distribute, or offer or advertise for sale endangered fish or wildlife unless the fish or wildlife have been lawfully born and raised in captivity for commercial purposes under the provisions of this chapter. (c)No person may possess, sell, distribute, or offer or advertise for sale any goods made from endangered fish or wildlife[127]	
ENDANGERED SPECIES, CONSERVATION, FUNDING **Provides for dedicated funding of an endangered species account.** A peace officer who has arrested a person for a violation of this chapter may seize fish or wildlife or goods made from fish or wildlife taken, possessed, or made in violation of this chapter. (b) Property taken under this section shall be delivered to the department for holding pending disposition of the court proceedings. If the court determines that the property was taken, possessed, or made in violation of the provisions of this chapter, the department may dispose of the property under its regulations. The costs of the department in holding seized fish or wildlife during the pendency of the proceedings may, in appropriate cases, be assessed against the defendant. … . All revenue received under this chapter shall be deposited in the state treasury to the credit	The ESA provides no dedicated funding for ESA actions.

[127] Parks And Wildlife Code Title 5. Wildlife And Plant Conservation Subtitle B. Hunting And Fishing Chapter 68. Endangered Species http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf

of the special nongame and endangered species conservation account.[128]	
WILDLIFE, ENFORCEMENT **Texas may take action to refuse hunting or fishing licenses if outstanding violations of wildlife laws exist in other states.** On behalf of this state, the commission may enter into the Interstate Wildlife Violator Compact. (b) If necessary to protect the interests of this state, the commission may withdraw from the Interstate Wildlife Violator Compact in accordance with the terms of the compact. (c)The commission may take all actions necessary to implement this chapter, including the adoption of rules and the delegation of authority to the director.[129] (The Interstate Wildlife Violator Compact is an agreement that unresolved hunting and fishing violations in one state can affect a person's hunting or fishing privileges in other participating states. Any person whose license privileges or rights are suspended in a member state could also be denied future purchase of a license in Texas until they have satisfied suspension in the other state.)[130]	The ESA contains no regulatory provisions to protect wildlife generally.
WILDLIFE, ENFORCEMENT …, a person who violates a provision of Title 7 of this code commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … A person who violates any of the following	The ESA prohibition against "take" is limited to listed species.

[128] Id, http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf
[129] Parks And Wildlife Code Title 6. Compacts Chapter 92. Interstate Wildlife Violator Compact http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.92.pdf
[130] http://www.tpwd.state.tx.us/newsmedia/releases/?req=20091105g

provisions of Title 7 of this code commits an offense that is a Class B Parks and Wildlife Code misdemeanor: Section 131.011; 143.023; 229.021; 237.022; 334.041; or 350.021. [131]	
WILDLIFE, CONSERVATION **Texas law protects generally all indigenous species from collection, holding, possession, display, transport, release, or propagation.** In this subchapter, "protected wildlife" means all indigenous mammals, indigenous birds, indigenous reptiles, indigenous amphibians, indigenous fish, and other indigenous aquatic life the taking, collecting, holding, possession, propagation, release, display, or transport of which is governed by a provision of this code other than this subchapter or by a commission rule adopted under any provision of this code other than this subchapter and includes endangered species. … No person may collect, hold, possess, display, transport, release, or propagate protected wildlife for the purposes of this subchapter without a permit issued under this subchapter..[132]	The ESA protections are limited to listed species.
WILDLIFE, CONSERVATION, ENDANGERED SPECIES, LOCAL GOVERNMENT The criteria that the Texas Forest Service uses	The ESA authorizes the designation of critical habitat only for listed species.

[131] Parks And Wildlife Code, Title 7. Local And Special Laws, Chapter 355. Penalties For Violations Of Title 7, Parks And, Wildlife Code
http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.355.pdf
[132] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation Subtitle A. Hunting And Fishing Licenses Chapter 43. Special Licenses And Permits Subchapter C. Permits For Scientific Research, Zoological Collection, Rehabilitation, And Educational Display
http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.43.htm

in determining CWHZ [Critical Habitat Wildlife Zone] upon request from a chief appraiser or taxing unit is set out as follows. (1) The presence of qualified endangered or threatened animal or plant, as defined in paragraph (2) of this section, in the zone and the existence of a plan to protect it must be evidenced by a memorandum of understanding, conservation agreements, or other documentation pertaining to the protection of such animal or plant life with a federal, state, or private organization with recognized responsibility for protecting this species. (2) The animal or plant is listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. §1531 et seq.) and its subsequent amendments, or as endangered und er Parks and Wildlife Code, §68.002, …[133]	
NATURAL RESOURCES, ENDANGERED SPECIES, WILDLIFE, CONSERVATION, LAND USE **Texas requires that applications for mining and reclamation authority explain how adverse wildlife impacts will be minimized using the best technology available. Texas also requires enhancement of the wildlife and environmental values if possible.** Each application shall contain a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on	The ESA allows control of federal agency actions and imposition of requirements to avoid jeopardizing the continued existence of a species and adverse modification of critical habitat. In the case of the lesser praire chicken since no critical habitat is designated, habitat will not be protected.

[133] Title 4 Agriculture Part 12 Texas A&M Forest Service Chapter 215 Forest Zone Determination Procedure Rule §215.9 The Criteria For Determining Critical Wildlife Habitat Zone Upon Request From A Chief Appraiser Or Taxing Unit http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=72782&p_tloc=&p_ploc=&pg=1&p_tac=72782&ti=4&pt=12&ch=215&rl=9&dt=&z_chk=3841529&z_contains=habitat

fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. [134]	
NATURAL RESOURCES, LAND USE **Texas protects wildlife habitat generally from surface mining and reclamation activities.** The operator of all surface mining and reclamation operations not otherwise exempted or excluded shall as a minimum: … (1) conduct surface mining operations in a manner consistent with prudent mining practice, so as to maximize the utilization and conservation of the resource being recovered so that reaffecting the land in the future through surface mining can be minimized; (a) The permit application shall, if required by the Commission, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation. (b) When a map or aerial photograph is	The ESA can only protect designated critical habitat from federal agency actions. There is no designation of critical habitat proposed for lesser prairie chickens, so no habitat protection will exist.

[134] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 12 Coal Mining Regulations Subchapter G Surface Coal Mining And Reclamation Operations, Permits, And Coal Exploration Procedures Systems Division 6 Surface Mining Permit Applications--Minimum Requirements For Reclamation And Operation Plan Rule §12.144, Fish And Wildlife Plan http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=7940&p_tloc=&p_ploc=&pg=1&p_tac=7940&ti=16&pt=1&ch=12&rl=144&dt=&z_chk=3841534&z_contains=habitat

required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under §12.133 of this title (relating to Fish and Wildlife Resources Information).; [135]	

[135] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 11 Surface Mining And Reclamation Division Subchapter C Substantive Rules--Uranium Exploration And Surface Mining Division 6 Uranium Surface Mining Reclamation Rule §11.152 Surface Mining Reclamation Standardshttp://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=148942&p_tloc=&p_ploc=&pg=1&p_tac=148942&ti=16&pt=1&ch=11&rl=152&dt=&z_chk=3841530&z_contains=habitat

OKLAHOMA

Applicable State Laws	Applicable ESA provisions
WILDLIFE, ENDANGERED SPECIES Under Oklahoma law, no person may possess, hunt, chase, harass, capture, shoot at, wound or kill, take or attempt to take, trap, or attempt to trap any endangered or threatened species or sub-species without specific written permission of the director.[136]	ESA provides similar protections for listed species.
WILDLIFE **Oklahoma offers protections for all "game birds".** "Game bird" is a bird species normally sought after by sportsmen, and includes only all species of brant, cranes, doves, ducks, gallinules, geese, grouse, partridge, pheasant, quail, prairie chickens, rails, snipes, swans, tinamous, wild turkeys, woodcock, and any part thereof.[137]	Only listed species are protected under the ESA.
WILDLIFE, **Oklahoma prohibits unauthorized "take".** "Hunting or taking" is pursuing, killing, capturing, trapping, snaring and netting wildlife, and all lesser acts such as disturbing, harrying, worrying or placing, setting, drawing or using any net, trap or other device used to take wildlife and includes specifically every attempt	The ESA prohibition against "take" applies only to listed species.

[136] Title 29. Game and Fish. Chapter 1. Oklahoma Wildlife Conservation Code. Article V. Game. Part 4. Section 5-412 - Prohibitions with Endangered or Threatened Species or Subspecies. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77803

[137] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-114 - Game Bird, http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77660

to take and every assistance to other persons in taking or attempting to take wild animals, except that the definitions of "taking" and "hunting" wildlife shall not include disturbing, harrying or worrying wild game in field trials or performance tests of dogs nor the act of any person in participating as owner, handler, trainer, official or member of an audience observing such trials, whether resident or nonresident, where wild game is not killed.[138]	
CONSERVATION **Oklahoma does not permit "take" of game birds during its closed season.** "Closed season" is all other times than open season, and is the period during which protected wildlife may not be lawfully taken.[139]	The ESA prohibition against take applies only to listed species.
HABITAT RESTORATION, WEED CONTROL, INVASIVE SPECIES The Forestry Division, in connection with the enforcement of the Oklahoma Forestry Code, shall have the following powers, authority, and duties: … 10. <u>To plan and conduct prescribed burning at the request and expense of landowners on public or private lands for the purpose of controlling Eastern Red Cedar and other invasive species, for hazardous fuel reduction, wildlife habitat manipulation, ecosystem restoration</u>, or achieving silvicultural objectives.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[138] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-118 - Hunting or Taking. http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77665

[139] Title 29. Game and Fish , Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-104 - Closed Season. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77645

Forestry Division employees shall be protected under The Governmental Tort Claims Act and shall not be personally liable beyond the limits established therein for activities pursuant to this paragraph unless gross negligence is established in a competent court of law.[140]	
FUNDING, WILDLIFE CONSERVATION A. The Department of Wildlife Conservation is hereby authorized to issue an Oklahoma Wildlife Habitat Stamp to any person upon the voluntary payment of a fee of Ten Dollars ($10.00). Said fee shall be deposited in the Wildlife Land Acquisition Fund created in subsection C of this section. … C. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Land Acquisition Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received pursuant to the provisions of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such	• The ESA Provides no dedicated funding • The ESA has no authority to require States to participate in recovery activities.

[140] Title 2. Agriculture , Chapter 1 - Agricultural Code, Forestry Administration and Enforcement, Article 16 - Oklahoma Forestry , Code Section 16-8 - Powers of Division - Appointment of Forest Investigators and Rangers - Powers and Duties - Entry Upon Lands - Arrests, etc. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=465855&hits=1318+864+309+

investments shall be deposited in the Wildlife Land Acquisition Fund. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection D of this section. … D. The Wildlife Land Acquisition Fund shall be used by the Oklahoma Wildlife Conservation Commission for the acquisition on a willing-seller willing-buyer basis only, leasing, taking of easements, development, management, and enhancement of lands acquired pursuant to this section for the following purposes: Management of game animals, protected animals and birds, furbearing animals, game birds, fish, and their restoration, propagation, and protection; and Creation and management of public hunting, fishing, and trapping areas as places where the public may hunt, fish, or trap as authorized by law.[141]	
HABITAT, WILDLIFE, CONSERVATION A. In order to encourage wildlife habitat conservation on private lands, the Department of Wildlife Conservation shall establish a program for wildlife habitat maintenance, enhancement, development, preservation, restoration, and management on private lands. To implement the program, the Department shall enter into multiyear contracts for approved	The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. The ESA provides no protection for non-listed species and does not provide for the "restoration" or "development" of those non-listed

[141] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 4 – Licenses, Section 4-132 - Authority to Issue Oklahoma Wildlife Habitat Stamp - Rules and Regulations - Creation and Use of Wildlife Land Acquisition Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466381&hits=1386+783+726+629+70+15+

projects on privately owned lands detailing the landowners' responsibilities. B. The Department shall promulgate rules pursuant to the Administrative Procedures Act to implement the program. Such rules may provide for incentives to participate in the program.[142]…	species. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE Oklahoma law prohibits the knowing and willful killing or molestation of hawks, falcons, owls, or eagles, or their nests, eggs, or young. The only exceptions to this prohibition are the taking of a hawk or owl in the act of destroying domestic birds or fowl, or the use of hawks, owls, falcons, or eagles by licensed falconers. [143]	The ESA limits protection to listed species.
ENFORCEMENT, WILDLIFE, ENDANGERED SPECIES Oklahoma prohibits the possession of wildlife or parts during closed season, and any endangered or threatened species. Under these Oklahoma statutes, no person may possess any wildlife or parts thereof during the closed season, any endangered or threatened species or parts thereof at any time, or any native bear or native cat that will grow to reach the weight of 50 lbs. or more, with exceptions. A	The ESA limits protection only to listed species.

[142] Title 29. Game and Fish, Chapter 1, Oklahoma Wildlife Conservation Code, Article 3, Section 3-312 - "Program for Wildlife Habitat Development, Preservation, Restoration, and Management - Rules - Construction of Program.". http://www.oscn.net/applications/oscn/deliverdocument.asp?id=436091&hits=935+479+463+407+23+7+

[143] OK - Game Animals - Part 4. Protected Game. § 5-410. Hawks; falcons; owls; eagles

conviction could result in a fine of $100-$500 and/or by imprisonment up to 30 days. In addition, no person may buy, barter, trade, or sell all or any part of any fish or wildlife or the nest or eggs of any bird protected by law, with exceptions. A first violation could result in a fine of $100 to $500 and/or by imprisonment up to 60 days. [144]	
WILDLIFE, CONSERVATION, FUNDING A. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Heritage Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received from senior citizen lifetime licenses issued pursuant to the provisions of paragraphs 4 through 6 of subsection B of Section 4-114 of this title by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such investments shall be deposited in the Wildlife Heritage Fund. Only interest and dividends derived from the principle can be expended and are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection B of this section. Any monies withdrawn from said fund by the	The ESA provides no dedicated funding and is limited in its application to listed species.

[144] OK - Wildlife - Part 5. Possession of Wildlife. OK ST T. 29 § 7-501 to 504

Oklahoma Wildlife Conservation Commission for investment pursuant to this subsection shall be deemed to be for the purposes specified in subsection B of this section. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.[145]	
WILDLIFE, ENFORCEMENT, ENDANGERED SPECIES **Oklahoma prohibits transportation of any wildlife out of Oklahoma.** Under these Oklahoma statutes, no common carrier may transport any wildlife or endangered or rare species, with exceptions. A violation could result in a fine of $25 to $100. In addition, no person may transport into or out of Oklahoma any wildlife or parts thereof, nests of wildlife, their eggs or their young, or any endangered or threatened species, with exceptions. A violation could result in a fine of $50 to $200, and/or imprisonment of 10 to 60 days. [146]	The ESA applies only to listed species.
WILDLIFE, CONSERVATION, FUNDING A. The Oklahoma Tax Commission shall include on each state individual income tax return form for tax years beginning after December 31, 2001, and each state corporate tax return form for tax years beginning after December 31, 2001, an opportunity for the taxpayer to donate	The ESA provides no dedicated funding.

[145] Title 29. Game and Fish Chapter 1 - Oklahoma Wildlife Conservation Code Article 4 - Licenses Section 4-134 - Creation and Use of Wildlife Heritage Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466383&hits=1344+1343+1124+1123+1094+1093+1032+1031+934+933+866+865+844+843+786+785+757+756+752+751+687+686+608+607+437+436+409+408+347+346+255+254+189+188+167+166+109+108+80+79+75+74+17+16+

[146] OK - Wildlife - Transportation of Wildlife OK ST T. 29 § 7-601 - 602

from a tax refund for the benefit of the Oklahoma Wildlife Diversity Program. B. For purposes of this section, "nongame wildlife" means any species of wildlife not legally classified as a game species or furbearer by statute or by rule adopted pursuant to statute. C. Except as otherwise provided for in this section, all monies generated pursuant to subsection A of this section shall be paid to the State Treasurer and placed to the credit of the Wildlife Diversity Fund. D. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Diversity Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received under the provisions of paragraph 2 of subsection C of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. …[147]	
CONSERVATION, WILDLIFE	• The ESA has no authority to require States to participate in

[147] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-310 - Wildlife Diversity Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466370&hits=1486+1485+1480+1479+1020+1019+994+993+939+938+910+909+905+904+860+859+640+639+633+632+302+301+276+275+221+220+192+191+187+186+142+141+

A. The Wildlife Conservation Commission shall constitute an advisory, administrative and policymaking board for the protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of wildlife in this state as provided in the Oklahoma Wildlife Conservation Code. B. The Director shall consult with the Commission regarding the administration of the affairs of the Department of Wildlife Conservation. The Commission is authorized and empowered to require from the Director complete reports and information relative to the affairs of the Department at the time and in the manner the Commission may deem advisable. … D. In addition to the other powers and duties prescribed by law, the Commission shall: … 8. Supervise the establishment, extension, improvement, and operation of the wildlife refuges, propagation areas or stations, public hunting areas, public fishing areas, game management areas, and fish hatcheries; 9. Prescribe the manner of cooperation with the Oklahoma Tourism and Recreation Department, colleges and universities within the state, other state agencies, any agency of the federal government, and any city, town, school district, or any other agency or organization in study of conservation and propagation of wildlife and in the establishment, maintenance, and operation of visual educational facilities, recreational facilities, and hunting and fishing facilities, in the study and propagation of wildlife;	recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • The ESA requires only federal agencies consult and has no authority to require State or local governments to consult where there is no federal action. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and “enhanced”. • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

… 14. Publicize and encourage the conservation and appreciation of wildlife and all other natural resources; 15. Regulate the seasons and harvest of wildlife; 16. Promulgate rules to sell fishing and hunting licenses via the Internet;….[148]	
WILDLIFE, ENFORCEMENT A. Except as otherwise provided by law, <u>any person arrested for a violation of any section of the Oklahoma Wildlife Conservation Code shall be admitted to bail as follows:</u> <u>1. Whenever a person is charged for any violation of any of the wildlife laws of this state or rules adopted by the Wildlife Conservation Commission pursuant to law, which violation is punishable as a misdemeanor</u> and the person is not immediately taken into physical custody pursuant to state law, the officer shall prepare a written citation containing a notice to appear in court, the name and address of the person, the offense charged, the time and place where the person shall appear in court and any other pertinent information as may be necessary; 2. The arresting officer shall indicate on the citation the date of the arraignment. The person charged shall appear in person or by counsel at the stated time and place for arraignment.[149]	The ESA only provides protections for listed species.

[148] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103 - Functions, Powers, and Duties of the Commission. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466368&hits=1919+1918+1913+1912+991+990+968+967+936+935+872+871+865+864+57+56+36+35+4+3+

[149] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 9 - Wildlife Bail Procedure Act, Section 9-112 - Admission to Bail for Violations of Wildlife Conservation Code. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=462892&hits=1526+1525+1498+1497+814+813+779+778+686+685+679+678+54+53+21+20+

CONSERVATION, HABITAT Oklahoma provides for private lands fish and wildlife habitat conservation and improvement programs which include maintenance, protection, enhancement and restoration for habitat generally including aquatic, riparian, upland, wetland and forest habitat. … conservation improvement contract requirements [150] (a) The following projects may be approved for Private Lands Fish and Wildlife Habitat Conservation and Improvement Programs (1) Aquatic Habitat maintenance, protection, enhancement, or restoration, (2) Riparian Habitat maintenance, protection, enhancement, or restoration (3) Upland Habitat maintenance, protection, enhancement, or restoration (4) Wetland Habitat maintenance, protection, enhancement, or restoration (5) Forest Habitat maintenance, protection, enhancement, or restoration, (6) Any other project which is deemed appropriate by the Department.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

[150] 800:25-35-3. Approved projects and conservation improvement contract requirements http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_

KANSAS

Applicable State Laws	Applicable ESA provisions
CONSERVATION **Kansas requires programs, including land acquisition to conserve non-game and threatened and endangered species.** Same; programs for conservation. (a) The secretary shall establish such programs, including acquisition of land or aquatic habitat, as are deemed necessary for the conservation of nongame, threatened and endangered species. The secretary shall utilize all authority vested in the secretary by the laws of this state to carry out the purposes of this section with the exception that the secretary shall not utilize the power of eminent domain to carry out such programs unless a specific authorization and appropriation is made therefor by the legislature.[151]	The ESA provides no authority for establishment of programs or land adquisition for endangered species.
FUNDING, CONSERVATION **Kansas provides for species in need of conservation and allows tax credits for lands known to support populations of such species.** Tax credits for expenditures related to nongame (a) There shall be allowed two types of credits against the tax liability of a taxpayer imposed under the Kansas income tax act related to real property that is both: (1) Designated by the secretary of wildlife, parks and tourism pursuant to the nongame and endangered species conservation act as critical habitat for a threatened or endangered species	The ESA provides no tax credits and can only list species

[151] Article 9. - Licenses, Permits, Stamps And Other Issues 32-962.

or certified by the secretary of wildlife, parks and tourism as land known to support populations of species in need of conservation; and (2) included in management activities as part of a recovery plan, or an agreement identified in subsection (b) of K.S.A. 32-962 and amendments thereto, as approved by the secretary of wildlife and parks, for a species listed as threatened, endangered or in need of conservation pursuant to the nongame endangered species conservation act.[152]	
WILDLIFE, CONSERVATION **Kansas provides programs to allow species to sustain themselves, not recover. These protections are offered to non-listed species.** … (a) The secretary shall conduct investigations on nongame species in order to develop information relating to population, distribution, habitat needs, limiting factors and other biological and ecological data to determine conservation measures necessary for their continued ability to sustain themselves successfully. On the basis of such information and determinations, the secretary shall adopt rules and regulations pursuant to K.S.A. 32-963 which contain a list of the nongame species deemed by the secretary to be in need of conservation and shall develop conservation programs pursuant to K.S.A. 32-962 which are designed to insure the continued ability of such nongame species to perpetuate themselves	The ESA provides protections only for listed species and does not offer any program for species prior to their listing to ensure that they do not become endangered/threatened.

[152] Article 32. - Statute 79-32,203: Tax credits for expenditures related to nongame and endangered species.

successfully. The secretary shall conduct ongoing investigations of nongame species.[153]	
WILDLIFE (a) Commercialization of wildlife is knowingly committing any of the following, except as permitted by statute or rules and regulations: (1) Capturing, killing or possessing, for profit or commercial purposes, all or any part of any wildlife protected by this section; (2) selling, bartering, purchasing or offering to sell, barter or purchase, for profit or commercial purposes, all or any part of any wildlife protected by this section;[154]	The ESA provides protections only for listed species.
WILDLIFE, ENFORCEMENT Wildlife violator compact; enactment of compact. The wildlife violator compact is enacted into law and entered into by the State of Kansas with any and all jurisdictions legally joining therein in accordance with its terms.[155]	
WILDLIFE Unlawful possession of wildlife or wild turkey; refusal to allow inspection of property used in taking wildlife; penalties. (a) It is unlawful for any person to: ...	The Kansas statute provides penalties for any unlawful possession of wildlife, including wild turkey. The ESA only prohibits the "take" of listed species. Non-listed species are

[153] Article 9. - Licenses, Permits, Stamps And Other Issues 32-959.
[154] Article 10. - Enforcement , 32-1005. http://kslegislature.org/li/b2013_14/statute/032_000_0000_chapter/032_010_0000_article/032_010_0005_section/032_010_0005_k/
[155] Chapter 32 Article 10 »Section 61 » 32-1061. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0061_section/032_010_0061_k/

(4) possess any wildlife unlawfully killed or otherwise unlawfully taken outside this state;[156]	provide no protections.
LOCAL GOVERNMENT, WEED CONTROL Control and eradication of noxious weeds; payment of costs; sale of chemicals for use on private property, price. ... If the governing body of any political subdivision owning or supervising lands infested with noxious weeds within their jurisdiction fails to control such noxious weeds after 15 days' notice directing any such body to do so, the board of county commissioners shall proceed to have proper control and eradication methods used upon such lands,...[157]	Certain invasive species of plants are listed as potential threats to the habitat of the lesser prairie chicken. Kansas provides authority for its local governments to eradicate "noxious weeds" on private lands. The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
ENDANGERED SPECIES Nongame and endangered species conservation act; title. K.S.A. 32-957 through 32-963, 32-1009 through 32-1012, 32-1033 and K.S.A. 32-960a and 32-960b, and amendments thereto, shall be known and may be cited as the	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety

[156] Chapter 32 Article 10 »Section 4 32-1004. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0004_section/032_010_0004_k/

[157] Chapter 2 Article 13 Section 19 WEEDS

nongame and endangered species conservation act.[158] As used in the nongame and endangered species conservation act: (a) "Conserve," "conserving" and "conservation" mean the use of all methods and procedures for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such numbers. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, regulated taking and, when and where appropriate, the periodic or total protection of species or populations of wildlife. With respect to threatened species and endangered species, the terms mean the use of all methods and procedures, including but not limited to those described above, which are necessary to bring any threatened or endangered species to the point at which the methods, procedures and measures provided for such species pursuant to the nongame and endangered species conservation act are no longer necessary. (b) "Ecosystem" means a system of living organisms and their environment, each influencing the existence of the other and both necessary for the maintenance of life. (c) "Endangered species" means any species of wildlife whose continued existence as a viable component of the state's wild fauna	of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Kansas). • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a federal agency action.

[158] Chapter 32 »Article 9 Section 57 Article 9. - Licenses, Permits, Stamps And Other Issues

is determined to be in jeopardy. That term also includes any species of wildlife determined to be an endangered species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (d) "Nongame species" means any species of wildlife not legally classified a game species, furbearer, threatened species or an endangered species by statute or by rule and regulation adopted pursuant to statute. (e) "Optimum carrying capacity" means that point at which a given habitat can support healthy populations of wildlife species, having regard to the total ecosystem, without diminishing the ability of the habitat to continue that function. (f) "Threatened species" means any species of wildlife which appears likely, within the foreseeable future, to become an endangered species. That term also includes any species of wildlife determined to be a threatened species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (g) "Wildlife" means any member of the animal kingdom, including, without limitation, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof. ….[159]	

[159] http://kansasstatutes.lesterama.org/Chapter_32/Article_9/#32-958

PLANNING AND ZONING ...(b) The planning commission may adopt and amend a comprehensive plan as a whole by a single resolution, ... In the preparation of such plan, the planning commission shall make or cause to be made comprehensive surveys and studies of past and present conditions and trends relating to land use, population and building intensity, public facilities, transportation and transportation facilities, **economic conditions, natural resources and may include any other element deemed necessary to the comprehensive plan**. Such proposed plan shall show the commission's recommendations for the development or redevelopment of the territory including: (a) The general location, extent and relationship of the use of land for agriculture, residence, business, industry, recreation, education, ... (f) utilization and conservation of natural resources; and (g) any other element deemed necessary to the proper development or redevelopment of the area.[160]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
LAND USE, PLANNING AND ZONING …construction of public facility or utility in conformance with comprehensive plan. (a) Except as provided in subsection (b), whenever the planning commission has adopted and certified the comprehensive plan for one or more major sections or functional subdivisions thereof, no public improvement, public facility or public utility of a type embraced within the recommendations of the comprehensive plan or portion thereof shall be constructed without first being submitted to and being approved by the	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.

[160] Chapter 12 Article 7 Section 47 Article 7. - Planning And Zoning 12-747.

planning commission as being in conformity with the plan.[161]	
LAND USE, PLANNING AND ZONING Zoning of land outside city limits; conditions and limitations; notice to county commissioners. Cities are hereby authorized to adopt zoning regulations affecting all or any designated portion of the land located outside the city but within three miles thereof under the following conditions Except for flood plain regulations in areas designated as a flood plain, nothing in this act shall be construed as authorizing any city to adopt regulations applying to or affecting any land in excess of three acres under one ownership which is used only for agricultural purposes: (a) The city has established a planning commission under the provisions of K.S.A. 12-702, and amendments thereto, which provides for the appointment of two commission members who reside outside the city but within the area subject to the zoning regulations of the city, or the city has established a joint, metropolitan or regional planning commission in cooperation with the county in which such city is located pursuant to the provisions of K.S.A. 12-718, and amendments thereto.[162]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Fences composed of posts a In fences composed of posts and wires, the posts shall be of ordinary size for fencing purposes, and set in the ground at least two feet deep and not more	Local governments are permitted to regulate fence The ESA provides

[161] Chapter 12 Article 7 Section 48 Article 7. - Planning And Zoning
[162] Chapter 12 Article 7 Section 15b Article 7. - Planning And Zoning

than twelve feet apart, with holes through the posts or staples on the side not more than fifteen inches apart, to admit four separate strands of fence wire not smaller than No. 9, and shall be provided with rollers and levers, at suitable distances, to strain and hold the wire straight and firm.[163]	• No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
FUNDING, CONSERVATION Assent to wildlife restoration act; use of fees. (a) The state of Kansas hereby assents to the provisions of the wildlife restoration act (16 U.S.C. 669 et seq.), as amended. The secretary is hereby authorized and directed to perform such acts as necessary to the conduct and establishment of cooperative wildlife restoration projects, as defined in such act, in compliance with such act and with rules and regulations promulgated by the secretary of the interior thereunder. The state treasurer is hereby authorized to receive and disburse all money apportioned to the state in accordance with the provisions of such act.[164]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
FUNDING, CONSERVATION Conservation fee fund; authorized expenditures; accounting procedures; reduction of fees and assessments, when. (a) There is hereby created in the state treasury the conservation fee fund. All deposits credited to the conservation fee fund shall be for the use of the state corporation commission in administering the provisions of K.S.A. 55-172 through 55-184, 55-601 through 55-613, 55-701 through 55-713, 55-901 and 55-1201 through 55-1205.[165]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[163] Home Statute Chapter 29 Article 1 Section 3 Fencing
[164] Chapter 32 Article 8 Section 28 Article 8. - Department Of Wildlife, Parks And Tourism
[165] Chapter 55 Article 1 Section 43 Article 1. - Oil And Gas Wells; Regulatory Provisions

LAND USE, PLANNING AND ZONING Application of intent to drill wells, required information; notification of surface owner; fee and contents; information to department of health and environment and county clerk; approval of application, when; conditions; compliance with rules and regulations. (a) Prior to the drilling of any well, every operator shall file an application of intent to drill with the commission. Such application shall include such information as required by the commission, including the name and address of the surface owner, and shall be on a form prescribed by the commission. Such application shall also include non-binding preliminary estimates of the location of roads of ingress or egress, any tank battery and any pipeline or electrical line. The commission shall, upon receipt of such application, send a copy of such application to the named surface owner, as well as the contact information, including name, address, phone number, fax or email address, for a designated representative of the applicant.[166]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action. • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Removal of structures and abutments from lands after abandoning wells; exception. (a) Leaving the surface of lands with a part of the operating structure or other equipment intact after abandoning oil or gas wells is against public policy, and constitutes a public nuisance, and shall be hereafter prohibited. Whenever any lease operator abandons any oil or gas well, the lease operator, within six months thereafter, shall remove any rig, derrick or other operating structure, and all abutments and other obstacles of every kind or size used in the operation of such oil or gas lease, from the land upon which	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.

[166] Chapter 55 Article 1 Section 51 Article 1. - Oil And Gas Wells; Regulatory Provisions

the well was theretofore operated, and shall grade the surface of the soil in such manner as to leave the land, as nearly as practicable, in the same condition after the removal of such structures, equipment and obstacles as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise.[167]	

[167] Chapter 55 »Article 1 »Section 77 Article 1. - Oil And Gas Wells; Regulatory Provisions

NEW MEXICO

Applicable State Laws	Applicable ESA provisions
WILDLIFE The game animals and quadrupeds, game birds and fowl, and game fish as herein defined shall be protected and hunting, taking, capturing, killing or possession, or attempt to hunt, take, capture or kill of any or all species named herein shall be regulated by the state game commission under the authority of Chapter 117 of the 1931 Session Laws of the state of New Mexico.	The ESA provides protections against take for only for listed species.
WILDLIFE, ENFORCEMENT **New Mexico regulates the LPC under its game laws. Which prohibit the "take" of species, including the LPC, without a permit.** A. Except as permitted by regulations adopted by the state game commission or as otherwise allowed by law, it is unlawful to: (1) hunt, take, capture, kill or attempt to take, capture or kill, at any time or in any manner, any game animal, game bird or game fish in the state; or (2) possess, offer for sale, sell, offer to purchase or purchase in the state all or any part of any game animal, game bird or game fish….[168]	The ESA only provides protections against "take" for listed species.
PLANNING AND ZONING, HABITAT **New Mexico has stated a clear preference for avoidance of wildlife areas in its**	The ESA Provides: • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical

[168] NM Stat § 17-2-7 (1996 through 1st Sess 50th Legis)

development of utilities. Scenic enhancement: The following provisions for scenic enhancement shall apply for utility facility installation in cited areas: (1) The type and size of the utility facilities and the manner and extent to which they are permitted within areas of scenic enhancement and natural beauty may materially alter the scenic quality, appearance and view of highway roadsides and adjacent areas. Such areas include scenic strips, overlooks, rest areas, recreation areas and the rights-of-ways and adjacent highways. Also included are Sections of highways which pass through public parks, recreation areas, wildlife and waterfowl refuges and historic sites. Whenever possible, new utility installations within all such strips overlooks and areas shall be avoided.[169]	habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
HABITAT, CONSERVATION **New Mexico requires that its wildlife department regulate "vehicle travel" on habitat for certain classes of species.** New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species. … "To provide a description of lands closed to vehicle travel under the Habitat Protection Act and to describe prohibited activities on said lands. [170]	The ESA provides not authority to regulate activities on non-federal lands, absent a federal nexus.
WILDLIFE, CONSERVATION,	The ESA provides no authority to

[169] Title 17: Public Utilities And Utility Services Chapter 4: Utility Rights Of Way And Easements Part 2 , Requirements For Occupancy Of State Highway System Right-Of-Way By Utility Facilities
[170] http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0002.htm

ENFORCEMENT **New Mexico state game commission has authority to establish rules to acquire lands and to prevent damage to wildlife and wildlife habitat on lands owned or controlled by the department.** New Mexico state game commission with the authority to acquire land and to establish rules and regulations that it may deem necessary to carry out the purposes of Chapter 17, NMSA 1978[171]	acquire lands or to establish regulations necessary to protect species. The only protections offered by the ESA provide protections from "take", allow designation of critical habitat, and require federal agencies consult.
WILDLIFE **LPC are game birds in New Mexico, and as such, they are protected. No game bird may be hunted during a closed season or without a permit.** **New Mexico has also established areas of LPC habitat, where the LPC are protected and season is only open for quails.** Season and hours: Upland game may be hunted or taken only during open seasons and only during the period from one-half hour before sunrise to one-half hour after sunset, unless otherwise specifically allowed by rule…. (1) On wildlife management areas, the lesser prairie-chicken areas, and the Sandhills Prairie conservation area hunting hours shall be from one-half hour before sunrise to one-half hour after sunset	ESA only prohibits "take" of listed species.

[171] Title 19 Natural Resources And Wildlife, Chapter 34 Wildlife Habitat And Lands, Part 4 Protection Of Department Of Game And Fish Lands. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0004.htm

… **(e)** The state game commission owned lesser prairie-chicken areas shall be open for quail hunting during established seasons.[172]	
WILDLIFE, ENFORCEMENT **New Mexico also provides protections for wildlife and game animals on private lands.** It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on any private property that is in compliance with 30-14-1 and 30-14-6 NMSA 1978 posting requirements without possessing written permission from the landowner or person in control of the land or trespass rights, unless otherwise permitted in rule or statute. It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on private property if the consent to enter or remain has been denied or withdrawn by the owner or person in control of the land or trespass rights, per 30-14-1 NMSA 1978, unless otherwise permitted in rule or statute. … Any game animals, furbearers, game birds, or game fish taken in violation of this section shall be subject to seizure.[173]	The ESA provides protection against "take" only for listed species.
WILDLIFE, CONSERVATION, HABITAT New Mexico has designated the LPC as a	The ESA can only prohibit take and require federal agencies to consult on

[172] 19.31.5.9 Manner And Methods For Upland Game http://www.nmcpr.state.nm.us/nmregister/xxi/xxi15/19.31.5.htm

[173] Unlawful Taking Or Killing Of Game Animals, Furbearers, Game Birds, Or Game Fish On Private Land, [19.31.10.18 NMAC - N, 4-1-2009]. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.031.0010.htm

"Species of Greatest Conservation Need (SGCN)" in its wildlife conservation strategy. New Mexico's wildlife conservation strategy demonstrates New Mexico's concern for wildlife habitat resources to keep wildlife populations healthy and sustainable and fully addresses eight essential elements established by Congress. It focuses on strategic actions intended to keep common species common and work to prevent wildlife from becoming endangered with a constructed framework for identifying species of greatest conservation need, the habitat treatments necessary to sustain them and other members of their ecological community.[174]	actions on federal lands. The ESA cannot require States to undertake independent conservation activities.
WILDLIFE, FUNDING **New Mexico requires local government to undertake activities to "promote" the health, safety and welfare of the State's wildlife.** It is the intent of the legislature by the passage of the Pollution Control Revenue Bond Act to authorize municipalities to acquire, own, lease or sell projects for the purpose of reducing, abating or preventing pollution, including, but not limited to, removing pollutants, contaminants or foreign substances from land, air or water, or removing or treating any substance in a processed material which otherwise would cause pollution when such material is used, to protect and promote the health, welfare and safety of the citizens of this state and its and wildlife, with the resultant higher level of employment and economic activity and stability. It is not intended hereby to authorize any municipality itself to operate any	The ESA requires consultation by federal agencies on actions that may affect listed species. The ESA provides no authority to require local municipalities to undertake projects to protect wildlife, absent a federal nexus.

[174]New Mexico Department of Game and Fish. 2006. Comprehensive Wildlife Conservation Strategy for New Mexico. New Mexico Department of Game and Fish. Santa Fe, New Mexico. 526 pp + appendices.

manufacturing, industrial or commercial enterprise. The provisions of the Pollution Control Revenue Bond Act shall be liberally construed in conformity with this intent.[175]	
WILDLIFE, HABITAT, CONSERVATION **New Mexico has established conservation districts to "enhance" wildlife and habitat.** A. The "conservation services division" is created within the department of game and fish. B. The conservation services division is responsible for: (1) management, enhancement, research and conservation of public wildlife habitat ; (2) the lease, purchase, enhancement and management of state wildlife habitat ; (3) assisting landowners in improving wildlife habitats; (4) development of educational programs related to conservation of wildlife and the environment, including the expanded dissemination of wildlife publications; and (5) communication and consultation with federal and other state agencies, local governments and communities, private organizations and affected interests responsible for habitat, wilderness, recreation, water quality and environmental protection to ensure comprehensive conservation services for	The ESA does not have a provision for the "enhancement" of a listed species. Only a prohibition against take and for activities that may allow "recovery".

[175] 3-59-3. Legislative intent.

hunters, anglers and nonconsumptive wildlife users.[176]	
WILDLIFE, FUNDING, HABITAT The purpose of the Game and Fish Bond Act is to provide for use of revenues derived from fees for hunting and fishing licenses to issue bonds to provide for fish hatcheries and rearing facilities, game and fish at acquisition, development and improvement projects and other similar capital outlay projects.[177]	The ESA does not provide dedicated funding.
WILDLIFE, ENDANGERED SPECIES, HABITAT **Requires studies to be conducted to determine the status and survival requirements of threatened and endangered species.** In addition to other powers and duties, the director (of fish and game): A. may acquire land or aquatic habitat interests for the conservation, management, restoration, propagation and protection of threatened or endangered species; and B. shall conduct studies to determine the status and requirements for survival of threatened or endangered species.[178]	The ESA cannot require a State to undertake conservation activities.

[176] 17-6-1 to 17-6-11 NMSA 1978] may be cited as the "Habitat Protection Act"; 17-1-5.1. Conservation services division; duties.
[177] 17-1-17. Purpose of act.
[178] 17-2-44. Director; land or aquatic habitat interest acquisition.

COUNTY AND LOCAL LAW

County	Authority	Synopsis
BERNALILLO COUNTY, NEW MEXICO		The Bernalillo County Open Space Master Naturalist Program aims to instill the pursuit of life-long learning and promote environmental stewardship. Participants are activity engaged through education and service dedicated to the beneficial management of natural resources on Open Space properties.
BERNALILLO COUNTY, NEW MEXICO	Code of Ordinances, Art. II, Sec. 58-46,	The purpose of this article is to promulgate laws that preserve Bernalillo County open space for the purposes for which they were acquired, including the protection of natural areas, cultural and historical sites, agricultural lands, wildlife habitat, water resources and viewsheds, the promotion of environmental education, and the provision of resource-based recreation.
BERNALILLO COUNTY, NEW MEXICO [179]	Sec. 58-107	No person shall harm, hunt, pursue, molest, harass, trap, collect or remove any mammal, bird, reptile or amphibian animals or eggs or young of such animals on/from open space lands.
Union, NEW MEXICO [180]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [181]

[179] http://library.municode.com/index.aspx?clientId=13071&stateId=31&stateName=New%20Mexico&p_PageAlias=all-county-ordinances
[180] http://nm-unioncounty.civiccities.com/directory.aspx
[181] http://www.unionnm.us/DocumentCenter/Home/View/9

Quay, NEW MEXICO	Quay County Comprehensive Plan	Once adopted, the Comprehensive Plan becomes the official policy of the County. It is passed as a resolution rather than an ordinance in order to maintain its flexibility and change as conditions and priorities change.
Eddy, NEW MEXICO	Ordinance 41, Land Use	The Eddy County Land Use Policies and Procedures was developed by Eddy Government to guide the use of public lands and cooperation with County, State and Federal governments. [182]
Eddy, NEW MEXICO	Comprehensive Plan	Ensures compliance with environmental standards and advocates the use of environmental studies in planning (page. 53). ... County/city cooperation in managing growth and development in the PPJ could include one or more of the following measures: ...proximity to environmentally sensitive lands or farmland. (p. 23)[183]
Eddy, NEW MEXICO	Ordinance 19, Regulating, Controlling the Growth and Removal of Plants	Encourages native plant growth[184]
Chaves, NEW MEXICO	Art. V, Area 1 Regulations	Designation of Wildlife Habitat[185]

182 http://www.co.eddy.nm.us/Ordinance%20pdfs/landuseO-02-41.pdf
183 http://www.co.eddy.nm.us/EddyCty-FinalRPT10-08.pdf
184 http://www.co.eddy.nm.us/Ordinance%20pdfs/weedsgrowthcontrolandremovalO-91-19.pdf
185 http://co.chaves.nm.us/~cochaves/pdf/ZoningOrdinance.pdf

Chaves, NEW MEXICO	Chaves County Comprehensive Plan and Zoning Report, 4-1	Public Land Policy[186]
Chaves, NEW MEXICO	Chaves County Public Lands Advisory Committee	A committee that coordinates with federal and state agencies on public land related issues, including environmental regulation. [187]
De Baca, NEW MEXICO		
San Miguel, NEW MEXICO	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [188]
	Regulating The Permitting, Placement, Construction And Modification Of Oil And Gas Drilling And Production	The purpose of this Ordinance to: 1. Provide for a permitting process for responsible oil and gas operations and allow responsible economic development within the County; 2. Protect the water, air, environment, wildlife and other natural and economic resources within the County;..[189]
Colorado		

[186] http://co.chaves.nm.us/~cochaves/pdf/Comprehensive_Plan.pdf
[187] http://co.chaves.nm.us/index.php/2012-05-03-17-38-37/planning-zoning
[188] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf
[189] http://www.smcounty.net/Agenda/Oil%20and%20Gas%20Ordinance.pdf

Prowers, COLORADO		Utility and Development Permit Resolution and Prowers County Permitting & Development Guide including land use policy. [190]
Las Animas, COLORADO	Wildlife habitat analysis, special uses ect.	The Planning and Zoning Department is responsible for the administration and processing of applications for division of lands, subdivisions, rezoning and other land use cases.[191]
Bent, COLORADO	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.
Kiowa, COLORADO	Zoning and Planning	Approvals required from zoning and planning office commissioner
Otero, COLORADO	Areas having statewide impact or significance	Guidelines And Regulations For Areas And Activities Of State Interest County Of Otero State Of Colorado [192]

190 http://www.prowerscounty.net/Index.asp?HtAUNHADBcDIHwQ+NHADBcHt132i@330_DwVvZru3HhR7JKifAdCW2gmaUtOEnTljIqsXzyN8pcoB15YkQxe06bLFMSG49P+/

191 http://www.lasanimascounty.net/index.php/land-use-home

192 http://www.oterogov.com/images/LandUse/guidelinesregs20060814.pdf

Costilla, COLORADO		Comprehensive Plan outlines zoning, land use and environmental constraints.[193]
Pueblo, COLORADO	Rural land use plan, special uses	Title 17, Land Use and Zoning. The Rural Land Use process was adopted by Pueblo County to provide an alternative method of land division that encourages the clustering of single-family residential dwellings to maintain rural character, preserve open space, reduce the extension of roads and utilities, and offer landowners a new approach for developing the land without going through the full subdivision process. It provides a means of developing rural property while at the same time protecting wildlife habitat or critical areas, maintaining agricultural lands suitable for farming or ranching operations, and preserve and conserve water resources. In order to go through the Rural Land Use Process, the Cluster Development criteria must be met.[194] [195]
Oklahoma		
Roger Mills, OKLAHOMA	Zoning	Zoning permits and/or approval required for development
Greer, OKLAHOMA	Zoning	MAPC rezones for buildings , cell towers, and other structures. (Metropolitan action planning commission)

[193] http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Comprehensive+Plan+.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251756861482&ssbinary=true

[194] http://county.pueblo.org/government/county/department/planning-and-development/zoning

[195] http://county.pueblo.org/government/county/code/title17/chapter17-104

APPENDIX 6-- EXISTING CONSERVATION PROGRAMS

Name of program/Agency	Authority/Funding Source
FWS	
Four grant programs are available through the Cooperative Endangered Species Conservation Fund they include: Traditional" Conservation Grants, and; "Nontraditional" Grants: • Habitat Conservation Plan Land Acquisition • Habitat Conservation Planning Assistance • Recovery Land Acquisition Grants.)	ESA, Sec. 6 Support development of Habitat Conservation Plans (HCPs)federally listed threatened or endangered species, proposed and candidate species, and unlisted species proposed to be covered by the HCP.
USDA-	
Lesser Prairie Chicken Initiative	Prairie Chicken Initiative: The five states addressing Lesser Prairie Chicken habitat requested NRCS priority focus on improving habitat. NRCS and its conservation partners are helping farmers and ranchers enhance, restore and protect habitat for this sensitive and reclusive bird. For Fiscal Year 2013 Lesser Prairie-Chicken Initiative is funded under Wildlife Habitat Incentive Program.[196]
Wildlife Habitat Incentive Program	WHIP: The Food, Conservation, and Energy Act of 2008 reauthorized WHIP as a voluntary approach to improving wildlife habitat in our Nation. The Natural Resources Conservation Service administers WHIP to provide both technical assistance and up to 75 percent cost-share assistance to establish and improve fish and wildlife habitat..[197] In fiscal year 2011, the WHIP Program had a

[196] http://www.ks.nrcs.usda.gov/programs/lpci/index.html
[197] http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046975

<table>
<tr><td></td><td>U.S. total of 3,856 contracts, which represents 848,656 acres of land and a funding obligation of $60,580,860.

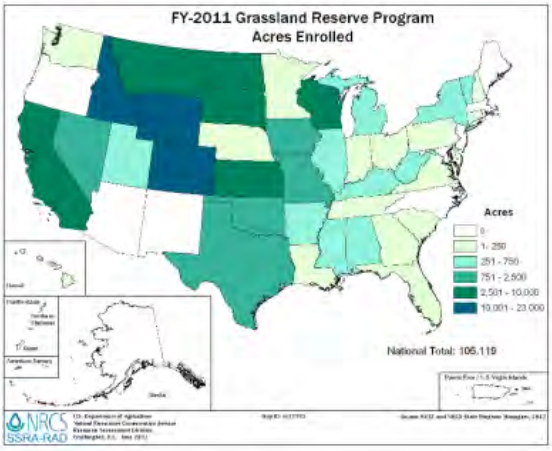
Contract Data for the impacted states[198]:
<table>
<tr><th>State</th><th># Contacts</th><th>Acres Enrolled</th><th>Funds Obligated</th></tr>
<tr><td>Colorado</td><td>12</td><td>15,655.9</td><td>$421,303</td></tr>
<tr><td>Kansas</td><td>119</td><td>23,799.1</td><td>$1,480,428</td></tr>
<tr><td>New Mexico</td><td>35</td><td>24,489.6</td><td>$779,789</td></tr>
<tr><td>Oklahoma</td><td>10</td><td>3,013.7</td><td>$185,084</td></tr>
<tr><td>Texas</td><td>283</td><td>317,448.9</td><td>$9,834,629</td></tr>
</table></td></tr>
<tr><td>Working Land for Wildlife</td><td>Working Lands for Wildlife is a new partnership between NRCS and the U.S. Fish and Wildlife Service (FWS) to combat the decline of seven specific wildlife species whose decline can be reversed and will benefit other species with similar habitat needs.

NRCS and FWS announced an agreement that will provide “long-term regulatory predictability for up to 30 years to farmers, ranchers and forest landowners participating in the U.S. Department of Agriculture's Working Lands for Wildlife (WLFW) Initiative.[199]

The agreement builds on a $33 million investment NRCS announced last spring dedicated toward producers who develop and implement conservation plans to manage and restore high-priority habitats for seven specific wildlife species across the country. The species are greater sage-grouse, New England cottontail,</td></tr>
</table>

198 http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046225

199 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

<table>
<tr><td></td><td>bog turtle, golden-winged warbler, gopher tortoise, lesser prairie-chicken and the Southwestern willow flycatcher."[200]</td></tr>
<tr><td>The Grassland Reserve Program (GRP)</td><td>GRP is a voluntary conservation program that emphasizes support for working grazing operations, enhancement of plant and animal biodiversity, and protection of grassland under threat of conversion to other uses.
2011 Easement Enrollment Data for impacted States:
<table>
<tr><th>State</th><th>Easements</th><th>Acres</th></tr>
<tr><td>Colorado</td><td>14</td><td>51,185</td></tr>
<tr><td>Kansas</td><td>74</td><td>42,133</td></tr>
<tr><td>Oklahoma</td><td>9</td><td>10,304</td></tr>
<tr><td>Texas</td><td>37</td><td>15,405</td></tr>
<tr><td>New Mexico</td><td>4</td><td>22,225[201]</td></tr>
</table>

</td></tr>
</table>

200 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

201 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/grassland/?cid=stelprdb1048273

State Acres for Wildlife Enhancement (SAFE) Approved Projects. SAFE is a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years.	In 2012, the SAFE Program identified the following priorities for the impacted States: [202] **Colorado Lesser Prairie Chicken SAFE** The goal of the Colorado Lesser Prairie Chicken SAFE is to restore and enhance 21,500 acres of short and midgrass sand sagebrush prairie to maintain and enhance lesser prairie chicken populations in Colorado. **Colorado Shortgrass Prairie SAFE** The goal of the Colorado Shortgrass Prairie SAFE is to preserve the integrity and expand the extent of shortgrass prairie managed for wildlife species in eastern Colorado. Project partners hope to accomplish this by enrolling 11,475 acres in CRP. **Kansas Upland Game Birds SAFE** The goal of the Kansas Upland Game Birds SAFE project is to improve populations of bobwhite quail and other grassland-associated wildlife by creating nesting/brood-rearing habitat on portions of crop fields. This SAFE effort will establish and maintain 30,100 acres in CRP consisting of diverse native grass and forb cover. Quail, pheasant and other grassland birds are species that will benefit from SAFE enrollments. **Kansas Lesser Prairie Chicken Habitat SAFE** The goal of the Kansas Lesser Prairie Chicken Habitat SAFE project is to enroll 30,000 acres in CRP to restore mixed-grass prairies to maintain and enhance lesser prairie chicken populations. The lesser prairie chicken is a candidate for federal listing as a threatened or endangered species. **New Mexico Lesser Prairie Chicken SAFE**

202 http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20110812_consv_en_safe.html

	The goal of the New Mexico Lesser Prairie Chicken SAFE project is to enroll 2,600 acres in CRP in the eastern part of the state to benefit the lesser prairie chicken by restoring native grasslands for breeding and brood-rearing. In eastern New Mexico, this bird and other species have been petitioned for listing under the Endangered Species Act. **Oklahoma Mixed Grass Prairie SAFE** The goal of the Oklahoma Mixed Grass Prairie SAFE project is to enroll 15,100 acres in CRP to restore mixed-grass prairie type associations in northwestern Oklahoma to benefit northern bobwhite, Cassin's sparrow and other grassland birds. **Texas Gulf Coast Prairies SAFE** The goal of the Texas Gulf Coast Prairies SAFE is to enroll 500 acres to restore grassland and shallow water habitats in the Gulf Coast Prairie region of Texas for a variety of bird species. **Texas Mixed Grass SAFE** The goal of the Texas Mixed Grass SAFE project is to enroll 78,400 acres in CRP to reconnect geographically and reproductively isolated populations of lesser prairie chickens by creating native mixed grass prairie and travel corridors. [203]

[203] ftp://ftp-fc.sc.egov.usda.gov/KS/Outgoing/Web_Files/Programs/lepc/2012/lpci_practices.pdf

APPENDIX 7 -- INDIVIDUAL, STATE AND REGIONAL VOLUNTARY ACTIONS

Name of program/Agency	Authority/Funding Source
The Western Governors Association Southern Great Plains Crucial Habitat Assessment Tool (SGP CHAT)	Range Wide 5 State Lesser Prairie Chicken Model – SGP CHAT is the result of phase one of a three-year WGA Wildlife Council project, led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken (LEPC) throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[204] [205]
Lesser Prairie Chicken Initiative Kansas Field Training	Educational seminars related to the lesser prairie chicken. [206]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[207]
Wildlife Habitat Evaluation Guide (WHEG)	The regionalized Wildlife Habitat Evaluation Guide (WHEG) for lesser prairie-chicken (LEPC) serves two functions: 1) use as a planning too lto identify limiting factors for LEPC; 2) and will be used to demonstrate what concerns/threats are most limiting range wide and how NRCS has addressed those on our LPCI contracts.[208]

[204] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[205] http://kars.ku.edu/geodata/maps/sgpchat/
[206] http://www.ksre.ksu.edu/doc13897.ashx
[207] http://kec.kansas.gov/reports/wind_siting_handbook.pdf
[208] http://www.ksre.ksu.edu/doc13898.ashx

	In 2000, the Association of Fish and Wildlife Agencies (AFWA) Teaming with Wildlife (TWW) coalition Representing more than 3,500 agencies, conservation groups and businesses led the passage of two important wildlife and fisheries conservation funding acts: Wildlife Conservation and Restoration Program(WCRP) and State Wildlife Grants(SWG) (TWW 2008 – 2011, see new TWW 2012). The following year, the United States' Congress required each state and territory to develop a "comprehensive wildlife conservation strategy" to guide the distribution of these funds(USFWS 2000). Eight elements of conservation success were identified by the US Fish and Wildlife Service (USFWS 2000) and a representative team from state fish and wildlife agencies and conservation organizations to guide the plans' development. The elements address species, habitats and communities, problems and issues, conservation actions, monitoring, plan reviews, coordination with conservation partners, and public involvement. SPECIES OF GREATEST CONSERVATION NEED (SGCN) Each state identified a list of species representative of the diversity, health and importance of the wildlife of their state. While the lists could include game and other state and federal regulated species, SGCN lists primarily focused on rare, declining, and vulnerable fish and wildlife species needing special attention for recovery, stability, and/or to prevent listings under state or federal regulation (e.g. Endangered Species Act). CONSERVATION ACTIONS AND MONITORING Conservation actions(e.g. research, survey, restoration, land or water protection, partnership-building) were defined to address the threats and issues which negatively affect species, habitats and systems. A baseline assessment of existing habitats was important for many states to define and prioritize where actions were most needed. For some states, this assessment could not be accomplished with the available data; therefore, baseline development itself became a conservation action. Actions were developed on

	the framework of existing conservation for each state: private landowner outreach, partnerships with other agencies and organizations, public involvement, legislative and regulatory support, to name a few. Measuring and reporting progress, lessons learned and successes ("effectiveness") is best accomplished through monitoring. This component is very important, yet frequently it is the most difficult to achieve due to very limited time, money and human resources. MOMENTUM 2005 – 2011 By 2006, 56 plans were created – one for each US state and territory – and approved by USFWS Regional review teams(TWW 2012). These plans were called State Wildlife Action Plans(SWAP) or Comprehensive Wildlife Conservation Strategies(CWCS). Since plans were approved, conservation partners and resource conservation agencies have seen the value in these plans grow as information resources, support or guidance for their conservation activities, and platforms for conservation practice improvement.[209]
Colorado Wildlife Action Plan	Submitted to the U.S. Fish and Wildlife Service on September 29, 2005, and it was finalized November 2, 2006. • 210 species were identified as Species of Greatest Conservation Need (SGCN). [210]
Interagency Group	W. Governor's Association Interstate Working Group
Upland Bird Grassland Habitat Strategy on the Eastern Plains	Grassland wildlife habitat conservation in eastern Colorado is implemented through a diverse mix of programs and efforts. Colorado Parks and Wildlife (CPW) has identified and prioritized areas of high upland wildlife habitat and population potential, which typically coincides with historic mid-grass or sand-sage prairie habitats.
Pheasant Habitat Improvement Program,	The Pheasant Habitat Improvement Program (PHIP) is a cooperative effort between the Colorado Parks and Wildlife,

[209] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_overview_2012.pdf
[210] http://wildlife.state.co.us/SiteCollectionDocuments/DOW/WildlifeSpecies/CWCS_FinalReport2006.pdf

(PHIP)	Pheasants Forever Inc., and local Pheasants Forever Chapters in Colorado. The program is designed to assist landowners in developing and enhancing habitat for ring-necked pheasants. PHIP is offered within the core pheasant range in Colorado, including the counties of Morgan, southeastern Weld, Logan, Phillips, Sedgwick, Yuma, Washington, Kit Carson, Cheyenne, Kiowa, Prowers and Baca.[211]
Private Lands Technical Assistance Programs	Private Landowner Assistance offers a wide variety of programs to assist private landowners on improving fisheries and wildlife on their property and can provide technical support and assistance on improving wildlife habitats.[212]
Habitat Partnership Program (HPP)	This grant is designed to encourage multiple entities to partner with the Habitat Partnership Program on large scale habitat improvement projects which, when completed, will provide benefits to livestock, private land owners, land managers, big game animals and other wildlife species. Habitat improvement projects include using mechanical and chemical tools to improve/increase available habitat and forage. Typical habitat improvement projects done by HPP include brush manipulation (hydroaxing, roller chopping, Lawson aerating, burning, etc), weed control using biological and chemical means, water developments (maintaining existing water sources and developing new ones), fertilizing and reseeding.[213]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are paving the way of our future by developing best management practices or BMPs that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy

[211] http://wildlife.state.co.us/LANDWATER/PRIVATELANDPROGRAM/PHIP/Pages/PHIP.aspx
[212] http://www.kdwpt.state.ks.us/news/Services/Private-Landowner-Assistance
[213] http://www.riparianrestorationconnection.com/component/content/article/193-habitat-partnership-program-hpp-habitat-improvement-grant

	from renewable sources by 2020 in a wildlife friendly manner.[214]
LESSER PRAIRIE-CHICKEN WILDLIFE MANAGEMENT PLAN	The Texas Parks and Wildlife Department(TPWD) provides free technical assistance to landowners and land managers interested in wildlife management through the private lands enhancement program. Local biologists work with land owners to develop and then meet the wildlife management goals and objectives for all species of land owner interest on a given property. A wildlife management plan (WMP) can provide numerous benefits for landowners. Once implemented it improves habitat, potentially increases wildlife numbers, and can improve grazing resources. Additionally, use of a WMP promotes aesthetic value, and therefore can raise property value. The lesser prairie-chicken is a candidate species for listing under the Endangered Species Act. This particular WMP (specific to protecting and improving lesser prairie-chicken habitat) will fulfill the requirements for entering into a Candidate Conservation Agreement with Assurances(CCAA. [215]
Texas Conservation Agreement	CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES FOR LESSER PRAIRIE-CHICKENS between TEXAS PARKS AND WILDLIFE DEPARTMENT and U. S. FISH AND WILDLIFE SERVICE[216]
TEXAS CONSERVATIONACTIO N PLAN State/Multi-Region	Through the Texas Conservation Action Plan (TCAP), ecologists and other stakeholders all across the state have identified 1311 Species of Greatest Conservation Need (SGCN), 232 Rare Plant Communities, the best examples of habitats and those at risk, issues affecting our resources, and potential solutions to continue to protect lands and water for future generations of

[214] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml

[215] v http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd_1046b_w7000_lesser_prairie_chicken_wmp.pdf

[216]http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

	people, fish and wildlife. The challenges are many, but the landscape of conservation partners and opportunities is extensive. This plan is designed to help interested folks connect and put into practice the most needed conservation actions. [217]
An Assessment of Herbicide Treatment and Grazing on Lesser Prairie Chicken Survival, Nest Site Collection[218]	Blake Grisham- Department of Natural Resources Management, Texas Tech University [219]
Candidate Conservation Agreement With Assurances -Oklahoma	The U.S. Fish and Wildlife Service (Service) has approved the Oklahoma Department of Wildlife Conservation's (ODWC) Candidate Conservation Agreement with Assurances (CCAA) for the lesser prairie-chicken. - approved 2/5/13[220]
Great Plains HCP	HCPs are an integral component of an application for an Incidental Take Permit (ITP) under the federal Endangered Species Act (ESA). ITPs are a voluntary tool that non-federal entities may use to receive authorization for "take" of federally-listed (i.e., officially recognized as endangered or threatened) species of wildlife that may occur in connection with otherwise lawful activity. "Take" is defined in the ESA as, "…to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" with respect to federally-listed endangered species.[221]

[217] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_statewide_multiregion_handbook.pdf
[218] http://www.ksre.ksu.edu/doc13892.ashx
[219] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1047721.pdf
[220] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf
[221] http://www.greatplainswindhcp.org/documents/fact_sheet.pdf ; http://www.greatplainswindhcp.org/aboutthehcp.cfm

Oklahoma Conservation Commission	Commission created to assist with state conservation and education efforts and is an authorized rulemaking entity. [222] [223] The Oklahoma Conservation Commission and conservation districts accomplish conservation of renewable natural resources through soil and water conservation, landuse planning, small watershed upstream flood control, abandoned mine land reclamation, water quality monitoring, environmental education and wetlands conservation.
Ecology and Management of the Lesser Prai rie-Chick en[224]	Oklahoma Cooperative Extension Service, Division of Agricultural Sciences and Natural Resources, Oklahoma State University
Wildlife Credits Program	Offers stewardship payments to agricultural producers for work done to protect and expand habitat for the rare upland bird. Is made possible with an agreement between the Wildlife Department, Oklahoma Conservation Commission and the Oklahoma Association of Conservation Districts. [225]
Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (Tympanuchus pallidicinctus) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.[226]
Oklahoma Lesser Prairie Chicken Conservation Plan (OLEPCCP	a conservation plan to address the decline of the lesser prairie chicken (LEPC) in Oklahoma. The conservation plan will identify management strategies to improve LEPC population viability through improvements to LEPC habitat emphasizing tools and incentives to encourage landowners to partner with agencies in conservation efforts while achieving their land use needs.[227]

[222] http://www.ok.gov/conservation/
[223] http://www.ok.gov/conservation/About_Us/Rules_and_Rulemaking/index.html
[224] http://www.environment.ok.gov/documents/OKWindEnergy/EcologyMgmtLesserPrairieChicken.pdf
[225] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[226] http://www.wildlifedepartment.com/lepcdevelopmentplanning.htm
[227] http://www.wildlifedepartment.com/wildlifemgmt/lepc/cons_plan.htm

Habitat Evaluation Guide for the Lesser Prairie-chicken[228]	Guide for Management and Habitat Restoration co-authored by Oklahoma State University, George Miksh Avian Research Center, and the Nature Conservancy.
Eastern Ceder Removal	NRCS is using new technology to enhance existing satellite images to identify redcedar growth and estimate the inventory available for harvest. Counties that are included in this Cedar Mapping project: Cimarron, Ellis, Murray, Okfuskee, Pottawatomie, and Woodward.[229]
Lesser Prairie Chicken Initiative Core Conservation Practices	NRCS Programs for habitat restoration include: Brush Management, Early Succession Habitat Development, Firebreak , Fence, Obstruction Removal, Prescribed Grazing, Prescribed Burning, Range Planting, Restoration of Rare and Declining Habitat, Watering Facility supporting programs. [230]
Kansas Comprehensive Wildlife Conservation Plan[231]	The theme of Kansas' Comprehensive Wildlife Conservation Plan (CWCP) is "Keeping Common Species Common." A major premise of Kansas' approach to developing the CWCP was to use existing information - not to start from scratch or conduct new studies. The process relied heavily on experts and interested parties participating in the process to bring the best available information into the plan.
LONG-RANGE PLAN For The Management of Lesser Prairie Chickens in New Mexico 2002-2006	The goal of the plan is to satisfy the public's lesser prairie-chicken related recreational and ecological interests and resolve related socio-economic issues. A three-fold approach will be integral in achieving this: 1) We will obtain a better understanding of LPC abundance, distribution and population trends. 2) We will continue to seek public involvement in and support of LPC management efforts. 3) We will work with private landowners and land management

[228] ftp://wiley.kars.ku.edu/windresource/Habitat%20Evaluation%20Guide%20for%20the%20LPC.pdf
[229] http://boisecitynews2.wordpress.com/2009/03/03/oklahoma-launches-plan-to-battle-eastern-redcedar/
[230] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcsdev11_023947.pdf
[231] http://kdwpt.state.ks.us/news/Services/Kansas-CWCP/Kansas-CWCP

	agencies to provide habitat necessary to ensure long-term conservation of LPC habitat.[232]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH[233]	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.
Southeast New Mexico Lesser Prairie-Chicken Working Group	NMDGF, as part of the Department's outreach efforts, NMDGF in collaboration with the USFWS, Bureau of Land Management (BLM), New Mexico State Land Office (SLO), and Wildlife Management Institute, proposed that a "Southeast New Mexico Lesser Prairie-Chicken Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LEPC in southeastern and east central New Mexico. The organizers hoped the various constituencies would be able to negotiate a collaborative plan that would, when implemented, improve the status of the species such that federal listing would no longer be warranted, while protecting the interests of the participating parties. In 2005, the Working Group adopted a conservation strategy and recommendations which laid out general approaches, priorities and parameters for achieving the goal of LEPC conservation and recovery while maintaining economic values and traditional land uses. The strategy document outlines and prioritizes a variety of recommended programs, projects, and practices for reducing threats to the LEPC while maintaining other uses of the land.
GIS habitat analysis for lesser prairie-chickens in southeastern New Mexico	Geographic Information System (GIS) habitat analyses for lesser prairie-chicken (LPCH, Tympanuchus pallidicinctus) conservation planning. The 876,799 ha study area included most of the occupied habitat for the LPCH in New Mexico. The objectives were to identify and quantify: 1. suitable LPCH habitat in New Mexico, 2. conversion of native

232 http://www.wildlife.state.nm.us/conservation/documents/PCLongRange.pdf

233 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	habitats, 3. potential for habitat restoration, and 4. unsuitable habitat available for oil and gas activities.[234]
Range-wide Population Estimation and Monitoring for LPC	A range-wide sampling framework and survey method is being developed to estimate total abundance of active leks for the population of LEPC. In addition, standard operating procedures are being developed for aerial surveys and ground truthing surveys.[235]
Interstate Collaboration Range Wide Conservation Plan	Lesser Prairie Chicken Interstate Working Group A focused conservation effort for LPC was described and approved by WAFWA through the Lesser prairie chicken conservation initiative (LPCCI) drafted by the Lesser Prairie Chicken Interstate Working Group (LPCIWG) in May 2008. The LPCIWG is one of the technical groups associated with the WAFWA Grassland Initiative and the 5 cooperating states have and continue to commit staff to this endeavor since it was formally established in 1996. The Lesser Prairie-Chicken (LPC) Interstate Working Group of the Western Association of Fish and Wildlife Agencies (WAFWA) is developing a range-wide conservation plan to increase the population of the LPC, in partnership within federal agencies and others. The states include Colorado, Kansas, New Mexico, Oklahoma and Texas. The conservation plan emphasizes tools and incentives to encourage landowners and others to voluntarily partner with agencies in LPC habitat conservation efforts, while also achieving their land use needs.236

[234] http://www.ksre.ksu.edu/doc13889.ashx
[235] http://www.wafwa.org/documents/Final_Study_Design_Appendices_12_8_2011.pdf
[236] http://www.wafwa.org/html/prairie_chicken.shtml

Memorandum Of Understanding For Conservation And Management Of Lesser Prairie-Chickens And Associated Species And Their Habitats	The purpose of this Memorandum of Understanding (MOU) is to provide, under auspices of the Western Association of Fish and Wildlife Agencies (WAFWA), for interagency cooperation in conservation and management of lesser prairie-chickens (Tympanuchus pallidicinctus) and associated species and their habitats across their current 5-state range (i.e. parts of Colorado, Kansas, New Mexico, Oklahoma, and Texas). The purpose of this MOU is also to provide for cooperation among participating agencies in the development and implementation of conservation programs for lesser prairie-chickens (LEPC) and their associated habitats. The participating agencies agree that cooperation is necessary to collect and analyze data on lesser prairie-chickens and their habitats, and to plan and implement actions necessary to establish and/or maintain viable LEPC populations that are sufficient to preclude present or future endangerment, within the constraints of approved budgets.[237]

[237] http://www.wafwa.org/documents/LPCCI_FINAL.pdf

New Mexico CCCA	This Candidate Conservation Agreement (CCA) for the LPC and the SDL represents a collaborative effort between the FWS, the Bureau of Land Management (BLM), and the Center of Excellence for Hazardous Materials Management (CEHMM). The CCA builds upon the BLMs "Special Status Species Resource Management Plan Amendment" (RMPA) (completed in April 2008) for southeast New Mexico. The RMPA established the foundational (minimum) requirements that will be applied to all future Federal activities, regardless of whether a permittee or lessee participates in this CCA. The strength of the CCA comes from the implementation of additional conservation measures that are additive, or above and beyond those foundational requirements established in the RMPA.[238] .As of July 15, 2012, thirty oil and gas companies are enrolled in the CCA/A for a total of 808,000 acres (the participating Federal agency in this case is the Bureau of Land Management (BLM)). In addition, forty-one New Mexico ranchers have enrolled a combined 1.5 million acres of rangeland in the CCA/A and the New Mexico State Land Office has enrolled 248,000 acres in the CCAA. Partners in the NM CCA/A include BLM, CEHMM (non-profit third party to manage funds and implement CCA/A's), New Mexico Department of Game and Fish (NMGF), New Mexico State Land Office and several oil-gas companies. The CCA/A includes the entire range of the lesser prairie-chicken in New Mexico.

[238] http://www.fws.gov/southwest/es/Documents/R2ES/LPC-SDL_CCA-CCAA_2008.pdf

North American Landbird Conservation Plan-co-authored by States, Industry and FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [239]
New Mexico LPC/SDL Working Group Conservation Plan	Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico In December, 2002, representatives of NMDGF, FWS, the Federal Bureau of Land Management (BLM), the New Mexico State Land Office (NMSLO), and the Wildlife Management Institute proposed that a "Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LPC and SDL.[240]
Land Acquisition for Habitat	In May 2008, following an extensive public planning process, the Bureau of Land Management (BLM) designated an Area of Critical Environmental Concern (ACEC) about 35 miles east of Roswell. The designation is meant to provide much-needed habitat for two species being considered for listing under the Endangered Species Act: the Lesser Prairie-chicken and the sand dune lizard. To conserve this high value habitat, the BLM requested The Conservation Fund's assistance in acquiring key lands in and around the special area. The Fund has worked on several projects that together have protected about 58,000 acres of land.

[239] http://www.partnersinflight.org/cont_plan/#Access
[240] http://nwcos.org/Resources/LPC_SDL_Conservation_Strategy_CD.pdf

Land Acquisition for Habitat	The Johnson Ranch in southeastern New Mexico has been purchased by The Nature Conservancy. The 9,170 acre property contains critical habitat for 25 Species of Greatest Conservation Need—as identified in the state's Comprehensive Wildlife Conservation Strategy (also known as Wildlife Action Plan)—including the lesser prairie-chicken.
POWERLINE PROJECT GUIDELINES NEW MEXICO DEPARTMENT OF GAME AND FISH	Recommendations for conservation and development without wildlife disturbances. [241]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.[242]
RECOMMENDATIONS TO MINIMIZE ADVERSE IMPACTS OF WIND ENERGY DEVELOPMENT ON WILDLIFE 2012	The New Mexico Department of Game and Fish (NMDGF) does not have regulatory authority specific to wind power development, nor is there any other statewide permitting authority in New Mexico. The information in this guideline is intended for use by wind project developers, their consultants, local government and the general public. Developers are encouraged to contact NMDGF for project-specific comments and recommendations. Specific locations of listed species will be kept confidential, however other information shared with NMDGF may be accessible to the public through the NM Inspection of Public Records Act. NMDGF Guidelines referred to herein may be found in the

241 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/2007POWERLINEGUIDELINES.pdf

242 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	Habitat Handbook, under the Conservation tab on the Department website.[243]
Oklahoma Conservation Easement	The Oklahoma Wildlife Conservation Commission and the Department of Wildlife Conservation shall not enter into or approve a setback or conservation easement that includes a setback related to energy or agricultural structures and regarding a threatened, endangered or candidate species that is more restrictive than those created pursuant to federal law, rules or guidelines. B. Prior to entering into or approving a conservation easement or setback pursuant to subsection A of this section, the Commission and the Department shall review all information and studies presented to the Commission or Department by a public or private entity affected by the proposed conservation easement or setback.[244]
Colorado Conservation Easements	"Conservation easement in gross", for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural,

243 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

244 Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103b - Setback or Conservation Easement Related to Energy or Agricultural Structures and Threatened or Endangered Species. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466365&hits=481+480+475+474+260+259+253+252+189+188+182+181+12+11+5+4+

	horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.[245]
Colorado Conservation Easements	Nature of conservation easements in gross. (1) A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in section 38-30.5-102 and transferable by any lawful method for the transfer of interests in real property in this state. (2) A conservation easement in gross shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding that it may be negative in character. (3) A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it. (4) The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating the easement. (5) A conservation easement in gross that encumbers water or a water right as permitted by section 38-30.5-104 (1) may be created only by the voluntary act of the owner of the water or water right and may be made revocable by the instrument creating it.[246]
Colorado Conservation Easements	The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary. Further, the general assembly finds and declares that it is in the public interest to determine who may receive such easements and for what purpose such easements may be received.[247]

[245] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[246] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[247] Title 38. PROPERTY - REAL AND PERSONAL, REAL PROPERTY, Interests in Land, Article 30.5. Conservation Easements.

Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	Interior Secretary Salazar announces $57.8 million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP- The planning proposal lands encompasses the whooping cranes migration route in the U.S. and their wintering grounds, along with containing a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[248]

http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=27609&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

[248] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html

APPENDIX 8-LITERATURE CITED

[Please note, where references are made to literature cited in the U.S. Fish and Wildlife Service's 2012 Proposed listing, for consistency, CESAR has adopted the abbreviated citation conventions used in that document.]

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Name: Amos Eno

Comments: The attached comments are provided on behalf of Amos Eno, President of Resources First Foundation (RFF), in response to the Federal Register publication of a Notice of Intent to prepare an Environmental Impact Statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP), directed to the lesser prairie-chicken (Docket No. FWS–R2–ES–2013–0134 (Feb. 7, 2014)).

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Comments on the American Habitat Center Proposed Stakeholder Conservation Strategy for the Lesser Prairie-Chicken

The following comments are provided on behalf of Amos Eno, President of Resources First Foundation (RFF), in response to the Federal Register publication of a Notice of Intent to prepare an Environmental Impact Statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP), directed to the lesser prairie-chicken (Docket No. FWS–R2–ES–2013–0134 (Feb. 7, 2014)).

Amos Eno and Resources First Foundation

RFF appreciates the opportunity to comment on the American Habitat Center's proposed Stakeholder Conservation Strategy for the Lesser-Prairie Chicken. RFF was founded in 2000 to support and develop innovative conservation programs to strengthen and sustain rural communities, economies, and green businesses, and to support private sector conservation initiatives. RFF's founder, Amos Eno, has been working with species and their landscapes since the inception of the Endangered Species Act (ESA) over forty years ago. Eno was integral in coordinating landscape scale conservation to restore grizzly bear habitat as Executive Director of the National Fish and Wildlife Foundation and designed the California Candor recovery program. Under the direction of Eno, RFF has developed a wide array of web-based initiatives to provide for the multifaceted needs of private landowners, land and energy conservation professionals, and business professionals to enhance conservation on working lands and preserve rural economies. Most recently, RFF has developed a website designed to engage landowners in habitat conservation for the Lesser Prairie Chicken (LPC) and other species, entitled the Critical Habitat Management Portal (CHMP).

Introduction

The American Habitat Center's proposed Stakeholder Conservation Strategy (SCS) contains procedural and substantive flaws that render the EIS scoping process ineffective and premature. The SCS fails to provide sufficient information on the species and the conservation actions proposed to be implemented under the HCP to permit meaningful comment on the scoping of an EIS. For example, the HCP's conservation metrics are deficient in comparison to those described in the Range-wide Conservation Plan for the Lesser Prairie Chicken (RWP) and its included Oil and Gas Candidate Conservation Agreement with Assurances. Additionally, the SCS appears to be similar to the Texas Conservation Plan (TCP) for the dune sagebrush lizard and bears some of the same infirmities, such as the confidentially provision, that have been challenged in court.

The SCS also fails to satisfactorily consider the comprehensive range-wide conservation efforts that have substantial commitment by landowners and are experiencing great success with on the ground implementation across the five range states. The conservation programs included in the RWP, created by the Western Association of Fish and Wildlife Agencies, have already conserved over ten million acres of LPC habitat and are currently being implemented throughout the five state range. Approximately 2.5 million acres are enrolled in the range-wide Oil and Gas CCAA, 3 million acres in the

New Mexico CCA/CCAA, and 4.5 million acres in NRCS's Lesser Prairie Chicken Initiative. WAFWA's RWP and other state and federal agency actions that have received FWS approval or endorsement must be incorporated as the starting point for any EIS scoping discussion.

RFF therefore suggests that deficiencies be corrected and EIS scoping be reopened after correction.

Comments

1. Additional Time Must be Provided for the EIS Scoping Process

Additional time to complete adequate scoping of the SCS is needed to ensure that all appropriate inquiries have been addressed. To begin, the SCS's timeframe should be adjusted to reflect the realities of environmental review. The SCS will not have an immediate impact on LPC habitat conservation due to NEPA public comment and review requirements, therefore it should not be portrayed to operate in a 'continuous and seamless manner', addressing conservation both pre and post listing. It is not realistic to prepare and implement a CCAA in under a month that will adequately address habitat conservation. Existing conservation programs, including multiple CCAAs, are currently being implemented. Therefore, the SCS should be adjusted to consider the impacts these programs will have on LPC habitat conservation. Furthermore, coordinating an EIS that covers five state ranges, as well as state, regional and federal parties, will require an extensive review. The possibility of finalizing a thorough evaluation of proposed SCS habitat impacts and alternatives by the proposed deadline of December, 2014 will likely be inadequate.

The American Habitat Center (ACH) also includes stakeholders whose ability and experience in developing a conservation plan at this scale pales compared to WAFWA credentials. In order to support landscape scale coordination, the SCS should incorporate a broader range of experienced stakeholders. By incorporating additional stakeholders, the ACH will promote the credibility of the SCS and HCP by reducing the possibility of self-dealing and administrative abuse. To address these concerns, the HCP's provisions providing for the self-elected advisory committee and board of trustees should be clarified to depict who will appoint these members, what oversight responsibilities will be present, and include a much more influential role for traditional and experienced wildlife managers, such as fish and game agencies. The provision electing scientists with demonstrated abilities does not assign appropriate credentials for determining the appropriate level of scientific experience and should also be clarified. Similarly, the provision requiring an understood and qualified third party for verification is unclear. Further explanation is needed on what constitutes "expressly understood duties" and who will delineate and enforce them.

As mentioned in the introduction, the SCS has similar confidentially provisions to the TCP, which have been proven to be problematic. EIS scoping should be extended to provide for a more thorough evaluation of state confidentiality laws, such as the strict requirements in Texas and New Mexico, as well as how to protect private information from FOIA requests.

The SCS is a late entry into LPC conservation and has the potential to compete with existing conservation programs, such as USDA's Conservation Reserve Program and other functioning state and federal programs. The HCP is predicated on listing, an issue in and of itself that could imperil ongoing conservation efforts and induce a widespread adverse reaction among landowners. Scoping of a post listing tool, such as the HCP, must await a listing decision. Thus, EIS scoping must be reopened after or extended through the effective date of any decision to list the LPC.

In order to permit stakeholders to provide meaningful comments during the EIS scoping period, more information is needed on how the HCP will be implemented. For example, in the habitat loss provision the HCP does not mention how it will address drought, which is the leading cause for LPC population decline. In the oil and gas provisions the HCP neglects to address surface water and aquifer depletion, and requires written consent for effects of setting aside property, which could present an insurmountable task due to vertical parcelization. There is also a provision providing for habitat conservation in Nebraska, which has not been supported by research or incorporated into the document's scoping procedure. Finally, it contains restrictions, such as those on traffic and requiring speed limits, which are unenforceable and without appropriate management frameworks.

2. The SCS is Deficient

The SCS is defective in a variety of functional ways. As self-described, the SCS contains three primary components; the Habitat Exchange (Exchange), the Habitat Quantification Tool (HQT), and the Regional Habitat Conservation Plan (HCP). The HCP in turn references the HQT as the means for determining debits and identifies the Exchange as the primary means for meeting mitigation obligations. Thus, the three components are inextricably linked and a deficiency in one of the components renders the remaining components equally as deficient.

Among the HCP's and Exchange's defects are the failure of the documents to fully and properly consider the environmental impacts in the LPC's habitat that have already been approved by FWS. It must be noted that the SCS does not and cannot exist in a vacuum. Thus, incidental take permitted by the HCP, quantified by the HQT, or mitigated through the use of the Exchange must be considered in light of the incidental take FWS has already authorized through other tools, such as the RWP and approved CCAAs.

In addition, other plans covering identical habitat for identical industries, minimize and mitigate impacts to the species to a greater extent and should be explicitly included in the scoping analysis. Pursuant to 50 CFR 17.22 (b)(2)(i)(b), an incidental take permit may be issued only upon a finding that an applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings. The HCP cannot satisfy this criteria because it contains conservation measures that are less protective of the LPC than the RWP. For example, during the LPC breeding season oil and gas activities are restricted within a half of a mile of a lek in the HCP, whereas the RWP restricts activities within one and quarter miles of an active lek. Other plans that are more protective and that are being implemented through a broad cross section of stakeholders establish what is practicable to the maximum extent. The

EIS scoping process must await revisions to the HCP that will bring its conservation measures in line with existing endorsed or approved plans.

The SCS's HCP provides no enforcement role for the FWS. Rather, the HCP merely states that nothing in the HCP restricts FWS from enforcing under 50 CFR 13.28(a), which is not relevant because this provision addresses FWS's ability to enforce against a permittee and fails to provide FWS a role in enforcement between the permit holder and a plan participant. The HCP tacitly recognizes this issue by explaining that the permit holder alone enforces. Furthermore, the enforcement provisions are vague and provide little information regarding who, when, where and how enforcement might take place. Again, the EIS scoping process must await revisions to the HCP that will provide enforcement provisions that include a clearly defined role for FWS.

Finally, the Exchange employs a conservation credit system that resembles a BitCoin banking system. The potential transaction value of these conservation credits is unclear and potentially infeasible. As former Federal Reserve Chairman, Ben Benanke, observed on CNBC in reference to BitCoin "… it holds no intrinsic value, only transactional value" (8 March 2014). Without evidence of established or reliable markets, reliance on these markets could create significant barriers in funding for conservation across the range and sow confusion among targeted landowners. NEPA requires a full examination of the proposed Exchange's environmental and socioeconomic impacts and repercussions, particularly as they pertain to New Mexico and west Texas.

3. EIS Scoping Must Await the 2014 LPC Aerial Survey

In addition to the HCP's fundamental flaws, the scoping process outlined in materials provided by the SCS proponents requires that any EIS take into consideration the results of the 2014 LPC aerial survey. The 2014 aerial survey is scheduled to begin in March and it is our understanding that FWS has been promised results in July 2014. When available, the results of the survey must be incorporated into the HCP, the HQT, and the Exchange. Thereafter, the scoping process must be reopened for public comments so that the environmental impact of any associated incidental take permit may be fully assessed in light of the best available data.

Conclusion

RFF makes the following final points on the AHC's SCS for the LPC:

First, the NEPA scoping process provided is not adequate for meaningful public participation. "For an EIS, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions." However, the scoping document put forward is deficient in engaging the numerous programs of federal, state and local agencies. It does not address concerns of the public and holds great potential for confusing the landowners engaged with WFAWA and the RWP. The No Action Alternative by default should include the RWP and be the starting place for scoping discussion.

Second, there is inadequate analysis of major component parts of the proposed SCS. Past actions, such as those concerning the dune sagebrush lizard HCP and the Fort Hood plan, should be incorporated and deficiencies examined carefully. The SCS must also include provisions that minimize the potential for self-dealing and permit FWS enforcement oversight. The HCP and related documents must be revised and the EIS scoping process reopened only after all deficiencies have been corrected.

Third, because the SCS is a post listing tool, the EIS scoping process must be reopened after a listing decision is made and, in the event of a decision to list the LPC, no earlier than starting with the date the 2014 LPC aerial survey is available.

MARLA PEEK
DIRECTOR OF REGULATORY AFFAIRS

WRITER DIRECT
(405) 523-2437
FAX (405) 530-2634
marla.peek@okfb.org

March 10, 2014

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

Re: EIS for the Stakeholder Conservation Strategy/American Habitat Center Habitat Conservation Plan for the Lesser Prairie Chicken

To Whom It May Concern:

Please accept these comments on behalf of the Oklahoma Farm Bureau, Oklahoma's largest general farm organization, with about 100,000 member families. The proposed listing of the Lesser Prairie Chicken (LPC) as threatened affects thousands of our members in northwestern and the panhandle of Oklahoma. I serve on the policy committee for the Stakeholder Conservation Strategy (Strategy). I was able to attend the scoping meeting in Woodward on February 26. I found it to be comprehensive and instructive. There were several questions from the audience and they were answered politely and completely by Allison Arnold with the U.S. Fish and Wildlife Service (Service) and Steve Manning with Natural Resources Solutions.

It is inspiring to see organizations, like Farm Bureau and other agricultural organizations which represent landowners, working together with the oil and gas industry and the Environmental Defense Fund toward the common goal of preserving and restoring LPC populations and habitat. At a time when there is never enough federal or state dollars for threatened and endangered species conservation, the Strategy may very well be the best model for species conservation for the future. This model has been built to be robust, with thorough scrutiny and oversight as the operating structure places the Service at the top of the Strategy.

As a policy committee member involved in the stakeholder process, I thought the planning structure worked well. Oklahoma Farm Bureau came into the project at the urging of the Texas Farm Bureau. I was pleased to see the level of cooperation and respectfulness the stakeholders paid to one another. That the Strategy and this Environmental Impact Statement are being completed so quickly is evidence of how well everyone has worked together.

Following are some of the elements of the Habitat Exchange that we really like.

- Dynamic permanent conservation offset. As we understand this entirely new concept, a dynamic permanent offset keeps the net conservation benefit constant, even though the offset may change from one piece of property to another, thus making the offset permanent. This will be managed by the Habitat Exchange Administrator.
- Free-market based buying and selling of credits and debits.
- Creation of the Habitat Quantification Tool.

- Creation of a Reserve Account to keep the net conservation benefit to the chicken whole when circumstances happen to a property owner which are beyond his control.

The entire process of creating the Strategy has been a pleasure. We do not wish to see the LPC listed as threatened; however, we are hopeful this Strategy will be successful for the LPC, the environment and the landowners.

Thank you for your consideration in this matter.

Sincerely,

Marla R. Peek
Director of Regulatory Affairs

cc: OFB Board of Directors

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

Re: FWS/R2/ES-ARD/056558
Via: Facsimile (505) 248-6788 and US Post

Dear Ms. Shaughnessy:

The Finney County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP coontains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including an consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act*." The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law*." For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Duane Drees

Roman Halbur

Dave Jones

Larry Jones

Clifford Mayo

Gove County

Office of the County Commission
520 Washington St. PO Box 128
Gove, KS 67736 785-838-4456

CC'd Sam J

February 24, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

FEB 2 7 2014

Re: FWS/R2/ES-ARD/056558
Via: Facsimile (505) 248-6915 and US Post

Dear Ms. Shaughnessy:

The Gove County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The notification accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparation of an Environmental Impact Statement (EIS) during the Lesser Prairie Chicken Listing determination, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 this county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations and through the notification letter have accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link is established, we expect similar coordination efforts during future activities, consistent with the NRCP.

Currently, our county participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves to identify, assess and evaluate impacts to human and natural environments projected from contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally-available data and information be utilized in the process. This methodology affords side-by side comparison of all proposed alternatives, including cost considerations, implications to cultural resources, the effects of no-action, and reasonable steps required to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report called "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory, procedural and economic-impact requirements, and evaluation of historical experiences local officials have had with USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement, and a Habitat Conservation Tool; as a unit, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in a EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting the Draft EA places the USFWS-financed, 5-State WAFWA Rangewide Conservation Plan into the NEPA process - negating USFWSs federal register position that "*NEPA does not apply as a matter of law.*" For reasons detailed in the KNRC Comments, the Draft EA was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA remains insufficient to support a Finding of No Significant Impact (FONSI).

In contrast to information presented in the Draft EA, KNRC identified substantial cost impacts to regional communities arising from increased energy rates in the event mitigation proposed by 5-State Rangewide Conservation Plan were to be implemented. Similarly, testimony given at the KNRC Public Hearing identified potential land devaluations of $2.1B and significant, unaddressed implications arising from the here-to-fore unaddressed issue of Split Estates.

To be meaningful, the EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context alongside all reasonable alternatives (40 CFR §1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS Plan is unavailable to our County for review and consideration, we are not able to understand or meaningfully prepare for presentations proposed for the Draft EIS Scoping Meeting.

Considering the legal, procedural and technical aspects of the Lesser Prairie Chicken Listing Proposal, we recommend USFWS to include the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22, 2013 Conference Opinion by USFWS.

Cordially,

Mahlon A. Tuttle, Chairman

Bart Briggs, Member

Michael R. Gillespie, Member

GRAHAM COUNTY BOARD OF COMMISSIONERS
Don Scott, Chairman-Todd Toll, Member-Roger Davignon, Member
Graham County Courthouse
410 N Pomeroy
Hill City, Kansas 67642
(785)421-3453

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Graham County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

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The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Roger Davignon

Don Scott

Todd Toll

GRANT
— COUNTY —
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Grant County Commissioners
108 S. Glenn
Ulysses, Kansas 67880
Phone 620-356-1335
Fax 620-356-3081
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FEB 2 0 2014

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service-Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Grant County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

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This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

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The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Carl Higgs

Linda McHenry

Martin Long

OFFICIAL SEAL GRANT COUNTY, KANSAS

March 10, 2014

Public Comments Processing
Docket # FWS-R2-ES-2013-0134

Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
MS 2042–PDM
Arlington, VA 22203

Subject: Comments on U.S. Fish and Wildlife Service Notice of Intent To Prepare an Environmental Impact Statement for a Habitat Conservation Plan for Commercial Developments, Including Energy Developments, and Agricultural and Conservation Activities Within Six States

Dear Regional Director Nicholopoulos:

Thank you for the opportunity to comment on the Service's planned environmental impact statement (EIS) on a proposed application for an Incidental Take Permit (ITP) including a Habitat Conservation Plan (HCP).

We would like to clarify that EDF is not a co-applicant on the Lesser Prairie-chicken HCP as was stated in the Notice of Intent. EDF is not seeking incidental take nor was it an author of the Habitat Conservation Plan (HCP). However, we are in favor of the US Fish & Wildlife Service (USFWS) evaluating the environmental impacts of the HCP.

The proposed HCP includes a mitigation option called Habitat Exchange that EDF helped to develop along with some of the same stakeholders referenced in the Notice of Intent. That stakeholder group includes energy companies, agricultural and conservation interests committed to finding a practical way to address a possible listing of the lesser prairie chicken. We strongly support the Habitat Exchange as a new tool to minimize and mitigate permitted development impacts. The Lesser Prairie-Chicken Habitat Exchange allows developers impacting lesser-prairie chicken to acquire credits from farmers and ranchers who have enhanced habitat. It holds the potential to contribute to species recovery by engaging landowners in ecosystem management for the species and shifting landowner perceptions of listed species from a liability to an asset. We think this system shows great promise as a meaningful mitigation measure for industry participants in a USFWS-approved HCP.

The proposed HCP also includes provisions that would allow incidental take of the lesser prairie chicken . EDF believes that HCPs should achieve the following:

1875 Connecticut Avenue, NW
Washington, DC 20009
T 202 387 3500
F 202 234 6049
edf.org
New York, NY / Austin, TX / Bentonville, AR / Boston, MA / Boulder, CO / Raleigh, NC
Sacramento, CA / San Francisco, CA / Washington, DC / Beijing, China / La Paz, Mexico

- Do not reduce the chances of the species' survival and recovery in the wild.
- Have a focused and credible scientific basis;
- Offer a thorough evaluation of the likely impact of covered activities, based on best available science;
- Outline steps to minimize impacts to species' habitat and where impacts are unavoidable, to offset those impacts in such a way as to create net conservation benefit.
- Have a clear adaptive management framework, especially where data gaps and scientific uncertainty exist.

We look forward to reviewing the HCP for its scientific integrity and effectiveness as a conservation strategy. We hope that it will achieve the principles outlined above and include the Habitat Exchange as a preferred mitigation alternative.

Sincerely,

Eric Holst
Senior Director, Working Lands

David W. Wolfe
Director, Conservation Strategies

Logan County

COMMISSIONERS
785-671-4244; Fax: 785-671-3341
LG_County_Clerk@wan.kdor.state.ks.us

710 W. 2nd St.
Oakley, KS 67748

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Logan County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

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In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Carl Uhrich, ~~Chairman~~ Member

Dave Hubert, ~~Member~~ Chairman

Clint Kvasnicka, Member

February 24, 2014

Ms. Michelle Shaughnessy,
Assistant Regional Director
Department of Interior
United States Fish and Wildlife Service
Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

Docket No. FWS-R2-ES-2013-0134
FXE11120200000 F2-145-FF02ENEHOO

Re: KNRC Response to the February 7, 2014 Environmental Impact Statement Notice Of Intent; Inclusion of Alternatives in EIS Scoping

Dear Ms. Shaughnessy:

The Kansas Natural Resource Coalition (KNRC) is a collaboration of 32 County Governments who maintain participatory involvement in administrative government on behalf of its citizenry; KNRC's mission is to promote balanced, necessary and effective administrative policymaking through the mechanism of government-to-government Coordination.

The National Environmental Policy Act (NEPA) (42 USC §§4321-4347) and the implementation mechanism of the Council on Environmental Quality (CEQ) Regulations, (40 CFR §§1500-1508) mandate balancing of human and natural environments during federal decision-making. The overarching purpose of NEPA is to assure protection and productivity of the natural environment in the context of general human welfare and harmony with existing social, economic, and cultural systems.

In the *Federal Register* Volume 79, Number 26, published February 7, 2014, The United States Fish and Wildlife Service (USFWS) published a Notice of Intent to prepare an Environmental Impact Statement (EIS) for conservation of the lesser prairie-chicken. Preparation of an EIS is governed by the mandates and provisions of NEPA and CEQ regulations.

The NEPA implementation procedures found in the CEQ Regulations assure adequate consideration is given to the both human and natural environments from the onset of any proposed Major Federal Action (40 CFR §1501.2). CEQ procedures prescribe an integrated, interdisciplinary approach to "*rigorously explore and objectively evaluate all reasonable alternatives*." The evaluation process is precise in that all reasonable conservation alternatives received by USFWS are to be subjected to EIS Scoping and may only be eliminated from consideration after thorough, objective and systematic exploration of their viability (40 CFR §1502.14 (a),(b)).

The purpose of the Environmental Impact Statement (EIS) is to provide full and fair discussion of all "*reasonable alternative[s] which would avoid or minimize adverse impacts or enhance the quality of the human environment*" (40 CFR §1502.1). The EIS is to be prepared "*as close as possible to the time the agency* (USFWS) *is developing or is presented with a proposal so that preparation can be completed in time for the final statement*"..... "*in time to be an important contribution to the decision making process and will not be used to rationalize or justify decisions already made*" (40 CFR §1502.5).

Having given notice of its intent to prepare the EIS, USFWS is not now permitted to issue a Record of Decision (ROD) on its lesser prairie-chicken listing proposal until the potential for adverse effects on the human environment for all reasonable alternatives have been thoroughly evaluated. Additionally, no action on any plan may proceed until a ROD has been issued. (40 CFR §1505.2(b),(c); 40 CFR §1506.1).

The heart of the EIS is evaluation of all reasonable alternatives in a side-by-side, comparative and analytical format, providing justification and rationale for elimination of any reasonable alternative. To that end, *all* reasonable alternatives must be included as the EIS scoping process moves forward for the lesser prairie-chicken listing proposal (40 CFR 1502.14).

Existing alternatives previously made available to USFWS that must be included in the EIS Scoping Proposal include:

1) *American Habitat Center Multi-State Stakeholder Conservation Strategy (SCS);*
2) The USFWS-funded and approved *Lesser Prairie-Chicken Rangewide Conservation Plan by the Western Association of Fish and Wildlife Agencies* (RWCP);
3) The *Lesser Prairie-Chicken Conservation, Study and Management Plan* (Kansas County Conservation Plan, KCCP) by the Kansas Natural Resource Coalition;
4) No Action.

In December 2013 KNRC made formal comment to the public record on the inadequacy of the RWCP Environmental Assessment (EA) document entitled "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken; Draft Environmental Assessment*." KNRC identified 15 substantive deficiencies that render the RWCP EA insufficient as the basis for concluding whether a Finding of No Significant Impact (FONSI) decision is appropriate and can be made.

In contrast to superficial treatment of economic impacts found in the RWCP EA, the November 7 and 8, 2013 KNRC Public Hearing documented a substantial increase in electrical energy costs[1], calculated a potential $2.1 Billion decrease in land valuation,[2] identified significant potential for Fifth Amendment land takings, and brought forward a heretofore unaddressed, property-rights conflict arising from split-estates, if the RWCP were to implemented.[3]

The sharp contrast between the innocuous human-impact assessment presented in the RWCP EA and the potential impacts identified by KNRC make it impossible to consider the RWCP EA as fulfillment of the NEPA requirement; similarly, because the RWCP and 4d Rule would impose regulation by one state and two federal agencies, the intensity of synergistic, magnified and unintended downstream consequences to ranching, industry and agriculture *must* be evaluated during the EIS scoping process (40CFR§1508.27(b)).

Conservation programs prepared, adopted and administered by local government can be better adapted to local conservation needs, and enjoy greater local support and thereby are more effective and preferable to imposed, top-down conservation mandates. This is particularly true in Kansas where 94% of lands are privately held and local communities tend to be resistant to external controls; local citizens are far more apt to participate in and support locally-sponsored and directed conservation systems.

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[1] Kansas Natural Resource Coalition. *Findings of Fact and Conclusions of Law; In Re: the Advisability of Listing the Lesser Prairie Chicken as a Threatened Species under the Endangered Species Act*. pps 27-29. January, 29 2014.
[2] Ibid., p. 32.
[3] Ibid., p. 32

The *Lesser Prairie-Chicken Conservation, Study and Management Plan* (KCCP), adopted by KNRC's 32 local governments, presents current conservation practices, supports a realistic monitoring system, and includes a reasonable plan to ensure continuously-improving, incremental conservation of the lesser prairie-chicken. The KCCP specifies proposed actions for further study and builds upon existing state and federal programs to manage, monitor and grow lesser prairie-chicken populations. The KNRC Conservation Plan employs an administrative structure for information transfer, decision making and fiscal planning; it respects existing geopolitical boundaries and does not propose activities for lesser prairie-chicken habitats rightfully governed by other states.

Inclusion of the KNRC Conservation Plan in the EIS scoping process is not discretionary on the part of USFWS for three reasons.

1) The KNRC Conservation Plan is technically sound because it employs credible and ongoing conservation practices for the lesser prairie-chicken, identifying data gaps needing further study.
2) The KNRC Conservation Plan has been adopted by 32 counties with lesser prairie-chicken habitat in Kansas, and its implementation has the effect of a single plan administered at the local level. KNRCs *existing* structure functions as an on-the-ground, administrative exchange for information transfer, data exchange, and identification of conservation needs;
3) The Determinations Section of the Endangered Species Act, Section 4(b)(1)(A), requires the Secretary of Interior to *take into account* conservation plans developed by local governments; the practical outworking of ESA 4(b)(1)(A) is manifest in the procedural requirements of 40 CFR§1500.2(e), 40 CFR§1502.1, 40 CFR§1502.5(b), and 40 CFR §1502.14(a),(b).

Because the concept of, or need for, regulatory certainty is not found in ESA, NEPA or the CEQ Regulations, the KNRC conservation plan cannot be disqualified before the scoping process because it does not contain a Candidate Conservation Agreement (CCA) or Candidate Conservation Agreement with Assurance (CCAA) component. The only test for inclusion in the EIS process is whether the KNRC conservation plan is a reasonable alternative.

The "No Action" alternative's impact to human health must be evaluated and compared alongside other alternatives as part of the EIS scoping process, such that the context of all impacts can be gauged for decision-making. Through this methodology the EIS process allows decision makers, government entities at all levels, and the public to understand the full range of impacts to the human environment from any conservation plan proposed during the lesser prairie-chicken listing process.

40 CFR §1501.6 provides the administrative structure of Cooperating Agencies who possess and may contribute specific expertise to the EIS process. For its part as the primary responsible agency in the lesser prairie-chicken listing process, USFWS is the Lead Agency. For purposes of the EIS, KNRC proposes the following agencies be considered as Cooperating Agencies:

- US Department of Agriculture, Natural Resource Conservation Service - due its participation in the November 22, 2013 Conference Opinion;
- Kansas Department of Wildlife, Parks and Tourism for its participation in the RWCP;
- Western Association of Fish and Wildlife Agencies for their participation in the RWCP;
- The American Habitat Center for their participation in the SCS.

In 42 USC §4331(a) the Congress states ". . . *it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.*"

In 42 USC §4331(b) the Congress directs the federal government ". . . *to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources . . .*"

Represented by their leadership team, the 32 member counties of the Kansas Natural Resource Coalition will exercise their Coordination responsibilities under NEPA, ESA and several Executive Orders to effect government-to-government Coordination during the EIS scoping process.

KNRC proposes USFWS to consider the following documents during the EIS scoping process:

- November 22, 2013 Conference Opinion by USFWS;
- June 30, 2011 Conference Report by USFWS;
- June 2, 2012 correspondence from Kansas Department of Wildlife, Parks and Tourism Assistant Secretary Keith Sexson to Region 2 USFWS Director Dr. Benjamin Tuggle;
- September 1, 2010 lesser prairie-chicken determination by the Threatened and Endangered Species Task force of the Kansas Department of Wildlife and Parks;
- January 29, 2013 Findings of Fact and Conclusions of Law; In Re: the Advisability of Listing the Lesser prairie-chicken as a Threatened Species under the Endangered Species Act by the Kansas Natural Resource Coalition;
- October 14, 2013 Natural Resource Coordination Plan by the Kansas Natural Resource Coalition;
- June 7, 2013 Comments on the Lesser prairie-chicken listing proposal by United States Department of Agriculture;
- October 14, 2013 Lesser prairie-chicken Conservation, Study and Management Plan by the Kansas Natural Resource Coalition;
- November 29, 2013 correspondence by Kansas Natural Resource Coalition to Daniel Ashe requesting DOI Authorities Policy and Consistency with KNRC Plans.

KNRC remains hopeful USFWS will utilize the NEPA and CEQ process to the maximum extent possible as it reviews all reasonable conservation alternatives during the EIS scoping process.

Please contact me if you or your staff have questions or wish to discuss the elements of this correspondence.

Respectfully,

Ken J. Klemm
President
Kansas Natural Resource Coalition
(651) 336-9498

Verbal Comments for Garden City EIS Scoping Mtg. 25 Feb. 2014

Hello, I am Ken Klemm, President of the Kansas Natural Resource Coalition and I am here representing the 32 Western Kansas Counties of that Coalition and the Kansas citizens that live therein.

For those who are not familiar with our Coalition let me briefly describe who we are and what we have to offer.

As I previously mentioned, we are a coalition comprised of 32 Western Kansas Counties. The lands our counties cover represent almost the entire lesser prairie chicken habitat in Kansas and we host the majority of the bird population found in all five states.

Each of the Counties in our coalition have passed into their local code, by way of resolution, a *Lesser Prairie Chicken Conservation, Study and Management Plan*, also known as the *Kansas County Conservation Plan*, or KCCP.

Our plan is the lowest cost option and relies on an existing governmental framework. This eliminates the need for additional layers of government and the resulting added costs, duplication of efforts and unintended consequences suffered when government treads in new territory. Conservation programs prepared, adopted and administered by local government can be better adapted to local conservation needs, enjoy greater local support and thereby are more effective and preferable to imposed, top-down conservation mandates.

Our Coalition has also dedicated significant time to researching the technical, procedural and scientific parameters surrounding this issue. This effort has included a two day public hearing, held here in Garden City, centered on the "*Advisability of Listing the Lesser Prairie Chicken as a Threatened Species under The Endangered Species Act*." This hearing provided valuable and insightful testimony by Kansas Congressmen, bankers/lenders, biological technical experts, statisticians, conservationists, farmers, ranchers, businessmen, industry leaders and Kansas Wildlife, Parks and Tourism staff.

A comprehensive document has been compiled regarding our findings and has been submitted to the USFWS for their review and use in making their determination. Our Coalition believes, after extensively researching this issue, that the best available science is not supportive of the listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure survival, preservation and viability of the species.

However, we are very pleased that the USFWS has hosted this meeting to begin the EIS scoping process, as mandated in the National Environmental Protection Act.

Like the USFWS, our Coalition also understands that NEPA applies directly to the endangered species act and that an EIS scoping is appropriate under NEPA and CEQ.

We believe that in order to be fully compliant with NEPA mandates and CEQ procedures that the Service must broaden the scope of their EIS beyond the Stakeholder Conservation Strategy to include:

- the USFWS funded and approved *Lesser Prairie Chicken Plan by the Western Association of Fish and Wildlife Agencies* – also known as the *5 State Range-wide Conservation Plan*;
- the *Lesser Prairie Chicken Conservation, Study and Management Plan* – also known as the Kansas County Conservation Plan – put forth by our coalition;
- as well as the mandated consideration of taking no action.

Additionally, our coalition feels that it would be in the best interest of the citizens we represent if the USFWS, in their role as the lead agency, would initiate meaningful coordination with all the affected agencies including:

- The US Department of Agriculture – Natural Resource Conservation Service;
- the Kansas Department of Wildlife Parks and Tourism;
- the Western Association of Fish and Wildlife Agencies;
- the American Habitat Center;
- and the Kansas Natural Resource Coalition.

Our Coalition is most eager to assist the Service in their fulfillment of their Congressionally mandated tasks and looks forward to using our role as a coordinating agency to help the service research all possible options so the service can reach a determination and develop a plan that will *foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.*

Once again, we are most pleased with the start of this scoping process and remain hopeful that the Service will carefully consider our comments. We stand as willing partners to help the Service meet their mandated responsibilities.

Respectfully Submitted,
Ken Klemm
Kansas Natural Resource Coalition, President

In Re:
The Advisability of Listing the Lesser Prairie Chicken as a Threatened Species under the Endangered Species Act

Hearing Date:	November 7 and 8, 2013
Hearing Location:	Clarion Hotel 1911 East Kansas Avenue, Garden City, KS 67846
Hearing Officer:	Fred Kelly Grant
Hearing Council:	Ken J. Klemm Mahlon Tuttle Teresa Harder Nikki Schwerdferger
Court Reporter:	Lee Ann Bates, CSR, RPR, CRR Advanced Court Reporting Services PO Box 1872 Hutchinson, KS 67504-1872

The Hearing Council of the Kansas Natural Resource Coalition examined if the public record, expert testimony, science, information, studies and the Listing Proposal by the United States Fish and Wildlife Service itself contain sufficient evidence to conclude listing the Lesser Prairie Chicken (*Tumpanuchus pallidicicutus*) as a Threatened Species under the Endangered Species Act (ESA) is advisable and necessary for its continued existence, viability and preservation.

Because ESA in not a stand-alone mandate, preservation of the Lesser Prairie Chicken must take place in the context of and with reasonable consideration for human environments, economic systems and local culture.

For reasons presented in this report, the Hearing Council concludes the USFWS Listing Proposal does not present science supportive of the listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure survival, preservation and viability of the species.

The Hearing Council further concludes minimum standards that evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met.

KANSAS

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

of

The Kansas Natural Resource Coalition

In Re:
The Advisability Of Listing The Lesser Prairie Chicken
as a
Threatened Species Under The Endangered Species Act

January 29, 2014

Ken J. Klemm
President
Commissioner, Sherman County

Mahlon Tuttle
Vice President
Commissioner, Gove County

Teresa Harder
Commissioner, Morton County

J. R. Carlson
Executive Director

Nikki Schwerdferger
Commissioner, Hamilton County

Fred Kelly Grant
Hearing Officer

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PUBLIC HEARING PARTICIPANTS

Carl Uhrich	Logan County Commissioner
Sheila Ellis	Research Analyst, Landholder
Keith Edwards	Farmer, Rancher adjacent to ferret release site in Logan County
Kyle Hoffman	Kansas State House of Representatives, Vice Chair House Agricultural Natural Resource Committee
Cameron Edwards	Farmer, Rancher adjacent to ferret release site in Logan County
James Carlson	KNRC Executive Director; Engineer; Environmental Policy and Technical Expert
Keith Sexson	Assistant Secretary, Kansas Department of Wildlife, Parks and Tourism; State Director, Western Area Fish and Wildlife Association
Jim Pitman	Vice Chair Western Area Fish and Wildlife Association; Small Game Coordinator, Kansas Department of Wildlife, Parks and Tourism;
Mike Lewis	Hamilton County Commissioner
Bruce Graham	CEO, Kansas Electric Cooperatives, Inc.
Don Hineman	Kansas State Representative, District 118
Nikki Schwerdfeger	Hamilton County Commissioner
Clint Pearson	Farm Manager, Banker, Rancher
Jillane Hixson	Rancher, Farmer, Conservation Easement Holder
Val Emick	Rancher, Farmer, Conservation Easement Holder
Lynn Freese	Director of Member Services - Wheatland Electric Cooperative
Kirk Thompson	General Manager - CMS Electric Cooperative, Inc.
Ken Klemm	Sherman County Commissioner
Paul Reynolds	Manager of Environment - Sunflower Electric Power Corp.
Nicole Dick	Professor of Mathematics and Statistics - Garden City Community College
Robert Zink, PhD	Breckenridge Chair in Ornithology, Bell Museum; Professor of Ecology, Evolution, and Behavior, University of Minnesota
Norman MacLeod	Land, Water & Endangered Species Consultant; Former Executive Director at Environmental Sciences Independent Peer Review Institute
Ralph Ostmeyer	Kansas State Senator - District 40
Larry Powell	Kansas State Senator - District 39

GENERAL

1. On December 11, 2012 the United States Fish and Wildlife Service (USFWS) proposed to list the Lesser Prairie Chicken (LPC) as a Threatened Species under the Endangered Species Act (ESA). In subsequent Federal Register Notifications, USFWS has proposed a special 4(d) Rule under Section 4 of the ESA.

2. Implementation of the Lesser Prairie Chicken Listing Proposal and 4(d) Rule would take place through a three pronged system; the 5 State Rangewide Conservation Plan by Western Area Fish and Wildlife Agencies (WAFWA) proposes to create a demand system, deriving mitigation revenue for administration of Lesser Prairie Chicken conservation programs from utilities, energy, wind producers, agriculture, local government and others implicated for habitat impacts. Mitigation monies collected from impact activities are then proposed to purchase (supply) conservation habitat throughout the region occupied by the Lesser Prairie Chicken.

3. The second and third prongs of the USFWS Listing Proposal implements policies from the Natural Resources Conservation Service (NRCS)/USFWS Conference Opinion and Biological Opinion process; that is US Department of Agriculture (USDA)/NRCS programs will be modified to levy requirements on private land for those participating in habitat, farm and other federal NRCS economic-incentive programs. Because a large portion of Kansas farmers and ranchers participate in federal programs, NRCS Conservation Practices 645 and 528 will affect a significant portion of private lands.

4. The 32 County Kansas Natural Resource Coalition (KNRC) prepared and adopted into local ordinances a *Natural Resource Coordination Plan* and *Lesser Prairie Chicken Conservation, Study and Management Plan*. The KNRC Coordination Plan contains as its basis Federal statutes, regulations, and Executive Orders (EO), and the Coalition relies on the extensive federal record as foundation for coordination, environmental procedure, due process and facts provided in this Finding of Fact and Conclusions of Law document.

5. KNRC's basis for expecting coordination during the Lesser Prairie Chicken Listing Proposal is derived from the Endangered Species Act Section 4(b) which requires the Secretary of Interior to *"take into account conservation efforts by political subdivisions of states,"* and the Federal Land Policy and Management Act (FLPMA) Section 1712(c)(9) requiring consistency with local plans.

6. The *Lesser Prairie Chicken Conservation, Management and Study Plan* prepared by KNRC contains viable, low cost, scientifically sound and ongoing conservation practices for the Lesser Prairie Chicken, including a process to fill data gaps and technical uncertainties in the scientific record.

7. Application of the authorities in the KNRC *Conservation* and *Coordination Plans* is based on the Tenth Amendment police power of the United States Constitution empowering local government to protect public safety, health and welfare. Local governments have a duty to guard against damage to the economic stability and the social cohesiveness of the communities they serve.

BACKGROUND

The Kansas Natural Resource Coalition (KNRC) -

8. KNRC is a coalition of 32 Western Kansas counties that have real and material interest in the proposal to list the Lesser Prairie Chicken as a threatened species under ESA. Since its inception and the December 11, 2012 proposal by USFWS, KNRC has been actively engaged in the process of coordination through its Lesser Prairie Chicken Conservation, Study and Management Plan.

9. The mission of the KNRC is:

> *The Kansas Natural Resource Coalition (KNRC) is an association of counties who maintain collective and participatory involvement in administrative government on behalf of its citizenry. The coalition serves as a conduit between local, state and federal governments to promote balanced, necessary and effective administrative policymaking. The KNRC mission includes monitoring, analyzing, understanding, communicating and participating in those initiatives that materially affect the natural or human systems governed by individual member counties.*

Approach -

10. Background documents of the Coalition's Lesser Prairie Chicken conservation efforts have been made available to KNRC members and USFWS through correspondence, filings to the public record, data transmittals, verbal communications, and coordination meetings. KNRC's detailed knowledge of the technical issues, conservation requirements, historical context, policy initiatives, and statutory/executive requirements surrounding the Lesser Prairie Chicken all coalesce in the Public Hearing process and the Coalition's Finding of Fact and Conclusions of Law.

11. A Public Hearing was held on November 7 and 8, 2013 to receive, review and evaluate available information pertaining to the proposed Lesser Prairie Chicken listing and establish compliance of USFWS with congressional acts, presidential EOs, federal and state regulations, sound scientific principals, economic considerations, cultural and civic impacts, good environmental practice and established Plans.

12. As part of the Public Hearing and information-review process, KNRC considered the historical context, relationships of USFWS with local government and communities, the availability, accuracy, quality and thoroughness of technical information, scope of the listing approach, and necessity for ESA protections in light of existing conservation and regulatory programs. Based upon the established record, incomplete or missing studies, and testimony presented, the hearing council weighed the efficacy of the Listing Proposal against potential impacts to economic stability, social cohesiveness, diminution of private property values, and potential conservation deficits in state and local plans.

Criteria for Evaluation of Listing Proposal -

13. Criteria used to guide the Public Hearing and prepare this Finding of Fact document include:

- Do statutory requirements exist for USFWS to attempt consistency with the Coalitions' *Lesser Prairie Chicken Conservation, Management, and Study Plan*?
- Are there Regulatory, Statutory and/or Executive laws requiring USFWS to perform cultural and socioeconomic analysis in conjunction with, in preparation for, or as part of the USFWS Threatened Listing Proposal for the Lesser Prairie Chicken?
- Is there sufficient evidence in the public record, from testimony, and in the experience of KNRC Hearing Council to conclude the USFWS Lesser Prairie Chicken Listing Proposal is a *Major Federal Action* as defined by National Environmental Policy Act (NEPA) and Regulations by the Council on Environmental Quality (CEQ)?
- Does the USFWS Listing Proposal and 4(d) Rule demonstrate the means and measures necessary to create, balance and maintain harmonic conditions between the existing human environment and conservation requirements of the Lesser Prairie Chicken?
- Is the October 23, 2013 endorsement of the WAFWA Rangewide Plan by USFWS considered a *Major Federal Action*?
- Is there sufficient information in the public record, correspondence, and from testimony to conclude participation by Kansas Department of Wildlife Parks and Tourism (KDWPT) is a Cooperating Agency with USFWS in development of the WAFWA Rangewide Plan?
- Is there sufficient information in the public record, correspondence and from testimony to conclude participation by USDA/NRCS is a Cooperating Agency with USFWS through its participation in preparation of Conference/Biological Opinions?
- Does a Regulatory, Statutory and/or Executive-Order basis exist requiring USFWS, KDWPT and NRCS to coordinate efforts, initiatives, activities and other *Major Federal Actions* with individual KNRC members prior to initiation of such action?

- Based upon the elements contained in the KNRC Coordination Plan, Exhibits and Testimony from the Public Hearing and its own experience, can KNRC conclude USFWS has failed in the requirement to coordinate the Lesser Prairie Chicken threatened-listing proposal with local government?
- Is there evidence to conclude any failure by USFWS to coordinate its actions with KNRC members in the Lesser Prairie Chicken listing process may be knowing, willful and deliberate?
- The Endangered Species Act, Section 4(b)(1)(A) BASIS FOR DETERMINATIONS, provides:

  > "*The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.*"

- Is there evidence in the public record and from testimony at the Public Hearing to conclude USFWS has taken "*into account*" the *Lesser Prairie Chicken Conservation, Management, and Study Plan* and the efforts by local government in its Listing Proposal?
- Have the potential economic, cultural or property impacts stemming from potential implementation of the WAFWA 5 State Plan or NRCS Conservation Practices 645 or 528 been reasonably evaluated, made available for consideration and is the technical basis for them warranted?
- Does a sufficient technical record exist to conclude a "*Threatened*" Determination of the Lesser Prairie Chicken over its 5-State Range due to historical, ongoing, and probable future impact of cumulative habitat loss and fragmentation resulting from conversion of grasslands to agricultural use, encroachment by invasive woody plants, wind energy, development, petroleum production, presence of roads and manmade vertical structures including tower, utility lines, fences, turbines, wells and buildings?
- Does the body of information, evidence, exhibits and testimony from the Public Hearing provide sound basis to conclude the existence or future of the Lesser Prairie Chicken is threatened due to: habitat destruction, modification, or curtailment; the species or its habitat is over utilized for commercial, recreational, scientific or educational purposes; the species is particularly vulnerable or affected by disease or predation; existing state or federal conservation programs are not adequate or sufficient to ensure the existence of the Lesser Prairie Chicken?
- Has a reasonable range of unintended private property take consequences from implementation of the WAFWA Rangewide Plan or NRCS Conservation Practices 645 and 528 been made available to local government?

COORDINATION HISTORY; NOTIFICATION

14. On August 23, 2013 KNRC transmitted its *Natural Resource Coordination Plan* and *Lesser Prairie Chicken Conservation, Management and Study Plan* throughout the US Departments of Interior, Commerce, Agriculture and to senior leadership of USFWS in Regions 2 and 6.

15. The KNRC Coordination Plan, adopted into local ordinances of all 32 KNRC Counties, provides the foundation for local governments to call for meaningful participation in Major Federal Actions at the onset of Major Federal Action; the Coordination Plan is a compilation of federal statutes, EOs and regulations that require assessment and balancing of natural and human environments and meaningful coordination with local government on those Major Actions that concern them.

16. Mr. James Carlson, environmental policy expert, engineer, and Executive Director for the Kansas Natural Resource Coalition testified that on September 11, 2013, coordination was formally and personally invoked with USFWS Deputy Director of Endangered Species Paul Souza and Department of Interior (DOI) Counselor to Assistant Secretary Michael Bean. During that Coordination Meeting, both Mr. Souza and Mr. Bean were given Notice of the November 7 and 8, 2013 KNRC Public Hearing.

17. Mr. Carlson testified he and President Klemm reviewed in detail with USFWS the elements from the KNRC Coordination and Conservation Plans, as well as EOs and coordination requirements found in the Federal Land Policy and Management Act. During that meeting the requirement to achieve consistency with the KNRC *Lesser Prairie Chicken Conservation, Management and Study Plan* was established.

18. Mr. Carlson testified he specifically drew attention to the requirements of US Department of Interior Agencies to coordinate in EO 13352 and the need for a Regulatory Impact Analysis in EO 12291.

19. Mr. Carlson testified USFWS was *"nearly to completely disinterested in the coordination and conservation plans we had presented,"* and that USFWS pointed KNRC to the WAFWA Rangewide Plan.

20. At the Public Hearing Mr. Carlson pointed out WAFWA is quasi-governmental organization, and the WAFWA Rangewide Plan would be a collaboration of non-elected officials, testimony corroborated by Commissioner Ken Klemm.

21. Mr. Carlson testified Section 4 of the Endangered Species Act requires the Secretary of Interior to "take into account," which means to weigh and contemplate carefully the conservation measures by local government prior to making a determination under Section 4 of the Endangered Species Act.

22. Mr. Carlson testified in making its listing notification, USFWS had not coordinated whatsoever with local government.

23. Kansas State Representatives Hoffman, Hineman and Kansas State Senators Powell and Ostmeyer testified USFWS had not coordinated with their committees or the State Legislature. In his concluding remarks, Senator Powell stated:

> *"Unlike the Fish and Wildlife Service, the Coalition of Counties has coordinated its work and efforts extensively with me, with my [Senate Natural Resource] committee, and with the Legislative and Executive branches of our State Government. They [KNRC] have engaged in coordination with the [USFWS] Federal Agency, but the Coalition reports that the Service has not followed through with any meaningful discussions."*

24. Mr. Carlson testified commissioners from 16 KNRC Counties signed affidavits stating that USFWS has not notified them of the Lesser Prairie Chicken Listing Proposal nor contacted them at any point during the Listing Process; this testimony was corroborated by Commissioner Klemm, who shared the steering committee had a 100% return rate of all affidavits randomly distributed to 16 of the 32 KNRC counties.

25. At the November 1, Coordination Meeting Number 2, Heather Whitlaw, Supervisor of the Kansas USFWS Field Office, refused to discuss how the Service is "taking into account" the KNRC Plans, and she was unwilling – at the direction of the Department of Interior Solicitor – to describe how USFWS is attempting consistency between the endorsed WAFWA Rangewide Plan and the Coalition's *Lesser Prairie Chicken Conservation, Management and Study Plan.* Her response was simply to read a prepared statement:

> *"...language was that she [Solicitor Jacobsen] cannot agree with the Coalition's interpretation of federal authorities and feels that the project leaders/staff person, such as myself, is not prepared to debate this today."*

26. The October 18, 2013 agenda calling Coordination Meeting Number 2 specifically requested USFWS to send *"delegates who have the latitude, position and authority to speak for USFWS on regional policy, technical and Lesser Prairie Chicken issues that will be discussed."*

27. Ms. Heather Whitlaw, Field Supervisor of the Kansas Field Office was the only USFWS representative sent to the November 1, 2013 Coordination Meeting Number 2.

28. On November 7 and 8, 2013, KNRC held the Public Hearing to which both Ms. Whitlaw and Dana Jacobsen, Assistant Regional Solicitor Rocky Mountain Region for Department of Interior, refused repeated invitations. In written correspondence Ms. Whitlaw stated the Public Hearing is "*not the right forum for discussions*" of conservation plans.

29. Solicitor Jacobsen refused attendance at the KNRC Public Hearing due to "budget constraints" and "other commitments;" despite several public notifications and personal requests for attendance; no USFWS personnel attended the Public Hearing held by representatives of 32 counties of local government.

30. In correspondence following the November 1, 2013 Coordination Meeting, USFWS Solicitor Jacobsen and Director Ashe were specifically requested to attend the Public Hearing and give testimony and rationale behind USFWS disagreement with the Federal Statutes, EOs and CEQ Regulations presented in the KNRC *Natural Resource Coordination Plan.*

31. USFWS has refused to respond to written and verbal requests to coordinate with local government by non-attendance at the November 7 and 8, 2013 Public Hearing on the Lesser Prairie Chicken Listing Proposal.

32. As of the close of the Public Hearing process, USFWS has ignored repeated verbal and written requests to attempt consistency with the *Lesser Prairie Chicken Conservation, Management and Study Plan* and has provided no comments, questions or feed back on that document.

33. Sheila Ellis, Research Analyst, farmer and ranch owner, testified Logan County, Kansas did not receive early notification on the Lesser Prairie Chicken Listing Proposal and 4(d) Rule despite resolutions and notification requests.

34. Between May and November 2009, 38 Kansas counties in addition to Logan County, adopted and provided resolutions to USFWS specifically invoking coordination and notification rights prior to any Major Federal Action.

35. None of the 39 Kansas counties who invoked coordination were notified of USFWS's intent to list the Lesser Prairie Chicken as a Threatened Species before publication of the Listing Notification in the December 11, 2012 Federal Register.

36. Logan County did not receive notification of USFWS's intent to list the Lesser Prairie Chicken as a Threatened Species prior to publication of the Listing Notification in the December 11, 2012 Federal Register.

37. On October 26, 2012 at Logan County Coordination Meeting Number 6, USFWS Assistant Regional Director Thabault was specifically asked by Commissioner Uhrich about the Lesser Prairie Chicken, to which Mr. Thabault replied:

> *"...we [USFWS] were under that settlement agreement obliged to either issue a proposed rule or withdraw the listing in September. Uh, we were not able to comply with that date and we got a, uh, uh, some waiver from the court and we are now obliged to make some sort of determination, just shortly before the end of November. So, we will either publish a proposed rule to list the species or we will withdraw the species from the candidate list; those are the two decisions points we have before us. So no proposal's been put out yet."*

38. The Lesser Prairie Chicken Listing Notification was published in the Federal Register on December 11, 2012.

Previous USFWS Activities -

39. Commissioner Carl Uhrich of Logan County gave testimony that both the Kansas and Region 6 Offices of USFWS understand the Federal requirement to coordinate with local government; Logan County has sent "many" letters to USFWS calling coordination meetings and the Service has not denied the applicability of coordination or participation in coordination efforts on releases of Black-footed Ferrets in the county.

40. Commissioner Uhrich testified, "*USFWS will coordinate but not cooperate.*"

41. On November 19, 2007, Logan County adopted Resolution No. 07-11 invoking its right as local government to Coordinate and be notified prior to introduction of endangered species, including Black-footed Ferrets; USFWS was subsequently made aware of that resolution. Sheila Ellis testified that since the Logan County resolution, USFWS has repeatedly introduced Black-footed Ferrets at the Haverfield/Logan County release site without notification or explanation to local government. In some cases, Black-footed Ferret introductions came to light through the local press, placing the Logan County Commissioners in an awkward position with their constituents.

42. Introduction of the Black-footed Ferret at the Haverfield/Logan County release sites brought immediate conflict with local residents and litigation with the Logan County Commission. Local residents believe infestation and proliferation of Prairie Dogs, the primary food source of the Black-footed Ferret, to be incompatible with agriculture, ranching, property values, human safety and Kansas statutes which require local governments to eradicate all Prairie Dog populations on private lands.

43. A central issue with the introduction of the Black-footed Ferret is control of Prairie Dog infestations along the perimeter boundaries such that Prairie Dog infestations do not propagate and impact neighboring properties.

44. Commissioner Uhrich testified over time 150 Black-footed Ferrets have been released in Logan County, and published 2013 counts record a current population of 11 Black-footed Ferrets. The to-date cost of the Logan County Black-footed Ferret recovery program to the American taxpayer was stated to be approximately one million dollars. Corroborative testimony by Ms. Ellis put rangewide expenditures for the Black-footed Ferret program between 1981 and 2012 at $30 million.

45. Mrs. Ellis testified the Haverfield/Logan County release site was selected for introduction because plague has decimated Black-footed Ferret populations at the South Dakota introduction sites and recent South Dakota Black-footed Ferret counts at that site have declined, due to plague, from 350 to 72.

46. Keith Edwards, a 5th generation farmer and rancher who manages a 7 mile contiguous boundary with the Haverfield/Logan County release site questioned the genetic diversity of Black-footed Ferret populations released in Logan County, stating the ferrets are a result of line breeding from 16 DNA sources.

47. On October 15, 2009, then USFWS Field Office Supervisor Mike LeValley admitted on the record to knowingly and willfully violating the Logan County Notification Resolution by scheduling and performing Black-footed Ferret releases on the Haverfield/Logan County release site.

48. Requests to USFWS under the Data Quality Act for verification of the historical range of the Black-footed Ferret resulted in USFWS producing documentation of a ferret skull specimen, purportedly a dead pet originating from Gove County brought into a tavern in Logan County.

49. To date, USFWS has produced no credible scientific information in support of its claim the Black-footed Ferret once occupied the range within Logan County.

50. During coordination meetings held on April 4, 2012 and October 26, 2012, Logan County Commissioners were misled by on-the-record statements of USFWS Assistant Regional Director Thabault and Kansas Field Supervisor LeValley as to future planning for Black-footed Ferret releases in the historical purported range. Black-footed Ferret Safe Harbor Agreement (BFFSHA) documents released on December 19, 2012 reveal scoping began on March 13, 2012 and a September 12, 2012 final signature on a Memorandum of Understanding for the BFFSHA contradict the on-the-record statements given by Mr. Thabault and Mr. LeValley as to knowledge of plans and release activities.

51. Mrs. Ellis testified USFWS was unwilling to establish baseline Prairie Dog population counts along perimeter properties surrounding the Haverfield/Logan County introduction sites because of the "*unavailability*" of data. The message was USFWS was under no obligation to establish, monitor, or track changes in Prairie Dog populations on properties adjacent to the Haverfield/Logan County sites such that impact to neighboring properties could be gauged, monitored, and its impacts understood.

52. In public meetings, coordination meetings, public documents and its Environmental Assessment for the Black-footed Ferret introduction, USFWS characterized the project as "*experimental*" with a finite, 5-year duration. Classification of the Black-footed Ferret introduction as experimental was coupled with public assurances by USFWS to neighboring landholders and correspondence with Kansas US Representative Moran that ranching activities on adjacent properties would not be restricted and if "*problems arise that cannot be resolved*" with the Black-footed Ferret introduction project USFWS was prepared to terminate and "*take its ferrets and go home*."

53. When USFWS issued itself an Endangered Species Permit for introduction of the Black-footed Ferret, the permit was classified under Section 10(a) (Recovery) instead of Section 10(j) (Non-essential Experimental Population.) Throughout the permitting and introduction process, USFWS misrepresented to the Logan County Commissioners, Landholders, and the public at large the nature and intent of the Black-footed Ferret introduction program.

54. The Section 10(a) ESA permit for recovery of the Black-footed Ferret expired on December 31, 2012 and USFWS has not opened up the permit renewal for public comment in the Federal Register.

55. The Black-footed Ferret recovery program in Logan County, Kansas is currently taking place under the authority of an expired Endangered Species Act permit.

56. Keith Edwards testified rapid, prolific infestation of Prairie Dogs coupled with newly placed chemical (Rozol and Phostoxin) restrictions encumbered landholders' ability to control Prairie Dog populations when they are particularly active and reproduction rates high. The chemical restrictions were imposed despite USFWS commitments to local property owners that longstanding management and ranching practices would be unaffected by Black-footed Ferret introductions.

57. Prairie Dog chemical restrictions placed on neighboring land holders combined with escalating Prairie Dog infestations translated into substantial and documented proliferation on farms and ranches "*miles*" away from the Haverfield Black-footed Ferret introduction site. Impacts to the Edwards' property include increased labor for Prairie Dog control, expenditures for chemicals, lost revenue from decreased pasture usage, and reduced stocking rates. The Black-footed Ferret introductions and subsequent Prairie Dog infestations have resulted in increased safety risks from rattlesnakes that accompany Prairie Dog towns.

58. The increased rattlesnake risk was corroborated by Commissioner Uhrich, who recounted a recent, near-fatal instance where a boy was bitten by a rattlesnake in the newly Prairie Dog infested area.

59. Direct ranch operating losses incurred by the Edwards operations were stated to be in excess of $160,000.

60. Increased Logan County expenditures directly attributable to the USFWS Black-footed Ferret release program is $167,089.59.

61. Keith Edwards produced photographs of Prairie Dog infestations three miles from the Haverfield/Logan County release site.

62. Mrs. Ellis testified that "*miles and miles*" of property in a concentric circle beyond the Black-footed Ferret introduction site have been impacted by expanding and increasingly uncontrolled Prairie Dog infestations; a situation complicated by recent chemical restrictions placed on landholders.

63. Black-footed Ferret introductions at the Haverfield/Logan County release site have resulted in demonstrated property damage, forced cuts in stocking rates, reductions in land valuations, increased costs for rodent control and lost tax revenue to Logan County.

64. Testimony by Commissioner Uhrich and Mrs. Ellis recount how the James Ludolph property abutting the Haverfield introduction site has been deemed "*valueless*."

65. Mr. Ludolph holds land that is repeatedly infested by uncontrolled Prairie Dogs from the Haverfield Complex; he is currently unable to make productive use of his property because crop losses will complicate crop insurability across the remainder of his farming operation. Mr. Ludolph has reduced stocking rates on the affected property by as much as 75% and his land is becoming increasingly unproductive.

66. Commissioner Uhrich and Mrs. Ellis testified that Mr. Ludolph has stopped farming altogether on the abutting parcel because Prairie Dogs consume crops faster than he can grow them.

67. Reclamation costs to restore Mr. Ludolph's land to pre-ferret conditions are estimated at $410,000.

68. Mr. Ludolph retains tax liability for land that is increasingly non-productive and "valueless."

69. Increased chemical restrictions, ineffective buffer zones for Prairie Dog control, lack of baseline monitoring for Prairie Dogs on neighboring properties, and substantive, increased risks of rattle snakes have compromised the safety, productivity, and property values of Logan County landholders adjacent to the Black-footed Ferret introduction sites.

70. Throughout the Black-footed Ferret introduction project, USFWS has failed to respond to data requests, reasonable baseline monitoring, effective prairie dog buffer zone control and legitimate public safety concerns. Further, the record indicates by not examining the human related consequences prior to Black-footed Ferret introduction, diminution of private property values and other human-related impacts remain unaccounted for.

71. The total estimated expenses, value diminution, crop losses, livestock impacts, and reduced stocking rates for those giving testimony of Black-footed Ferret introductions is $4,217,360.82.

SCIENCE, DATA, AND TECHNICAL CONSIDERATIONS

72. The KNRC Hearing Council received testimony from national technical experts, statisticians, environmental policy experts and conservationists on the scientific methodology, interpretations, availability, accuracy and completeness of the body of science used by USFWS to support the Lesser Prairie Chicken Listing Proposal.

73. The Hearing Council weighed testimony in the context of its own *Natural Resource Coordination Plan* and *Lesser Prairie Chicken Conservation Management and Study Plan*, the public record, and its knowledge of the facts.

74. The KNRC Hearing Council received and weighed a body of testimony, evidence, information, data, and conclusions against the standards binding the Secretary of the Interior in Section 4(a) of the Endangered Species Act that require the Secretary of the Interior to demonstrate - through science - the evidence supports the Lesser Prairie Chicken is threatened throughout its range and is in need of Federal listing protection:

    1) the present or threatened destruction, modification, or curtailment of its habitat or range;
    2) overutilization for commercial, recreational, scientific, or educational purposes;

3) disease or predation;
4) the inadequacy of existing regulatory mechanisms;
5) other natural or manmade factors affecting its continued existence.

75. The Hearing Council received information and testimony in consideration of the effects of climate change, disease, elevated structures, population trends, impacts of electrical transmission/distribution lines and sound emanating from oil and gas exploration, maintenance and operations; the hearing council then assessed whether genetic variation of the Lesser Prairie Chicken is normal and sufficient to survive current stressors, and the sufficiency of existing parcels and programs to sustain populations.

76. Mr. Norman MacLeod, Natural Resource Policy expert on endangered species and former Executive Director of Environmental Sciences Independent Peer Review Institute testified the term "science," as defined and used in the Endangered Species Act, excludes consideration of items that are not "science."

77. The term "Best Available Science" suggests that some information is Best and other information is not; that science implicitly holds to a standard of measure.

78. The Coalition defines "best available science," in its Natural Resource Coordination Plan, Appendix D, page D-1, as *"that body of reproducible and credible data, information, and studies that are collectively available to the average person under normal circumstances."*

79. Dr. Robert Zink, Chair of Ornithology and Professor of Ecology, Evolution and Behavior at the University of Minnesota testified that Lesser Prairie Chicken populations have demonstrated throughout history remarkable up and down population trends in response to climate stressors, and Lesser Prairie Chickens adapt their range in response to climate and weather changes.

80. The Center for Environmental Science, Accuracy and Reliability (CESAR) was contracted to perform an independent peer review of the biological evidence using the Five Listing Factors in the Endangered Species Act. CESAR employs independent biologists that do not reside in the area, and whose interest is in "making sure that the Best Available Science is used to make listing petitions."

81. Dr. Zink stated that in issuing its listing report, he and CESAR peer-reviewed the studies and science used in the December 11, 2012 USFWS Lesser Prairie Chicken Listing Proposal as well as conducted ecological niche modeling for prediction of historical Lesser Prairie Chicken distributions.

Climate and Drought -

82. Over the past 20,000 years, Lesser Prairie Chicken populations have survived and responded to 15 or 16 glacial events by adapting its range, and have survived ongoing changes in global climate. The glacial advance/retreat process naturally fragments habitat, displacing all species in its path. The biological and historical record of the Lesser Prairie Chicken indicates a remarkable ability to survive multiple glacial episodes, and resilience of the Lesser Prairie Chicken to respond and rebound from climate extremes is corroborated by WAFWA and the states, who recognize the Lesser Prairie Chicken has a high reproductive potential in years of adequate conditions.

83. Dr. Zink testified that as glaciers recede, plant communities and organisms again invade and re-colonize, and Lesser Prairie Chickens and other fauna follow the vegetation as range adaptations take place.

84. Dr. Zink testified Lesser Prairie Chickens have adapted from the south and west to their current distribution.

85. Dr. Zink testified drought has had a major effect on Lesser Prairie Chickens, a conclusion corroborated by the Coalition in its March 11, 2013 Public Comments. Since 2006, the entire ecoregion occupied by the Lesser Prairie Chicken has been undergoing sever drought comparable to the 1930's and 1950's, which exceeds a minus 4 (severe to extreme) on the Palmer Drought Severity Index. The Coalition has cited numerous literature references that Lesser Prairie Chicken populations historically decline and recover remarkably following drought events, a conclusion supported by WAFWA and the states.

86. The ongoing impact, intensity, magnitude, and difficulty presented by drought was mentioned independently during the testimony of Ranchers Emick, Hixson, Klemm, Commissioner Lewis, Senator Hineman and Senator Ostmeyer.

87. Mr. MacLeod testified the Listing Proposal is taking place during deep drought conditions comparable to the 1930's and 1950's and that USFWS has not adequately accounted for drought in its Listing Proposal.

88. In the December 11, 2012 Federal Register Notification, page 73868, USFWS recognizes drought is *"considered a universal ecological driver across the great plains,"* with prolonged drought capable of causing local extinctions of annual forbs and grasses. Despite acknowledgement that drought significantly affects entire ecological systems, the contribution of drought as a threat was not evaluated or brought forward by USFWS.

89. The official 2012 WAFWA Lesser Prairie Chicken population count was 34,440, as to where the 2013 count stood at 17,616; WAFWA and the states believe extreme population fluctuations are the norm for this species and KDWPT recognizes *"the new 2013 counts to be attributed with severe drought conditions (not habitat loss)."*

90. The record from previous droughts indicates populations of all gallinaceous birds, such as the Lesser Prairie Chicken, to rebound remarkably when drought-stricken regions receive adequate rainfall.

91. Newly formed habitat conservation programs, such as that contemplated by the WAFWA Rangewide Plan, will take years to result in substantive habitat improvements – as to where the KNRC *Lesser Prairie Chicken Conservation Management and Study Plan* provides for ongoing conservation activities.

92. Dr. Zink pointed out listing the Lesser Prairie Chicken as a threatened species under the Endangered Species act would have no effect on weather patterns or climate change events.

93. In 1967 the Attwaters Prairie Chicken was included as one of the first species to be protected under Federal Endangered Species protections. At the time of listing, populations of Attwaters Prairie Chickens were estimated at 1,000 birds; current populations of Attwaters Prairie Chicken languish at marginally over 100 birds. By contrast and during the same time period, Greater Prairie Chicken populations in voluntary conservation programs in Wisconsin and Minnesota have thrived, increasing from 1600 birds to 3000.

Compensatory and Additive Mortality -

94. Compensatory mortality is considered by biologists to be normal, natural and necessary to maintain and balance population levels; additive sources constitute human-induced contributions from individual threats that collectively add to and thus contribute to overall population declines, such that existence of a species may be threatened or endangered. Dr. Zink questioned the methodology in the USFWS listing approach where independent threats were "*simply added together*" apart from analysis of their individual, additive contribution, and he questioned that USFWS has adequately demonstrated that human contributions exceed compensatory levels.

95. In June of 2012, WAFWA and the 5 states urged USFWS to perform a comprehensive threat analysis for the Lesser Prairie Chicken indicating their awareness of the importance of such scientific analysis and its absence in the Lesser Prairie Chicken technical record.

96. USFWS has not performed a comprehensive threat analyses and has not scientifically demonstrated in its Listing Proposal that individual anthropogenic threats pose an extinction potential to the Lesser Prairie Chicken.

Structures, Disease and Predation -

97. The hypotheses of whether Lesser Prairie Chickens demonstrate adversity to tall structures, such as wind towers and power lines, was questioned as untested as preferences for nest location vary with predator density in any given year. Because raptors demonstrate adversity to wind towers, Lesser Prairie Chickens have been observed in studies nesting closer to those structures during periods of high raptor density. Nesting location choices vary with predator conditions and density, and no scientific data implicating specific structure type(s) is available.

98. In June, 2012, WAFWA and the states noted that there are no studies to indicate increased predation of adult nests or hatch-year birds originating from structures is "*outside the range of natural variation.*"

99. WAFWA and the states concluded,

> "*Presently little is known on how wind power developments affect Lesser Prairie Chickens and/or Lesser Prairie Chicken habitats. To date the effects are speculative and not justification for listing, especially less than 2% of EOR is expected to be developed for this [wind energy] use.*"

100. Dr. Zink testified that CESAR reviewed the same studies USFWS used in its Listing Proposal. He stated that with respect to the threats posed by structures, the authors of those studies themselves concluded, "*we have no reason to believe the Prairie Chicken populations are being impacted severely by predation.*"

101. The increased threat of power lines and towers is purported by USFWS to result in increased predation because those structures afford better perches and increased vantage points for raptors. Dr. Zink reviewed other studies that conclude "*mammalian and reptilian predators have a greater influence on Lesser Prairie Chicken mortality during the breeding season.*" He went on to conclude because "*mammalian and reptilian predators don't sit on top of telephone poles, the big threat then, to us, seemed to be an insignificant one.*"

102. No raptor predation studies or data exist distinguishing power poles, wind towers, pump jacks, and other structures selectively implicated by USFWS from raptor predation threats posed by grain elevators, trees and bridges – bringing into question the reasoning used by USFWS to selectively implicate specific energy infrastructure.

103. Dr. Zink reviewed studies used by USFWS in support of its Listing Proposal. He testified the science to support the Listing Proposal was skewed to achieve a particular outcome: [The listing] *"has a bunch of internal inconsistencies. What the paper* [various studies] *said, some of the things* [for the Listing Proposal] *were just cherry-picked. I mean, the whole story wasn't brought forward."*

104. The Coalition previously concluded, in its Conservation Plan, that anthropogenic (man-made) structures can present "logistical impediments" but Lesser Prairie Chickens routinely cross anthropogenic boundaries.

105. The literature demonstrates Lesser Prairie Chickens navigate across all anthropogenic sources in search of forage, winter riparian areas, and preferred mixed grass habitats.

106. The documented establishment of 68 new, previously undetected leks north of the Arkansas River since 1960 represents a major northward range expansion of the Lesser Prairie Chicken across road, power lines, bridges, an interstate-highway corridor and other anthropogenic features.

Genetic Variability -

107. In its listing document, USFWS tied habitat fragmentation with genetic variability to demonstrate habitat fragmentation contributes to reduced genetic variation and decline of the species' resilience to outside stressors.

108. Genetic variability determines if populations are resistant to changes in climate, predation, competition and other stressors and thus may be extraordinarily susceptible to risk of extinction. Dr. Zink testified that a very significant genetic variability study (Hagen, 2010), employing a large number of biologists was not referenced in the Listing Proposal. Using data obtained from the Hagen study, Dr Zink and CESAR performed genetic variability analysis.

109. Dr. Zink and CESAR compared the genetic variability in existing Lesser Prairie Chicken populations throughout Kansas, Colorado, and Oklahoma. His work concluded Lesser Prairie Chicken populations contained just as much genetic variability in Colorado and Oklahoma as in Kansas, with Kansas populations being substantially larger than those in Colorado and Oklahoma. Dr. Zink concluded his studies show none of the Lesser Prairie Chicken populations are doing poorly, and he questioned why USFWS used some Hagen studies but neglected others in its Listing Proposal.

110. WAFWA and the states referred to the 2010 Hagen Study in preparation of the June 2012 letter. WAFWA's positive inclusion and statement *"according to current information, genetic exchange is still occurring at a significant level to maintain high genetic diversity for the species throughout a significant portion of its range, despite fragmentation levels,"* is indicative of their conclusion genetic variability is not reason to conclude reduced populations of the Lesser Prairie Chicken are susceptible to stressors of climate, disease and predation.

111. Dr. Zink concluded that reduced genetic variation is not occurring so existing fragmentation trends are not exposing Lesser Prairie Chicken populations to increased risk of extinction.

112. The wildlife agencies of the states as represented by WAFWA do not conclude the science supports that genetic variability is a problem resulting from habitat fragmentation.

Population Counting: Methodology and Trends -

113. In its September, 2012 Lesser Prairie Chicken survey, WAFWA observed Lesser Prairie Chicken monitoring and population counting methods differ markedly, yielding data inconsistencies in population trends over time, lek size, range and ultimately population status. Variations in survey methodology and scientific assumptions, combined with the historical lack of coordination between academia, state agencies, and others, has greatly complicated Lesser Prairie Chicken population measurement and behavioral assessment efforts.

114. In June, 2012 WAFWA and the states recognized *"limitations of current methods used for population estimates. These shortfalls include survey bias, small sample sizes, and access issues."*

115. In its 2013 Lesser Prairie Chicken count Kansas Department of Wildlife, Parks and Tourism noted their data set to be incomplete due to missed routes.

116. Lesser Prairie Chicken seasonal migration habits result in differential annual counts as the species relocates around local landscapes in search of favorable habitat, forage, and nesting conditions.

117. Nicole Dick, BA Mathematics, MS Statistics, Professor of Statistics and Mathematics at Garden City Community College, testified the Lesser Prairie Chicken population data in the WAFWA Rangewide Plan understates the populations of the Lesser Prairie Chicken because the surveys *"only counted some of the chickens"* and the methodology of [WAFWA] *"surveyed leks and how they only counted some of the chickens."*

118. Because Lesser Prairie Chicken counting methodologies only identify male "booming" during the mating season, females remain unaccounted for; the counting methodology simply doubles the number of audio-identified males, therefore assuming a 1 to 1 ratio of males to females.

119. Variations in individual sampling units determine the accuracy of measure and reliability of counting estimates because counting relies on audio detection of Lesser Prairie Chicken lekking activities. Further accuracy limitations to population counts include local topography, wind speed, season, institutional variations in methodology, and protocol.

120. The detectability of Lesser Prairie Chicken lekking activities was determined to be 5248 feet (less than 1 mile) in a published study co-authored by Heather Whitlaw, Field Office Supervisor of the Kansas USFWS Office. In her study, Whitlaw concludes at 5248 feet with optimum conditions audio detectability of lekking activities is *"equivalent to or below that of a whisper."* Her audibility study verifies Lesser Prairie Chicken detectability to be further complicated by topography, wind, weather and Lesser Prairie Chicken habitat conditions.

121. Lesser Prairie Chicken counting protocols correspond to roadway locations, which in Western Kansas are often found at much greater distances than one-mile intervals.

122. The Whitlaw Study asserts audibility limitations of Lesser Prairie Chicken booming activities at greater than 1 mile will result in missed leks, reduced population counts and skewed data sets throughout the entire Lesser Prairie Chicken species candidate period.

123. Professor Dick concluded methodology used in the WAFWA Rangewide Plan population counts underestimate the number of Lesser Prairie Chickens.

124. In its two day 2013 Lesser Prairie Chicken lek counting survey, Kansas Department of Wildlife, Parks and Tourism counted only males, assumed males attend all counted leks and that leks were detected at 1 mile intervals, in a "*degree of bias*[that is] *is fairly consistent across years*." In its two-day 2013 count, KDWPT notes spring 2013 data collection was incomplete "*due to un-surveyed rates from previous years, and as a result data collection* [for 2013 survey] *was incomplete.*"

125. Norman MacLeod testified the Lesser Prairie Chicken surveys were performed for a maximum of 1% of the habitat concluding, *"This is a very small sampling area and likely represents a larger than acceptable potential margin of error in population counts."*

126. In their June 7, 2013 comments USDA/FSA/NRCS/FS note for any final rule that *"in order to forecast as the FWS is required to for a final rule, a metric that is tied to the density or abundance of birds is needed before any determination is made."*

Habitat Fragmentation -

127. USFWS stands alone among government agencies in its assessment of habitat fragmentation, population trends, grazing pressures, and collision mortality. USDA, Forest Service, NRCS, WAFWA and the states are all on record as disagreeing with USFWS's untested definition of fragmentation, population trends, and hybridization of the Lesser Prairie Chicken.

128. In its December 11, 2012 listing document, USFWS cites *"historic, ongoing and probable future fragmentation"* of Lesser Prairie Chicken habitat as the primary factor for range contraction, and it suggests the compound effect of stressors and threats to be synergistic as the range of the Lesser Prairie Chicken further contracts—resulting in additional population declines of the Lesser Prairie Chicken.

129. In September, 2010 the Threatened and Endangered Task Committee appointed by the Secretary of Kansas Department of Wildlife, Parks and Tourism determined Lesser Prairie Chicken populations experience large variations in population density despite minimal loss in habitat.

130. On September 1, 2010 the Secretary of Kansas Department of Wildlife, Parks and Tourism accepted recommendations from the Threatened and Endangered Task Committee that denied a Petition by the Kansas Ornithological Society to list the Lesser Prairie Chicken as a Kansas State threatened species.

131. In June, 2012 WAFWA and the states observed that fragmentation has contributed to historical population declines and that recent conservation programs have slowed habitat fragmentation.

132. WAFWA and the states are on record as disagreeing with the science presented in 2008 and 2010 USFWS listing-priority and Candidate Notice of Reviews (CNOR) determination process:

- CNOR are based upon risk assumptions and projections, as to where states have hard science on fragmentation trends;
- Since the Lesser Prairie Chicken has become a candidate species, populations of the bird have undergone a 3-fold range expansion in Kansas, and 25% increase in estimated occupied range (EOR);
- Lesser Prairie Chicken populations have stabilized or are increasing depending upon habitat type;

- As of June, 2012 the feared return of Conservation Reserve Program (CRP) land to agricultural pursuits has not occurred; according to NRCS/FSA the CRP program over the short term has witnessed an 11% decrease between 2008 and 2011, but long term trends since 1998 demonstrate an overall 3% net gain in CRP enrollment;
- The assumption that expiration of individual CRP contracts translates into land being taken out of Lesser Prairie Chicken habitat is not accurate;
- Attrition of CRP enrollments is partially a result of NRCS and FSA programs becoming more discriminatory and excluding marginal lands once accepted in the program;
- The NRCS/CRP SAFE program, specifically aimed at Lesser Prairie Chicken conservation, retains 126,824 acres (of the available 147,600 acres) under long-term contracts;
- Successes of 5-State Watershed Action Team (SWAT) programs are reported by NRCS to provide measurable conservation practices, translating directly into reductions in habitat fragmentation;
- A significant portion of Lesser Prairie Chicken habitat remains in Lesser Prairie Chicken conservation plans and programs controlled by Federal and State agencies through Candidate Conservation Agreement with Assurances (CCAA) related programs:
    - 279,998 Texas Acres in Lesser Prairie Chicken farming and ranching CCAAs and 971,533 acres in wildlife management and programs;
    - 1,523,573 New Mexico and 97,335 Oklahoma acres in grazing programs;
    - 1,024,691 5-state acres in grazing cost-share programs; and,
    - 187,864 New Mexico acres, 11,000 Colorado acres and 20,989 Oklahoma acres in habitat protection programs.

133. In its June 7, 2013 comments the federal agencies responsible for the CRP program, USDA/NRCS/FSA/FS, note CRP acreage remains stable at 86% and the threat of expiring CRP contracts and potential extirpation of the Lesser Prairie Chicken due to decreased habitat "requires further examination:"

> *"An examination of current data of CRP acreages and LEPC populations indicates that CRP acreage has remained relatively stable over the past 20 years and LEPC populations in this region are projected to increase with virtually no likelihood of extirpation in the next 30-100 years (Garton 2012). An analysis that compared the location of expired CRP fields to the 2010 NAIP imagery in Kansas indicated that 86 percent of the acreage was still in grass. Not only were these acres still in grass cover but were located in areas of significant conservation need for LEPC, suggesting that the threat of grassland loss through expiration of CRP contracts requires further examination."*

134. Relocation and establishment of 68 new Lesser Prairie Chicken leks north of the Arkansas River between 1998 and 2011 indicates adaptability of the species to conditions and resilience to habitat fragmentation.

135. Dr. Zink testified Lesser Prairie Chickens migrate to varying habitat regions throughout the year for lekking, breeding, roosting and feeding, which means transition across habitat "edges" is routine and normal behavior; he characterized routine transitions of Lesser Prairie Chickens as "*normal behavior*" and not of concern with respect to biological traps, sinks, or impediment to survival from edge concerns purported in the listing document.

136. In its Lesser Prairie Chicken Conservation Plan, the Coalition recommended land multi-use studies to determine the minimum baseline Lesser Prairie Chicken population level parcel and habitat sizes necessary to support 6 to 10 leks and minimum nesting, breeding, roosting and feeding activities.

Grazing -

137. The USFWS and NRCS Conference Report > Conference Opinion > Biological Opinion process has codified Conservation Practices mandatory to NRCS contracts under the Upland Wildlife Habitat Management and other NRCS programs. Under Standard Conservation Practice 528, "Prescribed Grazing," routine agricultural livestock grazing would be highly regulated and subject to Conservation Practice 645, "Upland Wildlife Habitat."

138. Conservation Practice 645 of the Biological Opinion imposes grazing restrictions and is purported to "improve and maintain desired plant species composition, quality, vigor and a vegetative structure mosaic," as well as "*increase forage quality for grazing and browsing animals' health and productivity.*"

139. Conservation Practice 645 allows the ability of federal agencies *"to modify existing infrastructure* [on private property] *to reduce or eliminate potential adverse effects resulting from those structures,"* and requires preparation of an Environmental Evaluation for each property receiving funding.

140. Conservation Practice 645 allows establishment of permanent photo locations on private property. Conservation Practice 645 allows access to private property "*on a regular basis*" for "*evaluation of habitat conditions*."

141. In its December 11, 2012 Federal Register Notification, USFWS recognized the lack of science, studies, and information on grazing throughout the 5 State region:

> *"Although documented, the significance of direct livestock effects on the Lesser Prairie Chicken is largely unknown, detailed rangewide information is lacking on the extent, intensity, and forms of recent grazing, and the associated effects on the Lesser Prairie Chicken."*

142. Immediately thereafter USFWS speculates:

> *"However, livestock grazing occurs over such a large portion of the area currently occupied by lesser prairie-chickens that any degradation of habitat it causes is likely to produce population-level impacts on the lesser prairie-chicken."*

143. In its June 7, 2013 comments the agencies responsible for farm programs, e.g. USDA/FWA/NRCS/FS specifically refer to the threat posed by livestock grazing as a "*notion*," and they collectively are on record as vehemently defending livestock grazing as an effective tool for range management:

> *"There is significant scientific disagreement regarding the assumption that livestock grazing occurring over a large portion of the LEPC occupied area degrades habitat and causes population-level impacts on the LEPC. NRCS data refute this notion. Well-managed grazing lands can be high quality LEPC habitat. Further, NRCS has worked with ranchers to implement over 1 million acres of prescribed grazing management in the LEPC range, contributing to improved rangeland health. Using National Resource Inventory data, NRCS initial analyses show that rangeland health and vegetation conditions for LEPC are not as impacted or overgrazed as the proposed rule supposes."*

144. Clint Pearson, banker, 5th generation rancher and manager of ranches in 5 Kansas counties, testified that the NRCS CRP Program can be an impediment to the Lesser Prairie Chicken habitat. Because grazing is either not allowed or heavily restricted on CRP lands, the result is a homogeneous plant community that impedes Lesser Prairie Chicken mobility.

145. Mr. Pearson testified grazing is a powerful tool in land management and historic "mob grazing" patterns that tear up and aerate land making it more productive for livestock and the Lesser Prairie Chicken.

146. Ken Klemm, Sherman County Commissioner, buffalo ranch owner, and holistic conservationist, testified grazing is a natural part of the system, and mob grazing of millions of buffalo was beneficial to Lesser Prairie Chickens as the two *"evolved together, cohabitated together and could exist in perfect harmony together."*

147. Commissioner Klemm read into the record a firsthand account from 1860 by author and lay ornithologist J.R. Mead. Mead recounts firsthand knowledge of buffalo grazing habits where wave after wave of buffalo herds would pulverize the landscape to "innumerable parallel paths." The buffalo would eat all the vegetation "close to the ground." Mr. Mead goes on to write how the whole country, following grazing patterns, would reestablish itself to an appearance of a *"well-kept park belonging to an English nobleman."*

148. Rancher Keith Edwards corroborated Commissioner Klemm's testimony that buffalo trampling contributes to grass recovery. He gave testimony that rather than being a threat, grazing is a tool for effective ecosystem management.

149. Mr. Edwards, in testimony corroborated by Commissioner Klemm, discussed holistic management principles by international grazing conservationist Allan Savory. The carefully planned holistic principals discussed by Mr. Edwards and employed by Commissioner Klemm demonstrate in practice improved vegetative diversity, quality and abundance that results in improved Lesser Prairie Chicken habitat.

150. Mr. Edwards testified that at holistic management seminars he has attended, experts presented aerial photographs of lands demonstrating abundant vegetation on mob grazed lands and "sparse" vegetation on adjacent, government-managed lands.

151. Mr. Edwards concluded his testimony that mob grazing increases grass diversity and that restricting grazing will decrease the chance for survival of the Lesser Prairie Chicken.

152. Nikki Schwerdfeger, Hamilton County Commissioner and 3rd generation farm and ranch owner, testified as a girl her grandparents told about the Lesser Prairie Chicken lekking season to observe and enjoy the species; over time she witnessed introduction of center pivot sprinklers, fencing, and increased agricultural activities across their hundred-year-old farmstead.

153. Commissioner Schwerdfeger testified introduction of modern agricultural practices have sustained forage and alfalfa for the Lesser Prairie Chicken.

154. Commissioner Schwerdfeger's testimony is corroborated by detailed comments KNRC filed with USFWS on March 11, 2013.

155. Commissioner Schwerdfeger said that her 15 quarters of ranch land continues to support Lesser Prairie Chicken lekking, nesting, and foraging activities, and declines in Lesser Prairie Chicken, songbird, quail, and other fowl populations are due to drought conditions witnessed throughout the region. She stated the Lesser Prairie Chickens have *"adapted to farm life."*

156. Commissioner Schwerdfeger testified her land is a prime candidate to collect mitigation monies from the WAFWA Rangewide Plan, and that she could *"be a bad neighbor and say, okay there is money in it for me. Let me have it. But the Lesser Prairie Chickens will survive without paying me to do the things I am already doing."*

WAFWA RANGEWIDE PLAN

157. In June, 2012 WAFWA and the states concluded local conservation practices are sufficient and that scientific and commercial information indicates the Lesser Prairie Chicken is not now or in the foreseeable future threatened, rendering the need for federal intervention unnecessary:

> *"We conclude, with existing habitat conservation practices being implemented to reduce habitat fragmentation, and the best scientific and commercial information available, the LPC is not now, or in the foreseeable future, threatened by predation or disease to the extent that listing under the ESA as a threatened or endangered species is warranted at this time."*

158. In its September 1, 2010 memorandum the Secretary of Kansas Department of Wildlife and Parks (KDWP) accepted recommendations from its Threatened and Endangered Task Committee that KDWP should not list the Lesser Prairie Chicken as a State Threatened Species.

159. The reasoning used by the Kansas Department of Wildlife and Parks Threatened and Endangered Task Committee in concluding listing of the Lesser Prairie Chicken was unnecessary included:

- *"Documentation of over 200 lek sites north of the Arkansas River since 1990 in an area where the Lesser Prairie Chicken population was sparse or nonexistent;"*
- *"The Threat of habitat loss due to expiring CRP contracts has lessened due to federal agricultural policies that target renewal of CRP contracts to focus on Lesser Prairie Chicken habitat. One of the Conservation Priority Areas in Kansas is specifically designated for the Lesser Prairie Chicken;"*
- *"The threat of habitat fragmentation from energy development remains an uncertainty, but recent efforts to protect Lesser Prairie Chicken habitat are recognized;"*
- *"There is currently not enough known about the effects of energy development on Lesser Prairie Chicken habitat to assume developed areas will preclude Lesser Prairie Chicken use;"*
- *"Several ongoing and pending conservation actions directly or indirectly target habitat used by the Lesser Prairie Chicken;"* and,
- *"The majority of the ad hoc committee of Prairie Grouse Experts recommended that the Lesser Prairie Chicken remain unlisted in Kansas."*

160. The first sentence of the introduction section of the WAFWA Rangewide Plan states [the plan] *"is intended to preclude the need to list the Lesser Prairie Chicken under the Endangered Species Act of 1973, as amended (ESA)."*

161. In testimony given before the Hearing Council, Keith Sexson stated the intent of the WAFWA Rangewide Plan is to "*preclude a listing.*"

162. The purpose that the WAFWA Rangewide Plan is designed primarily to "preclude a listing" is corroborated in testimony by Jim Pittman at the Public Hearing, in coordination meetings, on slide presentations and in correspondence.

163. At the Public Hearing, when asked if USFWS has adequate scientific and commercial information upon which to base their proposed listing of the Lesser Prairie Chicken, Mr. Sexson stated Kansas Department of Wildlife, Parks and Tourism had *"not taken a position on the information that they [USFWS] have available to essentially go forward with a proposed listing."*

164. Keith Sexson was the primary recipient of the September 1, 2010 Memorandum where then Secretary Hayden accepted the position of the Threatened and Endangered Task Committee that the Lesser Prairie Chicken not be listed as a state threatened species.

165. Keith Sexson was the author of the June 2, 2012 letter to Dr. Benjamin Tuggle on behalf of WAFWA and the states that concluded the best science and commercial information do not support a federal determination that the Lesser Prairie Chicken is threatened or a listing necessary for its continued existence.

166. Norman MacLeod, endangered species and public policy expert and former executive director of Environmental Sciences Independent Peer Review Institute, testified that as of November 5, 2013 Kansas Department of Wildlife, Parks and Tourism had sold 3,723 Lesser Prairie Chicken Hunting Permits at $2.50 each.

167. Mr. MacLeod concluded due to the number of available hunting permits and the ongoing hunting season, Kansas Department of Wildlife, Parks and Tourism does not believe the Lesser Prairie Chicken "*is in sufficiently dire straits to warrant listing under the ESA.*"

168. Jim Pitman testified that there had been numerous conferences "*at the technical and at the administrative levels*" between WAFWA, USFWS and a select portion of the oil and gas industry during preparation of the mitigation portion of the WAFWA Rangewide Plan.

169. Jim Pitman testified the primary target of WAFWA mitigation is *"big industries;"* and that participation by oil and gas organizations is specifically what the service *"has indicated they're going to review when they evaluate the effectiveness of our plan."*

170. Mr. Pitman testified that USFWS, individual companies from the oil and gas industry, and WAFWA were involved in the *"permitting-process"* discussions and of the WAFWA Rangewide Plan because CCAAs have been tested in court.

171. A select group of oil and gas companies participated with WAFWA in defining the mitigation cost structure for the WAFWA Rangewide Plan.

172. Mr. Pittman testified local government was not involved in scoping or development of the WAFWA Rangewide Plan and no attempt was made to contact individual counties; participation of the counties was only sought in public meetings and comment periods following completion of the draft WAFWA Rangewide Plan and subsequent revisions.

173. The WAFWA Rangewide Plan proposes a 17-seat Advisory Committee that reports to a WAFWA Initiative Council comprised of non-elected members from the 5-state Fish and Wildlife Agencies. The 17-seat Advisory Committee would be comprised of industry, Non-Governmental Organizations (NGO), and other interested parties, along with 3 seats allocated among the 197 counties throughout the area regulated by the WAFWA Rangewide Plan.

174. The WAFWA Rangewide Plan proposes to put 197 local government counties on the same advisory platform as NGOs, all competing for three advisory seats.

175. Verbal testimony by senior management representatives of Wheatland Electric Cooperative, Sunflower Electric, Kansas Electrical Power Corporation, CMS Electric Cooperative and the statewide organization Kansas Electric Cooperatives (KEC) revealed that none of those companies or associations were contacted by WAFWA representatives for review, comment or opinion during preparation of the mitigation cost portion of the WAFWA Rangewide Plan.

176. Kansas Electric Cooperatives' CEO Bruce Graham testified the *"only certainty, after reviewing the* [WAFWA Rangewide] *Plan, is that mitigation will be onerous and costly."* He went on to testify the WAFWA Rangewide Plan will conflict with other Kansas state economical programs, such as the Rural Opportunities Zone Initiative, and that implementation of the mitigation portion would impact affordable housing, development and raise the cost of new rural infrastructure.

177. Mr. MacLeod testified that in his review of the WAFWA Rangewide Plan, *"WAFWA envisions collection of a quarter of a billion dollars in enrollment and mitigation fees over the course of 10 years,"* and *"the KNRC alternative would achieve similar goals at far lower expense."*

178. At two points during his testimony, Mr. Sexson states the WAFWA Rangewide Plan would "*prohibit disruption*" of economic activity *"in an area vital to state and national interest."*

179. Mr. Sexson testified he was not familiar with the safeguards to the human environment ensured by the NEPA process; the focus of the WAFWA Rangewide Plan was to provide a strategy to eliminate threats perceived by USFWS in order to preclude a listing. He also shared that there were no assurances that the WAFWA Rangewide Plan would be accepted by USFWS nor had Kansas Department of Wildlife, Parks and Tourism considered what would become of pre-enrollment mitigation monies from industry if USFWS listed the Lesser Prairie Chicken but rejected the WAFWA Rangewide Plan.

180. Kansas Department of Wildlife, Parks and Tourism has contributed to preparation of a federally endorsed plan without being familiar with the fundamental federal procedural and economic requirements that balance human and natural environments.

181. Mr. Graham testified calculations made by KEC would raise the cost of distribution lines by $11,000 to $22,000 per mile and transmission lines by $870,000 per mile, and that the not-for-profit electric cooperatives that occupy the Lesser Prairie Chicken range have no alternative but to pass those increased cost to member consumers, with the statement, *"every mile of line that they have to construct is going to mean visible dollars on the electric bill."*

182. Lynn Freese, Director of Member Services for Wheatland Electric Cooperative (WEC) that services 14 counties in the range of the Lesser Prairie Chicken, testified that of the 48-mile-average of distribution line WEC constructs per year, WEC would be facing *"an additional cost exposure of over $550,000 per year."* He testified WEC would be, by law, allowed to pass 90% of those costs on to customers, which would result in an estimated 1% escalation of all electrical rates per customer, per year.

183. Wheatland Electric Cooperative estimates 90% of the increased costs would be borne by new development, and over a 25 year period, the WAFWA Rangewide Mitigation proposal would add $13,750,000 in costs in WEC's service territory alone.

184. Wheatland Electric Cooperative concluded their analysis of WAFWA Rangewide Plan's mitigation costs by stating:

> *"Imposing these costs on member/consumers of Wheatland Electric will assuredly have a negative impact on new development, as well as the existing member/consumer base, especially those in the lower income brackets who tend to be elderly and minorities."*

185. Kirk Thomson, General Manager of CMS Electrical Cooperative, testified the mitigation costs under WAFWA Rangewide Plan would have a direct impact on rural populations, and those costs would disproportionally fall on folks in the western part of Kansas.

186. Mr. Thompson stated construction costs for a mile of distribution line in Chat 2 Habitat would double, and his calculations indicate a new development could cost a homeowner an additional $300 per month over a typical 60-month contract period.

187. Mr. Thompson stated that individual landowners wishing to develop their property would themselves be faced with pass-through costs contemplated by the mitigation portion of the WAFWA Rangewide Plan because territory serviced by cooperatives *"does not have developers to front or share costs."*

188. Mr. Thompson questioned why the costs to conserve the Lesser Prairie Chicken - because of the impacts of increased electric rates - should fall only to those in Western Kansas, and not the entire state or even the nation.

189. Scoping and primary preparation of the WAFWA Rangewide Plan has taken place without the involvement of or input from the 32 member KNRC Coalition.

190. The cost portion of the WAFWA Rangewide Plan has been prepared in concert with and input from only a small portion of affected industries.

191. The organizational structure of the WAFWA Rangewide Plan provides a limited role and advisory-only capacity for local governments.

192. The WAFWA Rangewide Plan, prepared using federal monies and with federal oversight, does not consider the cost implications to the human environment, industry, local government, minorities, families and local disadvantaged populations.

193. The WAFWA Rangewide Plan neglects to consider the downstream and long term cultural impacts and social cohesiveness issues that could arise from costs associated with its mitigation proposal.

LAND USE

Conservation Easements -

194. Conservation Easements are land title encumbrances that impose specific and detailed requirements on landholders such as buffer zones; riparian setbacks; land use and access restrictions; livestock and management requirements; imposition of inspection rights; structure construction, design, location or removal restrictions. Conservation Easements form the heart of the WAFWA Rangewide Plan with 25% of revenues proposed to purchase "In Perpetuity" habitat easements for Lesser Prairie Chicken habitat.

195. Examples of Conservation Easement programs cited in the WAFWA Rangewide Plan include the 4,183-acre Nature Conservancy Wilhite Ranch and 1,293-acre Lowe Ranch State Habitat in Prowers County, Colorado.

196. Prowers County, Colorado is located in Lesser Prairie Chicken habitat immediately adjacent to Coalition members across the Kansas state border.

197. Two large Prowers County ranch and land owners, Ms. Jillane Hixson and Ms. Valerie Emick, gave testimony about firsthand experience with Conservation Easements.

198. Ms. Hixson is a 3rd generation rancher and landholder; The Hixson farm dates back to the 1890s at which time her forefathers homesteaded the property she now manages.

199. In 2003, the Hixson family entered into a newly-legislated Colorado Conservation Easement Program and subdivided 150 acres of prime property valued at $12,000/acre ($1.8 million) into 3 separate Conservation Easements.

200. The Colorado Conservation Easement Tax Statute is based upon Internal Revenue Service (IRS) standard 26 USC170(h).

201. When the Colorado Conservation Easement program was initiated, thousands of prospective landholders attempted to participate in the program, and the $265 million claim to tax exemptions quickly overwhelmed the $20 million planned by Colorado for the Conservation Easement program. This resulted in a decision within Colorado Department of Revenue (CDOR) to implicate state-certified conservation easement appraisers.

202. The Hixson Conservation Easements were appropriately inspected by Colorado state certified appraisers, all conservation forms were completed, and state-required studies done according to policies. Following execution of the Conservation Easements, tax incentives were granted by the State of Colorado and the tax exemptions were transferred to a number of Conservation Easement purchasers.

203. In 2007 conflicts arose between CDOR, IRS, and the Hixson family over the value of the Hixson Conservation Easements even though the easements were appraised, certified and all procedures for their recording were precisely followed.

204. In 2011, CDOR appraised the Hixson property at a value of $0 per acre, and assigned penalties and back taxes of $1,560,000. The CDOR determination was at odds with formal determinations made by the IRS, who held the Hixson Conservation Easements retained value according to their 170(h) standard.

205. In addition to their property having been devalued from $1.8 million to $0 and the cost of lawyers, accountants, appraisers, stress and time, Ms. Hixson testified their family is still facing 34 law suits from individuals who purchased the Conservation Easement tax credits under the State approved program.

206. Ms. Hixson testified about another Conservation Easement holder in Winter Park, Colorado who also participated in the Colorado Conservation Easement Program and holds property valued by CDOR at $0 - while neighboring properties routinely sell for $60 million.

207. In the event of bankruptcy, the Hixson land containing Conservation Easements will be auctioned for the value of the land minus the encumbrances; the land can then be purchased by the Conservation Easement holder or Land Trust Company, who are the only entities that can remove the Conservation Easement restrictions from the title. The land can then be resold for market value.

208. In 2008 the Colorado Legislature revised the Conservation Easement Statute and applied the law retroactively, negatively affecting all landholders who entered into Conservation Easements between 2003 and 2008.

209. Ms. Hixson went on to testify that the CDOR has rejected 800 appraisals from the period of 2003 - 2007.

210. The Conservation Easement restrictions remain on the Hixson property.

211. Valerie Emick, a 3rd generation rancher, owns a large ranching and wind farm operation also in Prowers County, Colorado. In 2005, Ms. Emick and her family donated 13 parcels of high quality land to the Conservation Easement program, one containing a gravel pit operation. Ms. Emick testified due to problems with the Conservation Easement program, that the State of Colorado (CDOR) has valued their land at $0 per acre.

212. The Emicks donated 5 easements for $794,000 in tax credits and to-date have spent $340,000 in legal fees stemming from law suits associated with purchasers of their Conservation Easements tax credits. Ms. Emick described how the Colorado system does not allow for buyers and sellers of Conservation Easement tax credits to share information, complicating fact-finding.

213. Ms. Emick believes Conservation Easement land devaluations could happen in Kansas and Conservation Easements are a way for states to make up budget shortfalls and the government to gain control of private lands - testimony that was corroborated by Ms. Hixson.

214. In the October, 2013 version of the WAFWA Rangewide Plan, page 78, WAFWA proposes a 3,929,600 acre set aside for Focal Areas and a 500,480 acre set aside for Connectivity Zones in Kansas. USFWS has accepted a minimum goal of 25% lands to be set aside by in perpetuity Conservation Easements (but desire 50% or more.)

215. Based upon the Hixson and Emick property devaluation experience and current average NRCS land-value of $1,900 per acre, the USFWS goal for the 1,107,520 acres of habitat set aside of Focal and Connectivity lands could result in a devaluation of $2,104,288,000 - before additional consideration that Conservation Easements result in mineral-right devaluations, split-estate issues and access concerns.

Split Estates -

216. Mr. Freese testified Wheatland Electric owns several thousand acres of restored Lesser Prairie Chicken habitat in Kearny and Finney Counties – land that is an *"ideal candidate to be enrolled in the WAFWA Mitigation Program."*

217. Mr. Freese indicated under the current WAFWA Conservation Plan, subsurface mineral right holders across the many thousands of acres of Lesser Prairie Chicken range could experience difficulty accessing their water and mineral rights if the land is set aside in the WAFWA Conservation Mitigation program.

218. Mr. Freese articulated a scenario that as Lesser Prairie Chicken populations on lands in mitigation programs increase and birds migrate to adjacent properties, conflicts between adjacent landholders will arise because some lands will not be in conservation programs.

219. Mr. Freese testified there is "*gas production under every square foot*" and oil production "*under certain portions*" of Wheatland property and if Wheatland were to allow Conservation Easements on the surface then access for drilling pads and new wells could be prohibited. Because subsurface rights for the Wheatland properties are held by others, he recounted a situation where lawsuits will result because subsurface rights holders will be denied access by conservation easement provisions on the same tract of land.

220. Counties derive tax revenue from oil and gas production.

221. Mr. Pitman speculated that if conflicts arose between a mineral rights holder and a landholder enrolled in conservation, the conflict would be sent to the advisory board of WAFWA. This approach would remand split estate disputes to an unelected board partially comprised of foreign nationals to redress American land disputes.

222. Mr. Sexson testified the states would retain management authority over "resident fish and wildlife" lending uncertainty to the role of the state and WAFWA in redressing split-estate conflicts.

223. Commissioner Klemm read into the record the Third Amendment of the Kansas Bill of Rights, and pointed out there is no mechanism to exercise the right for redress of grievances under the Kansas Constitution or the First Amendment of the U.S. Constitution in the WAFWA Conservation Plan.

224. Commissioner Klemm drew attention to the fact that Kansas Department of Wildlife, Parks and Tourism has no authority under the Executive Branch of government to "*assess fees to private property, both land and improvements;*" and he has not heard of the legislature granting such authority.

225. Because WAFWA has no authority and thus would only be the administrator of the WAFWA Conservation Program, and because Kansas Department of Wildlife, Parks and Tourism has no jurisdiction over the split estate issue, any issues arising from split estate problems would be left to land owners and mineral-rights holders.

COMPLIANCE WITH FEDERAL STATUTES AND EXECUTIVE ORDERS

226. The Statutes, EOs and CEQ Regulations cited in the *Kansas Natural Resource Coordination Plan* assure local government receives accurate information, appropriate review of alternatives, reasonable assessment of economic consequences, prior notification of federal proposals, reasonable opportunity to vet issues and ample time to understand the implication of federal proposals on the human and natural environments.

227. Federal Statutes, EOs and CEQ Regulations cited in the *Kansas Natural Resource Coordination Plan* assures federal agencies preparing proposals will carefully consider the potential economic consequences, risk to private property from incidental property takes, impacts to agriculture and have published a reasonable understanding of the implications for the proposed Major Federal Action.

228. Mr. Carlson testified that KNRC personally reviewed with USFWS the *Natural Resource Coordination Plan* and the FLPMA ESA requirement to take into account local plans.

229. KNRC has been precise in its correspondence and consistent in its expectation that USFWS adhere to the CEQ, NEPA, Regulatory Flexibility Act and EO mandates that balance human and natural environments.

230. At the November 1, 2013 Coordination Meeting Number 2, USFWS stated objections to KNRC's interpretation of Statutes, EOs and CEQ Regulations and has since refused to address, respond to or communicate with KNRC details of its objections to KNRC.

231. Department of Interior Solicitor Dana Jacobsen refused repeated overtures to attend the KNRC Public Hearing or further comment on USFWS's stated disagreement of the authorities in the KNRC Plan.

232. There is no indication in the Public Record USFWS has performed the required Quantitative Regulatory Flexibility Analysis regarding the economic impact to small entities and businesses in the region covered by the Lesser Prairie Chicken Listing Proposal.

233. There is no indication USFWS has accounted for unintended consequences, performed a comprehensive cost/benefit analysis using local data, statistics and history, evaluated the aggregate cost/benefit to the human and natural environments, or attempted to select the least net-cost alternative.

234. The Listing Proposal is silent on the evaluation of impacts to private property and other potential, unnecessary takings required by EO 12630.

235. USFWS personnel have stated, at Coordination Meeting Number 2, its intent to not perform an Environmental Assessment (EA) or Environmental Impact Statement (EIS) as required by the National Environmental Policy Act and Council on Environmental Quality.

236. KNRC has brought USFWS's attention to the obligation to perform an Environmental Assessment and the application of recent decisions from the 10th Circuit Court of Appeals.

237. USFWS continues to ignore the Coalition's position that applicability of the 1995 ruling by the 10th Circuit Court of Appeals that Catron County Board of Commissioners v. USFWS supersedes its own interpretation the EIS is not required *"as a matter of law."*

238. USFWS is unresponsive to the Coalition's position that it must account for private property land interests and public health and safety as required by EO 13352. By continuing to ignore the *Lesser Prairie Chicken Conservation, Management and Study Plan*, USFWS is disregarding EOs 12372 and 13575 requiring federal agencies to utilize local plans and processes and accommodate concerns by local elected officials.

239. The FLMPA requirement for federal agencies to attempt consistency with local plans "*to the maximum extent possible*" necessitates USFWS attempt to reconcile differences with the KNRC *Natural Resource Conservation, Management and Study Plan* and reconcile its endorsement of the WAFWA Rangewide Plan to the local KNRC Plan.

240. In not performing the minimum required economic and social impact studies, USFWS has not considered the impact of the Listing Proposal on minorities, low-income populations and families as required by EOs 12898 and 12250.

Critical Habitat -

241. In the December 11, 2012 Listing Proposal, USFWS stated it has determined *"designation of critical habitat to be prudent but not determinable at this time."* Webster's Dictionary of 1828 defines "*prudent*" as "*cautious; circumspect; wise; careful of enterprises, measures or actions.*"

242. The WAFWA Rangewide Plan endorsed by USFWS proposes four geographical ecoregions comprising the Lesser Prairie Chicken range, and within those zones are "Focal Areas" and "Connectivity Zones" deemed essential to conservation of the Lesser Prairie Chicken - requiring special management and protection.

243. By endorsing the WAFWA Rangewide Plan, USFWS has geographically identified ecoregions, focal areas and connectivity zones that are critical habitat by definition in Endangered Species Act Section 3(5)(a).

244. Mr. Pitman gave testimony that WAFWA used the term "Crucial Habitat" instead of "Critical Habitat" so as intentionally not to be clear in the geographic designation of the Lesser Prairie Chicken habitat.

245. Mr. Pitman indicated if USFWS were designating areas of critical habitat, "*they would probably want to identify areas just where the birds are located, and currently high quality habitat*" and that the WAFWA Ecoregions, Connectivity Zones and Focal Areas "*may be good for that purpose.*"

246. Executive Director Carlson testified that there is no distinction between the words "crucial" and "critical" when it comes to the intent and implementation of the WAFWA Rangewide Plan.

247. Hearing Officer Fred Kelley Grant pointed out that when USFWS pointed to the ecoregions and strongholds in the Federal Register Notification, they are identifying Critical Habitat; he went on to say,

> *"USFWS is attempting to divide the statute that says when they list [a species] they shall designate critical habitat: they've tried to divide it so that all they do is list it, and they [USFWS] say we're not designating critical habitat so we don't have to go through NEPA, but in fact, they are."*

248. USFWS has proposed four Ecoregions with Connectivity Zones in its Listing Proposal that contain specific, geographic focal areas occupied by the Lesser Prairie Chicken that contain habitat essential to conservation and which require special management protections.

249. By endorsing the WAFWA Rangewide Plan, USFWS has designated Critical Habitat for the Lesser Prairie Chicken.

CONCLUSIONS

Coordination

- The Secretary of Interior has demonstrated full understanding of the statutory and administrative coordination requirement through its action with local government in the Logan County, Kansas, Black-footed Ferret introductions and in multiple locations nationwide.
- Throughout the preparation, publishing and the promotion of its Lesser Prairie Chicken Listing Proposal and special 4(d) Rule, the Secretary has willfully neglected coordination with 39 Western Kansas local governments.
- By ignoring repeated requests to attend the Kansas Natural Resource Coalition (KNRC) Public Hearing or provide any response of its stated disagreement with KNRC's use of authorities in the *Natural Resource Coordination Plan* and its *Lesser Prairie Chicken Conservation, Management and Study Plan*, the Secretary has deliberately refused to coordinate with local government.
- By dispatching field-level staff to attend crucial and time sensitive coordination meetings - despite specific requests for personnel commensurate to the issues - USFWS has disregarded the importance, timeliness and significance of local coordination efforts germane to the Lesser Prairie Chicken Determination Process.
- Through willful and ongoing disregard for the *Lesser Prairie Chicken Conservation, Management and Study Plan* adopted by 32 member Kansas Counties that predominate Lesser Prairie Chicken habitat, the Secretary is missing an integral conservation component fundamental to an accurate determination under Section 4 of the Endangered Species Act.
- By continuing to ignore KNRC's plea to attempt consistency between the USFWS-endorsed Western Association of Fish and Wildlife Agencies (WAFWA) Rangewide Plan and the KNRC *Lesser Prairie Chicken Conservation, Management and Study Plan* the Secretary has neglected statutory responsibility and fallen short of the standard required of federal agencies to keep apprised of, assist with and reconcile inconsistencies between local plans.
- Throughout the experimental Black-footed Ferret introduction project USFWS has knowingly violated local ordinances, provided incomplete information and perceptively misled Logan County commissioners during on-the-record coordination meetings.

- Because the Secretary has not taken into account the 32-County KNRC *Lesser Prairie Chicken Conservation, Management and Study Plan* whatsoever, the Secretary is not in a position to make a sound, fully-informed, scientific determination of the present and future risks to the Lesser Prairie Chicken under ESA Section 4(b).

Science, Data and Technical Considerations

- The Secretary demonstrated that the USFWS lacked sufficient scientific information upon which to base a defensible ESA listing decision for the Lesser Prairie Chicken by extending the decision deadline to remedy the Service's lack of information. Despite the availability of a significant body of additional scientific and commercial information, USFWS has failed to provide meaningful consideration to a significant portion of that information. USFWS failed to fully comply with its mandate to use the best available scientific and commercial information for the purpose of making a fully informed listing decision.
- The threat posed by habitat fragmentation in the listing proposal is scientifically untested, inconclusive, based upon outdated Conservation Reserve Program (CRP) information and lacking range-wide population trend data.
- The public record does not contain evidence or studies that USFWS has performed required population density and abundance metric analysis on a range or ecoregion level.
- The public record does not contain evidence USFWS has performed an analysis characterizing and distinguishing the individual, additive and compensatory contributions of all threats in its listing proposal.
- USFWS concerns of habitat withdrawal from CRP and State Acres for wildlife Enhancement (SAFE) programs due to expiring contracts are verifiably inaccurate, anecdotal and without scientific justification.
- Baseline data sufficient to adequately ascertain habitat fragmentation as a significant threat to the continued existence and future of the Lesser Prairie Chicken on a rangewide basis does not exist.
- Genetic variability analysis not sufficiently considered by USFWS in its Listing Proposal indicate that more than adequate genetic exchange continues throughout Lesser Prairie Chicken populations in Kansas, Colorado and Oklahoma; none of the populations can be considered inordinately susceptible to stressors of climate, disease or predation, despite current land fragmentation levels.

- The states and WAFWA do not conclude there is a lack of genetic variability related to habitat fragmentation sufficient to threaten the continued existence and viability of the Lesser Prairie Chicken.
- During the time horizon of its existence as a species, the Lesser Prairie Chicken has demonstrated resilience to climate variation on the short and long term scale. As the climate warms, the species expands its range northward, and as it cools, it expands its range southward. During the 1930s (Dust Bowl) Lesser Prairie Chickens demonstrated the capacity to survive a combination of drought and high temperatures exacerbated by anthropogenic landform changes and habitat fragmentation characteristics that are unlikely to be repeated.
- Lesser Prairie Chickens routinely and typically display movement across areas occupied by manmade structures, highways, power lines, oil pads and active crop lands in search of forage or in response to stressors. New leks observed across the Arkansas River and the Interstate 70 corridor are indicative of the resilience, response and ability of Lesser Prairie Chickens to adapt to current fragmented conditions.
- Seasonal movement of Lesser Prairie Chickens in search of food, forage and nesting sites is normal behavior; observed and documented patterns and new leks observed across the Arkansas River and Interstate 70 corridor alleviate concern about edge effects associated with habitat fragmentation.
- Inconsistencies in population counting methodology, small sample size, survey bias, access issues, and auditory detectability issues - all recognized by USFWS - combine to result in significant underestimation of Lesser Prairie Chicken populations.
- Year-to-year declines or spikes in Lesser Prairie Chicken population counts are normal and a result of varying weather patterns.
- WAFWA and the states agree that improving conservation programs, brush management, and heightened awareness have slowed - in some cases reversed - habitat fragmentation; and that more than 90% of CRP Lands having expired contracts remain as grasslands favorable to Lesser Prairie Chicken occupation. This data is corroborated by USDA/FSA/NRCS/FS.
- Since 2008 Lesser Prairie Chicken populations have stabilized or are increasing depending upon habitat type and proximity to drought stricken areas.

- The 2013 hunting-season policy on Lesser Prairie Chickens, for $2.50 per permit, clearly indicates Kansas Department of Wildlife, Parks and Tourism does not conclude that the Lesser Prairie Chicken is threatened in its Kansas Range.

WAFWA Rangewide Conservation Plan

- The responsible state agencies have access to the best quality, and most recent science and have primary interest in and responsibility for species preservation, placing them in the best position to assess the vulnerability of the Lesser Prairie Chicken to extinction.
- WAFWA and the states are on record as stating *"the Lesser Prairie Chicken is not now or in the foreseeable future at risk of extinction in all or a significant portion of its range."*
- Development, preparation and promotion of the WAFWA Rangewide Plan are a reaction to the specter of a "threatened" designation corroborated by a position taken by WAFWA and the states as late as June, 2012.
- *The Lesser Prairie Chicken Conservation, Management and Study Plan* is a low-cost, local government effort that balances conservation of the Lesser Prairie Chicken with agricultural productivity, ensuring the continued existence of the species in tandem with the general welfare of Western Kansans.
- Existing state and federal conservation programs remain more than adequate, increasing in conservation scope and efficacy, and have sufficient authority to respond to and conserve Lesser Prairie Chicken populations.
- The WAFWA Rangewide Plan contemplates a new, non-governmental structure that would oversee administration of the program at an annual cost of $27 million.
- Targeting of wind energy and electrical transmission infrastructure as responsible for predation and habitat fragmentation, to the exclusion of threats posed by trees, bridges, and grain elevators is speculative with an insubstantial scientific basis.
- Testimony that the primary predation threat to the Lesser Prairie Chicken emanates from mammalian sources brings into question contributions from raptor sources and minimizes the need for mitigation proposed in the WAFWA Rangewide Plan.

- The WAFWA Rangewide Plan was drafted by wildlife agencies of the 5-states along with select industries under guidance by USFWS; local government was excluded from the drafting process.
- The cost structure of the mitigation section of the WAFWA Rangewide Plan was negotiated between WAFWA and a small number of oil and gas companies to the exclusion of electric cooperatives, wind, agriculture and other potentially-affected industrial sectors.
- Through economic participation in a Major Federal Action the Kansas Department of Wildlife Parks and Tourism is a Cooperating Agency.
- Testimony by KDWPT revealed the mitigation portion of the WAFWA Rangewide Plan was prepared without consideration of the economic, cultural, social and minority impacts to the human environment.
- Conservation easements necessary to fulfill the 25% in perpetuity requirement in the WAFWA Rangewide Plan will result in property devaluations calculated to be as much as $2,104,288,000.
- The mitigation fees contemplated by the WAFWA Rangewide Plan will primarily be born by industry, agriculture, communities and residents in the 32 counties comprising the Coalition.
- Neither USFWS, WAFWA nor the states have evaluated alternatives, economic impacts, cost/benefits, down stream impacts or implications of the Listing Proposal to industry, communities, schools, minority and low-income populations of the human environment resulting from certain increased energy and mitigation costs.
- Neither USFWS, WAFWA nor the states have evaluated the required "No Action" alternative.

Grazing

- Throughout history millions of Bison in vast herds roamed the high plains, mob-grazing the vegetative landscape to stubble, pulverizing the soils and altering the landscape in the process. For their part, Lesser Prairie Chicken populations participated in, benefited from and adapted to grazing activities that characterize the high plains ecosystem.
- Contemporary ranchers and farmers utilizing working lands understand, nurture and guard those habitat, property and riparian areas upon which they depend - a fact particularly true in livestock grazing management.

- In its Listing Proposal, USFWS specifically recognizes the lack of Science "*on the extent, intensity and forms*" of potential impacts from grazing throughout the 5 State region, calling into question from the onset the need for the Regulatory Policies proposed in the Conference Opinion, NRCS Conservation Practices 528 and 425 and the Special 4d Rule.
- USFWS, through its Conference/Biological Opinion and Special 4d Rule, proposes to levy Regulatory Policies that according to USDA/FSA/NRCS/FS are both scientifically unjustified and unnecessary.
- Through its participation in the Conference Opinion process USDA/FSA/NRCS/FS is a Cooperating Agency.
- None of the 32 KNRC Counties were contacted by USFWS or USDA/FSA/NRCS/FS to coordinate during the Conference Opinion/Biological process.
- Conservation Practices 528 and 645 are tantamount to regulation as they impose new requirements on agricultural operations receiving federal subsidies - policies that will spill to agricultural operations that elect not to participate in federal programs.
- No analyses of the impact or benefit to agriculture, local business, communities or cultures resulting from the NRCS proposed Environmental Evaluation occur in the public record.
- Provisions in Conservation Practice 645 allowing Federal agencies to remove or modify structures on private properties could constitute a "Take" under the 5th Amendment of the US Constitution and Executive Order 12630.
- The imposition of permanent photo points as proposed under Conservation Practice 645 has no meaningful conservation purpose, is invasive, and imposes unnecessary restrictions on participants in government subsidy programs.
- Mob-grazing practices are beneficial to creating, sustaining and enhancing Lesser Prairie Chicken habitat and should be incorporated into all future federal programs and practices.
- The conservation practices found in the KNRC Lesser Prairie Chicken Conservation, Management and Study Plan are sufficient to protect, enhance and maintain Lesser Prairie Chicken habitat necessary to ensure the ongoing survival and vitality of the species.

Critical Habitat

- The geographic "Focal Areas" and "Connectivity Zones" identified in the USFWS-endorsed WAFWA Rangewide Plan are by definition in the Endangered Species Act Critical Habitat.
- Under NEPA and recent appellate court decisions USFWS is required to perform an Environmental Assessment and either issue a Finding of No Significant Impact (FONSI) or enter the Environmental Impact Statement (EIS) process prior to proceeding with it Listing Determination.
- In its Listing Determination USFWS has not used all practical means, nor applied statutory laws and administrative rules necessary to identify, consider and balance conservation of the Lesser Prairie Chicken in productive harmony with the social, economic and cultural considerations within the 32 counties located in the Lesser Prairie Chicken range.

Appendix A

Table of Executive, Judicial, Congressional, and Policy Authorities

Table of Authorities from KNRC Plans			
Authority	**Citation**	**Requirement**	**Plan Reference**
Federal Land Policy and Management Act	43 USC 1712(c)(9)	Requires Secretary to attempt to remain apprised of local Land Use [Conservation] Plans and assures consideration is given to local plans; Secretary is to assist in and attempt to resolve inconsistencies between Federal and non-Federal Government plans and attempt for meaningful involvement of local government officials. Applies in para materia.	Coordination Plan, Conservation Plan
National Environmental Policy Act	42 USC §§4321 - 4347 42 USC §4331 (a)-(c)	Provides the Policy of the Federal Government during major environmental action is to use "all practicable means," to coordinate Federal plans with local governments, in order to promote the general welfare, and create conditions where man and nature exist in productive harmony fulfilling the social, economic, and other requirements of present and future generations of Americans.	Coordination Plan, Conservation Plan
Endangered Species Act	16 USC §§1531 - 1544	Section 4(b)(1)(A) provides the Secretary must take into account, through the mechanism of Coordination and in the context of science only, the KNRC Conservation efforts - prior to making determinations.	Coordination Plan, Conservation Plan
Judicial Review	Catron County Board of Commissioners v. USFWS 75 F.3d 1429	1995 Ruling by 10th Circuit rejected USFWS position EA/EIS is not required "*as Matter of Law*" during Threatened 4d Proposal with Critical Habitat designation. The proposed Lesser Prairie Chicken 4d listing mirrors precisely the Catron County issues including designation of geographic "Focal" and "Crucial Habitat" areas in USFWS funded and endorsed WAFWA Rangewide Plan. KNRC holds NEPA process is required.	Coordination Plan Page 5; Appendix D Appendix E
Regulatory Flexibility Act	5 USC §§601-612	Major Federal Actions must include a Regulatory Flexibility Agenda or Analysis (RFA) that includes publication/notification to each affected county. The RFAs explore the range of alternatives and economic impact(s) to specific and identified governmental jurisdictions where actions are proposed, along with the reasoning and a schedule for the Proposed Action. RFAs typically include quantitative analysis of the economic impact(s) likely to occur to each small entity or business. The summary provides the nature, objectives and legal basis for Proposed Actions and competing alternatives which accomplish the same objectives, and any federal rules which may duplicate, overlap or conflict with the Proposed Action.	Coordination Plan Page 7
EO 12291	Agency Accountability; Duplication assessment; Cost/Benefit Analysis	EO 12291 provides proposed administrative decisions and regulations to based on adequate information, understanding of consequences, and Proposed Actions are not to be undertaken unless benefits outweigh the costs. Alternative analysis are to be performed and the least net cost alternative to society is to be selected; Agencies are to set regulatory priorities to maximize the aggregate net benefits to society, to take into account the condition of the particular industries and the economy affected by proposed regulations.	Coordination Plan Page 7
EO 12630	Governmental Actions and Interference With Constitutionally Protected Property Rights	The Fifth Amendment of the US Constitution provides private property shall not be taken for public use without just compensation. Executive departments are to be sensitive to, account for and evaluate potential private property takings to prevent unnecessary takings and establish if the actions worsen situations they are designed to protect as well as estimate cost to government if litigation becomes necessary. Executive departments are to weigh if a Proposed Action contributes more to public health and safety than the No Action alternatives.	Coordination Plan Appendix E

Table of Authorities from KNRC Plans			
Authority	**Citation**	**Requirement**	**Plan Reference**
EO 12372 EO 13575	Intergovernmental Coordination with State & Local Governments; White House Rural Council	Federal agencies are to Coordinate with elected local governments directly affected by a proposed Federal Action; if a local government develops its own Plan, Federal agencies shall utilize the local plan of process to determine official views of State; communicate early in process with local officials to explain actions; make efforts to accommodate communicate local elected officials' concerns; allow local governments to consolidate Federal plan submissions. Encourage State plans that meet objectives and standards and seek coordination views of local elected officials between states.	Coordination Plan Page 3
EO 13352	Facilitation of Cooperative Conservation	The Secretary of Interior is specifically required to Coordinate with local government in Conservation activities; DOI is to take appropriate account of and respect the interests of private property and in the interest of public [human] health and safety	Coordination Plan Page 6; Appendix E-4
Data Quality Act	Data Quality Act (Information Quality Act) Section 515(a) 3504(d)(1); 3516; 66 Federal Register 34489	Proposed Actions must be based upon usable, objective, timely, accurate, readably-accessible and reproducible data, information, facts, and research. The minimum federal standards are even higher for that body of information defined by OMB to be "influential" in nature - such as data used for decision making of important public policies.	Coordination Plan Page 7
EO 12866	Regulatory Planning and Review	Federal agencies are to conduct a Cost/Benefit analysis of alternatives, including No Action. C/B analysis is to consider quantifiable and qualitative measures. In selecting an alternative, agencies are to select approaches that maximize net benefits including potential economic, environmental and public health and safety.	Coordination Plan Revision 4
CEQ Regulations	40 CFR §1500 - 1508	Implements NEPA.	Coordination Plan Appendix B
CEQ Regulations	40 CFR 1508	Requires agencies in the EIS process to address the individual and incremental impact of each proposed environmental action(s) to the overall and aggregate environmental baseline.	Coordination Plan Appendix B
EO 12898 EO 12250	Environmental Justice and Minority Populations	Federal agencies are to identify and address impact to human health or environmental decisions on minority and low-income populations resulting from Proposed Rules programs, policies, and activities.	Coordination Plan Revision 3
Unfunded Mandates Act	2 USC §1501	Requires coordination and "special consideration" of local governments and the private sector during Proposed Actions that exceed $50M; requires evaluation of "Direct Costs" or "Direct Savings," to local governments as well as preparation of budgetary impact-estimates to each affected County.	Coordination Plan Revision 3
5/14/1998 DOI Policy Manual	Part 318 Chapter 3	DOI Part 318 DM3 is an internal DOI Procedural Manual entitled "**Record of Compliance**" (The ROC). The ROC specifically details compliance procedures to be undertaken, citing EOs 12866, 12612, 12988, The Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act. The purpose of the ROC is to "*reduce the chance the Rule will be litigated*" and it provides for signatures of the DOI Assistant Secretary prior to submittal of the Proposed Rule for Federal Register notification.	Coordination Plan Revision 3

Appendix B

List of Exhibits from

Public Hearing and Administrative Record

Exhibits of KNRC Hearing Officer & Public Hearing
Closed 5:00p.m. November 8, 2013

VOL	EXHIBIT	HEARING OFFICER TITLE	ADMITTED
1	HO1	KNRC President Klemm-Opening Statement	X
	HO2	Notice of Public Hearing	X
	HO3	November 7, 2013 Appearance Schedule Agenda	X
	HO4	November 8, 2013 Appearance Schedule Agenda	X
	HO5	Logan County Timeline	X
	HO6	Response, Ms. Jacobsen, Solicitor	X
	HO7	Letter, Mr. Grant	X
	HO8	Response, Ms. Whitlaw	X
	EXHIBIT	**PUBLIC HEARING TITLE**	**ADMITTED**
	A	Data Do Not Support the Listing of LPC	X
	B	LPC Range Wide Conservation Plan	X
	C	Range Wide Conservation Plan for the LPC	X
	D	Testimony of Carl Uhrich/attachments – continuation to volume 2	X
2	D	Testimony of Carl Uhrich/attachments – continuation of volume 1	X
	E	Addressing the Human Dimensions of Wolf Reintroduction	X
	F	Disturbance of Lekking Prairie Chickens	X
	G	Natural Resource Coordination Plan	X
	H	LPC Conservation, Management and Study Plan	X
	I	Written testimony to KNRC by Michael White & Kim Goodnight	X
	J	Email from Whitlaw, Heather-USFWS KS Field Supervisor	X
	K	Facsimile to Heather Whitlaw of USFWS	X
	L	Letter Fred Grant-KNRC hearing officer to USFWS Solicitor Dana	X
	M	Activity Report	X
	N	KNRC News Release	X
	O	USFWS News Release	X
3	P	Testimony of Sheila Ellis	X
2	Q	Testimony of Keith Edwards	X
	R	Testimony of Kyle Hoffman	X
	S	Testimony on behalf of WAFWA and KDWPT	X
	T	Testimony of Mike Lewis	X
	U	Testimony of Bruce Graham	X
	V	Testimony of Representative Don Hineman	X
	W	Testimony of Lynn Freese	X
	X	Testimony of Kirk Thompson	X
	Y	Testimony of Paul Reynolds	X

	Z	Testimony of Clint Pearson	X
	AA	Testimony of Norman MacLeod	X
	BB	County Questionnaire	X
	CC	KDWPT Memorandum	X
	DD	Comment letter from Ralph Ostmeyer/Larry Powell to USFWS Dan	X
	EE	KNRC Public Hearing sign in sheets	X
	FF	Federal Register-Vol.77 No.238---Vol.78 No. 87---Vol.78 No. 131	X

Exhibits of KNRC ADMINISTRATIVE RECORD
Closed 5:00 p.m. CST, November 15, 2013

VOL	EXHIBIT	TITLE	ADMITTED
1	I	Written testimony of James Ludolph	X
	II	Written testimony of Byron Sowers	X
	III	Written testimony of John J. Dowd, Jr. Pres. Syracuse Flying Service, Inc	X
	IV	Written testimony of Jeff and Sky Pate	X
	V	Written testimony of Lori Lennen	X
	VI	Written testimony of Ed Goedhart	X
	VII	US House Committee on Natural Resources (USHCNR) Hearing Notice 8-22-13	X
	VIII	Written testimony of Matt Knox, Montana Farm Bureau to USHCNR 9-4-13	X
	IX	Written testimony of Renee Taylor Environment Consulting to USHCNR 9-4-13	X
	X	US House Committee on Natural Resources (USHCNR) Hearing Notice 7-23-13	X
	XI	Written testimony of Kent McMullen Franklin Co Washington to USHCNR 8-1-13	X
	XII	Written testimony of Rob Roy Ramey II. Ph.D. to USHCNR 8-1-13	X
	XIII	Written testimony of Damien M. Schiff, Pacific Legal Foundation to USHCNR 8-1-13	X
	XIV	Written testimony of Kent McMullen Franklin Co Washington to USHCNR 8-1-13	X
	XV	US House Committee on Natural Resources (USHCNR) Hearing Notice 5-24-13	X
	XVI	US House Committee on Natural Resources Mega Settlement Agreements Map 6-4-13	X
	XVII	Written testimony of Tom Jankovsky, Comm Garfield Co, CO to USHCNR 6-4-13	X
	XVIII	Written testimony of Tyler Powell Dep Sec of Envir OK to USHCNR 6-4-13	X
	XIX	Written testimony of James Carlson, Exe Dir KNRC to USHCNR 6-3-13	X
	XX	US House Committee on Natural Resources (USHCNR) Hearing Agenda 7-31-07	X
	XXI	Written testimony of Rob Roy Ramey II. Ph.D. to USHCNR 7-31-07	X

VOL	EXHIBIT	TITLE	ADMITTED
2	XXII	Keith Sexson-KDWPT/WAFWA ltr to USFWS Benjamin Tuggle-R 2 6-2-12	X
	XXIII	KDWPT-statement--97% of Kansas PRIVATE OWNERSHIP--accessed 5-3-13	X
	XXIV	Public [Private] Land Ownership by State [50]—National Wilderness Institute	X
	XXV	CONFERENCE OPINION—6-30-2011—USFWS for NRCSs LPCI	X
	XXVI	USFWS Dir. Ashe/staff -Available to Media on Endorsement	X
	XXVII	POSITION Summary—Proposed Lesser Prairie-Chicken Threatened Listing/4d Rule	X
	XXVIII	Transmit-NRCP/LPCSMP; Notice of Hearing; Coordination Briefing request 8-23-13	X
	XXIX	KNRC-Talking Points – 9-14-13	X
	XXX	Excerpt 11-1-13 #2 Coordination Meeting w/ USFWS-insert full transcript upon completion	X
	XXXI	KDWPT Webinar Lesser Prairie-Chicken Update Presentation file slides 4-30-13	X
	XXXII	Mitigation Cost Estimations/Webinar Framework 4-30-13	X
	XXXIII	KDWPT News Release-extending historic LPC range outside Current-MAP 7-7-11	X
	XXXIV	WAFWA News Release 1st Statistically Valid LPC Population estimate 10-3-12	X
	XXXV	WAFWA report Range-Wide Population size-LPC-2012 &2013	X
	XXXVI	KDWPT Prairie Chicken Lek Survey - August 2013	X
	XXXVII	Habitat Conservation Plan Grants by State FY 2009-Whooping crane/LPC Grant	X
	XXXVIII	Oklahoma 5 Factors presentation Grant information pages 4-24 & 25-12	X
	XXXIX	Excerpts Grants information -- 5-State RWCP October 2013	X
	XL	KDWPT News Release USFWS grant supporting GPLCC for 5-State plan 5-15-13	X
	XLI	Great Plains Landscape Conserva Coop Fact Sheet, LPC priorities, Charter 6-23-11	X
	XLII	Bipartisan Letter LPN change from 8 to 2 dated 2-21-12	X
	XLIII	Texas Comptroller-ESA economic impact exhibits 5-10-13	X
	XLIV	USFWS Dir Dale Hall Memo-Maintaining Integrity -Scientific Decision-making 2-3-06	X
	XLV	USDA (FSA-NRCS-FS) Comments on DOI-FWS Proposed rule LPC 6_7_13	X
	XLVI	Comments of Kansas Counties, KEC, , 171 landholders w/references 3-11-13	X

VOL	EXHIBIT	TITLE	ADMITTED
2	XLVII	Usefulness of the Umbrella Species Concept as a Conservation Tool April 21, 2003	X
	XLVIII	C Kay-Wolf Recovery-Hidden Agenda-not about wolves…about control of west-96	X
	XLIX	WINTER Surveys of NE Prairie Chickens/Management Implications October 1963	X
	L	Not So Private Property? Endangered Species Pose Problems for Landowners 12-16-09	X
	LI	Grouse Wars: Spotted Owl of the Prairie States Threaten Energy Production 12-6-12	X
	LII	Sen. Vitter--Op-Ed--Endangered Species Act's hidden costs 2-8-13	X
	LIII	Forbes-EPA Secret & Costly 'Sue & Settle' Collusion w/ Environ Org 2-17-13	X
	LIV	Salt Lake Tribune—Are endangered species endangering property rights? 3-8-13	X
	LV	Mountain States Legal Foundation-W Pendley-LPC Is Not Threatened 3-11-13	X
	LVI	WSJ-Using Sue & Settle to Thwart Oil & Gas Drillers-S Moore 10-4-13	X

Appendix C

Acronym Glossary

Acronym Glossary

Acronym	Definition
BFF	Black-footed Ferret
BFFSHA	Black-footed Ferret Safe Harbor Agreement
CCAA	Candidate Conservation Agreement with Assurances
CDOR	Colorado Department of Revenue
CEO	Chief Executive Officer
CEQ	Council of Environmental Quality
CESAR	Center for Environmental Science, Accuracy and Reliability
CNOR	Candidate Notice of Reviews
CRP	Conservation Reserve Program
DOI	US Department of Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
EO	Executive Order
ESA	Endangered Species Act
FLPMA	Federal Land Policy and Management Act
FSA	Farm Service Agency
IRS	Internal Revenue Service
KDWP	Kansas Department of Wildlife and Parks (thru 6_30_11)
KDWPT	Kansas Department of Wildlife, Parks and Tourism
KEC	Kansas Electric Cooperatives, Inc
KNRC	Kansas Natural Resource Coalition
LPC	Lesser Prairie Chicken
NEPA	National Environmental Policy Act
NGO	Non-governmental Organization
NRCS	Natural Resources Conservation Service
SAFE	State Acres For wildlife Enhancement
SWAT	State Watershed Action Team
USC	United States Code
USDA	United States Department of Agriculture
USFWS	United States Fish and Wildlife Service
WAFWA	Western Association of Fish and Wildlife Agencies
WEC	Wheatland Electric Cooperative

Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134March 10, 201410:59 p.m. CDT

TALKING POINTS OF 32 COUNTY COALITION

close window

Name: KNRC

Comments: See attached file(s)

Submission of the Lesser Prairie Chicken Conservation, Study and Management Plan (Kansas County Conservation Plan – KCCP) of KANSAS NATURAL RESOURCE COALITION (KNRC) members, a coalition of 32 western Kansas Local Government Boards of County Commissioners.

Historical distribution of the KCCP:

1.Electronically transmitted to US Fish and Wildlife Service (USFWS) Director Dan Ashe – August 23, 2013;

2.Hand delivered to Messrs Paul Souza and Michael Bean – September 11, 2013;

3.Delivered US Postal Service to USFWS Region 2 & 6 offices and Field offices between September 16 and
November 1, 2013;

4.Submitted to Docket Number: FWS-R2-ES-2012-0071; 4500030113 RIN1018-AY21 – January 7, 2014.

The KNRC is a collaboration of 32 County Governments who maintain participatory involvement in administrative government on behalf of its citizenry; KNRC's mission is to promote balanced, necessary and effective administrative policymaking through the mechanism of government-to-government Coordination.

The National Environmental Policy Act (NEPA) (42 USC §§4321-4347) and the implementation mechanism of the Council on Environmental Quality (CEQ) Regulations, (40 CFR §§1500-1508) mandate balancing of human and natural environments during federal decision-making. The overarching purpose of NEPA is to assure protection and productivity of the natural environment in the context of general human welfare and harmony with existing social, economic, and cultural systems.

In the Federal Register Vol 79, Number 26, February 7, 2014, USFWS published Notice of Intent to prepare an Environmental Impact Statement (EIS) for conservation of the lesser prairie-chicken (LPC). Preparation of an EIS is governed by the mandates and provisions of NEPA and CEQ regulations.

CEQ procedures prescribe an integrated, interdisciplinary approach to "rigorously explore and objectively evaluate all reasonable alternatives." The evaluation process is precise in that all reasonable conservation alternatives received by USFWS are to be subjected to EIS Scoping and may only be eliminated from consideration after thorough, objective and systematic exploration of their viability (40 CFR §1502.14 (a),(b)).

Having given notice of its intent to prepare the EIS, USFWS is not now permitted to issue a Record of Decision (ROD) on its LPC listing proposal until the potential for adverse effects on the human environment for all reasonable alternatives have been thoroughly evaluated. Additionally, no action on any plan may proceed until a ROD has been issued. (40 CFR §1505.2(b),(c); 40 CFR §1506.1).

The heart of the EIS is evaluation of all reasonable alternatives in a side-by-side, comparative and analytical format, providing justification and rationale for elimination of any reasonable alternative. To that end, all reasonable alternatives must be included as the EIS scoping process moves forward for the LPC listing proposal (40 CFR 1502.14).

The KCCP, adopted by KNRC's 32 local governments, presents current conservation practices, supports a realistic monitoring system, and includes a reasonable plan to ensure continuously-improving, incremental conservation of the LPC. The KCCP specifies proposed actions for further study and builds upon existing state and federal programs to manage, monitor and grow LPC populations. The KCCP employs an administrative structure for information transfer, decision making and fiscal planning; it respects existing geopolitical boundaries and does not propose

activities for LPC habitats rightfully governed by other states.

Inclusion of the KCCP in the EIS scoping process is not discretionary on the part of USFWS for three reasons:

1)The KCCP is technically sound because it employs credible and ongoing conservation practices for the LPC, identifying data gaps needing further study;

2)The KCCP has been adopted by 32 counties with LPC habitat in Kansas, and its implementation has the effect of a single plan administered at the local level. KNRCs existing structure functions as an on-the-ground, administrative exchange for information transfer, data exchange, and identification of conservation needs;

3)The Determinations Section of the Endangered Species Act, Section 4(b)(1)(A), requires the Secretary of Interior to take into account conservation plans developed by local governments; the practical outworking of ESA 4(b)(1)(A) is manifest in the procedural requirements of 40 CFR§1500.2(e), 40 CFR§1502.1, 40 CFR§1502.5(b), and 40 CFR §1502.14(a),(b).

Because the concept of, or need for, regulatory certainty is not found in ESA, NEPA or the CEQ Regulations, the KCCP cannot be disqualified before the scoping process because it does not contain a Candidate Conservation Agreement (CCA) or Candidate Conservation Agreement with Assurances (CCAA) component(s). The only test for inclusion in the EIS process is whether the KCCP is a reasonable alternative.

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LESSER PRAIRIE CHICKEN CONSERVATION, MANAGEMENT and STUDY PLAN of The Kansas Natural Resource Coalition

October 14, 2013
Revision 3

EXECUTIVE SUMMARY

The Lesser Prairie Chicken (*Tympanuchus pallidicinctus)* is a beautiful upland grouse species found in four ecosystem regions in parts of Texas, Oklahoma, New Mexico, Kansas and Colorado. Conservation of the LPC has received much attention, being the subject of a Federal Threatened Listing Proposal, a 5-state Conservation Plan, and many other conservation initiatives.

The range-wide probability of extinction for the Lesser Prairie Chicken is very low; in the Mixed and Short Grass ecoregions the grouse is experiencing rising numerical counts, with population declines being observed in the Sand Sagebrush Prairie ecoregion. Because genetic diversity continues despite localized population decreases, there is no evidence to conclude genetic isolation is occurring. Similarly, quantitative science confirming the contribution of natural (drought, predation) or anthropogenic (fragmentation, agriculture expansion, utility corridors) impacts on Lesser Prairie Chicken is both absent and necessary before appropriate, effective conservation policies may be adopted.

The limited, disaggregated and incomplete body of human and scientific data for the Lesser Prairie Chicken suggests current regional policymaking and planning efforts for the species to be premature. The Lesser Prairie Chicken is not in immediate or long term threat of extirpation, threatened throughout its range, nor in jeopardy of genetic hybridization. For this reason, the Kansas Natural Resource Coalition (KNRC) has adopted a balanced, systematic and localized approach providing for immediate conservation, long-term maintenance, and future study of the Lesser Prairie Chicken. This approach ensures prudent conservation actions are currently undertaken alongside gathering of scientific and human information necessary for well-rounded, balanced, and informed policymaking.

This Plan is a companion document to the *Natural Resource Coordination Plan* (NRCP) adopted by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP presents the history, expectations, legal background and Congressional mandates for which the KNRC expects compliance from any Federal Agency proposing Major Agency Actions. This Conservation Plan sets forth the need, justification and data requirements for current conservation activities and future studies. Together, both documents form a government-to-government coordination program to be utilized at the onset of contemplated major federal action.

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BACKGROUND and PURPOSE

Summary and Intent; Plan and Coalition Area

This plan provides the framework, policies and technical needs to maintain current and enhance future conservation of the Lesser Prairie Chicken (*Tympanuchus pallidicinctus*) in the 32-County, 27,514 mi^2 area governed by the Coalition (Figure 1, Appendix A). It provides the mechanism, process, and context through which meaningful conservation efforts may be identified, assessed, encouraged, or even codified within individual Counties. As a companion document to the *Natural Resource Coordination Plan* (NRCP), this Conservation Management and Study Plan encourages current conservation efforts, and recommends sound, scientific work to fill substantial, existing data gaps. This approach will balance maintenance and conservation of the Lesser Prairie Chicken in concert with the needs of rural communities, agriculture, private landholders and local industry.[1]

The United States Fish and Wildlife Service (USFWS) has proposed listing the Lesser Prairie Chicken as a Threatened Species throughout a five-state area, including Kansas. The listing process was accelerated by a May, 2011 Settlement Agreement between USFWS and the Center for Biological Diversity;[2] a settlement that remains the primary impetus behind the current listing action.

The Kansas Natural Resource Coalition (KNRC) relies on those biological, regulatory, conservation, and administrative experts who possess the scientific, procedural, and regulatory background needed[3] to render appropriate listing decisions for Lesser Prairie Chicken. Consistent with its NRCP, the KNRC has potentially identified the absence of required procedural and administrative information in the USFWS Lesser Prairie Chicken Listing Proposal,[4] as well as significant disagreement about the availability, thoroughness, and depth of available, peer-reviewed scientific data required to render a balanced listing decision.

Given the apparent absence of procedural (NEPA) information and the conflicting, limited nature of existing scientific and related data, combined with the knowledge any Federal listing would have direct application to federally-controlled (6%)[5] land in Kansas, the KNRC believes positive engagement of local governments and private landholders is necessary for any conservation program to be effective. For its part, this plan provides immediate conservation

[1] 40 CFR 1500.2(f)

[2] In re: Endangered Species Action Section 4 Deadline Litigation No. 10-377 (EGS) MDL Docket No 2165.

[3] 16 USC 1533 (6)(1)(a). Endangered Species Act determinations must solely be based upon data; NEPA requires an Environmental Assessment

[4] Federal Register Volume 77 No. 238 December 11, 2012.

[5] Congressional Research Service, 7-5700, February 8, 2012, Federal Land Ownership: Overview and Data

actions and a program-wide restart with immediate focus on procedural actions required under the National Environmental Policy Act,[6] the Regulatory Flexibility Act,[7] The Data Quality Act,[8] and Executive Orders 12630, 13352, and 13575.

This Lesser Prairie Chicken Conservation, Management and Study Action Plan employs immediate, on-the-ground conservation actions, suggests collaborative, peer-review of the existing body of scientific data, and outlines meaningful study actions to address scientific data gaps. Because Lesser Prairie Chicken populations in the coalition-governed range are on the increase, assessment of the effectiveness of Conservation Programs is underway, and existing state regulatory-protection programs remain adequate, KNRC believes the most prudent course to be enhancement of ongoing conservation practices combined with investigation of data gaps and procurement of required human data. This plan functions to systematically align, through coordination, the efforts of local, state and federal agencies toward the required goal of consistency in government-to-government actions.

The goal of consistency will take place through coordination of activities invoked by the NRCP and this plan. KNRC recognizes this plan as a starting point and baseline, not as a final solution. It establishes the basis for collaborative working relationships between individual coalition members, private landowners, industry, and State and Federal Agencies.

Habitat, Regulatory Programs, and Hunting

Lesser Prairie Chicken habitat is found in parts of five-state region in Texas, Oklahoma, Kansas, New Mexico, and Colorado. Suitable LPC habitats are categorized as:

1) **Shinnery Oak Prairie Region -** eastern New Mexico and southwest Texas;
2) **Sand Sagebrush Prairie Region -** southeastern Colorado, southwestern Kansas, and western Oklahoma;
3) **Mixed Grass Prairie Region -** northeast Texas, northwest Oklahoma, and south-central Kansas; and,
4) **Short Grass/CRP Mosaic -** northwestern Kansas and eastern Colorado.

In 1975 Kansas enacted the Kansas Nongame and Endangered Species Conservation Act which gives the Department of Wildlife, Parks and Tourism (KDWPT) authority to identify and undertake conservation activities. Since that time, Kansas has implemented a number of species Recovery Plans with an objective to guide research, management, and enhancement of

[6] 42 USC §§4331-4332.
[7] 5 USC §§601-612.
[8] 44 USC §3504(1)(e)(1).

recovering species populations. Kansas has made significant progress in creating practices, plans and regulations that provide planting and prairie-grassland maintenance incentives for habitat enhancement. KNRC supports and encourages these collaborative programs.

Both KDWPT and KNRC members have mutual interest in identifying the cause of fluctuating Lesser Prairie Chicken populations, addressing potential habitat improvements, and undertaking meaningful conservation activities. For this reason, KNRC will work together with KDWPT, the United States Fish and Wildlife Service (USFWS), and other interested stakeholders to cooperatively develop a Lesser Prairie Chicken population stabilization and recovery plan. KNRC Steering Committee will create a process that will guide collaborative management efforts aimed at improving and conserving Lesser Prairie Chicken populations and habitat.

The Natural Resource Conservation Service (NRCS) Lesser Prairie Chicken Conservation Initiative Program (LPCCIP) protects and enhances LPC habitat by providing program incentives to set aside land for conservation purposes. Land set-asides in the Conservation Reserve Program (CRP) also contribute substantially to Lesser Prairie Chicken habitat.

In 2010 private landholders within the area governed by KNRC entered into 46 Wildlife Habitat Improvement Program (WHIP) and 13 EQUIP contracts sequestering 23,544 acres and 4,059 acres (respectively) for habitat purposes. In 2011, private landholders entered into 28 WHIP and 5 EQUIP contracts for a total of 13,717 acres and 5,999 acres respectively. As of preparation of this report, LPCCIP data for 2012 was unavailable for inclusion.

The human decision-making mechanisms involved in habitat conservation programs are not well understood, and data to render conclusions about fluctuating enrollments is not available. The dynamics private landholders face in considering removal of land from production include drought, status of farm legislation, general regulatory uncertainty, or even the specter of the Lesser Prairie Chicken listing process itself. For the present, the factors enabling the federal government to forecast private landholder enthusiasm or render conclusions on fluctuating conservation-program enrollments appear elusive.

To list the Lesser Prairie Chicken using the justification of “regulatory certainty” would be premature given the body and threshold level of scientific and enrollment information available. For its part, KNRC encourages a better understanding and analysis of enrollment information, combined with a thorough review and, as required, restructuring of incentive programs to optimize habitat set-asides for efficient implementation and maximization of value.

Hunting is typically a concern for declining species when distributed in small, isolated habitat patches or where hunting mortality is "additive" rather than "compensatory."[9] Hagen et al. (2009) reported hunting mortality contributed 3% to overall mortality. For its part, USFWS has indicated hunting does not present a material threat to declining populations:

"*Given the low number of lesser prairie-chickens harvested per year in Kansas relative to the population size, the statewide harvest is probably insignificant at the population level.*"

From the "take" perspective, KDWPT reports hunting in Kansas to be additive for normal annual population cycles. Lesser Prairie Chicken takes in Kansas are reported by KDWPT as:

- 500 in 2007,
- 750 in 2008,
- 910 in 2009,
- 633 in 2010,
- 378 in 2011.

KDWPT also reports that due to recent population increases in northwest part of the Coalition area, the 2012 hunting regulations were revised: The early 2012 season (Sept. 15-Oct. 15) and two-bird bag limit was extended into northwest Kansas; the northwest unit boundary was revised to include those areas north of U.S. Highway 96 and west of U.S. Highway 281. Hunting is still allowed in the *Sand Sagebrush Prairie Region* and *Cimarron River National Grasslands* even though KDWPT reports drought and heat-related breeding populations to have declined from 2011 to 2012.

Population Counts, Monitoring, and Range Maps

Lesser Prairie Chicken lek surveys conducted in 2012 indicate most Kansas Lesser Prairie Chicken populations to be stable or on slight decline over 2011. Declines were largely assessed by KDWPT to be a result of extreme and ongoing drought throughout 2011.[10] KDWPT further reports that during recent drought, habitats in northcentral and northwest Kansas fared the best, while areas in southcentral and southwest Kansas experienced the sharpest population declines - correlating drought and temporary habitat changes with population decline in those areas where drought is observed to be most severe.

[9] " (Hagen et al. 2009).

[10] http://www.kdwpt.state.ks.us/Hunting/Upland-Birds/Upland-Bird-Regional-Forecast.

Lesser Prairie Chicken monitoring and population counting methods differ markedly, yielding data inconsistencies in population trends over time, lek size, range and ultimately population status. Variations in survey methodology and scientific assumptions, combined with the historical lack of coordination between academia, state agencies and others, has greatly complicated Lesser Prairie Chicken population measurement and behavioral assessment efforts.[11]

The studies and conservation maintenance efforts contemplated by this Plan propose to encourage identification, standardization, and use of Lesser Prairie Chicken population assessment and quantification methodologies that are scientific, consistent, independently peer-reviewed, and uniform throughout the range governed by KNRC - and perhaps elsewhere.

The latest, best available lek and population data for the *Sand Sagebrush Prairie, Mixed Grass Prairie,* and *Short Grass/CRP Mosaic* ecoregions of the Kansas Lesser Prairie Chicken appear to have been collected by Western Association of Fish and Wildlife Agencies (WAFWA) between March 30 and May 3, 2012. For the present and given its current limited understanding of population count methodologies, KNRC has accepted the WAFWA population conclusions as being generally baseline for future population counts. KNRC does not believe the existing regional range maps are of sufficient resolution at the local level to accurately count the Lesser Prairie Chicken or serve as a basis to make public policy.

The WAFWA and Texas Tech Study flew 512 transects in 256, 15 km x 15 km blocks covering approximately 7,680 km throughout the 4 ecoregions. The WAFWA study estimated a total of 3,174 lesser prairie-chicken leks, 441 lesser and greater prairie-chicken mixed leks, and 309 hybrid lesser-greater prairie-chickens, for a total of 37,170 individual Lesser Prairie Chickens.

KNRC recognizes the acute need for comprehensive Lesser Prairie Chicken lek density, population-abundance surveys, and accurate consistent range mapping. We support the WAFWA methodology and recommendations as we understand them, including the use of the R-44 helicopters for precision counting. Data from homogeneous surveys, along with comprehensive Lesser Prairie Chicken population and habitat maps, should be merged as input to the Western Governor's Association's Southern Great Plains Crucial Habitat Assessment Tool - which could, following external peer review, serve as the central mapping tool.[12]

[11] *Results of the 2012 Rangewide Survey of the Lesser Prairie Chickens.* Western Association of Fish and Wildlife Agencies. September 4, 2012. P.4.

[12] Ibid p.25,26.

GOAL

Preserve, maintain and increase Lesser Prairie Chicken populations in balance with and respect for human, private and industrial systems throughout the 32-County Region governed by Coalition Members.

CONSERVATION PLAN

Guiding Principles

The Steering Committee of the Kansas Natural Resource Coalition is charged with development, revision, and implementation of land-use priorities for consideration by individual KNRC Members. The land-use priorities will establish and oversee resource values associated with lands within the Coalition area. As issues related to management of lands arise, the Steering Committee and individual Members will collaborate to address those issues consistent with this plan, the NRCP, and resource priorities.

KNRC desires participation from as diverse a group as possible to ensure a collaborative and cooperative effort from all resource interests in this Plan. To that end, KNRC will reach out to representatives of KDWPT, USFWS, The Kansas Bison Association (KBA), The United States Department of Agriculture - Farm Service Agency and Natural Resource Conservation Service (USDA - FSA and NRCS), Kansas State University (KSU), Kansas University (KU), Kansas Farm Bureau (KFB), and/or other public interest groups identified during this process. Specific principals include:

1. Include and encourage groups interested in Lesser Prairie Chicken management;
2. Respect individual and group views; pursue collaborative, peer-reviewed science and procedure-based decision making;
3. Develop management plans and actions compatible with the objectives and actions in the Natural Resource Coordination Plan and this Lesser Prairie Chicken Conservation, Management, and Study Plan;
4. Prepare plans that contemplate compatibility with the Multi-State, Range-wide Conservation Plan for the Lesser Prairie Chicken,[13] requirements of the Coalition, and individual County members;
5. Implement management actions consistent with the goal of this Plan;
6. Provide a conduit for meaningful, timely, complete, and accurate exchange of government-to-government data;
7. Recognize the technical, geographical, range and census baselines for the Lesser Prairie Chicken begin with adoption of this plan;
8. This plan is intended to be a living document, and is subject to change as more effective Lesser Prairie Chicken management options are discovered, studies provide new information, or individual member-needs dictate;
9. Promote research and conservation of the Lesser Prairie Chicken in context of preservation and respect for private property rights.

[13] Rangewide Conservation Plan for Lesser Prairie Chicken. Jonathan B. Haufler, et. al.

10. This plan's working cycle is 5-year increments with a minimum of two-year, interim reviews;
11. Additional funding external to the coalition will be required to accomplish plan actions and study objectives.[14]

Conservation Focal Points

The region governed by the 32-County Coalition occupies an area of approximately 27,514 mi^2 (17,608,960 acres) located primarily in the *Sand Sagebrush Prairie, Mixed Grass Prairie* and *Short Grass/CRP Mosaic* Kansas Lesser Prairie Chicken ecoregions.

While KNRC understands the range of the Lesser Prairie Chicken extends beyond the area governed by individual Coalition members, because the grouse is not in immediate jeopardy, under the specter of extirpation, threatened throughout its range, nor facing genetic hybridization, the KNRC has opted for a conservative approach to habitat management.

The importance of conservation in context of limited, disaggregated and incomplete body of human and scientific data has led KNRC to implement immediate conservation maintenance activities while simultaneously establishing future study objectives. These conservation actions and study objectives are summarized in Appendix B on forms consistent with the USFWS Policy for Evaluation of Conservation Efforts (PECE).

KNRC has identified a list of six Lesser Prairie Chicken areas for focus of Conservation Management and Study actions:

- Lesser Prairie Chicken Population and Monitoring;
- Lesser Prairie Chicken Habitat and Fragmentation;
- Lesser Prairie Chicken Nest Success in the vicinity of elevated structures;
- Lesser Prairie Chicken Predation and Inter-species Competition;
- Lesser Prairie Chicken Hunting;
- Program Funding.

The Steering Committee was established to facilitate each of the six Lesser Prairie Chicken management and conservation efforts. The Steering Committee will maintain responsibility to review conservation proposals and actions for consistency with USFWS Policy for Evaluation of Conservation Efforts (PECE) and the Management and Conservation efforts on the attached matrix.

[14] 42 USC 4331(a)

Conservation Actions

Invasive Species Control

Lesser Prairie Chickens no longer occupy significant portions of their former range in Barber, Harper, Kingman, Pratt, Reno, Rice and Stafford counties, as well as in midgrass and shortgrass prairies and conservation reserve grasslands. The literature[15] implicates tree invasion as one primary factor, with particular emphasis on encroachments by Eastern Redcedar and hedge. Because invasive trees produce a canopy effect and some varieties create undesirable soil conditions affecting understory plant growth, forage plants utilized by Lesser Prairie Chickens can be inhibited by invasive tree growth. Also, USFWS mountain-prairie region's Partners for Fish & Wildlife report by state on Kansas states that research has shown as little as one tree per acre can have a negative effect on the use of that acre by grassland nesting birds and one acre of cedar trees can consume as much as 55,000 gallons of water per year.[16]

Mounting scientific evidence suggests the presence of relatively few trees in a prairie landscape can have negative impacts on Lesser Prairie Chickens, and some studies have observed population declines in habitats with as few as four juniper trees per acre. Historically, few trees existed on the prairie grasslands because the trampling effect of millions of bison prohibited trees from being established on the landscape. The bison also contributed nutrients beneficial to the Lesser Prairie Chicken.

Policy

1. Include Eastern Redcedar in Coalition invasive species control plans, and discourage its use for windbreaks, hedge rows and other barrier applications.
2. Cedar trees should first be clipped or cut. If the terrain is relatively flat, a mechanical tree cutter may be used; in steep terrains, the trees should be removed with a chain saw.
3. Prescribed fire is one necessary tool to keep tree invasion in check. Cedar trees should be burned following cutting or new shoots can germinate.
4. Labor resources for invasive species control will be sought through State and local programs, and innovative procurement of resources will be considered and evaluated. Coalition members will contemplate the use of labor from county jails, prisons or public school systems for use in invasive-species control programs.
5. Seek additional funding from extra-coalition sources to support policies 1-4.

[15] Tree Invasion. Randy Rodgers, Kansas Department of Wildlife.

[16] http://www.fws.gov/mountain-prairie/pfw/r6pfw15.htm#top

Livestock Range and Management

The region governed by the coalition continues to enjoy a long history of livestock grazing on private and public lands. When properly managed, livestock and bison coexist well with and can be a benefit to Lesser Prairie Chickens and other grouse, helping to manage suitable habitat and decrease fire hazards.

The effect of Livestock grazing, range management, or excessive land rest on Lesser Prairie Chicken habitat is not well understood and the literature contains conflicting conclusions. Both over grazing or too much rest can lead to deteriorated habitat conditions by depletion of understory plants, resulting in changes for excessively dense sagebrush stands. While this is a potential threat, there is no evidence of widespread over grazing occurring in areas governed by the Coalition. Livestock grazing has also been implicated as having a potential impact on the amount and height of nesting cover that in turn can allow higher rates of nest predation. Again, KNRC is not aware of cover depletion such that would result in elevated predation rates for the Lesser Prairie Chicken.

Since the 1930's vast grazing management improvement programs have been implemented. Reductions in stocking levels, hundreds of miles of fence and extensive water developments have allowed for intensive control of the frequency, duration, intensity, rest and timing of grazing activities on private lands. For its part, NRCS encourages multi-use grazing along with Lesser Prairie Chicken habitat restoration, maintenance and conservation.[17]

While there is no evidence of wide spread range deterioration (downward trends) there is opportunity to develop or improve proper grazing management. "Proper grazing management" means to plan, schedule, and control the timing, intensity, and duration of grazing as well as its occurrence of over time, in a manner that achieves or trends toward management objectives.

Policy

1. Encourage sustainable grazing activities consistent with historic land use and ranching practices that are beneficial for both agricultural interests and Lesser Prairie Chicken habitats. Promote recommendations by U.S. Department of Agriculture, Natural Resources Conservation Service or other proven sources throughout the Plan Area.
2. Promote and distribute livestock grazing technical data as a tool to encourage Lesser Prairie Chicken habitat.
3. Any grazing restrictions or conservation measures that are put in place through a grazing permit shall be based solely on the conditions and activities specific to that permitted grazing allotment.

[17] http://www.ks.nrcs.usda.gov/news/releases/2012/lpci

Fence Marking

There is no evidence to indicate impact mortality is a factor contributing to population fluctuations of the Lesser Prairie Chicken in the area governed by the coalition. Lesser Prairie Chicken management literature[18,19] in other ecoregions has reported fence impacts could be a potential contribution to hen mortality. One low cost, immediate conservation option is to increase fence visibility by fence marking. Using this method, fence markers are made from strips of vinyl house siding cut into 3-inch long and 1.5-inch wide strips. The trim has a loop along one edge that makes it ideal for clipping on the fences between the barbs.

The markers are placed about 4 feet apart on the top and third wires in an alternating pattern, so the markers on the third wire are clipped approximately halfway between the markers on the top wire. Under this method the literature reports minimal mortalities due to fence collisions along marked fence rows, and the collision-reduction benefit is projected to extend 0.5 miles in either direction.

Policy

1. Provide opportunity for fence marking literature and instruction materials at appropriate county literature locations.
2. Encourage private landholders in potential Lesser Prairie Chicken habitat areas to implement fence-marking programs.
3. Consider fence-marking programs on county right-of-ways and during new construction or fence maintenance operations.

Habitat Conservation and Management; Population Counts and Introductions

Optimum habitat for Lesser Prairie Chicken consists of open, relatively flat rangeland in different stages of plant succession. These habitats display a diversity of native, short to mid-height grasses and wildflowers interspersed with low-growing shrubby cover in relatively close proximity to one another. Typical habitat consists of sand sagebrush communities dominated by sand dropseed, sideoats grama, and little bluestem. In northwest Kansas, mixed-grass prairie devoid of sagebrush and short-grass prairie also serves as habitat, and Lesser Prairie-Chicken populations have expanded in restored native grass areas under successful private and public (CRP) restoration programs.

[18] Fence marking for Lesser Prairie Chickens; a cooperative conservation solution. Sutton Avian Research Center. Bartlesville, Oklahoma.

[19] Lesser Prairie Chicken Fence Marking Initiative in New Mexico. Riley, Nancy. USFWS. 2008.

Policy

1. Encourage habitat restoration projects on private lands in context of maintaining private property rights. Request private landowners participating in habitat restoration to report annually on the progress of restoration efforts so individual counties have ability to track disturbed vs. restored acreages and information of positive restoration efforts.
2. Collaborate with KDWPT, USFWS and others in recognizing local conditions and Lesser Prairie Chicken habitat suitable for conservation activities including mapping and monitoring. Habitat identification and monitoring activities will include county-approved criteria and permits to allow temporary disturbances and other human activities.
3. Require the use of native plant species for restoration based on cost, availability, probability of successful establishment; allow for circumstance-specific exemptions in planting requirements.
4. All federal agencies with management responsibilities for the species and/or its habitat in the plan area shall provide that county with an annual county specific update of the monitoring programs, including data collected and specifics about their collection protocols.[20] All agencies will pre-inform the county of proposed research projects, programs, or activities, allowing sufficient time for the county's input and collaboration prior to implementation.[21]
5. No species introduction activities shall be allowed in any KNRC member county without prior review and approval from the county proposed for the introduction.
6. All data shall be collected and studies prepared using protocols that will ensure the quality, utility, objectivity and integrity of the information as required under the Information Quality Act[22] and the NRCP.
7. All data gathered in the plan area shall be shared in a timely and complete manner at the formal request of the County or Coalition, and shall be supplied irrespective of its state of completion.
8. Private landowners engaged in Lesser Prairie Chicken population monitoring, habitat monitoring, or data collection will be encouraged to share information and data with the county.

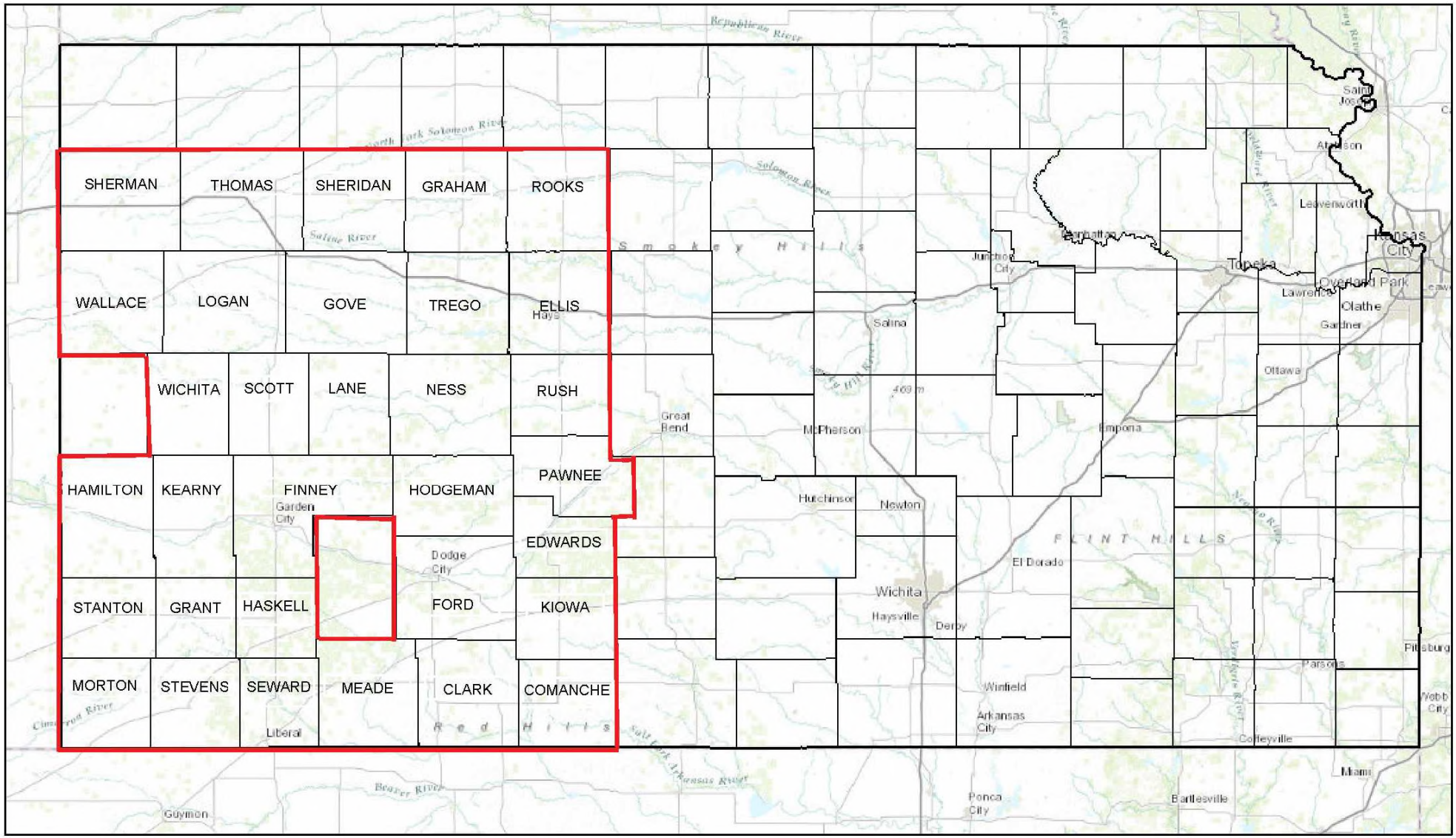
[20] 42 USC 4332 (G)

[21] 43 USC 1712(c)(9)

[22] 44 USC 3504(d)(1) Section 515

APPENDIX - A

Coalition Map



October 12, 2013

Kansas State Boundary

Kansas County Boundaries

1:3,172,438

0 25 50 100 mi

0 40 80 160 km

Kansas Applied Remote Sensing Program (KARS) / Kansas Biological Survey
Sources: Esri, DeLorme, NAVTEQ, TomTom, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, and the GIS User

APPENDIX - B

USFWS PECE Forms

Current Conservation Actions – Species and Habitat Maintenance					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Habitat Restoration	Beginning in 2005, a 5,000-acre tract west of US 83 and south of the Arkansas River in Finney County was restored to native Lesser Prairie Chicken habitat. The near-contiguous, multi-use parcel was converted from agricultural use to mixed-grass, sand sagebrush habitat that included underground placement of electrical lines. The tract now serves as a water-well field with limited access, permit-only hunting. Many species have been observed to reside there. One objective is to encourage similar projects in mixed-grass, sand sagebrush habitat regions.	Conversion and Ongoing Conservation		2 Private Corporations	

Current Conservation Actions – Species and Habitat Maintenance					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Multi-use Farm, Range and Native, Habitat Management	In 1999, a contiguous 3,532-acre mixed-use tract that blends farm, range and successful habitat-management principals was developed in Sherman County. The native buffalo and short-grass parcel, which includes 600 farmland acres and maintained, year-round wildlife watering points, has been successfully managed using Holistic principles.[23] Through carefully executed rest/rotation grazing management of bison, the plant mix now includes sizable medium and tall grass stands, including substantial tracts of little blue stem. For its part, the farmland is managed with cover crops desirable for wintering of wildlife. Typically farm plantings are left unharvested until winter when bison and desirable avian species such as the Lesser Prairie Chicken graze on them. In 2011, range transects were established and data, including fixed point photos, are recorded annually by range consultant Kirk Gadzia. These data and photographs are available for other fledgling projects.	Ongoing	None	None	

[23] Holistic Principals were developed and recommended by Allan Savory.

Current Conservation Actions – Species and Habitat Maintenance					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Collaborative Invasive Species Control	Barber County is host to aggressive invasive-species and wildlife-habitat restoration programs. In 2013, the county scheduled burning of several thousand acres, with over 100,000 acres planned for burning as part of its Burn Control Plan. Because the Eastern Red Cedar poses a significant threat to wildlife, including Lesser Prairie Chicken, the county maintains a collaborative tree cutting program under EQUIP, WHIP, and a private initiative called "*Mulch and Pellet*." Under the Mulch and Pellet program Eastern Red Cedar trees are cut, chipped and processed into pellet fuel for wood burning stoves - followed by prescribed land burning to ensure sterilization. Once eradicated, maintenance against the Eastern Red Cedar is assured through a County-wide Noxious Weed control program.	Ongoing	County	Public - KDWPT; NRCS: EQUIP, WHIP. Private - Mulch and Pellet initiative	

Current Conservation Actions – Species and Habitat Maintenance					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Utility line collision potential and electrocution mitigation	The potential for avian collision and electrocution hazards with electric utility lines exist. Most municipal and cooperative utilities in the coalition area have avian protection programs to protect birds, including Lesser Prairie Chickens from electrocution and collision potential. As part of new construction or major maintenance, these programs typically contemplate installation of longer cross-arms (increases conductor spacing), covered jumpers and bushing covers (insulates pole and substation equipment). Some utilities also include roost guards in new construction or major maintenance. These changes can reduce raptor lighting potential thought by some biologists to be one reason for Lesser Prairie Chicken avoidance behaviors. One study objective is to examine the effectiveness of utility collision and electrocution mitigation programs, and if beneficial to the Lesser Prairie Chicken, encourage modifications during line reconstruction or reconductor changes.	Ongoing programs	USDA RUS; municipalities and cooperatives	RUS	ESM 02.002.01

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Habitat Fragmentation	The baseline scientific data required to determine the effect of Habitat Fragmentation on a Range-wide basis does not exist. USFWS specifically notes the absence of biological features, habitat area requirements, optimum habitat corridors, and spatial requirements as absent in their listing proposal.[24] Because the region governed by the Coalition is nearly entirely private property, it is necessary to determine *minimum* Lesser Prairie Chicken population-level parcel sizes, fundamental habitat parameters and corridors necessary to sustain a home range of several (6-10) leks.[25] This study objective proposes to establish baseline parameters necessary to sustain a population, including nesting, roosting and feeding sites. The usefulness of a lek-density and interlek-distance index to habitat quality should also be investigated.[26] Because lek and display sites have been demonstrated to occupy areas discounted by USFWS as habitat (abandoned oil-drilling pads, unimproved and low-traffic roads, bare and recently burned areas, heavily grazed or cultivated fields, transmission utility corridors, etc.), a balanced multi-land use habitat study must include and evaluate these areas. Since available conclusions for establishing minimum population-level parcel sizes (and habitat fragmentation) are both incomplete and conflicting[27,28,29] the basis for the concept of "Minimum Stronghold" needs investigation.	Proposed	KDWPT, Academia, USFWS	USFWS, Private	

[24] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73886
[25] Appegate and Riley, 1998
[26] Crawford (1974), Locke (1992), and Giesen (1994)
[27] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[28] Id., p. 73836
[29] Data Do Not Support The Proposed Listing of Lesser Prairie Chicken. Center for Environmental Science, Accuracy & Reliability.

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Assessment**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Population Counts, Extirpation Potential, Genetic Isolation and Hybridization	The best available scientific data[30] demonstrates Lesser Prairie Chicken populations to be increasing and the likelihood of range-wide extinction to be very low. Using population reconstruction models and annual lek counts, range-wide population growth parameters and quasi-extinction probabilities were estimated.[31] The data indicate, on a range-wide basis, a low extinction probability within 86% of the species distribution and a annual population growth of 6.9% - reversing pre-candidacy (1980-1997) annual population declines of 3.7%. Scientific conclusions that Lesser Prairie Chicken populations are stable appear in conflict with the USFWS Listing Proposal that habitat fragmentation and manmade factors make individual populations subject to extirpation.[32] The large difference in population counts is possibly due to the consistency, methodology and accuracy of the population counts themselves. One study objective is to utilize the WAFWA and Texas Tech methodologies for future population abundance and density counts, and identify limiting factors such to ensure continuity over time and range. This study objective would include evaluation of historical population counts within the context of current methodologies to establish marginal data sets or techniques and focus on detailed maps with accurate resolution. Substantial literature conflicts exist as to the significance of genetic hybridization resulting from reductions in historic range and habitat fragmentation. Lesser and Greater Prairie Chickens are similar genetically and both species easily hybridize.[33] The current level of hybridization at range junctions appears sufficient to potentially lead to merging of the two species. A study of genetic monitoring between Greater and Lesser Prairie Chickens, with establishment of bright-line data and diversity factors which could constitute genetic isolation or decreased genetic variability is necessary before substantive conclusions regarding hybridization may be drawn.	Proposed	KDWPT, Academia, USFWS	USFWS, other	

[30] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group*; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702.

[31] *Data Do Not Support the Proposed Listing of Lesser Prairie Chicken*. Center for Environmental Science, Accuracy & Reliability. P.7

[32] Ibid., p. 73883

[33] (Gutierrez et al. 2000)

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Assessment**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Structures, Utility Corridors and General Avoidance	The body of scientific data demonstrating Lesser Prairie Chicken avoidance of electrical transmission corridors and wind structures is limited, anecdotal and conflicting. While Hagan, et al. found Lesser Prairie Chickens exhibited general preference to avoid power lines and buildings, the same study found those birds nesting in newly-constructed transmission corridors to have similar nest success as non-corridor populations. Other avian avoidance studies also have conflicting findings. Vodenal, et. al. found Greater Prairie Chickens to lek, nest and brood in the proximity of a Nebraska wind farm, despite the presence of localized, towering wind structures. Because some Lesser Prairie Chicken Conservation Plans have already proposed mitigation frameworks based upon the concept of avoidance, a quantitative, independently reviewed and science-based study of actual nest success, site fidelity, propensity to cross utility corridors, and numerical evaluation of avoidance tendencies of the Lesser Prairie Chicken is necessary before conclusions about avoidance tendencies may be drawn. While anthropogenic structures do present logistical impediments to Lesser Prairie Chicken movement, the literature clearly demonstrates Lesser Prairie Chickens to navigate across all anthropogenic sources - including power lines - in search of forage[34], winter riparian areas,[35] or more preferred, mixed-grass habitats. Electrical transmission and distribution poles provide enhanced vantage and rest opportunities for raptors, and Lesser Prairie Chickens (and other vulnerable prey) elect to build nests in more preferable, mixed-grass habitats which provide better cover. A study objective which considers specific nest-success factors in utility corridors having mixed-grass habitats is necessary to distinguish if actual nest success is decreased as a result of the presence of transmission lines, or if Lesser Prairie Chickens display a more general aversion to tall, anthropogenic and natural structures alike.	Proposed	KDWPT, Academia, USFWS	USFWS	

[34] Copelin, 1963, Taylor and Guthery, 1980.

[35] Schwilling, 1955

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Agricultural Conversion	The rate of native prairie conversion to agricultural use has slowed since the 1990s, and the net, per-year area of converted acres appears stable.[36] Significant data conflicts exist as to the degree ongoing agricultural conversions may have, if any, on the Lesser Prairie Chicken or if conversion stabilization has been reached. Because maximum numbers of Lesser Prairie Chickens have been found in areas planted between 5-37% of grain sorghum,[37] and nesting females commonly use agricultural areas planted with corn and alfalfa as winter forage grounds, quantitative data to assess stabilization and define conversion parameters is necessary for accurate conservation planning. This study objective assesses the degree and current conversion rate of native prairie to agricultural/industrial use as baseline to Lesser Prairie Chicken populations in the Sand Sagebrush Prairie ecoregion. One element of this study must include analysis of human behavioral factors involved in private owners deciding (or not) to enroll in governmental habitat and land-sequestration programs (EQUP, CRP, WHIP, etc.)	Proposed	KDWPT, NRCS	USFWS	

[36] Rogers and Hoffman 2005

[37] Crawford, 1974

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Livestock Grazing Regional Impacts	The potential, direct, and range-wide effect or benefits from livestock grazing and rotation are largely unknown, including to USFWS.[38] Because ranching is a significant part of the economic and cultural base of western Kansas, the grazing and livestock trampling on Lesser Prairie Chicken habitat must be quantified.[39,40] One study objective is to quantify the vegetative limits of when grazing may lead to conversion from mixed-grass to shortgrass-dominated habitats, possibly resulting in a decline of nesting habitats.[41] Another study objective is to evaluate and quantify the benefits of grazing and trampling in reducing vegetation canopy effects on understory vegetation. This study objective should in particular evaluate and replicate the benefits to Lesser Prairie Chicken habitats from massive and transient bison herds. Other study objectives include definition of rangeland rotation variables in concert with species habitat co-optimization and effectiveness of mechanical controls such as cross-fencing and fence marking. By examining multiple land-use parameters, the technical support for well-rounded conservation decision-making will be made available to coalition members.			NRCS; EQUIP/WHIP; USDA/KSU Grant for Beef grazing systems.	

[38] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843

[39] 40 CFR § 1508.8

[40] Executive Order 12630

[41] Hoffman 1963, Jackson and DeArment 1963, Litton et al. 199).

APPENDIX - C

Kansas Natural Resource Coalition
Contact Information

Table 1 Kansas Natural Resource Coalition				
County	**Address**	**Phone**	**County Clerk**	**Land Area**
Clark County	913 Highland Ashland 67831	(620) 635-2813	Rebecca Mishler	975
Comanche County	Box 776 Coldwater 67029	(620) 582-2361	Alice Smith	788
Edwards County	312 S. Massachusetts Kinsley 67547	(620) 659-3000	Gina Schuette	622
Ellis County	1204 Fort St., Box 720 Hays, KS 67601	(785) 628-9410	Donna Maskus	900
Finney County	PO Box M Garden City 67846	(620) 272-3575	Elsa Ulrich	1,302
Ford County	100 Gunsmoke Dodge City 67801	(620) 227-4550	Sharon Seibel	1099
Gove County	PO Box 128 Gove 67736	(620) 938-2300	Doug Press	1,072
Graham County	410 Pomeroy Hill City 67642	(785) 421-3453	Jana Irby	899
Grant County	108 S. Glenn Ulysses 67880	(620) 356-1335	Sheila Brown	575
Hamilton County	PO Box 1167 Syracuse 67878	(620) 384-5629	Angie Moser	997
Haskell County	PO Box 518 Sublette 67877	(620) 675-2263	Sharon L. Hinkle	578
Hodgeman County	PO Box 247 Jetmore 67854	(620) 357-6421	Sarah Rains	860
Kearny County	PO Box 86 Lakin 67860	(620) 355-6422	Jana Jenkinson	871
Kiowa County	211 E. Florida Greensburg 67054	(620) 723-3366	Kristie Odle	723
Lane County	PO Box 788 Dighton 67839	(620) 397-5356	Crysta S. Torson	717
Logan County	710 W. 2nd Oakley 67748	(785) 671-4244	Crystal Rucker	1,073
Meade County	P.O. Box 278 Meade 67864	(620) 873-8700	Janet Hale	980
Morton County	PO Box 1116 Elkhart 67950	(620) 697-2157	Gina Castillo	724
Ness County	202 W. Sycamore Ness City 67560	785-798-2401	Renee S. Kerr	1,075
Pawnee County	715 Broadway Larned 67550	(620) 285-3721	Ruth Searight	755
Rooks County	115 N. Walnut Stockton, 67669	(785) 425-6391	Clara Strutt	895
Rush County	P.O. Box 220 LaCrosse 67548	(785) 222-2731	Corinne Baldwin	718
Scott County	303 Court Scott City 67871	(620) 872-2420	Pamela J. Faurot	718
Seward County	515 N. Washington Liberal 67901	620-626-3355	Stacia Long	640
Sheridan County	Box 899 Hoxie 67740	(785) 675-3361	Paula Bielser	897
Sherman County	813 Broadway Goodland 67735	(785) 890-4802	Janet R. Rumpel	1,056
Stanton County	PO Box 190 Johnson 67855	(620) 492-2140	Sandra Barton	680
Stevens County	200 E. 6th Hugoton 67951	(620) 544-2541	Pam Bensel	728
Thomas County	300 N. Court St. Colby 67701	(785) 460-4500	Shelly Harms	1,075
Trego County	216 N. Main WaKeeney 67672	(785) 743-5773	Lori Augustine	889
Wallace County	PO Box 70 Sharon Springs 67758	(785) 852-4282	Jacalyn Mai	914
Wichita County	206 S. 4th Leoti 67861	(620) 375-2731	Carol Cary	719

APPENDIX - D

References

REFERENCES

Center for Environmental Science, Accuracy and Reliability. "Data do not support the proposed listing of lesser prairie chicken."

Council on Environmental Quality-Regulations. 40CFR §§ 1500-1518.

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Western Association of Fish and Wildlife Agencies. Results of the 2012 rangewide survey of the lesser prairie chickens. September 4, 2012.

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www.kdwpt.state.ks.us/hunnting/upland-birds/upland-bird-regional-forcast.

APPENDIX - E

Definitions and Glossary

DEFINITIONS

Adaptive Management	A scientific approach to adaptive management of wildlife populations requires that threats and management actions be treated as potentially falsifiable hypotheses, rather than certain knowledge. If the presumed threats to a population are ranked in order of importance (based on plausible cause and effect mechanisms), then even hypothetical threats can be prioritized and subsequently investigated in a scientific manner.	
Best Available Science	The best available science is that body of reproducible and credible data, information and studies that are collectively available to the average person under normal circumstances.	
Best Management Practices (BMPs)	A suite of techniques that guide or may be applied to management actions to aide in achieving desired outcomes. BMPs are often developed in conjunction with land use plans, but they are not considered a planning decision unless the plans specify that they are mandatory.	
Brood Rearing Habitat	Brood rearing habitats are utilized after chicks have hatched, and are generally more mesic (moist) areas with a higher percentage of forbs and grasses which help provide higher densities of insects, plant material, and seeds for chicks, hens, as well as males during the summer and early fall months. Specifically: • Sagebrush cover is from 10 to 30% • Cover of Mixed Mountain Shrubs is not more than 10% > Distance to nearest Forest is over 100 meters • Distance to Shrubby Woodlands is over 50 meters	
Categorical Exclusion (CX)	A category of actions that do not individually or cumulatively have a significant effect on the human environment and have been found to have no such effect in procedures adopted by a Federal agency pursuant to NEPA.	40 CFR 1500.4(p) 40 CFR 1500.5(k) 40 CFR 1501.4(a) 40 CFR 1507.3(b) 40 CFR 1508.4
Collaborate	To work together with another toward a common goal, especially in an intellectual endeavor; as, four chemists collaborated on the synthesis of the compound; three authors collaborated in writing the book.	Webster's Revised Unabridged Dictionary
Conserve	To cause no degradation or loss of Prairie-Chicken habitat. Conserve can also refer to maintaining intact Shortgrass Prairie, CRP Mosaic, Mixed Grass Prairie and Sand Sagebrush Prairie by fine tuning livestock use, watching for and treating new invasive species, and maintaining existing range improvements that benefit Prairie-Chicken, etc.	
Consistent	Possessing firmness or coherence; marked by harmony, regularity, or steady continuity; free from variation or contradiction.	Webster's Revised Unabridged Dictionary
Cooperation	The act of cooperating, or operating together to one end; joint operation; concurrent effort or labor.	Webster's Revised Unabridged Dictionary
Coordinate	Equal in rank or order; not subordinate.	Webster's Revised Unabridged Dictionary

Coordination	(1) The act of coordinating; the act of putting in the same order, class, rank, dignity, etc.; as, the coordination of the executive, the legislative, and the judicial authority in forming a government; the act of regulating and combining so as to produce harmonious results; harmonious adjustment as, a coordination of functions. (2) a process by which local government and federal agencies are to meet in a government to government dialogue in order to attempt to reach consistency between federal plans and actions and local plans and policies.	Webster's Revised Unabridged Dictionary
Coordination Meeting	A government-to-government meeting between a government agency or agencies and the Coalition. These meetings are public meetings, publicly noticed with agenda provided in advance. While public comment is not received during the meeting, the public is encouraged to attend regular Coalition meetings as the intent is for the coordination process to be open and transparent to the public. For the coordination meeting, the discussion is between federal agencies and the Coalition and is for the purpose of fulfilling the coordination duty, informing the agencies and Coalition of relevant projects, plans, studies and management activities. It is also the forum for discussion towards the resolution of unresolved conflicts between the counties policies, plans and the agencies programs.	
Coordination Process	A process mandated by federal law that requires federal agencies to coordinate their plans, programs and management activities with local governments. The minimum parameters of this process were defined by Congress at 43 USC 1712(c)(9) and prescribe that the agencies: (1) keep apprised of State, local, and tribal land use plans; (2) assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; (3) assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans; (4) provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands; and (5) make land use plans consistent with State and local plans to the maximum extent the Secretary finds consistent with Federal law.	Federal Land Policy and Management Act, 43 USC 1701
Early Application of NEPA	Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to reduce potential conflicts.	40 CFR 1501.2
Enhance	The improvement of habitat by increasing missing or modifying unsatisfactory components and/or attributes of the plant community to meet prairie-chicken objectives. Examples include modifying livestock grazing systems to improve the quantity and vigor of desirable forbs, improving water flow in riparian areas by modifying existing spring developments to return more water to	

	the riparian area below the development, or marking fences to minimize prairie-chicken hits and mortality.	
Environmental Assessment	A concise public document, prepared in compliance with NEPA, that briefly discusses the purpose and need for an action, alternatives to such action, and provides sufficient evidence and analysis of impacts to determine whether to prepare an environmental impact statement or finding of no significant impact.	40 CFR 1508.9
Environmental Assessment-When	(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement. (b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decision making.	40 CFR 1501.3
Environmental Impact Statement	A detailed written statement required by section 102(2)(C) of NEPA, analyzing the environmental impacts of a proposed action, adverse effects of the project that cannot be avoided, alternative courses of action, short-term uses of the environment versus the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitment of resources.	40 CFR 1508.11
Environmental Impact Statement-When	It is important to be as objective as possible when making a determination as to whether to prepare an EIS. One or more of the following criteria, depending on the severity and duration of effects, may trigger the preparation of an EIS. (a) Controversy over environmental effects (e.g., major scientific or technical disputes or inconsistencies over one or more environmental effects). (b) Change in policy having a major positive or negative environmental effect. (c) Precedent-setting actions with wide-reaching or long-term implications (e.g., special use permits for off-road vehicles, mineral extraction, new road construction). (d) Major alterations of natural environmental quality, that may exceed either local, State, or Federal environmental standards. (e) Exposing existing or future generations to increased safety or health hazards. (f) Conflicts with substantially proposed or adopted local, regional, State, interstate, or Federal land use plans or policies, that may result in adverse environmental effects. (g) Adverse effects on designated or proposed natural or recreation areas, such as wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine sanctuaries, national recreation areas, habitat conservation plan areas, threatened and endangered species, fish hatcheries, wildlife refuges, lands acquired or managed with Dingell-Johnson/Pittman-Robertson funds, unique or major wetland areas, and lands within a 100-year floodplain. (h) Removal from production of prime and unique agricultural lands, as designated by local, regional, State, or Federal	

	authorities; in accordance with the Department's Environmental Statement Memorandum No. ESM 94-7. (i) Adverse effects on municipal, industrial, or agricultural water supply or quality; or major consumptive use or other long-term commitment of water. (j) Condemnation of property rights or fee title to land; or large-scale relocation of people, homes, commercial, industrial, or major public facilities.	
Federal Agency	All agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.	40 CFR 1508.12
Finding of No Significant Impact-FONSI	A document prepared in compliance with NEPA, supported by an environmental assessment, that analyzes whether a Federal action will have no significant effect on the human environment and for which an environmental impact statement, therefore, will not be prepared.	40 CFR 1508.13
Governmental Information	Governmental information means information created, collected, processed, disseminated, or disposed of by or for the Federal Government.	
Human Environment	Includes the natural and physical environment and the relationship of people with the environment.	40 CFR 1508.13 40 CFR 1508.14
Influential	Influential, when used in the phrase "influential scientific, financial, or statistical information", means that the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions.	66FR 49718 September 28, 2001
Information	Information means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate.	
Integrity	Integrity refers to the security of information – protection of the information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.	66 FR 49718 September 28, 2001
Late Brood Rearing Area	Habitat includes mesic sagebrush and mixed shrub communities, wet meadows, and riparian habitats as well as some agricultural lands (e.g. alfalfa fields, etc).	
Lek	A traditional courtship display area attended by male sage -grouse in or adjacent to sagebrush dominated habitat. A lek is designated based on observations of two or more male sage-grouse engaged in courtship displays. Sub-dominant males may display on itinerant strutting areas during population peaks. Such areas usually fail to become established	Connelly et al 2000, Connelly et al. 2003, 2004

	leks. Therefore, a site where less than five males are observed strutting should be confirmed active for two years before meeting the definition of a lek.	
Lek, Active	Active leks are defined as locations where ≥ 2 males have been observed and documented as actively courting females in the last two years the lek was surveyed.	Doherty et al 2011
Lek Complex	A lek or group of leks within 2.5 km (1.5 mi) of each other between which male sage-grouse may interchange from one day to the next. Fidelity to leks has been well documented. Visits to multiple leks are most common among yearlings and less frequent for adult males, suggesting an age-related period of establishment	Connelly et al. 2004
Lek, Inactive	Any lek where sufficient data suggests that there was no strutting activity throughout a strutting season. Absence of strutting prairie-chicken during a single visit is insufficient documentation to establish that a lek is inactive. This designation requires documentation of either: 1) an absence of prairie-chicken on the lek during at least 2 ground surveys separated by at least seven days. These surveys must be conducted under ideal conditions (April 1-May 7 (or other appropriate date based on local conditions), no precipitation, light or no wind, half-hour before sunrise to one hour after sunrise) or 2) a ground check of the exact known lek site late in the strutting season (after April 15) that fails to find any sign (tracks, droppings, feathers) of strutting activity. Data collected by aerial surveys should not be used to designate inactive status as the aerial survey may actually disrupt activities.	
Major Federal Action	Actions with effects that may be major and which are potentially subject to Federal control and responsibility.	40 CFR 1508.18
Mandate, NEPA	Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.	40 CFR 1500.3

Meaningful Participation, Doctrine of	Timely, mutual inclusion of local governments in seeking consistency with local plans and policies including full disclosure, transparency monitoring and full availability of meaningful scientific data, information and studies.	
Mitigation	Compensating for resource impacts by replacing or providing substitute resources or habitat.	
Multiple Use	The management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.	Federal Land Policy and Management Act, 43 USC 1702(c)
National Environmental Policy Act of 1969 (NEPA)	Requires all federal agencies to examine the environmental impacts of their actions, incorporate environmental information, and utilize public participation in the planning and implementation of all actions. Federal agencies must integrate NEPA with other planning requirements and prepare appropriate NEPA documents to facilitate better environmental decision making. NEPA requires federal agencies to review and comment on federal agency environmental plans/documents when the agency has jurisdiction by law or special expertise with respect to any environmental impacts involved.	42 U.S.C. 4321-42 U.S.C. 4327 40 CFR 1500-40 CFR 1508
Nesting Habitat	Nesting habitat is generally moderately sized patches of denser and taller sagebrush, further away from roads and other activity areas. Specifically: • Sagebrush cover is from 20 to 50% • Cover of Mixed Mountain Shrubs is not more than 10% • Distance to nearest Forest is over 100 meters • Distance to Shrubby Woodlands is over 50 meters	
Notification	The Agencies must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. However, the methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.	43 CFR 46.305 (a)

Objectivity	Objectivity involves two distinct elements, presentation and substance. Objectivity includes whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner. This includes whether the information is presented within a proper context. Objectivity includes the requirement to identify all sources of the disseminated information and, in a scientific, financial, or statistical context, the supporting data and models so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. Objectivity also includes a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods.	66 FR 49718 September 28, 2001
Offsite Mitigation	Compensating for resource impacts by replacing or providing substitute resources or habitat at a different location than the project area.	
Proposal	Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.	40 CFR 1508.23
Quality	Quality is an all encompassing term in Data Quality Act comprising utility, objectivity, and integrity.	66 FR 49718 September 28, 2001
Range Improvement	Any activity, structure or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife. The term includes, but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results.	
Reproducibility	Reproducibility means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more (less) important impacts, the degree of imprecision that is tolerated is reduced (increased).	
Restoration	Implementation of a set of actions that promotes plant community diversity and structure that allows plant communities to be more resilient to disturbance and invasive species over the long term. The long-term goal is to create functional, high quality habitat that is occupied by prairie-chicken. Short-term goal may be to restore the landform, soils and hydrology and increase the percentage of preferred vegetation, seeding of desired species, or treatment of undesired species.	

Scientific Accuracy	Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.	40 CFR 1502.24
Significantly	as used in NEPA, requires considerations of both context and intensity: (a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant. (b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action.	40 CFR 1508.27
Social Effects	(a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.	40 CFR 1508.8
Suitable Habitat	Suitable Habitat includes all seasonal habitats (including lekking, nesting, brood rearing/summer and winter habitats) within the Plan area. Specifically, Suitable Habitat includes: • Sagebrush cover is from 10 to 50% • Cover of Mixed Mountain Shrubs is not more than 20% • Distance to nearest Forest is over 100 meters • Distance to Shrubby Woodlands is over 50 meters • Grass/forb dominated habitats (with >10% sagebrush cover) within 20 meters of • sagebrush habitat • Contiguous habitats >3 acres in size, or part of a block of Suitable Habitats in close proximity	

Temporarily Disturbed Areas	Areas that have seen recent vegetation disturbance activities (such as pipeline corridors and wildfire events) may not support sagebrush cover at a density or height suitable for sage-grouse use. If these areas occur within a block of Suitable Habitat, they will be considered Temporarily Disturbed, and still would be considered as long-term as Suitable Habitat. Temporarily Disturbed habitat will need to be tracked spatially within the Plan area.	
Utility	Utility is the usefulness of the information to its intended users, including the public. In assessing the usefulness of information that the Federal Agencies disseminate to the public, the Agencies need to consider the uses of the information not only from the perspective of the Agency but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information's usefulness from the public's perspective, the Agency must take care to ensure that transparency has been addressed in its review of the information.	FR 6649718 September 28, 2001

APPENDIX - F

County Resolutions

Resolution No. 13___

A Resolution of _____ Board of Commissioners
Adopting
The Lesser Prairie Chicken Conservation, Management and Study Plan

WHEREAS, The Lesser Prairie Chicken (*Tympanuchus pallidicinctus)* is an upland grouse species found in four ecosystem regions in parts of Texas, Oklahoma, New Mexico, Kansas and Colorado, including, as potential this County;

WHEREAS, The limited, disaggregated and incomplete body of human, procedural and scientific data for the Lesser Prairie Chicken suggests current regional policymaking and planning efforts for the Lesser Prairie Chicken to be premature;

WHEREAS, The Lesser Prairie Chicken is not in immediate or long term threat of extirpation, threatened throughout its range, nor in jeopardy of genetic hybridization;

WHEREAS, the Lesser Prairie Chicken Conservation, Management and Study Plan provides immediate conservation actions, proposes collaborative, peer-review of scientific data and information, and outlines meaningful study actions to address data gaps, omissions and needs;

WHEREAS, the Lesser Prairie Chicken Conservation, Management and Study Plan contains Conservation principles, actions and policies designed to manage and conserve the Lesser Prairie Chicken over the long term;

WHEREAS, The Lesser Prairie Chicken Conservation, Management and Study Plan provides for consistency of conservation activities between County, State and Federal initiatives through Government-to-Government coordination of activities invoked by the NRCP and this plan;

WHEREAS, the U.S. Fish and Wildlife Service is proposing to list the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.

NOW THEREFORE, BE IT RESOLVED THAT THE BOARD OF COUNTY COMMISSIONERS OF _____COUNTY, KANSAS RESOLVE TO:

1. ADOPT The principals, practices and policies of Lesser Prairie Chicken Conservation, Management and Study Plan;
2. PROMOTE, as outlined in the Lesser Prairie Chicken Conservation, Management and Study Plan, the conservation recommendations to residents, landholders, agricultural interests and industry as appropriate.

This Resolution was approved and adopted this _____ day of August, 2013.

BOARD OF COUNTY COMMISSIONERS:

_____COUNTY, KANSAS

_____
Chairman

_____
Member

_____
Member

_____
ATTEST: County Clerk

Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134-0001MARCH 10, 20146:03 p.m. CDT

The attached file includes November 1, 2013 transcribed minutes of Coordination Meeting #2 between the Kansas Natural Resource Coalition (KNRC) and US Fish and Wildlife Service (USFWS).

On page 21, responding to KNRC Hearing Officer Fred Grant and pages 31-32, responding to KNRC Executive Director Jim Carlson, USFWS-Region 6 Field Office Supervisor for Kansas Ecological Services Field Office (ESFO) Heather Whitlaw denied knowledge of preparation of Environmental Assessments (EA) in association with the Lesser Prairie-Chicken and USFWSs requirement to comply with NEPA.

In contradiction of Ms. Whitlaw's denials, Federal Register/Vol. 78, No. 243/Wednesday, December 18, 2013/Notices pages 76639-76641 notified:

1)"Pursuant to the National Environmental Policy Act (NEPA), we [USFWS] have prepared a draft environmental assessment (EA) that analyzes the potential impacts of issuance of the permit and implementation of the proposed CCAA, as well as two alternatives to the proposed action."

2)The permit application, draft CCAA, and draft EA are available for public review, and we seek public comment on these documents and potential issuance of the permit.

3)You also may review copies of these documents by appointment during regular business hours at the following offices: … (b) Kansas ESFO, 2609 Anderson Ave., Manhattan, KS 66502, (785) 539–3474;

4)The issuance of a section 10(a)(1)(A) permit is a Federal action subject to NEPA compliance, including the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500–1508).

5)We [USFWS] have prepared a draft EA to further analyze the direct, indirect, and cumulative impacts of the CCAA on the quality of the human environment and other natural resources. In compliance with NEPA, we analyzed the impacts of implementing the CCAA, issuance of the permit, and a reasonable range of alternatives in the draft EA.

6)After reviewing public comments, we will evaluate whether the proposed action and alternatives in the draft EA are adequate to support a Finding of No Significant Impact under NEPA. We now make the draft EA available for public inspection online or in person at the Service offices listed in ADDRESSES.

7)All comments we receive become part of the public record. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, NEPA, and Department of the Interior policies and procedures.

8)We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 et seq.) and its implementing regulations (50 CFR 17.22, 17.32), and NEPA (42 U.S.C. 4321 et seq.) and its implementing regulations (40 CFR 1506.6 and 43 CFR 46.305).

Additionally, in contradiction of Ms. Whitlaw's denials on November 1, 2013 of knowledge of EA preparation in association with the Lesser Prairie-Chicken, Ms. Whitlaw did on December 17, 2013 notify Kansas Natural Resource Coalition by email (attached):

1)"FWS is soliciting public comment on DRAFT Lesser Prairie-Chicken Range-wide Candidate Conservation Agreement with Assurances for Oil and Gas Activities (LEPC CCAA) and DRAFT Environmental Assessment (EA)"

2)The draft LEPC CCAA and EA are available for public comment until January 17, 2014. Copies

of the LEPC CCAA and EA are available on line at http://www.fws.gov/coloradoes/. If you have any questions, comments, or concerns, please contact Leslie Ellwood, 303-236-4747, or Amelia Orton-Palmer 303-236-4211 or myself 785-539-3474 ext 105 heather_whitlaw@fws.gov.

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Your Voice in Federal Decision-Making

Public Submission Posted: **01/10/2014** ID: **FWS-R2-ES-2012-0071-0560**

Your comment was submitted successfully!

View all documents and comments in this Docket

Success! You will now be commenting directly on:

The **Fish and Wildlife Service** (FWS) Proposed Rule: **Endangered and Threatened Wildlife and Plants: Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule**

For related information, **Open Docket Folder**

3 Your Receipt

Your Comment Tracking Number: **1jy-89so-r3nj**	Your comment will be viewable on Regulations.gov after the agency has reviewed it, which may be an indefinite amount of time. Use your tracking number to find out the status of your comment.

Your comment:

Comment: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners:

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2609 Anderson Ave. Manhattan, KS 66502, heather_whitlaw@fws.gov , 785-539-3474 ext 105
(same address & phone number listed in Federal Register notice--quoted in item 3 above).

637 characters remaining
Uploaded File(s)(Optional)

- KNRC Coordination Meeting #2 with USFWS transcribed minutes 11_1_13, FR & Whitlaw email.pdf: **success**

This information will appear on Regulations.gov:

First Name: Natural ResourceCoalition
Last Name: Local Government - KS
Country: United States
Government Agency Type: Local
Government Agency: 32-Kansas Boards of County Commissioners

This information will **not** appear on Regulations.gov:

Email Address: [redacted]@gmail.com

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From: "Whitlaw, Heather" <heather_whitlaw@fws.gov>
To: KNRC Counties <knrc.counties@gmail.com>; [redacted]
Sent: Tuesday, December 17, 2013 11:19 AM
Subject: FWS is soliciting public comment on DRAFT Lesser Prairie-Chicken Range-wide Candidate Conservation Agreement with Assurances for Oil and Gas Activities (LEPC CCAA) and DRAFT Environmental Assessment (EA)

All,

The U.S. Fish and Wildlife Service (Service) is soliciting public comment on a **DRAFT Lesser Prairie-Chicken Range-wide Candidate Conservation Agreement with Assurances for Oil and Gas Activities** (LEPC CCAA) and **DRAFT Environmental Assessment (EA)**. The LEPC CCAA provides conservation measures for the lesser prairie-chicken for oil and gas activities to be implemented on voluntarily enrolled non-Federal lands throughout the range of the lesser prairie-chicken in Colorado, Kansas, Oklahoma, New Mexico, and Texas.

On December 11, 2012, the Service proposed to list the lesser prairie chicken as threatened throughout its range. On May 6, 2013, the Service proposed a special rule, under the Endangered Species Act section 4(d), that would allow for take of the lesser prairie chicken incidental to activities conducted under a Service-approved comprehensive conservation program developed by or in coordination with a State agency. The Service has published the revised proposed 4(d) rule for public comment (78 FR 75306; December 11, 2013), and intends to issue its final determinations on the proposed listing and 4(d) rule no later than March 30, 2014.

The LEPC CCAA is designed to help implement the Lesser Prairie-Chicken Range-wide Plan (Range-wide Plan) prepared by the Western Association of Fish and Wildlife Agencies (WAFWA) and Lesser Prairie-Chicken Interstate Working Group. The Service has formally endorsed the Range-wide Plan. The Range-wide Plan provides a comprehensive conservation strategy that is intended to conserve the species and its habitat across its range. The Range-wide Plan provides: 1) an incentive-based landowner program, and 2) a mitigation framework to reduce threats and provide resources for off-site conservation. The LEPC CCAA incorporates the Range-wide Plan's avoidance, minimization, and mitigation measures that address impacts from oil and gas activities on enrolled lands. Oil and gas enrollment of lands into the LEPC CCAA would generate mitigation fees which would provide significant funds for the implementation of conservation actions under the Range-wide Plan.

WAFWA would administer the CCAA and hold the permit, while oil and gas companies would enroll under the permit through certificates of inclusion. In return for volunteering to implement the LEPC CCAA, the Service assures participants that it will not impose further commitments or restrictions for the lesser prairie-chicken during the term of the permit, even if the species is listed. The proposed term of the LEPC CCAA is 30 years.

The draft LEPC CCAA and EA are available for public comment until January 17, 2014. Copies of the LEPC CCAA and EA are available on line at*http://www.fws.gov/coloradoes/*. If you have any questions, comments, or concerns, please contact Leslie Ellwood, 303-236-4747, or Amelia Orton-Palmer 303-236-4211 or myself 785-539-3474 ext 105 heather_whitlaw@fws.gov.

Sincerely,
Heather

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Kansas Natural Resource Coalition (KNRC)
Coordination Meeting #2 with US Fish and Wildlife Services (USFWS) Minutes
Friday, November 1, 2013
1:00 p.m. MDT
Sherman County, Kansas Commissioners' Meeting Room
Goodland, KS

Present: Ken Klemm, President KNRC-Sherman County Commissioner
Mahlon Tuttle, Vice-President KNRC-Gove County Commissioner
Nikki Schwerdfeger, Steering Committee member-Hamilton County Commissioner
Jim Carlson, KNRC Executive Director
Sheila Ellis, STS Research Analyst
Fred Grant, KNRC Hearing Counsel
Heather Whitlaw, Field Office Supervisor for Kansas Ecological Field Office
Jim Pitman, Kansas Department of Wildlife, Parks and Tourism (KDWPT)
Small Game Program Coordinator/5-State Range-wide Conservation Plan
Kansas Representative on Interstate Working Group (IWG)

Acronyms

KNRC Kansas Natural Resource Coalition
NRCP Natural Resource Coordination Plan
LPC Lesser Prairie Chicken
RWCP 5-State Range-wide Conservation (Recovery) Plan
KDWPT Department of Wildlife, Parks and Tourism
DOI Department of Interior
NEPA National Environmental Policy Act
FLMPA Federal Land Policy and Management Act
EO Executive Order
ESA Endangered Species Act
IWG Interstate Working Group
WAFWA Western Association of Fish and Wildlife Agencies
NRCS Natural Resource Conservation Service
LPCI Lesser Prairie Chicken Initiative
RFA Regulatory Flexibility Act
USFWS US Fish and Wildlife Services
Service US Fish and Wildlife Services
LPCMSP Lesser Prairie Chicken Conservation, Management and Study Plan

KNRC President Ken Klemm: I'd just like to go ahead and open this meeting. It is a public meeting; the public is invited, they're not allowed to participate, 'cause this is our government-to-government Coordination meeting. It is our 2nd Official government to government Coordination meeting. And, I like to introduced Sheila Ellis, on my far left here, she's our research analyst; Fred Kelly Grant is our Hearing Officer; I am Ken Klemm, I am the President KNRC; This is Mahlon Tuttle, the Vice-President of KNRC; and Jim Carlson, who is our Executive Director. This meeting is being recorded and there will be notes taken as well and of course, you'd certainly be welcome to have copies of those, as well. We also have Heather Whitlaw. Heather can you tell us what your title is, please?

Ms. Whitlaw: Sure, I'm Field Office Supervisor for the Kansas Ecological Services Field office.

President Klemm: Ok

Ms. Whitlaw: Fish and Wildlife Service.

President Klemm: Boy, I'm glad I didn't have to memorize that. Thank you very much.

Ms. Whitlaw: You're welcome.

President Klemm: And Jim Pitman.

Mr. Pitman: Jim Pitman, my title is actually a little bit longer probably; I'm the Small Game Program Coordinator for Wildlife and Parks here in Kansas, but I'm also the state's Representative on the Lesser Prairie Chicken Interstate Working Group, which put this Range-wide Conservation Plan (RWCP) together.

President Klemm: Ok, alright, wonderful. I think that gets us beyond the opening exercises, so to say. So, Jim [Carlson], I'd like to go ahead and turn the time over to you as the Executive Director of the association or Coalition.

Executive Director Carlson: Alright.

Ms. Whitlaw: Is this our agenda for today? These four items in the letter (referencing attachment 1-Coordination letter dated October 18, 2013).

Executive Director Carlson: Yes, I was going to pass that but you have a copy then Heather [Ms. Whitlaw]?

Ms. Whitlaw: I do.

Carlson: Super, here's a hard copy for the group. Why don't you pass those down, they're all the same and then we're expecting one more commissioner from our steering committee.

President Klemm: Yes, we have one more commissioner from our steering committee. She had a little navigation issue and she should be here in probably 20 minutes. Nikki is her name, Schwerdfeger.

Sheila Ellis: Schwerdfeger is, I believe, how she taught me to say it.

President Klemm: Commissioner Nikki.

Sheila Ellis: We usually opt for 'Nikki.'

Executive Director Carlson: Thank you Commissioner Klemm. The, what I would like to do is touch on the items here in the agenda. You [President Klemm] mentioned that really for Coordination meeting #2, the 1st Coordination meeting was held in with US Fish and Wildlife Service Senior Leadership in Washington, DC with Deputy Assistant Director Souza, and Mr. Bean and some others from the Service. So this will be the 2nd Coordination meeting. What I'd like to do is just maybe touch on these items here, and for the record and then turn over to the group and ask, if there is anything while we're going through the Coordination Plan, the Conservation Plan that the group would like me to touch personally or that you would like to add to this agenda. We'll start there. We set aside an hour for that, for this meeting. We'll probably keep it pretty close to the hour unless Commissioner Klemm and the Steering Committee elects to lengthen that time. So that would be a decision they would make. Here are the four items: Review the KNRC

Natural Resource Coordination Plan (NRCP); Review the Lesser Prairie Chicken Conservation, Management and Study Plan (LPCMSP); Transmit details of the hearing that's coming up next week [November 07 and 08 KNRC Public Hearing; mentioning all had received the invitation to testify at the Public Hearing;] I believe, everyone has an invitation to that, if not there's one on the front of the Court House here, that you could, that we could get for you and what have you. We can get you an invitation and then the last thing that we'll touch on maybe some of the views of the recently, and when this was developed, it was now recently endorsed, the Range-wide Conservation [Recovery] Plan by the Western Association of Fish and Wildlife Agencies. So, we'll touch on that and then so, with that, we'll maybe go around the table and see, if anybody has anything to add. Or anything you'd like me to touch on, make sure I cover, while I'm speaking.

President Klemm: No, I don't, I think, my questions will be answered. Mr. Grant did you have anything?

Hearing Officer Grant: I, no the only thing, that I was going to ask is, uh, Mr. Sexson has a time to testify or make a presentation on Thursday of next week, is that right, 1:00 o'clock

Mr. Pitman: He told me…

Hearing Officer Grant: …and then at 1:30?

Mr. Pitman: He told me WAFWAs was at 1:00 and then Wildlife and Parks is at 1:30 p.m…

Hearing Officer Grant: 1:30?

Mr. Pitman: …or vice versa, I don't recall it;

Hearing Officer Grant: Are either of you going to be there?

Sheila Ellis: Jim [Pitman] is right here.

Hearing Officer Grant: Yea, right, that is at 1:00 and 1:30. Are you [Ms. Whitlaw] going…

Ms. Whitlaw: I am not planning to attend. No.

Hearing Officer Grant: How about you [Mr. Pitman]?

Mr. Pitman: Keith [Sexson, Under Secretary KDWPT] is attending and I'm probably going to be there also.

Hearing Officer Grant: Ok, did you want a time to make a presentation too?

Mr. Pitman: No, well, just make one set of remarks for WAFWA and for Wildlife and Parks.

Hearing Officer Grant: Ok.

Hearing Officer Grant: ‘Cause, I was just going to set a time that was convenient for you [Ms. Whitlaw] if you at some of the opening spots that haven’t been filled yet. But our being, I asked them [Hearing Board] to hold up on scheduling until we could find out whether…

Ms. Whitlaw: Thank you.

Hearing Officer Grant: …you were going to testify and at what time you wanted. So there’s, uh, there’s time on Thursday afternoon or Friday, if you want to add another spot to present anything.

Ms. Whitlaw: I appreciate the invitation but I don’t think I will be attending.

Hearing Officer Grant: Ok, ok. Ok, that’s all Mr. President.

President Klemm: Ok, and how about you folks [Ms. Whitlaw or Mr. Pitman], is there anything you would like to cover in this meeting other than what’s on the agenda.

Ms. Whitlaw: No, Sir.

President Klemm: Ok.

Mr. Pitman: I’m here to answer whatever questions you’ve got about the Range-wide Plan, so.

Executive Director Carlson: Maybe we’ll, we won’t fill all those blocks on the invitation pending this meeting Heather [Whitlaw] and may be we’ll introduce some things to help you consider that, reconsider that or maybe have a representative from the Service there. So, we encourage you [Ms. Whitlaw] to do that or consider that. Did Jim and Heather [Mr. Pitman and Ms. Whitlaw] did you bring possibly your copy of these guys here [NRCP and LPCMSP].

Ms. Whitlaw: Yes.

Executive Director Carlson: Ok, super.

Mr. Pitman: I did but I haven’t personally had a chance to look them over them much because I just got my hands on them yesterday so, but I did bring them along.

Executive Director Carlson: It’s great, yea, so it is my understanding then that KDWPT has not reviewed the LPCMSP?

Mr. Pitman: At least not me, I got these from Keith [Sexson], so I’m not sure how much he has dug into it.

Executive Director Carlson: Heather [Ms. Whitlaw} has USFWS had the opportunity to read this and study this plan?

Ms. Whitlaw: I have read it.

Executive Director Carlson: Ok, ok good, super, thank you for that. What I'm going to do here is I'm gonna walk us through, first of all, the Coordination plan. What this does is it sets the platform, it sets the platform, you know, actually before I do that, Commissioner Klemm, there's one more thing I'm going to recommend to the steering committee that we set the next Coordination meeting.

President Klemm: Ok.

Executive Director Carlson: Can we do that.

President Klemm: Yea, we could, we could certainly set…

Executive Director Carlson: Or did you want to wait to do that.

President Klemm: Let's wait 'til the end of this meeting and set a time.

Executive Director Carlson: Alright. What this Coordination plan does is its the instrument and platform of 32 Counties, 32 western Kansas Counties, that's just a little over 33% of the state. It's been adopted into the local ordinances all of 32 counties, so it is Local Ordinance and Local Law. What it does and I'll walk through the plan its self, and what were doing here is, we're setting the stage for Coordination for the Lesser Prairie Chicken listing but we're also sharing with the Service and invoking Coordination for the future. So, really, formally, what's happening here is this Coordination meeting is with USFWS and Kansas Department of Wildlife and Parks really at this point in time is not, we're not Coordinating with you [KDWPT] we [KNRC] have not formally invoked Coordination with the Department of Wildlife, Parks and Tourism at present. Now that could change during the meeting or what have you, but so really, we're here to go through this with the Service. So that's formally saying that's what we're doing. What this plan [NRCP] does is first of all it lays out the law, the federal law. Really, simply what we [KNRC] did guys is took four acts of Congress, six Executive Orders and that codified the Environmental and we distilled them down and then we codified them into the local ordinances and codes of 32 counties. So, that's really what you have in front of you is simply federal law, Executive Orders all codified here in a document into Local Law. That's really what you have in a big picture. It, the Coordination Plan, addresses any federal action—that was our design---so for example, any major federal action US Environmental Protection Agency, Department of Interior (DOI) US Wildlife is part of the DOI--- that proceeds with any major federal action would be, fall under the FLPMA and have to come into consistency with this plan [NRCP], as a local plan adopted by the 32 counties of local government. The law requires and the statutes require and the Executive Orders and I'm can to refer to those. What's really nice about this handy-dandy little plan is it's all included in one, so you've got all of the statutes and the Executive Orders all wrapped up into one neat tidy little document. You don't have to go on the internet and do all that kind of stuff; we've brought them over, brought the statutes over for ease of reference.

Executive Director Carlson: What I want to do first is distinguish where we [KNRC] are in the process. So, where we are in the process is in non-agreement with for example, we have, WAFWA has developed a Range-wide Conservation Plan in a sense, That's a Recovery plan—a recovery plan is as you know, I mean, actually, you're more experts

than I am, so I'm not trying to tell you something that you don't already know but from our [KNRC] understanding of recovery plan, is once you've defined a problem, once you've assessed the problem and determined that all the information and data is there to make a conclusion, then it's the solution to that problem. That's what the RWCP, as we [KNRC] see it, is. That's the end of the process. Now where we see this Coordination Plan [NRCP] comes in, this is at the beginning of the process. So, for example in National Environmental Policy Act (NEPA), for example, on any major federal action you would at the beginning of that process, you [USFWS] would, as major action are contemplated, then you would enter into, you would start notifying local government and then you'd start the necessary studies, undertake the necessary studies to, uh, that are part of all of this plan [NRCP]. So, we don't, right now, there's a non-agreement, we're just, we're not saying, we're not saying that necessarily to discuss it today. We're just sharing with you that this Coordination Plan [NRCP] is for the future, any major federal action would want to begin at the beginning with following this plan [NRCP]. In the Federal Land Policy and Management Act (FLPMA) 43 US Code, there, coordination is defined as any major, major federal action has to take into account and come into consistency with any, with all or any local plans. So, and that's what this is. That's what the Lesser Prairie Chicken plan is. It's a local plan that under the definitions of FLPMA any major federal action has to come into consistency with. And not only, or attempt, not have to come into consistency with, the other part of that is that to the maximum extent possible. And so, the word coordination is distinguished from, distinguished from other, like for example, there's another word for 'coordination', I'm drawing a blank here.

President Klemm: 'Cooperation.'

Executive Director Carlson: "Cooperation.' It is distinguished from 'cooperation' in that "coordination" is an effort, for example, if you think of Normandy, Invasion of Normandy, for a guy who knows your World War II history a little bit, that would be

Mr. Pitman: A little, just a little.

Executive Director Carlson: Oh man, ok really, whenever someone says, looks at me and like says 'a little bit' that means probably know quite a bit more than me.

Mr. Pitman: I had some family over there, so I know a little; I've heard about it from them but go ahead.

Executive Director Carlson: But that was a 'coordinated' effort, meaning that it's equal standing one entity with another. And so, that's what FLPMA says with regard to 'Coordination' with local government that federal agencies undertaking major federal actions have to come into coordinate with and achieve consistency with local plans.

Executive Director Carlson: Now, we [KNRC] recognize now, we have the Lesser Prairie Chicken (LPC) threatened listing out there. The threatened, the listing, the threatened listing for the Lesser Prairie Chicken is out there and that listing; well, the listing process has to be coordinated consistent with this plan, so I'll just share that with you, with both of you right now; particularly, we're speaking to the Service. And that's, falls under several places it's defined in FLPMA; it's actually applied ***Cooperative Core Conservation*** is found in ***Executive Order 13352***. There are others. And they need, it

needs to account for local interest and private ownership. So as we work through, as we coordinate as Local Government and Federal Government together for the threatened listing for the Lesser Prairie Chicken, that initiative needs to be coordinated with, attempting to achieve consistency with this local plan [LPCMSP]. Any questions there, Heather [Whitlaw]? I mean, jump in, I don't, you know.

Ms. Whitlaw: No, I'm just learning and listing.

Executive Director Carlson: Ok, yea, it's me and the plan here.

Mr. Pitman: I'm just an ignorant observer here, has anyone taken this approach before with another species or something in another state or?

Executive Director Carlson: Sure, uh.

Mr. Pitman: I'm not an ESA person. I'm a biologist, so.

Executive Director Carlson: Ok, ok, so you're not an ESA person. Good. Fred would you want to speak to that? Has this been used in other states or.

Hearing Officer Grant: Other states

President Klemm: Coordination process.

Hearing Officer Grant: Coordination process, yes, uh, in Idaho, Montana, Wyoming, California,

Mr. Pitman: With Wolves?

Hearing Officer Grant: Oregon, Washington. Pardon?

Mr. Pitman: with wolves, or do you know.

Hearing Officer Grant: Uh, not yet with the wolves, not yet, there're several counties getting together to try to do that…

Mr. Pitman: I see

Hearing Officer Grant: …but, tuh, oh, the endangered Bull Trout in Montana, the endangered Sucker Fish in California, the Grizzly in Montana, Bruno Hot Springs Snail and the Spotted Owl [corrected self] Spotted Frog in Idaho.

Mr. Pitman: I see, I see, that's, you don't have to go any further, I had never heard of this before so…

Executive Director Carlson: Right. It's..

Mr. Pitman: …that's not surprising since I don't deal with ESA.

President Klemm: It's not specific to ESA either---the Coordination process.

Mr. Pitman: Any government entity?

President Klemm: Any major governmental action.

Mr. Pitman: Federal or state or both?

Hearing Officer Grant: Both.

President Klemm: Could be both.

Executive Director Carlson: It is found in ESA Section 4(b) determinations. So, it is found in Endangered Species Act Section 4(b) when, with regard to determinations, determinations have to be made in conjunction with local plans and so, I don't know exactly the verbiage there in 4(b) but the determination needs to be taken to, not only take into account but be consistent, which that's a much higher bar.

Mr. Pitman: Mmhmm.

Executive Director Carlson: Take into account is, 'well, we looked at it, we read it, we thought about it, for example comments. The comment process, that's take into account. Coordination is we [KNRC-local governments] have equal standing to work through the endangered, the Lesser Prairie Chicken listing together as co-partner.

Mr. Pitman: So, the plan would be developed with you [KNRC] and the Service, so you're in agreement on the conservation plan or they [USFWS] just adopt what's been developed.

Executive Director Carlson: That's a really good question. I think that's a good segue to

Mr. Pitman: I'm just trying to learn.

Executive Director Carlson: Yea, right, no, I think that's a good question. Is um, and we can use the example of the Range-wide Conservation Plan from WAFWA, right. Before I say, what I'm going to say, a lot of hard work went into the RWCP. Gosh, you've been working for 18 months.

Mr. Pitman: That makes me feel better; I've lost a lot of sleep over it, so now you can tell me what you think.

Executive Director Carlson: No, no, I'm not priming the way to smack you but I'm priming the way to say, to put it in the right order. So, what we're going to do is we're going to order where RWCP from WAFWA falls in this process. A lot of hard work went in, I mean, I know,

Mr. Pitman: You bet.

Executive Director Carlson: I know, you guys have met a number of times, you and I visited about it, there's just been and probably there's some, an emotional stake in that plan as well.

Mr. Pitman: Absolutely.

Executive Director Carlson: There's a technical fact, so

Mr. Pitman: Our ultimate goal is to make it something that will work for everyone, so we'll take criticism.

Executive Director Carlson: So, the intent on that Jim [Pitman] is laudable, and I mean that, so I personally recognize that. Where the RWCP falls in the process or falls is it's a non-governmental organization that has developed it and so as such, it is one of many plans that are out there, this maybe the best, may not, I don't know but it is one of many out there. But when you compare it to this one [LPCMSP], a plan by local government, that the Service in doing, performing the Lesser Prairie Chicken listing has to attempt consistency with to the best of their ability, so that's a higher bar. And so, in answering your question, your comment, is, as we move forward, what really needs to happen is the Service needs to look through this document [LPCMSP] very carefully and if the RWCP is the plan of preference, as, and two weeks ago that was stated [USFWS endorsed RWCP]. You know, I've got a question with that. When the Service came out and endorsed the plan, the RWCP,

Ms. Whitlaw: Mmhmm.

Executive Director Carlson: was that, did that endorsement come out before the last plan last week? The seven pages or whatever were added?

Mr. Pitman: They [USFWS] endorsed the plan that came out in October. The one that is setting right here, so

Executive Director Carlson: Oh, they [USFFWS] did. So, they didn't endorse the September plan then.

Ms. Whitlaw: The October one.

Mr. Pitman: Right, right.

Ms. Whitlaw: Mmhmm.

Mr. Pitman: There were some things we [IWG] had to fix [in the RWCP] to satisfy those folks [USFWS].

Ms. Whitlaw: The September plan was submitted as the one for consideration for endorsement, then we [USFWS] responded back to the states and WAFWA with our [USFWS] comments; those comments were incorporated, happened to fall during the furlough time, and when we [USFWS] came back to work, um, the October plan [RWCP] had incorporated our [USFWS] comments and then that was the one the director (Ashe) endorsed.

Executive Director Carlson: I see, I see, so Director Ashe endorsed that plan [October plan] because the endorsement came out before Secretary Sexton sent out [corrected self]

Sexson sent out the revised [October RWCP] plan, so that's why I asked that, that was the basis for that question.

Ms. Whitlaw: "It was, the endorsement came before that October plan" [RWCP]

Executive Director Carlson: Was distributed.

Ms. Whitlaw: "came out---was distributed publicly but it was in existence---prior to."

Executive Director Carlson: I see, I see, ok, so it didn't go out for public comment or

Ms. Whitlaw: No, it did not.

Executive Director Carlson: or the, it was all internally.

Ms. Whitlaw: Yea.

Executive Director Carlson: At what point are we going to have a final plan that we can look at as a coalition.

Ms. Whitlaw: This is it (October RWCP).

Mr. Pitman: This is it (October RWCP).

Executive Director Carlson: This is it. Ok, oh great, so the October plan is stamped, this is it.

Mr. Pitman: Thank God.

Executive Director Carlson: Here comes the brass band and all that stuff.

Mr. Pitman: Yea, well, now we're trying to figure out how to implement it.

Ms. Whitlaw: Now we implement it.

Mr. Pitman: We're scrambling to implement it, right now.

Executive Director Carlson: Really? What's that, what's that entail?

Mr. Pitman: That entails going out and signing up industry folks to enroll in plan to be coverages under the ESA, with exemptions, if the bird [LPC] is listed and signing contracts with landowners to implement the conservation programs. So we're started down the road to do both of those things.

Executive Director Carlson: I see, so, the, is the idea then to implement the RWCP then before the listing determination or decision is made then?

Mr. Pitman: Absolutely."

Executive Director Carlson: Hi, how are you?

Commissioner Nikki Schwerdfeger joined the meeting: I've Highway 24, all the way from 81. I'm not sure which, I missed the Highway 70 at Salina and I've been there a thousand times.

Executive Director Carlson: Right, wow.

President Klemm: So, that question you just asked, can we direct that to US Fish and Wildlife Service [Ms. Whitlaw]

Executive Director Carlson: Sure.

President Klemm: About, it's the intention of the USFWS to implement this plan [RWCP] right now?

Ms. Whitlaw: It is not our [USFWS] plan to implement; it's the states' plan; our [USFWS] endorsement of the plan, I can't, for the official record, the endorsement would have to go back to whatever the Director's [Ashe's] statements were in his audio and written statements for the endorsement. But generally, the idea of the endorsement is that the Service recognizes that this is an important conservation strategy toward conservation of the species. It doesn't imply that the Service is not going to list and that's the stated objective of this plan [RWCP] is to preclude the need to list. So, endorsement doesn't mean we [USFWS] agree with the objective of this plan [RWCP].

President Klemm: Well, the objective at the beginning of the plan [RWCP], says developed to whether it was listed or not.

Ms. Whitlaw: Right, our endorsement does not, Director Ashe was very clear in his spoken and written comments that endorsement does not mean that we [USFWS] agree with that objective and what we [USFWS] are endorsing is the pathway for conservation of the species. The states having the authority at the moment to manage the species, being a state species.

Pitman said: The states' intent, of course, is to enroll as many industry and landowners, as we (WAFWA) can ahead of the listing in hopes they can prevent a listing from happening. But our plan, if a listing does occur, our plan gives us a quick pathway to delisting, so that's our objective. Not listed first but quick delisting, if it happens.

Ms. Whitlaw: And then with the complimentary 4d rule, umm, that you know, of course, we did publish a proposed 4(d) rule, the director [Ashe] has committed us to preparing a revised proposed 4d rule and that will be coming out, I would say, within the next month or so, is the assurance or certainty component of the Service's commitment to this plan through our endorsement. It's the document that is, that allows the Service to accept certain activities from being prohibited activities under the act. And so, the first proposed 4d had the set of criteria, if there is a plan in general that meets these criteria, then we [USFWS] felt that those activities under that plan that had met the criteria would be exempt from prohibitions and we're working right now on the revised 4d as it would relate to existing initiatives--- RWCP, NRCS LPCI, and a few other things. But that's, so and that 4d, of course, is only applicable if the species, if the final rule is to list the species and that will be in March of 2014. If the final rule is to list, that is a listing determination of "warranted"

for threatened listing, then we [USFWS] would publish the 4d rule, the final 4d at the same time. And those two documents, those two regulations would then be in effect 30 days after publication in the Federal Register. Uh, if our final listing determination is "not warranted," then there's no need for the 4d and it would be withdrawn. So, that's really the process. The Service will, you know, you all have included the PECEs analysis in your documents [LPCMSP] and we [USFWS] will follow the intent of the PECEs analysis, I'm not on the listing team specifically, so I don't know how they're going to use PECE as a policy but I know they will probably be following at least the guidance and the intent of PECE. I don't know about doing a full PECE analysis and using the RWCP and other existing initiatives, Lesser Prairie Chicken Initiative from NRCS and other initiatives to look at the two criteria in PECE, the certainty of implementation and the certainty of effectiveness and that policy being in place to look at conservation efforts, when the species' listing decision is in place. The states, I can't speak for Wildlife and Parks, but I think that the states would like the Service to look at the RWCP and the implementation that occurs between now and early 2014 and say "yes, there is certainty of implementation, as there is certainty of effectiveness" and we feel existing conservation measures are in place and we don't have to list the species. Would you [Mr. Pitman] agree?

Mr. Pitman: That's our [5-States] intent to do this voluntarily, if we can, so they [USFWS] don't have to regulate us (5-States).

Ms. Whitlaw: Does that answer your question a little bit, Jim [Carlson]?

Executive Director Carlson: Oh, yea, I'm just listening, good job, I mean it's, keep going.

Ms. Whitlaw: No, that's all.

Commissioner Schwerdfeger: And their [USFWS] endorsing it in its entirety?

Ms. Whitlaw: Yes, ma'am.

Commissioner Schwerdfeger: …including the mitigation plans?

Ms. Whitlaw: Yes, ma'am.

Commissioner Schwerdfeger: And those are considered to be voluntary?

Ms. Whitlaw: They [mitigation costs] are. They're all voluntary.

Commissioner Schwerdfeger: Ok, if, uh, there's not money there to be voluntary on there, then what would happen?

Ms. Whitlaw: I don't quite understand.

Commissioner Schwerdfeger: Well, ok, let's just go back, you're gonna have the whole plan, ok, all of it is [voluntary].

Ms. Whitlaw: Yes, yes.

Mr. Pitman: So the way industry is looking at this [RWCP], you know, we've been partnering with industry in the development of this plan, the whole way along and they're prepared to sign and we [5-States] expect that to happen soon, the majority of some of those industries, particularly Oil and Gas, they're looking at it as if they don't play voluntarily the Service is probably going to regulate and require this any way or something more stringent. And at least in our process, the voluntary process that we laid out, they've got a voice through that advisory committee, 'cause they've got a chance to participate and provide oversight in how this plan is implemented, including Local Government, there's two seats on there for local government too. And this association, for example, that you guys have formed, is in a perfect position to get one of those seats because you [KNRC] are more, cooperating better than some of the counties in some of the other states across the range. So, I just wanted to throw that out there.

Ms. Whitlaw: That nomination is coming up soon, isn't it?

Mr. Pitman: Real soon, they were talking about it yesterday, our directors, that's why Keith's [Sexson] not here today. He [Keith Sexson] is trying to figure out how to put some legs under this and make it work. They're talking about putting out a nomination, sometime in the next couple of weeks to solicit membership on that advisory committee.

Executive Director Carlson: And so, there, how many members would be on that advisory committee?

Mr. Pitman: Um, 17, I believe, but let me verify.

Executive Director Carlson: Ok, that's…

Mr. Pitman: It is 17 or 18.

Executive Director Carlson: Right, so, then there would be one seat, for example, if KNRC was part of that, then we would have a seat of equal standing, then with the other 16 or 17 participants?

Mr. Pitman: You bet

Executive Director Carlson: Ok

Mr. Pitman: You bet.

Executive Director Carlson: Alright

Mr. Pitman: Let me find it for you and I'll show you exactly.

Commissioner Schwerdfeger: I was just wondering, you know as a county commissioner, if I don't have the, the funds to voluntarily participate, what happens?

Ms. Whitlaw: Well, that's, that's a great question. So, now a, a county, a, the person, and stop me, when I get off track.

Mr. Pitman: Go ahead.

Ms. Whitlaw: The, the person or entity who's going to voluntarily participate is either a person who is impacting Lesser Prairie Chicken habitat, so oil and gas, transmission, road development---new developments, not anything in the past, new after listing or a person is a landowner who enrolls and is paid for the credits that they are generating. So those are the…

Commissioner Schwerdfeger: And that's enrolled other than already in NRCS?

Ms. Whitlaw: Yea, there, we can give you…

Commissioner Schwerdfeger: So, it would be in addition to, OK?

Ms. Whitlaw: Yea, we can get into the detail, the federal governmental overlap, is a little.

Commissioner Schwerdfeger: (speakers at the same time) No, that's fine, ok, that's fine, let's go back to…

Executive Director Carlson: But Heather [Whitlaw], just a follow-up question on that is, is; that's only on federal land, is that correct? Or, or what?

Ms. Whitlaw: Which?

Executive Director Carlson: Well, maybe I'm not really following you but 94% of all the land in Kansas is private, right?

Ms. Whitlaw: Oh, yea.

Executive Director Carlson: And, and so, help me understand this, if, if what, where's the incentive for, uh, your Oil & Gas folks to, to sign up with this plan or any plan instead of saying, 'gosh we'll just live life, it's voluntary, I can just live life normally' and where's the incentive for those fellows to just keep doing business as usual?

Mr. Pitman: The 'big stick' that the federal government has. They're afraid, if they don't do this voluntarily, they're gonna be regulated and they will be required to do the same thing any way or something more.

Ms. Whitlaw: Let me, so, just, just like anybody in this wonderful country, we all have free choice, right, to be in compliance with rules and regulations, and so, if the Lesser Prairie Chicken is listed, then it becomes, um, a violation of Endangered Species Act to "take" and we can have a discussion about there are people who are experts their whole life, about studying, what is 'take' of a species; for me, its you know, direct take is, you know intentional take would be shooting a bird, unintentional direct take could be where you hit it with a pickup and it dies, indirect take, um, is habitat loss, anything that affects breeding, feeding and sheltering, is the language that we [USFWS] use. So after the species is listed, it becomes a violation to take a species that's listed but there is nobody saying 'this is what you have to do', its more of a wanting to be in compliance, so the oil and gas companies are saying, 'we are going to voluntarily participate in this plan' because of what I was talking about with the 4d, um, protections.

Executive Director Carlson: Ok.

Ms. Whitlaw: So, the 4d protections, if you enroll in this plan, as an oil & gas company or a windfarm or a local utility coop, and the "Service" has published the special 4d rule that says, if you're enrolled in this plan and implementing it and in good graces with them and in compliance with all the terms and conditions, then the activities you are conducting under that plan are exempt from the prohibitions of the act, so you're basically exempt from "take." And that's the incentive for industry to participate.

Executive Director Carlson: Why wouldn't industry just wait for regulation?

Ms. Whitlaw: Because there is no, from the federal side, there's no

Executive Director Carlson: I know, I don't want to sound silly but why they wouldn't wait just normally, don't we wait for regulations on other things?

Mr. Pitman: They have oversight in our process, they can, they can direct how it is implemented through this advisory committee. They can't do that when the bird's listed.

Executive Director Carlson: I see.

Vice-President Tuttle: Who's 'they.'

Mr. Pitman: Industry or local governments or even the states for that matter, we don't have much authority.

Executive Director Carlson: Is the advisory committee comprised of all industry then?

Mr. Pitman: Nope, nope, there's, there's 17 members on it here, there's, there's, I'll just start at the bottom, 3 from local government, from this across the range, three from conservation organizations, uh, like NGOs types, nationa,…, uh, three from ag and landowner associations, like Cattlemen's Association, Farm Bureau and such, uh, three from industry, so they've got three seats on there, and that's Oil & Gas, wind and transmission, and etc., uh, one representative from each of the two primary federal departments closely involved with LPC conservation, that's the 'Service' and NRCS, one representative from three of the five state wildlife agencies. So, that's the 17 and then there'll be one WAFWA employee, as a non-voting member that chairs the group.

Executive Director Carlson: And that group sets the mitigation rates then?

Mr. Pitman: That group provides recommendations up to the five directors that're, that're meeting today, trying to put some legs under this.

Ms. Whitlaw: And [indiscernible] there's a structure underneath that group that's a fee setting committee or the mitigation committee and a science team.

Mr. Pitman: Yea, let me…

Executive Director Carlson: So the directors then are, are those, are those the state, New Mexico, K, uh, Texas, K…

Mr. Pitman: Kansas, somebody like Robin Jennison, or his appointee, which will probably be Keith. One of those two guys. Same in every other state, so they're appoint…governor appointed positions making that decisions.

Commissioner Schwerdfeger: Who represents the individual farmers, who are in the habitat area?

Mr. Pitman: They could, they could apply through that nomination process for one of those three agriculture, agricultural/landowner seats.

Commissioner Schwerdfeger: Just the one little guy who owns.

Mr. Pitman: They can apply.

Commissioner Schwerdfeger: I know, but are you gonna take the person who owns...

Mr. Pitman: Well, it wouldn't be me, it would be, it would be our directors.

Commissioner Schwerdfeger: I know, would they take 640 acres as someone to be on there.

Mr. Pitman: I would assume and that they would give the associations, like Farm Bureau, higher regard, but we want to give everybody the opportunity to participate somehow. You know, if a local farm, farmer doesn't belong to one of the associations and has some stake, he has the potential to get on here, if he can make a good case.

President Klemm: Jim [Pitman], what's the policing action of this mitigation aspect? I'm a rancher and I build a windmill and I want to put a road out to there and the thing says its going to cost me $40,000 to do that, how are you gonna, how are you gonna make me pay 40,000 bucks?

Mr. Pitman: First of all, our plan is voluntary, so you wouldn't have to. And what we're trying to do from the states' prospective is, we're trying to get the majority of the impactors enrolled in this plan and that's not the local producer. We're not interested in trying to sign up every farmer across the landscape into this plan and preclude their ability to develop. We interested in Oil & Gas, we're interested in Wind and we're interested in Transmission and we think that's how the 'Service' is probably going to evaluate the effectiveness of our plan. As to how many of those industries we've got enrolled. Now, we've provided a mechanism for anyone to enroll, so if for example, a farmer wants to enroll in the plan to get that, that 'take' exemptions she's talking about, they have the opportunity to do that but that's not who we're targeting.

President Klemm: Ok.

Vice-President Tuttle: Have you done a study on the economic impact that'll have on our area out here?

Mr. Pitman: Uh no, but what we've done, what we've done is develop the plan with Oil & Gas and we've tried to provide them, you know, work with them hand in hand, we're

gonna try to encourage avoidance of development and those sort of things and we've tried to limit as many conflicts as we can, so, so we've tried to put the areas with the highest potential for development outside of those areas we're asking them to avoid. And, and uh, we've also, of course, worked with the producers on, on these fees to come up with some rates that we would pay producers to implement conservation practices, so we haven't done an economic study but we're looking at 10+ million dollars going back to producers in some of these high priority areas to implement conservation practices.

Executive Director Carlson: Are those in your, the priorities areas are they in the [indiscernible]?

Mr. Pitman: You bet, you bet, there's just a little bit that comes into Sherman County, down in the southern part of the county, I noticed.

President Klemm: We're all from different counties here.

Mr. Pitman: And Gove, there's some in Gove for sure, I'm not sure where the rest of you folks.

Commissioner Schwerdfeger: I'm in Hamilton County, I'm…

Mr. Pitman: Hamilton for sure has some south of the 'Ark'.

Commissioner Schwerdfeger: Oh, yes and that's why I worried about…

Executive Director Carlson: And, and do these have the corridors too?

Mr. Pitman: Yes, absolutely.

Executive Director Carlson: Ok.

Mr. Pitman: So, so for example, who wants, who wants to see this but, short grass, oh, oh excuse me, so there for example would be Sherman County where we're setting now, so one of our focal areas would be in the southern and south eastern part of the county, these are the areas where we would be trying to encourage avoidance by charging a mitigation fee to development and these would also be areas we would be paying a premium to landowners to implement conservation practices. But again the whole thing's, uh, voluntary in terms of where they develop. This isn't a no go zone for energy development, if there is a good play there for Oil & Gas or something, that we've given a pathway for industry to go in there and still develop the site, it may cost them through our mitigation framework but, but, but its not a no go area.

Commissioner Schwerdfeger: So why is the local farmer with the, that or the rancher with that two miles of road total with all my stuff has to buy an insurance policy for running over a prairie chicken by joining this group?

Mr. Pitman: I'm not familiar with what you're talking about.

Executive Director Carlson: The question, question here, the let's say this is, these are the focal areas here.

Mr. Pitman: Uh huh.

Executive Director Carlson: Ok this line right here,

Mr. Pitman: Uh huh.

Executive Director Carlson: How, how was that line determined?

Mr. Pitman: That line? Well, first of all, we, we, I put these together then for Kansas at least initially, then we went out to six different public meetings and solicited comment both written and verbal, modified these things many times throughout that process. And we also worked with Oil & Gas in that process to try and avoid some of those higher priority areas for future developments, so it was public, a very long drawn out public process.

Executive Director Carlson: So this is based on habitat then?

Mr. Pitman: Habitat, know bird locations, poten.. high potentials for restoration and those sort of things.

Executive Director Carlson: I see.

Mr. Pitman: We didn't, we didn't encompass every…

Ms. Whitlaw: The lighter green

Mr. Pitman: …piece of good habitat we've got.

Ms. Whitlaw: The lighter green is what is considered the estimated occupied range of the species.

Executive Director Carlson: Ok, this right here.

Ms. Whitlaw: Up until the development of this plan, we had, as a group of biologist and people trying to effect conservation of the landscape, we were not strategic, we were just targeting opportunistically people who were voluntarily working in that big light green blob.

Executive Director Carlson: Ok,

Ms. Whitlaw: and

Executive Director Carlson: the big green blob, can we call it that from now on?

Ms. Whitlaw: Absolutely, that's what we call it.

Executive Director Carlson: Alright.

Ms. Whitlaw: And it became apparent and it's been successful, with like with the sage grouse to become more strategic and targeted in where conservation is delivered and where, um, development is recommended, you know, for avoidance.

Executive Director Carlson: Does the, does the sage grouse overlap this area too?

Ms. Whitlaw: No.

Mr. Pitman: No.

Executive Director Carlson: They don't cross one another?

Ms. Whitlaw: No.

Executive Director Carlson: Oh, I see.

President Klemm: So the US Fish and Wildlife Service endorsed this, have they done the economic studies on, has US Fish and Wildlife Service done economic studies and social studies to determine implementation of this, what it would do to local economies and such?

Ms. Whitlaw: No.

President Klemm: No, ok.

Executive Director Carlson: That mean you're certain?

Ms. Whitlaw: Have we done that?

Executive Director Carlson: I'll double back on that, I mean, as part of the, the, um, Federal Register Notification, December 11 through March, I don't know, 3 or 7 or something like that, there weren't any studies that went into that, any economic, 'hey, we want to look at local impacts, we think'.

Ms. Whitlaw: The only requirement for economic analysis is for the designation of critical habitat. So, the way that ESA is written and implemented now the 'Service' is not required and does not do economic analysis for proposed listing actions.

Executive Director Carlson: Oh, I see.

President Klemm: And so, help me understand, Jim.

Executive Director Carlson: It is…

President Klemm: …this, Jim [Carlson], wouldn't an endorsement of a plan of this magnitude be considered a major governmental action?

Executive Director Carlson: Boy, I would think so, or the least certainly the plan itself would be major governmental action. What are you, what are you getting at Commissioner [Klemm]?

President Klemm: Well, I would think the action of US Fish and Wildlife Service in its self of endorsing a plan of this magnitude uh would be considered a major governmental action and therefore, it would, would open up all of the requirements necessary to make that decision. And uh, I think, we would really like to know, if US Fish and Wildlife

Services went through the necessary steps to, to take a major governmental action such as endorsing such a plan, such as this

Executive Director Carlson: The, would, and Heather, I think, I've heard this before, I'm not sure but and not, I'm certainly not putting you on the spot necessarily, while I'm putting you on the spot but.

Ms. Whitlaw: {chuckled] "I understand."

Executive Director Carlson: Did uh, the um, am I understanding that you are taking the position the Endangered Species Act is a stand alone act, independent of all other federal acts like for example FLPMA, Regulatory Flexibility Act, Data Quality Act, and all of those, are you saying this act here is by its self? Or is it a part of a greater body, corpus juris, body of law.

Ms. Whitlaw: What I'm saying is I'm not a solicitor.

Executive Director Carlson: Me neither, I did that when I was a paper boy. What's that, but when you say a solicitor, what's that.

Ms. Whitlaw: I am not an attorney, I'm not a solicitor, I'm not a scholar of law.

Executive Director Carlson: I see.

Ms. Whitlaw: And in consultation with our Department of Interior Solicitor in preparation for this meeting, she [Solicitor] advised that, 'we respectfully disagree with the interpretations asserted' and so my answer would be, I'm, I'm not prepared to comment on whether the Endangered Species Act stands alone, a major federal action and, and/or its involvement in continuity with, with other regs.

Executive Director Carlson: Sure, good with that. Who the, who's the solicitor you've been in contact with?

Ms. Whitlaw: Dana Jacobsen.

Executive Director Carlson: Is she [Dana] in Denver.

Ms. Whitlaw: Yes.

Executive Director Carlson: Ok, so who's the lead agency for Fish and Wildlife Services, is it Region 2 or Region 6?

Ms. Whitlaw: For which.

Executive Director Carlson: For the Lesser Prairie Chicken.

Ms. Whitlaw: Region 2.

Executive Director Carlson: I see.

Executive Director Carlson: Has Dana looked at this [coordination plan]? Has she seen this?

Ms. Whitlaw: Yes, sir.

Executive Director Carlson: Ok, and what, what, um, what's her [Dana] interpretation of this generally, is that?

Ms. Whitlaw: I think, I just communicated it.

Executive Director Carlson: Ok, she's (Dana) saying that she disagrees that the Service, um, does the Service have to come into consis…, did she disagree with the question that says, um the service has to come into consistency…attempt consistency with local plans, would she disagree with that?

Ms. Whitlaw stated from her note pad, "Her [Dana] language was 'that she cannot agree with the Coalition's interpretation of federal authorities and feels that the project leader/staff person, such as myself, is not prepared to debate this today.'."

Executive Director Carlson: I see, ok, good, um, I'm, I'm good with that, well, I guess I've got a few follow-up questions but. Fred do you want to, we're going out of my area here.

Hearing Officer Grant: I didn't understand, you say you're, you're good with that right?

Executive Director Carlson: I'm not good with that, you're right, I'm, I'm not good with that.

Hearing Officer Grant: Um, Mr. President, I'd like to ask a question, if I could.

President Klemm: Yes, sir.

Hearing Officer Grant: Um, you're not going to do an **EA** or any NEPA process then with regard to the, uh, preference for this plan?

Ms. Whitlaw: No, not to my knowledge, we're not doing that."

Hearing Officer Grant: Ok. Well, I do have, I do have a few other questions then. When you, you say that, and it's going to help me be ready for the Hearing Officer, uh, you consulted with Oil & Gas…

Mr. Pitman: Yes sir,

Hearing Officer Grant: ...with the industry. How did you do that? In what format did you do that?"

Mr. Pitman: Through their associations, each state has an association typically. So…"

Hearing Officer Grant: Well, but when, when you did that did sit down and negotiate with them, um, how did, how did that work out?

Mr. Pitman: You bet, yea we've had numerous, not me personally, one of the other guys that's been writing this plan has had daily conference calls with those folks for the last several months.

Hearing Officer Grant: Ok, and so they helped you write the plan really?

Mr. Pitman: Uh, you know, within our bounds.

Hearing Officer Grant: Right.

Mr. Pitman: We didn't, we didn't bow to every request that they made but we came to agreement on how to approach these things and within their [USFWS] guidelines, ya know, they gave us some guidelines of what was required.

Hearing Officer Grant: Was Fish and Wildlife involved in the conference calls and so on?

Mr. Pitman: Not the conference calls.

Ms. Whitlaw: Not with Oil and Gas, no.

Mr. Pitman: No, we would come up with the recommendation---several times we've done this---and send it to the Service for consideration; they'd [USFWS] come back with comments and we would go through the same process.

Hearing Officer Grant: Did they know where those comments were coming from, from Oil and Gas?

Mr. Pitman: Did the Service know?

Hearing Officer Grant: Yes.

Mr. Pitman: Well, you mean individuals with Oil and Gas?

Hearing Officer Grant: Well, no I mean, I didn't, when you had these meetings and conference calls with Oil and Gas, then you referred, uh, material to the Service, did the Service know you were communicating in that way with Oil and Gas industries?

Mr. Pitman: Yea, absolutely.

Hearing Officer Grant: Ok, did you do the same with the local governments of these 31 counties?

Mr. Pitman: We didn't have conference calls like that, their avenue was to, to come to us through those public meetings, we had six in Kansas alone, I know, plus we had several written comment periods, where those folks could participate. We certainly would have settin', set down with Local Government had they asked but we never got that request until today. At least, I haven't.

Hearing Officer Grant: But Oil and Gas did they make the request to you?"

Mr. Pitman: Yes, absolutely. They knew, they knew this plan was going to affect them.

Hearing Officer Grant: And so, they weren't limited to the public comment meetings?

Mr. Pitman: "Well, their, their developing permitting mechanisms too for Oil and Gas, which is a little different than, than like a Local Government would need. They need, their looking for some permit, uh sort of lookin' for, uh, assurances from the Service, which is a little bit higher standard than typically what Local Government would need.

Hearing Officer Grant: Higher standard than Local Governments would have.

Mr. Pitman: In terms of protections, they're the impactor; they're the ones that need the regulatory certainty.

President Klemm: But Wind and Power Transmission and industry and many other things that are impacted have to play by that, as well.

Mr. Pitman: Most of those were approached or approached us and have decided to go other routes.

President Klemm: I see

Mr. Pitman: Wind for example is working on HCP, which is a post listing document and that doesn't match with the states' goals. We want to prevent a listing, so they wanted to go a different route.

President Klemm: Ok

Mr. Pitman: Transmissions a little harder, a little more difficult to work with because they really don't have an association, so we've dealt with individual transmission companies but its harder to get to them than it is through an association like Oil and Gas.

Commissioner Schwerdfeger: Do you believe that, uh, the public meetings or the importance of the public meetings was communicated very thoroughly to private individuals, such as the farmers in those red or dark green blobs.

Mr. Pitman: At least the press releases we put out, I think were pretty clear with the intent of our plan.

Commissioner Schwerdfeger: And the press releases…

Mr. Pitman: I don't know exactly, who, how they went out.

Commissioner Schwerdfeger: See, that's my question, the independent farmer/owner on the street was not personally notified of the importance of attending or anything about the meetings.

Mr. Pitman: Kind of they were, the last series of meetings that we had in Kansas here, we did direct mailers to the peoples in the focal areas and connectivity zones about our public meetings.

Commissioner Schwerdfeger: And I received one those?

Mr. Pitman: Uh, you should of, if you were in one of the focal areas or connectivity zones.

Commissioner Schwerdfeger: I didn't.

Mr. Pitman: OK

Vice President Tuttle: You said the last ones?

Mr. Pitman: The last series of public meetings, which happened, uh, in March, I believe, March or, I can't remember, its been

Vice- President Tuttle: Where were those six meetings, what parts of the state?

Mr. Pitman: Hold on, I'll show you, there's a table in here actually.

President Klemm: You probably dream about that book don't you?

Mr. Pitman: I haven't slept in two years.

Commissioner Schwerdfeger: You know, I'm not putting you on the spot either but I just wondered, if you…

Mr. Pitman: No, hey look…

Commissioner Schwerdfeger: …if you knew who sent out those no, those written notices and a list of the mailing list because I don't think anyone in my constituency south of, you know, received a personal notice.

Mr. Pitman: They came out of Pratt and I would certainly be glad to…

Commissioner Schwerdfeger: I would like to see that.

Mr. Pitman: …try to dig up that list.

Commissioner Schwerdfeger: I don't, as a county commissioner, I received no calls, no indication that anybody knew of the severity of the problem.

Hearing Officer Grant: Mr. President, while he's looking at that, I have another question.

President Klemm: Yes, please.

Hearing Officer Grant: Were the meetings with the Oil and Gas Industry, were they public meetings?

Mr. Pitman: The ones we were working on the permitting document were not because they only pertain to Oil and Gas and that what the conference calls were about was that

permitting document but the plan, they had to come to the public meetings just like everyone else, if they wanted to talk about the conservation strategy in our plan.

Hearing Officer Grant: Tell me about the permitting document. What did it have to do with the, well, I understand how the process works. What did that have to do with the plan its self?

Mr. Pitman: This may be better for her [Ms. Whitlaw] to answer but the permitting document, I'll give you my perspective, the permitting document, uh, will be tied to our plan. So that they signed this permitting document, its called a CCAA to sign ahead, onto before a listing to get those 'take' exemptions, should a listing occur, if they agree to certain conservation measures. And we're trying to tie that CCAA to our plan and so the conservation measures that they would be required to following are the ones in this plan. And you [Ms. Whitlaw] want to add to that?

Ms. Whitlaw: Um, it's a, the permitting document, so the Section 10 of the Endangered Species Act is where we issue those permits from, so the enhancement of survival permit that comes with the CCAA, um, is a dormant permit, and then, if and when the species is listed then the permit comes into effect.

Hearing Officer Grant: Right

Ms. Whitlaw: So, it's redundant for Oil and Gas to have a CCAA and a Section 10 permit and also be working under this plan and be a signed on participant as an impactor and receiving the 4d assurances, it's a redundant process. Um, however, some people are more comfortable, not just Oil and Gas, some, generally, some people are more comfortable with a permit than something that's codified in regulation and vice versa. So we're working on the CCAA as a tiered, pretty much mirror document to this that will be available for companies to sign onto voluntarily, if they want.

Hearing Officer Grant: If for example, if a county operates a windfarm or some form of energy development they would have to file the same kind of permit form, is that right?

Ms. Whitlaw: If, so in that scenario, we're assuming that this bird is listed and we're assuming that the windfarm then is a new impact, so we agree on those two things? Given those two things, if the county wanted assurances that they would not be in violation of the Endangered Species Act or interpretation of federal law, then signing on here, working under the provisions of the conservation measures, um, provides those assurances through the 4d.

Hearing Officer Grant: What I was getting at, I guess, is, was the same attempt made to explain to the 31 counties or how many counties do you have?

President Klemm: 32.

Hearing Officer Grant: 32 counties, that was explained to the industry that, if they were going to go into the energy development or something that they needed to work with you on the permit processing in the plan?

Mr. Pitman: I mean, that's something, a conversation they would have with the Service, we are helping Oil and Gas prepare this, with WAFWA being the permit holder. But they, we don't do, we don't permit developments, it's the service, so that they would have needed to have that conversation…

Ms. Whitlaw: I think he is asking about…

Mr. Pitman: …with the Service

Ms. Whitlaw: …plan development.

Hearing officer Grant: Yea, I'm asking, you had conference calls with the industry?

Mr. Pitman: Right, but…

Hearing Officer Grant: Because they knew that they either had to work with you, if they were going to have any input into that plan or they wouldn't have any input.

Mr. Pitman: They [Oil and Gas] approached the Service first and the Service…

Hearing Officer Grant: Oh, really.

Mr. Pitman: …told them to work with us.

Hearing Officer Grant: OK

Mr. Pitman: Is my understanding, again, I'm not the individual…

Hearing Officer Grant: Is that your understanding?

Ms. Whitlaw: That I'm, that I'm not clear on.

Mr. Pitman: I'm fairly certain they contacted the regional office but I'm not the person that's been involved with that group, so…

Hearing Officer Grant: Ok.

Mr. Pitman: You wanted to see where the public meetings were in Kansas, there's a list right there [Page 166, RWCP].

Vice- President Tuttle: A follow-up question on that. Wakeeny was March 5th, was that one of your earlier meetings or later meetings?

Mr. Pitman: That'd be later meetings, we had some in November.

Vice- President Tuttle: I certainly never received any written notice of it at all.

Mr. Pitman: Are you in one of the focal areas?

Vice- President Tuttle: Yes, I am.

Mr. Pitman: Hmh.

Vice- President Tuttle: I think, what do you call the focal areas?

Mr. Pitman: Well, that's on that map you looked at, one of those red or yellow areas. If you were in one of those, you should have gotten a mailer.

Vice- President Tuttle: I'm in the dark green.

Mr. Pitman: So, no you wouldn't of, we reached out to, we didn't have time to…

Vice- President Tuttle: I thought…

Mr. Pittman:…get a full mailing list.

Vice- President Tuttle: The way I read that deal the red was a connecting area.

Mr. Pitman: Uh, I think, the red areas, I don't remember the colors but I think the red areas were focal areas and the areas between them, I think, were yellow or connectivity zones.

Ms. Whitlaw: No, I think, he's correct, I think…

Mr. Pittman: Is that right? The other way?

Ms. Whitlaw: Is green and red on that one.

Mr. Pitman: Let's look, hold on.

[Overlapping conversations]

President Klemm: Do we know about when Oil and Gas contacted US Fish and Wildlife Service?

Mr. Pittman: You're right green are focal areas and the red are the...

Ms. Whitlaw: No

President Klemm: No.

Vice President Tuttle: I farm right down in here and I haven't

Ms. Whitlaw: I'm not really involved in that.

Mr. Pitman: In it or just outside?

Ms. Whitlaw: And don't forget now Region…

Mr. Pittman: It's kind of hard to tell on a map, I know.

Ms. Whitlaw: …as you know already, Region 2 of the Fish and Wildlife Service has the lead.

Vice President Tuttle: Mmh,

Ms. Whitlaw: That's out of Albuquerque and then…

Vice President Tuttle: that could be just a hair outside.

Ms. Whitlaw: …we're here in Region 6 for Kansas and Colorado.

Mr. Pittman: I mean, we didn't have time to send to 40 million acres so we just picked the highest priorities.

Ms. Whitlaw: And so the communication…

Vice- President Tuttle: I didn't go to that Wakeeny meeting because I had a conflict

Ms. Whitlaw: …within the Service, I mean, I workin' up here in Kansas and there's a bunch of stuff going on in Albuquerque that I'm not privy to.

President Klemm: It doesn't all just go to one head in DC. That would be…

Mr. Pitman and Vice- President Tuttle conversation indiscernible.

Ms. Whitlaw: Right, its all, ideally, its all worked at the field level, you know, its, this is not something that DC should have to

Commissioner Schwerdfeger: Mr. President, I can't, I can't follow both conversations here.

President Klemm: Ok, we'll, go ahead.

Commissioner Schwerdfeger: I'm sorry.

President Klemm: Are you finished talking about.

Commissioner Schwerdfeger: Ok but, I'm sorry but I was not hearing, I was not hearing the other…

President Klemm: Excuse me, I didn't doing my job very well, I apologize, I'm a little new at this. So, the question was, to the US Fish and Wildlife Service, if she (Ms. Whitlaw) knew when US Fish and Wildlife Service was contacted by Oil and Gas and your answer was, you don't know?

Ms. Whitlaw: I don't know, if we were contacted, when we were contacted, who would have been contacted.

President Klemm: And Oil and Gas, were integral in this process developing this and, but Counties, County Governments weren't, City Governments weren't.

Mr. Pittman: They were integral just in the permitting piece, the rest, the rest of the document, the conservation strategy, the mitigation framework, and those sort of things, they would have had to participate through the public meetings and written comment period, just like everybody else. And they did, they sent us a lot of written comments.

Hearing Officer Grant: So they didn't discuss those things at all during those conference calls?

Mr. Pitman: Uh, pieces of 'em that were relative to the conservation strategy, ya know, I couldn't list every individual piece but certainly those things were discussed to some degree.

Commissioner Schwerdfeger: Uh, I personally attended that webinar that you're saying there were 200+ people at, uh, in the location that I attended at, uh, there was no one there to mediate or answer questions, uh, commercials ran during the deal, it was very disjointed. There was about a 20 minute lag, where we were off line and people got up and left because this just kept coming and going. It, ya know, so, was it just my location that didn't have anybody that knew what was going on?

Mr. Pitman: Uh, possibly, I don't know who was out in the field coordinating all those…

Commissioner Schwerdfeger: We didn't have anybody but an extension agent, was the only person there and all he did was run the projector, and apologize for, we couldn't ask questions, I mean, we asked questions but they were never submitted.

Executive Director Carlson: That was the webinar?

Commissioner Schwerdfeger: That was the webinar.

Mr. Pitman: I was the one who did it. I didn't do the IT stuff…the wrong guy…

[INDISCERNIBLE]

Commissioner Schwerdfeger: But Jim, he was on the other of it so he was not on the receiving side, so I think, there were times when the gentlemen giving the presentation were unaware that the recipients were not connected.

Executive Director Carlson: mmh uh.

Commissioner Schwerdfeger: Because the commercials were random and when we'd come back, you maybe have spoken for 10 minutes and we never heard it.

Mr. Pitman: I heard about it afterwards, and all I can do is apologize.

Commissioner Schwerdfeger: Ok.

Mr. Pitman: 'Cause, you know, I didn't have anything to do with setting it up.

Commissioner Schwerdfeger: But when we list it on there that 200 people attended a webinar, it was worthless.

Mr. Pitman: I'm sorry to hear that.

Commissioner Schwerdfeger: In my opinion.

Executive Director Carlson: Yea, the uh,

President Klemm: If I could just make one follow-up questions, it's evident that you used Oil and Gas, Coordinated with the State on this plan and through the US Fish and Wildlife Service, as well in some capacity there, were there any other entities, government entities, or industry players that were afforded the same privilege to help develop this plan?

Mr. Pitman: They were offered some. We offered, wind energy industry to set down with them and do some of those sort of things and they chose to go a different route. Try to coordinate Transmission to do the same thing but they didn't have a very good structure, you know, have an association like you guys have got. So, you didn't really have it at that time, when we first started this but Oil and Gas…

President Klemm: But individual counties in that region, none of them were contacted?

Mr. Pitman: Just, not directly, just through the public process.

Executive Director Carlson: We had, we had 17 counties, that filed comments on, in March, so we were Kansas Natural Resource Coalition in March,

Mr. Pitman: Mhm.

Executive Director Carlson; …so there were 17 counties, um in March.

Mr. Pitman: Some of these questions…

Executive Director Carlson: We're not here to say 'hey you didn't do this, you didn't do that.'

President Klemm: Right, we're just trying to understand.

Mr. Pitman: I'm just trying to answer the best I can. Some of these questions would be better to directed to someone like Keith or one of the other directors because they were the ones that were handling coordination and some entities. I'm the biologist, you know, I doing the conservation strategy and those sort of things.

President Klemm: And therein lies the, uh, the benefit of our Public Hearing, November 7th & 8th and we highly encourage US Fish and Wildlife Service to attend as well because, as you can tell, our range of questions certainly impact US Fish and Wildlife Service, as far as your, your play in how this has all come together and how that effects our local economies and our society out here in western Kansas.

Ms. Whitlaw: Well the, just to, you know, just to be clear that there are, there are differences, different authorities for the state and for the Fish and Wildlife Service and we have responsibility for implementing the Endangered Species Act, as one of our authorities, which includes Section 4, listing and delisting actions, um Section 6,

government, um, coordination with state governments, Section 10 permit issuance, and then, you know, other migratory bird treaty, the Bald and Golden Eagle Protection Act, but that is, that's our authority, no more, no less. And so, we have partnered with the fish, with the states with their authority for management of the species, um, to endorse the plan. So I just I want to circle back to make sure that we understand that, that I could convey to you that this is a, that we have tried to create an effective partnership for conservation of the landscape but that there is designation of who is responsible for what.

Executive Director Carlson: So you're, you now, Heather (Ms. Whitlaw) are talking about the Range-wide Conservation Plan?

Ms. Whitlaw: I'm talking about the whole, the whole process, you started this meeting by talking about process, and 'the process', and what comes first in 'the process', you know, from 'the process' from the Fish and Wildlife Service point of view was initiated in '95, you know, when we received the petition to list the species. It's that petition that requires an action from the federal agency.

Executive Director Carlson: Ok.

Ms. Whitlaw: And so that process of determining it as warranted for listing but precluded in 1998, the annual process of candidate notices of review in the Federal Register all through 2011, the increasing the listing action, the uh, settlement with the litigants on chickens, the publication of the proposed rule, all of this is our process, I guess is what I'm saying.

Executive Director Carlson: And good, and that was 1995, so it's just about **20** years.

Ms. Whitlaw: Mmhmm.

Executive Director Carlson: The Service has had **20** years to do an **environmental impact statement**?

Ms. Whitlaw: On what?

Executive Director Carlson: The Lesser Prairie Chicken as a threatened species.

Ms Whitlaw: Why would we do that?

Executive Director Carlson: Because it is requi…, we take the position it's required by under National Environmental Policy Act.

Ms. Whitlaw: For, in the action…

Executive Director Carlson: The proposed action is the listing proc…, the listing of the Lesser Prairie Chicken, the specter of the listing of the Lesser Prairie, I'm asking

Ms. Whitlaw: Yea

Executive Director Carlson: Why did you do an envir…, and **EA** to find out, if you needed to do an **EIS**, I mean, you had **20** years?

Ms. Whitlaw: Because of the Service's interpretation of, of laws and regulations that listing actions do not require NEPA.

Executive Director Carlson: Ok, so you're exempt from the NEPA process for listing actions for threatened or endangered or both or?

Ms. Whitlaw: Well…

Executive Director Carlson: Maybe,

Ms. Whitlaw: This is probably the last comment I can make down this road but it is my interp…, my understanding, from our Solicitors that the Fish and Wildlife Service believes that NEPA is not required for listing and delisting actions.

Hearing Officer Grant: So you're not prepared to say what your, why the Service didn't follow the order of the 10th Circuit that was issued in 1996?

Ms. Whitlaw: No. That would be a discussion for, for Solicitors.

Hearing Officer Grant: Do you recognize the 10th Circuit is the applicable law in this state?

Ms. Whitlaw: Yes.

Executive Director Carlson: The, uh, maybe what I'll do is return to, we've been over an hour but, I'll return to, I was working through the Coordination Plan and what we would take, what we've done is we've taken federal, federal law, NEP…National Environmental Policy Act, Regulatory Flexibility Act, Data Quality Act, we've codified it here and six Executive Orders, we codified it into the, uh, the local government, requirements that local government is under any major action, federal action is handing federal agencies and saying you have to come in, achieve consistency with our plan, so I'm responding to what you said…

Ms. Whitlaw: I understand

Executive Director Carlson: Ok, here's what we're going, is, um, even if the Service does take that position that still now that there's a plan that the Service has to come into consistency with under the Federal Land Policy Management Act, even if you take the one position that it doesn't apply now, it's part of our local ordinances, so we would take the position that it does apply through coordination.

Ms. Whitlaw: And I think, my discussions with my Solicitor would indicate that she disagrees with your interpretation of …

Executive Director Carlson: Sure…

Ms. Whitlaw: …the authorities and how FLPMA ap…, you know, applies and

Executive Director Carlson: Good

Ms. Whitlaw: …a discussion for a different,

Executive Director Carlson: Her name is Dena?

Ms. Whitlaw: Dana Jacobsen.

Hearing Officer Grant: How about the Endangered Species Act? I assume that she recognizes that it applies to you?

Ms. Whitlaw: It is, it is one of the acts that we implement.

Hearing Officer Grant: Right.

Ms. Whitlaw: Yes.

Hearing Officer Grant: What about the provision that the Secretary before he makes any decision as to listing, he has to take into account any local conservation plan or program.

Ms. Whitlaw: You know, I didn't bring my copy of the Act, I apologize. I, I can't speak to it. I…

Hearing Officer Grant: Ok, but you would recognize that it is in there it should have been done?

Executive Director Carlson: What we would

Ms. Whitlaw: I can't

Hearing Officer Grant: Ok.

Ms. Whitlaw: This is not for me to say.

Executive Director Carlson: Good. What we would like to do there, Heather [Whitlaw] is ask Dana to speak to these questions because there, we're raising them and so we would like Dana, Dana to speak to these questions.

Hearing Officer Grant: Well, if I could just add to that, that's not, that's unfortunately not within the purview of local government, the Solicitors are kind of out there on their own, you can certainly ask but I wouldn't encourage you to expect it.

Executive Director Carlson: Hmm.

Hearing Officer Grant: Uh, because she's (Solicitor Dana Jacobsen) facing a very difficult situation, she's got a 10th Circuit decision that says she's wrong and so, it would be very difficult for her but you've heard their request anyhow...

Ms. Whitlaw: Yes, sir, absolutely, absolutely

Hearing Officer Grant: …that your Solicitor speak to those.

Ms. Whitlaw: Absolutely

President Klemm: If you could please relay that, we would appreciate that very much.

Ms. Whitlaw: I will do that.

Executive Director Carlson: And with that, I'll take us through, we'll take us through the Coordination Plan just to be on record as part of the procedures in the process, reiterate the requirements, the resource, what we've recommended in here is that on page 8, what we've recommended, is a regulatory impact evaluation document be centralized, centralized document for all of the other parts of this Coordination Plan that we've, that the 32 counties have adopted, so what would be included in the regu…resource impact evaluation would be a central deliverable and it would contain the studies and the data, and under for example Regulatory Flexibility Act, there's a summary of alternatives, so whenever a major federal action is being contemplated, at the beginning of the process and that includes the Lesser Prairie Chicken threatened listing that there's a summary of alternative that needs to be evaluated, so we would request that those be included in the Regulatory, actually not request, that's part of this Coordination Plan. But those summary of alternatives that are required under Regulatory Flexibility Act-RFA, the economic impact analysis, those should be included in the resource impact evaluation. We also have the 32 counties have identified 12 resources, resources priorities and those are on page 9, and so under RFA when a major action's being undertaken these resource pri…categories/ priorities need to be included in the process and so that would be a general…impacts to general agriculture, ranching, energy extraction, you can read the rest. So when you're doing the impact analysis, economic impact analysis for the 32 counties that have populations anything less than 50,000 people then we recommend that the… Coordination Plan says that those will be included in the resource impact evaluation prior to the initiation of the proposal.

Hearing Officer Grant: I have one other question.

President Klemm: Ok.

Hearing Officer Grant: Can I ask one other question? During the consultation process for Fish and Wildlife did you consult with the EPA?

Ms. Whitlaw: Uh, I'm not the listing lead, so I can't answer. I know, we do, uh, federal government notifications of actions and they would have done direct mailing or notification to a variety of federal agencies. The lead office for the listing is the Oklahoma Ecological Field Office and their administrative record would indicate who had been contacted.

Hearing Officer Grant: What office in Oklahoma would that be?

Ms. Whitlaw: There's just the one, the Fish and Wildlife Service Oklahoma Ecological Services Field office in Tulsa.

Hearing Officer Grant: Ok, in Tulsa?

Ms. Whitlaw: Yes.

Hearing Officer Grant: Is that Region 2?

Ms. Whitlaw: It is Region 2.

Hearing Officer Grant: When were you in Region 2? Were you there, when this started or?

Ms. Whitlaw: I was.

Hearing Officer Grant: Ok. Could I ask you [Mr. Pitman] did EPA participate in any of your sessions?

Mr. Pitman: Not that I'm aware of. Nope, I've never had contact with them.

Hearing Officer Grant: Mr. President with your permission, as the Hearing Officer at the conclusion of this hearing, there are certain things a Hearing Officer has to recommend to the Hearing Board

Ms. Whitlaw: Can I, this is a hearing? I thought this was a meeting.

Hearing Officer Grant: Not today.

Ms. Whitlaw: Oh.

Hearing Officer Grant: At the hearing

Ms. Whitlaw: Oh, ok.

Hearing Officer Grant: And I, I would hope that you would extend my invitation to your Solicitor to make your legal presentation known or position known to the Hearing Board with regard to specific, some specific questions, if you wouldn't mind or if you want me to put it in a letter, I would.

Ms. Whitlaw: If you could put it in a letter that way it doesn't get messed up in my interpretation.

Hearing Officer Grant: I would like to draft a letter and have you look at it as the Hearing Board, if you would give us the address and everything where I could direct it to her.

Ms. Whitlaw: I will do that.

Hearing Officer Grant: Because there are certain things that I think the Board would want her interpretation for the Service…

Ms. Whitlaw: Ok

Hearing Officer Grant: …presented for their consideration.

Ms. Whitlaw: Ok. Ken can I email you the, her mailing address?

President Klemm: That would be fine.

Ms. Whitlaw: When I get back to the office?

President Klemm: Either myself or Mr. Carlson would be fine.

Hearing Officer Grant: Since, this is being recorded, I'll just put it on the record as to what they would be: The position of the Flintridge Development Company vs. Scenic Rivers Association-the 10th Circuit decision; I'm sorry, that's the earlier decision---the 1976; Catron County Board of Commissioners vs. Fish and Wildlife Service from the 10th Circuit in 1996 and the provision of the Endangered Species Act with regard to consulting Local Government and also the Counsel on Environmental Quality Regulations, but I'll, I'll specify them all in the letter, Mr. President.

President Klemm: Ok.

Hearing Officer Grant: …and I'll try to get that done to you [President Klemm], maybe by email and the members of the Hearing Board this weekend, so that we can get them to the Solicitor on Monday.

President Klemm: That would be preferable,

Hearing Officer Grant: Ok

President Klemm: yes.

[car horn alarm sounding]

Mr. Pitman: Somebody out there's having trouble aren't they.

President Klemm: Well, Jim got up and left in a hurry, he must recognize the sound of that horn.

Ms. Whitlaw: I wonder, if he does.

President Klemm: I'll wait for Jim [Executive Director Carlson] to come back in.

Sheila Ellis: Will that contact information have the fax number and email?

Ms. Whitlaw: Yes, it will.

Commissioner Schwerdfeger: Since, I was late, are you Michael?

Mr. Pitman: No, I'm Jim Pitman, Wildlife and Parks, it's a pleasure to meet you.

Ms. Whitlaw: I'm Heather Whitlaw, nice to meet you.

Commissioner Schwerdfeger: I recognize your name but I didn't

Mr. Pitman: I work for Keith, here in the state Wildlife and Parks.

President Klemm: Vehicle need a little attention, did it?

Executive Director Carlson: Well, its, yea, I had somebody sitting in the car that got out.

President Klemm: Uh huh.

Executive Director Carlson: There were some old ladies looking at me…

Mr. Pitman: Stole their car, [laughter].

President Klemm: We'll get you caught up, I think, that you, I think maybe you heard that Hearing Officer Grant is going to prepare a letter by this weekend so that we can submit it to US Fish and Wildlife Service Solicitor regarding our specific points and cases that he mentioned on the recording, that we would like her to come and testify at our Public Hearing on, so that's where we were and we waited for you.

Executive Director Carlson: Ok.

President Klemm: I got one other thing to bring up here, we have, we were just at some county meetings in Wichita and we had 15 of our 32 counties fill out a questionnaire,

Mr. Pitman: Uh huh.

President Klemm: …regarding US Fish and Wildlife Service's intent to, our consideration for listing the Lesser Prairie Chicken as a threatened species and we had 5 questions essentially, and not a single county said that they were ever contacted by the US Fish and Wildlife Service to inform or consult us about the proposed listing action of the Lesser Prairie Chicken. We had not a single county mention that the US Fish and Wildlife Service consulted the county about their support or opposition to the proposed listing. Each County, also, reported that they did have a Coordination Plan that requires the federal agencies to coordinate major actions with our, their county. That's, of course, our Coordination Plan. Then the final question was are you aware of any impact or economic studies that may have been performed or provided to your county regarding the proposed Lesser Prairie Chicken and almost without exception they all said there hadn't been any done, so we're fairly confident that the US Fish and Wildlife Service hasn't contacted any of the counties in this region and that's a real concern for our coalition that we've been left out of the process and the economic and the other issues that would affect us deeply have not been addressed.

Executive Director Carlson: Could I rap up one more thing?

President Klemm: Yes, please, let's rap

Executive Director Carlson: Before, we're over time.

President Klemm: Yes, let's rap it up and let's let these folks get back on the road.

Executive Director Carlson: Two more things, one that the, there's a species review that US Fish and Wildlife Service is conducting on a species review for what two species right now, is it the Prairie Gray Fox, species review in Kansas, in the Coalition area

Ms. Whitlaw: None, not that I'm aware of. Fish and Wildlife Service?

Mr. Pitman: Not that I'm aware of.

Sheila Ellis: It's a status review of that they've ran the notice on and it's the Long Eared Bat,

Ms. Whitlaw: Northern Long Eared Bat?

Sheila Ellis: The Spotted Skunk and the Prairie Gray Fox.

Executive Director Carlson: Ok, Prairie Gray Fox, there we go, status review.

Ms. Whitlaw: Two state species and one federal species.

Executive Director Carlson: Ok, so there's a status review? The, what we want to do, is go on record and say this is a long term coalition and this is the plan that we've adopted into our local ordinances that any federal agency contemplating major federal action needs to come into consistency with. I know, I've beat that to death, the, and so for the future, if the Service is contemplating those species, this is the formal meeting where we're giving notice to come into consistency with this plan, so that's one. Two, we would offer that this is the Lesser Prairie Chicken Conservation, Management and Study Plan, I didn't go through it in agonizing detail, I've planned to but I didn't go through it in detail but the any, any plan that the Service or the US Fish and Wildlife Service is contemplating endorsing or needs to be consistent with the elements of this plan. And so, what that means, what our recommendation is, is that you look at this plan side-by-side with another plan, any other plan you're contemplating and determine, if there's conflicts or issues that need resolution and bring those to us because that's what our Coordination Plan says that Coordination is, that the Service has to come into consistency with, so that would be our position with regard to.

President Klemm: Do you have any questions with regard to what he just said?

Executive Director Carlson: Yea, was I…

Ms. Whitlaw: No.

President Klemm: You clear? Ok, any other comments before we close this meeting?

Ms. Whitlaw: The process for meeting minutes, will you distribute them? Are you preparing meeting minutes?

President Klemm: Yes, we will distribute them. Yep, if you would like a copy, I'm sure.

Ms. Whitlaw: Can I have an opportunity to review them before their finalized?

President Klemm: Yes.

Ms. Whitlaw: Great

President Klemm: Yes, that would be fine.

Mr. Pitman: I would like the opportunity to do that too, but, if you're willing but I also want to leave you with my card here and let you know that I'm willing to come back and talk to you about the states plan in more detail and answer your questions.

President Klemm: Ok

Mr. Pitman: If you would like to get into the weeds, keep in mind, I'm not the legal person, if you have questions about legalities, you need to talk to her or some of our directors but if you want to know about how the conservation plan works, I be glad to answer those questions.

President Klemm: Ok, well, we'd love to have you at the November 7th & 8th hearing.

Mr. Pitman: I'm going to be there for sure. I will be there.

President Klemm: We will ask you all the questions needed then.

Mr. Pitman: Ok.

Executive Director Carlson: Commissioner Klemm did you want to set another Coordination meeting?

President Klemm: Yes, we should set another Coordination meeting time.

Ms. Whitlaw: What would the purpose of the meeting be?

Hearing Officer Grant: Yes?

Executive Director Carlson: The purpose of the Coordination Meeting would be to continue follow-up on questions that we raised during this meeting and ask how and we've requested you, the Service to look at this plan and any plans that you've endorsed and to identify conflicts.

Ms. Whitlaw: Mmhmm.

Executive Director Carlson: …and bring those back to us for resolution.

Ms. Whitlaw: I can't agree to a meeting without agenda.

Executive Director Carlson: Ok.

Hearing Officer Grant: Mr. President, I can suggest what your agenda could be. It's a you and your, which I've just read through for the first time fully, in your conservation plan, you raise ideas that I take it you're asking the Service to review and comment on to you as to why they should be considered in their decision and to make, to issue a listing. Um, is that correct, is that the purpose of that Conservation Plan.

President Klemm: That's one of the purposes, yes.

Hearing Officer Grant: So, that would be your agenda, I would think, is a...

Ms. Whitlaw: And I understand, I just, given that I've been counseled that we're in, respectfully in disagreement with your assertion of authorities, a meeting with that agenda continues to move down the line of more implying agreement and I don't feel that we are in a place yet to have another meeting to answer some of your questions until I understand more fully from our Solicitor that that would be an appropriate use of time.

Hearing Officer Grant: I suggest, Mr. President that you send a formal request setting forth specifically, as Logan County did, how many years ago?

Sheila Ellis: The first letter went out in September of '08.

Hearing Officer Grant: Of 2008, which brought the Service to table to deal with Logan County.

Ms. Whitlaw: I'm sorry, I would like to cooperate, I want to work with you, I want to participate, my office will send notifications of federal actions that I do to other federal agencies, we have a list and go right back and add the Coalition to the list. It would be, it would be good for us to continue to meet and discuss, if we could have a mutually agreed upon agenda, so please don't think that I don't want to, I very much want to work with this group, this is an important part of the landscape.

Executive Director Carlson: We're hearing that you would personally wish to cooperate but I think the letter that we'll send to your Solicitor, is the requirement to Coordinate.

Ms. Whitlaw: Ok.

Executive Director Carlson: And so, Heather [Ms. Whitlaw] personally, we're

Ms. Whitlaw: I understand.

President Klemm: Personally, we understand that.

Executive Director Carlson: we understand that and we're not at odds there, we think there's a requirement to coordinate that requires the Service to Coordinate on these two Plans.

Ms. Whitlaw: Ok.

Executive Director Carlson: So, someone perhaps in your leadership team or what have you would either instruct you personally or be at the table, preferably and we alluded to that in our letter that we'll be discussing policy questions, we'll be discussing technical questions, such like that so.

Ms. Whitlaw: Mmhmm.

Executive Director Carlson: We think we got the picture.

Vice President Tuttle: Can I make a comment.

President Klemm: Yes, please.

Vice-President Tuttle: I'm a county commissioner, I represent people, and contrary to what people in your position think, we don't all sit around and read the Federal Register everyday, no body in my constituency does, you started this process back in '95, none of us were aware of it and I was looking at your list there, you started meetings in November '12; it's my understanding this wasn't listed in the Federal Register to be studied until December '12.

Mr. Pitman: They settled in federal court with some folks to make listing determinations on a bunch…

Vice- President Tuttle: But the average farmer, I don't know that.

Mr. Pitman: Well, I wouldn't know this either, if we hadn't gone through this process. But they coordinated with the states and told us that their going to have to make a decision on whether to list the bird. That's when we started our process ahead of that.

Vice- President Tuttle: Secretary Jennings [Jennison] talked to the Kansas Legislative Policy Group in Norton a year ago and spoke on the Endangered Species or Threatened and Endangered Species Act and never once mentioned this to our group, which is about the same as our coalition group…

Mr. Pitman: Mmhmm.

Vice- President Tuttle: …that this was coming down the pike.

Mr. Pitman: Right, right. I mean, that's a conversation you need to have with the Secretary.

Vice- President Tuttle: So, why would you start hearings in November of '12 for people and my farmers today that I represent haven't the foggiest idea what I'm doing. They have an idea because I talk to them but, and they just wish me luck and say 'keep at it.' But they don't have the foggiest idea what's going on here. The average person doesn't.

Mr. Pitman: Right.

Vice- President Tuttle: Remember, that's the people we're representing and that's the people we're trying to run over.

Mr. Pitman: Well, I can only speak for myself and for myself; I sure tried to outreach this plan as much as I possibly could. But you know, it covers 40 million acres, so I'm only one man, I can't speak for Secretary Jennison, if he didn't mention that in that hearing that's a conversation…

Vice- President Tuttle: It wasn't a hearing, it was just a meeting.

Mr. Pitman: Or a meeting, I mean that's a conversation you need to have with the Secretary. I'm not sure why he mention that.

Vice- President Tuttle: We left that meeting feeling very good about Secretary Jennison's position on the Endangered Species Act. He wasn't in favor of listing, which your plan is to prevent the listing, which is the same goal we have.

Mr. Pitman: [Indiscernible] Absolutely.

Vice- President Tuttle: Just remember the people that are out there that's going to be affected by this really have no idea what's going on.

Commissioner Schwerdfeger: That's why I had requested the list of individual farmers or landowners, who were formally, not just in a flyer or something, who were formally…

Mr. Pitman: With a direct mailer.

Commissioner Schwerdfeger: …contacted, asked to comment on the prairie chicken.

Mr. Pitman: I will contact the folks in Pratt, who did that and I'll see, if I can get you that list.

Commissioner Schwerdfeger: Ok.

Mr. Pitman: I would be glad to do that.

Commissioner Schwerdfeger: 'Cause, you know, I also represent the dairy associations and I don't know if they were…

Mr. Pitman: You bet.

Commissioner Schwerdfeger: They're not with the Farm Bureau; they're not with the cattlemen.

Mr. Pitman: Right.

Commissioner Schwerdfeger: They're, so, I have quite a few people.

Mr. Pitman: Right.

President Klemm: Well, thank you.

Sheila Ellis: May I ask one question.

President Klemm: Yes, Sheila.

Sheila Ellis: You said this plan covers 40 million acres, how many acres does it cover in Kansas?

Mr. Pitman: I don't know the exact number, probably half that or a little more.

Sheila Ellis: Is that a figure you could get for us?

Mr. Pitman: Absolutely.

Sheila Ellis: Thank you.

Mr. Pitman: That's probably in the plan; I'd just have to dig for it.

Sheila Ellis: Ok.

Commissioner Schwerdfeger: Do you need a motion to adjournment?

President Klemm: Umm.

Commissioner Schwerdfeger: Or are we just in a meeting?

President Klemm: We're just in a meeting.

Commissioner Schwerdfeger: Ok, thank you, I didn't know how formal we were, so I,

President Klemm: I didn't call it to order.

Commissioner Schwerdfeger: …since I was formally late.

Vice- President Tuttle: Yea, you did, you called it to order.

President Klemm: Yea, I guess, I did, well take a motion.

Vice- President Tuttle: Thank you for coming up.

Mr. Pitman: It was a pleasure meeting you and again, I'll chat with you more.

Meeting adjourned

prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please send your written comments by January 17, 2014.

ADDRESSES: You may submit comments or requests for copies or more information by any of the following methods. Alternatively, you may use one of the following methods to request hard copies or a CD–ROM of the documents. Please specify the permit you are interested in by number (e.g., Permit No. TE–XXXXXX).

- *Email: permitsR6ES@fws.gov.* Please refer to the respective permit number (e.g., Permit No. TE–XXXXXX) in the subject line of the message.
- *U.S. Mail:* Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486–DFC, Denver, CO 80225.
- *In-Person Drop-Off, Viewing, or Pickup:* Call (303) 236–4212 to make an appointment during regular business hours at 134 Union Blvd., Suite 645, Lakewood, CO 80228.

FOR FURTHER INFORMATION CONTACT: Kathy Konishi, Permit Coordinator, Ecological Services, (303) 236–4212 (phone); *permitsR6ES@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 *et seq.*) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for permits and requires that we invite public comment before issuing these permits.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittees to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, and Federal agencies and the public to comment on the following applications. Documents and other information the applicants have submitted with their applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Application Number TE070027

Applicant: Tern and Plover Conservation Partnership, 516 Hardin Hall, 3310 Holdrege St., University of Nebraska, Lincoln, NE.

The applicant requests the renewal of a permit to conduct presence/absence surveys and banding of interior least terns (*Sterna antillarum athalassos*) in Nebraska for the purpose of enhancing the species' survival.

Permit Application Number TE094832

Applicant: U.S. Army Corps of Engineers, Federal Hydropower Facility, 399 Powerhouse Rd., Pickstown, SD.

The applicant requests the renewal of a permit for public educational display of pallid sturgeon (*Scaphirynchus albus*) for the purpose of enhancing the species' survival.

Permit Application Number TE069553

Applicant: U.S. Forest Service, Wall Ranger District, 708 Main St., Wall, SD.

The applicant requests the renewal of an existing permit to take black-footed ferret (*Mustela nigripes*) in conjunction with recovery activities in South Dakota for the purpose of enhancing its survival and recovery.

National Environmental Policy Act

In compliance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Public Availability of Comments

All comments and materials we receive in response to these requests will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: December 11, 2013.

Nicole Alt,

Acting Assistant Regional Director, Mountain-Prairie Region.

[FR Doc. 2013–30064 Filed 12–17–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2013–N268; FF06E24000–XXX–FRES48010660150]

Endangered and Threatened Wildlife and Plants; Enhancement of Survival Permit Application; Draft Oil and Gas Candidate Conservation Agreement With Assurances for the Lesser Prairie-Chicken; Draft Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), received an application for an enhancement of survival permit (permit) under the Endangered Species Act of 1973, as amended (ESA), for take associated with implementation of a lesser prairie-chicken Candidate Conservation Agreement with Assurances (CCAA) throughout the species' range in Kansas, Colorado, Oklahoma, New Mexico, and Texas. The intent of the CCAA is to provide the oil and gas industry with the opportunity to voluntarily conserve the lesser prairie-chicken and its habitat, in a manner that would contribute to precluding the need to list the species, while carrying out their oil and gas activities. The Western Association of Fish and Wildlife Agencies (WAFWA) is the permit applicant and proposes to convey incidental take authorization to oil and gas companies that enroll in the CCAA through certificates of inclusion. Pursuant to the National Environmental Policy Act (NEPA), we have prepared a draft environmental assessment (EA) that analyzes the potential impacts of issuance of the permit and implementation of the proposed CCAA, as well as two alternatives to the proposed action. The permit application, draft CCAA, and draft EA

are available for public review, and we seek public comment on these documents and potential issuance of the permit.

DATES: Written comments must be submitted by January 17, 2014.

ADDRESSES: Send written comments to Field Supervisor, Colorado Ecological Services Field Office, 134 Union Blvd., Ste. 670, Lakewood, CO 80228; or via email to *lesserprairiechicken@fws.gov*. The draft CCAA and EA are available for review on our Mountain-Prairie Region Ecological Services Web site at *http://www.fws.gov/coloradoes/.*

You also may review copies of these documents by appointment during regular business hours at the following offices: (a) Colorado Ecological Services Field Office (ESFO) (see address above), (303) 236–4773; (b) Kansas ESFO, 2609 Anderson Ave., Manhattan, KS 66502, (785) 539–3474; (c) Oklahoma ESFO, 9014 East 21 St., Tulsa, OK 74129, (918) 382–4501; (d) Austin, Texas ESFO, 10711 Burnet Rd., Suite 200, Austin, TX 78758, (512) 490–0057; (e) Arlington, Texas ESFO, 2005 NE Green Oaks Blvd., Suite 140, Arlington, TX 76006, (817) 277–1100; and (f) New Mexico ESFO, 2105 Osuna NE., Albuquerque, NM 87113, (505) 346–2525.

If you do not have access to the Web site or cannot visit our office, you may request copies by telephone at (303) 236–4773 or by letter to the Colorado ESFO.

FOR FURTHER INFORMATION CONTACT: Leslie Ellwood, Fish and Wildlife Biologist, Colorado Ecological Services Field Office, (303) 236–4747; *leslie_ellwood@fws.gov*.

SUPPLEMENTARY INFORMATION: A CCAA is an agreement in which private and other non-Federal landowners voluntarily agree to undertake management activities and conservation efforts on their properties to enhance, restore, or maintain habitat to benefit species that are proposed for listing under the ESA, that are candidates for listing, or that may become candidates. If we approve the CCAA, we will issue an associated enhancement of survival permit, under section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et seq.*), that authorizes incidental take resulting from covered activities should the species addressed in the CCAA become listed. Through the CCAA and permit, we also provide assurances to participating landowners that we will not impose additional land, water, or financial commitments or restrictions on land, water, or resource use, as a result of efforts to attract or increase the numbers or distribution of a species on their property if that species becomes listed under the ESA in the future. Application requirements and issuance criteria for enhancement of survival permits through a CCAA are found in 50 CFR 17.22(d) and 17.32(d), as well as 50 CFR part 13.

Under the proposed range-wide CCAA, participating members of the oil and gas industry (Participants) would implement conservation measures that avoid, minimize, and mitigate impacts to the lesser prairie-chicken and their habitat from oil and gas activities on enrolled lands. The Service would issue the permit to WAFWA, who would administer the CCAA and enroll the Participants. The CCAA would be in effect for 30 years. The CCAA would cover non-Federal lands within the current range of the lesser prairie-chicken, plus a 10-mile buffer around the current range. Any non-Federal lands within lesser prairie-chicken habitat in the covered area may be eligible for enrollment under the proposed CCAA.

The CCAA proposes to implement WAFWA's Lesser Prairie-chicken Range-wide Plan (Range-wide Plan), which the Service endorsed and WAFWA finalized in October 2013. The Range-wide Plan's conservation framework provides for financial incentives to landowners who voluntarily manage their lands to benefit the species. It also includes conservation measures to avoid, minimize, and mitigate impacts specific to current and anticipated land-use activities within the species' range, including oil and gas development. The Range-wide Plan contains a detailed mitigation fee structure that incentivizes locating impact activities outside of lesser prairie-chicken habitat or within lower quality habitat rather than within medium or high quality habitat. The proposed CCAA incorporates the Range-wide Plan's conservation measures and mitigation fees pertaining to oil and gas activities. Enrollment of lands with habitat impacted by oil and gas activities into the CCAA is intended to generate mitigation fees that will significantly help fund implementation of conservation actions under the Range-wide Plan for the lesser prairie-chicken throughout its range.

With issuance of the enhancement of survival permit, the Service would provide WAFWA and the Participants assurances that, should the lesser prairie-chicken be listed, no further commitments or restrictions than those they committed to under the CCAA would be imposed, as long as the CCAA is properly implemented. Furthermore, if the lesser prairie-chicken is listed, the permit would provide WAFWA with incidental take authorization. Participants would also receive take authorization through their certificates of inclusion under the permit. The permit would become effective on the effective date of a listing of the lesser prairie-chicken as endangered or threatened and would continue through the end of the CCAA term.

Background

The lesser prairie-chicken currently inhabits rangelands dominated primarily by shinnery oak-bluestem and sand sagebrush-bluestem vegetation. Major factors affecting the status of the lesser prairie-chicken are habitat fragmentation, overutilization of habitat by domestic livestock, oil and gas development, wind energy development, loss of native rangelands to cropland conversion, herbicide use, fire suppression, and drought. On June 9, 1998, we determined that listing of the lesser prairie-chicken under the ESA was warranted but precluded by other higher priority actions (63 FR 31400). In the December 10, 2008, Candidate Notice of Review (73 FR 75176), we elevated the listing priority of the lesser prairie-chicken from 8 to 2, because the overall magnitude of threats to the lesser prairie-chicken were increasing and occurring throughout almost all of its occupied range.

On December 11, 2012, the Service proposed to list the lesser prairie chicken as threatened throughout its range (77 FR 73828). On May 6, 2013, the Service proposed a special rule (78 FR 26302), under section 4(d) of the ESA, that would allow for take of the lesser prairie chicken incidental to activities conducted pursuant to a Service-approved comprehensive conservation program developed by or in coordination with a State agency. The rule also proposed authorizing take incidental to agricultural activities included within a conservation plan developed by the Natural Resources Conservation Service (NRCS) for private agricultural lands in connection with the NRCS's Lesser Prairie Chicken Initiative. The Service has published the revised proposed 4(d) rule for public comment (78 FR 75306; December 11, 2013), and intends to issue its final determinations on the proposed listing and 4(d) rule no later than March 30, 2014.

The Service has issued permits under three other approved CCAAs for the lesser prairie-chicken. A Statewide umbrella CCAA has been in effect in Texas since 2006, to enhance conservation efforts in conjunction with ranching, agricultural land use, and oil and gas activities. In New Mexico, a

combined umbrella CCAA and Candidate Conservation Agreement with the Bureau of Land Management, approved in 2008, addresses conservation efforts for oil and gas impacts. Most recently, a CCAA was finalized in 2013, for agricultural land use in Oklahoma. An additional CCAA was established with a single landowner in southwestern Kansas; however, this CCAA has since expired. The proposed rule to list the lesser prairie-chicken details several other conservation efforts for the species (77 FR 73828).

WAFWA developed the draft range-wide CCAA for oil and gas activities to facilitate implementation of the Range-wide Plan for conserving the lesser prairie-chicken and restoring its habitat on non-Federal lands throughout its range. Implementation of conservation measures in the proposed CCAA are expected to benefit the lesser prairie-chicken by establishing, augmenting and maintaining populations. Conservation measures that minimize new surface disturbance would also minimize habitat fragmentation and preserve contiguous expanses of habitat. Conservation measures that limit activities and operations during lekking, nesting, and brooding seasons would minimize impacts to reproduction. Furthermore, the conservation offsets implemented with mitigation fees from Participants are expected to further enhance lesser prairie-chicken habitat through the removal of infrastructure and remediation of impacts to restore habitat. Finally, the CCAA's regulatory assurances would act as an incentive for participation by oil and gas companies, thereby increasing conservation for the species.

The Secretary of the Interior has delegated to the Service the authority to approve or deny a section 10(a)(1)(A) permit in accordance with the ESA. To act on WAFWA's permit application, we must determine that the CCAA meets the issuance criteria specified in the ESA and at 50 CFR 17.22 and 17.32, as well as 50 CFR part 13. These criteria include a finding that the proposed CCAA complies with the requirements of our CCAA Policy (64 FR 32726, June 17, 1999).

The issuance of a section 10(a)(1)(A) permit is a Federal action subject to NEPA compliance, including the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500–1508). WAFWA's draft CCAA and application for the enhancement of survival permit are not eligible for categorical exclusion under NEPA. We have prepared a draft EA to further analyze the direct, indirect, and cumulative impacts of the CCAA on the quality of the human environment and other natural resources. In compliance with NEPA, we analyzed the impacts of implementing the CCAA, issuance of the permit, and a reasonable range of alternatives in the draft EA. Based on these analyses and any new information resulting from public comment on the proposed action, we will determine if issuance of the permit would cause any significant impacts to the human environment. After reviewing public comments, we will evaluate whether the proposed action and alternatives in the draft EA are adequate to support a Finding of No Significant Impact under NEPA. We now make the draft EA available for public inspection online or in person at the Service offices listed in **ADDRESSES**.

Public Availability of Comments

All comments we receive become part of the public record. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, NEPA, and Department of the Interior policies and procedures. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22, 17.32), and NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1506.6 and 43 CFR 46.305).

Dated: December 11, 2013.

Amelia Orton-Palmer,

Acting Assistant Regional Director—Ecological Services, Mountain-Prairie Region, Denver, CO.

[FR Doc. 2013–30196 Filed 12–17–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO300000.L14300000.xx0000]

Renewal of Approved Information Collection

AGENCY: Bureau of Land Management, Interior.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) to continue the collection of information from individuals, private entities, and State or local governments seeking leases, permits, and easements for the use, occupancy, or development of public lands administered by the BLM. The Office of Management and Budget (OMB) previously approved this information collection activity, and assigned it control number 1004–0009.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. For maximum consideration, written comments should be received on or before January 17, 2014.

ADDRESSES: Please submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004– 0009), Office of Management and Budget, Office of Information and Regulatory Affairs, fax 202–395–5806, or by electronic mail at *OIRA_submission@omb.eop.gov*. Please provide a copy of your comments to the BLM. You may do so via mail, fax, or electronic mail.

Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: To Jean Sonneman at 202–245–0050.

Electronic mail: Jean_Sonneman@blm.gov.

Please indicate "Attn: 1004–0009" regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: Jeff Holdren at 202–912–7335. Persons who use a telecommunication device for the deaf may call the Federal Information Relay Service at 1–800–877–8339, to leave a message for Mr. Holdren. You may also review the information collection request online at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR part 1320 provide that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond. In order to obtain and renew an OMB control number, Federal agencies are required to seek public comment on information collection and

Name: KNRC

Comments: Attach: CESAR REPORT DATA DO NOT SUPPORT THE PROPOSED LISTING OF LESSER PRAIRIE CHICKEN EXE SUMMARY

¡§CESAR¡¦S review of the proposed listing of the Lesser Prairie chicken applies the clear direction of the Endangered Species Act (ESA) that listings be based solely on data and that the conservation efforts of states and local agencies be considered. We closely examined the references cited by the US Fish and Wildlife Service (FWS), published literature, regulatory documents, and readily available data. In addition, we performed an independent analysis of the past distributional history of the lesser prairie chicken to provide a deeper-time perspective, and commissioned independent peer reviews of the available population analyses.

Our review identified data that demonstrate lesser prairie chicken populations are increasing and are unlikely to be extirpated either locally or range wide in the foreseeable future. In addition, our review identified analyses that demonstrate lesser prairie chickens have not lost their genetic diversity and are not genetically isolated. These data offer empirical support for the conclusion that local and statewide conservation efforts are and will continue to be effective. These two facts, both supported by data, are prima facie evidence that the lesser prairie chicken is not likely to become in danger of extinction in the foreseeable future.

Based on the information we developed, it appears that the FWS assumed population declines and loss of genetic diversity and used post hoc rationalizations to support listing based on speculative reasons for the nonexistent declines. The best available data on population growth and genetic health demonstrate that the lesser prairie chicken is not in decline throughout all or a significant portion of its range.

In part, CESAR¡¦s mission, ¡§¡Kis to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes¡K¡¨1 Accordingly, this report also addresses the threats identified in the proposed rule based on the FWS reliance on speculation, surmise and opinion. We believe that identifying those portions of the rule that fail to comply with the requirements of the ESA and related laws, regulations, and guidelines, will help improve this proposed rule as well as future rules.

In general, our review identified the following shortcomings in the proposed rule:

„«The proposed rule fails to consider data and analyses demonstrating lesser prairie chicken populations are increasing and that genetic isolation has not occurred.

„«The conclusions in the proposed rule are not based solely on the best scientific and commercial data available as required by the ESA, but on an amalgam of opinion, speculation, and surmise.

„«The proposed rule inaccurately implies that the states¡¦ ability to protect lesser prairie chicken through existing regulatory mechanisms is inadequate compared to that of the ESA.

„«The proposed rule fails to accurately acknowledge the scope and importance of the voluntary conservation contributions made by states and local agencies.

„«The proposed rule is internally inconsistent; asserting that sufficient information on habitat needs is available to list the species but that there is insufficient data to identify the characteristics and location of the habitat essential for the conservation of the species.

The ESA is a powerful tool for conserving species. However, it has clearly articulated standards for decision-making, explicitly requiring data and consideration of local efforts in the listing process. This proposed rule fails to meet the basic requirements of a listing determination as articulated in the ESA.¡¨

CONCLUSION ¡§The FWS has:

„«limited or incomplete data on historic habitat loss,

„«limited or incomplete data on the habitat requirements of the lesser prairie chicken and

„«limited or incomplete data on the available habitat for the lesser prairie chicken.

The best available data find increasing populations across the range of the greater prairie chicken and low extinction probabilities. Genetic analysis demonstrates no loss in genetic diversity and no evidence of genetic isolation.

A review of the state and local efforts to conserve the lesser prairie chicken demonstrates robust statutory authority for protection of habitat on public and private land as well as legislative commitment to conservation of wildlife species and their habitat at the state level. These authorities exist whether the species is listed or even remains a candidate.¡¨

¡§There are no data that support the FWS assertion that habitat fragmentation and decline with related effects are threatening the lesser prairie chicken. There are data that demonstrate population growth, low extinction probabilities, and genetic robustness.

The FWS has failed to meet the requirements of the Act that listing be based solely on data showing that the species is adversely affected by one or more of the five factors enumerated in the Act.¡¨

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Your Voice in Federal Decision-Making

Your comment was submitted successfully!

The **Fish and Wildlife Service** (FWS) Proposed Rule: **Endangered and Threatened Wildlife and Plants: Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule**

For related information, **Open Docket Folder**

3 Your Receipt

Your Comment Tracking Number:
1jy-8ac4-ndrx

Your comment will be viewable on Regulations.gov after the agency has reviewed it, which may be an indefinite amount of time. Use your tracking number to find out the status of your comment.

Your comment:

Comment:

CESAR
DATA DO NOT SUPPORT THE PROPOSED LISTING OF LESSER PRAIRIE CHICKEN
EXECUTIVE SUMMARY
"CESAR'S review of the proposed listing of the Lesser Prairie chicken applies the clear direction of the Endangered Species Act (ESA) that listings be based solely on data and that the conservation efforts of states and local agencies be considered. We closely examined the references cited by the US Fish and Wildlife Service (FWS), published literature, regulatory documents, and readily available data. In addition, we performed an independent analysis of the past distributional history of the lesser prairie chicken to provide a deeper-time perspective, and commissioned independent peer reviews of the available population analyses.
Our review identified data that demonstrate lesser prairie chicken populations are increasing and are unlikely to be extirpated either locally or range wide in the foreseeable future. In addition, our review identified analyses that demonstrate lesser prairie chickens have not lost their genetic diversity and are not genetically isolated. These data offer empirical support for the conclusion that local and statewide conservation efforts are and will continue to be effective. These two facts, both supported by data, are prima facie evidence that the lesser prairie chicken is not likely to become in danger of extinction in the foreseeable future.

Based on the information we developed, it appears that the FWS assumed population declines and loss of genetic diversity and used post hoc rationalizations to support listing based on speculative reasons for the nonexistent declines. The best available data on population growth and genetic health demonstrate that the lesser prairie chicken is not in decline throughout all or a significant portion of its range.

In part, CESAR's mission, "...is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes..."1 Accordingly, this report also addresses the threats identified in the proposed rule based on the FWS reliance on speculation, surmise and opinion. We believe that identifying those portions of the rule that fail to comply with the requirements of the ESA and related laws, regulations, and guidelines, will help improve this proposed rule as well as future rules.

In general, our review identified the following shortcomings in the proposed rule:

>The proposed rule fails to consider data and analyses demonstrating lesser prairie chicken populations are increasing and that genetic isolation has not occurred.

>The conclusions in the proposed rule are not based solely on the best scientific and commercial data available as required by the ESA, but on an amalgam of opinion, speculation, and surmise.

>The proposed rule inaccurately implies that the states' ability to protect lesser prairie chicken through existing regulatory mechanisms is inadequate compared to that of the ESA.

>The proposed rule fails to accurately acknowledge the scope and importance of the voluntary conservation contributions made by states and local agencies.

>The proposed rule is internally inconsistent; asserting that sufficient information on habitat needs is available to list the species but that there is insufficient data to identify the characteristics and location of the habitat essential for the conservation of the species.

The ESA is a powerful tool for conserving species. However, it has clearly articulated standards for decision-making, explicitly requiring data and consideration of local efforts in the listing process. This proposed rule fails to meet the basic requirements of a listing determination as articulated in the ESA."

CONCLUSION

"The FWS has:

>limited or incomplete data on historic habitat loss,

>limited or incomplete data on the habitat requirements of the lesser prairie chicken and

>limited or incomplete data on the available habitat for the lesser prairie chicken.

The best available data find increasing populations across the range of the greater prairie chicken and low extinction probabilities. Genetic analysis demonstrates no loss in genetic diversity and no evidence of genetic isolation. A review of the state and local efforts to conserve the lesser prairie chicken demonstrates robust statutory authority for protection of habitat on public and

private land as well as legislative commitment to conservation of wildlife species and their habitat at the state level. These authorities exist whether the species is listed or even remains a candidate."
"There are no data that support the FWS assertion that habitat fragmentation and decline with related effects are threatening the lesser prairie chicken. There are data that demonstrate population growth, low extinction probabilities, and genetic robustness.
The FWS has failed to meet the requirements of the Act that listing be based solely on data showing that the species is adversely affected by one or more of the five factors enumerated in the Act."

Uploaded File(s) (Optional)

- Data Do Not Support LPC Listing Report.pdf: **success**

This information will appear on Regulations.gov:

First Name:
Natural ResourceCoalition

Last Name:
Local Government - KS

Country:
United States

Government Agency Type:
Local

Government Agency:
32-Kansas Boards of County Commissioners

This information will **not** appear on Regulations.gov:

Email Address:
KNRC.counties@gmail.com

Center for Environmental Science, Accuracy & Reliability

DATA DO NOT SUPPORT THE PROPOSED LISTING OF LESSER PRAIRIE CHICKEN

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EXECUTIVE SUMMARY

CESAR'S review of the proposed listing of the Lesser Prairie chicken ("lesser prairie chicken" or "LPC") applies the clear direction of the Endangered Species Act (ESA) that listings be based solely on data and that the conservation efforts of states and local agencies be considered. We closely examined the references cited by the US Fish and Wildlife Service (FWS), published literature, regulatory documents, and readily available data. In addition, we performed an independent analysis of the past distributional history of the lesser prairie chicken to provide a deeper-time perspective, and commissioned independent peer reviews of the available population analyses.

Our review identified data that demonstrate lesser prairie chicken populations are increasing and are unlikely to be extirpated either locally or range wide in the foreseeable future. In addition, our review identified analyses that demonstrate lesser prairie chickens have not lost their genetic diversity and are not genetically isolated. These data offer empirical support for the conclusion that local and statewide conservation efforts are and will continue to be effective. **These two facts, both supported by data, are *prima facie* evidence that the lesser prairie chicken is not likely to become in danger of extinction in the forseeable future.**

Based on the information we developed, it appears that the FWS assumed population declines and loss of genetic diversity and used *post hoc* rationalizations to support listing based on speculative reasons for the non-existent declines. The best available data on population growth and genetic health demonstrate that the lesser prairie chicken is not in decline throughout all or a significant portion of its range.

In part, CESAR's mission, "…is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes…"[1] Accordingly, this report also addresses the threats identified in the proposed rule based on the FWS reliance on speculation, surmise and opinion. We believe that identifying those portions of the rule that fail to comply with the requirements of the ESA and related laws, regulations, and guidelines, will help improve this proposed rule as well as future rules.

In general, our review identified the following shortcomings in the proposed rule:

- The proposed rule fails to consider data and analyses demonstrating lesser prairie chicken populations are increasing and that genetic isolation has not occurred.

[1] http://www.bestscience.org/

- The conclusions in the proposed rule are not based solely on the best scientific and commercial data available as required by the ESA, but on an amalgam of opinion, speculation, and surmise.
- The proposed rule inaccurately implies that the states' ability to protect lesser prairie chicken through existing regulatory mechanisms is inadequate compared to that of the ESA.
- The proposed rule fails to accurately acknowledge the scope and importance of the voluntary conservation contributions made by states and local agencies
- The proposed rule is internally inconsistent; asserting that sufficient information on habitat needs is available to list the species but that there is insufficient data to identify the characteristics and location of the habitat essential for the conservation of the species.

The ESA is a powerful tool for conserving species. However, it has clearly articulated standards for decision-making, explicitly requiring data and consideration of local efforts in the listing process. This proposed rule fails to meet the basic requirements of a listing determination as articulated in the ESA.

BACKGROUND

ESA listing determination requirements

Instructions for listing determinations are included in Section 4 of the ESA. There are 3 primary requirements for a listing determination; the determination must be based *solely* on data,[2] the continued existence of the species must be threatened by one or more of the five listing factors enumerated in the ESA[3], and conservation actions of any State or political subdivision of that State must be considered.[4]

Data

The requirement that data support regulatory decisions is repeated throughout the ESA. This requirement includes listing, designation of critical habitat, and jeopardy determinations. The ESA does not require data for non-binding 90-day findings, allowing the use of 'information' rather than data. Neither does the Act require data for Recovery plans, which have no regulatory authority. However, the requirement for listing is specific, requiring that data be the *sole* determinant.

There is no provision in the Act that allows hypothesis, speculation, surmise, 'best professional judgment' or opinion to be substituted in the absence of data. The Supreme Court has affirmed this, stating:

"…The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise…"[5]

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[2] Section 4(b) of the ESA states: "BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) **solely on the basis of the best scientific and commercial data available** to him after conducting a review of the status of the species ..." and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

3 Section 4 (a) GENERAL (1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence...

4 Section 4(b) of the ESA states: BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and **after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species**, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas

5 Bennett v. Spear (95-813), 520 U.S. 154 (1997)

Listing Factors

The proposed rule makes the determination that the lesser prairie chicken is likely to become in danger of extinction in the foreseeable future due to the following factors:

"…due to historical, ongoing impacts and probable future impacts of the cumulative habitat loss and fragmentation…"

"…The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events..."

"… Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels…"

"…These threats are currently impacting lesser prairie-chickens throughout their range and are projected to continue and to increase in severity into the foreseeable future…"

From these statements we conclude that the FWS identifies 3 of the five ESA listing factors as threatening the lesser prairie chicken:

(A) "*the present or threatened destruction, modification, or curtailment of its habitat or range*";

(C) "*disease or predation*"; and

(E) "*other natural or manmade factors affecting its continued existence*".

ANALYSIS

DATA

Analyses, based on data collected by the states, demonstrate that lesser prairie chicken populations are increasing and that the range-wide likelihood of extinction is very low. Further, published analysis demonstrates lesser prairie chickens maintain genetic diversity and do not demonstrate genetic isolation. The FWS had to rely on information other than data in order to list the lesser prairie chicken in view of the documented increasing populations and genetic health. As a result, the FWS failed to rely solely on data, instead using speculation, surmise, and opinion. The FWS failed to rely on the 5 factors enumerated in the Act instead using additional factors not intended by Congress to be used for listing determinations. The FWS failed to adequately consider the effectiveness of existing and planned conservation Finally, after discussing the habitat needs, and shortcomings of existing habitat for lesser prairie chickens at length and in depth in order to explain how habitat was the basis for declines in the species, the FWS claims it is not able to identify those physical and biological characteristics essential to the conservation of the lesser prairie chicken, and thus cannot designate critical habitat.

Data Demonstrate Lesser Prairie Chicken Populations are Increasing Range-wide with Low Extinction Probabilities

We identified two papers which examined the health of lesser prairie chicken populations. First is an *Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*[6]. Using population reconstruction from annual counts at leks, models of population growth can be fit and population parameters of growth and quasi-extinction probabilities can be estimated. The table below summarizes the findings of this analysis.

Habitat Type	Population Growth	Probability of Extinction
CRP-shortgrass	4.4% annually	2%
Mixed-grass prairie (KS, OK, TX)	7.0% annually	<0.0001%
Sand sagebrush prairie (KS and CO)	2.0% annually	48%
Sand shinnery oak (NM and TX)	5.1% annually	< 0.0001%
Range-wide	10.6% annually	< 0.0001%
Range-wide 2012.– Assuming a 50% decline in trend across the range	6.4% annually	3.3%

The best scientific data available indicate that range-wide there is a low probability of extinction within 86% of the species distribution. This population growth and high likelihood of persistence continues when 2012 population trends are assumed to decrease by as much as 50%.[7]

A peripheral examination of the data also demonstrates that population trends from 1980-1997 were declining at an average annual rate of 3.7%. After the species was made a candidate and significant conservation efforts were initiated, post candidate status population growth was 6.9% increase annually.

[6] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group*; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

7 See Appendix 2 for the complete analysis

The paper has not been peer reviewed, so CESAR engaged two independent academics to review the methods and conclusions. One reviewer opined that while the absolute numbers may not be precise, the populations are clearly increasing. The other reviewer did not offer an opinion. Both reviewers liked the idea of more data and more analysis which would provide more resolution as to what is actually going on with this species. The reviewers agreed that the analysis was useful, and neither reviewer identified fatal flaws in the analysis. Based on the agreement that the work was useful, and that no reviewer found fatal flaws, but rather suggested additional improvements, we believe that this site specific analysis is the best available science, and it is consistent with the requirements of the Act that data be the basis of listing determinations.

Lesser Prairie Chickens are not Genetically Isolated, and there is Evidence of Hybridization

A 2010 publication[8] examined the genetics of the Lesser Prairie-Chicken to assess whether habitat loss fragmentation and population declines were resulting in genetic isolation or loss of diversity. Populations across Kansas, Colorado, Oklahoma, and New Mexico were examined. Little genetic differentiation was found except for the population in New Mexico, which was significantly different from most other populations. There was, however, evidence of significant isolation by distance at the rangewide scale that could explain the divergence of the population in New Mexico, simply because it is geographically isolated. The study also found evidence for a post-glacial population expansion within the species, which is consistent with the historical niche model that we constructed.[9] What can also be gleaned from the genetic study is that despite an overall historic reduction in range size, and increase in degree of range fragmentation, there is as yet no evidence of decreased genetic variability, either among populations, or in the species as a whole, relative to other grouse, or to birds in general.

The proposed listing document acknowledges the existence of hybridization between greater and lesser prairie chickens. The level of hybridization at the junction of the two ranges identified in the rule is high enough to potentially lead to merging of the two species. Thus hybridization is indeed occurring and calls into question the validity of the two species. The two grouse are very similar genetically (Gutierrez et al. 2000) and grouse are well-known to easily hybridize. We suggest that the FWS has underestimated the importance of monitoring hybridization and the

[8] *Regional Variation In MTDNA Of The Lesser Prairie-Chicken*, Hagan et. al. (2010); The Condor 112(1):29–37

[9] See Appendix 3 and the discussion under climate change.

implications for the taxonomy of the greater and lesser prairie chickens.

Assuming Population Declines Is Inconsistent With the Data Requirements of the ESA

As discussed in the previous sections, the best available data demonstrate that the lesser prairie chicken is not likely to become in danger of extinction in the foreseeable future. While the FWS may prefer their expert opinion and interpretation of the information outlined in the proposed rule, the plain language of the Act does not allow the use of anything but the best available data.

However, even if the data demonstrating population increases were not available, the following discussion identifies the arbitrary nature of the threats determinations in the proposed rule as well as the failure to comply with Congressional direction that listing determinations be based *solely* on data.

Habitat Effects Are Not Based On DataFWS Admits there is a 'lack of data' on Prairie Chicken Habitat Requirements

The FWS states that designation of critical habitat is not prudent because there is insufficient information on habitat requirements and identifies:

"A specific shortcoming of the currently available information is the lack of data about:

(1) The specific physical and biological features essential to the conservation of the species;

(2) how much habitat may ultimately be needed to conserve the species;

(3) where the habitat patches occur that have the best chance of rehabilitation; and

(4) where linkages between current and future populations may occur. "

Further, the FWS states:

"Additionally, while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations."

We note that the lack of data supporting the listing decision and identified in this report is confirmed by the FWS in this statement. We agree with the FWS that there is insufficient data to identify the available and the specific habitat requirements of the lesser prairie chicken. The lack of data makes any pronouncement regarding the effect of particular activities and habitat configurations speculative. This lack of data also makes it difficult to determine the effects of habitat changes on the lesser prairie chicken and consequently impossible to determine what habitat is necessary to conserve the prairie chicken.

The proposed rule assumes the effects of habitat loss and fragmentation, and then presents a *post hoc* rationalization of other habitat related factors which the FWS surmises contribute to the decline of lesser prairie chicken.

The discussion on prairie chicken habitat changes is framed in the context of each 'threat' individually and independently. The reader is provided with a large array of discrete facts regarding prairie chicken behavior in relation to specific structures, but nowhere are there data that reveal the range wide effect of these identified threats. The rule isolates each potential threat to lesser prairie chickens and asserts population level effects for each of them but provides no data on the actual effect of the interaction of these perceived threats, and never provides the reader any context to assess the range-wide extent of the effects. That is, the actual effect of a potential threat is dependent on the particular context of the population in which it is being evaluated. FWS assumes that any threat, no matter what the additional circumstances might be, is the same throughout the range and across time. However, what might be a threat under some circumstances (e.g., during a drought) might not be a threat in a normal year. The FWS approach is not biologically defensible.

The proposed rule argues that anthropogenic[10] activities threaten the lesser prairie chicken with rampant local extirpation that threatens eventual extinction, with no data to support the assertion. The basis for the listing decision rests on two principal threats, habitat loss and fragmentation. With no supporting data or analysis, the proposed rule asserts that the principal habitat threats amplify the effect of myriad other anthropogenic activities. A number of other specific 'potential' anthropogenic threats are also identified as generically 'contributing' to the decline of the lesser prairie chicken due to its weakened state resulting from habitat loss and fragmentation. The FWS speculates these threats include conversion of grasslands to agricultural uses, encroachment by invasive woody plants, petroleum production, roads, and presence of manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings. Again, the listing is predicated on threats unsupported by data and despite that admission that:

"… while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations… '

This statement clearly acknowledges there are no data with respect to whether a particular feature is adverse, beneficial, or neutral.

The rule's treatment of the issue of avoidance of selected anthropogenic

[10] Human based

features is a good example. The proposed rule[11] states:

"…lesser prairie-chickens seldom nested or reared broods within approximately 177 m (580 ft) of oil or gas wellheads, 366 m (1,200 ft) of electrical transmission lines, 792 m (2,600 ft) of improved roads, and 1,219 m (4,000 ft) of buildings".

However, the proposed rule fails to acknowledge the citation that supports this observation of avoidance also notes that, **avoidance did not result in lowered nest success**[12], which is of course the underlying reason for concern. Implicit in the FWS identification of avoidance as a threat is the surmise that lesser quality habitat was used and nest failures resulted, causing harm across the range of the lesser prairie chicken. The omitted data demonstrate the danger in relying on surmise. The FWS failed to consider that the cited literature did not examine what contributing effect other factors interacting with the structures may have had. The ESA requires the FWS to provide or rely on data that demonstrate how populations are reduced by this behavior and how the results of the study apply to all (or essential or significant portions) of the various habitats in use by the species.

Thus, we suggest that it is premature to extend an individually identified and isolated threat to the entire species. That is, suggesting that one factor (e.g. vertical structures) is a threat, without any observed adverse effects and without consideration of other co-relevant factors, such as location or type of habitat, degree of isolation, population size, whether the population was recently impacted by drought, or any other pertinent factor, risks failing to accurately identify the real threats.

The following section discusses the specific and general threats related to habitat identified in the proposed rule, the data supporting the existence of the threat, and the data supporting its population level effects.

Habitat loss and Population

The lack of early data on lesser prairie chickens and their habitat makes it difficult if not virtually impossible to make valid comparisons of historic and present habitat. Fortunately, such historic comparisons are not a consideration in the assessment of threats for listing under the ESA. The ESA requires identification of:

*"the **present or threatened** destruction, modification, or curtailment of its habitat or range"*

The FWS takes the position that substantiating population declines is unnecessary to list a species. The FWS asserts that measurement of the threats is all that is necessary. It is, however, necessary to be able to measure, in terms of data, either habitat loss and its population level effects or population changes. In the case of the lesser

[11] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73853
[12] Pitman et al. (2005)

prairie chicken, precise ground and aerial surveys (e.g., the States and Western Assoc. of Fish and Wildlife agencies) are available. Furthermore, states have implemented new and more accurate survey techniques which facilitate understanding population level responses over time. There is little doubt that the current range of the lesser prairie chicken has changed from that of its historic range[13] [14] but whether it's 25%, 50% or 95% is irrelevant; we know approximately how many birds exist today and where most of them live. The goal of the listing determination is to determine whether the remaining populations are increasing decreasing, or stable, have adequate habitat, that the existing habitat is sufficiently stable, and if not, to assess the species and the threats to the habitat to determine whether the species qualifies as threatened under the factors identified by Congress.

In the case of the lesser prairie chicken we have access to a record of the near-term habitat amounts and population changes in occupied habitat thanks to the aforementioned aerial surveys supported by the states. These aerial surveys have provided increased accuracy in population and habitat monitoring. However, these changing survey techniques, while leading to more accurate estimates, inhibit direct comparisons across time, requiring instead that changes be measured using sophisticated statistical techniques.[15] The analysis of the current population data demonstrates increasing populations and low extinction probabilities.

Lesser Prairie Chickens are not Threatened by Habitat Fragmentation

The FWS own data and analysis, referenced in the rule, demonstrate that habitat beyond the minimum required to ensure the continued existence of the lesser prairie chicken is available. A FWS spatial analysis identified 71 patches that met the listing determination's arbitrary minimum size of 10,117 ha (25,000 ac)[16] within the five state estimated occupied range. This satisfies the statement in the proposed rule that a minimum of four strongholds of 10,117 ha (25,000 ac) distributed across the ecological diversity of the species are necessary. **These data demonstrate that despite the existing fragmentation throughout the occupied portion of the range, the rule's arbitrary minimum stronghold threshold is met. This is confirmed by the data showing population growth throughout the range**[17].

[13] See Appendix 1 for a discussion of the historic range figures used by the FWS and their applicability to the listing determination.

[14] The same could be said for virtually any species living in the United States at the time of European settlement.

[15] The Hagan 2012 analysis of lesser prairie chicken populations is one example; another, Garton et. al. 2010 was used by the FWS, it examined disparate sage grouse population measurements.

[16] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73836

[17] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser*

The discussion of habitat fragmentation included in the rule is confusing and misleading. The information is presented without context and without a discussion of population level effects. In the following paragraphs we elucidate habitat fragmentation in the context of lesser prairie chicken life history adaptations and their environment.

The FWS states in the conclusion of the proposed listing:

'…as a result of the significant reduction in numbers and range of lesser prairie-chickens resulting from cumulative ongoing habitat fragmentation, combined with the lack of sufficient redundancy and resiliency of current populations, we conclude that the lesser prairie-chicken is currently at risk of extinction or is likely to be in danger of extinction in the foreseeable future.'

The question of habitat fragmentation and its consequence is key to the FWS determination that listing of the greater prairie chicken is supported. However, the basis for the determination that the existing fragmentation is sufficient to have population level effects is not supported by the data cited by the FWS.

Specifically, the FWS makes several conflicting statements regarding area of habitat needed for successful lesser prairie chicken populations. First, the proposed rule states,

"…Although a minimum size has not been established, studies and expert opinion, including those regarding greater prairie-chickens, suggest that the minimum parcel size is likely to exceed 100 ha (250 acres)..."[18]

Later the[19] proposed rule concludes that,

"…conservation and eventual recovery of the lesser prairie-chicken should consist of the establishment of secure strongholds or core areas of high quality habitat that are at least 10,117 ha (25,000 ac) in size and support 6–10 active leks, each being used by at least 6 males..."

The proposed rule does not provide the data used to determine that a home range two orders of magnitude larger than the minimum is necessary. Home ranges for lesser prairie chickens vary by habitat type and environment. This is because each of the life history components of lesser prairie chicken vary greatly as the birds adapt to available habitat and other environmental aspects. Leks, or the display grounds of males where females come to mate, can be quite small. It would not be useful to consider the area needed for a lek by itself, as it does not include nesting, feeding and roosting sites. However, it is useful to note that, leks are also found on habitat the rule assumes is not available for lesser prairie chickens such as, "…abandoned

Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[18] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856)
[19] Id., p. 73836)

oil-drilling sites (oil pads) with little or no vegetation, unimproved roads with little traffic, areas treated with shrub-specific herbicide, recently burned areas, heavily grazed areas (e.g., stock tanks, mineral licks), and cultivated fields adjacent to grassland…"[20]. Hence, lek placement is adaptable and areas identified as unsuitable at present, may in fact be used in the proper circumstances. Because of the adaptability of lesser prairie chickens it is not advisable to make broad surmises about habitat availability and needs included in the proposed listing rule, in lieu of actual data.

There are different ways to estimate the area of habitat needed for successful lesser prairie chicken populations and no agreed-upon answer. This is due to the fact that there are separate areas for nesting, feeding and the lek itself, all of which might be fragmented by interspersed areas of unsuitable habitat (either natural or human made), in the native landscape. The proposed rule cites several studies that evaluate the area required for home range and a population. Home range estimates range from 21 ac to 4806 ac, with many values in between. The huge variance in range area is the result of reports of home range by season (i.e. breeding less than wintering), different drought conditions, and availability of food. At the population level, there is no evidence on how many birds or leks would be necessary to maintain population viability. As a consequence, estimates reported by FWS show enormous variation, from 1,012,140 ac to 2,530 ac. Other figures include 7,900 ac, 25,000 ac, 12,000 ac, 72,649 ac, and 24,710 ac. In violation of the requirements of the ESA, **the FWS does not include the data that support the determination to use the 10,117 ha (25,000 ac), nor does it explain the basis for the determination**.

The FWS references a spatial analysis they conducted to determine the extent of fragmentation within the estimated occupied range of the lesser prairie-chicken.[21] Infrastructure features such as roads, transmission lines, airports, cities and similar populated areas, oil and gas wells, and other vertical features such as communication towers and wind turbines were delineated. These features were buffered by known avoidance distances and compared with likely lesser prairie- chicken habitat. **The analysis revealed 71 patches that exceeded the minimum 10,117 ha (25,000 ac) range that exist within the five- state estimated occupied area**. Of the patches over 10,117 ha (25,000 ac), all were impacted by fragmenting features, just not to the extent that the patch was fragmented into a smaller sized patch. Thus, even if, as the rule states:

[20] Hagen et al. 2004

[21] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856; The analysis is referenced but not included in the citations, so it is not possible to assess its validity.

"… a minimum of four strongholds will be needed, distributed across the ecological diversity of the species, in order to secure the status of the species."[22]

There are several times that many patches currently in existence.

Edge Effects Due to Habitat Fragmentation

It is well known that in some ecosystems increasing linear amounts of habitat edge, as a consequence of habitat fragmentation, present threats to some species. For example, birds nesting in forests are negatively impacted by nearby open-country edges because it facilitates access by habitat-edge nest predators such as raccoons (*Procyon lotor*), and provides access to nests by avian brood parasites such as the ubiquitous brown-headed cowbird (*Molothrus ater*). The proposed rule contains numerous citations referencing the negative effects of edges that are apparently supposed to illustrate their danger to lesser prairie chickens; however, none of the citations address the effects of edges on lesser prairie chickens[23]. The proposed rule also states that typical native lesser prairie chicken habitat is a mosaic of different habitat patches. We note that each of the patches within the native mosaic creates an edge[24] [25]. Thus, the lesser prairie chicken's coexistence with edge effects in their native habitat indicates that they are part of the native landscape in which lesser prairie chickens evolved.

The FWS suggests that edges and habitat fragmentation will make it difficult for lesser prairie chicken individuals to find leks. The rule provides no data, and no evidence to support the statement. As such, it appears to be purely speculative. Further, given that leks are often used traditionally for years, and that breeding and feeding grounds are typically nearby, the notion that a lesser prairie chicken would be unable to find an active lek is scarcely credible. It is also worth noting that leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine the birds' selection of a new lek site. Surely a species would not have evolved a reproductive system that randomly makes it impossible for females and males to find each other at mating season.

[22] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[23] Id., pp. 73851-57
[24] Id., pp. 73852
[25] "Consequently, blocks of habitat that collectively or individually encompass multiple successional states that comprise tall grasses and shrubs needed for nesting, and are in proximity to more open grasslands supporting forbs for brood rearing, and are combined with smaller areas of short grass and bare ground used for breeding, support all of the habitat types used by lesser prairie- chickens throughout the year." Federal Register, Vol. 77, No. 238 , December 11, 2012, pp. 73852

Anthropogenic Changes to Lesser Prairie Chicken Habitat

This statement in the rule appears to be opinion.

'The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events…."[26]

The FWS provides no data or analysis to support the statement, and has earlier admitted there are no data on historic habitat or populations. Nevertheless, the proposed rule contains a list of activities which 'may' have an adverse effect on lesser prairie chicken, based on these assumed impacts. The information provided in the proposed rule consists of lists of areas where these 'threats' exist within lesser prairie chicken habitat and speculative mechanisms for their adverse effects. However, no data are provided to substantiate the assertions that the adverse effects attributed to these threats actually exist or how they affect lesser prairie chicken populations' extinction risk. We recognize that "extreme weather events" was intended to be only one possible example of a stochastic event, but an extreme weather event that would wreak such widespread damage would likely be destructive even to native species at peak abundances.

[26] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73883

Livestock Grazing, Water and Habitat Conversion

Livestock

The FWS surmises that because livestock grazing occurs over such a large portion of the occupied range, it must be a threat. Accepting the idea of adverse effects of livestock grazing on a species whose historic habitat included seasonal and widespread overgrazing by bison is counter-intuitive. The proposed rule implies that the pattern of grazing today is different, but does not quantify those differences or the adverse consequences. The rule also identifies other adverse effects such as nest trampling, but provides no information on the extent to which this occurs or the population level effects of such occurrences. Identification of livestock grazing as a threat to the species is purely speculative. In fact, the rule states:

"…Although documented, the significance of direct livestock effects on the lesser prairie-chicken is largely unknown. Detailed, range wide information is lacking on the extent, intensity, and forms of recent grazing, and associated effects on the lesser prairie-chicken. "

Additionally, the rule fails to account for the availability of water from stock tanks as a positive effect of grazing cattle. The rule cites research documenting the regular use of stock tanks by both male

and female lesser prairie chickens. The FWS suggests that stock tanks,

"…may be particularly important during periods of drought."[27]

The rule immediately discounts its importance stating that lesser prairie chickens do not require water speculating that dew is a 'likely' source:

"Lesser prairie-chickens likely rely on food sources and consumption of dew to satisfy their metabolic moisture requirement but will use surface water when it is available."

While the rule admits beneficial aspects of a ready source of water to the species, it fails to consider it in assessment of the effect of livestock grazing:

"Little is known regarding the specific water requirements of the lesser prairie chicken, but their distribution does not appear to be influenced by the presence of surface water."

"Total annual precipitation across the range of the lesser prairie-chicken varies, on average, from roughly 63 cm (25 in) in the eastern portions of the historical range to as little as 25 cm (10 in) in the western portions of the range. Consequently, few sources of freestanding surface water existed in lesser prairie-chicken historical range prior to settlement."

Agricultural conversion

The proposed rule states that agricultural conversion adversely affects lesser prairie chicken. However, the statement is only partially accurate. The cited research notes that lesser prairie chickens commonly forage in agricultural crops such as grain sorghum, corn, and other grain fields adjacent to native pasture from late autumn through early spring and that alfalfa is an important food source for pre-nesting females and lekking males in southwestern Kansas. The citations also reported that maximum numbers of lesser prairie chickens were found in areas in which 5-37% of the landscape was planted to grain sorghum using minimum-tillage techniques. The citations used by FWS in the proposed rule also note that recently, conversion of grass lands to agriculture has slowed, as the number of hectares per year converted has not increased. The proposed rule provides no data to substantiate the statement that increases in agricultural conversion continue to occur. Neither does the proposed rule make any attempt to assess or quantify the benefits to lesser prairie chickens of increased food sources from agricultural crops, the percentage of no-till agriculture or of the crops that provide food for lesser prairie chickens. The multiple variables involved in assessing the effect of agricultural conversion illustrate the speculative nature of sweeping assumptions about the effect of any activity on lesser prairie chicken habitat.

[27] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843

Human encroachment: energy production and transmission , fences, roads

The proposed rule lists several citations that report there are indications that human structures influence lek placement. The proposed rule includes wind turbines, energy transmission lines, power poles and lines, oil rigs, fences and roads in this category. The proposed rule posits that the vertical presence in the lesser prairie chicken landscape is in and of itself a threat. The threat is predicated on research that found lesser prairie chickens avoided these structures.

Specifically, Pitman says that leks are farther from anthropogenic structures than expected by chance. Pruett et al. (2009) found that lesser prairie chicken tended to avoid roads and power lines. Hagen (2011) noted that, "Monte Carlo simulations of expected distances indicated that the nearest 90% of lesser prairie chicken centers of use were farther from anthropogenic features than would be expected at random." However, as noted elsewhere, there are no data that this avoidance results in reduced nest success or reduced populations. Pitman et al. (2005) measured distances from nests to various anthropogenic features, and found:

"distances to the features were not substantial predictors of apparent nest success. Grass height, sagebrush plant density, and sagebrush height were the most important vegetation characteristics influencing nest success."

Further, based on the narrow reach of the supporting research, it is only surmise that structures have an adverse effect, since the effect of other interacting features, such as whether it was a drought year and the placement of the structures in relation to the lesser prairie chicken preferred activity for the site have not been evaluated.

The proposed rule speculates that human activities nearby leks might interfere with the transmission of male vocalizations ("booming") on the leks, thereby preventing females from finding the leks.[28] This speculation is inconsistent with what we know of lesser prairie chickens. First, as discussed above, leks are relatively long-lived, and it is unlikely that there are females or males in the local population who are unaware of their location and active status. Second, leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine their selection of a new lek site, but this behavior does not appear to affect the ability of leks to be found during mating season. Finally, a characteristic of lesser prairie chicken habitat is frequent wind, which abates sounds reducing the effects of surrounding noise. Nevertheless, the

[28] Federal Register, Vol. 77, No. 238 , December 11, 2012, p.73839

rule relies on the findings of a paper[29] which addresses the effect of noise on a flycatcher, warbler, sparrow and a vireo, all small songbirds, and no open country ground nesting game birds whose environmental requirements would more closely mirror those of lesser prairie chickens. Accordingly, the study, although important in its own right, is irrelevant to the lesser prairie chicken as the tremendous differences in the ecology of the species involved preclude drawing any inferences related to lesser prairie chickens. Thus, there are no scientific data to indicate that noise is a threat to the lesser prairie chicken.

Collision mortality

The proposed rule concluded that:

"power lines and unmarked wire fences are known to cause injury and mortality of lesser prairie-chickens, although the specific range wide impact on lesser prairie chickens is largely unquantified."[30]

The statement is based on a study which demonstrated that statistically, the effect of collisions was insignificant. [31] The rule identifies data from 1999 to 2004, in which researchers recovered 322 carcasses of radio-marked lesser prairie-chickens in New Mexico, Oklahoma, and portions of the Texas panhandle. The percentages of documented lesser prairie-chicken deaths from collision were estimated to be 42 percent in Oklahoma and 14 percent in New Mexico. Based on the information in Table 2 of the proposed rule, there were roughly 10,000 individuals in the three states during this time interval, and therefore, during this period, there were approximately 60,000 potential encounters. Therefore, the 14% to 42% of 322 birds (45 to 135) that died via collisions amount to less than 1/10 of one percent of the population (0.1%). Therefore, the available data indicate that although it would be highly useful to put markers on the top row of fences especially near leks, collision mortality is relatively insignificant factor.

Disease and Predation

The proposed rule states:

"The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events. Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels"

Predation

Although in the section on predators, FWS plays down the role of predators, throughout the proposed rule, there are repeated assertions that diverse threats increase predation. These discussions ascribe a role to predators that will result

[29] Francis et al. (2009)
[30] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73863
[31] Patten et al. (2005b)

from existing and planned towers serving as perches for raptors. For Example, FWS states that lesser prairie chickens avoid vertical structures as "presumably a behavioral response that serves to limit exposure to predation." The proposed rule cites a long term study in Oklahoma.[32] In that study, they identified roughly 43 carcasses out of a total lesser prairie chicken population of 3,000.attributable to raptor depredation.[33] Thus only a handful of birds were killed by raptors. The authors of this study stated "We have no reason to believe that lesser prairie chicken populations are being impacted severely by predation."[34] In a different study Behney et al. (2012, p. 294) "suspected that mammalian and reptilian predators had a greater influence on lesser prairie chicken mortality during the breeding season than raptors." Yet, in their conclusion the FWS ignores these data and opines that predation is a threat.

There are no data that support the speculative statements in the proposed rule that towers would provide roosts for ambush-style raptors. Most raptors such as large hawks, hunt from the air. A major avian predator, the Great Horned Owl, likely approaches low to the ground during crepuscular periods, and perching on a tower might make it visible. Only documented depredation where the species of raptor and hunting method were recorded would provide this information. Here again, the FWS lack sound or even reasonable scientific data on the effects of towers on increasing predator pressure. It requires observations over time, measuring the rate at which lesser prairie chickens are taken by avian predators at leks both with and without nearby towers or other vertical structures. And most importantly, one would have to demonstrate the assertion the depredation from raptors was additive and not compensatory. That is, as FWS noted, lesser prairie chickens evolved with a suite of mammalian and avian predators. Only if some new source of predation occurred that resulted in take of individuals over and above natural levels, would depredation be relevant, and the proposed rule presents no data empirical or otherwise to support this conclusion.

Disease

The FWS states in the proposed rule:

"…There is no information that indicates parasites or disease are causing, or contributing to, the decline of any lesser prairie-chicken populations, and, at this time, we have no basis for concluding that disease or parasite loads are a threat to any lesser prairie-chicken populations. Consequently, we do not consider disease or parasite infections to be a significant factor in the decline of the lesser prairie-chicken…"

[32] Wolfe et al. (2007) who conducted a long term study from 1999-2004.
[33] Table 2, FWS 2012
[34] Wolf et al. (2007: 101)

The proposed rule then goes on to state, that if populations continue to decline or become more fragmented, even small changes in habitat abundance or quality could have more significant consequences. The implication is that there would be a marginal increase in disease within the population driven by habitat changes. There are no data to support an assertion that disease will increase as habitat loss or fragmentation occurs, if the statement were supportable, the putative loss in habitat which this rule surmises, has already occurred and should have resulted in some measurable increase in disease over time. Such an increase is not recorded or even remarked. In any event, if populations decline or are sparse, diseases that are density dependent would have difficulty becoming a major threat.

Climate Change

The proposed rule identifies global warming and potential extreme weather events as a threat to the species. The rule assumes that warming will occur (as opposed to some unspecified climate change) and concludes that as a result, habitats will dwindle and further compound the putative negative effects of habitat fragmentation. However, many climate projections predict that species ranges will shift, not shrink and in fact, conditions for some species might improve.

Changes in species' range sizes are ubiquitous, and do not automatically imperil their continued existence. For example, during the last Ice age, known as the Last Glacial Maximum (LGM; 21,000 years before present), southward extending glaciers pushed many species into small southerly isolated habitat patches (refugia), where they survived for thousands of years, subsequently expanding as climate shifted again.

CESAR used a niche model to examine the current and past distribution of lesser prairie chicken (Appendix 3). Our work demonstrates that the lesser prairie chicken was one of those species which was distributed in a fragmented series of habitat patches south of the current range during the last glacial maximum, 21,000 years ago. Clearly the species survived this displacement and fragmentation, and as climate conditions ameliorated post glacial retreat, they followed their northward-moving habitats to where they are today. Thus the species has survived previous significant climate changes and has the potential to survive major, glacial-scale changes in earth's climate and still prosper. [35]

The FWS provides no data to substantiate a conclusion that a species which has weathered significant climate change and persisted over 21,000 years is not equipped to survive and adapt to current climate change.

[35] For a more in-depth discussion of the analysis, see Appendix 3

Adequate Regulatory Authority Exists to protect the Lesser Prairie Chicken at the State and Local Level

As part of our review of the proposed listing rule, CESAR lawyers examined the existing state and local protections for the lesser prairie chickens. We found that each state had its own comprehensive scheme for protecting species and their habitats. These protections, for the most part, went far beyond the narrow protections of the ESA encompassing wildlife and wildlife habitat protections.

Benefits of ESA Listing

The proposed rule states that the ESA provides protection beyond that which state and local agencies provide. This is only conditionally true. The ESA protects listed species by requiring federal agencies to avoid jeopardizing the continued existence of the species, prohibiting the 'take'[36] of listed species, and by protecting designated critical habitat. The FWS in the proposed rule implies that listing provides the ability to protect habitat on private property, is the only source for recovery planning and increases funding available for the conservation of lesser prairie chickens.

The habitat protections provided under the ESA largely flow from the designation of critical habitat. The protections apply only to that habitat which has been designated as 'critical'. The protections are further limited to the subset of critical habitat which is affected by a federal agency action. So while much private habitat can be designated as 'critical habitat', in fact it is not protected under the ESA unless a federal agency action has an effect on it. With respect to the lesser prairie chicken, this distinction is moot as the FWS has declined to designate critical habitat as 'not prudent", due to the lack of data related to the species habitat requirements.

The prohibitions against take protect the species immediate habitat if its modification or destruction leads to the death of an individual member of the species. The requirement that federal agencies consult with the FWS to ensure their actions do not 'jeopardize the continued existence of the species' allow for take as long as jeopardy does not result.

While listing of a species results in a requirement to develop a recovery plan, these plans are developed to the maximum extent practicable and there are no regulatory requirements attached to the plan. Recovery plans are aspirational documents, the ESA

[36] The Act defines take as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct..." The word harm has been interpreted to include habitat modification, which foreseeably causes the actual injury or death to a listed species. The FWS has asserted the ability to regulate habitat under this provision and consequently resists designating critical habitat. The courts have disagreed with this interpretation, pointing out that simply protecting against habitat alteration that actually kills a species is not preservation of the ecosystem upon which a species relies.

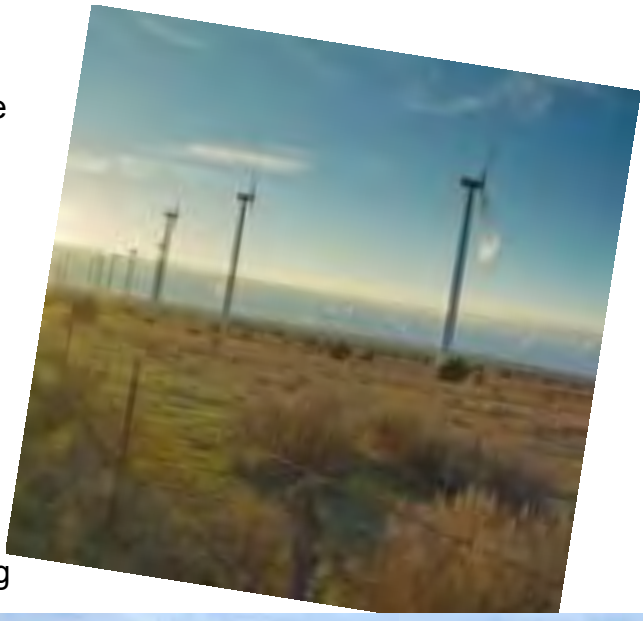
imposes no requirements for scientific rigor to their contents, such as requiring them to use the 'best scientific and commercial data available'. Further, any group can and has developed recovery plans. The FWS has developed Recovery plans, individual states have developed recovery plans, and working groups have developed recovery plans. The ESA is not the sole generator of a recovery plan.

The ESA provides no dedicated funding for listed species.[37] While it is possible to argue that if a species is listed the probability of funding increases, the evidence is unpersuasive. With nearly 1,500 listed species, one would expect all available wildlife research and conservation funds would be used to address those species. Instead, funding for wildlife conservation, recovery, and research is not devoted solely to endangered species, much is still available for unlisted and unregulated species.

Realistically listing of a species, assures federal agencies are required to review their actions in the context of the ESA, and to a limited extent those requirements extend to private lands affected by federal agencies.

Generally, a listing under the federal ESA listing does not necessarily:

- Protect habitat on private property;
- Provide access to dedicated federal funding;
- Result in a recovery plan



[37] We contrast this with the affected States which individually provide state funds for wildlife conservation.

Existing Federal Agency Regulatory Protections

The FWS admits that the lesser prairie chicken cannot be fully recovered on federal lands, which only support about four percent (4%) of the species' overall range. The five states where the majority of the lesser prairie chickens are found (primarily on private property, not federal lands) have significant state, county and local laws and regulations in effect to protect the lesser prairie chicken.

Where federal lands are involved, we note that in many cases federal agencies have taken voluntary actions to ensure that they consult with the FWS whether or not a species has been listed. These agencies include the Forest Service and the BLM. These two agencies have responsibility for managing millions of acres. These agencies have formally designated prairie chickens and their habitats as species for which their respective management plans will take special consideration. [38] These management plans are binding, and failure to adhere to their conditions can be challenged in court. [39] There is no evidence that the agencies are routinely ignoring the requirements of their management plans for lesser prairie chickens.

The voluntary consultation by federal agencies provide protections that go beyond what is required by the ESA as the agencies land use plans have a standard that manages the lands to recover or enhance wildlife and habitat. A consultation under the ESA requires only that the federal agency, avoid 'jeopardizing the continued existence of the species', or the 'destruction or adverse modification' of its critical habitat.

FEDERAL AGENCY PROTECTION[40]	ESA PROTECTION INCREASE
Bureau of Land Management • Environmental assessments required for all major activities; • Early consultation as to presence of species in project area;	None. BLM Land use plans[41] for the lesser prairie chicken habitat are complete. These plans are based on voluntary consultation with the

[38] The section on conservation actions includes details on the conservation actions undertaken by these land management agencies.
[39] Western Watersheds Project v. Ken Salazar, Secretary, Department Of The Interior, Case No. 4:08-CV-516-BLW, Document 131, Memorandum Decision And Order. http://www.advocateswest.org/sites/default/files/bulletin/Victory%20in%20First%20Round%20of%20BLM%20RMP%20Litigation/Order%20granting%20WWP%20Motion%20for%20Summary%20Judgment.pdf
[40] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[41] http://www.blm.gov/flpma/FLPMA.pdf

• Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Duty to protect and restore habitat from invasive species; • Guidelines for energy development; • Best management practices for energy development "approved" by FWS • Duty to create Resource Management Plans; • Duty to conserve "candidate" species and sensitive species designated by individual states; • Designated Area of Critical of Environmental Concern (ACEC) for lesser prairie chicken	FWS as though the lesser prairie chicken were listed under the ESA.[42] The requirements in the land use plans are based on a standard to restore or enhance habitat conditions, the ESA simply require that federal agencies: 1. Avoid jeopardy, 2. Avoid destruction or adverse modification of habitat. Federal lands controlled by BLM and the USFS managed under provisions that already provides lesser prairie chickens and their habitat enhanced protection. Federal lands controlled by BLM and the USFS have already agreed to voluntary consultation with the FWS on the lesser prairie chicken, whether it is listed or not; Current federal land management practices provide for management, enhancement, and recovery of habitats used by lesser prairie chicken, rather than just avoiding jeopardy. Each of the states with lesser prairie chicken habitat prohibit take either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[42] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

Department of Agriculture • Duty to protect and restore habitat from invasive species; • Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Environmental assessments required for all major activities;	No additional habitat protections would be provided, first because the listing does not designate critical habitat, second because the land management agencies manage to a restoration/enhancement standard which is higher than the ESA 'avoid jeopardy' and no destruction or adverse modification standard. USFS land use requirements for lesser prairie chicken are based on voluntary consultations with the FWS and a standard to improve habitat conditions[43]. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[43] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

State and Local Regulatory Protection

The five states with lesser prairie chicken habitat have significant protections in place for wildlife in general, allowing them to protect prairie chickens and their habitat without federal authority. Each state has its own Endangered Species Act and Colorado has listed the lesser prairie chicken. Some states have identified it more specifically with a designation indicating it is a species of special concern. All the states identify it as a game species and have statutes which provide for penalties for taking under anti-poaching laws. In addition, each of the States and their associated local government have the authority and expertise to protect wildlife habitat generally and specifically, whether it is on government or private land.

The following is a cursory review of applicable law which should be considered illustrative rather than a comprehensive list.

In making comparisons between the ESA and local protection it is important to note that ESA protections are limited to federal lands, and those critical habitat lands which are affected by a federal agency action. While the FWS may prefer their ability to protect the species, there is no indication that a lack of regulatory authority is hampering the states from protecting lesser prairie chickens. The states bring their own expert agency status to the protection of species within their jurisdiction, and each state has identified a commitment to protection, restoration, and enhancement of wildlife resources. There is no basis for asserting that state expertise or authority is lacking and, as noted earlier, increasing populations support a conclusion that state and voluntary conservation efforts are having a beneficial effect.

Colorado, Kansas, New Mexico, Oklahoma and Texas already have flexible laws and regulations in place to effectively deal with changing conditions to prevent depletion and waste of wildlife resources. Further, the documented policies of the federal land use agencies whose actions most impact the lesser prairie chicken and its habitat, currently identify the lesser prairie chicken as a species for which special management and protection is afforded even in the absence of an ESA listing. In light of the prohibitions of take under anti-poaching laws that apply to the lesser prairie chicken, listing under the ESA will only criminalize accidental take of lesser prairie chickens.

Existing laws at the state, county and local levels have the authority to protect and manage activities on state, public and private lands with the actual or potential benefit to the lesser prairie chicken. The service candidly admits that only about four percent (4%) of the species' overall range occurs on federal lands and that the lesser prairie chicken cannot be fully recovered on federal lands alone. Fortunately, there are adequate state, county and local laws and regulations currently available in Colorado, Kansas, New Mexico, Oklahoma and Texas to protect the lesser prairie chicken.

The following chart summarizes current protections provided to the lesser prairie chicken on a state-by-state basis and identifies any marginal increase in protection provided by the ESA[44].

STATE	ESA PROTECTION INCREASE
Colorado • Species listed under the state ESA and take is prohibited. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Prohibits unauthorized 'take' of wildlife, whether listed or not • Provides dedicated funding for wildlife and habitat. • Goal is for all wildlife to achieve self-sustaining population; • Wildlife laws are enforced with civil and criminal penalties.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Oklahoma • State has authority to enter private lands for purpose of controlling Red Cedar and other invasive plant species; • Dedicated funding for wildlife habitat restoration activities; • Protects all wildlife from illegal "take"; • Wildlife laws are enforced with civil and criminal penalties; • Provides classification for "sensitive species" such as lesser prairie chicken. • Provides protections intended to achieve self-sustaining wildlife populations. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Comprehensive regulation of energy development and natural resource development industries.	ESA provides no ability to control activity on private land unless it is affected by a federal agency action. The ESA would criminalize accidental take.

[44] A detailed chart can be found in Appendix 5.

• Classifies lesser prairie chicken as a game bird ad protects it with anti-poaching laws.	
New Mexico • Dedicated funding source for wildlife protection and promotion; • Conservation Services are available for management and enhancement (including research and conservation actions) of wildlife and habitat; • Educational publications on wildlife and habitat related conservation issues; • State requires studies to be conducted to determine the status and survival requirements of threatened or endangered species. • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Kansas • Established habitat acquisition and restoration programs; • Programs to ensure that all wildlife maintain or achieve “self-sustaining” populations; • Penalties for failure to adhere to wildlife laws; • Local governments have authority to create noxious weed programs; • Planning and zoning must be conducted in a manner that will consider all natural resources of the State; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Texas • Noxious weed control programs; • Dedicated funding for wildlife research; • Dedicated funding for wildlife and habitat conservation;	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in

• Civil and criminal penalties for violation of wildlife laws; • Wildlife laws protect all "indigenous" wildlife (not only listed species) from "take"; • Conservation incentive programs with dedicated funding; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it under anti-poaching laws.	protection by an ESA listing would be to criminalize accidental take.

COLORADO

Colorado has implemented rules, regulations and codes to ensure the protection of wildlife and to ensure a continuous operation of planning, acquisition and development of wildlife habitats and facilities for its indigenous wildlife populations. The protections available in Colorado include, but are not limited to, local governments, planning and zoning, land use and conservation and have included provisions for enforcement so as to promote consultation with other states and federal government for the purposes of increasing the number of individuals within the species and populations of wildlife up to the optimum on a statewide basis to ensure equitable and reasonable privileges of ownership along with the pursuit of wildlife resources.

NEW MEXICO

New Mexico has a comprehensive wildlife conservation strategy. The strategy focuses on actions intended to keep common species common while working to prevent wildlife from becoming endangered. Using rigorous science, New Mexico has constructed an ecological framework for identifying the species of greatest conservation need, the habitat necessary to sustain them and other members of their ecological communities with periodic review processes necessary to ensure citizen involvement and acceptance.

KANSAS

Kansas has enacted the Kansas Nongame and Endangered Species Conservation Act of 1975 which gives the Department of Wildlife, Parks and Tourism authority to identify and undertake appropriate conservation measures. In that regard Kansas has implemented recovery plans with an objective to guide research and management aimed at enhancing listed species populations with the ultimate goal of allowing species to recover. Kansas has taken great strides in creating, practices, plans and regulations

which provides incentives to plant and maintain prairie grasslands which have greatly benefited the lesser prairie chicken.[45]

TEXAS

As an example of the available protections, the Texas Agriculture Code allows the authority to determine critical wildlife habitat zones, create and regulate noxious weed control districts and to regulate range restrictions. Additionally, the Texas Natural Resources Code and Parks and WildlifeCode allow Texas to regulate and develop and administer programs to ensure continued agriculture production and water availability as well as wildlife habitat availability. Texas also has an administrative code whose purpose, in part, is to provide a comprehensive method for the conservation of an ample supply of wildlife resources on a statewide basis to insure reasonable and equitable privileges of ownership along with the pursuit of wildlife resources.

OKLAHOMA

Oklahoma has developed the Oklahoma Lesser Prairie-Chicken Conservation Plan (OLEPCCP) to "protect, enhance, and restore their habitat while also addressing other factors leading to their decline." This plan is intended to benefit the people, economy, and wildlife resources of Oklahoma by providing a framework for effective management and habitat improvement. Oklahoma is working to conserve the lesser prairie chicken while minimizing effects on human economies and developments. Appropriate habitat improvement/conservation goals and long-term management actions/strategies are being utilized to achieve these goals as well as coordinated strategies to implement management actions – including interagency coordination and incentives or other programs that will make restoration and maintenance of LEPC habitat economically viable for landowners and industries. While these efforts are underway, Oklahoma defines lesser prairie chickens as game birds and protects them under their anti-poaching statutes.

Table 1. Federal Lands By State[46]

State	Total Federal Land Acreage[47]	Total Acreage in the State	% of
Colorado (listed under CO ESA)	24,086,075	66,485,760	36.2%

[45] The anti-poaching laws protect the species at all time. Kansas offers limited hunting of LPC.
[46] Congressional Research Service, 7-5700, February 8, 2012, Federal Land Ownership: Overview and Data, http://www.fas.org/sgp/crs/misc/R42346.pdf
[47] Understates total; includes lands of the four major federal land management agencies and the Department
of Defense, but excludes lands administered by other federal agencies (e.g., Agricultural Research Service, Bureau of Reclamation, Department of Energy, National Aeronautics and Space Administration).

Kansas	301,157	52,510,720	0.6%
New Mexico	27,001,583	77,766,400	34.7%
Oklahoma	703,336	44,087,680	1.6%
Texas	2,977,950	168,217,600	1.8%

Federal Voluntary Conservation Actions

As noted earlier, particularly in the case of federal land management agencies, conservation actions undertaken voluntarily as part of a program of land management by the federal agencies, become enforceable once they are adopted. In a similar manner, once landowners enter into voluntary conservation programs with federal agencies, the provisions of the programs themselves become requirements.

Summary Chart of Federal Agency Ongoing Conservation Programs[48]

FEDERAL AGENCY CONSERVATION ACTIONS[49]

Department of Agriculture
 	
• Natural Resources Conservation Service:
  ○ Lesser Prairie Chicken Initiative: helping farmers and ranchers enhance, restore and protect habitat for lesser prairie chicken;
  ○ Conservation Reserve Program (CRP): one of the primary management tools for habitat restoration;
  ○ Wildlife Habitat Incentive Program: voluntary approach to improving wildlife habitat;
  ○ Working Land for Wildlife: FWS cooperative to combat the decline of seven specific wildlife species, including the lesser prairie chicken;
  ○ Grassland Reserve Program (GRP): a voluntary conservation program working with individuals to enhance plant and animal biodiversity, and protection of grassland;
  ○ State Acres for Wildlife Enhancement (SAFE): a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years;
  ○ The Environmental Quality Incentives Program (EQIP): a voluntary program that provides financial and technical assistance to agricultural

[48] A detailed chart can be found in Appendix 6
[49] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken

producers through contracts up to a maximum term of ten years in length.

Fish and Wildlife Service
 	
• Habitat Conservation Planning Assistance;
• Habitat Conservation Plan (HCP) Land Acquisition;
• Oklahoma and Texas have entered into CCCA's for the protection of the lesser prairie chicken. Candidate Conservation Agreements (CCAs) are voluntary conservation agreements between FWS and one or more public or private parties.[50]
  ○ Oklahoma CCCA: On March 4, 2013 Oklahoma's CCCA was finalized. FWS states that Oklahoma "has shown capability for and commitment to implementing all of the terms of the CCAA. The ODWC has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA".[51]
  ○ Texas CCCA: This CCAA pertains to lands in Texas encompassed by the current distribution of LPC, those lands that are unoccupied potential habitat, and those that could provide potential habitat if the current population and distribution of LPC should increase.[52] In Texas, TPWD holds a permit and issues Certificates of Inclusion to participating landowners who are voluntarily implementing management plans for lesser prairie-chickens. As of July 15, 2012, twenty-five Texas ranchers have 282,878 acres enrolled in the CCAA.[53]

BLM and USFS have entered into agreements to consult with the FWS voluntarily on candidate species and 'species of special concern.[54]

State and Local Voluntary Conservation Actions

The question of the effectiveness of voluntary versus regulatory conservation actions is difficult, and there is little literature that rigorously explores the issue. The argument for voluntary conservation is that regulatory conservation makes the species or its habitat a liability. Voluntary conservation removes the potential for the loss of property or its value and encourages behaviors that are beneficial to the species.

[50] The Service works with its partners to identify threats to candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements, and design and implement conservation measures and monitor their effectiveness. http://www.fws.gov/endangered/what-we-do/cca.html

[51] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf

[52] http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

[53] http://www.fws.gov/southwest/es/Documents/R2ES/LPC_FAQ_18July2012.pdf

[54] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

The population review we referenced earlier[55] noted declines in lesser prairie chicken populations in the decades prior to its designation as a 'candidate species' and increases after designation and the onset of voluntary conservation actions.

The 5 states in the lesser prairie chicken range have implemented a number of conservation actions over the past fifteen years. The FWS has articulated a policy for evaluating those conservation actions. This policy, known as the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy")[56], is particularly important for conservation actions that are ongoing or proposed for the future.

The FWS's PECE Policy requires during listing decisions that the FWS evaluate whether "formalized conservation efforts" [57] ("FCEs") "contribute to making it unnecessary to list a species". The purpose of the policy is to ensure consistent and adequate evaluation of future or recently implemented conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents when making listing decisions. The policy is expected to facilitate the development by States and other entities of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.[58]

This policy applies to those conservation efforts that "have not yet been implemented or have been implemented but have not yet demonstrated whether they are effective at the time of a listing decision."[59]

When evaluating an FCE that is not yet implemented, the FWS must make this evaluation based on the "certainty of implementing the conservation effort and the certainty that the effort will be effective." [60]

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[55] An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[56] 50 CFR Chapter IV, Federal Register / Vol. 68, No. 60 / Friday, March 28, 2003

[57] "conservation efforts as "specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species". Conservation efforts may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial actions." A formalized conservation effort is one "identified in a conservation agreement, conservation plan, management plan, or similar document." Id.

[58] http://www.sagebrushsea.org/esa/FWS_PECE_q&a.pdf

[59] Id.

[60] The PECE Policy states that the following factors will be considered: 1. Identified Parties, Funding and Resources necessary to implement the effort; 2. The legal authority of the parties to proceed with the FCE are described; 3. The legal procedural requirements (e.g. environmental review) necessary to implement the effort are described and within the means of the parties to accomplish; . 4. Authorizations (e.g., permits, landowner permission) necessary to implement the conservation effort are identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement

The majority the voluntary conservation actions could be considered ongoing, however, some such as the Interstate Working Group Range Wide Management Plan[61] and Oklahoma's CCCA have yet to be completed or implemented but would require a determination that there is high level of "certainty" of implementation given their near completion status and the large investment of resources.

In prior listing determinations, the FWS has declared that if a conservation plan cannot be demonstrated to be effective, it cannot be considered in a listing determination. This position is not supported by the plain language of the PECE policy. Further, it is demonstrably arbitrary in that most, if not all of the actions contemplated by these conservation plans are consistent with best management practices required by the FWS in their consultations with the federal land management agencies, in consultations which include the species and in documents sponsored by the FWS.[62]

Finally, we note that despite the assertions of the FWS as to efficacy of an ESA listing in protecting the species, the ESA provides very narrow protections, limited by the consultation process and the language of the ESA which does not provide regulatory requirements for enhancement or improvement, instead requiring that jeopardy of the continued existence of the species be avoided, and adverse modification and destruction of habitat be avoided.[63]

The limitations of the ESA in recovering species are aptly illustrated by the fact that of nearly 1,500 species listed less than 50 have recovered. Of that number only 20 actually recovered, the remainder were either extinct (9) or listed in error.[64] Voluntary conservation avoids the perverse incentives created by criminalization of accidental 'take' of

the effort will obtain these authorizations; 5. Voluntary participants are identified and methods (e.g. incentives) used to obtain necessary level of voluntary participation are described; 6. Regulatory mechanisms (e.g., laws, regulations, ordinances) necessary to implement the conservation effort are in place; 7. A high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding; 8. An implementation schedule (including incremental completion dates) for the conservation effort is provided; 9. The conservation agreement or plan that includes the conservation effort is approved by all parties to the agreement or plan.

[61] The type and level of voluntary participation (e.g., number of landowners allowing entry to their land, or number of participants agreeing to change timber management practices and acreage involved) necessary to implement the conservation effort is identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain that level of voluntary participation (e.g., an explanation of how incentives to be provided will result in the necessary level of voluntary participation). Id.

[62] Jamison, B. E., J. A. Dechant, D. H. Johnson, L. D. Igl, C. M. Goldade, and B. R. Euliss. 2002. Effects of management practices on grassland birds: Lesser Prairie-Chicken. Northern Prairie Wildlife Research Center, Jamestown, ND. 29 pages.

[63] The prohibition does not apply in the case of the lesser prairie chicken as the FWS has determined that designation of lesser prairie chicken habitat is 'not prudent' as there are no data to support a designation.

[64] http://www.ncpa.org/pub/st303?pg=5

species and harnesses the much broader power of states and local agencies to protect habitat on private lands. In the case of the lesser prairie chicken, where only 4% of its habitat is on federal land, the voluntary protection of habitat on private land is essential.

The fact that the affected states and landowners have been funding and participating in conservation activities beginning in 1996 with the formation of the lesser prairie chicken working group[65] and continuing to the present with the State of Oklahoma entering into a conservation agreement with the FWS demonstrates the commitment to species conservation. In the intervening 15 years, money time and effort have been expended to conserve the lesser prairie chicken.[66] If these efforts, which rely on the expert agency's recommendations, cannot be expected to succeed, then it brings into question the expertise the FWS brings to the discussion.

[65] http://www.wafwa.org/html/prairie_chicken.shtml

[66] See Appendix 7

Chart of Voluntary Conservation Actions[67]

VOLUNTARY CONSERVATION ACTIONS[68]
• Each State has prepared and/or participated in at least one conservation plan • Each State has prepared and/or participated preparation of at least one management plan • Each State has prepared and/or participated in development of at least one recovery plan • The five states participate in an Interstate Working Group to collaborate on conservation activities • Interstate Range Wide conservation plan • The states either individually and through the interagency group have funded or carried out research geared toward improving conservation techniques • All the affected states have a habitat restoration program • Several States have prepared guidelines and best management practices for natural resource development and some for the protection of the LPC specifically. • Each State has dedicated funding and multiple financial incentive programs to encourage habitat restoration on private lands, this can be used for lesser prairie chickens and other species as necessary.

Wind Industry Conservation Actions[69]

The FWS indicates wind power development is a primary concern with respect to the lesser prairie chicken. Their concern is based on the assumption that avoidance of vertical structures results in some as-yet unidentified threat to the species.[70] Because of the explicit statements in the proposed rule regarding concerns related to expansion of wind power and the lack of regulation related to that expansion, we examined regulation and voluntary conservation actions related to wind power explicitly.

[67] See Appendix 5 for a detailed list of voluntary conservation actions.
[68] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[69] See Appendix 7
[70] The studies cited found lesser prairie chickens avoided vertical structures, but did not identify any adverse effects resulting from that avoidance.

We identified a significant commitment to conservation in general by the industry. In a letter to the Secretary of the Department of Interior, the American Wind Energy Association expresses that the " final version of the Guidelines on March 23rd, 2012 was the culmination of over 5 years of a painstaking, but collaborative, process between representatives of the wind energy industry" and regulatory agencies.[71] This dedication to the process should provide a high level of certainty with regarding to this FCE.

Below is a summary chart of activities.[72]

Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.
Wind Energy Mapping Tools	Playa Maps for Colorado, Kansas, Nebraska, New Mexico, Oklahoma and Texas by county.
Southern Plains Wind and Wildlife Planner	Southern Plains Wind and Wildlife Planner for a set of species and ecosystems in Colorado and New Mexico.
Southern Great Plains Crucial Habitat Assessment Tool for Lesser Prairie-Chicken	Led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[73]
North American Landbird Conservation Plan-co-authored by the FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [74]

[71] http://awea.org/newsroom/pressreleases/upload/AWEA-and-Member-Company-Letter-to-Salazar-re-Wind-Energy-Guidelines-May-15-2012.pdf
[72] See Appendix 7
[73] http://kars.ku.edu/geodata/maps/sgpchat/
[74] http://www.partnersinflight.org/cont_plan/#Access

FWS Wind Energy Guidelines	FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [75] FWS in its guidance document states that it is issuing the guidelines pursuant to its authority under the ESA. FWS claims authority given its mandate to identify and protect endangered and threatened species and to "provide means to conserve" their ecosystems. FWS cites the ESA as the authority that directs federal agencies to "utilize their authorities to conserve listed species" and states that FWS and other federal agencies are encouraged to "do the same with respect to 'candidate' species". [76] Industry Adoption of Wind Energy Guidelines which address comprehensive wildlife and habitat considerations and best management practices. :
FWS	Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.
BLM	Interim Wind Energy Development Policy The Interim Wind Energy Development Policy (IM 2003-020), was issued October 16, 2002. This document ensures application of the BLM Wind Energy Development policies and best management practices (BMPs) in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on BLM managed public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan must comply with the IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[77]

[75] http://www.fws.gov/windenergy/docs/WEG_final.pdf
[76] Id.
[77] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf

BLM	Wind Energy Development Policy This IM further clarifies the BLM Wind Energy Development policies and best management practices (BMPs) provided in the Wind Energy Development Programmatic Environmental Impact Statement (EIS) of June 2005. Issuance of this IM ensures BLM-wide consistency in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on the public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan will comply with policy provided in this IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[78]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are developing best management practices (BMPs) that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy from renewable sources by 2020 in a wildlife friendly manner.[79]
Recommendations To Minimize Adverse Impacts Of Wind Energy Development On Wildlife 2012	There is no statewide permitting authority in New Mexico with regard to wind development. However, the state has developed guidelines for use by wind project developers, their consultants, local government and the general public. New Mexico Department of Game and Fish offers guidance for projects and guidelines in their Habitat Handbook.[80]
Multi-State	On April 22, 2009 Interior Secretary Salazar announced $57.8

[78] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf
[79] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml
[80] http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP. The planning proposal lands a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[81]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[82]

[81] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html
[82] http://kec.kansas.gov/reports/wind_siting_handbook.pdf

FERC Transmission Line Regulation	The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.[83]	
County Protections		
Union, New Mexico[84]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [85]
San Miguel, New Mexico	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [86]
Bent, Colorado	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.

[83] http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission.pdf
[84] http://nm-unioncounty.civiccities.com/directory.aspx
[85] http://www.unionnm.us/DocumentCenter/Home/View/9
[86] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf

CONCLUSION

The FWS has:

- limited or incomplete data on historic habitat loss,
- limited or incomplete data on the habitat requirements of the lesser prairie chicken and
- limited or incomplete data on the available habitat for the lesser prairie chicken.

The best available data find increasing populations across the range of the greater prairie chicken and low extinction probabilities. Genetic analysis demonstrates no loss in genetic diversity and no evidence of genetic isolation.

A review of the state and local efforts to conserve the lesser prairie chicken demonstrates robust statutory authority for protection of habitat on public and private land as well as legislative commitment to conservation of wildlife species and their habitat at the state level. These authorities exist whether the species is listed or even remains a candidate.

Voluntary conservation efforts are numerous and widespread, and range from individual land owners to developers of wind energy farms. These efforts are often developed in conjunction with the FWS and/or are consistent with the direction given in the publications sponsored or funded by the FWS which identify effective conservation measures. The effectiveness of these measures is provided support by the fact that increasing population numbers coincide with the advent of heightened awareness of the population declines of the lesser prairie chicken due to its identification as a 'candidate species' under the ESA.

There are no data that support the FWS assertion that habitat fragmentation and decline with related effects are threatening the lesser prairie chicken. There are data that demonstrate population growth, low extinction probabilities, and genetic robustness.

The FWS has failed to meet the requirements of the Act that listing be based solely on data showing that the species is adversely affected by one or more of the five factors enumerated inthe Act.

APPENDIX 1

The 84% reduction in the area historically occupied by lesser prairie chickens cited by the FWS is little more than a guess with an unknown error surrounding it. The FWS admits that "Very little information is available regarding the size of lesser prairie chicken populations prior to 1900." Robb and Schroeder (2005) stated: "Few records exist to verify the historical distribution of lesser prairie-chickens prior to European settlement because the geographic region that is generally regarded as historical range (southeastern Colorado, southwestern Kansas, western Oklahoma, northern Texas, and eastern New Mexico) was largely unexplored during the 1800s (Aldrich and Duvall 1955, Sharpe 1968). The first expeditions to explore Colorado tended to bypass the southeastern part of the state (Rockwell 1908), and it was not until 1914 that lesser prairie-chickens were recorded officially from Baca County (Lincoln 1918)."

As an example of the potential misuse of the uncertainty of the historical data, USFW wrote that "Litton (1978, p. 1) suggested that as many as two million birds may have occurred in Texas alone prior to 1900." Litton's paper was a non-peer reviewed article, and what Litton actually wrote was: "Records indicate there may have been as many as two million lesser prairie chickens in Texas prior to 1900, before exploitation by early-day sportsmen and market hunters". However, there is no reference by Litton as to what these "records" consisted of, and therefore it is not useful to repeat this number, as it is not verifiable and fails to meet the data standard of the ESA.

Even more potentially confounding is the apparent change in behavior of lesser prairie chickens. Jackson and DeArment (1963) stated that much of the range in southern Texas where maps show the bird as historically present were likely temporary wintering grounds; today the lesser prairie chicken is thought to be non-migratory. What percentage of this putative historic range includes temporary wintering or resting grounds? This lack of data makes it impossible to realistically reconstruct lesser prairie chicken behavior or range of over 100 years ago and extrapolate it to existing conditions.

APPENDIX 2

An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens

A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group

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Issue: Each state monitors spring populations of lesser prairie-chickens with similar (but not exact) methods to detect and count birds on leks. Additionally, sampling effort has varied overtime with generally more extensive efforts in recent years. Thus far, comparison between or among states has not been possible because of these facts.

Need: A unifying analytic method for assessing trend of lesser prairie chicken populations among states and geographic regions is needed to evaluate past and future population performance as a result of conservation actions or changes in land use.

A proposed method: There have been 3 range-wide assessments of greater sage-grouse population dynamics and persistence (Connelly et al. 2004, WAFWA 2008, Garton et al. 2010), and similar issues of data consistency and variation in sampling effort were common to all three studies. Garton et al. (2010) is the only peer reviewed published article from the three, and was largely based on the analytic methods in Connelly et al (2004). Using population reconstruction from annual counts at leks, density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) models of population growth can be fit and population parameters of growth ($\square_t$), population equilibrium, and quasi-extinction probabilities can be estimated.

In this example, data were pooled by 4 geographic regions, sand sagebrush (CO, KS), CRP-shortgrass prairie (KS), mixed grass prairie (SE KS, OK, TX-Panhandle), and shinnery oak (NM, TX west) in which to estimate annual rates of change ($\square_t$), average growth rate (trend from 1997-2011), variation of ($\square_t$), quasi-extinction probability (population drops to 25% of equilibrium), and population equilibrium. Data across all regions was pooled to assess trend and estimate population parameters for the entire lesser prairie chicken range. Finally, concern has been generated regarding declines in populations in 2012. To address this concern, a worked example assuming a 50% decline (2012 trends have not been finalized yet) in trend rangewide occurred is provided to demonstrate what affect it may have on the entire range.

Lesser prairie chicken lek counts reported by individual states were summarized within ecologic regions and used to reconstruct an index to the historical abundance of the population within each zone. We treated the number of lesser prairie chicken counted

at leks in the final year as an index to the minimum number of lesser prairie chicken attending leks. Lek counts in each year were a cluster sample of lesser prairie chicken and thus treated by standard finite population sampling procedures (Scheafer et al. 1996: 297).

Sampling effort devoted to counting leks has varied enormously from year to year and grown appreciably in the last 5 years. To standardize estimates and remove bias due to variable sample sizes we treated the number of lesser prairie chickens counted in the initial count (or another base year if final year counts were inadequate) as the standard for projecting later counts by applying a ratio estimator (Scheafer et al. 1996: 200) to estimate the finite rate of change (λ_t) for the population between successive years as follows. Beginning with the initial year of a route (1997 or more recent), lesser prairie chicken counted along each route censused in both 1997 and 1998 were treated as cluster samples of individual lesser prairie chickens in successive years. The ratio of lesser prairie chickens counted in a pair of successive years estimates the finite rate of change at each route in that one year interval (λ_t). These ratios were combined across routes within a region for each year to estimate the finite rate of change for the entire population within a zone to estimate the finite rate of change for that management zone between successive years (e.g. 1997 to 1998):

$$\lambda(t) = \frac{\sum_{i=1}^{n} M_i(t+1)}{\sum_{i=1}^{n} M_i(t)}$$, where $M_i(t)$ = number of LPEC counted along route *i* in year *t*,

across *n* routes counted in both years *t* and *t+1*,

Because methodologies were not exact, an average λ_t was calculated among routes and states for each region. Unlike previous methods, that reconstructed populations from the penultimate year backwards, in this method the index to population size was projected forward from 1997 to assess trend since LESSER PRAIRIE CHICKEN were classified as a candidate as a threatened or endangered species. This approach does not affect the rates of change or persistence estimates, but provides a baseline more meaningful to the conservation question at hand. Because population sizes were not well described in 1997, and the method is based on proportional changes of ratios, all trends were assessed as a percentage of the 1997 index which was set to 100% (See Connelly et al. 2004). The index to population size for subsequent years was then calculated by taking the number of LESSER PRAIRIE CHICKENs counted in the initial year (1997) as a baseline estimate of population size within a region and projecting the next year's minimum LESSER PRAIRIE CHICKEN abundance by multiplying the 1997 abundance by the ratio estimator of the finite rate of change from 1997 to 1998 (e.g. finite rate of change of 0.81 between 1998 and 1999 suggested that the 19% fewer

LESSER PRAIRIE CHICKEN were counted at leks in 2000 than in 1999). This process was repeated for the change from 2000 to 2001 (finite rate of change of 1.015) yielding a breeding population index for a given zone in 2001 and so on up to 2011. Repeating this process for each management zone yielded a population index for each zone stretching from 1997 to 2011 for populations in all regions. These population indices provided the basis for all further analyses and modeling.

Fitting population growth models

Using the time series of population indices for each region, 2 stochastic population growth models were fit including: (1) exponential growth with process error (EGPE, Dennis et al. 1991), (2) exponential growth state space (EGSS, Staples et al. 2004) which incorporates both process and sampling error, and most importantly allows for the parsing of these error rates for more precise estimates of population persistence.

Results:

CRP-shortgrass.—There were 3 routes established to monitor trends of LESSER PRAIRIE CHICKEN in the CRP grasslands north of the Arkansas River in Kansas beginning in 2000. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 4.4% annually (Figure 1A; Table 1). The equilibrium of a density dependent population was approximately 99% of the baseline in 2000, and the probability of extinction (declining to 25% of equilibrium) was 2%.

Mixed-grass prairie.– There were 6 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS, OK, and TX, 2 of which began in 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 7.0% annually (Figure 1B; Table 1). The equilibrium of a density dependent population was approximately 229% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was <0.0001%.

Sand sagebrush prairie.– There were 7 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS and CO both of which began prior to 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 2.0% annually (Figure 1C; Table 1). The equilibrium of a density dependent population was approximately 183% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 48%.

Sand shinnery oak.– There were 29 routes to monitor LESSER PRAIRIE CHICKEN in shinnery oak habitat of NM and TX. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 5.1% annually (Figure 1D; Table 1). The equilibrium of a density dependent population was approximately 196% of the baseline

in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide.– There were 45 routes to monitor LESSER PRAIRIE CHICKEN across the range. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 10.6% annually (Figure 1E; Table 1). The equilibrium of a density dependent population was approximately 276% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide 2012.–Assuming a 50% decline in trend across the range, the 10-yr average annual finite rate of population change (λ_t) indicated population growth of 6.4% annually (Figure 1F; Table 1). The equilibrium of a density dependent population was approximately 262% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 3.3%.

Summary.– Regionally populations continue to show significant signs of population growth, however, because of low rates of growth and large variation in estimates of lambda, sand sagebrush habitat (14% of species distribution) was one region that indicated the greatest likelihood of reaching 25% or less of the equilibrium population size. Thus, 86% of the species' distribution exhibits population growth (>2% annually) with low probability of extinction. Range-wide analysis indicates the species as whole has grown at a rate of 10.6% since 1997 with low probability of extinction. Lastly, if the range-wide population trends did decrease by as much as 50% in 2012, populations are projected to be 73% greater than in 1997, and likelihood of population persistence remains high (>96%).

A peripheral examination of population trends prior to the 1997 candidate status recommendation, indicates that on average populations from 1980-1997 were declining at an average annual rate of 3.7%, post candidate status population growth was 6.9% increase annually.

Further refinements: There are 3 recommendations to make this modeling approach more rigorous with the existing data: 1) to analyze the data on a lek by lek analysis rather than at the route or county scale, 2) where longer term data exist develop models for longer time periods that specifically identify significant transitions in trend (upwards or downwards), to better understand temporal factors that may be affecting different historic periods and changes in land use, and 3) once population estimates are available from aerial surveys in 2012 then trend analyses and PVA can be conducted relative to population size and trends

beginning in 2012 and projecting backwards. This approach would be almost identical to that of greater sage-grouse PVA conducted by Garton et al. (2010).

Literature cited.

Connelly, J. W., S. T. Knick, M. A. Schroeder, and S. J. Stiver. 2004. Conservation assessment of greater sage-grouse and their habitats. Western Association of Fish and Wildlife Agencies. Cheyenne, Wyoming.

Garton, E. O., J. W. Connelly, C. A. Hagen, J. S. Horne, A. Moser, and M. A. Schroeder. 2010. Greater Sage-Grouse population dynamics and probability of persistence. Studies in Avian Biology 38: 293-382.

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Figures

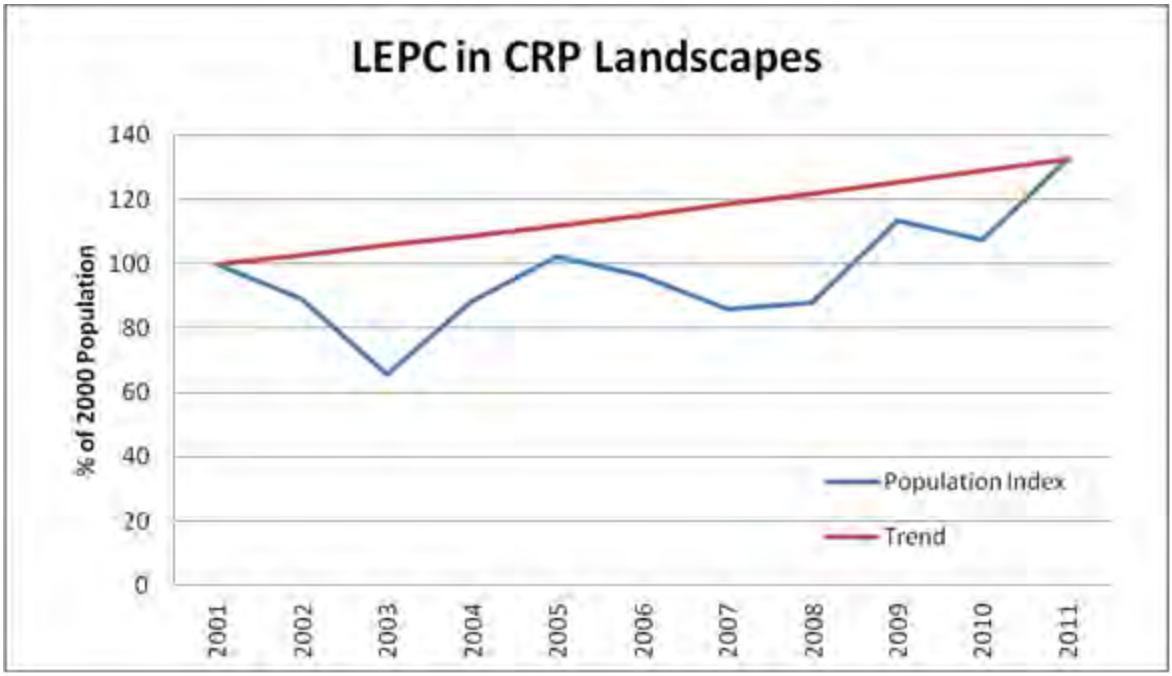

Figure 1A. Lesser prairie-population index for CRP Landscapes from 2001-2011, quantified as a percentage of the 2001 baseline population.

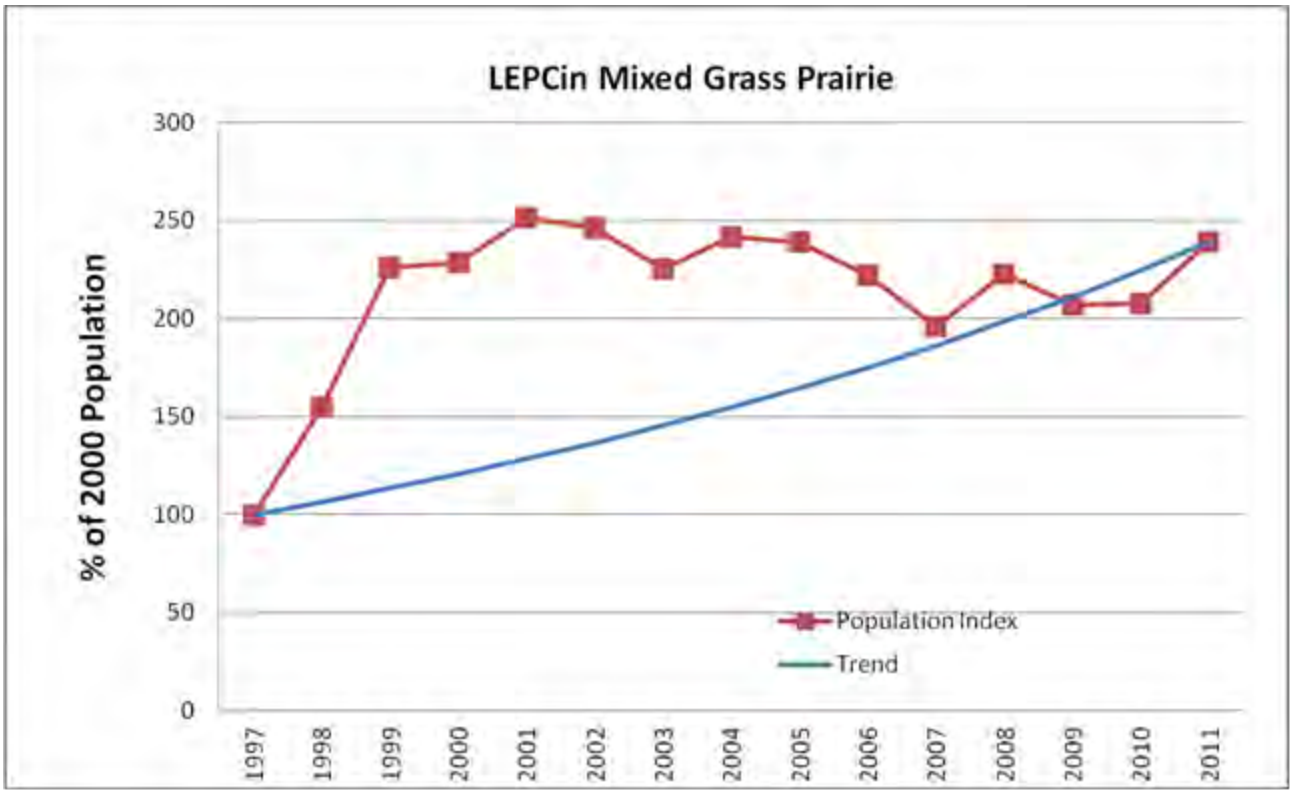

Figure 1B. Lesser prairie-chicken population index for mixed grass-prairie landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

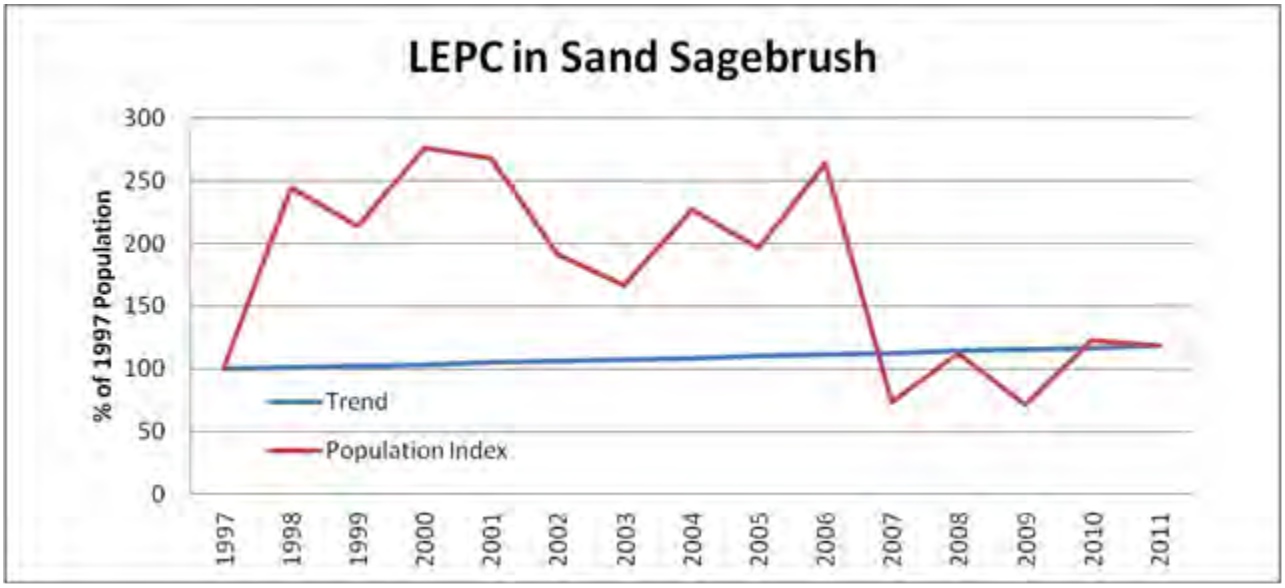

Figure 1C. Lesser prairie-chicken population index for sand sagebrush landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

Figure 1D. Lesser prairie-chicken population index for sand shinnery oak landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

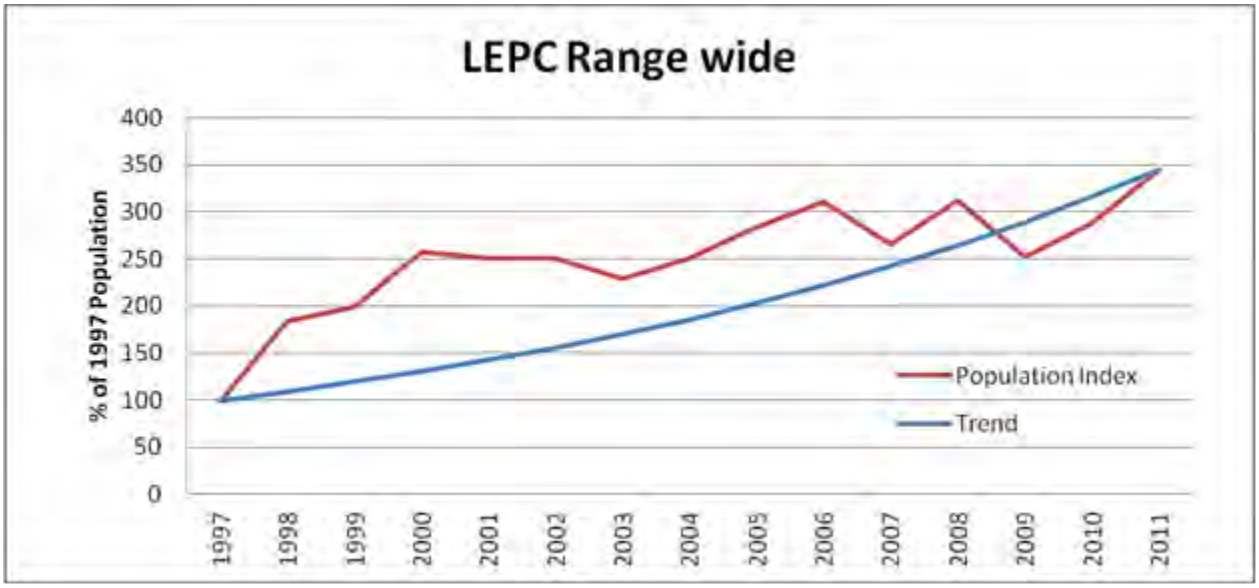

Figure 1E. Lesser prairie-chicken Range-wide population index from 1997-2011, quantified as a percentage of the 1997 baseline population.

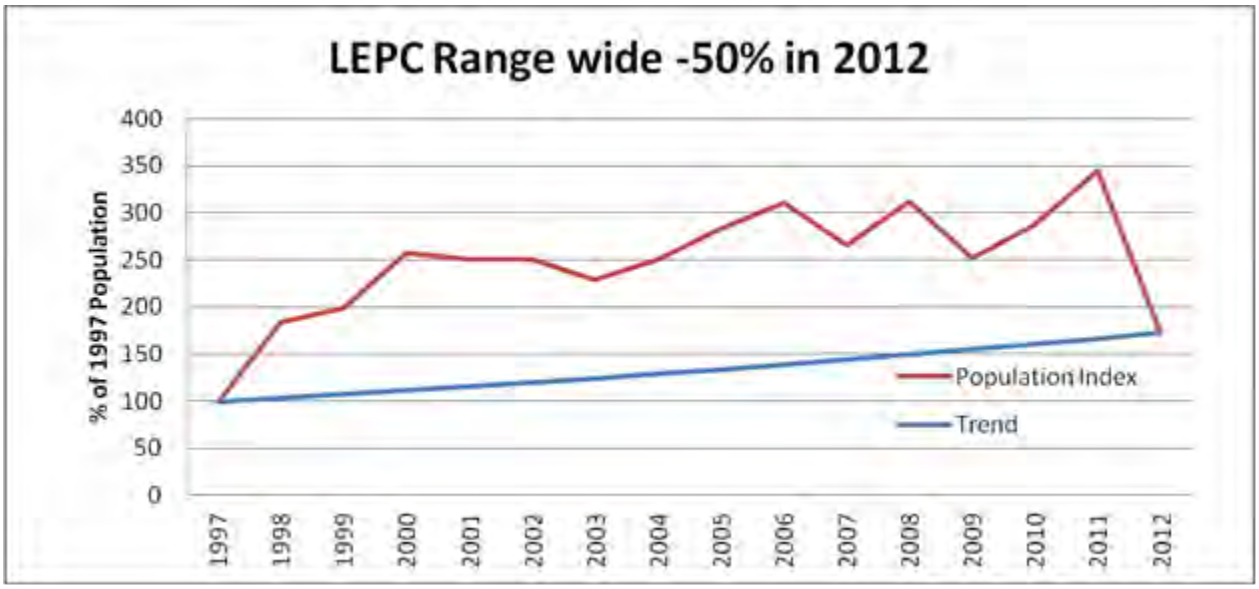

Figure 1F. Hypothetical lesser prairie-chicken Range-wide population index from 1997-2012 assuming a 50% decline from 2011-2012, quantified as a percentage of the 1997 baseline population.

Table 1. Parameter estimates from density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) population models for Lesser Prairie-Chickens in 4 regional areas 1997-2011. Range-wide estimates are provided for the same time period, and a hypothetical example demonstrating what a 50% decline in 2012 might forecast for the species. Where, r = instantaneous rate of growth adjusted for sampling variation, se(r) standard error of r, r' = unadjusted instantaneous rate of growth, lambda = finite rate of population growth (exp(r)), nq = population equilibrium under density dependent model, ne(nu) = quasi-extinction threshold (25% of of nq), pi = probability of population reaching ne(nu), theta = time in which ne(nu) would be reached if threshold was reached, and %EOR = percentage of the Estimated Occupied Range these trend results represent.

Region	r	se(r)	r'	lambda	nq	ne(nu)	pi	theta	%EOR
Mixed	0.074	0.005	0.101	1.077	229	57	0.000	18.8	44%
Sage	0.020	0.077	0.022	1.020	183	46	0.482	68.5	14%
Oak	0.051	0.022	0.062	1.052	196	49	0.002	27.2	19%
CRP	0.044	0.032	0.059	1.045	99	25	0.021	31.2	24%
Range	0.106	0.038	0.114	1.112	276	69	0.000	13.0	100%
2012**	0.064	0.052	0.068	1.066	262	66	0.033	21.8	100%

APPENDIX 3

An evaluation of the historic range changes that have occurred in the Lesser Prairie Chicken since the Last Glacial Maximum.

Species have niches in ecological time and space that can be defined in various ways. Currently, a commonly accepted scientific approach is to use a technique called Ecological Niche Modeling (ENM) or to others, Species Distribution Models (SDM). Today, these techniques are considered part of biodiversity informatics.j

The approach involves taking a set of georeferenced locality points for a species, and then using a computer algorithm to build a model that predicts these points using current information on climate, such as temperature, rainfall, or degree of seasonality. The model then generates a predicted distribution of the species that can be tested by seeing how well known locality points (that were not part of the original model) are predicted.

One can then predict where the niche space for the species occurred at different points in time. Currently, readily available climate data exist for the Last Glacial Maximum (LGM; 21,000 years before present [ybp]) and the Last Interglacial (120,000 ybp). This gives a view of the species' range during the maximum southward extent of the last major north temperate glacier, and shows how and where the species was displaced to (if displaced at all).

We obtained a georeferenced list of 110 occurrences for the lesser prairie chicken (Table 1) from an online source of museum and observation records (Ornis-2). These span many years and give an indication of where the species occurred historically (since museum specimens started being preserved). We used the program Maxent to model distributions. After a preliminary analysis involving 10 independent runs, we selected climate layers that provided over 5% to the model (

The predicted current distribution of the lesser prairie chicken (Fig. 1) agrees well with known and recent historical distribution, with the exclusion of what is considered the southern part of the range in Texas. This might be because, as discussed elsewhere, it was mainly a non-breeding area. Locality points omitted from the model were predicted with 93% accuracy suggesting that the model performs very well.

The contribution of the climate variables to the model were: Mean Temperature of Driest Quarter (43%), Precipitation of Warmest Quarter (16.5%), Precipitation Seasonality (Coefficient of Variation) (15.9%), Mean Temperature of Warmest Quarter (13.4%), Temperature Seasonality (8.7%), and Isothermality (BIO2/BIO7) (2.5%). It appears that

lesser prairie chickens are considerably influenced by the temperature at the driest part of the year.

We used the model to predict the distribution of the lesser prairie chicken at the LGM, assuming that the niche has not evolved and that the same environmental parameters were present at both time periods. As might be expected during a time of southerly range displacements owing to glacial advances, the range of the species was shifted south and west (Fig. 1, blue). It also can be seen that the predicted range was considerably more fragmented and reduced in areal extent. This suggests that lesser prairie chickens have survived extended periods of range fragmentation.

Table 1. Longitude (first number) and latitude (second number) for 110 localities for lesser prairie chickens obtained from Ornis2 (http://ornis2.ornisnet.org/).

-104.3247985,38.4328835; -98.32064,38.49836; -100.35,37.283; -100.2670064,37.0826239; -101.3473741,38.4817103; -100.3709181,37.2370813; -96.5981521,38.3051704; -100.7333333,37.85; -100.986,37.88333333; -100.0233333,37.855; -101.05,37.81666667; -100.05,37.85; -100.75,37.85; -100.0166667,37.85; -100.7666667,37.86666667; -100.8166667,37.86666667; -100.7666667,37.88333333; -101.0833333,37.88333333; -101.9833333,37.9; -101.9666667,37.9; -100.0666667,37.83333333; -100.0666667,37.86666667; -100.7333333,37.83333333; -99.5334,38.1087; -100.2358583,37.1402; -100.570589,37.1033548; -100.4666672,37.25; -100.0237999,37.7580571; -100.4662,37.09608; -100.8722222,37.97166667; -100.9888889,37.79444444; -101.1336803,37.8512936; -101.04,37.84; -101.05,37.844; -100.8654953,37.974823; -100.1661233,37.10322; -102.58177,42.06867; -100.407486,40.0407579; -103.18355,33.62926; -103.3396721,33.6428738; -103.0999985,35.34999847; -104.2283,32.4206; -104.2667,32.45; -103.183052,33.629166; -103.2804947,33.543606; -103.1650051,33.6407777; -103.59829,35.719908; -104.2283325,32.42055511; -103.2659912,33.5871673; -103.1835594,33.6292667; -104.2448044,32.4501; -104.2456627,32.4522729; -106.8189278,36.2283497; -103.1877136,33.6512083; -103.3049766,33.6428738; -103.4949646,34.0890633; -104.4119186,33.602314; -103.3401489,33.644349; -103.2234191,33.6420625; -103.1925201,33.5293753; -103.760376,35.1201894; -104.6245622,32.4628466; -103.3917154,33.6437204; -103.14,33.6565; -103.1536667,33.70766667; -103.1095833,33.69303333; -103.144,33.71993333; -103.1740667,33.6883; -106.0253796,34.1656598; -103.1451667,33.64996667; -103.1391667,33.695685; -103.1406,33.70101667; -103.1105667,33.68353333; -103.1404333,33.64923333; -103.172,33.69523333; -103.1381,33.65913333; -103.1395,33.65883333; -103.1497833,33.70505; -103.1715167,33.69496667; -103.312382,33.6428738; -103.1148167,33.68505; -103.1274667,33.68211667; -103.05038,33.75831; -103.12661,33.85024; -103.12695,33.85074; -103.27935,33.62703333; -103.1144444,33.68583333; -103.1451667,33.66856667; -103.6326599,34.3133827; -99.77119,36.02616; -99.77119,35.9899; -99.67005,36.0529; -99.765129,35.8848778; -99.77119,36.03342; 9628.12,3649.21; -96.6503334,36.9375441; -99.65741,36.04264; -99.6818,36.00441; -99.64477,36.03238; -99.66392,36.00441; -99.64604,35.85937; -99.77119,35.93189; -99.7792053,36.2254423; -99.2710876,36.433437; -98.7157861,35.3080899; -98.4933319,29.4238892; -100.2709541,35.4453278; -101.6632921,30.6870249; -100.193,36.071; -96.262207,43.084937;

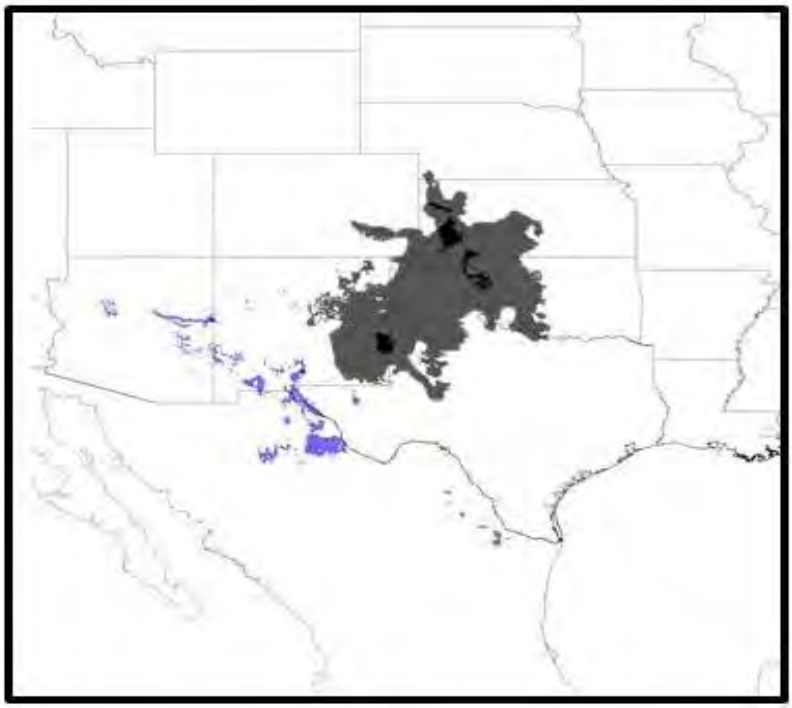

Figure 1. Predicted distribution of lesser prairie chicken at present (black, gray) and at Last Glacial Maximum (blue). For present distribution, black indicates area of highest predicted occurrence.

APPENDIX 4-- FEDERAL PROTECTIONS

Agency	Law/Mgt. Directive/Agreement	ESA Provisions
ALL	**National Environmental Policy Act of 1969 (NEPA) [(42 U.S.C. 4332(2)(C)** The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. By regulation, a Biological Assessment is prepared for "major construction activities". Under NEPA, those considered to be Federal actions significantly affecting the quality of the human environment as referred to meet NEPA requirements federal agencies prepare a detailed statement known as an Environmental Impact Statement (EIS). EPA reviews and comments on EISs prepared by other federal agencies, maintains a national filing system for all EISs, and assures that its own actions comply with NEPA.	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Take protection also provides limited habitat protection if the habitat alteration results in death of an individual. • In the case of the lesser prairie chicken, there no habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Protection of critical habitat is limited to habitat affected by a federal agency action,
	Federal Land Policy and Management Act of 1976", Sec. 101. [43 U.S.C. 1701 (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest; **…** (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat which are also affected by federal agency actions (moot, as

	atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;…(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;…[87]	the FWS is not designating for the lesser prairie chicken) • In Reviewing the activities of federal agencies, ESA limitations on take are only that it may not result in jeopardizing the continued existence of listed species, • IN the case of lesser prairie chicken, take is prohibited under state anti-poaching laws. • The ESA does not require comprehensive management plans.
ALL	**Executive Order 13112, February 3, 1999, "Invasive Species"** **Section 2. Federal Agency Duties** (a) Each Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, (1) identify such actions;(2) subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv)	Executive Order 13112 requires that all federal agencies prevent degradation of all habitat (not only lesser prairie chicken habitat) by ensuring that invasive species are prevented and/or controlled. This EO requires restoration of habitat. • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for

[87] http://www.blm.gov/flpma/FLPMA.pdf

	provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and (3) not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has pre-scribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions. (b) Federal agencies shall pursue the duties set forth in this section in consultation with the Invasive Species Council, consistent with the Invasive Species Management Plan and in cooperation with stakeholders, as appropriate, and, as approved by the Department of State, when Federal agencies are working with international organizations and foreign nations.	the lesser prairie chicken) • In reviewing the activities of federal agencies, the limitations on take are only that it may not result in jeopardizing the continued existence of listed species,
BLM and FS	**Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And**	No additional protection under the ESA. The MOU provides for "voluntary" consultation on candidate species, such as a lesser prairie chicken. The primary functions of the ESA

	Wildlife Service[88] This MOA establishes interagency commitment to and guidance for the following: (1) Early interagency communication, coordination, consultation, and conferencing on candidate, proposed, and listed species to take place prior to and during plan/program proposal development… The scope of this MOA includes Land and Resource Management Plans prepared by the FS pursuant to the National Forest Management Act of 1976 [16 U.S.C. 1601-1614] and Resource Management Plans and Management Framework Plans prepared by the BLM pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701-1784]. The MOA may also be applied to other programmatic level proposals. These may include, but are not limited to, a recreation or grazing program, riparian restoration strategy, multi-year forest management activities, recovery strategy or other proposals. The Service provides this information related to "programattic biological opinions": Developing a programmatic biological opinion. Once the biological assessment is completed, a determination on the need for formal consultation will be made by the Service. Formal consultation is required when a Federal action is likely to adversely affect listed species. When it is determined that an action may affect, but is not likely to adversely affect listed	are to prohibit "take" of the listed species (which is addressed by each States wildlife code) and the "consultation" on federal lands. BLM Management Manual already prescribes such protections for 'special status species' of which the lesser Prairie Chicken is one. Further, under the MOA, consultation has already occurred for the federal lands under BLM management. The ESA provides only for protection for listed species by : • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Does not require management plans • The ESA limits protection to listed species, their designated critical habitat where a federal

88 http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

	species, the consultation between the action agency and the Service may be handled informally (see 50 CFR §402.11 for further information on the informal or early consultation process). If formal consultation is necessary, a programmatic biological opinion will be developed by the Service in consultation with the Agencies. Attachment 3 gives a template for a programmatic biological opinion. This programmatic biological opinion will: (1) describe all of the potential projects; (2) contain suggested avoidance/minimization measures, placed in the project description, if appropriate; (3) describe the status and environmental baseline of listed, proposed, and candidate species in the project area; (4) reiterate potential effects of the project actions as evaluated in the biological assessment; and, (5) possibly describe limits to the amount of project impacts, take, and habitat affected and/or lost. A jeopardy analysis will be done to determine whether the programmatic process should proceed (see jeopardy discussion below).[89]	action is affecting them. • In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being designated. Given the limitations of the ESA and the voluntary actions and agreements by the agencies primarily involved in the activities the rule finds are "threatening" the lesser prairie chicken, the ESA provides no additional protections to the species.
BLM	**Special Status Species Management-Handbook 6840[90]** The stated purpose of BLM Handbook 6840 ("Special Status Species Management Handbook" is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special	The ESA requires that the FWS be consulted on actions affecting listed species on federal lands. • The ESA limits protection to listed species, their

[89] http://www.fws.gov/endangered/esa-library/pdf/pages7-18.pdf

[90] http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	status species are: (1) species listed or proposed for listing under the Endangered Species Act (ESA), and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s). All Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.[91] In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA. Any obligation to conserve proposed critical habitat under this section is terminated at the time the proposal becomes final or the habitat is no longer proposed for listing. All federally designated candidate species, proposed species, and delisted species in the 5 years following their delisting shall be conserved as Bureau sensitive species. A. Designation of Bureau Sensitive Species. State Directors shall designate species within their respective States as	designated critical habitat where a federal action is affecting them. • Does not require management plans, . The BLM's Special Status Species Management Handbook outlines a policy that is much more inclusive and relates directly to species that are considered "sensitive" at a state level. Each of the states referenced in the proposed rule currently consider the lesser prairie chicken to be sensitive, thus, the current policy provides more protection than the ESA.

91 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	Bureau sensitive by using the following criteria. For species inhabiting multiple States, State Directors shall coordinate with one another in the designation of Bureau sensitive species so that species status is consistent across the species' range on BLM-administered lands, where appropriate.	
FERC	**Transmission Line Regulation** The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.	The proposed rule emphasizes the potential adverse effect of increased transmission as a result of transmission lines and implies that the proposed listing is the only protection available for lesser prairie chicken and their habitat. However, FERC requires consideration of wildlife and their habitat in considering siting and construction of these lines. In addition, because the permitting is undertaken by FERC, NEPA applies which would necessitate a full review of the effects on the lesser prairie chicken.
BLM, AFWA, WAFWA, FS	**Memorandum Of Understanding Among Association Of Fish And Wildlife Agencies (AFWA) And Western Association Of Fish And Wildlife Agencies (WAFWA) And U.S. Department Of Agriculture Forest Service (FS) And U.S. Department Of The Interior Bureau Of Land Management (BLM)** "The purpose of this Memorandum of Understanding (MOU) is to promote cooperative conservation of fish and	This MOU provides that these federal agencies will engage in cooperative activities for the benefit of wildlife, particularly priority wildlife impacted by energy development issues. We note this includes wind power. The ESA provides only for protection for listed species by reviewing the activities of federal agencies. The

	wildlife resources by facilitating communications and enhancing success in resolving issues related to energy development and its effect on fish, wildlife, and habitat."[92] The Parties' joint objectives are to: 1. Identify and define the key fish and wildlife habitat/energy development issues at the species, habitat, and wildlife community levels across state, administrative and district lines. 2. Develop communication systems to keep state fish and wildlife agencies, federal land management/permitting agencies, and the energy industry informed about and involved in programmatic issues related to maintenance and enhancement of fish, wildlife and habitat resources during energy development.	limitations on take are only that it may not result in jeopardizing the continued existence of the species • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Protection of critical habitat is limited to habitat affected by a federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA regulatory provisions do not provide for enhancement of wildlife or its habitat.
DOT	**Department Of Transportation, Federal Highway Administration, 23 CFR Part 777, Mitigation of Impacts to Wetlands and Natural Habitat** The Federal Highway Administration (FHWA) provides stewardship over the construction, maintenance and preservation of the Nation's highways, bridges and tunnels. FHWA also conducts research and provides technical assistance to state and local agencies in	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • In the case of the lesser prairie chicken, no

92 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/ib_attachments/2009.Par.99939.File.dat/IB2009-072_att1.pdf

	an effort to improve safety, mobility, and livability, and to encourage innovation.[93] This regulation was developed to "provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal aid projects funded pursuant to provisions of title 23, U.S. Code." … In considering projects under this section, the following requirements must be met: (a) The reasonableness of the public expenditure and extent of Federal participation with title 23, U.S. Code, funds shall be directly related to: (1) The importance of the impacted wetlands and natural habitats; (2) The extent of highway impacts on the wetlands and natural habitats, as determined through an appropriate, interdisciplinary, impact assessment; and (3) Actions necessary to comply with the Clean Water Act, Section 404, the Endangered Species Act of 1973, and other relevant Federal statutes. (b) Evaluation of the importance of the impacted wetlands and natural habitats shall consider: (1) Wetland and natural habitat functional capacity; (2) Relative importance of these functions to the total wetland or natural habitat resource of the area; (3) Other factors such as uniqueness, esthetics, or cultural values; and (4) Input from the appropriate resource management agencies through interagency coordination. (c) A	habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Does not require management plans.

9393 https://www.fhwa.dot.gov/

	determination of the highway impact should focus on both the shortand long-term affects of the project on wetland or natural habitat functional capacity, consistent with 40 CFR part 1500, 40 CFR 1502.16, 33 CFR 320.4, and the FHWA's environmental compliance regulations, found at 23 CFR part 771.[94]	
BLM	**2008 Special Status Species Resource Management Plan Amendment (2008 RMPA)** Address land-use decisions affecting special status species, primarily the habitats of lesser prairie chickens and sand dune lizards. Established the Lesser Prairie-Chicken Area of Critical Environmental Concern (ACEC).[95] [96]	The Special Status Species Resource Management Plan Amendment by BLM identifies the requirement that BLM consult with the FWS on activities that may affect wildlife even if the species is not listed.
	2008 Designation of Area of Critical Environmental Concern[97] Area of Critical of Environmental Concern (ACEC) are special management areas designated by BLM to protect significant historic, cultural, or scenic values; fish and wildlife resources; natural process or systems; and/or natural hazards that:	• Any ESA habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken)

[94] http://www.gpo.gov/fdsys/pkg/FR-2000-12-29/pdf/00-33194.pdf#page=12
[95] http://www.blm.gov/nm/st/en/fo/Roswell_Field_Office/special_status_species.html
[96] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf
[97] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf

	• have more than locally significant qualities which give it special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource; • have qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change; • has been recognized as warranting protection in order to satisfy national priority concerns or to carry out the mandates of Federal Land Management and Practices Act (FLMPA); • has qualities which warrant highlighting in order to satisfy public or management concerns about safety and public welfare; and/or • poses a significant threat to human life and safety or to property.	
BLM	**Managing Structures for the Safety of Sage-grouse, Sharp-tailed grouse, and Lesser Prairie-chicken**[98] This Instruction Memorandum (IM) provides guidance to effectively address sage-grouse, sharp-tailed grouse, and lesser prairie-chicken collisions with fences and other structures on public land.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all lands managed by BLM.

98 http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-022.html

FWS	**FWS Wind Energy Guidelines** FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [99] Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all affected lands.
BLM	**Reclamation and Best Management Practices Best Management Practices "BMP" for the Lesser Prairie Chicken** In "Appendix 5 Reclamation And Best Management Practices" to BLM's 2008 RMPA, BLM states that it will "incorporate appropriate Best Management Practices (BMPs" for the lesser prairie chicken " into proposed Applications for Permit to Drill (APDs) and associated rights-of-way (ROW) approvals after appropriate National Environmental Policy Act (NEPA) evaluation." [100]	

[99] http://www.fws.gov/windenergy/docs/WEG_final.pdf

[100] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34869.File.dat/pdf_rmpa_final_document_11_07_app_5.pdf

APPENDIX 5-- STATE AND LOCAL PROTECTIONS

COLORADO

Applicable State Laws	Comparison to Applicable ESA provisions
WILDLIFE Colorado statutes provide intent to protect species and will require that "…, there shall be a continuous operation of planning, acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities."[101] There is no limitation on the wildlife or species this applies to.	The ESA provides for • No planning, acquisition or development of wildlife habitats • Protects only listed species and designated critical habitat. • Limits activities and protections to listed species and designated critical habitat.
LAND USE, CONSERVATION **Colorado has vested its local government with authority to regulate land use to consider wildlife habitat and species.** … Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;"[102]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
LOCAL GOVERNMENT, PLANNING AND	The ESA provides no authority to undertake such planning, aquisition,

[101] (Colorado Revised Statutes, Title 33, Article 1 http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[102] C.R.S. 29-20-104 (2012), Title 29. Government - Local, Land Use Control And Conservation, Article 20.Local Government Regulation of Land Use, Part 1. Local Government Land Use Control Enabling Act, 29-20-104. Powers of local governments. ... for local governments to regulate land use to protect wildlife habitat and wildlife species. Drostev. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003). http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

ZONING **Colorado law establishes a Commission with specific direction to consider protected species in municipality development.** (1) It is the duty of the commission to make and adopt a master plan for the physical development of the municipality. When a commission decides to adopt a master plan, the commission shall conduct public hearings, after notice of such public hearings …, prior to final adoption of a master plan …. Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall, after consideration of each of the following, where applicable or appropriate, show the commission's recommendations for the development of said municipality and outlying areas, including:… (II) The United States fish and wildlife service of the United States department of the interior and the parks and wildlife commission created in section 33-9-101, C.R.S., for locating areas inhabited by endangered or threatened species; [103]…	and management actions. Nor does the ESA require consultation on non-federal lands (absent a federal nexus).
WILDLIFE "(1) It is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors. It is further declared to be the policy of this state that there shall be provided a comprehensive program designed to offer the greatest possible variety of wildlife-related recreational opportunity to the people of this state and its visitors and that, to carry out such program and policy, there shall be a continuous operation of planning,	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a

[103] C.R.S. 30-28-106 (2012), Title 30. Government - County, County Planning And Building Codes, Article 28.County Planning And Building Codes, Part 1. County Planning, 30-28-106. Adoption of master plan

acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities. (2) All wildlife within this state not lawfully acquired and held by private ownership is declared to be the property of this state. Right, title, interest, acquisition, transfer, sale, importation, exportation, release, donation, or possession of wildlife is permitted only as provided in articles 1 to 6 of this title or in any rule of the parks and wildlife commission..[104]… Right to capture or kill exists only as permitted by statute."	federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. • Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE, ENDANGERED SPECIES **Colorado may protect species which do not qualify for federal ESA listing.** (1) On the basis of investigations of nongame wildlife provided for in section 33-2-104 and other available scientific and commercial data and after consultation with other state wildlife agencies, the Colorado water conservation board, the Colorado water and power development authority, water conservancy districts, and other water conservation districts of the state, and other water resource development agencies within the state, appropriate federal agencies, and other interested persons and organizations, the commission shall by regulation adopted pursuant to the procedures specified in sections 33-1-111 and 24-4-103, C.R.S., establish a list of those species and, where necessary, subspecies of wildlife indigenous to this state which are determined to be endangered or	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Colorado).

[104] C.R.S. 33-1-101 (2012), Title 33. Parks And Wildlife, Wildlife, Article 1.Wildlife - General Provisions, 33-1-101. Legislative declaration http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

threatened within this state, giving their common and scientific names by species and, where necessary, by subspecies…[105]	
WILDLIFE, ENDANGERED SPECIES, CONSERVATION (1) The division shall establish such programs including acquisition of land or aquatic habitat as are deemed necessary for management of nongame, endangered, or threatened wildlife. (2) In carrying out programs authorized by this section, the division may enter into agreements with federal agencies or political subdivisions of this state or with private persons for administration and management of any area established under this section or utilized for management of nongame, endangered, or threatened wildlife. (3) The commission may permit, under such terms and conditions as may be prescribed by regulation, the taking, possession, transportation, exportation, or shipment of species or subspecies of wildlife which appear on the state lists of endangered or threatened species for scientific, zoological, or educational purposes, for propagation in captivity of such wildlife, or for other special purposes.[106] ...	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
WILDLIFE, ENFORCEMENT **Colorado provides for criminal and civil**	The ESA provides protections only for species listed under its provisions.

[105] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-105. Endangered Or Threatened Species. http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-105&sessionyr=2013&Title=33&datatype=S&noheader=1&nojumpmsg=0

[106] C.R.S. 33-2-106 (2012), TITLE 33. PARKS AND WILDLIFE, WILDLIFE, ARTICLE 2. NONGAME AND ENDANGERED SPECIES CONSERVATION, 33-2-106. Management programs. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=23935&userid=PRODSG&cvfilename=&noheader=1&Interface=

penalties for all wildlife unlawfully 'taken', this provision would apply to lesser prairie chickens whether or not they are listed under the ESA Division action to recover possession and value of wildlife unlawfully taken : (1) The division may bring and maintain a civil action against any person, in the name of the people of the state, to recover possession or value or both possession and value of any wildlife taken in violation of articles 1 to 6 of this title. A writ of replevin may issue in such an action without bond. No previous demand for possession shall be necessary. If costs or damages are adjudged in favor of the defendant, the same shall be paid out of the wildlife cash fund. Neither the pendency of such civil action nor a criminal prosecution for the same taking shall be a bar to the other; nor shall anything in this section affect the right of seizure under other provisions of articles 1 to 6 of this title.[107]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES **Colorado can prohibit 'take' of any wildlife species they determine is in need of such protection;** **Colorado can manage any nongame wildlife they determine is in need of such management. Colorado also requires collection of biological and ecological data to prepare management actions.**	The ESA provides only for protection for listed species by : 1. Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, 2. In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being

[107] C.R.S. 33-6-110 (2012), Title 33. Parks And Wildlife, Wildlife, Article 6. Law Enforcement And Penalties - Wildlife, Part 1. General Provisions, 33-6-110. Division Action To Recover Possession And Value Of Wildlife Unlawfully Taken. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24001&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(1) The division shall conduct investigations on nongame wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully. On the basis of such determinations, the commission shall issue regulations and develop management programs designed to ensure the continued ability of nongame wildlife to perpetuate themselves successfully. Such regulations shall set forth species or subspecies of nongame wildlife which the commission deems in need of management pursuant to this section, giving their common and scientific names by species and, where necessary, by subspecies. The commission shall conduct ongoing investigations of nongame wildlife and may from time to time amend such regulations by adding or deleting therefrom species or subspecies of nongame wildlife. (2) The commission shall by regulation establish limitations relating to the taking, possession, transportation, exportation, processing, sale or offering for sale, or shipment as may be deemed necessary to manage nongame wildlife. (3) Except as provided in regulations issued by the commission, it is unlawful for any person to take, possess, transport, export, process, sell or offer for sale, or ship nongame wildlife deemed by the commission to be in need of management pursuant to this section. Subject to the same exception, it is also unlawful for any common or contract carrier to knowingly	designated. 3. Prohibiting “take” of the species. 4. Does not require investigations of biological and ecological data to determine management measures necessary 5. Does not require management plans, . Absent a federal nexus, the ESA cannot regulate activities on non-federal lands.

transport or receive for shipment nongame wildlife deemed by the commission to be in need of management pursuant to this section.[108]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES "1) "Management" means the collection and application of biological information for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels. The term includes the entire range of activities that constitute a modern, scientific resource program including, but not limited to, research, census, law enforcement, habitat acquisition and improvement, and education. Also included within the term, when and where appropriate, is the periodic or total protection of species or populations. "Management" may include artificial propagation to maintain threatened or endangered species populations, in concert with the exercise of water rights, and may also include restriction of stocking of species which are in competition with threatened or endangered species for the available habitat."[109]	The ESA • Only applies to listed species; • Does not require collection of information on listed species • Does not require the implementation of a scientific resource program, or any kind of organized management program. survival. The ESA cannot require participation of state and private actors in recovery activities on non-federal lands.
WILDLIFE, ENFORCEMENT Colorado prohibits 'take' of wildlife generally. Illegal sale of wildlife : (1) (a…, it is unlawful for	The ESA provides protections for listed species by prohibiting take only of listed species.:

[108] Colorado Statutes, Title 33. Parks And Wildlife, Wildlife, Article 2. Nongame And Endangered Species Conservation http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-104&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[109] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-103. Definitions http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=32-15-109&statecd=CO&sessionyr=2012&TOCId=23929&userid=GUEST9&cvfilename=&docname=&Interface=NLL&noheader=1

any person to knowingly sell or purchase, or knowingly offer for sale or purchase, wildlife or to solicit another person in the illegal hunting or taking of wildlife for the purposes of monetary or commercial gain or profit.[110] 2) Any person who violates this section: (a) With respect to big game, endangered species, or eagles, commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S. Upon such conviction, the commission may suspend any or all wildlife license privileges of the person for a minimum of one year to life. (b) With respect to all other wildlife, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and an assessment of twenty license suspension points.[111]	
PLANNING AND ZONING, LOCAL GOVERNMENT **Colorado regulates habitat destruction by mining operators:** (1) Every operator to whom a permit is issued pursuant to this article shall perform the reclamation prescribed by the reclamation plan adopted pursuant to this section….f) In those areas where revegetation is part of the reclamation plan, land shall be revegetated so that a diverse, effective, and long-lasting	1. The ESA provides protections for listed species by regulating activities of federal agencies 2. The ESA cannot require actors on Colorado public lands and private lands to engage in conservation actions.

[110] Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions
[111] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions 33-6-117. Willful Destruction Of Wildlife - Legislative Intent

vegetative cover is established that is capable of self-regeneration and is at least equal, with respect to the extent of cover, to the natural vegetation of the surrounding area. Species chosen for revegetation shall be compatible for the proposed post-extraction land use and shall be of adequate diversity to establish successful reclamation.[112]	
LAND USE, LOCAL GOVERNMENT **Protects public and private habitat of species from the actions of all operators.** Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (a) Regulating development and activities in hazardous areas; (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;…[113]	ESA protects only those habitats designated as critical habitat through regulation of only federal agencies.
WILDLIFE CONSERVATION, FUNDING **Colorado provides a dedicated funding stream for wildlife conservation.** (1)(a) Except as provided in subsections (7) and (8) of this section, sections 33-1-112.5 and 33-6-105, and in part 7 of article 22 of title 39, C.R.S., all moneys received from wildlife license fees, and all moneys from all other wildlife sources, and all interest earned on such	The ESA provides no dedicated funding.

[112] Title 34. Mineral Resources Mines And Minerals Article 32.5. Colorado Land Reclamation Act For The Extraction Of Construction Materials C.R.S. 34-32.5-116 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=PRODSG&interface=NLL&statecd=CO&codesec=34-32.5-116&sessionyr=2012&Title=34&datatype=S&noheader=1&nojumpmsg=0

[113] C.R.S. 30-28-121 Title 30. Government - County County Planning And Building Codes Article 28.County Planning And Building Codes Part 1. County Planning, http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

moneys shall be deposited in the state treasury and credited to the wildlife cash fund, which fund is hereby created, and such moneys shall be utilized for expenditures authorized or contemplated by and not inconsistent with the provisions of articles 1 to 6 of this title for wildlife activities and functions and for the financing of impact assistance grants pursuant to part 3 of article 25 of title 30, C.R.S…. (b) There is hereby created a wildlife habitat account in the wildlife for future generations trust fund, created in paragraph (a) of this subsection (7). The state treasurer shall deduct five million dollars from the wildlife cash fund, created in subsection (1) of this section, and transfer such sum to the wildlife habitat account. The interest earned on such five million dollars shall be continuously appropriated and shall be used solely for operation and maintenance of properties, leases, and easements owned by the division. (8) (a) There is hereby created in the state treasury the habitat partnership cash fund. The moneys in the habitat partnership cash fund shall consist of those moneys annually transferred from the wildlife cash fund in accordance with paragraph (e) of this subsection (8) for the partnership program and any gifts, grants, donations, and reimbursements made to the program from other sources. The moneys in the fund shall be used in accordance with the duties of the habitat partnership council as specified in section 33-1-110 (7) and (8), including, but not limited to, reasonable and necessary expenses incurred by council members in the fulfillment of their duties, as approved by the director. All interest derived from the investment of moneys in the habitat partnership cash fund shall be	

credited to the fund. Any balance remaining in the fund at the end of any fiscal year shall remain in the fund subject to the limitations provided…[114]	
FUNDING ...(4) (a) (I) <u>All moneys received pursuant to the issuance of the Colorado wildlife habitat stamp shall be used for the benefit of wildlife habitat or access to wildlife habitat,</u> including costs associated with the operation and maintenance, such as weed control and fencing, of lands under the Colorado wildlife habitat protection program administered by the division. Revenues collected from the sale of the stamp are subject to annual appropriation….[115]	The ESA provides no dedicated funding.
WILDLIFE, CONSERVATION, FUNDING **Colorado legislature has expressed the priority for funding for the preservation of species of concern, including the LPC.** (1) The general assembly hereby finds, determines, and declares that: (a) Protecting wildlife habitat and obtaining public access are important elements to preserving wildlife and wildlife-related recreational opportunities in Colorado; (b) The general assembly specifically recognizes that hunting of big game species is an activity that hundreds of thousands of residents and visitors to Colorado enjoy, which contributes significantly to state and local economies; and (c) <u>Priorities for the expenditure of funds</u>	The ESA provides no dedicated funding.

114114114 Title 33. Parks And Wildlife Wildlife Article 1.Wildlife - General Provisions C.R.S. 33-1-112 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-1-112&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

115 Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees

generated from the sale of habitat stamps and Colorado wildlife passports shall include protecting big game winter range and migration corridors, acquiring public access to wildlife-related recreation, including fishing, hunting, and wildlife viewing, protecting habitat for species of concern, and preserving the diversity of wildlife enjoyed by Coloradans...[116]	
WILDLIFE, ENFORCEMENT On lands controlled by the Colorado parks and wildlife division, damage to property or habitat (1) It is unlawful for any person to remove, damage, deface, or destroy any real or personal property or wildlife habitat under the control of the division. Any person who violates this subsection (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. In addition, the court may require the defendant to reimburse the division for any damages.[117]	
LAND USE, NATURAL RESOURCES **Colorado specifically protects all wildlife habitat from adverse impacts from all oil and gas operations.** 1) This section shall be known and may be cited as the "Colorado Habitat Stewardship Act of 2007".	The ESA protects only critical habitat from the effects of federal actions. No critical habitat is being designated for lesser prairie chicken so no federal protection will ensue

[116] Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-4-102.7&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[117] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions C.R.S. 33-6-129 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24023&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(2) The commission shall administer this article so as to minimize adverse impacts to wildlife resources affected by oil and gas operations. (3) In order to minimize adverse impacts to wildlife resources, the commission shall: (a) Establish a timely and efficient procedure for consultation with the parks and wildlife commission and division of parks and wildlife on decision-making that impacts wildlife resources;[118] (b) Provide for commission consultation and consent of the affected surface owner, or the surface owner's appointed tenant, on permit-specific conditions for wildlife habitat protection. Such conditions shall be discontinued when final reclamation has occurred....	
WILDLIFE CONSERVATION, LAND USE **Colorado requires that state lands be managed in a manner that protects wildlife habitat.** (1) The state board of land commissioners shall be composed of five members appointed by the governor,....(6) (a) The people of the state of Colorado have recognized in section 10 of article IX of the state constitution that the state school lands are an endowment of land assets held in a perpetual, intergenerational public trust for the support of public schools, which should not be significantly diminished; that the disposition and use of such lands should therefore benefit public schools including local school districts; and that the economic	The ESA only protects the designated critical habitat of a listed species from federal agency actions. No critical habitat is being designated for lesser prairie chickens.

[118] Title 34. Mineral Resources Oil And Natural Gas Article 60.Oil And Gas Conservation C.R.S. 34-60-128 (2012), http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=34-60-128&sessionyr=2010&Title=34&datatype=S&noheader=1&nojumpmsg=0

productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. In recognition of these principles, the state board of land commissioners shall be governed by the standards set forth in section 10 of article IX of the state constitution in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.[119]	

[119] Title 36. Natural Resources - General Public Lands And Rivers Article 1.State Board Of Land Commissioners, C.R.S. 36-1-101.5 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=35-49-104&statecd=CO&sessionyr=2012&TOCId=25658&userid=GUEST9&cvfilename=&docname=&Interface=&noheader=1

TEXAS

Applicable State Laws	Applicable ESA provisions
WILDLIFE **Texas requires a research program and funding to support it to develop wildlife research.** The Texas Agricultural Experiment Station, in consultation with the Agriculture and Wildlife Research and Management Advisory Committee established under Section 88.216, Education Code, shall develop and administer a program to finance agriculture and wildlife research that the Texas Agricultural Experiment Station determines to be of the highest scientific merit and to offer significant promise in providing new directions for long-term solutions to continued agriculture production, water availability, and wildlife habitat availability. [120]	The ESA does not require or fund a research program.
CONSERVATION **Texas protects Game Birds from catch, kill, or possession (dead or alive). Further protections are offered for the nest and eggs. Lesser prairie chickens are classified as Game Birds and are protected under the Texas statute.** GAME BIRDS. Wild turkey, wild ducks of all varieties, wild geese of all varieties, wild brant, wild grouse, wild prairie chickens, wild pheasants of all varieties, wild partridge, wild bobwhite quail, wild scaled quail, wild Mearn's quail, wild Gambel's quail, wild red-billed pigeons, wild band-tailed pigeons, wild mourning doves, wild white-winged doves, wild	. An ESA listing would provide only the limited additional protection of criminalizing accidental take.

[120] Agriculture Code Title 3. Agricultural Research And Promotion Chapter 50. Agriculture And Wildlife Research Program Sec.50.001. Program http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.50.pdf

white-fronted doves, wild snipe of all varieties, wild shore birds of all varieties, chachalacas, wild plover of all varieties, and wild sandhill cranes are game birds. … Sec. 64.003. DESTROYING NESTS OR EGGS. No person may destroy or take the nest, eggs, or young of any wild game bird, wild bird, or wild fowl protected by this code except as provided in this code. … Sec. 64.004. TRAPPING GAME BIRDS. No person may set a trap, net, or other device for taking game birds or take or snare a game bird by a device without obtaining a permit from the department. .. Sec. 64.005. PENALTY. A person who violates a provision of this subchapter commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … Sec. 64.007. POSSESSION OF LIVE GAME BIRDS. No person may possess a live game bird in this state except as authorized by this code.[121]	

[121] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation, Subtitle B. Hunting And Fishing, Chapter 64. Birds, Subchapter A. General Provisions. http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.64.htm#64.001

CONSERVATION, LOCAL GOVERNMENT **Texas requires control of noxious weeds [122] [123] and funding of that control.** "Board" means the board of directors of a district. (2) "District" means a noxious weed control district. … The legislature has determined that: (1) noxious weeds are present in this state to a degree that poses a threat to agriculture and is deleterious to the proper use of soil and other natural resources; and (2) reclamation of land from noxious weeds is a public right and duty in the interest of conservation and development of the natural resources of the state. The board may: (1)determine which noxious weeds are subject to control and what appropriate methods of control are to be used, including spraying, cutting, burning, tilling, or any other appropriate method; (2) prescribe specific areas in the district in which control measures are to be used; (3) prescribe the period during which control measures are to be used; and (4) incur expenses and take other actions necessary to carry out the purposes of this chapter.[124]	The ESA provides no authority or funding for control of noxious weeds.
PLANNING AND ZONING, LAND USE **Structures are listed as a threat to the LPC.**	

[122] Title 5. Production, Processing, And Sale Of Horticultural Products,Subtitle B. Horticultural Diseases And Pests, Chapter 78. Noxious Weed Control Districts http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.78.pdf

[123] http://plants.usda.gov/java/noxious?rptType=State&statefips=48

[124] Agriculture Code ,Chapter 78. Noxious Weed Control Districts, Subchapter A. General Provisions http://law.justia.com/codes/texas/2005/ag/005.00.000078.00.html

Zoning regulations affecting the building of structures and location in Texas are adopted in accordance with the States comprehensive plan which provides for protection of the State's natural resources. Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:…(7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements. … The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land. [125]	
WILDLIFE, CONSERVATION **Texas Department of Parks and Wildlife provides local agencies recommendations information on wildlife protection to all government agencies that approve, permit, license or construct development projects.** "The department is the state agency with primary responsibility for protecting the state's fish and wildlife resources. (b)The department's resource protection activities include: (1)investigating fish kills and any type of pollution that may cause loss of fish or wildlife	The ESA provides consultation only through section 7 to federal agency actions that may affect listed species or their critical habitat. In the case of the lesser prairie chicken, since no critical habitat is being designated, no habitat protection is provided.

[125] Local Government Code Title 7. Regulation Of Land Use, Structures, Businesses, And Related Activities Subtitle A. Municipal Regulatory Authority http://www.statutes.legis.state.tx.us/Docs/LG/pdf/LG.211.pdf

resources, taking necessary action to identify the cause and party responsible for the fish kill or pollution, estimating the monetary value of lost resources, and seeking restoration through presentation of evidence to the agency responsible for permitting or through suit in county or district court; (2) providing recommendations that will protect fish and wildlife resources to local, state, and federal agencies that 1approve, permit, license, or construct developmental projects; (3)providing information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources;… [126]	
ENDANGERED SPECIES **Texas provides for listing of species based on the same factors as the ESA. Like Colorado, Texas may protect species which are only threatened in a portion of their range.** **Texas prohibits take of state listed species.** The director shall file with the secretary of state a list of fish or wildlife threatened with statewide extinction. (b)Fish or wildlife may be classified by the director as threatened with statewide extinction if the department finds that the continued existence of the fish or wildlife is endangered due to: (1)the destruction, drastic modification, or severe curtailment of its habitat; (2)its overutilization for commercial or sporting purposes; (3)disease or predation; or (4)other natural or man-made factors.	The ESA limits listing protections to species only if the at risk of extinction occurs in a significant portion of their range. The ESA cannot must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Texas).if the species is at risk in only one portion of its range.

[126] Parks And Wildlife Code, Title 2. Parks And Wildlife Department, Chapter 12. Powers And Duties Concerning Wildlife, Subchapter A. General Powers And Duties http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.12.pdf

… No person may capture, trap, take, or kill, or attempt to capture, trap, take, or kill, endangered fish or wildlife. (b)No person may possess, sell, distribute, or offer or advertise for sale endangered fish or wildlife unless the fish or wildlife have been lawfully born and raised in captivity for commercial purposes under the provisions of this chapter. (c)No person may possess, sell, distribute, or offer or advertise for sale any goods made from endangered fish or wildlife[127]	
ENDANGERED SPECIES, CONSERVATION, FUNDING **Provides for dedicated funding of an endangered species account.** A peace officer who has arrested a person for a violation of this chapter may seize fish or wildlife or goods made from fish or wildlife taken, possessed, or made in violation of this chapter. (b) Property taken under this section shall be delivered to the department for holding pending disposition of the court proceedings. If the court determines that the property was taken, possessed, or made in violation of the provisions of this chapter, the department may dispose of the property under its regulations. The costs of the department in holding seized fish or wildlife during the pendency of the proceedings may, in appropriate cases, be assessed against the defendant. … . All revenue received under this chapter shall be deposited in the state treasury to the credit	The ESA provides no dedicated funding for ESA actions.

[127] Parks And Wildlife Code Title 5. Wildlife And Plant Conservation Subtitle B. Hunting And Fishing Chapter 68. Endangered Species http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf

of the special nongame and endangered species conservation account.[128]	
WILDLIFE, ENFORCEMENT **Texas may take action to refuse hunting or fishing licenses if outstanding violations of wildlife laws exist in other states.** On behalf of this state, the commission may enter into the Interstate Wildlife Violator Compact. (b) If necessary to protect the interests of this state, the commission may withdraw from the Interstate Wildlife Violator Compact in accordance with the terms of the compact. (c)The commission may take all actions necessary to implement this chapter, including the adoption of rules and the delegation of authority to the director.[129] (The Interstate Wildlife Violator Compact is an agreement that unresolved hunting and fishing violations in one state can affect a person's hunting or fishing privileges in other participating states. Any person whose license privileges or rights are suspended in a member state could also be denied future purchase of a license in Texas until they have satisfied suspension in the other state.)[130]	The ESA contains no regulatory provisions to protect wildlife generally.
WILDLIFE, ENFORCEMENT …, a person who violates a provision of Title 7 of this code commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … A person who violates any of the following	The ESA prohibition against "take" is limited to listed species.

[128] Id, http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf
[129] Parks And Wildlife Code Title 6. Compacts Chapter 92. Interstate Wildlife Violator Compact http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.92.pdf
[130] http://www.tpwd.state.tx.us/newsmedia/releases/?req=20091105g

provisions of Title 7 of this code commits an offense that is a Class B Parks and Wildlife Code misdemeanor: Section 131.011; 143.023; 229.021; 237.022; 334.041; or 350.021. [131]	
WILDLIFE, CONSERVATION **Texas law protects generally all indigenous species from collection, holding, possession, display, transport, release, or propagation.** In this subchapter, "protected wildlife" means all indigenous mammals, indigenous birds, indigenous reptiles, indigenous amphibians, indigenous fish, and other indigenous aquatic life the taking, collecting, holding, possession, propagation, release, display, or transport of which is governed by a provision of this code other than this subchapter or by a commission rule adopted under any provision of this code other than this subchapter and includes endangered species. … No person may collect, hold, possess, display, transport, release, or propagate protected wildlife for the purposes of this subchapter without a permit issued under this subchapter..[132]	The ESA protections are limited to listed species.
WILDLIFE, CONSERVATION, ENDANGERED SPECIES, LOCAL GOVERNMENT The criteria that the Texas Forest Service uses	The ESA authorizes the designation of critical habitat only for listed species.

[131] Parks And Wildlife Code, Title 7. Local And Special Laws, Chapter 355. Penalties For Violations Of Title 7, Parks And, Wildlife Code
http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.355.pdf
[132] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation Subtitle A. Hunting And Fishing Licenses Chapter 43. Special Licenses And Permits Subchapter C. Permits For Scientific Research, Zoological Collection, Rehabilitation, And Educational Display
http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.43.htm

in determining CWHZ [Critical Habitat Wildlife Zone] upon request from a chief appraiser or taxing unit is set out as follows. (1) The presence of qualified endangered or threatened animal or plant, as defined in paragraph (2) of this section, in the zone and the existence of a plan to protect it must be evidenced by a memorandum of understanding, conservation agreements, or other documentation pertaining to the protection of such animal or plant life with a federal, state, or private organization with recognized responsibility for protecting this species. (2) The animal or plant is listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. §1531 et seq.) and its subsequent amendments, or as endangered und er Parks and Wildlife Code, §68.002, …[133]	
NATURAL RESOURCES, ENDANGERED SPECIES, WILDLIFE, CONSERVATION, LAND USE **Texas requires that applications for mining and reclamation authority explain how adverse wildlife impacts will be minimized using the best technology available. Texas also requires enhancement of the wildlife and environmental values if possible.** Each application shall contain a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on	The ESA allows control of federal agency actions and imposition of requirements to avoid jeopardizing the continued existence of a species and adverse modification of critical habitat. In the case of the lesser praire chicken since no critical habitat is designated, habitat will not be protected.

[133] Title 4 Agriculture Part 12 Texas A&M Forest Service Chapter 215 Forest Zone Determination Procedure Rule §215.9 The Criteria For Determining Critical Wildlife Habitat Zone Upon Request From A Chief Appraiser Or Taxing Unit http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=72782&p_tloc=&p_ploc=&pg=1&p_tac=72782&ti=4&pt=12&ch=215&rl=9&dt=&z_chk=3841529&z_contains=habitat

fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. [134]	
NATURAL RESOURCES, LAND USE **Texas protects wildlife habitat generally from surface mining and reclamation activities.** The operator of all surface mining and reclamation operations not otherwise exempted or excluded shall as a minimum: … (1) conduct surface mining operations in a manner consistent with prudent mining practice, so as to maximize the utilization and conservation of the resource being recovered so that reaffecting the land in the future through surface mining can be minimized; (a) The permit application shall, if required by the Commission, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation. (b) When a map or aerial photograph is	The ESA can only protect designated critical habitat from federal agency actions. There is no designation of critical habitat proposed for lesser prairie chickens, so no habitat protection will exist.

[134] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 12 Coal Mining Regulations Subchapter G Surface Coal Mining And Reclamation Operations, Permits, And Coal Exploration Procedures Systems Division 6 Surface Mining Permit Applications--Minimum Requirements For Reclamation And Operation Plan Rule §12.144, Fish And Wildlife Plan http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=7940&p_tloc=&p_ploc=&pg=1&p_tac=7940&ti=16&pt=1&ch=12&rl=144&dt=&z_chk=3841534&z_contains=habitat

required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under §12.133 of this title (relating to Fish and Wildlife Resources Information).; [135]	

[135] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 11 Surface Mining And Reclamation Division Subchapter C Substantive Rules--Uranium Exploration And Surface Mining Division 6 Uranium Surface Mining Reclamation Rule §11.152 Surface Mining Reclamation Standardshttp://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=148942&p_tloc=&p_ploc=&pg=1&p_tac=148942&ti=16&pt=1&ch=11&rl=152&dt=&z_chk=3841530&z_contains=habitat

OKLAHOMA

Applicable State Laws	Applicable ESA provisions
WILDLIFE, ENDANGERED SPECIES Under Oklahoma law, no person may possess, hunt, chase, harass, capture, shoot at, wound or kill, take or attempt to take, trap, or attempt to trap any endangered or threatened species or sub-species without specific written permission of the director.[136]	ESA provides similar protections for listed species.
WILDLIFE **Oklahoma offers protections for all "game birds".** "Game bird" is a bird species normally sought after by sportsmen, and includes only all species of brant, cranes, doves, ducks, gallinules, geese, grouse, partridge, pheasant, quail, prairie chickens, rails, snipes, swans, tinamous, wild turkeys, woodcock, and any part thereof.[137]	Only listed species are protected under the ESA.
WILDLIFE, **Oklahoma prohibits unauthorized "take".** "Hunting or taking" is pursuing, killing, capturing, trapping, snaring and netting wildlife, and all lesser acts such as disturbing, harrying, worrying or placing, setting, drawing or using any net, trap or other device used to take wildlife and includes specifically every attempt	The ESA prohibition against "take" applies only to listed species.

[136] Title 29. Game and Fish. Chapter 1. Oklahoma Wildlife Conservation Code. Article V. Game. Part 4. Section 5-412 - Prohibitions with Endangered or Threatened Species or Subspecies. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77803

[137] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-114 - Game Bird, http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77660

to take and every assistance to other persons in taking or attempting to take wild animals, except that the definitions of "taking" and "hunting" wildlife shall not include disturbing, harrying or worrying wild game in field trials or performance tests of dogs nor the act of any person in participating as owner, handler, trainer, official or member of an audience observing such trials, whether resident or nonresident, where wild game is not killed.[138]	
CONSERVATION **Oklahoma does not permit "take" of game birds during its closed season.** "Closed season" is all other times than open season, and is the period during which protected wildlife may not be lawfully taken.[139]	The ESA prohibition against take applies only to listed species.
HABITAT RESTORATION, WEED CONTROL, INVASIVE SPECIES The Forestry Division, in connection with the enforcement of the Oklahoma Forestry Code, shall have the following powers, authority, and duties: … 10. <u>To plan and conduct prescribed burning at the request and expense of landowners on public or private lands for the purpose of controlling Eastern Red Cedar and other invasive species, for hazardous fuel reduction, wildlife habitat manipulation, ecosystem restoration</u>, or achieving silvicultural objectives.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[138] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-118 - Hunting or Taking. http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77665

[139] Title 29. Game and Fish , Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-104 - Closed Season. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77645

Forestry Division employees shall be protected under The Governmental Tort Claims Act and shall not be personally liable beyond the limits established therein for activities pursuant to this paragraph unless gross negligence is established in a competent court of law.[140]	
FUNDING, WILDLIFE CONSERVATION A. The Department of Wildlife Conservation is hereby authorized to issue an Oklahoma Wildlife Habitat Stamp to any person upon the voluntary payment of a fee of Ten Dollars ($10.00). Said fee shall be deposited in the Wildlife Land Acquisition Fund created in subsection C of this section. … C. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Land Acquisition Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received pursuant to the provisions of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such	• The ESA Provides no dedicated funding • The ESA has no authority to require States to participate in recovery activities.

[140] Title 2. Agriculture , Chapter 1 - Agricultural Code, Forestry Administration and Enforcement, Article 16 - Oklahoma Forestry , Code Section 16-8 - Powers of Division - Appointment of Forest Investigators and Rangers - Powers and Duties - Entry Upon Lands - Arrests, etc. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=465855&hits=1318+864+309+

investments shall be deposited in the Wildlife Land Acquisition Fund. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection D of this section. … D. The Wildlife Land Acquisition Fund shall be used by the Oklahoma Wildlife Conservation Commission for the acquisition on a willing-seller willing-buyer basis only, leasing, taking of easements, development, management, and enhancement of lands acquired pursuant to this section for the following purposes: Management of game animals, protected animals and birds, furbearing animals, game birds, fish, and their restoration, propagation, and protection; and Creation and management of public hunting, fishing, and trapping areas as places where the public may hunt, fish, or trap as authorized by law.[141]	
HABITAT, WILDLIFE, CONSERVATION A. In order to encourage wildlife habitat conservation on private lands, the Department of Wildlife Conservation shall establish a program for wildlife habitat maintenance, enhancement, development, preservation, restoration, and management on private lands. To implement the program, the Department shall enter into multiyear contracts for approved	The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. The ESA provides no protection for non-listed species and does not provide for the "restoration" or "development" of those non-listed

[141] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 4 – Licenses, Section 4-132 - Authority to Issue Oklahoma Wildlife Habitat Stamp - Rules and Regulations - Creation and Use of Wildlife Land Acquisition Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466381&hits=1386+783+726+629+70+15+

projects on privately owned lands detailing the landowners' responsibilities. B. The Department shall promulgate rules pursuant to the Administrative Procedures Act to implement the program. Such rules may provide for incentives to participate in the program.[142]…	species. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE Oklahoma law prohibits the knowing and willful killing or molestation of hawks, falcons, owls, or eagles, or their nests, eggs, or young. The only exceptions to this prohibition are the taking of a hawk or owl in the act of destroying domestic birds or fowl, or the use of hawks, owls, falcons, or eagles by licensed falconers. [143]	The ESA limits protection to listed species.
ENFORCEMENT, WILDLIFE, ENDANGERED SPECIES Oklahoma prohibits the possession of wildlife or parts during closed season, and any endangered or threatened species. Under these Oklahoma statutes, no person may possess any wildlife or parts thereof during the closed season, any endangered or threatened species or parts thereof at any time, or any native bear or native cat that will grow to reach the weight of 50 lbs. or more, with exceptions. A	The ESA limits protection only to listed species.

[142] Title 29. Game and Fish, Chapter 1, Oklahoma Wildlife Conservation Code, Article 3, Section 3-312 - "Program for Wildlife Habitat Development, Preservation, Restoration, and Management - Rules - Construction of Program.". http://www.oscn.net/applications/oscn/deliverdocument.asp?id=436091&hits=935+479+463+407+23+7+

[143] OK - Game Animals - Part 4. Protected Game. § 5-410. Hawks; falcons; owls; eagles

conviction could result in a fine of $100-$500 and/or by imprisonment up to 30 days. In addition, no person may buy, barter, trade, or sell all or any part of any fish or wildlife or the nest or eggs of any bird protected by law, with exceptions. A first violation could result in a fine of $100 to $500 and/or by imprisonment up to 60 days. [144]	
WILDLIFE, CONSERVATION, FUNDING A. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Heritage Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received from senior citizen lifetime licenses issued pursuant to the provisions of paragraphs 4 through 6 of subsection B of Section 4-114 of this title by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such investments shall be deposited in the Wildlife Heritage Fund. Only interest and dividends derived from the principle can be expended and are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection B of this section. Any monies withdrawn from said fund by the	The ESA provides no dedicated funding and is limited in its application to listed species.

[144] OK - Wildlife - Part 5. Possession of Wildlife. OK ST T. 29 § 7-501 to 504

Oklahoma Wildlife Conservation Commission for investment pursuant to this subsection shall be deemed to be for the purposes specified in subsection B of this section. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.[145]	
WILDLIFE, ENFORCEMENT, ENDANGERED SPECIES **Oklahoma prohibits transportation of any wildlife out of Oklahoma.** Under these Oklahoma statutes, no common carrier may transport any wildlife or endangered or rare species, with exceptions. A violation could result in a fine of $25 to $100. In addition, no person may transport into or out of Oklahoma any wildlife or parts thereof, nests of wildlife, their eggs or their young, or any endangered or threatened species, with exceptions. A violation could result in a fine of $50 to $200, and/or imprisonment of 10 to 60 days. [146]	The ESA applies only to listed species.
WILDLIFE, CONSERVATION, FUNDING A. The Oklahoma Tax Commission shall include on each state individual income tax return form for tax years beginning after December 31, 2001, and each state corporate tax return form for tax years beginning after December 31, 2001, an opportunity for the taxpayer to donate	The ESA provides no dedicated funding.

[145] Title 29. Game and Fish Chapter 1 - Oklahoma Wildlife Conservation Code Article 4 - Licenses Section 4-134 - Creation and Use of Wildlife Heritage Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466383&hits=1344+1343+1124+1123+1094+1093+1032+1031+934+933+866+865+844+843+786+785+757+756+752+751+687+686+608+607+437+436+409+408+347+346+255+254+189+188+167+166+109+108+80+79+75+74+17+16+

[146] OK - Wildlife - Transportation of Wildlife OK ST T. 29 § 7-601 - 602

from a tax refund for the benefit of the Oklahoma Wildlife Diversity Program. B. For purposes of this section, "nongame wildlife" means any species of wildlife not legally classified as a game species or furbearer by statute or by rule adopted pursuant to statute. C. Except as otherwise provided for in this section, all monies generated pursuant to subsection A of this section shall be paid to the State Treasurer and placed to the credit of the Wildlife Diversity Fund. D. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Diversity Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received under the provisions of paragraph 2 of subsection C of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. …[147]	
CONSERVATION, WILDLIFE	• The ESA has no authority to require States to participate in

[147] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-310 - Wildlife Diversity Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466370&hits=1486+1485+1480+1479+1020+1019+994+993+939+938+910+909+905+904+860+859+640+639+633+632+302+301+276+275+221+220+192+191+187+186+142+141+

A. The Wildlife Conservation Commission shall constitute an advisory, administrative and policymaking board for the protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of wildlife in this state as provided in the Oklahoma Wildlife Conservation Code. B. The Director shall consult with the Commission regarding the administration of the affairs of the Department of Wildlife Conservation. The Commission is authorized and empowered to require from the Director complete reports and information relative to the affairs of the Department at the time and in the manner the Commission may deem advisable. … D. In addition to the other powers and duties prescribed by law, the Commission shall: … 8. Supervise the establishment, extension, improvement, and operation of the wildlife refuges, propagation areas or stations, public hunting areas, public fishing areas, game management areas, and fish hatcheries; 9. Prescribe the manner of cooperation with the Oklahoma Tourism and Recreation Department, colleges and universities within the state, other state agencies, any agency of the federal government, and any city, town, school district, or any other agency or organization in study of conservation and propagation of wildlife and in the establishment, maintenance, and operation of visual educational facilities, recreational facilities, and hunting and fishing facilities, in the study and propagation of wildlife;	recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • The ESA requires only federal agencies consult and has no authority to require State or local governments to consult where there is no federal action. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and “enhanced”. • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

… 14. Publicize and encourage the conservation and appreciation of wildlife and all other natural resources; 15. Regulate the seasons and harvest of wildlife; 16. Promulgate rules to sell fishing and hunting licenses via the Internet;….[148]	
WILDLIFE, ENFORCEMENT A. Except as otherwise provided by law, <u>any person arrested for a violation of any section of the Oklahoma Wildlife Conservation Code shall be admitted to bail as follows:</u> <u>1. Whenever a person is charged for any violation of any of the wildlife laws of this state or rules adopted by the Wildlife Conservation Commission pursuant to law, which violation is punishable as a misdemeanor</u> and the person is not immediately taken into physical custody pursuant to state law, the officer shall prepare a written citation containing a notice to appear in court, the name and address of the person, the offense charged, the time and place where the person shall appear in court and any other pertinent information as may be necessary; 2. The arresting officer shall indicate on the citation the date of the arraignment. The person charged shall appear in person or by counsel at the stated time and place for arraignment.[149]	The ESA only provides protections for listed species.

[148] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103 - Functions, Powers, and Duties of the Commission. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466368&hits=1919+1918+1913+1912+991+990+968+967+936+935+872+871+865+864+57+56+36+35+4+3+

[149] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 9 - Wildlife Bail Procedure Act, Section 9-112 - Admission to Bail for Violations of Wildlife Conservation Code. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=462892&hits=1526+1525+1498+1497+814+813+779+778+686+685+679+678+54+53+21+20+

CONSERVATION, HABITAT Oklahoma provides for private lands fish and wildlife habitat conservation and improvement programs which include maintenance, protection, enhancement and restoration for habitat generally including aquatic, riparian, upland, wetland and forest habitat. … conservation improvement contract requirements [150] (a) The following projects may be approved for Private Lands Fish and Wildlife Habitat Conservation and Improvement Programs (1) Aquatic Habitat maintenance, protection, enhancement, or restoration, (2) Riparian Habitat maintenance, protection, enhancement, or restoration (3) Upland Habitat maintenance, protection, enhancement, or restoration (4) Wetland Habitat maintenance, protection, enhancement, or restoration (5) Forest Habitat maintenance, protection, enhancement, or restoration, (6) Any other project which is deemed appropriate by the Department.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

[150] 800:25-35-3. Approved projects and conservation improvement contract requirements http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_

KANSAS

Applicable State Laws	Applicable ESA provisions
CONSERVATION **Kansas requires programs, including land acquisition to conserve non-game and threatened and endangered species.** Same; programs for conservation. (a) The secretary shall establish such programs, including acquisition of land or aquatic habitat, as are deemed necessary for the conservation of nongame, threatened and endangered species. The secretary shall utilize all authority vested in the secretary by the laws of this state to carry out the purposes of this section with the exception that the secretary shall not utilize the power of eminent domain to carry out such programs unless a specific authorization and appropriation is made therefor by the legislature.[151]	The ESA provides no authority for establishment of programs or land adquisition for endangered species.
FUNDING, CONSERVATION **Kansas provides for species in need of conservation and allows tax credits for lands known to support populations of such species.** Tax credits for expenditures related to nongame (a) There shall be allowed two types of credits against the tax liability of a taxpayer imposed under the Kansas income tax act related to real property that is both: (1) Designated by the secretary of wildlife, parks and tourism pursuant to the nongame and endangered species conservation act as critical habitat for a threatened or endangered species	The ESA provides no tax credits and can only list species

[151] Article 9. - Licenses, Permits, Stamps And Other Issues 32-962.

or certified by the secretary of wildlife, parks and tourism as land known to support populations of species in need of conservation; and (2) included in management activities as part of a recovery plan, or an agreement identified in subsection (b) of K.S.A. 32-962 and amendments thereto, as approved by the secretary of wildlife and parks, for a species listed as threatened, endangered or in need of conservation pursuant to the nongame endangered species conservation act.[152]	
WILDLIFE, CONSERVATION **Kansas provides programs to allow species to sustain themselves, not recover. These protections are offered to non-listed species.** … (a) The secretary shall conduct investigations on nongame species in order to develop information relating to population, distribution, habitat needs, limiting factors and other biological and ecological data to determine conservation measures necessary for their continued ability to sustain themselves successfully. On the basis of such information and determinations, the secretary shall adopt rules and regulations pursuant to K.S.A. 32-963 which contain a list of the nongame species deemed by the secretary to be in need of conservation and shall develop conservation programs pursuant to K.S.A. 32-962 which are designed to insure the continued ability of such nongame species to perpetuate themselves	The ESA provides protections only for listed species and does not offer any program for species prior to their listing to ensure that they do not become endangered/threatened.

[152] Article 32. - Statute 79-32,203: Tax credits for expenditures related to nongame and endangered species.

successfully. The secretary shall conduct ongoing investigations of nongame species.[153]	
WILDLIFE (a) Commercialization of wildlife is knowingly committing any of the following, except as permitted by statute or rules and regulations: (1) Capturing, killing or possessing, for profit or commercial purposes, all or any part of any wildlife protected by this section; (2) selling, bartering, purchasing or offering to sell, barter or purchase, for profit or commercial purposes, all or any part of any wildlife protected by this section;[154]	The ESA provides protections only for listed species.
WILDLIFE, ENFORCEMENT Wildlife violator compact; enactment of compact. The wildlife violator compact is enacted into law and entered into by the State of Kansas with any and all jurisdictions legally joining therein in accordance with its terms.[155]	
WILDLIFE Unlawful possession of wildlife or wild turkey; refusal to allow inspection of property used in taking wildlife; penalties. (a) It is unlawful for any person to: ...	The Kansas statute provides penalties for any unlawful possession of wildlife, including wild turkey. The ESA only prohibits the "take" of listed species. Non-listed species are

[153] Article 9. - Licenses, Permits, Stamps And Other Issues 32-959.
[154] Article 10. - Enforcement , 32-1005. http://kslegislature.org/li/b2013_14/statute/032_000_0000_chapter/032_010_0000_article/032_010_0005_section/032_010_0005_k/
[155] Chapter 32 Article 10 »Section 61 » 32-1061. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0061_section/032_010_0061_k/

(4) possess any wildlife unlawfully killed or otherwise unlawfully taken outside this state;[156]	provide no protections.
LOCAL GOVERNMENT, WEED CONTROL Control and eradication of noxious weeds; payment of costs; sale of chemicals for use on private property, price. ... If the governing body of any political subdivision owning or supervising lands infested with noxious weeds within their jurisdiction fails to control such noxious weeds after 15 days' notice directing any such body to do so, the board of county commissioners shall proceed to have proper control and eradication methods used upon such lands,...[157]	Certain invasive species of plants are listed as potential threats to the habitat of the lesser prairie chicken. Kansas provides authority for its local governments to eradicate "noxious weeds" on private lands. The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
ENDANGERED SPECIES Nongame and endangered species conservation act; title. K.S.A. 32-957 through 32-963, 32-1009 through 32-1012, 32-1033 and K.S.A. 32-960a and 32-960b, and amendments thereto, shall be known and may be cited as the	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety

[156] Chapter 32 Article 10 »Section 4 32-1004. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0004_section/032_010_0004_k/

[157] Chapter 2 Article 13 Section 19 WEEDS

nongame and endangered species conservation act.[158] As used in the nongame and endangered species conservation act: (a) "Conserve," "conserving" and "conservation" mean the use of all methods and procedures for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such numbers. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, regulated taking and, when and where appropriate, the periodic or total protection of species or populations of wildlife. With respect to threatened species and endangered species, the terms mean the use of all methods and procedures, including but not limited to those described above, which are necessary to bring any threatened or endangered species to the point at which the methods, procedures and measures provided for such species pursuant to the nongame and endangered species conservation act are no longer necessary. (b) "Ecosystem" means a system of living organisms and their environment, each influencing the existence of the other and both necessary for the maintenance of life. (c) "Endangered species" means any species of wildlife whose continued existence as a viable component of the state's wild fauna	of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Kansas). • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a federal agency action.

[158] Chapter 32 »Article 9 Section 57 Article 9. - Licenses, Permits, Stamps And Other Issues

is determined to be in jeopardy. That term also includes any species of wildlife determined to be an endangered species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (d) "Nongame species" means any species of wildlife not legally classified a game species, furbearer, threatened species or an endangered species by statute or by rule and regulation adopted pursuant to statute. (e) "Optimum carrying capacity" means that point at which a given habitat can support healthy populations of wildlife species, having regard to the total ecosystem, without diminishing the ability of the habitat to continue that function. (f) "Threatened species" means any species of wildlife which appears likely, within the foreseeable future, to become an endangered species. That term also includes any species of wildlife determined to be a threatened species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (g) "Wildlife" means any member of the animal kingdom, including, without limitation, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof. ….[159]	

[159] http://kansasstatutes.lesterama.org/Chapter_32/Article_9/#32-958

PLANNING AND ZONING ...(b) The planning commission may adopt and amend a comprehensive plan as a whole by a single resolution, ... In the preparation of such plan, the planning commission shall make or cause to be made comprehensive surveys and studies of past and present conditions and trends relating to land use, population and building intensity, public facilities, transportation and transportation facilities, **economic conditions, natural resources and may include any other element deemed necessary to the comprehensive plan**. Such proposed plan shall show the commission's recommendations for the development or redevelopment of the territory including: (a) The general location, extent and relationship of the use of land for agriculture, residence, business, industry, recreation, education, ... (f) utilization and conservation of natural resources; and (g) any other element deemed necessary to the proper development or redevelopment of the area.[160]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
LAND USE, PLANNING AND ZONING …construction of public facility or utility in conformance with comprehensive plan. (a) Except as provided in subsection (b), whenever the planning commission has adopted and certified the comprehensive plan for one or more major sections or functional subdivisions thereof, no public improvement, public facility or public utility of a type embraced within the recommendations of the comprehensive plan or portion thereof shall be constructed without first being submitted to and being approved by the	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.

[160] Chapter 12 Article 7 Section 47 Article 7. - Planning And Zoning 12-747.

planning commission as being in conformity with the plan.[161]	
LAND USE, PLANNING AND ZONING Zoning of land outside city limits; conditions and limitations; notice to county commissioners. Cities are hereby authorized to adopt zoning regulations affecting all or any designated portion of the land located outside the city but within three miles thereof under the following conditions Except for flood plain regulations in areas designated as a flood plain, nothing in this act shall be construed as authorizing any city to adopt regulations applying to or affecting any land in excess of three acres under one ownership which is used only for agricultural purposes: (a) The city has established a planning commission under the provisions of K.S.A. 12-702, and amendments thereto, which provides for the appointment of two commission members who reside outside the city but within the area subject to the zoning regulations of the city, or the city has established a joint, metropolitan or regional planning commission in cooperation with the county in which such city is located pursuant to the provisions of K.S.A. 12-718, and amendments thereto.[162]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Fences composed of posts a In fences composed of posts and wires, the posts shall be of ordinary size for fencing purposes, and set in the ground at least two feet deep and not more	Local governments are permitted to regulate fence The ESA provides

[161] Chapter 12 Article 7 Section 48 Article 7. - Planning And Zoning
[162] Chapter 12 Article 7 Section 15b Article 7. - Planning And Zoning

than twelve feet apart, with holes through the posts or staples on the side not more than fifteen inches apart, to admit four separate strands of fence wire not smaller than No. 9, and shall be provided with rollers and levers, at suitable distances, to strain and hold the wire straight and firm.[163]	• No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
FUNDING, CONSERVATION Assent to wildlife restoration act; use of fees. (a) The state of Kansas hereby assents to the provisions of the wildlife restoration act (16 U.S.C. 669 et seq.), as amended. The secretary is hereby authorized and directed to perform such acts as necessary to the conduct and establishment of cooperative wildlife restoration projects, as defined in such act, in compliance with such act and with rules and regulations promulgated by the secretary of the interior thereunder. The state treasurer is hereby authorized to receive and disburse all money apportioned to the state in accordance with the provisions of such act.[164]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
FUNDING, CONSERVATION Conservation fee fund; authorized expenditures; accounting procedures; reduction of fees and assessments, when. (a) There is hereby created in the state treasury the conservation fee fund. All deposits credited to the conservation fee fund shall be for the use of the state corporation commission in administering the provisions of K.S.A. 55-172 through 55-184, 55-601 through 55-613, 55-701 through 55-713, 55-901 and 55-1201 through 55-1205.[165]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[163] Home Statute Chapter 29 Article 1 Section 3 Fencing
[164] Chapter 32 Article 8 Section 28 Article 8. - Department Of Wildlife, Parks And Tourism
[165] Chapter 55 Article 1 Section 43 Article 1. - Oil And Gas Wells; Regulatory Provisions

LAND USE, PLANNING AND ZONING Application of intent to drill wells, required information; notification of surface owner; fee and contents; information to department of health and environment and county clerk; approval of application, when; conditions; compliance with rules and regulations. (a) Prior to the drilling of any well, every operator shall file an application of intent to drill with the commission. Such application shall include such information as required by the commission, including the name and address of the surface owner, and shall be on a form prescribed by the commission. Such application shall also include non-binding preliminary estimates of the location of roads of ingress or egress, any tank battery and any pipeline or electrical line. The commission shall, upon receipt of such application, send a copy of such application to the named surface owner, as well as the contact information, including name, address, phone number, fax or email address, for a designated representative of the applicant.[166]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action. • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Removal of structures and abutments from lands after abandoning wells; exception. (a) Leaving the surface of lands with a part of the operating structure or other equipment intact after abandoning oil or gas wells is against public policy, and constitutes a public nuisance, and shall be hereafter prohibited. Whenever any lease operator abandons any oil or gas well, the lease operator, within six months thereafter, shall remove any rig, derrick or other operating structure, and all abutments and other obstacles of every kind or size used in the operation of such oil or gas lease, from the land upon which	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.

[166] Chapter 55 Article 1 Section 51 Article 1. - Oil And Gas Wells; Regulatory Provisions

the well was theretofore operated, and shall grade the surface of the soil in such manner as to leave the land, as nearly as practicable, in the same condition after the removal of such structures, equipment and obstacles as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise.[167]	

[167] Chapter 55 »Article 1 »Section 77 Article 1. - Oil And Gas Wells; Regulatory Provisions

NEW MEXICO

Applicable State Laws	Applicable ESA provisions
WILDLIFE The game animals and quadrupeds, game birds and fowl, and game fish as herein defined shall be protected and hunting, taking, capturing, killing or possession, or attempt to hunt, take, capture or kill of any or all species named herein shall be regulated by the state game commission under the authority of Chapter 117 of the 1931 Session Laws of the state of New Mexico.	The ESA provides protections against take for only for listed species.
WILDLIFE, ENFORCEMENT **New Mexico regulates the LPC under its game laws. Which prohibit the "take" of species, including the LPC, without a permit.** A. Except as permitted by regulations adopted by the state game commission or as otherwise allowed by law, it is unlawful to: (1) hunt, take, capture, kill or attempt to take, capture or kill, at any time or in any manner, any game animal, game bird or game fish in the state; or (2) possess, offer for sale, sell, offer to purchase or purchase in the state all or any part of any game animal, game bird or game fish….[168]	The ESA only provides protections against "take" for listed species.
PLANNING AND ZONING, HABITAT **New Mexico has stated a clear preference for avoidance of wildlife areas in its**	The ESA Provides: • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical

[168] NM Stat § 17-2-7 (1996 through 1st Sess 50th Legis)

development of utilities. Scenic enhancement: The following provisions for scenic enhancement shall apply for utility facility installation in cited areas: (1) The type and size of the utility facilities and the manner and extent to which they are permitted within areas of scenic enhancement and natural beauty may materially alter the scenic quality, appearance and view of highway roadsides and adjacent areas. Such areas include scenic strips, overlooks, rest areas, recreation areas and the rights-of-ways and adjacent highways. Also included are Sections of highways which pass through public parks, recreation areas, wildlife and waterfowl refuges and historic sites. Whenever possible, new utility installations within all such strips overlooks and areas shall be avoided.[169]	habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
HABITAT, CONSERVATION **New Mexico requires that its wildlife department regulate "vehicle travel" on habitat for certain classes of species.** New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species. … "To provide a description of lands closed to vehicle travel under the Habitat Protection Act and to describe prohibited activities on said lands. [170]	The ESA provides not authority to regulate activities on non-federal lands, absent a federal nexus.
WILDLIFE, CONSERVATION,	The ESA provides no authority to

[169] Title 17: Public Utilities And Utility Services Chapter 4: Utility Rights Of Way And Easements Part 2 , Requirements For Occupancy Of State Highway System Right-Of-Way By Utility Facilities
[170] http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0002.htm

ENFORCEMENT **New Mexico state game commission has authority to establish rules to acquire lands and to prevent damage to wildlife and wildlife habitat on lands owned or controlled by the department.** New Mexico state game commission with the authority to acquire land and to establish rules and regulations that it may deem necessary to carry out the purposes of Chapter 17, NMSA 1978[171]	acquire lands or to establish regulations necessary to protect species. The only protections offered by the ESA provide protections from "take", allow designation of critical habitat, and require federal agencies consult.
WILDLIFE **LPC are game birds in New Mexico, and as such, they are protected. No game bird may be hunted during a closed season or without a permit.** **New Mexico has also established areas of LPC habitat, where the LPC are protected and season is only open for quails.** Season and hours: Upland game may be hunted or taken only during open seasons and only during the period from one-half hour before sunrise to one-half hour after sunset, unless otherwise specifically allowed by rule…. (1) On wildlife management areas, the lesser prairie-chicken areas, and the Sandhills Prairie conservation area hunting hours shall be from one-half hour before sunrise to one-half hour after sunset	ESA only prohibits "take" of listed species.

[171] Title 19 Natural Resources And Wildlife, Chapter 34 Wildlife Habitat And Lands, Part 4 Protection Of Department Of Game And Fish Lands. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0004.htm

… **(e)** The state game commission owned lesser prairie-chicken areas shall be open for quail hunting during established seasons.[172]	
WILDLIFE, ENFORCEMENT **New Mexico also provides protections for wildlife and game animals on private lands.** It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on any private property that is in compliance with 30-14-1 and 30-14-6 NMSA 1978 posting requirements without possessing written permission from the landowner or person in control of the land or trespass rights, unless otherwise permitted in rule or statute. It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on private property if the consent to enter or remain has been denied or withdrawn by the owner or person in control of the land or trespass rights, per 30-14-1 NMSA 1978, unless otherwise permitted in rule or statute. … Any game animals, furbearers, game birds, or game fish taken in violation of this section shall be subject to seizure.[173]	The ESA provides protection against "take" only for listed species.
WILDLIFE, CONSERVATION, HABITAT New Mexico has designated the LPC as a	The ESA can only prohibit take and require federal agencies to consult on

[172] 19.31.5.9 Manner And Methods For Upland Game http://www.nmcpr.state.nm.us/nmregister/xxi/xxi15/19.31.5.htm

[173] Unlawful Taking Or Killing Of Game Animals, Furbearers, Game Birds, Or Game Fish On Private Land, [19.31.10.18 NMAC - N, 4-1-2009]. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.031.0010.htm

"Species of Greatest Conservation Need (SGCN)" in its wildlife conservation strategy. New Mexico's wildlife conservation strategy demonstrates New Mexico's concern for wildlife habitat resources to keep wildlife populations healthy and sustainable and fully addresses eight essential elements established by Congress. It focuses on strategic actions intended to keep common species common and work to prevent wildlife from becoming endangered with a constructed framework for identifying species of greatest conservation need, the habitat treatments necessary to sustain them and other members of their ecological community.[174]	actions on federal lands. The ESA cannot require States to undertake independent conservation activities.
WILDLIFE, FUNDING **New Mexico requires local government to undertake activities to "promote" the health, safety and welfare of the State's wildlife.** It is the intent of the legislature by the passage of the Pollution Control Revenue Bond Act to authorize municipalities to acquire, own, lease or sell projects for the purpose of reducing, abating or preventing pollution, including, but not limited to, removing pollutants, contaminants or foreign substances from land, air or water, or removing or treating any substance in a processed material which otherwise would cause pollution when such material is used, to protect and promote the health, welfare and safety of the citizens of this state and its and wildlife, with the resultant higher level of employment and economic activity and stability. It is not intended hereby to authorize any municipality itself to operate any	The ESA requires consultation by federal agencies on actions that may affect listed species. The ESA provides no authority to require local municipalities to undertake projects to protect wildlife, absent a federal nexus.

[174]New Mexico Department of Game and Fish. 2006. Comprehensive Wildlife Conservation Strategy for New Mexico. New Mexico Department of Game and Fish. Santa Fe, New Mexico. 526 pp + appendices.

manufacturing, industrial or commercial enterprise. The provisions of the Pollution Control Revenue Bond Act shall be liberally construed in conformity with this intent.[175]	
WILDLIFE, HABITAT, CONSERVATION **New Mexico has established conservation districts to "enhance" wildlife and habitat.** A. The "conservation services division" is created within the department of game and fish. B. The conservation services division is responsible for: (1) management, enhancement, research and conservation of public wildlife habitat ; (2) the lease, purchase, enhancement and management of state wildlife habitat ; (3) assisting landowners in improving wildlife habitats; (4) development of educational programs related to conservation of wildlife and the environment, including the expanded dissemination of wildlife publications; and (5) communication and consultation with federal and other state agencies, local governments and communities, private organizations and affected interests responsible for habitat, wilderness, recreation, water quality and environmental protection to ensure comprehensive conservation services for	The ESA does not have a provision for the "enhancement" of a listed species. Only a prohibition against take and for activities that may allow "recovery".

[175] 3-59-3. Legislative intent.

hunters, anglers and nonconsumptive wildlife users.[176]	
WILDLIFE, FUNDING, HABITAT The purpose of the Game and Fish Bond Act is to provide for use of revenues derived from fees for hunting and fishing licenses to issue bonds to provide for fish hatcheries and rearing facilities, game and fish at acquisition, development and improvement projects and other similar capital outlay projects.[177]	The ESA does not provide dedicated funding.
WILDLIFE, ENDANGERED SPECIES, HABITAT **Requires studies to be conducted to determine the status and survival requirements of threatened and endangered species.** In addition to other powers and duties, the director (of fish and game): A. may acquire land or aquatic habitat interests for the conservation, management, restoration, propagation and protection of threatened or endangered species; and B. shall conduct studies to determine the status and requirements for survival of threatened or endangered species.[178]	The ESA cannot require a State to undertake conservation activities.

[176] 17-6-1 to 17-6-11 NMSA 1978] may be cited as the "Habitat Protection Act"; 17-1-5.1. Conservation services division; duties.
[177] 17-1-17. Purpose of act.
[178] 17-2-44. Director; land or aquatic habitat interest acquisition.

COUNTY AND LOCAL LAW

County	Authority	Synopsis
BERNALILLO COUNTY, NEW MEXICO		The Bernalillo County Open Space Master Naturalist Program aims to instill the pursuit of life-long learning and promote environmental stewardship. Participants are activity engaged through education and service dedicated to the beneficial management of natural resources on Open Space properties.
BERNALILLO COUNTY, NEW MEXICO	Code of Ordinances, Art. II, Sec. 58-46,	The purpose of this article is to promulgate laws that preserve Bernalillo County open space for the purposes for which they were acquired, including the protection of natural areas, cultural and historical sites, agricultural lands, wildlife habitat, water resources and viewsheds, the promotion of environmental education, and the provision of resource-based recreation.
BERNALILLO COUNTY, NEW MEXICO [179]	Sec. 58-107	No person shall harm, hunt, pursue, molest, harass, trap, collect or remove any mammal, bird, reptile or amphibian animals or eggs or young of such animals on/from open space lands.
Union, NEW MEXICO [180]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [181]

[179] http://library.municode.com/index.aspx?clientId=13071&stateId=31&stateName=New%20Mexico&p_PageAlias=all-county-ordinances
[180] http://nm-unioncounty.civiccities.com/directory.aspx
[181] http://www.unionnm.us/DocumentCenter/Home/View/9

Quay, NEW MEXICO	Quay County Comprehensive Plan	Once adopted, the Comprehensive Plan becomes the official policy of the County. It is passed as a resolution rather than an ordinance in order to maintain its flexibility and change as conditions and priorities change.
Eddy, NEW MEXICO	Ordinance 41, Land Use	The Eddy County Land Use Policies and Procedures was developed by Eddy Government to guide the use of public lands and cooperation with County, State and Federal governments. [182]
Eddy, NEW MEXICO	Comprehensive Plan	Ensures compliance with environmental standards and advocates the use of environmental studies in planning (page. 53). ... County/city cooperation in managing growth and development in the PPJ could include one or more of the following measures: ...proximity to environmentally sensitive lands or farmland. (p. 23)[183]
Eddy, NEW MEXICO	Ordinance 19, Regulating, Controlling the Growth and Removal of Plants	Encourages native plant growth[184]
Chaves, NEW MEXICO	Art. V, Area 1 Regulations	Designation of Wildlife Habitat[185]

182 http://www.co.eddy.nm.us/Ordinance%20pdfs/landuseO-02-41.pdf
183 http://www.co.eddy.nm.us/EddyCty-FinalRPT10-08.pdf
184 http://www.co.eddy.nm.us/Ordinance%20pdfs/weedsgrowthcontrolandremovalO-91-19.pdf
185 http://co.chaves.nm.us/~cochaves/pdf/ZoningOrdinance.pdf

Chaves, NEW MEXICO	Chaves County Comprehensive Plan and Zoning Report, 4-1	Public Land Policy[186]
Chaves, NEW MEXICO	Chaves County Public Lands Advisory Committee	A committee that coordinates with federal and state agencies on public land related issues, including environmental regulation. [187]
De Baca, NEW MEXICO		
San Miguel, NEW MEXICO	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [188]
	Regulating The Permitting, Placement, Construction And Modification Of Oil And Gas Drilling And Production	The purpose of this Ordinance to: 1. Provide for a permitting process for responsible oil and gas operations and allow responsible economic development within the County; 2. Protect the water, air, environment, wildlife and other natural and economic resources within the County;..[189]
Colorado		

[186] http://co.chaves.nm.us/~cochaves/pdf/Comprehensive_Plan.pdf
[187] http://co.chaves.nm.us/index.php/2012-05-03-17-38-37/planning-zoning
[188] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf
[189] http://www.smcounty.net/Agenda/Oil%20and%20Gas%20Ordinance.pdf

Prowers, COLORADO		Utility and Development Permit Resolution and Prowers County Permitting & Development Guide including land use policy. [190]
Las Animas, COLORADO	Wildlife habitat analysis, special uses ect.	The Planning and Zoning Department is responsible for the administration and processing of applications for division of lands, subdivisions, rezoning and other land use cases.[191]
Bent, COLORADO	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.
Kiowa, COLORADO	Zoning and Planning	Approvals required from zoning and planning office commissioner
Otero, COLORADO	Areas having statewide impact or significance	Guidelines And Regulations For Areas And Activities Of State Interest County Of Otero State Of Colorado [192]

190 http://www.prowerscounty.net/Index.asp?HtAUNHADBcDIHwQ+NHADBcHt132i@330_DwVvZru3HhR7JKifAdCW2gmaUtOEnTljIqsXzyN8pcoB15YkQxe06bLFMSG49P+/

191 http://www.lasanimascounty.net/index.php/land-use-home

192 http://www.oterogov.com/images/LandUse/guidelinesregs20060814.pdf

Costilla, COLORADO		Comprehensive Plan outlines zoning, land use and environmental constraints.[193]
Pueblo, COLORADO	Rural land use plan, special uses	Title 17, Land Use and Zoning. The Rural Land Use process was adopted by Pueblo County to provide an alternative method of land division that encourages the clustering of single-family residential dwellings to maintain rural character, preserve open space, reduce the extension of roads and utilities, and offer landowners a new approach for developing the land without going through the full subdivision process. It provides a means of developing rural property while at the same time protecting wildlife habitat or critical areas, maintaining agricultural lands suitable for farming or ranching operations, and preserve and conserve water resources. In order to go through the Rural Land Use Process, the Cluster Development criteria must be met.[194] [195]
Oklahoma		
Roger Mills, OKLAHOMA	Zoning	Zoning permits and/or approval required for development
Greer, OKLAHOMA	Zoning	MAPC rezones for buildings , cell towers, and other structures. (Metropolitan action planning commission)

[193] http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Comprehensive+Plan+.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251756861482&ssbinary=true

[194] http://county.pueblo.org/government/county/department/planning-and-development/zoning

[195] http://county.pueblo.org/government/county/code/title17/chapter17-104

APPENDIX 6-- EXISTING CONSERVATION PROGRAMS

Name of program/Agency	Authority/Funding Source
FWS	
Four grant programs are available through the Cooperative Endangered Species Conservation Fund they include: Traditional" Conservation Grants, and; "Nontraditional" Grants: • Habitat Conservation Plan Land Acquisition • Habitat Conservation Planning Assistance • Recovery Land Acquisition Grants.)	ESA, Sec. 6 Support development of Habitat Conservation Plans (HCPs)federally listed threatened or endangered species, proposed and candidate species, and unlisted species proposed to be covered by the HCP.
USDA-	
Lesser Prairie Chicken Initiative	Prairie Chicken Initiative: The five states addressing Lesser Prairie Chicken habitat requested NRCS priority focus on improving habitat. NRCS and its conservation partners are helping farmers and ranchers enhance, restore and protect habitat for this sensitive and reclusive bird. For Fiscal Year 2013 Lesser Prairie-Chicken Initiative is funded under Wildlife Habitat Incentive Program.[196]
Wildlife Habitat Incentive Program	WHIP: The Food, Conservation, and Energy Act of 2008 reauthorized WHIP as a voluntary approach to improving wildlife habitat in our Nation. The Natural Resources Conservation Service administers WHIP to provide both technical assistance and up to 75 percent cost-share assistance to establish and improve fish and wildlife habitat..[197] In fiscal year 2011, the WHIP Program had a

[196] http://www.ks.nrcs.usda.gov/programs/lpci/index.html
[197] http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046975

<table>
<tr><td></td><td>U.S. total of 3,856 contracts, which represents 848,656 acres of land and a funding obligation of $60,580,860.

Contract Data for the impacted states[198]:
<table>
<tr><th>State</th><th># Contacts</th><th>Acres Enrolled</th><th>Funds Obligated</th></tr>
<tr><td>Colorado</td><td>12</td><td>15,655.9</td><td>$421,303</td></tr>
<tr><td>Kansas</td><td>119</td><td>23,799.1</td><td>$1,480,428</td></tr>
<tr><td>New Mexico</td><td>35</td><td>24,489.6</td><td>$779,789</td></tr>
<tr><td>Oklahoma</td><td>10</td><td>3,013.7</td><td>$185,084</td></tr>
<tr><td>Texas</td><td>283</td><td>317,448.9</td><td>$9,834,629</td></tr>
</table></td></tr>
<tr><td>Working Land for Wildlife</td><td>Working Lands for Wildlife is a new partnership between NRCS and the U.S. Fish and Wildlife Service (FWS) to combat the decline of seven specific wildlife species whose decline can be reversed and will benefit other species with similar habitat needs.

NRCS and FWS announced an agreement that will provide “long-term regulatory predictability for up to 30 years to farmers, ranchers and forest landowners participating in the U.S. Department of Agriculture's Working Lands for Wildlife (WLFW) Initiative.[199]

The agreement builds on a $33 million investment NRCS announced last spring dedicated toward producers who develop and implement conservation plans to manage and restore high-priority habitats for seven specific wildlife species across the country. The species are greater sage-grouse, New England cottontail,</td></tr>
</table>

198 http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046225

199 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

<table>
<tr><td></td><td>bog turtle, golden-winged warbler, gopher tortoise, lesser prairie-chicken and the Southwestern willow flycatcher."[200]</td></tr>
<tr><td>The Grassland Reserve Program (GRP)</td><td>GRP is a voluntary conservation program that emphasizes support for working grazing operations, enhancement of plant and animal biodiversity, and protection of grassland under threat of conversion to other uses.
2011 Easement Enrollment Data for impacted States:
<table>
<tr><th>State</th><th>Easements</th><th>Acres</th></tr>
<tr><td>Colorado</td><td>14</td><td>51,185</td></tr>
<tr><td>Kansas</td><td>74</td><td>42,133</td></tr>
<tr><td>Oklahoma</td><td>9</td><td>10,304</td></tr>
<tr><td>Texas</td><td>37</td><td>15,405</td></tr>
<tr><td>New Mexico</td><td>4</td><td>22,225[201]</td></tr>
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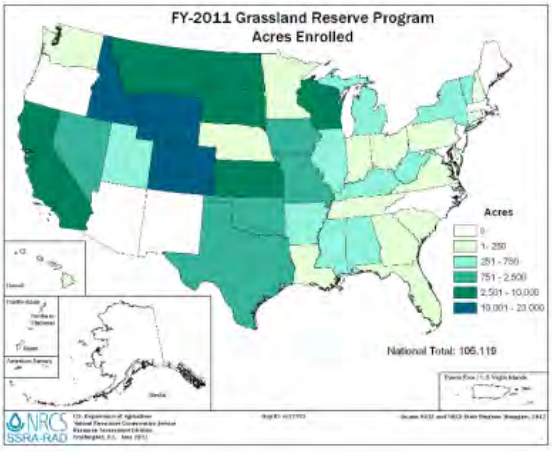
</td></tr>
</table>

200 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

201 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/grassland/?cid=stelprdb1048273

State Acres for Wildlife Enhancement (SAFE) Approved Projects. SAFE is a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years.	In 2012, the SAFE Program identified the following priorities for the impacted States: [202] **Colorado Lesser Prairie Chicken SAFE** The goal of the Colorado Lesser Prairie Chicken SAFE is to restore and enhance 21,500 acres of short and midgrass sand sagebrush prairie to maintain and enhance lesser prairie chicken populations in Colorado. **Colorado Shortgrass Prairie SAFE** The goal of the Colorado Shortgrass Prairie SAFE is to preserve the integrity and expand the extent of shortgrass prairie managed for wildlife species in eastern Colorado. Project partners hope to accomplish this by enrolling 11,475 acres in CRP. **Kansas Upland Game Birds SAFE** The goal of the Kansas Upland Game Birds SAFE project is to improve populations of bobwhite quail and other grassland-associated wildlife by creating nesting/brood-rearing habitat on portions of crop fields. This SAFE effort will establish and maintain 30,100 acres in CRP consisting of diverse native grass and forb cover. Quail, pheasant and other grassland birds are species that will benefit from SAFE enrollments. **Kansas Lesser Prairie Chicken Habitat SAFE** The goal of the Kansas Lesser Prairie Chicken Habitat SAFE project is to enroll 30,000 acres in CRP to restore mixed-grass prairies to maintain and enhance lesser prairie chicken populations. The lesser prairie chicken is a candidate for federal listing as a threatened or endangered species. **New Mexico Lesser Prairie Chicken SAFE**

202 http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20110812_consv_en_safe.html

	The goal of the New Mexico Lesser Prairie Chicken SAFE project is to enroll 2,600 acres in CRP in the eastern part of the state to benefit the lesser prairie chicken by restoring native grasslands for breeding and brood-rearing. In eastern New Mexico, this bird and other species have been petitioned for listing under the Endangered Species Act. **Oklahoma Mixed Grass Prairie SAFE** The goal of the Oklahoma Mixed Grass Prairie SAFE project is to enroll 15,100 acres in CRP to restore mixed-grass prairie type associations in northwestern Oklahoma to benefit northern bobwhite, Cassin's sparrow and other grassland birds. **Texas Gulf Coast Prairies SAFE** The goal of the Texas Gulf Coast Prairies SAFE is to enroll 500 acres to restore grassland and shallow water habitats in the Gulf Coast Prairie region of Texas for a variety of bird species. **Texas Mixed Grass SAFE** The goal of the Texas Mixed Grass SAFE project is to enroll 78,400 acres in CRP to reconnect geographically and reproductively isolated populations of lesser prairie chickens by creating native mixed grass prairie and travel corridors. [203]

[203] ftp://ftp-fc.sc.egov.usda.gov/KS/Outgoing/Web_Files/Programs/lepc/2012/lpci_practices.pdf

APPENDIX 7 -- INDIVIDUAL, STATE AND REGIONAL VOLUNTARY ACTIONS

Name of program/Agency	Authority/Funding Source
The Western Governors Association Southern Great Plains Crucial Habitat Assessment Tool (SGP CHAT)	Range Wide 5 State Lesser Prairie Chicken Model – SGP CHAT is the result of phase one of a three-year WGA Wildlife Council project, led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken (LEPC) throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[204] [205]
Lesser Prairie Chicken Initiative Kansas Field Training	Educational seminars related to the lesser prairie chicken. [206]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[207]
Wildlife Habitat Evaluation Guide (WHEG)	The regionalized Wildlife Habitat Evaluation Guide (WHEG) for lesser prairie-chicken (LEPC) serves two functions: 1) use as a planning too lto identify limiting factors for LEPC; 2) and will be used to demonstrate what concerns/threats are most limiting range wide and how NRCS has addressed those on our LPCI contracts.[208]

[204] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[205] http://kars.ku.edu/geodata/maps/sgpchat/
[206] http://www.ksre.ksu.edu/doc13897.ashx
[207] http://kec.kansas.gov/reports/wind_siting_handbook.pdf
[208] http://www.ksre.ksu.edu/doc13898.ashx

	In 2000, the Association of Fish and Wildlife Agencies (AFWA) Teaming with Wildlife (TWW) coalition Representing more than 3,500 agencies, conservation groups and businesses led the passage of two important wildlife and fisheries conservation funding acts: Wildlife Conservation and Restoration Program(WCRP) and State Wildlife Grants(SWG) (TWW 2008 – 2011, see new TWW 2012). The following year, the United States' Congress required each state and territory to develop a "comprehensive wildlife conservation strategy" to guide the distribution of these funds(USFWS 2000). Eight elements of conservation success were identified by the US Fish and Wildlife Service (USFWS 2000) and a representative team from state fish and wildlife agencies and conservation organizations to guide the plans' development. The elements address species, habitats and communities, problems and issues, conservation actions, monitoring, plan reviews, coordination with conservation partners, and public involvement. SPECIES OF GREATEST CONSERVATION NEED (SGCN) Each state identified a list of species representative of the diversity, health and importance of the wildlife of their state. While the lists could include game and other state and federal regulated species, SGCN lists primarily focused on rare, declining, and vulnerable fish and wildlife species needing special attention for recovery, stability, and/or to prevent listings under state or federal regulation (e.g. Endangered Species Act). CONSERVATION ACTIONS AND MONITORING Conservation actions(e.g. research, survey, restoration, land or water protection, partnership-building) were defined to address the threats and issues which negatively affect species, habitats and systems. A baseline assessment of existing habitats was important for many states to define and prioritize where actions were most needed. For some states, this assessment could not be accomplished with the available data; therefore, baseline development itself became a conservation action. Actions were developed on

	the framework of existing conservation for each state: private landowner outreach, partnerships with other agencies and organizations, public involvement, legislative and regulatory support, to name a few. Measuring and reporting progress, lessons learned and successes ("effectiveness") is best accomplished through monitoring. This component is very important, yet frequently it is the most difficult to achieve due to very limited time, money and human resources. MOMENTUM 2005 – 2011 By 2006, 56 plans were created – one for each US state and territory – and approved by USFWS Regional review teams(TWW 2012). These plans were called State Wildlife Action Plans(SWAP) or Comprehensive Wildlife Conservation Strategies(CWCS). Since plans were approved, conservation partners and resource conservation agencies have seen the value in these plans grow as information resources, support or guidance for their conservation activities, and platforms for conservation practice improvement.[209]
Colorado Wildlife Action Plan	Submitted to the U.S. Fish and Wildlife Service on September 29, 2005, and it was finalized November 2, 2006. • 210 species were identified as Species of Greatest Conservation Need (SGCN). [210]
Interagency Group	W. Governor's Association Interstate Working Group
Upland Bird Grassland Habitat Strategy on the Eastern Plains	Grassland wildlife habitat conservation in eastern Colorado is implemented through a diverse mix of programs and efforts. Colorado Parks and Wildlife (CPW) has identified and prioritized areas of high upland wildlife habitat and population potential, which typically coincides with historic mid-grass or sand-sage prairie habitats.
Pheasant Habitat Improvement Program,	The Pheasant Habitat Improvement Program (PHIP) is a cooperative effort between the Colorado Parks and Wildlife,

[209] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_overview_2012.pdf
[210] http://wildlife.state.co.us/SiteCollectionDocuments/DOW/WildlifeSpecies/CWCS_FinalReport2006.pdf

(PHIP)	Pheasants Forever Inc., and local Pheasants Forever Chapters in Colorado. The program is designed to assist landowners in developing and enhancing habitat for ring-necked pheasants. PHIP is offered within the core pheasant range in Colorado, including the counties of Morgan, southeastern Weld, Logan, Phillips, Sedgwick, Yuma, Washington, Kit Carson, Cheyenne, Kiowa, Prowers and Baca.[211]
Private Lands Technical Assistance Programs	Private Landowner Assistance offers a wide variety of programs to assist private landowners on improving fisheries and wildlife on their property and can provide technical support and assistance on improving wildlife habitats.[212]
Habitat Partnership Program (HPP)	This grant is designed to encourage multiple entities to partner with the Habitat Partnership Program on large scale habitat improvement projects which, when completed, will provide benefits to livestock, private land owners, land managers, big game animals and other wildlife species. Habitat improvement projects include using mechanical and chemical tools to improve/increase available habitat and forage. Typical habitat improvement projects done by HPP include brush manipulation (hydroaxing, roller chopping, Lawson aerating, burning, etc), weed control using biological and chemical means, water developments (maintaining existing water sources and developing new ones), fertilizing and reseeding.[213]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are paving the way of our future by developing best management practices or BMPs that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy

[211] http://wildlife.state.co.us/LANDWATER/PRIVATELANDPROGRAM/PHIP/Pages/PHIP.aspx
[212] http://www.kdwpt.state.ks.us/news/Services/Private-Landowner-Assistance
[213] http://www.riparianrestorationconnection.com/component/content/article/193-habitat-partnership-program-hpp-habitat-improvement-grant

	from renewable sources by 2020 in a wildlife friendly manner.[214]
LESSER PRAIRIE-CHICKEN WILDLIFE MANAGEMENT PLAN	The Texas Parks and Wildlife Department(TPWD) provides free technical assistance to landowners and land managers interested in wildlife management through the private lands enhancement program. Local biologists work with land owners to develop and then meet the wildlife management goals and objectives for all species of land owner interest on a given property. A wildlife management plan (WMP) can provide numerous benefits for landowners. Once implemented it improves habitat, potentially increases wildlife numbers, and can improve grazing resources. Additionally, use of a WMP promotes aesthetic value, and therefore can raise property value. The lesser prairie-chicken is a candidate species for listing under the Endangered Species Act. This particular WMP (specific to protecting and improving lesser prairie-chicken habitat) will fulfill the requirements for entering into a Candidate Conservation Agreement with Assurances(CCAA. [215]
Texas Conservation Agreement	CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES FOR LESSER PRAIRIE-CHICKENS between TEXAS PARKS AND WILDLIFE DEPARTMENT and U. S. FISH AND WILDLIFE SERVICE[216]
TEXAS CONSERVATIONACTIO N PLAN State/Multi-Region	Through the Texas Conservation Action Plan (TCAP), ecologists and other stakeholders all across the state have identified 1311 Species of Greatest Conservation Need (SGCN), 232 Rare Plant Communities, the best examples of habitats and those at risk, issues affecting our resources, and potential solutions to continue to protect lands and water for future generations of

[214] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml

[215] v http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd_1046b_w7000_lesser_prairie_chicken_wmp.pdf

[216]http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

	people, fish and wildlife. The challenges are many, but the landscape of conservation partners and opportunities is extensive. This plan is designed to help interested folks connect and put into practice the most needed conservation actions. [217]
An Assessment of Herbicide Treatment and Grazing on Lesser Prairie Chicken Survival, Nest Site Collection[218]	Blake Grisham- Department of Natural Resources Management, Texas Tech University [219]
Candidate Conservation Agreement With Assurances -Oklahoma	The U.S. Fish and Wildlife Service (Service) has approved the Oklahoma Department of Wildlife Conservation's (ODWC) Candidate Conservation Agreement with Assurances (CCAA) for the lesser prairie-chicken. - approved 2/5/13[220]
Great Plains HCP	HCPs are an integral component of an application for an Incidental Take Permit (ITP) under the federal Endangered Species Act (ESA). ITPs are a voluntary tool that non-federal entities may use to receive authorization for "take" of federally-listed (i.e., officially recognized as endangered or threatened) species of wildlife that may occur in connection with otherwise lawful activity. "Take" is defined in the ESA as, "…to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" with respect to federally-listed endangered species.[221]

[217] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_statewide_multiregion_handbook.pdf
[218] http://www.ksre.ksu.edu/doc13892.ashx
[219] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1047721.pdf
[220] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf
[221] http://www.greatplainswindhcp.org/documents/fact_sheet.pdf ; http://www.greatplainswindhcp.org/aboutthehcp.cfm

Oklahoma Conservation Commission	Commission created to assist with state conservation and education efforts and is an authorized rulemaking entity. [222] [223] The Oklahoma Conservation Commission and conservation districts accomplish conservation of renewable natural resources through soil and water conservation, landuse planning, small watershed upstream flood control, abandoned mine land reclamation, water quality monitoring, environmental education and wetlands conservation.
Ecology and Management of the Lesser Prai rie-Chick en[224]	Oklahoma Cooperative Extension Service, Division of Agricultural Sciences and Natural Resources, Oklahoma State University
Wildlife Credits Program	Offers stewardship payments to agricultural producers for work done to protect and expand habitat for the rare upland bird. Is made possible with an agreement between the Wildlife Department, Oklahoma Conservation Commission and the Oklahoma Association of Conservation Districts. [225]
Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (Tympanuchus pallidicinctus) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.[226]
Oklahoma Lesser Prairie Chicken Conservation Plan (OLEPCCP	a conservation plan to address the decline of the lesser prairie chicken (LEPC) in Oklahoma. The conservation plan will identify management strategies to improve LEPC population viability through improvements to LEPC habitat emphasizing tools and incentives to encourage landowners to partner with agencies in conservation efforts while achieving their land use needs.[227]

[222] http://www.ok.gov/conservation/
[223] http://www.ok.gov/conservation/About_Us/Rules_and_Rulemaking/index.html
[224] http://www.environment.ok.gov/documents/OKWindEnergy/EcologyMgmtLesserPrairieChicken.pdf
[225] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[226] http://www.wildlifedepartment.com/lepcdevelopmentplanning.htm
[227] http://www.wildlifedepartment.com/wildlifemgmt/lepc/cons_plan.htm

Habitat Evaluation Guide for the Lesser Prairie-chicken[228]	Guide for Management and Habitat Restoration co-authored by Oklahoma State University, George Miksh Avian Research Center, and the Nature Conservancy.
Eastern Ceder Removal	NRCS is using new technology to enhance existing satellite images to identify redcedar growth and estimate the inventory available for harvest. Counties that are included in this Cedar Mapping project: Cimarron, Ellis, Murray, Okfuskee, Pottawatomie, and Woodward.[229]
Lesser Prairie Chicken Initiative Core Conservation Practices	NRCS Programs for habitat restoration include: Brush Management, Early Succession Habitat Development, Firebreak , Fence, Obstruction Removal, Prescribed Grazing, Prescribed Burning, Range Planting, Restoration of Rare and Declining Habitat, Watering Facility supporting programs. [230]
Kansas Comprehensive Wildlife Conservation Plan[231]	The theme of Kansas' Comprehensive Wildlife Conservation Plan (CWCP) is "Keeping Common Species Common." A major premise of Kansas' approach to developing the CWCP was to use existing information - not to start from scratch or conduct new studies. The process relied heavily on experts and interested parties participating in the process to bring the best available information into the plan.
LONG-RANGE PLAN For The Management of Lesser Prairie Chickens in New Mexico 2002-2006	The goal of the plan is to satisfy the public's lesser prairie-chicken related recreational and ecological interests and resolve related socio-economic issues. A three-fold approach will be integral in achieving this: 1) We will obtain a better understanding of LPC abundance, distribution and population trends. 2) We will continue to seek public involvement in and support of LPC management efforts. 3) We will work with private landowners and land management

[228] ftp://wiley.kars.ku.edu/windresource/Habitat%20Evaluation%20Guide%20for%20the%20LPC.pdf
[229] http://boisecitynews2.wordpress.com/2009/03/03/oklahoma-launches-plan-to-battle-eastern-redcedar/
[230] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcsdev11_023947.pdf
[231] http://kdwpt.state.ks.us/news/Services/Kansas-CWCP/Kansas-CWCP

	agencies to provide habitat necessary to ensure long-term conservation of LPC habitat.[232]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH[233]	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.
Southeast New Mexico Lesser Prairie-Chicken Working Group	NMDGF, as part of the Department's outreach efforts, NMDGF in collaboration with the USFWS, Bureau of Land Management (BLM), New Mexico State Land Office (SLO), and Wildlife Management Institute, proposed that a "Southeast New Mexico Lesser Prairie-Chicken Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LEPC in southeastern and east central New Mexico. The organizers hoped the various constituencies would be able to negotiate a collaborative plan that would, when implemented, improve the status of the species such that federal listing would no longer be warranted, while protecting the interests of the participating parties. In 2005, the Working Group adopted a conservation strategy and recommendations which laid out general approaches, priorities and parameters for achieving the goal of LEPC conservation and recovery while maintaining economic values and traditional land uses. The strategy document outlines and prioritizes a variety of recommended programs, projects, and practices for reducing threats to the LEPC while maintaining other uses of the land.
GIS habitat analysis for lesser prairie-chickens in southeastern New Mexico	Geographic Information System (GIS) habitat analyses for lesser prairie-chicken (LPCH, Tympanuchus pallidicinctus) conservation planning. The 876,799 ha study area included most of the occupied habitat for the LPCH in New Mexico. The objectives were to identify and quantify: 1. suitable LPCH habitat in New Mexico, 2. conversion of native

232 http://www.wildlife.state.nm.us/conservation/documents/PCLongRange.pdf

233 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	habitats, 3. potential for habitat restoration, and 4. unsuitable habitat available for oil and gas activities.[234]
Range-wide Population Estimation and Monitoring for LPC	A range-wide sampling framework and survey method is being developed to estimate total abundance of active leks for the population of LEPC. In addition, standard operating procedures are being developed for aerial surveys and ground truthing surveys.[235]
Interstate Collaboration Range Wide Conservation Plan	Lesser Prairie Chicken Interstate Working Group A focused conservation effort for LPC was described and approved by WAFWA through the Lesser prairie chicken conservation initiative (LPCCI) drafted by the Lesser Prairie Chicken Interstate Working Group (LPCIWG) in May 2008. The LPCIWG is one of the technical groups associated with the WAFWA Grassland Initiative and the 5 cooperating states have and continue to commit staff to this endeavor since it was formally established in 1996. The Lesser Prairie-Chicken (LPC) Interstate Working Group of the Western Association of Fish and Wildlife Agencies (WAFWA) is developing a range-wide conservation plan to increase the population of the LPC, in partnership within federal agencies and others. The states include Colorado, Kansas, New Mexico, Oklahoma and Texas. The conservation plan emphasizes tools and incentives to encourage landowners and others to voluntarily partner with agencies in LPC habitat conservation efforts, while also achieving their land use needs.236

[234] http://www.ksre.ksu.edu/doc13889.ashx
[235] http://www.wafwa.org/documents/Final_Study_Design_Appendices_12_8_2011.pdf
[236] http://www.wafwa.org/html/prairie_chicken.shtml

Memorandum Of Understanding For Conservation And Management Of Lesser Prairie-Chickens And Associated Species And Their Habitats	The purpose of this Memorandum of Understanding (MOU) is to provide, under auspices of the Western Association of Fish and Wildlife Agencies (WAFWA), for interagency cooperation in conservation and management of lesser prairie-chickens (Tympanuchus pallidicinctus) and associated species and their habitats across their current 5-state range (i.e. parts of Colorado, Kansas, New Mexico, Oklahoma, and Texas). The purpose of this MOU is also to provide for cooperation among participating agencies in the development and implementation of conservation programs for lesser prairie-chickens (LEPC) and their associated habitats. The participating agencies agree that cooperation is necessary to collect and analyze data on lesser prairie-chickens and their habitats, and to plan and implement actions necessary to establish and/or maintain viable LEPC populations that are sufficient to preclude present or future endangerment, within the constraints of approved budgets.[237]

[237] http://www.wafwa.org/documents/LPCCI_FINAL.pdf

New Mexico CCCA	This Candidate Conservation Agreement (CCA) for the LPC and the SDL represents a collaborative effort between the FWS, the Bureau of Land Management (BLM), and the Center of Excellence for Hazardous Materials Management (CEHMM). The CCA builds upon the BLMs "Special Status Species Resource Management Plan Amendment" (RMPA) (completed in April 2008) for southeast New Mexico. The RMPA established the foundational (minimum) requirements that will be applied to all future Federal activities, regardless of whether a permittee or lessee participates in this CCA. The strength of the CCA comes from the implementation of additional conservation measures that are additive, or above and beyond those foundational requirements established in the RMPA.[238] .As of July 15, 2012, thirty oil and gas companies are enrolled in the CCA/A for a total of 808,000 acres (the participating Federal agency in this case is the Bureau of Land Management (BLM)). In addition, forty-one New Mexico ranchers have enrolled a combined 1.5 million acres of rangeland in the CCA/A and the New Mexico State Land Office has enrolled 248,000 acres in the CCAA. Partners in the NM CCA/A include BLM, CEHMM (non-profit third party to manage funds and implement CCA/A's), New Mexico Department of Game and Fish (NMGF), New Mexico State Land Office and several oil-gas companies. The CCA/A includes the entire range of the lesser prairie-chicken in New Mexico.

[238] http://www.fws.gov/southwest/es/Documents/R2ES/LPC-SDL_CCA-CCAA_2008.pdf

North American Landbird Conservation Plan-co-authored by States, Industry and FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [239]
New Mexico LPC/SDL Working Group Conservation Plan	Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico In December, 2002, representatives of NMDGF, FWS, the Federal Bureau of Land Management (BLM), the New Mexico State Land Office (NMSLO), and the Wildlife Management Institute proposed that a "Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LPC and SDL.[240]
Land Acquisition for Habitat	In May 2008, following an extensive public planning process, the Bureau of Land Management (BLM) designated an Area of Critical Environmental Concern (ACEC) about 35 miles east of Roswell. The designation is meant to provide much-needed habitat for two species being considered for listing under the Endangered Species Act: the Lesser Prairie-chicken and the sand dune lizard. To conserve this high value habitat, the BLM requested The Conservation Fund's assistance in acquiring key lands in and around the special area. The Fund has worked on several projects that together have protected about 58,000 acres of land.

[239] http://www.partnersinflight.org/cont_plan/#Access
[240] http://nwcos.org/Resources/LPC_SDL_Conservation_Strategy_CD.pdf

Land Acquisition for Habitat	The Johnson Ranch in southeastern New Mexico has been purchased by The Nature Conservancy. The 9,170 acre property contains critical habitat for 25 Species of Greatest Conservation Need—as identified in the state's Comprehensive Wildlife Conservation Strategy (also known as Wildlife Action Plan)—including the lesser prairie-chicken.
POWERLINE PROJECT GUIDELINES NEW MEXICO DEPARTMENT OF GAME AND FISH	Recommendations for conservation and development without wildlife disturbances. [241]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.[242]
RECOMMENDATIONS TO MINIMIZE ADVERSE IMPACTS OF WIND ENERGY DEVELOPMENT ON WILDLIFE 2012	The New Mexico Department of Game and Fish (NMDGF) does not have regulatory authority specific to wind power development, nor is there any other statewide permitting authority in New Mexico. The information in this guideline is intended for use by wind project developers, their consultants, local government and the general public. Developers are encouraged to contact NMDGF for project-specific comments and recommendations. Specific locations of listed species will be kept confidential, however other information shared with NMDGF may be accessible to the public through the NM Inspection of Public Records Act. NMDGF Guidelines referred to herein may be found in the

241 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/2007POWERLINEGUIDELINES.pdf

242 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	Habitat Handbook, under the Conservation tab on the Department website.[243]
Oklahoma Conservation Easement	The Oklahoma Wildlife Conservation Commission and the Department of Wildlife Conservation shall not enter into or approve a setback or conservation easement that includes a setback related to energy or agricultural structures and regarding a threatened, endangered or candidate species that is more restrictive than those created pursuant to federal law, rules or guidelines. B. Prior to entering into or approving a conservation easement or setback pursuant to subsection A of this section, the Commission and the Department shall review all information and studies presented to the Commission or Department by a public or private entity affected by the proposed conservation easement or setback.[244]
Colorado Conservation Easements	"Conservation easement in gross", for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural,

243 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

244 Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103b - Setback or Conservation Easement Related to Energy or Agricultural Structures and Threatened or Endangered Species. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466365&hits=481+480+475+474+260+259+253+252+189+188+182+181+12+11+5+4+

	horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.[245]
Colorado Conservation Easements	Nature of conservation easements in gross. (1) A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in section 38-30.5-102 and transferable by any lawful method for the transfer of interests in real property in this state. (2) A conservation easement in gross shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding that it may be negative in character. (3) A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it. (4) The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating the easement. (5) A conservation easement in gross that encumbers water or a water right as permitted by section 38-30.5-104 (1) may be created only by the voluntary act of the owner of the water or water right and may be made revocable by the instrument creating it.[246]
Colorado Conservation Easements	The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary. Further, the general assembly finds and declares that it is in the public interest to determine who may receive such easements and for what purpose such easements may be received.[247]

[245] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[246] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[247] Title 38. PROPERTY - REAL AND PERSONAL, REAL PROPERTY, Interests in Land, Article 30.5. Conservation Easements.

Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	Interior Secretary Salazar announces $57.8 million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP- The planning proposal lands encompasses the whooping cranes migration route in the U.S. and their wintering grounds, along with containing a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[248]

http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=27609&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

[248] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html

APPENDIX 8-LITERATURE CITED

[Please note, where references are made to literature cited in the U.S. Fish and Wildlife Service's 2012 Proposed listing, for consistency, CESAR has adopted the abbreviated citation conventions used in that document.]

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Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134-0001March 10, 20146:24 p.m. CDT

PREVIOUSLY SUBMITTED on March 11, 2013 to:

[Docket Number: FWS-R2-ES-2012 - 0071:4500030113]

RIN 1018-av21

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BEFORE THE
UNITED STATES
DEPARTMENT OF THE INTERIOR

AGENCY INFORMATION COLLECTION ACTIVITIES: ENDANGERED AND THREATENED WILDLIFE AND PLANTS: LISTING OF THE LESSER PRARIE CHICKEN AS A THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT

[Docket Number: FWS-R2-ES-2012 - 0071:4500030113]
RIN 1018-av21

COMMENTS
OF
KANSAS COUNTIES:

Clark, Gove, Greeley, Hodgeman, Kearny, Lane, Logan, Morton, Ness, Seward, Scott, Trego, Wallace, Wichita,
and,
Kansas Electric Cooperatives (KEC)
Kansans for Balanced Resource Choices (KBRC)
171 Private Kansas Landholders

Background –

The Lesser Prairie Chicken (*Tympanuchus pallidicinctus*) is a wonderful upland prairie grouse species displaying some of the most extraordinary mating rituals in the avian world. On early spring Kansas mornings, groups of male Lesser Prairie Chickens can be found at lek sites exhibiting elaborate dancing and vocalizations designed to attract females. Kansans care about preservation of the Lesser Prairie Chicken within the context of respect for private landholders, balanced environmental stewardship, the right of sovereign State and Local governments to govern their own regions, and sound scientific judgment.

The Lesser Prairie Chicken (LPC) is known to occupy areas in Eastern Colorado, Northern Texas, Eastern New Mexico, Western Oklahoma and Western Kansas. The majority (>80%) of land within known LPC range is privately owned, with the exception of significant parcels of BLM land in eastern New Mexico.

The historical LPC range prior to 1960 is speculative and population (census) counts are limited, qualitative and speculative.

Currently, the LPC is found in four ecoregions called *Sand Shinnery Oak*, *Mixed Grass Prairie*, *Shortgrass*, and *Sandsage Prairie*. Of the four ecoregions, the LPC in Kansas is displaying good recovery and populations not previously observed north of the Arkansas River are being counted, even as far north as Interstate 70. It is noteworthy that the highest population density of LPCs being observed in Kansas are in areas *previously undocumented* by this species, demonstrating their resilience, adaptability and ability to migrate to conditions better suited for sustainability.

Drought –

Since 2006, nearly the entire ecoregion occupied by the LPC has been undergoing a severe drought comparable to those of the 1930s and 1950s. During all three periods the Palmer Drought Severity Index (PDSI) throughout most of the Great Plains exceeded "-4," classified as "*severe to extreme*."

LPC census counts during and immediately following the droughts of the 1930s and 1950s demonstrate LPC populations fluctuate widely, experiencing significant decline during dry periods and recovering remarkably following drought events.[1] Similarly, during drought periods LPCs have been observed to permanently relocate considerable distances to more preferable habitat (Copelin 1963, Riley et al. 1994).

We were astonished not to find *any* literature discussion - and the associated impacts - of the decade-long drying of the Arkansas River between Deerfield and Great Bend Kansas, which particularly augments the ongoing drought season (Schwilling, 1955).

Because the ecoregions within the current range of the LPC are experiencing an ongoing, intense and severe drought, LPC population counts and data collection activities – and any policies derived from them – will not reflect typical conditions.

Ring-Necked Pheasant –

In 1906 the Ring-Necked Pheasant (*Phasianus colchicus*) was introduced in 84 Kansas Counties, and it is found throughout the range of the LPC. Ring-Necked Pheasants are hearty, prolific and have been documented as being both aggressive[2,3] and parasitic to the nests of Lesser Prairie Chickens.[4] Holt, in particular, studied aggressive Pheasant behavior toward LPCs during breeding activities noting that "*Disturbance of leks during breeding season could prevent breeding activities and have a negative impact on populations.*" Other studies also support this conclusion. Because steep decline of the LPC populations correlates well with introduction of Ring-Necked Pheasants and the droughts of 1930s and 1950s, it is highly probable the cumulative impacts of those events, coupled with habitat losses from native land conversions (1950 – 1995) are the primary contributors to the observed reduction in LPC populations.

Habitat Degradation -

The primary anthropogenic (man induced) mechanism contributing to regional decline of LPC populations is conversion of land from native prairie to agriculture and rangeland uses. The trend in native prairie conversions, and associated LPC habitat degradation, leveled off in the 1990s and in the case of the NRCS CRP Program, has even reversed (Rogers and Hoffman 2005).

In contrast to native prairie conversions from agricultural activities, land-use allocations for roadways, oil and gas exploration, wind generation, transmission line service roads and similar industrial uses are localized in scale and miniscule in area. Substantial literature disagreements exist as to the degree of impact from service roads, oil and gas pads and pump jacks on LPC lekking, nesting and brooding activities[a] (Jamison, et al. 2002). While anthropogenic activities can affect the *nest selection* process, they typically do not affect *nest success* (brood numbers) – meaning that LPCs prefer quieter neighborhoods, with a minimum of threats, given a choice.

In its Federal Register Notification, USF&W is basing the substance of its proposed LPC Listing as attributable to: "*the historical, ongoing and probable future impacts of habitat loss and fragmentation resulting from conversion of grassland to agricultural uses; encroachment by invasive woody plants; wind energy development; petroleum production; and presence of roads and manmade structures including towers, utility lines, fences, turbines, wells and buildings*." Of these, LPC habitat losses and fragmentation from agricultural/ranching conversions appear at near completion, and even to be reversing; programs for control of invasive flora are ongoing and most western-Kansas Counties have entire Departments dedicated to invasive plant control.

USF&W proposes to list the LPC out of concern for anticipated habitat losses from wind farm construction and operation, fragmentation from transmission line corridors and roadways, and impacts by petroleum production and transmission. For purposes of these comments we have addressed these items separately.

Wind Farm Construction and Operations -

With significant fiscal support from Federal Subsidies, wind farm construction on private, western-Kansas lands is ongoing. In many cases, construction of wind farms is taking place on lands already converted from native prairie to agricultural and ranching purposes. This multi-purpose land use offers environmental benefits from the standpoints of electricity production and agriculture.

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[a]See also: Crawford and Bolen 1976a, Davis et al. 1979, Sell 1979, Taylor 1979, Ahlborn 1980, Locke 1992, Bidwell et al. 2003.

In a shrill call to regulate the wind-energy sector, Pruett et. al[5] use adjectives like "*dire*" and "*imperiled*" to impart urgency that they "*feel*" study of negative effects from wind energy to be timely and important - and we agree: more study is necessary prior to initiating Policy affecting the wind energy sector. What we do not agree with, as Policymakers ourselves, is the necessity to regulate in the absence of compelling data and legitimate, peer-reviewed studies which scientifically confirm impacts and preferences of the LPC. One need not look far to find examples of environmental policies that are expensive, have unintended consequences, and which offer limited benefit to the species they propose to protect.

Similar to the literature conflicts identified in the LPC habitat studies, studies on wind-farms also have conflicting findings. As example, Vodenal et al. (2011) found Greater Prairie Chickens to lek, nest, brood and remain in the proximity of a Nebraska wind farm despite the presence of localized, towering structures. The Vodenal Study, in tandem with observations that LPCs routinely cross transmission corridors to feed and migrate,[6] is at odds with the notion of "*Site Fidelity*" – the conjecture some biologists have used to explain away data aberrations that LPCs do in fact nest, brood and live in electric transmission line corridors.

Because tower height and blade design has negated direct LPC collisions, combined with the fact that wind farms typically bury transmission lines underground, it would seem to us the majority of potential impacts from wind farms consist only in habitat loss from conversion of native prairie lands.

Transmission Line Corridors -

Prior to settlement, the Great Plains landscape was occupied by few elevated structures, save a few hearty trees. As modern man progressed, the prairie landscape was transformed through construction of grain elevators, bridges, light poles, signage - with electrical transmission/distribution lines to serve them.

Construction of elevated, manmade structures provides raptors and like-kind birds-of-prey with an enhanced opportunity for both vantage and rest, and this advantage has been well documented. This is not limited to electric utility poles.

A study by Hagan, et al.[7] (field work 1997-2002; published 2011) sought to test the "*behavioral avoidance of landscape features by LPCs in southwestern Kansas*." This study included radio-tagging and movement-monitoring of 190 LPCs over a 4 year period, followed by complex regression analysis. Findings include a *general* preference of LPCs to avoid powerlines <u>and</u> buildings, and that LPCs "*were less likely to include powerlines* [in their range] *than other non-use areas*." Data from the same study also found LPCs nesting in newly-constructed transmission corridors <u>did not exhibit avoidance tendencies and had similar nest success</u> to non-corridor populations.

In response to conflicting transmission corridor-avoidance data, the concept of "Site Fidelity" was introduced and has been carried through the literature as science, including justification for the current Listing proposal by USF&W. Site Fidelity is the speculation that adult LPCs tend to return or remain in areas where disturbances exist, with subsequent generations displaying less affinity to those areas than their parents. It is noteworthy that LPCs in "disturbed" areas display similar nest success and they will remain in those areas given adequate, mixed-grass cover.

Electrical transmission and distribution poles provide enhanced vantage and rest opportunities for raptors, and LPCs (and other vulnerable prey) simply elect to build nests in more preferable, mixed-grass habitats which provide better cover. In human terms, if one is born in East Saint Louis, South Side Chicago, East Los Angeles, or near Branch Avenue in Washington D.C., they will, given a choice, relocate for better cover in future generations.

Fragmentation -

Fragmentation of LPC habitat has occurred primarily through conversion of native prairie to agriculture, which combined with the stressors of extreme drought and aggression by Ring-necked Pheasants, has contributed to overall population decline of the LPC. Various hypotheses have been forwarded pointing to habitat fragmentation from oil/gas pipelines, distribution/transmission powerlines, roadways and service lanes. While these anthropogenic sources do present logistical impediments to LPC movement, the literature clearly demonstrates LPCs to navigate across *all* anthropogenic sources - including powerlines - in search of forage (Copelin 1963, Taylor and Guthery,1980), winter riparian corridors (Schwilling, 1955), and more preferred, mixed-grass habitat.

Discussion

Many of those represented in this document reside on property held in our families for *generations*, with some going back to era of Land Grants. For Kansans, we are concerned for the Lesser Prairie Chicken because it is part of our heritage and neighborhoods.

Objective review of the Public Record and simple, down-home knowledge of this bird indicate LPC population declines are a result of drought, loss of habitat from native prairie conversions, and stressors from aggression/parasitism by Ring-necked Pheasants. Just as no one likes to cross bad neighborhoods in rough urban settings, LPCs display a general avoidance of buildings, pump jacks and power-line corridors – and this fact neither makes these fixtures a barrier nor imparts culpability for their presence.

Concern is expressed about the apparent unbalanced – perhaps even biased – focus away from natural LPC stressors and fragmentation toward future, perceived impacts - especially in light of glaringly conflicting studies. Because habitat fragmentation is complete and empirical data from specific anthropogenic sources is limited, conflicting or anecdotal, a Threatened Listing of the LPC would be premature, - or perhaps even elongate recovery of the Lesser Prairie Chicken.

Concluding Remarks

We concur with the Conservation recommdations explicitly outlined by C.H. Hagen, B. Jamison, K. Giesen and T. Riley:[8]

> "*We recommend that each State develop and implement conservation plans for LPCHs. These Plans should use local groups comprised of representatives from all interested stakeholders to identify and solve regional issues within ecological regions. Conservation Plans should include 1) quantity of habitat remaining in each state, 2) common problems involved in conserving the LPCH, and 3) conditions needed to maintain healthy populations*."

and believe the best conservation approach to include a collaboration of local, state and regional initiatives coordinated by the existing 5-State Interstate Working Group. Many Conservation Agreements (CCAs) are already in place, others are still in progress. Similarly, the *Draft, Range-Wide Conservation Plan* (RWCP) displays good promise as a potential voluntary plan central to LPC Recovery. We look forward to more information as to how Impact Assessment Credits would be calculated for Transmission Line mitigation; our current understanding is the debit-and-credit mitigation calculation may not consist of an acre-for-acre mitigation – which could be important to us for equity reasons.[9]

USF&W is constrained to base final action for the LPC on the *best scientific and commercially available data available.* We respectfully submit that a complete Body of such information is not currently available, and as such, we encourage USF&W to issue a "Not-Warranted" determination for this Action.

Authorities

Endangered Species Act (16 USC 1361-1407; 16 USC 1531-1544; 16 USC 4201-4245); FR Volume 77 No. 238: December 11, 2012.

Respectfully submitted,

J. R. Carlson
Stillwater Technical Solutions
6505 South Highway 83
PO Box 93
Garden City, KS 67846
j.r.carlson@sbcglobal.net

REFERENCES

[1] Jackson, A.S., and R. DeArment. 1963. The lesser prairie-chicken in the Texas Panhandle. Journal of Wildlife Management 27:733-737.

[2] Vance, D. Russel, and Ronald L. Westemeier. 1979. Interactions of pheasants and prairie chickens in Illinois. Wildlife Society Bulletin 7(4):221-225.

[3] Holt, R.D., Matthew J. Butler, Warren B. Ballard, Curtis A. Kukal, and Heather Whitlaw. 2010. Disturbance of lekking lesser prairie-chickens by ring-necked pheasants. Western North American Naturalist 70(2):241-244.

[4] Westemeier, R.L., et.al. 1998. Parasitism of greater prairie chick nests by ring-necked pheasants. Journal of Wildlife Management 62(3):861.

[5] Pruett, Christin L., Michael A. Patten, and Donald H. Wolfe. 2009. It's not easy being green: wind energy and a declining grassland bird. BioScience 59(3):257-262.

[6] Hagen, C.A., J.C. Pitman, T.M. Loughin, B.K. Sandercock, R.J. Robel, and R.D. Applegate. 2011. Impacts of anthropogenic features on habitat use by lesser prairie-chicken. Ecology Conservation and Management pps 72.

[7] Ibid.

[8] Hagen, Christian A., Brent E. Jamison, Kenneth M. Giesen, and Terry Z. Riley. 2004. Guidelines for managing lesser prairie chicken populations and their habitats. Wildlife Society Bulletin 32(1): pps 76.

[9] Haufler, Jonathan, et. al. 2013. Draft Range Wide Conservation Plan for the Lesser Prairie Chicken.

Woodward, Alan J.W., Samuel D. Fuhlendorf, David M. Leslie, Jr., and J. Shackford. 2000. Influence of landscape composition and change on lesser prairie chicken (Tympanuchus pallidicinctus) populations. The American Midland Naturalist 145:261-274.

Fuhlendorf, Samuel D., Alan J.W. Woodward, David M. Leslie, Jr., and John S. Shackford. 2002. Multi-scale effects of habitat loss and fragmentation on lesser prairie-chicken populations of the US Southern Great Plains. Landscape Ecology 17:617-628.

Pitman, J. , C.A. Hagen, R. J. Robel, T.M. Loughin, and R.D. Applegate. 2005. Location and success of lesser prairie-chicken nests in relation to vegetation and human disturbance. Journal of Wildlife Management.

Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134-0001March 10, 20148:31 p.m. CDT

Previously submitted to:

Docket Number: FWS-R2-ES-2012 - 0071

On October 2, 2013, the attached correspondence and Notice of Hearing provided Director Ashe with notification that:

•On November 7 and 8, 2013 the Kansas Natural Resource Coalition (KNRC) would conduct a Public Hearing in
Garden City, Kansas regarding "The Advisability of Listing The Lesser Prairie Chicken as a Threatened Species
Under The Endangered Species Act. Attached to the correspondence was official notification of that Hearing;

•The purpose of the Public Hearing was to receive data, studies, alternative plans and other information
necessary to evaluate consistency with the Natural Resource Coordination and Lesser Prairie Chicken
Conservation, Management and Study Plans adopted by the 31-County KNRC (now 32-county KNRC);

•KNRC was hopeful the Service would be an active participant in, provide testimony to, and coordinate with the
hearing panel during the important fact-finding event;

•The Coalition looked forward to coordinating with the Service to affect conservation within the

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Public Submission Posted: **01/06/2014** ID: **FWS-R2-ES-2012-0071-0496**

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The **Fish and Wildlife Service** (FWS) Proposed Rule: **Endangered and Threatened Wildlife and Plants: Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule**

For related information, **Open Docket Folder**

3 Your Receipt

Your Comment Tracking Number: **1jx-89m4-coka**	Your comment will be viewable on Regulations.gov after the agency has reviewed it, which may be an indefinite amount of time. Use your tracking number to find out the status of your comment.

Your comment:

Comment: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners:

On October 2, 2013, the attached correspondence and Notice of Hearing provided Director Ashe with notification that:

•On November 7 and 8, 2013 the Kansas Natural Resource Coalition (KNRC) would conduct a Public Hearing in Garden City, Kansas regarding "The Advisability of Listing The Lesser Prairie Chicken as a Threatened Species Under The Endangered Species Act. Attached to the correspondence was official notification of that Hearing;

•The purpose of the Public Hearing was to receive data, studies, alternative plans and other information necessary to evaluate consistency with the Natural Resource Coordination and Lesser Prairie Chicken Conservation, Management and Study Plans adopted by the 31-County KNRC (now 32-county KNRC);

•KNRC was hopeful the Service would be an active participant in, provide testimony to, and coordinate with the hearing panel during the important fact-finding event;

•The Coalition looked forward to coordinating with the Service to affect conservation within the context of the human environment KNRC serves and the natural environment about which KNRC cares.

3615 characters remaining

Uploaded File(s) (Optional)

- Notice of Hearing.pdf: **success**
- KNRC AsheTransmittal Notice of Public Hearing 100213.pdf: **success**

This information was sent to the agency:

This information will appear on Regulations.gov:

First Name: Natural ResourceCoalition

Last Name: Local Government - KS

Country: United States

This information will **not** appear on Regulations.gov:

Email Address: [redacted]@gmail.com

October 2, 2013

Mr. Daniel Ashe - Director
Department of Interior
United States Fish and Wildlife Service
1849 C Street Northwest - MS 3238
Washington, District of Columbia 20240

Re: Notification of Public Hearing - Proposed Lesser Prairie Chicken Threatened Species Listing

Via: Fax and Electronic Media

Dear Director Ashe:

On November 7 and 8, 2013 the Kansas Natural Resource Coalition (KNRC) will conduct a Public Hearing in Garden City, Kansas regarding **"***The Advisability of Listing The Lesser Prairie Chicken as a Threatened Species Under The Endangered Species Act*. Attached is notification of that Hearing.

The purpose of the Public Hearing is to receive data, studies, alternative plans and other information necessary to evaluate consistency with the *Natural Resource Coordination* and *Lesser Prairie Chicken Conservation, Management and Study Plans* adopted by the 31-County KNRC.

We are hopeful the Service will be an active participant in, provide testimony to, and coordinate with the hearing panel during this important fact-finding event.

The Coalition looks forward to coordinating with the Service to affect conservation within the context of the human environment we serve and the natural environment about which we care.

Respect and Regards,

Ken J. Klemm,
Commissioner, Sherman County, Kansas
President, Kansas Natural Resource Coalition

cc w/attachment:

S. Jewell, Secretary - DOI
C. F. Kerry, Acting Secretary – DOC
N. Sutley, Chair - CEQ
T. Vilsack, Secretary - DOA
P. Souza, Deputy Assistant Director of Endangered Species-USFWS
M.J. Bean, Counselor to the Assistant Secretary-USFWS
G. Shultz, Division Chief-Conservation & Classification-USFWS
M. Kelhart, Congressional and Legislative Affairs Specialist-USFWS
B. Tuggle, Regional Director - USFWS R2
N. Walsh, Regional Director - USFWS R6
H. Whitlaw, Field Supervisor - USFWS
L. Bright - NEPA Compliance - USFWS
Honorable Senator Pat Roberts
Honorable Senator Jerry Moran
Congressman Tim Huelskamp
Congressman Doc Hastings
Governor Sam Brownback
Senator Larry Powell (Ks State)
Senator Ralph Ostmeyer (Ks State)
Representative Don Hineman (Ks State)
R. Jennison, Secretary - KDWPT
K. Sexson, Assistant Secretary - KDWPT

NOTICE OF PUBLIC HEARING

The Advisability Of Listing The Lesser Prairie Chicken as a Threatened Species Under The Endangered Species Act

On Thursday, November 7, 2013 and Friday, November 8, 2013, between 9:00 am and 4:30 pm, The Kansas Natural Resource Coalition (KNRC), through its Hearing Council, will conduct a Public Hearing at the Clarion Hotel, 1911 East Kansas Avenue, Garden City Kansas 67846, to receive information and consider the advisability of listing the Lesser Prairie Chicken (LPC) (*Tympanuchus pallidicinctus*) as a Threatened Species under the Endangered Species Act (ESA).

The Public Hearing will be held for the purpose of receiving, analyzing and evaluating all relevant information regarding the proposed listing and to evaluate consistency of listing efforts with congressional acts, presidential executive orders, federal and state regulations, sound scientific principal, economic considerations, cultural and civic impacts, general environmental practice and established plans.

All persons, organizations and agencies possessing such information are invited to appear before the KNRC Hearing Counsel to offer testimony, oral and/or written, pertaining to the proposed LPC listing. The Hearing Counsel will receive information, including - but not limited to - LPC studies, population counts, scientific methodologies, historic and current data, range maps, impact studies, charts, alternative plans, conservation practices, correspondence, photographs, scientific conclusions and/or other relevant Lesser Prairie Chicken information, including but not limited to:

- Specific, tangible and documented natural and/or human threats to the LPC species, its habitat, range and/or ecosystem(s);
- Information, data and studies of future impact(s), if any, that would be expected to occur to the LPC species, its habitat, range and/or ecosystem(s)in the event a "not warranted" determination is made or no action is taken;
- Specific, tangible or measurable improvement(s) to LPC populations, habitats, ecosystems, and/or other benefits projected to result from, in conjunction with, or emanating out of a threatened-status listing determination under ESA;
- Information as to present/future impact(s) upon or benefit to the human environment, cultural systems, social cohesiveness, changes in economic circumstances, and/or changes to agriculture, commerce, industry or private property projected to result from, in conjunction with, or emanating out of a threatened-status listing determination and, alternatively, information regarding impact(s) emanating from a not warranted or no action determination under ESA;
- Public notifications, correspondence, comments and/or review opportunities from the Environmental Assessment (EA) or Environmental-Impact Statement (EIS) process, including Findings of Impact and similar, related NEPA procedural studies, and information relevant to the coordination process initiated by any federal agency with local government(s), if any.

Persons, organizations and/or agencies requesting to appear before the Hearing Council must submit a written Intent to Testify to KNRC, PO Box 93, Garden City, KS 67846 or KNRC.counties@gmail.com on or before 5:00 pm CST Monday, November 04, 2013. Copies of written and electronic information may be filed during the hearing, and the record will remain open for acceptance of written and/or electronic information until 5:00 pm CST on Friday, November 15, 2013. All written and electronic submissions shall be provided to the Hearing Counsel or received by land delivery at PO Box 93, Garden City, Kansas 67846 before the November 15 deadline.

Name: KNRC

Comments: Submission of KANSAS NATURAL RESOURCE COALITION (KNRC), coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134 March 10, 2014

Between 11-18-13 to 1-6-14 KNRC requested access to the Administrative Record for the Lesser Prairie-Chicken (LPC) proposed listing for review.
KNRC officially invoked their Coordinate position with US Fish & Wildlife Service (USFWS) on behalf of 32-member Counties on 9-11-13.
During the time period set out above, KNRC expressed need, provided statutory requirements for allowing KNRC complete access to the Administrative Record in at least 8 communications (Attached stream file).

KNRC believes USFWS has failed to meet Coordinate duties with local government under Endangered Species Act, National Environmental Policy Act (NEPA) and Data Quality Act.
KNRC has made clear under Coordination's government-to-government status that KNRC is not subject to Freedom of Information Act (FOIA) requirements as the public.
KNRC specifically requested the following physical/electronic file be made available. In particular, KNRC is interested reviewing the following Compliance documents as part of the KNRC Coordination review:
•Signed version of 5/14/1998 DOI Policy Manual Part 318 Chapter 3;
•Environmental Justice and Minority Population Studies in KNRC Region as required by EOs 12898 and 12250;
•Regulatory Flexibility Analysis (RFA) exploring the range of alternatives to the LPC Listing and economic impact to the 32 KNRC Counties;
•Copies of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) in compliance with NEPA (or Environmental Impact Statement);
•Copies of the Agency Accountability Assessment, Regulatory Duplication Assessment, Cost/Benefit and Alternative Analysis to the LPC Listing - with a conclusion statement that the least net cost alternative was selected in compliance with EO 12291.
Communications (in pertinent part):

12-9-13 KNRC Executive Director Jim Carlson wrote (paraphrased):

Administrative file review by KNRC is not a request under FOIA– it's based upon Government-to-Government Coordination status we have invoked with USFWS.
KNRC is not aware of ongoing litigation proceedings affording USFWS the ability to make the entire Administrative File for the LPC Threatened Listing unavailable for coordination review.
This means the Administrative Record for the Lesser Prairie Chicken Listing Proposal is to be available as it would be to any sister DOI agency, including electronic correspondence.
If USFWS Upper Management is in nonagreement with KNRCs understanding of Administrative file review process, they should forward correspondence with disagreements - along with contact information - and I will take the subject up with them.

12-12-13 KNRC Pres. Klemm wrote (paraphrased):

Response to Ms. One's 12-10-13 Correspondence for USFWS:
KNRC has not requested review of LPC Administrative file in the Tulsa, Oklahoma Ecological Services Field Offices pursuant to FOIA and our request is not subject to its Terms or to the provisions you point out in the Correspondence.

On 3 occasions KNRC contacted Mr. Ken Collins of USFWS requesting access/review of administrative documents pursuant to coordination requirements directly applicable to USFWS.
According to the Council on Environmental Quality (CEQ) regulations, KNRC has established its claim and authority to insist on Coordination which REQUIRES USFWS provide meaningful input to KNRC "TO THE FULLEST EXTENT POSSIBLE."

KNRCs request is made pursuant to the Data Quality Act (DQA) which requires USFWS to verify credibility, relevance, and soundness of all data/documents relied upon for the LPC Listing Proposal.

Acting upon our rightful position under the doctrine of Coordination, CEQ regulations and Presidential Executive Orders directing your agency to coordinate and simplify relationships with local government, as well as requirements placed upon your Agency under the DQA, KNRC reiterates our request for access to the LPC Administrative file.

If you are not familiar with the concepts of Coordination KNRC respectfully requests you confer with both the Agency's Data Quality Officer and your attorney. We cannot let the position as to the FOIA process stand because it is inappropriate under Government-to-Government Coordination and it unnecessarily delays our rightful access to information until well into the determination process.

By copy of this letter, I notify Mr. Fred Grant who serves as Hearing Officer for KNRC regarding USFWS issues regarding the LPC. If we do not receive a more cooperative/coordinated response to our request by 12- 28-13, KNRC is requesting Mr. Grant - via this correspondence - to notify the proper authorities in Department of Justice.

1-6-14 KNRC Pres Klemm reiterated above message and reminded USFWS that KNRC on 3 occasions contacted Mr. Collins on the administrative file.

close window

FOIA NON APPLICABIITY TO KNRC ADMINISTRATIVE DOCUMENT REVIEW REQUEST COMMUNICATION STREAM

Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners:

On Mon, Nov 18, 2013 at 7:30 AM, KNRC Counties <knrc.counties@gmail.com> wrote:

Hello Heather -

At what USFWS Office location(s) are the physical file(s) for the proposed Lesser Prairie Chicken located?

KNRC has documents we wish to forward to the Administrative file.

Regards,

Jim Carlson
Executive Director
Kansas Natural Resource Coalition

From: **Whitlaw, Heather** <heather_whitlaw@fws.gov>
Date: Mon, Nov 18, 2013 at 1:58 PM
Subject: Re: Proposed Lesser Prairie Chicken Listing - Administrative Files
To: KNRC Counties <knrc.counties@gmail.com>
Cc: Ken Collins <Ken_Collins@fws.gov>

Hello Jim,

The Administrative Record for lesser prairie-chicken is located at the Tulsa, OK Ecological Services Field Office at 9014 E 21st Street, Tulsa, OK 74129 (http://www.fws.gov/southwest/es/oklahoma/). The listing lead biologist is Ken Collins (ken_collins@fws.gov) and I have copied him on this reply.

Ken can provide more information about management of the Administrative Record if you are interested. At this point, I would just offer that any information provided to the Service outside of an Open Comment Period can be considered in decision making, but is not required. A more effective option for KNRC to consider would be to submit the documents that are relevant to the proposed listing rule and revised proposed special 4(d) rule when that comment period is opened in the near future. I don't know the exact dates, but will let you know as soon as I know them.

Thanks,
Heather

Heather Whitlaw
Field Supervisor, Ecological Services
US Fish and Wildlife Service, KS Field Office
2609 Anderson Ave.
Manhattan, KS 66502
heather_whitlaw@fws.gov
785-539-3474 ext 105
[redacted] (cell)

----- Original Message -----
From: KNRC Counties
To: Whitlaw, Heather
Cc: Ken Collins
Sent: Monday, November 18, 2013 4:32 PM
Subject: Re: Proposed Lesser Prairie Chicken Listing - Administrative Files

Hello Heather -

Thank you for the timely and thorough response - we appreciate it and look forward to the reopening of the Comment Period.

I need to respectfully correct you on one point. The Open Comment (Public Comment) process pertains to members of the the Public, Non-Government Organizations, Environmental Groups and similar interested parties.

Because KNRC is comprised of local governmental agencies (e.g. Counties) and the Coordination process is underway, KNRC has access to the Administrative record throughout the Major-Agency Action process.

This means KNRC can place documents into the Lesser Prairie Chicken Administrative record at any point until a Determination is made.

Regards,

Jim Carlson
Executive Director
Kansas Natural Resource Coalition

From: Jim Carlson <j.r.carlson@sbcglobal.net>
To: "Ken_Collins@fws.gov" <Ken_Collins@fws.gov>
Cc: Ken Klemm <[redacted]>; Teresa Harder <t[redacted]>; Mahlon Tuttle <[redacted]>; Nikki Schwerdfeger <[redacted]>
Sent: Monday, December 2, 2013 3:26 PM
Subject: December 12 Lesser Prairie Chicken Administrative File Review

Hello Ken -

In conjunction with the Coordination process and the proposed listing of the Lesser Prairie Chicken, Kansas Natural Resource Coalition (KNRC) has asked me to review the Administrative File for the Lesser Prairie Chicken in the Tulsa USFWS Ecological Services Offices.

I have set aside Thursday, December 12 beginning at 9:30 am for this purpose. KNRC is requesting the Service to have the Administrative File accessible at that time.

Please let me know what Polic(ies) may apply or how duplication charges may be assessed for copying, printing, etc.

I will bring a "flash" drive, so electronic and email correspondence pertaining to the PLC listing process may be copied.

If there other needs that I should be aware of, please write or call.

Regards,

Jim Carlson
Executive Director
Kansas Natural Resource Coalition
(620) 260-9169

On Fri, Dec 6, 2013 at 2:08 PM, KNRC Counties <knrc.counties@gmail.com> wrote:

Hello Heather -

Thank you for requesting clarification and the desire for clear communication.

The November 29, 2013 KNRC correspondence contains very substantial policy items, among them KNRC's request for a line-by-line response to disagreements the Service has with KNRC's interpretation of the Coordination/Procedural/Economic authorities and a request for the Service to attempt consistency between the 5-State RWCP with the KNRC *Lesser Prairie Chicken Conservation, Management and Study Plan*.

We appreciate progress on Notifications noting the November 29, 2013 KNRC correspondence includes a request for the Service to hold future FR Notifications on the 5-State Plan pending arbitration of consistency issues.

KNRC placed the week of January 06, 2014 on the Calender as a placeholder for Coordination Meeting Number 3, as that date gives the Coalition one week to understand the Service's written responses before Coordination discussions.

Because the December 31, 2013 date was set for the Services' response, I suggest setting Coordination Meeting Number 3, between the USFWS and KNRC, for Thursday, January 09, 2014 - the western Kansas venue to be determined.

As far as participants are concerned, my opinion is the substance of the 11/29/13 correspondence requires attention from yourself, Regional Solicitor(s), and those Policy folks with sufficient authority, latitude and position to speak to the issues presented in the letter.

Hope this helps -

Regards,

Jim Carlson
Executive Director
Kansas Natural Resource Coalition

From: **Whitlaw, Heather** <heather_whitlaw@fws.gov>
Date: Fri, Dec 6, 2013 at 2:17 PM
Subject: Re: Fw: KNRC-FWS next meeting
To: KNRC Counties <knrc.counties@gmail.com>
Cc: Ken Klemm <[redacted]>, County-Morton-Comm Teresa Harder <[redacted]>, County-Gove-Comm Mahlon Tuttle <[redacted]>, Nikki Schwerdfeger <[redacted]>

Thank you Jim - I appreciate this response and your clarifications. We are working on our response to KNRC and intend to address the issues raised in your November 29 letter to the Director.

Sincerely,
Heather

Heather Whitlaw
Field Supervisor, Ecological Services
US Fish and Wildlife Service, KS Field Office
2609 Anderson Ave.
Manhattan, KS 66502
heather_whitlaw@fws.gov
785-539-3474 ext 105
[redacted] (cell)

On Fri, Dec 6, 2013 at 2:27 PM, Ken Klemm <[redacted]> wrote to USFWS Ken Collins:

Ken -

Jim Carlson, KNRC Coalition Executive Director, will be arriving at the Tulsa , USFWS Field Office at 9:30 am on December 12 to Coordinate review of the Lesser Prairie Chicken Administrative File.

Jim has left phone messages and provided the Service with notification (found below). I too have left you a voicemail today. Time is of the essence.

We are requesting the following physical and electronic file be made available prior to Jim's arrival. In particular, KNRC is interested reviewing the following Compliance documents; if they need to be sent from other DOI offices, we are requesting that process be complete to facilitate the KNRC Coordination review:

- Signed version of 5/14/1998 *DOI Policy Manual Part 318 Chapter 3*;
- *Environmental Justice and Minority Population Studies* in KNRC Region as required by EOs 12898 and 12250;
- Regulatory Flexibility Analysis (RFA) exploring the range of alternatives to the LPC Listing and economic impact to the 32 KNRC Counties;
- Copies of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) in compliance with National Environmental Policy Act (or Environmental Impact Statement);
- Copies of the Agency Accountability Assessment, Regulatory Duplication Assessment, Cost/Benefit and Alternative Analysis to the Lesser Prairie Chicken Listing - with a conclusion statement that the least net cost alternative was selected in compliance with EO 12291.

Please contact Jim or myself should you have questions or have additional information on this process.

Regards,

Ken J. Klemm

President,
Kansas Natural Resource Coalition

From: "Collins, Ken" <ken_collins@fws.gov>
To: Ken Klemm <[redacted]>
Cc: Jim Carlson <[redacted]>
Sent: Monday, December 9, 2013 8:42 AM
Subject: Re: December 12 Lesser Prairie Chicken Administrative File Review

Gentlemen,

I apologize for being so slow to respond. I have been awaiting direction from upper management, particularly how to handle the information in the administrative record that is considered predecisional/deliberative and attorney-client privileged. I hope to have an answer later this afternoon. With respect to the lesser prairie-chicken files, excluding the administrative record, those files are available without restriction.

Thank you for your patience.

Ken Collins
U.S. Fish and Wildlife Service
Oklahoma Ecological Services Field Office 9014 E. 21st Street
Tulsa, OK 74129
(918) 581-7458 Office
(918) 581-7458 Fax

----- Original Message -----
From: Jim Carlson
To: Collins, Ken
Cc: Ken Klemm ; dana.jacobsen@sol.doi.gov ; Benjimin Tuggle
Sent: Monday, December 09, 2013 9:42 AM
Subject: Re: December 12 Lesser Prairie Chicken Administrative File Review

Hello Ken -

The Administrative file review by the Kansas Natural Resource Coalition (KNRC) is not a request under Freedom of Information Act - it is based upon Government-to-Government Coordination status we have invoked with USFWS.

KNRC is not aware of ongoing litigation proceedings that afford USFWS the ability to make the entire Administrative File for the Lesser Prairie Chicken Threatened Listing unavailable for coordination review.

What this means is the Administrative Record for the Lesser Prairie Chicken Listing is to be made available as it would be to any sister DOI agency, including electronic correspondence.

If folks in USFWS Upper Management do not agree with our understanding of the Administrative file review process, please forward your correspondence with them - along with their contact information - and I will take the subject up with them.

I look forward to understanding more about Lesser Prairie Chicken Listing procedure and process on Thursday, 12/12.

See you at that time.

Regards,

J. R. Carlson
Executive Director
Kansas Natural Resource Coalition
(620) 260-9169

From: "Ikenson, Melanie" <melanie_ikenson@fws.gov>
To: ken@thebuffaloguys.com
Cc: j.r.carlson@sbcglobal.net
Sent: Tuesday, December 10, 2013 12:06 PM
Subject: Request for records related to the Lesser Prairie Chicken

Dear Mr. Klemm: Please see the attached letter in response to your request for records from the Oklahoma Ecological Services Field Office. Please let me know if you have any questions regarding our response. A hard copy will follow via Fedex and/or certified mail.

Best,
Melanie

Melanie Ikenson
ESA Litigation/FOIA Coordinator (Region 2)
USFWS-Ecological Services
500 Gold Ave SW (Room 6034)
Albuquerque, NM 87102
Office: 505-248-6284
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United States Department of the Interior

U.S. FISH AND WILDLIFE SERVICE
Ecological Services
P.O. Box 1306, Room 6034
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/FOIA/05
6205
FWS-2014-00240

DEC 10 2013

Mr. Ken J. Klemm
[redacted]
Kansas 67735

Dear Mr. Klemm:

Region 2 of the U.S. Fish and Wildlife Service (Service) received your December 6, 2013 request for records on December 6, 2013, via email. In your request to visit the Oklahoma Ecological Services Field Office to review the "Lesser Prairie Chicken Administrative File," you specifically seek copies of:

> "the following Compliance documents; if they need to be sent from other DOI offices, we are requesting that process be complete to facilitate the KNRC Coordination review:
>
> a. Signed version of 5/14/1998 *DOI Policy Manual Part 318 Chapter 3;*
> b. *Environmental Justice and Minority Population Studies* in KNRC Region as required by E0s 12898 and 12250;
> c. Regulatory Flexibility Analysis (RFA) exploring the range of alternatives to the LPC Listing and economic impact to the 32 KNRC Counties;
> d. Copies of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) in compliance with National Environmental Policy Act (or Environmental Impact Statement);
> e. Copies of the Agency Accountability Assessment, Regulatory Duplication Assessment, Cost/Benefit and Alternative Analysis to the Lesser Prairie Chicken Listing - with a conclusion statement that the least net cost alternative was selected in compliance with EO 12291."

We are processing your request under the Freedom of Information Act (FOIA). Your request has been assigned tracking number FWS-2014-00240. The policy chapter in response to Item a can be found at: http://www.fws.gov/policy/library/rg,318dm3.pdf or via http://elips.doi.gov/elips/browse.aspx. In response to Item d, information regarding compliance with the National Environmental Policy Act can be found in the proposed rule listing the lesser prairie chicken as threatened (78 FR 26302) at: http://www.gpo.gov/fdsys/pkg/FR-2013-05-06/pdf/2013-10497.pdf. In addition, the supporting documentation (literature cited) for the proposed rule is available online at: http://wwwfws.govisouthwest/es/LPC LitCited.html. We did not locate any records in response to Items b, c, or e, of your request.

In accordance with 43 CFR 2.57, you may appeal the adequacy of our search to the FOIA Appeals Officer. The FOIA Appeals Officer must receive your FOIA appeal no later than 30 workdays from the date of this final letter responding to your FOIA request. Appeals arriving or delivered after 5 p.m. E.T., Monday through Friday, will be deemed received on the next workday. Your appeal must be in writing and addressed to:

Freedom of Information Act Appeals Officer
U.S. Department of the Interior
Office of the Solicitor
1849 C Street, NW, MS 6556
Washington, DC 20240

You must include, with your appeal, copies of all correspondence between you and the Service concerning your FOIA request including a copy of your original FOIA request and this letter. Failure to include this documentation with your appeal will result in the Department of Interior's rejection of your appeal. The appeal should be marked on both the envelope and the face of the

letter with the legend, "FREEDOM OF INFORMATION APPEAL." Your letter should include in as much detail as possible any reason(s) why you believe the Service's response is in error.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

This completes our response to your request. The fees incurred in processing your request were less than $50.00 and are not being charged in accordance with 43 CFR 2.49(1). If you have any questions, please contact Melanie Ikenson, Regional FOIA Coordinator, at 505-248-6284; or by email at melanie_ikenson@fws.gov.

Sincerely,

[Elizabeth One]

[for] Assistant Regional Director
Ecological Services

December 12, 2013

Elizabeth One
Assistant Regional Director
Ecological Services
PO Box 1306 Room 6034
Albuquerque, New Mexico 87103

Ms. Melene Ikensen
Ecological Services
PO Box 1306 Room 6034
Albuquerque, New Mexico 87103

Re: Thursday, December 12, 2013 Lesser Prairie Chicken Records Review

Dear Ms. Ikensen and Ms. One:

In response to the December 10, 2013 Correspondence from USFWS, The Kansas Natural Resource Coalition (KNRC) has not requested review of Lesser Prairie Chicken Administrative file in the Tulsa, Oklahoma Ecological Services Field Offices pursuant to the Freedom of Information Act (FOIA) and our request is not subject to its Terms or to the provisions you point out in your December 10, 2013 Correspondence.

On three occasions KNRC has contacted Mr. Ken Collins of the USFWS requesting access to and review of administrative documents pursuant to coordination requirements directly applicable to

USFWS. According to the Council on Environmental Quality (CEQ) regulations, KNRC has established its claim and authority to insist on Coordination which REQUIRES USFWS provide meaningful input to KNRC "TO THE FULLEST EXTENT POSSIBLE." In addition, our request is made pursuant to the Data Quality Act which requires USFWS to verify the credibility, relevance, and soundness of all data and documents upon which you are relying for the Lesser Prairie Chicken Listing Proposal.

Acting upon our rightful position under the doctrine of Coordination, CEQ regulations and Presidential Executive Orders directing your agency to coordinate and simplify relationships with local government, as well as requirements placed upon your Agency under the Data Quality Act, KNRC now reiterates our request for access to the Lesser Prairie Chicken Administrative file.

If you are not familiar with the concepts of Coordination KNRC respectfully requests you confer with both the Agency's Data Quality Officer and with your attorney. We cannot let the position as to the FOIA process stand because it is inappropriate under Government-to-Government Coordination and it unnecessarily delays our rightful access to information until well into the determination process.

By copy of this letter, I am notifying Mr. Fred Kelly Grant who serves as the Hearing Officer for the Coalition regarding USFWS issues regarding the Lesser Prairie Chicken. If we do not receive a more cooperative and coordinated response to our request by December 28, 2013, KNRC is requesting Mr. Grant - via this correspondence - to notify the proper authorities in the Department of Justice.

Ken J. Klemm
President, Kansas Natural Resource Coalition

On Mon, Jan 6, 2014 at 4:08 AM, KNRC Counties <knrc.counties@gmail.com> wrote:

Dear Messrs. Ashe, Thabault and Ms. Jacobsen,

I would like to draw your attention to the attached KNRC correspondence of November 29, 2013, addressed to each of you. In the correspondence KNRC requested a response to matters vital to the proposed listing by the USFWS of the Lesser Prairie Chicken as a Threatened Species.

The deadline assigned for response to the correspondence was December 31, 2013 - a date that has passed with our concerns unanswered. KNRC had expected the Service to fulfill your Coordination duties and respond to valid concerns with the hope of making progress in mutual conservation efforts. This hope was strengthened with the receipt of Heather Whitlaw's note of December 6th 2013, wherein she indicated that a response would be forthcoming.

With this note we wish to postpone our proposed Coordination meeting date of January 9, 2014 until we have had sufficient time to confer and counsel about the Service's unwillingness to Coordinate with our Coalition. We will soon be rescheduling that Coordination Meeting.

On three occasions KNRC contacted Mr. Ken Collins of the USFWS Tulsa Office requesting access to and review of the Lesser Prairie Chicken administrative file pursuant to coordination requirements applicable to USFWS. According to the Council on Environmental Quality (CEQ) regulations, KNRC has established its claim and authority to insist on Coordination which requires USFWS provide meaningful input to KNRC "TO THE FULLEST EXTENT POSSIBLE." In addition, our request is made pursuant to the Data Quality Act which requires USFWS to verify the credibility, relevance, and soundness of all data and documents upon which you are relying for the Lesser Prairie Chicken Listing Proposal.

Acting upon our rightful position under the doctrine of Coordination, CEQ regulations and Presidential Executive Orders directing your agency to coordinate and simplify relationships with local government, as

well as requirements placed upon your Agency under the Data Quality Act, KNRC reiterates its request for access to the Lesser Prairie Chicken Administrative file outside of the Freedom of Information process, which applies to the public, not-government-to-government document requests.

A timely response to the administrative file access request would be appreciated.

Best Regards,

Ken Klemm
President, Kansas Natural Resource Coalition
Sherman County Commissioner

From: **Whitlaw, Heather** <heather_whitlaw@fws.gov>
Date: Wed, Jan 8, 2014 at 1:54 PM
Subject: Re: Authorities Response; Administrative File Review
To: KNRC Counties <knrc.counties@gmail.com>
Cc: Michael Thabault <Michael_Thabault@fws.gov>, Dana Jacobsen <dana.jacobsen@sol.doi.gov>, Ken Collins <Ken_Collins@fws.gov>

Dear Commissioner Klemm,

Happy New Year and I hope your holidays were filled with family and friends.

Thank you for this email, and I confirm that you are postponing the proposed January 09, 2014 meeting until a later date.

Regarding the FWS response to your November 29, 2013 correspondence, we are developing a response however with the holiday season and leave schedules during that time we were unable to meet your stated deadline. Please be assured that we continue to prepare a response and will have it to you as soon as possible.

I have copied Mr. Ken Collins on this reply because I did not see him on your original email list, and I believe he should be kept informed of administrative file discussions.

Regards,
Heather

Heather Whitlaw
Field Supervisor, Ecological Services
US Fish and Wildlife Service, KS Field Office
2609 Anderson Ave.
Manhattan, KS 66502
heather_whitlaw@fws.gov
785-539-3474 ext 105
785-313-0772 (cell)

Submitted 1_10_14 Docket Number: FWS-R2-ES-2012 - 0071

Your comment was submitted successfully!

View all documents and comments in this Docket

Success! You will now be commenting directly on:

The **Fish and Wildlife Service** (FWS) Proposed Rule: **Endangered and Threatened Wildlife and Plants: Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule**

For related information, **Open Docket Folder**

3 Your Receipt

Your Comment Tracking Number: **1jy-89sr-ks1f**	Your comment will be viewable on Regulations.gov after the agency has reviewed it, which may be an indefinite amount of time. Use your tracking number to find out the status of your comment.

Your comment:

Comment: Submission of KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners:

Between 11-18-13 to 1-6-14 KNRC requested access to the Administrative Record for the Lesser Prairie-Chicken (LPC) proposed listing for review.

KNRC officially invoked their Coordinate position with US Fish & Wildlife Service (USFWS) on behalf of 32-member Counties on 9-11-13.

During the time period set out above, KNRC expressed need, provided statutory requirements for allowing KNRC complete access to the Administrative Record in at least 8 communications (Attached stream file).

KNRC believes USFWS has failed to meet Coordinate duties with local government under Endangered Species Act, National Environmental Policy Act (NEPA) and Data Quality Act.

KNRC has made clear under Coordination's government-to-government status that KNRC is not subject to the Freedom of Information Act (FOIA) requirements as the public.

KNRC specifically requested the following physical/electronic file be made available. In particular, KNRC is interested reviewing the following Compliance documents as part of the KNRC Coordination review:

•Signed version of 5/14/1998 DOI Policy Manual Part 318 Chapter 3;

•Environmental Justice and Minority Population Studies in KNRC Region as required by EOs 12898 and 12250;

•Regulatory Flexibility Analysis (RFA) exploring the range of alternatives to the LPC Listing and economic impact to the 32 KNRC Counties;

•Copies of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) in compliance with NEPA (or Environmental Impact Statement);

•Copies of the Agency Accountability Assessment, Regulatory Duplication Assessment, Cost/Benefit and Alternative Analysis to the LPC Listing - with a conclusion statement that the least net cost alternative was selected in compliance with EO 12291.

Communications (in pertinent part):

12-9-13

KNRC Executive Director Jim Carlson wrote (paraphrased):

Administrative file review by KNRC is not a request under FOIA– it's based upon Government-to-Government Coordination status we have invoked with USFWS.

KNRC is not aware of ongoing litigation proceedings affording USFWS the ability to make the entire Administrative File for the LPC Threatened Listing unavailable for coordination review.

This means the Administrative Record for the Lesser Prairie Chicken Listing Proposal is to be available as it would be to any sister DOI agency, including electronic correspondence.

If USFWS Upper Management is in nonagreement with KNRCs understanding of Administrative file review process, they should forward correspondence with disagreements - along with contact information - and I will take the subject up with them.

12-12-13

KNRC Pres. Klemm wrote (paraphrased):

Response to Ms. One's 12-10-13 Correspondence for USFWS:

KNRC has not requested review of LPC Administrative file in the Tulsa, Oklahoma Ecological Services Field Offices pursuant to FOIA and our request is not subject to its Terms or to the provisions you point out in the Correspondence.

On 3 occasions KNRC contacted Mr. Ken Collins of USFWS requesting access/review of administrative documents pursuant to coordination requirements directly applicable to USFWS. According to the Council on Environmental Quality (CEQ) regulations, KNRC has established its claim and authority to insist on Coordination which REQUIRES USFWS provide meaningful input to KNRC "TO THE FULLEST EXTENT POSSIBLE."

KNRCs request is made pursuant to the Data Quality Act (DQA) which requires USFWS to verify credibility, relevance, and soundness of all data/documents relied upon for the LPC Listing Proposal.

Acting upon our rightful position under the doctrine of Coordination, CEQ regulations and Presidential Executive Orders directing your agency to coordinate and simplify relationships with local government, as well as requirements placed upon your Agency under the DQA, KNRC reiterates our request for access to the LPC Administrative file.

If you are not familiar with the concepts of Coordination KNRC respectfully requests you confer with both the Agency's Data Quality Officer and your attorney. We cannot let the position as to the FOIA process stand because it is inappropriate under Government-to-Government Coordination and it unnecessarily delays our rightful access to information until well into the determination process.

By copy of this letter, I notify Mr. Fred Grant who serves as the Hearing Officer for KNRC regarding USFWS issues regarding the LPC. If we do not receive a more cooperative/coordinated response to our request by 12- 28-13, KNRC is requesting Mr. Grant - via this correspondence - to notify the proper authorities in the Department of Justice.

1-6-14

KNRC Pres Klemm reiterating the above message and reminding USFWS that KNRC on 3 occasions contacted Mr. Collins on the administrative file.

1 characters remaining

Uploaded File(s)(Optional)

- FOIA NON APPLICABIITY _KNRC ADMINISTRATIVE DOC_REVIEW REQUEST communication stream 11_18_13 to 1_9_14.pdf: **success**

This information will appear on Regulations.gov:

First Name: Natural ResourceCoalition
Last Name: Local Government - KS
Country: United States
Government Agency Type: Local
Government Agency: 32-Kansas Boards of County Commissioners

This information will **not** appear on Regulations.gov:

Email Address: KNRC.counties@gmail.com

Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134March 10, 20149:19 p.m. CDT

6-20-13, to Docket Number: FWS-R2-ES-2012 - 0071 the Bureau of Land Management (BLM) commented on the proposal to list the lesser prairie-chicken (LPC) as a threatened species with a special 4(d) rule, as follows:

1.Page 26306 of the May 6, 2013, Federal Register notice, the proposed rule states:

" . . we propose that none of the provisions in 50 CFR 17.31 would apply to actions that result from activities associated
with a comprehensive conservation program developed by or in coordination with the State agency or agencies
responsible for the management and conservation of fish and wildlife within the affected State (s), or their agent(s), and
that the Service determines provides a net conservation benefit for the lesser prairie-chicken."

The language created ambiguity as to what would constitute a "comprehensive conservation program."

The BLM supported efforts of the Interstate Working Group (IWG) in their development of the Range-wide Conservation Plan (RWCP) for the Lesser Prairie-Chicken. BLM believed the April 2013 version of the RWCP met or was very close to meeting criteria listed in the proposed rule. The 4(d) rule proposal was not clear whether the RWCP would be incorporated into the USFWS rule in its entirety or whether the appendices addressing candidate conservation measures would be the focus of the rule.

2.Commented to the USFWS in March 2013 regarding the proposed rule & reiterated support of Candidate Conservation Agreements with Assurances (CCAA)/Candidate Conservation Agreements (CCA)--agreements, developed in collaboration between the two agencies, were designed to apply conservation measures on the ground while species still had candidate status. BLM promoted the agreements with the caveat that once a determination to list was made, enrollment would not be allowed.

3.May 6, 2013 Federal register notice asks for comments on "a provision that would allow continued enrollment in the existing CCAs and CCAAs beyond the effective date of a final listing determination, if the results of our final listing determination conclude that threatened species status is appropriate." The BLM expressed short-term and long-term concerns:

•4(d) rule, once finalized, cannot extend to Federal lands and minerals. Under a 4(d) rule formal Section 7
consultation will be required for Federally permitted activities in the range of the LPC. The USFWS's rule proposal loses
any conservation benefit that might have been associated with USFWS approval of BLM's proposed CCA for oil/gas
development activities in TX, OK, KS and CO.

•Should the USFWS list LPC as a threatened species, conservation agreements cannot continue to include the
word "candidate" in titles or bodies of documents. Once the determination is made to list, the time for referring to the
species as a candidate is over. BLM could foresee the conservation measures of the CCAA/CCA program being rolled
into a conservation plan under a different name, but would advocate that companies/individuals enrolling post-listing use
the fee schedule developed by the IWG for the RWCP instead of the current fee schedule used in New Mexico—
rewarding those individuals/companies that had foresight to participate in proactive conservation

measures.

4.Experience with CCAA/CCA program, the most difficult task is convincing industry groups/individuals of the desirability of participating in conservation programs before the USFWS makes a determination to list. A provision to allow enrollment in a CCAA under the same terms and conditions after a determination is made negates what is perhaps the biggest selling point of the CCA/CCAA program — avoiding protracted Section 7 consultation after a listing determination. Continuing enrollment in CCA/CCAA program under the same terms/conditions after a determination is made rewards parties who could have placed the conservation practices necessary to avoid the need to list a species but chose not to participate.

5.Understood USFWS has obligations to make determinations regarding the status of several species by 2016. There's enough time for proactive conservation programs, i.e. CCAAs, to be put into place for the species so that listing the species as threatened or endangered may be avoided.

Summarized, existing CCAA/CCAs, and new CCAA/CCAs proposed in RWCP offer powerful tools to improve conservation of LPC. Urged USFWS to delay a final listing decision until these tools can be fully implemented and conservation benefits measured.

BLM wanted to be a partner in the efforts to conserve LPC and believes partnerships formed by this issue will continue grow stronger and looked forward to working with the USFWS in the future.

close window

regulations.gov
Your Voice in Federal Decision-Making

Public Submission Posted: **01/13/2014** ID: **FWS-R2-ES-2012-0071-0573**

Your comment was submitted successfully!

View all documents and comments in this Docket

Success! You will now be commenting directly on:

The **Fish and Wildlife Service** (FWS) Proposed Rule: **Endangered and Threatened Wildlife and Plants: Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule**

For related information, **Open Docket Folder**

3 Your Receipt

Your Comment Tracking Number: **1jy-89ss-l2kw**	Your comment will be viewable on Regulations.gov after the agency has reviewed it, which may be an indefinite amount of time. Use your tracking number to find out the status of your comment.

Your comment:

Comment: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners:

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responsible for the management and conservation of fish and wildlife within the affected State(s), or their agent(s), and
that the Service determines provides a net conservation benefit for the lesser prairie-chicken."

The language created ambiguity as to what would constitute a "comprehensive conservation program." The BLM supported efforts of the Interstate Working Group (IWG) in their development of the Range-wide Conservation Plan (RWCP) for the Lesser Prairie-Chicken. BLM believed the April 2013 version of the RWCP met or was very close to meeting criteria listed in the proposed rule. The 4(d) rule proposal was not clear whether the RWCP would be incorporated into the USFWS rule in its entirety or whether the appendices addressing candidate conservation measures would be the focus of the rule.

2.Commented to the USFWS in March 2013 regarding the proposed rule & reiterated support of Candidate Conservation Agreements with Assurances (CCAA)/Candidate Conservation Agreements (CCA)--agreements, developed in collaboration between the two agencies, were designed to apply conservation measures on the ground while species still had candidate status. BLM promoted the agreements with the caveat that once a determination to list was made, enrollment would not be allowed.

3.May 6, 2013 Federal register notice asks for comments on "a provision that would allow continued enrollment in the existing CCAs and CCAAs beyond the effective date of a final listing determination, if the results of our final listing determination conclude that threatened species status is appropriate." The BLM expressed short-term and long-term concerns:
•4(d) rule, once finalized, cannot extend to Federal lands and minerals. Under a 4(d) rule formal Section 7 consultation will be required for Federally permitted activities in the range of the LPC. The USFWS's rule proposal loses
any conservation benefit that might have been associated with USFWS approval of BLM's proposed CCA for oil/gas
development activities in TX, OK, KS and CO.
•Should the USFWS list LPC as a threatened species, conservation agreements cannot continue to include the
word "candidate" in titles or bodies of documents. Once the determination is made to list, the time for referring to the
species as a candidate is over. BLM could foresee the conservation measures of the CCAA/CCA program being rolled
into a conservation plan under a different name, but would advocate that companies/individuals enrolling post-listing use
the fee schedule developed by the IWG for the RWCP instead of the current fee schedule used in New Mexico—
rewarding those individuals/companies that had foresight to participate in proactive conservation measures.

4.Experience with CCAA/CCA program, the most difficult task is convincing industry groups/individuals of the desirability of participating in conservation programs before the USFWS makes a determination to list. A provision to allow enrollment in a CCAA under the same terms and conditions after a determination is made negates what is perhaps the biggest selling point of the CCA/CCAA program — avoiding protracted Section 7 consultation after a listing determination. Continuing enrollment in CCA/CCAA program under the same terms/conditions after a determination is made rewards parties who could have placed the conservation practices necessary to avoid the need to list a species but chose not to participate.

5.Understood USFWS has obligations to make determinations regarding the status of several species by 2016. There’s enough time for proactive conservation programs, i.e. CCAAs, to be put into place for the species so that listing the species as threatened or endangered may be avoided.

Summarized, existing CCAA/CCAs, and new CCAA/CCAs proposed in RWCP offer powerful tools to improve conservation of LPC. Urged USFWS to delay a final listing decision until these tools can be fully implemented and conservation benefits measured.

BLM wanted to be a partner in the efforts to conserve LPC and believes partnerships formed by this issue will continue grow stronger and looked forward to working with the USFWS in the future.

134 characters remaining
Uploaded File(s)(Optional)

- BLM 6-20-13 _final.pdf: **success**

This information was sent to the agency:

This information will appear on Regulations.gov:

First Name: Natural ResourceCoalition
Last Name: Local Government - KS
Country: United States
Government Agency Type: Local
Government Agency: 32-Kansas Boards of County Commissioners

This information will **not** appear on Regulations.gov:

Email Address: [redacted]@gmail.com

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
New Mexico State Office
P.O. Box 27115
Santa Fe, New Mexico 87502-0115
www.blm.gov/nm

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
6841 (9300)

June 20, 2013

Public Comments Processing
Attn: FWS-R2-ES-2012-0071
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 20420 PDM
Arlington, VA 22203

Ladies and Gentlemen:

Thank you for allowing the Bureau of Land Management (BLM) to comment on the proposal to list the lesser prairie-chicken (LPC) as a threatened species under the Endangered Species Act with a special 4(d) rule. The BLM enjoys a strong working relationship with the U.S. Fish and Wildlife Service (USFWS). The partnership between our agencies spans decades and has grown especially strong as we have worked together to protect this species. Our agencies have similar goals in restoring land health for the benefit of wildlife, water quality and quantity, and other resources. In the spirit of protecting and conserving resources, please accept the BLM's comments.

On page 26306 of the May 6, 2013, Federal Register notice, the proposed rule states:

> " . . we propose that none of the provisions in 50 CFR 17.31 would apply to actions that result from activities associated with a comprehensive conservation program developed by or in coordination with the State agency or agencies responsible for the management and conservation of fish and wildlife within the affected State(s), or their agent(s), and that the Service determines provides a net conservation benefit for the lesser prairie-chicken."

This language creates ambiguity as to what would constitute a "comprehensive conservation program." The BLM supports the efforts of the Interstate Working Group (IWG) in their development of the Range-wide Conservation Plan for the Lesser Prairie-Chicken. The BLM believes the April 2013 version of the Range-Wide Plan meets or is very close to meeting the criteria listed in the proposed rule. It is not clear from the 4(d) rule proposal whether the range-wide plan would be incorporated into the USFWS rule in its entirety or whether the appendices addressing candidate conservation measures would be the focus of the rule.

In our comments supplied to the USFWS in March 2013 regarding the proposed rule, the BLM reiterated its support of the Candidate Conservation Agreements with Assurances (CCAA) and the Candidate Conservation Agreements (CCA). These agreements, developed in collaboration between our two agencies, were designed to apply conservation measures on the ground while species still had candidate status. The BLM then promoted these agreements with the caveat that once a determination to list was made, enrollment would not be allowed.

The May 6, 2013 Federal register notice asks for comments on "a provision that would allow continued enrollment in the existing CCAs and CCAAs beyond the effective date of a final listing determination, if the results of our final listing determination conclude that threatened species status is appropriate." The BLM has short-term concerns and long-term concerns.

First, it is our understanding that a 4(d) rule, once finalized, cannot extend to Federal lands and minerals. Under a 4(d) rule formal Section 7 consultation will be required for Federally permitted activities in the range of the LPC. The USFWS's rule proposal, therefore, loses any conservation benefit that might have been associated with USFWS approval of BLM's proposed CCA for oil and gas development activities in Texas, Oklahoma, Kansas, and Colorado.

Second, should the USFWS list the LPC as a threatened species, the conservation agreements cannot continue to include the word "candidate" in the title or in the body of the documents. Once the determination is made to list, the time for referring to the species as a candidate is over. The BLM can foresee the conservation measures of the CCAA/CCA program being rolled into a conservation plan under a different name, but would advocate that companies and individuals enrolling post-listing use the fee schedule developed by the IWG for the Range-wide Plan instead of the current fee schedule used in New Mexico. This would reward those individuals and companies that had the foresight to participate in proactive conservation measures.

In the BLM's experience with CCAA/CCA program, the most difficult task is convincing industry groups and individuals of the desirability of participating in conservation programs *before* the USFWS makes a determination to list. A provision to allow enrollment in a CCAA under the same terms and conditions after a determination is made negates what is perhaps the biggest selling point of the CCA/CCAA program – avoiding protracted Section 7 consultation after a listing determination has been made. Continuing enrollment in a CCA/CCAA program under the same terms and conditions after a determination is made rewards the very parties who could have put into place the conservation practices necessary to avoid the need to list a species but chose not to participate.

The BLM understands the USFWS has obligations to make determinations regarding the status of several species by 2016. There is enough time for proactive conservation programs, such as the CCAAs, to be put into place for these species so that listing these species as threatened or endangered may be avoided

In summary, existing CCAAs and CCAs, and the new CCAAs and CCA proposed in the range-wide plan offer powerful tools to improve conservation of the LPC. We urge the USFWS to delay a final listing decision until these tools can be fully implemented and their conservation benefits measured.

The BLM wants to be a partner in the efforts to conserve LPC and believes partnerships formed by this issue will continue grow stronger. We look forward to working with the USFWS in the future.

Sincerely,

Jesse J. Juen
State Director

cc:
Helen Hankins
Benjamin Tuggle

Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134-0001March 10, 20146:50 p.m. CDT

Kansas Senators Larry Powell and Ralph Ostmeyer submitted on June 20, 2013, the attached comment to:

Docket Number: FWS-R2-ES-2012 - 0071:4500030113

RIN 1018-AY21

Directed to the Attention of:

Honorable Director Daniel M. Ashe
U.S. Fish and Wildlife Service
4401 N. Fairfax Dr., Suite 330
Arlington, Virginia 22203

In the attached comment, the Senators, summarized:

"In Summary the Proposed Threatened Listing and 4d Rule for the LPC is a broad, multistate, controversial, Major Federal Action unquestionably subject to NEPA, Executive Orders 11991 and 11514, CEQ Rules found in 40 CFR 1500-1508 and The Regulatory Flexibility Act.

Because the Congressional intent behind the EA/EIS process is to ensure impacts of Federal Actions are carefully considered prior to decisions, the need of an EA creates fundamental science and information gaps essential to balanced consideration - negating basic (and required) safeguards for human protection. If the Service bypasses preparation of an EA - and potentially an EIS - that decision could delay on-the-ground conservation efforts, similar to delays experienced in litigation over the Polar Bear.

The Service should not rush to achieve judicial deadlines which overrun required congressional mandates designed to protect the interests, private holdings and livelihood of residents of a five-state, rural population.

As a result of the enclosed compelling information, lack of science, and judicial background, we are requesting the Service issue a “not warranted” determination for the Lesser Prairie Chicken listing proposal.

Respectfully submitted,Respectfully submitted,

Kansas Senator Ralph OstmeyerKansas Senator Larry Powell
40th District39th District

close window

AGENCY INFORMATION COLLECTION ACTIVITIES: ENDANGERED AND THREATENED WILDLIFE AND PLANTS: LISTING OF THE LESSER PRARIE CHICKEN AS A THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT

[Docket Number: FWS-R2-ES-2012 - 0071:4500030113]
RIN 1018-AY21

Honorable Director Daniel M. Ashe
U.S. Fish and Wildlife Service
4401 N. Fairfax Dr., Suite 330
Arlington, Virginia 22203

Dear Honorable Director Ashe,

Between the years of 1969 and 1984 Congress and the Executive Branch of the Federal Government established a number of National Policies[1] requiring Federal Agencies to gauge the impact of their decisions on Human and Natural Environments. The goal of these policies is to create a landscape "*in which both man and the environment can exist in productive harmony"* and "*fulfill the social, economic and other requirements of present and future generations of Americans.*"[2]

To achieve the Congressional goal, every Federal Agency contemplating Major Action is required to weigh the impact of its actions on both natural and human environments - including potential economic affects to small business, impacts to local government and cultural/sociological effects. In short, the procedural mechanisms are in place to solicit, distill, sort, assess, and process species-related information within its human context such as to arrive at the best possible, scientifically-based decision.

In codifying NEPA, Congress required the Executive Branch to create the Council on Environmental Quality (CEQ), and establish regulations[3] implementing the procedural aspects of NEPA. Executive Orders (EO) 11514 and 11991, among others, carry out those statutory mandates.

Similar Acts of Congress contained the same endpoint objective - to strike an appropriate balance between environmental requirements and minimum, baseline protections of those Human Systems, which are affected through the decision process. As example, *The Regulatory Flexibility Act*[4] (RFA) requires all Federal Agencies proposing Major Action[5] to prepare and publish quantitative, economic analysis of the impacts to all regional businesses and local governments before decisions are made.

With respect to private property and in keeping with "*fundamental principles of good government,*" Executive Order 12630 requires all Federal Agencies contemplating Major Action to evaluate the fiscal, regulatory, and potential fifth-amendment impact of their decisions to avoid indirect or incidental taking of private property.

In response to the May 10, 2011 Settlement Agreement between the Service and WildEarth Guardians,[6] USFWS proposes to list the Lesser Prairie Chicken (LPC) as a Threatened species throughout a 5-state region. The significance of this proposal and its potential ramifications to human and local environments cannot be understated. The LPC listing process began in 1995 and since has been the subject of moratoria, findings, candidate listings and numerous Federal Register Notifications.[7] In June, 1998 the Service concluded the Listing was *warranted but precluded* by more pressing actions; in December, 2008 the Service adjusted the LPC Listing Priority Number from "8" to "2." These actions created the platform for the *WildEarth Guardians* to litigate, forcing the Service into the present, collective listing process.

In the Federal Register (FR) Notification, the Service states the NEPA process "*need not be performed*," referencing a 1983 letter from CEQ.[8,9] Similarly, the FR Notification and attending public record contain no evidence the Service published a quantitative, economic-impact analysis as required by RFA, nor has it examined impacts to private property[10] as required by EO 12630. Indeed, the public record for the Lesser Prairie Chicken Listing contrasts markedly with NEPA and CEQ mandates, a large body of case law, and even the Service's own Policy Manuals[11] requiring EAs and the NEPA process. And the Service has had time to perform the required procedural NEPA actions - it just has elected not to do so.

Part of the problem resides at lower administrative levels, where Service employees interpret ESA Section 4(b)(1)(A) as a stand-alone mandate, explicitly excluding relevant information, data, studies or buffering constraints from the decision process. This view negates the "commercial" requirement of "*best science and commercial data*," nullifies the procedural requirements of NEPA, and expressly disregards any human-related data, studies or information. In fact, the opposite is true: not only does NEPA apply to the proposed Lesser Prairie Chicken Listing, it provides the minimum, baseline requirements for ESA implementation - without which any decision is likely to be skewed in its understanding of the global impacts. Such a decision could not possibly be scientific.

In the December, 2012 Listing Notification,[12] the Service relies upon an archaic 1983 CEQ Opinion Letter and a Ruling by the 6th Circuit Court of Appeals that the EA/EIS process is not required "*as a matter of Law*.[13]" In its zeal to pursue the May 10, 2011 Settlement Agreement, the Service specifically disregards a decision from the 10th Circuit Court of Appeals - the federal Court having Kansas jurisdiction - which *precisely* mirrors the current, LPC listing proposal. In its ruling, the 10th Circuit dismantled the Services' reliance upon the CEQ Letter and the logic from the earlier 6th Circuit decision ruling, instead finding the NEPA procedural rules *do* in fact apply to threatened listing proposals.[14] The 10th Circuit also discounted the Services' position that silence during subsequent ESA reauthorizations was tantamount to congressional approval of Federal departure from NEPA mandates.

With respect to available data and conservation of the Lesser Prairie Chicken, ongoing conservation efforts, literature conflicts and data gaps demand a "not warranted" decision to allow time for evaluation, expansion and objective study. Simply put, the available science is disjointed, anecdotal and limited in its scope.

For example, the baseline scientific data required to determine Habitat Fragmentation on a Range-wide basis does not exist. In the Federal Register notification, the Service specifically notes the absence of biological features, habitat area requirements, optimum habitat corridors, and spatial requirements as absent in their listing proposal. [15] Because the Kansas Lesser Prairie Chicken region is almost entirely private property, it is necessary to determine *minimum* Lesser Prairie Chicken population-level parcel sizes and fundamental habitat parameters required to sustain a home range.[16]

Essential study needs missing from the listing include:

- The need for baseline parameters necessary to sustain populations, including nesting, roosting and feeding sites.
- The concept of "Minimum Stronghold," needs further investigation as available conclusions for establishing minimum population-level parcel sizes (and habitat fragmentation) are both incomplete and conflicting.[17,18,19]
- The best available scientific data[20] demonstrates range wide Lesser Prairie Chicken populations to be increasing and the likelihood of range-wide extinction to be very low. In one study employing population reconstruction models, annual lek counts, range-wide population growth parameters and quasi-extinction probabilities were estimated.[21] The data in that study indicate, on a range-wide basis, a low extinction probability within 86% of the species distribution and an annual population growth of 6.9% - reversing pre-candidacy (1980-1997) annual population declines of 3.7%. These scientific conclusions are in conflict with the USFWS Listing Proposal that habitat fragmentation and manmade factors make individual populations subject to extirpation.[22] This needs to be investigated.
- Substantial literature conflicts exist as to the significance of genetic hybridization resulting from a reduction in historic range and habitat fragmentation. Lesser and Greater Prairie Chickens are similar genetically and both species easily hybridize.[23] The Service needs to conduct genetic monitoring between Greater and Lesser Prairie Chickens and establish actual data and diversity factors, which could constitute genetic isolation or decreased genetic variability before substantive conclusions regarding hybridization may be drawn.
- The potential, direct, and range-wide effect or benefits from livestock grazing and rotation are largely unknown, including to USFWS.[24] Because ranching is a significant part of the economic base and culture of western Kansas, the grazing and livestock trampling on Lesser Prairie Chicken habitat must be quantified before scientific and economic decisions can be made.[25,26]

- The body of scientific data demonstrating Lesser Prairie Chicken avoidance of electrical transmission corridors and wind structures is limited, antidotal and conflicting. While Hagan, et al. found Lesser Prairie Chickens exhibited general preference to avoid power lines and buildings, the same study found those birds nesting in newly-constructed transmission corridors to have similar nest success as non-corridor populations. Other avian avoidance studies also had conflicting findings. Vodenal, et. al. found Greater Prairie Chickens to lek, nest and brood in the proximity of a Nebraska wind farm, despite the presence of localized, towering wind structures.

In Summary the Proposed Threatened Listing and 4d Rule[27] for the LPC is a broad, multistate, controversial, Major Federal Action unquestionably subject to NEPA, Executive Orders 11991 and 11514, CEQ Rules found in 40 CFR 1500-1508 and The Regulatory Flexibility Act.

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As a result of the enclosed compelling information, lack of science, and judicial background, we are requesting the Service issue a “not warranted” determination for the Lesser Prairie Chicken listing proposal.

Respectfully submitted,

Kansas Senator Ralph Ostmeyer
40th District

Respectfully submitted,

Kansas Senator Larry Powell
39th District

REFERENCES

[1] 42 USC §4331-4332
[2] 42 USC §4331(a)
[3] 40 CFR 1500 – 1508
[4] 5 USC §§601-612
[5] 40 CFR 1508.18
[6] In re Endangered Species Act Section 4 Deadline Litigation, No. 10-377 (EGS) MDL Docket No. 2165.
[7] 62FR 36482 - July 8,1997; 63FR 31400 - June 9, 1998; 64FR 57534 - October 25, 1999; 73FR 75176 - December 10, 2008
[8] Federal Register Volume 77, No. 238. December 11, 2012 pps.73887
[9] Federal Register Volume 48, No. 207. October, 1983 pps.49244
[10] It is noteworthy 94% of the land in Kansas addressed by the Lesser Prairie Chicken Listing is privately-owned.
[11] See: FWS NEPA Reference Handbook 550 FW1; 550 FW1.4, et. al.
[12] Federal Register Volume 77, No. 238. December 11, 2012 pps.73887.
[13] Federal Register Volume 48, No. 207. October, 1983 pps.49244.
[14] Catron County Board of Commissioners v. United States Fish and Wildlife Service 75 F .3d 1429 (10th Cir. 1996)
[15] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73886
[16] Applegate and Riley, 1998
[17] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[18] Id., p. 73836
[19] Data Do Not Support The Proposed Listing of Lesser Prairie Chicken. Center for Environmental Science, Accuracy & Reliability.
[20] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group;* Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702.
[21] *Data Do Not Support the Proposed Listing of Lesser Prairie Chicken.* Center for Environmental Science, Accuracy & Reliability. P.7
[22] Ibid., p. 73883
[23] Gutierrez et al. 2000
[24] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843
[25] 40 CFR § 1508
[26] Executive Order 12630
[27] 16 USC § 1533 4(d)
[28] In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litigation, Oct. 17, 2011.

Your comment was submitted successfully!

Thank you for submitting a comment on the following Proposed Rule:

Endangered and Threatened Wildlife and Plants: Listing Lesser Prairie-Chicken as Threatened Species with Special Rule

Agency: FWS

Document ID: FWS-R2-ES-2012-0071-0311

Your Comment Tracking Number: **1jx-860k-906c**

Note this tracking number to find your comment at a later date.

Your attached files:

Sen Ostmeyer and Sen Powell LPC Comment 6-20-13 - Final.pdf ✔Successfully uploaded

When will my comment appear online?

After submitting your comment, you will not be able to view your comment until the appropriate agency reviews and publishes it on Regulations.gov. Given certain regulations may have thousands of comments, processing may take several weeks before it is viewed online. To obtain further information, please follow-up with the agency contact listed in the document soliciting your input. To view this document click the link above.

How do I find my comment in the future?

The best way to find your comment in the future is to enter your Comment Tracking Number in the search field on the homepage. You can also search by keyword or submitter name.

You are commenting on a Proposed Rule:
Endangered and Threatened Wildlife and Plants: Listing Lesser Prairie-Chicken as Threatened Species with Special Rule (FWS-R2-ES-2012-0071-0311)

INFORMATION

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Last Name:	KS Sen. L Powell, 39th
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Fax Number:	
Organization Name:	
Submitter's Representative:	
Government Agency Type:	State
Government Agency:	Kansas State Senators

COMMENT

Please, see attached file.

Attachments:
Sen Ostmeyer and Sen Powell LPC Comment 6-20-13 - Final.pdf

Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners to:

ID: FWS-R2-ES-2013-0134-0001

KNRC Coordination #3 Meeting 2_7_14 with USFWS-DC minutes:

February 10, 2014

Mr. Paul Souza
Deputy Assistant Director Ecological Services
United States Fish and Wildlife Service
4401 N Fairfax Dr USFWS
Arlington, VA 22203

Mr. Michel Bean
Counselor to the Assistant Secretary – USFWS
Department of Interior
1849 C Street, NW
Washington, D.C. 20240

Re: Summary and Observations: Coordination Meeting No. 3 – Review of KNRCs Findings of Fact and Conclusions of Law Report; Conservation Plans: Summary and Reconciliation

Dear Messrs Souza and Bean:

Thank you for your time spent in review of the January 29, 2014 Kansas Natural Resource Coalition's (KNRCs) Findings of Fact and Conclusions of Law (FOF) document and participation in the February 7, 2014 Coordination Meeting Number 3. This correspondence serves as the record and summary of items and topics reviewed and discussed.

1.US Fish and Wildlife Service (USFWS) opened the meeting requesting KNRCs position on the 02/06/14 Draft Notice of Intent to Prepare an Environmental Impact Statement for the Six State Habitat Conservation Plan (HCP). KNRC responded that the HCP had not been available, so any comment or participation would be premature.

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Respectfully,

Ken J. Klemm
Sherman County Commissioner
President, Kansas Natural Resource Coalition

close window

February 10, 2014

Mr. Paul Souza
Deputy Assistant Director Ecological Services
United States Fish and Wildlife Service
4401 N Fairfax Dr USFWS
Arlington, VA 22203

Mr. Michel Bean
Counselor to the Assistant Secretary – USFWS
Department of Interior
1849 C Street, NW
Washington, D.C. 20240

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Ken Klemm

Ken J. Klemm
Sherman County Commissioner
President, Kansas Natural Resource Coalition

Planned maintenance work on the Regulations.gov infrastructure is scheduled for Saturday, February 15, beginning at 6:00 a.m. and lasting until 10:00 p.m. (ET). As a result the site will be unavailable between these times.

regulations.gov

Public SubmissionPosted:02/14/2014 ID:FWS-R2-ES-2012-0071-0629

Your comment was submitted successfully!

The **Fish and Wildlife Service** (FWS) Proposed Rule: **Endangered and Threatened Wildlife and Plants: Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule**

For related information, **Open Docket Folder**

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Your comment:

Comment:

Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners: KNRC Coordination Meeting #3 with USFWS-DC Minutes 02_10_14

February 10, 2014

Mr. Paul Souza
Deputy Assistant Director Ecological Services
United States Fish and Wildlife Service
4401 N Fairfax Dr USFWS
Arlington, VA 22203

Mr. Michel Bean
Counselor to the Assistant Secretary – USFWS
Department of Interior
1849 C Street, NW
Washington, D.C. 20240

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Ken J. Klemm
Sherman County Commissioner
President, Kansas Natural Resource Coalition

Uploaded File(s) (Optional)

- KNRC Coordination Meeting #3 with USFWS-DC Minutes 02_10_14.pdf: **success**

This information will appear on Regulations.gov:

First Name:
Natural ResourceCoalition

Last Name:
Local Government - KS

Country:
United States

Government Agency Type:
Local

Government Agency:
32-Kansas Boards of County Commissioners

This information will **not** appear on Regulations.gov:

Email Address:
[redacted]@gmail.com

Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134-0001March 10, 20149:01 p.m. CDT

On June 7, 2013 United States Department of Agriculture (USDA) submitted the attached comprehensive comment with tables, figures and maps to:

USDA (FSA-NRCS-FS) Comments on DOI-FWS Proposed Rule to List the Lesser Prairie Chicken as a Threatened Species

--
Public Comments Processing
Attn: FWS-R2-ES-2012-0071

In part, USDA commented:

"USDA questions some of the assumptions regarding the Conservation Reserve Program (CRP) lands being used to support the proposed rule, particularly with respect to the consideration of agricultural and livestock operations contained therein."

"The LEPC is found in suitable habitat on land that is 95% privately-owned. These are working lands. As we detail more fully below, without assurances that their cooperative conservation efforts regarding LEPC and associated good deeds will not go unpunished, USDA is concerned that the listing of LEPC may lead to a lack of interest among agricultural producers to participate in programs such as CRP and the Grassland Reserve Program (GRP). This would be detrimental to efforts to maintain, enhance, and restore habitat for the species. In these comments, we strongly urge FWS to ensure that landowners currently enrolled in CRP or who plan to enroll are provided regulatory assurance or exemptions to encourage continuing stewardship of these lands."

"For over 27 years, CRP has proven to be an effective tool in establishing habitat for LEPC throughout its range, but especially in Kansas north of the Arkansas River. While there is fluidity in CRP enrollment as individual properties are enrolled in CRP and others come out of the program at the end of 10 to 15-year contracts, the total acres enrolled in CRP throughout the LEPC range has remained relatively constant at around 5.5 million acres since 1998. As noted more fully below, the proposed rule does not accurately characterize the future threat posed by the potential loss of CRP acres."

"LEPC populations and occupied range have certainly been reduced from historic levels, but we have seen positive change, such as the expansion of occupied range in Kansas, as a result of voluntary, incentive-based approaches to LEPC conservation in recent years. In addition, the Range-wide Conservation Plan for the LEPC being developed by the LEPC Interstate Working Group, the Western Association of Fish and Wildlife Agencies (WAFWA), and the Ecosystem Management Research Institute, and the conference reports on LEPC being developed by both FSA and the NRCS, will significantly aid LEPC conservation efforts."

"The CRP is a voluntary long-term land conservation program. Not all land is eligible to participate in the CRP. To be eligible, land must be either cropland planted or considered planted in 4 of the 6 crop years prior to the passage of the most current Farm Bill, in this case from 2002 to 2007, or marginal pastureland suitable for riparian or other buffers. In addition to be eligible for a general signup, cropland must be considered highly erodible (Erodibility Index of 8 or greater), be expiring CRP acreage, or be located in a national or State CRP conservation priority area."

"Because not all offers to participate in CRP general signup can be accepted, applicants compete nationally by submitting offers to enter eligible land into the CRP during designated signup periods. Under CRP's general signup, landowner offers are ranked according to an Environmental Benefits Index (EBI). Use of the EBI ensures that the most environmentally sensitive lands relative to cost are selected and that all offers are considered fairly. FSA collects data and

assigns points for each EBI factor based on the expected relative environmental benefits for the land and conservation practice offered. As noted above, those seeking to enroll land (and/or practices) beneficial to the LEPC receive additional points, boosting their enrollment chances. Each eligible offer is ranked in comparison to all other offers and selections are made from that ranking."

"The original CRP authority allowed for up to 45 million acres nationally to be enrolled in the program. Current CRP enrollment authority under the Food, Conservation, and Energy Act of 2008 is 32 million acres nationwide. Current CRP enrollment nationwide is slightly more than 27 million acres, of which approximately 5.5 million acres are located within the LEPC occupied range."

"The CRP, as implemented, provides predictable high-quality LEPC habitat. The program has evolved over time in a manner that benefits the LEPC to an even greater extent than in its early years."

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USDA (FSA-NRCS-FS) Comments on DOI-FWS Proposed Rule to List the Lesser Prairie Chicken as a Threatened Species

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

RE: United States Department of Agriculture Response to Lesser Prairie Chicken Federal Register Proposed Rule (FWS-R2-ES-2012-0071: 450003113)

To Whom It May Concern:

The United States Department of Agriculture (USDA) appreciates the opportunity to provide comments on the proposed rule, published in the Federal Register on December 11, 2012, to list the lesser prairie chicken (Tympanuchus pallidicinctus) as threatened under the Endangered Species Act of 1973, as amended. The United States Department of Interior (DOI) Fish and Wildlife Service (FWS) is proposing listing the lesser prairie chicken (LEPC) as threatened at this time as a result of a significant change in its listing priority number (LPN). The FWS changed the LEPC LPN from an 8 to 2; a change brought about as a result of the perceived threat of further LEPC habitat fragmentation due to expanding energy and associated infrastructure development throughout the historic range of the LEPC.

The proposed rule to designate the LEPC as threatened, if finalized, will extend the protection of the ESA to the species. The FWS is requesting comments regarding the scientific methods to evaluate the status of the species and the specific information regarding the species status and trend relative to populations, habitat quality and management implications that address six basic types of information requested in the proposed rule.

Within USDA, three agencies, the Farm Service Agency (FSA), the Natural Resources Conservation Service (NRCS), and the Forest Service (FS) have programs or activities that would be impacted by the potential listing of the LEPC. USDA also notes that these programs or activities can be used to protect, enhance,

or restore LEPC habitat, thus minimizing or eliminating the need for the listing. Comments pertaining to the programs of these agencies are provided below.

Farm Service Agency

While the proposed rule describes in detail numerous threats to LEPC, USDA questions some of the assumptions regarding the Conservation Reserve Program (CRP) lands being used to support the proposed rule, particularly with respect to the consideration of agricultural and livestock operations contained therein.

The LEPC is found in suitable habitat on land that is 95% privately-owned. These are working lands. As we detail more fully below, without assurances that their cooperative conservation efforts regarding LEPC and associated good deeds will not go unpunished, USDA is concerned that the listing of LEPC may lead to a lack of interest among agricultural producers to participate in programs such as CRP and the Grassland Reserve Program (GRP). This would be detrimental to efforts to maintain, enhance, and restore habitat for the species. In these comments, we strongly urge FWS to ensure that landowners currently enrolled in CRP or who plan to enroll are provided regulatory assurance or exemptions to encourage continuing stewardship of these lands.

For over 27 years, CRP has proven to be an effective tool in establishing habitat for LEPC throughout its range, but especially in Kansas north of the Arkansas River. While there is fluidity in CRP enrollment as individual properties are enrolled in CRP and others come out of the program at the end of 10 to 15-year contracts, the total acres enrolled in CRP throughout the LEPC range has remained relatively constant at around 5.5 million acres since 1998. As noted more fully below, the proposed rule does not accurately characterize the future threat posed by the potential loss of CRP acres.

LEPC populations and occupied range have certainly been reduced from historic levels, but we have seen positive change, such as the expansion of occupied range in Kansas, as a result of voluntary, incentive-based approaches to LEPC conservation in recent years. In addition, the Range-wide Conservation Plan for the LEPC being developed by the LEPC Interstate Working Group, the Western Association of Fish and Wildlife Agencies (WAFWA), and the Ecosystem Management Research Institute, and the conference reports on LEPC being developed by both FSA and the NRCS, will significantly aid LEPC conservation efforts.

Our following comments are intended to clarify provisions pertaining to CRP contained in the proposed rule.

General CRP. CRP was established with the passage of the Food Security Act of 1985. Its original purpose was to reduce the production of surplus agricultural commodities by retiring marginal, highly erodible and other sensitive cropland and converting it to long-term conservation covers, either grasses or trees and, in so doing, reduce soil erosion and protect water resources. The Federal Agriculture Improvement and Reform Act of 1996 added enhancement of wildlife habitat as a co-equal objective of the CRP along with soil and water. The 1996 Farm Bill also provided USDA with the authority to develop targeted CRP initiatives to address environmental concerns of high priority associated with agricultural operations.

The CRP is a voluntary long-term land conservation program. Not all land is eligible to participate in the CRP. To be eligible, land must be either cropland planted or considered planted in 4 of the 6 crop years prior to the passage of the most current Farm Bill, in this case from 2002 to 2007, or marginal pastureland suitable for riparian or other buffers. In addition to be eligible for a general signup, cropland must be considered highly erodible (Erodibility Index of 8 or greater), be expiring CRP acreage, or be located in a national or State CRP conservation priority area.

Because not all offers to participate in CRP general signup can be accepted, applicants compete nationally by submitting offers to enter eligible land into the CRP during designated signup periods. Under CRP's general signup, landowner offers are ranked according to an Environmental Benefits Index (EBI). Use of the EBI ensures that the most environmentally sensitive lands relative to cost are selected and that all offers are considered fairly. FSA collects data and assigns points for each EBI factor based on the expected relative environmental benefits for the land and conservation practice offered. As noted above, those seeking to enroll land (and/or practices) beneficial to the LEPC receive additional points, boosting their enrollment chances. Each eligible offer is ranked in comparison to all other offers and selections are made from that ranking. FSA uses the following EBI factors to assess the environmental benefits for the land offered:

- Wildlife habitat benefits resulting from conservation covers on contract acreage;
- Water quality benefits from reduced erosion, runoff, and leaching;
- On-farm benefits from reduced erosion;

- Benefits that will likely endure beyond the contract period;
- Air quality benefits from reduced wind erosion; and
- Cost.

Continuous CRP. Certain CRP practices are of such environmental importance that producer offers for such practices can be accepted on a continuous basis without competition. Under Continuous CRP, environmentally desirable land devoted to certain conservation practices may be enrolled at any time. Specific eligibility requirements apply, but offers are not subject to competitive bidding. Additional incentives include a practice incentive payment (PIP) of 40 percent of the reimbursable cost associated with developing appropriate cover, and a one-time signing incentive payment (SIP) of up to $150 per acre may also be offered.

Financial assistance to CRP participants is available in the form of annual rental payments throughout 10 to 15-year CRP contracts, cost share for cover establishment and management activities, and other incentives. The annual rental payments are based on the agricultural rental value of the land and are provided through the Commodity Credit Corporation (CCC).

Producers may offer land at these rates or may offer a lower rental rate to increase the likelihood that their offer to participate in CRP will be acceptable. CRP cost share is available to eligible participants in an amount not to exceed 50 percent of the eligible costs of establishing and managing the approved conservation practice. Additional incentives, such as the PIP and SIP, are also available to encourage producer interest in continuous CRP.

Technical assistance is provided to landowners to assist in developing and implementing conservation plans for their CRP contracts. These plans are developed by the NRCS, other conservation partners, or a USDA approved technical service provider in coordination with the landowner. The conservation plan is part of the CRP contract and details the seed mix to be used, required maintenance and mid-contract management activities, and other essential information for establishing, restoring, maintaining, or enhancing conservation covers for soil, water and wildlife benefits.

The original CRP authority allowed for up to 45 million acres nationally to be enrolled in the program. Current CRP enrollment authority under the Food, Conservation, and Energy Act of 2008 is 32 million acres nationwide. Current CRP enrollment nationwide is slightly more than 27 million acres, of which approximately 5.5 million acres are located within the LEPC occupied range.

The CRP, as implemented, provides predictable high-quality LEPC habitat. The program has evolved over time in a manner that benefits the LEPC to an even greater extent than in its early years. These actions include:

- Better targeting CRP outreach to encourage enrollment in the LEPC range—This includes offering additional points to those who offer land in the LEPC range, thereby improving the likelihood of contract acceptance and enrollment. Continuous signup initiatives such as State Acres for Wildlife (SAFE) have been designed to enhance important wildlife habitat. The five states with LEPC populations, Colorado, Kansas, New Mexico, Oklahoma, and Texas have each instituted SAFE initiatives to enhance or create LEPC habitat (table 1).

- Improving the quality of CRP covers for LEPC habitat—This includes providing incentives for landowners to establish native grass and other covers that benefit the LEPC. Landowners who submit offers to establish these covers improve the likelihood their land will be accepted for enrollment. Further, mid-contract management (for the LEPC region conservation practices to enhance vegetative covers to benefit the LEPC) is required on contracts enrolled since 2003.

Although the proposed rule is in many respects quite comprehensive, it does not accurately describe the scope and benefits of CRP to the LEPC range, including the content noted above. Further, the proposed rule at times relies on outdated data. For example, the discussion of the CRP under the 'Summary of Factors Affecting the Species" draws conclusions based on outdated survey data regarding expected re-enrollment, which leads to an incorrect interpretation of the impacts of CRP. In fact, CRP participants in the LEPC States have replaced expiring contracts through reenrollments and newly offered land at levels over 75 percent in every general signup since 1997. With this level of reenrollment and the substantial number of new CRP acres enrolled each year, the program offers predictability for LEPC habitat. See, for example, Garton (2012).

CRP Baseline Enrollment. Since 1995, CRP enrollment in the LEPC region has exceeded 5.5 million acres (Figures 1 and 2). With continued adaptive and proactive management, CRP enrollment will continue to provide essential habitat for the LEPC, as described below.

By 1995, 35 million acres were enrolled nationally in the CRP. Because the first contracts began expiring in 1995, surveys were conducted to estimate what landowners would do with their enrolled land post-expiration. The proposed rule references one of these surveys and accurately reports survey results showing that landowners were likely to return the CRP to crop production or use this land to graze livestock.

However, the survey results were not validated against landowner actions when contracts expired. Because the CRP was not re-authorized until the 1996 Farm Bill, the survey did not ask if the contract holder would reenroll in the program, and therefore does not reflect landowner behavior after CRP contracts expired. We currently have the actual history of enrollment, and it should be used rather than projections based on a survey from approximately two decades ago. Many of the original acres enrolled in the CRP are in the LEPC area and expired in 1997-2000. Signups 15, 16, 18, and 20, conducted in the 1997 through 2000 --the point in time when actual re-enrollment can first be gauged--accepted 29.1 million acres nationally (16.4 million, 5.8 million, 4.7, million, and 2.2 million acres respectively) and 6.2 million acres in the LEPC region (table 2). An examination of state-level CRP re-enrollment activity reveals that re-enrollment rates ranged from 63 percent for Oklahoma to 81 percent for Colorado, with a region wide average of 75 percent.

The proposed rule did not consider new acres entering the CRP. Combining signups 15, 16, 18, and 20, CRP had a net gain of 497,000 acres in the 5 LEPC states. No state had a net loss of CRP acres.

The proposed rule did not account for the quality of the cover. During Signups 15, 16, 18, and 20 (and in future signups), the Environmental Benefits Index (EBI) was used to rate and select CRP offers. As noted earlier, the EBI provides additional points for CRP offers that use native grass covers. In many cases, new native grass contracts substituted for expiring contracts using introduced grasses, and thus resulted in covers more suitable for LEPC.

The Heimlich and Kula, and the Deibel et al. studies suggest that years of high commodity prices would result in low CRP participation. That is not, however, our experience. Fiscal year 2012, for example, was a year with exceptionally high corn and wheat prices. In 2012, the LEPC states (Colorado, Kansas, New Mexico, Oklahoma, and Texas) had 2.2 million acres expiring from the CRP, and 1.9 million acres were accepted. This is 13 percent fewer acres than were expiring, but only a 3 percent reduction in CRP acres in the LEPC states overall.

Targeting. CRP from its inception targeted highly erodible land (HEL). Because the LEPC region is characterized by highly erodible soils, CRP enrollment in the region is high (see maps 1 and 2). As the conservation benefits associated with specific locations and certain practices were documented, FSA refined the targeting to encourage greater enrollment in these areas and using those practices. An environmental benefits index (EBI) was developed to encourage enrollment of those practices that provided better wildlife covers. Landowners offering to establish covers such as mixes of native grass and forbs were provided with more points increasing the likelihood their offers would be accepted. The EBI is considered responsible for the proportion of new CRP grassland acres in native grass cover increasing. Since 1997, 91 percent of new CRP contracts in the LEPC states, were planted to native grass (table 3).

Additionally, state and national conservation priority areas (CPA) were established, making cropland that is important for wildlife (or other environmental benefits) eligible for CRP. Additionally, land from these CPAs offered for enrollment receives additional EBI points, increasing the likelihood these offers will be accepted. Each of the five States with LEPC populations has established LEPC CPAs.

Initiatives. As the benefits to wildlife from installing specific practices in critical locations have been documented, FSA has developed initiatives to encourage adoption of these practices. The initiatives provide additional incentives for participation, by including these practices within the Continuous CRP allowing enrollment into the CRP at any time, and providing SIP and PIP payments under some initiatives.

For the LEPC, the CRP initiative of greatest importance is SAFE. On October 8, 2012, Secretary Vilsack announced the allocation of an additional 66,400 acres for LEPC SAFE. The additional allocation was made because enrollments in Kansas and Texas had exhausted the full acreage allocated to those states. The five LEPC states now have 214,000 acres allocated for LEPC SAFE initiatives, and have enrolled 116,825 acres as of January 31, 2013 (table 1). Under SAFE, new land entering CRP are offered SIP and PIP payments. State fish and wildlife agencies, non-profit organizations and other conservation partners work collaboratively with FSA to target CRP delivery to specific conservation practices and geographic areas where enrollment of eligible farm land in continuous CRP will provide significant wildlife value. FSA in cooperation with appropriate state fish and wildlife agencies and other conservation partners monitors SAFE and manages available acres to ensure that CRP goals and objectives are being met.

Other continuous sign-up initiatives that can establish covers beneficial for the LEPC are the Highly Erodible Land, Pollinator, and Non-flood Plain and Playa Wetlands initiatives. The Highly Erodible Land initiative seeks to protect the nation's most environmentally sensitive lands by permitting landowners to enroll up to 750,000 acres of land with an Erodibility Index (EI) of 20 or greater. Because the LEPC region closely overlays the Dust Bowl, there are a substantial number of acres in the LEPC region that are eligible to participate in the HEL initiative. The Pollinator and Non-flood Plain and Playa Wetlands initiatives also provide good LEPC habitat and are available in the LEPC region.

CRP Adaptive Vegetative Management. A conservation plan must be developed and approved before land is enrolled in the CRP. Conservation plans include all the practices necessary for the successful establishment and maintenance of the vegetative cover on all of the acres offered for CRP. NRCS or the Technical Service Provider (TSP) includes the following elements in the conservation plan:

- Ensures that the CRP cover will not be disturbed during the primary nesting or brood rearing season, as determined by FSA State Committee in consultation with the State Technical Committee,
- Includes required maintenance for weed, insect, and pest control,
- Includes application rates, such as the amount of seed mixes, lime, and fertilizer, that are consistent with practice specifications, and
- Ensures the plan meets the objectives of the Conservation Priority Area (in this case, LEPC).

The conservation practices in the plan are practices approved by the State Technical Committee as suitable for CRP vegetative covers in that State. It is important to recognize that the FWS is an important member of State Technical Committees and its expertise in the management of wildlife habitat is carefully considered when conservation practices are approved.

CRP Covers Over Time. CRP vegetative covers in the LEPC states have changed over time. USDA responded to information provided by NRCS, FWS, state fish and wildlife agencies, and conservation organizations indicating that native grass provided better wildlife habitat than introduced grasses. This information was used to construct an EBI that provided greater weight to diverse native grass covers. The effect of the EBI on CRP vegetative covers can be seen in Table 3. Between 1986 and 1991, 69 percent of grass covers established in the LEPC states were native grass. The variation among states at that time was considerable.

Although over 90 percent of the grass established in Kansas and New Mexico was native, only 40 percent of the grass in Oklahoma and 57 percent in Texas was native between 1986 and 1991. Over time, primarily because of the adoption of the EBI and the EBI's awarding of more point for native grass covers, the proportion of grass covers established under CRP increased. Since 1997, 91 percent of grass covers planted in the LEPC states is native grass, ranging from a low of 78 percent in Oklahoma to a high of 98 percent in Kansas.

Mid-Contract Management. All CRP participants with contracts effective beginning with signup 26 are required to perform at least 1 mid-contract management activity as part of their approved conservation plan. Fifty percent cost share payments are provided landowners for mid-contract management, and NRCS or the TSP conservationists work with participants to plan these activities. They include activities such as light disking, inter-seeding, prescribed burning, upland wildlife habitat management (for example, elimination of woody vegetation encroachment and spot spraying to eliminate invasive species), and other practices designed to ensure plant diversity, wildlife benefits, and enhancement of permanent cover. Management activities are site specific and must be completed before the end of year 6 for contracts with a 10 year contract length, or before the end of year 9 for contracts with a 15 year contract length.

Mid-contract management in the LEPC region is reflected by the number of acres of prescribed burning and upland wildlife habitat management practices. Since 2003, over 190,000 of CRP have been treated with prescribed burning and nearly 470,000 acres have received upland wildlife habitat management in the LEPC region (table 4). There are approximately 200,000 additional acres of pending for both the prescribed burning and upland wildlife habitat management practices in CRP conservation plans within the region.

Haying and Grazing. The CRP has always served as a forage safety net in times of drought or other emergency. Safeguarding wildlife are rules requiring no haying and grazing, except as approved through emergency authorization, during the primary nesting and brood rearing season, hay harvesting requirements that 50 percent of the field be left un-harvested, and grazing requirements restricting grazing intensity to 75 percent of carrying capacity. Haying and grazing of CRP land is limited to certain CRP program practices. Haying and grazing considerations are to be incorporated into the NRCS-approved conservation plan, adherence to which is a requirement of CRP contract compliance. Haying and grazing activities must maintain vegetative cover, minimize soil erosion, and protect water quality and wildlife habitat. The total number of days allowed for

haying and grazing of CRP is limited. Frequency of haying and grazing throughout the occupied range of the lesser prairie chicken is restricted due to the National Wildlife Federation (NWF) settlement. Before the NWF settlement, haying and grazing frequency was 1 out of every 3 years. After the NWF settlement on September 26, 2006, for haying it is 1 out of every 10 years and for grazing 1 out of every 5 years. Over the last 10 years, FSA estimates less than 5 percent of the CRP acreage in Colorado, Kansas, New Mexico, Oklahoma and Texas had managed haying and grazing activities.

CRP participants that hay or graze are usually required to forego a portion of their annual rental payment, usually 25 percent, though due to extreme drought conditions, the amount of annual payment reduction was reduced to 10 percent in 2012.

During periods of extreme weather events, such as drought, when emergency haying and grazing activities are authorized, considerably more CRP acres are hayed or grazed. Emergency haying and grazing is generally intended for periods of drought or excessive moisture of such magnitude that livestock producers nationally or across wide-ranging areas are faced with culling herds or livestock losses.

The highest proportion of CRP land used for haying and grazing in the LEPC range in recent years was observed in 2012 (23.0 percent), 2011 (20.9 percent), and 2006 (12.4 percent) when the region was suffering from drought conditions (table 5). In each of those drought years emergency grazing made up over 60 percent of the acres that were hayed or grazed. Throughout 2012, the occupied range of LEPC was classified as abnormally dry or worse. USDA shares FWS concerns that widespread haying and over-grazing of CRP under drought conditions may compromise the ability of these grasslands to provide year-round escape and thermal cover during the winter for LEPC at least until the return of normal precipitation patterns. FSA will work closely with NRCS, state fish and wildlife agencies, and other conservation partners to minimize long-term impact of emergency haying and grazing of CRP on LEPC habitat. It is the intention of USDA that haying and grazing be properly utilized to produce a mosaic of vegetation structure and composition to benefit LEPC.

Other Permissive Uses of CRP Land. The harvesting of biomass from CRP land is considered in a manner similar to managed haying. Managed harvesting, including harvest for biomass, is authorized no more frequently than 1 out of every 3 years. Managed harvesting is limited to a specific time period outside of the nesting and

brood-rearing season. Consideration of managed harvesting must be incorporated into the NRCS-approved conservation plan as appropriate.

The installation of commercial energy facilities and associated infrastructure is generally considered incompatible with lesser prairie chicken conservation as it contributes to further occupied habitat loss and fragmentation. The installation of windmills, wind turbines, wind-monitoring towers, or other wind-powered equipment outside of the primary nesting or brood-rearing season on CRP acreage on a case by case basis is consistent with CRP statute. Local FSA county committees may approve up to five acres per CRP contract of wind turbines on CRP acreage provided the environmental impacts have been considered. The five acre threshold is a cumulative figure that is calculated by totaling the square footage of land area devoted to the footprint of the wind generating device and any firebreak installed around the footprint. Access roads, transformers, and other ancillary equipment will not be considered in calculating the 5 acre threshold. For cases over 5 acres, authority for approval rests with FSA national headquarters.

Retention of Conservation Cover after CRP Contract Expiration. The proposed rule implies that once CRP acres come off contract that they are immediately returned to agricultural production. This does not appear to be the case however. An analysis that compared the location of expired CRP fields to 2010 National Agriculture Imagery Program (NAIP) imagery in Kansas found that 86% of the acreage was still in grass. Not only were these acres still in conservation cover, but that the native grass was located in areas of significant conservation need for LEPC. Across the entire LEPC range, a 2012 survey estimated that of CRP acreage that expired during the period of 2008 through 2011 that 73% of the acres in Colorado, 90% of the acres in Kansas, 97% of the acres in New Mexico, 90% of the acres in Oklahoma, and 80% of the acres in Texas were still in grass. The empirical evidence that the bulk of land leaving the CRP remains in grass covers is strong indication that the assumption that the land will be cultivated is incorrect.

Discussion. The FWS proposed rule for listing the LEPC as threatened characterizes CRP as temporarily restoring cropland to grasslands, and therefore subject to conversion back to cropland. A concern expressed by the proposed rule is that CRP will not provide increases in the extent of grassland within the LEPC range. This perspective based on outdated survey results, on one hand overlooks the established stability and predictability of CRP and on the other does not consider actions USDA is taking to enhance the quality of CRP covers and target critical LEPC areas.

Figures 1 and 2 clearly illustrate the stable influence of CRP on grassland covers in the LEPC range. Since 1997 when the first CRP contracts expired, the program has constantly maintained over 5.5 million acres of grassland in the LEPC region. The expiration of CRP contracts in the LEPC range has been held as a reason for considering the CRP enrollment as transitory (table 6). However, when the record of expiring acres, reenrollment and recruitment of new acres is examined, CRP is obviously a stabilizing influence on LEPC habitat. CRP lands will provide a tool to reduce habitat fragmentation and will furnish a mosaic of established and newly established native grass covers.

Further, Maps 1 and 2 demonstrate the focus USDA has placed on the LEPC range, with the 98 counties in the LEPC range accounting for 20 percent of CRP enrollment. Further, corn and soybeans are not viable cropping options in the LEPC range so with the long term contraction in wheat acreage, CRP is likely to remain a prominent feature within the landscape.

USDA has used and continues to use CRP to target LEPC habitat. On October 8, 2012, Secretary Vilsack announced 66,400 additional acres for the LEPC SAFE. This action designates these acres for LEPC wildlife habitat, and provides additional incentives to landowners who establish practices beneficial for LEPC. Additionally, the EBI used in the general signup provides additional points for landowners in the LEPC CPAs and establishing native grasses. These points increase the ability of landowners in the LEPC region to have their offers accepted. USDA will continue to identify and implement actions that enhance LEPC habitat.

A fundamental concern USDA has with the listing of the LEPC, is the potential impact on landowner willingness to participate in the CRP. If landowners perceive participation in CRP as exposing them to increased regulatory liability under the Endangered Species Act, then it is likely that they will be unwilling to enroll in the CRP. If this happens, the listing of the LEPC could have the perverse result of providing less certainty for maintaining LEPC populations. If the LEPC were listed, USDA would like to work with FWS to ensure that landowners currently enrolled in CRP and those who plan to enroll receive regulatory assurances such as those provided by the Safe Harbor Program, so that landowners are not punished for their past, current or future stewardship commitments. That is, landowners with expiring CRP contracts should have no greater regulatory liability under the ESA than those landowners who have not participated in the CRP.

With this in mind and in a manner similar to that taken by NRCS, FSA has initiated conferencing with the FWS to develop a conference report covering

landowner participation in CRP within the range of the LEPC. The conference report will outline FSA conservation program activities, practices and measures to be followed when establishing, restoring, maintaining or enhancing LEPC habitat. Our discussions to date indicate that the FWS feels that following these conservation measures will minimize or eliminate potential agricultural threats to the LEPC and eventually produce beneficial effects for the species.

Conclusion. USDA does not agree with many of the Fish and Wildlife Service's conclusions regarding CRP in the proposed listing. Specifically, USDA disagrees with FWS's contention that CRP's positive impact on the LEPC will necessarily and substantially shrink, that CRP expiration is a persistent and unmanageable threat, or that CRP grasslands will not continue to provide viable LEPC habitat into the foreseeable future. The history of CRP shows that CRP enrollment has been relatively constant in the region of the LEPC and that the program continues to provide significant benefits. For example, Garton found in 2012 that LEPC populations in proximity to CRP grasslands are projected to increase with virtually no likelihood of extirpation in the next 30 years.

USDA believes that our innovative approaches and development of targeted CRP initiatives has, in spite of declining national CRP enrollment caps, had a very positive impact on LEPC and disprove the dire predictions of some with respect to the impacts on the bird. In short, USDA believes that the proposed rule overlooks many of the recent successes in terms of LEPC conservation. In addition, USDA believes it is crucial that any listing decision for the LEPC ensure that measures are taken to maintain and enhance landowner willingness to participate in the CRP and to engage in conservation measures and management activities that benefit the LEPC.

In the event that the FWS determines that LEPC will be listed as a threatened species, USDA requests that a 4(d) special rule be incorporated into the final rule and promulgated to exempt incidental take of the LEPC resulting from routine farming and ranching activities, occurring on private or tribal lands, when applied as prescribed and conditioned by conservation practices and measures utilized by USDA and approved by the FWS. As the conservation practices and associated conservation measures are anticipated to result in positive LEPC population response, FSA requests that all lands where agricultural producers are implementing approved conservation practices and measures described in conference opinions be excluded from designation as critical habitat for LEPC.

Natural Resources Conservation Service

Introduction. Over the past several years, NRCS has been an active partner with FWS and landowners and managers, accelerating voluntary private lands conservation to benefit the LEPC and much has been done in that regard. While the proposed rule provides a substantial amount of information on the status of and threats facing the LEPC, there remains scientific disagreement and additional data that should be considered relative to: 1) recent and ongoing conservation actions; and 2) factors affecting the LEPC.

To accommodate consideration of this critical information, USDA recommends that FWS delay the final determination to incorporate the most recent conservation, scientific, and biological information into its regulatory determination for this species. Section 4(a)(6)[1] of the Endangered Species Act (ESA) allows an extension of up to 6 months, if there is scientific disagreement regarding the sufficiency or accuracy of the available data relevant to the determination, for the purposes of soliciting additional data (Federal Register Vol. 76:75858). USDA looks forward to working with FWS and providing new and relevant scientific information and assistance as needed so that the best determination can be made for the LEPC.

The following summarizes some of the additional information and key areas of scientific disagreement that are critical to consider as part of the FWS listing determination.

Recent and Ongoing Conservation Actions. Since 2008, when the change in listing priority signaled that a listing proposal should be imminent, significant conservation efforts have taken place, which have accelerated habitat conservation and abated threats. While the record considers many of these activities, USDA requests that the full range of voluntary private land conservation actions and effects data be considered.

In 2010, NRCS began its Lesser Prairie Chicken Initiative (LPCI), responding to the need identified by the Kansas Department of Wildlife, Parks and Tourism to maintain Conservation Reserve Program (CRP) fields as working grasslands to benefit the LEPC.

[1] Section 4 of the ESA: 4(a)(6)(A): "if the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i)that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data."

The LPCI was implemented in the five states where LEPC occurs. Since 2010, over $23 million has been invested to apply conservation measures on nearly 1 million acres of land to improve LEPC habitat. In addition, easements that can protect habitat over the long term also are becoming part of the LPCI. New Mexico has used the Grasslands Reserve Program (GRP) in LEPC range. Nearly 34,600 acres are currently enrolled in easements in LEPC habitat areas (permanent easements on 17,289 acres, 30-year easements on 7,296 acres expiring in 2034, and 20-year easements on 10,006 acres expiring in 2029).

NRCS and partners have made available corresponding and significant increases in technical staffing to support private land implementation of conservation practices to benefit and reduce threats to the species. Currently, there are an additional 11 dedicated technical positions supported by 13 partners, and an additional eight Biologists hired by Pheasants Forever and Rocky Mountain Bird Observatory that work specifically in LEPC range.

Under Section 7(a)(4) of the Endangered Species Act, NRCS has "conferenced" with the FWS to include conservation measures for a suite of practices that ranchers can use to maintain the long term viability of their operations in a way that supports LEPC populations. Example practices include:

- Grazing management that improves LEPC habitat and rangeland health and allows for producers to better withstand drought conditions;
- Brush management to remove invasive species that limit LEPC habitat and decrease forage available for livestock;
- Fencing and water development carefully located, to allow expired CRP land to be retained as grass for habitat for LEPC and prescribed grazing.

The Conferencing activities between FWS and NRCS have yielded significant benefits to both the landowner and the bird. During conferencing, NRCS practices were reviewed and conservation measures were included to insure practices implemented as designed are benign or beneficial to LEPC. Further, current monitoring and outcome-based evaluations are conducted consistently across the range to facilitate the largest biological value and data that can be summarized across broad geographic regions. These practices and monitoring framework are outlined in a Conference Report completed by NRCS and FWS in June 2011. The monitoring and analysis following implementation of practices and conservation

measures provides a rich dataset that should be foundational in the FWS determination.

Through NRCS' prescribed grazing conservation practice, ranchers are managing grazing land use to maintain or improve watershed health. Through the LPCI contracts, the practice also must be implemented in a manner that benefits LEPC, including nesting and brood-rearing needs. Since 2008, over 1.2 million acres of prescribed grazing across the range and since 2010 over 520,000 acres of prescribed grazing have been implemented under the LPCI. In New Mexico alone, nearly 110,000 acres have been under deferred grazing for 10-12 month periods to provide improved nesting cover.

Also through LPCI, any new or existing fence within agreed-upon distances from known lek sites is marked or removed to help prevent potential collisions. To date, 324 miles of fence have been marked and 120 miles of fence removed. The benefit for LEPC is estimated to prevent between 700 and 900 collisions annually through this conservation measure.

Factors Affecting the LEPC Listing. Among the considerations in raising the listing priority number from 8 to 2 for the LEPC were assumptions regarding the threats facing the species, including habitat fragmentation, grassland conversion, grazing pressure, collision mortality, and shrub control. Many of these threats have been mitigated through the conservation actions outlined previously, while others warrant further evaluation in light of scientific disagreement.

Habitat fragmentation. The measure by which the Rule defines fragmentation appears to be in significant disagreement with population trend data. To date, there are no range-wide assessments that accurately characterize the extent, juxtaposition, and types of fragmentation that are associated with unoccupied LEPC habitat. Fuhlendorf et al. (2002) provides some insight, however that work did not address fragmentation associated with the mosaic of agriculture and CRP fields. Recent work by the 5-state wildlife agencies indicates that some of the most fragmented landscapes identified in the Rule are areas that host some of the highest densities of LEPCs (McDonald et al. in review). Furthermore, many of the threats identified to be significant to the persistence of LEPC in the foreseeable future (e.g., hybridization, hunting, nest parasitism) are based on an untested definition of fragmentation. In order to forecast as the FWS is required to for the Final Rule, a metric that is tied to the density or abundance of birds is needed before any determination is made.

Grassland Conversion. The limitations in comparing National Landcover Data (NLCD) sets from 1992 and 2006 and the absence of the transitional dataset (Coan et al. 2009) create significant scientific disagreement on the extent of grasslands change in the species' range. Authors of the interim NLCD (2001) noted that direct comparison of these two (NLCD 1992 and NLCD 2001 [same method as 2006]), and independently created land cover products is not recommended (Homer et al. 2007: 340). There exist additional datasets that should be evaluated to better describe the extent of agricultural conversion of native grasslands in LEPC range (Coan et al. 2009; Fry et al. 2011).

Similarly, there is scientific disagreement regarding the capacity of the Conservation Reserve Program (CRP) to provide significant, permanent increases in the extent of native grassland that could support the long-term persistence of the LEPC. An examination of current data of CRP acreages and LEPC populations indicates that CRP acreage has remained relatively stable over the past 20 years and LEPC populations in this region are projected to increase with virtually no likelihood of extirpation in the next 30-100 years (Garton 2012). An analysis that compared the location of expired CRP fields to the 2010 NAIP imagery in Kansas indicated that 86 percent of the acreage was still in grass. Not only were these acres still in grass cover but were located in areas of significant conservation need for LEPC, suggesting that the threat of grassland loss through expiration of CRP contracts requires further examination.

Livestock Grazing. There is significant scientific disagreement regarding the assumption that livestock grazing occurring over a large portion of the LEPC occupied area degrades habitat and causes population-level impacts on the LEPC. NRCS data refute this notion. Well-managed grazing lands can be high quality LEPC habitat. Further, NRCS has worked with ranchers to implement over 1 million acres of prescribed grazing management in the LEPC range, contributing to improved rangeland health. Using National Resource Inventory data, NRCS initial analyses show that rangeland health and vegetation conditions for LEPC are not as impacted or overgrazed as the proposed rule supposes.

Brush management. There is significant scientific disagreement with regard to the long-term effects of shinnery oak control on LEPC populations as well as additional data that should be considered in the record. Grisham (2012) demonstrates that with proper livestock management, 10 years post-treatment there are no negative effects of shinnery oak control on LEPC, and based on vegetation response, the activity could be beneficial. In addition, NRCS has had state level guidance for control of shinnery in the range of LEPC in Texas since 2001, and in

New Mexico since 2008. Also in place is new policy on brush management, and new science on proper methods of "control" and LEPC response to those methods that warrant consideration. Since 2008, NRCS and partners have treated nearly 600,000 acres, focusing on invasive cedar and mesquite, which has reduced the threat of wood invasion by 6 percent across the estimated occupied range of the LEPC.

Conclusion. In order to integrate additional data and resolve significant scientific disagreements, USDA recommends a 6 month delay in taking final action. In addition, during that time there are significant conservation operation opportunities to benefit the LEPC. Foremost is the completion of the FWS and NRCS work to transform the Conference Report to an Opinion, which will provide additional predictability and incentives for voluntary conservation to benefit the LEPC. NRCS will continue with financial and technical assistance as well by enrolling 2013 LPCI contracts. Over 80,000 acres of prescribed grazing and over 30,000 acres of brush management planned and contracted during previous LPCI enrollments will be implemented.

Also, States will finalize and begin implementation of their range-wide LEPC management plan that will create the opportunity for landowners to participate in a range-wide Candidate Conservation Agreement with Assurances (CCAA) that mirrors the conservation systems offered under LPCI. States expect a large amount of immediate participation. Planned research studies evaluating the impact of brush management, fence collisions, and grazing management will also begin in the next 6 months with great potential to inform the dialogue on the benefits of all of these efforts to LEPC populations.

Finally, in the event the FWS decides to proceed with listing the LEPC as a threatened species, USDA recommends that all lands (current and future) where USDA is working with ranchers and land managers to implement practices covered under the conference report/opinion be exempted from the listing requirements, per section 4(d) of the ESA, or that these landowners be provided regulatory assurances in some other way that ensures that they are not subject to increased regulatory liability under the Endangered Species Act as a result of their stewardship commitments. Additionally, USDA requests that all lands where agricultural producers are implementing approved conservation practices and measures described in conference opinions be excluded from designation as critical habitat for LEPC.

On all lands where operators are following the provisions of the conference report/opinion it has already been determined by the FWS as stated in the LEPC Conference Report: "Overall effective implementation of the NRCS conservation practices and their associated conservation measures described in this Report are anticipated to result in a positive population response by the species by reducing or eliminating potential adverse effects." Excluding these agricultural conservation efforts will ensure that implementation and valuable conservation benefits continue uninterrupted.

Forest Service

In the interest of using the 'best available science', the USFWS ruling assessment process would benefit from use of the following publication:

Cushman, Samuel A.; Landguth, Erin L.; Flather, Curtis. 2010. Phase I: Climate change and connectivity: Assessing landscape and species vulnerability.

This research was conducted on 3 focal species of the Great Plains, including the Lesser Prairie Chicken. It assessed the interaction of climate change with human development on lesser prairie chicken habitat. It integrates expected changes in vegetation and land use patterns across the entire Great Plains, using state-of-the-art spatial analyses and modeling approaches to predict the effects of these changes on habitat area, fragmentation, and corridor network.

Please consider consultation with landscape ecologist, Dr. Samuel Cushman for more scientific information or analyses.

USDA offers comments on the status and trends of the LEPC and its habitat on national forest system (NFS) lands in the attached documents. USDA believes it is premature with respect to NFS activities to offer recommendations of a 4(d) rule pending the preparation of a draft final rule and a clearer understanding of the needs of the LEPC on NFS lands relative to the range-wide concerns. USDA would welcome such a discussion prior to finalization of the draft final rule.

Further, USDA recommends the FWS review the 2010 Resource Planning Act Assessment (RPA) Water report RMRS-GTR-295 as it contains pertinent information on drought projections for the area that is the home range of the LEPC. One of the Threat Factors in the listing proposal is 'drought'. In the RPA, you will find information on water trends at long temporal and large spatial scales, which will be a useful backdrop. The current proposal describes the future of drought in the Great Plains, in terms of future drought being "indicated" or "suggested", and the most recent publications FWS cites regarding future drought are from 2007 and 2009. The RPA is a more rigorous report, based on an enormous amount of data, that clearly projects drought will be a prominent factor in the future of the Great Plains, and it is a more recent publication (2012).

With respect to LEPC presence on NFS lands, the LEPC occurs on the Cimarron and Comanche National Grasslands (C&G NF&G) and does not occur on the Cibola National Forest and Grassland. On the C&G NF&G, the LEPC is a high

profile species and the FS has focused its conservation efforts on maintaining and improving habitat quality. In addition to habitat improvement efforts, the FS has also conducted annual lek counts. The attached documents summarize our annual LEPC counts, which give some indication of population trends. These documents also describe some recent impacts to available habitat, as well as conservation efforts aimed at improving available habitat.

Table 1: State Acres for Wildlife (SAFE) for LEPC Habitat in the LEPC Region

	Acres Allocated	Acres Enrolled
Colorado	21,500	13.487
Kansas	52,100	29,880
New Mexico	2,600	2,600
Oklahoma	15,100	6,668
Texas	122,700	77,664
Total	214,000	116,825

Table 2: Contract Expirations, CRP Reenrollment, and New Lands 1997 -2000
(Signups 15, 16, 18, and 20)

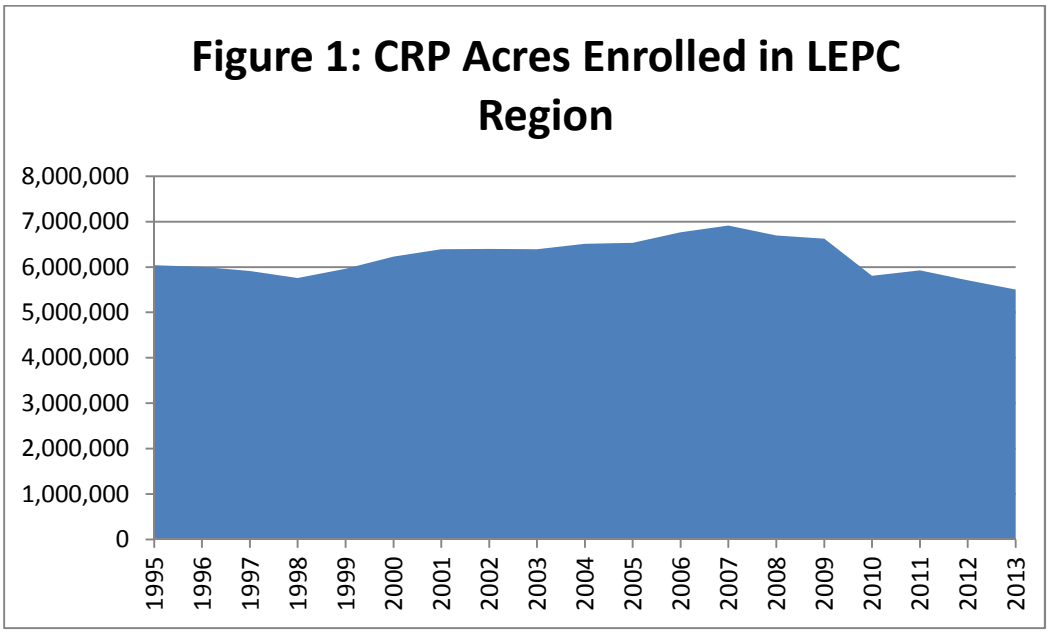
State	Expired 1997-2000	Reenrolled	Percent Reenrolled	New Lands	Total	Percent Change in Enrollment
Colorado	1,081,738	873,756	81	313,873	1,187,628	10
Kansas	1,696,185	1,287,688	76	409,544	1,697,232	0
New Mexico	412,762	327,774	79	220,403	548,177	33
Oklahoma	843,071	532,662	63	334,160	866,822	3
Texas	1,723,458	1,298,221	75	656,143	1,954,364	13
	5,757,214	4,320,100	75	1,934,122	6,254,222	9

Table 3: CRP in LEPC States - Grass Covers Over Time

	Grass Planted 1986- 1991			Grass Plantings since 1997 - Current Enrollment – February 2013		
	Introduced Grass	Native Grass	% Native	Introduced Grass	Native Grass	% Native
Colorado	552,924	1,336,781	71%	64,020	911,430	93%
Kansas	243,282	2,628,046	92%	13,588	845,284	98%
New Mexico	30,715	445,368	94%	34,561	274,103	89%
Oklahoma	696,358	462,128	40%	104,799	377,348	78%
Texas	1,637,659	2,201,900	57%	231,961	1,947,236	89%
Region	3,160,938	7,074,223	69%	448,929	4,355,401	91%

Table 4: CRP Mid-Contract Management in LEPC Region

	Prescribed Burning (Acres)	Upland Wildlife Habitat Management (Acres)
2003	48	12,833
2004	2,892	15,576
2005	6,045	12,822
2006	9,335	24,904
2007	10,917	23,301
2008	30,079	36,360
2009	21,345	13,060
2010	41,071	15,807
2011	46,096	161,898
2012	23,800	152,701
	191,629	469,260



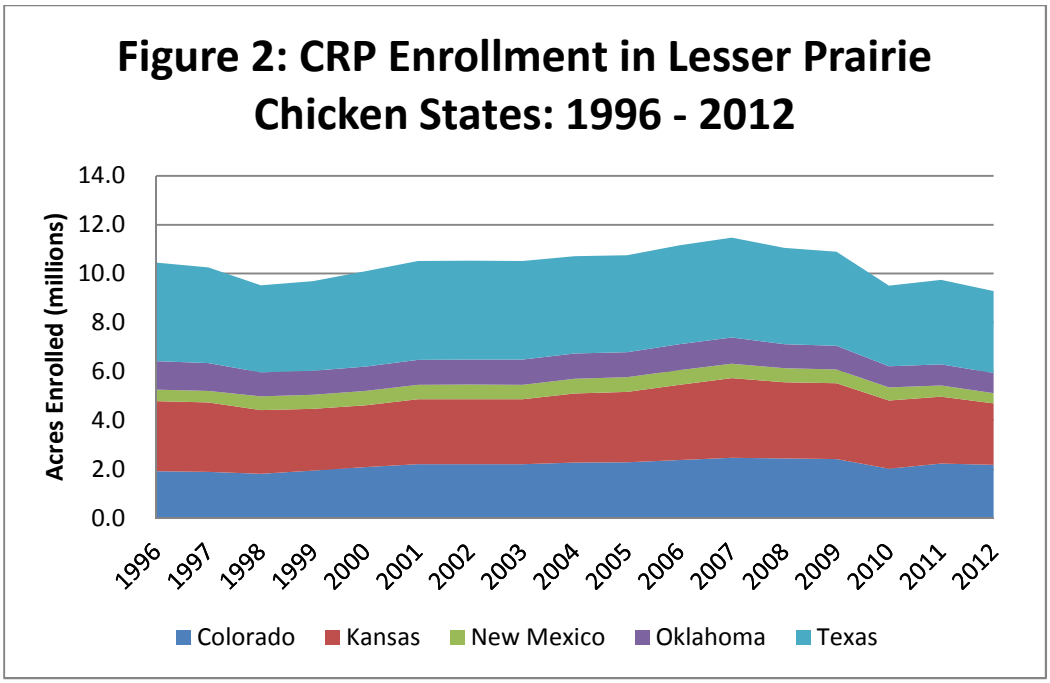


Figure 2: CRP Enrollment in Lesser Prairie Chicken States: 1996 - 2012
Acres Enrolled (millions)
14.0
12.0
10.0
8.0
6.0
4.0
2.0
0.0
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
Colorado
Kansas
New Mexico
Oklahoma
Texas

Table 5: Haying and Grazing of CRP in LEPC Region

Percent of Total Acres

	Managed Haying - Acres	Managed Grazing - Acres	Emergency Haying - Acres	Emergency Grazing - Acres	Total
2004	0.6%	0.1%	2.4%	0.5%	3.6%
2005	0.7%	0.0%	1.8%	0.0%	2.5%
2006	1.0%	1.6%	1.9%	7.9%	12.4%
2007	0.7%	0.0%	0.8%	0.4%	1.9%
2008	0.6%	0.9%	0.4%	2.4%	4.3%
2009	2.3%	0.0%	2.2%	0.0%	4.6%
2010	1.1%	0.0%	1.2%	0.0%	2.3%
2011	2.7%	2.2%	1.0%	14.8%	20.9%
2012	0.5%	5.7%	0.2%	16.6%	23.0%

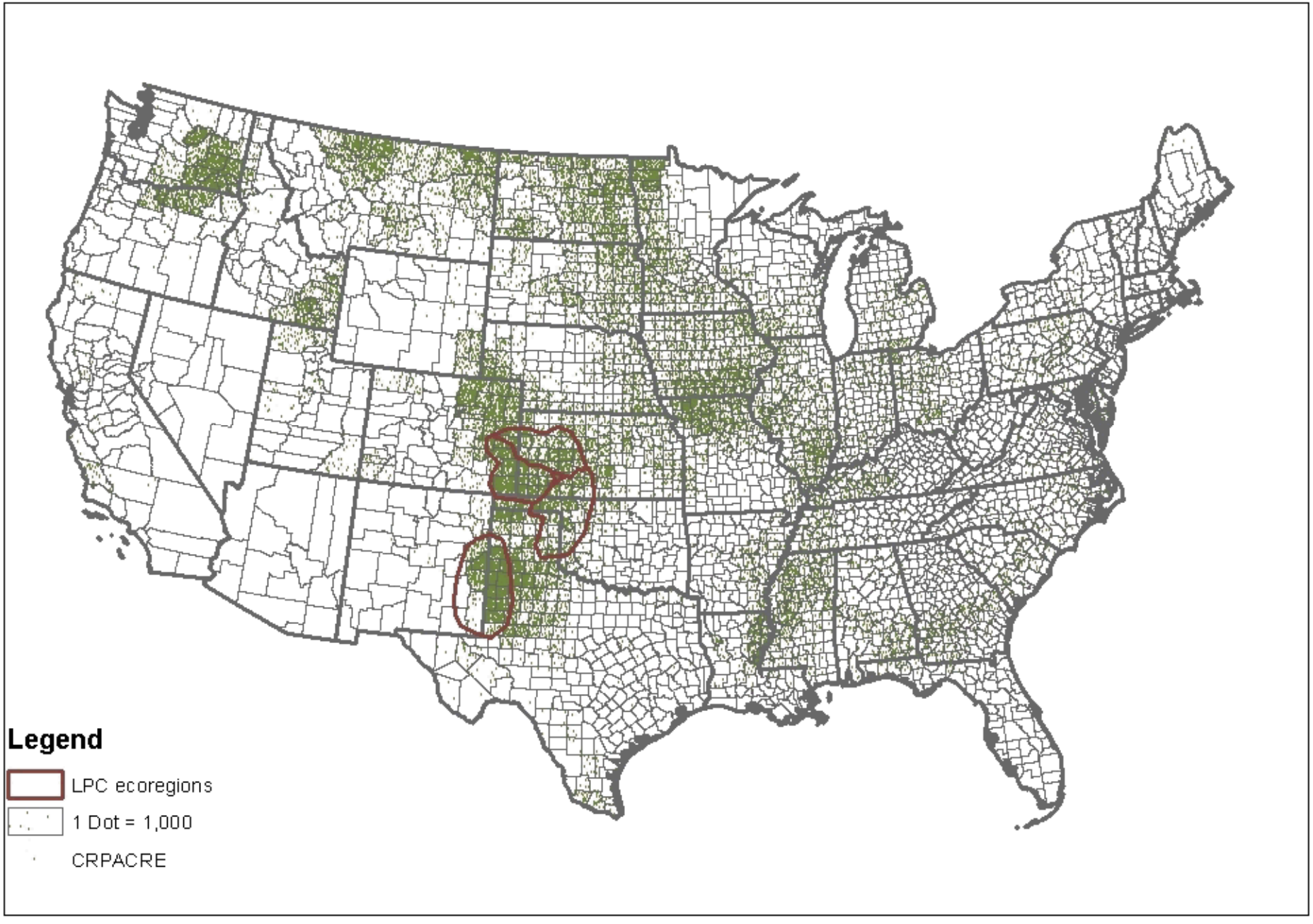
Percent of acres hayed or grazed

	Managed Haying - Acres	Managed Grazing - Acres	Emergency Haying - Acres	Emergency Grazing - Acres	Total
2004	17%	2%	67%	14%	100%
2005	27%	0%	73%	0%	100%
2006	8%	13%	15%	64%	100%
2007	38%	0%	40%	22%	100%
2008	14%	20%	10%	55%	100%
2009	51%	0%	48%	1%	100%
2010	49%	0%	51%	0%	100%
2011	13%	11%	5%	71%	100%
2012	2%	25%	1%	72%	100%

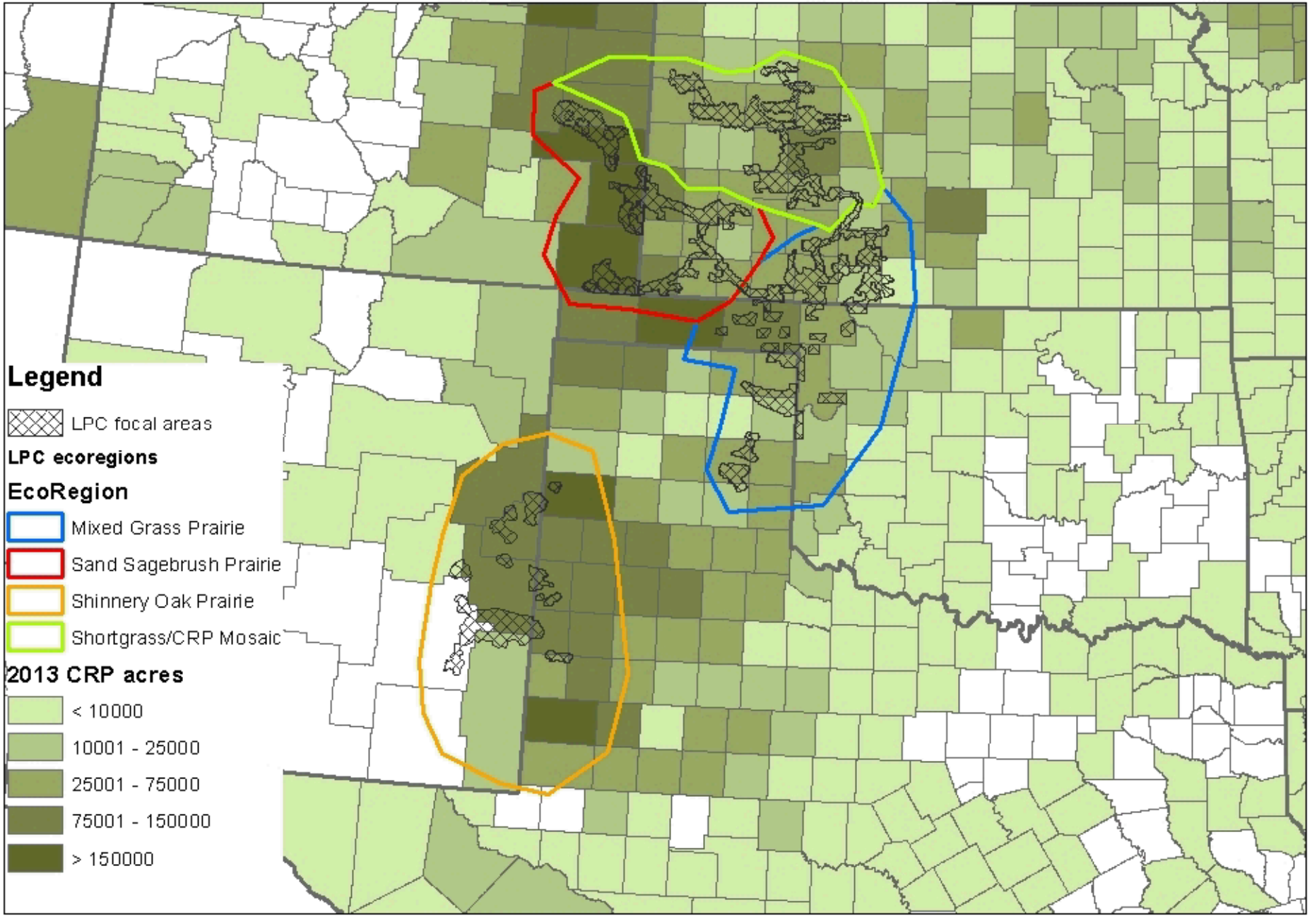
Table 6: CRP Expiring Acres in the LEPC Region

YEAR	ACRES
2012	9,554
2013	425,403
2014	201,762
2015	175,017
2016	98,570
2017	362,682
2018	156,908
2019	102,380
2020	1,351,160
2021	1,058,013
2022	1,229,235
2023	19,843
2024	18,509
2025	156,241
2026	81,868
2027	52,960

Map 1: CRP and Lesser Prairie Chicken Ecoregions



Map 2: CRP and Lesser Prairie Chicken Focal Areas and Ecoregions



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Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134March 10, 2014p.m. CDT

Previously submitted on January 10, 2014 to:

Docket Number: FWS-R2-ES-2012 - 0071

The attached 23-Page summary of the April 24 and 25, 2012 Arcadia Lake Conference between the five state agencies, USFWS Regions 2, 6, NRCS, FSA, BLM and USFS demonstrate the efficacy of State programs, challenge the 2008 and 2010 CNOR, propose completion of a science-based “Threat Analysis” and propose, using scientific data, that Listing of the Lesser Prairie Chicken is unnecessary.

The Arcadia Lake Conference is notably lacking in representation by any Local Government, and its presence and content bring squarely into question why the states of Kansas, Texas, Oklahoma, New Mexico, and Colorado so radically changed their position as to participate in development and advocacy of the WAFWA Rangewide Conservation Plan.

The attached June 2, 2012 correspondence from Keith Sexson to Dr. Benjamin Tuggle, along with other records and documents presents a stark divergence in technical opinion between the States and USFWS that continues to this day. Because the body of science required to achieve the minimum threshold determination to list the Lesser Prairie-Chicken is completely absent - a fact herein demonstrated by the States - existing programs, along with implementation of the KNRC Lesser Prairie Chicken Conservation, Management and Study Plan, remain the best option for conserving the Lesser Prairie Chicken in balance with both the Human and Natural Environments.

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Comment: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners:

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Country: United States
Government Agency Type: Local
Government Agency: 32-Kansas Boards of County Commissioners

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Email Address: [redacted]@gmail.com

Submission of the **KANSAS NATURAL RESOURCE COALITION (KNRC),** a coalition of 32 western Kansas Local Government Boards of County Commissioners:

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and Tourism

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Robin Jennison, Secretary

Sam Brownback, Governor

2 June 2012

Dr. Benjamin Tuggle, Director
United States Fish and Wildlife Service
Region 2
Post Office Box 1306
Albuquerque, New Mexico 87103-1306

Dear Dr. Tuggle,

The purpose of this letter is to summarize the information presented at the April 24-25 Lesser Prairie-Chicken (*Tympanuchus pallidicinctus)* (LPC) Partners meeting held at the Arcadia Lake Conservation Education Center, near Edmond, Oklahoma and coordinated by the Western Association of Fish and Wildlife Agencies (WAFWA) Grassland Initiative (WGI). Those in attendance included representatives from the 5 wildlife agencies within the LPC range, U.S. Fish and Wildlife Service (USFWS) Region 2 and 6, National Resource Conservation Service (NRCS), Farm Service Agency (FSA), Bureau of Land Management (BLM), and U.S. Forest Service (USFS) participated by telephone (see attached attendance list). After receiving a welcome from the State of Oklahoma, myself as the director sponsor for the WGI, lined out the purpose of the meeting. Three objectives for the meeting were identified in the invitation: 1) Give all participants an up-to-current update on the accomplishments of the LPC Interstate Working Group and future work; 2) an idea of the focal habitat programs benefiting LPC delivered by state, federal and NGO partners; 3) acceptance of a coordinated 5 state implementation/management plan approach that pulls together all conservation actions being accomplished and programs that are yet to be implemented for maintaining and improving LPC populations.

Because you assured meeting participants the proposed rule has yet to be drafted by the USFWS, we feel this summary is important to include in the USFWS analysis due to the presentation of new information. Although you stated during meeting discussions "nothing new" was presented to the USFWS they did not already know, the states challenge this assertion. This belief is based upon the fact the raw data had not been compiled prior to April 24-25, nor had the raw data ever been requested by the USFWS for these types of an analyses. To our knowledge neither FSA or NRCS or other partners had ever received a formal data request from USFWS until the April 19, 2011 letter from Dixie Bounds (see attachment 1).

In this summary, we will highlight where presentation information contradicts the justification used to increase the listing priority in the 2008 and 2010 Candidate Notice of Reviews (CNORs). The CNORs state "*The most serious threats to the lesser prairie chicken are loss of habitat from conversion of native rangelands to introduced forages and cultivated crops; conversion of suitable restored habitat in the Conservation Reserve Program to cropland; cumulative habitat*

degradation caused by severe grazing; and energy development, including transmission, and wind, oil, and gas development. We have determined that the overall magnitude of threats to the lesser prairie chicken throughout its range is high, and that the threats are ongoing, and thus imminent. Consequently, we have retained an LPN of 2 for this species."

The 2008 and subsequent CNORs analyses were based on assumptions of risk and projections of these assumptions into the future. The States in their presentations and in this letter provide real data which contradict those previous assumptions of risk and projections.

The 5 states within the LPC range (the States hereafter) strongly believe a complete threat analysis with the information from the April 24-25 meeting should be conducted to provide a more thoroughly informed proposed rule decision for the LPC. As we all agreed at the meeting, a tremendous amount of conservation has been implemented benefiting the species and because of these conservation actions, data indicates population trends across their range have basically stabilized since it was first classified as a candidate for listing in 1998. Furthermore, the data demonstrates the overall threats are not as imminent as previously assumed in the CNORs.

LPC LISTING STATUS AND THE PECE POLICY

Allison Arnold focused on the Candidate Review history and identified the threats for LPC, which included: habitat loss and degradation, fragmentation of existing habitat, and changing land uses, which include transmission development, oil and gas drilling, wind-energy development and the conversion of both natural and man-made grasslands to crops. A timeline was presented starting with the 1995 listing petition and ending with a proposed rule decision in September 2012. After September 2012 proposed rule decision, the USFWS has 1 year to make a final decision (September 2013). This final decision can be extended approximately 6 months if a significant scientific disagreement occurs and the USFWS determines it could have bearing on their final decision.

The USFWS then reviewed how a conservation plan must meet the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) Policy. The USFWS stated to increase the likelihood of success the states need to build off of existing occupied areas with minimum habitat blocks of 20,000 acres. The USFWS recognized the LPC population response in KS, which was a significant range expansion (three-fold in KS, and 25% of the Estimated Occupied Range [EOR]) resulting from the CRP program. The States assert that the best available science, referenced and provided herein, verifies the conservation actions implemented through a coordinated effort between KS, NRCS, and FSA do benefit LPC populations by creating usable habitat. Also, unlike sage-grouse, conservation actions can create LPC habitat in as little as 3-5 years, allowing wildlife and resource managers the ability to target conservation on the landscape to conserve or move populations to reduce conflicts. This fact does not appear anywhere in the CNORs.

Finally, the USFWS recognized all the partners at the Federal, State, university, non-governmental, and industry level. They lined out 4 priorities necessary for a successful management plan. These priorities were:

1. The overall conservation strategy should render benefits to representative species to achieve a robust conservation strategy at the ecosystem level.
2. Need alignment among Partners to effectively conserve the species with a five-state comprehensive range-wide strategy.
3. To achieve these things in the near future, State representatives on the LPC Interstate Working Group need to continue to move forward with the authority of State Agency leadership to benefit the LPC.
4. Identify an LPC point-of-contact and make it a workload priority.

ROLE OF WAFWA AND THE WESTERN GRASSLANDS INITATIVE FOR THE LPC

Bill Van Pelt presented on the role of WAFWA and the integration of the LPC into the WGI. WAFWA is a strong advocate for the rights of states and provinces to manage fish and wildlife within their borders and has been a key organization in promoting the principles of sound resource management and the building of partnerships at the regional, national and international levels to enhance wildlife conservation efforts and the protection of associated habitats in the public interest. This conservation commitment by WAFWA members was enhanced by the creation of the WGI in 2005, which was unanimously approved for a 5-year extension in January 2011. This coordinated approach has been successful in affecting the status of swift fox and various prairie dog species at the landscape level by implementing conservation actions in a collective manner while sharing resources efficiently and strategically. As a result of these conservation efforts, USFWS has determined neither the black-tailed prairie dog nor the swift fox is a candidate for federal listing. We believe with the supporting data the LPC warrants the same finding. The WAFWA presentation continued by highlighting the guiding principles for the WGI:

1. Primary focus is on federal or state listed species or those identified species of conservation concern.
2. Cooperation is necessary to collect and analyze data on these focal species and their habitats.
3. To plan and implement conservation actions to preclude present or future endangerment.
4. Ecosystem approach to the grassland management

The LPC is one of the species that falls under the WGI. While a conservation effort for LPC was described and the Lesser Prairie-Chicken Conservation Initiative (LPCCI) in May 2008 (Davis et al., it lacked some of the parameters necessary to meet the PECE policy. This plan was drafted by the Lesser Prairie-Chicken Interstate Working Group (LPCIWG), which is one of the technical groups associated with the WGI. In a general sense, the LPCCI identified a range-wide goal of maintaining habitat to support breeding populations of LPC and identified conservation

strategies to work toward this goal. However, it did not identify measurable parameters to assess progress and did not identify areas to focus conservation actions. While various partners implemented conservation actions from the LPCCI starting in 2008, it has not been done in a manner to track progress. A range-wide management/implementation plan would bring a more focused and coordinated approach. It is important for the USFWS to recognize many of the conservation actions that will go into a range-wide implementation/management plan have been on-going for many years and have proven benefits to the species.

STATE AND FEDERAL LPC CONSERVATION ACCOMPLISHMENTS

The next set of presentations was given by core state members of the LPCIWG and the partners attending the meeting and staff from federal agencies engaged in LPC conservation. The order of the state presentations was Texas, Colorado, New Mexico, Kansas, and Oklahoma followed by NRCS/FSA, BLM and USFS (by phone). All presentations were in a format that addressed the 5-factor analysis and in the context of new information generated since 2008, which is when the USFWS changed the CNOR rating for LPC from eight to two. The group agreed to present current information for LPC using the five factors established by the USFWS to evaluate a species' status for listing under the Endangered Species Act (ESA). The five statutory listing factors are: 1) present or threatened destruction, modification or curtailment of habitat or range; 2) overutilization for commercial, recreational, scientific or educational purposes; 3) disease or predation; 4) the inadequacy of existing regulatory mechanisms; or 5) other natural or man-made factors affecting their continued existence. Each state presented their state specific information during their presentation; however it is important to note that each of the states and federal agencies are carrying out the exact same sorts of conservation actions for LPCs. These actions include brush management, prescribed grazing, grassland restoration, conservation agreements and easements, as well as engaging industry to minimize and offset potential development impacts. Furthermore, in these presentations, the states and federal agencies conclusively documented that:

1. The information and assumptions used by USFWS in Candidate Reviews in 2008 and 2010, which lead to the increase in the CNOR rating from eight to two, was incomplete.
2. While populations have varied locally and regionally since 2008, across the entire range LPC populations have stabilized or increased depending on habitat type.
3. The projected loss of CRP has not occurred, and CRP is an important component of LPC habitat across the entire range.
4. The projected loss and degradation of remaining native rangelands has not proven to be as significant an issue as represented in the 2008 CNOR. The states and federal agencies have a significant proportion of the range of the species under grazing agreements and are focusing significant efforts at addressing the invasion of mesquite and cedar across the range of the species.
5. The states and federal agencies currently possess sufficient regulatory authority to protect the species from unpermitted take. Furthermore the agencies are engaging industry and agriculture to minimize and offset impacts, and have developed common, range-wide tools to direct those efforts and help minimize habitat fragmentation.

6. That the species has demonstrated its abilities to recover from significant climate change events such as large-scale droughts and periods of extreme temperatures.
7. And that the LPC is not now or in the foreseeable future at risk of extinction in all or a significant portion of its range.

All presentations are posted on the WAFWA website for further review and NRCS briefing summary is attached to this summary (see attachment 2).

Each presentation gave a general overview of the habitats and LPC populations within their boundaries. LPCs historically occupied sandhill habitat characterized by mixed-grass prairies, shinnery oak (*Quercus havardii*)-bluestem (*Andropogon* spp.) and sand sagebrush (*Artemisia filifolia*)-bluestem communities in the plains of eastern New Mexico and portions of southeastern Colorado, southwestern Kansas, western Oklahoma, and the Texas panhandle. LPCs require different habitats depending on the season of the year; but it is thought that a group of birds using a lek (breeding area), can range over 12,000 – 20,000 acres during the course of a year. The LPC uses the different parts of its range according to the needs during each phase of its life cycle. The current EOR is 19,046,296 acres, and including the total area of all watersheds (USGS HUC12s) overlapping the EOR the acreage is 29,469,337 acres. HUCs are watersheds defined by USGS on different spatial scales.

The LPC population estimate using the most recent state data is around 33,736 birds. This includes 2011 estimates of approximately 1,945 in TX, 161 in CO, 6,130 in NM, 2,000 (this is a number less than 3000) in OK, and 23,500 (this number is a mid point from 2005) in KS. However, many of the states pointed out in their presentation the limitations of current methods used for population estimates. These shortfalls include survey bias, small sample sizes, and access issues. Field observations from TX indicate the numbers of birds have been roughly the same over the last two years and birds are just moving around on the landscape to available habitat.

Collectively, the states are moving toward a statistically valid aerial survey method using 15 Km square grids placed throughout the entire chicken range. This survey method is being tested by the LPCIWG and WEST Inc. through a Southern Great Plains Landscape Conservation Cooperative grant with additional support from the 5 states, National Fish and Wildlife Foundation, and the BLM. Draft population estimates for 2012 are encouraging. It was anticipated the number would be down significantly, due to drought conditions observed in 2011. However, the states are pleased by the number of new leks discovered during the aerial surveys. The minimum estimate for 2012 is 30,641 birds. However, these estimates are a minimum abundance and are based only on the actual numbers counted during the aerial flight on confirmed LPC leks. Further refinement of the estimate is in progress. The USFWS requested a copy of any results as soon as they are available to include in the proposed rule making. The draft report is attached (see attachment 3). The final report is not expected until June or July.

These observations from the aerial surveys are significant because of the similarities to historic LPC population observations. In the July 1966, *Rare and Endangered Wildlife Report* the Bureau

of Sports Fisheries and Wildlife listed the LPC as rare. Rare was defined as "a rare species or subspecies is one that, although not presently threatened with extinction, is in such small numbers throughout its range that it may be endangered if its environment worsens. Close watch of its status is necessary." They contributed the low numbers to poor range conditions due to the severe drought and poor grazing practices. They also stated LPC were "almost extinct in the 1930s and populations fluctuate markedly." However, when being evaluated for inclusion on the first ESA list in 1974 LPC were not listed for federal protection. While it is unclear why it did not make the final ESA list, it could have been due to a perceived perception of an improved population status due to natural population fluctuations.

A wide population fluctuation is not surprising considering the species. The LPC is a gallinaceous bird. The birds in this Order have wide population fluctuations because they depend upon rainfall to create nesting structure and foraging habitat. During the KS presentation, it was mentioned how the LPC increased by 600% over a 10-year period with average to above average rainfall years. New Mexico documented a 50% increase from 3,013 in 2010 to 6,130 in 2011. WAFWA and their partners believe extreme population fluctuations are the norm for the species, and because of existing Farm Bill Programs, and other conservation efforts, the LPC population has been able to maintain itself at a sustainable population on the landscape at a higher level than what it did during other severe drought events like in the 1930s.

Since the April 24-25 meeting, the LPCIWG with assistance from NRCS, looked at LPC populations found within the four habitat types (see attachment 4). Regionally populations continue to show significant signs of population growth. However, because of low rates of growth and large variation in estimates of lambda, sand sagebrush habitat was one region that indicated the greatest likelihood of reaching 25% or less of the equilibrium population size. Thus, the majority of the population distribution exhibits population growth (>2% annually) with a low probability of extinction. A peripheral examination of population trends prior to the 1998 candidate status recommendation, indicates, on average, populations from 1980-1997 were declining at an average annual rate of 3.7%, post candidate status population growth was 6.9% increase annually.

1. PRESENT OR THREATENED DESTRUCTION, MODIFICATION OR CURTAILMENT OF HABITAT OR RANGE.

It is recognized a large amount of historic LPC habitat was converted from native grasslands to croplands in the early 1900s. However, thanks to various conservation efforts, there still remains a large amount of occupied habitat made up of native, restored, and manmade grassland habitats for LPC. The States and partners have focused a tremendous amount of resources to reduce the conversion of grasslands, native or manmade, in the last several years reducing this threat to the LPC. This habitat conservation includes implementing protections, easements, and targeting crucial areas currently in Farm Bill and state conservation programs to remain in conditions that are favorable to LPC.

Loss of Native range

Current data on "sodbusting" of native prairie since 2008 are inconclusive. The NASS data and Kansas GAP both indicate an increase in native range since 2008, by as much as 1 million acres. We are unsure of the reliability of those data and suggest there has been a minimal loss of native range since 2008.

Data presented in the June 2011 WAFWA letter to USFWS and the April 2012 presentation by States and partners does not support the CNORs. The states and NRCS/FSA recognized this potential threat as identified in 2008 and targeted conservation efforts to mitigate potential losses by providing assistance with fencing, prescribed grazing and water development. The states and NRCS/FSA summarized and presented data on CRP. Although, there has been an 11% decrease in CRP from 2008-2011, there has been a 3% net gain of CRP since 1998. Additionally, when a field enrolled in CRP expires it does not translate into LPC habitat being converted to cropland as indicated in the 2010 CNOR. Initial analysis conducted and presented by the NRCS indicates 90% of expired CRP lands, 163,196 acres, in KS are still in grasslands favorable for LPC occupation. The States, and NRCS, illustrated how 126,824 of the available 147,600 acres of the State Acres for Wildlife Enhancement (SAFE), are under contract. SAFE is a continuous CRP program within the LPC range specifically targeted at the LPC needs. The program has a 90% cost share on planting native cover with a substantial per acre sign-up bonus for new enrollments. Expired CRP can also be enrolled in the program but the cost share and bonus are not available for existing cover.

The states and NRCS report the program has been a success due to delivery by agency private lands biologists with assistance from State Watershed Action Teams (SWAT). The SWAT positions focus on promoting LPC Initiative cost-share programs and assist with monitoring and evaluation. In short, they provide a greater level of *certainty* that practices are implemented in areas that have the greatest conservation benefit to LPCs. There are 11 SWAT biologists spread across each of the States. Partnering with NGOs and industry has been critical to this program.

While fragmentation has contributed to population declines historically, recent information indicates habitat fragmentation trends have slowed with the implementation of habitat conservation programs mentioned above, and a focused effort to manage grazing and other habitat practices like brush control and fence marking. Presentations identified grazing management conducive to LPC, and programs that promote improved grazing management both improve habitat quality and help prevent further fragmentation. The state and federal agencies have a significant proportion of the LPC range under prescribed grazing and LPC conservation plans. These include TX having 255,044 acres enrolled under their LPC Farming and Ranching CCAA (an additional 24,954 acres were enrolled in the week following the meeting, bringing the current CCAA total to 279,998 acres) and another 971,533 acres enrolled under wildlife management plans, NM had 1,523,573 acres under their CCAA which includes grazing management, and OK having 97,335 acres. The NRCS has implemented a prescribed grazing cost-share program across all five states and has enrolled 1,024,691 acres. In addition, habitat protection occurs on 187,864 acres in NM, 11,000 acres in CO, and 20,989 acres in OK. In addition, the BLM has closed 370,435 acres to future oil and gas leasing and 847,000 acres to

wind and solar development. All totaled this is 4,627,951 acres (24.3% of the EOR) juxtaposed on the landscape to reduce fragmentation and maintain connectivity between habitat blocks.

Additional data supporting the statement habitat is not as fragmented as anticipated in the CNORs relates to the observed range expansions in some of the LPC range. In Kansas, since 1960, LPC were not known to exist north of the Arkansas River. Additionally, to the extent CRP is retained as grassland cover it greatly increases the connectivity of habitat.

In the spring of 2009, KDWPT developed a database to maintain locations of known greater and LPC lek sites and counts. This information was gathered from lek survey data sheets submitted during previous years and solicited from all KDWPT personnel and numerous other conservation partners across the state. An online data entry screen was developed so that people could enter opportunistic lek observations that were made in spring 2009 and subsequent years. Following the 2011 breeding season, the database contained 474 observations of 296 LPC and mixed lek sites that were known to be active at least once since 2005. This includes 126 observations of 68 leks north of the Arkansas River, where LPC were not known to exist only 15 years ago. In 2011 and 2012 Texas also documented shifts in LPC population into CRP lands deemed probably unsuitable in the 2008 and 2010 CNOR. While these shifts, or reoccupations, are clearly not direct movements of populations, they illustrate sufficient habitat connectivity.

The addition of CRP in areas like Deaf Smith and Bailey Counties, TX in the 1980s represented a habitat augmentation, resulting in range expansions of LPCs in 2011. Additional new leks associated with CRP in Texas were detected in 2012, resulting in the addition of more than 300,000 acres to the LPC EOR in Bailey, Lamb, Hockley and Cochran Counties. Other aerial and road surveys in TX are detecting the effects of other habitat augmentations from habitat conservation practices in the form of new leks outside of the EOR in Roberts, Ochiltree, and Yoakum counties. This pattern of population shifts and reoccupation of former range has also been identified in other parts of the species range. According to LPCCI, and implied in the July1966 *Rare and Endangered Wildlife Report* over the last century a pattern of periodic decline and increase, including reoccupation of former range has occurred in New Mexico.

It is recognized that declines in LPC populations can be observed as a result of habitat degradation through brush encroachment and isolation of populations from habitat fragmentation. Brush control in the form of removal and burning, has been employed by the states and their partners to reduce this potential threat. This includes 350,362 acres in OK, 291,648 acres in TX, and 70,566 acres in NM. In KS, a minimum of 8,540 acres of habitat manipulations have been implemented by KDWPT and USFWS partners. The NRCs has implemented similar measures in the state as well. All totaled this is a minimum 721,116 acres created to maintain or expand LPC range. The BLM has carried out numerous projects in New Mexico to reduce fragmentation. This includes treating 366,350 acres of mesquite with plans to treat an additional 317,220 acres. They have also reclaimed 1,325 acres of abandoned well pads

and roads. They require burial of power lines within two miles of leks and give credits for power line removal. To date, 32.5 miles have been removed in LPC habitat.

This belief of intact habitats is further supported by population genetics. According to current information, genetic exchange is still occurring at a significant level to maintain high genetic diversity for the species throughout a significant portion of its range, despite fragmentation levels (Hagen et. al 2010). Currently, a range-wide assessment of nuclear DNA is being conducted (USGS Fort Collins, CO) which will provide additional insights to genetic structuring and connectivity.

The State's presentations then shifted to the other potential threat identified in the CNOR, and their efforts to prevent, minimize and mitigate impacts from wind and transmission development on LPC habitat and populations. Everyone at the April 2012 Partners meeting agreed the LPC is a species that truly requires management at the landscape level and various strategies must be implemented to further stabilize the population and monitor conservation efforts. During the presentations, each state touched upon the two-prong conservation planning approach being pursued to maintain LPC populations and reduce potential threats.

To assist with management decisions in regards to LPC, the Western Governors Association (WGA), LPCIWG, and the Playa Lakes Joint Venture (PLJV) collaborated on a range-wide decision support system (DSS) directed at project site location for energy development and targeting of conservation efforts. It is known as the Southern Great Plains Crucial Habitat Assessment Tool (SGP-CHAT). Large patches of native prairie and CRP are important LPC habitats, but connection between those patches is also important. Managing for connected landscapes is particularly difficult in private land-dominated landscapes. Accomplishing landscape-level management requires state of the art tools, as well as coordination and engagement of agencies, NGO conservation partners, and industry.

The SGP-CHAT incorporates layers from modeling efforts like the range-wide lek and nest habitat model, and an update of the PLJV Core/Core Buffer model to identify existing landscape-level habitat patches, as well as a least cost path analysis to identify existing and potential corridors between habitat patches, while maintaining data confidentiality required by individual state laws. The first iteration of this tool was completed and made accessible to the public in September 2011. The second iteration is in the planning stages, with a kick-off meeting scheduled in Oklahoma City in June 2012. The purpose will be updating and enhancing the SGP-CHAT and adding increased functionality for industry, agencies, and conservation organizations.

The conservation potential of the SGP CHAT across an entire 5-state range is extraordinary. It allows for industry, public utilities, and consulting firms to conduct transparent tier-one analyses for project sighting with current data sources, which will reduce industry costs and improve conservation of the species. This tool will also be particularly useful in developing landscape-level conservation strategies for the five state wildlife agencies across the range of the species, and targeting conservation funds from other sources such as compensation/mitigation dollars and other cost-share habitat improvement programs like Partners for Wildlife and the Landowner

Incentive Program. NRCS reported using the SGP CHAT along with FSA Common Land Use data to target LPC Initiative funds. The states also reported development of more state specific tools to compliment the SGP-CHAT. For example, OK has had great success with industry using their spatial planning tool. As a result of this proactive measure, OK has generated $11.15 million dollars in voluntary mitigation funds to offset habitat impacts.

TX has developed voluntary offset guidelines for all types of developments impacting natural resources, and is in negotiations with Cross Texas Transmission to offset for impacts from the Gray to Tesla CREZ (Competitive Renewable Energy Zones) power transmission project in LPC habitat and on the Caprock Canyons Trailway. This negotiation resulted in $600,000 in funding for the addition of important LPC habitat to the TNC Yoakum Dunes Preserve in Yoakum County and more aerial surveys. The LPC states have been directly involved with ongoing development of the Great Plains Wind Energy HCP for LPCs and Whooping Cranes. The LPCIWG is represented on the technical committee for this effort. Analysis for this HCP suggests that permitted development will impact less than 2% of the LPC EOR and sighting guidelines in the HCP will avoid leks and potential LPC habitat.

Another proactive conservation planning effort is the pursuit of Candidate Conservation Agreement with Assurances (CCAA/CCA) by states and their partners. For example, TPWD has teamed with USFWS and the Dorothy Marcille Wood Foundation to develop outreach on a CCAA for LPCs in Texas. This program informs landowners about the requirements to work with TPWD staff, other agencies, or NGOs to develop, agree to, and carry out a TPWD and USFWS-approved management plan specifically targeted at LPC conservation. In return, the landowners receive a certificate of inclusion in the CCAA, which provides regulatory assurances to ensure their operations will not be significantly impacted by a future listing. This plan also helps direct landowners to cost-share opportunities for brush control, native plant seeding, and water development and fencing to support improved grazing management. These programs include the TPWD Landowner Incentive Program (LIP), USFWS Partners for Wildlife, and the NRCS LPCI and Environmental Quality Improvement Program (EQIP). TPWD is also working with the Panhandle Producers and Royalty Owners Association and Permian Basin Petroleum Association in an effort to develop an oil and gas CCAA similar to what NM has in place.

The CCA/CCAA developed by the USFWS and the BLM in New Mexico are historic in their approach and acceptance by ranchers and oil and gas companies. The CCA/CCAA already has 15 ranchers who have enrolled 623,000 combined acres and another 18 ranchers totaling 594,000 acres are being reviewed for inclusion. The New Mexico State Land Office is also actively considering enrolling their unleased lands in the CCA/CCAA to help provide protections for LPC. In addition to the ranchers who have signed up, there is an additional 115,363 acres of oil and gas leases on Federal minerals that are signed up on approved Certificates of Participation. These voluntary agreements have also resulted in over $3,000,000 being contributed by industry to fund on-the-ground habitat improvement projects such as reclamation of man-made infrastructure (well pads and roads), removal of power lines, and vegetation (mesquite) treatments. The USFS also described how they are managing for LPC in their planning efforts.

In conclusion, for this factor the states believe that the best scientific and commercial information available indicates the LPC is not in the foreseeable future threatened by this factor. Habitat conservation programs are succeeding in efforts to protect and even expand LPC habitats and populations across portions of the range of the species. Expected declines in CRP enrollment that brought on the increase in the listing priority rating in the 2008 CNOR, and maintained in the 2010 CNOR, have not occurred and concerns over exotic CRP are significantly less than expected in 2008 and 2010. The states have created a project sighting tool to help minimize development impacts and are working to improve it to direct conservation efforts to further connect LPC populations and habitat. The current aerial survey method is the first statistically valid approach implemented throughout the entire range of the LPC and will allow the states and partners to better track LPC response to conservation actions in the future.

2. OVERUTILIZATION FOR COMMERCIAL, RECREATIONAL, SCIENTIFIC OR EDUCATIONAL PURPOSES.
The states currently define and control commercial, recreational, scientific and educational take for the LPC. States within the LPC range manage scientific collection and hunting through permitting and licensing processes and setting of hunting seasons. For scientific collection each application is reviewed on a case-by-case basis and there is no indication LPC are being over utilized from a scientific standpoint. Various regulations are in place for LPC for recreational use and are summarized below by state.

New Mexico manages LPC under the statutory authority of Chapter 17 of New Mexico Statutes Annotated 1978. It is the purpose of this act and the policy of the state of New Mexico to provide an adequate and flexible system for the protection of the game and fish of New Mexico and for their use and development for public recreation and food supply, and to provide for their propagation, planting, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the state of New Mexico."

In 1997, NMDGF was petitioned to investigate the status of the LPC for listing. The Department found that the prospects for survival and recruitment of the LPC were not jeopardized to a degree that constitutes classification as threatened or endangered under the Wildlife Conservation Act (Davis 2006). The Department's recommendation regarding the LPC Investigation was brought before the State Game Commission in November 2006. The motion to accept the Final Listing Investigation Report and recommendation that the LEPC not be listed under the Wildlife Conservation Action was carried unanimously. The LPC hunting season has been closed in New Mexico since 1996.

TPWD manages LPC under the authority of the Texas Statute (http://www.statutes.legis.state.tx.us/) Parks and Wildlife Code, Title 2 Chapters 11 and 12, and PWC Title 5 Chapters 61 and 64. The mission of TPWD is to manage and conserve the natural and cultural resources of Texas and to provide hunting, fishing, and outdoor recreation opportunities for the use and enjoyment of present and future generations. In Texas, LPCs are considered game birds, however, harvest and hunting seasons for this species were suspended indefinitely in 2009. Texas Statute, Parks and Wildlife code Title 2; Chapter 12 subchapter A Sec. 12.011 establishes the responsibility for protecting the state's fish and wildlife resources

which authorizes TPWD to provide comments and recommendations on projects to minimize impacts to fish and wildlife. From 2008-11 TPWD reviewed 55 projects. Texas Bill 2259 requires reclamation of inactive oil and gas wells, which are wells out of production more than 10 years. This translates into 4,212 wells that are slated to be removed within the counties in the EOR between 2011 and 2016.

The ODWC manages LPC under authority given by Title 29, Oklahoma Statutes, §29-3-103 Functions, powers and duties of the Commission, which states: "A. The Wildlife Conservation Commission shall constitute an advisory, administrative and policymaking board for the protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of wildlife in this state as provided in the Oklahoma Wildlife Conservation Code...." (http://www.lsb.state.ok.us/OKStatutes/CompleteTitles/os29.rtf). The mission of the ODWC is to manage Oklahoma's wildlife resources and habitat to provide scientific, educational, aesthetic, economic and recreational benefits for present and future generations of hunters, anglers and others who appreciate wildlife. LPC are considered game birds in Oklahoma, but there has been no open season since 1997.

Kansas manages LPC under the authorities in Kansas Statutes Annotated (KSA) 32–702 which states: "It shall be the policy of the state of Kansas to protect, provide and improve outdoor recreation and natural resources in this state and to plan and provide for the wise management and use of the state's natural resources, thus contributing to and benefiting the public's health and its cultural, recreational and economic life. For these purposes, the secretary, the commission and the department are hereby vested with the duties and powers hereinafter set forth." Hunting of LPC is closely regulated in Kansas through bag limits and seasons. Research has indicated that hunter harvest is an insignificant source of mortality in Kansas (Hagen et al. 2006, Hagen et al. 2007, Fields 2004, Pitman *unpublished data*). Removing that source of mortality will not result in a significant increase in population growth (Hagen et al. 2009). In 2009, the KDWPT was petitioned to list the LPC at the state level. The ad hoc review committee recommended not listing the species, which was approved by the Commission.

CDOW has responsibility for the management and conservation of wildlife resources, including the conservation and management of threatened and endangered species, within their borders as defined and directed by state laws (i.e., Colorado Revised Statutes, Title 33, Article 1). Title 33 Article 1-101, Legislative declaration states: "It is the policy of the State of Colorado that the wildlife and their environment are to be protected, preserved, enhanced and managed for the use, benefit, and enjoyment of the people of this state and its visitors. It is further declared to be the policy of this state that there shall be provided a comprehensive program designed to offer the greatest possible variety of wildlife-related recreational opportunity to the people of this state and its visitors and that, to carry out such program and policy, there shall be a continuous operation of planning, acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities." LPC are not hunted in Colorado.

The states feel the best scientific and commercial information available indicates that the LPC is not now, or in the foreseeable future, threatened by the overutilization for commercial, recreational, scientific or educational purposes.

3. DISEASE OR PREDATION

The next factor presented by the states and partners dealt with disease and predation. As identified in the LPCCI, LPC have a short life expectancy and, as with most prairie grouse, eventually die from predation. Rough-legged hawk (*Buteo lagopus*), red-tailed hawk (*Buteo jamaicensis*), prairie falcon (*Falco mexicanus*), Cooper's hawk (*Accipiter cooperii*), northern harrier (*Circus cyaneus*), ferruginous hawk (*Buteo regalis*), golden eagle (*Aquila chrysaetos*), great horned owl (*Bubo virginianus*), coyote (*Canis latrans*), and badger (*Taxidea taxus*) have all been identified as predators of LPC adults and chicks. Nesting hens, eggs, and chicks are most vulnerable to predation, especially where nesting cover and brood habitat are inadequate to provide for concealment and escape. Predators of nests include Chihuahuan raven (*Corvus cryptoleucus*), striped skunk (*Mephitis mephitis*), ground squirrels (*Spermophilus spilosoma*), and bullsnakes (*Pituophis melanoleucus*), raccoons, bobcats, as well as coyotes and badgers. New Mexico, along with the BLM mentioned monitoring feral pigs as a potential predator in their presentations but had no evidence supporting direct predation.

Predation of prairie grouse is often considered a consequence of habitat quality and juxtaposition, prairie grouse density, and predator numbers. While inadequate habitat quality increase the predation risk and numerous studies have found higher rates of nest predation on grouse species in fragmented landscapes containing more edge and smaller patch sizes. The introduction of trees, power lines, or other vertical structures into prairie habitats provides hunting perches for raptors and may indirectly increase raptor predation on LPC. Currently, there are NO studies that indicate predation of adult, nests, or hatch year birds is outside the range of natural variation.

To date, there have been no identified diseases that have population impacts on LPC populations. However, several endoparasites including nematodes and cestodes are known to infect the species. In a recent study in New Mexico, LPC tested positive for *Eimeria* and *Plasmodium* species, however, the parasite load was not perceived as a significant contributor to LPC mortality. Hagen et al. (2002a) found low levels (<5%) of *Mycoplasma* spp. antibodies in LPC sera in Kansas and also concluded that such levels were not limiting to populations.

We conclude, with existing habitat conservation practices being implemented to reduce habitat fragmentation, and the best scientific and commercial information available, the LPC is not now, or in the foreseeable future, threatened by predation or disease to the extent that listing under the ESA as a threatened or endangered species is warranted at this time.

4. THE INADEQUACY OF EXISTING REGULATORY MECHANISMS

All the states within the range of the LPC have the regulatory authorities in place to protect LPC from unpermitted take. In Colorado, the LPC was listed as threatened in 1973 under its Nongame and Endangered or Threatened Species Act. All the states within the range have the species listed

as a species in need of conservation under their State Wildlife Action Plan, which focuses conservation measures to reduce impacts to the species. These authorities allow states to enter into regulatory conservation programs like a CCAA with landowners and the USFWS. In addition, voluntary programs are employed to encourage conservation.

For example, with the exception of those species listed under the Kansas Nongame and Endangered Species Conservation Act, all impacts to wildlife as a result of energy production/transmission are voluntarily addressed on a case-by-case basis in Kansas. Energy development (production and transmission) is under the authority of the Kansas Corporation Commission (KCC). KDWPT continues to foster and maintain a cooperative relationship with the KCC in an effort to integrate wildlife concerns into their regulatory process. At this time, the KCC does not have authority over the sighting of renewable energy projects such as wind and solar. To date, KDWPT has developed a sound relationship with most renewable energy developers and utilities and as a result have avoided substantial impacts to the LPC.

For KS, only 39.3% of the EOR lies over gas and oil formations and 27% of the EOR is subject to well spacing greater than 4 wells per section (see attachment 5). The Kansas Corporation Commission (KCC) under K.S.A. 82-3-103 –permit for all oil and gas drilling activities and K.S.A. 82-3-(107-108) –Basic proration orders requires set-backs of 330 ft. from lease boundary which equates to 10 acres per well (64/section) Many formations have specific proration orders Much more stringent spacing and set-backs. Also for electric sighting transmission K.S.A. 66-1178 requires a sighting permit, public hearing, and requires the 3 member KCC Commission to issue final order within 120 days of application. Several lines have been adjusted through this process to minimize/eliminate LPC impacts.

In Texas, the Railroad Commission of Texas (RRC, Commission) is the state agency with primary regulatory jurisdiction over the oil and natural gas industry, pipeline transporters, natural gas and hazardous liquid pipeline industry, natural gas utilities, the LP-gas industry, and coal and uranium surface mining operations. The Oil and Gas Division of the Commission is responsible for new field designations and review and approval of directional surveys, drilling and pipeline permits, waste management permitting and administrative compliance. Individual industry associations such as the Permian Basin Petroleum Association (PBPA) and Panhandle Producers and Royalty Owners Association (PPROA) have expressed interest in voluntary regulation through a CCAA for the LPC. TPWD plans to pursue that option with these associations over the next year.

The Public Utility Commission (PUC) of Texas regulates the state's electric and telecommunication utilities, implements respective legislation, and offers customer assistance in resolving consumer complaints. The PUC also oversees transmission development projects, selects the location of those projects, and permits those projects through the issuance of a Certificate of Convenience and Necessity (CCN). Requirements for wind energy developments in Texas include county zoning permits and Federal Aviation Administration (FAA) permits. In addition, wind energy developers must provide an economic plan detailing benefits to the state

and local community to the Texas Comptrollers Office to receive tax abatement. TPWD, has taken an active role in efforts to inform the PUC on potential effects of proposed developments on the LPC, and is pursuing efforts for voluntary mitigation of transmission impacts to LPC habitat.

In New Mexico, oil and gas development is permitted and regulated by the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department (EMNRD). One of the primary goals of the EMNRD is to protect the environment and ensure responsible reclamation of land and resources affected by mineral extraction. Individual oil and gas companies within the Permian Basin Petroleum Association have also committed to voluntary regulation of impacts on LPC habitat by entering into CCA/CCAAs.

Federal land management agencies have the ability to identify areas as special management areas for sensitive species. The USFS regards the LPC as a sensitive species and a Management Indicator Species on the Comanche and Cimarron National Grasslands (USDA–FS 2003). The BLM also considers the LPC in its regional management plans (BLM 2005).

We conclude that the best scientific and commercial information available indicates the LPC is not now, or in the foreseeable future, threatened by this factor. Besides having the authority for take, other regulatory measures are in place to reduce the impacts of energy development in core population areas like KS and TX. Voluntary regulation efforts through CCA/CCAA programs in NM, and in development in other states, as well as voluntary offsets and mitigation are bolstering existing regulatory mechanisms for protecting LPC populations and habitat.

5. OTHER NATURAL OR MAN-MADE FACTORS AFFECTING THEIR CONTINUED EXISTENCE.

There are a variety of factors both natural or man-made that may affect LPC populations. Below we summarize those factors that some believe could impact the existence of LPC.

Climate change and severe weather

Understanding how weather and long-term climatic events affect LPC survival and reproduction is important to develop adequate conservation strategies that will sustain populations. Weather events can have a negative effect on recruitment of young into the population through variety of mechanisms; hail, untimely rain, and extreme temperatures. General projections for the western United States generally include increased summer temperatures and increased variability in precipitation. Finer, down-scaled climate models for temperature in the region suggest that the annual number of 100 plus degree days may increase within the LPC EOR particularly in the southern portion of the range, but predicting fine scale trends in precipitation is much more difficult. It is the interaction of temperature and precipitation along with range management that determine nesting habitat quality and quantity, and nesting habitat is considered to be the primary factor in determining LPC population trend. So projecting that long-term trend without fine-scale predictions for precipitation is problematic.

Drought does impact LPCs through its effect on seasonal growth of vegetation necessary to provide nesting and roosting cover, food, and escape from predators. Major droughts of the

1930s, 1950s, and 1990s markedly reduced LPC populations across their range, but this species demonstrated its ability to survive and recover from those droughts. Furthermore, conservation programs currently in place will likely contribute to a higher number of LPCs surviving future droughts. Effects from last year's record breaking drought this spring were mentioned in the presentations with lower numbers of bird s being observed on leks. In New Mexico, which on average receives less total precipitation (e.g., the Carlsbad region), LPC populations are impacted more frequently and more severely by drought. LPC populations in these areas may have always been more variable than those farther to the north, although population data are insufficient to say this with certainty. The states feel with using a standardized survey method, this can be better tracked in the future. Along with other prairie grouse, LPC have a high reproductive potential in years of adequate conditions. Thus, drought conditions are unlikely to be the sole causative factor in long-term LPC population declines. The effects of drought on population growth rate may be more significant in small, isolated populations. The take home message the states presented was the fact LPCs are adapted to high levels of variability and when habitat and weather conditions are conducive populations can respond quickly.

Predictive models of climate change suggest greater fluctuations in weather patterns at all temporal scales. Increasing temperatures will likely result in a northward shift of the climatic conditions most suitable to the species, possibly resulting in the southernmost parts of the current LPC range becoming unsuitable. Such range shifts are already occurring in many species and may be occurring for the LPC and was implied in the June 2011 WAFWA letter (see attachment 6). Fortunately, due to existing conservation efforts by the states and their partners, extensive habitats that are probably suitable for the species (sandsage prairie, mixed-grass prairie, and CRP) already exist to the north of the current LPC range, particularly in northeastern Colorado, northwestern Kansas and western Nebraska, and as implied earlier, LPC could shift into these more-northern habitats as temperatures increase.

Energy development and infrastructure

Noise associated with pumping and oil field activities may impact breeding activities if background noise interferes with mating display vocalizations. Further, sage-grouse lek attendance was lower on breeding grounds located in close proximity to active mineral resource developments compared to less disturbed lek sites. The BLM has put in place timing restrictions for drilling and seismic activities from March 1-June15, which coincides with the breeding period for LPC. In addition, noise restrictions have been put in place as well. Other well field infrastructure such as roads, power lines, pump jacks, and tank may result in habitat fragmentation. These issues have all been addressed in the New Mexico oil and gas CCAA through the use of common right of ways, directional drilling, common tank batteries, and financial offsets to improve lands elsewhere and affect a net overall gain in LPC habitat. Similar practices are in development in both Texas and Oklahoma where the majority of oil and gas development occurs within the range of the LPC.

Presently, little is known on how wind power developments affect LPC and/or LPC habitats. To date, the effects are speculative and are not justification for listing, especially since less than 2% of the EOR is expected to be developed for this use. Areas within the range of LPC are currently

being monitored for suitability as wind energy sites. These developments include the towers and turbines that harness the energy, as well as access roads and some types of transmission line connections to substations or other existing power grids. The effects of habitat fragmentation affect local LPC populations by decreasing the area of habitat available for nesting and brood-rearing (Pitman et al. 2005). However, these assumptions may not be true for wind turbines. A recent study by Kansas State University is finding GPC have minimal avoidance of turbines. The prediction that nesting and brood-rearing hens of both species will avoid large wind turbines by at least a one-mile radius made by Robel et al. (2004) probably is not accurate.

The 2008 CNOR cited the potential for unregulated wind energy development as evidence for increasing the LPC listing priority rating. Since that time, there has been very little wind energy development within the current estimated occupied range. This trend appears to be related, in part, to the recent economic slowdown and scarcity of credit. However, wind developers appear to be focusing more on areas outside of the range of the species, and are working towards ways to minimize and compensate for future take within that range. Thirteen of the largest wind energy companies in the United States are working with USFWS on the development of a Habitat Conservation Plan (HCP) for LPCs across the range, which WILL greatly diminish this threat in the future. Thus, the future HCP combined with current build out and ongoing collaborative efforts of the States and industry, has significantly reduced wind energy as an emerging and future threat.

Hybridization

With the addition of extensive native, mixed-species grasslands provided by CRP in Kansas, both LPC and greater prairie-chickens extended their modern ranges back into the historical zone of overlap in west-central Kansas. In this region, mixed leks and limited hybridization between these species have again occurred. With approximately 5 years passing since mixed leks and hybrids were re-identified in Kansas, monitoring by the KDWPT in the region of overlap has not detected any change in the prevalence of either species or in the proportion of hybrids present. In additions, it is unclear if hybrids are fertile. Thus, there are no data to support hybridization as a threat to the species persistence.

We conclude that efforts by wind energy developers to minimize impacts by using sighting tools like the SGP-CHAT or compensate for future LPC take and a general lack of expansion of wind energy across the range of the species over the past three years does not warrant a LPC listing priority. Furthermore, hybridization does not appear to be a threat to the species existence. The best scientific and commercial information available indicates other natural and man-made factors are not now, or in the foreseeable future, a threat to LPC. As implied in WAFWA's 2011 letter, LPC may be reacting to climate change by shifting their range.

SOUTHERN GREAT PLAINS CRUCIAL HABITAT ANALYSIS TOOL

Allan Janus of ODWC provided a SGP CHAT development presentation. The SGP CHAT classifies crucial habitats and important wildlife corridors into five "actionable" categories,

following guidelines of the WGA: **Category 1 (Irreplaceable):** Habitat that is rare or fragile and is essential to achieving and/or maintaining LPC population viability. **Category 2 (Limiting):** Habitat which is limiting to LPC populations or metapopulations. **Category 3 (Significant):** Habitat, including wildlife corridors, that contributes significantly to the maintenance of LPC populations or metapopulations. **Category 4 (Unknown):** Lands likely to have significant value to the LPC, but for which there is insufficient data or a lack of information. **Category 5 (Common):** Habitat which is relatively common, generally less limiting to LPC populations or metapopulations, and generally better suited for land use conversion. Two modeling efforts and 8 data sets were used to identify and rank the habitats. SGP CHAT web service provides users access to other data layers that may be useful for landscape and habitat assessment. Final landscape level data summarized to 1-mile hexagons. Web service can be imported into local desktop ArcGIS session for assessment of personal GIS layers in relation to SGP CHAT layers. This allows for private assessment of sensitive data and pro-active planning. It was documented from November 1, 2011–March 31, 2012 the SGP CHAT page was viewed 1680 times. Hexagon grids were downloaded 15 times. There was interest by the USFWS on how this tool could be used for their risk assessment. It was agreed the feasibility would be explored by the LPCIWG and USFWS.

RANGE-WIDE AERIAL SURVEY AND MONITORING FRAMEWORK

Sean Kyle of TPWD discussed the range-wide aerial survey and presented on overview of results from the surveys currently in progress. The methodology was designed in consultation with WEST Inc. and was funded by a grant from the Great Plains LCC (see attachment 7). It is based off a Generalized Random Tessellation Stratified (GRTS) survey design and uses distance sampling. The survey area measure 15x15km blocks with two random transects selected for survey. Two strata were used in the design: Strata 1 was within expanded EOR and Strata 2 was within a 30 mile buffer of EOR. Surveys are flown by helicopter during the breeding season when LPC are found on leks. For the pilot test of this new method, 292 blocks were flown in Strata 1. Funding for flights came from GPLCC, BLM, NFWF, OK, and TPWD. In addition, TX and OK were flying some strata 2 blocks. As of the meeting, there were 114 detections. The survey was completed on May 3 and the data is being analyzed by WEST Inc. They anticipate having an initial analysis done May 31 and a draft report by the end of June. The methodology proved to work well even in low densities that were expected following the severe drought that occurred last year across much of the range.

OKLAHOMA LEPC MANAGEMENT PLAN

Jon Haufler of EMRI discussed the development of an OK state specific plan. The purpose of the OK plan is to protect, enhance, and restore LPC habitat while also addressing other factors leading to their decline. It identifies research needs, management actions to support responsible development, and develop incentives to landowners to improve or restore suitable habitat. They outlined the process they used for the plan development, which included convening a science

team to develop population objectives, identify areas to focus conservation actions to meet objectives, and convene an implementation team to put conservation on the ground. A series of public meetings are being held to solicit input. After public input is incorporated into the plan, EMRI will submit a final to OK at the end of June. They also voiced interest in assisting with a 5 state plan.

FINAL DISCUSSION

Participants reviewed the PECE policy and the draft outline prepared by the WAFWA Grassland Coordinator (see attachment 8). Central to the discussions was a timeline for completion. The USFWS stated if the information was received by July 15 it could be incorporated into the Final Rule for the proposed listing decision. EMRI was asked to outline how they would pursue a 5 state plan. They gave a rough outline that looked like:

<u>Next 4 months</u>

Science Team (LPCIWG, key researchers and USFWS)

- Population goals
- Habitat plan – acreage, core areas with "example map"

Implementation Team (LPCIWG plus partners w/USFWS)

- Framework – key action steps and timelines
- E.g. – state public lands, mitigation opportunities
- Some contacts with industry and public (to inform)
- Policy check in with state directors

Framework – roadmap with triggers

Goals (biological)

Commitments – state commitment, permittee(s), money

Action steps

<u>Following 6 to 8 months</u>

Full multistate landscape plan

- With "triggers"
- Accomplishments on the ground
- Implementation monitoring
- Effectiveness monitoring

The states heard the USFWS say during the meeting, while they recognized all these conservation efforts were going on for LPC, they were having trouble seeing how all these conservation efforts fit together in a cohesive manner for the overall conservation and benefit of the species. While there may be a lack of clarity of how current conservation efforts coalesce into a meaningful and effective program for addressing LPC population concerns, let there be no question concerning the sincerity and commitment from the 5 LPC states, their directors and staff in completing and implementing a range-wide LPC conservation plan. Let it also be clear that the states recognize the importance of partnership with other federal, state, and local

governmental entities, NGO's, industry, and private landowners in the successful development and implementation of this plan. Central to the plan, and were presented at the April 24-25 meeting, will be documentation of biological response of LPC to conservation actions (e.g., to inform PECE requirement of "certainty of effectiveness"). In addition, the plan will identify ways to meet glaring science needs to questions like "What is the response of LPC to habitat fragmentation?" and it will overlay NRCS practices data with state population data to correlate LPC response. The states and partners will outline ways to legally share data such as lek locations and NRCS enrollments, etc. It is recognized MOUs or other agreements will need to be in place to address confidentiality/sharing issues. The plan will outline the long-term commitment by states to conduct regular aerial surveys and highlight commitment by outside partners (oil & gas, wind, state corporation commissions, etc). Other elements in the plan would include: Extension/continuation of NRCS programs, NRCS conference findings, and Wind HCP. USFWS wants to be at the table to help fold this information into the plan.

CONCLUSIONS AND RECOMENDATIONS

We have few models to best understand how ESA would improve conservation delivery for a landscape scale species for which the primary conservation focus is habitat management on private land. Perhaps, we can look to the examples of the Attwater's prairie-chicken and greater prairie-chicken populations in Wisconsin and Minnesota. Attwater's was one of the first species protected under the Federal ESA in 1967 at which time population was estimated to be at 1,000 birds. Sadly, today the population holds-on at barely 100 only as a result of 20 years of captive rearing and release (over 1,700 individuals released). By comparison, the small and isolated populations of greater prairie-chickens in Minnesota (1,600 in 1974; 3,000 in 2010) have thrived over this time period through voluntary conservation, and in fact were hunted for the first time in MN in 2004. Wisconsin prairie-chickens also have maintained themselves over this time frame (1,000 in 1972; 600 in 2011). Although recent declines (2008-11) are attributed to severe winters combined with summer drought through 2010. While the comparison is not perfect, it is illustrative of how voluntary conservation for species on private lands may be best conserved through voluntary and not federally mandated actions.

Greater than 97% of the LPC EOR is on private land where the ESA has less ability to influence land and species management and where voluntary private landowner agreement is necessary for successful conservation on a landscape scale. Many private landowners are reluctant to partner to conserve a species if they believe they are risking ESA restrictions in the future. However, increasing occupied acreage and the level of active conservation on private land are necessary to meet any population objectives or change a trend. Private landowners must be part of the solution, and that depends on their successful interaction with state wildlife agencies. We believe increased trust by private landowners and the greatest conservation success will be met by leaving LPC management under state wildlife agency authority.

WAFWA believes the threats specified in the 2008 and 2010 CNOR, such as expiration of CRP and potential for habitat loss caused by energy development, which led to the increase in listing priority have been addressed and warrants a more thorough analysis by the USFWS for the proposed listing. WAFWA will offer the assistance of the LPCIWG and the WAFWA Grassland Coordinator for this analysis. We believe that changes in these factors and voluntary conservation efforts, such as CCA/CCAA programs, HCPs, and mitigation efforts, have significantly reduced the perceived threats to the species. Additionally, we have observed an increase in the distribution of LPCs by 25% of the EOR, and population trends indicate between 20% and 100% increases for 86% of the EOR. The sand sagebrush region (14% of EOR) is the exception where populations have declined in recent years due to drought.

The take home message from the analyses presented by the States and our partners, strongly suggests the data and methods the USFWS used to project or forecast threats for LPC need to be reevaluated prior to the proposed listing decision. Primarily in light of the ongoing conservation efforts which have mitigated or removed a number of threats (e.g., CRP expiration, brush management), and more accurate information that depicts the real magnitude of the threat across the range which in a number of cases was greatly diminished (e.g., oil-gas development, largely in-fill of existing fields; rangeland health is significantly better than expected across the EOR; and new data indicating reduced applications of herbicide Tebuthiruon are much less of threat than previously described). Thus, the States respectfully request a place to peer review the science and methodology used to determine the proposed and final rule for LPC.

As demonstrated over the past 15 years, WAFWA states remain committed to leading the multi-state conservation effort for grassland-associated species and the habitats they depend upon to survive. This partnership has promoted on-the-ground conservation efforts to enhance grassland wildlife populations. We believe this ongoing partnership and continued partnerships with private landowners are critical to continue conservation of LPC. While we are submitting a conceptual outline for a range-wide plan with elements of it already fully implemented and discussed during the April 24-25 meeting (see attachment 9), we will have a fully completed plan for USFWS evaluation no later than March 31, 2013.

Lastly, in the name of LPC conservation, it is paramount that a clear line of communication and involvement by the USFWS with the state's be established and maintained throughout this planning process. The states believe that both entities recognize this communication to be mutually beneficial and critical if conserving the LPC is to be achievable.

Thank you again for the opportunity to provide input on the proposed listing of LPC. If you have any questions about information in this letter please contact myself or Bill Van Pelt, WAFWA Grassland Coordinator at 623-236-7573.

Sincerely,

Keith Sexson

Keith Sexson
Assistant Secretary, KS Wildlife, Parks and Tourism
and WAFWA Grassland Initiative Director Sponsor

cc: WAFWA LPC Grassland Initiative Directors and Coordinator
USFWS Director and Region 6 Director

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Hagen, C. A., J. C. Pitman, B. K. Sandercock, R. J. Robel, and R. D. Applegate. 2007. Age-specific survival and probable causes of mortality in female lesser prairie-chickens. Journal of Wildlife Management 71: 518-525

Hagen, C. A., B. K. Sandercock, J. C. Pitman, R. J. Robel, and R. D. Applegate. 2009. Spatial variation in lesser prairie-chicken demography: a sensitivity analysis of population dynamics and management alternatives. Journal of Wildlife Management 73: 1325-1332.

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Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134-0001March 10, 2014p.m. CDT

Previously submitted on January 7, 2014 to:

Docket Number: FWS-R2-ES-2012 - 0071

On August 23, 2013, Director Ashe was electronically delivered the attached correspondence, KNRC Natural Resource Coordination Plan (NRCP) and Lesser Prairie Chicken Conservation, Management and Study Plan (LPCMSP).

The correspondence:

•Apprized the United States Fish and Wildlife Service (USFWS) of the newly formed Kansas Natural Resource Coalition (KNRC);

•Formally transmitted the attached KNRCs Natural Resource Coordination Plan (NRCP) and Lesser Prairie Chicken Conservation, Management and Study Plan (LPCMSP);

•Announced an upcoming Public Hearing;

•Requested a Coordination briefing with USFWS during the week of September 9, 2013.

•Described KNRC, which was a coalition of 29 western Kansas counties (currently 32 member counties) formed to facilitate Government-to-Government Coordination during major federal action.

•Stated trust Director Ashe understood, coordination with local government is required, desirable, and fundamental to balancing the needs of human and natural environments during decision making.

•Apprized the attached NRCP and LPCMSP, which were adopted into the ordinances of member coalition counties, establish the mechanism though which the coalition encourages participation and expects consistency during major federal action.

•Provided notification that on November 7 and 8, 2013, KNRC had scheduled a Public Hearing in Garden City, Kansas for purposes of producing information and establishing the advisability of listing the Lesser Prairie Chicken as a Threatened Species under the Endangered Species Act.

•KNRC stated a hope USFWS would be an active participant in, provide testimony to, and coordinate with the hearing panel during the Public Hearing, an important fact-finding event.

•Stated the Coalition looked forward to working with USFWS to affect conservation within the context of the human environment we serve and the natural environment we care about.

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Public Submission to **FWS** on **01/07/2014 ID:** FWS-R2-ES-2012-0071-0499

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The **Fish and Wildlife Service** (FWS) Proposed Rule: **Endangered and Threatened Wildlife and Plants: Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule**

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Your Comment Tracking Number: **1jy-89qg-6cur**	Your comment will be viewable on Regulations.gov after the agency has reviewed it, which may be an indefinite amount of time. Use your tracking number to find out the status of your comment.

Your comment:

Comment: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners:

On August 23, 2013, Director Ashe was electronically provided the attached correspondence, KNRC Natural Resource Coordination Plan (NRCP) and Lesser Prairie Chicken Conservation, Management and Study Plan (LPCMSP).

The attached Plans, along with the Public Hearing Notification, achieved the following:

•Apprized the United States Fish and Wildlife Service (USFWS) of the newly formed Kansas Natural Resource Coalition
(KNRC) Coordination expectations during proposed Major Federal Actions;

•Formally transmitted the attached KNRCs Natural Resource Coordination Plan (NRCP) and Lesser Prairie Chicken
Conservation, Management and Study Plan (LPCMSP);

•Requested a Coordination briefing with USFWS during the week of September 9, 2013;

•Described KNRC, a then coalition of 29 western Kansas counties (currently 32 counties) formed to facilitate
Government-to-Government Coordination during all Major Federal Action;

•Indicated hope that Director Ashe will act on his understanding that coordination with local government is required,
desirable, and fundamental to balancing the needs of human and natural environments during decision making;

•Apprized USFWS the NRCP and LPCMSP were adopted into the ordinances of all KNRC member

counties and,
insomuch as Federal Statutes and Executive Orders allow, KNRC expects USFWS to attempt consistency with those
Plans as part of any major federal action;

•Provided notification that on November 7 and 8, 2013, KNRC had scheduled a Public Hearing in Garden City, Kansas
for purposes of producing information and establishing the Advisability of Listing the Lesser Prairie Chicken as a
Threatened Species Under The Endangered Species Act;

•KNRC stated a hope USFWS would be an active participant in, provide testimony to, and coordinate with the hearing
council during the Public Hearing - an important fact-finding event during the course of the proposed Lesser Prairie
Chicken Listing Proposal;

•Stated the Coalition looked forward to working with USFWS to affect conservation within the context of the human and
natural environments.
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Uploaded File(s)(Optional)

- Ashe 8_23_13 transmittal, NRCP and LPCMSP reg.gov bundle.pdf: **success**

This information was sent to the agency:

This information will appear on Regulations.gov:

First Name: Natural ResourceCoalition
Last Name: Local Government - KS
Country: United States
Organization Name: Kansas Natural Resource Coalition
Government Agency Type: Local
Government Agency: 32-Kansas Boards of County Commissioners

This information will **not** appear on Regulations.gov:

Email Address: [redacted]@gmail.com

August 23, 2013

Mr. Daniel Ashe - Director
Department of Interior
United States Fish and Wildlife Service
1849 C Street Northwest - MS 3238
Washington, District of Columbia 20240

Re: Transmittal of Coordination and Conservation Plans; Notification of Public Hearing; Request for Coordination Briefing

Via: Electronic Media through Congressional Offices and Regular Mail

Dear Director Ashe:

I write to apprize the United States Fish and Wildlife Service (USFWS) of the newly formed Kansas Natural Resource Coalition (KNRC); to formally transmit our *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plans*; to announce an upcoming Public Hearing; and finally to request a Coordination briefing with you during the week of September 9, 2013.

KNRC is a coalition of 29 western Kansas counties formed to facilitate Government-to-Government Coordination during major federal action. As I trust you understand, coordination with local government is required,[1] desirable,[2] and fundamental to balancing the needs of human and natural environments during decision making.[3] The attached Plans, adopted into the ordinances of member coalition counties, establish the mechanism though which the coalition encourages participation and expects consistency during major federal action.

On November 7 and 8, 2013, KNRC has scheduled a Public Hearing in Garden City, Kansas for purposes of producing information and establishing the advisability of listing the Lesser Prairie Chicken as a Threatened Species under the Endangered Species Act. We are hopeful USFWS will be an active participant in, provide testimony to, and coordinate with the hearing panel during this important fact-finding event.

I have set aside the week of September 9-12, 2013 for meetings with congressional and other interested parties on natural-resource issues, and will be available Tuesday afternoon (09/10), Wednesday (09/11), or Thursday morning (09/12) to address the near-certain questions likely to be generated from review of the attached documents.

The Coalition looks forward to working with USFWS to affect conservation within the context of the human environment we serve and the natural environment we care about.

Respect and Regards,

Ken J. Klemm, President
Kansas Natural Resource Coalition

cc w/Enclosures:

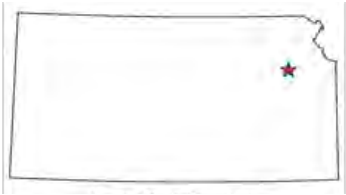
S. Jewell, Secretary - Department of the Interior
C. F. Kerry, Acting Secretary - Department of Commerce
N. Sutley, Chair - Council on Environmental Quality
T. Vilsack, Secretary - Department of Agriculture
B. Tuggle, Regional Director - USFWS R2
N. Walsh, Regional Director - USFWS R6
H. Whitlaw, Field Supervisor - USFWS
L. Bright - USFWS NEPA Compliance

Honorable Senator P. Roberts
Honorable Senator J. Moran
Congressman T. Huelskamp
Congressman Doc Hastings
Senator L. Powell (Ks State)
Senator R. Ostermeyer (Ks State)
R. Jennison, Secretary - KDWP&T
Representative D. Hineman (Ks State)

[1] Executive Orders 13352, 12372, 11514; [1] 43 USC §1712(c)(9), 42 USC §4332(1); 40 CFR §1500.2(a-f).
[2] Executive Order 12630.
[3] Executive Orders 12630, 12291; 5 USC §§602 - 612.

NATURAL RESOURCE COORDINATION PLAN
of
The Kansas Natural Resource Coalition

October 14, 2013
Revision 3



EXECUTIVE SUMMARY

In recent decades natural-resource conservation efforts have gained substantially in importance. Because rural Americans share common environmental resources, areas and regions, there is acute need to define, assess, prioritize and allocate natural resources in a manner which promotes the general welfare, fosters creativity, and creates conditions under which man and nature can co-exist in productive social, economic and environmental harmony.

The complex array, varying missions, and sometimes conflicting roles of local, state, or federal agencies suggest the need for a systematic approach to natural resource conservation that assures local government receives early communication, timely exchange of technical information, ample opportunity to understand issues, and a clear platform to vet, affect or arbitrate environmental issues. This Natural Resource Coordination Plan (NRCP) outlines such a platform, providing in broad strokes the rationale, objectives, protocol, and implementation structure necessary to further natural resource conservation in those areas governed by the Kansas Natural Resource Coalition (KNRC).

Because the majority of the 27,514 mi^2 (17,608,960 acres) region governed by Coalition Members contains private property and nearly all business and governmental interests fall into the *Small Business Concern*/*Small Governmental Jurisdiction* classification, this Plan ensures appropriate human, cultural, and socioeconomic safeguards are in place to balance both the human and natural environments.

This Plan contains little new information but instead relies on the extensive public record as basis for its requirements. The Plan begins by presenting existing Statutes, Regulations, Executive Orders and Case Law as foundational to both conservation and human protection. By adopting and implementing a systematic approach already part of the public record, the existing technical, regulatory and administrative platform will assure meaningful, net conservation benefits take place alongside appropriate and assured human protections.

All Major Actions by Federal Agencies as defined in 40 CFR§1508.18 fall within the scope, intent and procedural rules invoked by this Plan.

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1.0 The Kansas Natural Resource Coalition

1.1 Purpose and Organization

The Kansas Natural Resource Coalition (KNRC) is an organization of 32 county governments joined together for collective coordination of natural resource conservation and environmental programs with federal and state governmental agencies. Each member county has adopted a Resolution asserting its authority to expect and invoke coordination with respective governmental agencies, either independently or as part of the Coalition. For purposes of brevity and example, one executed Resolution has been included in Appendix F of this NRCP. The remaining, identical and executed Resolutions have been compiled in a separate volume.

1.2 Roles and General Responsibilities

The KNRC has been organized with a central policy committee and four subordinate working groups to facilitate communications, budget/finance, technical oversight, and centralized leadership. This structure provides conduits for communication, document retention, technical review, cost management/allocation, and centralized decision making throughout coordination activities.

Each member county has a participative voice in the policy committee and the opportunity to staff all respective committees. Officers include a president, vice president, secretary and treasurer, all elected by the policy committee for 3-year terms. The organizational structure and general responsibilities of KNRC committees are presented on Table 1 in Appendix A.

2.0 Overview

2.1 Applicability and Central Theme

This Natural Resource Coordination Plan (NRCP) provides the technical, administrative and coordination foundation to achieve a net increase in resource conservation over time. As a planning document having regional coverage, its purpose is to outline a framework, philosophy, and expectations to assure meaningful participation in government-to-government coordination between the Coalition or individual county members and federal and state agencies.

The goal of increased conservation will be achieved by ensuring major actions are procedurally consistent, scientifically based, and economically sound. Those items, issues or conflicts not resolvable at the staff or local level will be referred to the secretaries of the respective federal agencies for mediation; typically the Secretaries of Interior, Agriculture or Commerce.

Experience demonstrates regulatory proposals coordinated with local governments early in the process elicit less resistance, are more efficient, use fewer resources, and offer greater overall conservation benefits to the human and natural environments. Accordingly, one objective of this NRCP is to assemble those administrative, procedural, and data-quality assurance requirements necessary to affect appropriate, consistent and effective conservation decisions for the widest possible circle of stakeholders.

The Coalition consists of 32 counties occupying an approximately 27,714 mi^2 (17,736,960 acres) area in western and southern Kansas. The Coalition is designed to represent the general interests of member counties during the coordination process with federal agencies, but its existence does not at all diminish the sovereign status or the right of individual counties to expect coordination on those actions that concern them. Individual county members retain the right to withdraw from elements, portions or the entirety of this NRCP with correspondence to the Coalition Steering Committee or by independently asserting coordination on their own behalf. Contact information, individual county data and supporting information for participating counties is included in Appendix B. Figure 1 in Appendix C presents a map of the territory governed by participating county signatories.

Signatories to this NRCP are sovereign, small governmental entities each having responsibility for taxation, land use, zoning, infrastructure, local industry, small business, public health/safety, and similar decision making. Because natural and human resources - and potential governmental regulations pertaining to them - are of crucial importance to local populations, Coalition members represent front-line stakeholders potentially affected by Major Federal Actions.[1,2] Consequently, federal environmental or natural-resource proposals potentially affecting populations, local economies or cultures within the coalition area are to be made available prior to or at very early stages of the federal planning process - well before notifications of such actions are published in the Federal Register.[3]

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[1] 40 CFR §1508.18; 40 CFR §1508.27.

[2] Executive Order 12291 Section 1(b) Regulatory Impact Analysis and Review.

[3] 40 CFR §1501.2

This NRCP is applicable to all federal agencies contemplating Major Actions.[4] Consistent with federal statutes, regulations and various Executive Orders, the Coalition is establishing and expecting coordination with those agencies whose Major Actions or Proposals could have direct or indirect impacts on human or natural environments. As a result, the Coalition shares mutual, government-to-government responsibility and expects consistency with this NRCP from federal agencies, subordinates or those governmental affiliates receiving federal funding or assistance, including:[5]

- United States Bureau of Land Management;
- United States Department of Interior;
- United States Fish and Wildlife Service;
- United States Department of Agriculture;
- United States Environmental Protection Agency;
- Kansas Department of Health and Environment.

2.2 Purpose and Approach

Coalition members will work in tandem with their respective government counterparts in achieving federal responsibility to use all "*practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans*."[6] The Coalition expects all respective agencies to make every practicable effort to "*utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment*."

2.2.1 Major Federal Actions - Defined

Major Federal Actions subject to the statutory NEPA requirements and this NRCP include actions with effects that may be major and which are potentially subject to federal control and responsibility. Specific Major Federal Actions include:[7]

[4] 42 USC §4332(1); 40 CFR §1500.2(a-f); Executive Orders 12372 and 13352.
[5] 42 USC §4331(a)
[6] 42 USC §4331(a)
[7] 40 CFR 1508.18 (a),(b)(1-4)

1. *"New and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures;"*
2. *Adoption of formal plans, such as official documents prepared or approved by federal agencies*;
3. *Adoption of programs, such as a group of concerted actions to implement a specific policy or plan*;
4. *Legislative Proposals.*

2.2.2 Guiding Statutes; Applicability

The foundational statutory mandate which undergirds all environmental law and policies of the United States is the National Environmental Policy Act of 1969 (NEPA).[8] All subsequent environmental acts by the US Congress are built upon, subject to, and to be viewed through the lens of NEPA.

NEPA establishes a format for procedural review of the consequences of any Major Federal Action to the human and natural environments. NEPA Title I declares the purpose and national policy of the Act, whereas NEPA Title II created the Council for Environmental Quality (CEQ).

NEPA and its implementing CEQ Regulations,[9] in concert with numerous Executive Orders,[10,11] bind federal agencies to the environmental processes, procedures, notification requirements and government-to-government coordination requirements included as part of this NRCP. Similarly, the statutory mandates in the *Regulatory Flexibility Act* of 1980[12] covering small business and governments and the public land-management principals codified in the *Federal Land Policy and Management Act*[13] serve as foundational statutory laws underpinning this NRCP.

The threshold tests the Coalition will use to determine whether Major Federal or State Actions may significantly influence the human environment[14] include:

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[8] 42 USC. §§4321 - 4347
[9] 40 CFR §§1500-1508
[10] Executive Order 11514 Protection and Enhancement of Environmental Quality.
[11] Executive Order 11991 Responsibilities of Council on Environmental Quality.
[12] 5 USC §§601-612
[13] 43 USC §§1701-1782
[14] 40 CFR §1508.14; 40 CFR §1508.8

1) Could federal or state proposals be defined as "Major Federal Actions?"[15]
2) Does a program receive federal funding and/or technical assistance?[16]
3) Is or could a proposed, potential action be controversial?

If pre-proposals to Major Actions pass any or all of the above tests, the responsibilities and procedural requirements outlined in this NRCP apply.[17]

An extensive record of judicial review of USFWS listing proposals under the Endangered Species Act (ESA) demonstrates the procedural rules in NEPA apply unless a *"clear and unavoidable statutory conflict"* exists.[18] For several species-listing efforts, USFWS has relied upon an archaic 1983 CEQ Opinion Letter[19] and rulings by the 9th and 6th Circuit Courts of Appeal that the EA/EIS process is not required "*as a matter of law*." However, subsequent rulings by the 10th Circuit Court of Appeals - the Federal Circuit Court having jurisdiction over the region governed by the Coalition - expressly rejected the Service's reliance upon the CEQ letter and rationale from the earlier 9th and 6th Court decisions. Instead, the 10th Circuit held NEPA procedural rules *do* apply to actions under a threatened listing proposal proposed under ESA.[20] The 10th Circuit also discounted the Service's position that congressional silence during subsequent ESA reauthorizations was tantamount to approval of USFWS's departure from NEPA mandates.[21] Other, more recent appellate decisions have reached the same conclusion: that the procedural requirements of NEPA are not optional, and reliance upon the 1983 guidance letter from CEQ does not exempt USFWS from the requirement to complete an Environmental Assessment.[22] In keeping with a plain reading of NEPA and binding 10th Court decisions, the Coalition requires federal agencies contemplating Major Actions to complete the NEPA process in a timely fashion prior to or at the onset of Major Agency Action.[23]

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[15] 40 CFR §1508.18

[16] 31 USC §1221

[17] The technical, procedural and economic-study requirements of Coordination may also be retroactively applied to environmental programs and regulations.

[18] Flint Ridge Development Co. v. Scenic Rivers Assn. 426 USC 776, 788 (1976).

[19] Federal Register Vol. No. 207 October, 1983. P. 49244.

[20] Catron County Board of Commissioners v. USFWS 75 F.3d 1429 (10th Cir. 1996).

[21] Ibid. Catron County v. USFWS.

[22] In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation No. 08-764 DKTS 282, 283 D.D.C. October 17, 2011.

[23] 40 CFR §1502.5

2.2.3 Private Property

The Coalition will work with all federal agencies in fulfilling their obligation to work in a timely[24,25] manner which:

i) *facilitates cooperative conservation*;

ii) *takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land*; and,

iii) *properly accommodates local participation*.[26,27]

Similarly, and with respect to private property, "*because principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights"* the Coalition expects "*executive departments and agencies review their actions carefully to prevent unnecessary takings*" in a manner which "*account in decision-making for those takings that are necessitated by statutory mandate*."[28]

2.2.4 Small Business

The economy in the Coalition-governed region is nearly entirely agrarian. Most communities and small governmental jurisdictions are substantially dependent upon ranching, farming, beef processing, energy extraction/transport, and electric generation as a means of a livelihood. Unlike urban settings, citizens in rural areas typically augment their primary occupations with other civic and vocational responsibilities. Examples include a farmer who works part-time as a county firefighter, an EMS technician who doubles as a school bus driver, or the house wife who teaches part-time at the community college.

Because major federal actions often have wide ranging (and sometimes unintended) consequences, the need to examine economic effects and impacts on social cohesiveness of communities of <50,000 people exists.[29] As a result, any contemplated Major Actions in the region governed by the Coalition must include a *Regulatory Flexibility Agenda (RFA-1)* and *Regulatory Flexibility Analysis (RFA-2).* The Coalition expects publication and notification requirements of RFA to be fulfilled, and requests the respective agendas and analysis to be sent both to affected member counties and the Steering Committee.

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[24] 40 CFR §1502.5

[25] Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976).

[26] Executive Order 13352. Facilitation of Cooperative Conservation.

[27] Executive Order 13575, 3(1-23); 4(a)–(d) Establishment of White House Rural Council.

[28] Executive Order 12630. Governmental Actions and Interference With Constitutionally Protected Property Rights.

[29] Executive Order 12291, Section 3. Regulatory Impact Analysis and Review.

The required RFAs must explore the range of alternatives and economic impact(s) to those *specific small entities* and *governmental jurisdictions* where actions are proposed to take place. The RFAs shall include, at a minimum, the following information:

1. Description of the subject, reasoning, and promulgation-schedule of those contemplated actions likely to have a significant economic impact(s) on a substantial number of small entities within the Coalition area;[30,31]
2. Summary of the nature, objectives and legal basis for completing a contemplated action;[32]
3. A *Regulatory Flexibility Analysis* estimating the number or classifications of *small entities* and *governmental jurisdictions* and an economic impact-analysis of the contemplated actions to each small entity or classification;
4. A summary of competing alternatives to the contemplated action which accomplish the objectives of the action and which minimize the economic impact of the rule to small business and government;
5. Identification of all relevant federal rules which may duplicate, overlap or conflict with the contemplated or proposed action.

2.2.5 Public Lands

The vast majority of land in the region governed by the Coalition is private; nonetheless, some public lands are interspersed within the region governed by the Coalition. Land use, planning, management and recreational interests[33] on public land within areas governed by the Coalition shall be coordinated with individual Coalition members and the Coalition expects early and advance notice of those federal decisions which could have a significant impact upon intermingled federal and non-federal lands. The Coalition recognizes federal law includes a multiple-use principle for federally managed lands, and they positively support all multiple use in practice. Maintenance of multiple use priorities include preservation of historic and traditional economic uses of public lands in the region.

[30] Regulatory Flexibility Act 5. USC §602 (a)(1).
[31] Executive Order 12291 Sections 1,2; Regulatory Impact Analysis and Review.
[32] Regulatory Flexibility Act 5. USC §602 (a)(2).
[33] 16 USC Section 4601-1. Outdoor Recreation Programs – Coordination of Programs.

The Federal Land Policy and Management Act (FLPMA) sets forth the "*criteria for development and revision of land use plans.*"[34] FLPMA section 1712 (c)(9) provides for coordinate status to local governments when engaging in land use planning, and requires the *Secretary* [*of Interior*] to "*coordinate the land use inventory, planning, and management activities…with the land use planning and management programs of other federal departments and agencies and of the State and local governments within which the lands are located*."[35] This provision gives priority to those counties engaged in a land-use planning over the general public, special interest groups of citizens, and other, non-governmental organizations.

In view of the requirement that the Secretary (of Interior) "coordinate" land use inventory, planning and management activities with local governments, the Coalition understands meaningful coordination of planning activities must take place at the beginning of the planning cycle, before draft federal plans are released for public consideration. Section 1712 (c)(9) further provides that the Secretary of Interior must assure that the BLM's land use plans be "consistent with State and local plans" to the maximum extent possible under federal law and the purposes of the FLMPA. The Coalition recognizes and has adopted the early notification, coordination, and consistency requirements of FLMPA as part of the Public Land Planning Process.

3.0 Coordination Program

3.1 Process

3.1.1 Natural and Human Resource Impact Evaluation

Because environmental, conservation, and natural resource-related decisions have wide-ranging and long-term implications for both the natural and human environments, the Coalition recommends all economic, procedural, and cultural studies required by federal law be consolidated into a central, Resource Impact Evaluation (RIE) document. This recommendation is intended to impose no new requirements; instead it provides a centralized mechanism to present the benefits, alternatives, limitations or restrictions identified for human and natural environments resulting from contemplated major actions.

[34] 43 USC 1712 (c)

[35] The definition of Coordination in FLMPA is translated *in pari materia* to the Endangered Species Act, Clean Water Act, Clean Air Act and other, similar environmental legislation.

The RIE is intended to guide the coordination process and implement 5 USC § 603(a)(b), Executive Orders 12630 and 12291, and present, as may be appropriate, consolidated information for early implementation of NEPA[36] and the NEPA process in general. Thus, the RIE would serve as the central document to achieve consistency with local plans and should be concurrent with the Environmental Assessment (EA) or Environmental Impact Statement (EIS) process.

The Coalition anticipates the RIE could support a federal agency decision for a Categorical Exclusion, preparation of an Environmental Assessment, or an Environmental Impact Statement, providing the foundation for a Record of Decision (ROD).

3.1.2 Resource Priorities

The objective behind establishing resource priorities is to identify sectors that could be affected by major actions so focused studies can be conducted in context of proposed conservation actions. This approach enables balanced resource decision making in a manner that promotes conservation in tandem with economic stability, social cohesiveness, public health/safety and appropriate, required safe guards for industry, culture and private property. The RIE should contain the minimum information sufficient to enable third party evaluation of down stream and future impacts of contemplated federal actions - such as potential changes in property values, limitations on property rights, diminution of public health or safety, or impact(s) in economic circumstance.

The Coalition has identified 12 resource-priority categories for evaluation, as appropriate, during the RFA and EO-required socioeconomic impact analysis. The potential impacts and alternatives to those categories should be addressed for each Coalition member prior to or in conjunction with preparation of the RIE or performance of the EA or EIS process.

The resource categories are:

General Agriculture	Farming
Ranching	Beef Supply Chain
Energy Extraction	Beef Processing
Water Quality and Resources	Energy Transmission
Electricity Generation	Grain Transportation/Storage
Ethanol Production	Wind Energy

[36] 40 CFR §1501.2; 50 CFR 424.13; 50 CFR 424.16

3.1.3 Evaluation Criteria

During the Regulatory Impact, Environmental Assessment or Environmental Impact Statement process the potential economic and down stream cultural impacts to those Coalition Counties contemplated for major actions are evaluated. Systematic use of the existing regulatory framework allows impacts of any proposed action(s) to be defined, quantified and presented in a side-by-side comparison with those alternative actions which achieve similar technical and regulatory objectives. This methodology allows the cost, benefits, and/or drawbacks of any proposed action - and its alternative(s) - to be clearly understood by those counties which could be most affected.

If a federal agency promulgates a final rule, a final Regulatory Flexibility Analysis shall be published containing the results of the RFI process, alternatives evaluated, and issues raised by the Coalition, if any.[37]

3.2 Data, Information, and Maps

All contemplated Major Federal Actions must be based upon usable, objective, timely, accurate, readably-accessible and reproducible data, information, facts, and research.[38] The minimum federal standards *are even higher* for that body of information defined by Office of Management and Budget (OMB) to be "influential" in nature – such as data used for decision making of important public policies.[39]

In the context of coordination, it is the Coalition's policy is to have timely, full, and transparent access to all data, research sources, notes and maps used to contemplate Major Actions. This is particularly the case for geographical or range maps such that underlying data, resolutions and all supporting information necessary to assure reproducibility and third-party review can be achieved. This requirement will help ensure the quality, utility, objectivity, and integrity such that sound and reproducible science supports all environmental and conservation-related decisions.

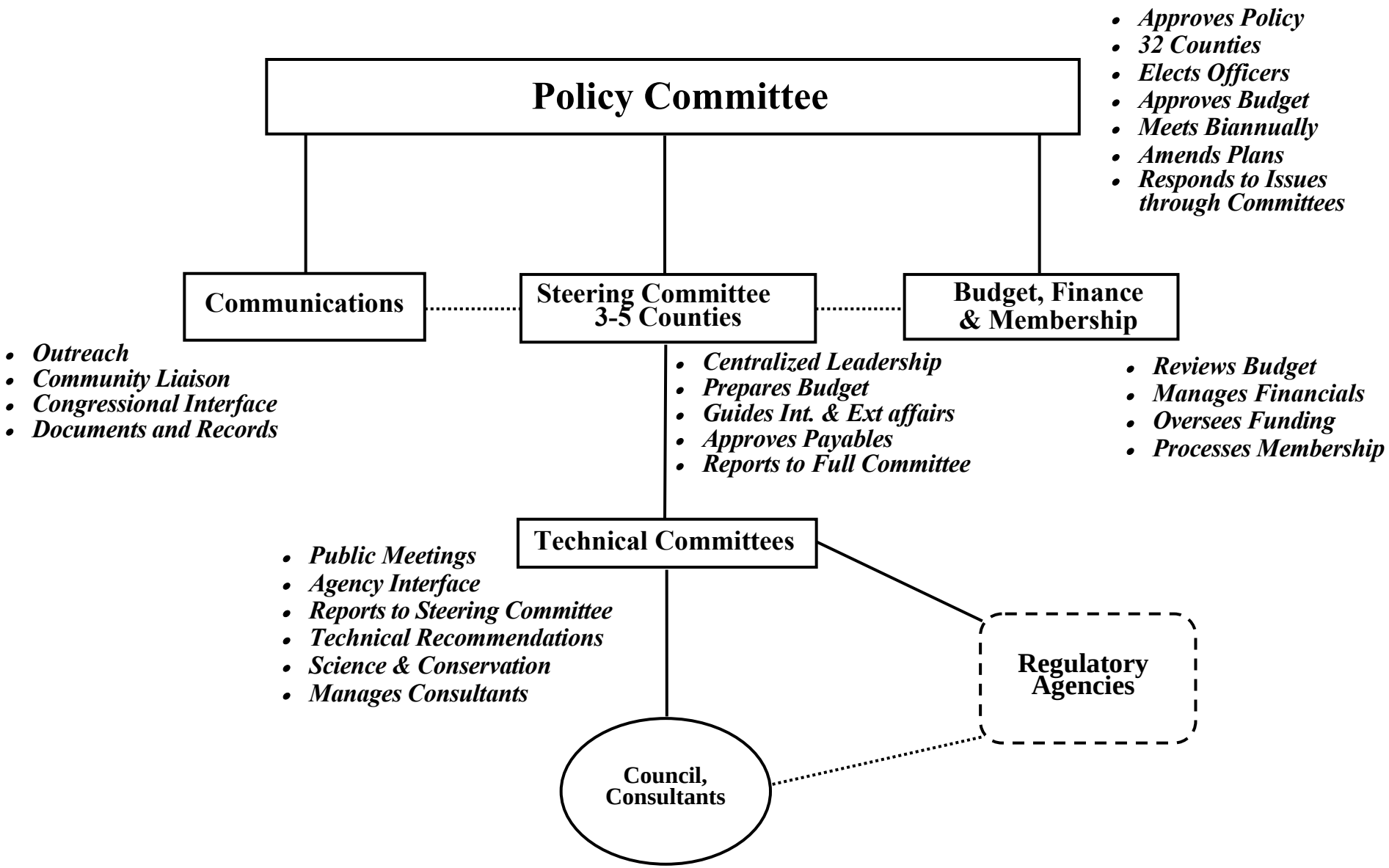
[37] 5 USC §604 (a)1-4;(6)
[38] Data Quality Act (Information Quality Act) Section 515(a) 3504(d)(1);3516.
[39] 66 Federal Register 34489 September 28, 2001.

Appendix A

Coalition Organizational Chart

ORGANIZATIONAL STRUCTURE & RESPONSIBILITIES

(Effective October 14, 2013)



Appendix B

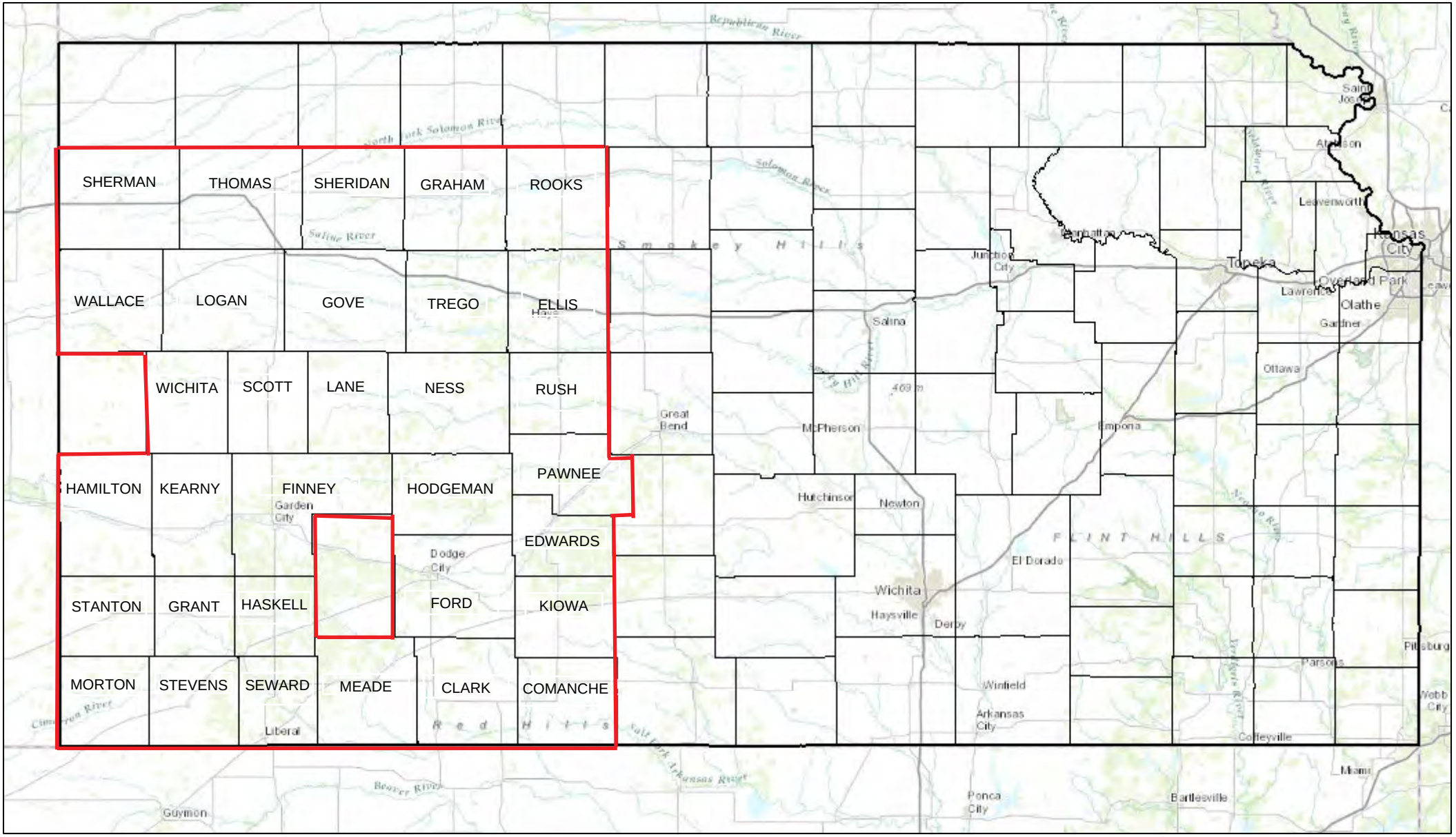
Kansas Natural Resource Coalition

Contact Information

Kansas Natural Resource Coalition				
County	**Address**	**Phone**	**County Clerk**	**Land Area**
Clark County	913 Highland Ashland 67831	(620) 635-2813	Rebecca Mishler	975
Comanche County	Box 776 Coldwater 67029	(620) 582-2361	Alice Smith	788
Edwards County	312 S. Massachusetts Kinsley 67547	(620) 659-3000	Gina Schuette	622
Ellis County	1204 Fort St., Box 720 Hays, KS 67601	(785) 628-9410	Donna Maskus	900
Finney County	PO Box M Garden City 67846	(620) 272-3575	Elsa Ulrich	1,302
Ford County	100 Gunsmoke Dodge City 67801	(620) 227-4550	Sharon Seibel	1099
Gove County	PO Box 128 Gove 67736	(620) 938-2300	Doug Press	1,072
Graham County	410 Pomeroy Hill City 67642	(785) 421-3453	Jana Irby	899
Grant County	108 S. Glenn Ulysses 67880	(620) 356-1335	Sheila Brown	575
Hamilton County	PO Box 1167 Syracuse 67878	(620) 384-5629	Angie Moser	997
Haskell County	PO Box 518 Sublette 67877	(620) 675-2263	Sharon L. Hinkle	578
Hodgeman County	PO Box 247 Jetmore 67854	(620) 357-6421	Sarah Rains	860
Kearny County	PO Box 86 Lakin 67860	(620) 355-6422	Jana Jenkinson	871
Kiowa County	211 E. Florida Greensburg 67054	(620) 723-3366	Kristie Odle	723
Lane County	PO Box 788 Dighton 67839	(620) 397-5356	Crysta S. Torson	717
Logan County	710 W. 2nd Oakley 67748	(785) 671-4244	Crystal Rucker	1,073
Meade County	P.O. Box 278 Meade 67864	(620) 873-8700	Janet Hale	980
Morton County	PO Box 1116 Elkhart 67950	(620) 697-2157	Gina Castillo	724
Ness County	202 W. Sycamore Ness City 67560	785-798-2401	Renee S. Kerr	1,075
Pawnee County	715 Broadway Larned 67550	(620) 285-3721	Ruth Searight	755
Rooks County	115 N. Walnut Stockton, 67669	(785) 425-6391	Clara Strutt	895
Rush County	P.O. Box 220 LaCrosse 67548	(785) 222-2731	Corinne Baldwin	718
Scott County	303 Court Scott City 67871	(620) 872-2420	Pamela J. Faurot	718
Seward County	515 N. Washington Liberal 67901	620-626-3355	Stacia Long	640
Sheridan County	Box 899 Hoxie 67740	(785) 675-3361	Paula Bielser	897
Sherman County	813 Broadway Goodland 67735	(785) 890-4802	Janet R. Rumpel	1,056
Stanton County	PO Box 190 Johnson 67855	(620) 492-2140	Sandra Barton	680
Stevens County	200 E. 6th Hugoton 67951	(620) 544-2541	Pam Bensel	728
Thomas County	300 N. Court St. Colby 67701	(785) 460-4500	Shelly Harms	1,075
Trego County	216 N. Main WaKeeney 67672	(785) 743-5773	Lori Augustine	889
Wallace County	PO Box 70 Sharon Springs 67758	(785) 852-4282	Jacalyn Mai	914
Wichita County	206 S. 4th Leoti 67861	(620) 375-2731	Carol Cary	719

Appendix C

Coalition Map



October 12, 2013

Kansas State Boundary

Kansas County Boundaries

1:3,172,438

0 25 50 100 mi

0 40 80 160 km

Kansas Applied Remote Sensing Program (KARS) / Kansas Biological Survey
Sources: Esri, DeLorme, NAVTEQ, TomTom, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, and the GIS User

Appendix D

Definitions and Glossary

DEFINITIONS

Best Available Science	The best available science is that body of reproducible and credible data, information and studies that are collectively available to the average person under normal circumstances.	
Best Management Practices (BMPs)	A suite of techniques that guide or may be applied to management actions to aide in achieving desired outcomes. BMPs are often developed in conjunction with land use plans, but they are not considered a planning decision unless the plans specify that they are mandatory.	
Categorical Exclusion (CX)	A category of actions that do not individually or cumulatively have a significant effect on the human environment and have been found to have no such effect in procedures adopted by a federal agency pursuant to NEPA.	40 CFR 1500.4(p) 40 CFR 1500.5(k) 40 CFR 1501.4(a) 40 CFR 1507.3(b) 40 CFR 1508.4
Collaborate	To work together with another toward a common goal, especially in an intellectual endeavor; as, four chemists collaborated on the synthesis of the compound; three authors collaborated in writing the book.	Webster's Revised Unabridged Dictionary
Consistent	Possessing firmness or coherence; marked by harmony, regularity, or steady continuity; free from variation or contradiction.	Webster's Revised Unabridged Dictionary
Cooperation	The act of cooperating, or operating together to one end; joint operation; concurrent effort or labor.	Webster's Revised Unabridged Dictionary
Coordinate	Equal in rank or order; not subordinate.	Webster's Revised Unabridged Dictionary
Coordination	(1) The act of coordinating; the act of putting in the same order, class, rank, dignity, etc.; as, the coordination of the executive, the legislative, and the judicial authority in forming a government; the act of regulating and combining so as to produce harmonious results; harmonious adjustment as, a coordination of functions. (2) a process by which local government and federal agencies are to meet in a government to government dialogue in order to attempt to reach consistency between federal plans and actions and local plans and policies.	Webster's Revised Unabridged Dictionary
Coordination Meeting	A government-to-government meeting between a government agency or agencies and the Coalition. These meetings are public meetings, publicly noticed with agenda provided in advance. While public comment is not received during the meeting, the public is encouraged to attend regular Coalition meetings as the intent is for the coordination process to be open and transparent to the public. For the coordination meeting, the discussion is between federal agencies and the Coalition and is for the purpose of fulfilling the coordination duty, informing the agencies and Coalition of relevant projects, plans, studies and management activities. It is also the forum for discussion towards the resolution of unresolved conflicts between the counties policies, plans and contemplated agency programs.	

Coordination Process	A process mandated by federal law that requires federal agencies to coordinate their plans, programs and management activities with local governments. The minimum parameters of this process were defined by Congress at 43 USC 1712(c)(9) and prescribe that the agencies: (1) keep apprised of State, local, and tribal land use plans; (2) assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; (3) assist in resolving, to the extent practical, inconsistencies between federal and non-federal government plans; (4) provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-federal lands; and (5) make land use plans consistent with State and local plans to the maximum extent the Secretary finds consistent with federal law.	Federal Land Policy and Management Act, 43 USC 1701
Early Application of NEPA	Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to reduce potential conflicts.	40 CFR 1501.2
Environmental Assessment	A concise public document prepared in compliance with NEPA, that briefly discusses the purpose and need for an action, alternatives to such action, and provides sufficient evidence and analysis of impacts to determine whether to prepare an environmental impact statement (EIS) or finding of no significant impact (FONSI).	40 CFR 1508.9
Environmental Impact Statement	A detailed written statement required by section 102(2)(C) of NEPA, analyzing the environmental impacts of a proposed action, adverse effects of the project that cannot be avoided, alternative courses of action, short-term uses of the environment versus the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitment of resources.	40 CFR 1508.11
Environmental Impact Statement-When	It is important to be as objective as possible when making a determination as to whether to prepare an EIS. One or more of the following criteria, depending on the severity and duration of effects, may trigger the preparation of an EIS. (a) <u>Controversy over environmental effects (e.g., major scientific or technical disputes or inconsistencies</u> over one or more environmental effects). (b) Change in policy having a major positive or negative environmental effect. (c) Precedent-setting actions with wide-reaching or long-term implications (e.g., special use permits for off-road vehicles, mineral extraction, new road construction). (d) Major alterations of natural environmental quality that may exceed local, State, or federal environmental standards.	

	(e) Exposing existing or future generations to increased safety or health hazards. (f) Conflicts with substantially proposed or adopted local, regional, State, interstate, or federal land use plans or policies, that may result in adverse environmental effects. (g) Adverse effects on designated or proposed natural or recreation areas, such as wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine sanctuaries, national recreation areas, habitat conservation plan areas, threatened and endangered species, fish hatcheries, wildlife refuges, lands acquired or managed with Dingell-Johnson/Pittman-Robertson funds, unique or major wetland areas, and lands within a 100-year floodplain. (h) Removal from production of prime and unique agricultural lands, as designated by local, regional, State, or federal authorities; in accordance with the Department's Environmental Statement Memorandum No. ESM 94-7. (i) Adverse effects on municipal, industrial, or agricultural water supply or quality; or major consumptive use or other long-term commitment of water. (j) Condemnation of property rights or fee title to land; or large-scale relocation of people, homes, commercial, industrial, or major public facilities.	
Federal Agency	All agencies of the federal government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.	40 CFR 1508.12
Finding of No Significant Impact-FONSI	A document prepared in compliance with NEPA, supported by an environmental assessment that analyzes whether a federal action will have no significant effect on the human environment and for which an environmental impact statement, therefore, will not be prepared.	40 CFR 1508.13
Governmental Information	Governmental information means information created, collected, processed, disseminated, or disposed of by or for the federal government.	
Human Environment	Includes the natural and physical environment and the relationship of people with the environment.	40 CFR 1508.13 40 CFR 1508.14
Influential	Influential, when used in the phrase “influential scientific, financial, or statistical information”, means that the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions.	66FR 49718 September 28, 2001

Information	Information means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate.	
Integrity	Integrity refers to the security of information – protection of the information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.	66 FR 49718 September 28, 2001
Major Federal Action	Actions with effects that may be major and which are potentially subject to federal control and responsibility.	40 CFR 1508.18
Mandate, NEPA	Parts 1500 through 1508 of this title provide regulations applicable to and binding on all federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) <u>except where compliance would be inconsistent with other statutory requirements</u>. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.	40 CFR 1500.3
Meaningful Participation, Doctrine of	Timely, mutual inclusion of local governments in seeking consistency with local plans and policies including full disclosure, transparency monitoring and full availability of meaningful scientific data, information and studies.	
Multiple Use	The management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future	Federal Land Policy and Management Act, 43 USC 1702(c)

	generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.	
National Environmental Policy Act of 1969 (NEPA)	Requires all federal agencies to examine the environmental impacts of their actions, incorporate environmental information, and utilize public participation in the planning and implementation of all actions. Federal agencies must integrate NEPA with other planning requirements and prepare appropriate NEPA documents to facilitate better environmental decision making. NEPA requires federal agencies to review and comment on federal agency environmental plans/documents when the agency has jurisdiction by law or special expertise with respect to any environmental impacts involved.	42 USC 4321- 42 USC 4327 40 CFR 1500- 40 CFR 1508
Notification	The agencies must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. However, the methods for providing public notification and opportunities for public involvement are at the discretion of the responsible official.	43 CFR 46.305 (a)
Objectivity	Objectivity involves two distinct elements, presentation and substance. Objectivity includes whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner. This includes whether the information is presented within a proper context. Objectivity includes the requirement to identify all sources of the disseminated information and, in a scientific, financial, or statistical context, the supporting data and models so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. Objectivity also includes a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods.	66 FR 49718 September 28, 2001
Offsite Mitigation	Compensating for resource impacts by replacing or providing substitute resources or habitat at a different location than the project area.	
Proposal	*Proposal* exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.	40 CFR 1508.23

Quality	Quality is an all encompassing term in Data Quality Act comprising utility, objectivity, and integrity.	66 FR 49718 September 28, 2001
Reproducibility	Reproducibility means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more (less) important impacts, the degree of imprecision that is tolerated is reduced (increased).	
Scientific Accuracy	Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.	40 CFR 1502.24
Significantly	as used in NEPA, requires considerations of both context and intensity: (a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant. (b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action.	40 CFR 1508.27
Social Effects	(a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.	40 CFR 1508.8

Utility	Utility is the usefulness of the information to its intended users, including the public. In assessing the usefulness of information that the federal agencies disseminate to the public, the agencies need to consider the uses of the information not only from the perspective of the agency but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information's usefulness from the public's perspective, the agency must take care to ensure that transparency has been addressed in its review of the information.	FR 6649718 September 28, 2001

Appendix E

Statutes and Executive Orders

Executive Order 13575
Establishment of the White House Rural Council

June 9, 2011

By the authority vested in me as President by the Constitution and the laws of the United States of America and in order to enhance Federal engagement with rural communities, it is hereby ordered as follows:

Section 1. Policy. Sixteen percent of the American population lives in rural counties. Strong, sustainable rural communities are essential to winning the future and ensuring American competitiveness in the years ahead. These communities supply our food, fiber, and energy, safeguard our natural resources, and are essential in the development of science and innovation. Though rural communities face numerous challenges, they also present enormous economic potential. The Federal Government has an important role to play in order to expand access to the capital necessary for economic growth, promote innovation, improve access to health care and education, and expand outdoor recreational activities on public lands.

To enhance the Federal Government's efforts to address the needs of rural America, this order establishes a council to better coordinate Federal programs and maximize the impact of Federal investment to promote economic prosperity and quality of life in our rural communities.

Sec. 2. Establishment. There is established a White House Rural Council (Council).

Sec. 3. Membership.

(a) The Secretary of Agriculture shall serve as the Chair of the Council, which shall also include the heads of the following executive branch departments, agencies, and offices:

(1) the Department of the Treasury;
(2) the Department of Defense;
(3) the Department of Justice;
(4) the Department of the Interior;
(5) the Department of Commerce;
(6) the Department of Labor;
(7) the Department of Health and Human Services;
(8) the Department of Housing and Urban Development;
(9) the Department of Transportation;
(10) the Department of Energy;
(11) the Department of Education;
(12) the Department of Veterans Affairs;
(13) the Department of Homeland Security;
(14) the Environmental Protection Agency;
(15) the Federal Communications Commission;
(16) the Office of Management and Budget;
(17) the Office of Science and Technology Policy;
(18) the Office of National Drug Control Policy;
(19) the Council of Economic Advisers;
(20) the Domestic Policy Council;
(21) the National Economic Council;
(22) the Small Business Administration;
(23) the Council on Environmental Quality;
(24) the White House Office of Public Engagement and Intergovernmental Affairs;
(25) the White House Office of Cabinet Affairs; and such other executive branch departments, agencies, and offices as the President or the Secretary of Agriculture may, from time to time, designate.

(b) A member of the Council may designate, to perform the Council functions of the member, a senior-level official who is part of the member's department, agency, or office, and who is a full-time officer or employee of the Federal Government.

(c) The Department of Agriculture shall provide funding and administrative support for the Council to the extent permitted by law and within existing appropriations.

(d) The Council shall coordinate its policy development through the Domestic Policy Council and the National Economic Council.

Sec. 4. Mission and Function of the Council. The Council shall work across executive departments, agencies, and offices to coordinate development of policy recommendations to promote economic prosperity and quality of life in rural America, and shall coordinate my Administration's engagement with rural communities. The Council shall:

(a) make recommendations to the President, through the Director of the Domestic Policy Council and the Director of the National Economic Council, on streamlining and leveraging Federal investments in rural areas, where appropriate, to increase the impact of Federal dollars and create economic opportunities to improve the quality of life in rural America;

(b) coordinate and increase the effectiveness of Federal engagement with rural stakeholders, including agricultural organizations, small businesses, education and training institutions, health-care providers, telecommunications services providers, research and land grant institutions, law enforcement, State, local, and tribal governments, and nongovernmental organizations regarding the needs of rural America;

(c) coordinate Federal efforts directed toward the growth and development of geographic regions that encompass both urban and rural areas; and

(d) identify and facilitate rural economic opportunities associated with energy development, outdoor recreation, and other conservation related activities.

Sec. 5. General Provisions.

(a) The heads of executive departments and agencies shall assist and provide information to the Council, consistent with applicable law, as may be necessary to carry out the functions of the Council. Each executive department and agency shall bear its own expense for participating in the Council.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

The White House, June 9, 2011.

[Filed with the Office of the Federal Register, 11:15 a.m., June 13, 2011] NOTE: This Executive order was published in the *Federal Register* on June 14.

Categories: Executive Orders : White House Rural Council, establishment. *Subjects:* White House Office : Rural Council, White House. *DCPD Number:* DCPD201100431.

Executive Order 13352

Facilitation of Cooperative Conservation

August 26, 2004

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

Sec. 2. Definition. As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

Sec. 3. Federal Activities. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

Sec. 4. White House Conference on Cooperative Conservation. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

Sec. 5. General Provision. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH

THE WHITE HOUSE,

August 26, 2004.

Executive Order 12630

Governmental Actions and Interference With Constitutionally Protected Property Rights

March 16, 1988

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose.

(a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. Definitions. For the purpose of this Order:

(a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority.

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. Department and Agency Action. In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decisionmaking process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. Executive Department and Agency Implementation.

(a) The head of each executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e) (1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. Judicial Review. This Order is intended only to improve the Internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

The White House,

March 15, 1988.

[Filed with the Office of the Federal Register, 4:53 p.m., March 16, 1988]

Executive Order 12372

Intergovernmental review of Federal programs

July 14, 1982

By the authority vested in me as President by the Constitution and laws of the United States of America, including Section 401(a) of the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4231(a)), Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. 3334) and Section 301 of Title 3 of the United States Code, and in order to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for the State and local government coordination and review of proposed Federal financial assistance and direct Federal development, it is hereby ordered as follows:

[Preamble amended by Executive Order 12416 of Apr. 8, 1983, 48 FR 15587, 3 CFR, 1983 Comp., p. 186]

Section 1. Federal agencies shall provide opportunities for consultation by elected officials of those State and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance or direct Federal development.

Sec. 2. To the extent the States, in consultation with local general purpose governments, and local special purpose governments they consider appropriate, develop their own processes or refine existing processes for State and local elected officials to review and coordinate proposed Federal financial assistance and direct Federal development, the Federal agencies shall, to the extent permitted by law:

(a) Utilize the State process to determine official views of State and local elected officials.

(b) Communicate with State and local elected officials as early in the program planning cycle as is reasonably feasible to explain specific plans and actions.

(c) Make efforts to accommodate State and local elected officials' concerns with proposed Federal financial assistance and direct Federal development that are communicated through the designated State process. For those cases where the concerns cannot be accommodated, Federal officials shall explain the bases for their decision in a timely manner.

(d) Allow the States to simplify and consolidate existing Federally required State plan submissions. Where State planning and budgeting systems are sufficient and where permitted by law, the substitution of State plans for Federally required State plans shall be encouraged by the agencies.

(e) Seek the coordination of views of affected State and local elected officials in one State with those of another State when proposed Federal financial assistance or direct Federal development has an impact on interstate metropolitan urban centers or other interstate areas. Existing interstate mechanisms that are redesignated as part of the State process may be used for this purpose.

(f) Support State and local governments by discouraging the reauthorization or creation of any planning organization which is Federally-funded, which has a Federally-prescribed membership, which is established for a limited purpose, and which is not adequately representative of, or accountable to, State or local elected officials.

Sec. 3. (a) The State process referred to in Section 2 shall include those where States delegate, in specific instances, to local elected officials the review, coordination, and communication with Federal agencies.

(b) At the discretion of the State and local elected officials, the State process may exclude certain Federal programs from review and comment.

Sec. 4. The Office of Management and Budget (OMB) shall maintain a list of official State entities designated by the States to review and coordinate proposed Federal financial assistance and direct Federal development. The Office of Management and Budget shall disseminate such lists to the Federal agencies.

Sec. 5. (a) Agencies shall propose rules and regulations governing the formulation, evaluation, and review of proposed Federal financial assistance and direct Federal development pursuant to this Order, to be submitted to the Office of Management and Budget for approval.

(b) The rules and regulations which result from the process indicated in Section 5(a) above shall replace any current rules and regulations and become effective September 30, 1983.

[Sec. 5 amended by Executive Order 12416 of Apr. 8, 1983, 48 FR 15587, 3 CFR, 1983 Comp., p. 186]

Sec. 6. The Director of the Office of Management and Budget is authorized to prescribe such rules and regulations, if any, as he deems appropriate for the effective implementation and administration of this Order and the Intergovernmental Cooperation Act of 1968. The Director is also authorized to exercise the authority vested in the President by Section 401(a) of that Act (42 U.S.C. 4231(a)), in a manner consistent with this Order.

Sec. 7. The Memorandum of November 8, 1968, is terminated (33 *Fed. Reg.* 16487, November 13, 1968). The Director of the Office of Management and

Budget shall revoke OMB Circular A-95, which was issued pursuant to that Memorandum. However, Federal agencies shall continue to comply with the rules and regulations issued pursuant to that Memorandum, including those issued by the Office of Management and Budget, until new rules and regulations have been issued in accord with this Order.

Sec. 8. The Director of the Office of Management and Budget shall report to the President by September 30, 1984 on Federal agency compliance with this Order. The views of State and local elected officials on their experiences with these policies, along with any suggestions for improvement, will be included in the Director's report.

[Sec. 8 amended by Executive Order 12416 of Apr. 8, 1983, 48 FR 15587, 3 CFR, 1983 Comp., p. 186]

/s/ RONALD REAGAN

The White House July 14, 1982

[Filed with the Office of the Federal Register, 3:18 p.m., July 14, 1982]

Executive Order 12291

Federal regulation

Source: The provisions of Executive Order 12291 of Feb. 17, 1981, appear at 46 FR 13193, 3 CFR, 1981 Comp., p. 127, unless otherwise noted.

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations, it is hereby ordered as follows:

Section 1. Definitions. For the purposes of this Order:

(a) "Regulation" or "rule" means an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency, but does not include:

(1) Administrative actions governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code;

(2) Regulations issued with respect to a military or foreign affairs function of the United States; or

(3) Regulations related to agency organization, management, or personnel.

(b) "Major rule" means any regulation that is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

(c) "Director" means the Director of the Office of Management and Budget.

(d) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10).

(e) "Task Force" means the Presidential Task Force on Regulatory Relief.

Sec. 2. General Requirements. In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Sec. 3. Regulatory Impact Analysis and Review.

(a) In order to implement Section 2 of this Order, each agency shall, in connection with every major rule, prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis. Such Analyses may be combined with any Regulatory Flexibility Analyses performed under 5 U.S.C. 603 and 604.

(b) Each agency shall initially determine whether a rule it intends to propose or to issue is a major rule, provided that, the Director, subject to the direction of the Task Force, shall have authority, in accordance with Sections 1(b) and 2 of this Order, to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.

(c) Except as provided in Section 8 of this Order, agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director as follows:

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which shall be transmitted, along with the proposed rule, to the Director at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules, the agency shall prepare a preliminary Regulatory Impact Analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director at least 60 days prior to the publication of a notice of proposed rulemaking, and a final Regulatory Impact Analysis, which shall be transmitted along with the final rule at least 30 days prior to the publication of the major rule as a final rule;

(3) For all rules other than major rules, agencies shall submit to the Director, at least 10 days prior to publication, every notice of proposed rulemaking and final rule.

(d) To permit each proposed major rule to be analyzed in light of the requirements stated in Section 2 of this Order, each preliminary and final Regulatory Impact Analysis shall contain the following information:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

(e) (1) The Director, subject to the direction of the Task Force, which shall resolve any issues raised under this Order or ensure that they are presented to the President, is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.

(2) The Director shall be deemed to have concluded review unless the Director advises an agency to the contrary under subsection (f) of this Section:

(A) Within 60 days of a submission under subsection (c)(1) or a submission of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under subsection (c)(2);

(B) Within 30 days of the submission of a final Regulatory Impact Analysis and a final rule under subsection (c)(2); and

(C) Within 10 days of the submission of a notice of proposed rulemaking or final rule under subsection (c)(3).

(f) (1) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order, and shall, subject to Section 8(a)(2) of this Order, refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a)(2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

(3) Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.

(g) For every rule for which an agency publishes a notice of proposed rulemaking, the agency shall include in its notice:

(1) A brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination; and

(2) For each proposed major rule, a brief summary of the agency's preliminary Regulatory Impact Analysis.

(h) Agencies shall make their preliminary and final Regulatory Impact Analyses available to the public.

(i) Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

Sec. 4. Regulatory Review. Before approving any final major rule, each agency shall:

(a) Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent, and include in the **Federal Register** at the time of promulgation a memorandum of law supporting that determination.

(b) Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

Sec. 5. Regulatory Agendas.

(a) Each agency shall publish, in October and April of each year, an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to this Order. These agendas may be incorporated with the agendas published under 5 U.S.C. 602, and must contain at the minimum:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;

(2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and

(3) A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.

(b) The Director, subject to the direction of the Task Force, may, to the extent permitted by law:

(1) Require agencies to provide additional information in an agenda; and

(2) Require publication of the agenda in any form.

Sec. 6. The Task Force and Office of Management and Budget.

(a) To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to:

(1) Designate any proposed or existing rule as a major rule in accordance with Section 1(b) of this Order;

(2) Prepare and promulgate uniform standards for the identification of major rules and the development of Regulatory Impact Analyses;

(3) Require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source;

(4) Waive the requirements of Sections 3, 4, or 7 of this Order with respect to any proposed or existing major rule;

(5) Identify duplicative, overlapping and conflicting rules, existing or proposed, and existing or proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of this Order, and, in each such case, require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;

(6) Develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for purposes of compiling a regulatory budget;

(7) In consultation with interested agencies, prepare for consideration by the President recommendations for changes in the agencies' statutes; and

(8) Monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance.

(b) The Director, subject to the direction of the Task Force, is authorized to establish procedures for the performance of all functions vested in the Director by this Order. The Director shall take appropriate steps to coordinate the implementation of the analysis, transmittal, review, and clearance provisions of this Order with the authorities and requirements provided for or imposed upon the Director and agencies under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. 3501 *et seq.*

Sec. 7. Pending Regulations.

(a) To the extent necessary to permit reconsideration in accordance with this Order, agencies shall, except as provided in Section 8 of this Order, suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective, excluding:

(1) Major rules that cannot legally be postponed or suspended;

(2) Major rules that, for good cause, ought to become effective as final rules without reconsideration. Agencies shall prepare, in accordance with Section 3 of this Order, a final Regulatory Impact Analysis for each major rule that they suspend or postpone.

(b) Agencies shall report to the Director no later than 15 days prior to the effective date of any rule that the agency has promulgated in final form as of the date of this Order, and that has not yet become effective, and that will not be reconsidered under subsection (a) of this Section:

(1) That the rule is excepted from reconsideration under subsection (a), including a brief statement of the legal or other reasons for that determination; or

(2) That the rule is not a major rule.

(c) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require reconsideration, in accordance with this Order, of any major rule that an agency has issued in final form as of the date of this Order and that has not become effective; and

(2) Designate a rule that an agency has issued in final form as of the date of this Order and that has not yet become effective as a major rule in accordance with Section 1(b) of this Order.

(d) Agencies may, in accordance with the Administrative Procedure Act and other applicable statutes, permit major rules that they have issued in final form as of the date of this Order, and that have not yet become effective, to take effect as interim rules while they are being reconsidered in accordance with this Order, *provided that,* agencies shall report to the Director, no later than 15 days before any such rule is proposed to take effect as an interim rule, that the rule should appropriately take effect as an interim rule while the rule is under reconsideration.

(e) Except as provided in Section 8 of this Order, agencies shall, to the extent permitted by law, refrain from promulgating as a final rule any proposed major rule that has been published or issued as of the date of this Order until a final Regulatory Impact Analysis, in accordance with Section 3 of this Order, has been prepared for the proposed major rule.

(f) Agencies shall report to the Director, no later than 30 days prior to promulgating as a final rule any proposed rule that the agency has published or issued as of the date of this Order and that has not been considered under the terms of this Order:

(1) That the rule cannot legally be considered in accordance with this Order, together with a brief explanation of the legal reasons barring such consideration; or

(2) That the rule is not a major rule, in which case the agency shall submit to the Director a copy of the proposed rule.

(g) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require consideration, in accordance with this Order, of any proposed major rule that the agency has published or issued as of the date of this Order; and

(2) Designate a proposed rule that an agency has published or issued as of the date of this Order, as a major rule in accordance with Section 1(b) of this Order.

(h) The Director shall be deemed to have determined that an agency's report to the Director under subsections (b), (d), or (f) of this Section is consistent with the purposes of this Order, unless the Director advises the agency to the contrary:

(1) Within 15 days of its report, in the case of any report under subsections (b) or (d); or

(2) Within 30 days of its report, in the case of any report under subsection (f).

(i) This Section does not supersede the President's Memorandum of January 29, 1981, entitled "Postponement of Pending Regulations", which shall remain in effect until March 30, 1981.

(j) In complying with this Section, agencies shall comply with all applicable provisions of the Administrative Procedure Act, and with any other procedural requirements made applicable to the agencies by other statutes.

Sec. 8. Exemptions.

(a) The procedures prescribed by this Order shall not apply to:

(1) Any regulation that responds to an emergency situation, *provided that*, any such regulation shall be reported to the Director as soon as is practicable, the agency shall publish in the **Federal Register** a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency shall prepare and transmit as soon as is practicable a Regulatory Impact Analysis of any such major rule; and

(2) Any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order, *provided that*, any such regulation shall be reported to the Director together with a brief explanation of the conflict, the agency shall publish in the **Federal Register** a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines.

(b) The Director, subject to the direction of the Task Force, may, in accordance with the purposes of this Order, exempt any class or category of regulations from any or all requirements of this Order.

Sec. 9. Judicial Review. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Sec. 10. Revocations. Executive Orders No. 12044, as amended, and No. 12174 are revoked

Executive Order 11991

Environmental Impact Statements

May 24, 1977

RELATING TO PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

By virtue of the authority vested in. me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4371 et seq.), and Section. 309 of the Clean Air Act, as amended (42 U.S.C. 1857h-7), it is hereby ordered as follows:

SECTION 1. Subsection (h) of Section 3 (relating to responsibilities of the Council on Environmental Quality) of Executive Order No. 11514, as amended, is revised to read as follows:

"(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution.".

SEC. 2. The following new subsection is added to Section 2 (relating to responsibilities of Federal agencies) of Executive Order No. 11514, as amended:

"(g) In carrying out their responsibilities under the Act and this Order, comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.".

JIMMY CARTER

The White House,

May 24, 1977.

[Filed with the Office of the Federal Register, 1:45 p.m., May 24, 1977]

Executive Order 11514

Protection and Enhancement of Environmental Quality

By virtue of the authority vested in me as President of the United States and in furtherance of the purpose and policy of the National Environmental Policy Act of 1969 (Public Law No. 91-190, approved January 1, 1970), it is ordered as follows:

Section 1. Policy.

The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.

Sec. 2. Responsibilities of Federal agencies.

Consonant with Title I of the National Environmental Policy Act of 1969, hereafter referred to as the "Act", the heads of Federal agencies shall:

(a) Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Such activities shall include those directed to controlling pollution and enhancing the environment and those designed to accomplish other program objectives which may affect the quality of the environment. Agencies shall develop programs and measures to protect and enhance environmental quality and shall assess progress in meeting the specific objectives of such activities. Heads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment.

(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Federal agencies shall also encourage State and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

(c) Insure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to Federal agencies, States, counties, municipalities, institutions, and other entities, as appropriate.

(d) Review their agencies' statutory authority, administrative regulations, policies, and procedures, including those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purposes and provisions of the Act. A report on this review and the corrective actions taken or planned, including such measures to be proposed to the President as may be necessary to bring their authority and policies into conformance with the intent, purposes, and procedures of the Act, shall be provided to the Council on Environmental Quality not later than September 1, 1970.

(e) Engage in exchange of data and research results, and cooperate with agencies of other governments to foster the purposes of the Act.

(f) Proceed, in coordination with other agencies, with actions required by section 102 of the Act.

(g) In carrying out their responsibilities under the Act and this Order, comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.

Sec. 3. Responsibilities of Council on Environmental Quality

The Council on Environmental Quality shall:

(a) Evaluate existing and proposed policies and activities of the Federal Government directed to the control of pollution and the enhancement of the environment and to the accomplishment of other objectives which affect the quality of the environment. This shall include continuing review of procedures employed in the development and enforcement of Federal standards affecting environmental quality. Based upon such evaluations the Council shall, where appropriate, recommend to the President polices and programs to achieve more effective protection and enhancement of environmental quality and shall, where appropriate, seek resolution of significant environmental issues.

(b) Recommend to the President and to the agencies priorities among programs designed for the control of pollution and for enhancement of the environment.

(c) Determine the need for new policies and programs for dealing with environmental problems not being adequately addressed.

(d) Conduct, as it determines to be appropriate, public hearings or conferences on issues of environmental significance.

(e) Promote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality.

(f) Coordinate Federal programs related to environmental quality.

(g) Advise and assist the President and the agencies in achieving international cooperation for dealing with environmental problems, under the foreign policy guidance of the Secretary of State.

(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decision makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution.

(i) Issue such other instructions to agencies, and request such reports and other information from them, as may be required to carry out the Council's responsibilities under the Act.

(j) Assist the President in preparing the annual Environmental Quality Report provided for in section 201 of the Act.

(k) Foster investigations, studies, surveys, research, and analyses relating to (i) ecological systems and environmental quality, (ii) the impact of new and changing technologies thereon, and (iii) means of preventing or reducing adverse effects from such technologies.

Sec. 4. Amendments of E.O. 11472.

[EDITOR'S NOTE: E.O. 11472 *expired* January 5, 1977]

/s/ Richard Nixon

THE WHITE HOUSE

March 5, 1970

Appendix F

County Resolutions

Resolution No. 13___

A Resolution of _____ Board of Commissioners Adopting The Natural Resource Coordination Plan of the Kansas Natural Resource Coalition

WHEREAS, The complex array, varying missions, and potentially conflicting roles of local, state, or federal agencies suggests need of a systematic approach to natural-resource conservation that assures this County receives timely communication, a means to exchange technical information, ample opportunity to understand, vet, affect or arbitrate natural resource or environmental issues;

WHEREAS, This County has an ongoing interest and participative role in federal and state policies that could, do or will affect its populations, interests, properties, culture or socioeconomic wellbeing;

WHEREAS, Government to Government Coordination provides the means, mechanism and opportunity to effectively solicit, communicate and exchange information, data, issues or plans between governmental agencies;

WHEREAS, This County has, will and can establish resource priorities that work *to create and maintain conditions in which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of its members*;

WHEREAS, The Natural Resource Coordination Plan provides the background, history, justification and basis for effective Government-to-Government Coordination;

WHEREAS, This County desires to exercise, either individually or collectively as part of a group, its right to Coordinate with respective governmental agencies;

WHEREAS, This County recognizes the statutory obligation of the United States Bureau of Land Management; United States Department of Interior; United States Fish and Wildlife Service; United States Department of Agriculture; United States Environmental Protection Agency; United States Forest Service, and other federal and state agencies undertaking actions within its boundaries to attempt consistency with the policies, plans and natural-resource conservation programs of this County in their planning, inventory and management activities.

NOW THEREFORE, BE IT RESOLVED THAT THE BOARD OF COUNTY COMMISSIONERS OF _____COUNTY, KANSAS RESOLVE TO:

1. ADOPT The principals, practices and policies of the Natural Resource Coordination Plan of the Kansas Natural Resource Coalition.

This Resolution was approved and adopted this _____ day of August, 2013.

BOARD OF COUNTY COMMISSIONERS:

_____COUNTY, KANSAS

_____
Chairman

_____
Member

_____
Member

ATTEST: County Clerk _____

LESSER PRAIRIE CHICKEN CONSERVATION, MANAGEMENT and STUDY PLAN of The Kansas Natural Resource Coalition

October 14, 2013
Revision 3

EXECUTIVE SUMMARY

The Lesser Prairie Chicken (*Tympanuchus pallidicinctus)* is a beautiful upland grouse species found in four ecosystem regions in parts of Texas, Oklahoma, New Mexico, Kansas and Colorado. Conservation of the LPC has received much attention, being the subject of a Federal Threatened Listing Proposal, a 5-state Conservation Plan, and many other conservation initiatives.

The range-wide probability of extinction for the Lesser Prairie Chicken is very low; in the Mixed and Short Grass ecoregions the grouse is experiencing rising numerical counts, with population declines being observed in the Sand Sagebrush Prairie ecoregion. Because genetic diversity continues despite localized population decreases, there is no evidence to conclude genetic isolation is occurring. Similarly, quantitative science confirming the contribution of natural (drought, predation) or anthropogenic (fragmentation, agriculture expansion, utility corridors) impacts on Lesser Prairie Chicken is both absent and necessary before appropriate, effective conservation policies may be adopted.

The limited, disaggregated and incomplete body of human and scientific data for the Lesser Prairie Chicken suggests current regional policymaking and planning efforts for the species to be premature. The Lesser Prairie Chicken is not in immediate or long term threat of extirpation, threatened throughout its range, nor in jeopardy of genetic hybridization. For this reason, the Kansas Natural Resource Coalition (KNRC) has adopted a balanced, systematic and localized approach providing for immediate conservation, long-term maintenance, and future study of the Lesser Prairie Chicken. This approach ensures prudent conservation actions are currently undertaken alongside gathering of scientific and human information necessary for well-rounded, balanced, and informed policymaking.

This Plan is a companion document to the *Natural Resource Coordination Plan* (NRCP) adopted by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP presents the history, expectations, legal background and Congressional mandates for which the KNRC expects compliance from any Federal Agency proposing Major Agency Actions. This Conservation Plan sets forth the need, justification and data requirements for current conservation activities and future studies. Together, both documents form a government-to-government coordination program to be utilized at the onset of contemplated major federal action.

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BACKGROUND and PURPOSE

Summary and Intent; Plan and Coalition Area

This plan provides the framework, policies and technical needs to maintain current and enhance future conservation of the Lesser Prairie Chicken (*Tympanuchus pallidicinctus*) in the 32-County, 27,514 mi^2 area governed by the Coalition (Figure 1, Appendix A). It provides the mechanism, process, and context through which meaningful conservation efforts may be identified, assessed, encouraged, or even codified within individual Counties. As a companion document to the *Natural Resource Coordination Plan* (NRCP), this Conservation Management and Study Plan encourages current conservation efforts, and recommends sound, scientific work to fill substantial, existing data gaps. This approach will balance maintenance and conservation of the Lesser Prairie Chicken in concert with the needs of rural communities, agriculture, private landholders and local industry.[1]

The United States Fish and Wildlife Service (USFWS) has proposed listing the Lesser Prairie Chicken as a Threatened Species throughout a five-state area, including Kansas. The listing process was accelerated by a May, 2011 Settlement Agreement between USFWS and the Center for Biological Diversity;[2] a settlement that remains the primary impetus behind the current listing action.

The Kansas Natural Resource Coalition (KNRC) relies on those biological, regulatory, conservation, and administrative experts who possess the scientific, procedural, and regulatory background needed[3] to render appropriate listing decisions for Lesser Prairie Chicken. Consistent with its NRCP, the KNRC has potentially identified the absence of required procedural and administrative information in the USFWS Lesser Prairie Chicken Listing Proposal,[4] as well as significant disagreement about the availability, thoroughness, and depth of available, peer-reviewed scientific data required to render a balanced listing decision.

Given the apparent absence of procedural (NEPA) information and the conflicting, limited nature of existing scientific and related data, combined with the knowledge any Federal listing would have direct application to federally-controlled (6%)[5] land in Kansas, the KNRC believes positive engagement of local governments and private landholders is necessary for any conservation program to be effective. For its part, this plan provides immediate conservation

[1] 40 CFR 1500.2(f)

[2] In re: Endangered Species Action Section 4 Deadline Litigation No. 10-377 (EGS) MDL Docket No 2165.

[3] 16 USC 1533 (6)(1)(a). Endangered Species Act determinations must solely be based upon data; NEPA requires an Environmental Assessment

[4] Federal Register Volume 77 No. 238 December 11, 2012.

[5] Congressional Research Service, 7-5700, February 8, 2012, Federal Land Ownership: Overview and Data

actions and a program-wide restart with immediate focus on procedural actions required under the National Environmental Policy Act,[6] the Regulatory Flexibility Act,[7] The Data Quality Act,[8] and Executive Orders 12630, 13352, and 13575.

This Lesser Prairie Chicken Conservation, Management and Study Action Plan employs immediate, on-the-ground conservation actions, suggests collaborative, peer-review of the existing body of scientific data, and outlines meaningful study actions to address scientific data gaps. Because Lesser Prairie Chicken populations in the coalition-governed range are on the increase, assessment of the effectiveness of Conservation Programs is underway, and existing state regulatory-protection programs remain adequate, KNRC believes the most prudent course to be enhancement of ongoing conservation practices combined with investigation of data gaps and procurement of required human data. This plan functions to systematically align, through coordination, the efforts of local, state and federal agencies toward the required goal of consistency in government-to-government actions.

The goal of consistency will take place through coordination of activities invoked by the NRCP and this plan. KNRC recognizes this plan as a starting point and baseline, not as a final solution. It establishes the basis for collaborative working relationships between individual coalition members, private landowners, industry, and State and Federal Agencies.

Habitat, Regulatory Programs, and Hunting

Lesser Prairie Chicken habitat is found in parts of five-state region in Texas, Oklahoma, Kansas, New Mexico, and Colorado. Suitable LPC habitats are categorized as:

1) **Shinnery Oak Prairie Region -** eastern New Mexico and southwest Texas;
2) **Sand Sagebrush Prairie Region -** southeastern Colorado, southwestern Kansas, and western Oklahoma;
3) **Mixed Grass Prairie Region -** northeast Texas, northwest Oklahoma, and south-central Kansas; and,
4) **Short Grass/CRP Mosaic -** northwestern Kansas and eastern Colorado.

In 1975 Kansas enacted the Kansas Nongame and Endangered Species Conservation Act which gives the Department of Wildlife, Parks and Tourism (KDWPT) authority to identify and undertake conservation activities. Since that time, Kansas has implemented a number of species Recovery Plans with an objective to guide research, management, and enhancement of

[6] 42 USC §§4331-4332.
[7] 5 USC §§601-612.
[8] 44 USC §3504(1)(e)(1).

recovering species populations. Kansas has made significant progress in creating practices, plans and regulations that provide planting and prairie-grassland maintenance incentives for habitat enhancement. KNRC supports and encourages these collaborative programs.

Both KDWPT and KNRC members have mutual interest in identifying the cause of fluctuating Lesser Prairie Chicken populations, addressing potential habitat improvements, and undertaking meaningful conservation activities. For this reason, KNRC will work together with KDWPT, the United States Fish and Wildlife Service (USFWS), and other interested stakeholders to cooperatively develop a Lesser Prairie Chicken population stabilization and recovery plan. KNRC Steering Committee will create a process that will guide collaborative management efforts aimed at improving and conserving Lesser Prairie Chicken populations and habitat.

The Natural Resource Conservation Service (NRCS) Lesser Prairie Chicken Conservation Initiative Program (LPCCIP) protects and enhances LPC habitat by providing program incentives to set aside land for conservation purposes. Land set-asides in the Conservation Reserve Program (CRP) also contribute substantially to Lesser Prairie Chicken habitat.

In 2010 private landholders within the area governed by KNRC entered into 46 Wildlife Habitat Improvement Program (WHIP) and 13 EQUIP contracts sequestering 23,544 acres and 4,059 acres (respectively) for habitat purposes. In 2011, private landholders entered into 28 WHIP and 5 EQUIP contracts for a total of 13,717 acres and 5,999 acres respectively. As of preparation of this report, LPCCIP data for 2012 was unavailable for inclusion.

The human decision-making mechanisms involved in habitat conservation programs are not well understood, and data to render conclusions about fluctuating enrollments is not available. The dynamics private landholders face in considering removal of land from production include drought, status of farm legislation, general regulatory uncertainty, or even the specter of the Lesser Prairie Chicken listing process itself. For the present, the factors enabling the federal government to forecast private landholder enthusiasm or render conclusions on fluctuating conservation-program enrollments appear elusive.

To list the Lesser Prairie Chicken using the justification of “regulatory certainty” would be premature given the body and threshold level of scientific and enrollment information available. For its part, KNRC encourages a better understanding and analysis of enrollment information, combined with a thorough review and, as required, restructuring of incentive programs to optimize habitat set-asides for efficient implementation and maximization of value.

Hunting is typically a concern for declining species when distributed in small, isolated habitat patches or where hunting mortality is "additive" rather than "compensatory."[9] Hagen et al. (2009) reported hunting mortality contributed 3% to overall mortality. For its part, USFWS has indicated hunting does not present a material threat to declining populations:

"*Given the low number of lesser prairie-chickens harvested per year in Kansas relative to the population size, the statewide harvest is probably insignificant at the population level.*"

From the "take" perspective, KDWPT reports hunting in Kansas to be additive for normal annual population cycles. Lesser Prairie Chicken takes in Kansas are reported by KDWPT as:

- 500 in 2007,
- 750 in 2008,
- 910 in 2009,
- 633 in 2010,
- 378 in 2011.

KDWPT also reports that due to recent population increases in northwest part of the Coalition area, the 2012 hunting regulations were revised: The early 2012 season (Sept. 15-Oct. 15) and two-bird bag limit was extended into northwest Kansas; the northwest unit boundary was revised to include those areas north of U.S. Highway 96 and west of U.S. Highway 281. Hunting is still allowed in the *Sand Sagebrush Prairie Region* and *Cimarron River National Grasslands* even though KDWPT reports drought and heat-related breeding populations to have declined from 2011 to 2012.

Population Counts, Monitoring, and Range Maps

Lesser Prairie Chicken lek surveys conducted in 2012 indicate most Kansas Lesser Prairie Chicken populations to be stable or on slight decline over 2011. Declines were largely assessed by KDWPT to be a result of extreme and ongoing drought throughout 2011.[10] KDWPT further reports that during recent drought, habitats in northcentral and northwest Kansas fared the best, while areas in southcentral and southwest Kansas experienced the sharpest population declines - correlating drought and temporary habitat changes with population decline in those areas where drought is observed to be most severe.

[9] " (Hagen et al. 2009).

[10] http://www.kdwpt.state.ks.us/Hunting/Upland-Birds/Upland-Bird-Regional-Forecast.

Lesser Prairie Chicken monitoring and population counting methods differ markedly, yielding data inconsistencies in population trends over time, lek size, range and ultimately population status. Variations in survey methodology and scientific assumptions, combined with the historical lack of coordination between academia, state agencies and others, has greatly complicated Lesser Prairie Chicken population measurement and behavioral assessment efforts.[11]

The studies and conservation maintenance efforts contemplated by this Plan propose to encourage identification, standardization, and use of Lesser Prairie Chicken population assessment and quantification methodologies that are scientific, consistent, independently peer-reviewed, and uniform throughout the range governed by KNRC - and perhaps elsewhere.

The latest, best available lek and population data for the *Sand Sagebrush Prairie, Mixed Grass Prairie,* and *Short Grass/CRP Mosaic* ecoregions of the Kansas Lesser Prairie Chicken appear to have been collected by Western Association of Fish and Wildlife Agencies (WAFWA) between March 30 and May 3, 2012. For the present and given its current limited understanding of population count methodologies, KNRC has accepted the WAFWA population conclusions as being generally baseline for future population counts. KNRC does not believe the existing regional range maps are of sufficient resolution at the local level to accurately count the Lesser Prairie Chicken or serve as a basis to make public policy.

The WAFWA and Texas Tech Study flew 512 transects in 256, 15 km x 15 km blocks covering approximately 7,680 km throughout the 4 ecoregions. The WAFWA study estimated a total of 3,174 lesser prairie-chicken leks, 441 lesser and greater prairie-chicken mixed leks, and 309 hybrid lesser-greater prairie-chickens, for a total of 37,170 individual Lesser Prairie Chickens.

KNRC recognizes the acute need for comprehensive Lesser Prairie Chicken lek density, population-abundance surveys, and accurate consistent range mapping. We support the WAFWA methodology and recommendations as we understand them, including the use of the R-44 helicopters for precision counting. Data from homogeneous surveys, along with comprehensive Lesser Prairie Chicken population and habitat maps, should be merged as input to the Western Governor's Association's Southern Great Plains Crucial Habitat Assessment Tool - which could, following external peer review, serve as the central mapping tool.[12]

[11] *Results of the 2012 Rangewide Survey of the Lesser Prairie Chickens.* Western Association of Fish and Wildlife Agencies. September 4, 2012. P.4.

[12] Ibid p.25,26.

GOAL

Preserve, maintain and increase Lesser Prairie Chicken populations in balance with and respect for human, private and industrial systems throughout the 32-County Region governed by Coalition Members.

CONSERVATION PLAN

Guiding Principles

The Steering Committee of the Kansas Natural Resource Coalition is charged with development, revision, and implementation of land-use priorities for consideration by individual KNRC Members. The land-use priorities will establish and oversee resource values associated with lands within the Coalition area. As issues related to management of lands arise, the Steering Committee and individual Members will collaborate to address those issues consistent with this plan, the NRCP, and resource priorities.

KNRC desires participation from as diverse a group as possible to ensure a collaborative and cooperative effort from all resource interests in this Plan. To that end, KNRC will reach out to representatives of KDWPT, USFWS, The Kansas Bison Association (KBA), The United States Department of Agriculture - Farm Service Agency and Natural Resource Conservation Service (USDA - FSA and NRCS), Kansas State University (KSU), Kansas University (KU), Kansas Farm Bureau (KFB), and/or other public interest groups identified during this process. Specific principals include:

1. Include and encourage groups interested in Lesser Prairie Chicken management;
2. Respect individual and group views; pursue collaborative, peer-reviewed science and procedure-based decision making;
3. Develop management plans and actions compatible with the objectives and actions in the Natural Resource Coordination Plan and this Lesser Prairie Chicken Conservation, Management, and Study Plan;
4. Prepare plans that contemplate compatibility with the Multi-State, Range-wide Conservation Plan for the Lesser Prairie Chicken,[13] requirements of the Coalition, and individual County members;
5. Implement management actions consistent with the goal of this Plan;
6. Provide a conduit for meaningful, timely, complete, and accurate exchange of government-to-government data;
7. Recognize the technical, geographical, range and census baselines for the Lesser Prairie Chicken begin with adoption of this plan;
8. This plan is intended to be a living document, and is subject to change as more effective Lesser Prairie Chicken management options are discovered, studies provide new information, or individual member-needs dictate;
9. Promote research and conservation of the Lesser Prairie Chicken in context of preservation and respect for private property rights.

[13] Rangewide Conservation Plan for Lesser Prairie Chicken. Jonathan B. Haufler, et. al.

10. This plan's working cycle is 5-year increments with a minimum of two-year, interim reviews;
11. Additional funding external to the coalition will be required to accomplish plan actions and study objectives.[14]

Conservation Focal Points

The region governed by the 32-County Coalition occupies an area of approximately 27,514 mi^2 (17,608,960 acres) located primarily in the *Sand Sagebrush Prairie, Mixed Grass Prairie* and *Short Grass/CRP Mosaic* Kansas Lesser Prairie Chicken ecoregions.

While KNRC understands the range of the Lesser Prairie Chicken extends beyond the area governed by individual Coalition members, because the grouse is not in immediate jeopardy, under the specter of extirpation, threatened throughout its range, nor facing genetic hybridization, the KNRC has opted for a conservative approach to habitat management.

The importance of conservation in context of limited, disaggregated and incomplete body of human and scientific data has led KNRC to implement immediate conservation maintenance activities while simultaneously establishing future study objectives. These conservation actions and study objectives are summarized in Appendix B on forms consistent with the USFWS Policy for Evaluation of Conservation Efforts (PECE).

KNRC has identified a list of six Lesser Prairie Chicken areas for focus of Conservation Management and Study actions:

- Lesser Prairie Chicken Population and Monitoring;
- Lesser Prairie Chicken Habitat and Fragmentation;
- Lesser Prairie Chicken Nest Success in the vicinity of elevated structures;
- Lesser Prairie Chicken Predation and Inter-species Competition;
- Lesser Prairie Chicken Hunting;
- Program Funding.

The Steering Committee was established to facilitate each of the six Lesser Prairie Chicken management and conservation efforts. The Steering Committee will maintain responsibility to review conservation proposals and actions for consistency with USFWS Policy for Evaluation of Conservation Efforts (PECE) and the Management and Conservation efforts on the attached matrix.

[14] 42 USC 4331(a)

Conservation Actions

Invasive Species Control

Lesser Prairie Chickens no longer occupy significant portions of their former range in Barber, Harper, Kingman, Pratt, Reno, Rice and Stafford counties, as well as in midgrass and shortgrass prairies and conservation reserve grasslands. The literature[15] implicates tree invasion as one primary factor, with particular emphasis on encroachments by Eastern Redcedar and hedge. Because invasive trees produce a canopy effect and some varieties create undesirable soil conditions affecting understory plant growth, forage plants utilized by Lesser Prairie Chickens can be inhibited by invasive tree growth. Also, USFWS mountain-prairie region's Partners for Fish & Wildlife report by state on Kansas states that research has shown as little as one tree per acre can have a negative effect on the use of that acre by grassland nesting birds and one acre of cedar trees can consume as much as 55,000 gallons of water per year.[16]

Mounting scientific evidence suggests the presence of relatively few trees in a prairie landscape can have negative impacts on Lesser Prairie Chickens, and some studies have observed population declines in habitats with as few as four juniper trees per acre. Historically, few trees existed on the prairie grasslands because the trampling effect of millions of bison prohibited trees from being established on the landscape. The bison also contributed nutrients beneficial to the Lesser Prairie Chicken.

Policy

1. Include Eastern Redcedar in Coalition invasive species control plans, and discourage its use for windbreaks, hedge rows and other barrier applications.
2. Cedar trees should first be clipped or cut. If the terrain is relatively flat, a mechanical tree cutter may be used; in steep terrains, the trees should be removed with a chain saw.
3. Prescribed fire is one necessary tool to keep tree invasion in check. Cedar trees should be burned following cutting or new shoots can germinate.
4. Labor resources for invasive species control will be sought through State and local programs, and innovative procurement of resources will be considered and evaluated. Coalition members will contemplate the use of labor from county jails, prisons or public school systems for use in invasive-species control programs.
5. Seek additional funding from extra-coalition sources to support policies 1-4.

[15] Tree Invasion. Randy Rodgers, Kansas Department of Wildlife.

[16] http://www.fws.gov/mountain-prairie/pfw/r6pfw15.htm#top

Livestock Range and Management

The region governed by the coalition continues to enjoy a long history of livestock grazing on private and public lands. When properly managed, livestock and bison coexist well with and can be a benefit to Lesser Prairie Chickens and other grouse, helping to manage suitable habitat and decrease fire hazards.

The effect of Livestock grazing, range management, or excessive land rest on Lesser Prairie Chicken habitat is not well understood and the literature contains conflicting conclusions. Both over grazing or too much rest can lead to deteriorated habitat conditions by depletion of understory plants, resulting in changes for excessively dense sagebrush stands. While this is a potential threat, there is no evidence of widespread over grazing occurring in areas governed by the Coalition. Livestock grazing has also been implicated as having a potential impact on the amount and height of nesting cover that in turn can allow higher rates of nest predation. Again, KNRC is not aware of cover depletion such that would result in elevated predation rates for the Lesser Prairie Chicken.

Since the 1930's vast grazing management improvement programs have been implemented. Reductions in stocking levels, hundreds of miles of fence and extensive water developments have allowed for intensive control of the frequency, duration, intensity, rest and timing of grazing activities on private lands. For its part, NRCS encourages multi-use grazing along with Lesser Prairie Chicken habitat restoration, maintenance and conservation.[17]

While there is no evidence of wide spread range deterioration (downward trends) there is opportunity to develop or improve proper grazing management. "Proper grazing management" means to plan, schedule, and control the timing, intensity, and duration of grazing as well as its occurrence of over time, in a manner that achieves or trends toward management objectives.

Policy

1. Encourage sustainable grazing activities consistent with historic land use and ranching practices that are beneficial for both agricultural interests and Lesser Prairie Chicken habitats. Promote recommendations by U.S. Department of Agriculture, Natural Resources Conservation Service or other proven sources throughout the Plan Area.
2. Promote and distribute livestock grazing technical data as a tool to encourage Lesser Prairie Chicken habitat.
3. Any grazing restrictions or conservation measures that are put in place through a grazing permit shall be based solely on the conditions and activities specific to that permitted grazing allotment.

[17] http://www.ks.nrcs.usda.gov/news/releases/2012/lpci

Fence Marking

There is no evidence to indicate impact mortality is a factor contributing to population fluctuations of the Lesser Prairie Chicken in the area governed by the coalition. Lesser Prairie Chicken management literature[18,19] in other ecoregions has reported fence impacts could be a potential contribution to hen mortality. One low cost, immediate conservation option is to increase fence visibility by fence marking. Using this method, fence markers are made from strips of vinyl house siding cut into 3-inch long and 1.5-inch wide strips. The trim has a loop along one edge that makes it ideal for clipping on the fences between the barbs.

The markers are placed about 4 feet apart on the top and third wires in an alternating pattern, so the markers on the third wire are clipped approximately halfway between the markers on the top wire. Under this method the literature reports minimal mortalities due to fence collisions along marked fence rows, and the collision-reduction benefit is projected to extend 0.5 miles in either direction.

Policy

1. Provide opportunity for fence marking literature and instruction materials at appropriate county literature locations.
2. Encourage private landholders in potential Lesser Prairie Chicken habitat areas to implement fence-marking programs.
3. Consider fence-marking programs on county right-of-ways and during new construction or fence maintenance operations.

Habitat Conservation and Management; Population Counts and Introductions

Optimum habitat for Lesser Prairie Chicken consists of open, relatively flat rangeland in different stages of plant succession. These habitats display a diversity of native, short to mid-height grasses and wildflowers interspersed with low-growing shrubby cover in relatively close proximity to one another. Typical habitat consists of sand sagebrush communities dominated by sand dropseed, sideoats grama, and little bluestem. In northwest Kansas, mixed-grass prairie devoid of sagebrush and short-grass prairie also serves as habitat, and Lesser Prairie-Chicken populations have expanded in restored native grass areas under successful private and public (CRP) restoration programs.

[18] Fence marking for Lesser Prairie Chickens; a cooperative conservation solution. Sutton Avian Research Center. Bartlesville, Oklahoma.

[19] Lesser Prairie Chicken Fence Marking Initiative in New Mexico. Riley, Nancy. USFWS. 2008.

Policy

1. Encourage habitat restoration projects on private lands in context of maintaining private property rights. Request private landowners participating in habitat restoration to report annually on the progress of restoration efforts so individual counties have ability to track disturbed vs. restored acreages and information of positive restoration efforts.
2. Collaborate with KDWPT, USFWS and others in recognizing local conditions and Lesser Prairie Chicken habitat suitable for conservation activities including mapping and monitoring. Habitat identification and monitoring activities will include county-approved criteria and permits to allow temporary disturbances and other human activities.
3. Require the use of native plant species for restoration based on cost, availability, probability of successful establishment; allow for circumstance-specific exemptions in planting requirements.
4. All federal agencies with management responsibilities for the species and/or its habitat in the plan area shall provide that county with an annual county specific update of the monitoring programs, including data collected and specifics about their collection protocols.[20] All agencies will pre-inform the county of proposed research projects, programs, or activities, allowing sufficient time for the county's input and collaboration prior to implementation.[21]
5. No species introduction activities shall be allowed in any KNRC member county without prior review and approval from the county proposed for the introduction.
6. All data shall be collected and studies prepared using protocols that will ensure the quality, utility, objectivity and integrity of the information as required under the Information Quality Act[22] and the NRCP.
7. All data gathered in the plan area shall be shared in a timely and complete manner at the formal request of the County or Coalition, and shall be supplied irrespective of its state of completion.
8. Private landowners engaged in Lesser Prairie Chicken population monitoring, habitat monitoring, or data collection will be encouraged to share information and data with the county.

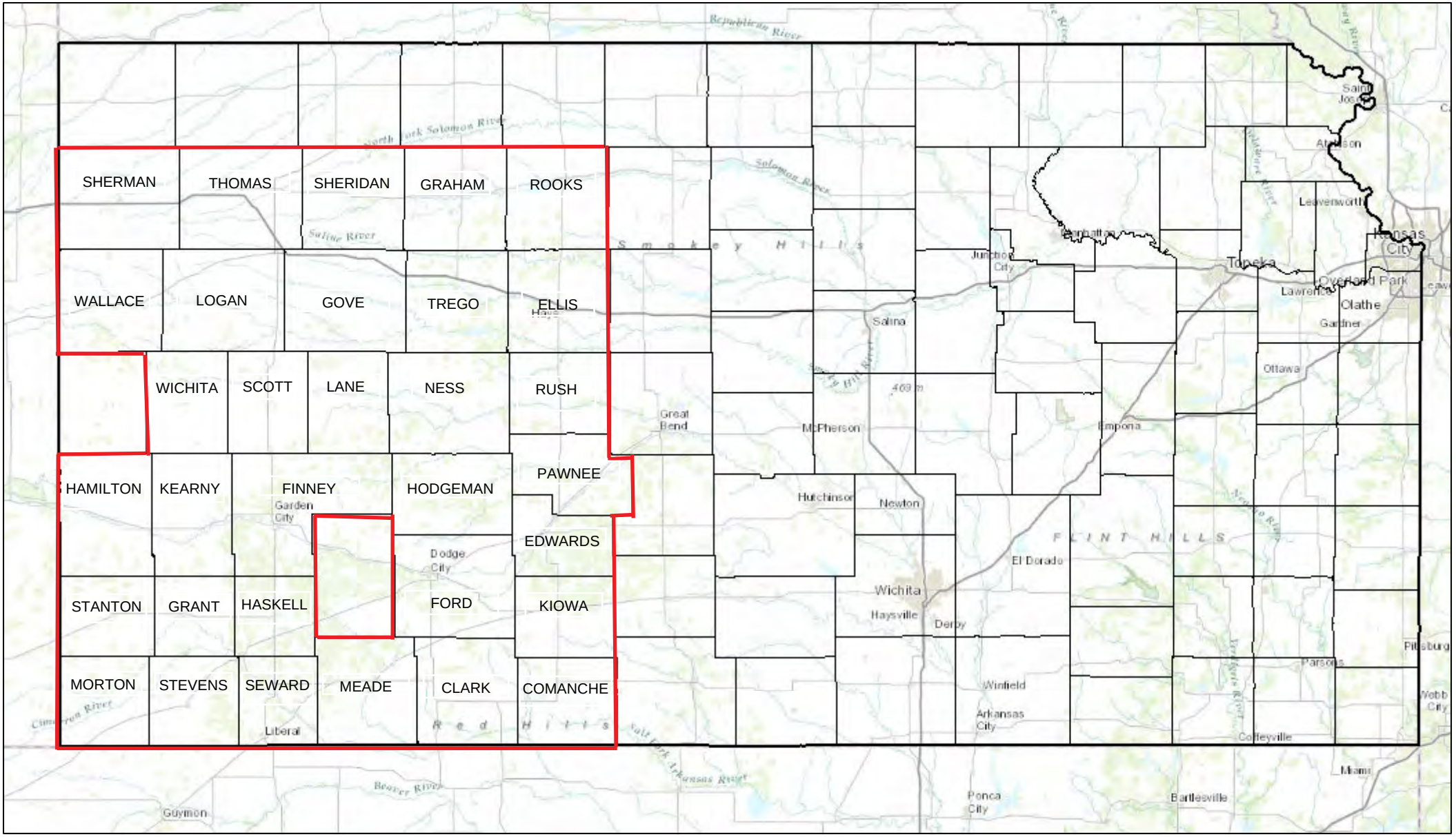
[20] 42 USC 4332 (G)

[21] 43 USC 1712(c)(9)

[22] 44 USC 3504(d)(1) Section 515

APPENDIX - A

Coalition Map



October 12, 2013

Kansas State Boundary

Kansas County Boundaries

1:3,172,438

0 25 50 100 mi

0 40 80 160 km

Kansas Applied Remote Sensing Program (KARS) / Kansas Biological Survey
Sources: Esri, DeLorme, NAVTEQ, TomTom, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, and the GIS User

APPENDIX - B

USFWS PECE Forms

Current Conservation Actions – Species and Habitat Maintenance					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Habitat Restoration	Beginning in 2005, a 5,000-acre tract west of US 83 and south of the Arkansas River in Finney County was restored to native Lesser Prairie Chicken habitat. The near-contiguous, multi-use parcel was converted from agricultural use to mixed-grass, sand sagebrush habitat that included underground placement of electrical lines. The tract now serves as a water-well field with limited access, permit-only hunting. Many species have been observed to reside there. One objective is to encourage similar projects in mixed-grass, sand sagebrush habitat regions.	Conversion and Ongoing Conservation		2 Private Corporations	

Current Conservation Actions – Species and Habitat Maintenance					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Multi-use Farm, Range and Native, Habitat Management	In 1999, a contiguous 3,532-acre mixed-use tract that blends farm, range and successful habitat-management principals was developed in Sherman County. The native buffalo and short-grass parcel, which includes 600 farmland acres and maintained, year-round wildlife watering points, has been successfully managed using Holistic principles.[23] Through carefully executed rest/rotation grazing management of bison, the plant mix now includes sizable medium and tall grass stands, including substantial tracts of little blue stem. For its part, the farmland is managed with cover crops desirable for wintering of wildlife. Typically farm plantings are left unharvested until winter when bison and desirable avian species such as the Lesser Prairie Chicken graze on them. In 2011, range transects were established and data, including fixed point photos, are recorded annually by range consultant Kirk Gadzia. These data and photographs are available for other fledgling projects.	Ongoing	None	None	

[23] Holistic Principals were developed and recommended by Allan Savory.

Current Conservation Actions – Species and Habitat Maintenance					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Collaborative Invasive Species Control	Barber County is host to aggressive invasive-species and wildlife-habitat restoration programs. In 2013, the county scheduled burning of several thousand acres, with over 100,000 acres planned for burning as part of its Burn Control Plan. Because the Eastern Red Cedar poses a significant threat to wildlife, including Lesser Prairie Chicken, the county maintains a collaborative tree cutting program under EQUIP, WHIP, and a private initiative called "*Mulch and Pellet*." Under the Mulch and Pellet program Eastern Red Cedar trees are cut, chipped and processed into pellet fuel for wood burning stoves - followed by prescribed land burning to ensure sterilization. Once eradicated, maintenance against the Eastern Red Cedar is assured through a County-wide Noxious Weed control program.	Ongoing	County	Public - KDWPT; NRCS: EQUIP, WHIP. Private - Mulch and Pellet initiative	

Current Conservation Actions – Species and Habitat Maintenance					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Utility line collision potential and electrocution mitigation	The potential for avian collision and electrocution hazards with electric utility lines exist. Most municipal and cooperative utilities in the coalition area have avian protection programs to protect birds, including Lesser Prairie Chickens from electrocution and collision potential. As part of new construction or major maintenance, these programs typically contemplate installation of longer cross-arms (increases conductor spacing), covered jumpers and bushing covers (insulates pole and substation equipment). Some utilities also include roost guards in new construction or major maintenance. These changes can reduce raptor lighting potential thought by some biologists to be one reason for Lesser Prairie Chicken avoidance behaviors. One study objective is to examine the effectiveness of utility collision and electrocution mitigation programs, and if beneficial to the Lesser Prairie Chicken, encourage modifications during line reconstruction or reconductor changes.	Ongoing programs	USDA RUS; municipalities and cooperatives	RUS	ESM 02.002.01

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Habitat Fragmentation	The baseline scientific data required to determine the effect of Habitat Fragmentation on a Range-wide basis does not exist. USFWS specifically notes the absence of biological features, habitat area requirements, optimum habitat corridors, and spatial requirements as absent in their listing proposal.[24] Because the region governed by the Coalition is nearly entirely private property, it is necessary to determine *minimum* Lesser Prairie Chicken population-level parcel sizes, fundamental habitat parameters and corridors necessary to sustain a home range of several (6-10) leks.[25] This study objective proposes to establish baseline parameters necessary to sustain a population, including nesting, roosting and feeding sites. The usefulness of a lek-density and interlek-distance index to habitat quality should also be investigated.[26] Because lek and display sites have been demonstrated to occupy areas discounted by USFWS as habitat (abandoned oil-drilling pads, unimproved and low-traffic roads, bare and recently burned areas, heavily grazed or cultivated fields, transmission utility corridors, etc.), a balanced multi-land use habitat study must include and evaluate these areas. Since available conclusions for establishing minimum population-level parcel sizes (and habitat fragmentation) are both incomplete and conflicting[27,28,29] the basis for the concept of "Minimum Stronghold" needs investigation.	Proposed	KDWPT, Academia, USFWS	USFWS, Private	

[24] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73886
[25] Appegate and Riley, 1998
[26] Crawford (1974), Locke (1992), and Giesen (1994)
[27] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[28] Id., p. 73836
[29] Data Do Not Support The Proposed Listing of Lesser Prairie Chicken. Center for Environmental Science, Accuracy & Reliability.

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Assessment**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Population Counts, Extirpation Potential, Genetic Isolation and Hybridization	The best available scientific data[30] demonstrates Lesser Prairie Chicken populations to be increasing and the likelihood of range-wide extinction to be very low. Using population reconstruction models and annual lek counts, range-wide population growth parameters and quasi-extinction probabilities were estimated.[31] The data indicate, on a range-wide basis, a low extinction probability within 86% of the species distribution and a annual population growth of 6.9% - reversing pre-candidacy (1980-1997) annual population declines of 3.7%. Scientific conclusions that Lesser Prairie Chicken populations are stable appear in conflict with the USFWS Listing Proposal that habitat fragmentation and manmade factors make individual populations subject to extirpation.[32] The large difference in population counts is possibly due to the consistency, methodology and accuracy of the population counts themselves. One study objective is to utilize the WAFWA and Texas Tech methodologies for future population abundance and density counts, and identify limiting factors such to ensure continuity over time and range. This study objective would include evaluation of historical population counts within the context of current methodologies to establish marginal data sets or techniques and focus on detailed maps with accurate resolution. Substantial literature conflicts exist as to the significance of genetic hybridization resulting from reductions in historic range and habitat fragmentation. Lesser and Greater Prairie Chickens are similar genetically and both species easily hybridize.[33] The current level of hybridization at range junctions appears sufficient to potentially lead to merging of the two species. A study of genetic monitoring between Greater and Lesser Prairie Chickens, with establishment of bright-line data and diversity factors which could constitute genetic isolation or decreased genetic variability is necessary before substantive conclusions regarding hybridization may be drawn.	Proposed	KDWPT, Academia, USFWS	USFWS, other	

[30] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group*; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702.

[31] *Data Do Not Support the Proposed Listing of Lesser Prairie Chicken*. Center for Environmental Science, Accuracy & Reliability. P.7

[32] Ibid., p. 73883

[33] (Gutierrez et al. 2000)

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Assessment**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Structures, Utility Corridors and General Avoidance	The body of scientific data demonstrating Lesser Prairie Chicken avoidance of electrical transmission corridors and wind structures is limited, anecdotal and conflicting. While Hagan, et al. found Lesser Prairie Chickens exhibited general preference to avoid power lines and buildings, the same study found those birds nesting in newly-constructed transmission corridors to have similar nest success as non-corridor populations. Other avian avoidance studies also have conflicting findings. Vodenal, et. al. found Greater Prairie Chickens to lek, nest and brood in the proximity of a Nebraska wind farm, despite the presence of localized, towering wind structures. Because some Lesser Prairie Chicken Conservation Plans have already proposed mitigation frameworks based upon the concept of avoidance, a quantitative, independently reviewed and science-based study of actual nest success, site fidelity, propensity to cross utility corridors, and numerical evaluation of avoidance tendencies of the Lesser Prairie Chicken is necessary before conclusions about avoidance tendencies may be drawn. While anthropogenic structures do present logistical impediments to Lesser Prairie Chicken movement, the literature clearly demonstrates Lesser Prairie Chickens to navigate across all anthropogenic sources - including power lines - in search of forage[34], winter riparian areas,[35] or more preferred, mixed-grass habitats. Electrical transmission and distribution poles provide enhanced vantage and rest opportunities for raptors, and Lesser Prairie Chickens (and other vulnerable prey) elect to build nests in more preferable, mixed-grass habitats which provide better cover. A study objective which considers specific nest-success factors in utility corridors having mixed-grass habitats is necessary to distinguish if actual nest success is decreased as a result of the presence of transmission lines, or if Lesser Prairie Chickens display a more general aversion to tall, anthropogenic and natural structures alike.	Proposed	KDWPT, Academia, USFWS	USFWS	

[34] Copelin, 1963, Taylor and Guthery, 1980.

[35] Schwilling, 1955

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Agricultural Conversion	The rate of native prairie conversion to agricultural use has slowed since the 1990s, and the net, per-year area of converted acres appears stable.[36] Significant data conflicts exist as to the degree ongoing agricultural conversions may have, if any, on the Lesser Prairie Chicken or if conversion stabilization has been reached. Because maximum numbers of Lesser Prairie Chickens have been found in areas planted between 5-37% of grain sorghum,[37] and nesting females commonly use agricultural areas planted with corn and alfalfa as winter forage grounds, quantitative data to assess stabilization and define conversion parameters is necessary for accurate conservation planning. This study objective assesses the degree and current conversion rate of native prairie to agricultural/industrial use as baseline to Lesser Prairie Chicken populations in the Sand Sagebrush Prairie ecoregion. One element of this study must include analysis of human behavioral factors involved in private owners deciding (or not) to enroll in governmental habitat and land-sequestration programs (EQUP, CRP, WHIP, etc.)	Proposed	KDWPT, NRCS	USFWS	

[36] Rogers and Hoffman 2005

[37] Crawford, 1974

Conservation Actions - Research Needs and Justification					
Threats or Conditions	**Status, Needs and Conservation Action**	**Completion Dates**	**Lead Agency**	**Funding Sources**	**Authorities**
Livestock Grazing Regional Impacts	The potential, direct, and range-wide effect or benefits from livestock grazing and rotation are largely unknown, including to USFWS.[38] Because ranching is a significant part of the economic and cultural base of western Kansas, the grazing and livestock trampling on Lesser Prairie Chicken habitat must be quantified.[39,40] One study objective is to quantify the vegetative limits of when grazing may lead to conversion from mixed-grass to shortgrass-dominated habitats, possibly resulting in a decline of nesting habitats.[41] Another study objective is to evaluate and quantify the benefits of grazing and trampling in reducing vegetation canopy effects on understory vegetation. This study objective should in particular evaluate and replicate the benefits to Lesser Prairie Chicken habitats from massive and transient bison herds. Other study objectives include definition of rangeland rotation variables in concert with species habitat co-optimization and effectiveness of mechanical controls such as cross-fencing and fence marking. By examining multiple land-use parameters, the technical support for well-rounded conservation decision-making will be made available to coalition members.			NRCS; EQUIP/WHIP; USDA/KSU Grant for Beef grazing systems.	

[38] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843

[39] 40 CFR § 1508.8

[40] Executive Order 12630

[41] Hoffman 1963, Jackson and DeArment 1963, Litton et al. 199).

APPENDIX - C

Kansas Natural Resource Coalition
Contact Information

Table 1 Kansas Natural Resource Coalition				
County	**Address**	**Phone**	**County Clerk**	**Land Area**
Clark County	913 Highland Ashland 67831	(620) 635-2813	Rebecca Mishler	975
Comanche County	Box 776 Coldwater 67029	(620) 582-2361	Alice Smith	788
Edwards County	312 S. Massachusetts Kinsley 67547	(620) 659-3000	Gina Schuette	622
Ellis County	1204 Fort St., Box 720 Hays, KS 67601	(785) 628-9410	Donna Maskus	900
Finney County	PO Box M Garden City 67846	(620) 272-3575	Elsa Ulrich	1,302
Ford County	100 Gunsmoke Dodge City 67801	(620) 227-4550	Sharon Seibel	1099
Gove County	PO Box 128 Gove 67736	(620) 938-2300	Doug Press	1,072
Graham County	410 Pomeroy Hill City 67642	(785) 421-3453	Jana Irby	899
Grant County	108 S. Glenn Ulysses 67880	(620) 356-1335	Sheila Brown	575
Hamilton County	PO Box 1167 Syracuse 67878	(620) 384-5629	Angie Moser	997
Haskell County	PO Box 518 Sublette 67877	(620) 675-2263	Sharon L. Hinkle	578
Hodgeman County	PO Box 247 Jetmore 67854	(620) 357-6421	Sarah Rains	860
Kearny County	PO Box 86 Lakin 67860	(620) 355-6422	Jana Jenkinson	871
Kiowa County	211 E. Florida Greensburg 67054	(620) 723-3366	Kristie Odle	723
Lane County	PO Box 788 Dighton 67839	(620) 397-5356	Crysta S. Torson	717
Logan County	710 W. 2nd Oakley 67748	(785) 671-4244	Crystal Rucker	1,073
Meade County	P.O. Box 278 Meade 67864	(620) 873-8700	Janet Hale	980
Morton County	PO Box 1116 Elkhart 67950	(620) 697-2157	Gina Castillo	724
Ness County	202 W. Sycamore Ness City 67560	785-798-2401	Renee S. Kerr	1,075
Pawnee County	715 Broadway Larned 67550	(620) 285-3721	Ruth Searight	755
Rooks County	115 N. Walnut Stockton, 67669	(785) 425-6391	Clara Strutt	895
Rush County	P.O. Box 220 LaCrosse 67548	(785) 222-2731	Corinne Baldwin	718
Scott County	303 Court Scott City 67871	(620) 872-2420	Pamela J. Faurot	718
Seward County	515 N. Washington Liberal 67901	620-626-3355	Stacia Long	640
Sheridan County	Box 899 Hoxie 67740	(785) 675-3361	Paula Bielser	897
Sherman County	813 Broadway Goodland 67735	(785) 890-4802	Janet R. Rumpel	1,056
Stanton County	PO Box 190 Johnson 67855	(620) 492-2140	Sandra Barton	680
Stevens County	200 E. 6th Hugoton 67951	(620) 544-2541	Pam Bensel	728
Thomas County	300 N. Court St. Colby 67701	(785) 460-4500	Shelly Harms	1,075
Trego County	216 N. Main WaKeeney 67672	(785) 743-5773	Lori Augustine	889
Wallace County	PO Box 70 Sharon Springs 67758	(785) 852-4282	Jacalyn Mai	914
Wichita County	206 S. 4th Leoti 67861	(620) 375-2731	Carol Cary	719

APPENDIX - D

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APPENDIX - E

Definitions and Glossary

DEFINITIONS

Adaptive Management	A scientific approach to adaptive management of wildlife populations requires that threats and management actions be treated as potentially falsifiable hypotheses, rather than certain knowledge. If the presumed threats to a population are ranked in order of importance (based on plausible cause and effect mechanisms), then even hypothetical threats can be prioritized and subsequently investigated in a scientific manner.	
Best Available Science	The best available science is that body of reproducible and credible data, information and studies that are collectively available to the average person under normal circumstances.	
Best Management Practices (BMPs)	A suite of techniques that guide or may be applied to management actions to aide in achieving desired outcomes. BMPs are often developed in conjunction with land use plans, but they are not considered a planning decision unless the plans specify that they are mandatory.	
Brood Rearing Habitat	Brood rearing habitats are utilized after chicks have hatched, and are generally more mesic (moist) areas with a higher percentage of forbs and grasses which help provide higher densities of insects, plant material, and seeds for chicks, hens, as well as males during the summer and early fall months. Specifically: • Sagebrush cover is from 10 to 30% • Cover of Mixed Mountain Shrubs is not more than 10% > Distance to nearest Forest is over 100 meters • Distance to Shrubby Woodlands is over 50 meters	
Categorical Exclusion (CX)	A category of actions that do not individually or cumulatively have a significant effect on the human environment and have been found to have no such effect in procedures adopted by a Federal agency pursuant to NEPA.	40 CFR 1500.4(p) 40 CFR 1500.5(k) 40 CFR 1501.4(a) 40 CFR 1507.3(b) 40 CFR 1508.4
Collaborate	To work together with another toward a common goal, especially in an intellectual endeavor; as, four chemists collaborated on the synthesis of the compound; three authors collaborated in writing the book.	Webster's Revised Unabridged Dictionary
Conserve	To cause no degradation or loss of Prairie-Chicken habitat. Conserve can also refer to maintaining intact Shortgrass Prairie, CRP Mosaic, Mixed Grass Prairie and Sand Sagebrush Prairie by fine tuning livestock use, watching for and treating new invasive species, and maintaining existing range improvements that benefit Prairie-Chicken, etc.	
Consistent	Possessing firmness or coherence; marked by harmony, regularity, or steady continuity; free from variation or contradiction.	Webster's Revised Unabridged Dictionary
Cooperation	The act of cooperating, or operating together to one end; joint operation; concurrent effort or labor.	Webster's Revised Unabridged Dictionary
Coordinate	Equal in rank or order; not subordinate.	Webster's Revised Unabridged Dictionary

Coordination	(1) The act of coordinating; the act of putting in the same order, class, rank, dignity, etc.; as, the coordination of the executive, the legislative, and the judicial authority in forming a government; the act of regulating and combining so as to produce harmonious results; harmonious adjustment as, a coordination of functions. (2) a process by which local government and federal agencies are to meet in a government to government dialogue in order to attempt to reach consistency between federal plans and actions and local plans and policies.	Webster's Revised Unabridged Dictionary
Coordination Meeting	A government-to-government meeting between a government agency or agencies and the Coalition. These meetings are public meetings, publicly noticed with agenda provided in advance. While public comment is not received during the meeting, the public is encouraged to attend regular Coalition meetings as the intent is for the coordination process to be open and transparent to the public. For the coordination meeting, the discussion is between federal agencies and the Coalition and is for the purpose of fulfilling the coordination duty, informing the agencies and Coalition of relevant projects, plans, studies and management activities. It is also the forum for discussion towards the resolution of unresolved conflicts between the counties policies, plans and the agencies programs.	
Coordination Process	A process mandated by federal law that requires federal agencies to coordinate their plans, programs and management activities with local governments. The minimum parameters of this process were defined by Congress at 43 USC 1712(c)(9) and prescribe that the agencies: (1) keep apprised of State, local, and tribal land use plans; (2) assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; (3) assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans; (4) provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands; and (5) make land use plans consistent with State and local plans to the maximum extent the Secretary finds consistent with Federal law.	Federal Land Policy and Management Act, 43 USC 1701
Early Application of NEPA	Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to reduce potential conflicts.	40 CFR 1501.2
Enhance	The improvement of habitat by increasing missing or modifying unsatisfactory components and/or attributes of the plant community to meet prairie-chicken objectives. Examples include modifying livestock grazing systems to improve the quantity and vigor of desirable forbs, improving water flow in riparian areas by modifying existing spring developments to return more water to	

	the riparian area below the development, or marking fences to minimize prairie-chicken hits and mortality.	
Environmental Assessment	A concise public document, prepared in compliance with NEPA, that briefly discusses the purpose and need for an action, alternatives to such action, and provides sufficient evidence and analysis of impacts to determine whether to prepare an environmental impact statement or finding of no significant impact.	40 CFR 1508.9
Environmental Assessment-When	(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement. (b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decision making.	40 CFR 1501.3
Environmental Impact Statement	A detailed written statement required by section 102(2)(C) of NEPA, analyzing the environmental impacts of a proposed action, adverse effects of the project that cannot be avoided, alternative courses of action, short-term uses of the environment versus the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitment of resources.	40 CFR 1508.11
Environmental Impact Statement-When	It is important to be as objective as possible when making a determination as to whether to prepare an EIS. One or more of the following criteria, depending on the severity and duration of effects, may trigger the preparation of an EIS. (a) Controversy over environmental effects (e.g., major scientific or technical disputes or inconsistencies over one or more environmental effects). (b) Change in policy having a major positive or negative environmental effect. (c) Precedent-setting actions with wide-reaching or long-term implications (e.g., special use permits for off-road vehicles, mineral extraction, new road construction). (d) Major alterations of natural environmental quality, that may exceed either local, State, or Federal environmental standards. (e) Exposing existing or future generations to increased safety or health hazards. (f) Conflicts with substantially proposed or adopted local, regional, State, interstate, or Federal land use plans or policies, that may result in adverse environmental effects. (g) Adverse effects on designated or proposed natural or recreation areas, such as wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine sanctuaries, national recreation areas, habitat conservation plan areas, threatened and endangered species, fish hatcheries, wildlife refuges, lands acquired or managed with Dingell-Johnson/Pittman-Robertson funds, unique or major wetland areas, and lands within a 100-year floodplain. (h) Removal from production of prime and unique agricultural lands, as designated by local, regional, State, or Federal	

	authorities; in accordance with the Department's Environmental Statement Memorandum No. ESM 94-7. (i) Adverse effects on municipal, industrial, or agricultural water supply or quality; or major consumptive use or other long-term commitment of water. (j) Condemnation of property rights or fee title to land; or large-scale relocation of people, homes, commercial, industrial, or major public facilities.	
Federal Agency	All agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.	40 CFR 1508.12
Finding of No Significant Impact-FONSI	A document prepared in compliance with NEPA, supported by an environmental assessment, that analyzes whether a Federal action will have no significant effect on the human environment and for which an environmental impact statement, therefore, will not be prepared.	40 CFR 1508.13
Governmental Information	Governmental information means information created, collected, processed, disseminated, or disposed of by or for the Federal Government.	
Human Environment	Includes the natural and physical environment and the relationship of people with the environment.	40 CFR 1508.13 40 CFR 1508.14
Influential	Influential, when used in the phrase "influential scientific, financial, or statistical information", means that the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions.	66FR 49718 September 28, 2001
Information	Information means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate.	
Integrity	Integrity refers to the security of information – protection of the information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.	66 FR 49718 September 28, 2001
Late Brood Rearing Area	Habitat includes mesic sagebrush and mixed shrub communities, wet meadows, and riparian habitats as well as some agricultural lands (e.g. alfalfa fields, etc).	
Lek	A traditional courtship display area attended by male sage -grouse in or adjacent to sagebrush dominated habitat. A lek is designated based on observations of two or more male sage-grouse engaged in courtship displays. Sub-dominant males may display on itinerant strutting areas during population peaks. Such areas usually fail to become established	Connelly et al 2000, Connelly et al. 2003, 2004

	leks. Therefore, a site where less than five males are observed strutting should be confirmed active for two years before meeting the definition of a lek.	
Lek, Active	Active leks are defined as locations where ≥ 2 males have been observed and documented as actively courting females in the last two years the lek was surveyed.	Doherty et al 2011
Lek Complex	A lek or group of leks within 2.5 km (1.5 mi) of each other between which male sage-grouse may interchange from one day to the next. Fidelity to leks has been well documented. Visits to multiple leks are most common among yearlings and less frequent for adult males, suggesting an age-related period of establishment	Connelly et al. 2004
Lek, Inactive	Any lek where sufficient data suggests that there was no strutting activity throughout a strutting season. Absence of strutting prairie-chicken during a single visit is insufficient documentation to establish that a lek is inactive. This designation requires documentation of either: 1) an absence of prairie-chicken on the lek during at least 2 ground surveys separated by at least seven days. These surveys must be conducted under ideal conditions (April 1-May 7 (or other appropriate date based on local conditions), no precipitation, light or no wind, half-hour before sunrise to one hour after sunrise) or 2) a ground check of the exact known lek site late in the strutting season (after April 15) that fails to find any sign (tracks, droppings, feathers) of strutting activity. Data collected by aerial surveys should not be used to designate inactive status as the aerial survey may actually disrupt activities.	
Major Federal Action	Actions with effects that may be major and which are potentially subject to Federal control and responsibility.	40 CFR 1508.18
Mandate, NEPA	Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.	40 CFR 1500.3

Meaningful Participation, Doctrine of	Timely, mutual inclusion of local governments in seeking consistency with local plans and policies including full disclosure, transparency monitoring and full availability of meaningful scientific data, information and studies.	
Mitigation	Compensating for resource impacts by replacing or providing substitute resources or habitat.	
Multiple Use	The management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.	Federal Land Policy and Management Act, 43 USC 1702(c)
National Environmental Policy Act of 1969 (NEPA)	Requires all federal agencies to examine the environmental impacts of their actions, incorporate environmental information, and utilize public participation in the planning and implementation of all actions. Federal agencies must integrate NEPA with other planning requirements and prepare appropriate NEPA documents to facilitate better environmental decision making. NEPA requires federal agencies to review and comment on federal agency environmental plans/documents when the agency has jurisdiction by law or special expertise with respect to any environmental impacts involved.	42 U.S.C. 4321-42 U.S.C. 4327 40 CFR 1500-40 CFR 1508
Nesting Habitat	Nesting habitat is generally moderately sized patches of denser and taller sagebrush, further away from roads and other activity areas. Specifically: • Sagebrush cover is from 20 to 50% • Cover of Mixed Mountain Shrubs is not more than 10% • Distance to nearest Forest is over 100 meters • Distance to Shrubby Woodlands is over 50 meters	
Notification	The Agencies must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. However, the methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.	43 CFR 46.305 (a)

Objectivity	Objectivity involves two distinct elements, presentation and substance. Objectivity includes whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner. This includes whether the information is presented within a proper context. Objectivity includes the requirement to identify all sources of the disseminated information and, in a scientific, financial, or statistical context, the supporting data and models so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. Objectivity also includes a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods.	66 FR 49718 September 28, 2001
Offsite Mitigation	Compensating for resource impacts by replacing or providing substitute resources or habitat at a different location than the project area.	
Proposal	Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.	40 CFR 1508.23
Quality	Quality is an all encompassing term in Data Quality Act comprising utility, objectivity, and integrity.	66 FR 49718 September 28, 2001
Range Improvement	Any activity, structure or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife. The term includes, but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results.	
Reproducibility	Reproducibility means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more (less) important impacts, the degree of imprecision that is tolerated is reduced (increased).	
Restoration	Implementation of a set of actions that promotes plant community diversity and structure that allows plant communities to be more resilient to disturbance and invasive species over the long term. The long-term goal is to create functional, high quality habitat that is occupied by prairie-chicken. Short-term goal may be to restore the landform, soils and hydrology and increase the percentage of preferred vegetation, seeding of desired species, or treatment of undesired species.	

Scientific Accuracy	Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.	40 CFR 1502.24
Significantly	as used in NEPA, requires considerations of both context and intensity: (a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant. (b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action.	40 CFR 1508.27
Social Effects	(a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.	40 CFR 1508.8
Suitable Habitat	Suitable Habitat includes all seasonal habitats (including lekking, nesting, brood rearing/summer and winter habitats) within the Plan area. Specifically, Suitable Habitat includes: • Sagebrush cover is from 10 to 50% • Cover of Mixed Mountain Shrubs is not more than 20% • Distance to nearest Forest is over 100 meters • Distance to Shrubby Woodlands is over 50 meters • Grass/forb dominated habitats (with >10% sagebrush cover) within 20 meters of • sagebrush habitat • Contiguous habitats >3 acres in size, or part of a block of Suitable Habitats in close proximity	

Temporarily Disturbed Areas	Areas that have seen recent vegetation disturbance activities (such as pipeline corridors and wildfire events) may not support sagebrush cover at a density or height suitable for sage-grouse use. If these areas occur within a block of Suitable Habitat, they will be considered Temporarily Disturbed, and still would be considered as long-term as Suitable Habitat. Temporarily Disturbed habitat will need to be tracked spatially within the Plan area.	
Utility	Utility is the usefulness of the information to its intended users, including the public. In assessing the usefulness of information that the Federal Agencies disseminate to the public, the Agencies need to consider the uses of the information not only from the perspective of the Agency but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information's usefulness from the public's perspective, the Agency must take care to ensure that transparency has been addressed in its review of the information.	FR 6649718 September 28, 2001

APPENDIX - F

County Resolutions

Resolution No. 13___

A Resolution of _____ Board of Commissioners
Adopting
The Lesser Prairie Chicken Conservation, Management and Study Plan

WHEREAS, The Lesser Prairie Chicken (*Tympanuchus pallidicinctus)* is an upland grouse species found in four ecosystem regions in parts of Texas, Oklahoma, New Mexico, Kansas and Colorado, including, as potential this County;

WHEREAS, The limited, disaggregated and incomplete body of human, procedural and scientific data for the Lesser Prairie Chicken suggests current regional policymaking and planning efforts for the Lesser Prairie Chicken to be premature;

WHEREAS, The Lesser Prairie Chicken is not in immediate or long term threat of extirpation, threatened throughout its range, nor in jeopardy of genetic hybridization;

WHEREAS, the Lesser Prairie Chicken Conservation, Management and Study Plan provides immediate conservation actions, proposes collaborative, peer-review of scientific data and information, and outlines meaningful study actions to address data gaps, omissions and needs;

WHEREAS, the Lesser Prairie Chicken Conservation, Management and Study Plan contains Conservation principles, actions and policies designed to manage and conserve the Lesser Prairie Chicken over the long term;

WHEREAS, The Lesser Prairie Chicken Conservation, Management and Study Plan provides for consistency of conservation activities between County, State and Federal initiatives through Government-to-Government coordination of activities invoked by the NRCP and this plan;

WHEREAS, the U.S. Fish and Wildlife Service is proposing to list the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.

NOW THEREFORE, BE IT RESOLVED THAT THE BOARD OF COUNTY COMMISSIONERS OF _____COUNTY, KANSAS RESOLVE TO:

1. ADOPT The principals, practices and policies of Lesser Prairie Chicken Conservation, Management and Study Plan;
2. PROMOTE, as outlined in the Lesser Prairie Chicken Conservation, Management and Study Plan, the conservation recommendations to residents, landholders, agricultural interests and industry as appropriate.

This Resolution was approved and adopted this _____ day of August, 2013.

BOARD OF COUNTY COMMISSIONERS:

_____COUNTY, KANSAS

_____
Chairman

_____
Member

_____
Member

_____
ATTEST: County Clerk

Name: KNRC

Comments: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners, to:

Docket ID: FWS-R2-ES-2013-0134March 10, 201410:45 p.m. CDT

Previously submitted to:

Docket Number: FWS-R2-ES-2012 - 0071

In the attached Memorandum dated 1 September 2010, then Secretary of Kansas Department of Wildlife and Parks, (KDWP) J. Michael Hayden declared to KDWP Assistant Secretary Keith Sexson and KDWP Landowner Incentive Program Coordinator Murray Laubhan that pursuant to the general powers of the Secretary, as well as those enumerated in the Nongame and Endangered Species Conservation Act, he accepted the recommendation of the Threatened and Endangered Species Task Committee (Task Committee) and denied the petition submitted by the Kansas Ornithological Society for listing of the Lesser Prairie-Chicken as threatened within the State of Kansas.

The attached Memorandum bundle additionally includes the Task Committees' report, which Secretary Hayden accepted the recommendation within the report that the Lesser Prairie-Chicken "remain unlisted."

The report states, "The full review process of the Task Committee included investigating scientific literature, reanalyzing the lek data, conducting four informational meetings, and questioning an ad hoc committee of nine prairie grouse experts. This year-long process led to a decision from the Task Committee to recommend that the LEPC remain unlisted in Kansas. This recommendation is provided to the KDWP Secretary.

The decision of the T&E Task Committee that the LEPC remain unlisted was based on the following reasons:

1. Kansas has a relatively robust population of Lesser Prairie-Chickens when compared to other states within its present range. The documentation of over 200lek sites north of the Arkansas River since 1990 in an area where the population was sparse or nonexistent in recent decades is significant. This might be attributed to the past NRCS policy decision to use native prairie grasses to establish CRP cover and the proximity of those CRP acres to existing rangeland habitat.

2. The threat of habitat loss due to expiring CRP contracts has lessened due to federal agricultural policies that target renewal of CRP contracts to focus on LEPC habitat. One of the Conservation Priority Areas in Kansas is specifically designated for the LEPC.

3. The threat of habitat fragmentation from energy development remains an uncertainty, but recent efforts to protect LEPC habitat are recognized. These include voluntary avoidance of habitat, pending recommendations from the Wind Turbine Advisory Committee, and federal grants under the Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy Habitat Conservation Plan (HCP).

4. There is currently not enough known about the effects of energy development on LEPC habitat to assume developed areas will preclude LEPC use.

5. Several ongoing and pending conservation actions directly or indirectly target habitat used by the LEPC. These efforts beneficially affect a significant area within the LEPC range and represent a commitment of finances and manpower towards protecting the species. These include the efforts of the Playa Lakes Joint Ventures, the Interstate LEPC Working Group, USFWS Partners for Wildlife Program, federal Environmental Quality Incentive Program (EQUIP), Wildlife Habitat Incentives Program (WHIP), and the Landowner Incentives Program (LIP). These efforts may be less effective or less extensive if the species was listed as Threatened or Endangered.

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Your Voice in Federal Decision-Making Submitted 1_9_14 to Docket Number: FWS-R2-ES-2012 - 0071

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The **Fish and Wildlife Service** (FWS) Proposed Rule: **Endangered and Threatened Wildlife and Plants: Listing the Lesser Prairie-Chicken as a Threatened Species with a Special Rule**

For related information, **Open Docket Folder**

3 Your Receipt

Your Comment Tracking Number: **1jy-89ry-ezgz**	Your comment will be viewable on Regulations.gov after the agency has reviewed it, which may be an indefinite amount of time. Use your tracking number to find out the status of your comment.

Your comment:

Comment: Submission of the KANSAS NATURAL RESOURCE COALITION (KNRC), a coalition of 32 western Kansas Local Government Boards of County Commissioners:

In the attached Memorandum dated 1 September 2010, then Secretary of Kansas Department of Wildlife and Parks, (KDWP) J. Michael Hayden declared to KDWP Assistant Secretary Keith Sexson and KDWP Landowner Incentive Program Coordinator Murray Laubhan that pursuant to the general powers of the Secretary, as well as those enumerated in the Nongame and Endangered Species Conservation Act, he accepted the recommendation of the Threatened and Endangered Species Task Committee (Task Committee) and denied the petition submitted by the Kansas Ornithological Society for listing of the Lesser Prairie-Chicken as threatened within the State of Kansas.

The attached Memorandum bundle additionally includes the Task Committees' report, which Secretary Hayden accepted the recommendation within the report that the Lesser Prairie-Chicken "remain unlisted."

The report states, "The full review process of the Task Committee included investigating scientific literature, reanalyzing the lek data, conducting four informational meetings, and questioning an ad hoc committee of nine prairie grouse experts. This year-long process led to a decision from the Task Committee to recommend that the LEPC remain unlisted in Kansas. This recommendation is provided to the KDWP Secretary.

The decision of the T&E Task Committee that the LEPC remain unlisted was based on the following reasons:

1. Kansas has a relatively robust population of Lesser Prairie-Chickens when compared to other states within its present range. The documentation of over 200lek sites north of the Arkansas River since 1990 in an area where the population was sparse or nonexistent in recent decades is significant. This might be attributed to the past NRCS policy decision to use native prairie grasses to establish CRP cover and the proximity of those CRP acres to existing rangeland habitat.

2. The threat of habitat loss due to expiring CRP contracts has lessened due to federal agricultural policies that target renewal of CRP contracts to focus on LEPC habitat. One of the Conservation Priority Areas in Kansas is specifically designated for the LEPC.

3. The threat of habitat fragmentation from energy development remains an uncertainty, but recent efforts to protect LEPC habitat are recognized. These include voluntary avoidance of habitat, pending recommendations from the Wind Turbine Advisory Committee, and federal grants under the Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy Habitat Conservation Plan (HCP).

4. There is currently not enough known about the effects of energy development on LEPC habitat to assume developed areas will preclude LEPC use.

5. Several ongoing and pending conservation actions directly or indirectly target habitat used by the LEPC. These efforts beneficially affect a significant area within the LEPC range and represent a commitment of finances and manpower towards protecting the species. These include the efforts of the Playa Lakes Joint Ventures, the Interstate LEPC Working Group, USFWS Partners for Wildlife Program, federal Environmental Quality Incentive Program (EQUIP), Wildlife Habitat Incentives Program (WHIP), and the Landowner Incentives Program (LIP). These efforts may be less effective or less extensive if the species was listed as Threatened or Endangered.

Uploaded File(s)(Optional)

- KDWP_Final_Decision_1_Sept_2010 LPC not threatened.pdf: **success**

This information will appear on Regulations.gov:

First Name: Natural ResourceCoalition
Last Name: Local Government - KS
Country: United States
Government Agency Type: Local
Government Agency: 32-Kansas Boards of County Commissioners

This information will **not** appear on Regulations.gov:

Email Address: KNRC.counties@gmail.com

KANSAS
DEPARTMENT OF WILDLIFE AND PARKS

Mark Parkinson, Governor
J. Michael Hayden, Secretary

www.kdwp.state.ks.us

MEMORANDUM

TO: Keith Sexson and Murray Laubhan

FROM: J. Michael Hayden

DATE: 1 September 2010

RE: Lesser Prairie-Chicken Listing Petition

Pursuant to the general powers of the Secretary as well as those enumerated in the Nongame and Endangered Species Conservation Act, I am accepting the recommendations of the Threatened and Endangered Species Task Committee and denying the petition submitted by the Kansas Ornithological Society for listing of the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) as threatened within the State of Kansas.

OFFICE OF THE SECRETARY
1020 S. Kansas Ave., Suite 200, Topeka, KS 66612-1327
Voice: (785) 296-2281 ▪ Fax: (785) 296-6953

Kansas Lesser Prairie-Chicken Status Recommendation: Remain Unlisted

The Threatened and Endangered Task Committee is appointed by the Kansas Department of Wildlife and Parks (KDWP) Secretary to review issues and provide recommendations to the Secretary related to the listing of a wildlife species whose continued existence as a viable component of the state's fauna is or appears likely in the foreseeable future to be in jeopardy. In this case, the Task Committee was asked to review a petition submitted by the Kansas Ornithological Society and six Audubon chapters to list the Lesser Prairie-Chicken (LEPC) as a Threatened species in Kansas. The first part of this process involved a determination of whether the initial petition warranted a full review.

In 2009, the petition to list the LEPC as a Kansas Threatened Species was preliminarily reviewed by the Task Committee and found to warrant further review due to the following factors: (1) threats from reversion of Conservation Reserve Program (CRP) acres to cropland, (2) fragmentation of habitat from energy development, and (3) declining trend in lek survey data.

The full review process of the Task Committee included investigating scientific literature, reanalyzing the lek data, conducting four informational meetings, and questioning an ad hoc committee of nine prairie grouse experts. This year-long process led to a decision from the Task Committee to recommend that the LEPC remain unlisted in Kansas. This recommendation is provided to the KDWP Secretary.

The majority decision (5-2 vote) of the T&E Task Committee that the LEPC remain unlisted was based on the following reasons:

1. Kansas has a relatively robust population of Lesser Prairie-Chickens when compared to other states within its present range. The documentation of over 200 lek sites north of the Arkansas River since 1990 in an area where the population was sparse or nonexistent in recent decades is significant. This might be attributed to the past NRCS policy decision to use native prairie grasses to establish CRP cover and the proximity of those CRP acres to existing rangeland habitat.
2. The threat of habitat loss due to expiring CRP contracts has lessened due to federal agricultural policies that target renewal of CRP contracts to focus on LEPC habitat. One of the Conservation Priority Areas in Kansas is specifically designated for the LEPC.
3. The threat of habitat fragmentation from energy development remains an uncertainty, but recent efforts to protect LEPC habitat are recognized. These include voluntary avoidance of habitat, pending recommendations from the Wind Turbine Advisory Committee, and federal grants under the Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy Habitat Conservation Plan (HCP).
4. There is currently not enough known about the effects of energy development on LEPC habitat to assume developed areas will preclude LEPC use.

5. Several ongoing and pending conservation actions directly or indirectly target habitat used by the LEPC. These efforts beneficially affect a significant area within the LEPC range and represent a commitment of finances and manpower towards protecting the species. These include the efforts of the Playa Lakes Joint Ventures, the Interstate LEPC Working Group, USFWS Partners for Wildlife Program, federal Environmental Quality Incentive Program (EQUIP), Wildlife Habitat Incentives Program (WHIP), and the Landowner Incentives Program (LIP). These efforts may be less effective or less extensive if the species was listed as Threatened or Endangered.

6. The majority of the ad hoc committee of prairie grouse experts recommended that the LEPC remain unlisted in Kansas.

The recommendation that the LEPC should remain unlisted in Kansas was not a consensus of the committee. Remaining areas of concern are:

a. As a species, current LEPC range has declined ~88% from its historical range and eight of the nine ad hoc committee members indicated the species' population has declined between 30-90% both within Kansas and across the entire range of the species. Seven of the ad hoc committee reviewers thought the lek count data KDWP has collected is appropriate for estimating LEPC populations, and that data also show a decline in recent years and over the extent of the sampling.
b. According to KDWP lek count data, this species experienced large variations in population density since the 1980s, even in areas with minimal loss of habitat. The cause of this variation has not been documented, but it seems clear LEPC can experience rapid declines in population. Although the overall trend seems to indicate a declining population, it is not clear that the overall population in Kansas is stable.
c. Many of the threats facing the LEPC in Kansas are widespread and pervasive. In particular, tree invasion and overgrazing of rangeland are threats that continue to be a problem across the range of the LEPC. The degree and magnitude of these threats on LEPC have not been quantified, but many experts are concerned that these might cause significant negative effects to the overall species viability.
d. Although the majority of the ad hoc committee indicated that the LEPC probably fit the definition of threatened, there was reluctance to recommend that listing because of the possible offsetting and negative effects to conservation efforts on private land from curtailment of hunting or perceived intervention in land management options.
e. The majority of the published literature refers to the LEPC as a vulnerable species, an opinion reflected in the U.S. Fish and Wildlife Service's decision that the species warranted listing at the federal level. However, the federal listing process has been precluded due to higher priorities since that 1998 decision.
f. Lastly, the ad hoc committee of experts was concerned that sufficient avoidance of LEPC habitat by energy development interests probably would not occur by voluntary actions alone. Although many energy companies are voluntarily collaborating with state and federal agencies to minimize effects to LEPC habitat, in Kansas this has been mediated by the local energy buyers. Development of

new markets, incentives, and energy transportation networks might dramatically and rapidly alter this relationship.

The T&E Task Committee offers the following management recommendations for inclusion or refinement into existing plans:

- KDWP should explore other techniques of surveying LEPC (i.e., adding random survey routes or using limited aerial surveys) as well as more rigorous methods of population estimation and quantification of habitat gain or loss.
- KDWP should continue to actively promote LEPC conservation, including collaboration with other agencies and organizations to address Farm Bill-related effects on habitat, energy development threats, and woody invasion.
- If continued decline of habitat and population is noted in the next few years, a subsequent review of the LEPC should be conducted at the upcoming 5-year review of the Kansas T&E lists scheduled to begin in 2013.

In summary, after considering the petition, investigating scientific literature, holding informational meetings, reanalyzing the lek survey data set, and consulting nine experts who have research or management experience regarding prairie grouse biology, the Task Committee recommends that the LEPC should remain unlisted.

T&E Task Committee:
Bill Busby, Kansas Biological Survey
Mark Eberle, Fort Hays State University
Elmer Finck, Fort Hays State University
James Larson, KDWP
Edwin Miller, KDWP (Chair)
Tom Mosher, KDWP
Dan Mulhern, U.S. Fish and Wildlife Service

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Lane County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Thomas Bennett

Kathleen Delaney

Jon Risley

Logan County

COMMISSIONERS
785-671-4244; Fax: 785-671-3341
LG_County_Clerk@wan.kdor.state.ks.us

710 W. 2nd St.
Oakley, KS 67748

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Logan County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Carl Uhrich, ~~Chairman~~ Member

Dave Hubert, ~~Member~~ Chairman

Clint Kvasnicka, Member

Boyd Orr
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Fowler, KS 67844

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BOARD OF COUNTY COMMISSIONERS

MEADE COUNTY

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Meade County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

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In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Clair Bender

Clair Bender

Janna R. Frydendall

Janna Frydendall

Boyd Orr

Boyd Orr

Board of County Commissioners

1st Dist. Jay Harris
2nd Dist. Sandra Y. Rupp
3rd Dist. Frederick P. Flax

Ness County, Kansas
202 W Sycamore
Ness City, Kansas 67560

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Ness County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Frederick P Flax

Frederick Flax

Jay Harris

Jay Harris

Sandra Rupp

Sandra Rupp

QUAY COUNTY GOVERNMENT
300 South Third Street
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Submitted via Federal eRulemaking Portal: http://www.regulations.gov

March 10, 2014

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

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

To Whom It May Concern:

Quay County on behalf of the County Government, residents, businesses and landowners submit the following comments on the above-referenced U.S. Fish and Wildlife Service (USFWS) Notice of Intent (NOI). Collectively, Quay County represents a large area of eastern New Mexico that will be affected by potential issuance of federal permits associated with the potential listing of the lesser-prairie chicken (LPC) under the Endangered Species Act of 1973, as amended (ESA). Quay County requests that County and each of the aforementioned entities be noted as separate commenters on the NOI.

Quay County is opposed to the USFWS proceeding with scoping the development of an Environmental Impact Statement to assess the potential impacts of the issuance of an Incidental Take Permit (ITP) under section 10 (a)(1)(B) of the ESA. We want to remind USFWS that such a permit associated with a Habitat Conservation Plan is only relevant and applicable if The Lesser Prairie Chicken is actually listed under the ESA. Because we believe a listing is not warranted and no such listing determination is made, this NOI and scoping action is premature and predecisional in nature.

As stated in previous comments by Quay County we fully support implementation of the WAFWA Rangewide Plan (RWP) as a voluntary conservation mechanism for long-term management and health of lesser prairie-chickens. We believe all of the stakeholders across the five states and the species that RWP is providing substantive conservation benefits as defined in the ESA. The NOI, we believe, undermines the RWP with schemes that jeopardize future conservation of LPC. Therefore, Quay County requests USFWS to determine and approve the No Action alternative and deny issuance of the ITP as described in the above-referenced docket number.

In closing we want to restate our resolute opposition to listing the LPC as threatened or endangered under the ESA. The substantial success shown by the States in implementation of the RWP since USFWS endorsement in October 2013 is proof that stakeholders and the States are able to voluntarily conserve LPC without the need for federal ESA protection. We assert that through a listing decision of 'not warranted and the full utilization of the voluntary and comprehensive use of the RWP the species will thrive.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

If you have any questions or comments regarding the above, please contact the undersigned.

Sincerely,

Richard Primrose
Quay County Manager

Eddy County
Board of Commissioners

Glenn Collier
Susan Crockett
Tony Hernandez
Royce Pearson
Jack Volpato

Eddy County

Eddy County Manager
Rick J. Rudometkin

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March 10, 2014

Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, NS 2042 – PDM
Arlington, VA 22203

RE: SCOPING ISSUES TO BE COORDINATED WITH EDDY COUNTY DURING THE PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT FOR THE STAKEHOLDERS CONSERVATION STRATEGY / AMERICAN HABITAT CENTER HABITAT CONSERVATION PLAN

RE: Docket No. FWS-R2-ES-2013-0134

Dear Sir or Madame;

This letter is in response to the U.S. Fish and Wildlife Service (Service) Federal Register Notice requesting comments on the issues to be considered during the scoping process "for the preparation of an environmental impact statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP) under the Endangered Species Act …" (FR 2-7-2014 page 7472). Eddy County has reviewed the "Stakeholder Conservation Plan for the Lesser Prairie-Chicken" (hereafter known as "Stakeholder Plan") submitted by the American Habitat Center February 2014. Following are issues critical to the County that should be considered by the Service and coordinated with our County during the EIS process.

1. **The Stakeholder Plan is Duplicative and Unnecessary**

There are already several conservation programs in place for landowners, commercial energy developers, agriculture interests and conservationists to participate in for the purpose of conserving the Lesser Prairie Chicken (LPC) and its habitat. These are acknowledged in section 2.2 of the Plan, "Existing Conservation Plans for the LEPC" (Stakeholder page 16-24). Notably, the Range-wide Conservation Plan for the LPC (hereafter Range-wide Plan) was recently approved by the Service and over 2.5 million acres have already been enrolled.

The Range-wide Plan was prepared with the assistance of major energy interests as well as other agriculture interests for the purpose of providing a systematic means for them to actively participate in the conservation of the LPC. These are the same interests the Stakeholders Plan is targeting. Already, these companies have contributed the essential funding for the program.

Importantly, the Range-wide Plan was prepared with the active participation of the five state agencies with management responsibility for the LPC and is to be managed by the Western Association of Fish and Wildlife Agencies (WAFWA). The Range-wide plan was prepared with complete transparency and heavy involvement of those interests that can directly impact the conservation of the LPC.

The Stakeholder Plan offers no new conservation measures or assurances that are not already being met by currently approved and active plans. The document states that its purpose is to (1) Conserve the LPC and, (2) allow uninterrupted economic development (page 24). A simple reading of the plans already active, as described in the previous section, demonstrate that these two purposes are currently being met. Preparing an EIS for the Stakeholder Plan is an unfortunate waste of taxpayer funds and agency time, as there is no compelling need for the Plan that is not already being met through other programs.

2. The Stakeholders Plan is Unrealistic

One of the key objectives of the Stakeholder Plan is to conserve 90% of the LPC habitat.

> *"The Plan will conserve nearly 90% of LEPC Habitat and will result in substantial enhancement of habitat through required avoidance, minimization and mitigation measures."* (Page 50)

The devices they plan to utilize to conserve the habitat are through outright acquisition of the land or a permanent conservation easement.

> *"Many HCP's mitigate for loss of habitat through the preservation or permanent protection of similar habitat, sometimes in combination with other non-permanent measures. This preservation component is implemented through fee-simple acquisition of habitat or the use of perpetual conservation easements."* (Page 49)

The total Estimated Occupied Range (EOR) of the LEPC as determined by the Service is 19,902,922 acres. The EOR range covers five states. It is a substantial area of land, and any program that boasts to be able to conserve 90%, or 17,912,623 acres of this area, should be questioned, especially when the vehicle to do so is through outright acquisition of the land or permanent easements. Massive buy-in from landowners and those who own property interests in this land must take place. Additionally, the idea that enough private landowners would voluntarily place a permanent easement or outright sell their land based on the assurances that they will not be further penalized if the LPC is listed is a fantasy.

By their own acknowledgement, the Plan developers recognize that 95%, or 18,907,776 acres, of the LPC habitat is privately owned. "The EOR of the LEPC is spread over five states and is comprised of up to 95% private land ownership." (Page 95) In order for them to own or permanently control 90% of this they are planning to obtain the "voluntary" commitment of the landowners. However, they know this objective is unattainable and even acknowledge that acquiring the various property rights necessary to ensure full conservation of the land is an impossible task.

"Ownership and occupancy of these lands is not always limited to a single entity, but may be expressed through a complex and severed relationship of surface estate, mineral estate and surface and mineral leasehold interests. Any effort to create a permanent set-aside of meaningful acreage for the LEPC will require the written agreement from all interest holders, which may be an insurmountable task due to the inability to identify and obtain agreement of all owners of the surface and mineral estates." (Page 49)

And further;

"The establishment of a permanent preserve in most cases is a challenge due to the need to identify and acquire contractual commitments from both the surface owner and the mineral owner, which in this region are typically held by different people and entities. The task of determining who owns the interests and contact information for those property owners is a significant undertaking. Further, ***the potential for property owners and other interest holders to delay or disrupt an acquisition program through reluctance or refusal to sell targeted or key properties*** *creates additional issues."* (Page 49-50)

Clearly, the Plan developers know that acquiring 90% of the LPC habitat is an "insurmountable task." However, what is most disturbing is their acknowledgement that landowners may "delay," or "disrupt" the acquisition program through "reluctance" or "refusal" to sell the properties they have identified and targeted. The Plan claims to be a "voluntary" plan for landowners, yet, by their own admission, it is clear that this Plan will be utilized to "target" land within focal areas and that landowners will find themselves under immense pressure to enroll. Nowhere in the plan do they state that the species does not warrant listing, and the plan itself is not designed to "preclude" a listing. The Plan is designed to acquire 90% of the habitat through fee-simple acquisition or permanent conservation easements.

They benefit from the threat of listing the LPC in order to coerce landowners into "voluntarily" giving up their land.

The Plan developers know their objective of acquiring 90% of the habitat area is unrealistic and, therefore, have submitted a HCP that will fail. The Service should deny approving the plan based on the AHC's admission that landowners will be targeted and pressured into selling their land, an unconstitutional act.

3. The Plan's Minimum Goal of 20% Participation is also Unrealistic

As noted by the Plan developers above, acquiring agreement among the various owners of the property interests in any given parcel will be a dubious task, short of coercion. However, they claim to already have assurances from property interest holders that cover 20% of the habitat. In a footnote on page 95, they claim:

"The assumption that 20% of Total Habitat Acreage will enroll in the Plan drives the $0.36 per acre Participation Fee calculations and is conservative based on the commitments currently obtained from stakeholders to participate in the Plan."

Who are these committed participants? They are not revealed in the Plan. Because this 20% participation is necessary to meet the funding requirement, more than just a footnote ought to be required to ensure this obligation can be met, especially given that the Plan developers acknowledge how difficult it will be to get all property interests for any given parcel to agree to participate.

We can assume that the major oil and gas companies named in the cover letter that was submitted with the application might be these participants. What proof is being required that they will fulfill this obligation? Without this, the plan is meaningless and proper implementation is questionable.

4. The Stakeholder Plan Administrators and Benefactors are Not Transparent

The Plan has been submitted by the American Habitat Center (AHC), a non-profit entity, so they claim. However, there is no further detail as to who makes up the AHC. A number of questions are left open.

a. Who are the members of the Board of Directors for AHC?
b. Who are the "Stakeholders" that created the AHC and the Stakeholder Plan
c. Who will be appointed to the Oversight and Science Committees?
d. What type of non-profit entity is the AHC; a (c) (3), (4) etc.?
e. In which state is the AHC incorporated?
f. Has the AHC provided the Service with its official Incorporation and Non-Profit Status documents?

Through press releases, the County has ascertained that several organizations have come together to create this plan, including the Environmental Defense Fund and some state cattlemen's and farming organizations. What is important for the Service to take into account is that these organizations can only make decisions that affect the Associations, not their members directly. Therefore, any commitment on behalf of the Associations that there will be widespread participation of its members should be discounted, unless proof is submitted by the AHC, whoever the actual members of this organization may be.

In addition, there are other non-transparent issues within the Habitat Exchange Agreement (HEA) attached to the Plan. The HEA is an agreement between the Habitat Exchange Administrator, whoever that is, and Region 2 and Region 6 of the U.S. Fish and Wildlife Service. Within the HEA, there will be an "Oversight Committee," a "Policy Committee," a "Resolution Committee," and a "Science Committee" all of which will be named at a later date.

Obviously, the AHC will carry a tremendous amount of influence determining who the "stakeholders" and representatives from the "conservation interests, industry, and agriculture" groups will be providing crucial oversight of the HEA and the Plan. This is totally unacceptable.

5. The AHC does not have Authority to Enforce the Stakeholders Plan Directly

Although we do not know who will ultimately govern the AHC, this entity is requesting to be approved as the permit holder of an Incidental Take Permit and enhancement of survival permit issued by the Service. Private groups can initiate an HCP without government participation; however, they must assure that they have the authority to enforce the permit. The Service Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 3-2 states that this is allowed "so long as the permittees have the authority to regulate or control all or applicable parts of the HCP and the conditions of the HCP are enforceable." The Stakeholder Plan assures they have this authority.

> *"The Permit Holder will enforce the Plan. By entering into clear enforceable CIs and CPs, Participants will contractually agree to perform the obligations required of them under the Plan and consent to enforcement of those obligations by the Permit Holder. See Section 8.8. FWS will also have clear and defined enforcement responsibilities and mechanisms with respect to the Plan and the permit issued to the Permit Holder under the Implementing Agreement. See Appendix K. The mechanisms available to the FWS include access to properties enrolled under the Plan, approval rights with respect to Credit-generation and release activities, and representation on the Oversight Committee and Science Committee. In these ways, enforcement of the Plan and increased compliance with the ESA in the Permit Area can be assured."* (Page 4-5)

In other words, the AHC does not have the authority outright to enforce the plan; the landowners who participate will give up their right to control their land and provide this authority to the AHC. The only enforcement authority the AHC will have is through the acquiescence of landowner's rights to the AHC. The AHC has stated they will acquire this when landowners "voluntarily" enroll their land in the program; however, there is reasonable concern that landowners will be targeted and pressured into participating.

A participant in this plan can either be a landowner, leaseholder or holder of other property interests. Land sold will presumably be protected until program administers determine the conservation need is no longer relevant. Land placed in a permanent conservation easement will be held in perpetuity. However, if a landowner is covered under the AHC permit, this protection will only be guaranteed for 30 years. So, a landowner, leaseholder or other property interest holder is being asked to permanently give up their rights when the protection they are trading these rights for is only offered for 30 years. It is highly suspect that landowners will flock to sign up under this program once the full details of their commitment are revealed.

6. Key Issues that should be Studied and Analyzed during the EIS process

a. The Environmental Impact Statement needs to rigorously analyze the impact on the local economies within the plan area where private land will be targeted for acquisition, and landowners refuse to sell. The direct, indirect and cumulative impact on the local economy needs to be analyzed when the targeted land is devalued by the action. Based on statements discussed earlier that are in the Stakeholder Plan, it is reasonable to presume that landowners

will be targeted and pressured into selling key properties. This impact on the local economy must be studied. Additionally, the impact this will have on the culture of the community should be examined.

b. The Stakeholder Plan is relying solely on the science referenced in the Service's proposed rule to list the LPC as threatened. The Notice does not represent the best available science on the LPC as scientists have critically examined the notice and new data and studies have been brought forward. In the EIS analysis, two additional studies must be considered (documents attached):

   i. "Data Do Not Support the Listing of the Lesser Prairie Chicken," prepared by the Center for Environmental Science, Accuracy and Reliability (released in 2013)
   ii. Review of the Science Predicting Population Trends prepared by Darling Geomatics (March 2014)

Summary

We appreciate the Service giving strong consideration to the issues discussed above. It is our County's position that the application should be denied because the Stakeholder Plan provides no new conservation efforts that are not already being fulfilled through other plans.

Also, the preparers of the plan have not been transparent as to who they are and who will be governing the program. It concerns us greatly that the Service would be considering providing a non-existent entity with such a high responsibility as being a permit holder for a plan area that consists of six states.

Further, we are very concerned that landowners will be targeted by the group and coerced into participating in the Plan.

For these reasons the plan should be denied.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

Sincerely,

Rick J. Rudometkin
County Manager on behalf of
The Eddy County Commission

March 9, 2014

RE: Review and comments on:

1. **"An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens" by Edward O. Garton (2012)**
2. **"Range-wide Population size of the Lesser Prairie-chicken: 2012 and 2013" by McDonald et al (2013) and**
3. **"The Predicted Influence of Climate Change on Lesser Prairie-Chicken Reproductive Parameters" by Grisham et al (2013)**

Background

The lesser prairie-chicken (*Tympanuchus pallidicinctus*) (LPC) is a species of prairie grouse that occupies a five-state range including portions of Texas, New Mexico, Oklahoma, Kansas and Colorado. The species is state listed as threatened in Colorado, and the U.S. Fish and Wildlife Service (USFWS) identified the species as a candidate for Federal listing in 1998.

Based on USFWS findings, lesser prairie-chicken populations need large tracts of relatively intact native grasslands and prairies to thrive. Over time, threats to the LPC have included habitat loss, modification, degradation, and fragmentation within its range. Predator cycles and weather also affect annual population numbers.

Over the past year, the USFWS has been analyzing the status of the LPC, threats to the species and conservation efforts resulting in a proposal to list the species. The USFWS will make a final determination whether to list the species by March 30, 2014.

Analysis of Flaws in Population Studies and Reports

Though the USFWS states that it will make a final determination about whether to list the LPC as threatened after a full assessment of the status of the bird, the problem is the fact that the USFWS does not have sufficient population data to determine status. Though LPC are at a lower level than their peak before agriculture, they may be stable, secure and on an upward trend since the concepts of sustainability and prairie grass conservation began in the 1980s.

USFWS is legally obligated under the Endangered Species Act, Information Quality Act and *Bennett vs Spear*, to make LPC decisions based on the best available scientific information that is applicable to the species. However, because the listing proposal process for the LPC is part of the terms of a multi-year listing work plan approved by the U.S. District Court for the District of Columbia on September 9, 2011 the USFWS may feel pressured to make a decision based on inadequate data regarding population numbers and trends. We recommend against a decision based on less than minimally acceptable scientific data.

The scientific information used must be legally consistent with standards of the Information Quality Act (Quality, Objectivity, Utility and Integrity). In contrast to the interpretation of the Act by some federal agencies, the objectivity and integrity requirements mean that the data collected by state and federal agencies, or used in published scientific research relied upon by those agencies, must be provided to the public.

Though the public was not provide with the raw data used in scientific research relied upon by USFWS, in violation of the Information Quality Act, the following is a list of flaws in the two most recent reports USFWS is using to assess LPC population trends as well as an analysis of some relevant information USFWS failed to use. The purpose of this letter is to point out the flaws in the two studies as well as missing information. We strongly recommend USFWS conclude listing is not warranted and further monitoring of populations, habitat quality and conservation measures is needed.

The only recent information USFWS appears to be using to base population numbers and trends on is a combination of archaic data that was not comparable to recent data and statistically invalid recent data.

What is known about LPC populations:

There was a widespread pattern of sporadic sampling for the first decade (mid-1960s to mid-1970s), more frequent but inconsistent sampling across regions for two decades (middle period of mid-1970s to mid-1990s) leading to sustained increased sampling effort over the past 18 years. However, survey protocols continue to vary between States, which makes even relatively recent data difficult if not impossible to compare from State to State.

Two years of helicopter surveying coupled with ground surveys during 2012 through 2013 across known LPC range has created the beginning of a new type of comprehensive survey data under a single methodology over 5 states. However, it will take 10 to 20 years of consistent data collection to even begin to truly determine the trend and limiting factors for the species, in light of weather cycles, predator cycles, and current land management.

Considering the fact that the LPC did not go extinct during the Dust Bowl Era when its habitat was at its worse, the LPC is wide spread and locally common in areas across five states, and all five states have significant positive LPC habitat conservation and habitat restoration programs in place, the LPC is not in danger of extinction.

These birds are a boom and bust species, adapted to fluctuations in weather. A downward trend in population number and/or lek numbers during poor weather conditions such as the recent drought in LPC habitat is normal and is not a reason to list the species as threatened under the ESA. Listing would harm the ability of the five states to manage LPC habitat in ways that benefit the species and would harm our national economy as well as the economies of the five affected states.

What isn't known about LPC populations:

USFWS personnel do not know population numbers and trends at this time in history. A significant amount of conservation of LPC habitat has been going on since the 1970s. Due to an overwhelming number of species to address in a very short amount of time, USFWS could not thoroughly analyze the best available science, which is the detailed long term raw data collected at the State level. Instead, USFWS relied on a few data summary reports that have significant flaws and USFWS missed other studies that have scientific validity. Even if USFWS had time to look at all raw data, the data was collected under too many different types of protocol to make meaningful comparisons. Until 2012, intensity, duration, timing, and methods of surveying LPC have varied too much over time and geographic region to compare.

There is no question that LPC population status, trend and limiting factor questions need to be studied in a more uniform manner for a longer period of time. A conclusion that listing is warranted would be premature and would harm potential habitat restoration efforts.

1. Review of Garton 2012

In a review of "*An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*" by Edward O. Garton (2012) there are a number of sound reasons to have reservations about the conclusions Garton reached.

Garton (2012) discussed many of the **limitations of the available population data** including the **limited number of leks surveyed** as one goes farther back in time, the **inconsistencies in the survey methods** used, the **assumptions** of observed males on leks to numbers of females, and the **minimum population sizes assumed** to be needed to maintain populations.

We are in full agreement with Garton that there were too many inconsistencies in the survey approach and a unified approach is necessary to assess trends across LPC range. The work done by McDonald et al. (2013), described below, may be a good start toward obtaining statistically valid data, but it will take 10 to 20 years or more to begin to gather the necessary statistical data to see real population trends and relate them to weather, predator cycles, habitat conditions, and conservation measures. In the mean time, any speculation that the bird will plummet toward extinction is unfounded.

Garton (2012) makes specific predictions about avian population persistence, 30 and 100 years into the future. There are sound reasons to have reservations about the conclusions of Garton et al. (2012). Briefly, the extinction prediction models used in Garton's paper contained invalid assumptions, methodological bias, improper accounting for the propagation of error in model predictions, and use of thresholds for extinction that lack a sound empirical basis. Collectively, those issues point to bird populations not being as threatened as reported.

In violation of the Information Quality Act, the raw and final data sets used in the Garton 2012 analysis are not publicly available. The absence of publicly available data is also contrary to the Department of Interior's Information Quality Guidelines (requiring that reproducibility "shall generally require sufficient transparency about data and methods that an independent reanalysis could be undertaken by a qualified member of the public," (Department of Interior 2002)) and

demonstrates a lack of adherence to key White House policy directives on scientific integrity (Obama 2009; Holdren 2010, 2011).

Moreover, Garton (2012) made errors and invalid assumptions that induced a negative bias in population trends. In the early decades of surveys, large and easy to find leks were primarily counted. In more recent decades, as more leks were added to surveys, they were often smaller in size. Thus, the average number of males attending leks has declined, in part, due to an artifact in how the data were collected (see Table 1 below).

Table 1. Lesser Prairie Chicken monitoring and population trends 1965-2012 summarized over 5-year periods for Range-wide Prairie Region (Garton 2012)

Parameter[1]	2005-12[2]	2000-04	1995-99	1990-94	1985-89	1980-84	1975-79	1970-74	1965-69
Leks counted	183	149	98	51	65	56	23	7	6
Average males/lek	8	13	8	12	19	32	85	195	137
Number of active leks	98	93	50	32	53	40	22	7	6
Percent active leks	53	62	51	68	82	71	94	100	100
Average males/active lek	16	21	15	17	24	45	88	195	137
Lambda - Annual rate of change	0.907	0.965	1.267	0.828	0.942	0.917	0.990	0.992	1.228
S.E.(Annual rate of change)	0.068	0.065	0.150	0.112	0.081	0.082	0.096	0.124	0.193

1 Averaged over years for each period.
2 Eight years of data in this period.

Even with this flaw in Garton's analysis, his research conclusion is that there is "*a general increase in lesser prairie chicken populations in the last half of the 1960s followed by a long term decline from the 1970s to mid 1990s when the population apparently stabilized at substantially lower abundance range-wide (50,000-100,000 compared to estimates around 200,000 during the 1970s and 1980s)...*"

It is likely that Garton is correct in stating that LPC populations have stabilized. However, Garton (2012) goes on to theorize catastrophic population failure based on insufficient data and the assumption that current conditions (severe drought throughout LPC) will continue unchanged:

*Parametric bootstraps of the probability of persistence of Lesser Prairie Chickens for each eco-regional population and the range-wide population reveal that only the sand sagebrush prairie region has a substantial likelihood of falling below quasi-extinction levels equivalent to effective population size of 50 (82 birds counted at leks) within 30 years but most eco-regional populations and the range-wide population have substantial likelihoods of falling below 500 (852 birds counted at leks) within 100 years as required for long term persistence" (*Garton 2012*).*

Garton (2012) showed "fu*ture projections of carrying capacity without substantial changes in key determinants of LPC population dynamics are slightly above 10,000 in 30 years and less than 1,000 in 100 years."*

Garton's projections are wrong.

Garton showed higher levels of short term risk and significant long term likelihood of dropping below the effective population thresholds for maintaining genetics of 50 and 500 individuals based on the above **assumption** of **no changes to key determinants of LPC population dynamics**.

What about the significant drought within LPC habitat within the recent past? Garton's projections were made during what Grisham et al. (2013) defines as the worst El Niño is history in portions of the LPC range. The recent El Niño climate phenomena disproportionately affecting LPC habitat during the LPC survey period Garton relied upon.

Garton's predictions were based on the incorrect assumption that there will be no change in a key determinant of LPC population dynamics – severe drought. Science does not support Garton's assumption.

Does Garton really believe that weather does not change and that the recent drought within LPC habitat will continue for the next 30 to 100 years?

Grisham et al. (2013) (see below) studied climate and its affect on LPC in New Mexico and Texas. Though those results contradict earlier publications including Garton (2012), Grisham's work appears to be ignored by USFWS. Could it be that USFWS feels too vested in their recent analysis and too pressured by court imposed time constraints to spend time to analyze Grisham's work?

Garton's analysis of LPC populations (2012) used short and long-term population viability targets based on the 50/500 rule as the basis for the quasi-extinction analyses, which is the effective population as it relates to genetic maintenance. As noted by Flather et al. (2011), **the 50/500 values are simply viability goals for maintaining genetically diverse populations; they provide "*little direct connection with extinction risk.*"**

Traill et al. (2010) attempted to determine a generalized minimum viable population number, much like the 50/500 rule, and reported that the evolutionary and demographic constraints on populations require minimum sizes to be at least 5,000 adults. However, Flather et al. (2011) reported on reviews they conducted of the viability analyses used by Traill et al. (2010) revealed that a huge range in minimum viable population estimations existed, finding that even estimates conducted within many populations varying by orders of magnitude.

They also reported on the limitations of population viability analyses (PVA's) to provide meaningful estimates of minimum population sizes. Flather et al (2011) stated that **estimates of extinction risk from PVA models were often imprecise, inaccurate, contingent upon threats currently acting, and affected by model structure, study duration and other uncontrolled factors** (Flather et al. 2011 referencing Beissinger and Westphal 1998). Flather et al. (2011) went on to note that PVA's were best used for ranking relative extinction risk, switching the focus of

these analyses away from the determination of a minimum viable population to emphasize the importance of PVAs for understanding the relative probability of persistence for populations in comparisons among management options.

Garton (2012) did not provide an estimated minimum viable population for LPC, but did provide the quasi-extinction probabilities for the range-wide population as well as for the ecoregional populations based on past population trends. They **projected continued losses** in population carrying capacity within the sand sagebrush and mixed grass ecoregions **if habitat impact conditions continue on their current trajectory. However,** we know that habitat impact conditions will change – they already have changed since Grisham, Garton and McDonald wrote their papers. During late 2013 and early 2014, the states with LPC began receiving above average rains and though the drought remains, **conditions are improving across parts of the LPC habitat (http://www.srh.noaa.gov/oun/?n=climate-drought).**

2. Review of McDonald et al. 2013

McDonald et al (2913) surveyed sage-grouse leks from helicopters over a 5 state region from sunrise until approximately 2.5 hours after sunrise between March 31 and May 3 in 2012 and between March 20 and April 21 in 2013.

McDonald et al. (2013) surveyed for LPC during one of the worst droughts in recent history as documented by Grisham et al. (2013). Grisham assessed the potential changes in clutch size, incubation start date, and nest survival for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico. Grisham stated that the "***2011 nesting season provides insight to how an extreme La Niña event and subsequent drought affects lesser prairie-chicken*** *reproductive ecology. From 15 October 2010 to 31 August* ***2011****, the total precipitation on the study site was only 2.46 cm (0.97 inches), constituting* ***the worst drought and warmest La Niña event on record****.*

The ***drought of 2011*** *was so severe that sand shinnery oak and grasses on the study site did not leaf out, eliminating nesting cover and subsequently delaying nest initiation (Li Z, Kafatos M , 2000) Interannual variability of vegetation in the United States and its relation to El Niño/Southern Oscillation. (Remote Sens Environ 3: 239–247. doi: 10.1126/science.242.4886.1640). Cover provides protection from predators and thermal stress, and when thermal cover is lacking, nests are exposed to the element (Grisham et al 2013).*

This is of concern, as ***lesser prairie-chickens appear to be particularly sensitive*** *to landscape alterations* ***(****Woodward et al. 2001); (Fuhlendorf et al. 2002) and* ***drought*** *Hamerstrom F, Hamerstrom F (1961).*

Drought is suspected to negatively influence prairie grouse through reduced growth of vegetation that provides nesting, roosting, and escape cover, and food (Merchant SS, 1982). Furthermore, there is evidence that home range sizes increase (Merchant SS, 1982 and Copelin, 1963) and ***recruitment is lower during drought years*** *(Merchant SS 1982). Home range size expansion during drought years may lead to localized abandonment, especially in fragmented landscapes. Furthermore, landscape alterations and management (e.g., herbicide treatment of shrubs, grazing systems) appear to influence resource selection, survival, and reproductive success of lesser prairie-chicken populations.*

For USFWS to use two years of McDonald's helicopter surveys with associated on-the-ground field verifications during a major drought as "trend" data violations the ESA, *Bennett vs Spear* and the Information Quality Act. Any conclusions USFWS reaches based on McDonald et al (2012) other than finding LPC populations need more study are arbitrary and capricious.

As Grisham et al. (2013) clearly shows – low LPC numbers in 2012-2013 were due to drought. Like many game birds, LPC are a boom and bust species.

The lek-count data reported in McDonald et al. (2013) is grossly inadequate to estimate population "trends" as a basis for management.

The lack of scientific validity in these data and the fact that LPC populations are known to fluctuate significantly over time makes a case for a long-term study but not the case for listing the LPC as threatened. It is impossible to discern any pattern in the data gathered by McDonald et al. (2013) that could be used to guide management actions at this time. **The data gathered by McDonald et al. (2013) during two years of field work is not scientifically defensible "trend" data**.

McDonald et al. 2013 qualified their report as follows:

"A*cquiring precise and unbiased estimates of population size requires either a complete census or probabilistic sample of subunits with which to infer population size (Johnson 2002); however, limited funding and staffing have often precluded implementation of these sampling designs. The result had been the development of population indices to monitor population trend or estimate a minimum population size.* ***The limitation of such data is its unknown relationship to population size*** *(emphasis added).* **..**

Population trends of LEPC have been monitored using spring lek counts since the 1940s. Survey effort and methods have varied over time, but lek data were the best available long term data set to assess trend. ***Breeding season sex ratio, detection probability, and lek attendance rates are not well understood*** *(emphasis added) (Behney et al. 2012). These factors, including variation in sampling methods, require several assumptions to be made when estimating the population size from lek count information (Walsh et al. 2004, Garton et al. 2011).*"

McDonald et al. (2013) recommend "that the 2013 survey design and methods be used for future monitoring of the size of LPC population and abundance of leks.

Population trend data for any game bird cannot be based on two years of data. The use of 2012 and 2013 LPC data collected by McDonald et al. to state the species is declining is bad science and bad public policy. What if the numbers where the opposite and 2013 population numbers were higher than 2012? Would USFWS stop the listing process?

Since LPC are cyclic, looking at a different set of years will show upward swings as often as the data shows downward swings (see Figure 2 below as an example of how game birds such as LPC fluctuate up and down over time). No one can look at two years of LPC data and state that they know the "population trend." Use of McDonald's 2012-2013 data as "population trend data" to

make any management of listing decisions would violate all scientifically accepted principles of population data analysis.

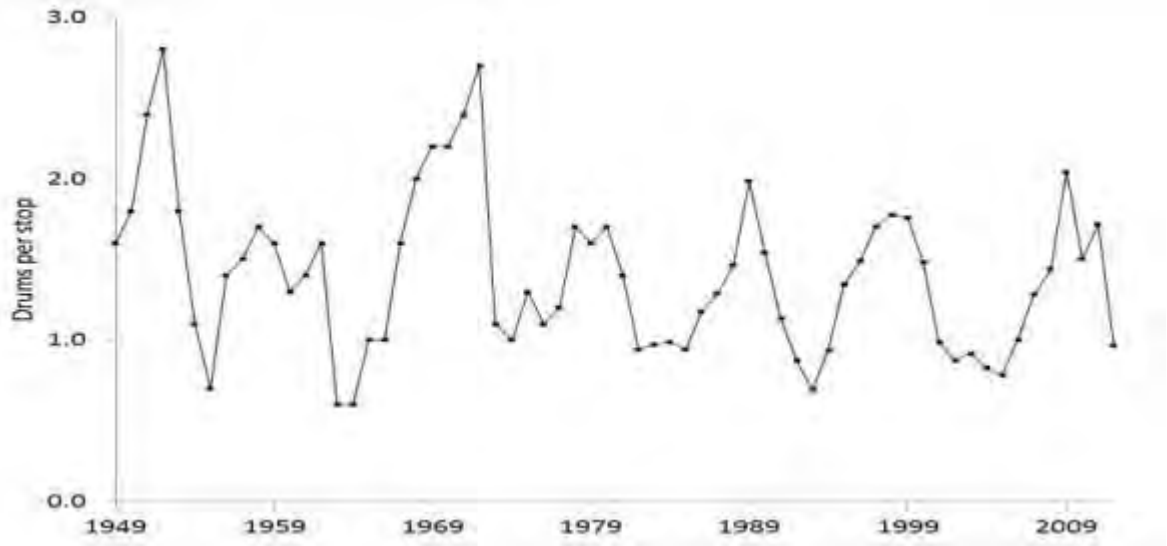

Figure 2. Example of peaks and valleys in game bird populations (based on rough grouse data)

Problems with McDonald et al. (2013)

- Lek and bird count data obtained by McDonald et al. (2013) were based on a single aerial survey each year for two years rather than the highest count obtained from 3 or more ground counts each year for two or more years. It has been shown that multiple counts are often required to ascertain a reasonable estimate of numbers of males attending leks (Beck and Braun 1980, Connelly et al. 2003, Walsh et al. 2004, Garton et al. 2011).
- McDonald et al. (2012) had a problem with one of the four ecoregions surveyed. The sand sagebrush prairie region ground count of leks gave a larger value than that obtained from the aerial surveys. McDonald et al. (2012) and Garton (2012) had to substitute the ground survey data for the aerial survey estimate.
- Garton (2012) made use of the 2012 aerial survey estimates of minimum population size for three of the ecoregions as the basis for reconstructing earlier population sizes.
- McDonald et al. (2013) surveys performed in 2012 and 2013 were completed during a severe drought throughout the area surveyed.
- The final year estimates form the starting points for all future projections of population abundance and as such could skew estimates of the probability of quasi-extinction (i.e., falling below a specified minimum abundance (50 adults or 500 adults under the classic 50:500 rule for short term and long term persistence from Franklin, 1980 and Soule, 1980). Garton (2012) noted that "*the shorter term "current" time period population estimates reported in the appendices and future projections using bootstrapping may have been more severely impacted by that final observation as they often give more pessimistic forecasts of probability of persistence when compared to those from the 3 long-term data sets.*"

3. Review of Grisham et al. (2013)

Grisham et al. (2013) assessed the potential changes in clutch size, incubation start date, and nest survival for LPC for the years 2050 and 2080 based on modeled predictions of climate change and reproductive data for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico.

Grisham et al. (2013) determined that "*the influence of drought and climate change on lesser prairie-chicken reproductive ecology has, to date, been largely overlooked. This is of concern, as lesser prairie-chickens appear to be particularly sensitive to landscape alterations and drought.*" They qualified their results to state that their "*assessment did not consider annual survival of adults, chick survival, or the positive benefit of habitat management and conservation, which may ultimately offset the potentially negative effect of drought on nest survival.*"

Grisham et al. (2013) noted that "*A key issue in conservation of lesser prairie-chickens in context of climate change is the lack of estimates for many specific vital rates and sufficient sample sizes.* ***Despite substantial efforts to conserve lesser prairie-chickens and their habitat, long-term studies that provide adequate <u>data to properly allow for predictive modeling</u> of the role climate change may have on the reproductive ecology of this species <u>are lacking</u>*** (emphasis added)."

<u>Conclusion</u>

A thorough analysis of LPC data collected to date clearly demonstrates that at this time in history there is inadequate data to scientifically predict LPC population trends or the probability of extinction. Garton (2012) and McDonald et al. (2013) both based the majority of their analysis on two years of helicopter surveys during a severe drought, underestimating LPC populations and overestimating the probability of extinction.

Conservation measures now in place will serve to increase LPC populations over time. In February 2014 the USFWS and the Western Association of Fish and Wildlife Agencies signed the Range-wide Oil and Gas Industry Candidate Conservation Agreement with Assurances for the LPC (LPC CCAA). The agreement is the result of longstanding cooperation between the Service and the five range states of the LPC—Texas, Oklahoma, Kansas, Colorado and New Mexico—to undertake conservation action for the species.

The Range-wide LPC Plan provides a comprehensive conservation strategy that is intended to conserve the species across its range. The Range-wide LPC Plan provides: 1) incentive-based landowner programs, and 2) a mitigation framework to reduce threats and provide resources for off-site conservation. The LPC CCAA incorporates the Range-wide LPC Plan's avoidance, minimization, and mitigation measures that address impacts from oil and gas activities on enrolled lands. Enrollment of lands into the LPC CCAA will generate mitigation fees, which will provide significant funds for the implementation of conservation actions under the Range-wide LPC Plan.

There is evidence of expansion of LPC into parts of the shortgrass ecoregion where they were not known to previously occur. In northwest Kansas, LPC have expanded back into some of their historical range and new areas where they were not known to previously occur due to the

establishing of Conservation Reserve Program (CRP) lands (Rodgers and Hoffman 2005). LPC populations are doing well in these planted fields with a generally expanding population (Garton 2012).

LPC usually experience either booms or busts in reproductive success (Hagen et al 2009). The "boom bust" reproductive strategy suggests that lesser prairie-chickens maximize reproductive efforts when conditions are optimal. For the Southern High Plains population, cooler, wetter springs maximize both food and cover for lesser prairie-chickens. Evidence suggests precipitation and temperature influence nest survival (Fields et al. 2006) and these variables will subsequently continue to influence nest survival in the future.

Until long term population trend data can be gathered and until the CCAA is monitored for 10 to 20 years, any consideration of listing the LEPC as threatened or endangered would be premature and based on a paucity of scientific data. A listing under the ESA would be scientifically and legally unsupported.

Darling Geomatics

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Literature citations available upon request

Center for Environmental Science, Accuracy & Reliability

DATA DO NOT SUPPORT THE PROPOSED LISTING OF LESSER PRAIRIE CHICKEN

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EXECUTIVE SUMMARY

CESAR'S review of the proposed listing of the Lesser Prairie chicken ("lesser prairie chicken" or "LPC") applies the clear direction of the Endangered Species Act (ESA) that listings be based solely on data and that the conservation efforts of states and local agencies be considered. We closely examined the references cited by the US Fish and Wildlife Service (FWS), published literature, regulatory documents, and readily available data. In addition, we performed an independent analysis of the past distributional history of the lesser prairie chicken to provide a deeper-time perspective, and commissioned independent peer reviews of the available population analyses.

Our review identified data that demonstrate lesser prairie chicken populations are increasing and are unlikely to be extirpated either locally or range wide in the foreseeable future. In addition, our review identified analyses that demonstrate lesser prairie chickens have not lost their genetic diversity and are not genetically isolated. These data offer empirical support for the conclusion that local and statewide conservation efforts are and will continue to be effective. **These two facts, both supported by data, are *prima facie* evidence that the lesser prairie chicken is not likely to become in danger of extinction in the forseeable future.**

Based on the information we developed, it appears that the FWS assumed population declines and loss of genetic diversity and used *post hoc* rationalizations to support listing based on speculative reasons for the non-existent declines. The best available data on population growth and genetic health demonstrate that the lesser prairie chicken is not in decline throughout all or a significant portion of its range.

In part, CESAR's mission, "…is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes…"[1] Accordingly, this report also addresses the threats identified in the proposed rule based on the FWS reliance on speculation, surmise and opinion. We believe that identifying those portions of the rule that fail to comply with the requirements of the ESA and related laws, regulations, and guidelines, will help improve this proposed rule as well as future rules.

In general, our review identified the following shortcomings in the proposed rule:

- The proposed rule fails to consider data and analyses demonstrating lesser prairie chicken populations are increasing and that genetic isolation has not occurred.

[1] http://www.bestscience.org/

- The conclusions in the proposed rule are not based solely on the best scientific and commercial data available as required by the ESA, but on an amalgam of opinion, speculation, and surmise.
- The proposed rule inaccurately implies that the states' ability to protect lesser prairie chicken through existing regulatory mechanisms is inadequate compared to that of the ESA.
- The proposed rule fails to accurately acknowledge the scope and importance of the voluntary conservation contributions made by states and local agencies
- The proposed rule is internally inconsistent; asserting that sufficient information on habitat needs is available to list the species but that there is insufficient data to identify the characteristics and location of the habitat essential for the conservation of the species.

The ESA is a powerful tool for conserving species. However, it has clearly articulated standards for decision-making, explicitly requiring data and consideration of local efforts in the listing process. This proposed rule fails to meet the basic requirements of a listing determination as articulated in the ESA.

BACKGROUND

ESA listing determination requirements

Instructions for listing determinations are included in Section 4 of the ESA. There are 3 primary requirements for a listing determination; the determination must be based *solely* on data,[2] the continued existence of the species must be threatened by one or more of the five listing factors enumerated in the ESA[3], and conservation actions of any State or political subdivision of that State must be considered.[4]

Data

The requirement that data support regulatory decisions is repeated throughout the ESA. This requirement includes listing, designation of critical habitat, and jeopardy determinations. The ESA does not require data for non-binding 90-day findings, allowing the use of 'information' rather than data. Neither does the Act require data for Recovery plans, which have no regulatory authority. However, the requirement for listing is specific, requiring that data be the *sole* determinant.

There is no provision in the Act that allows hypothesis, speculation, surmise, 'best professional judgment' or opinion to be substituted in the absence of data. The Supreme Court has affirmed this, stating:

"…The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise…"[5]

---

[2] Section 4(b) of the ESA states: "BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) **solely on the basis of the best scientific and commercial data available** to him after conducting a review of the status of the species ..." and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

3 Section 4 (a) GENERAL (1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence...

4 Section 4(b) of the ESA states: BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and **after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species**, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas

5 Bennett v. Spear (95-813), 520 U.S. 154 (1997)

Listing Factors

The proposed rule makes the determination that the lesser prairie chicken is likely to become in danger of extinction in the foreseeable future due to the following factors:

"…due to historical, ongoing impacts and probable future impacts of the cumulative habitat loss and fragmentation…"

"…The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events..."

"… Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels…"

"…These threats are currently impacting lesser prairie-chickens throughout their range and are projected to continue and to increase in severity into the foreseeable future…"

From these statements we conclude that the FWS identifies 3 of the five ESA listing factors as threatening the lesser prairie chicken:

(A) "*the present or threatened destruction, modification, or curtailment of its habitat or range*";

(C) "*disease or predation*"; and

(E) "*other natural or manmade factors affecting its continued existence*".

ANALYSIS

DATA

Analyses, based on data collected by the states, demonstrate that lesser prairie chicken populations are increasing and that the range-wide likelihood of extinction is very low. Further, published analysis demonstrates lesser prairie chickens maintain genetic diversity and do not demonstrate genetic isolation. The FWS had to rely on information other than data in order to list the lesser prairie chicken in view of the documented increasing populations and genetic health. As a result, the FWS failed to rely solely on data, instead using speculation, surmise, and opinion. The FWS failed to rely on the 5 factors enumerated in the Act instead using additional factors not intended by Congress to be used for listing determinations. The FWS failed to adequately consider the effectiveness of existing and planned conservation Finally, after discussing the habitat needs, and shortcomings of existing habitat for lesser prairie chickens at length and in depth in order to explain how habitat was the basis for declines in the species, the FWS claims it is not able to identify those physical and biological characteristics essential to the conservation of the lesser prairie chicken, and thus cannot designate critical habitat.

Data Demonstrate Lesser Prairie Chicken Populations are Increasing Range-wide with Low Extinction Probabilities

We identified two papers which examined the health of lesser prairie chicken populations. First is an *Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*[6]. Using population reconstruction from annual counts at leks, models of population growth can be fit and population parameters of growth and quasi-extinction probabilities can be estimated. The table below summarizes the findings of this analysis.

Habitat Type	Population Growth	Probability of Extinction
CRP-shortgrass	4.4% annually	2%
Mixed-grass prairie (KS, OK, TX)	7.0% annually	<0.0001%
Sand sagebrush prairie (KS and CO)	2.0% annually	48%
Sand shinnery oak (NM and TX)	5.1% annually	< 0.0001%
Range-wide	10.6% annually	< 0.0001%
Range-wide 2012.– Assuming a 50% decline in trend across the range	6.4% annually	3.3%

The best scientific data available indicate that range-wide there is a low probability of extinction within 86% of the species distribution. This population growth and high likelihood of persistence continues when 2012 population trends are assumed to decrease by as much as 50%.[7]

A peripheral examination of the data also demonstrates that population trends from 1980-1997 were declining at an average annual rate of 3.7%. After the species was made a candidate and significant conservation efforts were initiated, post candidate status population growth was 6.9% increase annually.

[6] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group*; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

7 See Appendix 2 for the complete analysis

The paper has not been peer reviewed, so CESAR engaged two independent academics to review the methods and conclusions. One reviewer opined that while the absolute numbers may not be precise, the populations are clearly increasing. The other reviewer did not offer an opinion. Both reviewers liked the idea of more data and more analysis which would provide more resolution as to what is actually going on with this species. The reviewers agreed that the analysis was useful, and neither reviewer identified fatal flaws in the analysis. Based on the agreement that the work was useful, and that no reviewer found fatal flaws, but rather suggested additional improvements, we believe that this site specific analysis is the best available science, and it is consistent with the requirements of the Act that data be the basis of listing determinations.

Lesser Prairie Chickens are not Genetically Isolated, and there is Evidence of Hybridization

A 2010 publication[8] examined the genetics of the Lesser Prairie-Chicken to assess whether habitat loss fragmentation and population declines were resulting in genetic isolation or loss of diversity. Populations across Kansas, Colorado, Oklahoma, and New Mexico were examined. Little genetic differentiation was found except for the population in New Mexico, which was significantly different from most other populations. There was, however, evidence of significant isolation by distance at the rangewide scale that could explain the divergence of the population in New Mexico, simply because it is geographically isolated. The study also found evidence for a post-glacial population expansion within the species, which is consistent with the historical niche model that we constructed.[9] What can also be gleaned from the genetic study is that despite an overall historic reduction in range size, and increase in degree of range fragmentation, there is as yet no evidence of decreased genetic variability, either among populations, or in the species as a whole, relative to other grouse, or to birds in general.

The proposed listing document acknowledges the existence of hybridization between greater and lesser prairie chickens. The level of hybridization at the junction of the two ranges identified in the rule is high enough to potentially lead to merging of the two species. Thus hybridization is indeed occurring and calls into question the validity of the two species. The two grouse are very similar genetically (Gutierrez et al. 2000) and grouse are well-known to easily hybridize. We suggest that the FWS has underestimated the importance of monitoring hybridization and the

[8] *Regional Variation In MTDNA Of The Lesser Prairie-Chicken*, Hagan et. al. (2010); The Condor 112(1):29–37

[9] See Appendix 3 and the discussion under climate change.

implications for the taxonomy of the greater and lesser prairie chickens.

Assuming Population Declines Is Inconsistent With the Data Requirements of the ESA

As discussed in the previous sections, the best available data demonstrate that the lesser prairie chicken is not likely to become in danger of extinction in the foreseeable future. While the FWS may prefer their expert opinion and interpretation of the information outlined in the proposed rule, the plain language of the Act does not allow the use of anything but the best available data.

However, even if the data demonstrating population increases were not available, the following discussion identifies the arbitrary nature of the threats determinations in the proposed rule as well as the failure to comply with Congressional direction that listing determinations be based *solely* on data.

Habitat Effects Are Not Based On DataFWS Admits there is a 'lack of data' on Prairie Chicken Habitat Requirements

The FWS states that designation of critical habitat is not prudent because there is insufficient information on habitat requirements and identifies:

"A specific shortcoming of the currently available information is the lack of data about:

(1) The specific physical and biological features essential to the conservation of the species;

(2) how much habitat may ultimately be needed to conserve the species;

(3) where the habitat patches occur that have the best chance of rehabilitation; and

(4) where linkages between current and future populations may occur. "

Further, the FWS states:

"Additionally, while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations."

We note that the lack of data supporting the listing decision and identified in this report is confirmed by the FWS in this statement. We agree with the FWS that there is insufficient data to identify the available and the specific habitat requirements of the lesser prairie chicken. The lack of data makes any pronouncement regarding the effect of particular activities and habitat configurations speculative. This lack of data also makes it difficult to determine the effects of habitat changes on the lesser prairie chicken and consequently impossible to determine what habitat is necessary to conserve the prairie chicken.

The proposed rule assumes the effects of habitat loss and fragmentation, and then presents a *post hoc* rationalization of other habitat related factors which the FWS surmises contribute to the decline of lesser prairie chicken.

The discussion on prairie chicken habitat changes is framed in the context of each 'threat' individually and independently. The reader is provided with a large array of discrete facts regarding prairie chicken behavior in relation to specific structures, but nowhere are there data that reveal the range wide effect of these identified threats. The rule isolates each potential threat to lesser prairie chickens and asserts population level effects for each of them but provides no data on the actual effect of the interaction of these perceived threats, and never provides the reader any context to assess the range-wide extent of the effects. That is, the actual effect of a potential threat is dependent on the particular context of the population in which it is being evaluated. FWS assumes that any threat, no matter what the additional circumstances might be, is the same throughout the range and across time. However, what might be a threat under some circumstances (e.g., during a drought) might not be a threat in a normal year. The FWS approach is not biologically defensible.

The proposed rule argues that anthropogenic[10] activities threaten the lesser prairie chicken with rampant local extirpation that threatens eventual extinction, with no data to support the assertion. The basis for the listing decision rests on two principal threats, habitat loss and fragmentation. With no supporting data or analysis, the proposed rule asserts that the principal habitat threats amplify the effect of myriad other anthropogenic activities. A number of other specific 'potential' anthropogenic threats are also identified as generically 'contributing' to the decline of the lesser prairie chicken due to its weakened state resulting from habitat loss and fragmentation. The FWS speculates these threats include conversion of grasslands to agricultural uses, encroachment by invasive woody plants, petroleum production, roads, and presence of manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings. Again, the listing is predicated on threats unsupported by data and despite that admission that:

"… while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations… '

This statement clearly acknowledges there are no data with respect to whether a particular feature is adverse, beneficial, or neutral.

The rule's treatment of the issue of avoidance of selected anthropogenic

[10] Human based

features is a good example. The proposed rule[11] states:

"…lesser prairie-chickens seldom nested or reared broods within approximately 177 m (580 ft) of oil or gas wellheads, 366 m (1,200 ft) of electrical transmission lines, 792 m (2,600 ft) of improved roads, and 1,219 m (4,000 ft) of buildings".

However, the proposed rule fails to acknowledge the citation that supports this observation of avoidance also notes that, **avoidance did not result in lowered nest success**[12], which is of course the underlying reason for concern. Implicit in the FWS identification of avoidance as a threat is the surmise that lesser quality habitat was used and nest failures resulted, causing harm across the range of the lesser prairie chicken. The omitted data demonstrate the danger in relying on surmise. The FWS failed to consider that the cited literature did not examine what contributing effect other factors interacting with the structures may have had. The ESA requires the FWS to provide or rely on data that demonstrate how populations are reduced by this behavior and how the results of the study apply to all (or essential or significant portions) of the various habitats in use by the species.

Thus, we suggest that it is premature to extend an individually identified and isolated threat to the entire species. That is, suggesting that one factor (e.g. vertical structures) is a threat, without any observed adverse effects and without consideration of other co-relevant factors, such as location or type of habitat, degree of isolation, population size, whether the population was recently impacted by drought, or any other pertinent factor, risks failing to accurately identify the real threats.

The following section discusses the specific and general threats related to habitat identified in the proposed rule, the data supporting the existence of the threat, and the data supporting its population level effects.

Habitat loss and Population

The lack of early data on lesser prairie chickens and their habitat makes it difficult if not virtually impossible to make valid comparisons of historic and present habitat. Fortunately, such historic comparisons are not a consideration in the assessment of threats for listing under the ESA. The ESA requires identification of:

*"the **present or threatened** destruction, modification, or curtailment of its habitat or range"*

The FWS takes the position that substantiating population declines is unnecessary to list a species. The FWS asserts that measurement of the threats is all that is necessary. It is, however, necessary to be able to measure, in terms of data, either habitat loss and its population level effects or population changes. In the case of the lesser

[11] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73853
[12] Pitman et al. (2005)

prairie chicken, precise ground and aerial surveys (e.g., the States and Western Assoc. of Fish and Wildlife agencies) are available. Furthermore, states have implemented new and more accurate survey techniques which facilitate understanding population level responses over time. There is little doubt that the current range of the lesser prairie chicken has changed from that of its historic range[13] [14] but whether it's 25%, 50% or 95% is irrelevant; we know approximately how many birds exist today and where most of them live. The goal of the listing determination is to determine whether the remaining populations are increasing decreasing, or stable, have adequate habitat, that the existing habitat is sufficiently stable, and if not, to assess the species and the threats to the habitat to determine whether the species qualifies as threatened under the factors identified by Congress.

In the case of the lesser prairie chicken we have access to a record of the near-term habitat amounts and population changes in occupied habitat thanks to the aforementioned aerial surveys supported by the states. These aerial surveys have provided increased accuracy in population and habitat monitoring. However, these changing survey techniques, while leading to more accurate estimates, inhibit direct comparisons across time, requiring instead that changes be measured using sophisticated statistical techniques.[15] The analysis of the current population data demonstrates increasing populations and low extinction probabilities.

Lesser Prairie Chickens are not Threatened by Habitat Fragmentation

The FWS own data and analysis, referenced in the rule, demonstrate that habitat beyond the minimum required to ensure the continued existence of the lesser prairie chicken is available. A FWS spatial analysis identified 71 patches that met the listing determination's arbitrary minimum size of 10,117 ha (25,000 ac)[16] within the five state estimated occupied range. This satisfies the statement in the proposed rule that a minimum of four strongholds of 10,117 ha (25,000 ac) distributed across the ecological diversity of the species are necessary. **These data demonstrate that despite the existing fragmentation throughout the occupied portion of the range, the rule's arbitrary minimum stronghold threshold is met. This is confirmed by the data showing population growth throughout the range**[17].

[13] See Appendix 1 for a discussion of the historic range figures used by the FWS and their applicability to the listing determination.

[14] The same could be said for virtually any species living in the United States at the time of European settlement.

[15] The Hagan 2012 analysis of lesser prairie chicken populations is one example; another, Garton et. al. 2010 was used by the FWS, it examined disparate sage grouse population measurements.

[16] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73836

[17] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser*

The discussion of habitat fragmentation included in the rule is confusing and misleading. The information is presented without context and without a discussion of population level effects. In the following paragraphs we elucidate habitat fragmentation in the context of lesser prairie chicken life history adaptations and their environment.

The FWS states in the conclusion of the proposed listing:

'…as a result of the significant reduction in numbers and range of lesser prairie-chickens resulting from cumulative ongoing habitat fragmentation, combined with the lack of sufficient redundancy and resiliency of current populations, we conclude that the lesser prairie-chicken is currently at risk of extinction or is likely to be in danger of extinction in the foreseeable future.'

The question of habitat fragmentation and its consequence is key to the FWS determination that listing of the greater prairie chicken is supported. However, the basis for the determination that the existing fragmentation is sufficient to have population level effects is not supported by the data cited by the FWS.

Specifically, the FWS makes several conflicting statements regarding area of habitat needed for successful lesser prairie chicken populations. First, the proposed rule states,

"…Although a minimum size has not been established, studies and expert opinion, including those regarding greater prairie-chickens, suggest that the minimum parcel size is likely to exceed 100 ha (250 acres)..."[18]

Later the[19] proposed rule concludes that,

"…conservation and eventual recovery of the lesser prairie-chicken should consist of the establishment of secure strongholds or core areas of high quality habitat that are at least 10,117 ha (25,000 ac) in size and support 6–10 active leks, each being used by at least 6 males..."

The proposed rule does not provide the data used to determine that a home range two orders of magnitude larger than the minimum is necessary. Home ranges for lesser prairie chickens vary by habitat type and environment. This is because each of the life history components of lesser prairie chicken vary greatly as the birds adapt to available habitat and other environmental aspects. Leks, or the display grounds of males where females come to mate, can be quite small. It would not be useful to consider the area needed for a lek by itself, as it does not include nesting, feeding and roosting sites. However, it is useful to note that, leks are also found on habitat the rule assumes is not available for lesser prairie chickens such as, "…abandoned

Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[18] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856)
[19] Id., p. 73836)

oil-drilling sites (oil pads) with little or no vegetation, unimproved roads with little traffic, areas treated with shrub-specific herbicide, recently burned areas, heavily grazed areas (e.g., stock tanks, mineral licks), and cultivated fields adjacent to grassland…"[20]. Hence, lek placement is adaptable and areas identified as unsuitable at present, may in fact be used in the proper circumstances. Because of the adaptability of lesser prairie chickens it is not advisable to make broad surmises about habitat availability and needs included in the proposed listing rule, in lieu of actual data.

There are different ways to estimate the area of habitat needed for successful lesser prairie chicken populations and no agreed-upon answer. This is due to the fact that there are separate areas for nesting, feeding and the lek itself, all of which might be fragmented by interspersed areas of unsuitable habitat (either natural or human made), in the native landscape. The proposed rule cites several studies that evaluate the area required for home range and a population. Home range estimates range from 21 ac to 4806 ac, with many values in between. The huge variance in range area is the result of reports of home range by season (i.e. breeding less than wintering), different drought conditions, and availability of food. At the population level, there is no evidence on how many birds or leks would be necessary to maintain population viability. As a consequence, estimates reported by FWS show enormous variation, from 1,012,140 ac to 2,530 ac. Other figures include 7,900 ac, 25,000 ac, 12,000 ac, 72,649 ac, and 24,710 ac. In violation of the requirements of the ESA, **the FWS does not include the data that support the determination to use the 10,117 ha (25,000 ac), nor does it explain the basis for the determination**.

The FWS references a spatial analysis they conducted to determine the extent of fragmentation within the estimated occupied range of the lesser prairie-chicken.[21] Infrastructure features such as roads, transmission lines, airports, cities and similar populated areas, oil and gas wells, and other vertical features such as communication towers and wind turbines were delineated. These features were buffered by known avoidance distances and compared with likely lesser prairie- chicken habitat. **The analysis revealed 71 patches that exceeded the minimum 10,117 ha (25,000 ac) range that exist within the five- state estimated occupied area**. Of the patches over 10,117 ha (25,000 ac), all were impacted by fragmenting features, just not to the extent that the patch was fragmented into a smaller sized patch. Thus, even if, as the rule states:

[20] Hagen et al. 2004

[21] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856; The analysis is referenced but not included in the citations, so it is not possible to assess its validity.

"… a minimum of four strongholds will be needed, distributed across the ecological diversity of the species, in order to secure the status of the species."[22]

There are several times that many patches currently in existence.

Edge Effects Due to Habitat Fragmentation

It is well known that in some ecosystems increasing linear amounts of habitat edge, as a consequence of habitat fragmentation, present threats to some species. For example, birds nesting in forests are negatively impacted by nearby open-country edges because it facilitates access by habitat-edge nest predators such as raccoons (*Procyon lotor*), and provides access to nests by avian brood parasites such as the ubiquitous brown-headed cowbird (*Molothrus ater*). The proposed rule contains numerous citations referencing the negative effects of edges that are apparently supposed to illustrate their danger to lesser prairie chickens; however, none of the citations address the effects of edges on lesser prairie chickens[23]. The proposed rule also states that typical native lesser prairie chicken habitat is a mosaic of different habitat patches. We note that each of the patches within the native mosaic creates an edge[24] [25]. Thus, the lesser prairie chicken's coexistence with edge effects in their native habitat indicates that they are part of the native landscape in which lesser prairie chickens evolved.

The FWS suggests that edges and habitat fragmentation will make it difficult for lesser prairie chicken individuals to find leks. The rule provides no data, and no evidence to support the statement. As such, it appears to be purely speculative. Further, given that leks are often used traditionally for years, and that breeding and feeding grounds are typically nearby, the notion that a lesser prairie chicken would be unable to find an active lek is scarcely credible. It is also worth noting that leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine the birds' selection of a new lek site. Surely a species would not have evolved a reproductive system that randomly makes it impossible for females and males to find each other at mating season.

[22] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[23] Id., pp. 73851-57
[24] Id., pp. 73852
[25] "Consequently, blocks of habitat that collectively or individually encompass multiple successional states that comprise tall grasses and shrubs needed for nesting, and are in proximity to more open grasslands supporting forbs for brood rearing, and are combined with smaller areas of short grass and bare ground used for breeding, support all of the habitat types used by lesser prairie- chickens throughout the year." Federal Register, Vol. 77, No. 238 , December 11, 2012, pp. 73852

Anthropogenic Changes to Lesser Prairie Chicken Habitat

This statement in the rule appears to be opinion.

'The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events…."[26]

The FWS provides no data or analysis to support the statement, and has earlier admitted there are no data on historic habitat or populations. Nevertheless, the proposed rule contains a list of activities which 'may' have an adverse effect on lesser prairie chicken, based on these assumed impacts. The information provided in the proposed rule consists of lists of areas where these 'threats' exist within lesser prairie chicken habitat and speculative mechanisms for their adverse effects. However, no data are provided to substantiate the assertions that the adverse effects attributed to these threats actually exist or how they affect lesser prairie chicken populations' extinction risk. We recognize that "extreme weather events" was intended to be only one possible example of a stochastic event, but an extreme weather event that would wreak such widespread damage would likely be destructive even to native species at peak abundances.

[26] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73883

Livestock Grazing, Water and Habitat Conversion

Livestock

The FWS surmises that because livestock grazing occurs over such a large portion of the occupied range, it must be a threat. Accepting the idea of adverse effects of livestock grazing on a species whose historic habitat included seasonal and widespread overgrazing by bison is counter-intuitive. The proposed rule implies that the pattern of grazing today is different, but does not quantify those differences or the adverse consequences. The rule also identifies other adverse effects such as nest trampling, but provides no information on the extent to which this occurs or the population level effects of such occurrences. Identification of livestock grazing as a threat to the species is purely speculative. In fact, the rule states:

"…Although documented, the significance of direct livestock effects on the lesser prairie-chicken is largely unknown. Detailed, range wide information is lacking on the extent, intensity, and forms of recent grazing, and associated effects on the lesser prairie-chicken. "

Additionally, the rule fails to account for the availability of water from stock tanks as a positive effect of grazing cattle. The rule cites research documenting the regular use of stock tanks by both male

and female lesser prairie chickens. The FWS suggests that stock tanks,

"…may be particularly important during periods of drought."[27]

The rule immediately discounts its importance stating that lesser prairie chickens do not require water speculating that dew is a 'likely' source:

"Lesser prairie-chickens likely rely on food sources and consumption of dew to satisfy their metabolic moisture requirement but will use surface water when it is available."

While the rule admits beneficial aspects of a ready source of water to the species, it fails to consider it in assessment of the effect of livestock grazing:

"Little is known regarding the specific water requirements of the lesser prairie chicken, but their distribution does not appear to be influenced by the presence of surface water."

"Total annual precipitation across the range of the lesser prairie-chicken varies, on average, from roughly 63 cm (25 in) in the eastern portions of the historical range to as little as 25 cm (10 in) in the western portions of the range. Consequently, few sources of freestanding surface water existed in lesser prairie-chicken historical range prior to settlement."

Agricultural conversion

The proposed rule states that agricultural conversion adversely affects lesser prairie chicken. However, the statement is only partially accurate. The cited research notes that lesser prairie chickens commonly forage in agricultural crops such as grain sorghum, corn, and other grain fields adjacent to native pasture from late autumn through early spring and that alfalfa is an important food source for pre-nesting females and lekking males in southwestern Kansas. The citations also reported that maximum numbers of lesser prairie chickens were found in areas in which 5-37% of the landscape was planted to grain sorghum using minimum-tillage techniques. The citations used by FWS in the proposed rule also note that recently, conversion of grass lands to agriculture has slowed, as the number of hectares per year converted has not increased. The proposed rule provides no data to substantiate the statement that increases in agricultural conversion continue to occur. Neither does the proposed rule make any attempt to assess or quantify the benefits to lesser prairie chickens of increased food sources from agricultural crops, the percentage of no-till agriculture or of the crops that provide food for lesser prairie chickens. The multiple variables involved in assessing the effect of agricultural conversion illustrate the speculative nature of sweeping assumptions about the effect of any activity on lesser prairie chicken habitat.

[27] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843

Human encroachment: energy production and transmission , fences, roads

The proposed rule lists several citations that report there are indications that human structures influence lek placement. The proposed rule includes wind turbines, energy transmission lines, power poles and lines, oil rigs, fences and roads in this category. The proposed rule posits that the vertical presence in the lesser prairie chicken landscape is in and of itself a threat. The threat is predicated on research that found lesser prairie chickens avoided these structures.

Specifically, Pitman says that leks are farther from anthropogenic structures than expected by chance. Pruett et al. (2009) found that lesser prairie chicken tended to avoid roads and power lines. Hagen (2011) noted that, "Monte Carlo simulations of expected distances indicated that the nearest 90% of lesser prairie chicken centers of use were farther from anthropogenic features than would be expected at random." However, as noted elsewhere, there are no data that this avoidance results in reduced nest success or reduced populations. Pitman et al. (2005) measured distances from nests to various anthropogenic features, and found:

"distances to the features were not substantial predictors of apparent nest success. Grass height, sagebrush plant density, and sagebrush height were the most important vegetation characteristics influencing nest success."

Further, based on the narrow reach of the supporting research, it is only surmise that structures have an adverse effect, since the effect of other interacting features, such as whether it was a drought year and the placement of the structures in relation to the lesser prairie chicken preferred activity for the site have not been evaluated.

The proposed rule speculates that human activities nearby leks might interfere with the transmission of male vocalizations ("booming") on the leks, thereby preventing females from finding the leks.[28] This speculation is inconsistent with what we know of lesser prairie chickens. First, as discussed above, leks are relatively long-lived, and it is unlikely that there are females or males in the local population who are unaware of their location and active status. Second, leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine their selection of a new lek site, but this behavior does not appear to affect the ability of leks to be found during mating season. Finally, a characteristic of lesser prairie chicken habitat is frequent wind, which abates sounds reducing the effects of surrounding noise. Nevertheless, the

[28] Federal Register, Vol. 77, No. 238 , December 11, 2012, p.73839

rule relies on the findings of a paper[29] which addresses the effect of noise on a flycatcher, warbler, sparrow and a vireo, all small songbirds, and no open country ground nesting game birds whose environmental requirements would more closely mirror those of lesser prairie chickens. Accordingly, the study, although important in its own right, is irrelevant to the lesser prairie chicken as the tremendous differences in the ecology of the species involved preclude drawing any inferences related to lesser prairie chickens. Thus, there are no scientific data to indicate that noise is a threat to the lesser prairie chicken.

Collision mortality

The proposed rule concluded that:

"power lines and unmarked wire fences are known to cause injury and mortality of lesser prairie-chickens, although the specific range wide impact on lesser prairie chickens is largely unquantified."[30]

The statement is based on a study which demonstrated that statistically, the effect of collisions was insignificant. [31] The rule identifies data from 1999 to 2004, in which researchers recovered 322 carcasses of radio-marked lesser prairie-chickens in New Mexico, Oklahoma, and portions of the Texas panhandle. The percentages of documented lesser prairie-chicken deaths from collision were estimated to be 42 percent in Oklahoma and 14 percent in New Mexico. Based on the information in Table 2 of the proposed rule, there were roughly 10,000 individuals in the three states during this time interval, and therefore, during this period, there were approximately 60,000 potential encounters. Therefore, the 14% to 42% of 322 birds (45 to 135) that died via collisions amount to less than 1/10 of one percent of the population (0.1%). Therefore, the available data indicate that although it would be highly useful to put markers on the top row of fences especially near leks, collision mortality is relatively insignificant factor.

Disease and Predation

The proposed rule states:

"The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events. Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels"

Predation

Although in the section on predators, FWS plays down the role of predators, throughout the proposed rule, there are repeated assertions that diverse threats increase predation. These discussions ascribe a role to predators that will result

[29] Francis et al. (2009)
[30] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73863
[31] Patten et al. (2005b)

from existing and planned towers serving as perches for raptors. For Example, FWS states that lesser prairie chickens avoid vertical structures as "presumably a behavioral response that serves to limit exposure to predation." The proposed rule cites a long term study in Oklahoma.[32] In that study, they identified roughly 43 carcasses out of a total lesser prairie chicken population of 3,000.attributable to raptor depredation.[33] Thus only a handful of birds were killed by raptors. The authors of this study stated "We have no reason to believe that lesser prairie chicken populations are being impacted severely by predation."[34] In a different study Behney et al. (2012, p. 294) "suspected that mammalian and reptilian predators had a greater influence on lesser prairie chicken mortality during the breeding season than raptors." Yet, in their conclusion the FWS ignores these data and opines that predation is a threat.

There are no data that support the speculative statements in the proposed rule that towers would provide roosts for ambush-style raptors. Most raptors such as large hawks, hunt from the air. A major avian predator, the Great Horned Owl, likely approaches low to the ground during crepuscular periods, and perching on a tower might make it visible. Only documented depredation where the species of raptor and hunting method were recorded would provide this information. Here again, the FWS lack sound or even reasonable scientific data on the effects of towers on increasing predator pressure. It requires observations over time, measuring the rate at which lesser prairie chickens are taken by avian predators at leks both with and without nearby towers or other vertical structures. And most importantly, one would have to demonstrate the assertion the depredation from raptors was additive and not compensatory. That is, as FWS noted, lesser prairie chickens evolved with a suite of mammalian and avian predators. Only if some new source of predation occurred that resulted in take of individuals over and above natural levels, would depredation be relevant, and the proposed rule presents no data empirical or otherwise to support this conclusion.

Disease

The FWS states in the proposed rule:

"…There is no information that indicates parasites or disease are causing, or contributing to, the decline of any lesser prairie-chicken populations, and, at this time, we have no basis for concluding that disease or parasite loads are a threat to any lesser prairie-chicken populations. Consequently, we do not consider disease or parasite infections to be a significant factor in the decline of the lesser prairie-chicken…"

[32] Wolfe et al. (2007) who conducted a long term study from 1999-2004.
[33] Table 2, FWS 2012
[34] Wolf et al. (2007: 101)

The proposed rule then goes on to state, that if populations continue to decline or become more fragmented, even small changes in habitat abundance or quality could have more significant consequences. The implication is that there would be a marginal increase in disease within the population driven by habitat changes. There are no data to support an assertion that disease will increase as habitat loss or fragmentation occurs, if the statement were supportable, the putative loss in habitat which this rule surmises, has already occurred and should have resulted in some measurable increase in disease over time. Such an increase is not recorded or even remarked. In any event, if populations decline or are sparse, diseases that are density dependent would have difficulty becoming a major threat.

Climate Change

The proposed rule identifies global warming and potential extreme weather events as a threat to the species. The rule assumes that warming will occur (as opposed to some unspecified climate change) and concludes that as a result, habitats will dwindle and further compound the putative negative effects of habitat fragmentation. However, many climate projections predict that species ranges will shift, not shrink and in fact, conditions for some species might improve.

Changes in species' range sizes are ubiquitous, and do not automatically imperil their continued existence. For example, during the last Ice age, known as the Last Glacial Maximum (LGM; 21,000 years before present), southward extending glaciers pushed many species into small southerly isolated habitat patches (refugia), where they survived for thousands of years, subsequently expanding as climate shifted again.

CESAR used a niche model to examine the current and past distribution of lesser prairie chicken (Appendix 3). Our work demonstrates that the lesser prairie chicken was one of those species which was distributed in a fragmented series of habitat patches south of the current range during the last glacial maximum, 21,000 years ago. Clearly the species survived this displacement and fragmentation, and as climate conditions ameliorated post glacial retreat, they followed their northward-moving habitats to where they are today. Thus the species has survived previous significant climate changes and has the potential to survive major, glacial-scale changes in earth's climate and still prosper. [35]

The FWS provides no data to substantiate a conclusion that a species which has weathered significant climate change and persisted over 21,000 years is not equipped to survive and adapt to current climate change.

[35] For a more in-depth discussion of the analysis, see Appendix 3

Adequate Regulatory Authority Exists to protect the Lesser Prairie Chicken at the State and Local Level

As part of our review of the proposed listing rule, CESAR lawyers examined the existing state and local protections for the lesser prairie chickens. We found that each state had its own comprehensive scheme for protecting species and their habitats. These protections, for the most part, went far beyond the narrow protections of the ESA encompassing wildlife and wildlife habitat protections.

Benefits of ESA Listing

The proposed rule states that the ESA provides protection beyond that which state and local agencies provide. This is only conditionally true. The ESA protects listed species by requiring federal agencies to avoid jeopardizing the continued existence of the species, prohibiting the 'take'[36] of listed species, and by protecting designated critical habitat. The FWS in the proposed rule implies that listing provides the ability to protect habitat on private property, is the only source for recovery planning and increases funding available for the conservation of lesser prairie chickens.

The habitat protections provided under the ESA largely flow from the designation of critical habitat. The protections apply only to that habitat which has been designated as 'critical'. The protections are further limited to the subset of critical habitat which is affected by a federal agency action. So while much private habitat can be designated as 'critical habitat', in fact it is not protected under the ESA unless a federal agency action has an effect on it. With respect to the lesser prairie chicken, this distinction is moot as the FWS has declined to designate critical habitat as 'not prudent", due to the lack of data related to the species habitat requirements.

The prohibitions against take protect the species immediate habitat if its modification or destruction leads to the death of an individual member of the species. The requirement that federal agencies consult with the FWS to ensure their actions do not 'jeopardize the continued existence of the species' allow for take as long as jeopardy does not result.

While listing of a species results in a requirement to develop a recovery plan, these plans are developed to the maximum extent practicable and there are no regulatory requirements attached to the plan. Recovery plans are aspirational documents, the ESA

[36] The Act defines take as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct..." The word harm has been interpreted to include habitat modification, which foreseeably causes the actual injury or death to a listed species. The FWS has asserted the ability to regulate habitat under this provision and consequently resists designating critical habitat. The courts have disagreed with this interpretation, pointing out that simply protecting against habitat alteration that actually kills a species is not preservation of the ecosystem upon which a species relies.

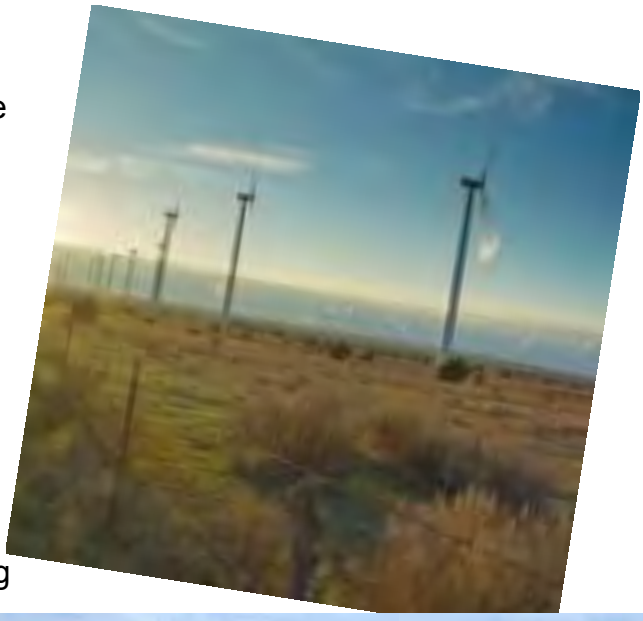
imposes no requirements for scientific rigor to their contents, such as requiring them to use the 'best scientific and commercial data available'. Further, any group can and has developed recovery plans. The FWS has developed Recovery plans, individual states have developed recovery plans, and working groups have developed recovery plans. The ESA is not the sole generator of a recovery plan.

The ESA provides no dedicated funding for listed species.[37] While it is possible to argue that if a species is listed the probability of funding increases, the evidence is unpersuasive. With nearly 1,500 listed species, one would expect all available wildlife research and conservation funds would be used to address those species. Instead, funding for wildlife conservation, recovery, and research is not devoted solely to endangered species, much is still available for unlisted and unregulated species.

Realistically listing of a species, assures federal agencies are required to review their actions in the context of the ESA, and to a limited extent those requirements extend to private lands affected by federal agencies.

Generally, a listing under the federal ESA listing does not necessarily:

- Protect habitat on private property;
- Provide access to dedicated federal funding;
- Result in a recovery plan



[37] We contrast this with the affected States which individually provide state funds for wildlife conservation.

Existing Federal Agency Regulatory Protections

The FWS admits that the lesser prairie chicken cannot be fully recovered on federal lands, which only support about four percent (4%) of the species' overall range. The five states where the majority of the lesser prairie chickens are found (primarily on private property, not federal lands) have significant state, county and local laws and regulations in effect to protect the lesser prairie chicken.

Where federal lands are involved, we note that in many cases federal agencies have taken voluntary actions to ensure that they consult with the FWS whether or not a species has been listed. These agencies include the Forest Service and the BLM. These two agencies have responsibility for managing millions of acres. These agencies have formally designated prairie chickens and their habitats as species for which their respective management plans will take special consideration. [38] These management plans are binding, and failure to adhere to their conditions can be challenged in court. [39] There is no evidence that the agencies are routinely ignoring the requirements of their management plans for lesser prairie chickens.

The voluntary consultation by federal agencies provide protections that go beyond what is required by the ESA as the agencies land use plans have a standard that manages the lands to recover or enhance wildlife and habitat. A consultation under the ESA requires only that the federal agency, avoid 'jeopardizing the continued existence of the species', or the 'destruction or adverse modification' of its critical habitat.

FEDERAL AGENCY PROTECTION[40]	ESA PROTECTION INCREASE
Bureau of Land Management • Environmental assessments required for all major activities; • Early consultation as to presence of species in project area;	None. BLM Land use plans[41] for the lesser prairie chicken habitat are complete. These plans are based on voluntary consultation with the

[38] The section on conservation actions includes details on the conservation actions undertaken by these land management agencies.
[39] Western Watersheds Project v. Ken Salazar, Secretary, Department Of The Interior, Case No. 4:08-CV-516-BLW, Document 131, Memorandum Decision And Order. http://www.advocateswest.org/sites/default/files/bulletin/Victory%20in%20First%20Round%20of%20BLM%20RMP%20Litigation/Order%20granting%20WWP%20Motion%20for%20Summary%20Judgment.pdf
[40] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[41] http://www.blm.gov/flpma/FLPMA.pdf

• Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Duty to protect and restore habitat from invasive species; • Guidelines for energy development; • Best management practices for energy development "approved" by FWS • Duty to create Resource Management Plans; • Duty to conserve "candidate" species and sensitive species designated by individual states; • Designated Area of Critical of Environmental Concern (ACEC) for lesser prairie chicken	FWS as though the lesser prairie chicken were listed under the ESA.[42] The requirements in the land use plans are based on a standard to restore or enhance habitat conditions, the ESA simply require that federal agencies: 1. Avoid jeopardy, 2. Avoid destruction or adverse modification of habitat. Federal lands controlled by BLM and the USFS managed under provisions that already provides lesser prairie chickens and their habitat enhanced protection. Federal lands controlled by BLM and the USFS have already agreed to voluntary consultation with the FWS on the lesser prairie chicken, whether it is listed or not; Current federal land management practices provide for management, enhancement, and recovery of habitats used by lesser prairie chicken, rather than just avoiding jeopardy. Each of the states with lesser prairie chicken habitat prohibit take either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[42] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

Department of Agriculture • Duty to protect and restore habitat from invasive species; • Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Environmental assessments required for all major activities;	No additional habitat protections would be provided, first because the listing does not designate critical habitat, second because the land management agencies manage to a restoration/enhancement standard which is higher than the ESA 'avoid jeopardy' and no destruction or adverse modification standard. USFS land use requirements for lesser prairie chicken are based on voluntary consultations with the FWS and a standard to improve habitat conditions[43]. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[43] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

State and Local Regulatory Protection

The five states with lesser prairie chicken habitat have significant protections in place for wildlife in general, allowing them to protect prairie chickens and their habitat without federal authority. Each state has its own Endangered Species Act and Colorado has listed the lesser prairie chicken. Some states have identified it more specifically with a designation indicating it is a species of special concern. All the states identify it as a game species and have statutes which provide for penalties for taking under anti-poaching laws. In addition, each of the States and their associated local government have the authority and expertise to protect wildlife habitat generally and specifically, whether it is on government or private land.

The following is a cursory review of applicable law which should be considered illustrative rather than a comprehensive list.

In making comparisons between the ESA and local protection it is important to note that ESA protections are limited to federal lands, and those critical habitat lands which are affected by a federal agency action. While the FWS may prefer their ability to protect the species, there is no indication that a lack of regulatory authority is hampering the states from protecting lesser prairie chickens. The states bring their own expert agency status to the protection of species within their jurisdiction, and each state has identified a commitment to protection, restoration, and enhancement of wildlife resources. There is no basis for asserting that state expertise or authority is lacking and, as noted earlier, increasing populations support a conclusion that state and voluntary conservation efforts are having a beneficial effect.

Colorado, Kansas, New Mexico, Oklahoma and Texas already have flexible laws and regulations in place to effectively deal with changing conditions to prevent depletion and waste of wildlife resources. Further, the documented policies of the federal land use agencies whose actions most impact the lesser prairie chicken and its habitat, currently identify the lesser prairie chicken as a species for which special management and protection is afforded even in the absence of an ESA listing. In light of the prohibitions of take under anti-poaching laws that apply to the lesser prairie chicken, listing under the ESA will only criminalize accidental take of lesser prairie chickens.

Existing laws at the state, county and local levels have the authority to protect and manage activities on state, public and private lands with the actual or potential benefit to the lesser prairie chicken. The service candidly admits that only about four percent (4%) of the species' overall range occurs on federal lands and that the lesser prairie chicken cannot be fully recovered on federal lands alone. Fortunately, there are adequate state, county and local laws and regulations currently available in Colorado, Kansas, New Mexico, Oklahoma and Texas to protect the lesser prairie chicken.

The following chart summarizes current protections provided to the lesser prairie chicken on a state-by-state basis and identifies any marginal increase in protection provided by the ESA[44].

STATE	ESA PROTECTION INCREASE
Colorado • Species listed under the state ESA and take is prohibited. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Prohibits unauthorized 'take' of wildlife, whether listed or not • Provides dedicated funding for wildlife and habitat. • Goal is for all wildlife to achieve self-sustaining population; • Wildlife laws are enforced with civil and criminal penalties.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Oklahoma • State has authority to enter private lands for purpose of controlling Red Cedar and other invasive plant species; • Dedicated funding for wildlife habitat restoration activities; • Protects all wildlife from illegal "take"; • Wildlife laws are enforced with civil and criminal penalties; • Provides classification for "sensitive species" such as lesser prairie chicken. • Provides protections intended to achieve self-sustaining wildlife populations. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Comprehensive regulation of energy development and natural resource development industries.	ESA provides no ability to control activity on private land unless it is affected by a federal agency action. The ESA would criminalize accidental take.

[44] A detailed chart can be found in Appendix 5.

• Classifies lesser prairie chicken as a game bird ad protects it with anti-poaching laws.	
New Mexico • Dedicated funding source for wildlife protection and promotion; • Conservation Services are available for management and enhancement (including research and conservation actions) of wildlife and habitat; • Educational publications on wildlife and habitat related conservation issues; • State requires studies to be conducted to determine the status and survival requirements of threatened or endangered species. • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Kansas • Established habitat acquisition and restoration programs; • Programs to ensure that all wildlife maintain or achieve “self-sustaining” populations; • Penalties for failure to adhere to wildlife laws; • Local governments have authority to create noxious weed programs; • Planning and zoning must be conducted in a manner that will consider all natural resources of the State; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Texas • Noxious weed control programs; • Dedicated funding for wildlife research; • Dedicated funding for wildlife and habitat conservation;	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in

• Civil and criminal penalties for violation of wildlife laws; • Wildlife laws protect all "indigenous" wildlife (not only listed species) from "take"; • Conservation incentive programs with dedicated funding; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it under anti-poaching laws.	protection by an ESA listing would be to criminalize accidental take.

COLORADO

Colorado has implemented rules, regulations and codes to ensure the protection of wildlife and to ensure a continuous operation of planning, acquisition and development of wildlife habitats and facilities for its indigenous wildlife populations. The protections available in Colorado include, but are not limited to, local governments, planning and zoning, land use and conservation and have included provisions for enforcement so as to promote consultation with other states and federal government for the purposes of increasing the number of individuals within the species and populations of wildlife up to the optimum on a statewide basis to ensure equitable and reasonable privileges of ownership along with the pursuit of wildlife resources.

NEW MEXICO

New Mexico has a comprehensive wildlife conservation strategy. The strategy focuses on actions intended to keep common species common while working to prevent wildlife from becoming endangered. Using rigorous science, New Mexico has constructed an ecological framework for identifying the species of greatest conservation need, the habitat necessary to sustain them and other members of their ecological communities with periodic review processes necessary to ensure citizen involvement and acceptance.

KANSAS

Kansas has enacted the Kansas Nongame and Endangered Species Conservation Act of 1975 which gives the Department of Wildlife, Parks and Tourism authority to identify and undertake appropriate conservation measures. In that regard Kansas has implemented recovery plans with an objective to guide research and management aimed at enhancing listed species populations with the ultimate goal of allowing species to recover. Kansas has taken great strides in creating, practices, plans and regulations

which provides incentives to plant and maintain prairie grasslands which have greatly benefited the lesser prairie chicken.[45]

TEXAS

As an example of the available protections, the Texas Agriculture Code allows the authority to determine critical wildlife habitat zones, create and regulate noxious weed control districts and to regulate range restrictions. Additionally, the Texas Natural Resources Code and Parks and WildlifeCode allow Texas to regulate and develop and administer programs to ensure continued agriculture production and water availability as well as wildlife habitat availability. Texas also has an administrative code whose purpose, in part, is to provide a comprehensive method for the conservation of an ample supply of wildlife resources on a statewide basis to insure reasonable and equitable privileges of ownership along with the pursuit of wildlife resources.

OKLAHOMA

Oklahoma has developed the Oklahoma Lesser Prairie-Chicken Conservation Plan (OLEPCCP) to "protect, enhance, and restore their habitat while also addressing other factors leading to their decline." This plan is intended to benefit the people, economy, and wildlife resources of Oklahoma by providing a framework for effective management and habitat improvement. Oklahoma is working to conserve the lesser prairie chicken while minimizing effects on human economies and developments. Appropriate habitat improvement/conservation goals and long-term management actions/strategies are being utilized to achieve these goals as well as coordinated strategies to implement management actions – including interagency coordination and incentives or other programs that will make restoration and maintenance of LEPC habitat economically viable for landowners and industries. While these efforts are underway, Oklahoma defines lesser prairie chickens as game birds and protects them under their anti-poaching statutes.

Table 1. Federal Lands By State[46]

State	Total Federal Land Acreage[47]	Total Acreage in the State	% of
Colorado (listed under CO ESA)	24,086,075	66,485,760	36.2%

[45] The anti-poaching laws protect the species at all time. Kansas offers limited hunting of LPC.
[46] Congressional Research Service, 7-5700, February 8, 2012, Federal Land Ownership: Overview and Data, http://www.fas.org/sgp/crs/misc/R42346.pdf
[47] Understates total; includes lands of the four major federal land management agencies and the Department
of Defense, but excludes lands administered by other federal agencies (e.g., Agricultural Research Service, Bureau of Reclamation, Department of Energy, National Aeronautics and Space Administration).

Kansas	301,157	52,510,720	0.6%
New Mexico	27,001,583	77,766,400	34.7%
Oklahoma	703,336	44,087,680	1.6%
Texas	2,977,950	168,217,600	1.8%

Federal Voluntary Conservation Actions

As noted earlier, particularly in the case of federal land management agencies, conservation actions undertaken voluntarily as part of a program of land management by the federal agencies, become enforceable once they are adopted. In a similar manner, once landowners enter into voluntary conservation programs with federal agencies, the provisions of the programs themselves become requirements.

Summary Chart of Federal Agency Ongoing Conservation Programs[48]

FEDERAL AGENCY CONSERVATION ACTIONS[49]

Department of Agriculture
 	
• Natural Resources Conservation Service:
  ○ Lesser Prairie Chicken Initiative: helping farmers and ranchers enhance, restore and protect habitat for lesser prairie chicken;
  ○ Conservation Reserve Program (CRP): one of the primary management tools for habitat restoration;
  ○ Wildlife Habitat Incentive Program: voluntary approach to improving wildlife habitat;
  ○ Working Land for Wildlife: FWS cooperative to combat the decline of seven specific wildlife species, including the lesser prairie chicken;
  ○ Grassland Reserve Program (GRP): a voluntary conservation program working with individuals to enhance plant and animal biodiversity, and protection of grassland;
  ○ State Acres for Wildlife Enhancement (SAFE): a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years;
  ○ The Environmental Quality Incentives Program (EQIP): a voluntary program that provides financial and technical assistance to agricultural

[48] A detailed chart can be found in Appendix 6
[49] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken

producers through contracts up to a maximum term of ten years in length.

Fish and Wildlife Service
 	
• Habitat Conservation Planning Assistance;
• Habitat Conservation Plan (HCP) Land Acquisition;
• Oklahoma and Texas have entered into CCCA's for the protection of the lesser prairie chicken. Candidate Conservation Agreements (CCAs) are voluntary conservation agreements between FWS and one or more public or private parties.[50]
  ○ Oklahoma CCCA: On March 4, 2013 Oklahoma's CCCA was finalized. FWS states that Oklahoma "has shown capability for and commitment to implementing all of the terms of the CCAA. The ODWC has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA".[51]
  ○ Texas CCCA: This CCAA pertains to lands in Texas encompassed by the current distribution of LPC, those lands that are unoccupied potential habitat, and those that could provide potential habitat if the current population and distribution of LPC should increase.[52] In Texas, TPWD holds a permit and issues Certificates of Inclusion to participating landowners who are voluntarily implementing management plans for lesser prairie-chickens. As of July 15, 2012, twenty-five Texas ranchers have 282,878 acres enrolled in the CCAA.[53]

BLM and USFS have entered into agreements to consult with the FWS voluntarily on candidate species and 'species of special concern.[54]

State and Local Voluntary Conservation Actions

The question of the effectiveness of voluntary versus regulatory conservation actions is difficult, and there is little literature that rigorously explores the issue. The argument for voluntary conservation is that regulatory conservation makes the species or its habitat a liability. Voluntary conservation removes the potential for the loss of property or its value and encourages behaviors that are beneficial to the species.

[50] The Service works with its partners to identify threats to candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements, and design and implement conservation measures and monitor their effectiveness. http://www.fws.gov/endangered/what-we-do/cca.html

[51] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf

[52] http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

[53] http://www.fws.gov/southwest/es/Documents/R2ES/LPC_FAQ_18July2012.pdf

[54] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

The population review we referenced earlier[55] noted declines in lesser prairie chicken populations in the decades prior to its designation as a 'candidate species' and increases after designation and the onset of voluntary conservation actions.

The 5 states in the lesser prairie chicken range have implemented a number of conservation actions over the past fifteen years. The FWS has articulated a policy for evaluating those conservation actions. This policy, known as the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy")[56], is particularly important for conservation actions that are ongoing or proposed for the future.

The FWS's PECE Policy requires during listing decisions that the FWS evaluate whether "formalized conservation efforts" [57] ("FCEs") "contribute to making it unnecessary to list a species". The purpose of the policy is to ensure consistent and adequate evaluation of future or recently implemented conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents when making listing decisions. The policy is expected to facilitate the development by States and other entities of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.[58]

This policy applies to those conservation efforts that "have not yet been implemented or have been implemented but have not yet demonstrated whether they are effective at the time of a listing decision."[59]

When evaluating an FCE that is not yet implemented, the FWS must make this evaluation based on the "certainty of implementing the conservation effort and the certainty that the effort will be effective." [60]

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[55] An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[56] 50 CFR Chapter IV, Federal Register / Vol. 68, No. 60 / Friday, March 28, 2003

[57] "conservation efforts as "specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species". Conservation efforts may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial actions." A formalized conservation effort is one "identified in a conservation agreement, conservation plan, management plan, or similar document." Id.

[58] http://www.sagebrushsea.org/esa/FWS_PECE_q&a.pdf

[59] Id.

[60] The PECE Policy states that the following factors will be considered: 1. Identified Parties, Funding and Resources necessary to implement the effort; 2. The legal authority of the parties to proceed with the FCE are described; 3. The legal procedural requirements (e.g. environmental review) necessary to implement the effort are described and within the means of the parties to accomplish; . 4. Authorizations (e.g., permits, landowner permission) necessary to implement the conservation effort are identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement

The majority the voluntary conservation actions could be considered ongoing, however, some such as the Interstate Working Group Range Wide Management Plan[61] and Oklahoma's CCCA have yet to be completed or implemented but would require a determination that there is high level of "certainty" of implementation given their near completion status and the large investment of resources.

In prior listing determinations, the FWS has declared that if a conservation plan cannot be demonstrated to be effective, it cannot be considered in a listing determination. This position is not supported by the plain language of the PECE policy. Further, it is demonstrably arbitrary in that most, if not all of the actions contemplated by these conservation plans are consistent with best management practices required by the FWS in their consultations with the federal land management agencies, in consultations which include the species and in documents sponsored by the FWS.[62]

Finally, we note that despite the assertions of the FWS as to efficacy of an ESA listing in protecting the species, the ESA provides very narrow protections, limited by the consultation process and the language of the ESA which does not provide regulatory requirements for enhancement or improvement, instead requiring that jeopardy of the continued existence of the species be avoided, and adverse modification and destruction of habitat be avoided.[63]

The limitations of the ESA in recovering species are aptly illustrated by the fact that of nearly 1,500 species listed less than 50 have recovered. Of that number only 20 actually recovered, the remainder were either extinct (9) or listed in error.[64] Voluntary conservation avoids the perverse incentives created by criminalization of accidental 'take' of

the effort will obtain these authorizations; 5. Voluntary participants are identified and methods (e.g. incentives) used to obtain necessary level of voluntary participation are described; 6. Regulatory mechanisms (e.g., laws, regulations, ordinances) necessary to implement the conservation effort are in place; 7. A high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding; 8. An implementation schedule (including incremental completion dates) for the conservation effort is provided; 9. The conservation agreement or plan that includes the conservation effort is approved by all parties to the agreement or plan.

[61] The type and level of voluntary participation (e.g., number of landowners allowing entry to their land, or number of participants agreeing to change timber management practices and acreage involved) necessary to implement the conservation effort is identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain that level of voluntary participation (e.g., an explanation of how incentives to be provided will result in the necessary level of voluntary participation). Id.

[62] Jamison, B. E., J. A. Dechant, D. H. Johnson, L. D. Igl, C. M. Goldade, and B. R. Euliss. 2002. Effects of management practices on grassland birds: Lesser Prairie-Chicken. Northern Prairie Wildlife Research Center, Jamestown, ND. 29 pages.

[63] The prohibition does not apply in the case of the lesser prairie chicken as the FWS has determined that designation of lesser prairie chicken habitat is 'not prudent' as there are no data to support a designation.

[64] http://www.ncpa.org/pub/st303?pg=5

species and harnesses the much broader power of states and local agencies to protect habitat on private lands. In the case of the lesser prairie chicken, where only 4% of its habitat is on federal land, the voluntary protection of habitat on private land is essential.

The fact that the affected states and landowners have been funding and participating in conservation activities beginning in 1996 with the formation of the lesser prairie chicken working group[65] and continuing to the present with the State of Oklahoma entering into a conservation agreement with the FWS demonstrates the commitment to species conservation. In the intervening 15 years, money time and effort have been expended to conserve the lesser prairie chicken.[66] If these efforts, which rely on the expert agency's recommendations, cannot be expected to succeed, then it brings into question the expertise the FWS brings to the discussion.

[65] http://www.wafwa.org/html/prairie_chicken.shtml

[66] See Appendix 7

Chart of Voluntary Conservation Actions[67]

VOLUNTARY CONSERVATION ACTIONS[68]
• Each State has prepared and/or participated in at least one conservation plan • Each State has prepared and/or participated preparation of at least one management plan • Each State has prepared and/or participated in development of at least one recovery plan • The five states participate in an Interstate Working Group to collaborate on conservation activities • Interstate Range Wide conservation plan • The states either individually and through the interagency group have funded or carried out research geared toward improving conservation techniques • All the affected states have a habitat restoration program • Several States have prepared guidelines and best management practices for natural resource development and some for the protection of the LPC specifically. • Each State has dedicated funding and multiple financial incentive programs to encourage habitat restoration on private lands, this can be used for lesser prairie chickens and other species as necessary.

Wind Industry Conservation Actions[69]

The FWS indicates wind power development is a primary concern with respect to the lesser prairie chicken. Their concern is based on the assumption that avoidance of vertical structures results in some as-yet unidentified threat to the species.[70] Because of the explicit statements in the proposed rule regarding concerns related to expansion of wind power and the lack of regulation related to that expansion, we examined regulation and voluntary conservation actions related to wind power explicitly.

[67] See Appendix 5 for a detailed list of voluntary conservation actions.
[68] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[69] See Appendix 7
[70] The studies cited found lesser prairie chickens avoided vertical structures, but did not identify any adverse effects resulting from that avoidance.

We identified a significant commitment to conservation in general by the industry. In a letter to the Secretary of the Department of Interior, the American Wind Energy Association expresses that the " final version of the Guidelines on March 23rd, 2012 was the culmination of over 5 years of a painstaking, but collaborative, process between representatives of the wind energy industry" and regulatory agencies.[71] This dedication to the process should provide a high level of certainty with regarding to this FCE.

Below is a summary chart of activities.[72]

Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.
Wind Energy Mapping Tools	Playa Maps for Colorado, Kansas, Nebraska, New Mexico, Oklahoma and Texas by county.
Southern Plains Wind and Wildlife Planner	Southern Plains Wind and Wildlife Planner for a set of species and ecosystems in Colorado and New Mexico.
Southern Great Plains Crucial Habitat Assessment Tool for Lesser Prairie-Chicken	Led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[73]
North American Landbird Conservation Plan-co-authored by the FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [74]

[71] http://awea.org/newsroom/pressreleases/upload/AWEA-and-Member-Company-Letter-to-Salazar-re-Wind-Energy-Guidelines-May-15-2012.pdf
[72] See Appendix 7
[73] http://kars.ku.edu/geodata/maps/sgpchat/
[74] http://www.partnersinflight.org/cont_plan/#Access

FWS Wind Energy Guidelines	FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [75] FWS in its guidance document states that it is issuing the guidelines pursuant to its authority under the ESA. FWS claims authority given its mandate to identify and protect endangered and threatened species and to "provide means to conserve" their ecosystems. FWS cites the ESA as the authority that directs federal agencies to "utilize their authorities to conserve listed species" and states that FWS and other federal agencies are encouraged to "do the same with respect to 'candidate' species". [76] Industry Adoption of Wind Energy Guidelines which address comprehensive wildlife and habitat considerations and best management practices. :
FWS	Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.
BLM	Interim Wind Energy Development Policy The Interim Wind Energy Development Policy (IM 2003-020), was issued October 16, 2002. This document ensures application of the BLM Wind Energy Development policies and best management practices (BMPs) in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on BLM managed public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan must comply with the IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[77]

[75] http://www.fws.gov/windenergy/docs/WEG_final.pdf
[76] Id.
[77] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf

BLM	Wind Energy Development Policy This IM further clarifies the BLM Wind Energy Development policies and best management practices (BMPs) provided in the Wind Energy Development Programmatic Environmental Impact Statement (EIS) of June 2005. Issuance of this IM ensures BLM-wide consistency in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on the public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan will comply with policy provided in this IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[78]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are developing best management practices (BMPs) that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy from renewable sources by 2020 in a wildlife friendly manner.[79]
Recommendations To Minimize Adverse Impacts Of Wind Energy Development On Wildlife 2012	There is no statewide permitting authority in New Mexico with regard to wind development. However, the state has developed guidelines for use by wind project developers, their consultants, local government and the general public. New Mexico Department of Game and Fish offers guidance for projects and guidelines in their Habitat Handbook.[80]
Multi-State	On April 22, 2009 Interior Secretary Salazar announced $57.8

[78] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf
[79] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml
[80] http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP. The planning proposal lands a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[81]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[82]

[81] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html
[82] http://kec.kansas.gov/reports/wind_siting_handbook.pdf

FERC Transmission Line Regulation	The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.[83]	
County Protections		
Union, New Mexico[84]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [85]
San Miguel, New Mexico	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [86]
Bent, Colorado	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.

[83] http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission.pdf
[84] http://nm-unioncounty.civiccities.com/directory.aspx
[85] http://www.unionnm.us/DocumentCenter/Home/View/9
[86] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf

CONCLUSION

The FWS has:

- limited or incomplete data on historic habitat loss,
- limited or incomplete data on the habitat requirements of the lesser prairie chicken and
- limited or incomplete data on the available habitat for the lesser prairie chicken.

The best available data find increasing populations across the range of the greater prairie chicken and low extinction probabilities. Genetic analysis demonstrates no loss in genetic diversity and no evidence of genetic isolation.

A review of the state and local efforts to conserve the lesser prairie chicken demonstrates robust statutory authority for protection of habitat on public and private land as well as legislative commitment to conservation of wildlife species and their habitat at the state level. These authorities exist whether the species is listed or even remains a candidate.

Voluntary conservation efforts are numerous and widespread, and range from individual land owners to developers of wind energy farms. These efforts are often developed in conjunction with the FWS and/or are consistent with the direction given in the publications sponsored or funded by the FWS which identify effective conservation measures. The effectiveness of these measures is provided support by the fact that increasing population numbers coincide with the advent of heightened awareness of the population declines of the lesser prairie chicken due to its identification as a 'candidate species' under the ESA.

There are no data that support the FWS assertion that habitat fragmentation and decline with related effects are threatening the lesser prairie chicken. There are data that demonstrate population growth, low extinction probabilities, and genetic robustness.

The FWS has failed to meet the requirements of the Act that listing be based solely on data showing that the species is adversely affected by one or more of the five factors enumerated inthe Act.

APPENDIX 1

The 84% reduction in the area historically occupied by lesser prairie chickens cited by the FWS is little more than a guess with an unknown error surrounding it. The FWS admits that "Very little information is available regarding the size of lesser prairie chicken populations prior to 1900." Robb and Schroeder (2005) stated: "Few records exist to verify the historical distribution of lesser prairie-chickens prior to European settlement because the geographic region that is generally regarded as historical range (southeastern Colorado, southwestern Kansas, western Oklahoma, northern Texas, and eastern New Mexico) was largely unexplored during the 1800s (Aldrich and Duvall 1955, Sharpe 1968). The first expeditions to explore Colorado tended to bypass the southeastern part of the state (Rockwell 1908), and it was not until 1914 that lesser prairie-chickens were recorded officially from Baca County (Lincoln 1918)."

As an example of the potential misuse of the uncertainty of the historical data, USFW wrote that "Litton (1978, p. 1) suggested that as many as two million birds may have occurred in Texas alone prior to 1900." Litton's paper was a non-peer reviewed article, and what Litton actually wrote was: "Records indicate there may have been as many as two million lesser prairie chickens in Texas prior to 1900, before exploitation by early-day sportsmen and market hunters". However, there is no reference by Litton as to what these "records" consisted of, and therefore it is not useful to repeat this number, as it is not verifiable and fails to meet the data standard of the ESA.

Even more potentially confounding is the apparent change in behavior of lesser prairie chickens. Jackson and DeArment (1963) stated that much of the range in southern Texas where maps show the bird as historically present were likely temporary wintering grounds; today the lesser prairie chicken is thought to be non-migratory. What percentage of this putative historic range includes temporary wintering or resting grounds? This lack of data makes it impossible to realistically reconstruct lesser prairie chicken behavior or range of over 100 years ago and extrapolate it to existing conditions.

APPENDIX 2

An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens

A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group

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Issue: Each state monitors spring populations of lesser prairie-chickens with similar (but not exact) methods to detect and count birds on leks. Additionally, sampling effort has varied overtime with generally more extensive efforts in recent years. Thus far, comparison between or among states has not been possible because of these facts.

Need: A unifying analytic method for assessing trend of lesser prairie chicken populations among states and geographic regions is needed to evaluate past and future population performance as a result of conservation actions or changes in land use.

A proposed method: There have been 3 range-wide assessments of greater sage-grouse population dynamics and persistence (Connelly et al. 2004, WAFWA 2008, Garton et al. 2010), and similar issues of data consistency and variation in sampling effort were common to all three studies. Garton et al. (2010) is the only peer reviewed published article from the three, and was largely based on the analytic methods in Connelly et al (2004). Using population reconstruction from annual counts at leks, density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) models of population growth can be fit and population parameters of growth ($\square_t$), population equilibrium, and quasi-extinction probabilities can be estimated.

In this example, data were pooled by 4 geographic regions, sand sagebrush (CO, KS), CRP-shortgrass prairie (KS), mixed grass prairie (SE KS, OK, TX-Panhandle), and shinnery oak (NM, TX west) in which to estimate annual rates of change ($\square_t$), average growth rate (trend from 1997-2011), variation of ($\square_t$), quasi-extinction probability (population drops to 25% of equilibrium), and population equilibrium. Data across all regions was pooled to assess trend and estimate population parameters for the entire lesser prairie chicken range. Finally, concern has been generated regarding declines in populations in 2012. To address this concern, a worked example assuming a 50% decline (2012 trends have not been finalized yet) in trend rangewide occurred is provided to demonstrate what affect it may have on the entire range.

Lesser prairie chicken lek counts reported by individual states were summarized within ecologic regions and used to reconstruct an index to the historical abundance of the population within each zone. We treated the number of lesser prairie chicken counted

at leks in the final year as an index to the minimum number of lesser prairie chicken attending leks. Lek counts in each year were a cluster sample of lesser prairie chicken and thus treated by standard finite population sampling procedures (Scheafer et al. 1996: 297).

Sampling effort devoted to counting leks has varied enormously from year to year and grown appreciably in the last 5 years. To standardize estimates and remove bias due to variable sample sizes we treated the number of lesser prairie chickens counted in the initial count (or another base year if final year counts were inadequate) as the standard for projecting later counts by applying a ratio estimator (Scheafer et al. 1996: 200) to estimate the finite rate of change (λ_t) for the population between successive years as follows. Beginning with the initial year of a route (1997 or more recent), lesser prairie chicken counted along each route censused in both 1997 and 1998 were treated as cluster samples of individual lesser prairie chickens in successive years. The ratio of lesser prairie chickens counted in a pair of successive years estimates the finite rate of change at each route in that one year interval (λ_t). These ratios were combined across routes within a region for each year to estimate the finite rate of change for the entire population within a zone to estimate the finite rate of change for that management zone between successive years (e.g. 1997 to 1998):

$$\lambda(t) = \frac{\sum_{i=1}^{n} M_i(t+1)}{\sum_{i=1}^{n} M_i(t)}$$, where $M_i(t)$ = number of LPEC counted along route *i* in year *t*,

across *n* routes counted in both years *t* and *t+1*,

Because methodologies were not exact, an average λ_t was calculated among routes and states for each region. Unlike previous methods, that reconstructed populations from the penultimate year backwards, in this method the index to population size was projected forward from 1997 to assess trend since LESSER PRAIRIE CHICKEN were classified as a candidate as a threatened or endangered species. This approach does not affect the rates of change or persistence estimates, but provides a baseline more meaningful to the conservation question at hand. Because population sizes were not well described in 1997, and the method is based on proportional changes of ratios, all trends were assessed as a percentage of the 1997 index which was set to 100% (See Connelly et al. 2004). The index to population size for subsequent years was then calculated by taking the number of LESSER PRAIRIE CHICKENs counted in the initial year (1997) as a baseline estimate of population size within a region and projecting the next year's minimum LESSER PRAIRIE CHICKEN abundance by multiplying the 1997 abundance by the ratio estimator of the finite rate of change from 1997 to 1998 (e.g. finite rate of change of 0.81 between 1998 and 1999 suggested that the 19% fewer

LESSER PRAIRIE CHICKEN were counted at leks in 2000 than in 1999). This process was repeated for the change from 2000 to 2001 (finite rate of change of 1.015) yielding a breeding population index for a given zone in 2001 and so on up to 2011. Repeating this process for each management zone yielded a population index for each zone stretching from 1997 to 2011 for populations in all regions. These population indices provided the basis for all further analyses and modeling.

Fitting population growth models

Using the time series of population indices for each region, 2 stochastic population growth models were fit including: (1) exponential growth with process error (EGPE, Dennis et al. 1991), (2) exponential growth state space (EGSS, Staples et al. 2004) which incorporates both process and sampling error, and most importantly allows for the parsing of these error rates for more precise estimates of population persistence.

Results:

CRP-shortgrass.—There were 3 routes established to monitor trends of LESSER PRAIRIE CHICKEN in the CRP grasslands north of the Arkansas River in Kansas beginning in 2000. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 4.4% annually (Figure 1A; Table 1). The equilibrium of a density dependent population was approximately 99% of the baseline in 2000, and the probability of extinction (declining to 25% of equilibrium) was 2%.

Mixed-grass prairie.– There were 6 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS, OK, and TX, 2 of which began in 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 7.0% annually (Figure 1B; Table 1). The equilibrium of a density dependent population was approximately 229% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was <0.0001%.

Sand sagebrush prairie.– There were 7 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS and CO both of which began prior to 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 2.0% annually (Figure 1C; Table 1). The equilibrium of a density dependent population was approximately 183% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 48%.

Sand shinnery oak.– There were 29 routes to monitor LESSER PRAIRIE CHICKEN in shinnery oak habitat of NM and TX. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 5.1% annually (Figure 1D; Table 1). The equilibrium of a density dependent population was approximately 196% of the baseline

in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide.– There were 45 routes to monitor LESSER PRAIRIE CHICKEN across the range. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 10.6% annually (Figure 1E; Table 1). The equilibrium of a density dependent population was approximately 276% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide 2012.–Assuming a 50% decline in trend across the range, the 10-yr average annual finite rate of population change (λ_t) indicated population growth of 6.4% annually (Figure 1F; Table 1). The equilibrium of a density dependent population was approximately 262% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 3.3%.

Summary.– Regionally populations continue to show significant signs of population growth, however, because of low rates of growth and large variation in estimates of lambda, sand sagebrush habitat (14% of species distribution) was one region that indicated the greatest likelihood of reaching 25% or less of the equilibrium population size. Thus, 86% of the species' distribution exhibits population growth (>2% annually) with low probability of extinction. Range-wide analysis indicates the species as whole has grown at a rate of 10.6% since 1997 with low probability of extinction. Lastly, if the range-wide population trends did decrease by as much as 50% in 2012, populations are projected to be 73% greater than in 1997, and likelihood of population persistence remains high (>96%).

A peripheral examination of population trends prior to the 1997 candidate status recommendation, indicates that on average populations from 1980-1997 were declining at an average annual rate of 3.7%, post candidate status population growth was 6.9% increase annually.

Further refinements: There are 3 recommendations to make this modeling approach more rigorous with the existing data: 1) to analyze the data on a lek by lek analysis rather than at the route or county scale, 2) where longer term data exist develop models for longer time periods that specifically identify significant transitions in trend (upwards or downwards), to better understand temporal factors that may be affecting different historic periods and changes in land use, and 3) once population estimates are available from aerial surveys in 2012 then trend analyses and PVA can be conducted relative to population size and trends

beginning in 2012 and projecting backwards. This approach would be almost identical to that of greater sage-grouse PVA conducted by Garton et al. (2010).

Literature cited.

Connelly, J. W., S. T. Knick, M. A. Schroeder, and S. J. Stiver. 2004. Conservation assessment of greater sage-grouse and their habitats. Western Association of Fish and Wildlife Agencies. Cheyenne, Wyoming.

Garton, E. O., J. W. Connelly, C. A. Hagen, J. S. Horne, A. Moser, and M. A. Schroeder. 2010. Greater Sage-Grouse population dynamics and probability of persistence. Studies in Avian Biology 38: 293-382.

Western Association of Fish and Wildlife Agencies. 2008. Greater sage-grouse population trends an analysis of lek databases. Unpublished report, Cheyenne, Wyoming.

Figures

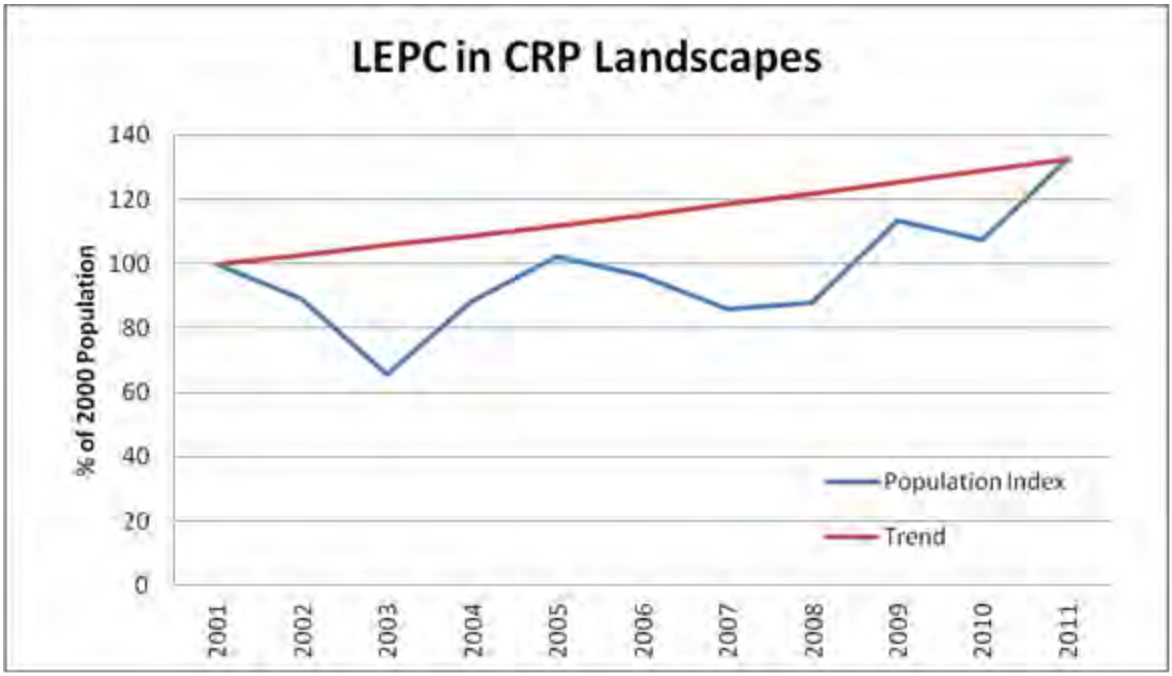


Figure 1A. Lesser prairie-population index for CRP Landscapes from 2001-2011, quantified as a percentage of the 2001 baseline population.

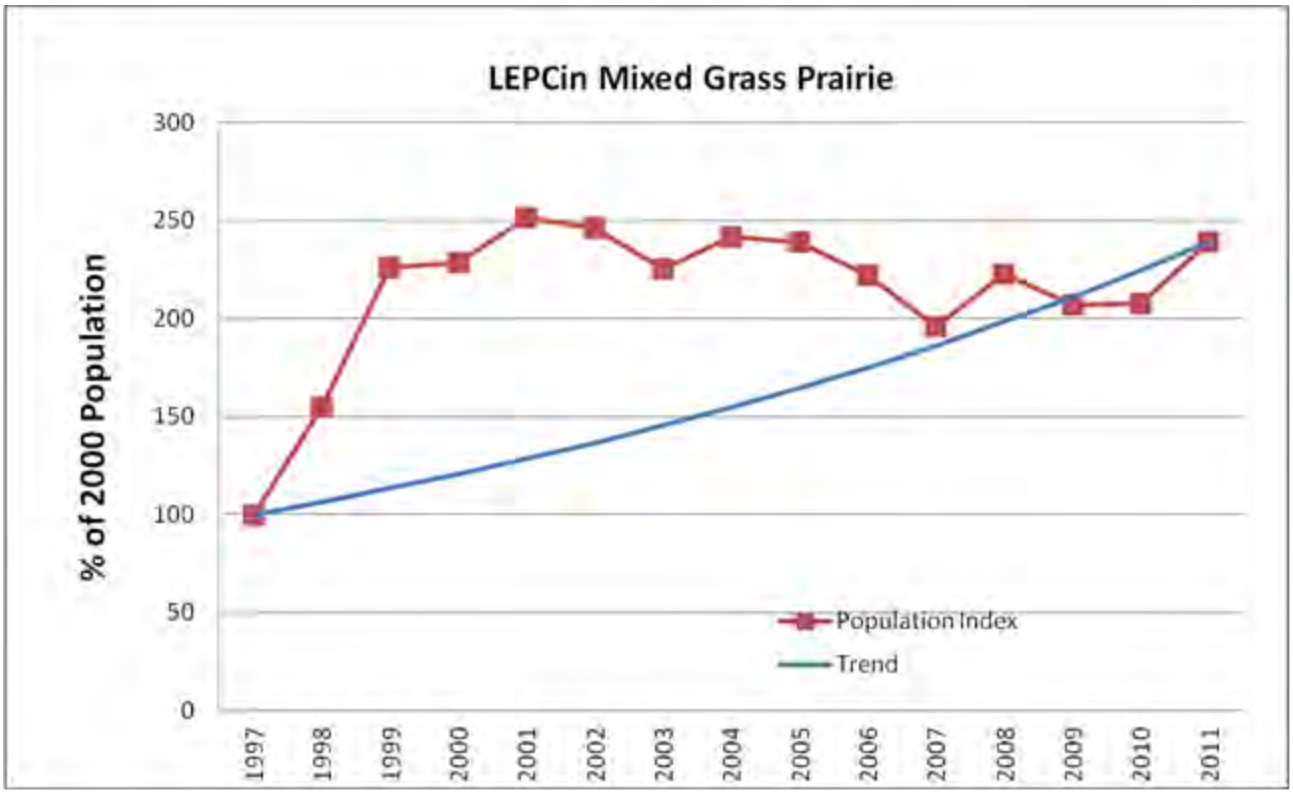


Figure 1B. Lesser prairie-chicken population index for mixed grass-prairie landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

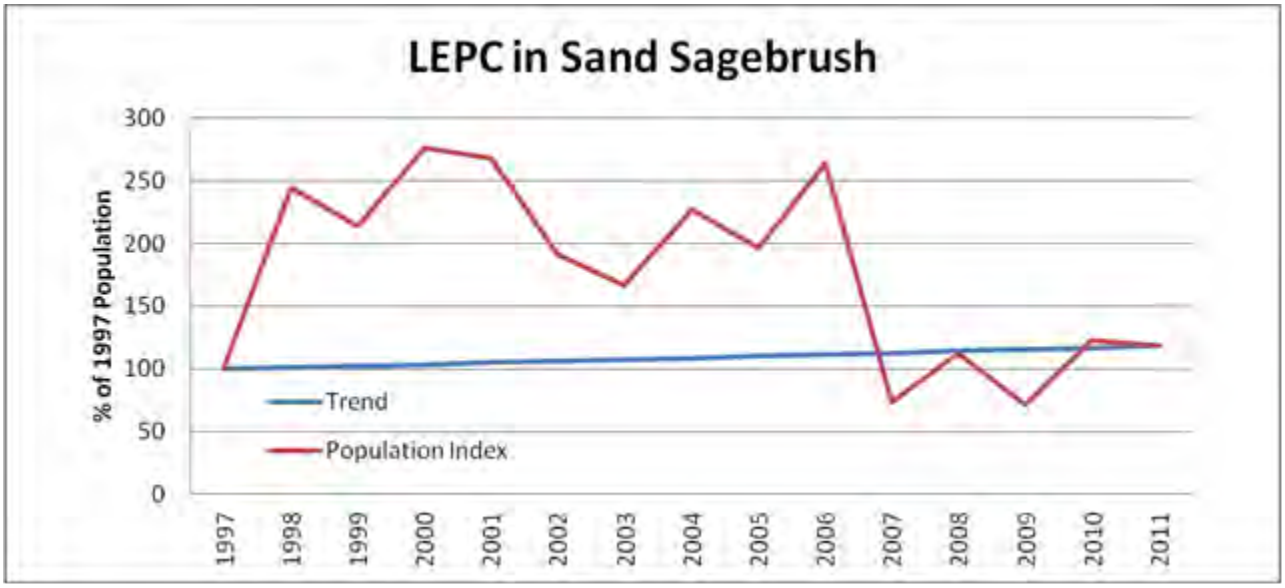


Figure 1C. Lesser prairie-chicken population index for sand sagebrush landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

Figure 1D. Lesser prairie-chicken population index for sand shinnery oak landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

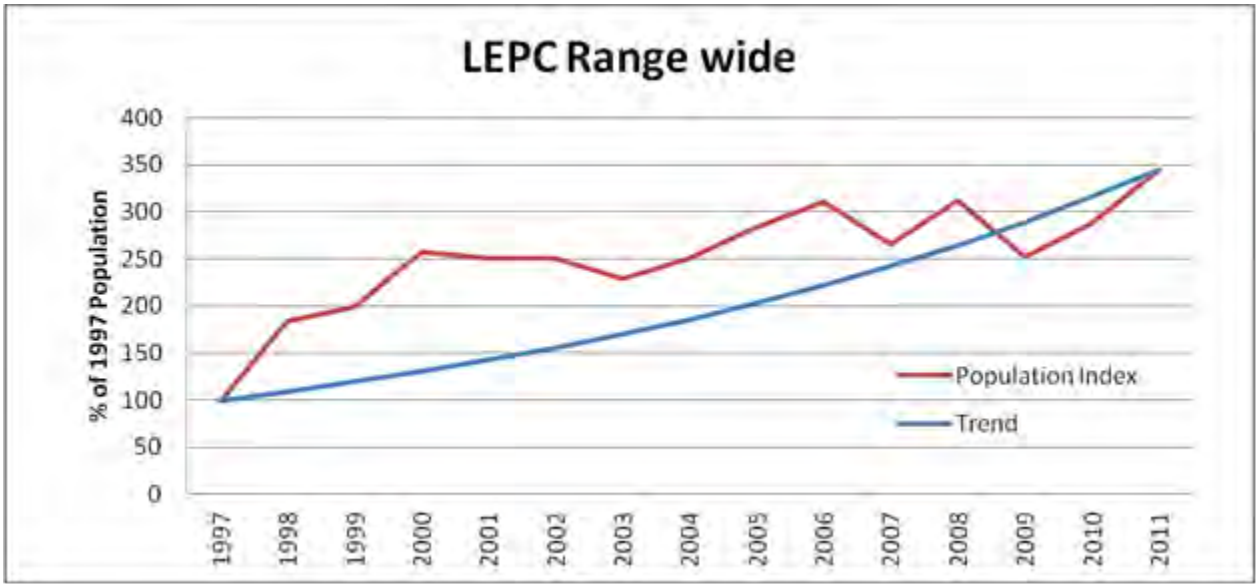


Figure 1E. Lesser prairie-chicken Range-wide population index from 1997-2011, quantified as a percentage of the 1997 baseline population.

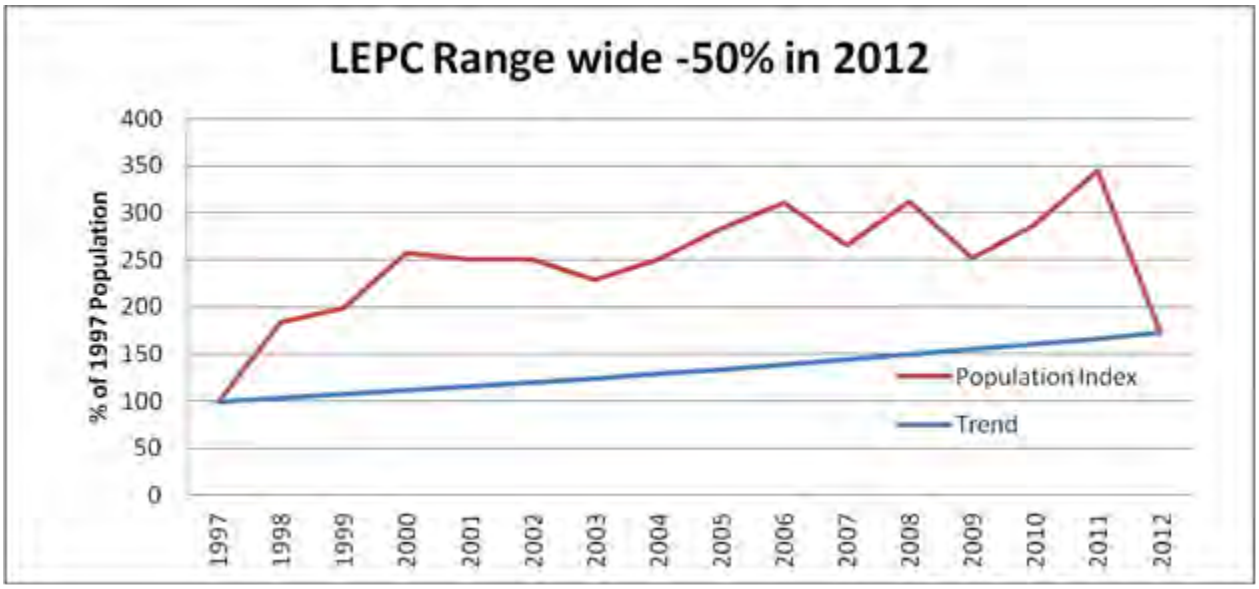


Figure 1F. Hypothetical lesser prairie-chicken Range-wide population index from 1997-2012 assuming a 50% decline from 2011-2012, quantified as a percentage of the 1997 baseline population.

Table 1. Parameter estimates from density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) population models for Lesser Prairie-Chickens in 4 regional areas 1997-2011. Range-wide estimates are provided for the same time period, and a hypothetical example demonstrating what a 50% decline in 2012 might forecast for the species. Where, r = instantaneous rate of growth adjusted for sampling variation, se(r) standard error of r, r' = unadjusted instantaneous rate of growth, lambda = finite rate of population growth (exp(r)), nq = population equilibrium under density dependent model, ne(nu) = quasi-extinction threshold (25% of of nq), pi = probability of population reaching ne(nu), theta = time in which ne(nu) would be reached if threshold was reached, and %EOR = percentage of the Estimated Occupied Range these trend results represent.

Region	r	se(r)	r'	lambda	nq	ne(nu)	pi	theta	%EOR
Mixed	0.074	0.005	0.101	1.077	229	57	0.000	18.8	44%
Sage	0.020	0.077	0.022	1.020	183	46	0.482	68.5	14%
Oak	0.051	0.022	0.062	1.052	196	49	0.002	27.2	19%
CRP	0.044	0.032	0.059	1.045	99	25	0.021	31.2	24%
Range	0.106	0.038	0.114	1.112	276	69	0.000	13.0	100%
2012**	0.064	0.052	0.068	1.066	262	66	0.033	21.8	100%

APPENDIX 3

An evaluation of the historic range changes that have occurred in the Lesser Prairie Chicken since the Last Glacial Maximum.

Species have niches in ecological time and space that can be defined in various ways. Currently, a commonly accepted scientific approach is to use a technique called Ecological Niche Modeling (ENM) or to others, Species Distribution Models (SDM). Today, these techniques are considered part of biodiversity informatics.j

The approach involves taking a set of georeferenced locality points for a species, and then using a computer algorithm to build a model that predicts these points using current information on climate, such as temperature, rainfall, or degree of seasonality. The model then generates a predicted distribution of the species that can be tested by seeing how well known locality points (that were not part of the original model) are predicted.

One can then predict where the niche space for the species occurred at different points in time. Currently, readily available climate data exist for the Last Glacial Maximum (LGM; 21,000 years before present [ybp]) and the Last Interglacial (120,000 ybp). This gives a view of the species' range during the maximum southward extent of the last major north temperate glacier, and shows how and where the species was displaced to (if displaced at all).

We obtained a georeferenced list of 110 occurrences for the lesser prairie chicken (Table 1) from an online source of museum and observation records (Ornis-2). These span many years and give an indication of where the species occurred historically (since museum specimens started being preserved). We used the program Maxent to model distributions. After a preliminary analysis involving 10 independent runs, we selected climate layers that provided over 5% to the model (

The predicted current distribution of the lesser prairie chicken (Fig. 1) agrees well with known and recent historical distribution, with the exclusion of what is considered the southern part of the range in Texas. This might be because, as discussed elsewhere, it was mainly a non-breeding area. Locality points omitted from the model were predicted with 93% accuracy suggesting that the model performs very well.

The contribution of the climate variables to the model were: Mean Temperature of Driest Quarter (43%), Precipitation of Warmest Quarter (16.5%), Precipitation Seasonality (Coefficient of Variation) (15.9%), Mean Temperature of Warmest Quarter (13.4%), Temperature Seasonality (8.7%), and Isothermality (BIO2/BIO7) (2.5%). It appears that

lesser prairie chickens are considerably influenced by the temperature at the driest part of the year.

We used the model to predict the distribution of the lesser prairie chicken at the LGM, assuming that the niche has not evolved and that the same environmental parameters were present at both time periods. As might be expected during a time of southerly range displacements owing to glacial advances, the range of the species was shifted south and west (Fig. 1, blue). It also can be seen that the predicted range was considerably more fragmented and reduced in areal extent. This suggests that lesser prairie chickens have survived extended periods of range fragmentation.

Table 1. Longitude (first number) and latitude (second number) for 110 localities for lesser prairie chickens obtained from Ornis2 (http://ornis2.ornisnet.org/).

-104.3247985,38.4328835; -98.32064,38.49836; -100.35,37.283; -100.2670064,37.0826239; -101.3473741,38.4817103; -100.3709181,37.2370813; -96.5981521,38.3051704; -100.7333333,37.85; -100.986,37.88333333; -100.0233333,37.855; -101.05,37.81666667; -100.05,37.85; -100.75,37.85; -100.0166667,37.85; -100.7666667,37.86666667; -100.8166667,37.86666667; -100.7666667,37.88333333; -101.0833333,37.88333333; -101.9833333,37.9; -101.9666667,37.9; -100.0666667,37.83333333; -100.0666667,37.86666667; -100.7333333,37.83333333; -99.5334,38.1087; -100.2358583,37.1402; -100.570589,37.1033548; -100.4666672,37.25; -100.0237999,37.7580571; -100.4662,37.09608; -100.8722222,37.97166667; -100.9888889,37.79444444; -101.1336803,37.8512936; -101.04,37.84; -101.05,37.844; -100.8654953,37.974823; -100.1661233,37.10322; -102.58177,42.06867; -100.407486,40.0407579; -103.18355,33.62926; -103.3396721,33.6428738; -103.0999985,35.34999847; -104.2283,32.4206; -104.2667,32.45; -103.183052,33.629166; -103.2804947,33.543606; -103.1650051,33.6407777; -103.59829,35.719908; -104.2283325,32.42055511; -103.2659912,33.5871673; -103.1835594,33.6292667; -104.2448044,32.4501; -104.2456627,32.4522729; -106.8189278,36.2283497; -103.1877136,33.6512083; -103.3049766,33.6428738; -103.4949646,34.0890633; -104.4119186,33.602314; -103.3401489,33.644349; -103.2234191,33.6420625; -103.1925201,33.5293753; -103.760376,35.1201894; -104.6245622,32.4628466; -103.3917154,33.6437204; -103.14,33.6565; -103.1536667,33.70766667; -103.1095833,33.69303333; -103.144,33.71993333; -103.1740667,33.6883; -106.0253796,34.1656598; -103.1451667,33.64996667; -103.1391667,33.695685; -103.1406,33.70101667; -103.1105667,33.68353333; -103.1404333,33.64923333; -103.172,33.69523333; -103.1381,33.65913333; -103.1395,33.65883333; -103.1497833,33.70505; -103.1715167,33.69496667; -103.312382,33.6428738; -103.1148167,33.68505; -103.1274667,33.68211667; -103.05038,33.75831; -103.12661,33.85024; -103.12695,33.85074; -103.27935,33.62703333; -103.1144444,33.68583333; -103.1451667,33.66856667; -103.6326599,34.3133827; -99.77119,36.02616; -99.77119,35.9899; -99.67005,36.0529; -99.765129,35.8848778; -99.77119,36.03342; 9628.12,3649.21; -96.6503334,36.9375441; -99.65741,36.04264; -99.6818,36.00441; -99.64477,36.03238; -99.66392,36.00441; -99.64604,35.85937; -99.77119,35.93189; -99.7792053,36.2254423; -99.2710876,36.433437; -98.7157861,35.3080899; -98.4933319,29.4238892; -100.2709541,35.4453278; -101.6632921,30.6870249; -100.193,36.071; -96.262207,43.084937;

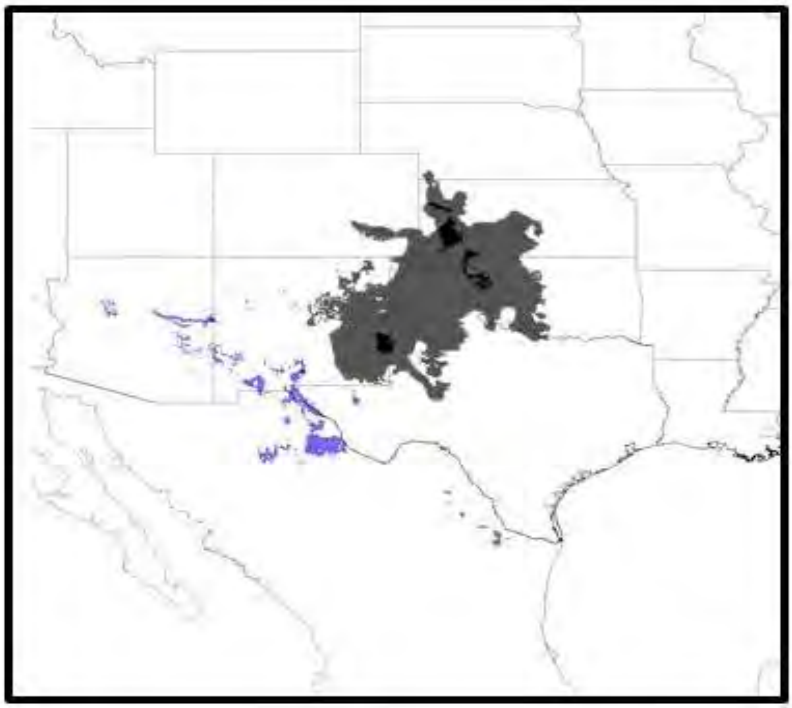


Figure 1. Predicted distribution of lesser prairie chicken at present (black, gray) and at Last Glacial Maximum (blue). For present distribution, black indicates area of highest predicted occurrence.

APPENDIX 4-- FEDERAL PROTECTIONS

Agency	Law/Mgt. Directive/Agreement	ESA Provisions
ALL	**National Environmental Policy Act of 1969 (NEPA) [(42 U.S.C. 4332(2)(C)** The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. By regulation, a Biological Assessment is prepared for "major construction activities". Under NEPA, those considered to be Federal actions significantly affecting the quality of the human environment as referred to meet NEPA requirements federal agencies prepare a detailed statement known as an Environmental Impact Statement (EIS). EPA reviews and comments on EISs prepared by other federal agencies, maintains a national filing system for all EISs, and assures that its own actions comply with NEPA.	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Take protection also provides limited habitat protection if the habitat alteration results in death of an individual. • In the case of the lesser prairie chicken, there no habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Protection of critical habitat is limited to habitat affected by a federal agency action,
	Federal Land Policy and Management Act of 1976", Sec. 101. [43 U.S.C. 1701 (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest; **…** (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat which are also affected by federal agency actions (moot, as

	atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;…(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;…[87]	the FWS is not designating for the lesser prairie chicken) • In Reviewing the activities of federal agencies, ESA limitations on take are only that it may not result in jeopardizing the continued existence of listed species, • IN the case of lesser prairie chicken, take is prohibited under state anti-poaching laws. • The ESA does not require comprehensive management plans.
ALL	**Executive Order 13112, February 3, 1999, "Invasive Species"** **Section 2. Federal Agency Duties** (a) Each Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, (1) identify such actions;(2) subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv)	Executive Order 13112 requires that all federal agencies prevent degradation of all habitat (not only lesser prairie chicken habitat) by ensuring that invasive species are prevented and/or controlled. This EO requires restoration of habitat. • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for

[87] http://www.blm.gov/flpma/FLPMA.pdf

	provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and (3) not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has pre-scribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions. (b) Federal agencies shall pursue the duties set forth in this section in consultation with the Invasive Species Council, consistent with the Invasive Species Management Plan and in cooperation with stakeholders, as appropriate, and, as approved by the Department of State, when Federal agencies are working with international organizations and foreign nations.	the lesser prairie chicken) • In reviewing the activities of federal agencies, the limitations on take are only that it may not result in jeopardizing the continued existence of listed species,
BLM and FS	**Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And**	No additional protection under the ESA. The MOU provides for "voluntary" consultation on candidate species, such as a lesser prairie chicken. The primary functions of the ESA

	Wildlife Service[88] This MOA establishes interagency commitment to and guidance for the following: (1) Early interagency communication, coordination, consultation, and conferencing on candidate, proposed, and listed species to take place prior to and during plan/program proposal development… The scope of this MOA includes Land and Resource Management Plans prepared by the FS pursuant to the National Forest Management Act of 1976 [16 U.S.C. 1601-1614] and Resource Management Plans and Management Framework Plans prepared by the BLM pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701-1784]. The MOA may also be applied to other programmatic level proposals. These may include, but are not limited to, a recreation or grazing program, riparian restoration strategy, multi-year forest management activities, recovery strategy or other proposals. The Service provides this information related to "programattic biological opinions": Developing a programmatic biological opinion. Once the biological assessment is completed, a determination on the need for formal consultation will be made by the Service. Formal consultation is required when a Federal action is likely to adversely affect listed species. When it is determined that an action may affect, but is not likely to adversely affect listed	are to prohibit "take" of the listed species (which is addressed by each States wildlife code) and the "consultation" on federal lands. BLM Management Manual already prescribes such protections for 'special status species' of which the lesser Prairie Chicken is one. Further, under the MOA, consultation has already occurred for the federal lands under BLM management. The ESA provides only for protection for listed species by : • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Does not require management plans • The ESA limits protection to listed species, their designated critical habitat where a federal

88 http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

	species, the consultation between the action agency and the Service may be handled informally (see 50 CFR §402.11 for further information on the informal or early consultation process). If formal consultation is necessary, a programmatic biological opinion will be developed by the Service in consultation with the Agencies. Attachment 3 gives a template for a programmatic biological opinion. This programmatic biological opinion will: (1) describe all of the potential projects; (2) contain suggested avoidance/minimization measures, placed in the project description, if appropriate; (3) describe the status and environmental baseline of listed, proposed, and candidate species in the project area; (4) reiterate potential effects of the project actions as evaluated in the biological assessment; and, (5) possibly describe limits to the amount of project impacts, take, and habitat affected and/or lost. A jeopardy analysis will be done to determine whether the programmatic process should proceed (see jeopardy discussion below).[89]	action is affecting them. • In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being designated. Given the limitations of the ESA and the voluntary actions and agreements by the agencies primarily involved in the activities the rule finds are "threatening" the lesser prairie chicken, the ESA provides no additional protections to the species.
BLM	**Special Status Species Management-Handbook 6840[90]** The stated purpose of BLM Handbook 6840 ("Special Status Species Management Handbook" is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special	The ESA requires that the FWS be consulted on actions affecting listed species on federal lands. • The ESA limits protection to listed species, their

[89] http://www.fws.gov/endangered/esa-library/pdf/pages7-18.pdf

[90] http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	status species are: (1) species listed or proposed for listing under the Endangered Species Act (ESA), and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s). All Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.[91] In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA. Any obligation to conserve proposed critical habitat under this section is terminated at the time the proposal becomes final or the habitat is no longer proposed for listing. All federally designated candidate species, proposed species, and delisted species in the 5 years following their delisting shall be conserved as Bureau sensitive species. A. Designation of Bureau Sensitive Species. State Directors shall designate species within their respective States as	designated critical habitat where a federal action is affecting them. • Does not require management plans, . The BLM's Special Status Species Management Handbook outlines a policy that is much more inclusive and relates directly to species that are considered "sensitive" at a state level. Each of the states referenced in the proposed rule currently consider the lesser prairie chicken to be sensitive, thus, the current policy provides more protection than the ESA.

91 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	Bureau sensitive by using the following criteria. For species inhabiting multiple States, State Directors shall coordinate with one another in the designation of Bureau sensitive species so that species status is consistent across the species' range on BLM-administered lands, where appropriate.	
FERC	**Transmission Line Regulation** The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.	The proposed rule emphasizes the potential adverse effect of increased transmission as a result of transmission lines and implies that the proposed listing is the only protection available for lesser prairie chicken and their habitat. However, FERC requires consideration of wildlife and their habitat in considering siting and construction of these lines. In addition, because the permitting is undertaken by FERC, NEPA applies which would necessitate a full review of the effects on the lesser prairie chicken.
BLM, AFWA, WAFWA, FS	**Memorandum Of Understanding Among Association Of Fish And Wildlife Agencies (AFWA) And Western Association Of Fish And Wildlife Agencies (WAFWA) And U.S. Department Of Agriculture Forest Service (FS) And U.S. Department Of The Interior Bureau Of Land Management (BLM)** "The purpose of this Memorandum of Understanding (MOU) is to promote cooperative conservation of fish and	This MOU provides that these federal agencies will engage in cooperative activities for the benefit of wildlife, particularly priority wildlife impacted by energy development issues. We note this includes wind power. The ESA provides only for protection for listed species by reviewing the activities of federal agencies. The

	wildlife resources by facilitating communications and enhancing success in resolving issues related to energy development and its effect on fish, wildlife, and habitat."[92] The Parties' joint objectives are to: 1. Identify and define the key fish and wildlife habitat/energy development issues at the species, habitat, and wildlife community levels across state, administrative and district lines. 2. Develop communication systems to keep state fish and wildlife agencies, federal land management/permitting agencies, and the energy industry informed about and involved in programmatic issues related to maintenance and enhancement of fish, wildlife and habitat resources during energy development.	limitations on take are only that it may not result in jeopardizing the continued existence of the species • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Protection of critical habitat is limited to habitat affected by a federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA regulatory provisions do not provide for enhancement of wildlife or its habitat.
DOT	**Department Of Transportation, Federal Highway Administration, 23 CFR Part 777, Mitigation of Impacts to Wetlands and Natural Habitat** The Federal Highway Administration (FHWA) provides stewardship over the construction, maintenance and preservation of the Nation's highways, bridges and tunnels. FHWA also conducts research and provides technical assistance to state and local agencies in	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • In the case of the lesser prairie chicken, no

92 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/ib_attachments/2009.Par.99939.File.dat/IB2009-072_att1.pdf

	an effort to improve safety, mobility, and livability, and to encourage innovation.[93] This regulation was developed to "provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal aid projects funded pursuant to provisions of title 23, U.S. Code." … In considering projects under this section, the following requirements must be met: (a) The reasonableness of the public expenditure and extent of Federal participation with title 23, U.S. Code, funds shall be directly related to: (1) The importance of the impacted wetlands and natural habitats; (2) The extent of highway impacts on the wetlands and natural habitats, as determined through an appropriate, interdisciplinary, impact assessment; and (3) Actions necessary to comply with the Clean Water Act, Section 404, the Endangered Species Act of 1973, and other relevant Federal statutes. (b) Evaluation of the importance of the impacted wetlands and natural habitats shall consider: (1) Wetland and natural habitat functional capacity; (2) Relative importance of these functions to the total wetland or natural habitat resource of the area; (3) Other factors such as uniqueness, esthetics, or cultural values; and (4) Input from the appropriate resource management agencies through interagency coordination. (c) A	habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Does not require management plans.

9393 https://www.fhwa.dot.gov/

	determination of the highway impact should focus on both the shortand long-term affects of the project on wetland or natural habitat functional capacity, consistent with 40 CFR part 1500, 40 CFR 1502.16, 33 CFR 320.4, and the FHWA's environmental compliance regulations, found at 23 CFR part 771.[94]	
BLM	**2008 Special Status Species Resource Management Plan Amendment (2008 RMPA)** Address land-use decisions affecting special status species, primarily the habitats of lesser prairie chickens and sand dune lizards. Established the Lesser Prairie-Chicken Area of Critical Environmental Concern (ACEC).[95] [96]	The Special Status Species Resource Management Plan Amendment by BLM identifies the requirement that BLM consult with the FWS on activities that may affect wildlife even if the species is not listed.
	2008 Designation of Area of Critical Environmental Concern[97] Area of Critical of Environmental Concern (ACEC) are special management areas designated by BLM to protect significant historic, cultural, or scenic values; fish and wildlife resources; natural process or systems; and/or natural hazards that:	• Any ESA habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken)

[94] http://www.gpo.gov/fdsys/pkg/FR-2000-12-29/pdf/00-33194.pdf#page=12
[95] http://www.blm.gov/nm/st/en/fo/Roswell_Field_Office/special_status_species.html
[96] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf
[97] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf

	• have more than locally significant qualities which give it special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource; • have qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change; • has been recognized as warranting protection in order to satisfy national priority concerns or to carry out the mandates of Federal Land Management and Practices Act (FLMPA); • has qualities which warrant highlighting in order to satisfy public or management concerns about safety and public welfare; and/or • poses a significant threat to human life and safety or to property.	
BLM	**Managing Structures for the Safety of Sage-grouse, Sharp-tailed grouse, and Lesser Prairie-chicken**[98] This Instruction Memorandum (IM) provides guidance to effectively address sage-grouse, sharp-tailed grouse, and lesser prairie-chicken collisions with fences and other structures on public land.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all lands managed by BLM.

98 http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-022.html

FWS	**FWS Wind Energy Guidelines** FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [99] Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all affected lands.
BLM	**Reclamation and Best Management Practices Best Management Practices "BMP" for the Lesser Prairie Chicken** In "Appendix 5 Reclamation And Best Management Practices" to BLM's 2008 RMPA, BLM states that it will "incorporate appropriate Best Management Practices (BMPs" for the lesser prairie chicken " into proposed Applications for Permit to Drill (APDs) and associated rights-of-way (ROW) approvals after appropriate National Environmental Policy Act (NEPA) evaluation." [100]	

[99] http://www.fws.gov/windenergy/docs/WEG_final.pdf

[100] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34869.File.dat/pdf_rmpa_final_document_11_07_app_5.pdf

APPENDIX 5-- STATE AND LOCAL PROTECTIONS

COLORADO

Applicable State Laws	Comparison to Applicable ESA provisions
WILDLIFE Colorado statutes provide intent to protect species and will require that "…, there shall be a continuous operation of planning, acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities."[101] There is no limitation on the wildlife or species this applies to.	The ESA provides for • No planning, acquisition or development of wildlife habitats • Protects only listed species and designated critical habitat. • Limits activities and protections to listed species and designated critical habitat.
LAND USE, CONSERVATION **Colorado has vested its local government with authority to regulate land use to consider wildlife habitat and species.** … Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;"[102]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
LOCAL GOVERNMENT, PLANNING AND	The ESA provides no authority to undertake such planning, aquisition,

[101] (Colorado Revised Statutes, Title 33, Article 1 http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[102] C.R.S. 29-20-104 (2012), Title 29. Government - Local, Land Use Control And Conservation, Article 20.Local Government Regulation of Land Use, Part 1. Local Government Land Use Control Enabling Act, 29-20-104. Powers of local governments. ... for local governments to regulate land use to protect wildlife habitat and wildlife species. Drostev. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003). http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

ZONING **Colorado law establishes a Commission with specific direction to consider protected species in municipality development.** (1) It is the duty of the commission to make and adopt a master plan for the physical development of the municipality. When a commission decides to adopt a master plan, the commission shall conduct public hearings, after notice of such public hearings …, prior to final adoption of a master plan …. Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall, after consideration of each of the following, where applicable or appropriate, show the commission's recommendations for the development of said municipality and outlying areas, including:… (II) The United States fish and wildlife service of the United States department of the interior and the parks and wildlife commission created in section 33-9-101, C.R.S., for locating areas inhabited by endangered or threatened species; [103]…	and management actions. Nor does the ESA require consultation on non-federal lands (absent a federal nexus).
WILDLIFE "(1) It is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors. It is further declared to be the policy of this state that there shall be provided a comprehensive program designed to offer the greatest possible variety of wildlife-related recreational opportunity to the people of this state and its visitors and that, to carry out such program and policy, there shall be a continuous operation of planning,	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a

[103] C.R.S. 30-28-106 (2012), Title 30. Government - County, County Planning And Building Codes, Article 28.County Planning And Building Codes, Part 1. County Planning, 30-28-106. Adoption of master plan

acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities. (2) All wildlife within this state not lawfully acquired and held by private ownership is declared to be the property of this state. Right, title, interest, acquisition, transfer, sale, importation, exportation, release, donation, or possession of wildlife is permitted only as provided in articles 1 to 6 of this title or in any rule of the parks and wildlife commission..[104]… Right to capture or kill exists only as permitted by statute."	federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. • Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE, ENDANGERED SPECIES **Colorado may protect species which do not qualify for federal ESA listing.** (1) On the basis of investigations of nongame wildlife provided for in section 33-2-104 and other available scientific and commercial data and after consultation with other state wildlife agencies, the Colorado water conservation board, the Colorado water and power development authority, water conservancy districts, and other water conservation districts of the state, and other water resource development agencies within the state, appropriate federal agencies, and other interested persons and organizations, the commission shall by regulation adopted pursuant to the procedures specified in sections 33-1-111 and 24-4-103, C.R.S., establish a list of those species and, where necessary, subspecies of wildlife indigenous to this state which are determined to be endangered or	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Colorado).

[104] C.R.S. 33-1-101 (2012), Title 33. Parks And Wildlife, Wildlife, Article 1.Wildlife - General Provisions, 33-1-101. Legislative declaration http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

threatened within this state, giving their common and scientific names by species and, where necessary, by subspecies…[105]	
WILDLIFE, ENDANGERED SPECIES, CONSERVATION (1) The division shall establish such programs including acquisition of land or aquatic habitat as are deemed necessary for management of nongame, endangered, or threatened wildlife. (2) In carrying out programs authorized by this section, the division may enter into agreements with federal agencies or political subdivisions of this state or with private persons for administration and management of any area established under this section or utilized for management of nongame, endangered, or threatened wildlife. (3) The commission may permit, under such terms and conditions as may be prescribed by regulation, the taking, possession, transportation, exportation, or shipment of species or subspecies of wildlife which appear on the state lists of endangered or threatened species for scientific, zoological, or educational purposes, for propagation in captivity of such wildlife, or for other special purposes.[106] ...	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
WILDLIFE, ENFORCEMENT **Colorado provides for criminal and civil**	The ESA provides protections only for species listed under its provisions.

[105] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-105. Endangered Or Threatened Species. http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-105&sessionyr=2013&Title=33&datatype=S&noheader=1&nojumpmsg=0

[106] C.R.S. 33-2-106 (2012), TITLE 33. PARKS AND WILDLIFE, WILDLIFE, ARTICLE 2. NONGAME AND ENDANGERED SPECIES CONSERVATION, 33-2-106. Management programs. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=23935&userid=PRODSG&cvfilename=&noheader=1&Interface=

penalties for all wildlife unlawfully 'taken', this provision would apply to lesser prairie chickens whether or not they are listed under the ESA Division action to recover possession and value of wildlife unlawfully taken : (1) The division may bring and maintain a civil action against any person, in the name of the people of the state, to recover possession or value or both possession and value of any wildlife taken in violation of articles 1 to 6 of this title. A writ of replevin may issue in such an action without bond. No previous demand for possession shall be necessary. If costs or damages are adjudged in favor of the defendant, the same shall be paid out of the wildlife cash fund. Neither the pendency of such civil action nor a criminal prosecution for the same taking shall be a bar to the other; nor shall anything in this section affect the right of seizure under other provisions of articles 1 to 6 of this title.[107]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES **Colorado can prohibit 'take' of any wildlife species they determine is in need of such protection;** **Colorado can manage any nongame wildlife they determine is in need of such management. Colorado also requires collection of biological and ecological data to prepare management actions.**	The ESA provides only for protection for listed species by : 1. Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, 2. In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being

[107] C.R.S. 33-6-110 (2012), Title 33. Parks And Wildlife, Wildlife, Article 6. Law Enforcement And Penalties - Wildlife, Part 1. General Provisions, 33-6-110. Division Action To Recover Possession And Value Of Wildlife Unlawfully Taken. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24001&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(1) The division shall conduct investigations on nongame wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully. On the basis of such determinations, the commission shall issue regulations and develop management programs designed to ensure the continued ability of nongame wildlife to perpetuate themselves successfully. Such regulations shall set forth species or subspecies of nongame wildlife which the commission deems in need of management pursuant to this section, giving their common and scientific names by species and, where necessary, by subspecies. The commission shall conduct ongoing investigations of nongame wildlife and may from time to time amend such regulations by adding or deleting therefrom species or subspecies of nongame wildlife. (2) The commission shall by regulation establish limitations relating to the taking, possession, transportation, exportation, processing, sale or offering for sale, or shipment as may be deemed necessary to manage nongame wildlife. (3) Except as provided in regulations issued by the commission, it is unlawful for any person to take, possess, transport, export, process, sell or offer for sale, or ship nongame wildlife deemed by the commission to be in need of management pursuant to this section. Subject to the same exception, it is also unlawful for any common or contract carrier to knowingly	designated. 3. Prohibiting “take” of the species. 4. Does not require investigations of biological and ecological data to determine management measures necessary 5. Does not require management plans, . Absent a federal nexus, the ESA cannot regulate activities on non-federal lands.

transport or receive for shipment nongame wildlife deemed by the commission to be in need of management pursuant to this section.[108]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES "1) "Management" means the collection and application of biological information for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels. The term includes the entire range of activities that constitute a modern, scientific resource program including, but not limited to, research, census, law enforcement, habitat acquisition and improvement, and education. Also included within the term, when and where appropriate, is the periodic or total protection of species or populations. "Management" may include artificial propagation to maintain threatened or endangered species populations, in concert with the exercise of water rights, and may also include restriction of stocking of species which are in competition with threatened or endangered species for the available habitat."[109]	The ESA • Only applies to listed species; • Does not require collection of information on listed species • Does not require the implementation of a scientific resource program, or any kind of organized management program. survival. The ESA cannot require participation of state and private actors in recovery activities on non-federal lands.
WILDLIFE, ENFORCEMENT Colorado prohibits 'take' of wildlife generally. Illegal sale of wildlife : (1) (a…, it is unlawful for	The ESA provides protections for listed species by prohibiting take only of listed species.:

[108] Colorado Statutes, Title 33. Parks And Wildlife, Wildlife, Article 2. Nongame And Endangered Species Conservation http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-104&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[109] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-103. Definitions http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=32-15-109&statecd=CO&sessionyr=2012&TOCId=23929&userid=GUEST9&cvfilename=&docname=&Interface=NLL&noheader=1

any person to knowingly sell or purchase, or knowingly offer for sale or purchase, wildlife or to solicit another person in the illegal hunting or taking of wildlife for the purposes of monetary or commercial gain or profit.[110] 2) Any person who violates this section: (a) With respect to big game, endangered species, or eagles, commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S. Upon such conviction, the commission may suspend any or all wildlife license privileges of the person for a minimum of one year to life. (b) With respect to all other wildlife, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and an assessment of twenty license suspension points.[111]	
PLANNING AND ZONING, LOCAL GOVERNMENT **Colorado regulates habitat destruction by mining operators:** (1) Every operator to whom a permit is issued pursuant to this article shall perform the reclamation prescribed by the reclamation plan adopted pursuant to this section….f) In those areas where revegetation is part of the reclamation plan, land shall be revegetated so that a diverse, effective, and long-lasting	1. The ESA provides protections for listed species by regulating activities of federal agencies 2. The ESA cannot require actors on Colorado public lands and private lands to engage in conservation actions.

[110] Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions
[111] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions 33-6-117. Willful Destruction Of Wildlife - Legislative Intent

vegetative cover is established that is capable of self-regeneration and is at least equal, with respect to the extent of cover, to the natural vegetation of the surrounding area. Species chosen for revegetation shall be compatible for the proposed post-extraction land use and shall be of adequate diversity to establish successful reclamation.[112]	
LAND USE, LOCAL GOVERNMENT **Protects public and private habitat of species from the actions of all operators.** Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (a) Regulating development and activities in hazardous areas; (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;…[113]	ESA protects only those habitats designated as critical habitat through regulation of only federal agencies.
WILDLIFE CONSERVATION, FUNDING **Colorado provides a dedicated funding stream for wildlife conservation.** (1)(a) Except as provided in subsections (7) and (8) of this section, sections 33-1-112.5 and 33-6-105, and in part 7 of article 22 of title 39, C.R.S., all moneys received from wildlife license fees, and all moneys from all other wildlife sources, and all interest earned on such	The ESA provides no dedicated funding.

[112] Title 34. Mineral Resources Mines And Minerals Article 32.5. Colorado Land Reclamation Act For The Extraction Of Construction Materials C.R.S. 34-32.5-116 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=PRODSG&interface=NLL&statecd=CO&codesec=34-32.5-116&sessionyr=2012&Title=34&datatype=S&noheader=1&nojumpmsg=0

[113] C.R.S. 30-28-121 Title 30. Government - County County Planning And Building Codes Article 28.County Planning And Building Codes Part 1. County Planning, http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

moneys shall be deposited in the state treasury and credited to the wildlife cash fund, which fund is hereby created, and such moneys shall be utilized for expenditures authorized or contemplated by and not inconsistent with the provisions of articles 1 to 6 of this title for wildlife activities and functions and for the financing of impact assistance grants pursuant to part 3 of article 25 of title 30, C.R.S…. (b) There is hereby created a wildlife habitat account in the wildlife for future generations trust fund, created in paragraph (a) of this subsection (7). The state treasurer shall deduct five million dollars from the wildlife cash fund, created in subsection (1) of this section, and transfer such sum to the wildlife habitat account. The interest earned on such five million dollars shall be continuously appropriated and shall be used solely for operation and maintenance of properties, leases, and easements owned by the division. (8) (a) There is hereby created in the state treasury the habitat partnership cash fund. The moneys in the habitat partnership cash fund shall consist of those moneys annually transferred from the wildlife cash fund in accordance with paragraph (e) of this subsection (8) for the partnership program and any gifts, grants, donations, and reimbursements made to the program from other sources. The moneys in the fund shall be used in accordance with the duties of the habitat partnership council as specified in section 33-1-110 (7) and (8), including, but not limited to, reasonable and necessary expenses incurred by council members in the fulfillment of their duties, as approved by the director. All interest derived from the investment of moneys in the habitat partnership cash fund shall be	

credited to the fund. Any balance remaining in the fund at the end of any fiscal year shall remain in the fund subject to the limitations provided…[114]	
FUNDING ...(4) (a) (I) <u>All moneys received pursuant to the issuance of the Colorado wildlife habitat stamp shall be used for the benefit of wildlife habitat or access to wildlife habitat,</u> including costs associated with the operation and maintenance, such as weed control and fencing, of lands under the Colorado wildlife habitat protection program administered by the division. Revenues collected from the sale of the stamp are subject to annual appropriation….[115]	The ESA provides no dedicated funding.
WILDLIFE, CONSERVATION, FUNDING **Colorado legislature has expressed the priority for funding for the preservation of species of concern, including the LPC.** (1) The general assembly hereby finds, determines, and declares that: (a) Protecting wildlife habitat and obtaining public access are important elements to preserving wildlife and wildlife-related recreational opportunities in Colorado; (b) The general assembly specifically recognizes that hunting of big game species is an activity that hundreds of thousands of residents and visitors to Colorado enjoy, which contributes significantly to state and local economies; and (c) <u>Priorities for the expenditure of funds</u>	The ESA provides no dedicated funding.

114114114 Title 33. Parks And Wildlife Wildlife Article 1.Wildlife - General Provisions C.R.S. 33-1-112 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-1-112&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

115 Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees

generated from the sale of habitat stamps and Colorado wildlife passports shall include protecting big game winter range and migration corridors, acquiring public access to wildlife-related recreation, including fishing, hunting, and wildlife viewing, protecting habitat for species of concern, and preserving the diversity of wildlife enjoyed by Coloradans...[116]	
WILDLIFE, ENFORCEMENT On lands controlled by the Colorado parks and wildlife division, damage to property or habitat (1) It is unlawful for any person to remove, damage, deface, or destroy any real or personal property or wildlife habitat under the control of the division. Any person who violates this subsection (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. In addition, the court may require the defendant to reimburse the division for any damages.[117]	
LAND USE, NATURAL RESOURCES **Colorado specifically protects all wildlife habitat from adverse impacts from all oil and gas operations.** 1) This section shall be known and may be cited as the "Colorado Habitat Stewardship Act of 2007".	The ESA protects only critical habitat from the effects of federal actions. No critical habitat is being designated for lesser prairie chicken so no federal protection will ensue

[116] Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-4-102.7&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[117] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions C.R.S. 33-6-129 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24023&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(2) The commission shall administer this article so as to minimize adverse impacts to wildlife resources affected by oil and gas operations. (3) In order to minimize adverse impacts to wildlife resources, the commission shall: (a) Establish a timely and efficient procedure for consultation with the parks and wildlife commission and division of parks and wildlife on decision-making that impacts wildlife resources;[118] (b) Provide for commission consultation and consent of the affected surface owner, or the surface owner's appointed tenant, on permit-specific conditions for wildlife habitat protection. Such conditions shall be discontinued when final reclamation has occurred....	
WILDLIFE CONSERVATION, LAND USE **Colorado requires that state lands be managed in a manner that protects wildlife habitat.** (1) The state board of land commissioners shall be composed of five members appointed by the governor,....(6) (a) The people of the state of Colorado have recognized in section 10 of article IX of the state constitution that the state school lands are an endowment of land assets held in a perpetual, intergenerational public trust for the support of public schools, which should not be significantly diminished; that the disposition and use of such lands should therefore benefit public schools including local school districts; and that the economic	The ESA only protects the designated critical habitat of a listed species from federal agency actions. No critical habitat is being designated for lesser prairie chickens.

[118] Title 34. Mineral Resources Oil And Natural Gas Article 60.Oil And Gas Conservation C.R.S. 34-60-128 (2012), http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=34-60-128&sessionyr=2010&Title=34&datatype=S&noheader=1&nojumpmsg=0

productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. In recognition of these principles, the state board of land commissioners shall be governed by the standards set forth in section 10 of article IX of the state constitution in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.[119]	

[119] Title 36. Natural Resources - General Public Lands And Rivers Article 1.State Board Of Land Commissioners, C.R.S. 36-1-101.5 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=35-49-104&statecd=CO&sessionyr=2012&TOCId=25658&userid=GUEST9&cvfilename=&docname=&Interface=&noheader=1

TEXAS

Applicable State Laws	Applicable ESA provisions
WILDLIFE **Texas requires a research program and funding to support it to develop wildlife research.** The Texas Agricultural Experiment Station, in consultation with the Agriculture and Wildlife Research and Management Advisory Committee established under Section 88.216, Education Code, shall develop and administer a program to finance agriculture and wildlife research that the Texas Agricultural Experiment Station determines to be of the highest scientific merit and to offer significant promise in providing new directions for long-term solutions to continued agriculture production, water availability, and wildlife habitat availability. [120]	The ESA does not require or fund a research program.
CONSERVATION **Texas protects Game Birds from catch, kill, or possession (dead or alive). Further protections are offered for the nest and eggs. Lesser prairie chickens are classified as Game Birds and are protected under the Texas statute.** GAME BIRDS. Wild turkey, wild ducks of all varieties, wild geese of all varieties, wild brant, wild grouse, wild prairie chickens, wild pheasants of all varieties, wild partridge, wild bobwhite quail, wild scaled quail, wild Mearn's quail, wild Gambel's quail, wild red-billed pigeons, wild band-tailed pigeons, wild mourning doves, wild white-winged doves, wild	. An ESA listing would provide only the limited additional protection of criminalizing accidental take.

[120] Agriculture Code Title 3. Agricultural Research And Promotion Chapter 50. Agriculture And Wildlife Research Program Sec.50.001. Program http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.50.pdf

white-fronted doves, wild snipe of all varieties, wild shore birds of all varieties, chachalacas, wild plover of all varieties, and wild sandhill cranes are game birds. … Sec. 64.003. DESTROYING NESTS OR EGGS. No person may destroy or take the nest, eggs, or young of any wild game bird, wild bird, or wild fowl protected by this code except as provided in this code. … Sec. 64.004. TRAPPING GAME BIRDS. No person may set a trap, net, or other device for taking game birds or take or snare a game bird by a device without obtaining a permit from the department. .. Sec. 64.005. PENALTY. A person who violates a provision of this subchapter commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … Sec. 64.007. POSSESSION OF LIVE GAME BIRDS. No person may possess a live game bird in this state except as authorized by this code.[121]	

[121] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation, Subtitle B. Hunting And Fishing, Chapter 64. Birds, Subchapter A. General Provisions. http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.64.htm#64.001

CONSERVATION, LOCAL GOVERNMENT **Texas requires control of noxious weeds [122] [123] and funding of that control.** "Board" means the board of directors of a district. (2) "District" means a noxious weed control district. … The legislature has determined that: (1) noxious weeds are present in this state to a degree that poses a threat to agriculture and is deleterious to the proper use of soil and other natural resources; and (2) reclamation of land from noxious weeds is a public right and duty in the interest of conservation and development of the natural resources of the state. The board may: (1)determine which noxious weeds are subject to control and what appropriate methods of control are to be used, including spraying, cutting, burning, tilling, or any other appropriate method; (2) prescribe specific areas in the district in which control measures are to be used; (3) prescribe the period during which control measures are to be used; and (4) incur expenses and take other actions necessary to carry out the purposes of this chapter.[124]	The ESA provides no authority or funding for control of noxious weeds.
PLANNING AND ZONING, LAND USE **Structures are listed as a threat to the LPC.**	

[122] Title 5. Production, Processing, And Sale Of Horticultural Products,Subtitle B. Horticultural Diseases And Pests, Chapter 78. Noxious Weed Control Districts http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.78.pdf

[123] http://plants.usda.gov/java/noxious?rptType=State&statefips=48

[124] Agriculture Code ,Chapter 78. Noxious Weed Control Districts, Subchapter A. General Provisions http://law.justia.com/codes/texas/2005/ag/005.00.000078.00.html

Zoning regulations affecting the building of structures and location in Texas are adopted in accordance with the States comprehensive plan which provides for protection of the State's natural resources. Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:…(7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements. … The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land. [125]	
WILDLIFE, CONSERVATION **Texas Department of Parks and Wildlife provides local agencies recommendations information on wildlife protection to all government agencies that approve, permit, license or construct development projects.** "The department is the state agency with primary responsibility for protecting the state's fish and wildlife resources. (b)The department's resource protection activities include: (1)investigating fish kills and any type of pollution that may cause loss of fish or wildlife	The ESA provides consultation only through section 7 to federal agency actions that may affect listed species or their critical habitat. In the case of the lesser prairie chicken, since no critical habitat is being designated, no habitat protection is provided.

[125] Local Government Code Title 7. Regulation Of Land Use, Structures, Businesses, And Related Activities Subtitle A. Municipal Regulatory Authority http://www.statutes.legis.state.tx.us/Docs/LG/pdf/LG.211.pdf

resources, taking necessary action to identify the cause and party responsible for the fish kill or pollution, estimating the monetary value of lost resources, and seeking restoration through presentation of evidence to the agency responsible for permitting or through suit in county or district court; (2) providing recommendations that will protect fish and wildlife resources to local, state, and federal agencies that 1approve, permit, license, or construct developmental projects; (3)providing information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources;… [126]	
ENDANGERED SPECIES **Texas provides for listing of species based on the same factors as the ESA. Like Colorado, Texas may protect species which are only threatened in a portion of their range.** **Texas prohibits take of state listed species.** The director shall file with the secretary of state a list of fish or wildlife threatened with statewide extinction. (b)Fish or wildlife may be classified by the director as threatened with statewide extinction if the department finds that the continued existence of the fish or wildlife is endangered due to: (1)the destruction, drastic modification, or severe curtailment of its habitat; (2)its overutilization for commercial or sporting purposes; (3)disease or predation; or (4)other natural or man-made factors.	The ESA limits listing protections to species only if the at risk of extinction occurs in a significant portion of their range. The ESA cannot must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Texas).if the species is at risk in only one portion of its range.

[126] Parks And Wildlife Code, Title 2. Parks And Wildlife Department, Chapter 12. Powers And Duties Concerning Wildlife, Subchapter A. General Powers And Duties http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.12.pdf

… No person may capture, trap, take, or kill, or attempt to capture, trap, take, or kill, endangered fish or wildlife. (b)No person may possess, sell, distribute, or offer or advertise for sale endangered fish or wildlife unless the fish or wildlife have been lawfully born and raised in captivity for commercial purposes under the provisions of this chapter. (c)No person may possess, sell, distribute, or offer or advertise for sale any goods made from endangered fish or wildlife[127]	
ENDANGERED SPECIES, CONSERVATION, FUNDING **Provides for dedicated funding of an endangered species account.** A peace officer who has arrested a person for a violation of this chapter may seize fish or wildlife or goods made from fish or wildlife taken, possessed, or made in violation of this chapter. (b) Property taken under this section shall be delivered to the department for holding pending disposition of the court proceedings. If the court determines that the property was taken, possessed, or made in violation of the provisions of this chapter, the department may dispose of the property under its regulations. The costs of the department in holding seized fish or wildlife during the pendency of the proceedings may, in appropriate cases, be assessed against the defendant. … . All revenue received under this chapter shall be deposited in the state treasury to the credit	The ESA provides no dedicated funding for ESA actions.

[127] Parks And Wildlife Code Title 5. Wildlife And Plant Conservation Subtitle B. Hunting And Fishing Chapter 68. Endangered Species http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf

of the special nongame and endangered species conservation account.[128]	
WILDLIFE, ENFORCEMENT **Texas may take action to refuse hunting or fishing licenses if outstanding violations of wildlife laws exist in other states.** On behalf of this state, the commission may enter into the Interstate Wildlife Violator Compact. (b) If necessary to protect the interests of this state, the commission may withdraw from the Interstate Wildlife Violator Compact in accordance with the terms of the compact. (c)The commission may take all actions necessary to implement this chapter, including the adoption of rules and the delegation of authority to the director.[129] (The Interstate Wildlife Violator Compact is an agreement that unresolved hunting and fishing violations in one state can affect a person's hunting or fishing privileges in other participating states. Any person whose license privileges or rights are suspended in a member state could also be denied future purchase of a license in Texas until they have satisfied suspension in the other state.)[130]	The ESA contains no regulatory provisions to protect wildlife generally.
WILDLIFE, ENFORCEMENT …, a person who violates a provision of Title 7 of this code commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … A person who violates any of the following	The ESA prohibition against "take" is limited to listed species.

[128] Id, http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf
[129] Parks And Wildlife Code Title 6. Compacts Chapter 92. Interstate Wildlife Violator Compact http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.92.pdf
[130] http://www.tpwd.state.tx.us/newsmedia/releases/?req=20091105g

provisions of Title 7 of this code commits an offense that is a Class B Parks and Wildlife Code misdemeanor: Section 131.011; 143.023; 229.021; 237.022; 334.041; or 350.021. [131]	
WILDLIFE, CONSERVATION **Texas law protects generally all indigenous species from collection, holding, possession, display, transport, release, or propagation.** In this subchapter, "protected wildlife" means all indigenous mammals, indigenous birds, indigenous reptiles, indigenous amphibians, indigenous fish, and other indigenous aquatic life the taking, collecting, holding, possession, propagation, release, display, or transport of which is governed by a provision of this code other than this subchapter or by a commission rule adopted under any provision of this code other than this subchapter and includes endangered species. … No person may collect, hold, possess, display, transport, release, or propagate protected wildlife for the purposes of this subchapter without a permit issued under this subchapter..[132]	The ESA protections are limited to listed species.
WILDLIFE, CONSERVATION, ENDANGERED SPECIES, LOCAL GOVERNMENT The criteria that the Texas Forest Service uses	The ESA authorizes the designation of critical habitat only for listed species.

[131] Parks And Wildlife Code, Title 7. Local And Special Laws, Chapter 355. Penalties For Violations Of Title 7, Parks And, Wildlife Code
http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.355.pdf
[132] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation Subtitle A. Hunting And Fishing Licenses Chapter 43. Special Licenses And Permits Subchapter C. Permits For Scientific Research, Zoological Collection, Rehabilitation, And Educational Display
http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.43.htm

in determining CWHZ [Critical Habitat Wildlife Zone] upon request from a chief appraiser or taxing unit is set out as follows. (1) The presence of qualified endangered or threatened animal or plant, as defined in paragraph (2) of this section, in the zone and the existence of a plan to protect it must be evidenced by a memorandum of understanding, conservation agreements, or other documentation pertaining to the protection of such animal or plant life with a federal, state, or private organization with recognized responsibility for protecting this species. (2) The animal or plant is listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. §1531 et seq.) and its subsequent amendments, or as endangered und er Parks and Wildlife Code, §68.002, …[133]	
NATURAL RESOURCES, ENDANGERED SPECIES, WILDLIFE, CONSERVATION, LAND USE **Texas requires that applications for mining and reclamation authority explain how adverse wildlife impacts will be minimized using the best technology available. Texas also requires enhancement of the wildlife and environmental values if possible.** Each application shall contain a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on	The ESA allows control of federal agency actions and imposition of requirements to avoid jeopardizing the continued existence of a species and adverse modification of critical habitat. In the case of the lesser praire chicken since no critical habitat is designated, habitat will not be protected.

[133] Title 4 Agriculture Part 12 Texas A&M Forest Service Chapter 215 Forest Zone Determination Procedure Rule §215.9 The Criteria For Determining Critical Wildlife Habitat Zone Upon Request From A Chief Appraiser Or Taxing Unit http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=72782&p_tloc=&p_ploc=&pg=1&p_tac=72782&ti=4&pt=12&ch=215&rl=9&dt=&z_chk=3841529&z_contains=habitat

fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. [134]	
NATURAL RESOURCES, LAND USE **Texas protects wildlife habitat generally from surface mining and reclamation activities.** The operator of all surface mining and reclamation operations not otherwise exempted or excluded shall as a minimum: … (1) conduct surface mining operations in a manner consistent with prudent mining practice, so as to maximize the utilization and conservation of the resource being recovered so that reaffecting the land in the future through surface mining can be minimized; (a) The permit application shall, if required by the Commission, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation. (b) When a map or aerial photograph is	The ESA can only protect designated critical habitat from federal agency actions. There is no designation of critical habitat proposed for lesser prairie chickens, so no habitat protection will exist.

[134] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 12 Coal Mining Regulations Subchapter G Surface Coal Mining And Reclamation Operations, Permits, And Coal Exploration Procedures Systems Division 6 Surface Mining Permit Applications--Minimum Requirements For Reclamation And Operation Plan Rule §12.144, Fish And Wildlife Plan http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=7940&p_tloc=&p_ploc=&pg=1&p_tac=7940&ti=16&pt=1&ch=12&rl=144&dt=&z_chk=3841534&z_contains=habitat

required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under §12.133 of this title (relating to Fish and Wildlife Resources Information).; [135]	

[135] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 11 Surface Mining And Reclamation Division Subchapter C Substantive Rules--Uranium Exploration And Surface Mining Division 6 Uranium Surface Mining Reclamation Rule §11.152 Surface Mining Reclamation Standardshttp://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=148942&p_tloc=&p_ploc=&pg=1&p_tac=148942&ti=16&pt=1&ch=11&rl=152&dt=&z_chk=3841530&z_contains=habitat

OKLAHOMA

Applicable State Laws	Applicable ESA provisions
WILDLIFE, ENDANGERED SPECIES Under Oklahoma law, no person may possess, hunt, chase, harass, capture, shoot at, wound or kill, take or attempt to take, trap, or attempt to trap any endangered or threatened species or sub-species without specific written permission of the director.[136]	ESA provides similar protections for listed species.
WILDLIFE **Oklahoma offers protections for all "game birds".** "Game bird" is a bird species normally sought after by sportsmen, and includes only all species of brant, cranes, doves, ducks, gallinules, geese, grouse, partridge, pheasant, quail, prairie chickens, rails, snipes, swans, tinamous, wild turkeys, woodcock, and any part thereof.[137]	Only listed species are protected under the ESA.
WILDLIFE, **Oklahoma prohibits unauthorized "take".** "Hunting or taking" is pursuing, killing, capturing, trapping, snaring and netting wildlife, and all lesser acts such as disturbing, harrying, worrying or placing, setting, drawing or using any net, trap or other device used to take wildlife and includes specifically every attempt	The ESA prohibition against "take" applies only to listed species.

[136] Title 29. Game and Fish. Chapter 1. Oklahoma Wildlife Conservation Code. Article V. Game. Part 4. Section 5-412 - Prohibitions with Endangered or Threatened Species or Subspecies. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77803

[137] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-114 - Game Bird, http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77660

to take and every assistance to other persons in taking or attempting to take wild animals, except that the definitions of "taking" and "hunting" wildlife shall not include disturbing, harrying or worrying wild game in field trials or performance tests of dogs nor the act of any person in participating as owner, handler, trainer, official or member of an audience observing such trials, whether resident or nonresident, where wild game is not killed.[138]	
CONSERVATION **Oklahoma does not permit "take" of game birds during its closed season.** "Closed season" is all other times than open season, and is the period during which protected wildlife may not be lawfully taken.[139]	The ESA prohibition against take applies only to listed species.
HABITAT RESTORATION, WEED CONTROL, INVASIVE SPECIES The Forestry Division, in connection with the enforcement of the Oklahoma Forestry Code, shall have the following powers, authority, and duties: … 10. <u>To plan and conduct prescribed burning at the request and expense of landowners on public or private lands for the purpose of controlling Eastern Red Cedar and other invasive species, for hazardous fuel reduction, wildlife habitat manipulation, ecosystem restoration</u>, or achieving silvicultural objectives.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[138] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-118 - Hunting or Taking. http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77665

[139] Title 29. Game and Fish , Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-104 - Closed Season. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77645

Forestry Division employees shall be protected under The Governmental Tort Claims Act and shall not be personally liable beyond the limits established therein for activities pursuant to this paragraph unless gross negligence is established in a competent court of law.[140]	
FUNDING, WILDLIFE CONSERVATION A. The Department of Wildlife Conservation is hereby authorized to issue an Oklahoma Wildlife Habitat Stamp to any person upon the voluntary payment of a fee of Ten Dollars ($10.00). Said fee shall be deposited in the Wildlife Land Acquisition Fund created in subsection C of this section. … C. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Land Acquisition Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received pursuant to the provisions of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such	• The ESA Provides no dedicated funding • The ESA has no authority to require States to participate in recovery activities.

[140] Title 2. Agriculture , Chapter 1 - Agricultural Code, Forestry Administration and Enforcement, Article 16 - Oklahoma Forestry , Code Section 16-8 - Powers of Division - Appointment of Forest Investigators and Rangers - Powers and Duties - Entry Upon Lands - Arrests, etc. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=465855&hits=1318+864+309+

investments shall be deposited in the Wildlife Land Acquisition Fund. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection D of this section. … D. The Wildlife Land Acquisition Fund shall be used by the Oklahoma Wildlife Conservation Commission for the acquisition on a willing-seller willing-buyer basis only, leasing, taking of easements, development, management, and enhancement of lands acquired pursuant to this section for the following purposes: Management of game animals, protected animals and birds, furbearing animals, game birds, fish, and their restoration, propagation, and protection; and Creation and management of public hunting, fishing, and trapping areas as places where the public may hunt, fish, or trap as authorized by law.[141]	
HABITAT, WILDLIFE, CONSERVATION A. In order to encourage wildlife habitat conservation on private lands, the Department of Wildlife Conservation shall establish a program for wildlife habitat maintenance, enhancement, development, preservation, restoration, and management on private lands. To implement the program, the Department shall enter into multiyear contracts for approved	The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. The ESA provides no protection for non-listed species and does not provide for the "restoration" or "development" of those non-listed

[141] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 4 – Licenses, Section 4-132 - Authority to Issue Oklahoma Wildlife Habitat Stamp - Rules and Regulations - Creation and Use of Wildlife Land Acquisition Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466381&hits=1386+783+726+629+70+15+

projects on privately owned lands detailing the landowners' responsibilities. B. The Department shall promulgate rules pursuant to the Administrative Procedures Act to implement the program. Such rules may provide for incentives to participate in the program.[142]…	species. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE Oklahoma law prohibits the knowing and willful killing or molestation of hawks, falcons, owls, or eagles, or their nests, eggs, or young. The only exceptions to this prohibition are the taking of a hawk or owl in the act of destroying domestic birds or fowl, or the use of hawks, owls, falcons, or eagles by licensed falconers. [143]	The ESA limits protection to listed species.
ENFORCEMENT, WILDLIFE, ENDANGERED SPECIES Oklahoma prohibits the possession of wildlife or parts during closed season, and any endangered or threatened species. Under these Oklahoma statutes, no person may possess any wildlife or parts thereof during the closed season, any endangered or threatened species or parts thereof at any time, or any native bear or native cat that will grow to reach the weight of 50 lbs. or more, with exceptions. A	The ESA limits protection only to listed species.

[142] Title 29. Game and Fish, Chapter 1, Oklahoma Wildlife Conservation Code, Article 3, Section 3-312 - "Program for Wildlife Habitat Development, Preservation, Restoration, and Management - Rules - Construction of Program.". http://www.oscn.net/applications/oscn/deliverdocument.asp?id=436091&hits=935+479+463+407+23+7+

[143] OK - Game Animals - Part 4. Protected Game. § 5-410. Hawks; falcons; owls; eagles

conviction could result in a fine of $100-$500 and/or by imprisonment up to 30 days. In addition, no person may buy, barter, trade, or sell all or any part of any fish or wildlife or the nest or eggs of any bird protected by law, with exceptions. A first violation could result in a fine of $100 to $500 and/or by imprisonment up to 60 days. [144]	
WILDLIFE, CONSERVATION, FUNDING A. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Heritage Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received from senior citizen lifetime licenses issued pursuant to the provisions of paragraphs 4 through 6 of subsection B of Section 4-114 of this title by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such investments shall be deposited in the Wildlife Heritage Fund. Only interest and dividends derived from the principle can be expended and are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection B of this section. Any monies withdrawn from said fund by the	The ESA provides no dedicated funding and is limited in its application to listed species.

[144] OK - Wildlife - Part 5. Possession of Wildlife. OK ST T. 29 § 7-501 to 504

Oklahoma Wildlife Conservation Commission for investment pursuant to this subsection shall be deemed to be for the purposes specified in subsection B of this section. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.[145]	
WILDLIFE, ENFORCEMENT, ENDANGERED SPECIES **Oklahoma prohibits transportation of any wildlife out of Oklahoma.** Under these Oklahoma statutes, no common carrier may transport any wildlife or endangered or rare species, with exceptions. A violation could result in a fine of $25 to $100. In addition, no person may transport into or out of Oklahoma any wildlife or parts thereof, nests of wildlife, their eggs or their young, or any endangered or threatened species, with exceptions. A violation could result in a fine of $50 to $200, and/or imprisonment of 10 to 60 days. [146]	The ESA applies only to listed species.
WILDLIFE, CONSERVATION, FUNDING A. The Oklahoma Tax Commission shall include on each state individual income tax return form for tax years beginning after December 31, 2001, and each state corporate tax return form for tax years beginning after December 31, 2001, an opportunity for the taxpayer to donate	The ESA provides no dedicated funding.

[145] Title 29. Game and Fish Chapter 1 - Oklahoma Wildlife Conservation Code Article 4 - Licenses Section 4-134 - Creation and Use of Wildlife Heritage Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466383&hits=1344+1343+1124+1123+1094+1093+1032+1031+934+933+866+865+844+843+786+785+757+756+752+751+687+686+608+607+437+436+409+408+347+346+255+254+189+188+167+166+109+108+80+79+75+74+17+16+

[146] OK - Wildlife - Transportation of Wildlife OK ST T. 29 § 7-601 - 602

from a tax refund for the benefit of the Oklahoma Wildlife Diversity Program. B. For purposes of this section, "nongame wildlife" means any species of wildlife not legally classified as a game species or furbearer by statute or by rule adopted pursuant to statute. C. Except as otherwise provided for in this section, all monies generated pursuant to subsection A of this section shall be paid to the State Treasurer and placed to the credit of the Wildlife Diversity Fund. D. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Diversity Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received under the provisions of paragraph 2 of subsection C of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. …[147]	
CONSERVATION, WILDLIFE	• The ESA has no authority to require States to participate in

[147] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-310 - Wildlife Diversity Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466370&hits=1486+1485+1480+1479+1020+1019+994+993+939+938+910+909+905+904+860+859+640+639+633+632+302+301+276+275+221+220+192+191+187+186+142+141+

A. The Wildlife Conservation Commission shall constitute an advisory, administrative and policymaking board for the protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of wildlife in this state as provided in the Oklahoma Wildlife Conservation Code. B. The Director shall consult with the Commission regarding the administration of the affairs of the Department of Wildlife Conservation. The Commission is authorized and empowered to require from the Director complete reports and information relative to the affairs of the Department at the time and in the manner the Commission may deem advisable. … D. In addition to the other powers and duties prescribed by law, the Commission shall: … 8. Supervise the establishment, extension, improvement, and operation of the wildlife refuges, propagation areas or stations, public hunting areas, public fishing areas, game management areas, and fish hatcheries; 9. Prescribe the manner of cooperation with the Oklahoma Tourism and Recreation Department, colleges and universities within the state, other state agencies, any agency of the federal government, and any city, town, school district, or any other agency or organization in study of conservation and propagation of wildlife and in the establishment, maintenance, and operation of visual educational facilities, recreational facilities, and hunting and fishing facilities, in the study and propagation of wildlife;	recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • The ESA requires only federal agencies consult and has no authority to require State or local governments to consult where there is no federal action. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and “enhanced”. • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

… 14. Publicize and encourage the conservation and appreciation of wildlife and all other natural resources; 15. Regulate the seasons and harvest of wildlife; 16. Promulgate rules to sell fishing and hunting licenses via the Internet;….[148]	
WILDLIFE, ENFORCEMENT A. Except as otherwise provided by law, <u>any person arrested for a violation of any section of the Oklahoma Wildlife Conservation Code shall be admitted to bail as follows:</u> <u>1. Whenever a person is charged for any violation of any of the wildlife laws of this state or rules adopted by the Wildlife Conservation Commission pursuant to law, which violation is punishable as a misdemeanor</u> and the person is not immediately taken into physical custody pursuant to state law, the officer shall prepare a written citation containing a notice to appear in court, the name and address of the person, the offense charged, the time and place where the person shall appear in court and any other pertinent information as may be necessary; 2. The arresting officer shall indicate on the citation the date of the arraignment. The person charged shall appear in person or by counsel at the stated time and place for arraignment.[149]	The ESA only provides protections for listed species.

[148] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103 - Functions, Powers, and Duties of the Commission. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466368&hits=1919+1918+1913+1912+991+990+968+967+936+935+872+871+865+864+57+56+36+35+4+3+

[149] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 9 - Wildlife Bail Procedure Act, Section 9-112 - Admission to Bail for Violations of Wildlife Conservation Code. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=462892&hits=1526+1525+1498+1497+814+813+779+778+686+685+679+678+54+53+21+20+

CONSERVATION, HABITAT Oklahoma provides for private lands fish and wildlife habitat conservation and improvement programs which include maintenance, protection, enhancement and restoration for habitat generally including aquatic, riparian, upland, wetland and forest habitat. … conservation improvement contract requirements [150] (a) The following projects may be approved for Private Lands Fish and Wildlife Habitat Conservation and Improvement Programs (1) Aquatic Habitat maintenance, protection, enhancement, or restoration, (2) Riparian Habitat maintenance, protection, enhancement, or restoration (3) Upland Habitat maintenance, protection, enhancement, or restoration (4) Wetland Habitat maintenance, protection, enhancement, or restoration (5) Forest Habitat maintenance, protection, enhancement, or restoration, (6) Any other project which is deemed appropriate by the Department.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

[150] 800:25-35-3. Approved projects and conservation improvement contract requirements http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_

KANSAS

Applicable State Laws	Applicable ESA provisions
CONSERVATION **Kansas requires programs, including land acquisition to conserve non-game and threatened and endangered species.** Same; programs for conservation. (a) The secretary shall establish such programs, including acquisition of land or aquatic habitat, as are deemed necessary for the conservation of nongame, threatened and endangered species. The secretary shall utilize all authority vested in the secretary by the laws of this state to carry out the purposes of this section with the exception that the secretary shall not utilize the power of eminent domain to carry out such programs unless a specific authorization and appropriation is made therefor by the legislature.[151]	The ESA provides no authority for establishment of programs or land adquisition for endangered species.
FUNDING, CONSERVATION **Kansas provides for species in need of conservation and allows tax credits for lands known to support populations of such species.** Tax credits for expenditures related to nongame (a) There shall be allowed two types of credits against the tax liability of a taxpayer imposed under the Kansas income tax act related to real property that is both: (1) Designated by the secretary of wildlife, parks and tourism pursuant to the nongame and endangered species conservation act as critical habitat for a threatened or endangered species	The ESA provides no tax credits and can only list species

[151] Article 9. - Licenses, Permits, Stamps And Other Issues 32-962.

or certified by the secretary of wildlife, parks and tourism as land known to support populations of species in need of conservation; and (2) included in management activities as part of a recovery plan, or an agreement identified in subsection (b) of K.S.A. 32-962 and amendments thereto, as approved by the secretary of wildlife and parks, for a species listed as threatened, endangered or in need of conservation pursuant to the nongame endangered species conservation act.[152]	
WILDLIFE, CONSERVATION **Kansas provides programs to allow species to sustain themselves, not recover. These protections are offered to non-listed species.** … (a) The secretary shall conduct investigations on nongame species in order to develop information relating to population, distribution, habitat needs, limiting factors and other biological and ecological data to determine conservation measures necessary for their continued ability to sustain themselves successfully. On the basis of such information and determinations, the secretary shall adopt rules and regulations pursuant to K.S.A. 32-963 which contain a list of the nongame species deemed by the secretary to be in need of conservation and shall develop conservation programs pursuant to K.S.A. 32-962 which are designed to insure the continued ability of such nongame species to perpetuate themselves	The ESA provides protections only for listed species and does not offer any program for species prior to their listing to ensure that they do not become endangered/threatened.

[152] Article 32. - Statute 79-32,203: Tax credits for expenditures related to nongame and endangered species.

successfully. The secretary shall conduct ongoing investigations of nongame species.[153]	
WILDLIFE (a) Commercialization of wildlife is knowingly committing any of the following, except as permitted by statute or rules and regulations: (1) Capturing, killing or possessing, for profit or commercial purposes, all or any part of any wildlife protected by this section; (2) selling, bartering, purchasing or offering to sell, barter or purchase, for profit or commercial purposes, all or any part of any wildlife protected by this section;[154]	The ESA provides protections only for listed species.
WILDLIFE, ENFORCEMENT Wildlife violator compact; enactment of compact. The wildlife violator compact is enacted into law and entered into by the State of Kansas with any and all jurisdictions legally joining therein in accordance with its terms.[155]	
WILDLIFE Unlawful possession of wildlife or wild turkey; refusal to allow inspection of property used in taking wildlife; penalties. (a) It is unlawful for any person to: ...	The Kansas statute provides penalties for any unlawful possession of wildlife, including wild turkey. The ESA only prohibits the "take" of listed species. Non-listed species are

[153] Article 9. - Licenses, Permits, Stamps And Other Issues 32-959.
[154] Article 10. - Enforcement , 32-1005. http://kslegislature.org/li/b2013_14/statute/032_000_0000_chapter/032_010_0000_article/032_010_0005_section/032_010_0005_k/
[155] Chapter 32 Article 10 »Section 61 » 32-1061. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0061_section/032_010_0061_k/

(4) possess any wildlife unlawfully killed or otherwise unlawfully taken outside this state;[156]	provide no protections.
LOCAL GOVERNMENT, WEED CONTROL Control and eradication of noxious weeds; payment of costs; sale of chemicals for use on private property, price. ... If the governing body of any political subdivision owning or supervising lands infested with noxious weeds within their jurisdiction fails to control such noxious weeds after 15 days' notice directing any such body to do so, the board of county commissioners shall proceed to have proper control and eradication methods used upon such lands,...[157]	Certain invasive species of plants are listed as potential threats to the habitat of the lesser prairie chicken. Kansas provides authority for its local governments to eradicate "noxious weeds" on private lands. The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
ENDANGERED SPECIES Nongame and endangered species conservation act; title. K.S.A. 32-957 through 32-963, 32-1009 through 32-1012, 32-1033 and K.S.A. 32-960a and 32-960b, and amendments thereto, shall be known and may be cited as the	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety

[156] Chapter 32 Article 10 »Section 4 32-1004. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0004_section/032_010_0004_k/

[157] Chapter 2 Article 13 Section 19 WEEDS

nongame and endangered species conservation act.[158] As used in the nongame and endangered species conservation act: (a) "Conserve," "conserving" and "conservation" mean the use of all methods and procedures for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such numbers. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, regulated taking and, when and where appropriate, the periodic or total protection of species or populations of wildlife. With respect to threatened species and endangered species, the terms mean the use of all methods and procedures, including but not limited to those described above, which are necessary to bring any threatened or endangered species to the point at which the methods, procedures and measures provided for such species pursuant to the nongame and endangered species conservation act are no longer necessary. (b) "Ecosystem" means a system of living organisms and their environment, each influencing the existence of the other and both necessary for the maintenance of life. (c) "Endangered species" means any species of wildlife whose continued existence as a viable component of the state's wild fauna	of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Kansas). • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a federal agency action.

[158] Chapter 32 »Article 9 Section 57 Article 9. - Licenses, Permits, Stamps And Other Issues

is determined to be in jeopardy. That term also includes any species of wildlife determined to be an endangered species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (d) "Nongame species" means any species of wildlife not legally classified a game species, furbearer, threatened species or an endangered species by statute or by rule and regulation adopted pursuant to statute. (e) "Optimum carrying capacity" means that point at which a given habitat can support healthy populations of wildlife species, having regard to the total ecosystem, without diminishing the ability of the habitat to continue that function. (f) "Threatened species" means any species of wildlife which appears likely, within the foreseeable future, to become an endangered species. That term also includes any species of wildlife determined to be a threatened species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (g) "Wildlife" means any member of the animal kingdom, including, without limitation, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof. ….[159]	

[159] http://kansasstatutes.lesterama.org/Chapter_32/Article_9/#32-958

PLANNING AND ZONING ...(b) The planning commission may adopt and amend a comprehensive plan as a whole by a single resolution, ... In the preparation of such plan, the planning commission shall make or cause to be made comprehensive surveys and studies of past and present conditions and trends relating to land use, population and building intensity, public facilities, transportation and transportation facilities, **economic conditions, natural resources and may include any other element deemed necessary to the comprehensive plan**. Such proposed plan shall show the commission's recommendations for the development or redevelopment of the territory including: (a) The general location, extent and relationship of the use of land for agriculture, residence, business, industry, recreation, education, ... (f) utilization and conservation of natural resources; and (g) any other element deemed necessary to the proper development or redevelopment of the area.[160]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
LAND USE, PLANNING AND ZONING …construction of public facility or utility in conformance with comprehensive plan. (a) Except as provided in subsection (b), whenever the planning commission has adopted and certified the comprehensive plan for one or more major sections or functional subdivisions thereof, no public improvement, public facility or public utility of a type embraced within the recommendations of the comprehensive plan or portion thereof shall be constructed without first being submitted to and being approved by the	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.

[160] Chapter 12 Article 7 Section 47 Article 7. - Planning And Zoning 12-747.

planning commission as being in conformity with the plan.[161]	
LAND USE, PLANNING AND ZONING Zoning of land outside city limits; conditions and limitations; notice to county commissioners. Cities are hereby authorized to adopt zoning regulations affecting all or any designated portion of the land located outside the city but within three miles thereof under the following conditions Except for flood plain regulations in areas designated as a flood plain, nothing in this act shall be construed as authorizing any city to adopt regulations applying to or affecting any land in excess of three acres under one ownership which is used only for agricultural purposes: (a) The city has established a planning commission under the provisions of K.S.A. 12-702, and amendments thereto, which provides for the appointment of two commission members who reside outside the city but within the area subject to the zoning regulations of the city, or the city has established a joint, metropolitan or regional planning commission in cooperation with the county in which such city is located pursuant to the provisions of K.S.A. 12-718, and amendments thereto.[162]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Fences composed of posts a In fences composed of posts and wires, the posts shall be of ordinary size for fencing purposes, and set in the ground at least two feet deep and not more	Local governments are permitted to regulate fence The ESA provides

[161] Chapter 12 Article 7 Section 48 Article 7. - Planning And Zoning
[162] Chapter 12 Article 7 Section 15b Article 7. - Planning And Zoning

than twelve feet apart, with holes through the posts or staples on the side not more than fifteen inches apart, to admit four separate strands of fence wire not smaller than No. 9, and shall be provided with rollers and levers, at suitable distances, to strain and hold the wire straight and firm.[163]	• No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
FUNDING, CONSERVATION Assent to wildlife restoration act; use of fees. (a) The state of Kansas hereby assents to the provisions of the wildlife restoration act (16 U.S.C. 669 et seq.), as amended. The secretary is hereby authorized and directed to perform such acts as necessary to the conduct and establishment of cooperative wildlife restoration projects, as defined in such act, in compliance with such act and with rules and regulations promulgated by the secretary of the interior thereunder. The state treasurer is hereby authorized to receive and disburse all money apportioned to the state in accordance with the provisions of such act.[164]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
FUNDING, CONSERVATION Conservation fee fund; authorized expenditures; accounting procedures; reduction of fees and assessments, when. (a) There is hereby created in the state treasury the conservation fee fund. All deposits credited to the conservation fee fund shall be for the use of the state corporation commission in administering the provisions of K.S.A. 55-172 through 55-184, 55-601 through 55-613, 55-701 through 55-713, 55-901 and 55-1201 through 55-1205.[165]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[163] Home Statute Chapter 29 Article 1 Section 3 Fencing
[164] Chapter 32 Article 8 Section 28 Article 8. - Department Of Wildlife, Parks And Tourism
[165] Chapter 55 Article 1 Section 43 Article 1. - Oil And Gas Wells; Regulatory Provisions

LAND USE, PLANNING AND ZONING Application of intent to drill wells, required information; notification of surface owner; fee and contents; information to department of health and environment and county clerk; approval of application, when; conditions; compliance with rules and regulations. (a) Prior to the drilling of any well, every operator shall file an application of intent to drill with the commission. Such application shall include such information as required by the commission, including the name and address of the surface owner, and shall be on a form prescribed by the commission. Such application shall also include non-binding preliminary estimates of the location of roads of ingress or egress, any tank battery and any pipeline or electrical line. The commission shall, upon receipt of such application, send a copy of such application to the named surface owner, as well as the contact information, including name, address, phone number, fax or email address, for a designated representative of the applicant.[166]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action. • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Removal of structures and abutments from lands after abandoning wells; exception. (a) Leaving the surface of lands with a part of the operating structure or other equipment intact after abandoning oil or gas wells is against public policy, and constitutes a public nuisance, and shall be hereafter prohibited. Whenever any lease operator abandons any oil or gas well, the lease operator, within six months thereafter, shall remove any rig, derrick or other operating structure, and all abutments and other obstacles of every kind or size used in the operation of such oil or gas lease, from the land upon which	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.

[166] Chapter 55 Article 1 Section 51 Article 1. - Oil And Gas Wells; Regulatory Provisions

the well was theretofore operated, and shall grade the surface of the soil in such manner as to leave the land, as nearly as practicable, in the same condition after the removal of such structures, equipment and obstacles as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise.[167]	

[167] Chapter 55 »Article 1 »Section 77 Article 1. - Oil And Gas Wells; Regulatory Provisions

NEW MEXICO

Applicable State Laws	Applicable ESA provisions
WILDLIFE The game animals and quadrupeds, game birds and fowl, and game fish as herein defined shall be protected and hunting, taking, capturing, killing or possession, or attempt to hunt, take, capture or kill of any or all species named herein shall be regulated by the state game commission under the authority of Chapter 117 of the 1931 Session Laws of the state of New Mexico.	The ESA provides protections against take for only for listed species.
WILDLIFE, ENFORCEMENT **New Mexico regulates the LPC under its game laws. Which prohibit the "take" of species, including the LPC, without a permit.** A. Except as permitted by regulations adopted by the state game commission or as otherwise allowed by law, it is unlawful to: (1) hunt, take, capture, kill or attempt to take, capture or kill, at any time or in any manner, any game animal, game bird or game fish in the state; or (2) possess, offer for sale, sell, offer to purchase or purchase in the state all or any part of any game animal, game bird or game fish….[168]	The ESA only provides protections against "take" for listed species.
PLANNING AND ZONING, HABITAT **New Mexico has stated a clear preference for avoidance of wildlife areas in its**	The ESA Provides: • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical

[168] NM Stat § 17-2-7 (1996 through 1st Sess 50th Legis)

development of utilities. Scenic enhancement: The following provisions for scenic enhancement shall apply for utility facility installation in cited areas: (1) The type and size of the utility facilities and the manner and extent to which they are permitted within areas of scenic enhancement and natural beauty may materially alter the scenic quality, appearance and view of highway roadsides and adjacent areas. Such areas include scenic strips, overlooks, rest areas, recreation areas and the rights-of-ways and adjacent highways. Also included are Sections of highways which pass through public parks, recreation areas, wildlife and waterfowl refuges and historic sites. Whenever possible, new utility installations within all such strips overlooks and areas shall be avoided.[169]	habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
HABITAT, CONSERVATION **New Mexico requires that its wildlife department regulate "vehicle travel" on habitat for certain classes of species.** New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species. … "To provide a description of lands closed to vehicle travel under the Habitat Protection Act and to describe prohibited activities on said lands. [170]	The ESA provides not authority to regulate activities on non-federal lands, absent a federal nexus.
WILDLIFE, CONSERVATION,	The ESA provides no authority to

[169] Title 17: Public Utilities And Utility Services Chapter 4: Utility Rights Of Way And Easements Part 2 , Requirements For Occupancy Of State Highway System Right-Of-Way By Utility Facilities
[170] http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0002.htm

ENFORCEMENT **New Mexico state game commission has authority to establish rules to acquire lands and to prevent damage to wildlife and wildlife habitat on lands owned or controlled by the department.** New Mexico state game commission with the authority to acquire land and to establish rules and regulations that it may deem necessary to carry out the purposes of Chapter 17, NMSA 1978[171]	acquire lands or to establish regulations necessary to protect species. The only protections offered by the ESA provide protections from "take", allow designation of critical habitat, and require federal agencies consult.
WILDLIFE **LPC are game birds in New Mexico, and as such, they are protected. No game bird may be hunted during a closed season or without a permit.** **New Mexico has also established areas of LPC habitat, where the LPC are protected and season is only open for quails.** Season and hours: Upland game may be hunted or taken only during open seasons and only during the period from one-half hour before sunrise to one-half hour after sunset, unless otherwise specifically allowed by rule…. (1) On wildlife management areas, the lesser prairie-chicken areas, and the Sandhills Prairie conservation area hunting hours shall be from one-half hour before sunrise to one-half hour after sunset	ESA only prohibits "take" of listed species.

[171] Title 19 Natural Resources And Wildlife, Chapter 34 Wildlife Habitat And Lands, Part 4 Protection Of Department Of Game And Fish Lands. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0004.htm

… **(e)** The state game commission owned lesser prairie-chicken areas shall be open for quail hunting during established seasons.[172]	
WILDLIFE, ENFORCEMENT **New Mexico also provides protections for wildlife and game animals on private lands.** It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on any private property that is in compliance with 30-14-1 and 30-14-6 NMSA 1978 posting requirements without possessing written permission from the landowner or person in control of the land or trespass rights, unless otherwise permitted in rule or statute. It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on private property if the consent to enter or remain has been denied or withdrawn by the owner or person in control of the land or trespass rights, per 30-14-1 NMSA 1978, unless otherwise permitted in rule or statute. … Any game animals, furbearers, game birds, or game fish taken in violation of this section shall be subject to seizure.[173]	The ESA provides protection against "take" only for listed species.
WILDLIFE, CONSERVATION, HABITAT New Mexico has designated the LPC as a	The ESA can only prohibit take and require federal agencies to consult on

[172] 19.31.5.9 Manner And Methods For Upland Game http://www.nmcpr.state.nm.us/nmregister/xxi/xxi15/19.31.5.htm

[173] Unlawful Taking Or Killing Of Game Animals, Furbearers, Game Birds, Or Game Fish On Private Land, [19.31.10.18 NMAC - N, 4-1-2009]. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.031.0010.htm

"Species of Greatest Conservation Need (SGCN)" in its wildlife conservation strategy. New Mexico's wildlife conservation strategy demonstrates New Mexico's concern for wildlife habitat resources to keep wildlife populations healthy and sustainable and fully addresses eight essential elements established by Congress. It focuses on strategic actions intended to keep common species common and work to prevent wildlife from becoming endangered with a constructed framework for identifying species of greatest conservation need, the habitat treatments necessary to sustain them and other members of their ecological community.[174]	actions on federal lands. The ESA cannot require States to undertake independent conservation activities.
WILDLIFE, FUNDING **New Mexico requires local government to undertake activities to "promote" the health, safety and welfare of the State's wildlife.** It is the intent of the legislature by the passage of the Pollution Control Revenue Bond Act to authorize municipalities to acquire, own, lease or sell projects for the purpose of reducing, abating or preventing pollution, including, but not limited to, removing pollutants, contaminants or foreign substances from land, air or water, or removing or treating any substance in a processed material which otherwise would cause pollution when such material is used, to protect and promote the health, welfare and safety of the citizens of this state and its and wildlife, with the resultant higher level of employment and economic activity and stability. It is not intended hereby to authorize any municipality itself to operate any	The ESA requires consultation by federal agencies on actions that may affect listed species. The ESA provides no authority to require local municipalities to undertake projects to protect wildlife, absent a federal nexus.

[174]New Mexico Department of Game and Fish. 2006. Comprehensive Wildlife Conservation Strategy for New Mexico. New Mexico Department of Game and Fish. Santa Fe, New Mexico. 526 pp + appendices.

manufacturing, industrial or commercial enterprise. The provisions of the Pollution Control Revenue Bond Act shall be liberally construed in conformity with this intent.[175]	
WILDLIFE, HABITAT, CONSERVATION **New Mexico has established conservation districts to "enhance" wildlife and habitat.** A. The "conservation services division" is created within the department of game and fish. B. The conservation services division is responsible for: (1) management, enhancement, research and conservation of public wildlife habitat ; (2) the lease, purchase, enhancement and management of state wildlife habitat ; (3) assisting landowners in improving wildlife habitats; (4) development of educational programs related to conservation of wildlife and the environment, including the expanded dissemination of wildlife publications; and (5) communication and consultation with federal and other state agencies, local governments and communities, private organizations and affected interests responsible for habitat, wilderness, recreation, water quality and environmental protection to ensure comprehensive conservation services for	The ESA does not have a provision for the "enhancement" of a listed species. Only a prohibition against take and for activities that may allow "recovery".

[175] 3-59-3. Legislative intent.

hunters, anglers and nonconsumptive wildlife users.[176]	
WILDLIFE, FUNDING, HABITAT The purpose of the Game and Fish Bond Act is to provide for use of revenues derived from fees for hunting and fishing licenses to issue bonds to provide for fish hatcheries and rearing facilities, game and fish at acquisition, development and improvement projects and other similar capital outlay projects.[177]	The ESA does not provide dedicated funding.
WILDLIFE, ENDANGERED SPECIES, HABITAT **Requires studies to be conducted to determine the status and survival requirements of threatened and endangered species.** In addition to other powers and duties, the director (of fish and game): A. may acquire land or aquatic habitat interests for the conservation, management, restoration, propagation and protection of threatened or endangered species; and B. shall conduct studies to determine the status and requirements for survival of threatened or endangered species.[178]	The ESA cannot require a State to undertake conservation activities.

[176] 17-6-1 to 17-6-11 NMSA 1978] may be cited as the "Habitat Protection Act"; 17-1-5.1. Conservation services division; duties.
[177] 17-1-17. Purpose of act.
[178] 17-2-44. Director; land or aquatic habitat interest acquisition.

COUNTY AND LOCAL LAW

County	Authority	Synopsis
BERNALILLO COUNTY, NEW MEXICO		The Bernalillo County Open Space Master Naturalist Program aims to instill the pursuit of life-long learning and promote environmental stewardship. Participants are activity engaged through education and service dedicated to the beneficial management of natural resources on Open Space properties.
BERNALILLO COUNTY, NEW MEXICO	Code of Ordinances, Art. II, Sec. 58-46,	The purpose of this article is to promulgate laws that preserve Bernalillo County open space for the purposes for which they were acquired, including the protection of natural areas, cultural and historical sites, agricultural lands, wildlife habitat, water resources and viewsheds, the promotion of environmental education, and the provision of resource-based recreation.
BERNALILLO COUNTY, NEW MEXICO [179]	Sec. 58-107	No person shall harm, hunt, pursue, molest, harass, trap, collect or remove any mammal, bird, reptile or amphibian animals or eggs or young of such animals on/from open space lands.
Union, NEW MEXICO [180]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [181]

[179] http://library.municode.com/index.aspx?clientId=13071&stateId=31&stateName=New%20Mexico&p_PageAlias=all-county-ordinances
[180] http://nm-unioncounty.civiccities.com/directory.aspx
[181] http://www.unionnm.us/DocumentCenter/Home/View/9

Quay, NEW MEXICO	Quay County Comprehensive Plan	Once adopted, the Comprehensive Plan becomes the official policy of the County. It is passed as a resolution rather than an ordinance in order to maintain its flexibility and change as conditions and priorities change.
Eddy, NEW MEXICO	Ordinance 41, Land Use	The Eddy County Land Use Policies and Procedures was developed by Eddy Government to guide the use of public lands and cooperation with County, State and Federal governments. [182]
Eddy, NEW MEXICO	Comprehensive Plan	Ensures compliance with environmental standards and advocates the use of environmental studies in planning (page. 53). ... County/city cooperation in managing growth and development in the PPJ could include one or more of the following measures: ...proximity to environmentally sensitive lands or farmland. (p. 23)[183]
Eddy, NEW MEXICO	Ordinance 19, Regulating, Controlling the Growth and Removal of Plants	Encourages native plant growth[184]
Chaves, NEW MEXICO	Art. V, Area 1 Regulations	Designation of Wildlife Habitat[185]

182 http://www.co.eddy.nm.us/Ordinance%20pdfs/landuseO-02-41.pdf
183 http://www.co.eddy.nm.us/EddyCty-FinalRPT10-08.pdf
184 http://www.co.eddy.nm.us/Ordinance%20pdfs/weedsgrowthcontrolandremovalO-91-19.pdf
185 http://co.chaves.nm.us/~cochaves/pdf/ZoningOrdinance.pdf

Chaves, NEW MEXICO	Chaves County Comprehensive Plan and Zoning Report, 4-1	Public Land Policy[186]
Chaves, NEW MEXICO	Chaves County Public Lands Advisory Committee	A committee that coordinates with federal and state agencies on public land related issues, including environmental regulation. [187]
De Baca, NEW MEXICO		
San Miguel, NEW MEXICO	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [188]
	Regulating The Permitting, Placement, Construction And Modification Of Oil And Gas Drilling And Production	The purpose of this Ordinance to: 1. Provide for a permitting process for responsible oil and gas operations and allow responsible economic development within the County; 2. Protect the water, air, environment, wildlife and other natural and economic resources within the County;..[189]
Colorado		

[186] http://co.chaves.nm.us/~cochaves/pdf/Comprehensive_Plan.pdf
[187] http://co.chaves.nm.us/index.php/2012-05-03-17-38-37/planning-zoning
[188] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf
[189] http://www.smcounty.net/Agenda/Oil%20and%20Gas%20Ordinance.pdf

Prowers, COLORADO		Utility and Development Permit Resolution and Prowers County Permitting & Development Guide including land use policy. [190]
Las Animas, COLORADO	Wildlife habitat analysis, special uses ect.	The Planning and Zoning Department is responsible for the administration and processing of applications for division of lands, subdivisions, rezoning and other land use cases.[191]
Bent, COLORADO	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.
Kiowa, COLORADO	Zoning and Planning	Approvals required from zoning and planning office commissioner
Otero, COLORADO	Areas having statewide impact or significance	Guidelines And Regulations For Areas And Activities Of State Interest County Of Otero State Of Colorado [192]

190 http://www.prowerscounty.net/Index.asp?HtAUNHADBcDIHwQ+NHADBcHt132i@330_DwVvZru3HhR7JKifAdCW2gmaUtOEnTljIqsXzyN8pcoB15YkQxe06bLFMSG49P+/

191 http://www.lasanimascounty.net/index.php/land-use-home

192 http://www.oterogov.com/images/LandUse/guidelinesregs20060814.pdf

Costilla, COLORADO		Comprehensive Plan outlines zoning, land use and environmental constraints.[193]
Pueblo, COLORADO	Rural land use plan, special uses	Title 17, Land Use and Zoning. The Rural Land Use process was adopted by Pueblo County to provide an alternative method of land division that encourages the clustering of single-family residential dwellings to maintain rural character, preserve open space, reduce the extension of roads and utilities, and offer landowners a new approach for developing the land without going through the full subdivision process. It provides a means of developing rural property while at the same time protecting wildlife habitat or critical areas, maintaining agricultural lands suitable for farming or ranching operations, and preserve and conserve water resources. In order to go through the Rural Land Use Process, the Cluster Development criteria must be met.[194] [195]
Oklahoma		
Roger Mills, OKLAHOMA	Zoning	Zoning permits and/or approval required for development
Greer, OKLAHOMA	Zoning	MAPC rezones for buildings , cell towers, and other structures. (Metropolitan action planning commission)

[193] http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Comprehensive+Plan+.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251756861482&ssbinary=true

[194] http://county.pueblo.org/government/county/department/planning-and-development/zoning

[195] http://county.pueblo.org/government/county/code/title17/chapter17-104

APPENDIX 6-- EXISTING CONSERVATION PROGRAMS

Name of program/Agency	Authority/Funding Source
FWS	
Four grant programs are available through the Cooperative Endangered Species Conservation Fund they include: Traditional" Conservation Grants, and; "Nontraditional" Grants: • Habitat Conservation Plan Land Acquisition • Habitat Conservation Planning Assistance • Recovery Land Acquisition Grants.)	ESA, Sec. 6 Support development of Habitat Conservation Plans (HCPs)federally listed threatened or endangered species, proposed and candidate species, and unlisted species proposed to be covered by the HCP.
USDA-	
Lesser Prairie Chicken Initiative	Prairie Chicken Initiative: The five states addressing Lesser Prairie Chicken habitat requested NRCS priority focus on improving habitat. NRCS and its conservation partners are helping farmers and ranchers enhance, restore and protect habitat for this sensitive and reclusive bird. For Fiscal Year 2013 Lesser Prairie-Chicken Initiative is funded under Wildlife Habitat Incentive Program.[196]
Wildlife Habitat Incentive Program	WHIP: The Food, Conservation, and Energy Act of 2008 reauthorized WHIP as a voluntary approach to improving wildlife habitat in our Nation. The Natural Resources Conservation Service administers WHIP to provide both technical assistance and up to 75 percent cost-share assistance to establish and improve fish and wildlife habitat..[197] In fiscal year 2011, the WHIP Program had a

[196] http://www.ks.nrcs.usda.gov/programs/lpci/index.html
[197] http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046975

<table>
<tr><td></td><td>U.S. total of 3,856 contracts, which represents 848,656 acres of land and a funding obligation of $60,580,860.

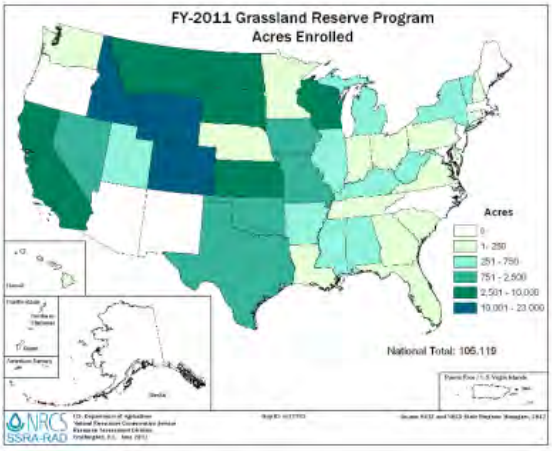
Contract Data for the impacted states[198]:
<table>
<tr><th>State</th><th># Contacts</th><th>Acres Enrolled</th><th>Funds Obligated</th></tr>
<tr><td>Colorado</td><td>12</td><td>15,655.9</td><td>$421,303</td></tr>
<tr><td>Kansas</td><td>119</td><td>23,799.1</td><td>$1,480,428</td></tr>
<tr><td>New Mexico</td><td>35</td><td>24,489.6</td><td>$779,789</td></tr>
<tr><td>Oklahoma</td><td>10</td><td>3,013.7</td><td>$185,084</td></tr>
<tr><td>Texas</td><td>283</td><td>317,448.9</td><td>$9,834,629</td></tr>
</table></td></tr>
<tr><td>Working Land for Wildlife</td><td>Working Lands for Wildlife is a new partnership between NRCS and the U.S. Fish and Wildlife Service (FWS) to combat the decline of seven specific wildlife species whose decline can be reversed and will benefit other species with similar habitat needs.

NRCS and FWS announced an agreement that will provide “long-term regulatory predictability for up to 30 years to farmers, ranchers and forest landowners participating in the U.S. Department of Agriculture's Working Lands for Wildlife (WLFW) Initiative.[199]

The agreement builds on a $33 million investment NRCS announced last spring dedicated toward producers who develop and implement conservation plans to manage and restore high-priority habitats for seven specific wildlife species across the country. The species are greater sage-grouse, New England cottontail,</td></tr>
</table>

198 http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046225

199 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

<table>
<tr><td></td><td>bog turtle, golden-winged warbler, gopher tortoise, lesser prairie-chicken and the Southwestern willow flycatcher."[200]</td></tr>
<tr><td>The Grassland Reserve Program (GRP)</td><td>GRP is a voluntary conservation program that emphasizes support for working grazing operations, enhancement of plant and animal biodiversity, and protection of grassland under threat of conversion to other uses.
2011 Easement Enrollment Data for impacted States:
<table>
<tr><th>State</th><th>Easements</th><th>Acres</th></tr>
<tr><td>Colorado</td><td>14</td><td>51,185</td></tr>
<tr><td>Kansas</td><td>74</td><td>42,133</td></tr>
<tr><td>Oklahoma</td><td>9</td><td>10,304</td></tr>
<tr><td>Texas</td><td>37</td><td>15,405</td></tr>
<tr><td>New Mexico</td><td>4</td><td>22,225[201]</td></tr>
</table>

</td></tr>
</table>

200 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

201 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/grassland/?cid=stelprdb1048273

State Acres for Wildlife Enhancement (SAFE) Approved Projects. SAFE is a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years.	In 2012, the SAFE Program identified the following priorities for the impacted States: [202] **Colorado Lesser Prairie Chicken SAFE** The goal of the Colorado Lesser Prairie Chicken SAFE is to restore and enhance 21,500 acres of short and midgrass sand sagebrush prairie to maintain and enhance lesser prairie chicken populations in Colorado. **Colorado Shortgrass Prairie SAFE** The goal of the Colorado Shortgrass Prairie SAFE is to preserve the integrity and expand the extent of shortgrass prairie managed for wildlife species in eastern Colorado. Project partners hope to accomplish this by enrolling 11,475 acres in CRP. **Kansas Upland Game Birds SAFE** The goal of the Kansas Upland Game Birds SAFE project is to improve populations of bobwhite quail and other grassland-associated wildlife by creating nesting/brood-rearing habitat on portions of crop fields. This SAFE effort will establish and maintain 30,100 acres in CRP consisting of diverse native grass and forb cover. Quail, pheasant and other grassland birds are species that will benefit from SAFE enrollments. **Kansas Lesser Prairie Chicken Habitat SAFE** The goal of the Kansas Lesser Prairie Chicken Habitat SAFE project is to enroll 30,000 acres in CRP to restore mixed-grass prairies to maintain and enhance lesser prairie chicken populations. The lesser prairie chicken is a candidate for federal listing as a threatened or endangered species. **New Mexico Lesser Prairie Chicken SAFE**

202 http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20110812_consv_en_safe.html

	The goal of the New Mexico Lesser Prairie Chicken SAFE project is to enroll 2,600 acres in CRP in the eastern part of the state to benefit the lesser prairie chicken by restoring native grasslands for breeding and brood-rearing. In eastern New Mexico, this bird and other species have been petitioned for listing under the Endangered Species Act. **Oklahoma Mixed Grass Prairie SAFE** The goal of the Oklahoma Mixed Grass Prairie SAFE project is to enroll 15,100 acres in CRP to restore mixed-grass prairie type associations in northwestern Oklahoma to benefit northern bobwhite, Cassin's sparrow and other grassland birds. **Texas Gulf Coast Prairies SAFE** The goal of the Texas Gulf Coast Prairies SAFE is to enroll 500 acres to restore grassland and shallow water habitats in the Gulf Coast Prairie region of Texas for a variety of bird species. **Texas Mixed Grass SAFE** The goal of the Texas Mixed Grass SAFE project is to enroll 78,400 acres in CRP to reconnect geographically and reproductively isolated populations of lesser prairie chickens by creating native mixed grass prairie and travel corridors. [203]

[203] ftp://ftp-fc.sc.egov.usda.gov/KS/Outgoing/Web_Files/Programs/lepc/2012/lpci_practices.pdf

APPENDIX 7 -- INDIVIDUAL, STATE AND REGIONAL VOLUNTARY ACTIONS

Name of program/Agency	Authority/Funding Source
The Western Governors Association Southern Great Plains Crucial Habitat Assessment Tool (SGP CHAT)	Range Wide 5 State Lesser Prairie Chicken Model – SGP CHAT is the result of phase one of a three-year WGA Wildlife Council project, led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken (LEPC) throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[204] [205]
Lesser Prairie Chicken Initiative Kansas Field Training	Educational seminars related to the lesser prairie chicken. [206]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[207]
Wildlife Habitat Evaluation Guide (WHEG)	The regionalized Wildlife Habitat Evaluation Guide (WHEG) for lesser prairie-chicken (LEPC) serves two functions: 1) use as a planning too lto identify limiting factors for LEPC; 2) and will be used to demonstrate what concerns/threats are most limiting range wide and how NRCS has addressed those on our LPCI contracts.[208]

[204] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[205] http://kars.ku.edu/geodata/maps/sgpchat/
[206] http://www.ksre.ksu.edu/doc13897.ashx
[207] http://kec.kansas.gov/reports/wind_siting_handbook.pdf
[208] http://www.ksre.ksu.edu/doc13898.ashx

	In 2000, the Association of Fish and Wildlife Agencies (AFWA) Teaming with Wildlife (TWW) coalition Representing more than 3,500 agencies, conservation groups and businesses led the passage of two important wildlife and fisheries conservation funding acts: Wildlife Conservation and Restoration Program(WCRP) and State Wildlife Grants(SWG) (TWW 2008 – 2011, see new TWW 2012). The following year, the United States' Congress required each state and territory to develop a "comprehensive wildlife conservation strategy" to guide the distribution of these funds(USFWS 2000). Eight elements of conservation success were identified by the US Fish and Wildlife Service (USFWS 2000) and a representative team from state fish and wildlife agencies and conservation organizations to guide the plans' development. The elements address species, habitats and communities, problems and issues, conservation actions, monitoring, plan reviews, coordination with conservation partners, and public involvement. SPECIES OF GREATEST CONSERVATION NEED (SGCN) Each state identified a list of species representative of the diversity, health and importance of the wildlife of their state. While the lists could include game and other state and federal regulated species, SGCN lists primarily focused on rare, declining, and vulnerable fish and wildlife species needing special attention for recovery, stability, and/or to prevent listings under state or federal regulation (e.g. Endangered Species Act). CONSERVATION ACTIONS AND MONITORING Conservation actions(e.g. research, survey, restoration, land or water protection, partnership-building) were defined to address the threats and issues which negatively affect species, habitats and systems. A baseline assessment of existing habitats was important for many states to define and prioritize where actions were most needed. For some states, this assessment could not be accomplished with the available data; therefore, baseline development itself became a conservation action. Actions were developed on

	the framework of existing conservation for each state: private landowner outreach, partnerships with other agencies and organizations, public involvement, legislative and regulatory support, to name a few. Measuring and reporting progress, lessons learned and successes ("effectiveness") is best accomplished through monitoring. This component is very important, yet frequently it is the most difficult to achieve due to very limited time, money and human resources. MOMENTUM 2005 – 2011 By 2006, 56 plans were created – one for each US state and territory – and approved by USFWS Regional review teams(TWW 2012). These plans were called State Wildlife Action Plans(SWAP) or Comprehensive Wildlife Conservation Strategies(CWCS). Since plans were approved, conservation partners and resource conservation agencies have seen the value in these plans grow as information resources, support or guidance for their conservation activities, and platforms for conservation practice improvement.[209]
Colorado Wildlife Action Plan	Submitted to the U.S. Fish and Wildlife Service on September 29, 2005, and it was finalized November 2, 2006. • 210 species were identified as Species of Greatest Conservation Need (SGCN). [210]
Interagency Group	W. Governor's Association Interstate Working Group
Upland Bird Grassland Habitat Strategy on the Eastern Plains	Grassland wildlife habitat conservation in eastern Colorado is implemented through a diverse mix of programs and efforts. Colorado Parks and Wildlife (CPW) has identified and prioritized areas of high upland wildlife habitat and population potential, which typically coincides with historic mid-grass or sand-sage prairie habitats.
Pheasant Habitat Improvement Program,	The Pheasant Habitat Improvement Program (PHIP) is a cooperative effort between the Colorado Parks and Wildlife,

[209] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_overview_2012.pdf
[210] http://wildlife.state.co.us/SiteCollectionDocuments/DOW/WildlifeSpecies/CWCS_FinalReport2006.pdf

(PHIP)	Pheasants Forever Inc., and local Pheasants Forever Chapters in Colorado. The program is designed to assist landowners in developing and enhancing habitat for ring-necked pheasants. PHIP is offered within the core pheasant range in Colorado, including the counties of Morgan, southeastern Weld, Logan, Phillips, Sedgwick, Yuma, Washington, Kit Carson, Cheyenne, Kiowa, Prowers and Baca.[211]
Private Lands Technical Assistance Programs	Private Landowner Assistance offers a wide variety of programs to assist private landowners on improving fisheries and wildlife on their property and can provide technical support and assistance on improving wildlife habitats.[212]
Habitat Partnership Program (HPP)	This grant is designed to encourage multiple entities to partner with the Habitat Partnership Program on large scale habitat improvement projects which, when completed, will provide benefits to livestock, private land owners, land managers, big game animals and other wildlife species. Habitat improvement projects include using mechanical and chemical tools to improve/increase available habitat and forage. Typical habitat improvement projects done by HPP include brush manipulation (hydroaxing, roller chopping, Lawson aerating, burning, etc), weed control using biological and chemical means, water developments (maintaining existing water sources and developing new ones), fertilizing and reseeding.[213]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are paving the way of our future by developing best management practices or BMPs that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy

[211] http://wildlife.state.co.us/LANDWATER/PRIVATELANDPROGRAM/PHIP/Pages/PHIP.aspx
[212] http://www.kdwpt.state.ks.us/news/Services/Private-Landowner-Assistance
[213] http://www.riparianrestorationconnection.com/component/content/article/193-habitat-partnership-program-hpp-habitat-improvement-grant

	from renewable sources by 2020 in a wildlife friendly manner.[214]
LESSER PRAIRIE-CHICKEN WILDLIFE MANAGEMENT PLAN	The Texas Parks and Wildlife Department(TPWD) provides free technical assistance to landowners and land managers interested in wildlife management through the private lands enhancement program. Local biologists work with land owners to develop and then meet the wildlife management goals and objectives for all species of land owner interest on a given property. A wildlife management plan (WMP) can provide numerous benefits for landowners. Once implemented it improves habitat, potentially increases wildlife numbers, and can improve grazing resources. Additionally, use of a WMP promotes aesthetic value, and therefore can raise property value. The lesser prairie-chicken is a candidate species for listing under the Endangered Species Act. This particular WMP (specific to protecting and improving lesser prairie-chicken habitat) will fulfill the requirements for entering into a Candidate Conservation Agreement with Assurances(CCAA. [215]
Texas Conservation Agreement	CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES FOR LESSER PRAIRIE-CHICKENS between TEXAS PARKS AND WILDLIFE DEPARTMENT and U. S. FISH AND WILDLIFE SERVICE[216]
TEXAS CONSERVATIONACTIO N PLAN State/Multi-Region	Through the Texas Conservation Action Plan (TCAP), ecologists and other stakeholders all across the state have identified 1311 Species of Greatest Conservation Need (SGCN), 232 Rare Plant Communities, the best examples of habitats and those at risk, issues affecting our resources, and potential solutions to continue to protect lands and water for future generations of

[214] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml

[215] v http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd_1046b_w7000_lesser_prairie_chicken_wmp.pdf

[216]http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

	people, fish and wildlife. The challenges are many, but the landscape of conservation partners and opportunities is extensive. This plan is designed to help interested folks connect and put into practice the most needed conservation actions. [217]
An Assessment of Herbicide Treatment and Grazing on Lesser Prairie Chicken Survival, Nest Site Collection[218]	Blake Grisham- Department of Natural Resources Management, Texas Tech University [219]
Candidate Conservation Agreement With Assurances -Oklahoma	The U.S. Fish and Wildlife Service (Service) has approved the Oklahoma Department of Wildlife Conservation's (ODWC) Candidate Conservation Agreement with Assurances (CCAA) for the lesser prairie-chicken. - approved 2/5/13[220]
Great Plains HCP	HCPs are an integral component of an application for an Incidental Take Permit (ITP) under the federal Endangered Species Act (ESA). ITPs are a voluntary tool that non-federal entities may use to receive authorization for "take" of federally-listed (i.e., officially recognized as endangered or threatened) species of wildlife that may occur in connection with otherwise lawful activity. "Take" is defined in the ESA as, "…to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" with respect to federally-listed endangered species.[221]

[217] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_statewide_multiregion_handbook.pdf
[218] http://www.ksre.ksu.edu/doc13892.ashx
[219] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1047721.pdf
[220] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf
[221] http://www.greatplainswindhcp.org/documents/fact_sheet.pdf ; http://www.greatplainswindhcp.org/aboutthehcp.cfm

Oklahoma Conservation Commission	Commission created to assist with state conservation and education efforts and is an authorized rulemaking entity. [222] [223] The Oklahoma Conservation Commission and conservation districts accomplish conservation of renewable natural resources through soil and water conservation, landuse planning, small watershed upstream flood control, abandoned mine land reclamation, water quality monitoring, environmental education and wetlands conservation.
Ecology and Management of the Lesser Prai rie-Chick en[224]	Oklahoma Cooperative Extension Service, Division of Agricultural Sciences and Natural Resources, Oklahoma State University
Wildlife Credits Program	Offers stewardship payments to agricultural producers for work done to protect and expand habitat for the rare upland bird. Is made possible with an agreement between the Wildlife Department, Oklahoma Conservation Commission and the Oklahoma Association of Conservation Districts. [225]
Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (Tympanuchus pallidicinctus) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.[226]
Oklahoma Lesser Prairie Chicken Conservation Plan (OLEPCCP	a conservation plan to address the decline of the lesser prairie chicken (LEPC) in Oklahoma. The conservation plan will identify management strategies to improve LEPC population viability through improvements to LEPC habitat emphasizing tools and incentives to encourage landowners to partner with agencies in conservation efforts while achieving their land use needs.[227]

[222] http://www.ok.gov/conservation/
[223] http://www.ok.gov/conservation/About_Us/Rules_and_Rulemaking/index.html
[224] http://www.environment.ok.gov/documents/OKWindEnergy/EcologyMgmtLesserPrairieChicken.pdf
[225] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[226] http://www.wildlifedepartment.com/lepcdevelopmentplanning.htm
[227] http://www.wildlifedepartment.com/wildlifemgmt/lepc/cons_plan.htm

Habitat Evaluation Guide for the Lesser Prairie-chicken[228]	Guide for Management and Habitat Restoration co-authored by Oklahoma State University, George Miksh Avian Research Center, and the Nature Conservancy.
Eastern Ceder Removal	NRCS is using new technology to enhance existing satellite images to identify redcedar growth and estimate the inventory available for harvest. Counties that are included in this Cedar Mapping project: Cimarron, Ellis, Murray, Okfuskee, Pottawatomie, and Woodward.[229]
Lesser Prairie Chicken Initiative Core Conservation Practices	NRCS Programs for habitat restoration include: Brush Management, Early Succession Habitat Development, Firebreak , Fence, Obstruction Removal, Prescribed Grazing, Prescribed Burning, Range Planting, Restoration of Rare and Declining Habitat, Watering Facility supporting programs. [230]
Kansas Comprehensive Wildlife Conservation Plan[231]	The theme of Kansas' Comprehensive Wildlife Conservation Plan (CWCP) is "Keeping Common Species Common." A major premise of Kansas' approach to developing the CWCP was to use existing information - not to start from scratch or conduct new studies. The process relied heavily on experts and interested parties participating in the process to bring the best available information into the plan.
LONG-RANGE PLAN For The Management of Lesser Prairie Chickens in New Mexico 2002-2006	The goal of the plan is to satisfy the public's lesser prairie-chicken related recreational and ecological interests and resolve related socio-economic issues. A three-fold approach will be integral in achieving this: 1) We will obtain a better understanding of LPC abundance, distribution and population trends. 2) We will continue to seek public involvement in and support of LPC management efforts. 3) We will work with private landowners and land management

[228] ftp://wiley.kars.ku.edu/windresource/Habitat%20Evaluation%20Guide%20for%20the%20LPC.pdf
[229] http://boisecitynews2.wordpress.com/2009/03/03/oklahoma-launches-plan-to-battle-eastern-redcedar/
[230] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcsdev11_023947.pdf
[231] http://kdwpt.state.ks.us/news/Services/Kansas-CWCP/Kansas-CWCP

	agencies to provide habitat necessary to ensure long-term conservation of LPC habitat.[232]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH[233]	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.
Southeast New Mexico Lesser Prairie-Chicken Working Group	NMDGF, as part of the Department's outreach efforts, NMDGF in collaboration with the USFWS, Bureau of Land Management (BLM), New Mexico State Land Office (SLO), and Wildlife Management Institute, proposed that a "Southeast New Mexico Lesser Prairie-Chicken Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LEPC in southeastern and east central New Mexico. The organizers hoped the various constituencies would be able to negotiate a collaborative plan that would, when implemented, improve the status of the species such that federal listing would no longer be warranted, while protecting the interests of the participating parties. In 2005, the Working Group adopted a conservation strategy and recommendations which laid out general approaches, priorities and parameters for achieving the goal of LEPC conservation and recovery while maintaining economic values and traditional land uses. The strategy document outlines and prioritizes a variety of recommended programs, projects, and practices for reducing threats to the LEPC while maintaining other uses of the land.
GIS habitat analysis for lesser prairie-chickens in southeastern New Mexico	Geographic Information System (GIS) habitat analyses for lesser prairie-chicken (LPCH, Tympanuchus pallidicinctus) conservation planning. The 876,799 ha study area included most of the occupied habitat for the LPCH in New Mexico. The objectives were to identify and quantify: 1. suitable LPCH habitat in New Mexico, 2. conversion of native

232 http://www.wildlife.state.nm.us/conservation/documents/PCLongRange.pdf

233 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	habitats, 3. potential for habitat restoration, and 4. unsuitable habitat available for oil and gas activities.[234]
Range-wide Population Estimation and Monitoring for LPC	A range-wide sampling framework and survey method is being developed to estimate total abundance of active leks for the population of LEPC. In addition, standard operating procedures are being developed for aerial surveys and ground truthing surveys.[235]
Interstate Collaboration Range Wide Conservation Plan	Lesser Prairie Chicken Interstate Working Group A focused conservation effort for LPC was described and approved by WAFWA through the Lesser prairie chicken conservation initiative (LPCCI) drafted by the Lesser Prairie Chicken Interstate Working Group (LPCIWG) in May 2008. The LPCIWG is one of the technical groups associated with the WAFWA Grassland Initiative and the 5 cooperating states have and continue to commit staff to this endeavor since it was formally established in 1996. The Lesser Prairie-Chicken (LPC) Interstate Working Group of the Western Association of Fish and Wildlife Agencies (WAFWA) is developing a range-wide conservation plan to increase the population of the LPC, in partnership within federal agencies and others. The states include Colorado, Kansas, New Mexico, Oklahoma and Texas. The conservation plan emphasizes tools and incentives to encourage landowners and others to voluntarily partner with agencies in LPC habitat conservation efforts, while also achieving their land use needs.236

[234] http://www.ksre.ksu.edu/doc13889.ashx
[235] http://www.wafwa.org/documents/Final_Study_Design_Appendices_12_8_2011.pdf
[236] http://www.wafwa.org/html/prairie_chicken.shtml

Memorandum Of Understanding For Conservation And Management Of Lesser Prairie-Chickens And Associated Species And Their Habitats	The purpose of this Memorandum of Understanding (MOU) is to provide, under auspices of the Western Association of Fish and Wildlife Agencies (WAFWA), for interagency cooperation in conservation and management of lesser prairie-chickens (Tympanuchus pallidicinctus) and associated species and their habitats across their current 5-state range (i.e. parts of Colorado, Kansas, New Mexico, Oklahoma, and Texas). The purpose of this MOU is also to provide for cooperation among participating agencies in the development and implementation of conservation programs for lesser prairie-chickens (LEPC) and their associated habitats. The participating agencies agree that cooperation is necessary to collect and analyze data on lesser prairie-chickens and their habitats, and to plan and implement actions necessary to establish and/or maintain viable LEPC populations that are sufficient to preclude present or future endangerment, within the constraints of approved budgets.[237]

[237] http://www.wafwa.org/documents/LPCCI_FINAL.pdf

New Mexico CCCA	This Candidate Conservation Agreement (CCA) for the LPC and the SDL represents a collaborative effort between the FWS, the Bureau of Land Management (BLM), and the Center of Excellence for Hazardous Materials Management (CEHMM). The CCA builds upon the BLMs "Special Status Species Resource Management Plan Amendment" (RMPA) (completed in April 2008) for southeast New Mexico. The RMPA established the foundational (minimum) requirements that will be applied to all future Federal activities, regardless of whether a permittee or lessee participates in this CCA. The strength of the CCA comes from the implementation of additional conservation measures that are additive, or above and beyond those foundational requirements established in the RMPA.[238] .As of July 15, 2012, thirty oil and gas companies are enrolled in the CCA/A for a total of 808,000 acres (the participating Federal agency in this case is the Bureau of Land Management (BLM)). In addition, forty-one New Mexico ranchers have enrolled a combined 1.5 million acres of rangeland in the CCA/A and the New Mexico State Land Office has enrolled 248,000 acres in the CCAA. Partners in the NM CCA/A include BLM, CEHMM (non-profit third party to manage funds and implement CCA/A's), New Mexico Department of Game and Fish (NMGF), New Mexico State Land Office and several oil-gas companies. The CCA/A includes the entire range of the lesser prairie-chicken in New Mexico.

[238] http://www.fws.gov/southwest/es/Documents/R2ES/LPC-SDL_CCA-CCAA_2008.pdf

North American Landbird Conservation Plan-co-authored by States, Industry and FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [239]
New Mexico LPC/SDL Working Group Conservation Plan	Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico In December, 2002, representatives of NMDGF, FWS, the Federal Bureau of Land Management (BLM), the New Mexico State Land Office (NMSLO), and the Wildlife Management Institute proposed that a "Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LPC and SDL.[240]
Land Acquisition for Habitat	In May 2008, following an extensive public planning process, the Bureau of Land Management (BLM) designated an Area of Critical Environmental Concern (ACEC) about 35 miles east of Roswell. The designation is meant to provide much-needed habitat for two species being considered for listing under the Endangered Species Act: the Lesser Prairie-chicken and the sand dune lizard. To conserve this high value habitat, the BLM requested The Conservation Fund's assistance in acquiring key lands in and around the special area. The Fund has worked on several projects that together have protected about 58,000 acres of land.

[239] http://www.partnersinflight.org/cont_plan/#Access
[240] http://nwcos.org/Resources/LPC_SDL_Conservation_Strategy_CD.pdf

Land Acquisition for Habitat	The Johnson Ranch in southeastern New Mexico has been purchased by The Nature Conservancy. The 9,170 acre property contains critical habitat for 25 Species of Greatest Conservation Need—as identified in the state's Comprehensive Wildlife Conservation Strategy (also known as Wildlife Action Plan)—including the lesser prairie-chicken.
POWERLINE PROJECT GUIDELINES NEW MEXICO DEPARTMENT OF GAME AND FISH	Recommendations for conservation and development without wildlife disturbances. [241]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.[242]
RECOMMENDATIONS TO MINIMIZE ADVERSE IMPACTS OF WIND ENERGY DEVELOPMENT ON WILDLIFE 2012	The New Mexico Department of Game and Fish (NMDGF) does not have regulatory authority specific to wind power development, nor is there any other statewide permitting authority in New Mexico. The information in this guideline is intended for use by wind project developers, their consultants, local government and the general public. Developers are encouraged to contact NMDGF for project-specific comments and recommendations. Specific locations of listed species will be kept confidential, however other information shared with NMDGF may be accessible to the public through the NM Inspection of Public Records Act. NMDGF Guidelines referred to herein may be found in the

241 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/2007POWERLINEGUIDELINES.pdf

242 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	Habitat Handbook, under the Conservation tab on the Department website.[243]
Oklahoma Conservation Easement	The Oklahoma Wildlife Conservation Commission and the Department of Wildlife Conservation shall not enter into or approve a setback or conservation easement that includes a setback related to energy or agricultural structures and regarding a threatened, endangered or candidate species that is more restrictive than those created pursuant to federal law, rules or guidelines. B. Prior to entering into or approving a conservation easement or setback pursuant to subsection A of this section, the Commission and the Department shall review all information and studies presented to the Commission or Department by a public or private entity affected by the proposed conservation easement or setback.[244]
Colorado Conservation Easements	"Conservation easement in gross", for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural,

243 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

244 Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103b - Setback or Conservation Easement Related to Energy or Agricultural Structures and Threatened or Endangered Species. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466365&hits=481+480+475+474+260+259+253+252+189+188+182+181+12+11+5+4+

	horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.[245]
Colorado Conservation Easements	Nature of conservation easements in gross. (1) A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in section 38-30.5-102 and transferable by any lawful method for the transfer of interests in real property in this state. (2) A conservation easement in gross shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding that it may be negative in character. (3) A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it. (4) The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating the easement. (5) A conservation easement in gross that encumbers water or a water right as permitted by section 38-30.5-104 (1) may be created only by the voluntary act of the owner of the water or water right and may be made revocable by the instrument creating it.[246]
Colorado Conservation Easements	The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary. Further, the general assembly finds and declares that it is in the public interest to determine who may receive such easements and for what purpose such easements may be received.[247]

[245] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[246] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[247] Title 38. PROPERTY - REAL AND PERSONAL, REAL PROPERTY, Interests in Land, Article 30.5. Conservation Easements.

Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	Interior Secretary Salazar announces $57.8 million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP- The planning proposal lands encompasses the whooping cranes migration route in the U.S. and their wintering grounds, along with containing a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[248]

http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=27609&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

[248] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html

APPENDIX 8-LITERATURE CITED

[Please note, where references are made to literature cited in the U.S. Fish and Wildlife Service's 2012 Proposed listing, for consistency, CESAR has adopted the abbreviated citation conventions used in that document.]

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SUSANA MARTINEZ
Governor

JEFF M. WITTE
Secretary

March 7, 2014

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

RE: Notice of Intent to Prepare an Environmental Impact Statement for a Habitat Conservation Plan for Commercial Developments, Including Energy Developments, and Agricultural and Conservation Activities Within Six States

To Whom It May Concern:

New Mexico Department of Agriculture (NMDA) submits the following comments in response to the notice of intent to prepare an Environmental Impact Statement (EIS) for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP) for commercial developments, including energy developments, and agricultural and conservation activities within six states (*Docket FWS-R2-ES-2013-0134*).

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012 (New Mexico Agricultural Statistics 2012). NMDA's comments focus on process questions related to the development of an EIS on the ITP application, including concerns about how alternatives will be developed.

In the plan proposed by the American Habitat Center, landowners can enroll in versions of the American Habitat Center's plan with an Enrollment Agreement under a proposed addition to the Section 4(d) Special Rule, with a Certificate of Inclusion under a proposed Candidate Conservation Agreement with Assurances, and a Certificate of Participation under an HCP. The last segment of the American Habitat Center's plan, and the issuance of the required ITP, is the segment up for comment.

Currently, landowners can choose to enroll in the Western Association of Fish and Wildlife Agencies' Range-wide Conservation Plan or the Natural Resources Conservation Service's Lesser Prairie-Chicken Initiative. Additionally, the proposed 4(d) Special Rule *(79 FR 4652)* exempts some agricultural activities from take provisions.

NMDA contends that all six options (three currently approved and three segments of the current proposal) should be evaluated as alternatives during the construction of the EIS. Although NMDA supports private, local, state, and federal land-based efforts to preclude listing the lesser prairie-chicken (LEPC) as threatened, NMDA is concerned that the addition of three more options for landowners has

the potential to negatively impact conservation initiatives for the LEPC by causing landowner confusion and diluting the impact of any one program.

Significant efforts by private landowners and private sector businesses as well as state and federal government entities to implement land management activities that benefit LEPC habitat in New Mexico and throughout its range involve large tracts of land. According to figures provided in the Range-wide Conservation Plan for the LEPC, the following acreages are currently providing LEPC habitat on private lands within the five states where the LEPC is found:

Lesser Prairie-Chicken Conservation Initiative (LPCI)	942,572 acres
Conservation Reserve Program (CRP)	5.5 million acres
Candidate Conservation Agreement with Assurances (CCAA)	2.1 million acres
State Acres for Wildlife Enhancement (SAFE)	214,000 acres

Private landowners (ranchers and farmers), private sector businesses, and nongovernmental organizations have voluntarily protected and improved more acres of LEPC habitat than all of the federal and state agencies combined. This demonstrates the commitment of the agricultural community and private sector to habitat improvement for the LEPC under the current paradigm. This commitment may be jeopardized if landowners have to choose between six competing plans. Faced with so many choices, landowners may be overwhelmed and choose not to enroll in any of the programs, undermining their purpose.

Thank you for the opportunity to comment on this proposal. We request the U.S. Fish and Wildlife Service continue to keep NMDA informed of this and other efforts related to LEPC.

Please contact Angela Brannigan at (575) 646-8025 if you have questions about these comments.

Sincerely,

Jeff M. Witte

JMW/AB/ya

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

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

March 10, 2014

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

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

To Whom It May Concern:

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

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

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

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

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

Sincerely,

Jose Varela Lopez, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

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

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

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

New Mexico Cattle Growers' Association
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January 6, 2014

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

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

To Whom It May Concern:

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

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

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

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

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

The Service further proposes that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to activities that are conducted during the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, hay, or forage production.
(1) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands in cultivation, provided that the harvest of cultivated lands is conducted by methods that allow wildlife to flush and escape, such as starting operations in the middle of the field and working outward, or by modifying equipment to include flush bar attachments.
(2) Routine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as irrigation conveyance structures and roads.
While the Parties appreciate the proposed and aforementioned take allowance under a listing scenario, the Parties strongly recommend broadening the allowance to include those lands that were previously cultivated but are currently out of production due to rotation, set-aside, or other normal or dryland agricultural practices that would preclude a landowner from cultivating a particular field in the year previous or concurrent to the listing decision.

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

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

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

Sincerely,

Rex Wilson, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

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

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

March 10, 2014

Docket ID: FWS-R2-ES-2013-0134

RE: Submission by the Permian Basin Petroleum Association (PBPA) on behalf of its 1000 members, a substantial portion of which exist within the range of the lesser prairie chicken and scope of this Environmental Impact Statement.

To Whom It May Concern:

The PBPA represents over 1000 member companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the Permian Basin region of west Texas and southeastern New Mexico. The Permian Basin is the most prolific oil producing region in the United States and produces approximately twenty percent of the oil produced in the America annually. PBPA member companies have existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities in areas with LPC habitat, and therefore will be significantly impacted by this rulemaking.

PBPA members have always intended to support any reasonable post listing plan and offer these comments which are intended to be constructive.

In reviewing the scoping documents, scoping meeting presentation, and scoping posters provided by FWS, PBPA wishes to raise several issues to be addressed during this process:

1) NEPA Scoping Process is Not Adequate for Meaningful Public Participation

§ 46.235 NEPA scoping process. (a) Scoping is a process that continues throughout the planning and early stages of preparation of an environmental impact statement. Scoping is required for an environmental impact statement; scoping may be helpful during preparation of an environmental assessment, but is not required (see paragraph 46.305(a) Public involvement in the environmental assessment process). For an environmental impact statement, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions. Scoping is an opportunity to introduce and explain the interdisciplinary approach and solicit information as to additional disciplines that should be included. Scoping also provides an opportunity to bring agencies and applicants together to lay the groundwork for setting time limits, expediting reviews where possible, integrating other environmental reviews, and identifying any major obstacles that could delay the process. The Responsible Official shall determine whether, in

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some cases, the invitation requirement in 40 CFR 1501.7(a)(1) may be satisfied by including such an invitation in the notice of intent (NOI). (b) In scoping meetings, newsletters, or by other communication methods appropriate to scoping, the lead agency must make it clear that the lead agency is ultimately responsible for determining the scope of an environmental impact statement and that suggestions obtained during scoping are only options for the bureau to consider.

COMMENT: The rushed and abbreviated timeframe of the scoping hearings is surprising and troubling since few stakeholders were able to become aware of these proceedings in time to develop comments or, more importantly, to attend. We believe most affected stakeholders simply didn't receive adequate notice of the scoping meetings. We are concerned that the minimal scoping meetings held do not comply with Departmental public participation and involvement regulatory guidelines.
For example, the HCP being considered extends into Nebraska, which is not part of the habitat USFWS or the states have identified. Additional scoping meetings should be scheduled in all affected areas, including Nebraska, in order to provide an opportunity for broader and more meaningful involvement by impacted states, local governments, landowners, industry and other interested parties. We believe extensive public involvement is necessary and desirable, if not required, in order to evaluate this proposed action adequately. Without it, we fear that the USFWS will not be able to develop a viable document that fully addresses the full range of reasonable alternatives to be analyzed and the extent to which new data and analyses will be required.

Particular issues of concern, currently absent from the scoping process, include the following:

- As mentioned above, the HCP under consideration extends into Nebraska. The EIS must evaluate the inclusion of this area as well as an alternative that does not include this area. Any analysis must examine whether the HCP's inclusion of conservation credits from Nebraska, an area not identified as habitat, results in less conservation in identified habitat.

- The HCP does not and cannot exist in a vacuum. As with any plan, its environmental impact must be assessed against the environmental impacts already authorized in the LEPC's habitat. Any incidental take permitted by the HCP must be evaluated along with the incidental take permitted by the WAFWA Range-wide Conservation Plan, USDA/NRCS CRP, and the existing New Mexico, Texas, and Oklahoma CCAAs respectively. These plans currently enjoy combined enrollment in excess of 10 million acres of habitat in the LEPC's estimated occupied range and are already being implemented and providing assurances to those enrolled. The permit issued with the CCAA allows 1.9 million acres of take over a 30 year period. By comparison, the HCP proposes even greater take, i.e., an authorization of 2.2 million acres of take over a 30 year period. The EIS must evaluate the impact of permitting 2.2. million acres of take under the HCP <u>in addition</u> to the take that is already authorized under the RWP, the various CCAAs, and other approved mechanisms. The baseline case resulting from these various programs must be evaluated in the application of additional plans or programs EIS must also evaluate the impact on the LEPC and its range should no take in addition to the take already permitted by approved mechanisms be permitted.

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COMMENT: We believe the NEPA contractor has thoroughly underestimated the time required to provide 1) adequate scoping, 2) meaningful public participation, 3) meaningful agency involvement and coordination in the process, and 4) adequate analysis of the complex environmental, social, and economic impacts that the proposed conservation strategy and habitat management plan will have, not only on the 5 state area impacted by the proposed regulatory and administrative actions, but on the nation as a whole. There are literally thousands of landowners, hundreds of communities, hundreds of major industries and countless local and national environmental and business organizations that will need time to digest this proposal and to review any documents and analyses for adequacy. The proposed does not provide adequate time for persons or organizations that may be interested or affected to become involved enough in the process to provide meaningful input.

We believe considerable new environmental and socio-economic data will be required considering the anticipated significant potential impact of this proposed untested conservation approach. It establishes a de facto regulatory bureaucracy that all stakeholders need to better understand - particularly how it will in fact work to improve protection of the Lesser Prairie Chicken to a greater extent that the Range-wide Conservation Plan currently in place.

Most full Environmental Impact Statements on proposals of this magnitude take a minimum of 1 ½ years to complete, and more likely in excess of 2 years. Experience has taught us that the NEPA process cannot be shortened at the will of the proponent. All procedural steps in the process must be met and additional time allotted for unexpected delays resulting from adverse comments on scoping, the Draft EIS and the Final EIS. The requirement to consider and evaluate all reasonable alternatives fully and completely and to fully involve, to the extent practicable, all affected stakeholders nearly always mitigates against any attempt to expedite a NEPA document in the face of controversy and complexity surrounding a proposed action. This process is too important and too complex to be rushed. We strongly recommend that USFWS re-evaluate the proposed timeframe and publish one that is more realistic and one that can be effectively managed so as to be consistent with Departmental NEPA guidelines.

3) Need for Proposed Action in Question - Appropriate Consideration of the "No Action Alternative"

COMMENT: The proposed action being subject to NEPA contains a Stakeholder Conservation Strategy and a draft Habitat Conservation Plan that would become effective should the Lesser Prairie Chicken become listed as "Threatened" or "Endangered" under the ESA. The February Notice of the Scoping and NEPA Process is silent on the No Action Alternative and other reasonable alternatives to the Proposed Action, particularly with respect to the Western Association of Fish and Wildlife Agencies (WAFWA) Range-Wide Conservation Plan. The Range-wide Conservation Plan, which has already satisfied NEPA and been previously adopted by Congress and the USFWS, is being implemented successfully along side the New Mexico, Texas, and Oklahoma CCAAs, as well as the USDA CRP and NRCS LPCI programs. With considerable stakeholder support, these plans have already protected in excess of 10 million combined acres of critical Lesser Prairie Chicken habitat throughout the geographic area to be impacted by the proposed action. The decision to proceed with an alternative conservation strategy and plan in the absence a final ESA regulatory determination of the status of the Prairie Chicken, at the very least, causes considerable confusion

among the many stakeholders who are very much in need of the regulatory security the Range-wide Conservation Plan and complementary programs already provide.
We believe the No Action Alternative, which by default should include the Range-wide Conservation Plan et al, should be the starting place for scoping discussions. The Proposed Action cannot be fully understood in the absence of a USFWS presentation and understanding of these plans, their metrics, and what they are already accomplishing for habitat protection in perpetuity.
Stakeholders need to know that these existing CCAAs and the Range-wide Plan have already been adopted by USFWS and are already being implemented within the project area--in some cases, on private and public lands that could be impacted by the regulatory scheme contained in the Proposed Action. Scoping done without this vital information on alternatives would risk commencing the drafting of the analyses and writing of the EIS in a vacuum that defies the reality of USFWS's existing conservation planning and habitat protection strategy and the positive work that is already resulting from it.

4) State Wildlife Agencies and Affected Local Government Agencies Should be Included in the NEPA Process as Cooperating Agencies consistent with DOI NEPA Regulations

§ 46.225 How to select cooperating agencies. (a) An "eligible governmental entity" is: (1) Any Federal agency that is qualified to participate in the development of an environmental impact statement as provided for in 40 CFR 1501.6 and 1508.5 by virtue of its jurisdiction by law, as defined in 40 CFR 1508.15; (2) Any Federal agency that is qualified to participate in the development of an environmental impact statement by virtue of its special expertise, as defined in 40 CFR 1508.26; or (3) Any non-Federal agency (State, tribal, or local) with qualifications similar to those in paragraphs (a)(1) and (a)(2) of this section. (b) Except as described in paragraph (c) of this section, the Responsible Official for the lead bureau must invite eligible governmental entities to participate as cooperating agencies VerDate Aug<31>2005 18:06 Oct 14, 2008 Jkt 217001 PO 00000 Frm 00030 Fmt 4701 Sfmt 4700 E:\FR\FM\15OCR3.SGM 15OCR3 pwalker on PROD1PC71 with RULES361320 Federal Register / Vol when the bureau is developing an environmental impact statement. (c) The Responsible Official for the lead bureau must consider any request by an eligible governmental entity to participate in a particular environmental impact statement as a cooperating agency.

COMMENT: The Department of the Interior has been a leader in involving local and state government agencies in NEPA compliance activities, particularly when these actions involve region-wide planning efforts. DOI regulations specifically provide for consultation, coordination and cooperation with government and tribal agencies and embrace CEQ guidelines which direct agencies to "encourage and facilitate" public involvement in the NEPA process. We suggest that in this case, maximum participation of affected local and state agencies in all phases of the development of this NEPA document is essential and desirable to develop and enhance the prospects for a cooperative conservation solution to the protection of the Lesser Prairie Chicken in a way that minimizes disruption to the regional economy. We strongly urge that, at a minimum, wildlife agencies from all 5 affected states plus Nebraska be offered the opportunity to participate as cooperating agencies in all major phases of the development of the EIS including the evaluation of the adequacy and completeness of the Scoping process. We also urge that county and city government agencies that desire to participate as cooperating agencies be allowed to do so. We strongly urge that this recommendation be adopted in the Scoping process (which will need to be extended in order to do so) so that 1) the prospects for a community consensus can be attempted as per Department NEPA policy and 2) so that the existing Range-wide Conservation Plan, currently being implemented, will be appropriately analyzed and properly evaluated in the context of the Proposed Action.

Please contact me if I can be of any assistance.

Sincerely,

Ben Shepperd
President

Name: Ben Shepperd

Comments: Submission by the Permian Basin Petroleum Association (PBPA) on behalf of its 1000 members, a substantial portion of which exist within the range of the lesser prairie chicken and scope of this Environmental Impact Statement.

See attached file(s)

close window

March 10, 2014

Docket ID: FWS-R2-ES-2013-0134

RE: Submission by the Permian Basin Petroleum Association (PBPA) on behalf of its 1000 members, a substantial portion of which exist within the range of the lesser prairie chicken and scope of this Environmental Impact Statement.

To Whom It May Concern:

The PBPA represents over 1000 member companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the Permian Basin region of west Texas and southeastern New Mexico. The Permian Basin is the most prolific oil producing region in the United States and produces approximately twenty percent of the oil produced in the America annually. PBPA member companies have existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities in areas with LPC habitat, and therefore will be significantly impacted by this rulemaking.

PBPA members have always intended to support any reasonable post listing plan and offer these comments which are intended to be constructive.

In reviewing the scoping documents, scoping meeting presentation, and scoping posters provided by FWS, PBPA wishes to raise several issues to be addressed during this process:

1) NEPA Scoping Process is Not Adequate for Meaningful Public Participation

§ 46.235 NEPA scoping process. (a) Scoping is a process that continues throughout the planning and early stages of preparation of an environmental impact statement. Scoping is required for an environmental impact statement; scoping may be helpful during preparation of an environmental assessment, but is not required (see paragraph 46.305(a) Public involvement in the environmental assessment process). For an environmental impact statement, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions. Scoping is an opportunity to introduce and explain the interdisciplinary approach and solicit information as to additional disciplines that should be included. Scoping also provides an opportunity to bring agencies and applicants together to lay the groundwork for setting time limits, expediting reviews where possible, integrating other environmental reviews, and identifying any major obstacles that could delay the process. The Responsible Official shall determine whether, in

PERMIAN BASIN PETROLEUM ASSOCIATION
P.O. BOX 132 MIDLAND, TEXAS 79702 WWW.PBPA.INFO 432-684-6345

some cases, the invitation requirement in 40 CFR 1501.7(a)(1) may be satisfied by including such an invitation in the notice of intent (NOI). (b) In scoping meetings, newsletters, or by other communication methods appropriate to scoping, the lead agency must make it clear that the lead agency is ultimately responsible for determining the scope of an environmental impact statement and that suggestions obtained during scoping are only options for the bureau to consider.

COMMENT: The rushed and abbreviated timeframe of the scoping hearings is surprising and troubling since few stakeholders were able to become aware of these proceedings in time to develop comments or, more importantly, to attend. We believe most affected stakeholders simply didn't receive adequate notice of the scoping meetings. We are concerned that the minimal scoping meetings held do not comply with Departmental public participation and involvement regulatory guidelines.
For example, the HCP being considered extends into Nebraska, which is not part of the habitat USFWS or the states have identified. Additional scoping meetings should be scheduled in all affected areas, including Nebraska, in order to provide an opportunity for broader and more meaningful involvement by impacted states, local governments, landowners, industry and other interested parties. We believe extensive public involvement is necessary and desirable, if not required, in order to evaluate this proposed action adequately. Without it, we fear that the USFWS will not be able to develop a viable document that fully addresses the full range of reasonable alternatives to be analyzed and the extent to which new data and analyses will be required.

Particular issues of concern, currently absent from the scoping process, include the following:

- As mentioned above, the HCP under consideration extends into Nebraska. The EIS must evaluate the inclusion of this area as well as an alternative that does not include this area. Any analysis must examine whether the HCP's inclusion of conservation credits from Nebraska, an area not identified as habitat, results in less conservation in identified habitat.

- The HCP does not and cannot exist in a vacuum. As with any plan, its environmental impact must be assessed against the environmental impacts already authorized in the LEPC's habitat. Any incidental take permitted by the HCP must be evaluated along with the incidental take permitted by the WAFWA Range-wide Conservation Plan, USDA/NRCS CRP, and the existing New Mexico, Texas, and Oklahoma CCAAs respectively. These plans currently enjoy combined enrollment in excess of 10 million acres of habitat in the LEPC's estimated occupied range and are already being implemented and providing assurances to those enrolled. The permit issued with the CCAA allows 1.9 million acres of take over a 30 year period. By comparison, the HCP proposes even greater take, i.e., an authorization of 2.2 million acres of take over a 30 year period. The EIS must evaluate the impact of permitting 2.2. million acres of take under the HCP <u>in addition</u> to the take that is already authorized under the RWP, the various CCAAs, and other approved mechanisms. The baseline case resulting from these various programs must be evaluated in the application of additional plans or programs EIS must also evaluate the impact on the LEPC and its range should no take in addition to the take already permitted by approved mechanisms be permitted.

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Please contact me if I can be of any assistance.

Sincerely,

Ben Shepperd
President

MARLA PEEK
DIRECTOR OF REGULATORY AFFAIRS

WRITER DIRECT
(405) 523-2437
FAX (405) 530-2634
marla.peek@okfb.org

March 10, 2014

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

Re: EIS for the Stakeholder Conservation Strategy/American Habitat Center Habitat Conservation Plan for the Lesser Prairie Chicken

To Whom It May Concern:

Please accept these comments on behalf of the Oklahoma Farm Bureau, Oklahoma's largest general farm organization, with about 100,000 member families. The proposed listing of the Lesser Prairie Chicken (LPC) as threatened affects thousands of our members in northwestern and the panhandle of Oklahoma. I serve on the policy committee for the Stakeholder Conservation Strategy (Strategy). I was able to attend the scoping meeting in Woodward on February 26. I found it to be comprehensive and instructive. There were several questions from the audience and they were answered politely and completely by Allison Arnold with the U.S. Fish and Wildlife Service (Service) and Steve Manning with Natural Resources Solutions.

It is inspiring to see organizations, like Farm Bureau and other agricultural organizations which represent landowners, working together with the oil and gas industry and the Environmental Defense Fund toward the common goal of preserving and restoring LPC populations and habitat. At a time when there is never enough federal or state dollars for threatened and endangered species conservation, the Strategy may very well be the best model for species conservation for the future. This model has been built to be robust, with thorough scrutiny and oversight as the operating structure places the Service at the top of the Strategy.

As a policy committee member involved in the stakeholder process, I thought the planning structure worked well. Oklahoma Farm Bureau came into the project at the urging of the Texas Farm Bureau. I was pleased to see the level of cooperation and respectfulness the stakeholders paid to one another. That the Strategy and this Environmental Impact Statement are being completed so quickly is evidence of how well everyone has worked together.

Following are some of the elements of the Habitat Exchange that we really like.

- Dynamic permanent conservation offset. As we understand this entirely new concept, a dynamic permanent offset keeps the net conservation benefit constant, even though the offset may change from one piece of property to another, thus making the offset permanent. This will be managed by the Habitat Exchange Administrator.
- Free-market based buying and selling of credits and debits.
- Creation of the Habitat Quantification Tool.

- Creation of a Reserve Account to keep the net conservation benefit to the chicken whole when circumstances happen to a property owner which are beyond his control.

The entire process of creating the Strategy has been a pleasure. We do not wish to see the LPC listed as threatened; however, we are hopeful this Strategy will be successful for the LPC, the environment and the landowners.

Thank you for your consideration in this matter.

Sincerely,

Marla R. Peek
Director of Regulatory Affairs

cc: OFB Board of Directors

USDA
United States Department of Agriculture

Farm and Foreign Agricultural Services

Farm Service Agency

Farm Programs

1400 Independence Ave, SW
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MAR 1 2014
Div. of Policy & Dir. Mgt.

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

Dear Director Ashe:

The U.S. Department of Agriculture (USDA), Farm Service Agency (FSA), appreciates the opportunity to comment on the U. S. Department of Interior (USDOI), Fish and Wildlife Service (FWS), intent to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (**42 U.S.C. 4321, et seq.**) on a proposed application for an Incidental Take Permit (ITP) under Section 10(a)(1)(B) of the Endangered Species Act (ESA) of 1973, as amended (**16 U.S.C. 1531**) . The potential ITP includes activities that cover regional construction, operation, and maintenance associated with multiple commercial energy facilities; agricultural activities, including farming and ranching; and conservation management activities within portions of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, and Texas. FWS will seek public input including accepting written comments received at announced public scoping meetings held within the proposed permit area prior to developing a draft EIS for potential issuance of an ITP.

Under ESA to obtain an ITP, an applicant must submit an Habitat Conservation Plan containing measures that would minimize incidental take, including avoidance, and mitigate for the effects of any incidental take to the maximum extent practicable, and ensure that the taking is incidental to, and not the purpose of, otherwise lawful activity (16 U.S.C. 1539(a)(1)(B) and 1539(a)(2)(A)).

The potential ITP is directed to the lesser prairie chicken (*Tympanuchus pallidicinctus*), a species currently proposed to be listed as threatened pursuant to the ESA. The lesser prairie chicken has some likelihood of being affected by the applicant's activities within the proposed permit area.

The applicant is a diverse group of stakeholders representing energy, agricultural, and conservation industry and organizations, known collectively as the American Habitat Center, that have come together to develop a Stakeholder Conservation Strategy, containing three primary components:

- a Habitat Conservation Plan (HCP),
- a Habitat Quantification Tool (HQT), and
- a Habitat Exchange (HE).

USDA is an Equal Opportunity Provider and Employer

The HCP describes conservation measures designed to avoid, minimize, and mitigate incidental take through habitat preservation, enhancement, and restoration, The HQT provides a method for determining habitat value and debits. The HE provides a primary means for meeting mitigation obligations through exchange of credits.

FSA has only a few general comments to make:

FSA supports FWS actions to prepare the EIS. Since the December 11, 2012, publication of the proposal to list the species as threatened in the Federal Register (77 FR 73828), the FWS has endorsed the Western Association of Fish and Wildlife Agencies (WAFWA) Range-wide Conservation Plan for the Lesser Prairie Chicken and provided a Conference Opinion on the Lesser Prairie Chicken Initiative (LPCI) and other conservation activities within the range of the lesser prairie chicken conducted by the USDA Natural Resources Conservation Service (NRCS). The FWS is currently preparing a Biological Opinion pertaining to a Biological Assessment developed by FSA regarding the Conservation Reserve Program (CRP) and the conservation of the lesser prairie chicken. The review of the American Habitat Center Stakeholder Conservation Strategy is consistent with FWS previous actions related to the public initiatives described. The most significant difference is that the American Habitat Center Stakeholder Conservation Strategy is a private sector initiative. Conservation measures to avoid and minimize negative impact on lesser prairie chicken appear similar across all four initiatives. There also appears to be some commonalities with respect to mitigation between the WAFWA and the American Habitat Center efforts.

However, there does appear to be nuances or difference between the HQT and the Crucial Habitat Assessment Tool (CHAT) being used by WAFWA that could lead to determination of different habitat values of the same acre of land depending on which tool is being used. FSA believes that lesser prairie chicken conservation and the lesser prairie chicken community would benefit if the tools being used to determine habitat value would derive similar values with respect to habitat benefit. Economic value will vary significantly depending on area land values but the intrinsic value as lesser prairie chicken habitat should be similar whether the HQT or CHAT tool is used.

The American Habitat Center must ensure that adequate funding for implementation of the Stakeholder Conservation Strategy, including biological and compliance monitoring, is provided. It would seem logical to avoid the appearance of conflict of interest that a third party not directly associated with or tied to the American Habitat Center would be employed to conduct required implementation monitoring and evaluation.

Lastly, FSA has some concerns related to lesser prairie chicken conservation credit exchanges and the FWS position relative to "federalization". FSA has been monitoring loss of CRP enrollment in the occupied range of the lesser prairie chicken since 2007. FSA has been trying to work with other public and private partners to improve the conservation value of land relative to other competitive land uses. Given that the occupied range of the lesser prairie chicken is over 90% privately owned and that species persistence is highly dependent on landowner willingness to voluntarily restore, establish, maintain, and manage land for the benefit of lesser prairie chicken and other wildlife, FSA would ask FWS to re-consider its position and allow for acres enrolled in CRP to be considered and credited, as appropriate, through exchanges and other mitigation initiatives.

Thank you, again, for the opportunity to provide input regarding efforts to conserve the lesser prairie chicken.

Sincerely,

Matthew T. Ponish, Acting Director
Conservation and Environmental Programs Division

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Kismet Properties, Inc.
Past President
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ValPoint Operating, LLC

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Stacey Ladd
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March 10, 2014

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

RE: NEPA Scoping process

To Whom It May Concern:

RE: Submission by the Panhandle Producers & royalty Owners Association (PPROA), the independent oil and gas trade association representing more than 750 members in the Texas Panhandle, Western Oklahoma and Southwestern Kansas. The membership includes oil and gas production companies, support companies and mineral royalty owners, most of whom have interests or operations in the range of the lesser prairie chicken and scope of this Environmental Impact Statement.

Many PPROA member companies have existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities in areas with LPC habitat, and therefore will be significantly impacted by this rulemaking. We have several areas of concern in the proposed scoping process:

1) NEPA Scoping Process is Not Adequate for Meaningful Public Participation *(§ 46.235 NEPA scoping process)*
COMMENT: The compressed timeframe meant few stakeholders were able to become aware of these proceedings in time to develop comments or attend. It is our concern minimal scoping meetings held do not comply with Departmental public participation and involvement regulatory guidelines.

Particular issues of concern, currently absent from the scoping process, include the following:

- Any analysis must examine whether the HCP's inclusion of conservation credits from Nebraska, an area not identified as habitat, results in less conservation in identified habitat.
- The HCP does not and cannot exist in a vacuum. As with any plan, its environmental impact must be assessed against the environmental impacts already authorized in the LEPC's habitat. Any incidental take permitted by the HCP must be evaluated along with the incidental take permitted by the WAFWA Range-wide Conservation Plan, USDA/NRCS CRP, and the existing New Mexico, Texas, and Oklahoma CCAAs respectively. These plans currently enjoy combined enrollment in excess of 10 million acres of habitat in the LEPC's estimated occupied range and are already being implemented and providing assurances to those enrolled. The permit issued with the CCAA allows 1.9 million acres of take over a 30 year period. By comparison, the HCP proposes even greater take, i.e., an authorization of 2.2 million acres of take over a 30 year period. The EIS must evaluate the impact of permitting 2.2. million acres of take under the HCP <u>in addition</u> to the take that is already authorized under the RWP, the various CCAAs, and other approved mechanisms. The baseline case resulting from these various programs must be evaluated in the application of additional plans or programs EIS must also evaluate the impact on the LEPC and its range should no take in addition to the take already permitted by approved mechanisms be permitted.

2) Proposed "Approximate Schedule" is Inadequate to Properly Evaluate this Complex Issue and Proposal (*§ 46.240 Establishing time limits for the NEPA process.)*

COMMENT: We believe the NEPA contractor has thoroughly underestimated the time required to provide 1) adequate scoping, 2) meaningful public participation, 3) meaningful agency involvement and coordination in the process, and 4) adequate analysis of the complex environmental, social, and economic impacts that the proposed conservation strategy and habitat management plan will have, not only on the 5 state area impacted by the proposed regulatory and administrative actions, but on the nation as a whole. There are literally thousands of landowners, hundreds of communities, hundreds of major industries and countless local and national environmental and business organizations that will need time to digest this proposal and to review any documents and analyses for adequacy. The proposed does not provide adequate time for persons or organizations that may be interested or affected to become involved enough in the process to provide meaningful input.

We believe considerable new environmental and socio-economic data will be required considering the anticipated significant potential impact of this proposed untested conservation approach. It establishes a de facto regulatory bureaucracy that all stakeholders need to better understand - particularly how it will in fact work to improve protection of the Lesser Prairie Chicken to a greater extent that the Range-wide Conservation Plan currently in place.

Most full Environmental Impact Statements on proposals of this magnitude take a minimum of 1 ½ years to complete, and more likely in excess of 2 years. Experience has taught us that the NEPA process cannot be shortened at the will of the proponent. All procedural steps in the process must be met and additional time allotted for unexpected delays resulting from adverse comments on scoping, the Draft EIS and the Final EIS. The requirement to consider and evaluate all reasonable alternatives fully and completely and to fully involve, to the extent practicable, all affected stakeholders nearly always mitigates against any attempt to expedite a NEPA document in the face of controversy and complexity surrounding a proposed action. This process is too important and too complex to be rushed. We strongly recommend that USFWS re-evaluate the proposed timeframe and publish one that is more realistic and one that can be effectively managed so as to be consistent with Departmental NEPA guidelines.

3) Need for Proposed Action in Question - Appropriate Consideration of the "No Action Alternative"

COMMENT: The proposed action being subject to NEPA contains a Stakeholder Conservation Strategy and a draft Habitat Conservation Plan that would become effective should the Lesser Prairie Chicken become listed as "Threatened" or "Endangered" under the ESA. The February Notice of the Scoping and NEPA Process is silent on the No Action Alternative and other reasonable alternatives to the Proposed Action, particularly with respect to the Western Association of Fish and Wildlife Agencies (WAFWA) Range-Wide Conservation Plan. The Range-wide Conservation Plan, which has already satisfied NEPA and been previously adopted by Congress and the USFWS, is being implemented successfully along side the New Mexico, Texas, and Oklahoma CCAAs, as well as the USDA CRP and NRCS LPCI programs. With considerable stakeholder support, these plans have already protected in excess of 10 million combined acres of critical Lesser Prairie Chicken habitat throughout the geographic area to be impacted by the proposed action. The decision to proceed with an alternative conservation strategy and plan in the absence a final ESA regulatory determination of the status of the Prairie Chicken, at the very least, causes considerable confusion among the many stakeholders who are very much in need of the regulatory security the Range-wide Conservation Plan and complementary programs already provide.

We believe the No Action Alternative, which by default should include the Range-wide Conservation Plan et al, should be the starting place for scoping discussions. The Proposed Action cannot be fully understood in the absence of a USFWS presentation and understanding of these plans, their metrics, and what they are already accomplishing for habitat protection in perpetuity.

Stakeholders need to know that these existing CCAAs and the Range-wide Plan have already been adopted by USFWS and are already being implemented within the project area--in some cases, on private and public lands that could be impacted by the regulatory scheme contained in the Proposed Action. Scoping done without this vital information on alternatives would risk commencing the drafting of the analyses and writing of the EIS in a vacuum that defies the reality of USFWS's existing conservation planning and habitat protection strategy and the positive work that is already resulting from it.

4) State Wildlife Agencies and Affected Local Government Agencies Should be Included in the NEPA Process as Cooperating Agencies consistent with DOI NEPA Regulations (*§ 46.225 How to select cooperating agencies).*

COMMENT: The Department of the Interior has been a leader in involving local and state government agencies in NEPA compliance activities, particularly when these actions involve region-wide planning efforts. DOI regulations specifically provide for consultation, coordination and cooperation with government and tribal agencies and embrace CEQ guidelines which direct agencies to "encourage and facilitate" public involvement in the NEPA process. We suggest that in this case, maximum participation of affected local and state agencies in all phases of the development of this NEPA document is

essential and desirable to develop and enhance the prospects for a cooperative conservation solution to the protection of the Lesser Prairie Chicken in a way that minimizes disruption to the regional economy. We strongly urge that, at a minimum, wildlife agencies from all 5 affected states plus Nebraska be offered the opportunity to participate as cooperating agencies in all major phases of the development of the EIS including the evaluation of the adequacy and completeness of the Scoping process. We also urge that county and city government agencies that desire to participate as cooperating agencies be allowed to do so. We strongly urge that this recommendation be adopted in the Scoping process (which will need to be extended in order to do so) so that 1) the prospects for a community consensus can be attempted as per Department NEPA policy and 2) so that the existing Range-wide Conservation Plan, currently being implemented, will be appropriately analyzed and properly evaluated in the context of the Proposed Action.

Please do not hesitate to contact me if you have any questions regarding the Association's concerns with any of the issues covered in these comments.

Sincerely,

H. Wayne Hughes

QUAY COUNTY GOVERNMENT
300 South Third Street
P.O. Box 1246
Tucumcari, NM 88401
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Submitted via Federal eRulemaking Portal: http://www.regulations.gov

March 10, 2014

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

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

To Whom It May Concern:

Quay County on behalf of the County Government, residents, businesses and landowners submit the following comments on the above-referenced U.S. Fish and Wildlife Service (USFWS) Notice of Intent (NOI). Collectively, Quay County represents a large area of eastern New Mexico that will be affected by potential issuance of federal permits associated with the potential listing of the lesser-prairie chicken (LPC) under the Endangered Species Act of 1973, as amended (ESA). Quay County requests that County and each of the aforementioned entities be noted as separate commenters on the NOI.

Quay County is opposed to the USFWS proceeding with scoping the development of an Environmental Impact Statement to assess the potential impacts of the issuance of an Incidental Take Permit (ITP) under section 10 (a)(1)(B) of the ESA. We want to remind USFWS that such a permit associated with a Habitat Conservation Plan is only relevant and applicable if The Lesser Prairie Chicken is actually listed under the ESA. Because we believe a listing is not warranted and no such listing determination is made, this NOI and scoping action is premature and predecisional in nature.

As stated in previous comments by Quay County we fully support implementation of the WAFWA Rangewide Plan (RWP) as a voluntary conservation mechanism for long-term management and health of lesser prairie-chickens. We believe all of the stakeholders across the five states and the species that RWP is providing substantive conservation benefits as defined in the ESA. The NOI, we believe, undermines the RWP with schemes that jeopardize future conservation of LPC. Therefore, Quay County requests USFWS to determine and approve the No Action alternative and deny issuance of the ITP as described in the above-referenced docket number.

In closing we want to restate our resolute opposition to listing the LPC as threatened or endangered under the ESA. The substantial success shown by the States in implementation of the RWP since USFWS endorsement in October 2013 is proof that stakeholders and the States are able to voluntarily conserve LPC without the need for federal ESA protection. We assert that through a listing decision of 'not warranted and the full utilization of the voluntary and comprehensive use of the RWP the species will thrive.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

If you have any questions or comments regarding the above, please contact the undersigned.

Sincerely,

Richard Primrose
Quay County Manager

Eddy County
Board of Commissioners

Glenn Collier
Susan Crockett
Tony Hernandez
Royce Pearson
Jack Volpato

Eddy County

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March 10, 2014

Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, NS 2042 – PDM
Arlington, VA 22203

RE: SCOPING ISSUES TO BE COORDINATED WITH EDDY COUNTY DURING THE PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT FOR THE STAKEHOLDERS CONSERVATION STRATEGY / AMERICAN HABITAT CENTER HABITAT CONSERVATION PLAN

RE: Docket No. FWS-R2-ES-2013-0134

Dear Sir or Madame;

This letter is in response to the U.S. Fish and Wildlife Service (Service) Federal Register Notice requesting comments on the issues to be considered during the scoping process "for the preparation of an environmental impact statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP) under the Endangered Species Act …" (FR 2-7-2014 page 7472). Eddy County has reviewed the "Stakeholder Conservation Plan for the Lesser Prairie-Chicken" (hereafter known as "Stakeholder Plan") submitted by the American Habitat Center February 2014. Following are issues critical to the County that should be considered by the Service and coordinated with our County during the EIS process.

1. **The Stakeholder Plan is Duplicative and Unnecessary**

There are already several conservation programs in place for landowners, commercial energy developers, agriculture interests and conservationists to participate in for the purpose of conserving the Lesser Prairie Chicken (LPC) and its habitat. These are acknowledged in section 2.2 of the Plan, "Existing Conservation Plans for the LEPC" (Stakeholder page 16-24). Notably, the Range-wide Conservation Plan for the LPC (hereafter Range-wide Plan) was recently approved by the Service and over 2.5 million acres have already been enrolled.

The Range-wide Plan was prepared with the assistance of major energy interests as well as other agriculture interests for the purpose of providing a systematic means for them to actively participate in the conservation of the LPC. These are the same interests the Stakeholders Plan is targeting. Already, these companies have contributed the essential funding for the program.

Importantly, the Range-wide Plan was prepared with the active participation of the five state agencies with management responsibility for the LPC and is to be managed by the Western Association of Fish and Wildlife Agencies (WAFWA). The Range-wide plan was prepared with complete transparency and heavy involvement of those interests that can directly impact the conservation of the LPC.

The Stakeholder Plan offers no new conservation measures or assurances that are not already being met by currently approved and active plans. The document states that its purpose is to (1) Conserve the LPC and, (2) allow uninterrupted economic development (page 24). A simple reading of the plans already active, as described in the previous section, demonstrate that these two purposes are currently being met. Preparing an EIS for the Stakeholder Plan is an unfortunate waste of taxpayer funds and agency time, as there is no compelling need for the Plan that is not already being met through other programs.

2. The Stakeholders Plan is Unrealistic

One of the key objectives of the Stakeholder Plan is to conserve 90% of the LPC habitat.

> *"The Plan will conserve nearly 90% of LEPC Habitat and will result in substantial enhancement of habitat through required avoidance, minimization and mitigation measures."* (Page 50)

The devices they plan to utilize to conserve the habitat are through outright acquisition of the land or a permanent conservation easement.

> *"Many HCP's mitigate for loss of habitat through the preservation or permanent protection of similar habitat, sometimes in combination with other non-permanent measures. This preservation component is implemented through fee-simple acquisition of habitat or the use of perpetual conservation easements."* (Page 49)

The total Estimated Occupied Range (EOR) of the LEPC as determined by the Service is 19,902,922 acres. The EOR range covers five states. It is a substantial area of land, and any program that boasts to be able to conserve 90%, or 17,912,623 acres of this area, should be questioned, especially when the vehicle to do so is through outright acquisition of the land or permanent easements. Massive buy-in from landowners and those who own property interests in this land must take place. Additionally, the idea that enough private landowners would voluntarily place a permanent easement or outright sell their land based on the assurances that they will not be further penalized if the LPC is listed is a fantasy.

By their own acknowledgement, the Plan developers recognize that 95%, or 18,907,776 acres, of the LPC habitat is privately owned. "The EOR of the LEPC is spread over five states and is comprised of up to 95% private land ownership." (Page 95) In order for them to own or permanently control 90% of this they are planning to obtain the "voluntary" commitment of the landowners. However, they know this objective is unattainable and even acknowledge that acquiring the various property rights necessary to ensure full conservation of the land is an impossible task.

"Ownership and occupancy of these lands is not always limited to a single entity, but may be expressed through a complex and severed relationship of surface estate, mineral estate and surface and mineral leasehold interests. Any effort to create a permanent set-aside of meaningful acreage for the LEPC will require the written agreement from all interest holders, which may be an insurmountable task due to the inability to identify and obtain agreement of all owners of the surface and mineral estates." (Page 49)

And further;

"The establishment of a permanent preserve in most cases is a challenge due to the need to identify and acquire contractual commitments from both the surface owner and the mineral owner, which in this region are typically held by different people and entities. The task of determining who owns the interests and contact information for those property owners is a significant undertaking. Further, ***the potential for property owners and other interest holders to delay or disrupt an acquisition program through reluctance or refusal to sell targeted or key properties*** *creates additional issues."* (Page 49-50)

Clearly, the Plan developers know that acquiring 90% of the LPC habitat is an "insurmountable task." However, what is most disturbing is their acknowledgement that landowners may "delay," or "disrupt" the acquisition program through "reluctance" or "refusal" to sell the properties they have identified and targeted. The Plan claims to be a "voluntary" plan for landowners, yet, by their own admission, it is clear that this Plan will be utilized to "target" land within focal areas and that landowners will find themselves under immense pressure to enroll. Nowhere in the plan do they state that the species does not warrant listing, and the plan itself is not designed to "preclude" a listing. The Plan is designed to acquire 90% of the habitat through fee-simple acquisition or permanent conservation easements.

They benefit from the threat of listing the LPC in order to coerce landowners into "voluntarily" giving up their land.

The Plan developers know their objective of acquiring 90% of the habitat area is unrealistic and, therefore, have submitted a HCP that will fail. The Service should deny approving the plan based on the AHC's admission that landowners will be targeted and pressured into selling their land, an unconstitutional act.

3. The Plan's Minimum Goal of 20% Participation is also Unrealistic

As noted by the Plan developers above, acquiring agreement among the various owners of the property interests in any given parcel will be a dubious task, short of coercion. However, they claim to already have assurances from property interest holders that cover 20% of the habitat. In a footnote on page 95, they claim:

"The assumption that 20% of Total Habitat Acreage will enroll in the Plan drives the $0.36 per acre Participation Fee calculations and is conservative based on the commitments currently obtained from stakeholders to participate in the Plan."

Who are these committed participants? They are not revealed in the Plan. Because this 20% participation is necessary to meet the funding requirement, more than just a footnote ought to be required to ensure this obligation can be met, especially given that the Plan developers acknowledge how difficult it will be to get all property interests for any given parcel to agree to participate.

We can assume that the major oil and gas companies named in the cover letter that was submitted with the application might be these participants. What proof is being required that they will fulfill this obligation? Without this, the plan is meaningless and proper implementation is questionable.

4. The Stakeholder Plan Administrators and Benefactors are Not Transparent

The Plan has been submitted by the American Habitat Center (AHC), a non-profit entity, so they claim. However, there is no further detail as to who makes up the AHC. A number of questions are left open.

a. Who are the members of the Board of Directors for AHC?
b. Who are the "Stakeholders" that created the AHC and the Stakeholder Plan
c. Who will be appointed to the Oversight and Science Committees?
d. What type of non-profit entity is the AHC; a (c) (3), (4) etc.?
e. In which state is the AHC incorporated?
f. Has the AHC provided the Service with its official Incorporation and Non-Profit Status documents?

Through press releases, the County has ascertained that several organizations have come together to create this plan, including the Environmental Defense Fund and some state cattlemen's and farming organizations. What is important for the Service to take into account is that these organizations can only make decisions that affect the Associations, not their members directly. Therefore, any commitment on behalf of the Associations that there will be widespread participation of its members should be discounted, unless proof is submitted by the AHC, whoever the actual members of this organization may be.

In addition, there are other non-transparent issues within the Habitat Exchange Agreement (HEA) attached to the Plan. The HEA is an agreement between the Habitat Exchange Administrator, whoever that is, and Region 2 and Region 6 of the U.S. Fish and Wildlife Service. Within the HEA, there will be an "Oversight Committee," a "Policy Committee," a "Resolution Committee," and a "Science Committee" all of which will be named at a later date.

Obviously, the AHC will carry a tremendous amount of influence determining who the "stakeholders" and representatives from the "conservation interests, industry, and agriculture" groups will be providing crucial oversight of the HEA and the Plan. This is totally unacceptable.

5. The AHC does not have Authority to Enforce the Stakeholders Plan Directly

Although we do not know who will ultimately govern the AHC, this entity is requesting to be approved as the permit holder of an Incidental Take Permit and enhancement of survival permit issued by the Service. Private groups can initiate an HCP without government participation; however, they must assure that they have the authority to enforce the permit. The Service Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 3-2 states that this is allowed "so long as the permittees have the authority to regulate or control all or applicable parts of the HCP and the conditions of the HCP are enforceable." The Stakeholder Plan assures they have this authority.

> *"The Permit Holder will enforce the Plan. By entering into clear enforceable CIs and CPs, Participants will contractually agree to perform the obligations required of them under the Plan and consent to enforcement of those obligations by the Permit Holder. See Section 8.8. FWS will also have clear and defined enforcement responsibilities and mechanisms with respect to the Plan and the permit issued to the Permit Holder under the Implementing Agreement. See Appendix K. The mechanisms available to the FWS include access to properties enrolled under the Plan, approval rights with respect to Credit-generation and release activities, and representation on the Oversight Committee and Science Committee. In these ways, enforcement of the Plan and increased compliance with the ESA in the Permit Area can be assured."* (Page 4-5)

In other words, the AHC does not have the authority outright to enforce the plan; the landowners who participate will give up their right to control their land and provide this authority to the AHC. The only enforcement authority the AHC will have is through the acquiescence of landowner's rights to the AHC. The AHC has stated they will acquire this when landowners "voluntarily" enroll their land in the program; however, there is reasonable concern that landowners will be targeted and pressured into participating.

A participant in this plan can either be a landowner, leaseholder or holder of other property interests. Land sold will presumably be protected until program administers determine the conservation need is no longer relevant. Land placed in a permanent conservation easement will be held in perpetuity. However, if a landowner is covered under the AHC permit, this protection will only be guaranteed for 30 years. So, a landowner, leaseholder or other property interest holder is being asked to permanently give up their rights when the protection they are trading these rights for is only offered for 30 years. It is highly suspect that landowners will flock to sign up under this program once the full details of their commitment are revealed.

6. Key Issues that should be Studied and Analyzed during the EIS process

a. The Environmental Impact Statement needs to rigorously analyze the impact on the local economies within the plan area where private land will be targeted for acquisition, and landowners refuse to sell. The direct, indirect and cumulative impact on the local economy needs to be analyzed when the targeted land is devalued by the action. Based on statements discussed earlier that are in the Stakeholder Plan, it is reasonable to presume that landowners

will be targeted and pressured into selling key properties. This impact on the local economy must be studied. Additionally, the impact this will have on the culture of the community should be examined.

b. The Stakeholder Plan is relying solely on the science referenced in the Service's proposed rule to list the LPC as threatened. The Notice does not represent the best available science on the LPC as scientists have critically examined the notice and new data and studies have been brought forward. In the EIS analysis, two additional studies must be considered (documents attached):

   i. "Data Do Not Support the Listing of the Lesser Prairie Chicken," prepared by the Center for Environmental Science, Accuracy and Reliability (released in 2013)
   ii. Review of the Science Predicting Population Trends prepared by Darling Geomatics (March 2014)

Summary

We appreciate the Service giving strong consideration to the issues discussed above. It is our County's position that the application should be denied because the Stakeholder Plan provides no new conservation efforts that are not already being fulfilled through other plans.

Also, the preparers of the plan have not been transparent as to who they are and who will be governing the program. It concerns us greatly that the Service would be considering providing a non-existent entity with such a high responsibility as being a permit holder for a plan area that consists of six states.

Further, we are very concerned that landowners will be targeted by the group and coerced into participating in the Plan.

For these reasons the plan should be denied.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

Sincerely,

Rick J. Rudometkin
County Manager on behalf of
The Eddy County Commission

March 9, 2014

RE: Review and comments on:

1. **"An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens" by Edward O. Garton (2012)**
2. **"Range-wide Population size of the Lesser Prairie-chicken: 2012 and 2013" by McDonald et al (2013) and**
3. **"The Predicted Influence of Climate Change on Lesser Prairie-Chicken Reproductive Parameters" by Grisham et al (2013)**

Background

The lesser prairie-chicken (*Tympanuchus pallidicinctus*) (LPC) is a species of prairie grouse that occupies a five-state range including portions of Texas, New Mexico, Oklahoma, Kansas and Colorado. The species is state listed as threatened in Colorado, and the U.S. Fish and Wildlife Service (USFWS) identified the species as a candidate for Federal listing in 1998.

Based on USFWS findings, lesser prairie-chicken populations need large tracts of relatively intact native grasslands and prairies to thrive. Over time, threats to the LPC have included habitat loss, modification, degradation, and fragmentation within its range. Predator cycles and weather also affect annual population numbers.

Over the past year, the USFWS has been analyzing the status of the LPC, threats to the species and conservation efforts resulting in a proposal to list the species. The USFWS will make a final determination whether to list the species by March 30, 2014.

Analysis of Flaws in Population Studies and Reports

Though the USFWS states that it will make a final determination about whether to list the LPC as threatened after a full assessment of the status of the bird, the problem is the fact that the USFWS does not have sufficient population data to determine status. Though LPC are at a lower level than their peak before agriculture, they may be stable, secure and on an upward trend since the concepts of sustainability and prairie grass conservation began in the 1980s.

USFWS is legally obligated under the Endangered Species Act, Information Quality Act and *Bennett vs Spear*, to make LPC decisions based on the best available scientific information that is applicable to the species. However, because the listing proposal process for the LPC is part of the terms of a multi-year listing work plan approved by the U.S. District Court for the District of Columbia on September 9, 2011 the USFWS may feel pressured to make a decision based on inadequate data regarding population numbers and trends. We recommend against a decision based on less than minimally acceptable scientific data.

The scientific information used must be legally consistent with standards of the Information Quality Act (Quality, Objectivity, Utility and Integrity). In contrast to the interpretation of the Act by some federal agencies, the objectivity and integrity requirements mean that the data collected by state and federal agencies, or used in published scientific research relied upon by those agencies, must be provided to the public.

Though the public was not provide with the raw data used in scientific research relied upon by USFWS, in violation of the Information Quality Act, the following is a list of flaws in the two most recent reports USFWS is using to assess LPC population trends as well as an analysis of some relevant information USFWS failed to use. The purpose of this letter is to point out the flaws in the two studies as well as missing information. We strongly recommend USFWS conclude listing is not warranted and further monitoring of populations, habitat quality and conservation measures is needed.

The only recent information USFWS appears to be using to base population numbers and trends on is a combination of archaic data that was not comparable to recent data and statistically invalid recent data.

What is known about LPC populations:

There was a widespread pattern of sporadic sampling for the first decade (mid-1960s to mid-1970s), more frequent but inconsistent sampling across regions for two decades (middle period of mid-1970s to mid-1990s) leading to sustained increased sampling effort over the past 18 years. However, survey protocols continue to vary between States, which makes even relatively recent data difficult if not impossible to compare from State to State.

Two years of helicopter surveying coupled with ground surveys during 2012 through 2013 across known LPC range has created the beginning of a new type of comprehensive survey data under a single methodology over 5 states. However, it will take 10 to 20 years of consistent data collection to even begin to truly determine the trend and limiting factors for the species, in light of weather cycles, predator cycles, and current land management.

Considering the fact that the LPC did not go extinct during the Dust Bowl Era when its habitat was at its worse, the LPC is wide spread and locally common in areas across five states, and all five states have significant positive LPC habitat conservation and habitat restoration programs in place, the LPC is not in danger of extinction.

These birds are a boom and bust species, adapted to fluctuations in weather. A downward trend in population number and/or lek numbers during poor weather conditions such as the recent drought in LPC habitat is normal and is not a reason to list the species as threatened under the ESA. Listing would harm the ability of the five states to manage LPC habitat in ways that benefit the species and would harm our national economy as well as the economies of the five affected states.

What isn't known about LPC populations:

USFWS personnel do not know population numbers and trends at this time in history. A significant amount of conservation of LPC habitat has been going on since the 1970s. Due to an overwhelming number of species to address in a very short amount of time, USFWS could not thoroughly analyze the best available science, which is the detailed long term raw data collected at the State level. Instead, USFWS relied on a few data summary reports that have significant flaws and USFWS missed other studies that have scientific validity. Even if USFWS had time to look at all raw data, the data was collected under too many different types of protocol to make meaningful comparisons. Until 2012, intensity, duration, timing, and methods of surveying LPC have varied too much over time and geographic region to compare.

There is no question that LPC population status, trend and limiting factor questions need to be studied in a more uniform manner for a longer period of time. A conclusion that listing is warranted would be premature and would harm potential habitat restoration efforts.

1. Review of Garton 2012

In a review of "*An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*" by Edward O. Garton (2012) there are a number of sound reasons to have reservations about the conclusions Garton reached.

Garton (2012) discussed many of the **limitations of the available population data** including the **limited number of leks surveyed** as one goes farther back in time, the **inconsistencies in the survey methods** used, the **assumptions** of observed males on leks to numbers of females, and the **minimum population sizes assumed** to be needed to maintain populations.

We are in full agreement with Garton that there were too many inconsistencies in the survey approach and a unified approach is necessary to assess trends across LPC range. The work done by McDonald et al. (2013), described below, may be a good start toward obtaining statistically valid data, but it will take 10 to 20 years or more to begin to gather the necessary statistical data to see real population trends and relate them to weather, predator cycles, habitat conditions, and conservation measures. In the mean time, any speculation that the bird will plummet toward extinction is unfounded.

Garton (2012) makes specific predictions about avian population persistence, 30 and 100 years into the future. There are sound reasons to have reservations about the conclusions of Garton et al. (2012). Briefly, the extinction prediction models used in Garton's paper contained invalid assumptions, methodological bias, improper accounting for the propagation of error in model predictions, and use of thresholds for extinction that lack a sound empirical basis. Collectively, those issues point to bird populations not being as threatened as reported.

In violation of the Information Quality Act, the raw and final data sets used in the Garton 2012 analysis are not publicly available. The absence of publicly available data is also contrary to the Department of Interior's Information Quality Guidelines (requiring that reproducibility "shall generally require sufficient transparency about data and methods that an independent reanalysis could be undertaken by a qualified member of the public," (Department of Interior 2002)) and

demonstrates a lack of adherence to key White House policy directives on scientific integrity (Obama 2009; Holdren 2010, 2011).

Moreover, Garton (2012) made errors and invalid assumptions that induced a negative bias in population trends. In the early decades of surveys, large and easy to find leks were primarily counted. In more recent decades, as more leks were added to surveys, they were often smaller in size. Thus, the average number of males attending leks has declined, in part, due to an artifact in how the data were collected (see Table 1 below).

Table 1. Lesser Prairie Chicken monitoring and population trends 1965-2012 summarized over 5-year periods for Range-wide Prairie Region (Garton 2012)

Parameter[1]	2005-12[2]	2000-04	1995-99	1990-94	1985-89	1980-84	1975-79	1970-74	1965-69
Leks counted	183	149	98	51	65	56	23	7	6
Average males/lek	8	13	8	12	19	32	85	195	137
Number of active leks	98	93	50	32	53	40	22	7	6
Percent active leks	53	62	51	68	82	71	94	100	100
Average males/active lek	16	21	15	17	24	45	88	195	137
Lambda - Annual rate of change	0.907	0.965	1.267	0.828	0.942	0.917	0.990	0.992	1.228
S.E.(Annual rate of change)	0.068	0.065	0.150	0.112	0.081	0.082	0.096	0.124	0.193

1 Averaged over years for each period.
2 Eight years of data in this period.

Even with this flaw in Garton's analysis, his research conclusion is that there is "*a general increase in lesser prairie chicken populations in the last half of the 1960s followed by a long term decline from the 1970s to mid 1990s when the population apparently stabilized at substantially lower abundance range-wide (50,000-100,000 compared to estimates around 200,000 during the 1970s and 1980s)...*"

It is likely that Garton is correct in stating that LPC populations have stabilized. However, Garton (2012) goes on to theorize catastrophic population failure based on insufficient data and the assumption that current conditions (severe drought throughout LPC) will continue unchanged:

*Parametric bootstraps of the probability of persistence of Lesser Prairie Chickens for each eco-regional population and the range-wide population reveal that only the sand sagebrush prairie region has a substantial likelihood of falling below quasi-extinction levels equivalent to effective population size of 50 (82 birds counted at leks) within 30 years but most eco-regional populations and the range-wide population have substantial likelihoods of falling below 500 (852 birds counted at leks) within 100 years as required for long term persistence" (*Garton 2012*).*

Garton (2012) showed "fu*ture projections of carrying capacity without substantial changes in key determinants of LPC population dynamics are slightly above 10,000 in 30 years and less than 1,000 in 100 years."*

Garton's projections are wrong.

Garton showed higher levels of short term risk and significant long term likelihood of dropping below the effective population thresholds for maintaining genetics of 50 and 500 individuals based on the above **assumption** of **no changes to key determinants of LPC population dynamics**.

What about the significant drought within LPC habitat within the recent past? Garton's projections were made during what Grisham et al. (2013) defines as the worst El Niño is history in portions of the LPC range. The recent El Niño climate phenomena disproportionately affecting LPC habitat during the LPC survey period Garton relied upon.

Garton's predictions were based on the incorrect assumption that there will be no change in a key determinant of LPC population dynamics – severe drought. Science does not support Garton's assumption.

Does Garton really believe that weather does not change and that the recent drought within LPC habitat will continue for the next 30 to 100 years?

Grisham et al. (2013) (see below) studied climate and its affect on LPC in New Mexico and Texas. Though those results contradict earlier publications including Garton (2012), Grisham's work appears to be ignored by USFWS. Could it be that USFWS feels too vested in their recent analysis and too pressured by court imposed time constraints to spend time to analyze Grisham's work?

Garton's analysis of LPC populations (2012) used short and long-term population viability targets based on the 50/500 rule as the basis for the quasi-extinction analyses, which is the effective population as it relates to genetic maintenance. As noted by Flather et al. (2011), **the 50/500 values are simply viability goals for maintaining genetically diverse populations; they provide "*little direct connection with extinction risk.*"**

Traill et al. (2010) attempted to determine a generalized minimum viable population number, much like the 50/500 rule, and reported that the evolutionary and demographic constraints on populations require minimum sizes to be at least 5,000 adults. However, Flather et al. (2011) reported on reviews they conducted of the viability analyses used by Traill et al. (2010) revealed that a huge range in minimum viable population estimations existed, finding that even estimates conducted within many populations varying by orders of magnitude.

They also reported on the limitations of population viability analyses (PVA's) to provide meaningful estimates of minimum population sizes. Flather et al (2011) stated that **estimates of extinction risk from PVA models were often imprecise, inaccurate, contingent upon threats currently acting, and affected by model structure, study duration and other uncontrolled factors** (Flather et al. 2011 referencing Beissinger and Westphal 1998). Flather et al. (2011) went on to note that PVA's were best used for ranking relative extinction risk, switching the focus of

these analyses away from the determination of a minimum viable population to emphasize the importance of PVAs for understanding the relative probability of persistence for populations in comparisons among management options.

Garton (2012) did not provide an estimated minimum viable population for LPC, but did provide the quasi-extinction probabilities for the range-wide population as well as for the ecoregional populations based on past population trends. They **projected continued losses** in population carrying capacity within the sand sagebrush and mixed grass ecoregions **if habitat impact conditions continue on their current trajectory. However,** we know that habitat impact conditions will change – they already have changed since Grisham, Garton and McDonald wrote their papers. During late 2013 and early 2014, the states with LPC began receiving above average rains and though the drought remains, **conditions are improving across parts of the LPC habitat (http://www.srh.noaa.gov/oun/?n=climate-drought).**

2. Review of McDonald et al. 2013

McDonald et al (2913) surveyed sage-grouse leks from helicopters over a 5 state region from sunrise until approximately 2.5 hours after sunrise between March 31 and May 3 in 2012 and between March 20 and April 21 in 2013.

McDonald et al. (2013) surveyed for LPC during one of the worst droughts in recent history as documented by Grisham et al. (2013). Grisham assessed the potential changes in clutch size, incubation start date, and nest survival for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico. Grisham stated that the "***2011 nesting season provides insight to how an extreme La Niña event and subsequent drought affects lesser prairie-chicken*** *reproductive ecology. From 15 October 2010 to 31 August* ***2011****, the total precipitation on the study site was only 2.46 cm (0.97 inches), constituting* ***the worst drought and warmest La Niña event on record****.*

The ***drought of 2011*** *was so severe that sand shinnery oak and grasses on the study site did not leaf out, eliminating nesting cover and subsequently delaying nest initiation (Li Z, Kafatos M , 2000) Interannual variability of vegetation in the United States and its relation to El Niño/Southern Oscillation. (Remote Sens Environ 3: 239–247. doi: 10.1126/science.242.4886.1640). Cover provides protection from predators and thermal stress, and when thermal cover is lacking, nests are exposed to the element (Grisham et al 2013).*

This is of concern, as ***lesser prairie-chickens appear to be particularly sensitive*** *to landscape alterations* ***(****Woodward et al. 2001); (Fuhlendorf et al. 2002) and* ***drought*** *Hamerstrom F, Hamerstrom F (1961).*

Drought is suspected to negatively influence prairie grouse through reduced growth of vegetation that provides nesting, roosting, and escape cover, and food (Merchant SS, 1982). Furthermore, there is evidence that home range sizes increase (Merchant SS, 1982 and Copelin, 1963) and ***recruitment is lower during drought years*** *(Merchant SS 1982). Home range size expansion during drought years may lead to localized abandonment, especially in fragmented landscapes. Furthermore, landscape alterations and management (e.g., herbicide treatment of shrubs, grazing systems) appear to influence resource selection, survival, and reproductive success of lesser prairie-chicken populations.*

For USFWS to use two years of McDonald's helicopter surveys with associated on-the-ground field verifications during a major drought as "trend" data violations the ESA, *Bennett vs Spear* and the Information Quality Act. Any conclusions USFWS reaches based on McDonald et al (2012) other than finding LPC populations need more study are arbitrary and capricious.

As Grisham et al. (2013) clearly shows – low LPC numbers in 2012-2013 were due to drought. Like many game birds, LPC are a boom and bust species.

The lek-count data reported in McDonald et al. (2013) is grossly inadequate to estimate population "trends" as a basis for management.

The lack of scientific validity in these data and the fact that LPC populations are known to fluctuate significantly over time makes a case for a long-term study but not the case for listing the LPC as threatened. It is impossible to discern any pattern in the data gathered by McDonald et al. (2013) that could be used to guide management actions at this time. **The data gathered by McDonald et al. (2013) during two years of field work is not scientifically defensible "trend" data**.

McDonald et al. 2013 qualified their report as follows:

"A*cquiring precise and unbiased estimates of population size requires either a complete census or probabilistic sample of subunits with which to infer population size (Johnson 2002); however, limited funding and staffing have often precluded implementation of these sampling designs. The result had been the development of population indices to monitor population trend or estimate a minimum population size.* ***The limitation of such data is its unknown relationship to population size*** *(emphasis added).* **..**

Population trends of LEPC have been monitored using spring lek counts since the 1940s. Survey effort and methods have varied over time, but lek data were the best available long term data set to assess trend. ***Breeding season sex ratio, detection probability, and lek attendance rates are not well understood*** *(emphasis added) (Behney et al. 2012). These factors, including variation in sampling methods, require several assumptions to be made when estimating the population size from lek count information (Walsh et al. 2004, Garton et al. 2011).*"

McDonald et al. (2013) recommend "that the 2013 survey design and methods be used for future monitoring of the size of LPC population and abundance of leks.

Population trend data for any game bird cannot be based on two years of data. The use of 2012 and 2013 LPC data collected by McDonald et al. to state the species is declining is bad science and bad public policy. What if the numbers where the opposite and 2013 population numbers were higher than 2012? Would USFWS stop the listing process?

Since LPC are cyclic, looking at a different set of years will show upward swings as often as the data shows downward swings (see Figure 2 below as an example of how game birds such as LPC fluctuate up and down over time). No one can look at two years of LPC data and state that they know the "population trend." Use of McDonald's 2012-2013 data as "population trend data" to

make any management of listing decisions would violate all scientifically accepted principles of population data analysis.

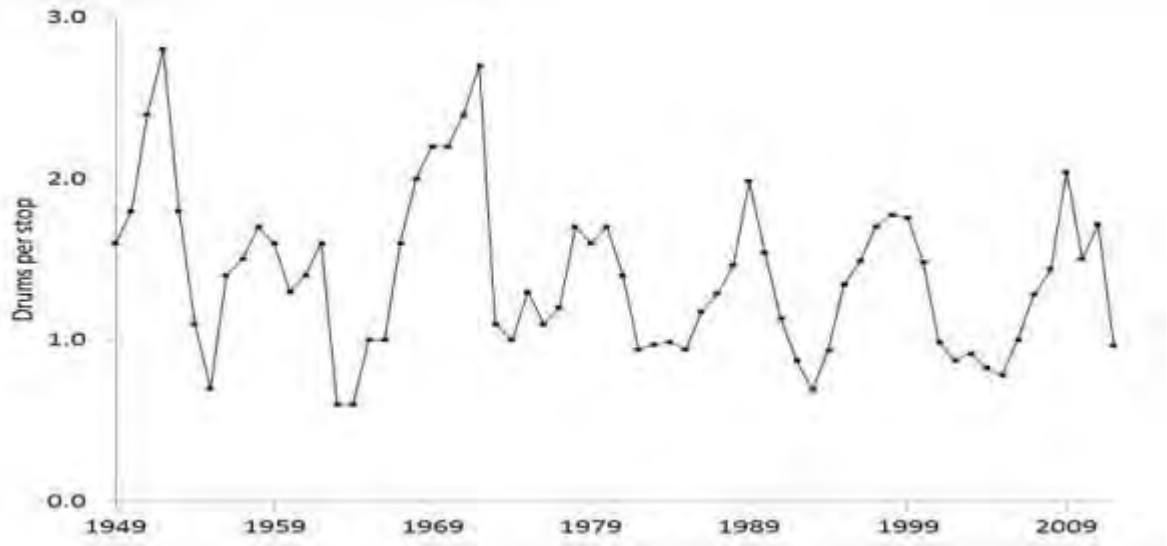

Figure 2. Example of peaks and valleys in game bird populations (based on rough grouse data)

Problems with McDonald et al. (2013)

- Lek and bird count data obtained by McDonald et al. (2013) were based on a single aerial survey each year for two years rather than the highest count obtained from 3 or more ground counts each year for two or more years. It has been shown that multiple counts are often required to ascertain a reasonable estimate of numbers of males attending leks (Beck and Braun 1980, Connelly et al. 2003, Walsh et al. 2004, Garton et al. 2011).
- McDonald et al. (2012) had a problem with one of the four ecoregions surveyed. The sand sagebrush prairie region ground count of leks gave a larger value than that obtained from the aerial surveys. McDonald et al. (2012) and Garton (2012) had to substitute the ground survey data for the aerial survey estimate.
- Garton (2012) made use of the 2012 aerial survey estimates of minimum population size for three of the ecoregions as the basis for reconstructing earlier population sizes.
- McDonald et al. (2013) surveys performed in 2012 and 2013 were completed during a severe drought throughout the area surveyed.
- The final year estimates form the starting points for all future projections of population abundance and as such could skew estimates of the probability of quasi-extinction (i.e., falling below a specified minimum abundance (50 adults or 500 adults under the classic 50:500 rule for short term and long term persistence from Franklin, 1980 and Soule, 1980). Garton (2012) noted that "*the shorter term "current" time period population estimates reported in the appendices and future projections using bootstrapping may have been more severely impacted by that final observation as they often give more pessimistic forecasts of probability of persistence when compared to those from the 3 long-term data sets.*"

3. Review of Grisham et al. (2013)

Grisham et al. (2013) assessed the potential changes in clutch size, incubation start date, and nest survival for LPC for the years 2050 and 2080 based on modeled predictions of climate change and reproductive data for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico.

Grisham et al. (2013) determined that "*the influence of drought and climate change on lesser prairie-chicken reproductive ecology has, to date, been largely overlooked. This is of concern, as lesser prairie-chickens appear to be particularly sensitive to landscape alterations and drought.*" They qualified their results to state that their "*assessment did not consider annual survival of adults, chick survival, or the positive benefit of habitat management and conservation, which may ultimately offset the potentially negative effect of drought on nest survival.*"

Grisham et al. (2013) noted that "*A key issue in conservation of lesser prairie-chickens in context of climate change is the lack of estimates for many specific vital rates and sufficient sample sizes.* ***Despite substantial efforts to conserve lesser prairie-chickens and their habitat, long-term studies that provide adequate <u>data to properly allow for predictive modeling</u> of the role climate change may have on the reproductive ecology of this species <u>are lacking</u>*** (emphasis added)."

<u>Conclusion</u>

A thorough analysis of LPC data collected to date clearly demonstrates that at this time in history there is inadequate data to scientifically predict LPC population trends or the probability of extinction. Garton (2012) and McDonald et al. (2013) both based the majority of their analysis on two years of helicopter surveys during a severe drought, underestimating LPC populations and overestimating the probability of extinction.

Conservation measures now in place will serve to increase LPC populations over time. In February 2014 the USFWS and the Western Association of Fish and Wildlife Agencies signed the Range-wide Oil and Gas Industry Candidate Conservation Agreement with Assurances for the LPC (LPC CCAA). The agreement is the result of longstanding cooperation between the Service and the five range states of the LPC—Texas, Oklahoma, Kansas, Colorado and New Mexico—to undertake conservation action for the species.

The Range-wide LPC Plan provides a comprehensive conservation strategy that is intended to conserve the species across its range. The Range-wide LPC Plan provides: 1) incentive-based landowner programs, and 2) a mitigation framework to reduce threats and provide resources for off-site conservation. The LPC CCAA incorporates the Range-wide LPC Plan's avoidance, minimization, and mitigation measures that address impacts from oil and gas activities on enrolled lands. Enrollment of lands into the LPC CCAA will generate mitigation fees, which will provide significant funds for the implementation of conservation actions under the Range-wide LPC Plan.

There is evidence of expansion of LPC into parts of the shortgrass ecoregion where they were not known to previously occur. In northwest Kansas, LPC have expanded back into some of their historical range and new areas where they were not known to previously occur due to the

establishing of Conservation Reserve Program (CRP) lands (Rodgers and Hoffman 2005). LPC populations are doing well in these planted fields with a generally expanding population (Garton 2012).

LPC usually experience either booms or busts in reproductive success (Hagen et al 2009). The "boom bust" reproductive strategy suggests that lesser prairie-chickens maximize reproductive efforts when conditions are optimal. For the Southern High Plains population, cooler, wetter springs maximize both food and cover for lesser prairie-chickens. Evidence suggests precipitation and temperature influence nest survival (Fields et al. 2006) and these variables will subsequently continue to influence nest survival in the future.

Until long term population trend data can be gathered and until the CCAA is monitored for 10 to 20 years, any consideration of listing the LEPC as threatened or endangered would be premature and based on a paucity of scientific data. A listing under the ESA would be scientifically and legally unsupported.

Darling Geomatics

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Literature citations available upon request

Center for Environmental Science, Accuracy & Reliability

DATA DO NOT SUPPORT THE PROPOSED LISTING OF LESSER PRAIRIE CHICKEN

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EXECUTIVE SUMMARY

CESAR'S review of the proposed listing of the Lesser Prairie chicken ("lesser prairie chicken" or "LPC") applies the clear direction of the Endangered Species Act (ESA) that listings be based solely on data and that the conservation efforts of states and local agencies be considered. We closely examined the references cited by the US Fish and Wildlife Service (FWS), published literature, regulatory documents, and readily available data. In addition, we performed an independent analysis of the past distributional history of the lesser prairie chicken to provide a deeper-time perspective, and commissioned independent peer reviews of the available population analyses.

Our review identified data that demonstrate lesser prairie chicken populations are increasing and are unlikely to be extirpated either locally or range wide in the foreseeable future. In addition, our review identified analyses that demonstrate lesser prairie chickens have not lost their genetic diversity and are not genetically isolated. These data offer empirical support for the conclusion that local and statewide conservation efforts are and will continue to be effective. **These two facts, both supported by data, are *prima facie* evidence that the lesser prairie chicken is not likely to become in danger of extinction in the forseeable future.**

Based on the information we developed, it appears that the FWS assumed population declines and loss of genetic diversity and used *post hoc* rationalizations to support listing based on speculative reasons for the non-existent declines. The best available data on population growth and genetic health demonstrate that the lesser prairie chicken is not in decline throughout all or a significant portion of its range.

In part, CESAR's mission, "…is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes…"[1] Accordingly, this report also addresses the threats identified in the proposed rule based on the FWS reliance on speculation, surmise and opinion. We believe that identifying those portions of the rule that fail to comply with the requirements of the ESA and related laws, regulations, and guidelines, will help improve this proposed rule as well as future rules.

In general, our review identified the following shortcomings in the proposed rule:

- The proposed rule fails to consider data and analyses demonstrating lesser prairie chicken populations are increasing and that genetic isolation has not occurred.

[1] http://www.bestscience.org/

- The conclusions in the proposed rule are not based solely on the best scientific and commercial data available as required by the ESA, but on an amalgam of opinion, speculation, and surmise.
- The proposed rule inaccurately implies that the states' ability to protect lesser prairie chicken through existing regulatory mechanisms is inadequate compared to that of the ESA.
- The proposed rule fails to accurately acknowledge the scope and importance of the voluntary conservation contributions made by states and local agencies
- The proposed rule is internally inconsistent; asserting that sufficient information on habitat needs is available to list the species but that there is insufficient data to identify the characteristics and location of the habitat essential for the conservation of the species.

The ESA is a powerful tool for conserving species. However, it has clearly articulated standards for decision-making, explicitly requiring data and consideration of local efforts in the listing process. This proposed rule fails to meet the basic requirements of a listing determination as articulated in the ESA.

BACKGROUND

ESA listing determination requirements

Instructions for listing determinations are included in Section 4 of the ESA. There are 3 primary requirements for a listing determination; the determination must be based *solely* on data,[2] the continued existence of the species must be threatened by one or more of the five listing factors enumerated in the ESA[3], and conservation actions of any State or political subdivision of that State must be considered.[4]

Data

The requirement that data support regulatory decisions is repeated throughout the ESA. This requirement includes listing, designation of critical habitat, and jeopardy determinations. The ESA does not require data for non-binding 90-day findings, allowing the use of 'information' rather than data. Neither does the Act require data for Recovery plans, which have no regulatory authority. However, the requirement for listing is specific, requiring that data be the *sole* determinant.

There is no provision in the Act that allows hypothesis, speculation, surmise, 'best professional judgment' or opinion to be substituted in the absence of data. The Supreme Court has affirmed this, stating:

"…The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise…"[5]

---

[2] Section 4(b) of the ESA states: "BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) **solely on the basis of the best scientific and commercial data available** to him after conducting a review of the status of the species ..." and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

3 Section 4 (a) GENERAL (1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence...

4 Section 4(b) of the ESA states: BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and **after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species**, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas

5 Bennett v. Spear (95-813), 520 U.S. 154 (1997)

Listing Factors

The proposed rule makes the determination that the lesser prairie chicken is likely to become in danger of extinction in the foreseeable future due to the following factors:

"…due to historical, ongoing impacts and probable future impacts of the cumulative habitat loss and fragmentation…"

"…The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events..."

"… Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels…"

"…These threats are currently impacting lesser prairie-chickens throughout their range and are projected to continue and to increase in severity into the foreseeable future…"

From these statements we conclude that the FWS identifies 3 of the five ESA listing factors as threatening the lesser prairie chicken:

(A) "*the present or threatened destruction, modification, or curtailment of its habitat or range*";

(C) "*disease or predation*"; and

(E) "*other natural or manmade factors affecting its continued existence*".

ANALYSIS

DATA

Analyses, based on data collected by the states, demonstrate that lesser prairie chicken populations are increasing and that the range-wide likelihood of extinction is very low. Further, published analysis demonstrates lesser prairie chickens maintain genetic diversity and do not demonstrate genetic isolation. The FWS had to rely on information other than data in order to list the lesser prairie chicken in view of the documented increasing populations and genetic health. As a result, the FWS failed to rely solely on data, instead using speculation, surmise, and opinion. The FWS failed to rely on the 5 factors enumerated in the Act instead using additional factors not intended by Congress to be used for listing determinations. The FWS failed to adequately consider the effectiveness of existing and planned conservation Finally, after discussing the habitat needs, and shortcomings of existing habitat for lesser prairie chickens at length and in depth in order to explain how habitat was the basis for declines in the species, the FWS claims it is not able to identify those physical and biological characteristics essential to the conservation of the lesser prairie chicken, and thus cannot designate critical habitat.

Data Demonstrate Lesser Prairie Chicken Populations are Increasing Range-wide with Low Extinction Probabilities

We identified two papers which examined the health of lesser prairie chicken populations. First is an *Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*[6]. Using population reconstruction from annual counts at leks, models of population growth can be fit and population parameters of growth and quasi-extinction probabilities can be estimated. The table below summarizes the findings of this analysis.

Habitat Type	Population Growth	Probability of Extinction
CRP-shortgrass	4.4% annually	2%
Mixed-grass prairie (KS, OK, TX)	7.0% annually	<0.0001%
Sand sagebrush prairie (KS and CO)	2.0% annually	48%
Sand shinnery oak (NM and TX)	5.1% annually	< 0.0001%
Range-wide	10.6% annually	< 0.0001%
Range-wide 2012.– Assuming a 50% decline in trend across the range	6.4% annually	3.3%

The best scientific data available indicate that range-wide there is a low probability of extinction within 86% of the species distribution. This population growth and high likelihood of persistence continues when 2012 population trends are assumed to decrease by as much as 50%.[7]

A peripheral examination of the data also demonstrates that population trends from 1980-1997 were declining at an average annual rate of 3.7%. After the species was made a candidate and significant conservation efforts were initiated, post candidate status population growth was 6.9% increase annually.

[6] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group*; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

7 See Appendix 2 for the complete analysis

The paper has not been peer reviewed, so CESAR engaged two independent academics to review the methods and conclusions. One reviewer opined that while the absolute numbers may not be precise, the populations are clearly increasing. The other reviewer did not offer an opinion. Both reviewers liked the idea of more data and more analysis which would provide more resolution as to what is actually going on with this species. The reviewers agreed that the analysis was useful, and neither reviewer identified fatal flaws in the analysis. Based on the agreement that the work was useful, and that no reviewer found fatal flaws, but rather suggested additional improvements, we believe that this site specific analysis is the best available science, and it is consistent with the requirements of the Act that data be the basis of listing determinations.

Lesser Prairie Chickens are not Genetically Isolated, and there is Evidence of Hybridization

A 2010 publication[8] examined the genetics of the Lesser Prairie-Chicken to assess whether habitat loss fragmentation and population declines were resulting in genetic isolation or loss of diversity. Populations across Kansas, Colorado, Oklahoma, and New Mexico were examined. Little genetic differentiation was found except for the population in New Mexico, which was significantly different from most other populations. There was, however, evidence of significant isolation by distance at the rangewide scale that could explain the divergence of the population in New Mexico, simply because it is geographically isolated. The study also found evidence for a post-glacial population expansion within the species, which is consistent with the historical niche model that we constructed.[9] What can also be gleaned from the genetic study is that despite an overall historic reduction in range size, and increase in degree of range fragmentation, there is as yet no evidence of decreased genetic variability, either among populations, or in the species as a whole, relative to other grouse, or to birds in general.

The proposed listing document acknowledges the existence of hybridization between greater and lesser prairie chickens. The level of hybridization at the junction of the two ranges identified in the rule is high enough to potentially lead to merging of the two species. Thus hybridization is indeed occurring and calls into question the validity of the two species. The two grouse are very similar genetically (Gutierrez et al. 2000) and grouse are well-known to easily hybridize. We suggest that the FWS has underestimated the importance of monitoring hybridization and the

[8] *Regional Variation In MTDNA Of The Lesser Prairie-Chicken*, Hagan et. al. (2010); The Condor 112(1):29–37

[9] See Appendix 3 and the discussion under climate change.

implications for the taxonomy of the greater and lesser prairie chickens.

Assuming Population Declines Is Inconsistent With the Data Requirements of the ESA

As discussed in the previous sections, the best available data demonstrate that the lesser prairie chicken is not likely to become in danger of extinction in the foreseeable future. While the FWS may prefer their expert opinion and interpretation of the information outlined in the proposed rule, the plain language of the Act does not allow the use of anything but the best available data.

However, even if the data demonstrating population increases were not available, the following discussion identifies the arbitrary nature of the threats determinations in the proposed rule as well as the failure to comply with Congressional direction that listing determinations be based *solely* on data.

Habitat Effects Are Not Based On DataFWS Admits there is a 'lack of data' on Prairie Chicken Habitat Requirements

The FWS states that designation of critical habitat is not prudent because there is insufficient information on habitat requirements and identifies:

"A specific shortcoming of the currently available information is the lack of data about:

(1) The specific physical and biological features essential to the conservation of the species;

(2) how much habitat may ultimately be needed to conserve the species;

(3) where the habitat patches occur that have the best chance of rehabilitation; and

(4) where linkages between current and future populations may occur. "

Further, the FWS states:

"Additionally, while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations."

We note that the lack of data supporting the listing decision and identified in this report is confirmed by the FWS in this statement. We agree with the FWS that there is insufficient data to identify the available and the specific habitat requirements of the lesser prairie chicken. The lack of data makes any pronouncement regarding the effect of particular activities and habitat configurations speculative. This lack of data also makes it difficult to determine the effects of habitat changes on the lesser prairie chicken and consequently impossible to determine what habitat is necessary to conserve the prairie chicken.

The proposed rule assumes the effects of habitat loss and fragmentation, and then presents a *post hoc* rationalization of other habitat related factors which the FWS surmises contribute to the decline of lesser prairie chicken.

The discussion on prairie chicken habitat changes is framed in the context of each 'threat' individually and independently. The reader is provided with a large array of discrete facts regarding prairie chicken behavior in relation to specific structures, but nowhere are there data that reveal the range wide effect of these identified threats. The rule isolates each potential threat to lesser prairie chickens and asserts population level effects for each of them but provides no data on the actual effect of the interaction of these perceived threats, and never provides the reader any context to assess the range-wide extent of the effects. That is, the actual effect of a potential threat is dependent on the particular context of the population in which it is being evaluated. FWS assumes that any threat, no matter what the additional circumstances might be, is the same throughout the range and across time. However, what might be a threat under some circumstances (e.g., during a drought) might not be a threat in a normal year. The FWS approach is not biologically defensible.

The proposed rule argues that anthropogenic[10] activities threaten the lesser prairie chicken with rampant local extirpation that threatens eventual extinction, with no data to support the assertion. The basis for the listing decision rests on two principal threats, habitat loss and fragmentation. With no supporting data or analysis, the proposed rule asserts that the principal habitat threats amplify the effect of myriad other anthropogenic activities. A number of other specific 'potential' anthropogenic threats are also identified as generically 'contributing' to the decline of the lesser prairie chicken due to its weakened state resulting from habitat loss and fragmentation. The FWS speculates these threats include conversion of grasslands to agricultural uses, encroachment by invasive woody plants, petroleum production, roads, and presence of manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings. Again, the listing is predicated on threats unsupported by data and despite that admission that:

"… while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations… '

This statement clearly acknowledges there are no data with respect to whether a particular feature is adverse, beneficial, or neutral.

The rule's treatment of the issue of avoidance of selected anthropogenic

[10] Human based

features is a good example. The proposed rule[11] states:

"…lesser prairie-chickens seldom nested or reared broods within approximately 177 m (580 ft) of oil or gas wellheads, 366 m (1,200 ft) of electrical transmission lines, 792 m (2,600 ft) of improved roads, and 1,219 m (4,000 ft) of buildings".

However, the proposed rule fails to acknowledge the citation that supports this observation of avoidance also notes that, **avoidance did not result in lowered nest success**[12], which is of course the underlying reason for concern. Implicit in the FWS identification of avoidance as a threat is the surmise that lesser quality habitat was used and nest failures resulted, causing harm across the range of the lesser prairie chicken. The omitted data demonstrate the danger in relying on surmise. The FWS failed to consider that the cited literature did not examine what contributing effect other factors interacting with the structures may have had. The ESA requires the FWS to provide or rely on data that demonstrate how populations are reduced by this behavior and how the results of the study apply to all (or essential or significant portions) of the various habitats in use by the species.

Thus, we suggest that it is premature to extend an individually identified and isolated threat to the entire species. That is, suggesting that one factor (e.g. vertical structures) is a threat, without any observed adverse effects and without consideration of other co-relevant factors, such as location or type of habitat, degree of isolation, population size, whether the population was recently impacted by drought, or any other pertinent factor, risks failing to accurately identify the real threats.

The following section discusses the specific and general threats related to habitat identified in the proposed rule, the data supporting the existence of the threat, and the data supporting its population level effects.

Habitat loss and Population

The lack of early data on lesser prairie chickens and their habitat makes it difficult if not virtually impossible to make valid comparisons of historic and present habitat. Fortunately, such historic comparisons are not a consideration in the assessment of threats for listing under the ESA. The ESA requires identification of:

*"the **present or threatened** destruction, modification, or curtailment of its habitat or range"*

The FWS takes the position that substantiating population declines is unnecessary to list a species. The FWS asserts that measurement of the threats is all that is necessary. It is, however, necessary to be able to measure, in terms of data, either habitat loss and its population level effects or population changes. In the case of the lesser

[11] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73853
[12] Pitman et al. (2005)

prairie chicken, precise ground and aerial surveys (e.g., the States and Western Assoc. of Fish and Wildlife agencies) are available. Furthermore, states have implemented new and more accurate survey techniques which facilitate understanding population level responses over time. There is little doubt that the current range of the lesser prairie chicken has changed from that of its historic range[13] [14] but whether it's 25%, 50% or 95% is irrelevant; we know approximately how many birds exist today and where most of them live. The goal of the listing determination is to determine whether the remaining populations are increasing decreasing, or stable, have adequate habitat, that the existing habitat is sufficiently stable, and if not, to assess the species and the threats to the habitat to determine whether the species qualifies as threatened under the factors identified by Congress.

In the case of the lesser prairie chicken we have access to a record of the near-term habitat amounts and population changes in occupied habitat thanks to the aforementioned aerial surveys supported by the states. These aerial surveys have provided increased accuracy in population and habitat monitoring. However, these changing survey techniques, while leading to more accurate estimates, inhibit direct comparisons across time, requiring instead that changes be measured using sophisticated statistical techniques.[15] The analysis of the current population data demonstrates increasing populations and low extinction probabilities.

Lesser Prairie Chickens are not Threatened by Habitat Fragmentation

The FWS own data and analysis, referenced in the rule, demonstrate that habitat beyond the minimum required to ensure the continued existence of the lesser prairie chicken is available. A FWS spatial analysis identified 71 patches that met the listing determination's arbitrary minimum size of 10,117 ha (25,000 ac)[16] within the five state estimated occupied range. This satisfies the statement in the proposed rule that a minimum of four strongholds of 10,117 ha (25,000 ac) distributed across the ecological diversity of the species are necessary. **These data demonstrate that despite the existing fragmentation throughout the occupied portion of the range, the rule's arbitrary minimum stronghold threshold is met. This is confirmed by the data showing population growth throughout the range**[17].

[13] See Appendix 1 for a discussion of the historic range figures used by the FWS and their applicability to the listing determination.

[14] The same could be said for virtually any species living in the United States at the time of European settlement.

[15] The Hagan 2012 analysis of lesser prairie chicken populations is one example; another, Garton et. al. 2010 was used by the FWS, it examined disparate sage grouse population measurements.

[16] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73836

[17] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser*

The discussion of habitat fragmentation included in the rule is confusing and misleading. The information is presented without context and without a discussion of population level effects. In the following paragraphs we elucidate habitat fragmentation in the context of lesser prairie chicken life history adaptations and their environment.

The FWS states in the conclusion of the proposed listing:

'…as a result of the significant reduction in numbers and range of lesser prairie-chickens resulting from cumulative ongoing habitat fragmentation, combined with the lack of sufficient redundancy and resiliency of current populations, we conclude that the lesser prairie-chicken is currently at risk of extinction or is likely to be in danger of extinction in the foreseeable future.'

The question of habitat fragmentation and its consequence is key to the FWS determination that listing of the greater prairie chicken is supported. However, the basis for the determination that the existing fragmentation is sufficient to have population level effects is not supported by the data cited by the FWS.

Specifically, the FWS makes several conflicting statements regarding area of habitat needed for successful lesser prairie chicken populations. First, the proposed rule states,

"…Although a minimum size has not been established, studies and expert opinion, including those regarding greater prairie-chickens, suggest that the minimum parcel size is likely to exceed 100 ha (250 acres)..."[18]

Later the[19] proposed rule concludes that,

"…conservation and eventual recovery of the lesser prairie-chicken should consist of the establishment of secure strongholds or core areas of high quality habitat that are at least 10,117 ha (25,000 ac) in size and support 6–10 active leks, each being used by at least 6 males..."

The proposed rule does not provide the data used to determine that a home range two orders of magnitude larger than the minimum is necessary. Home ranges for lesser prairie chickens vary by habitat type and environment. This is because each of the life history components of lesser prairie chicken vary greatly as the birds adapt to available habitat and other environmental aspects. Leks, or the display grounds of males where females come to mate, can be quite small. It would not be useful to consider the area needed for a lek by itself, as it does not include nesting, feeding and roosting sites. However, it is useful to note that, leks are also found on habitat the rule assumes is not available for lesser prairie chickens such as, "…abandoned

Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[18] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856)
[19] Id., p. 73836)

oil-drilling sites (oil pads) with little or no vegetation, unimproved roads with little traffic, areas treated with shrub-specific herbicide, recently burned areas, heavily grazed areas (e.g., stock tanks, mineral licks), and cultivated fields adjacent to grassland…"[20]. Hence, lek placement is adaptable and areas identified as unsuitable at present, may in fact be used in the proper circumstances. Because of the adaptability of lesser prairie chickens it is not advisable to make broad surmises about habitat availability and needs included in the proposed listing rule, in lieu of actual data.

There are different ways to estimate the area of habitat needed for successful lesser prairie chicken populations and no agreed-upon answer. This is due to the fact that there are separate areas for nesting, feeding and the lek itself, all of which might be fragmented by interspersed areas of unsuitable habitat (either natural or human made), in the native landscape. The proposed rule cites several studies that evaluate the area required for home range and a population. Home range estimates range from 21 ac to 4806 ac, with many values in between. The huge variance in range area is the result of reports of home range by season (i.e. breeding less than wintering), different drought conditions, and availability of food. At the population level, there is no evidence on how many birds or leks would be necessary to maintain population viability. As a consequence, estimates reported by FWS show enormous variation, from 1,012,140 ac to 2,530 ac. Other figures include 7,900 ac, 25,000 ac, 12,000 ac, 72,649 ac, and 24,710 ac. In violation of the requirements of the ESA, **the FWS does not include the data that support the determination to use the 10,117 ha (25,000 ac), nor does it explain the basis for the determination**.

The FWS references a spatial analysis they conducted to determine the extent of fragmentation within the estimated occupied range of the lesser prairie-chicken.[21] Infrastructure features such as roads, transmission lines, airports, cities and similar populated areas, oil and gas wells, and other vertical features such as communication towers and wind turbines were delineated. These features were buffered by known avoidance distances and compared with likely lesser prairie- chicken habitat. **The analysis revealed 71 patches that exceeded the minimum 10,117 ha (25,000 ac) range that exist within the five- state estimated occupied area**. Of the patches over 10,117 ha (25,000 ac), all were impacted by fragmenting features, just not to the extent that the patch was fragmented into a smaller sized patch. Thus, even if, as the rule states:

[20] Hagen et al. 2004

[21] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856; The analysis is referenced but not included in the citations, so it is not possible to assess its validity.

"… a minimum of four strongholds will be needed, distributed across the ecological diversity of the species, in order to secure the status of the species."[22]

There are several times that many patches currently in existence.

Edge Effects Due to Habitat Fragmentation

It is well known that in some ecosystems increasing linear amounts of habitat edge, as a consequence of habitat fragmentation, present threats to some species. For example, birds nesting in forests are negatively impacted by nearby open-country edges because it facilitates access by habitat-edge nest predators such as raccoons (*Procyon lotor*), and provides access to nests by avian brood parasites such as the ubiquitous brown-headed cowbird (*Molothrus ater*). The proposed rule contains numerous citations referencing the negative effects of edges that are apparently supposed to illustrate their danger to lesser prairie chickens; however, none of the citations address the effects of edges on lesser prairie chickens[23]. The proposed rule also states that typical native lesser prairie chicken habitat is a mosaic of different habitat patches. We note that each of the patches within the native mosaic creates an edge[24] [25]. Thus, the lesser prairie chicken's coexistence with edge effects in their native habitat indicates that they are part of the native landscape in which lesser prairie chickens evolved.

The FWS suggests that edges and habitat fragmentation will make it difficult for lesser prairie chicken individuals to find leks. The rule provides no data, and no evidence to support the statement. As such, it appears to be purely speculative. Further, given that leks are often used traditionally for years, and that breeding and feeding grounds are typically nearby, the notion that a lesser prairie chicken would be unable to find an active lek is scarcely credible. It is also worth noting that leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine the birds' selection of a new lek site. Surely a species would not have evolved a reproductive system that randomly makes it impossible for females and males to find each other at mating season.

[22] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[23] Id., pp. 73851-57
[24] Id., pp. 73852
[25] "Consequently, blocks of habitat that collectively or individually encompass multiple successional states that comprise tall grasses and shrubs needed for nesting, and are in proximity to more open grasslands supporting forbs for brood rearing, and are combined with smaller areas of short grass and bare ground used for breeding, support all of the habitat types used by lesser prairie- chickens throughout the year." Federal Register, Vol. 77, No. 238 , December 11, 2012, pp. 73852

Anthropogenic Changes to Lesser Prairie Chicken Habitat

This statement in the rule appears to be opinion.

'The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events…."[26]

The FWS provides no data or analysis to support the statement, and has earlier admitted there are no data on historic habitat or populations. Nevertheless, the proposed rule contains a list of activities which 'may' have an adverse effect on lesser prairie chicken, based on these assumed impacts. The information provided in the proposed rule consists of lists of areas where these 'threats' exist within lesser prairie chicken habitat and speculative mechanisms for their adverse effects. However, no data are provided to substantiate the assertions that the adverse effects attributed to these threats actually exist or how they affect lesser prairie chicken populations' extinction risk. We recognize that "extreme weather events" was intended to be only one possible example of a stochastic event, but an extreme weather event that would wreak such widespread damage would likely be destructive even to native species at peak abundances.

[26] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73883

Livestock Grazing, Water and Habitat Conversion

Livestock

The FWS surmises that because livestock grazing occurs over such a large portion of the occupied range, it must be a threat. Accepting the idea of adverse effects of livestock grazing on a species whose historic habitat included seasonal and widespread overgrazing by bison is counter-intuitive. The proposed rule implies that the pattern of grazing today is different, but does not quantify those differences or the adverse consequences. The rule also identifies other adverse effects such as nest trampling, but provides no information on the extent to which this occurs or the population level effects of such occurrences. Identification of livestock grazing as a threat to the species is purely speculative. In fact, the rule states:

"…Although documented, the significance of direct livestock effects on the lesser prairie-chicken is largely unknown. Detailed, range wide information is lacking on the extent, intensity, and forms of recent grazing, and associated effects on the lesser prairie-chicken. "

Additionally, the rule fails to account for the availability of water from stock tanks as a positive effect of grazing cattle. The rule cites research documenting the regular use of stock tanks by both male

and female lesser prairie chickens. The FWS suggests that stock tanks,

"…may be particularly important during periods of drought."[27]

The rule immediately discounts its importance stating that lesser prairie chickens do not require water speculating that dew is a 'likely' source:

"Lesser prairie-chickens likely rely on food sources and consumption of dew to satisfy their metabolic moisture requirement but will use surface water when it is available."

While the rule admits beneficial aspects of a ready source of water to the species, it fails to consider it in assessment of the effect of livestock grazing:

"Little is known regarding the specific water requirements of the lesser prairie chicken, but their distribution does not appear to be influenced by the presence of surface water."

"Total annual precipitation across the range of the lesser prairie-chicken varies, on average, from roughly 63 cm (25 in) in the eastern portions of the historical range to as little as 25 cm (10 in) in the western portions of the range. Consequently, few sources of freestanding surface water existed in lesser prairie-chicken historical range prior to settlement."

Agricultural conversion

The proposed rule states that agricultural conversion adversely affects lesser prairie chicken. However, the statement is only partially accurate. The cited research notes that lesser prairie chickens commonly forage in agricultural crops such as grain sorghum, corn, and other grain fields adjacent to native pasture from late autumn through early spring and that alfalfa is an important food source for pre-nesting females and lekking males in southwestern Kansas. The citations also reported that maximum numbers of lesser prairie chickens were found in areas in which 5-37% of the landscape was planted to grain sorghum using minimum-tillage techniques. The citations used by FWS in the proposed rule also note that recently, conversion of grass lands to agriculture has slowed, as the number of hectares per year converted has not increased. The proposed rule provides no data to substantiate the statement that increases in agricultural conversion continue to occur. Neither does the proposed rule make any attempt to assess or quantify the benefits to lesser prairie chickens of increased food sources from agricultural crops, the percentage of no-till agriculture or of the crops that provide food for lesser prairie chickens. The multiple variables involved in assessing the effect of agricultural conversion illustrate the speculative nature of sweeping assumptions about the effect of any activity on lesser prairie chicken habitat.

[27] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843

Human encroachment: energy production and transmission , fences, roads

The proposed rule lists several citations that report there are indications that human structures influence lek placement. The proposed rule includes wind turbines, energy transmission lines, power poles and lines, oil rigs, fences and roads in this category. The proposed rule posits that the vertical presence in the lesser prairie chicken landscape is in and of itself a threat. The threat is predicated on research that found lesser prairie chickens avoided these structures.

Specifically, Pitman says that leks are farther from anthropogenic structures than expected by chance. Pruett et al. (2009) found that lesser prairie chicken tended to avoid roads and power lines. Hagen (2011) noted that, "Monte Carlo simulations of expected distances indicated that the nearest 90% of lesser prairie chicken centers of use were farther from anthropogenic features than would be expected at random." However, as noted elsewhere, there are no data that this avoidance results in reduced nest success or reduced populations. Pitman et al. (2005) measured distances from nests to various anthropogenic features, and found:

"distances to the features were not substantial predictors of apparent nest success. Grass height, sagebrush plant density, and sagebrush height were the most important vegetation characteristics influencing nest success."

Further, based on the narrow reach of the supporting research, it is only surmise that structures have an adverse effect, since the effect of other interacting features, such as whether it was a drought year and the placement of the structures in relation to the lesser prairie chicken preferred activity for the site have not been evaluated.

The proposed rule speculates that human activities nearby leks might interfere with the transmission of male vocalizations ("booming") on the leks, thereby preventing females from finding the leks.[28] This speculation is inconsistent with what we know of lesser prairie chickens. First, as discussed above, leks are relatively long-lived, and it is unlikely that there are females or males in the local population who are unaware of their location and active status. Second, leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine their selection of a new lek site, but this behavior does not appear to affect the ability of leks to be found during mating season. Finally, a characteristic of lesser prairie chicken habitat is frequent wind, which abates sounds reducing the effects of surrounding noise. Nevertheless, the

[28] Federal Register, Vol. 77, No. 238 , December 11, 2012, p.73839

rule relies on the findings of a paper[29] which addresses the effect of noise on a flycatcher, warbler, sparrow and a vireo, all small songbirds, and no open country ground nesting game birds whose environmental requirements would more closely mirror those of lesser prairie chickens. Accordingly, the study, although important in its own right, is irrelevant to the lesser prairie chicken as the tremendous differences in the ecology of the species involved preclude drawing any inferences related to lesser prairie chickens. Thus, there are no scientific data to indicate that noise is a threat to the lesser prairie chicken.

Collision mortality

The proposed rule concluded that:

"power lines and unmarked wire fences are known to cause injury and mortality of lesser prairie-chickens, although the specific range wide impact on lesser prairie chickens is largely unquantified."[30]

The statement is based on a study which demonstrated that statistically, the effect of collisions was insignificant. [31] The rule identifies data from 1999 to 2004, in which researchers recovered 322 carcasses of radio-marked lesser prairie-chickens in New Mexico, Oklahoma, and portions of the Texas panhandle. The percentages of documented lesser prairie-chicken deaths from collision were estimated to be 42 percent in Oklahoma and 14 percent in New Mexico. Based on the information in Table 2 of the proposed rule, there were roughly 10,000 individuals in the three states during this time interval, and therefore, during this period, there were approximately 60,000 potential encounters. Therefore, the 14% to 42% of 322 birds (45 to 135) that died via collisions amount to less than 1/10 of one percent of the population (0.1%). Therefore, the available data indicate that although it would be highly useful to put markers on the top row of fences especially near leks, collision mortality is relatively insignificant factor.

Disease and Predation

The proposed rule states:

"The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events. Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels"

Predation

Although in the section on predators, FWS plays down the role of predators, throughout the proposed rule, there are repeated assertions that diverse threats increase predation. These discussions ascribe a role to predators that will result

[29] Francis et al. (2009)
[30] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73863
[31] Patten et al. (2005b)

from existing and planned towers serving as perches for raptors. For Example, FWS states that lesser prairie chickens avoid vertical structures as "presumably a behavioral response that serves to limit exposure to predation." The proposed rule cites a long term study in Oklahoma.[32] In that study, they identified roughly 43 carcasses out of a total lesser prairie chicken population of 3,000.attributable to raptor depredation.[33] Thus only a handful of birds were killed by raptors. The authors of this study stated "We have no reason to believe that lesser prairie chicken populations are being impacted severely by predation."[34] In a different study Behney et al. (2012, p. 294) "suspected that mammalian and reptilian predators had a greater influence on lesser prairie chicken mortality during the breeding season than raptors." Yet, in their conclusion the FWS ignores these data and opines that predation is a threat.

There are no data that support the speculative statements in the proposed rule that towers would provide roosts for ambush-style raptors. Most raptors such as large hawks, hunt from the air. A major avian predator, the Great Horned Owl, likely approaches low to the ground during crepuscular periods, and perching on a tower might make it visible. Only documented depredation where the species of raptor and hunting method were recorded would provide this information. Here again, the FWS lack sound or even reasonable scientific data on the effects of towers on increasing predator pressure. It requires observations over time, measuring the rate at which lesser prairie chickens are taken by avian predators at leks both with and without nearby towers or other vertical structures. And most importantly, one would have to demonstrate the assertion the depredation from raptors was additive and not compensatory. That is, as FWS noted, lesser prairie chickens evolved with a suite of mammalian and avian predators. Only if some new source of predation occurred that resulted in take of individuals over and above natural levels, would depredation be relevant, and the proposed rule presents no data empirical or otherwise to support this conclusion.

Disease

The FWS states in the proposed rule:

"…There is no information that indicates parasites or disease are causing, or contributing to, the decline of any lesser prairie-chicken populations, and, at this time, we have no basis for concluding that disease or parasite loads are a threat to any lesser prairie-chicken populations. Consequently, we do not consider disease or parasite infections to be a significant factor in the decline of the lesser prairie-chicken…"

[32] Wolfe et al. (2007) who conducted a long term study from 1999-2004.
[33] Table 2, FWS 2012
[34] Wolf et al. (2007: 101)

The proposed rule then goes on to state, that if populations continue to decline or become more fragmented, even small changes in habitat abundance or quality could have more significant consequences. The implication is that there would be a marginal increase in disease within the population driven by habitat changes. There are no data to support an assertion that disease will increase as habitat loss or fragmentation occurs, if the statement were supportable, the putative loss in habitat which this rule surmises, has already occurred and should have resulted in some measurable increase in disease over time. Such an increase is not recorded or even remarked. In any event, if populations decline or are sparse, diseases that are density dependent would have difficulty becoming a major threat.

Climate Change

The proposed rule identifies global warming and potential extreme weather events as a threat to the species. The rule assumes that warming will occur (as opposed to some unspecified climate change) and concludes that as a result, habitats will dwindle and further compound the putative negative effects of habitat fragmentation. However, many climate projections predict that species ranges will shift, not shrink and in fact, conditions for some species might improve.

Changes in species' range sizes are ubiquitous, and do not automatically imperil their continued existence. For example, during the last Ice age, known as the Last Glacial Maximum (LGM; 21,000 years before present), southward extending glaciers pushed many species into small southerly isolated habitat patches (refugia), where they survived for thousands of years, subsequently expanding as climate shifted again.

CESAR used a niche model to examine the current and past distribution of lesser prairie chicken (Appendix 3). Our work demonstrates that the lesser prairie chicken was one of those species which was distributed in a fragmented series of habitat patches south of the current range during the last glacial maximum, 21,000 years ago. Clearly the species survived this displacement and fragmentation, and as climate conditions ameliorated post glacial retreat, they followed their northward-moving habitats to where they are today. Thus the species has survived previous significant climate changes and has the potential to survive major, glacial-scale changes in earth's climate and still prosper. [35]

The FWS provides no data to substantiate a conclusion that a species which has weathered significant climate change and persisted over 21,000 years is not equipped to survive and adapt to current climate change.

[35] For a more in-depth discussion of the analysis, see Appendix 3

Adequate Regulatory Authority Exists to protect the Lesser Prairie Chicken at the State and Local Level

As part of our review of the proposed listing rule, CESAR lawyers examined the existing state and local protections for the lesser prairie chickens. We found that each state had its own comprehensive scheme for protecting species and their habitats. These protections, for the most part, went far beyond the narrow protections of the ESA encompassing wildlife and wildlife habitat protections.

Benefits of ESA Listing

The proposed rule states that the ESA provides protection beyond that which state and local agencies provide. This is only conditionally true. The ESA protects listed species by requiring federal agencies to avoid jeopardizing the continued existence of the species, prohibiting the 'take'[36] of listed species, and by protecting designated critical habitat. The FWS in the proposed rule implies that listing provides the ability to protect habitat on private property, is the only source for recovery planning and increases funding available for the conservation of lesser prairie chickens.

The habitat protections provided under the ESA largely flow from the designation of critical habitat. The protections apply only to that habitat which has been designated as 'critical'. The protections are further limited to the subset of critical habitat which is affected by a federal agency action. So while much private habitat can be designated as 'critical habitat', in fact it is not protected under the ESA unless a federal agency action has an effect on it. With respect to the lesser prairie chicken, this distinction is moot as the FWS has declined to designate critical habitat as 'not prudent", due to the lack of data related to the species habitat requirements.

The prohibitions against take protect the species immediate habitat if its modification or destruction leads to the death of an individual member of the species. The requirement that federal agencies consult with the FWS to ensure their actions do not 'jeopardize the continued existence of the species' allow for take as long as jeopardy does not result.

While listing of a species results in a requirement to develop a recovery plan, these plans are developed to the maximum extent practicable and there are no regulatory requirements attached to the plan. Recovery plans are aspirational documents, the ESA

[36] The Act defines take as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct..." The word harm has been interpreted to include habitat modification, which foreseeably causes the actual injury or death to a listed species. The FWS has asserted the ability to regulate habitat under this provision and consequently resists designating critical habitat. The courts have disagreed with this interpretation, pointing out that simply protecting against habitat alteration that actually kills a species is not preservation of the ecosystem upon which a species relies.

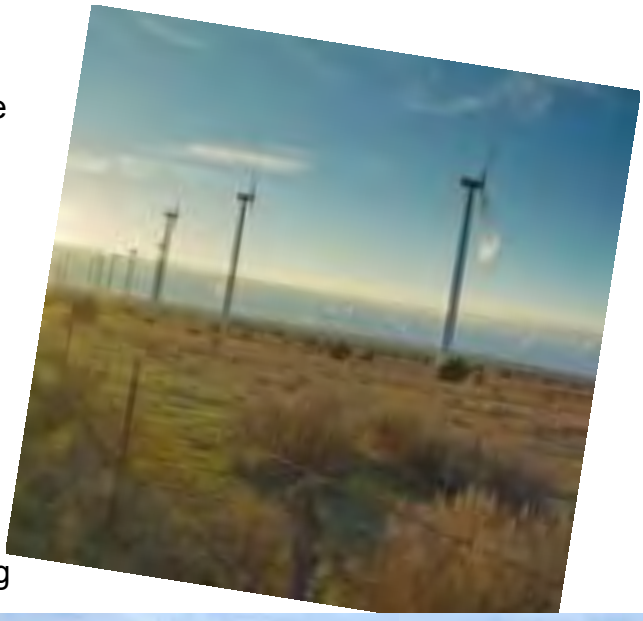
imposes no requirements for scientific rigor to their contents, such as requiring them to use the 'best scientific and commercial data available'. Further, any group can and has developed recovery plans. The FWS has developed Recovery plans, individual states have developed recovery plans, and working groups have developed recovery plans. The ESA is not the sole generator of a recovery plan.

The ESA provides no dedicated funding for listed species.[37] While it is possible to argue that if a species is listed the probability of funding increases, the evidence is unpersuasive. With nearly 1,500 listed species, one would expect all available wildlife research and conservation funds would be used to address those species. Instead, funding for wildlife conservation, recovery, and research is not devoted solely to endangered species, much is still available for unlisted and unregulated species.

Realistically listing of a species, assures federal agencies are required to review their actions in the context of the ESA, and to a limited extent those requirements extend to private lands affected by federal agencies.

Generally, a listing under the federal ESA listing does not necessarily:

- Protect habitat on private property;
- Provide access to dedicated federal funding;
- Result in a recovery plan



[37] We contrast this with the affected States which individually provide state funds for wildlife conservation.

Existing Federal Agency Regulatory Protections

The FWS admits that the lesser prairie chicken cannot be fully recovered on federal lands, which only support about four percent (4%) of the species' overall range. The five states where the majority of the lesser prairie chickens are found (primarily on private property, not federal lands) have significant state, county and local laws and regulations in effect to protect the lesser prairie chicken.

Where federal lands are involved, we note that in many cases federal agencies have taken voluntary actions to ensure that they consult with the FWS whether or not a species has been listed. These agencies include the Forest Service and the BLM. These two agencies have responsibility for managing millions of acres. These agencies have formally designated prairie chickens and their habitats as species for which their respective management plans will take special consideration. [38] These management plans are binding, and failure to adhere to their conditions can be challenged in court. [39] There is no evidence that the agencies are routinely ignoring the requirements of their management plans for lesser prairie chickens.

The voluntary consultation by federal agencies provide protections that go beyond what is required by the ESA as the agencies land use plans have a standard that manages the lands to recover or enhance wildlife and habitat. A consultation under the ESA requires only that the federal agency, avoid 'jeopardizing the continued existence of the species', or the 'destruction or adverse modification' of its critical habitat.

FEDERAL AGENCY PROTECTION[40]	ESA PROTECTION INCREASE
Bureau of Land Management • Environmental assessments required for all major activities; • Early consultation as to presence of species in project area;	None. BLM Land use plans[41] for the lesser prairie chicken habitat are complete. These plans are based on voluntary consultation with the

[38] The section on conservation actions includes details on the conservation actions undertaken by these land management agencies.
[39] Western Watersheds Project v. Ken Salazar, Secretary, Department Of The Interior, Case No. 4:08-CV-516-BLW, Document 131, Memorandum Decision And Order. http://www.advocateswest.org/sites/default/files/bulletin/Victory%20in%20First%20Round%20of%20BLM%20RMP%20Litigation/Order%20granting%20WWP%20Motion%20for%20Summary%20Judgment.pdf
[40] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[41] http://www.blm.gov/flpma/FLPMA.pdf

• Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Duty to protect and restore habitat from invasive species; • Guidelines for energy development; • Best management practices for energy development "approved" by FWS • Duty to create Resource Management Plans; • Duty to conserve "candidate" species and sensitive species designated by individual states; • Designated Area of Critical of Environmental Concern (ACEC) for lesser prairie chicken	FWS as though the lesser prairie chicken were listed under the ESA.[42] The requirements in the land use plans are based on a standard to restore or enhance habitat conditions, the ESA simply require that federal agencies: 1. Avoid jeopardy, 2. Avoid destruction or adverse modification of habitat. Federal lands controlled by BLM and the USFS managed under provisions that already provides lesser prairie chickens and their habitat enhanced protection. Federal lands controlled by BLM and the USFS have already agreed to voluntary consultation with the FWS on the lesser prairie chicken, whether it is listed or not; Current federal land management practices provide for management, enhancement, and recovery of habitats used by lesser prairie chicken, rather than just avoiding jeopardy. Each of the states with lesser prairie chicken habitat prohibit take either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[42] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

Department of Agriculture • Duty to protect and restore habitat from invasive species; • Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Environmental assessments required for all major activities;	No additional habitat protections would be provided, first because the listing does not designate critical habitat, second because the land management agencies manage to a restoration/enhancement standard which is higher than the ESA 'avoid jeopardy' and no destruction or adverse modification standard. USFS land use requirements for lesser prairie chicken are based on voluntary consultations with the FWS and a standard to improve habitat conditions[43]. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[43] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

State and Local Regulatory Protection

The five states with lesser prairie chicken habitat have significant protections in place for wildlife in general, allowing them to protect prairie chickens and their habitat without federal authority. Each state has its own Endangered Species Act and Colorado has listed the lesser prairie chicken. Some states have identified it more specifically with a designation indicating it is a species of special concern. All the states identify it as a game species and have statutes which provide for penalties for taking under anti-poaching laws. In addition, each of the States and their associated local government have the authority and expertise to protect wildlife habitat generally and specifically, whether it is on government or private land.

The following is a cursory review of applicable law which should be considered illustrative rather than a comprehensive list.

In making comparisons between the ESA and local protection it is important to note that ESA protections are limited to federal lands, and those critical habitat lands which are affected by a federal agency action. While the FWS may prefer their ability to protect the species, there is no indication that a lack of regulatory authority is hampering the states from protecting lesser prairie chickens. The states bring their own expert agency status to the protection of species within their jurisdiction, and each state has identified a commitment to protection, restoration, and enhancement of wildlife resources. There is no basis for asserting that state expertise or authority is lacking and, as noted earlier, increasing populations support a conclusion that state and voluntary conservation efforts are having a beneficial effect.

Colorado, Kansas, New Mexico, Oklahoma and Texas already have flexible laws and regulations in place to effectively deal with changing conditions to prevent depletion and waste of wildlife resources. Further, the documented policies of the federal land use agencies whose actions most impact the lesser prairie chicken and its habitat, currently identify the lesser prairie chicken as a species for which special management and protection is afforded even in the absence of an ESA listing. In light of the prohibitions of take under anti-poaching laws that apply to the lesser prairie chicken, listing under the ESA will only criminalize accidental take of lesser prairie chickens.

Existing laws at the state, county and local levels have the authority to protect and manage activities on state, public and private lands with the actual or potential benefit to the lesser prairie chicken. The service candidly admits that only about four percent (4%) of the species' overall range occurs on federal lands and that the lesser prairie chicken cannot be fully recovered on federal lands alone. Fortunately, there are adequate state, county and local laws and regulations currently available in Colorado, Kansas, New Mexico, Oklahoma and Texas to protect the lesser prairie chicken.

The following chart summarizes current protections provided to the lesser prairie chicken on a state-by-state basis and identifies any marginal increase in protection provided by the ESA[44].

STATE	ESA PROTECTION INCREASE
Colorado • Species listed under the state ESA and take is prohibited. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Prohibits unauthorized 'take' of wildlife, whether listed or not • Provides dedicated funding for wildlife and habitat. • Goal is for all wildlife to achieve self-sustaining population; • Wildlife laws are enforced with civil and criminal penalties.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Oklahoma • State has authority to enter private lands for purpose of controlling Red Cedar and other invasive plant species; • Dedicated funding for wildlife habitat restoration activities; • Protects all wildlife from illegal "take"; • Wildlife laws are enforced with civil and criminal penalties; • Provides classification for "sensitive species" such as lesser prairie chicken. • Provides protections intended to achieve self-sustaining wildlife populations. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Comprehensive regulation of energy development and natural resource development industries.	ESA provides no ability to control activity on private land unless it is affected by a federal agency action. The ESA would criminalize accidental take.

[44] A detailed chart can be found in Appendix 5.

• Classifies lesser prairie chicken as a game bird ad protects it with anti-poaching laws.	
New Mexico • Dedicated funding source for wildlife protection and promotion; • Conservation Services are available for management and enhancement (including research and conservation actions) of wildlife and habitat; • Educational publications on wildlife and habitat related conservation issues; • State requires studies to be conducted to determine the status and survival requirements of threatened or endangered species. • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Kansas • Established habitat acquisition and restoration programs; • Programs to ensure that all wildlife maintain or achieve “self-sustaining” populations; • Penalties for failure to adhere to wildlife laws; • Local governments have authority to create noxious weed programs; • Planning and zoning must be conducted in a manner that will consider all natural resources of the State; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Texas • Noxious weed control programs; • Dedicated funding for wildlife research; • Dedicated funding for wildlife and habitat conservation;	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in

• Civil and criminal penalties for violation of wildlife laws; • Wildlife laws protect all "indigenous" wildlife (not only listed species) from "take"; • Conservation incentive programs with dedicated funding; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it under anti-poaching laws.	protection by an ESA listing would be to criminalize accidental take.

COLORADO

Colorado has implemented rules, regulations and codes to ensure the protection of wildlife and to ensure a continuous operation of planning, acquisition and development of wildlife habitats and facilities for its indigenous wildlife populations. The protections available in Colorado include, but are not limited to, local governments, planning and zoning, land use and conservation and have included provisions for enforcement so as to promote consultation with other states and federal government for the purposes of increasing the number of individuals within the species and populations of wildlife up to the optimum on a statewide basis to ensure equitable and reasonable privileges of ownership along with the pursuit of wildlife resources.

NEW MEXICO

New Mexico has a comprehensive wildlife conservation strategy. The strategy focuses on actions intended to keep common species common while working to prevent wildlife from becoming endangered. Using rigorous science, New Mexico has constructed an ecological framework for identifying the species of greatest conservation need, the habitat necessary to sustain them and other members of their ecological communities with periodic review processes necessary to ensure citizen involvement and acceptance.

KANSAS

Kansas has enacted the Kansas Nongame and Endangered Species Conservation Act of 1975 which gives the Department of Wildlife, Parks and Tourism authority to identify and undertake appropriate conservation measures. In that regard Kansas has implemented recovery plans with an objective to guide research and management aimed at enhancing listed species populations with the ultimate goal of allowing species to recover. Kansas has taken great strides in creating, practices, plans and regulations

which provides incentives to plant and maintain prairie grasslands which have greatly benefited the lesser prairie chicken.[45]

TEXAS

As an example of the available protections, the Texas Agriculture Code allows the authority to determine critical wildlife habitat zones, create and regulate noxious weed control districts and to regulate range restrictions. Additionally, the Texas Natural Resources Code and Parks and WildlifeCode allow Texas to regulate and develop and administer programs to ensure continued agriculture production and water availability as well as wildlife habitat availability. Texas also has an administrative code whose purpose, in part, is to provide a comprehensive method for the conservation of an ample supply of wildlife resources on a statewide basis to insure reasonable and equitable privileges of ownership along with the pursuit of wildlife resources.

OKLAHOMA

Oklahoma has developed the Oklahoma Lesser Prairie-Chicken Conservation Plan (OLEPCCP) to "protect, enhance, and restore their habitat while also addressing other factors leading to their decline." This plan is intended to benefit the people, economy, and wildlife resources of Oklahoma by providing a framework for effective management and habitat improvement. Oklahoma is working to conserve the lesser prairie chicken while minimizing effects on human economies and developments. Appropriate habitat improvement/conservation goals and long-term management actions/strategies are being utilized to achieve these goals as well as coordinated strategies to implement management actions – including interagency coordination and incentives or other programs that will make restoration and maintenance of LEPC habitat economically viable for landowners and industries. While these efforts are underway, Oklahoma defines lesser prairie chickens as game birds and protects them under their anti-poaching statutes.

Table 1. Federal Lands By State[46]

State	Total Federal Land Acreage[47]	Total Acreage in the State	% of
Colorado (listed under CO ESA)	24,086,075	66,485,760	36.2%

[45] The anti-poaching laws protect the species at all time. Kansas offers limited hunting of LPC.
[46] Congressional Research Service, 7-5700, February 8, 2012, Federal Land Ownership: Overview and Data, http://www.fas.org/sgp/crs/misc/R42346.pdf
[47] Understates total; includes lands of the four major federal land management agencies and the Department
of Defense, but excludes lands administered by other federal agencies (e.g., Agricultural Research Service, Bureau of Reclamation, Department of Energy, National Aeronautics and Space Administration).

Kansas	301,157	52,510,720	0.6%
New Mexico	27,001,583	77,766,400	34.7%
Oklahoma	703,336	44,087,680	1.6%
Texas	2,977,950	168,217,600	1.8%

Federal Voluntary Conservation Actions

As noted earlier, particularly in the case of federal land management agencies, conservation actions undertaken voluntarily as part of a program of land management by the federal agencies, become enforceable once they are adopted. In a similar manner, once landowners enter into voluntary conservation programs with federal agencies, the provisions of the programs themselves become requirements.

Summary Chart of Federal Agency Ongoing Conservation Programs[48]

FEDERAL AGENCY CONSERVATION ACTIONS[49]

Department of Agriculture
 	
• Natural Resources Conservation Service:
  ○ Lesser Prairie Chicken Initiative: helping farmers and ranchers enhance, restore and protect habitat for lesser prairie chicken;
  ○ Conservation Reserve Program (CRP): one of the primary management tools for habitat restoration;
  ○ Wildlife Habitat Incentive Program: voluntary approach to improving wildlife habitat;
  ○ Working Land for Wildlife: FWS cooperative to combat the decline of seven specific wildlife species, including the lesser prairie chicken;
  ○ Grassland Reserve Program (GRP): a voluntary conservation program working with individuals to enhance plant and animal biodiversity, and protection of grassland;
  ○ State Acres for Wildlife Enhancement (SAFE): a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years;
  ○ The Environmental Quality Incentives Program (EQIP): a voluntary program that provides financial and technical assistance to agricultural

[48] A detailed chart can be found in Appendix 6
[49] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken

producers through contracts up to a maximum term of ten years in length.

Fish and Wildlife Service
 	
• Habitat Conservation Planning Assistance;
• Habitat Conservation Plan (HCP) Land Acquisition;
• Oklahoma and Texas have entered into CCCA's for the protection of the lesser prairie chicken. Candidate Conservation Agreements (CCAs) are voluntary conservation agreements between FWS and one or more public or private parties.[50]
  ○ Oklahoma CCCA: On March 4, 2013 Oklahoma's CCCA was finalized. FWS states that Oklahoma "has shown capability for and commitment to implementing all of the terms of the CCAA. The ODWC has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA".[51]
  ○ Texas CCCA: This CCAA pertains to lands in Texas encompassed by the current distribution of LPC, those lands that are unoccupied potential habitat, and those that could provide potential habitat if the current population and distribution of LPC should increase.[52] In Texas, TPWD holds a permit and issues Certificates of Inclusion to participating landowners who are voluntarily implementing management plans for lesser prairie-chickens. As of July 15, 2012, twenty-five Texas ranchers have 282,878 acres enrolled in the CCAA.[53]

BLM and USFS have entered into agreements to consult with the FWS voluntarily on candidate species and 'species of special concern.[54]

State and Local Voluntary Conservation Actions

The question of the effectiveness of voluntary versus regulatory conservation actions is difficult, and there is little literature that rigorously explores the issue. The argument for voluntary conservation is that regulatory conservation makes the species or its habitat a liability. Voluntary conservation removes the potential for the loss of property or its value and encourages behaviors that are beneficial to the species.

[50] The Service works with its partners to identify threats to candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements, and design and implement conservation measures and monitor their effectiveness. http://www.fws.gov/endangered/what-we-do/cca.html

[51] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf

[52] http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

[53] http://www.fws.gov/southwest/es/Documents/R2ES/LPC_FAQ_18July2012.pdf

[54] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

The population review we referenced earlier[55] noted declines in lesser prairie chicken populations in the decades prior to its designation as a 'candidate species' and increases after designation and the onset of voluntary conservation actions.

The 5 states in the lesser prairie chicken range have implemented a number of conservation actions over the past fifteen years. The FWS has articulated a policy for evaluating those conservation actions. This policy, known as the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy")[56], is particularly important for conservation actions that are ongoing or proposed for the future.

The FWS's PECE Policy requires during listing decisions that the FWS evaluate whether "formalized conservation efforts" [57] ("FCEs") "contribute to making it unnecessary to list a species". The purpose of the policy is to ensure consistent and adequate evaluation of future or recently implemented conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents when making listing decisions. The policy is expected to facilitate the development by States and other entities of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.[58]

This policy applies to those conservation efforts that "have not yet been implemented or have been implemented but have not yet demonstrated whether they are effective at the time of a listing decision."[59]

When evaluating an FCE that is not yet implemented, the FWS must make this evaluation based on the "certainty of implementing the conservation effort and the certainty that the effort will be effective." [60]

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[55] An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[56] 50 CFR Chapter IV, Federal Register / Vol. 68, No. 60 / Friday, March 28, 2003

[57] "conservation efforts as "specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species". Conservation efforts may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial actions." A formalized conservation effort is one "identified in a conservation agreement, conservation plan, management plan, or similar document." Id.

[58] http://www.sagebrushsea.org/esa/FWS_PECE_q&a.pdf

[59] Id.

[60] The PECE Policy states that the following factors will be considered: 1. Identified Parties, Funding and Resources necessary to implement the effort; 2. The legal authority of the parties to proceed with the FCE are described; 3. The legal procedural requirements (e.g. environmental review) necessary to implement the effort are described and within the means of the parties to accomplish; . 4. Authorizations (e.g., permits, landowner permission) necessary to implement the conservation effort are identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement

The majority the voluntary conservation actions could be considered ongoing, however, some such as the Interstate Working Group Range Wide Management Plan[61] and Oklahoma's CCCA have yet to be completed or implemented but would require a determination that there is high level of "certainty" of implementation given their near completion status and the large investment of resources.

In prior listing determinations, the FWS has declared that if a conservation plan cannot be demonstrated to be effective, it cannot be considered in a listing determination. This position is not supported by the plain language of the PECE policy. Further, it is demonstrably arbitrary in that most, if not all of the actions contemplated by these conservation plans are consistent with best management practices required by the FWS in their consultations with the federal land management agencies, in consultations which include the species and in documents sponsored by the FWS.[62]

Finally, we note that despite the assertions of the FWS as to efficacy of an ESA listing in protecting the species, the ESA provides very narrow protections, limited by the consultation process and the language of the ESA which does not provide regulatory requirements for enhancement or improvement, instead requiring that jeopardy of the continued existence of the species be avoided, and adverse modification and destruction of habitat be avoided.[63]

The limitations of the ESA in recovering species are aptly illustrated by the fact that of nearly 1,500 species listed less than 50 have recovered. Of that number only 20 actually recovered, the remainder were either extinct (9) or listed in error.[64] Voluntary conservation avoids the perverse incentives created by criminalization of accidental 'take' of

the effort will obtain these authorizations; 5. Voluntary participants are identified and methods (e.g. incentives) used to obtain necessary level of voluntary participation are described; 6. Regulatory mechanisms (e.g., laws, regulations, ordinances) necessary to implement the conservation effort are in place; 7. A high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding; 8. An implementation schedule (including incremental completion dates) for the conservation effort is provided; 9. The conservation agreement or plan that includes the conservation effort is approved by all parties to the agreement or plan.

[61] The type and level of voluntary participation (e.g., number of landowners allowing entry to their land, or number of participants agreeing to change timber management practices and acreage involved) necessary to implement the conservation effort is identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain that level of voluntary participation (e.g., an explanation of how incentives to be provided will result in the necessary level of voluntary participation). Id.

[62] Jamison, B. E., J. A. Dechant, D. H. Johnson, L. D. Igl, C. M. Goldade, and B. R. Euliss. 2002. Effects of management practices on grassland birds: Lesser Prairie-Chicken. Northern Prairie Wildlife Research Center, Jamestown, ND. 29 pages.

[63] The prohibition does not apply in the case of the lesser prairie chicken as the FWS has determined that designation of lesser prairie chicken habitat is 'not prudent' as there are no data to support a designation.

[64] http://www.ncpa.org/pub/st303?pg=5

species and harnesses the much broader power of states and local agencies to protect habitat on private lands. In the case of the lesser prairie chicken, where only 4% of its habitat is on federal land, the voluntary protection of habitat on private land is essential.

The fact that the affected states and landowners have been funding and participating in conservation activities beginning in 1996 with the formation of the lesser prairie chicken working group[65] and continuing to the present with the State of Oklahoma entering into a conservation agreement with the FWS demonstrates the commitment to species conservation. In the intervening 15 years, money time and effort have been expended to conserve the lesser prairie chicken.[66] If these efforts, which rely on the expert agency's recommendations, cannot be expected to succeed, then it brings into question the expertise the FWS brings to the discussion.

[65] http://www.wafwa.org/html/prairie_chicken.shtml

[66] See Appendix 7

Chart of Voluntary Conservation Actions[67]

VOLUNTARY CONSERVATION ACTIONS[68]
• Each State has prepared and/or participated in at least one conservation plan • Each State has prepared and/or participated preparation of at least one management plan • Each State has prepared and/or participated in development of at least one recovery plan • The five states participate in an Interstate Working Group to collaborate on conservation activities • Interstate Range Wide conservation plan • The states either individually and through the interagency group have funded or carried out research geared toward improving conservation techniques • All the affected states have a habitat restoration program • Several States have prepared guidelines and best management practices for natural resource development and some for the protection of the LPC specifically. • Each State has dedicated funding and multiple financial incentive programs to encourage habitat restoration on private lands, this can be used for lesser prairie chickens and other species as necessary.

Wind Industry Conservation Actions[69]

The FWS indicates wind power development is a primary concern with respect to the lesser prairie chicken. Their concern is based on the assumption that avoidance of vertical structures results in some as-yet unidentified threat to the species.[70] Because of the explicit statements in the proposed rule regarding concerns related to expansion of wind power and the lack of regulation related to that expansion, we examined regulation and voluntary conservation actions related to wind power explicitly.

[67] See Appendix 5 for a detailed list of voluntary conservation actions.
[68] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[69] See Appendix 7
[70] The studies cited found lesser prairie chickens avoided vertical structures, but did not identify any adverse effects resulting from that avoidance.

We identified a significant commitment to conservation in general by the industry. In a letter to the Secretary of the Department of Interior, the American Wind Energy Association expresses that the " final version of the Guidelines on March 23rd, 2012 was the culmination of over 5 years of a painstaking, but collaborative, process between representatives of the wind energy industry" and regulatory agencies.[71] This dedication to the process should provide a high level of certainty with regarding to this FCE.

Below is a summary chart of activities.[72]

Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.
Wind Energy Mapping Tools	Playa Maps for Colorado, Kansas, Nebraska, New Mexico, Oklahoma and Texas by county.
Southern Plains Wind and Wildlife Planner	Southern Plains Wind and Wildlife Planner for a set of species and ecosystems in Colorado and New Mexico.
Southern Great Plains Crucial Habitat Assessment Tool for Lesser Prairie-Chicken	Led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[73]
North American Landbird Conservation Plan-co-authored by the FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [74]

[71] http://awea.org/newsroom/pressreleases/upload/AWEA-and-Member-Company-Letter-to-Salazar-re-Wind-Energy-Guidelines-May-15-2012.pdf
[72] See Appendix 7
[73] http://kars.ku.edu/geodata/maps/sgpchat/
[74] http://www.partnersinflight.org/cont_plan/#Access

FWS Wind Energy Guidelines	FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [75] FWS in its guidance document states that it is issuing the guidelines pursuant to its authority under the ESA. FWS claims authority given its mandate to identify and protect endangered and threatened species and to "provide means to conserve" their ecosystems. FWS cites the ESA as the authority that directs federal agencies to "utilize their authorities to conserve listed species" and states that FWS and other federal agencies are encouraged to "do the same with respect to 'candidate' species". [76] Industry Adoption of Wind Energy Guidelines which address comprehensive wildlife and habitat considerations and best management practices. :
FWS	Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.
BLM	Interim Wind Energy Development Policy The Interim Wind Energy Development Policy (IM 2003-020), was issued October 16, 2002. This document ensures application of the BLM Wind Energy Development policies and best management practices (BMPs) in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on BLM managed public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan must comply with the IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[77]

[75] http://www.fws.gov/windenergy/docs/WEG_final.pdf
[76] Id.
[77] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf

BLM	Wind Energy Development Policy This IM further clarifies the BLM Wind Energy Development policies and best management practices (BMPs) provided in the Wind Energy Development Programmatic Environmental Impact Statement (EIS) of June 2005. Issuance of this IM ensures BLM-wide consistency in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on the public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan will comply with policy provided in this IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[78]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are developing best management practices (BMPs) that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy from renewable sources by 2020 in a wildlife friendly manner.[79]
Recommendations To Minimize Adverse Impacts Of Wind Energy Development On Wildlife 2012	There is no statewide permitting authority in New Mexico with regard to wind development. However, the state has developed guidelines for use by wind project developers, their consultants, local government and the general public. New Mexico Department of Game and Fish offers guidance for projects and guidelines in their Habitat Handbook.[80]
Multi-State	On April 22, 2009 Interior Secretary Salazar announced $57.8

[78] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf
[79] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml
[80] http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP. The planning proposal lands a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[81]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[82]

[81] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html
[82] http://kec.kansas.gov/reports/wind_siting_handbook.pdf

FERC Transmission Line Regulation	The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.[83]	
County Protections		
Union, New Mexico[84]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [85]
San Miguel, New Mexico	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [86]
Bent, Colorado	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.

[83] http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission.pdf
[84] http://nm-unioncounty.civiccities.com/directory.aspx
[85] http://www.unionnm.us/DocumentCenter/Home/View/9
[86] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf

CONCLUSION

The FWS has:

- limited or incomplete data on historic habitat loss,
- limited or incomplete data on the habitat requirements of the lesser prairie chicken and
- limited or incomplete data on the available habitat for the lesser prairie chicken.

The best available data find increasing populations across the range of the greater prairie chicken and low extinction probabilities. Genetic analysis demonstrates no loss in genetic diversity and no evidence of genetic isolation.

A review of the state and local efforts to conserve the lesser prairie chicken demonstrates robust statutory authority for protection of habitat on public and private land as well as legislative commitment to conservation of wildlife species and their habitat at the state level. These authorities exist whether the species is listed or even remains a candidate.

Voluntary conservation efforts are numerous and widespread, and range from individual land owners to developers of wind energy farms. These efforts are often developed in conjunction with the FWS and/or are consistent with the direction given in the publications sponsored or funded by the FWS which identify effective conservation measures. The effectiveness of these measures is provided support by the fact that increasing population numbers coincide with the advent of heightened awareness of the population declines of the lesser prairie chicken due to its identification as a 'candidate species' under the ESA.

There are no data that support the FWS assertion that habitat fragmentation and decline with related effects are threatening the lesser prairie chicken. There are data that demonstrate population growth, low extinction probabilities, and genetic robustness.

The FWS has failed to meet the requirements of the Act that listing be based solely on data showing that the species is adversely affected by one or more of the five factors enumerated inthe Act.

APPENDIX 1

The 84% reduction in the area historically occupied by lesser prairie chickens cited by the FWS is little more than a guess with an unknown error surrounding it. The FWS admits that "Very little information is available regarding the size of lesser prairie chicken populations prior to 1900." Robb and Schroeder (2005) stated: "Few records exist to verify the historical distribution of lesser prairie-chickens prior to European settlement because the geographic region that is generally regarded as historical range (southeastern Colorado, southwestern Kansas, western Oklahoma, northern Texas, and eastern New Mexico) was largely unexplored during the 1800s (Aldrich and Duvall 1955, Sharpe 1968). The first expeditions to explore Colorado tended to bypass the southeastern part of the state (Rockwell 1908), and it was not until 1914 that lesser prairie-chickens were recorded officially from Baca County (Lincoln 1918)."

As an example of the potential misuse of the uncertainty of the historical data, USFW wrote that "Litton (1978, p. 1) suggested that as many as two million birds may have occurred in Texas alone prior to 1900." Litton's paper was a non-peer reviewed article, and what Litton actually wrote was: "Records indicate there may have been as many as two million lesser prairie chickens in Texas prior to 1900, before exploitation by early-day sportsmen and market hunters". However, there is no reference by Litton as to what these "records" consisted of, and therefore it is not useful to repeat this number, as it is not verifiable and fails to meet the data standard of the ESA.

Even more potentially confounding is the apparent change in behavior of lesser prairie chickens. Jackson and DeArment (1963) stated that much of the range in southern Texas where maps show the bird as historically present were likely temporary wintering grounds; today the lesser prairie chicken is thought to be non-migratory. What percentage of this putative historic range includes temporary wintering or resting grounds? This lack of data makes it impossible to realistically reconstruct lesser prairie chicken behavior or range of over 100 years ago and extrapolate it to existing conditions.

APPENDIX 2

An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens

A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group

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Issue: Each state monitors spring populations of lesser prairie-chickens with similar (but not exact) methods to detect and count birds on leks. Additionally, sampling effort has varied overtime with generally more extensive efforts in recent years. Thus far, comparison between or among states has not been possible because of these facts.

Need: A unifying analytic method for assessing trend of lesser prairie chicken populations among states and geographic regions is needed to evaluate past and future population performance as a result of conservation actions or changes in land use.

A proposed method: There have been 3 range-wide assessments of greater sage-grouse population dynamics and persistence (Connelly et al. 2004, WAFWA 2008, Garton et al. 2010), and similar issues of data consistency and variation in sampling effort were common to all three studies. Garton et al. (2010) is the only peer reviewed published article from the three, and was largely based on the analytic methods in Connelly et al (2004). Using population reconstruction from annual counts at leks, density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) models of population growth can be fit and population parameters of growth ($\square_t$), population equilibrium, and quasi-extinction probabilities can be estimated.

In this example, data were pooled by 4 geographic regions, sand sagebrush (CO, KS), CRP-shortgrass prairie (KS), mixed grass prairie (SE KS, OK, TX-Panhandle), and shinnery oak (NM, TX west) in which to estimate annual rates of change ($\square_t$), average growth rate (trend from 1997-2011), variation of ($\square_t$), quasi-extinction probability (population drops to 25% of equilibrium), and population equilibrium. Data across all regions was pooled to assess trend and estimate population parameters for the entire lesser prairie chicken range. Finally, concern has been generated regarding declines in populations in 2012. To address this concern, a worked example assuming a 50% decline (2012 trends have not been finalized yet) in trend rangewide occurred is provided to demonstrate what affect it may have on the entire range.

Lesser prairie chicken lek counts reported by individual states were summarized within ecologic regions and used to reconstruct an index to the historical abundance of the population within each zone. We treated the number of lesser prairie chicken counted

at leks in the final year as an index to the minimum number of lesser prairie chicken attending leks. Lek counts in each year were a cluster sample of lesser prairie chicken and thus treated by standard finite population sampling procedures (Scheafer et al. 1996: 297).

Sampling effort devoted to counting leks has varied enormously from year to year and grown appreciably in the last 5 years. To standardize estimates and remove bias due to variable sample sizes we treated the number of lesser prairie chickens counted in the initial count (or another base year if final year counts were inadequate) as the standard for projecting later counts by applying a ratio estimator (Scheafer et al. 1996: 200) to estimate the finite rate of change (λ_t) for the population between successive years as follows. Beginning with the initial year of a route (1997 or more recent), lesser prairie chicken counted along each route censused in both 1997 and 1998 were treated as cluster samples of individual lesser prairie chickens in successive years. The ratio of lesser prairie chickens counted in a pair of successive years estimates the finite rate of change at each route in that one year interval (λ_t). These ratios were combined across routes within a region for each year to estimate the finite rate of change for the entire population within a zone to estimate the finite rate of change for that management zone between successive years (e.g. 1997 to 1998):

$$\lambda(t) = \frac{\sum_{i=1}^{n} M_i(t+1)}{\sum_{i=1}^{n} M_i(t)}$$, where $M_i(t)$ = number of LPEC counted along route *i* in year *t*,

across *n* routes counted in both years *t* and *t+1*,

Because methodologies were not exact, an average λ_t was calculated among routes and states for each region. Unlike previous methods, that reconstructed populations from the penultimate year backwards, in this method the index to population size was projected forward from 1997 to assess trend since LESSER PRAIRIE CHICKEN were classified as a candidate as a threatened or endangered species. This approach does not affect the rates of change or persistence estimates, but provides a baseline more meaningful to the conservation question at hand. Because population sizes were not well described in 1997, and the method is based on proportional changes of ratios, all trends were assessed as a percentage of the 1997 index which was set to 100% (See Connelly et al. 2004). The index to population size for subsequent years was then calculated by taking the number of LESSER PRAIRIE CHICKENs counted in the initial year (1997) as a baseline estimate of population size within a region and projecting the next year's minimum LESSER PRAIRIE CHICKEN abundance by multiplying the 1997 abundance by the ratio estimator of the finite rate of change from 1997 to 1998 (e.g. finite rate of change of 0.81 between 1998 and 1999 suggested that the 19% fewer

LESSER PRAIRIE CHICKEN were counted at leks in 2000 than in 1999). This process was repeated for the change from 2000 to 2001 (finite rate of change of 1.015) yielding a breeding population index for a given zone in 2001 and so on up to 2011. Repeating this process for each management zone yielded a population index for each zone stretching from 1997 to 2011 for populations in all regions. These population indices provided the basis for all further analyses and modeling.

Fitting population growth models

Using the time series of population indices for each region, 2 stochastic population growth models were fit including: (1) exponential growth with process error (EGPE, Dennis et al. 1991), (2) exponential growth state space (EGSS, Staples et al. 2004) which incorporates both process and sampling error, and most importantly allows for the parsing of these error rates for more precise estimates of population persistence.

Results:

CRP-shortgrass.—There were 3 routes established to monitor trends of LESSER PRAIRIE CHICKEN in the CRP grasslands north of the Arkansas River in Kansas beginning in 2000. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 4.4% annually (Figure 1A; Table 1). The equilibrium of a density dependent population was approximately 99% of the baseline in 2000, and the probability of extinction (declining to 25% of equilibrium) was 2%.

Mixed-grass prairie.– There were 6 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS, OK, and TX, 2 of which began in 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 7.0% annually (Figure 1B; Table 1). The equilibrium of a density dependent population was approximately 229% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was <0.0001%.

Sand sagebrush prairie.– There were 7 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS and CO both of which began prior to 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 2.0% annually (Figure 1C; Table 1). The equilibrium of a density dependent population was approximately 183% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 48%.

Sand shinnery oak.– There were 29 routes to monitor LESSER PRAIRIE CHICKEN in shinnery oak habitat of NM and TX. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 5.1% annually (Figure 1D; Table 1). The equilibrium of a density dependent population was approximately 196% of the baseline

in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide.– There were 45 routes to monitor LESSER PRAIRIE CHICKEN across the range. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 10.6% annually (Figure 1E; Table 1). The equilibrium of a density dependent population was approximately 276% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide 2012.–Assuming a 50% decline in trend across the range, the 10-yr average annual finite rate of population change (λ_t) indicated population growth of 6.4% annually (Figure 1F; Table 1). The equilibrium of a density dependent population was approximately 262% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 3.3%.

Summary.– Regionally populations continue to show significant signs of population growth, however, because of low rates of growth and large variation in estimates of lambda, sand sagebrush habitat (14% of species distribution) was one region that indicated the greatest likelihood of reaching 25% or less of the equilibrium population size. Thus, 86% of the species' distribution exhibits population growth (>2% annually) with low probability of extinction. Range-wide analysis indicates the species as whole has grown at a rate of 10.6% since 1997 with low probability of extinction. Lastly, if the range-wide population trends did decrease by as much as 50% in 2012, populations are projected to be 73% greater than in 1997, and likelihood of population persistence remains high (>96%).

A peripheral examination of population trends prior to the 1997 candidate status recommendation, indicates that on average populations from 1980-1997 were declining at an average annual rate of 3.7%, post candidate status population growth was 6.9% increase annually.

Further refinements: There are 3 recommendations to make this modeling approach more rigorous with the existing data: 1) to analyze the data on a lek by lek analysis rather than at the route or county scale, 2) where longer term data exist develop models for longer time periods that specifically identify significant transitions in trend (upwards or downwards), to better understand temporal factors that may be affecting different historic periods and changes in land use, and 3) once population estimates are available from aerial surveys in 2012 then trend analyses and PVA can be conducted relative to population size and trends

beginning in 2012 and projecting backwards. This approach would be almost identical to that of greater sage-grouse PVA conducted by Garton et al. (2010).

Literature cited.

Connelly, J. W., S. T. Knick, M. A. Schroeder, and S. J. Stiver. 2004. Conservation assessment of greater sage-grouse and their habitats. Western Association of Fish and Wildlife Agencies. Cheyenne, Wyoming.

Garton, E. O., J. W. Connelly, C. A. Hagen, J. S. Horne, A. Moser, and M. A. Schroeder. 2010. Greater Sage-Grouse population dynamics and probability of persistence. Studies in Avian Biology 38: 293-382.

Western Association of Fish and Wildlife Agencies. 2008. Greater sage-grouse population trends an analysis of lek databases. Unpublished report, Cheyenne, Wyoming.

Figures

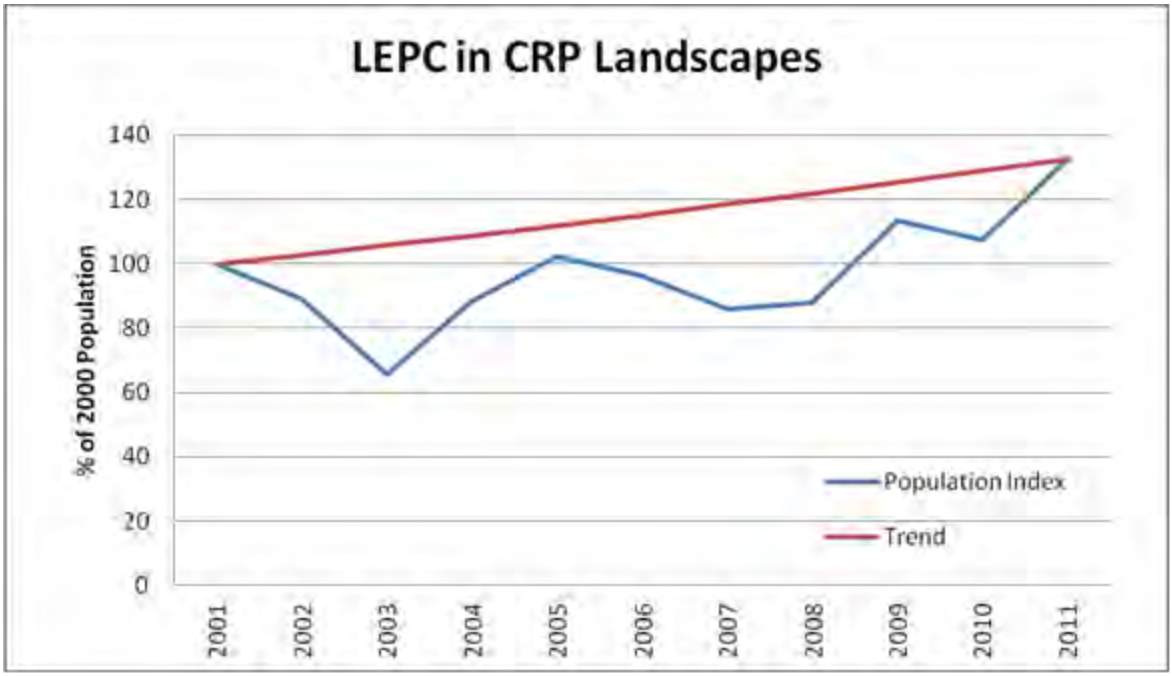


Figure 1A. Lesser prairie-population index for CRP Landscapes from 2001-2011, quantified as a percentage of the 2001 baseline population.

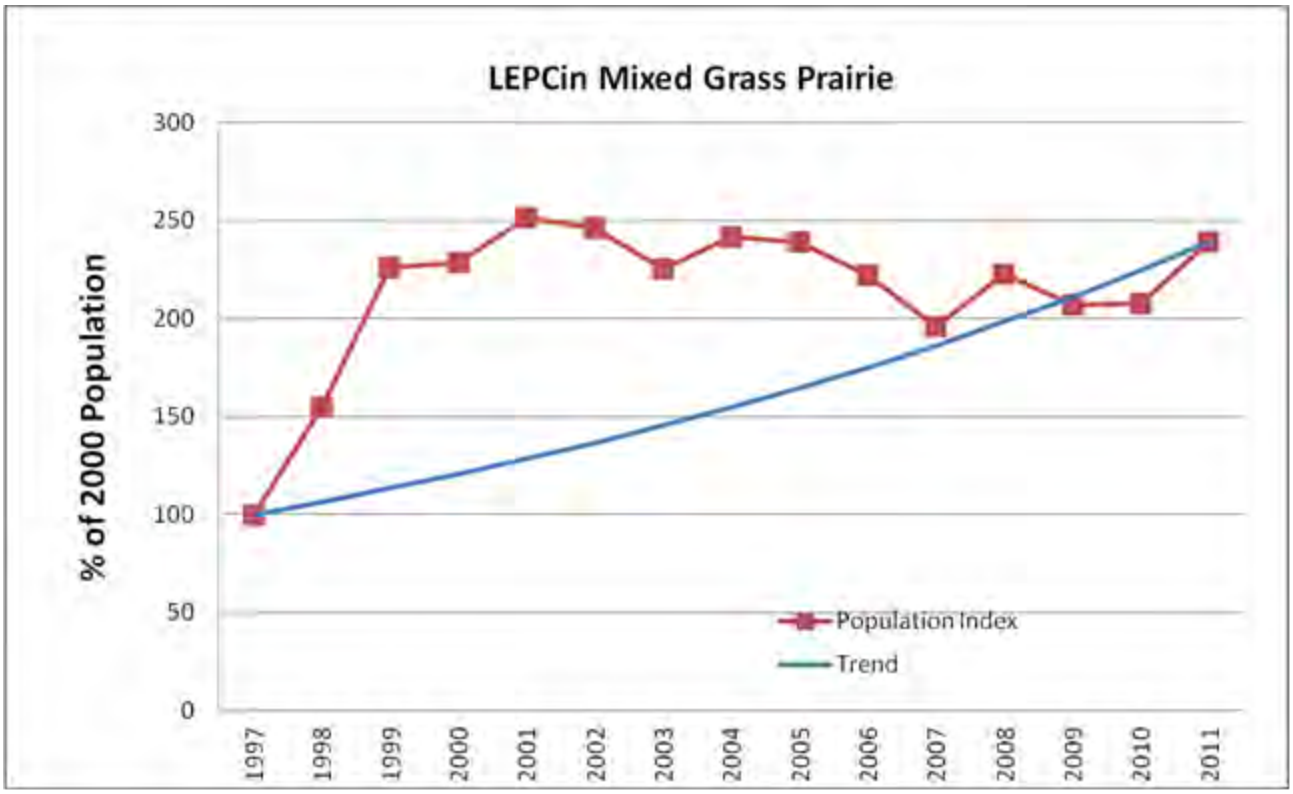


Figure 1B. Lesser prairie-chicken population index for mixed grass-prairie landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

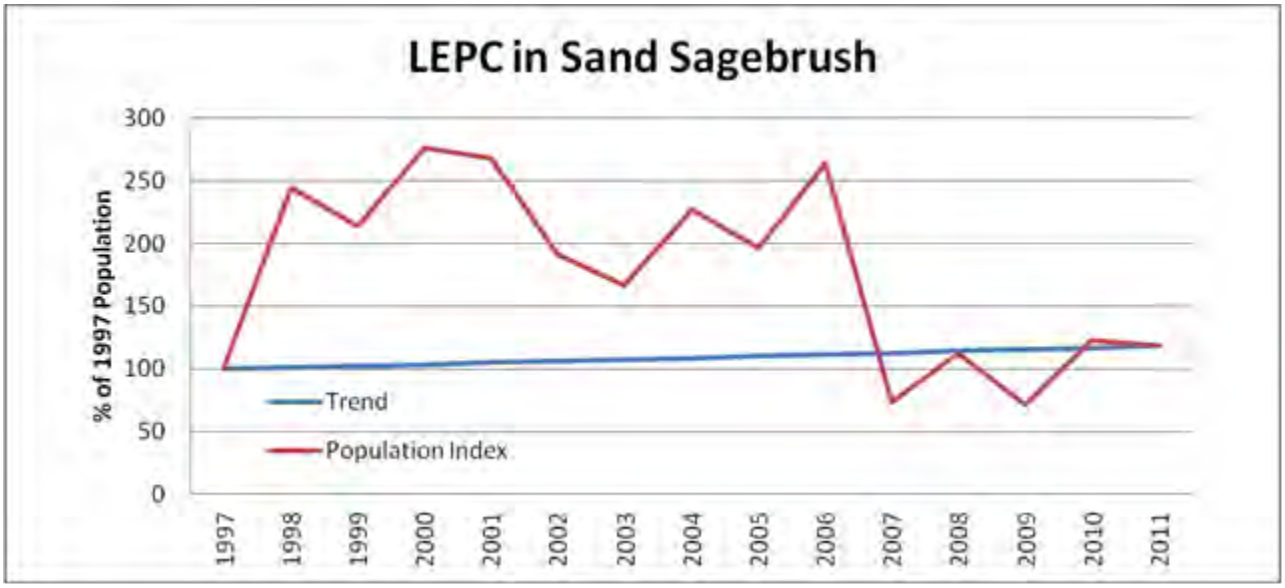


Figure 1C. Lesser prairie-chicken population index for sand sagebrush landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

Figure 1D. Lesser prairie-chicken population index for sand shinnery oak landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

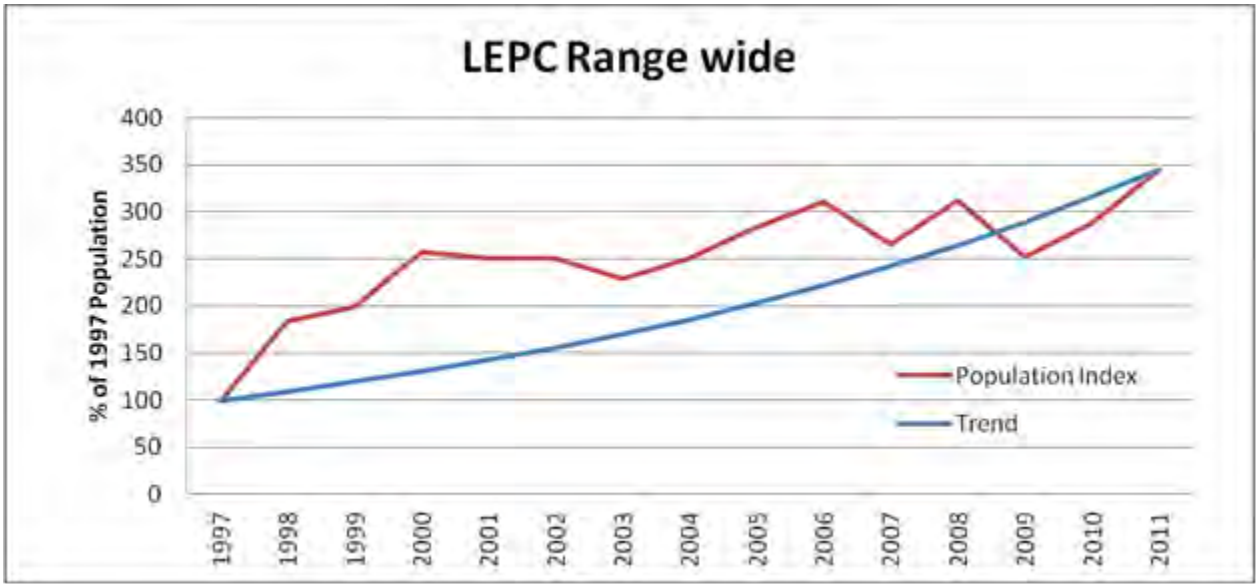


Figure 1E. Lesser prairie-chicken Range-wide population index from 1997-2011, quantified as a percentage of the 1997 baseline population.

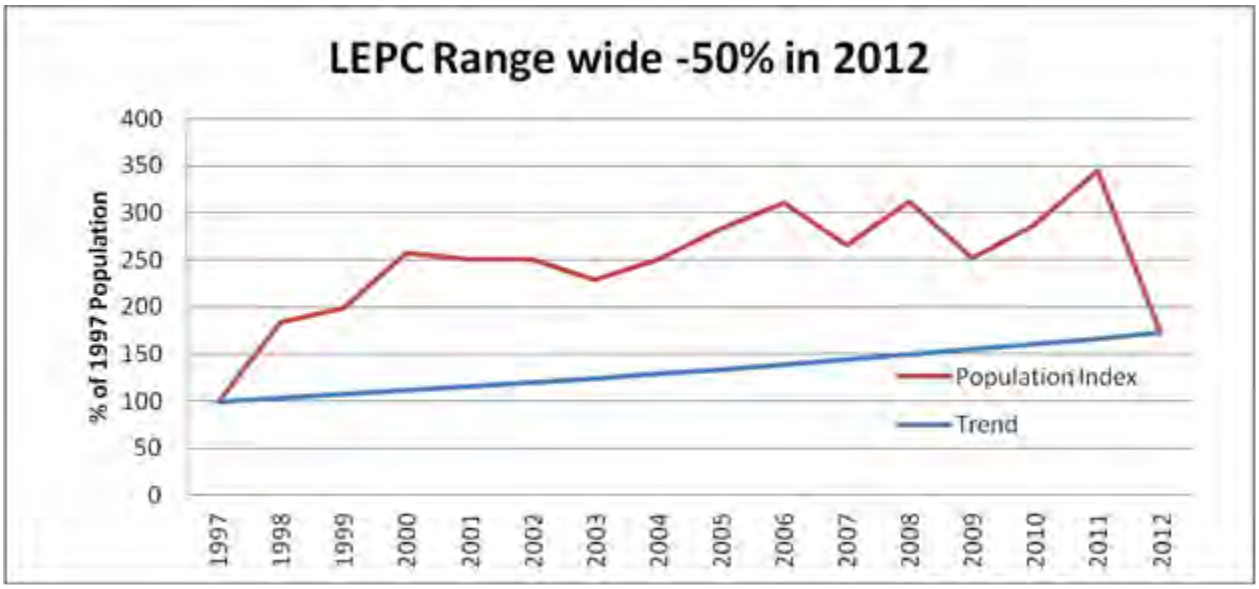


Figure 1F. Hypothetical lesser prairie-chicken Range-wide population index from 1997-2012 assuming a 50% decline from 2011-2012, quantified as a percentage of the 1997 baseline population.

Table 1. Parameter estimates from density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) population models for Lesser Prairie-Chickens in 4 regional areas 1997-2011. Range-wide estimates are provided for the same time period, and a hypothetical example demonstrating what a 50% decline in 2012 might forecast for the species. Where, r = instantaneous rate of growth adjusted for sampling variation, se(r) standard error of r, r' = unadjusted instantaneous rate of growth, lambda = finite rate of population growth (exp(r)), nq = population equilibrium under density dependent model, ne(nu) = quasi-extinction threshold (25% of of nq), pi = probability of population reaching ne(nu), theta = time in which ne(nu) would be reached if threshold was reached, and %EOR = percentage of the Estimated Occupied Range these trend results represent.

Region	r	se(r)	r'	lambda	nq	ne(nu)	pi	theta	%EOR
Mixed	0.074	0.005	0.101	1.077	229	57	0.000	18.8	44%
Sage	0.020	0.077	0.022	1.020	183	46	0.482	68.5	14%
Oak	0.051	0.022	0.062	1.052	196	49	0.002	27.2	19%
CRP	0.044	0.032	0.059	1.045	99	25	0.021	31.2	24%
Range	0.106	0.038	0.114	1.112	276	69	0.000	13.0	100%
2012**	0.064	0.052	0.068	1.066	262	66	0.033	21.8	100%

APPENDIX 3

An evaluation of the historic range changes that have occurred in the Lesser Prairie Chicken since the Last Glacial Maximum.

Species have niches in ecological time and space that can be defined in various ways. Currently, a commonly accepted scientific approach is to use a technique called Ecological Niche Modeling (ENM) or to others, Species Distribution Models (SDM). Today, these techniques are considered part of biodiversity informatics.j

The approach involves taking a set of georeferenced locality points for a species, and then using a computer algorithm to build a model that predicts these points using current information on climate, such as temperature, rainfall, or degree of seasonality. The model then generates a predicted distribution of the species that can be tested by seeing how well known locality points (that were not part of the original model) are predicted.

One can then predict where the niche space for the species occurred at different points in time. Currently, readily available climate data exist for the Last Glacial Maximum (LGM; 21,000 years before present [ybp]) and the Last Interglacial (120,000 ybp). This gives a view of the species' range during the maximum southward extent of the last major north temperate glacier, and shows how and where the species was displaced to (if displaced at all).

We obtained a georeferenced list of 110 occurrences for the lesser prairie chicken (Table 1) from an online source of museum and observation records (Ornis-2). These span many years and give an indication of where the species occurred historically (since museum specimens started being preserved). We used the program Maxent to model distributions. After a preliminary analysis involving 10 independent runs, we selected climate layers that provided over 5% to the model (

The predicted current distribution of the lesser prairie chicken (Fig. 1) agrees well with known and recent historical distribution, with the exclusion of what is considered the southern part of the range in Texas. This might be because, as discussed elsewhere, it was mainly a non-breeding area. Locality points omitted from the model were predicted with 93% accuracy suggesting that the model performs very well.

The contribution of the climate variables to the model were: Mean Temperature of Driest Quarter (43%), Precipitation of Warmest Quarter (16.5%), Precipitation Seasonality (Coefficient of Variation) (15.9%), Mean Temperature of Warmest Quarter (13.4%), Temperature Seasonality (8.7%), and Isothermality (BIO2/BIO7) (2.5%). It appears that

lesser prairie chickens are considerably influenced by the temperature at the driest part of the year.

We used the model to predict the distribution of the lesser prairie chicken at the LGM, assuming that the niche has not evolved and that the same environmental parameters were present at both time periods. As might be expected during a time of southerly range displacements owing to glacial advances, the range of the species was shifted south and west (Fig. 1, blue). It also can be seen that the predicted range was considerably more fragmented and reduced in areal extent. This suggests that lesser prairie chickens have survived extended periods of range fragmentation.

Table 1. Longitude (first number) and latitude (second number) for 110 localities for lesser prairie chickens obtained from Ornis2 (http://ornis2.ornisnet.org/).

-104.3247985,38.4328835; -98.32064,38.49836; -100.35,37.283; -100.2670064,37.0826239; -101.3473741,38.4817103; -100.3709181,37.2370813; -96.5981521,38.3051704; -100.7333333,37.85; -100.986,37.88333333; -100.0233333,37.855; -101.05,37.81666667; -100.05,37.85; -100.75,37.85; -100.0166667,37.85; -100.7666667,37.86666667; -100.8166667,37.86666667; -100.7666667,37.88333333; -101.0833333,37.88333333; -101.9833333,37.9; -101.9666667,37.9; -100.0666667,37.83333333; -100.0666667,37.86666667; -100.7333333,37.83333333; -99.5334,38.1087; -100.2358583,37.1402; -100.570589,37.1033548; -100.4666672,37.25; -100.0237999,37.7580571; -100.4662,37.09608; -100.8722222,37.97166667; -100.9888889,37.79444444; -101.1336803,37.8512936; -101.04,37.84; -101.05,37.844; -100.8654953,37.974823; -100.1661233,37.10322; -102.58177,42.06867; -100.407486,40.0407579; -103.18355,33.62926; -103.3396721,33.6428738; -103.0999985,35.34999847; -104.2283,32.4206; -104.2667,32.45; -103.183052,33.629166; -103.2804947,33.543606; -103.1650051,33.6407777; -103.59829,35.719908; -104.2283325,32.42055511; -103.2659912,33.5871673; -103.1835594,33.6292667; -104.2448044,32.4501; -104.2456627,32.4522729; -106.8189278,36.2283497; -103.1877136,33.6512083; -103.3049766,33.6428738; -103.4949646,34.0890633; -104.4119186,33.602314; -103.3401489,33.644349; -103.2234191,33.6420625; -103.1925201,33.5293753; -103.760376,35.1201894; -104.6245622,32.4628466; -103.3917154,33.6437204; -103.14,33.6565; -103.1536667,33.70766667; -103.1095833,33.69303333; -103.144,33.71993333; -103.1740667,33.6883; -106.0253796,34.1656598; -103.1451667,33.64996667; -103.1391667,33.695685; -103.1406,33.70101667; -103.1105667,33.68353333; -103.1404333,33.64923333; -103.172,33.69523333; -103.1381,33.65913333; -103.1395,33.65883333; -103.1497833,33.70505; -103.1715167,33.69496667; -103.312382,33.6428738; -103.1148167,33.68505; -103.1274667,33.68211667; -103.05038,33.75831; -103.12661,33.85024; -103.12695,33.85074; -103.27935,33.62703333; -103.1144444,33.68583333; -103.1451667,33.66856667; -103.6326599,34.3133827; -99.77119,36.02616; -99.77119,35.9899; -99.67005,36.0529; -99.765129,35.8848778; -99.77119,36.03342; 9628.12,3649.21; -96.6503334,36.9375441; -99.65741,36.04264; -99.6818,36.00441; -99.64477,36.03238; -99.66392,36.00441; -99.64604,35.85937; -99.77119,35.93189; -99.7792053,36.2254423; -99.2710876,36.433437; -98.7157861,35.3080899; -98.4933319,29.4238892; -100.2709541,35.4453278; -101.6632921,30.6870249; -100.193,36.071; -96.262207,43.084937;

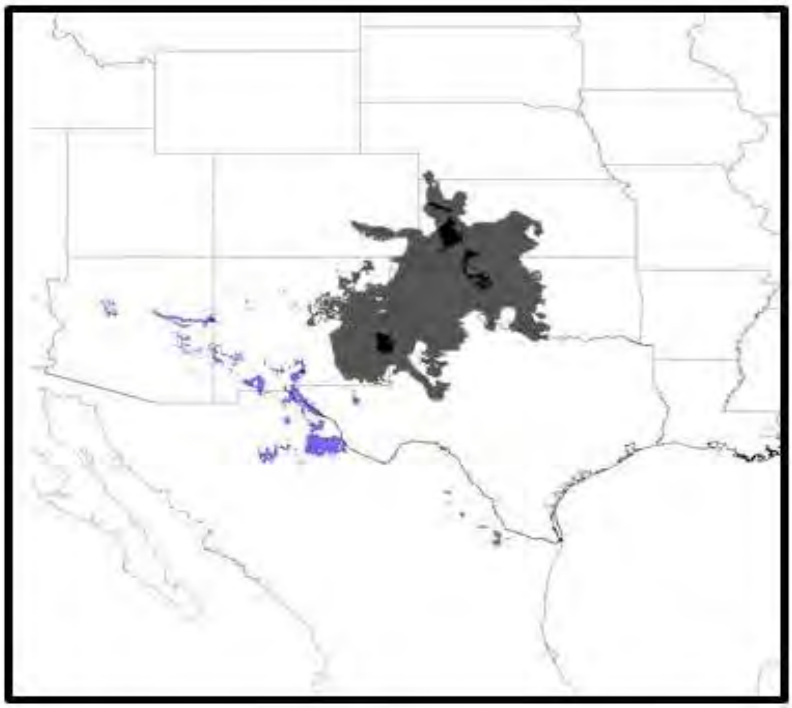


Figure 1. Predicted distribution of lesser prairie chicken at present (black, gray) and at Last Glacial Maximum (blue). For present distribution, black indicates area of highest predicted occurrence.

APPENDIX 4-- FEDERAL PROTECTIONS

Agency	Law/Mgt. Directive/Agreement	ESA Provisions
ALL	**National Environmental Policy Act of 1969 (NEPA) [(42 U.S.C. 4332(2)(C)** The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. By regulation, a Biological Assessment is prepared for "major construction activities". Under NEPA, those considered to be Federal actions significantly affecting the quality of the human environment as referred to meet NEPA requirements federal agencies prepare a detailed statement known as an Environmental Impact Statement (EIS). EPA reviews and comments on EISs prepared by other federal agencies, maintains a national filing system for all EISs, and assures that its own actions comply with NEPA.	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Take protection also provides limited habitat protection if the habitat alteration results in death of an individual. • In the case of the lesser prairie chicken, there no habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Protection of critical habitat is limited to habitat affected by a federal agency action,
	Federal Land Policy and Management Act of 1976", Sec. 101. [43 U.S.C. 1701 (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest; **…** (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat which are also affected by federal agency actions (moot, as

	atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;…(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;…[87]	the FWS is not designating for the lesser prairie chicken) • In Reviewing the activities of federal agencies, ESA limitations on take are only that it may not result in jeopardizing the continued existence of listed species, • IN the case of lesser prairie chicken, take is prohibited under state anti-poaching laws. • The ESA does not require comprehensive management plans.
ALL	**Executive Order 13112, February 3, 1999, "Invasive Species"** **Section 2. Federal Agency Duties** (a) Each Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, (1) identify such actions;(2) subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv)	Executive Order 13112 requires that all federal agencies prevent degradation of all habitat (not only lesser prairie chicken habitat) by ensuring that invasive species are prevented and/or controlled. This EO requires restoration of habitat. • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for

[87] http://www.blm.gov/flpma/FLPMA.pdf

	provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and (3) not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has pre-scribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions. (b) Federal agencies shall pursue the duties set forth in this section in consultation with the Invasive Species Council, consistent with the Invasive Species Management Plan and in cooperation with stakeholders, as appropriate, and, as approved by the Department of State, when Federal agencies are working with international organizations and foreign nations.	the lesser prairie chicken) • In reviewing the activities of federal agencies, the limitations on take are only that it may not result in jeopardizing the continued existence of listed species,
BLM and FS	**Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And**	No additional protection under the ESA. The MOU provides for "voluntary" consultation on candidate species, such as a lesser prairie chicken. The primary functions of the ESA

	Wildlife Service[88] This MOA establishes interagency commitment to and guidance for the following: (1) Early interagency communication, coordination, consultation, and conferencing on candidate, proposed, and listed species to take place prior to and during plan/program proposal development… The scope of this MOA includes Land and Resource Management Plans prepared by the FS pursuant to the National Forest Management Act of 1976 [16 U.S.C. 1601-1614] and Resource Management Plans and Management Framework Plans prepared by the BLM pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701-1784]. The MOA may also be applied to other programmatic level proposals. These may include, but are not limited to, a recreation or grazing program, riparian restoration strategy, multi-year forest management activities, recovery strategy or other proposals. The Service provides this information related to "programattic biological opinions": Developing a programmatic biological opinion. Once the biological assessment is completed, a determination on the need for formal consultation will be made by the Service. Formal consultation is required when a Federal action is likely to adversely affect listed species. When it is determined that an action may affect, but is not likely to adversely affect listed	are to prohibit "take" of the listed species (which is addressed by each States wildlife code) and the "consultation" on federal lands. BLM Management Manual already prescribes such protections for 'special status species' of which the lesser Prairie Chicken is one. Further, under the MOA, consultation has already occurred for the federal lands under BLM management. The ESA provides only for protection for listed species by : • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Does not require management plans • The ESA limits protection to listed species, their designated critical habitat where a federal

88 http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

	species, the consultation between the action agency and the Service may be handled informally (see 50 CFR §402.11 for further information on the informal or early consultation process). If formal consultation is necessary, a programmatic biological opinion will be developed by the Service in consultation with the Agencies. Attachment 3 gives a template for a programmatic biological opinion. This programmatic biological opinion will: (1) describe all of the potential projects; (2) contain suggested avoidance/minimization measures, placed in the project description, if appropriate; (3) describe the status and environmental baseline of listed, proposed, and candidate species in the project area; (4) reiterate potential effects of the project actions as evaluated in the biological assessment; and, (5) possibly describe limits to the amount of project impacts, take, and habitat affected and/or lost. A jeopardy analysis will be done to determine whether the programmatic process should proceed (see jeopardy discussion below).[89]	action is affecting them. • In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being designated. Given the limitations of the ESA and the voluntary actions and agreements by the agencies primarily involved in the activities the rule finds are "threatening" the lesser prairie chicken, the ESA provides no additional protections to the species.
BLM	**Special Status Species Management-Handbook 6840[90]** The stated purpose of BLM Handbook 6840 ("Special Status Species Management Handbook" is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special	The ESA requires that the FWS be consulted on actions affecting listed species on federal lands. • The ESA limits protection to listed species, their

[89] http://www.fws.gov/endangered/esa-library/pdf/pages7-18.pdf

[90] http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	status species are: (1) species listed or proposed for listing under the Endangered Species Act (ESA), and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s). All Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.[91] In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA. Any obligation to conserve proposed critical habitat under this section is terminated at the time the proposal becomes final or the habitat is no longer proposed for listing. All federally designated candidate species, proposed species, and delisted species in the 5 years following their delisting shall be conserved as Bureau sensitive species. A. Designation of Bureau Sensitive Species. State Directors shall designate species within their respective States as	designated critical habitat where a federal action is affecting them. • Does not require management plans, . The BLM's Special Status Species Management Handbook outlines a policy that is much more inclusive and relates directly to species that are considered "sensitive" at a state level. Each of the states referenced in the proposed rule currently consider the lesser prairie chicken to be sensitive, thus, the current policy provides more protection than the ESA.

91 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	Bureau sensitive by using the following criteria. For species inhabiting multiple States, State Directors shall coordinate with one another in the designation of Bureau sensitive species so that species status is consistent across the species' range on BLM-administered lands, where appropriate.	
FERC	**Transmission Line Regulation** The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.	The proposed rule emphasizes the potential adverse effect of increased transmission as a result of transmission lines and implies that the proposed listing is the only protection available for lesser prairie chicken and their habitat. However, FERC requires consideration of wildlife and their habitat in considering siting and construction of these lines. In addition, because the permitting is undertaken by FERC, NEPA applies which would necessitate a full review of the effects on the lesser prairie chicken.
BLM, AFWA, WAFWA, FS	**Memorandum Of Understanding Among Association Of Fish And Wildlife Agencies (AFWA) And Western Association Of Fish And Wildlife Agencies (WAFWA) And U.S. Department Of Agriculture Forest Service (FS) And U.S. Department Of The Interior Bureau Of Land Management (BLM)** "The purpose of this Memorandum of Understanding (MOU) is to promote cooperative conservation of fish and	This MOU provides that these federal agencies will engage in cooperative activities for the benefit of wildlife, particularly priority wildlife impacted by energy development issues. We note this includes wind power. The ESA provides only for protection for listed species by reviewing the activities of federal agencies. The

	wildlife resources by facilitating communications and enhancing success in resolving issues related to energy development and its effect on fish, wildlife, and habitat."[92] The Parties' joint objectives are to: 1. Identify and define the key fish and wildlife habitat/energy development issues at the species, habitat, and wildlife community levels across state, administrative and district lines. 2. Develop communication systems to keep state fish and wildlife agencies, federal land management/permitting agencies, and the energy industry informed about and involved in programmatic issues related to maintenance and enhancement of fish, wildlife and habitat resources during energy development.	limitations on take are only that it may not result in jeopardizing the continued existence of the species • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Protection of critical habitat is limited to habitat affected by a federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA regulatory provisions do not provide for enhancement of wildlife or its habitat.
DOT	**Department Of Transportation, Federal Highway Administration, 23 CFR Part 777, Mitigation of Impacts to Wetlands and Natural Habitat** The Federal Highway Administration (FHWA) provides stewardship over the construction, maintenance and preservation of the Nation's highways, bridges and tunnels. FHWA also conducts research and provides technical assistance to state and local agencies in	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • In the case of the lesser prairie chicken, no

92 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/ib_attachments/2009.Par.99939.File.dat/IB2009-072_att1.pdf

	an effort to improve safety, mobility, and livability, and to encourage innovation.[93] This regulation was developed to "provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal aid projects funded pursuant to provisions of title 23, U.S. Code." … In considering projects under this section, the following requirements must be met: (a) The reasonableness of the public expenditure and extent of Federal participation with title 23, U.S. Code, funds shall be directly related to: (1) The importance of the impacted wetlands and natural habitats; (2) The extent of highway impacts on the wetlands and natural habitats, as determined through an appropriate, interdisciplinary, impact assessment; and (3) Actions necessary to comply with the Clean Water Act, Section 404, the Endangered Species Act of 1973, and other relevant Federal statutes. (b) Evaluation of the importance of the impacted wetlands and natural habitats shall consider: (1) Wetland and natural habitat functional capacity; (2) Relative importance of these functions to the total wetland or natural habitat resource of the area; (3) Other factors such as uniqueness, esthetics, or cultural values; and (4) Input from the appropriate resource management agencies through interagency coordination. (c) A	habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Does not require management plans.

9393 https://www.fhwa.dot.gov/

	determination of the highway impact should focus on both the shortand long-term affects of the project on wetland or natural habitat functional capacity, consistent with 40 CFR part 1500, 40 CFR 1502.16, 33 CFR 320.4, and the FHWA's environmental compliance regulations, found at 23 CFR part 771.[94]	
BLM	**2008 Special Status Species Resource Management Plan Amendment (2008 RMPA)** Address land-use decisions affecting special status species, primarily the habitats of lesser prairie chickens and sand dune lizards. Established the Lesser Prairie-Chicken Area of Critical Environmental Concern (ACEC).[95] [96]	The Special Status Species Resource Management Plan Amendment by BLM identifies the requirement that BLM consult with the FWS on activities that may affect wildlife even if the species is not listed.
	2008 Designation of Area of Critical Environmental Concern[97] Area of Critical of Environmental Concern (ACEC) are special management areas designated by BLM to protect significant historic, cultural, or scenic values; fish and wildlife resources; natural process or systems; and/or natural hazards that:	• Any ESA habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken)

[94] http://www.gpo.gov/fdsys/pkg/FR-2000-12-29/pdf/00-33194.pdf#page=12
[95] http://www.blm.gov/nm/st/en/fo/Roswell_Field_Office/special_status_species.html
[96] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf
[97] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf

	• have more than locally significant qualities which give it special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource; • have qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change; • has been recognized as warranting protection in order to satisfy national priority concerns or to carry out the mandates of Federal Land Management and Practices Act (FLMPA); • has qualities which warrant highlighting in order to satisfy public or management concerns about safety and public welfare; and/or • poses a significant threat to human life and safety or to property.	
BLM	**Managing Structures for the Safety of Sage-grouse, Sharp-tailed grouse, and Lesser Prairie-chicken**[98] This Instruction Memorandum (IM) provides guidance to effectively address sage-grouse, sharp-tailed grouse, and lesser prairie-chicken collisions with fences and other structures on public land.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all lands managed by BLM.

98 http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-022.html

FWS	**FWS Wind Energy Guidelines** FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [99] Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all affected lands.
BLM	**Reclamation and Best Management Practices Best Management Practices "BMP" for the Lesser Prairie Chicken** In "Appendix 5 Reclamation And Best Management Practices" to BLM's 2008 RMPA, BLM states that it will "incorporate appropriate Best Management Practices (BMPs" for the lesser prairie chicken " into proposed Applications for Permit to Drill (APDs) and associated rights-of-way (ROW) approvals after appropriate National Environmental Policy Act (NEPA) evaluation." [100]	

[99] http://www.fws.gov/windenergy/docs/WEG_final.pdf

[100] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34869.File.dat/pdf_rmpa_final_document_11_07_app_5.pdf

APPENDIX 5-- STATE AND LOCAL PROTECTIONS

COLORADO

Applicable State Laws	Comparison to Applicable ESA provisions
WILDLIFE Colorado statutes provide intent to protect species and will require that "…, there shall be a continuous operation of planning, acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities."[101] There is no limitation on the wildlife or species this applies to.	The ESA provides for • No planning, acquisition or development of wildlife habitats • Protects only listed species and designated critical habitat. • Limits activities and protections to listed species and designated critical habitat.
LAND USE, CONSERVATION **Colorado has vested its local government with authority to regulate land use to consider wildlife habitat and species.** … Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;"[102]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
LOCAL GOVERNMENT, PLANNING AND	The ESA provides no authority to undertake such planning, aquisition,

[101] (Colorado Revised Statutes, Title 33, Article 1 http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[102] C.R.S. 29-20-104 (2012), Title 29. Government - Local, Land Use Control And Conservation, Article 20.Local Government Regulation of Land Use, Part 1. Local Government Land Use Control Enabling Act, 29-20-104. Powers of local governments. ... for local governments to regulate land use to protect wildlife habitat and wildlife species. Drostev. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003). http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

ZONING **Colorado law establishes a Commission with specific direction to consider protected species in municipality development.** (1) It is the duty of the commission to make and adopt a master plan for the physical development of the municipality. When a commission decides to adopt a master plan, the commission shall conduct public hearings, after notice of such public hearings …, prior to final adoption of a master plan …. Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall, after consideration of each of the following, where applicable or appropriate, show the commission's recommendations for the development of said municipality and outlying areas, including:… (II) The United States fish and wildlife service of the United States department of the interior and the parks and wildlife commission created in section 33-9-101, C.R.S., for locating areas inhabited by endangered or threatened species; [103]…	and management actions. Nor does the ESA require consultation on non-federal lands (absent a federal nexus).
WILDLIFE "(1) It is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors. It is further declared to be the policy of this state that there shall be provided a comprehensive program designed to offer the greatest possible variety of wildlife-related recreational opportunity to the people of this state and its visitors and that, to carry out such program and policy, there shall be a continuous operation of planning,	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a

[103] C.R.S. 30-28-106 (2012), Title 30. Government - County, County Planning And Building Codes, Article 28.County Planning And Building Codes, Part 1. County Planning, 30-28-106. Adoption of master plan

acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities. (2) All wildlife within this state not lawfully acquired and held by private ownership is declared to be the property of this state. Right, title, interest, acquisition, transfer, sale, importation, exportation, release, donation, or possession of wildlife is permitted only as provided in articles 1 to 6 of this title or in any rule of the parks and wildlife commission..[104]… Right to capture or kill exists only as permitted by statute."	federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. • Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE, ENDANGERED SPECIES **Colorado may protect species which do not qualify for federal ESA listing.** (1) On the basis of investigations of nongame wildlife provided for in section 33-2-104 and other available scientific and commercial data and after consultation with other state wildlife agencies, the Colorado water conservation board, the Colorado water and power development authority, water conservancy districts, and other water conservation districts of the state, and other water resource development agencies within the state, appropriate federal agencies, and other interested persons and organizations, the commission shall by regulation adopted pursuant to the procedures specified in sections 33-1-111 and 24-4-103, C.R.S., establish a list of those species and, where necessary, subspecies of wildlife indigenous to this state which are determined to be endangered or	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Colorado).

[104] C.R.S. 33-1-101 (2012), Title 33. Parks And Wildlife, Wildlife, Article 1.Wildlife - General Provisions, 33-1-101. Legislative declaration http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

threatened within this state, giving their common and scientific names by species and, where necessary, by subspecies…[105]	
WILDLIFE, ENDANGERED SPECIES, CONSERVATION (1) The division shall establish such programs including acquisition of land or aquatic habitat as are deemed necessary for management of nongame, endangered, or threatened wildlife. (2) In carrying out programs authorized by this section, the division may enter into agreements with federal agencies or political subdivisions of this state or with private persons for administration and management of any area established under this section or utilized for management of nongame, endangered, or threatened wildlife. (3) The commission may permit, under such terms and conditions as may be prescribed by regulation, the taking, possession, transportation, exportation, or shipment of species or subspecies of wildlife which appear on the state lists of endangered or threatened species for scientific, zoological, or educational purposes, for propagation in captivity of such wildlife, or for other special purposes.[106] ...	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
WILDLIFE, ENFORCEMENT **Colorado provides for criminal and civil**	The ESA provides protections only for species listed under its provisions.

[105] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-105. Endangered Or Threatened Species. http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-105&sessionyr=2013&Title=33&datatype=S&noheader=1&nojumpmsg=0

[106] C.R.S. 33-2-106 (2012), TITLE 33. PARKS AND WILDLIFE, WILDLIFE, ARTICLE 2. NONGAME AND ENDANGERED SPECIES CONSERVATION, 33-2-106. Management programs. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=23935&userid=PRODSG&cvfilename=&noheader=1&Interface=

penalties for all wildlife unlawfully 'taken', this provision would apply to lesser prairie chickens whether or not they are listed under the ESA Division action to recover possession and value of wildlife unlawfully taken : (1) The division may bring and maintain a civil action against any person, in the name of the people of the state, to recover possession or value or both possession and value of any wildlife taken in violation of articles 1 to 6 of this title. A writ of replevin may issue in such an action without bond. No previous demand for possession shall be necessary. If costs or damages are adjudged in favor of the defendant, the same shall be paid out of the wildlife cash fund. Neither the pendency of such civil action nor a criminal prosecution for the same taking shall be a bar to the other; nor shall anything in this section affect the right of seizure under other provisions of articles 1 to 6 of this title.[107]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES **Colorado can prohibit 'take' of any wildlife species they determine is in need of such protection;** **Colorado can manage any nongame wildlife they determine is in need of such management. Colorado also requires collection of biological and ecological data to prepare management actions.**	The ESA provides only for protection for listed species by : 1. Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, 2. In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being

[107] C.R.S. 33-6-110 (2012), Title 33. Parks And Wildlife, Wildlife, Article 6. Law Enforcement And Penalties - Wildlife, Part 1. General Provisions, 33-6-110. Division Action To Recover Possession And Value Of Wildlife Unlawfully Taken. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24001&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(1) The division shall conduct investigations on nongame wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully. On the basis of such determinations, the commission shall issue regulations and develop management programs designed to ensure the continued ability of nongame wildlife to perpetuate themselves successfully. Such regulations shall set forth species or subspecies of nongame wildlife which the commission deems in need of management pursuant to this section, giving their common and scientific names by species and, where necessary, by subspecies. The commission shall conduct ongoing investigations of nongame wildlife and may from time to time amend such regulations by adding or deleting therefrom species or subspecies of nongame wildlife. (2) The commission shall by regulation establish limitations relating to the taking, possession, transportation, exportation, processing, sale or offering for sale, or shipment as may be deemed necessary to manage nongame wildlife. (3) Except as provided in regulations issued by the commission, it is unlawful for any person to take, possess, transport, export, process, sell or offer for sale, or ship nongame wildlife deemed by the commission to be in need of management pursuant to this section. Subject to the same exception, it is also unlawful for any common or contract carrier to knowingly	designated. 3. Prohibiting “take” of the species. 4. Does not require investigations of biological and ecological data to determine management measures necessary 5. Does not require management plans, . Absent a federal nexus, the ESA cannot regulate activities on non-federal lands.

transport or receive for shipment nongame wildlife deemed by the commission to be in need of management pursuant to this section.[108]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES "1) "Management" means the collection and application of biological information for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels. The term includes the entire range of activities that constitute a modern, scientific resource program including, but not limited to, research, census, law enforcement, habitat acquisition and improvement, and education. Also included within the term, when and where appropriate, is the periodic or total protection of species or populations. "Management" may include artificial propagation to maintain threatened or endangered species populations, in concert with the exercise of water rights, and may also include restriction of stocking of species which are in competition with threatened or endangered species for the available habitat."[109]	The ESA • Only applies to listed species; • Does not require collection of information on listed species • Does not require the implementation of a scientific resource program, or any kind of organized management program. survival. The ESA cannot require participation of state and private actors in recovery activities on non-federal lands.
WILDLIFE, ENFORCEMENT Colorado prohibits 'take' of wildlife generally. Illegal sale of wildlife : (1) (a…, it is unlawful for	The ESA provides protections for listed species by prohibiting take only of listed species.:

[108] Colorado Statutes, Title 33. Parks And Wildlife, Wildlife, Article 2. Nongame And Endangered Species Conservation http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-104&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[109] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-103. Definitions http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=32-15-109&statecd=CO&sessionyr=2012&TOCId=23929&userid=GUEST9&cvfilename=&docname=&Interface=NLL&noheader=1

any person to knowingly sell or purchase, or knowingly offer for sale or purchase, wildlife or to solicit another person in the illegal hunting or taking of wildlife for the purposes of monetary or commercial gain or profit.[110] 2) Any person who violates this section: (a) With respect to big game, endangered species, or eagles, commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S. Upon such conviction, the commission may suspend any or all wildlife license privileges of the person for a minimum of one year to life. (b) With respect to all other wildlife, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and an assessment of twenty license suspension points.[111]	
PLANNING AND ZONING, LOCAL GOVERNMENT **Colorado regulates habitat destruction by mining operators:** (1) Every operator to whom a permit is issued pursuant to this article shall perform the reclamation prescribed by the reclamation plan adopted pursuant to this section….f) In those areas where revegetation is part of the reclamation plan, land shall be revegetated so that a diverse, effective, and long-lasting	1. The ESA provides protections for listed species by regulating activities of federal agencies 2. The ESA cannot require actors on Colorado public lands and private lands to engage in conservation actions.

[110] Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions
[111] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions 33-6-117. Willful Destruction Of Wildlife - Legislative Intent

vegetative cover is established that is capable of self-regeneration and is at least equal, with respect to the extent of cover, to the natural vegetation of the surrounding area. Species chosen for revegetation shall be compatible for the proposed post-extraction land use and shall be of adequate diversity to establish successful reclamation.[112]	
LAND USE, LOCAL GOVERNMENT **Protects public and private habitat of species from the actions of all operators.** Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (a) Regulating development and activities in hazardous areas; (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;…[113]	ESA protects only those habitats designated as critical habitat through regulation of only federal agencies.
WILDLIFE CONSERVATION, FUNDING **Colorado provides a dedicated funding stream for wildlife conservation.** (1)(a) Except as provided in subsections (7) and (8) of this section, sections 33-1-112.5 and 33-6-105, and in part 7 of article 22 of title 39, C.R.S., all moneys received from wildlife license fees, and all moneys from all other wildlife sources, and all interest earned on such	The ESA provides no dedicated funding.

[112] Title 34. Mineral Resources Mines And Minerals Article 32.5. Colorado Land Reclamation Act For The Extraction Of Construction Materials C.R.S. 34-32.5-116 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=PRODSG&interface=NLL&statecd=CO&codesec=34-32.5-116&sessionyr=2012&Title=34&datatype=S&noheader=1&nojumpmsg=0

[113] C.R.S. 30-28-121 Title 30. Government - County County Planning And Building Codes Article 28.County Planning And Building Codes Part 1. County Planning, http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

moneys shall be deposited in the state treasury and credited to the wildlife cash fund, which fund is hereby created, and such moneys shall be utilized for expenditures authorized or contemplated by and not inconsistent with the provisions of articles 1 to 6 of this title for wildlife activities and functions and for the financing of impact assistance grants pursuant to part 3 of article 25 of title 30, C.R.S…. (b) There is hereby created a wildlife habitat account in the wildlife for future generations trust fund, created in paragraph (a) of this subsection (7). The state treasurer shall deduct five million dollars from the wildlife cash fund, created in subsection (1) of this section, and transfer such sum to the wildlife habitat account. The interest earned on such five million dollars shall be continuously appropriated and shall be used solely for operation and maintenance of properties, leases, and easements owned by the division. (8) (a) There is hereby created in the state treasury the habitat partnership cash fund. The moneys in the habitat partnership cash fund shall consist of those moneys annually transferred from the wildlife cash fund in accordance with paragraph (e) of this subsection (8) for the partnership program and any gifts, grants, donations, and reimbursements made to the program from other sources. The moneys in the fund shall be used in accordance with the duties of the habitat partnership council as specified in section 33-1-110 (7) and (8), including, but not limited to, reasonable and necessary expenses incurred by council members in the fulfillment of their duties, as approved by the director. All interest derived from the investment of moneys in the habitat partnership cash fund shall be	

credited to the fund. Any balance remaining in the fund at the end of any fiscal year shall remain in the fund subject to the limitations provided…[114]	
FUNDING ...(4) (a) (I) <u>All moneys received pursuant to the issuance of the Colorado wildlife habitat stamp shall be used for the benefit of wildlife habitat or access to wildlife habitat,</u> including costs associated with the operation and maintenance, such as weed control and fencing, of lands under the Colorado wildlife habitat protection program administered by the division. Revenues collected from the sale of the stamp are subject to annual appropriation….[115]	The ESA provides no dedicated funding.
WILDLIFE, CONSERVATION, FUNDING **Colorado legislature has expressed the priority for funding for the preservation of species of concern, including the LPC.** (1) The general assembly hereby finds, determines, and declares that: (a) Protecting wildlife habitat and obtaining public access are important elements to preserving wildlife and wildlife-related recreational opportunities in Colorado; (b) The general assembly specifically recognizes that hunting of big game species is an activity that hundreds of thousands of residents and visitors to Colorado enjoy, which contributes significantly to state and local economies; and (c) <u>Priorities for the expenditure of funds</u>	The ESA provides no dedicated funding.

114114114 Title 33. Parks And Wildlife Wildlife Article 1.Wildlife - General Provisions C.R.S. 33-1-112 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-1-112&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

115 Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees

generated from the sale of habitat stamps and Colorado wildlife passports shall include protecting big game winter range and migration corridors, acquiring public access to wildlife-related recreation, including fishing, hunting, and wildlife viewing, protecting habitat for species of concern, and preserving the diversity of wildlife enjoyed by Coloradans...[116]	
WILDLIFE, ENFORCEMENT On lands controlled by the Colorado parks and wildlife division, damage to property or habitat (1) It is unlawful for any person to remove, damage, deface, or destroy any real or personal property or wildlife habitat under the control of the division. Any person who violates this subsection (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. In addition, the court may require the defendant to reimburse the division for any damages.[117]	
LAND USE, NATURAL RESOURCES **Colorado specifically protects all wildlife habitat from adverse impacts from all oil and gas operations.** 1) This section shall be known and may be cited as the "Colorado Habitat Stewardship Act of 2007".	The ESA protects only critical habitat from the effects of federal actions. No critical habitat is being designated for lesser prairie chicken so no federal protection will ensue

[116] Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-4-102.7&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[117] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions C.R.S. 33-6-129 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24023&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(2) The commission shall administer this article so as to minimize adverse impacts to wildlife resources affected by oil and gas operations. (3) In order to minimize adverse impacts to wildlife resources, the commission shall: (a) Establish a timely and efficient procedure for consultation with the parks and wildlife commission and division of parks and wildlife on decision-making that impacts wildlife resources;[118] (b) Provide for commission consultation and consent of the affected surface owner, or the surface owner's appointed tenant, on permit-specific conditions for wildlife habitat protection. Such conditions shall be discontinued when final reclamation has occurred....	
WILDLIFE CONSERVATION, LAND USE **Colorado requires that state lands be managed in a manner that protects wildlife habitat.** (1) The state board of land commissioners shall be composed of five members appointed by the governor,....(6) (a) The people of the state of Colorado have recognized in section 10 of article IX of the state constitution that the state school lands are an endowment of land assets held in a perpetual, intergenerational public trust for the support of public schools, which should not be significantly diminished; that the disposition and use of such lands should therefore benefit public schools including local school districts; and that the economic	The ESA only protects the designated critical habitat of a listed species from federal agency actions. No critical habitat is being designated for lesser prairie chickens.

[118] Title 34. Mineral Resources Oil And Natural Gas Article 60.Oil And Gas Conservation C.R.S. 34-60-128 (2012), http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=34-60-128&sessionyr=2010&Title=34&datatype=S&noheader=1&nojumpmsg=0

productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. In recognition of these principles, the state board of land commissioners shall be governed by the standards set forth in section 10 of article IX of the state constitution in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.[119]	

[119] Title 36. Natural Resources - General Public Lands And Rivers Article 1.State Board Of Land Commissioners, C.R.S. 36-1-101.5 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=35-49-104&statecd=CO&sessionyr=2012&TOCId=25658&userid=GUEST9&cvfilename=&docname=&Interface=&noheader=1

TEXAS

Applicable State Laws	Applicable ESA provisions
WILDLIFE **Texas requires a research program and funding to support it to develop wildlife research.** The Texas Agricultural Experiment Station, in consultation with the Agriculture and Wildlife Research and Management Advisory Committee established under Section 88.216, Education Code, shall develop and administer a program to finance agriculture and wildlife research that the Texas Agricultural Experiment Station determines to be of the highest scientific merit and to offer significant promise in providing new directions for long-term solutions to continued agriculture production, water availability, and wildlife habitat availability. [120]	The ESA does not require or fund a research program.
CONSERVATION **Texas protects Game Birds from catch, kill, or possession (dead or alive). Further protections are offered for the nest and eggs. Lesser prairie chickens are classified as Game Birds and are protected under the Texas statute.** GAME BIRDS. Wild turkey, wild ducks of all varieties, wild geese of all varieties, wild brant, wild grouse, wild prairie chickens, wild pheasants of all varieties, wild partridge, wild bobwhite quail, wild scaled quail, wild Mearn's quail, wild Gambel's quail, wild red-billed pigeons, wild band-tailed pigeons, wild mourning doves, wild white-winged doves, wild	. An ESA listing would provide only the limited additional protection of criminalizing accidental take.

[120] Agriculture Code Title 3. Agricultural Research And Promotion Chapter 50. Agriculture And Wildlife Research Program Sec.50.001. Program http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.50.pdf

white-fronted doves, wild snipe of all varieties, wild shore birds of all varieties, chachalacas, wild plover of all varieties, and wild sandhill cranes are game birds. … Sec. 64.003. DESTROYING NESTS OR EGGS. No person may destroy or take the nest, eggs, or young of any wild game bird, wild bird, or wild fowl protected by this code except as provided in this code. … Sec. 64.004. TRAPPING GAME BIRDS. No person may set a trap, net, or other device for taking game birds or take or snare a game bird by a device without obtaining a permit from the department. .. Sec. 64.005. PENALTY. A person who violates a provision of this subchapter commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … Sec. 64.007. POSSESSION OF LIVE GAME BIRDS. No person may possess a live game bird in this state except as authorized by this code.[121]	

[121] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation, Subtitle B. Hunting And Fishing, Chapter 64. Birds, Subchapter A. General Provisions. http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.64.htm#64.001

CONSERVATION, LOCAL GOVERNMENT **Texas requires control of noxious weeds [122] [123] and funding of that control.** "Board" means the board of directors of a district. (2) "District" means a noxious weed control district. … The legislature has determined that: (1) noxious weeds are present in this state to a degree that poses a threat to agriculture and is deleterious to the proper use of soil and other natural resources; and (2) reclamation of land from noxious weeds is a public right and duty in the interest of conservation and development of the natural resources of the state. The board may: (1)determine which noxious weeds are subject to control and what appropriate methods of control are to be used, including spraying, cutting, burning, tilling, or any other appropriate method; (2) prescribe specific areas in the district in which control measures are to be used; (3) prescribe the period during which control measures are to be used; and (4) incur expenses and take other actions necessary to carry out the purposes of this chapter.[124]	The ESA provides no authority or funding for control of noxious weeds.
PLANNING AND ZONING, LAND USE **Structures are listed as a threat to the LPC.**	

[122] Title 5. Production, Processing, And Sale Of Horticultural Products,Subtitle B. Horticultural Diseases And Pests, Chapter 78. Noxious Weed Control Districts http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.78.pdf

[123] http://plants.usda.gov/java/noxious?rptType=State&statefips=48

[124] Agriculture Code ,Chapter 78. Noxious Weed Control Districts, Subchapter A. General Provisions http://law.justia.com/codes/texas/2005/ag/005.00.000078.00.html

Zoning regulations affecting the building of structures and location in Texas are adopted in accordance with the States comprehensive plan which provides for protection of the State's natural resources. Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:…(7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements. … The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land. [125]	
WILDLIFE, CONSERVATION **Texas Department of Parks and Wildlife provides local agencies recommendations information on wildlife protection to all government agencies that approve, permit, license or construct development projects.** "The department is the state agency with primary responsibility for protecting the state's fish and wildlife resources. (b)The department's resource protection activities include: (1)investigating fish kills and any type of pollution that may cause loss of fish or wildlife	The ESA provides consultation only through section 7 to federal agency actions that may affect listed species or their critical habitat. In the case of the lesser prairie chicken, since no critical habitat is being designated, no habitat protection is provided.

[125] Local Government Code Title 7. Regulation Of Land Use, Structures, Businesses, And Related Activities Subtitle A. Municipal Regulatory Authority http://www.statutes.legis.state.tx.us/Docs/LG/pdf/LG.211.pdf

resources, taking necessary action to identify the cause and party responsible for the fish kill or pollution, estimating the monetary value of lost resources, and seeking restoration through presentation of evidence to the agency responsible for permitting or through suit in county or district court; (2) providing recommendations that will protect fish and wildlife resources to local, state, and federal agencies that 1approve, permit, license, or construct developmental projects; (3)providing information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources;… [126]	
ENDANGERED SPECIES **Texas provides for listing of species based on the same factors as the ESA. Like Colorado, Texas may protect species which are only threatened in a portion of their range.** **Texas prohibits take of state listed species.** The director shall file with the secretary of state a list of fish or wildlife threatened with statewide extinction. (b)Fish or wildlife may be classified by the director as threatened with statewide extinction if the department finds that the continued existence of the fish or wildlife is endangered due to: (1)the destruction, drastic modification, or severe curtailment of its habitat; (2)its overutilization for commercial or sporting purposes; (3)disease or predation; or (4)other natural or man-made factors.	The ESA limits listing protections to species only if the at risk of extinction occurs in a significant portion of their range. The ESA cannot must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Texas).if the species is at risk in only one portion of its range.

[126] Parks And Wildlife Code, Title 2. Parks And Wildlife Department, Chapter 12. Powers And Duties Concerning Wildlife, Subchapter A. General Powers And Duties http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.12.pdf

… No person may capture, trap, take, or kill, or attempt to capture, trap, take, or kill, endangered fish or wildlife. (b)No person may possess, sell, distribute, or offer or advertise for sale endangered fish or wildlife unless the fish or wildlife have been lawfully born and raised in captivity for commercial purposes under the provisions of this chapter. (c)No person may possess, sell, distribute, or offer or advertise for sale any goods made from endangered fish or wildlife[127]	
ENDANGERED SPECIES, CONSERVATION, FUNDING **Provides for dedicated funding of an endangered species account.** A peace officer who has arrested a person for a violation of this chapter may seize fish or wildlife or goods made from fish or wildlife taken, possessed, or made in violation of this chapter. (b) Property taken under this section shall be delivered to the department for holding pending disposition of the court proceedings. If the court determines that the property was taken, possessed, or made in violation of the provisions of this chapter, the department may dispose of the property under its regulations. The costs of the department in holding seized fish or wildlife during the pendency of the proceedings may, in appropriate cases, be assessed against the defendant. … . All revenue received under this chapter shall be deposited in the state treasury to the credit	The ESA provides no dedicated funding for ESA actions.

[127] Parks And Wildlife Code Title 5. Wildlife And Plant Conservation Subtitle B. Hunting And Fishing Chapter 68. Endangered Species http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf

of the special nongame and endangered species conservation account.[128]	
WILDLIFE, ENFORCEMENT **Texas may take action to refuse hunting or fishing licenses if outstanding violations of wildlife laws exist in other states.** On behalf of this state, the commission may enter into the Interstate Wildlife Violator Compact. (b) If necessary to protect the interests of this state, the commission may withdraw from the Interstate Wildlife Violator Compact in accordance with the terms of the compact. (c)The commission may take all actions necessary to implement this chapter, including the adoption of rules and the delegation of authority to the director.[129] (The Interstate Wildlife Violator Compact is an agreement that unresolved hunting and fishing violations in one state can affect a person's hunting or fishing privileges in other participating states. Any person whose license privileges or rights are suspended in a member state could also be denied future purchase of a license in Texas until they have satisfied suspension in the other state.)[130]	The ESA contains no regulatory provisions to protect wildlife generally.
WILDLIFE, ENFORCEMENT …, a person who violates a provision of Title 7 of this code commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … A person who violates any of the following	The ESA prohibition against "take" is limited to listed species.

[128] Id, http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf
[129] Parks And Wildlife Code Title 6. Compacts Chapter 92. Interstate Wildlife Violator Compact http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.92.pdf
[130] http://www.tpwd.state.tx.us/newsmedia/releases/?req=20091105g

provisions of Title 7 of this code commits an offense that is a Class B Parks and Wildlife Code misdemeanor: Section 131.011; 143.023; 229.021; 237.022; 334.041; or 350.021. [131]	
WILDLIFE, CONSERVATION **Texas law protects generally all indigenous species from collection, holding, possession, display, transport, release, or propagation.** In this subchapter, "protected wildlife" means all indigenous mammals, indigenous birds, indigenous reptiles, indigenous amphibians, indigenous fish, and other indigenous aquatic life the taking, collecting, holding, possession, propagation, release, display, or transport of which is governed by a provision of this code other than this subchapter or by a commission rule adopted under any provision of this code other than this subchapter and includes endangered species. … No person may collect, hold, possess, display, transport, release, or propagate protected wildlife for the purposes of this subchapter without a permit issued under this subchapter..[132]	The ESA protections are limited to listed species.
WILDLIFE, CONSERVATION, ENDANGERED SPECIES, LOCAL GOVERNMENT The criteria that the Texas Forest Service uses	The ESA authorizes the designation of critical habitat only for listed species.

[131] Parks And Wildlife Code, Title 7. Local And Special Laws, Chapter 355. Penalties For Violations Of Title 7, Parks And, Wildlife Code
http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.355.pdf
[132] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation Subtitle A. Hunting And Fishing Licenses Chapter 43. Special Licenses And Permits Subchapter C. Permits For Scientific Research, Zoological Collection, Rehabilitation, And Educational Display
http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.43.htm

in determining CWHZ [Critical Habitat Wildlife Zone] upon request from a chief appraiser or taxing unit is set out as follows. (1) The presence of qualified endangered or threatened animal or plant, as defined in paragraph (2) of this section, in the zone and the existence of a plan to protect it must be evidenced by a memorandum of understanding, conservation agreements, or other documentation pertaining to the protection of such animal or plant life with a federal, state, or private organization with recognized responsibility for protecting this species. (2) The animal or plant is listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. §1531 et seq.) and its subsequent amendments, or as endangered und er Parks and Wildlife Code, §68.002, …[133]	
NATURAL RESOURCES, ENDANGERED SPECIES, WILDLIFE, CONSERVATION, LAND USE **Texas requires that applications for mining and reclamation authority explain how adverse wildlife impacts will be minimized using the best technology available. Texas also requires enhancement of the wildlife and environmental values if possible.** Each application shall contain a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on	The ESA allows control of federal agency actions and imposition of requirements to avoid jeopardizing the continued existence of a species and adverse modification of critical habitat. In the case of the lesser praire chicken since no critical habitat is designated, habitat will not be protected.

[133] Title 4 Agriculture Part 12 Texas A&M Forest Service Chapter 215 Forest Zone Determination Procedure Rule §215.9 The Criteria For Determining Critical Wildlife Habitat Zone Upon Request From A Chief Appraiser Or Taxing Unit http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=72782&p_tloc=&p_ploc=&pg=1&p_tac=72782&ti=4&pt=12&ch=215&rl=9&dt=&z_chk=3841529&z_contains=habitat

fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. [134]	
NATURAL RESOURCES, LAND USE **Texas protects wildlife habitat generally from surface mining and reclamation activities.** The operator of all surface mining and reclamation operations not otherwise exempted or excluded shall as a minimum: … (1) conduct surface mining operations in a manner consistent with prudent mining practice, so as to maximize the utilization and conservation of the resource being recovered so that reaffecting the land in the future through surface mining can be minimized; (a) The permit application shall, if required by the Commission, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation. (b) When a map or aerial photograph is	The ESA can only protect designated critical habitat from federal agency actions. There is no designation of critical habitat proposed for lesser prairie chickens, so no habitat protection will exist.

[134] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 12 Coal Mining Regulations Subchapter G Surface Coal Mining And Reclamation Operations, Permits, And Coal Exploration Procedures Systems Division 6 Surface Mining Permit Applications--Minimum Requirements For Reclamation And Operation Plan Rule §12.144, Fish And Wildlife Plan http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=7940&p_tloc=&p_ploc=&pg=1&p_tac=7940&ti=16&pt=1&ch=12&rl=144&dt=&z_chk=3841534&z_contains=habitat

required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under §12.133 of this title (relating to Fish and Wildlife Resources Information).; [135]	

[135] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 11 Surface Mining And Reclamation Division Subchapter C Substantive Rules--Uranium Exploration And Surface Mining Division 6 Uranium Surface Mining Reclamation Rule §11.152 Surface Mining Reclamation Standardshttp://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=148942&p_tloc=&p_ploc=&pg=1&p_tac=148942&ti=16&pt=1&ch=11&rl=152&dt=&z_chk=3841530&z_contains=habitat

OKLAHOMA

Applicable State Laws	Applicable ESA provisions
WILDLIFE, ENDANGERED SPECIES Under Oklahoma law, no person may possess, hunt, chase, harass, capture, shoot at, wound or kill, take or attempt to take, trap, or attempt to trap any endangered or threatened species or sub-species without specific written permission of the director.[136]	ESA provides similar protections for listed species.
WILDLIFE **Oklahoma offers protections for all "game birds".** "Game bird" is a bird species normally sought after by sportsmen, and includes only all species of brant, cranes, doves, ducks, gallinules, geese, grouse, partridge, pheasant, quail, prairie chickens, rails, snipes, swans, tinamous, wild turkeys, woodcock, and any part thereof.[137]	Only listed species are protected under the ESA.
WILDLIFE, **Oklahoma prohibits unauthorized "take".** "Hunting or taking" is pursuing, killing, capturing, trapping, snaring and netting wildlife, and all lesser acts such as disturbing, harrying, worrying or placing, setting, drawing or using any net, trap or other device used to take wildlife and includes specifically every attempt	The ESA prohibition against "take" applies only to listed species.

[136] Title 29. Game and Fish. Chapter 1. Oklahoma Wildlife Conservation Code. Article V. Game. Part 4. Section 5-412 - Prohibitions with Endangered or Threatened Species or Subspecies. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77803

[137] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-114 - Game Bird, http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77660

to take and every assistance to other persons in taking or attempting to take wild animals, except that the definitions of "taking" and "hunting" wildlife shall not include disturbing, harrying or worrying wild game in field trials or performance tests of dogs nor the act of any person in participating as owner, handler, trainer, official or member of an audience observing such trials, whether resident or nonresident, where wild game is not killed.[138]	
CONSERVATION **Oklahoma does not permit "take" of game birds during its closed season.** "Closed season" is all other times than open season, and is the period during which protected wildlife may not be lawfully taken.[139]	The ESA prohibition against take applies only to listed species.
HABITAT RESTORATION, WEED CONTROL, INVASIVE SPECIES The Forestry Division, in connection with the enforcement of the Oklahoma Forestry Code, shall have the following powers, authority, and duties: … 10. <u>To plan and conduct prescribed burning at the request and expense of landowners on public or private lands for the purpose of controlling Eastern Red Cedar and other invasive species, for hazardous fuel reduction, wildlife habitat manipulation, ecosystem restoration</u>, or achieving silvicultural objectives.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[138] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-118 - Hunting or Taking. http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77665

[139] Title 29. Game and Fish , Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-104 - Closed Season. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77645

Forestry Division employees shall be protected under The Governmental Tort Claims Act and shall not be personally liable beyond the limits established therein for activities pursuant to this paragraph unless gross negligence is established in a competent court of law.[140]	
FUNDING, WILDLIFE CONSERVATION A. The Department of Wildlife Conservation is hereby authorized to issue an Oklahoma Wildlife Habitat Stamp to any person upon the voluntary payment of a fee of Ten Dollars ($10.00). Said fee shall be deposited in the Wildlife Land Acquisition Fund created in subsection C of this section. … C. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Land Acquisition Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received pursuant to the provisions of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such	• The ESA Provides no dedicated funding • The ESA has no authority to require States to participate in recovery activities.

[140] Title 2. Agriculture , Chapter 1 - Agricultural Code, Forestry Administration and Enforcement, Article 16 - Oklahoma Forestry , Code Section 16-8 - Powers of Division - Appointment of Forest Investigators and Rangers - Powers and Duties - Entry Upon Lands - Arrests, etc. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=465855&hits=1318+864+309+

investments shall be deposited in the Wildlife Land Acquisition Fund. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection D of this section. … D. The Wildlife Land Acquisition Fund shall be used by the Oklahoma Wildlife Conservation Commission for the acquisition on a willing-seller willing-buyer basis only, leasing, taking of easements, development, management, and enhancement of lands acquired pursuant to this section for the following purposes: Management of game animals, protected animals and birds, furbearing animals, game birds, fish, and their restoration, propagation, and protection; and Creation and management of public hunting, fishing, and trapping areas as places where the public may hunt, fish, or trap as authorized by law.[141]	
HABITAT, WILDLIFE, CONSERVATION A. In order to encourage wildlife habitat conservation on private lands, the Department of Wildlife Conservation shall establish a program for wildlife habitat maintenance, enhancement, development, preservation, restoration, and management on private lands. To implement the program, the Department shall enter into multiyear contracts for approved	The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. The ESA provides no protection for non-listed species and does not provide for the "restoration" or "development" of those non-listed

[141] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 4 – Licenses, Section 4-132 - Authority to Issue Oklahoma Wildlife Habitat Stamp - Rules and Regulations - Creation and Use of Wildlife Land Acquisition Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466381&hits=1386+783+726+629+70+15+

projects on privately owned lands detailing the landowners' responsibilities. B. The Department shall promulgate rules pursuant to the Administrative Procedures Act to implement the program. Such rules may provide for incentives to participate in the program.[142]…	species. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE Oklahoma law prohibits the knowing and willful killing or molestation of hawks, falcons, owls, or eagles, or their nests, eggs, or young. The only exceptions to this prohibition are the taking of a hawk or owl in the act of destroying domestic birds or fowl, or the use of hawks, owls, falcons, or eagles by licensed falconers. [143]	The ESA limits protection to listed species.
ENFORCEMENT, WILDLIFE, ENDANGERED SPECIES Oklahoma prohibits the possession of wildlife or parts during closed season, and any endangered or threatened species. Under these Oklahoma statutes, no person may possess any wildlife or parts thereof during the closed season, any endangered or threatened species or parts thereof at any time, or any native bear or native cat that will grow to reach the weight of 50 lbs. or more, with exceptions. A	The ESA limits protection only to listed species.

[142] Title 29. Game and Fish, Chapter 1, Oklahoma Wildlife Conservation Code, Article 3, Section 3-312 - "Program for Wildlife Habitat Development, Preservation, Restoration, and Management - Rules - Construction of Program.". http://www.oscn.net/applications/oscn/deliverdocument.asp?id=436091&hits=935+479+463+407+23+7+

[143] OK - Game Animals - Part 4. Protected Game. § 5-410. Hawks; falcons; owls; eagles

conviction could result in a fine of $100-$500 and/or by imprisonment up to 30 days. In addition, no person may buy, barter, trade, or sell all or any part of any fish or wildlife or the nest or eggs of any bird protected by law, with exceptions. A first violation could result in a fine of $100 to $500 and/or by imprisonment up to 60 days. [144]	
WILDLIFE, CONSERVATION, FUNDING A. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Heritage Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received from senior citizen lifetime licenses issued pursuant to the provisions of paragraphs 4 through 6 of subsection B of Section 4-114 of this title by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such investments shall be deposited in the Wildlife Heritage Fund. Only interest and dividends derived from the principle can be expended and are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection B of this section. Any monies withdrawn from said fund by the	The ESA provides no dedicated funding and is limited in its application to listed species.

[144] OK - Wildlife - Part 5. Possession of Wildlife. OK ST T. 29 § 7-501 to 504

Oklahoma Wildlife Conservation Commission for investment pursuant to this subsection shall be deemed to be for the purposes specified in subsection B of this section. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.[145]	
WILDLIFE, ENFORCEMENT, ENDANGERED SPECIES **Oklahoma prohibits transportation of any wildlife out of Oklahoma.** Under these Oklahoma statutes, no common carrier may transport any wildlife or endangered or rare species, with exceptions. A violation could result in a fine of $25 to $100. In addition, no person may transport into or out of Oklahoma any wildlife or parts thereof, nests of wildlife, their eggs or their young, or any endangered or threatened species, with exceptions. A violation could result in a fine of $50 to $200, and/or imprisonment of 10 to 60 days. [146]	The ESA applies only to listed species.
WILDLIFE, CONSERVATION, FUNDING A. The Oklahoma Tax Commission shall include on each state individual income tax return form for tax years beginning after December 31, 2001, and each state corporate tax return form for tax years beginning after December 31, 2001, an opportunity for the taxpayer to donate	The ESA provides no dedicated funding.

[145] Title 29. Game and Fish Chapter 1 - Oklahoma Wildlife Conservation Code Article 4 - Licenses Section 4-134 - Creation and Use of Wildlife Heritage Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466383&hits=1344+1343+1124+1123+1094+1093+1032+1031+934+933+866+865+844+843+786+785+757+756+752+751+687+686+608+607+437+436+409+408+347+346+255+254+189+188+167+166+109+108+80+79+75+74+17+16+

[146] OK - Wildlife - Transportation of Wildlife OK ST T. 29 § 7-601 - 602

from a tax refund for the benefit of the Oklahoma Wildlife Diversity Program. B. For purposes of this section, "nongame wildlife" means any species of wildlife not legally classified as a game species or furbearer by statute or by rule adopted pursuant to statute. C. Except as otherwise provided for in this section, all monies generated pursuant to subsection A of this section shall be paid to the State Treasurer and placed to the credit of the Wildlife Diversity Fund. D. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Diversity Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received under the provisions of paragraph 2 of subsection C of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. …[147]	
CONSERVATION, WILDLIFE	• The ESA has no authority to require States to participate in

[147] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-310 - Wildlife Diversity Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466370&hits=1486+1485+1480+1479+1020+1019+994+993+939+938+910+909+905+904+860+859+640+639+633+632+302+301+276+275+221+220+192+191+187+186+142+141+

A. The Wildlife Conservation Commission shall constitute an advisory, administrative and policymaking board for the protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of wildlife in this state as provided in the Oklahoma Wildlife Conservation Code. B. The Director shall consult with the Commission regarding the administration of the affairs of the Department of Wildlife Conservation. The Commission is authorized and empowered to require from the Director complete reports and information relative to the affairs of the Department at the time and in the manner the Commission may deem advisable. … D. In addition to the other powers and duties prescribed by law, the Commission shall: … 8. Supervise the establishment, extension, improvement, and operation of the wildlife refuges, propagation areas or stations, public hunting areas, public fishing areas, game management areas, and fish hatcheries; 9. Prescribe the manner of cooperation with the Oklahoma Tourism and Recreation Department, colleges and universities within the state, other state agencies, any agency of the federal government, and any city, town, school district, or any other agency or organization in study of conservation and propagation of wildlife and in the establishment, maintenance, and operation of visual educational facilities, recreational facilities, and hunting and fishing facilities, in the study and propagation of wildlife;	recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • The ESA requires only federal agencies consult and has no authority to require State or local governments to consult where there is no federal action. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and “enhanced”. • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

… 14. Publicize and encourage the conservation and appreciation of wildlife and all other natural resources; 15. Regulate the seasons and harvest of wildlife; 16. Promulgate rules to sell fishing and hunting licenses via the Internet;….[148]	
WILDLIFE, ENFORCEMENT A. Except as otherwise provided by law, <u>any person arrested for a violation of any section of the Oklahoma Wildlife Conservation Code shall be admitted to bail as follows:</u> <u>1. Whenever a person is charged for any violation of any of the wildlife laws of this state or rules adopted by the Wildlife Conservation Commission pursuant to law, which violation is punishable as a misdemeanor</u> and the person is not immediately taken into physical custody pursuant to state law, the officer shall prepare a written citation containing a notice to appear in court, the name and address of the person, the offense charged, the time and place where the person shall appear in court and any other pertinent information as may be necessary; 2. The arresting officer shall indicate on the citation the date of the arraignment. The person charged shall appear in person or by counsel at the stated time and place for arraignment.[149]	The ESA only provides protections for listed species.

[148] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103 - Functions, Powers, and Duties of the Commission. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466368&hits=1919+1918+1913+1912+991+990+968+967+936+935+872+871+865+864+57+56+36+35+4+3+

[149] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 9 - Wildlife Bail Procedure Act, Section 9-112 - Admission to Bail for Violations of Wildlife Conservation Code. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=462892&hits=1526+1525+1498+1497+814+813+779+778+686+685+679+678+54+53+21+20+

CONSERVATION, HABITAT Oklahoma provides for private lands fish and wildlife habitat conservation and improvement programs which include maintenance, protection, enhancement and restoration for habitat generally including aquatic, riparian, upland, wetland and forest habitat. … conservation improvement contract requirements [150] (a) The following projects may be approved for Private Lands Fish and Wildlife Habitat Conservation and Improvement Programs (1) Aquatic Habitat maintenance, protection, enhancement, or restoration, (2) Riparian Habitat maintenance, protection, enhancement, or restoration (3) Upland Habitat maintenance, protection, enhancement, or restoration (4) Wetland Habitat maintenance, protection, enhancement, or restoration (5) Forest Habitat maintenance, protection, enhancement, or restoration, (6) Any other project which is deemed appropriate by the Department.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

[150] 800:25-35-3. Approved projects and conservation improvement contract requirements http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_

KANSAS

Applicable State Laws	Applicable ESA provisions
CONSERVATION **Kansas requires programs, including land acquisition to conserve non-game and threatened and endangered species.** Same; programs for conservation. (a) The secretary shall establish such programs, including acquisition of land or aquatic habitat, as are deemed necessary for the conservation of nongame, threatened and endangered species. The secretary shall utilize all authority vested in the secretary by the laws of this state to carry out the purposes of this section with the exception that the secretary shall not utilize the power of eminent domain to carry out such programs unless a specific authorization and appropriation is made therefor by the legislature.[151]	The ESA provides no authority for establishment of programs or land adquisition for endangered species.
FUNDING, CONSERVATION **Kansas provides for species in need of conservation and allows tax credits for lands known to support populations of such species.** Tax credits for expenditures related to nongame (a) There shall be allowed two types of credits against the tax liability of a taxpayer imposed under the Kansas income tax act related to real property that is both: (1) Designated by the secretary of wildlife, parks and tourism pursuant to the nongame and endangered species conservation act as critical habitat for a threatened or endangered species	The ESA provides no tax credits and can only list species

[151] Article 9. - Licenses, Permits, Stamps And Other Issues 32-962.

or certified by the secretary of wildlife, parks and tourism as land known to support populations of species in need of conservation; and (2) included in management activities as part of a recovery plan, or an agreement identified in subsection (b) of K.S.A. 32-962 and amendments thereto, as approved by the secretary of wildlife and parks, for a species listed as threatened, endangered or in need of conservation pursuant to the nongame endangered species conservation act.[152]	
WILDLIFE, CONSERVATION **Kansas provides programs to allow species to sustain themselves, not recover. These protections are offered to non-listed species.** … (a) The secretary shall conduct investigations on nongame species in order to develop information relating to population, distribution, habitat needs, limiting factors and other biological and ecological data to determine conservation measures necessary for their continued ability to sustain themselves successfully. On the basis of such information and determinations, the secretary shall adopt rules and regulations pursuant to K.S.A. 32-963 which contain a list of the nongame species deemed by the secretary to be in need of conservation and shall develop conservation programs pursuant to K.S.A. 32-962 which are designed to insure the continued ability of such nongame species to perpetuate themselves	The ESA provides protections only for listed species and does not offer any program for species prior to their listing to ensure that they do not become endangered/threatened.

[152] Article 32. - Statute 79-32,203: Tax credits for expenditures related to nongame and endangered species.

successfully. The secretary shall conduct ongoing investigations of nongame species.[153]	
WILDLIFE (a) Commercialization of wildlife is knowingly committing any of the following, except as permitted by statute or rules and regulations: (1) Capturing, killing or possessing, for profit or commercial purposes, all or any part of any wildlife protected by this section; (2) selling, bartering, purchasing or offering to sell, barter or purchase, for profit or commercial purposes, all or any part of any wildlife protected by this section;[154]	The ESA provides protections only for listed species.
WILDLIFE, ENFORCEMENT Wildlife violator compact; enactment of compact. The wildlife violator compact is enacted into law and entered into by the State of Kansas with any and all jurisdictions legally joining therein in accordance with its terms.[155]	
WILDLIFE Unlawful possession of wildlife or wild turkey; refusal to allow inspection of property used in taking wildlife; penalties. (a) It is unlawful for any person to: ...	The Kansas statute provides penalties for any unlawful possession of wildlife, including wild turkey. The ESA only prohibits the "take" of listed species. Non-listed species are

[153] Article 9. - Licenses, Permits, Stamps And Other Issues 32-959.
[154] Article 10. - Enforcement , 32-1005. http://kslegislature.org/li/b2013_14/statute/032_000_0000_chapter/032_010_0000_article/032_010_0005_section/032_010_0005_k/
[155] Chapter 32 Article 10 »Section 61 » 32-1061. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0061_section/032_010_0061_k/

(4) possess any wildlife unlawfully killed or otherwise unlawfully taken outside this state;[156]	provide no protections.
LOCAL GOVERNMENT, WEED CONTROL Control and eradication of noxious weeds; payment of costs; sale of chemicals for use on private property, price. ... If the governing body of any political subdivision owning or supervising lands infested with noxious weeds within their jurisdiction fails to control such noxious weeds after 15 days' notice directing any such body to do so, the board of county commissioners shall proceed to have proper control and eradication methods used upon such lands,...[157]	Certain invasive species of plants are listed as potential threats to the habitat of the lesser prairie chicken. Kansas provides authority for its local governments to eradicate "noxious weeds" on private lands. The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
ENDANGERED SPECIES Nongame and endangered species conservation act; title. K.S.A. 32-957 through 32-963, 32-1009 through 32-1012, 32-1033 and K.S.A. 32-960a and 32-960b, and amendments thereto, shall be known and may be cited as the	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety

[156] Chapter 32 Article 10 »Section 4 32-1004. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0004_section/032_010_0004_k/

[157] Chapter 2 Article 13 Section 19 WEEDS

nongame and endangered species conservation act.[158] As used in the nongame and endangered species conservation act: (a) "Conserve," "conserving" and "conservation" mean the use of all methods and procedures for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such numbers. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, regulated taking and, when and where appropriate, the periodic or total protection of species or populations of wildlife. With respect to threatened species and endangered species, the terms mean the use of all methods and procedures, including but not limited to those described above, which are necessary to bring any threatened or endangered species to the point at which the methods, procedures and measures provided for such species pursuant to the nongame and endangered species conservation act are no longer necessary. (b) "Ecosystem" means a system of living organisms and their environment, each influencing the existence of the other and both necessary for the maintenance of life. (c) "Endangered species" means any species of wildlife whose continued existence as a viable component of the state's wild fauna	of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Kansas). • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a federal agency action.

[158] Chapter 32 »Article 9 Section 57 Article 9. - Licenses, Permits, Stamps And Other Issues

is determined to be in jeopardy. That term also includes any species of wildlife determined to be an endangered species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (d) "Nongame species" means any species of wildlife not legally classified a game species, furbearer, threatened species or an endangered species by statute or by rule and regulation adopted pursuant to statute. (e) "Optimum carrying capacity" means that point at which a given habitat can support healthy populations of wildlife species, having regard to the total ecosystem, without diminishing the ability of the habitat to continue that function. (f) "Threatened species" means any species of wildlife which appears likely, within the foreseeable future, to become an endangered species. That term also includes any species of wildlife determined to be a threatened species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (g) "Wildlife" means any member of the animal kingdom, including, without limitation, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof. ….[159]	

[159] http://kansasstatutes.lesterama.org/Chapter_32/Article_9/#32-958

PLANNING AND ZONING ...(b) The planning commission may adopt and amend a comprehensive plan as a whole by a single resolution, ... In the preparation of such plan, the planning commission shall make or cause to be made comprehensive surveys and studies of past and present conditions and trends relating to land use, population and building intensity, public facilities, transportation and transportation facilities, **economic conditions, natural resources and may include any other element deemed necessary to the comprehensive plan**. Such proposed plan shall show the commission's recommendations for the development or redevelopment of the territory including: (a) The general location, extent and relationship of the use of land for agriculture, residence, business, industry, recreation, education, ... (f) utilization and conservation of natural resources; and (g) any other element deemed necessary to the proper development or redevelopment of the area.[160]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
LAND USE, PLANNING AND ZONING …construction of public facility or utility in conformance with comprehensive plan. (a) Except as provided in subsection (b), whenever the planning commission has adopted and certified the comprehensive plan for one or more major sections or functional subdivisions thereof, no public improvement, public facility or public utility of a type embraced within the recommendations of the comprehensive plan or portion thereof shall be constructed without first being submitted to and being approved by the	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.

[160] Chapter 12 Article 7 Section 47 Article 7. - Planning And Zoning 12-747.

planning commission as being in conformity with the plan.[161]	
LAND USE, PLANNING AND ZONING Zoning of land outside city limits; conditions and limitations; notice to county commissioners. Cities are hereby authorized to adopt zoning regulations affecting all or any designated portion of the land located outside the city but within three miles thereof under the following conditions Except for flood plain regulations in areas designated as a flood plain, nothing in this act shall be construed as authorizing any city to adopt regulations applying to or affecting any land in excess of three acres under one ownership which is used only for agricultural purposes: (a) The city has established a planning commission under the provisions of K.S.A. 12-702, and amendments thereto, which provides for the appointment of two commission members who reside outside the city but within the area subject to the zoning regulations of the city, or the city has established a joint, metropolitan or regional planning commission in cooperation with the county in which such city is located pursuant to the provisions of K.S.A. 12-718, and amendments thereto.[162]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Fences composed of posts a In fences composed of posts and wires, the posts shall be of ordinary size for fencing purposes, and set in the ground at least two feet deep and not more	Local governments are permitted to regulate fence The ESA provides

[161] Chapter 12 Article 7 Section 48 Article 7. - Planning And Zoning
[162] Chapter 12 Article 7 Section 15b Article 7. - Planning And Zoning

than twelve feet apart, with holes through the posts or staples on the side not more than fifteen inches apart, to admit four separate strands of fence wire not smaller than No. 9, and shall be provided with rollers and levers, at suitable distances, to strain and hold the wire straight and firm.[163]	• No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
FUNDING, CONSERVATION Assent to wildlife restoration act; use of fees. (a) The state of Kansas hereby assents to the provisions of the wildlife restoration act (16 U.S.C. 669 et seq.), as amended. The secretary is hereby authorized and directed to perform such acts as necessary to the conduct and establishment of cooperative wildlife restoration projects, as defined in such act, in compliance with such act and with rules and regulations promulgated by the secretary of the interior thereunder. The state treasurer is hereby authorized to receive and disburse all money apportioned to the state in accordance with the provisions of such act.[164]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
FUNDING, CONSERVATION Conservation fee fund; authorized expenditures; accounting procedures; reduction of fees and assessments, when. (a) There is hereby created in the state treasury the conservation fee fund. All deposits credited to the conservation fee fund shall be for the use of the state corporation commission in administering the provisions of K.S.A. 55-172 through 55-184, 55-601 through 55-613, 55-701 through 55-713, 55-901 and 55-1201 through 55-1205.[165]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[163] Home Statute Chapter 29 Article 1 Section 3 Fencing
[164] Chapter 32 Article 8 Section 28 Article 8. - Department Of Wildlife, Parks And Tourism
[165] Chapter 55 Article 1 Section 43 Article 1. - Oil And Gas Wells; Regulatory Provisions

LAND USE, PLANNING AND ZONING Application of intent to drill wells, required information; notification of surface owner; fee and contents; information to department of health and environment and county clerk; approval of application, when; conditions; compliance with rules and regulations. (a) Prior to the drilling of any well, every operator shall file an application of intent to drill with the commission. Such application shall include such information as required by the commission, including the name and address of the surface owner, and shall be on a form prescribed by the commission. Such application shall also include non-binding preliminary estimates of the location of roads of ingress or egress, any tank battery and any pipeline or electrical line. The commission shall, upon receipt of such application, send a copy of such application to the named surface owner, as well as the contact information, including name, address, phone number, fax or email address, for a designated representative of the applicant.[166]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action. • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Removal of structures and abutments from lands after abandoning wells; exception. (a) Leaving the surface of lands with a part of the operating structure or other equipment intact after abandoning oil or gas wells is against public policy, and constitutes a public nuisance, and shall be hereafter prohibited. Whenever any lease operator abandons any oil or gas well, the lease operator, within six months thereafter, shall remove any rig, derrick or other operating structure, and all abutments and other obstacles of every kind or size used in the operation of such oil or gas lease, from the land upon which	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.

[166] Chapter 55 Article 1 Section 51 Article 1. - Oil And Gas Wells; Regulatory Provisions

the well was theretofore operated, and shall grade the surface of the soil in such manner as to leave the land, as nearly as practicable, in the same condition after the removal of such structures, equipment and obstacles as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise.[167]	

[167] Chapter 55 »Article 1 »Section 77 Article 1. - Oil And Gas Wells; Regulatory Provisions

NEW MEXICO

Applicable State Laws	Applicable ESA provisions
WILDLIFE The game animals and quadrupeds, game birds and fowl, and game fish as herein defined shall be protected and hunting, taking, capturing, killing or possession, or attempt to hunt, take, capture or kill of any or all species named herein shall be regulated by the state game commission under the authority of Chapter 117 of the 1931 Session Laws of the state of New Mexico.	The ESA provides protections against take for only for listed species.
WILDLIFE, ENFORCEMENT **New Mexico regulates the LPC under its game laws. Which prohibit the "take" of species, including the LPC, without a permit.** A. Except as permitted by regulations adopted by the state game commission or as otherwise allowed by law, it is unlawful to: (1) hunt, take, capture, kill or attempt to take, capture or kill, at any time or in any manner, any game animal, game bird or game fish in the state; or (2) possess, offer for sale, sell, offer to purchase or purchase in the state all or any part of any game animal, game bird or game fish….[168]	The ESA only provides protections against "take" for listed species.
PLANNING AND ZONING, HABITAT **New Mexico has stated a clear preference for avoidance of wildlife areas in its**	The ESA Provides: • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical

[168] NM Stat § 17-2-7 (1996 through 1st Sess 50th Legis)

development of utilities. Scenic enhancement: The following provisions for scenic enhancement shall apply for utility facility installation in cited areas: (1) The type and size of the utility facilities and the manner and extent to which they are permitted within areas of scenic enhancement and natural beauty may materially alter the scenic quality, appearance and view of highway roadsides and adjacent areas. Such areas include scenic strips, overlooks, rest areas, recreation areas and the rights-of-ways and adjacent highways. Also included are Sections of highways which pass through public parks, recreation areas, wildlife and waterfowl refuges and historic sites. Whenever possible, new utility installations within all such strips overlooks and areas shall be avoided.[169]	habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
HABITAT, CONSERVATION **New Mexico requires that its wildlife department regulate "vehicle travel" on habitat for certain classes of species.** New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species. … "To provide a description of lands closed to vehicle travel under the Habitat Protection Act and to describe prohibited activities on said lands. [170]	The ESA provides not authority to regulate activities on non-federal lands, absent a federal nexus.
WILDLIFE, CONSERVATION,	The ESA provides no authority to

[169] Title 17: Public Utilities And Utility Services Chapter 4: Utility Rights Of Way And Easements Part 2 , Requirements For Occupancy Of State Highway System Right-Of-Way By Utility Facilities
[170] http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0002.htm

ENFORCEMENT **New Mexico state game commission has authority to establish rules to acquire lands and to prevent damage to wildlife and wildlife habitat on lands owned or controlled by the department.** New Mexico state game commission with the authority to acquire land and to establish rules and regulations that it may deem necessary to carry out the purposes of Chapter 17, NMSA 1978[171]	acquire lands or to establish regulations necessary to protect species. The only protections offered by the ESA provide protections from "take", allow designation of critical habitat, and require federal agencies consult.
WILDLIFE **LPC are game birds in New Mexico, and as such, they are protected. No game bird may be hunted during a closed season or without a permit.** **New Mexico has also established areas of LPC habitat, where the LPC are protected and season is only open for quails.** Season and hours: Upland game may be hunted or taken only during open seasons and only during the period from one-half hour before sunrise to one-half hour after sunset, unless otherwise specifically allowed by rule…. (1) On wildlife management areas, the lesser prairie-chicken areas, and the Sandhills Prairie conservation area hunting hours shall be from one-half hour before sunrise to one-half hour after sunset	ESA only prohibits "take" of listed species.

[171] Title 19 Natural Resources And Wildlife, Chapter 34 Wildlife Habitat And Lands, Part 4 Protection Of Department Of Game And Fish Lands. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0004.htm

… **(e)** The state game commission owned lesser prairie-chicken areas shall be open for quail hunting during established seasons.[172]	
WILDLIFE, ENFORCEMENT **New Mexico also provides protections for wildlife and game animals on private lands.** It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on any private property that is in compliance with 30-14-1 and 30-14-6 NMSA 1978 posting requirements without possessing written permission from the landowner or person in control of the land or trespass rights, unless otherwise permitted in rule or statute. It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on private property if the consent to enter or remain has been denied or withdrawn by the owner or person in control of the land or trespass rights, per 30-14-1 NMSA 1978, unless otherwise permitted in rule or statute. … Any game animals, furbearers, game birds, or game fish taken in violation of this section shall be subject to seizure.[173]	The ESA provides protection against "take" only for listed species.
WILDLIFE, CONSERVATION, HABITAT New Mexico has designated the LPC as a	The ESA can only prohibit take and require federal agencies to consult on

[172] 19.31.5.9 Manner And Methods For Upland Game http://www.nmcpr.state.nm.us/nmregister/xxi/xxi15/19.31.5.htm

[173] Unlawful Taking Or Killing Of Game Animals, Furbearers, Game Birds, Or Game Fish On Private Land, [19.31.10.18 NMAC - N, 4-1-2009]. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.031.0010.htm

"Species of Greatest Conservation Need (SGCN)" in its wildlife conservation strategy. New Mexico's wildlife conservation strategy demonstrates New Mexico's concern for wildlife habitat resources to keep wildlife populations healthy and sustainable and fully addresses eight essential elements established by Congress. It focuses on strategic actions intended to keep common species common and work to prevent wildlife from becoming endangered with a constructed framework for identifying species of greatest conservation need, the habitat treatments necessary to sustain them and other members of their ecological community.[174]	actions on federal lands. The ESA cannot require States to undertake independent conservation activities.
WILDLIFE, FUNDING **New Mexico requires local government to undertake activities to "promote" the health, safety and welfare of the State's wildlife.** It is the intent of the legislature by the passage of the Pollution Control Revenue Bond Act to authorize municipalities to acquire, own, lease or sell projects for the purpose of reducing, abating or preventing pollution, including, but not limited to, removing pollutants, contaminants or foreign substances from land, air or water, or removing or treating any substance in a processed material which otherwise would cause pollution when such material is used, to protect and promote the health, welfare and safety of the citizens of this state and its and wildlife, with the resultant higher level of employment and economic activity and stability. It is not intended hereby to authorize any municipality itself to operate any	The ESA requires consultation by federal agencies on actions that may affect listed species. The ESA provides no authority to require local municipalities to undertake projects to protect wildlife, absent a federal nexus.

[174]New Mexico Department of Game and Fish. 2006. Comprehensive Wildlife Conservation Strategy for New Mexico. New Mexico Department of Game and Fish. Santa Fe, New Mexico. 526 pp + appendices.

manufacturing, industrial or commercial enterprise. The provisions of the Pollution Control Revenue Bond Act shall be liberally construed in conformity with this intent.[175]	
WILDLIFE, HABITAT, CONSERVATION **New Mexico has established conservation districts to "enhance" wildlife and habitat.** A. The "conservation services division" is created within the department of game and fish. B. The conservation services division is responsible for: (1) management, enhancement, research and conservation of public wildlife habitat ; (2) the lease, purchase, enhancement and management of state wildlife habitat ; (3) assisting landowners in improving wildlife habitats; (4) development of educational programs related to conservation of wildlife and the environment, including the expanded dissemination of wildlife publications; and (5) communication and consultation with federal and other state agencies, local governments and communities, private organizations and affected interests responsible for habitat, wilderness, recreation, water quality and environmental protection to ensure comprehensive conservation services for	The ESA does not have a provision for the "enhancement" of a listed species. Only a prohibition against take and for activities that may allow "recovery".

[175] 3-59-3. Legislative intent.

hunters, anglers and nonconsumptive wildlife users.[176]	
WILDLIFE, FUNDING, HABITAT The purpose of the Game and Fish Bond Act is to provide for use of revenues derived from fees for hunting and fishing licenses to issue bonds to provide for fish hatcheries and rearing facilities, game and fish at acquisition, development and improvement projects and other similar capital outlay projects.[177]	The ESA does not provide dedicated funding.
WILDLIFE, ENDANGERED SPECIES, HABITAT **Requires studies to be conducted to determine the status and survival requirements of threatened and endangered species.** In addition to other powers and duties, the director (of fish and game): A. may acquire land or aquatic habitat interests for the conservation, management, restoration, propagation and protection of threatened or endangered species; and B. shall conduct studies to determine the status and requirements for survival of threatened or endangered species.[178]	The ESA cannot require a State to undertake conservation activities.

[176] 17-6-1 to 17-6-11 NMSA 1978] may be cited as the "Habitat Protection Act"; 17-1-5.1. Conservation services division; duties.
[177] 17-1-17. Purpose of act.
[178] 17-2-44. Director; land or aquatic habitat interest acquisition.

COUNTY AND LOCAL LAW

County	Authority	Synopsis
BERNALILLO COUNTY, NEW MEXICO		The Bernalillo County Open Space Master Naturalist Program aims to instill the pursuit of life-long learning and promote environmental stewardship. Participants are activity engaged through education and service dedicated to the beneficial management of natural resources on Open Space properties.
BERNALILLO COUNTY, NEW MEXICO	Code of Ordinances, Art. II, Sec. 58-46,	The purpose of this article is to promulgate laws that preserve Bernalillo County open space for the purposes for which they were acquired, including the protection of natural areas, cultural and historical sites, agricultural lands, wildlife habitat, water resources and viewsheds, the promotion of environmental education, and the provision of resource-based recreation.
BERNALILLO COUNTY, NEW MEXICO [179]	Sec. 58-107	No person shall harm, hunt, pursue, molest, harass, trap, collect or remove any mammal, bird, reptile or amphibian animals or eggs or young of such animals on/from open space lands.
Union, NEW MEXICO [180]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [181]

[179] http://library.municode.com/index.aspx?clientId=13071&stateId=31&stateName=New%20Mexico&p_PageAlias=all-county-ordinances
[180] http://nm-unioncounty.civiccities.com/directory.aspx
[181] http://www.unionnm.us/DocumentCenter/Home/View/9

Quay, NEW MEXICO	Quay County Comprehensive Plan	Once adopted, the Comprehensive Plan becomes the official policy of the County. It is passed as a resolution rather than an ordinance in order to maintain its flexibility and change as conditions and priorities change.
Eddy, NEW MEXICO	Ordinance 41, Land Use	The Eddy County Land Use Policies and Procedures was developed by Eddy Government to guide the use of public lands and cooperation with County, State and Federal governments. [182]
Eddy, NEW MEXICO	Comprehensive Plan	Ensures compliance with environmental standards and advocates the use of environmental studies in planning (page. 53). ... County/city cooperation in managing growth and development in the PPJ could include one or more of the following measures: ...proximity to environmentally sensitive lands or farmland. (p. 23)[183]
Eddy, NEW MEXICO	Ordinance 19, Regulating, Controlling the Growth and Removal of Plants	Encourages native plant growth[184]
Chaves, NEW MEXICO	Art. V, Area 1 Regulations	Designation of Wildlife Habitat[185]

182 http://www.co.eddy.nm.us/Ordinance%20pdfs/landuseO-02-41.pdf
183 http://www.co.eddy.nm.us/EddyCty-FinalRPT10-08.pdf
184 http://www.co.eddy.nm.us/Ordinance%20pdfs/weedsgrowthcontrolandremovalO-91-19.pdf
185 http://co.chaves.nm.us/~cochaves/pdf/ZoningOrdinance.pdf

Chaves, NEW MEXICO	Chaves County Comprehensive Plan and Zoning Report, 4-1	Public Land Policy[186]
Chaves, NEW MEXICO	Chaves County Public Lands Advisory Committee	A committee that coordinates with federal and state agencies on public land related issues, including environmental regulation. [187]
De Baca, NEW MEXICO		
San Miguel, NEW MEXICO	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [188]
	Regulating The Permitting, Placement, Construction And Modification Of Oil And Gas Drilling And Production	The purpose of this Ordinance to: 1. Provide for a permitting process for responsible oil and gas operations and allow responsible economic development within the County; 2. Protect the water, air, environment, wildlife and other natural and economic resources within the County;..[189]
Colorado		

[186] http://co.chaves.nm.us/~cochaves/pdf/Comprehensive_Plan.pdf
[187] http://co.chaves.nm.us/index.php/2012-05-03-17-38-37/planning-zoning
[188] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf
[189] http://www.smcounty.net/Agenda/Oil%20and%20Gas%20Ordinance.pdf

Prowers, COLORADO		Utility and Development Permit Resolution and Prowers County Permitting & Development Guide including land use policy. [190]
Las Animas, COLORADO	Wildlife habitat analysis, special uses ect.	The Planning and Zoning Department is responsible for the administration and processing of applications for division of lands, subdivisions, rezoning and other land use cases.[191]
Bent, COLORADO	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.
Kiowa, COLORADO	Zoning and Planning	Approvals required from zoning and planning office commissioner
Otero, COLORADO	Areas having statewide impact or significance	Guidelines And Regulations For Areas And Activities Of State Interest County Of Otero State Of Colorado [192]

190 http://www.prowerscounty.net/Index.asp?HtAUNHADBcDIHwQ+NHADBcHt132i@330_DwVvZru3HhR7JKifAdCW2gmaUtOEnTljIqsXzyN8pcoB15YkQxe06bLFMSG49P+/

191 http://www.lasanimascounty.net/index.php/land-use-home

192 http://www.oterogov.com/images/LandUse/guidelinesregs20060814.pdf

Costilla, COLORADO		Comprehensive Plan outlines zoning, land use and environmental constraints.[193]
Pueblo, COLORADO	Rural land use plan, special uses	Title 17, Land Use and Zoning. The Rural Land Use process was adopted by Pueblo County to provide an alternative method of land division that encourages the clustering of single-family residential dwellings to maintain rural character, preserve open space, reduce the extension of roads and utilities, and offer landowners a new approach for developing the land without going through the full subdivision process. It provides a means of developing rural property while at the same time protecting wildlife habitat or critical areas, maintaining agricultural lands suitable for farming or ranching operations, and preserve and conserve water resources. In order to go through the Rural Land Use Process, the Cluster Development criteria must be met.[194] [195]
Oklahoma		
Roger Mills, OKLAHOMA	Zoning	Zoning permits and/or approval required for development
Greer, OKLAHOMA	Zoning	MAPC rezones for buildings , cell towers, and other structures. (Metropolitan action planning commission)

[193] http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Comprehensive+Plan+.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251756861482&ssbinary=true

[194] http://county.pueblo.org/government/county/department/planning-and-development/zoning

[195] http://county.pueblo.org/government/county/code/title17/chapter17-104

APPENDIX 6-- EXISTING CONSERVATION PROGRAMS

Name of program/Agency	Authority/Funding Source
FWS	
Four grant programs are available through the Cooperative Endangered Species Conservation Fund they include: Traditional" Conservation Grants, and; "Nontraditional" Grants: • Habitat Conservation Plan Land Acquisition • Habitat Conservation Planning Assistance • Recovery Land Acquisition Grants.)	ESA, Sec. 6 Support development of Habitat Conservation Plans (HCPs)federally listed threatened or endangered species, proposed and candidate species, and unlisted species proposed to be covered by the HCP.
USDA-	
Lesser Prairie Chicken Initiative	Prairie Chicken Initiative: The five states addressing Lesser Prairie Chicken habitat requested NRCS priority focus on improving habitat. NRCS and its conservation partners are helping farmers and ranchers enhance, restore and protect habitat for this sensitive and reclusive bird. For Fiscal Year 2013 Lesser Prairie-Chicken Initiative is funded under Wildlife Habitat Incentive Program.[196]
Wildlife Habitat Incentive Program	WHIP: The Food, Conservation, and Energy Act of 2008 reauthorized WHIP as a voluntary approach to improving wildlife habitat in our Nation. The Natural Resources Conservation Service administers WHIP to provide both technical assistance and up to 75 percent cost-share assistance to establish and improve fish and wildlife habitat..[197] In fiscal year 2011, the WHIP Program had a

[196] http://www.ks.nrcs.usda.gov/programs/lpci/index.html
[197] http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046975

<table>
<tr><td></td><td>U.S. total of 3,856 contracts, which represents 848,656 acres of land and a funding obligation of $60,580,860.

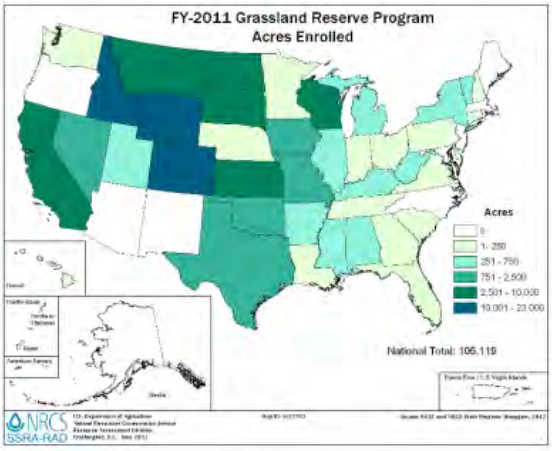
Contract Data for the impacted states[198]:
<table>
<tr><th>State</th><th># Contacts</th><th>Acres Enrolled</th><th>Funds Obligated</th></tr>
<tr><td>Colorado</td><td>12</td><td>15,655.9</td><td>$421,303</td></tr>
<tr><td>Kansas</td><td>119</td><td>23,799.1</td><td>$1,480,428</td></tr>
<tr><td>New Mexico</td><td>35</td><td>24,489.6</td><td>$779,789</td></tr>
<tr><td>Oklahoma</td><td>10</td><td>3,013.7</td><td>$185,084</td></tr>
<tr><td>Texas</td><td>283</td><td>317,448.9</td><td>$9,834,629</td></tr>
</table></td></tr>
<tr><td>Working Land for Wildlife</td><td>Working Lands for Wildlife is a new partnership between NRCS and the U.S. Fish and Wildlife Service (FWS) to combat the decline of seven specific wildlife species whose decline can be reversed and will benefit other species with similar habitat needs.

NRCS and FWS announced an agreement that will provide “long-term regulatory predictability for up to 30 years to farmers, ranchers and forest landowners participating in the U.S. Department of Agriculture's Working Lands for Wildlife (WLFW) Initiative.[199]

The agreement builds on a $33 million investment NRCS announced last spring dedicated toward producers who develop and implement conservation plans to manage and restore high-priority habitats for seven specific wildlife species across the country. The species are greater sage-grouse, New England cottontail,</td></tr>
</table>

198 http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046225

199 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

<table>
<tr><td></td><td>bog turtle, golden-winged warbler, gopher tortoise, lesser prairie-chicken and the Southwestern willow flycatcher."[200]</td></tr>
<tr><td>The Grassland Reserve Program (GRP)</td><td>GRP is a voluntary conservation program that emphasizes support for working grazing operations, enhancement of plant and animal biodiversity, and protection of grassland under threat of conversion to other uses.
2011 Easement Enrollment Data for impacted States:
<table>
<tr><th>State</th><th>Easements</th><th>Acres</th></tr>
<tr><td>Colorado</td><td>14</td><td>51,185</td></tr>
<tr><td>Kansas</td><td>74</td><td>42,133</td></tr>
<tr><td>Oklahoma</td><td>9</td><td>10,304</td></tr>
<tr><td>Texas</td><td>37</td><td>15,405</td></tr>
<tr><td>New Mexico</td><td>4</td><td>22,225[201]</td></tr>
</table>

</td></tr>
</table>

200 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

201 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/grassland/?cid=stelprdb1048273

State Acres for Wildlife Enhancement (SAFE) Approved Projects. SAFE is a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years.	In 2012, the SAFE Program identified the following priorities for the impacted States: [202] **Colorado Lesser Prairie Chicken SAFE** The goal of the Colorado Lesser Prairie Chicken SAFE is to restore and enhance 21,500 acres of short and midgrass sand sagebrush prairie to maintain and enhance lesser prairie chicken populations in Colorado. **Colorado Shortgrass Prairie SAFE** The goal of the Colorado Shortgrass Prairie SAFE is to preserve the integrity and expand the extent of shortgrass prairie managed for wildlife species in eastern Colorado. Project partners hope to accomplish this by enrolling 11,475 acres in CRP. **Kansas Upland Game Birds SAFE** The goal of the Kansas Upland Game Birds SAFE project is to improve populations of bobwhite quail and other grassland-associated wildlife by creating nesting/brood-rearing habitat on portions of crop fields. This SAFE effort will establish and maintain 30,100 acres in CRP consisting of diverse native grass and forb cover. Quail, pheasant and other grassland birds are species that will benefit from SAFE enrollments. **Kansas Lesser Prairie Chicken Habitat SAFE** The goal of the Kansas Lesser Prairie Chicken Habitat SAFE project is to enroll 30,000 acres in CRP to restore mixed-grass prairies to maintain and enhance lesser prairie chicken populations. The lesser prairie chicken is a candidate for federal listing as a threatened or endangered species. **New Mexico Lesser Prairie Chicken SAFE**

202 http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20110812_consv_en_safe.html

	The goal of the New Mexico Lesser Prairie Chicken SAFE project is to enroll 2,600 acres in CRP in the eastern part of the state to benefit the lesser prairie chicken by restoring native grasslands for breeding and brood-rearing. In eastern New Mexico, this bird and other species have been petitioned for listing under the Endangered Species Act. **Oklahoma Mixed Grass Prairie SAFE** The goal of the Oklahoma Mixed Grass Prairie SAFE project is to enroll 15,100 acres in CRP to restore mixed-grass prairie type associations in northwestern Oklahoma to benefit northern bobwhite, Cassin's sparrow and other grassland birds. **Texas Gulf Coast Prairies SAFE** The goal of the Texas Gulf Coast Prairies SAFE is to enroll 500 acres to restore grassland and shallow water habitats in the Gulf Coast Prairie region of Texas for a variety of bird species. **Texas Mixed Grass SAFE** The goal of the Texas Mixed Grass SAFE project is to enroll 78,400 acres in CRP to reconnect geographically and reproductively isolated populations of lesser prairie chickens by creating native mixed grass prairie and travel corridors. [203]

[203] ftp://ftp-fc.sc.egov.usda.gov/KS/Outgoing/Web_Files/Programs/lepc/2012/lpci_practices.pdf

APPENDIX 7 -- INDIVIDUAL, STATE AND REGIONAL VOLUNTARY ACTIONS

Name of program/Agency	Authority/Funding Source
The Western Governors Association Southern Great Plains Crucial Habitat Assessment Tool (SGP CHAT)	Range Wide 5 State Lesser Prairie Chicken Model – SGP CHAT is the result of phase one of a three-year WGA Wildlife Council project, led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken (LEPC) throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[204] [205]
Lesser Prairie Chicken Initiative Kansas Field Training	Educational seminars related to the lesser prairie chicken. [206]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[207]
Wildlife Habitat Evaluation Guide (WHEG)	The regionalized Wildlife Habitat Evaluation Guide (WHEG) for lesser prairie-chicken (LEPC) serves two functions: 1) use as a planning too lto identify limiting factors for LEPC; 2) and will be used to demonstrate what concerns/threats are most limiting range wide and how NRCS has addressed those on our LPCI contracts.[208]

[204] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[205] http://kars.ku.edu/geodata/maps/sgpchat/
[206] http://www.ksre.ksu.edu/doc13897.ashx
[207] http://kec.kansas.gov/reports/wind_siting_handbook.pdf
[208] http://www.ksre.ksu.edu/doc13898.ashx

	In 2000, the Association of Fish and Wildlife Agencies (AFWA) Teaming with Wildlife (TWW) coalition Representing more than 3,500 agencies, conservation groups and businesses led the passage of two important wildlife and fisheries conservation funding acts: Wildlife Conservation and Restoration Program(WCRP) and State Wildlife Grants(SWG) (TWW 2008 – 2011, see new TWW 2012). The following year, the United States' Congress required each state and territory to develop a "comprehensive wildlife conservation strategy" to guide the distribution of these funds(USFWS 2000). Eight elements of conservation success were identified by the US Fish and Wildlife Service (USFWS 2000) and a representative team from state fish and wildlife agencies and conservation organizations to guide the plans' development. The elements address species, habitats and communities, problems and issues, conservation actions, monitoring, plan reviews, coordination with conservation partners, and public involvement. SPECIES OF GREATEST CONSERVATION NEED (SGCN) Each state identified a list of species representative of the diversity, health and importance of the wildlife of their state. While the lists could include game and other state and federal regulated species, SGCN lists primarily focused on rare, declining, and vulnerable fish and wildlife species needing special attention for recovery, stability, and/or to prevent listings under state or federal regulation (e.g. Endangered Species Act). CONSERVATION ACTIONS AND MONITORING Conservation actions(e.g. research, survey, restoration, land or water protection, partnership-building) were defined to address the threats and issues which negatively affect species, habitats and systems. A baseline assessment of existing habitats was important for many states to define and prioritize where actions were most needed. For some states, this assessment could not be accomplished with the available data; therefore, baseline development itself became a conservation action. Actions were developed on

	the framework of existing conservation for each state: private landowner outreach, partnerships with other agencies and organizations, public involvement, legislative and regulatory support, to name a few. Measuring and reporting progress, lessons learned and successes ("effectiveness") is best accomplished through monitoring. This component is very important, yet frequently it is the most difficult to achieve due to very limited time, money and human resources. MOMENTUM 2005 – 2011 By 2006, 56 plans were created – one for each US state and territory – and approved by USFWS Regional review teams(TWW 2012). These plans were called State Wildlife Action Plans(SWAP) or Comprehensive Wildlife Conservation Strategies(CWCS). Since plans were approved, conservation partners and resource conservation agencies have seen the value in these plans grow as information resources, support or guidance for their conservation activities, and platforms for conservation practice improvement.[209]
Colorado Wildlife Action Plan	Submitted to the U.S. Fish and Wildlife Service on September 29, 2005, and it was finalized November 2, 2006. • 210 species were identified as Species of Greatest Conservation Need (SGCN). [210]
Interagency Group	W. Governor's Association Interstate Working Group
Upland Bird Grassland Habitat Strategy on the Eastern Plains	Grassland wildlife habitat conservation in eastern Colorado is implemented through a diverse mix of programs and efforts. Colorado Parks and Wildlife (CPW) has identified and prioritized areas of high upland wildlife habitat and population potential, which typically coincides with historic mid-grass or sand-sage prairie habitats.
Pheasant Habitat Improvement Program,	The Pheasant Habitat Improvement Program (PHIP) is a cooperative effort between the Colorado Parks and Wildlife,

[209] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_overview_2012.pdf
[210] http://wildlife.state.co.us/SiteCollectionDocuments/DOW/WildlifeSpecies/CWCS_FinalReport2006.pdf

(PHIP)	Pheasants Forever Inc., and local Pheasants Forever Chapters in Colorado. The program is designed to assist landowners in developing and enhancing habitat for ring-necked pheasants. PHIP is offered within the core pheasant range in Colorado, including the counties of Morgan, southeastern Weld, Logan, Phillips, Sedgwick, Yuma, Washington, Kit Carson, Cheyenne, Kiowa, Prowers and Baca.[211]
Private Lands Technical Assistance Programs	Private Landowner Assistance offers a wide variety of programs to assist private landowners on improving fisheries and wildlife on their property and can provide technical support and assistance on improving wildlife habitats.[212]
Habitat Partnership Program (HPP)	This grant is designed to encourage multiple entities to partner with the Habitat Partnership Program on large scale habitat improvement projects which, when completed, will provide benefits to livestock, private land owners, land managers, big game animals and other wildlife species. Habitat improvement projects include using mechanical and chemical tools to improve/increase available habitat and forage. Typical habitat improvement projects done by HPP include brush manipulation (hydroaxing, roller chopping, Lawson aerating, burning, etc), weed control using biological and chemical means, water developments (maintaining existing water sources and developing new ones), fertilizing and reseeding.[213]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are paving the way of our future by developing best management practices or BMPs that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy

[211] http://wildlife.state.co.us/LANDWATER/PRIVATELANDPROGRAM/PHIP/Pages/PHIP.aspx
[212] http://www.kdwpt.state.ks.us/news/Services/Private-Landowner-Assistance
[213] http://www.riparianrestorationconnection.com/component/content/article/193-habitat-partnership-program-hpp-habitat-improvement-grant

	from renewable sources by 2020 in a wildlife friendly manner.[214]
LESSER PRAIRIE-CHICKEN WILDLIFE MANAGEMENT PLAN	The Texas Parks and Wildlife Department(TPWD) provides free technical assistance to landowners and land managers interested in wildlife management through the private lands enhancement program. Local biologists work with land owners to develop and then meet the wildlife management goals and objectives for all species of land owner interest on a given property. A wildlife management plan (WMP) can provide numerous benefits for landowners. Once implemented it improves habitat, potentially increases wildlife numbers, and can improve grazing resources. Additionally, use of a WMP promotes aesthetic value, and therefore can raise property value. The lesser prairie-chicken is a candidate species for listing under the Endangered Species Act. This particular WMP (specific to protecting and improving lesser prairie-chicken habitat) will fulfill the requirements for entering into a Candidate Conservation Agreement with Assurances(CCAA. [215]
Texas Conservation Agreement	CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES FOR LESSER PRAIRIE-CHICKENS between TEXAS PARKS AND WILDLIFE DEPARTMENT and U. S. FISH AND WILDLIFE SERVICE[216]
TEXAS CONSERVATIONACTIO N PLAN State/Multi-Region	Through the Texas Conservation Action Plan (TCAP), ecologists and other stakeholders all across the state have identified 1311 Species of Greatest Conservation Need (SGCN), 232 Rare Plant Communities, the best examples of habitats and those at risk, issues affecting our resources, and potential solutions to continue to protect lands and water for future generations of

[214] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml

[215] v http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd_1046b_w7000_lesser_prairie_chicken_wmp.pdf

[216]http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

	people, fish and wildlife. The challenges are many, but the landscape of conservation partners and opportunities is extensive. This plan is designed to help interested folks connect and put into practice the most needed conservation actions. [217]
An Assessment of Herbicide Treatment and Grazing on Lesser Prairie Chicken Survival, Nest Site Collection[218]	Blake Grisham- Department of Natural Resources Management, Texas Tech University [219]
Candidate Conservation Agreement With Assurances -Oklahoma	The U.S. Fish and Wildlife Service (Service) has approved the Oklahoma Department of Wildlife Conservation's (ODWC) Candidate Conservation Agreement with Assurances (CCAA) for the lesser prairie-chicken. - approved 2/5/13[220]
Great Plains HCP	HCPs are an integral component of an application for an Incidental Take Permit (ITP) under the federal Endangered Species Act (ESA). ITPs are a voluntary tool that non-federal entities may use to receive authorization for "take" of federally-listed (i.e., officially recognized as endangered or threatened) species of wildlife that may occur in connection with otherwise lawful activity. "Take" is defined in the ESA as, "…to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" with respect to federally-listed endangered species.[221]

[217] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_statewide_multiregion_handbook.pdf
[218] http://www.ksre.ksu.edu/doc13892.ashx
[219] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1047721.pdf
[220] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf
[221] http://www.greatplainswindhcp.org/documents/fact_sheet.pdf ; http://www.greatplainswindhcp.org/aboutthehcp.cfm

Oklahoma Conservation Commission	Commission created to assist with state conservation and education efforts and is an authorized rulemaking entity. [222] [223] The Oklahoma Conservation Commission and conservation districts accomplish conservation of renewable natural resources through soil and water conservation, landuse planning, small watershed upstream flood control, abandoned mine land reclamation, water quality monitoring, environmental education and wetlands conservation.
Ecology and Management of the Lesser Prai rie-Chick en[224]	Oklahoma Cooperative Extension Service, Division of Agricultural Sciences and Natural Resources, Oklahoma State University
Wildlife Credits Program	Offers stewardship payments to agricultural producers for work done to protect and expand habitat for the rare upland bird. Is made possible with an agreement between the Wildlife Department, Oklahoma Conservation Commission and the Oklahoma Association of Conservation Districts. [225]
Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (Tympanuchus pallidicinctus) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.[226]
Oklahoma Lesser Prairie Chicken Conservation Plan (OLEPCCP	a conservation plan to address the decline of the lesser prairie chicken (LEPC) in Oklahoma. The conservation plan will identify management strategies to improve LEPC population viability through improvements to LEPC habitat emphasizing tools and incentives to encourage landowners to partner with agencies in conservation efforts while achieving their land use needs.[227]

[222] http://www.ok.gov/conservation/
[223] http://www.ok.gov/conservation/About_Us/Rules_and_Rulemaking/index.html
[224] http://www.environment.ok.gov/documents/OKWindEnergy/EcologyMgmtLesserPrairieChicken.pdf
[225] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[226] http://www.wildlifedepartment.com/lepcdevelopmentplanning.htm
[227] http://www.wildlifedepartment.com/wildlifemgmt/lepc/cons_plan.htm

Habitat Evaluation Guide for the Lesser Prairie-chicken[228]	Guide for Management and Habitat Restoration co-authored by Oklahoma State University, George Miksh Avian Research Center, and the Nature Conservancy.
Eastern Ceder Removal	NRCS is using new technology to enhance existing satellite images to identify redcedar growth and estimate the inventory available for harvest. Counties that are included in this Cedar Mapping project: Cimarron, Ellis, Murray, Okfuskee, Pottawatomie, and Woodward.[229]
Lesser Prairie Chicken Initiative Core Conservation Practices	NRCS Programs for habitat restoration include: Brush Management, Early Succession Habitat Development, Firebreak , Fence, Obstruction Removal, Prescribed Grazing, Prescribed Burning, Range Planting, Restoration of Rare and Declining Habitat, Watering Facility supporting programs. [230]
Kansas Comprehensive Wildlife Conservation Plan[231]	The theme of Kansas' Comprehensive Wildlife Conservation Plan (CWCP) is "Keeping Common Species Common." A major premise of Kansas' approach to developing the CWCP was to use existing information - not to start from scratch or conduct new studies. The process relied heavily on experts and interested parties participating in the process to bring the best available information into the plan.
LONG-RANGE PLAN For The Management of Lesser Prairie Chickens in New Mexico 2002-2006	The goal of the plan is to satisfy the public's lesser prairie-chicken related recreational and ecological interests and resolve related socio-economic issues. A three-fold approach will be integral in achieving this: 1) We will obtain a better understanding of LPC abundance, distribution and population trends. 2) We will continue to seek public involvement in and support of LPC management efforts. 3) We will work with private landowners and land management

[228] ftp://wiley.kars.ku.edu/windresource/Habitat%20Evaluation%20Guide%20for%20the%20LPC.pdf
[229] http://boisecitynews2.wordpress.com/2009/03/03/oklahoma-launches-plan-to-battle-eastern-redcedar/
[230] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcsdev11_023947.pdf
[231] http://kdwpt.state.ks.us/news/Services/Kansas-CWCP/Kansas-CWCP

	agencies to provide habitat necessary to ensure long-term conservation of LPC habitat.[232]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH[233]	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.
Southeast New Mexico Lesser Prairie-Chicken Working Group	NMDGF, as part of the Department's outreach efforts, NMDGF in collaboration with the USFWS, Bureau of Land Management (BLM), New Mexico State Land Office (SLO), and Wildlife Management Institute, proposed that a "Southeast New Mexico Lesser Prairie-Chicken Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LEPC in southeastern and east central New Mexico. The organizers hoped the various constituencies would be able to negotiate a collaborative plan that would, when implemented, improve the status of the species such that federal listing would no longer be warranted, while protecting the interests of the participating parties. In 2005, the Working Group adopted a conservation strategy and recommendations which laid out general approaches, priorities and parameters for achieving the goal of LEPC conservation and recovery while maintaining economic values and traditional land uses. The strategy document outlines and prioritizes a variety of recommended programs, projects, and practices for reducing threats to the LEPC while maintaining other uses of the land.
GIS habitat analysis for lesser prairie-chickens in southeastern New Mexico	Geographic Information System (GIS) habitat analyses for lesser prairie-chicken (LPCH, Tympanuchus pallidicinctus) conservation planning. The 876,799 ha study area included most of the occupied habitat for the LPCH in New Mexico. The objectives were to identify and quantify: 1. suitable LPCH habitat in New Mexico, 2. conversion of native

232 http://www.wildlife.state.nm.us/conservation/documents/PCLongRange.pdf

233 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	habitats, 3. potential for habitat restoration, and 4. unsuitable habitat available for oil and gas activities.[234]
Range-wide Population Estimation and Monitoring for LPC	A range-wide sampling framework and survey method is being developed to estimate total abundance of active leks for the population of LEPC. In addition, standard operating procedures are being developed for aerial surveys and ground truthing surveys.[235]
Interstate Collaboration Range Wide Conservation Plan	Lesser Prairie Chicken Interstate Working Group A focused conservation effort for LPC was described and approved by WAFWA through the Lesser prairie chicken conservation initiative (LPCCI) drafted by the Lesser Prairie Chicken Interstate Working Group (LPCIWG) in May 2008. The LPCIWG is one of the technical groups associated with the WAFWA Grassland Initiative and the 5 cooperating states have and continue to commit staff to this endeavor since it was formally established in 1996. The Lesser Prairie-Chicken (LPC) Interstate Working Group of the Western Association of Fish and Wildlife Agencies (WAFWA) is developing a range-wide conservation plan to increase the population of the LPC, in partnership within federal agencies and others. The states include Colorado, Kansas, New Mexico, Oklahoma and Texas. The conservation plan emphasizes tools and incentives to encourage landowners and others to voluntarily partner with agencies in LPC habitat conservation efforts, while also achieving their land use needs.236

[234] http://www.ksre.ksu.edu/doc13889.ashx
[235] http://www.wafwa.org/documents/Final_Study_Design_Appendices_12_8_2011.pdf
[236] http://www.wafwa.org/html/prairie_chicken.shtml

Memorandum Of Understanding For Conservation And Management Of Lesser Prairie-Chickens And Associated Species And Their Habitats	The purpose of this Memorandum of Understanding (MOU) is to provide, under auspices of the Western Association of Fish and Wildlife Agencies (WAFWA), for interagency cooperation in conservation and management of lesser prairie-chickens (Tympanuchus pallidicinctus) and associated species and their habitats across their current 5-state range (i.e. parts of Colorado, Kansas, New Mexico, Oklahoma, and Texas). The purpose of this MOU is also to provide for cooperation among participating agencies in the development and implementation of conservation programs for lesser prairie-chickens (LEPC) and their associated habitats. The participating agencies agree that cooperation is necessary to collect and analyze data on lesser prairie-chickens and their habitats, and to plan and implement actions necessary to establish and/or maintain viable LEPC populations that are sufficient to preclude present or future endangerment, within the constraints of approved budgets.[237]

[237] http://www.wafwa.org/documents/LPCCI_FINAL.pdf

New Mexico CCCA	This Candidate Conservation Agreement (CCA) for the LPC and the SDL represents a collaborative effort between the FWS, the Bureau of Land Management (BLM), and the Center of Excellence for Hazardous Materials Management (CEHMM). The CCA builds upon the BLMs "Special Status Species Resource Management Plan Amendment" (RMPA) (completed in April 2008) for southeast New Mexico. The RMPA established the foundational (minimum) requirements that will be applied to all future Federal activities, regardless of whether a permittee or lessee participates in this CCA. The strength of the CCA comes from the implementation of additional conservation measures that are additive, or above and beyond those foundational requirements established in the RMPA.[238] .As of July 15, 2012, thirty oil and gas companies are enrolled in the CCA/A for a total of 808,000 acres (the participating Federal agency in this case is the Bureau of Land Management (BLM)). In addition, forty-one New Mexico ranchers have enrolled a combined 1.5 million acres of rangeland in the CCA/A and the New Mexico State Land Office has enrolled 248,000 acres in the CCAA. Partners in the NM CCA/A include BLM, CEHMM (non-profit third party to manage funds and implement CCA/A's), New Mexico Department of Game and Fish (NMGF), New Mexico State Land Office and several oil-gas companies. The CCA/A includes the entire range of the lesser prairie-chicken in New Mexico.

[238] http://www.fws.gov/southwest/es/Documents/R2ES/LPC-SDL_CCA-CCAA_2008.pdf

North American Landbird Conservation Plan-co-authored by States, Industry and FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [239]
New Mexico LPC/SDL Working Group Conservation Plan	Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico In December, 2002, representatives of NMDGF, FWS, the Federal Bureau of Land Management (BLM), the New Mexico State Land Office (NMSLO), and the Wildlife Management Institute proposed that a "Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LPC and SDL.[240]
Land Acquisition for Habitat	In May 2008, following an extensive public planning process, the Bureau of Land Management (BLM) designated an Area of Critical Environmental Concern (ACEC) about 35 miles east of Roswell. The designation is meant to provide much-needed habitat for two species being considered for listing under the Endangered Species Act: the Lesser Prairie-chicken and the sand dune lizard. To conserve this high value habitat, the BLM requested The Conservation Fund's assistance in acquiring key lands in and around the special area. The Fund has worked on several projects that together have protected about 58,000 acres of land.

[239] http://www.partnersinflight.org/cont_plan/#Access
[240] http://nwcos.org/Resources/LPC_SDL_Conservation_Strategy_CD.pdf

Land Acquisition for Habitat	The Johnson Ranch in southeastern New Mexico has been purchased by The Nature Conservancy. The 9,170 acre property contains critical habitat for 25 Species of Greatest Conservation Need—as identified in the state's Comprehensive Wildlife Conservation Strategy (also known as Wildlife Action Plan)—including the lesser prairie-chicken.
POWERLINE PROJECT GUIDELINES NEW MEXICO DEPARTMENT OF GAME AND FISH	Recommendations for conservation and development without wildlife disturbances. [241]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.[242]
RECOMMENDATIONS TO MINIMIZE ADVERSE IMPACTS OF WIND ENERGY DEVELOPMENT ON WILDLIFE 2012	The New Mexico Department of Game and Fish (NMDGF) does not have regulatory authority specific to wind power development, nor is there any other statewide permitting authority in New Mexico. The information in this guideline is intended for use by wind project developers, their consultants, local government and the general public. Developers are encouraged to contact NMDGF for project-specific comments and recommendations. Specific locations of listed species will be kept confidential, however other information shared with NMDGF may be accessible to the public through the NM Inspection of Public Records Act. NMDGF Guidelines referred to herein may be found in the

241 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/2007POWERLINEGUIDELINES.pdf

242 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	Habitat Handbook, under the Conservation tab on the Department website.[243]
Oklahoma Conservation Easement	The Oklahoma Wildlife Conservation Commission and the Department of Wildlife Conservation shall not enter into or approve a setback or conservation easement that includes a setback related to energy or agricultural structures and regarding a threatened, endangered or candidate species that is more restrictive than those created pursuant to federal law, rules or guidelines. B. Prior to entering into or approving a conservation easement or setback pursuant to subsection A of this section, the Commission and the Department shall review all information and studies presented to the Commission or Department by a public or private entity affected by the proposed conservation easement or setback.[244]
Colorado Conservation Easements	"Conservation easement in gross", for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural,

243 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

244 Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103b - Setback or Conservation Easement Related to Energy or Agricultural Structures and Threatened or Endangered Species. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466365&hits=481+480+475+474+260+259+253+252+189+188+182+181+12+11+5+4+

	horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.[245]
Colorado Conservation Easements	Nature of conservation easements in gross. (1) A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in section 38-30.5-102 and transferable by any lawful method for the transfer of interests in real property in this state. (2) A conservation easement in gross shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding that it may be negative in character. (3) A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it. (4) The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating the easement. (5) A conservation easement in gross that encumbers water or a water right as permitted by section 38-30.5-104 (1) may be created only by the voluntary act of the owner of the water or water right and may be made revocable by the instrument creating it.[246]
Colorado Conservation Easements	The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary. Further, the general assembly finds and declares that it is in the public interest to determine who may receive such easements and for what purpose such easements may be received.[247]

[245] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[246] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[247] Title 38. PROPERTY - REAL AND PERSONAL, REAL PROPERTY, Interests in Land, Article 30.5. Conservation Easements.

Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	Interior Secretary Salazar announces $57.8 million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP- The planning proposal lands encompasses the whooping cranes migration route in the U.S. and their wintering grounds, along with containing a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[248]

http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=27609&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

[248] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html

APPENDIX 8-LITERATURE CITED

[Please note, where references are made to literature cited in the U.S. Fish and Wildlife Service's 2012 Proposed listing, for consistency, CESAR has adopted the abbreviated citation conventions used in that document.]

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SUSANA MARTINEZ
Governor

JEFF M. WITTE
Secretary

March 7, 2014

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

RE: Notice of Intent to Prepare an Environmental Impact Statement for a Habitat Conservation Plan for Commercial Developments, Including Energy Developments, and Agricultural and Conservation Activities Within Six States

To Whom It May Concern:

New Mexico Department of Agriculture (NMDA) submits the following comments in response to the notice of intent to prepare an Environmental Impact Statement (EIS) for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP) for commercial developments, including energy developments, and agricultural and conservation activities within six states (*Docket FWS-R2-ES-2013-0134*).

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012 (New Mexico Agricultural Statistics 2012). NMDA's comments focus on process questions related to the development of an EIS on the ITP application, including concerns about how alternatives will be developed.

In the plan proposed by the American Habitat Center, landowners can enroll in versions of the American Habitat Center's plan with an Enrollment Agreement under a proposed addition to the Section 4(d) Special Rule, with a Certificate of Inclusion under a proposed Candidate Conservation Agreement with Assurances, and a Certificate of Participation under an HCP. The last segment of the American Habitat Center's plan, and the issuance of the required ITP, is the segment up for comment.

Currently, landowners can choose to enroll in the Western Association of Fish and Wildlife Agencies' Range-wide Conservation Plan or the Natural Resources Conservation Service's Lesser Prairie-Chicken Initiative. Additionally, the proposed 4(d) Special Rule *(79 FR 4652)* exempts some agricultural activities from take provisions.

NMDA contends that all six options (three currently approved and three segments of the current proposal) should be evaluated as alternatives during the construction of the EIS. Although NMDA supports private, local, state, and federal land-based efforts to preclude listing the lesser prairie-chicken (LEPC) as threatened, NMDA is concerned that the addition of three more options for landowners has

the potential to negatively impact conservation initiatives for the LEPC by causing landowner confusion and diluting the impact of any one program.

Significant efforts by private landowners and private sector businesses as well as state and federal government entities to implement land management activities that benefit LEPC habitat in New Mexico and throughout its range involve large tracts of land. According to figures provided in the Range-wide Conservation Plan for the LEPC, the following acreages are currently providing LEPC habitat on private lands within the five states where the LEPC is found:

Lesser Prairie-Chicken Conservation Initiative (LPCI)	942,572 acres
Conservation Reserve Program (CRP)	5.5 million acres
Candidate Conservation Agreement with Assurances (CCAA)	2.1 million acres
State Acres for Wildlife Enhancement (SAFE)	214,000 acres

Private landowners (ranchers and farmers), private sector businesses, and nongovernmental organizations have voluntarily protected and improved more acres of LEPC habitat than all of the federal and state agencies combined. This demonstrates the commitment of the agricultural community and private sector to habitat improvement for the LEPC under the current paradigm. This commitment may be jeopardized if landowners have to choose between six competing plans. Faced with so many choices, landowners may be overwhelmed and choose not to enroll in any of the programs, undermining their purpose.

Thank you for the opportunity to comment on this proposal. We request the U.S. Fish and Wildlife Service continue to keep NMDA informed of this and other efforts related to LEPC.

Please contact Angela Brannigan at (575) 646-8025 if you have questions about these comments.

Sincerely,

Jeff M. Witte

JMW/AB/ya

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

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

March 10, 2014

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

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

To Whom It May Concern:

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

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

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

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

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

Sincerely,

Jose Varela Lopez, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

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

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

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

New Mexico Cattle Growers' Association
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January 6, 2014

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

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

To Whom It May Concern:

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

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

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

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

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

The Service further proposes that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to activities that are conducted during the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, hay, or forage production.
(1) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands in cultivation, provided that the harvest of cultivated lands is conducted by methods that allow wildlife to flush and escape, such as starting operations in the middle of the field and working outward, or by modifying equipment to include flush bar attachments.
(2) Routine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as irrigation conveyance structures and roads.
While the Parties appreciate the proposed and aforementioned take allowance under a listing scenario, the Parties strongly recommend broadening the allowance to include those lands that were previously cultivated but are currently out of production due to rotation, set-aside, or other normal or dryland agricultural practices that would preclude a landowner from cultivating a particular field in the year previous or concurrent to the listing decision.

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

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

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

Sincerely,

Rex Wilson, President
NM Cattle Growers' Association

Mike White, President
NM Farm and Livestock Bureau

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

Kenny Salazar, President
NM Association of Conservation Districts

Marc Kincaid, President
NM Wool Growers, Inc.

March 10, 2014

Docket ID: FWS-R2-ES-2013-0134

RE: Submission by the Permian Basin Petroleum Association (PBPA) on behalf of its 1000 members, a substantial portion of which exist within the range of the lesser prairie chicken and scope of this Environmental Impact Statement.

To Whom It May Concern:

The PBPA represents over 1000 member companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the Permian Basin region of west Texas and southeastern New Mexico. The Permian Basin is the most prolific oil producing region in the United States and produces approximately twenty percent of the oil produced in the America annually. PBPA member companies have existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities in areas with LPC habitat, and therefore will be significantly impacted by this rulemaking.

PBPA members have always intended to support any reasonable post listing plan and offer these comments which are intended to be constructive.

In reviewing the scoping documents, scoping meeting presentation, and scoping posters provided by FWS, PBPA wishes to raise several issues to be addressed during this process:

1) NEPA Scoping Process is Not Adequate for Meaningful Public Participation

§ 46.235 NEPA scoping process. (a) Scoping is a process that continues throughout the planning and early stages of preparation of an environmental impact statement. Scoping is required for an environmental impact statement; scoping may be helpful during preparation of an environmental assessment, but is not required (see paragraph 46.305(a) Public involvement in the environmental assessment process). For an environmental impact statement, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions. Scoping is an opportunity to introduce and explain the interdisciplinary approach and solicit information as to additional disciplines that should be included. Scoping also provides an opportunity to bring agencies and applicants together to lay the groundwork for setting time limits, expediting reviews where possible, integrating other environmental reviews, and identifying any major obstacles that could delay the process. The Responsible Official shall determine whether, in

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some cases, the invitation requirement in 40 CFR 1501.7(a)(1) may be satisfied by including such an invitation in the notice of intent (NOI). (b) In scoping meetings, newsletters, or by other communication methods appropriate to scoping, the lead agency must make it clear that the lead agency is ultimately responsible for determining the scope of an environmental impact statement and that suggestions obtained during scoping are only options for the bureau to consider.

COMMENT: The rushed and abbreviated timeframe of the scoping hearings is surprising and troubling since few stakeholders were able to become aware of these proceedings in time to develop comments or, more importantly, to attend. We believe most affected stakeholders simply didn't receive adequate notice of the scoping meetings. We are concerned that the minimal scoping meetings held do not comply with Departmental public participation and involvement regulatory guidelines.
For example, the HCP being considered extends into Nebraska, which is not part of the habitat USFWS or the states have identified. Additional scoping meetings should be scheduled in all affected areas, including Nebraska, in order to provide an opportunity for broader and more meaningful involvement by impacted states, local governments, landowners, industry and other interested parties. We believe extensive public involvement is necessary and desirable, if not required, in order to evaluate this proposed action adequately. Without it, we fear that the USFWS will not be able to develop a viable document that fully addresses the full range of reasonable alternatives to be analyzed and the extent to which new data and analyses will be required.

Particular issues of concern, currently absent from the scoping process, include the following:

- As mentioned above, the HCP under consideration extends into Nebraska. The EIS must evaluate the inclusion of this area as well as an alternative that does not include this area. Any analysis must examine whether the HCP's inclusion of conservation credits from Nebraska, an area not identified as habitat, results in less conservation in identified habitat.

- The HCP does not and cannot exist in a vacuum. As with any plan, its environmental impact must be assessed against the environmental impacts already authorized in the LEPC's habitat. Any incidental take permitted by the HCP must be evaluated along with the incidental take permitted by the WAFWA Range-wide Conservation Plan, USDA/NRCS CRP, and the existing New Mexico, Texas, and Oklahoma CCAAs respectively. These plans currently enjoy combined enrollment in excess of 10 million acres of habitat in the LEPC's estimated occupied range and are already being implemented and providing assurances to those enrolled. The permit issued with the CCAA allows 1.9 million acres of take over a 30 year period. By comparison, the HCP proposes even greater take, i.e., an authorization of 2.2 million acres of take over a 30 year period. The EIS must evaluate the impact of permitting 2.2. million acres of take under the HCP <u>in addition</u> to the take that is already authorized under the RWP, the various CCAAs, and other approved mechanisms. The baseline case resulting from these various programs must be evaluated in the application of additional plans or programs EIS must also evaluate the impact on the LEPC and its range should no take in addition to the take already permitted by approved mechanisms be permitted.

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COMMENT: We believe the NEPA contractor has thoroughly underestimated the time required to provide 1) adequate scoping, 2) meaningful public participation, 3) meaningful agency involvement and coordination in the process, and 4) adequate analysis of the complex environmental, social, and economic impacts that the proposed conservation strategy and habitat management plan will have, not only on the 5 state area impacted by the proposed regulatory and administrative actions, but on the nation as a whole. There are literally thousands of landowners, hundreds of communities, hundreds of major industries and countless local and national environmental and business organizations that will need time to digest this proposal and to review any documents and analyses for adequacy. The proposed does not provide adequate time for persons or organizations that may be interested or affected to become involved enough in the process to provide meaningful input.

We believe considerable new environmental and socio-economic data will be required considering the anticipated significant potential impact of this proposed untested conservation approach. It establishes a de facto regulatory bureaucracy that all stakeholders need to better understand - particularly how it will in fact work to improve protection of the Lesser Prairie Chicken to a greater extent that the Range-wide Conservation Plan currently in place.

Most full Environmental Impact Statements on proposals of this magnitude take a minimum of 1 ½ years to complete, and more likely in excess of 2 years. Experience has taught us that the NEPA process cannot be shortened at the will of the proponent. All procedural steps in the process must be met and additional time allotted for unexpected delays resulting from adverse comments on scoping, the Draft EIS and the Final EIS. The requirement to consider and evaluate all reasonable alternatives fully and completely and to fully involve, to the extent practicable, all affected stakeholders nearly always mitigates against any attempt to expedite a NEPA document in the face of controversy and complexity surrounding a proposed action. This process is too important and too complex to be rushed. We strongly recommend that USFWS re-evaluate the proposed timeframe and publish one that is more realistic and one that can be effectively managed so as to be consistent with Departmental NEPA guidelines.

3) Need for Proposed Action in Question - Appropriate Consideration of the "No Action Alternative"

COMMENT: The proposed action being subject to NEPA contains a Stakeholder Conservation Strategy and a draft Habitat Conservation Plan that would become effective should the Lesser Prairie Chicken become listed as "Threatened" or "Endangered" under the ESA. The February Notice of the Scoping and NEPA Process is silent on the No Action Alternative and other reasonable alternatives to the Proposed Action, particularly with respect to the Western Association of Fish and Wildlife Agencies (WAFWA) Range-Wide Conservation Plan. The Range-wide Conservation Plan, which has already satisfied NEPA and been previously adopted by Congress and the USFWS, is being implemented successfully along side the New Mexico, Texas, and Oklahoma CCAAs, as well as the USDA CRP and NRCS LPCI programs. With considerable stakeholder support, these plans have already protected in excess of 10 million combined acres of critical Lesser Prairie Chicken habitat throughout the geographic area to be impacted by the proposed action. The decision to proceed with an alternative conservation strategy and plan in the absence a final ESA regulatory determination of the status of the Prairie Chicken, at the very least, causes considerable confusion

among the many stakeholders who are very much in need of the regulatory security the Range-wide Conservation Plan and complementary programs already provide.
We believe the No Action Alternative, which by default should include the Range-wide Conservation Plan et al, should be the starting place for scoping discussions. The Proposed Action cannot be fully understood in the absence of a USFWS presentation and understanding of these plans, their metrics, and what they are already accomplishing for habitat protection in perpetuity.
Stakeholders need to know that these existing CCAAs and the Range-wide Plan have already been adopted by USFWS and are already being implemented within the project area--in some cases, on private and public lands that could be impacted by the regulatory scheme contained in the Proposed Action. Scoping done without this vital information on alternatives would risk commencing the drafting of the analyses and writing of the EIS in a vacuum that defies the reality of USFWS's existing conservation planning and habitat protection strategy and the positive work that is already resulting from it.

4) State Wildlife Agencies and Affected Local Government Agencies Should be Included in the NEPA Process as Cooperating Agencies consistent with DOI NEPA Regulations

§ 46.225 How to select cooperating agencies. (a) An "eligible governmental entity" is: (1) Any Federal agency that is qualified to participate in the development of an environmental impact statement as provided for in 40 CFR 1501.6 and 1508.5 by virtue of its jurisdiction by law, as defined in 40 CFR 1508.15; (2) Any Federal agency that is qualified to participate in the development of an environmental impact statement by virtue of its special expertise, as defined in 40 CFR 1508.26; or (3) Any non-Federal agency (State, tribal, or local) with qualifications similar to those in paragraphs (a)(1) and (a)(2) of this section. (b) Except as described in paragraph (c) of this section, the Responsible Official for the lead bureau must invite eligible governmental entities to participate as cooperating agencies VerDate Aug<31>2005 18:06 Oct 14, 2008 Jkt 217001 PO 00000 Frm 00030 Fmt 4701 Sfmt 4700 E:\FR\FM\15OCR3.SGM 15OCR3 pwalker on PROD1PC71 with RULES361320 Federal Register / Vol when the bureau is developing an environmental impact statement. (c) The Responsible Official for the lead bureau must consider any request by an eligible governmental entity to participate in a particular environmental impact statement as a cooperating agency.

COMMENT: The Department of the Interior has been a leader in involving local and state government agencies in NEPA compliance activities, particularly when these actions involve region-wide planning efforts. DOI regulations specifically provide for consultation, coordination and cooperation with government and tribal agencies and embrace CEQ guidelines which direct agencies to "encourage and facilitate" public involvement in the NEPA process. We suggest that in this case, maximum participation of affected local and state agencies in all phases of the development of this NEPA document is essential and desirable to develop and enhance the prospects for a cooperative conservation solution to the protection of the Lesser Prairie Chicken in a way that minimizes disruption to the regional economy. We strongly urge that, at a minimum, wildlife agencies from all 5 affected states plus Nebraska be offered the opportunity to participate as cooperating agencies in all major phases of the development of the EIS including the evaluation of the adequacy and completeness of the Scoping process. We also urge that county and city government agencies that desire to participate as cooperating agencies be allowed to do so. We strongly urge that this recommendation be adopted in the Scoping process (which will need to be extended in order to do so) so that 1) the prospects for a community consensus can be attempted as per Department NEPA policy and 2) so that the existing Range-wide Conservation Plan, currently being implemented, will be appropriately analyzed and properly evaluated in the context of the Proposed Action.

Please contact me if I can be of any assistance.

Sincerely,

Ben Shepperd
President

Name: Ben Shepperd

Comments: Submission by the Permian Basin Petroleum Association (PBPA) on behalf of its 1000 members, a substantial portion of which exist within the range of the lesser prairie chicken and scope of this Environmental Impact Statement.

See attached file(s)

close window

March 10, 2014

Docket ID: FWS-R2-ES-2013-0134

RE: Submission by the Permian Basin Petroleum Association (PBPA) on behalf of its 1000 members, a substantial portion of which exist within the range of the lesser prairie chicken and scope of this Environmental Impact Statement.

To Whom It May Concern:

The PBPA represents over 1000 member companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the Permian Basin region of west Texas and southeastern New Mexico. The Permian Basin is the most prolific oil producing region in the United States and produces approximately twenty percent of the oil produced in the America annually. PBPA member companies have existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities in areas with LPC habitat, and therefore will be significantly impacted by this rulemaking.

PBPA members have always intended to support any reasonable post listing plan and offer these comments which are intended to be constructive.

In reviewing the scoping documents, scoping meeting presentation, and scoping posters provided by FWS, PBPA wishes to raise several issues to be addressed during this process:

1) NEPA Scoping Process is Not Adequate for Meaningful Public Participation

§ 46.235 NEPA scoping process. (a) Scoping is a process that continues throughout the planning and early stages of preparation of an environmental impact statement. Scoping is required for an environmental impact statement; scoping may be helpful during preparation of an environmental assessment, but is not required (see paragraph 46.305(a) Public involvement in the environmental assessment process). For an environmental impact statement, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions. Scoping is an opportunity to introduce and explain the interdisciplinary approach and solicit information as to additional disciplines that should be included. Scoping also provides an opportunity to bring agencies and applicants together to lay the groundwork for setting time limits, expediting reviews where possible, integrating other environmental reviews, and identifying any major obstacles that could delay the process. The Responsible Official shall determine whether, in

PERMIAN BASIN PETROLEUM ASSOCIATION
P.O. BOX 132 MIDLAND, TEXAS 79702 WWW.PBPA.INFO 432-684-6345

some cases, the invitation requirement in 40 CFR 1501.7(a)(1) may be satisfied by including such an invitation in the notice of intent (NOI). (b) In scoping meetings, newsletters, or by other communication methods appropriate to scoping, the lead agency must make it clear that the lead agency is ultimately responsible for determining the scope of an environmental impact statement and that suggestions obtained during scoping are only options for the bureau to consider.

COMMENT: The rushed and abbreviated timeframe of the scoping hearings is surprising and troubling since few stakeholders were able to become aware of these proceedings in time to develop comments or, more importantly, to attend. We believe most affected stakeholders simply didn't receive adequate notice of the scoping meetings. We are concerned that the minimal scoping meetings held do not comply with Departmental public participation and involvement regulatory guidelines.
For example, the HCP being considered extends into Nebraska, which is not part of the habitat USFWS or the states have identified. Additional scoping meetings should be scheduled in all affected areas, including Nebraska, in order to provide an opportunity for broader and more meaningful involvement by impacted states, local governments, landowners, industry and other interested parties. We believe extensive public involvement is necessary and desirable, if not required, in order to evaluate this proposed action adequately. Without it, we fear that the USFWS will not be able to develop a viable document that fully addresses the full range of reasonable alternatives to be analyzed and the extent to which new data and analyses will be required.

Particular issues of concern, currently absent from the scoping process, include the following:

- As mentioned above, the HCP under consideration extends into Nebraska. The EIS must evaluate the inclusion of this area as well as an alternative that does not include this area. Any analysis must examine whether the HCP's inclusion of conservation credits from Nebraska, an area not identified as habitat, results in less conservation in identified habitat.

- The HCP does not and cannot exist in a vacuum. As with any plan, its environmental impact must be assessed against the environmental impacts already authorized in the LEPC's habitat. Any incidental take permitted by the HCP must be evaluated along with the incidental take permitted by the WAFWA Range-wide Conservation Plan, USDA/NRCS CRP, and the existing New Mexico, Texas, and Oklahoma CCAAs respectively. These plans currently enjoy combined enrollment in excess of 10 million acres of habitat in the LEPC's estimated occupied range and are already being implemented and providing assurances to those enrolled. The permit issued with the CCAA allows 1.9 million acres of take over a 30 year period. By comparison, the HCP proposes even greater take, i.e., an authorization of 2.2 million acres of take over a 30 year period. The EIS must evaluate the impact of permitting 2.2. million acres of take under the HCP <u>in addition</u> to the take that is already authorized under the RWP, the various CCAAs, and other approved mechanisms. The baseline case resulting from these various programs must be evaluated in the application of additional plans or programs EIS must also evaluate the impact on the LEPC and its range should no take in addition to the take already permitted by approved mechanisms be permitted.

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Please contact me if I can be of any assistance.

Sincerely,

Ben Shepperd
President

MARLA PEEK
DIRECTOR OF REGULATORY AFFAIRS

WRITER DIRECT
(405) 523-2437
FAX (405) 530-2634
marla.peek@okfb.org

March 10, 2014

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

Re: EIS for the Stakeholder Conservation Strategy/American Habitat Center Habitat Conservation Plan for the Lesser Prairie Chicken

To Whom It May Concern:

Please accept these comments on behalf of the Oklahoma Farm Bureau, Oklahoma's largest general farm organization, with about 100,000 member families. The proposed listing of the Lesser Prairie Chicken (LPC) as threatened affects thousands of our members in northwestern and the panhandle of Oklahoma. I serve on the policy committee for the Stakeholder Conservation Strategy (Strategy). I was able to attend the scoping meeting in Woodward on February 26. I found it to be comprehensive and instructive. There were several questions from the audience and they were answered politely and completely by Allison Arnold with the U.S. Fish and Wildlife Service (Service) and Steve Manning with Natural Resources Solutions.

It is inspiring to see organizations, like Farm Bureau and other agricultural organizations which represent landowners, working together with the oil and gas industry and the Environmental Defense Fund toward the common goal of preserving and restoring LPC populations and habitat. At a time when there is never enough federal or state dollars for threatened and endangered species conservation, the Strategy may very well be the best model for species conservation for the future. This model has been built to be robust, with thorough scrutiny and oversight as the operating structure places the Service at the top of the Strategy.

As a policy committee member involved in the stakeholder process, I thought the planning structure worked well. Oklahoma Farm Bureau came into the project at the urging of the Texas Farm Bureau. I was pleased to see the level of cooperation and respectfulness the stakeholders paid to one another. That the Strategy and this Environmental Impact Statement are being completed so quickly is evidence of how well everyone has worked together.

Following are some of the elements of the Habitat Exchange that we really like.

- Dynamic permanent conservation offset. As we understand this entirely new concept, a dynamic permanent offset keeps the net conservation benefit constant, even though the offset may change from one piece of property to another, thus making the offset permanent. This will be managed by the Habitat Exchange Administrator.
- Free-market based buying and selling of credits and debits.
- Creation of the Habitat Quantification Tool.

- Creation of a Reserve Account to keep the net conservation benefit to the chicken whole when circumstances happen to a property owner which are beyond his control.

The entire process of creating the Strategy has been a pleasure. We do not wish to see the LPC listed as threatened; however, we are hopeful this Strategy will be successful for the LPC, the environment and the landowners.

Thank you for your consideration in this matter.

Sincerely,

Marla R. Peek
Director of Regulatory Affairs

cc: OFB Board of Directors

USDA
United States Department of Agriculture

Farm and Foreign Agricultural Services

Farm Service Agency

Farm Programs

1400 Independence Ave, SW
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MAR 1 2014
Div. of Policy & Dir. Mgt.

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

Dear Director Ashe:

The U.S. Department of Agriculture (USDA), Farm Service Agency (FSA), appreciates the opportunity to comment on the U. S. Department of Interior (USDOI), Fish and Wildlife Service (FWS), intent to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (**42 U.S.C. 4321, et seq.**) on a proposed application for an Incidental Take Permit (ITP) under Section 10(a)(1)(B) of the Endangered Species Act (ESA) of 1973, as amended (**16 U.S.C. 1531**) . The potential ITP includes activities that cover regional construction, operation, and maintenance associated with multiple commercial energy facilities; agricultural activities, including farming and ranching; and conservation management activities within portions of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, and Texas. FWS will seek public input including accepting written comments received at announced public scoping meetings held within the proposed permit area prior to developing a draft EIS for potential issuance of an ITP.

Under ESA to obtain an ITP, an applicant must submit an Habitat Conservation Plan containing measures that would minimize incidental take, including avoidance, and mitigate for the effects of any incidental take to the maximum extent practicable, and ensure that the taking is incidental to, and not the purpose of, otherwise lawful activity (16 U.S.C. 1539(a)(1)(B) and 1539(a)(2)(A)).

The potential ITP is directed to the lesser prairie chicken (*Tympanuchus pallidicinctus*), a species currently proposed to be listed as threatened pursuant to the ESA. The lesser prairie chicken has some likelihood of being affected by the applicant's activities within the proposed permit area.

The applicant is a diverse group of stakeholders representing energy, agricultural, and conservation industry and organizations, known collectively as the American Habitat Center, that have come together to develop a Stakeholder Conservation Strategy, containing three primary components:

- a Habitat Conservation Plan (HCP),
- a Habitat Quantification Tool (HQT), and
- a Habitat Exchange (HE).

USDA is an Equal Opportunity Provider and Employer

The HCP describes conservation measures designed to avoid, minimize, and mitigate incidental take through habitat preservation, enhancement, and restoration, The HQT provides a method for determining habitat value and debits. The HE provides a primary means for meeting mitigation obligations through exchange of credits.

FSA has only a few general comments to make:

FSA supports FWS actions to prepare the EIS. Since the December 11, 2012, publication of the proposal to list the species as threatened in the Federal Register (77 FR 73828), the FWS has endorsed the Western Association of Fish and Wildlife Agencies (WAFWA) Range-wide Conservation Plan for the Lesser Prairie Chicken and provided a Conference Opinion on the Lesser Prairie Chicken Initiative (LPCI) and other conservation activities within the range of the lesser prairie chicken conducted by the USDA Natural Resources Conservation Service (NRCS). The FWS is currently preparing a Biological Opinion pertaining to a Biological Assessment developed by FSA regarding the Conservation Reserve Program (CRP) and the conservation of the lesser prairie chicken. The review of the American Habitat Center Stakeholder Conservation Strategy is consistent with FWS previous actions related to the public initiatives described. The most significant difference is that the American Habitat Center Stakeholder Conservation Strategy is a private sector initiative. Conservation measures to avoid and minimize negative impact on lesser prairie chicken appear similar across all four initiatives. There also appears to be some commonalities with respect to mitigation between the WAFWA and the American Habitat Center efforts.

However, there does appear to be nuances or difference between the HQT and the Crucial Habitat Assessment Tool (CHAT) being used by WAFWA that could lead to determination of different habitat values of the same acre of land depending on which tool is being used. FSA believes that lesser prairie chicken conservation and the lesser prairie chicken community would benefit if the tools being used to determine habitat value would derive similar values with respect to habitat benefit. Economic value will vary significantly depending on area land values but the intrinsic value as lesser prairie chicken habitat should be similar whether the HQT or CHAT tool is used.

The American Habitat Center must ensure that adequate funding for implementation of the Stakeholder Conservation Strategy, including biological and compliance monitoring, is provided. It would seem logical to avoid the appearance of conflict of interest that a third party not directly associated with or tied to the American Habitat Center would be employed to conduct required implementation monitoring and evaluation.

Lastly, FSA has some concerns related to lesser prairie chicken conservation credit exchanges and the FWS position relative to "federalization". FSA has been monitoring loss of CRP enrollment in the occupied range of the lesser prairie chicken since 2007. FSA has been trying to work with other public and private partners to improve the conservation value of land relative to other competitive land uses. Given that the occupied range of the lesser prairie chicken is over 90% privately owned and that species persistence is highly dependent on landowner willingness to voluntarily restore, establish, maintain, and manage land for the benefit of lesser prairie chicken and other wildlife, FSA would ask FWS to re-consider its position and allow for acres enrolled in CRP to be considered and credited, as appropriate, through exchanges and other mitigation initiatives.

Thank you, again, for the opportunity to provide input regarding efforts to conserve the lesser prairie chicken.

Sincerely,

Matthew T. Ponish, Acting Director
Conservation and Environmental Programs Division

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Kismet Properties, Inc.
Past President
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ValPoint Operating, LLC

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Stacey Ladd
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March 10, 2014

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

RE: NEPA Scoping process

To Whom It May Concern:

RE: Submission by the Panhandle Producers & royalty Owners Association (PPROA), the independent oil and gas trade association representing more than 750 members in the Texas Panhandle, Western Oklahoma and Southwestern Kansas. The membership includes oil and gas production companies, support companies and mineral royalty owners, most of whom have interests or operations in the range of the lesser prairie chicken and scope of this Environmental Impact Statement.

Many PPROA member companies have existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities in areas with LPC habitat, and therefore will be significantly impacted by this rulemaking. We have several areas of concern in the proposed scoping process:

1) NEPA Scoping Process is Not Adequate for Meaningful Public Participation *(§ 46.235 NEPA scoping process)*
COMMENT: The compressed timeframe meant few stakeholders were able to become aware of these proceedings in time to develop comments or attend. It is our concern minimal scoping meetings held do not comply with Departmental public participation and involvement regulatory guidelines.

Particular issues of concern, currently absent from the scoping process, include the following:

- Any analysis must examine whether the HCP's inclusion of conservation credits from Nebraska, an area not identified as habitat, results in less conservation in identified habitat.
- The HCP does not and cannot exist in a vacuum. As with any plan, its environmental impact must be assessed against the environmental impacts already authorized in the LEPC's habitat. Any incidental take permitted by the HCP must be evaluated along with the incidental take permitted by the WAFWA Range-wide Conservation Plan, USDA/NRCS CRP, and the existing New Mexico, Texas, and Oklahoma CCAAs respectively. These plans currently enjoy combined enrollment in excess of 10 million acres of habitat in the LEPC's estimated occupied range and are already being implemented and providing assurances to those enrolled. The permit issued with the CCAA allows 1.9 million acres of take over a 30 year period. By comparison, the HCP proposes even greater take, i.e., an authorization of 2.2 million acres of take over a 30 year period. The EIS must evaluate the impact of permitting 2.2. million acres of take under the HCP <u>in addition</u> to the take that is already authorized under the RWP, the various CCAAs, and other approved mechanisms. The baseline case resulting from these various programs must be evaluated in the application of additional plans or programs EIS must also evaluate the impact on the LEPC and its range should no take in addition to the take already permitted by approved mechanisms be permitted.

2) Proposed "Approximate Schedule" is Inadequate to Properly Evaluate this Complex Issue and Proposal (*§ 46.240 Establishing time limits for the NEPA process.)*

COMMENT: We believe the NEPA contractor has thoroughly underestimated the time required to provide 1) adequate scoping, 2) meaningful public participation, 3) meaningful agency involvement and coordination in the process, and 4) adequate analysis of the complex environmental, social, and economic impacts that the proposed conservation strategy and habitat management plan will have, not only on the 5 state area impacted by the proposed regulatory and administrative actions, but on the nation as a whole. There are literally thousands of landowners, hundreds of communities, hundreds of major industries and countless local and national environmental and business organizations that will need time to digest this proposal and to review any documents and analyses for adequacy. The proposed does not provide adequate time for persons or organizations that may be interested or affected to become involved enough in the process to provide meaningful input.

We believe considerable new environmental and socio-economic data will be required considering the anticipated significant potential impact of this proposed untested conservation approach. It establishes a de facto regulatory bureaucracy that all stakeholders need to better understand - particularly how it will in fact work to improve protection of the Lesser Prairie Chicken to a greater extent that the Range-wide Conservation Plan currently in place.

Most full Environmental Impact Statements on proposals of this magnitude take a minimum of 1 ½ years to complete, and more likely in excess of 2 years. Experience has taught us that the NEPA process cannot be shortened at the will of the proponent. All procedural steps in the process must be met and additional time allotted for unexpected delays resulting from adverse comments on scoping, the Draft EIS and the Final EIS. The requirement to consider and evaluate all reasonable alternatives fully and completely and to fully involve, to the extent practicable, all affected stakeholders nearly always mitigates against any attempt to expedite a NEPA document in the face of controversy and complexity surrounding a proposed action. This process is too important and too complex to be rushed. We strongly recommend that USFWS re-evaluate the proposed timeframe and publish one that is more realistic and one that can be effectively managed so as to be consistent with Departmental NEPA guidelines.

3) Need for Proposed Action in Question - Appropriate Consideration of the "No Action Alternative"

COMMENT: The proposed action being subject to NEPA contains a Stakeholder Conservation Strategy and a draft Habitat Conservation Plan that would become effective should the Lesser Prairie Chicken become listed as "Threatened" or "Endangered" under the ESA. The February Notice of the Scoping and NEPA Process is silent on the No Action Alternative and other reasonable alternatives to the Proposed Action, particularly with respect to the Western Association of Fish and Wildlife Agencies (WAFWA) Range-Wide Conservation Plan. The Range-wide Conservation Plan, which has already satisfied NEPA and been previously adopted by Congress and the USFWS, is being implemented successfully along side the New Mexico, Texas, and Oklahoma CCAAs, as well as the USDA CRP and NRCS LPCI programs. With considerable stakeholder support, these plans have already protected in excess of 10 million combined acres of critical Lesser Prairie Chicken habitat throughout the geographic area to be impacted by the proposed action. The decision to proceed with an alternative conservation strategy and plan in the absence a final ESA regulatory determination of the status of the Prairie Chicken, at the very least, causes considerable confusion among the many stakeholders who are very much in need of the regulatory security the Range-wide Conservation Plan and complementary programs already provide.

We believe the No Action Alternative, which by default should include the Range-wide Conservation Plan et al, should be the starting place for scoping discussions. The Proposed Action cannot be fully understood in the absence of a USFWS presentation and understanding of these plans, their metrics, and what they are already accomplishing for habitat protection in perpetuity.

Stakeholders need to know that these existing CCAAs and the Range-wide Plan have already been adopted by USFWS and are already being implemented within the project area--in some cases, on private and public lands that could be impacted by the regulatory scheme contained in the Proposed Action. Scoping done without this vital information on alternatives would risk commencing the drafting of the analyses and writing of the EIS in a vacuum that defies the reality of USFWS's existing conservation planning and habitat protection strategy and the positive work that is already resulting from it.

4) State Wildlife Agencies and Affected Local Government Agencies Should be Included in the NEPA Process as Cooperating Agencies consistent with DOI NEPA Regulations (*§ 46.225 How to select cooperating agencies).*

COMMENT: The Department of the Interior has been a leader in involving local and state government agencies in NEPA compliance activities, particularly when these actions involve region-wide planning efforts. DOI regulations specifically provide for consultation, coordination and cooperation with government and tribal agencies and embrace CEQ guidelines which direct agencies to "encourage and facilitate" public involvement in the NEPA process. We suggest that in this case, maximum participation of affected local and state agencies in all phases of the development of this NEPA document is

essential and desirable to develop and enhance the prospects for a cooperative conservation solution to the protection of the Lesser Prairie Chicken in a way that minimizes disruption to the regional economy. We strongly urge that, at a minimum, wildlife agencies from all 5 affected states plus Nebraska be offered the opportunity to participate as cooperating agencies in all major phases of the development of the EIS including the evaluation of the adequacy and completeness of the Scoping process. We also urge that county and city government agencies that desire to participate as cooperating agencies be allowed to do so. We strongly urge that this recommendation be adopted in the Scoping process (which will need to be extended in order to do so) so that 1) the prospects for a community consensus can be attempted as per Department NEPA policy and 2) so that the existing Range-wide Conservation Plan, currently being implemented, will be appropriately analyzed and properly evaluated in the context of the Proposed Action.

Please do not hesitate to contact me if you have any questions regarding the Association's concerns with any of the issues covered in these comments.

Sincerely,

H. Wayne Hughes

QUAY COUNTY GOVERNMENT
300 South Third Street
P.O. Box 1246
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Submitted via Federal eRulemaking Portal: http://www.regulations.gov

March 10, 2014

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

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

To Whom It May Concern:

Quay County on behalf of the County Government, residents, businesses and landowners submit the following comments on the above-referenced U.S. Fish and Wildlife Service (USFWS) Notice of Intent (NOI). Collectively, Quay County represents a large area of eastern New Mexico that will be affected by potential issuance of federal permits associated with the potential listing of the lesser-prairie chicken (LPC) under the Endangered Species Act of 1973, as amended (ESA). Quay County requests that County and each of the aforementioned entities be noted as separate commenters on the NOI.

Quay County is opposed to the USFWS proceeding with scoping the development of an Environmental Impact Statement to assess the potential impacts of the issuance of an Incidental Take Permit (ITP) under section 10 (a)(1)(B) of the ESA. We want to remind USFWS that such a permit associated with a Habitat Conservation Plan is only relevant and applicable if The Lesser Prairie Chicken is actually listed under the ESA. Because we believe a listing is not warranted and no such listing determination is made, this NOI and scoping action is premature and predecisional in nature.

As stated in previous comments by Quay County we fully support implementation of the WAFWA Rangewide Plan (RWP) as a voluntary conservation mechanism for long-term management and health of lesser prairie-chickens. We believe all of the stakeholders across the five states and the species that RWP is providing substantive conservation benefits as defined in the ESA. The NOI, we believe, undermines the RWP with schemes that jeopardize future conservation of LPC. Therefore, Quay County requests USFWS to determine and approve the No Action alternative and deny issuance of the ITP as described in the above-referenced docket number.

In closing we want to restate our resolute opposition to listing the LPC as threatened or endangered under the ESA. The substantial success shown by the States in implementation of the RWP since USFWS endorsement in October 2013 is proof that stakeholders and the States are able to voluntarily conserve LPC without the need for federal ESA protection. We assert that through a listing decision of 'not warranted and the full utilization of the voluntary and comprehensive use of the RWP the species will thrive.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

If you have any questions or comments regarding the above, please contact the undersigned.

Sincerely,

Richard Primrose
Quay County Manager

QUAY COUNTY GOVERNMENT
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March 10, 2014

Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, NS 2042 – PDM
Arlington, VA 22203

RE: SCOPING ISSUES TO BE COORDINATED WITH QUAY COUNTY DURING THE PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT FOR THE STAKEHOLDERS CONSERVATION STRATEGY / AMERICAN HABITAT CENTER HABITAT CONSERVATION PLAN

RE: Docket No. FWS-RS-ES-2013-0134

Dear Sir or Madame;

This letter is in response to the U.S. Fish and Wildlife Service (Service) Federal Register Notice requesting comments on the issues to be considered during the scoping process "for the preparation of an environmental impact statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP) under the Endangered Species Act …" (FR 2-7-2014 page 7472). Quay County has reviewed the "Stakeholder Conservation Plan for the Lesser Prairie-Chicken" (hereafter known as "Stakeholder Plan") submitted by the American Habitat Center February 2014. Following are issues critical to the County that should be considered by the Service and coordinated with our County during the EIS process.

1. **The Stakeholder Plan is Duplicative and Unnecessary**

There are already several conservation programs in place for landowners, commercial energy developers, agriculture interests and conservationists to participate in for the purpose of conserving the Lesser Prairie Chicken (LPC) and its habitat. These are acknowledged in section 2.2 of the Plan, "Existing Conservation Plans for the LEPC" (Stakeholder page 16-24). Notably, the Range-wide Conservation Plan for the LPC (hereafter Range-wide Plan) was recently approved by the Service and over 2.5 million acres have already been enrolled.

The Range-wide Plan was prepared with the assistance of major energy interests as well as other agriculture interests for the purpose of providing a systematic means for them to actively participate in the conservation of the LPC. These are the same interests the Stakeholders Plan is targeting. Already, these companies have contributed the essential funding for the program.
Importantly, the Range-wide Plan was prepared with the active participation of the five state agencies with management responsibility for the LPC and is to be managed by the Western Association of Fish and Wildlife Agencies (WAFWA). The Range-wide plan was prepared with complete transparency and heavy involvement of those interests that can directly impact the conservation of the LPC.

The Stakeholder Plan offers no new conservation measures or assurances that are not already being met by currently approved and active plans. The document states that its purpose is to (1) Conserve the LPC and, (2) allow uninterrupted economic development (page 24). A simple reading of the plans already active, as described in the previous section, demonstrate that these two purposes are currently being met. Preparing an EIS for the Stakeholder Plan is an unfortunate waste of taxpayer funds and agency time, as there is no compelling need for the Plan that is not already being met through other programs.

2. The Stakeholders Plan is Unrealistic

One of the key objectives of the Stakeholder Plan is to conserve 90% of the LPC habitat.

> *"The Plan will conserve nearly 90% of LEPC Habitat and will result in substantial enhancement of habitat through required avoidance, minimization and mitigation measures."* (page 50)

The devices they plan to utilize to conserve the habitat are through outright acquisition of the land or a permanent conservation easement.

> *"Many HCP's mitigate for loss of habitat through the preservation or permanent protection of similar habitat, sometimes in combination with other non-permanent measures. This preservation component is implemented through fee-simple acquisition of habitat or the use of perpetual conservation easements."* (page 49)

The total Estimated Occupied Range (EOR) of the LEPC as determined by the Service is 19,902,922 acres. The EOR range covers five states. It is a substantial area of land, and any program that boasts to be able to conserve 90%, or 17,912,623 acres of this area, should be questioned, especially when the vehicle to do so is through outright acquisition of the land or permanent easements. Massive buy-in from landowners and those who own property interests in this land must take place. Additionally, the idea that enough private landowners would voluntarily place a permanent easement or outright sell their land based on the assurances that they will not be further penalized if the LPC is listed, is a fantasy.

By their own acknowledgement, the Plan developers recognize that 95%, or 18,907,776 acres, of the LPC habitat is privately owned. "The EOR of the LEPC is spread over five

states and is comprised of up to 95% private land ownership." (page 95) In order for them to own or permanently control 90% of this they are planning to obtain the "voluntary" commitment of the landowners. However, they know this objective is unattainable and even acknowledge that acquiring the various property rights necessary to ensure full conservation of the land is an impossible task.

> *"Ownership and occupancy of these lands is not always limited to a single entity, but may be expressed through a complex and severed relationship of surface estate, mineral estate and surface and mineral leasehold interests. Any effort to create a permanent set-aside of meaningful acreage for the LEPC will require the written agreement from all interest holders, which may be an insurmountable task due to the inability to identify and obtain agreement of all owners of the surface and mineral estates."* (page 49)

And further;

> *"The establishment of a permanent preserve in most cases is a challenge due to the need to identify and acquire contractual commitments from both the surface owner and the mineral owner, which in this region are typically held by different people and entities. The task of determining who owns the interests and contact information for those property owners is a significant undertaking. Further,* ***the potential for property owners and other interest holders to delay or disrupt an acquisition program through reluctance or refusal to sell targeted or key properties*** *creates additional issues."* (page 49-50)

Clearly, the Plan developers know that acquiring 90% of the LPC habitat is an "insurmountable task." However, what is most disturbing is their acknowledgement that landowners may "delay," or "disrupt" the acquisition program through "reluctance" or "refusal" to sell the properties they have identified and targeted. The Plan claims to be a "voluntary" plan for landowners, yet, by their own admission, it is clear that this Plan will be utilized to "target" land within focal areas and that landowners will find themselves under immense pressure to enroll. Nowhere in the plan do they state that the species does not warrant listing, and the plan itself is not designed to "preclude" a listing. The Plan is designed to acquire 90% of the habitat through fee-simple acquisition or permanent conservation easements.

They benefit from the threat of listing the LPC in order to coerce landowners into "voluntarily" giving up their land.

The Plan developers know their objective of acquiring 90% of the habitat area is unrealistic and, therefore, have submitted a HCP that will fail. The Service should deny approving the plan based on the AHC's admission that landowners will be targeted and pressured into selling their land, an unconstitutional act.

3. The Plan's Minimum Goal of 20% Participation is also Unrealistic

As noted by the Plan developers above, acquiring agreement among the various owners of the property interests in any given parcel will be a dubious task, short of coercion.

However, they claim to already have assurances from property interest holders that cover 20% of the habitat. In a footnote on page 95, they claim:

> *"The assumption that 20% of Total Habitat Acreage will enroll in the Plan drives the $0.36 per acre Participation Fee calculations and is conservative based on the commitments currently obtained from stakeholders to participate in the Plan."*

Who are these committed participants? They are not revealed in the Plan. Because this 20% participation is necessary to meet the funding requirement, more than just a footnote ought to be required to ensure this obligation can be met, especially given that the Plan developers acknowledge how difficult it will be to get all property interests for any given parcel to agree to participate.

We can assume that the major oil and gas companies named in the cover letter that was submitted with the application might be these participants. What proof is being required that they will fulfill this obligation? Without this, the plan is meaningless and proper implementation is questionable.

4. The Stakeholder Plan Administrators and Benefactors are Not Transparent

The Plan has been submitted by the American Habitat Center (AHC), a non-profit entity, so they claim. However, there is no further detail as to who makes up the AHC. A number of questions are left open.

a. Who are the members of the Board of Directors for AHC?
b. Who are the "Stakeholders" that created the AHC and the Stakeholder Plan
c. Who will be appointed to the Oversight and Science Committees?
d. What type of non-profit entity is the AHC; a (c)(3),(4) etc?
e. In which state is the AHC incorporated?
f. Has the AHC provided the Service with its official Incorporation and Non-Profit Status documents?

Through press releases, the County has ascertained that several organizations have come together to create this plan, including the Environmental Defense Fund and some state cattlemen's and farming organizations. What is important for the Service to take into account is that these organizations can only make decisions that affect the Associations, not their members directly. Therefore, any commitment on behalf of the Associations that there will be widespread participation of its members should be discounted, unless proof is submitted by the AHC, whomever the actual members of this organization may be.

In addition, there are other non-transparent issues within the Habitat Exchange Agreement (HEA) attached to the Plan. The HEA is an agreement between the Habitat Exchange Administrator, whoever that is, and Region 2 and Region 6 of the U.S. Fish and Wildlife Service. Within the HEA, there will be an "Oversight Committee," a "Policy Committee," a "Resolution Committee," and a "Science Committee" all of which will be named at a later date.

Obviously, the AHC will carry a tremendous amount of influence determining who the "stakeholders" and representatives from the "conservation interests, industry, and agriculture" groups will be providing crucial oversight of the HEA and the Plan. This is totally unacceptable.

5. The AHC does not have Authority to Enforce the Stakeholders Plan Directly

Although we do not know who will ultimately govern the AHC, this entity is requesting to be approved as the permit holder of an Incidental Take Permit and enhancement of survival permit issued by the Service. Private groups can initiate an HCP without government participation, however, they must assure that they have the authority to enforce the permit. The Service Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 3-2 states that this is allowed "so long as the permittees have the authority to regulate or control all or applicable parts of the HCP and the conditions of the HCP are enforceable." The Stakeholder Plan assures they have this authority.

> *"The Permit Holder will enforce the Plan. By entering into clear enforceable CIs and CPs, Participants will contractually agree to perform the obligations required of them under the Plan and consent to enforcement of those obligations by the Permit Holder. See Section 8.8. FWS will also have clear and defined enforcement responsibilities and mechanisms with respect to the Plan and the permit issued to the Permit Holder under the Implementing Agreement. See Appendix K. The mechanisms available to the FWS include access to properties enrolled under the Plan, approval rights with respect to Credit-generation and release activities, and representation on the Oversight Committee and Science Committee. In these ways, enforcement of the Plan and increased compliance with the ESA in the Permit Area can be assured."* (page 4-5)

In other words, the AHC does not have the authority outright to enforce the plan; the landowners who participate will give up their right to control their land and provide this authority to the AHC. The only enforcement authority the AHC will have is through the acquiescence of landowner's rights to the AHC. The AHC has stated they will acquire this when landowners "voluntarily" enroll their land in the program, however, there is reasonable concern that landowners will be targeted and pressured into participating.

A participant in this plan can either be a landowner, leaseholder or holder of other property interests. Land sold will presumably be protected until program administers determine the conservation need is no longer relevant. Land placed in a permanent conservation easement will be held in perpetuity. However, if a landowner is covered under the AHC permit, this protection will only be guaranteed for 30 years. So, a landowner, leaseholder or other property interest holder is being asked to permanently give up their rights when the protection they are trading these rights for is only offered for 30 years. It is highly suspect that landowners will flock to sign up under this program once the full details of their commitment are revealed.

6. **Key Issues that should be Studied and Analyzed during the EIS process**

a. The Environmental Impact Statement needs to rigorously analyze the impact on the local economies within the plan area where private land will be targeted for acquisition, and landowners refuse to sell. The direct, indirect and cumulative impact on the local economy needs to be analyzed when the targeted land is devalued by the action. Based on statements discussed earlier that are in the Stakeholder Plan, it is reasonable to presume that landowners will be targeted and pressured into selling key properties. This impact on the local economy must be studied. Additionally, the impact this will have on the culture of the community should be examined.

b. The Stakeholder Plan is relying solely on the science referenced in the Service's proposed rule to list the LPC as threatened. The Notice does not represent the best available science on the LPC as scientists have critically examined the notice and new data and studies have been brought forward. In the EIS analysis, two additional studies must be considered (documents attached):

   i. "Data Do Not Support the Listing of the Lesser Prairie Chicken," prepared by the Center for Environmental Science, Accuracy and Reliability (released in 2013)
   ii. Review of the Science Predicting Population Trends prepared by Darling Geomatics (March 2014)

Summary

We appreciate the Service giving strong consideration to the issues discussed above. It is our County's position that the application should be denied because the Stakeholder Plan provides no new conservation efforts that are not already being fulfilled through other plans.

Also, the preparers of the plan have not been transparent as to who they are and who will be governing the program. It concerns us greatly that the Service would be considering providing a non-existent entity with such a high responsibility as being a permit holder for a plan area that consists of six states.

Further, were are very concerned that landowners will be targeted by the group and coerced into participating in the Plan.

For these reasons the plan should be denied.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

Sincerely,

Richard Primrose
Quay County Manager

March 9, 2014

RE: Review and comments on:

1. **"An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens" by Edward O. Garton (2012)**
2. **"Range-wide Population size of the Lesser Prairie-chicken: 2012 and 2013" by McDonald et al (2013) and**
3. **"The Predicted Influence of Climate Change on Lesser Prairie-Chicken Reproductive Parameters" by Grisham et al (2013)**

Background

The lesser prairie-chicken (*Tympanuchus pallidicinctus*) (LPC) is a species of prairie grouse that occupies a five-state range including portions of Texas, New Mexico, Oklahoma, Kansas and Colorado. The species is state listed as threatened in Colorado, and the U.S. Fish and Wildlife Service (USFWS) identified the species as a candidate for Federal listing in 1998.

Based on USFWS findings, lesser prairie-chicken populations need large tracts of relatively intact native grasslands and prairies to thrive. Over time, threats to the LPC have included habitat loss, modification, degradation, and fragmentation within its range. Predator cycles and weather also affect annual population numbers.

Over the past year, the USFWS has been analyzing the status of the LPC, threats to the species and conservation efforts resulting in a proposal to list the species. The USFWS will make a final determination whether to list the species by March 30, 2014.

Analysis of Flaws in Population Studies and Reports

Though the USFWS states that it will make a final determination about whether to list the LPC as threatened after a full assessment of the status of the bird, the problem is the fact that the USFWS does not have sufficient population data to determine status. Though LPC are at a lower level than their peak before agriculture, they may be stable, secure and on an upward trend since the concepts of sustainability and prairie grass conservation began in the 1980s.

USFWS is legally obligated under the Endangered Species Act, Information Quality Act and *Bennett vs Spear*, to make LPC decisions based on the best available scientific information that is applicable to the species. However, because the listing proposal process for the LPC is part of the terms of a multi-year listing work plan approved by the U.S. District Court for the District of Columbia on September 9, 2011 the USFWS may feel pressured to make a decision based on inadequate data regarding population numbers and trends. We recommend against a decision based on less than minimally acceptable scientific data.

The scientific information used must be legally consistent with standards of the Information Quality Act (Quality, Objectivity, Utility and Integrity). In contrast to the interpretation of the Act by some federal agencies, the objectivity and integrity requirements mean that the data collected by state and federal agencies, or used in published scientific research relied upon by those agencies, must be provided to the public.

Though the public was not provide with the raw data used in scientific research relied upon by USFWS, in violation of the Information Quality Act, the following is a list of flaws in the two most recent reports USFWS is using to assess LPC population trends as well as an analysis of some relevant information USFWS failed to use. The purpose of this letter is to point out the flaws in the two studies as well as missing information. We strongly recommend USFWS conclude listing is not warranted and further monitoring of populations, habitat quality and conservation measures is needed.

The only recent information USFWS appears to be using to base population numbers and trends on is a combination of archaic data that was not comparable to recent data and statistically invalid recent data.

What is known about LPC populations:

There was a widespread pattern of sporadic sampling for the first decade (mid-1960s to mid-1970s), more frequent but inconsistent sampling across regions for two decades (middle period of mid-1970s to mid-1990s) leading to sustained increased sampling effort over the past 18 years. However, survey protocols continue to vary between States, which makes even relatively recent data difficult if not impossible to compare from State to State.

Two years of helicopter surveying coupled with ground surveys during 2012 through 2013 across known LPC range has created the beginning of a new type of comprehensive survey data under a single methodology over 5 states. However, it will take 10 to 20 years of consistent data collection to even begin to truly determine the trend and limiting factors for the species, in light of weather cycles, predator cycles, and current land management.

Considering the fact that the LPC did not go extinct during the Dust Bowl Era when its habitat was at its worse, the LPC is wide spread and locally common in areas across five states, and all five states have significant positive LPC habitat conservation and habitat restoration programs in place, the LPC is not in danger of extinction.

These birds are a boom and bust species, adapted to fluctuations in weather. A downward trend in population number and/or lek numbers during poor weather conditions such as the recent drought in LPC habitat is normal and is not a reason to list the species as threatened under the ESA. Listing would harm the ability of the five states to manage LPC habitat in ways that benefit the species and would harm our national economy as well as the economies of the five affected states.

What isn't known about LPC populations:

USFWS personnel do not know population numbers and trends at this time in history. A significant amount of conservation of LPC habitat has been going on since the 1970s. Due to an overwhelming number of species to address in a very short amount of time, USFWS could not thoroughly analyze the best available science, which is the detailed long term raw data collected at the State level. Instead, USFWS relied on a few data summary reports that have significant flaws and USFWS missed other studies that have scientific validity. Even if USFWS had time to look at all raw data, the data was collected under too many different types of protocol to make meaningful comparisons. Until 2012, intensity, duration, timing, and methods of surveying LPC have varied too much over time and geographic region to compare.

There is no question that LPC population status, trend and limiting factor questions need to be studied in a more uniform manner for a longer period of time. A conclusion that listing is warranted would be premature and would harm potential habitat restoration efforts.

1. Review of Garton 2012

In a review of "*An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*" by Edward O. Garton (2012) there are a number of sound reasons to have reservations about the conclusions Garton reached.

Garton (2012) discussed many of the **limitations of the available population data** including the **limited number of leks surveyed** as one goes farther back in time, the **inconsistencies in the survey methods** used, the **assumptions** of observed males on leks to numbers of females, and the **minimum population sizes assumed** to be needed to maintain populations.

We are in full agreement with Garton that there were too many inconsistencies in the survey approach and a unified approach is necessary to assess trends across LPC range. The work done by McDonald et al. (2013), described below, may be a good start toward obtaining statistically valid data, but it will take 10 to 20 years or more to begin to gather the necessary statistical data to see real population trends and relate them to weather, predator cycles, habitat conditions, and conservation measures. In the mean time, any speculation that the bird will plummet toward extinction is unfounded.

Garton (2012) makes specific predictions about avian population persistence, 30 and 100 years into the future. There are sound reasons to have reservations about the conclusions of Garton et al. (2012). Briefly, the extinction prediction models used in Garton's paper contained invalid assumptions, methodological bias, improper accounting for the propagation of error in model predictions, and use of thresholds for extinction that lack a sound empirical basis. Collectively, those issues point to bird populations not being as threatened as reported.

In violation of the Information Quality Act, the raw and final data sets used in the Garton 2012 analysis are not publicly available. The absence of publicly available data is also contrary to the Department of Interior's Information Quality Guidelines (requiring that reproducibility "shall generally require sufficient transparency about data and methods that an independent reanalysis could be undertaken by a qualified member of the public," (Department of Interior 2002)) and

demonstrates a lack of adherence to key White House policy directives on scientific integrity (Obama 2009; Holdren 2010, 2011).

Moreover, Garton (2012) made errors and invalid assumptions that induced a negative bias in population trends. In the early decades of surveys, large and easy to find leks were primarily counted. In more recent decades, as more leks were added to surveys, they were often smaller in size. Thus, the average number of males attending leks has declined, in part, due to an artifact in how the data were collected (see Table 1 below).

Table 1. Lesser Prairie Chicken monitoring and population trends 1965-2012 summarized over 5-year periods for Range-wide Prairie Region (Garton 2012)

Parameter[1]	2005-12[2]	2000-04	1995-99	1990-94	1985-89	1980-84	1975-79	1970-74	1965-69
Leks counted	183	149	98	51	65	56	23	7	6
Average males/lek	8	13	8	12	19	32	85	195	137
Number of active leks	98	93	50	32	53	40	22	7	6
Percent active leks	53	62	51	68	82	71	94	100	100
Average males/active lek	16	21	15	17	24	45	88	195	137
Lambda - Annual rate of change	0.907	0.965	1.267	0.828	0.942	0.917	0.990	0.992	1.228
S.E.(Annual rate of change)	0.068	0.065	0.150	0.112	0.081	0.082	0.096	0.124	0.193

1 Averaged over years for each period.
2 Eight years of data in this period.

Even with this flaw in Garton's analysis, his research conclusion is that there is "*a general increase in lesser prairie chicken populations in the last half of the 1960s followed by a long term decline from the 1970s to mid 1990s when the population apparently stabilized at substantially lower abundance range-wide (50,000-100,000 compared to estimates around 200,000 during the 1970s and 1980s)...*"

It is likely that Garton is correct in stating that LPC populations have stabilized. However, Garton (2012) goes on to theorize catastrophic population failure based on insufficient data and the assumption that current conditions (severe drought throughout LPC) will continue unchanged:

*Parametric bootstraps of the probability of persistence of Lesser Prairie Chickens for each eco-regional population and the range-wide population reveal that only the sand sagebrush prairie region has a substantial likelihood of falling below quasi-extinction levels equivalent to effective population size of 50 (82 birds counted at leks) within 30 years but most eco-regional populations and the range-wide population have substantial likelihoods of falling below 500 (852 birds counted at leks) within 100 years as required for long term persistence" (*Garton 2012*).*

Garton (2012) showed "fu*ture projections of carrying capacity without substantial changes in key determinants of LPC population dynamics are slightly above 10,000 in 30 years and less than 1,000 in 100 years."*

Garton's projections are wrong.

Garton showed higher levels of short term risk and significant long term likelihood of dropping below the effective population thresholds for maintaining genetics of 50 and 500 individuals based on the above **assumption** of **no changes to key determinants of LPC population dynamics**.

What about the significant drought within LPC habitat within the recent past? Garton's projections were made during what Grisham et al. (2013) defines as the worst El Niño is history in portions of the LPC range. The recent El Niño climate phenomena disproportionately affecting LPC habitat during the LPC survey period Garton relied upon.

Garton's predictions were based on the incorrect assumption that there will be no change in a key determinant of LPC population dynamics – severe drought. Science does not support Garton's assumption.

Does Garton really believe that weather does not change and that the recent drought within LPC habitat will continue for the next 30 to 100 years?

Grisham et al. (2013) (see below) studied climate and its affect on LPC in New Mexico and Texas. Though those results contradict earlier publications including Garton (2012), Grisham's work appears to be ignored by USFWS. Could it be that USFWS feels too vested in their recent analysis and too pressured by court imposed time constraints to spend time to analyze Grisham's work?

Garton's analysis of LPC populations (2012) used short and long-term population viability targets based on the 50/500 rule as the basis for the quasi-extinction analyses, which is the effective population as it relates to genetic maintenance. As noted by Flather et al. (2011), **the 50/500 values are simply viability goals for maintaining genetically diverse populations; they provide "*little direct connection with extinction risk.*"**

Traill et al. (2010) attempted to determine a generalized minimum viable population number, much like the 50/500 rule, and reported that the evolutionary and demographic constraints on populations require minimum sizes to be at least 5,000 adults. However, Flather et al. (2011) reported on reviews they conducted of the viability analyses used by Traill et al. (2010) revealed that a huge range in minimum viable population estimations existed, finding that even estimates conducted within many populations varying by orders of magnitude.

They also reported on the limitations of population viability analyses (PVA's) to provide meaningful estimates of minimum population sizes. Flather et al (2011) stated that **estimates of extinction risk from PVA models were often imprecise, inaccurate, contingent upon threats currently acting, and affected by model structure, study duration and other uncontrolled factors** (Flather et al. 2011 referencing Beissinger and Westphal 1998). Flather et al. (2011) went on to note that PVA's were best used for ranking relative extinction risk, switching the focus of

these analyses away from the determination of a minimum viable population to emphasize the importance of PVAs for understanding the relative probability of persistence for populations in comparisons among management options.

Garton (2012) did not provide an estimated minimum viable population for LPC, but did provide the quasi-extinction probabilities for the range-wide population as well as for the ecoregional populations based on past population trends. They **projected continued losses** in population carrying capacity within the sand sagebrush and mixed grass ecoregions **if habitat impact conditions continue on their current trajectory. However,** we know that habitat impact conditions will change – they already have changed since Grisham, Garton and McDonald wrote their papers. During late 2013 and early 2014, the states with LPC began receiving above average rains and though the drought remains, **conditions are improving across parts of the LPC habitat (http://www.srh.noaa.gov/oun/?n=climate-drought).**

2. Review of McDonald et al. 2013

McDonald et al (2913) surveyed sage-grouse leks from helicopters over a 5 state region from sunrise until approximately 2.5 hours after sunrise between March 31 and May 3 in 2012 and between March 20 and April 21 in 2013.

McDonald et al. (2013) surveyed for LPC during one of the worst droughts in recent history as documented by Grisham et al. (2013). Grisham assessed the potential changes in clutch size, incubation start date, and nest survival for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico. Grisham stated that the "***2011 nesting season provides insight to how an extreme La Niña event and subsequent drought affects lesser prairie-chicken*** *reproductive ecology. From 15 October 2010 to 31 August* ***2011****, the total precipitation on the study site was only 2.46 cm (0.97 inches), constituting* ***the worst drought and warmest La Niña event on record****.*

The ***drought of 2011*** *was so severe that sand shinnery oak and grasses on the study site did not leaf out, eliminating nesting cover and subsequently delaying nest initiation (Li Z, Kafatos M , 2000) Interannual variability of vegetation in the United States and its relation to El Niño/Southern Oscillation. (Remote Sens Environ 3: 239–247. doi: 10.1126/science.242.4886.1640). Cover provides protection from predators and thermal stress, and when thermal cover is lacking, nests are exposed to the element (Grisham et al 2013).*

This is of concern, as ***lesser prairie-chickens appear to be particularly sensitive*** *to landscape alterations* ***(****Woodward et al. 2001); (Fuhlendorf et al. 2002) and* ***drought*** *Hamerstrom F, Hamerstrom F (1961).*

Drought is suspected to negatively influence prairie grouse through reduced growth of vegetation that provides nesting, roosting, and escape cover, and food (Merchant SS, 1982). Furthermore, there is evidence that home range sizes increase (Merchant SS, 1982 and Copelin, 1963) and ***recruitment is lower during drought years*** *(Merchant SS 1982). Home range size expansion during drought years may lead to localized abandonment, especially in fragmented landscapes. Furthermore, landscape alterations and management (e.g., herbicide treatment of shrubs, grazing systems) appear to influence resource selection, survival, and reproductive success of lesser prairie-chicken populations.*

For USFWS to use two years of McDonald's helicopter surveys with associated on-the-ground field verifications during a major drought as "trend" data violations the ESA, *Bennett vs Spear* and the Information Quality Act. Any conclusions USFWS reaches based on McDonald et al (2012) other than finding LPC populations need more study are arbitrary and capricious.

As Grisham et al. (2013) clearly shows – low LPC numbers in 2012-2013 were due to drought. Like many game birds, LPC are a boom and bust species.

The lek-count data reported in McDonald et al. (2013) is grossly inadequate to estimate population "trends" as a basis for management.

The lack of scientific validity in these data and the fact that LPC populations are known to fluctuate significantly over time makes a case for a long-term study but not the case for listing the LPC as threatened. It is impossible to discern any pattern in the data gathered by McDonald et al. (2013) that could be used to guide management actions at this time. **The data gathered by McDonald et al. (2013) during two years of field work is not scientifically defensible "trend" data**.

McDonald et al. 2013 qualified their report as follows:

"A*cquiring precise and unbiased estimates of population size requires either a complete census or probabilistic sample of subunits with which to infer population size (Johnson 2002); however, limited funding and staffing have often precluded implementation of these sampling designs. The result had been the development of population indices to monitor population trend or estimate a minimum population size.* ***The limitation of such data is its unknown relationship to population size*** *(emphasis added).* **..**

Population trends of LEPC have been monitored using spring lek counts since the 1940s. Survey effort and methods have varied over time, but lek data were the best available long term data set to assess trend. ***Breeding season sex ratio, detection probability, and lek attendance rates are not well understood*** *(emphasis added) (Behney et al. 2012). These factors, including variation in sampling methods, require several assumptions to be made when estimating the population size from lek count information (Walsh et al. 2004, Garton et al. 2011).*"

McDonald et al. (2013) recommend "that the 2013 survey design and methods be used for future monitoring of the size of LPC population and abundance of leks.

Population trend data for any game bird cannot be based on two years of data. The use of 2012 and 2013 LPC data collected by McDonald et al. to state the species is declining is bad science and bad public policy. What if the numbers where the opposite and 2013 population numbers were higher than 2012? Would USFWS stop the listing process?

Since LPC are cyclic, looking at a different set of years will show upward swings as often as the data shows downward swings (see Figure 2 below as an example of how game birds such as LPC fluctuate up and down over time). No one can look at two years of LPC data and state that they know the "population trend." Use of McDonald's 2012-2013 data as "population trend data" to

make any management of listing decisions would violate all scientifically accepted principles of population data analysis.

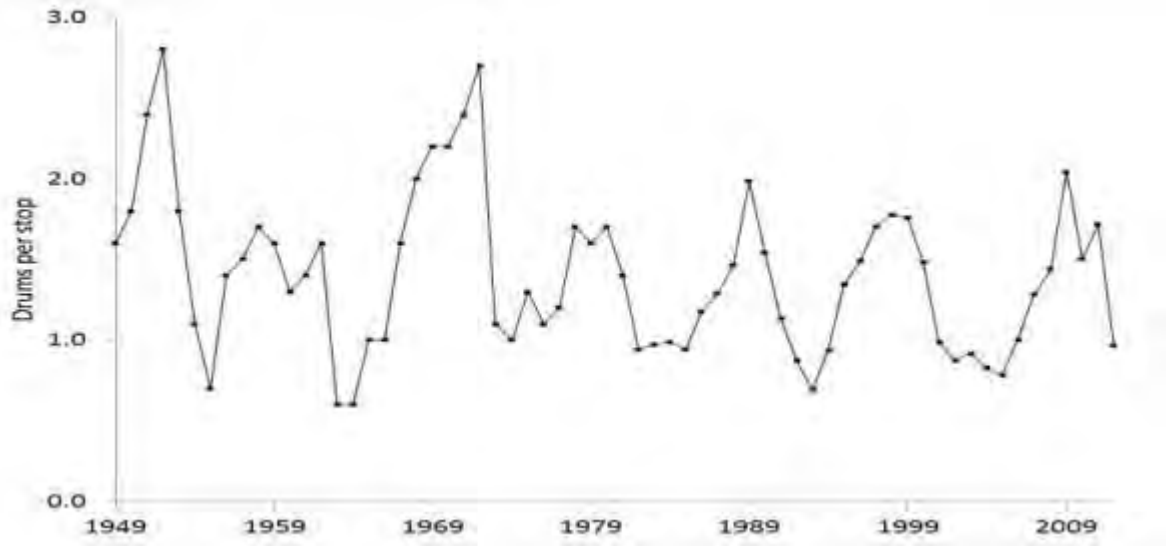

Figure 2. Example of peaks and valleys in game bird populations (based on rough grouse data)

Problems with McDonald et al. (2013)

- Lek and bird count data obtained by McDonald et al. (2013) were based on a single aerial survey each year for two years rather than the highest count obtained from 3 or more ground counts each year for two or more years. It has been shown that multiple counts are often required to ascertain a reasonable estimate of numbers of males attending leks (Beck and Braun 1980, Connelly et al. 2003, Walsh et al. 2004, Garton et al. 2011).
- McDonald et al. (2012) had a problem with one of the four ecoregions surveyed. The sand sagebrush prairie region ground count of leks gave a larger value than that obtained from the aerial surveys. McDonald et al. (2012) and Garton (2012) had to substitute the ground survey data for the aerial survey estimate.
- Garton (2012) made use of the 2012 aerial survey estimates of minimum population size for three of the ecoregions as the basis for reconstructing earlier population sizes.
- McDonald et al. (2013) surveys performed in 2012 and 2013 were completed during a severe drought throughout the area surveyed.
- The final year estimates form the starting points for all future projections of population abundance and as such could skew estimates of the probability of quasi-extinction (i.e., falling below a specified minimum abundance (50 adults or 500 adults under the classic 50:500 rule for short term and long term persistence from Franklin, 1980 and Soule, 1980). Garton (2012) noted that "*the shorter term "current" time period population estimates reported in the appendices and future projections using bootstrapping may have been more severely impacted by that final observation as they often give more pessimistic forecasts of probability of persistence when compared to those from the 3 long-term data sets.*"

3. Review of Grisham et al. (2013)

Grisham et al. (2013) assessed the potential changes in clutch size, incubation start date, and nest survival for LPC for the years 2050 and 2080 based on modeled predictions of climate change and reproductive data for LPC from 2001–2011 on the Southern High Plains of Texas and New Mexico.

Grisham et al. (2013) determined that "*the influence of drought and climate change on lesser prairie-chicken reproductive ecology has, to date, been largely overlooked. This is of concern, as lesser prairie-chickens appear to be particularly sensitive to landscape alterations and drought.*" They qualified their results to state that their "*assessment did not consider annual survival of adults, chick survival, or the positive benefit of habitat management and conservation, which may ultimately offset the potentially negative effect of drought on nest survival.*"

Grisham et al. (2013) noted that "*A key issue in conservation of lesser prairie-chickens in context of climate change is the lack of estimates for many specific vital rates and sufficient sample sizes.* ***Despite substantial efforts to conserve lesser prairie-chickens and their habitat, long-term studies that provide adequate <u>data to properly allow for predictive modeling</u> of the role climate change may have on the reproductive ecology of this species <u>are lacking</u>*** (emphasis added)."

<u>Conclusion</u>

A thorough analysis of LPC data collected to date clearly demonstrates that at this time in history there is inadequate data to scientifically predict LPC population trends or the probability of extinction. Garton (2012) and McDonald et al. (2013) both based the majority of their analysis on two years of helicopter surveys during a severe drought, underestimating LPC populations and overestimating the probability of extinction.

Conservation measures now in place will serve to increase LPC populations over time. In February 2014 the USFWS and the Western Association of Fish and Wildlife Agencies signed the Range-wide Oil and Gas Industry Candidate Conservation Agreement with Assurances for the LPC (LPC CCAA). The agreement is the result of longstanding cooperation between the Service and the five range states of the LPC—Texas, Oklahoma, Kansas, Colorado and New Mexico—to undertake conservation action for the species.

The Range-wide LPC Plan provides a comprehensive conservation strategy that is intended to conserve the species across its range. The Range-wide LPC Plan provides: 1) incentive-based landowner programs, and 2) a mitigation framework to reduce threats and provide resources for off-site conservation. The LPC CCAA incorporates the Range-wide LPC Plan's avoidance, minimization, and mitigation measures that address impacts from oil and gas activities on enrolled lands. Enrollment of lands into the LPC CCAA will generate mitigation fees, which will provide significant funds for the implementation of conservation actions under the Range-wide LPC Plan.

There is evidence of expansion of LPC into parts of the shortgrass ecoregion where they were not known to previously occur. In northwest Kansas, LPC have expanded back into some of their historical range and new areas where they were not known to previously occur due to the

establishing of Conservation Reserve Program (CRP) lands (Rodgers and Hoffman 2005). LPC populations are doing well in these planted fields with a generally expanding population (Garton 2012).

LPC usually experience either booms or busts in reproductive success (Hagen et al 2009). The "boom bust" reproductive strategy suggests that lesser prairie-chickens maximize reproductive efforts when conditions are optimal. For the Southern High Plains population, cooler, wetter springs maximize both food and cover for lesser prairie-chickens. Evidence suggests precipitation and temperature influence nest survival (Fields et al. 2006) and these variables will subsequently continue to influence nest survival in the future.

Until long term population trend data can be gathered and until the CCAA is monitored for 10 to 20 years, any consideration of listing the LEPC as threatened or endangered would be premature and based on a paucity of scientific data. A listing under the ESA would be scientifically and legally unsupported.

Darling Geomatics

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Literature citations available upon request

Center for Environmental Science, Accuracy & Reliability

DATA DO NOT SUPPORT THE PROPOSED LISTING OF LESSER PRAIRIE CHICKEN

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EXECUTIVE SUMMARY

CESAR'S review of the proposed listing of the Lesser Prairie chicken ("lesser prairie chicken" or "LPC") applies the clear direction of the Endangered Species Act (ESA) that listings be based solely on data and that the conservation efforts of states and local agencies be considered. We closely examined the references cited by the US Fish and Wildlife Service (FWS), published literature, regulatory documents, and readily available data. In addition, we performed an independent analysis of the past distributional history of the lesser prairie chicken to provide a deeper-time perspective, and commissioned independent peer reviews of the available population analyses.

Our review identified data that demonstrate lesser prairie chicken populations are increasing and are unlikely to be extirpated either locally or range wide in the foreseeable future. In addition, our review identified analyses that demonstrate lesser prairie chickens have not lost their genetic diversity and are not genetically isolated. These data offer empirical support for the conclusion that local and statewide conservation efforts are and will continue to be effective. **These two facts, both supported by data, are *prima facie* evidence that the lesser prairie chicken is not likely to become in danger of extinction in the forseeable future.**

Based on the information we developed, it appears that the FWS assumed population declines and loss of genetic diversity and used *post hoc* rationalizations to support listing based on speculative reasons for the non-existent declines. The best available data on population growth and genetic health demonstrate that the lesser prairie chicken is not in decline throughout all or a significant portion of its range.

In part, CESAR's mission, "…is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes…"[1] Accordingly, this report also addresses the threats identified in the proposed rule based on the FWS reliance on speculation, surmise and opinion. We believe that identifying those portions of the rule that fail to comply with the requirements of the ESA and related laws, regulations, and guidelines, will help improve this proposed rule as well as future rules.

In general, our review identified the following shortcomings in the proposed rule:

- The proposed rule fails to consider data and analyses demonstrating lesser prairie chicken populations are increasing and that genetic isolation has not occurred.

[1] http://www.bestscience.org/

- The conclusions in the proposed rule are not based solely on the best scientific and commercial data available as required by the ESA, but on an amalgam of opinion, speculation, and surmise.
- The proposed rule inaccurately implies that the states' ability to protect lesser prairie chicken through existing regulatory mechanisms is inadequate compared to that of the ESA.
- The proposed rule fails to accurately acknowledge the scope and importance of the voluntary conservation contributions made by states and local agencies
- The proposed rule is internally inconsistent; asserting that sufficient information on habitat needs is available to list the species but that there is insufficient data to identify the characteristics and location of the habitat essential for the conservation of the species.

The ESA is a powerful tool for conserving species. However, it has clearly articulated standards for decision-making, explicitly requiring data and consideration of local efforts in the listing process. This proposed rule fails to meet the basic requirements of a listing determination as articulated in the ESA.

BACKGROUND

ESA listing determination requirements

Instructions for listing determinations are included in Section 4 of the ESA. There are 3 primary requirements for a listing determination; the determination must be based *solely* on data,[2] the continued existence of the species must be threatened by one or more of the five listing factors enumerated in the ESA[3], and conservation actions of any State or political subdivision of that State must be considered.[4]

Data

The requirement that data support regulatory decisions is repeated throughout the ESA. This requirement includes listing, designation of critical habitat, and jeopardy determinations. The ESA does not require data for non-binding 90-day findings, allowing the use of 'information' rather than data. Neither does the Act require data for Recovery plans, which have no regulatory authority. However, the requirement for listing is specific, requiring that data be the *sole* determinant.

There is no provision in the Act that allows hypothesis, speculation, surmise, 'best professional judgment' or opinion to be substituted in the absence of data. The Supreme Court has affirmed this, stating:

"…The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise…"[5]

---

[2] Section 4(b) of the ESA states: "BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) **solely on the basis of the best scientific and commercial data available** to him after conducting a review of the status of the species ..." and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

3 Section 4 (a) GENERAL (1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence...

4 Section 4(b) of the ESA states: BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and **after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species**, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas

5 Bennett v. Spear (95-813), 520 U.S. 154 (1997)

Listing Factors

The proposed rule makes the determination that the lesser prairie chicken is likely to become in danger of extinction in the foreseeable future due to the following factors:

"…due to historical, ongoing impacts and probable future impacts of the cumulative habitat loss and fragmentation…"

"…The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events..."

"… Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels…"

"…These threats are currently impacting lesser prairie-chickens throughout their range and are projected to continue and to increase in severity into the foreseeable future…"

From these statements we conclude that the FWS identifies 3 of the five ESA listing factors as threatening the lesser prairie chicken:

(A) "*the present or threatened destruction, modification, or curtailment of its habitat or range*";

(C) "*disease or predation*"; and

(E) "*other natural or manmade factors affecting its continued existence*".

ANALYSIS

DATA

Analyses, based on data collected by the states, demonstrate that lesser prairie chicken populations are increasing and that the range-wide likelihood of extinction is very low. Further, published analysis demonstrates lesser prairie chickens maintain genetic diversity and do not demonstrate genetic isolation. The FWS had to rely on information other than data in order to list the lesser prairie chicken in view of the documented increasing populations and genetic health. As a result, the FWS failed to rely solely on data, instead using speculation, surmise, and opinion. The FWS failed to rely on the 5 factors enumerated in the Act instead using additional factors not intended by Congress to be used for listing determinations. The FWS failed to adequately consider the effectiveness of existing and planned conservation Finally, after discussing the habitat needs, and shortcomings of existing habitat for lesser prairie chickens at length and in depth in order to explain how habitat was the basis for declines in the species, the FWS claims it is not able to identify those physical and biological characteristics essential to the conservation of the lesser prairie chicken, and thus cannot designate critical habitat.

Data Demonstrate Lesser Prairie Chicken Populations are Increasing Range-wide with Low Extinction Probabilities

We identified two papers which examined the health of lesser prairie chicken populations. First is an *Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens*[6]. Using population reconstruction from annual counts at leks, models of population growth can be fit and population parameters of growth and quasi-extinction probabilities can be estimated. The table below summarizes the findings of this analysis.

Habitat Type	Population Growth	Probability of Extinction
CRP-shortgrass	4.4% annually	2%
Mixed-grass prairie (KS, OK, TX)	7.0% annually	<0.0001%
Sand sagebrush prairie (KS and CO)	2.0% annually	48%
Sand shinnery oak (NM and TX)	5.1% annually	< 0.0001%
Range-wide	10.6% annually	< 0.0001%
Range-wide 2012.– Assuming a 50% decline in trend across the range	6.4% annually	3.3%

The best scientific data available indicate that range-wide there is a low probability of extinction within 86% of the species distribution. This population growth and high likelihood of persistence continues when 2012 population trends are assumed to decrease by as much as 50%.[7]

A peripheral examination of the data also demonstrates that population trends from 1980-1997 were declining at an average annual rate of 3.7%. After the species was made a candidate and significant conservation efforts were initiated, post candidate status population growth was 6.9% increase annually.

[6] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group*; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

7 See Appendix 2 for the complete analysis

The paper has not been peer reviewed, so CESAR engaged two independent academics to review the methods and conclusions. One reviewer opined that while the absolute numbers may not be precise, the populations are clearly increasing. The other reviewer did not offer an opinion. Both reviewers liked the idea of more data and more analysis which would provide more resolution as to what is actually going on with this species. The reviewers agreed that the analysis was useful, and neither reviewer identified fatal flaws in the analysis. Based on the agreement that the work was useful, and that no reviewer found fatal flaws, but rather suggested additional improvements, we believe that this site specific analysis is the best available science, and it is consistent with the requirements of the Act that data be the basis of listing determinations.

Lesser Prairie Chickens are not Genetically Isolated, and there is Evidence of Hybridization

A 2010 publication[8] examined the genetics of the Lesser Prairie-Chicken to assess whether habitat loss fragmentation and population declines were resulting in genetic isolation or loss of diversity. Populations across Kansas, Colorado, Oklahoma, and New Mexico were examined. Little genetic differentiation was found except for the population in New Mexico, which was significantly different from most other populations. There was, however, evidence of significant isolation by distance at the rangewide scale that could explain the divergence of the population in New Mexico, simply because it is geographically isolated. The study also found evidence for a post-glacial population expansion within the species, which is consistent with the historical niche model that we constructed.[9] What can also be gleaned from the genetic study is that despite an overall historic reduction in range size, and increase in degree of range fragmentation, there is as yet no evidence of decreased genetic variability, either among populations, or in the species as a whole, relative to other grouse, or to birds in general.

The proposed listing document acknowledges the existence of hybridization between greater and lesser prairie chickens. The level of hybridization at the junction of the two ranges identified in the rule is high enough to potentially lead to merging of the two species. Thus hybridization is indeed occurring and calls into question the validity of the two species. The two grouse are very similar genetically (Gutierrez et al. 2000) and grouse are well-known to easily hybridize. We suggest that the FWS has underestimated the importance of monitoring hybridization and the

[8] *Regional Variation In MTDNA Of The Lesser Prairie-Chicken*, Hagan et. al. (2010); The Condor 112(1):29–37

[9] See Appendix 3 and the discussion under climate change.

implications for the taxonomy of the greater and lesser prairie chickens.

Assuming Population Declines Is Inconsistent With the Data Requirements of the ESA

As discussed in the previous sections, the best available data demonstrate that the lesser prairie chicken is not likely to become in danger of extinction in the foreseeable future. While the FWS may prefer their expert opinion and interpretation of the information outlined in the proposed rule, the plain language of the Act does not allow the use of anything but the best available data.

However, even if the data demonstrating population increases were not available, the following discussion identifies the arbitrary nature of the threats determinations in the proposed rule as well as the failure to comply with Congressional direction that listing determinations be based *solely* on data.

Habitat Effects Are Not Based On DataFWS Admits there is a 'lack of data' on Prairie Chicken Habitat Requirements

The FWS states that designation of critical habitat is not prudent because there is insufficient information on habitat requirements and identifies:

"A specific shortcoming of the currently available information is the lack of data about:

(1) The specific physical and biological features essential to the conservation of the species;

(2) how much habitat may ultimately be needed to conserve the species;

(3) where the habitat patches occur that have the best chance of rehabilitation; and

(4) where linkages between current and future populations may occur. "

Further, the FWS states:

"Additionally, while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations."

We note that the lack of data supporting the listing decision and identified in this report is confirmed by the FWS in this statement. We agree with the FWS that there is insufficient data to identify the available and the specific habitat requirements of the lesser prairie chicken. The lack of data makes any pronouncement regarding the effect of particular activities and habitat configurations speculative. This lack of data also makes it difficult to determine the effects of habitat changes on the lesser prairie chicken and consequently impossible to determine what habitat is necessary to conserve the prairie chicken.

The proposed rule assumes the effects of habitat loss and fragmentation, and then presents a *post hoc* rationalization of other habitat related factors which the FWS surmises contribute to the decline of lesser prairie chicken.

The discussion on prairie chicken habitat changes is framed in the context of each 'threat' individually and independently. The reader is provided with a large array of discrete facts regarding prairie chicken behavior in relation to specific structures, but nowhere are there data that reveal the range wide effect of these identified threats. The rule isolates each potential threat to lesser prairie chickens and asserts population level effects for each of them but provides no data on the actual effect of the interaction of these perceived threats, and never provides the reader any context to assess the range-wide extent of the effects. That is, the actual effect of a potential threat is dependent on the particular context of the population in which it is being evaluated. FWS assumes that any threat, no matter what the additional circumstances might be, is the same throughout the range and across time. However, what might be a threat under some circumstances (e.g., during a drought) might not be a threat in a normal year. The FWS approach is not biologically defensible.

The proposed rule argues that anthropogenic[10] activities threaten the lesser prairie chicken with rampant local extirpation that threatens eventual extinction, with no data to support the assertion. The basis for the listing decision rests on two principal threats, habitat loss and fragmentation. With no supporting data or analysis, the proposed rule asserts that the principal habitat threats amplify the effect of myriad other anthropogenic activities. A number of other specific 'potential' anthropogenic threats are also identified as generically 'contributing' to the decline of the lesser prairie chicken due to its weakened state resulting from habitat loss and fragmentation. The FWS speculates these threats include conversion of grasslands to agricultural uses, encroachment by invasive woody plants, petroleum production, roads, and presence of manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings. Again, the listing is predicated on threats unsupported by data and despite that admission that:

"… while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations… '

This statement clearly acknowledges there are no data with respect to whether a particular feature is adverse, beneficial, or neutral.

The rule's treatment of the issue of avoidance of selected anthropogenic

[10] Human based

features is a good example. The proposed rule[11] states:

"…lesser prairie-chickens seldom nested or reared broods within approximately 177 m (580 ft) of oil or gas wellheads, 366 m (1,200 ft) of electrical transmission lines, 792 m (2,600 ft) of improved roads, and 1,219 m (4,000 ft) of buildings".

However, the proposed rule fails to acknowledge the citation that supports this observation of avoidance also notes that, **avoidance did not result in lowered nest success**[12], which is of course the underlying reason for concern. Implicit in the FWS identification of avoidance as a threat is the surmise that lesser quality habitat was used and nest failures resulted, causing harm across the range of the lesser prairie chicken. The omitted data demonstrate the danger in relying on surmise. The FWS failed to consider that the cited literature did not examine what contributing effect other factors interacting with the structures may have had. The ESA requires the FWS to provide or rely on data that demonstrate how populations are reduced by this behavior and how the results of the study apply to all (or essential or significant portions) of the various habitats in use by the species.

Thus, we suggest that it is premature to extend an individually identified and isolated threat to the entire species. That is, suggesting that one factor (e.g. vertical structures) is a threat, without any observed adverse effects and without consideration of other co-relevant factors, such as location or type of habitat, degree of isolation, population size, whether the population was recently impacted by drought, or any other pertinent factor, risks failing to accurately identify the real threats.

The following section discusses the specific and general threats related to habitat identified in the proposed rule, the data supporting the existence of the threat, and the data supporting its population level effects.

Habitat loss and Population

The lack of early data on lesser prairie chickens and their habitat makes it difficult if not virtually impossible to make valid comparisons of historic and present habitat. Fortunately, such historic comparisons are not a consideration in the assessment of threats for listing under the ESA. The ESA requires identification of:

*"the **present or threatened** destruction, modification, or curtailment of its habitat or range"*

The FWS takes the position that substantiating population declines is unnecessary to list a species. The FWS asserts that measurement of the threats is all that is necessary. It is, however, necessary to be able to measure, in terms of data, either habitat loss and its population level effects or population changes. In the case of the lesser

[11] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73853
[12] Pitman et al. (2005)

prairie chicken, precise ground and aerial surveys (e.g., the States and Western Assoc. of Fish and Wildlife agencies) are available. Furthermore, states have implemented new and more accurate survey techniques which facilitate understanding population level responses over time. There is little doubt that the current range of the lesser prairie chicken has changed from that of its historic range[13] [14] but whether it's 25%, 50% or 95% is irrelevant; we know approximately how many birds exist today and where most of them live. The goal of the listing determination is to determine whether the remaining populations are increasing decreasing, or stable, have adequate habitat, that the existing habitat is sufficiently stable, and if not, to assess the species and the threats to the habitat to determine whether the species qualifies as threatened under the factors identified by Congress.

In the case of the lesser prairie chicken we have access to a record of the near-term habitat amounts and population changes in occupied habitat thanks to the aforementioned aerial surveys supported by the states. These aerial surveys have provided increased accuracy in population and habitat monitoring. However, these changing survey techniques, while leading to more accurate estimates, inhibit direct comparisons across time, requiring instead that changes be measured using sophisticated statistical techniques.[15] The analysis of the current population data demonstrates increasing populations and low extinction probabilities.

Lesser Prairie Chickens are not Threatened by Habitat Fragmentation

The FWS own data and analysis, referenced in the rule, demonstrate that habitat beyond the minimum required to ensure the continued existence of the lesser prairie chicken is available. A FWS spatial analysis identified 71 patches that met the listing determination's arbitrary minimum size of 10,117 ha (25,000 ac)[16] within the five state estimated occupied range. This satisfies the statement in the proposed rule that a minimum of four strongholds of 10,117 ha (25,000 ac) distributed across the ecological diversity of the species are necessary. **These data demonstrate that despite the existing fragmentation throughout the occupied portion of the range, the rule's arbitrary minimum stronghold threshold is met. This is confirmed by the data showing population growth throughout the range**[17].

[13] See Appendix 1 for a discussion of the historic range figures used by the FWS and their applicability to the listing determination.

[14] The same could be said for virtually any species living in the United States at the time of European settlement.

[15] The Hagan 2012 analysis of lesser prairie chicken populations is one example; another, Garton et. al. 2010 was used by the FWS, it examined disparate sage grouse population measurements.

[16] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73836

[17] *An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser*

The discussion of habitat fragmentation included in the rule is confusing and misleading. The information is presented without context and without a discussion of population level effects. In the following paragraphs we elucidate habitat fragmentation in the context of lesser prairie chicken life history adaptations and their environment.

The FWS states in the conclusion of the proposed listing:

'…as a result of the significant reduction in numbers and range of lesser prairie-chickens resulting from cumulative ongoing habitat fragmentation, combined with the lack of sufficient redundancy and resiliency of current populations, we conclude that the lesser prairie-chicken is currently at risk of extinction or is likely to be in danger of extinction in the foreseeable future.'

The question of habitat fragmentation and its consequence is key to the FWS determination that listing of the greater prairie chicken is supported. However, the basis for the determination that the existing fragmentation is sufficient to have population level effects is not supported by the data cited by the FWS.

Specifically, the FWS makes several conflicting statements regarding area of habitat needed for successful lesser prairie chicken populations. First, the proposed rule states,

"…Although a minimum size has not been established, studies and expert opinion, including those regarding greater prairie-chickens, suggest that the minimum parcel size is likely to exceed 100 ha (250 acres)..."[18]

Later the[19] proposed rule concludes that,

"…conservation and eventual recovery of the lesser prairie-chicken should consist of the establishment of secure strongholds or core areas of high quality habitat that are at least 10,117 ha (25,000 ac) in size and support 6–10 active leks, each being used by at least 6 males..."

The proposed rule does not provide the data used to determine that a home range two orders of magnitude larger than the minimum is necessary. Home ranges for lesser prairie chickens vary by habitat type and environment. This is because each of the life history components of lesser prairie chicken vary greatly as the birds adapt to available habitat and other environmental aspects. Leks, or the display grounds of males where females come to mate, can be quite small. It would not be useful to consider the area needed for a lek by itself, as it does not include nesting, feeding and roosting sites. However, it is useful to note that, leks are also found on habitat the rule assumes is not available for lesser prairie chickens such as, "…abandoned

Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[18] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856)
[19] Id., p. 73836)

oil-drilling sites (oil pads) with little or no vegetation, unimproved roads with little traffic, areas treated with shrub-specific herbicide, recently burned areas, heavily grazed areas (e.g., stock tanks, mineral licks), and cultivated fields adjacent to grassland…"[20]. Hence, lek placement is adaptable and areas identified as unsuitable at present, may in fact be used in the proper circumstances. Because of the adaptability of lesser prairie chickens it is not advisable to make broad surmises about habitat availability and needs included in the proposed listing rule, in lieu of actual data.

There are different ways to estimate the area of habitat needed for successful lesser prairie chicken populations and no agreed-upon answer. This is due to the fact that there are separate areas for nesting, feeding and the lek itself, all of which might be fragmented by interspersed areas of unsuitable habitat (either natural or human made), in the native landscape. The proposed rule cites several studies that evaluate the area required for home range and a population. Home range estimates range from 21 ac to 4806 ac, with many values in between. The huge variance in range area is the result of reports of home range by season (i.e. breeding less than wintering), different drought conditions, and availability of food. At the population level, there is no evidence on how many birds or leks would be necessary to maintain population viability. As a consequence, estimates reported by FWS show enormous variation, from 1,012,140 ac to 2,530 ac. Other figures include 7,900 ac, 25,000 ac, 12,000 ac, 72,649 ac, and 24,710 ac. In violation of the requirements of the ESA, **the FWS does not include the data that support the determination to use the 10,117 ha (25,000 ac), nor does it explain the basis for the determination**.

The FWS references a spatial analysis they conducted to determine the extent of fragmentation within the estimated occupied range of the lesser prairie-chicken.[21] Infrastructure features such as roads, transmission lines, airports, cities and similar populated areas, oil and gas wells, and other vertical features such as communication towers and wind turbines were delineated. These features were buffered by known avoidance distances and compared with likely lesser prairie- chicken habitat. **The analysis revealed 71 patches that exceeded the minimum 10,117 ha (25,000 ac) range that exist within the five- state estimated occupied area**. Of the patches over 10,117 ha (25,000 ac), all were impacted by fragmenting features, just not to the extent that the patch was fragmented into a smaller sized patch. Thus, even if, as the rule states:

[20] Hagen et al. 2004

[21] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856; The analysis is referenced but not included in the citations, so it is not possible to assess its validity.

"… a minimum of four strongholds will be needed, distributed across the ecological diversity of the species, in order to secure the status of the species."[22]

There are several times that many patches currently in existence.

Edge Effects Due to Habitat Fragmentation

It is well known that in some ecosystems increasing linear amounts of habitat edge, as a consequence of habitat fragmentation, present threats to some species. For example, birds nesting in forests are negatively impacted by nearby open-country edges because it facilitates access by habitat-edge nest predators such as raccoons (*Procyon lotor*), and provides access to nests by avian brood parasites such as the ubiquitous brown-headed cowbird (*Molothrus ater*). The proposed rule contains numerous citations referencing the negative effects of edges that are apparently supposed to illustrate their danger to lesser prairie chickens; however, none of the citations address the effects of edges on lesser prairie chickens[23]. The proposed rule also states that typical native lesser prairie chicken habitat is a mosaic of different habitat patches. We note that each of the patches within the native mosaic creates an edge[24] [25]. Thus, the lesser prairie chicken's coexistence with edge effects in their native habitat indicates that they are part of the native landscape in which lesser prairie chickens evolved.

The FWS suggests that edges and habitat fragmentation will make it difficult for lesser prairie chicken individuals to find leks. The rule provides no data, and no evidence to support the statement. As such, it appears to be purely speculative. Further, given that leks are often used traditionally for years, and that breeding and feeding grounds are typically nearby, the notion that a lesser prairie chicken would be unable to find an active lek is scarcely credible. It is also worth noting that leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine the birds' selection of a new lek site. Surely a species would not have evolved a reproductive system that randomly makes it impossible for females and males to find each other at mating season.

[22] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73856
[23] Id., pp. 73851-57
[24] Id., pp. 73852
[25] "Consequently, blocks of habitat that collectively or individually encompass multiple successional states that comprise tall grasses and shrubs needed for nesting, and are in proximity to more open grasslands supporting forbs for brood rearing, and are combined with smaller areas of short grass and bare ground used for breeding, support all of the habitat types used by lesser prairie- chickens throughout the year." Federal Register, Vol. 77, No. 238 , December 11, 2012, pp. 73852

Anthropogenic Changes to Lesser Prairie Chicken Habitat

This statement in the rule appears to be opinion.

'The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events…."[26]

The FWS provides no data or analysis to support the statement, and has earlier admitted there are no data on historic habitat or populations. Nevertheless, the proposed rule contains a list of activities which 'may' have an adverse effect on lesser prairie chicken, based on these assumed impacts. The information provided in the proposed rule consists of lists of areas where these 'threats' exist within lesser prairie chicken habitat and speculative mechanisms for their adverse effects. However, no data are provided to substantiate the assertions that the adverse effects attributed to these threats actually exist or how they affect lesser prairie chicken populations' extinction risk. We recognize that "extreme weather events" was intended to be only one possible example of a stochastic event, but an extreme weather event that would wreak such widespread damage would likely be destructive even to native species at peak abundances.

[26] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73883

Livestock Grazing, Water and Habitat Conversion

Livestock

The FWS surmises that because livestock grazing occurs over such a large portion of the occupied range, it must be a threat. Accepting the idea of adverse effects of livestock grazing on a species whose historic habitat included seasonal and widespread overgrazing by bison is counter-intuitive. The proposed rule implies that the pattern of grazing today is different, but does not quantify those differences or the adverse consequences. The rule also identifies other adverse effects such as nest trampling, but provides no information on the extent to which this occurs or the population level effects of such occurrences. Identification of livestock grazing as a threat to the species is purely speculative. In fact, the rule states:

"…Although documented, the significance of direct livestock effects on the lesser prairie-chicken is largely unknown. Detailed, range wide information is lacking on the extent, intensity, and forms of recent grazing, and associated effects on the lesser prairie-chicken. "

Additionally, the rule fails to account for the availability of water from stock tanks as a positive effect of grazing cattle. The rule cites research documenting the regular use of stock tanks by both male

and female lesser prairie chickens. The FWS suggests that stock tanks,

"…may be particularly important during periods of drought."[27]

The rule immediately discounts its importance stating that lesser prairie chickens do not require water speculating that dew is a 'likely' source:

"Lesser prairie-chickens likely rely on food sources and consumption of dew to satisfy their metabolic moisture requirement but will use surface water when it is available."

While the rule admits beneficial aspects of a ready source of water to the species, it fails to consider it in assessment of the effect of livestock grazing:

"Little is known regarding the specific water requirements of the lesser prairie chicken, but their distribution does not appear to be influenced by the presence of surface water."

"Total annual precipitation across the range of the lesser prairie-chicken varies, on average, from roughly 63 cm (25 in) in the eastern portions of the historical range to as little as 25 cm (10 in) in the western portions of the range. Consequently, few sources of freestanding surface water existed in lesser prairie-chicken historical range prior to settlement."

Agricultural conversion

The proposed rule states that agricultural conversion adversely affects lesser prairie chicken. However, the statement is only partially accurate. The cited research notes that lesser prairie chickens commonly forage in agricultural crops such as grain sorghum, corn, and other grain fields adjacent to native pasture from late autumn through early spring and that alfalfa is an important food source for pre-nesting females and lekking males in southwestern Kansas. The citations also reported that maximum numbers of lesser prairie chickens were found in areas in which 5-37% of the landscape was planted to grain sorghum using minimum-tillage techniques. The citations used by FWS in the proposed rule also note that recently, conversion of grass lands to agriculture has slowed, as the number of hectares per year converted has not increased. The proposed rule provides no data to substantiate the statement that increases in agricultural conversion continue to occur. Neither does the proposed rule make any attempt to assess or quantify the benefits to lesser prairie chickens of increased food sources from agricultural crops, the percentage of no-till agriculture or of the crops that provide food for lesser prairie chickens. The multiple variables involved in assessing the effect of agricultural conversion illustrate the speculative nature of sweeping assumptions about the effect of any activity on lesser prairie chicken habitat.

[27] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73843

Human encroachment: energy production and transmission , fences, roads

The proposed rule lists several citations that report there are indications that human structures influence lek placement. The proposed rule includes wind turbines, energy transmission lines, power poles and lines, oil rigs, fences and roads in this category. The proposed rule posits that the vertical presence in the lesser prairie chicken landscape is in and of itself a threat. The threat is predicated on research that found lesser prairie chickens avoided these structures.

Specifically, Pitman says that leks are farther from anthropogenic structures than expected by chance. Pruett et al. (2009) found that lesser prairie chicken tended to avoid roads and power lines. Hagen (2011) noted that, "Monte Carlo simulations of expected distances indicated that the nearest 90% of lesser prairie chicken centers of use were farther from anthropogenic features than would be expected at random." However, as noted elsewhere, there are no data that this avoidance results in reduced nest success or reduced populations. Pitman et al. (2005) measured distances from nests to various anthropogenic features, and found:

"distances to the features were not substantial predictors of apparent nest success. Grass height, sagebrush plant density, and sagebrush height were the most important vegetation characteristics influencing nest success."

Further, based on the narrow reach of the supporting research, it is only surmise that structures have an adverse effect, since the effect of other interacting features, such as whether it was a drought year and the placement of the structures in relation to the lesser prairie chicken preferred activity for the site have not been evaluated.

The proposed rule speculates that human activities nearby leks might interfere with the transmission of male vocalizations ("booming") on the leks, thereby preventing females from finding the leks.[28] This speculation is inconsistent with what we know of lesser prairie chickens. First, as discussed above, leks are relatively long-lived, and it is unlikely that there are females or males in the local population who are unaware of their location and active status. Second, leks change location on the landscape by themselves, naturally and without human intervention, and no one is sure what causes a lek to be abandoned or what exact criteria determine their selection of a new lek site, but this behavior does not appear to affect the ability of leks to be found during mating season. Finally, a characteristic of lesser prairie chicken habitat is frequent wind, which abates sounds reducing the effects of surrounding noise. Nevertheless, the

[28] Federal Register, Vol. 77, No. 238 , December 11, 2012, p.73839

rule relies on the findings of a paper[29] which addresses the effect of noise on a flycatcher, warbler, sparrow and a vireo, all small songbirds, and no open country ground nesting game birds whose environmental requirements would more closely mirror those of lesser prairie chickens. Accordingly, the study, although important in its own right, is irrelevant to the lesser prairie chicken as the tremendous differences in the ecology of the species involved preclude drawing any inferences related to lesser prairie chickens. Thus, there are no scientific data to indicate that noise is a threat to the lesser prairie chicken.

Collision mortality

The proposed rule concluded that:

"power lines and unmarked wire fences are known to cause injury and mortality of lesser prairie-chickens, although the specific range wide impact on lesser prairie chickens is largely unquantified."[30]

The statement is based on a study which demonstrated that statistically, the effect of collisions was insignificant. [31] The rule identifies data from 1999 to 2004, in which researchers recovered 322 carcasses of radio-marked lesser prairie-chickens in New Mexico, Oklahoma, and portions of the Texas panhandle. The percentages of documented lesser prairie-chicken deaths from collision were estimated to be 42 percent in Oklahoma and 14 percent in New Mexico. Based on the information in Table 2 of the proposed rule, there were roughly 10,000 individuals in the three states during this time interval, and therefore, during this period, there were approximately 60,000 potential encounters. Therefore, the 14% to 42% of 322 birds (45 to 135) that died via collisions amount to less than 1/10 of one percent of the population (0.1%). Therefore, the available data indicate that although it would be highly useful to put markers on the top row of fences especially near leks, collision mortality is relatively insignificant factor.

Disease and Predation

The proposed rule states:

"The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events. Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels"

Predation

Although in the section on predators, FWS plays down the role of predators, throughout the proposed rule, there are repeated assertions that diverse threats increase predation. These discussions ascribe a role to predators that will result

[29] Francis et al. (2009)
[30] Federal Register, Vol. 77, No. 238 , December 11, 2012, p. 73863
[31] Patten et al. (2005b)

from existing and planned towers serving as perches for raptors. For Example, FWS states that lesser prairie chickens avoid vertical structures as "presumably a behavioral response that serves to limit exposure to predation." The proposed rule cites a long term study in Oklahoma.[32] In that study, they identified roughly 43 carcasses out of a total lesser prairie chicken population of 3,000.attributable to raptor depredation.[33] Thus only a handful of birds were killed by raptors. The authors of this study stated "We have no reason to believe that lesser prairie chicken populations are being impacted severely by predation."[34] In a different study Behney et al. (2012, p. 294) "suspected that mammalian and reptilian predators had a greater influence on lesser prairie chicken mortality during the breeding season than raptors." Yet, in their conclusion the FWS ignores these data and opines that predation is a threat.

There are no data that support the speculative statements in the proposed rule that towers would provide roosts for ambush-style raptors. Most raptors such as large hawks, hunt from the air. A major avian predator, the Great Horned Owl, likely approaches low to the ground during crepuscular periods, and perching on a tower might make it visible. Only documented depredation where the species of raptor and hunting method were recorded would provide this information. Here again, the FWS lack sound or even reasonable scientific data on the effects of towers on increasing predator pressure. It requires observations over time, measuring the rate at which lesser prairie chickens are taken by avian predators at leks both with and without nearby towers or other vertical structures. And most importantly, one would have to demonstrate the assertion the depredation from raptors was additive and not compensatory. That is, as FWS noted, lesser prairie chickens evolved with a suite of mammalian and avian predators. Only if some new source of predation occurred that resulted in take of individuals over and above natural levels, would depredation be relevant, and the proposed rule presents no data empirical or otherwise to support this conclusion.

Disease

The FWS states in the proposed rule:

"…There is no information that indicates parasites or disease are causing, or contributing to, the decline of any lesser prairie-chicken populations, and, at this time, we have no basis for concluding that disease or parasite loads are a threat to any lesser prairie-chicken populations. Consequently, we do not consider disease or parasite infections to be a significant factor in the decline of the lesser prairie-chicken…"

[32] Wolfe et al. (2007) who conducted a long term study from 1999-2004.
[33] Table 2, FWS 2012
[34] Wolf et al. (2007: 101)

The proposed rule then goes on to state, that if populations continue to decline or become more fragmented, even small changes in habitat abundance or quality could have more significant consequences. The implication is that there would be a marginal increase in disease within the population driven by habitat changes. There are no data to support an assertion that disease will increase as habitat loss or fragmentation occurs, if the statement were supportable, the putative loss in habitat which this rule surmises, has already occurred and should have resulted in some measurable increase in disease over time. Such an increase is not recorded or even remarked. In any event, if populations decline or are sparse, diseases that are density dependent would have difficulty becoming a major threat.

Climate Change

The proposed rule identifies global warming and potential extreme weather events as a threat to the species. The rule assumes that warming will occur (as opposed to some unspecified climate change) and concludes that as a result, habitats will dwindle and further compound the putative negative effects of habitat fragmentation. However, many climate projections predict that species ranges will shift, not shrink and in fact, conditions for some species might improve.

Changes in species' range sizes are ubiquitous, and do not automatically imperil their continued existence. For example, during the last Ice age, known as the Last Glacial Maximum (LGM; 21,000 years before present), southward extending glaciers pushed many species into small southerly isolated habitat patches (refugia), where they survived for thousands of years, subsequently expanding as climate shifted again.

CESAR used a niche model to examine the current and past distribution of lesser prairie chicken (Appendix 3). Our work demonstrates that the lesser prairie chicken was one of those species which was distributed in a fragmented series of habitat patches south of the current range during the last glacial maximum, 21,000 years ago. Clearly the species survived this displacement and fragmentation, and as climate conditions ameliorated post glacial retreat, they followed their northward-moving habitats to where they are today. Thus the species has survived previous significant climate changes and has the potential to survive major, glacial-scale changes in earth's climate and still prosper. [35]

The FWS provides no data to substantiate a conclusion that a species which has weathered significant climate change and persisted over 21,000 years is not equipped to survive and adapt to current climate change.

[35] For a more in-depth discussion of the analysis, see Appendix 3

Adequate Regulatory Authority Exists to protect the Lesser Prairie Chicken at the State and Local Level

As part of our review of the proposed listing rule, CESAR lawyers examined the existing state and local protections for the lesser prairie chickens. We found that each state had its own comprehensive scheme for protecting species and their habitats. These protections, for the most part, went far beyond the narrow protections of the ESA encompassing wildlife and wildlife habitat protections.

Benefits of ESA Listing

The proposed rule states that the ESA provides protection beyond that which state and local agencies provide. This is only conditionally true. The ESA protects listed species by requiring federal agencies to avoid jeopardizing the continued existence of the species, prohibiting the 'take'[36] of listed species, and by protecting designated critical habitat. The FWS in the proposed rule implies that listing provides the ability to protect habitat on private property, is the only source for recovery planning and increases funding available for the conservation of lesser prairie chickens.

The habitat protections provided under the ESA largely flow from the designation of critical habitat. The protections apply only to that habitat which has been designated as 'critical'. The protections are further limited to the subset of critical habitat which is affected by a federal agency action. So while much private habitat can be designated as 'critical habitat', in fact it is not protected under the ESA unless a federal agency action has an effect on it. With respect to the lesser prairie chicken, this distinction is moot as the FWS has declined to designate critical habitat as 'not prudent", due to the lack of data related to the species habitat requirements.

The prohibitions against take protect the species immediate habitat if its modification or destruction leads to the death of an individual member of the species. The requirement that federal agencies consult with the FWS to ensure their actions do not 'jeopardize the continued existence of the species' allow for take as long as jeopardy does not result.

While listing of a species results in a requirement to develop a recovery plan, these plans are developed to the maximum extent practicable and there are no regulatory requirements attached to the plan. Recovery plans are aspirational documents, the ESA

[36] The Act defines take as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct..." The word harm has been interpreted to include habitat modification, which foreseeably causes the actual injury or death to a listed species. The FWS has asserted the ability to regulate habitat under this provision and consequently resists designating critical habitat. The courts have disagreed with this interpretation, pointing out that simply protecting against habitat alteration that actually kills a species is not preservation of the ecosystem upon which a species relies.

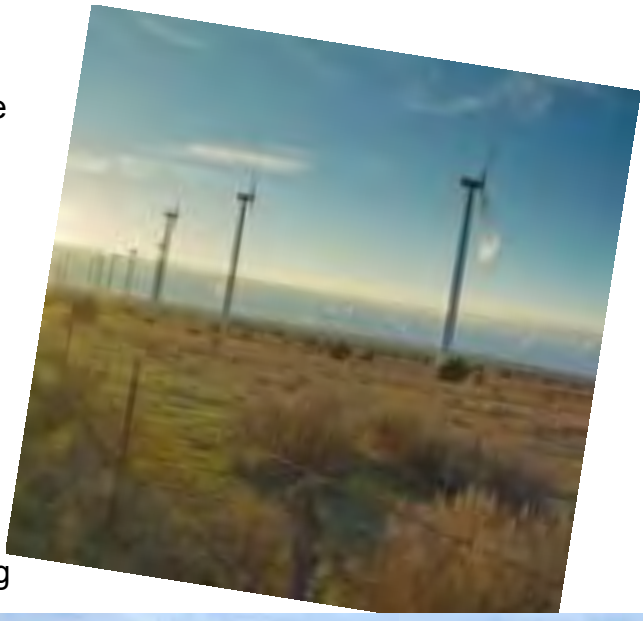
imposes no requirements for scientific rigor to their contents, such as requiring them to use the 'best scientific and commercial data available'. Further, any group can and has developed recovery plans. The FWS has developed Recovery plans, individual states have developed recovery plans, and working groups have developed recovery plans. The ESA is not the sole generator of a recovery plan.

The ESA provides no dedicated funding for listed species.[37] While it is possible to argue that if a species is listed the probability of funding increases, the evidence is unpersuasive. With nearly 1,500 listed species, one would expect all available wildlife research and conservation funds would be used to address those species. Instead, funding for wildlife conservation, recovery, and research is not devoted solely to endangered species, much is still available for unlisted and unregulated species.

Realistically listing of a species, assures federal agencies are required to review their actions in the context of the ESA, and to a limited extent those requirements extend to private lands affected by federal agencies.

Generally, a listing under the federal ESA listing does not necessarily:

- Protect habitat on private property;
- Provide access to dedicated federal funding;
- Result in a recovery plan



[37] We contrast this with the affected States which individually provide state funds for wildlife conservation.

Existing Federal Agency Regulatory Protections

The FWS admits that the lesser prairie chicken cannot be fully recovered on federal lands, which only support about four percent (4%) of the species' overall range. The five states where the majority of the lesser prairie chickens are found (primarily on private property, not federal lands) have significant state, county and local laws and regulations in effect to protect the lesser prairie chicken.

Where federal lands are involved, we note that in many cases federal agencies have taken voluntary actions to ensure that they consult with the FWS whether or not a species has been listed. These agencies include the Forest Service and the BLM. These two agencies have responsibility for managing millions of acres. These agencies have formally designated prairie chickens and their habitats as species for which their respective management plans will take special consideration. [38] These management plans are binding, and failure to adhere to their conditions can be challenged in court. [39] There is no evidence that the agencies are routinely ignoring the requirements of their management plans for lesser prairie chickens.

The voluntary consultation by federal agencies provide protections that go beyond what is required by the ESA as the agencies land use plans have a standard that manages the lands to recover or enhance wildlife and habitat. A consultation under the ESA requires only that the federal agency, avoid 'jeopardizing the continued existence of the species', or the 'destruction or adverse modification' of its critical habitat.

FEDERAL AGENCY PROTECTION[40]	ESA PROTECTION INCREASE
Bureau of Land Management • Environmental assessments required for all major activities; • Early consultation as to presence of species in project area;	None. BLM Land use plans[41] for the lesser prairie chicken habitat are complete. These plans are based on voluntary consultation with the

[38] The section on conservation actions includes details on the conservation actions undertaken by these land management agencies.
[39] Western Watersheds Project v. Ken Salazar, Secretary, Department Of The Interior, Case No. 4:08-CV-516-BLW, Document 131, Memorandum Decision And Order. http://www.advocateswest.org/sites/default/files/bulletin/Victory%20in%20First%20Round%20of%20BLM%20RMP%20Litigation/Order%20granting%20WWP%20Motion%20for%20Summary%20Judgment.pdf
[40] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[41] http://www.blm.gov/flpma/FLPMA.pdf

• Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Duty to protect and restore habitat from invasive species; • Guidelines for energy development; • Best management practices for energy development "approved" by FWS • Duty to create Resource Management Plans; • Duty to conserve "candidate" species and sensitive species designated by individual states; • Designated Area of Critical of Environmental Concern (ACEC) for lesser prairie chicken	FWS as though the lesser prairie chicken were listed under the ESA.[42] The requirements in the land use plans are based on a standard to restore or enhance habitat conditions, the ESA simply require that federal agencies: 1. Avoid jeopardy, 2. Avoid destruction or adverse modification of habitat. Federal lands controlled by BLM and the USFS managed under provisions that already provides lesser prairie chickens and their habitat enhanced protection. Federal lands controlled by BLM and the USFS have already agreed to voluntary consultation with the FWS on the lesser prairie chicken, whether it is listed or not; Current federal land management practices provide for management, enhancement, and recovery of habitats used by lesser prairie chicken, rather than just avoiding jeopardy. Each of the states with lesser prairie chicken habitat prohibit take either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[42] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

Department of Agriculture • Duty to protect and restore habitat from invasive species; • Agreement to "consult" for activities that may impact "candidate" species, such as the lesser prairie chicken; • Environmental assessments required for all major activities;	No additional habitat protections would be provided, first because the listing does not designate critical habitat, second because the land management agencies manage to a restoration/enhancement standard which is higher than the ESA 'avoid jeopardy' and no destruction or adverse modification standard. USFS land use requirements for lesser prairie chicken are based on voluntary consultations with the FWS and a standard to improve habitat conditions[43]. The only potential increase in protection by an ESA listing would be to criminalize accidental take.

[43] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

State and Local Regulatory Protection

The five states with lesser prairie chicken habitat have significant protections in place for wildlife in general, allowing them to protect prairie chickens and their habitat without federal authority. Each state has its own Endangered Species Act and Colorado has listed the lesser prairie chicken. Some states have identified it more specifically with a designation indicating it is a species of special concern. All the states identify it as a game species and have statutes which provide for penalties for taking under anti-poaching laws. In addition, each of the States and their associated local government have the authority and expertise to protect wildlife habitat generally and specifically, whether it is on government or private land.

The following is a cursory review of applicable law which should be considered illustrative rather than a comprehensive list.

In making comparisons between the ESA and local protection it is important to note that ESA protections are limited to federal lands, and those critical habitat lands which are affected by a federal agency action. While the FWS may prefer their ability to protect the species, there is no indication that a lack of regulatory authority is hampering the states from protecting lesser prairie chickens. The states bring their own expert agency status to the protection of species within their jurisdiction, and each state has identified a commitment to protection, restoration, and enhancement of wildlife resources. There is no basis for asserting that state expertise or authority is lacking and, as noted earlier, increasing populations support a conclusion that state and voluntary conservation efforts are having a beneficial effect.

Colorado, Kansas, New Mexico, Oklahoma and Texas already have flexible laws and regulations in place to effectively deal with changing conditions to prevent depletion and waste of wildlife resources. Further, the documented policies of the federal land use agencies whose actions most impact the lesser prairie chicken and its habitat, currently identify the lesser prairie chicken as a species for which special management and protection is afforded even in the absence of an ESA listing. In light of the prohibitions of take under anti-poaching laws that apply to the lesser prairie chicken, listing under the ESA will only criminalize accidental take of lesser prairie chickens.

Existing laws at the state, county and local levels have the authority to protect and manage activities on state, public and private lands with the actual or potential benefit to the lesser prairie chicken. The service candidly admits that only about four percent (4%) of the species' overall range occurs on federal lands and that the lesser prairie chicken cannot be fully recovered on federal lands alone. Fortunately, there are adequate state, county and local laws and regulations currently available in Colorado, Kansas, New Mexico, Oklahoma and Texas to protect the lesser prairie chicken.

The following chart summarizes current protections provided to the lesser prairie chicken on a state-by-state basis and identifies any marginal increase in protection provided by the ESA[44].

STATE	ESA PROTECTION INCREASE
Colorado • Species listed under the state ESA and take is prohibited. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Prohibits unauthorized 'take' of wildlife, whether listed or not • Provides dedicated funding for wildlife and habitat. • Goal is for all wildlife to achieve self-sustaining population; • Wildlife laws are enforced with civil and criminal penalties.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Oklahoma • State has authority to enter private lands for purpose of controlling Red Cedar and other invasive plant species; • Dedicated funding for wildlife habitat restoration activities; • Protects all wildlife from illegal "take"; • Wildlife laws are enforced with civil and criminal penalties; • Provides classification for "sensitive species" such as lesser prairie chicken. • Provides protections intended to achieve self-sustaining wildlife populations. • Local government has the authority to regulate land use on private and public land to protect for wildlife habitat • Comprehensive regulation of energy development and natural resource development industries.	ESA provides no ability to control activity on private land unless it is affected by a federal agency action. The ESA would criminalize accidental take.

[44] A detailed chart can be found in Appendix 5.

• Classifies lesser prairie chicken as a game bird ad protects it with anti-poaching laws.	
New Mexico • Dedicated funding source for wildlife protection and promotion; • Conservation Services are available for management and enhancement (including research and conservation actions) of wildlife and habitat; • Educational publications on wildlife and habitat related conservation issues; • State requires studies to be conducted to determine the status and survival requirements of threatened or endangered species. • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Kansas • Established habitat acquisition and restoration programs; • Programs to ensure that all wildlife maintain or achieve “self-sustaining” populations; • Penalties for failure to adhere to wildlife laws; • Local governments have authority to create noxious weed programs; • Planning and zoning must be conducted in a manner that will consider all natural resources of the State; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it with anti-poaching laws.	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in protection by an ESA listing would be to criminalize accidental take.
Texas • Noxious weed control programs; • Dedicated funding for wildlife research; • Dedicated funding for wildlife and habitat conservation;	Each of the states with lesser prairie chicken habitat prohibit take, either through a state ESA listing or anti-poaching laws. The only potential increase in

• Civil and criminal penalties for violation of wildlife laws; • Wildlife laws protect all "indigenous" wildlife (not only listed species) from "take"; • Conservation incentive programs with dedicated funding; • Comprehensive regulation of energy development and natural resource development industries. • Classifies lesser prairie chicken as a game bird and protects it under anti-poaching laws.	protection by an ESA listing would be to criminalize accidental take.

COLORADO

Colorado has implemented rules, regulations and codes to ensure the protection of wildlife and to ensure a continuous operation of planning, acquisition and development of wildlife habitats and facilities for its indigenous wildlife populations. The protections available in Colorado include, but are not limited to, local governments, planning and zoning, land use and conservation and have included provisions for enforcement so as to promote consultation with other states and federal government for the purposes of increasing the number of individuals within the species and populations of wildlife up to the optimum on a statewide basis to ensure equitable and reasonable privileges of ownership along with the pursuit of wildlife resources.

NEW MEXICO

New Mexico has a comprehensive wildlife conservation strategy. The strategy focuses on actions intended to keep common species common while working to prevent wildlife from becoming endangered. Using rigorous science, New Mexico has constructed an ecological framework for identifying the species of greatest conservation need, the habitat necessary to sustain them and other members of their ecological communities with periodic review processes necessary to ensure citizen involvement and acceptance.

KANSAS

Kansas has enacted the Kansas Nongame and Endangered Species Conservation Act of 1975 which gives the Department of Wildlife, Parks and Tourism authority to identify and undertake appropriate conservation measures. In that regard Kansas has implemented recovery plans with an objective to guide research and management aimed at enhancing listed species populations with the ultimate goal of allowing species to recover. Kansas has taken great strides in creating, practices, plans and regulations

which provides incentives to plant and maintain prairie grasslands which have greatly benefited the lesser prairie chicken.[45]

TEXAS

As an example of the available protections, the Texas Agriculture Code allows the authority to determine critical wildlife habitat zones, create and regulate noxious weed control districts and to regulate range restrictions. Additionally, the Texas Natural Resources Code and Parks and WildlifeCode allow Texas to regulate and develop and administer programs to ensure continued agriculture production and water availability as well as wildlife habitat availability. Texas also has an administrative code whose purpose, in part, is to provide a comprehensive method for the conservation of an ample supply of wildlife resources on a statewide basis to insure reasonable and equitable privileges of ownership along with the pursuit of wildlife resources.

OKLAHOMA

Oklahoma has developed the Oklahoma Lesser Prairie-Chicken Conservation Plan (OLEPCCP) to "protect, enhance, and restore their habitat while also addressing other factors leading to their decline." This plan is intended to benefit the people, economy, and wildlife resources of Oklahoma by providing a framework for effective management and habitat improvement. Oklahoma is working to conserve the lesser prairie chicken while minimizing effects on human economies and developments. Appropriate habitat improvement/conservation goals and long-term management actions/strategies are being utilized to achieve these goals as well as coordinated strategies to implement management actions – including interagency coordination and incentives or other programs that will make restoration and maintenance of LEPC habitat economically viable for landowners and industries. While these efforts are underway, Oklahoma defines lesser prairie chickens as game birds and protects them under their anti-poaching statutes.

Table 1. Federal Lands By State[46]

State	Total Federal Land Acreage[47]	Total Acreage in the State	% of
Colorado (listed under CO ESA)	24,086,075	66,485,760	36.2%

[45] The anti-poaching laws protect the species at all time. Kansas offers limited hunting of LPC.
[46] Congressional Research Service, 7-5700, February 8, 2012, Federal Land Ownership: Overview and Data, http://www.fas.org/sgp/crs/misc/R42346.pdf
[47] Understates total; includes lands of the four major federal land management agencies and the Department
of Defense, but excludes lands administered by other federal agencies (e.g., Agricultural Research Service, Bureau of Reclamation, Department of Energy, National Aeronautics and Space Administration).

Kansas	301,157	52,510,720	0.6%
New Mexico	27,001,583	77,766,400	34.7%
Oklahoma	703,336	44,087,680	1.6%
Texas	2,977,950	168,217,600	1.8%

Federal Voluntary Conservation Actions

As noted earlier, particularly in the case of federal land management agencies, conservation actions undertaken voluntarily as part of a program of land management by the federal agencies, become enforceable once they are adopted. In a similar manner, once landowners enter into voluntary conservation programs with federal agencies, the provisions of the programs themselves become requirements.

Summary Chart of Federal Agency Ongoing Conservation Programs[48]

FEDERAL AGENCY CONSERVATION ACTIONS[49]

Department of Agriculture
 	
• Natural Resources Conservation Service:
  ○ Lesser Prairie Chicken Initiative: helping farmers and ranchers enhance, restore and protect habitat for lesser prairie chicken;
  ○ Conservation Reserve Program (CRP): one of the primary management tools for habitat restoration;
  ○ Wildlife Habitat Incentive Program: voluntary approach to improving wildlife habitat;
  ○ Working Land for Wildlife: FWS cooperative to combat the decline of seven specific wildlife species, including the lesser prairie chicken;
  ○ Grassland Reserve Program (GRP): a voluntary conservation program working with individuals to enhance plant and animal biodiversity, and protection of grassland;
  ○ State Acres for Wildlife Enhancement (SAFE): a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years;
  ○ The Environmental Quality Incentives Program (EQIP): a voluntary program that provides financial and technical assistance to agricultural

[48] A detailed chart can be found in Appendix 6
[49] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken

producers through contracts up to a maximum term of ten years in length.

Fish and Wildlife Service
 	
• Habitat Conservation Planning Assistance;
• Habitat Conservation Plan (HCP) Land Acquisition;
• Oklahoma and Texas have entered into CCCA's for the protection of the lesser prairie chicken. Candidate Conservation Agreements (CCAs) are voluntary conservation agreements between FWS and one or more public or private parties.[50]
  ○ Oklahoma CCCA: On March 4, 2013 Oklahoma's CCCA was finalized. FWS states that Oklahoma "has shown capability for and commitment to implementing all of the terms of the CCAA. The ODWC has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA".[51]
  ○ Texas CCCA: This CCAA pertains to lands in Texas encompassed by the current distribution of LPC, those lands that are unoccupied potential habitat, and those that could provide potential habitat if the current population and distribution of LPC should increase.[52] In Texas, TPWD holds a permit and issues Certificates of Inclusion to participating landowners who are voluntarily implementing management plans for lesser prairie-chickens. As of July 15, 2012, twenty-five Texas ranchers have 282,878 acres enrolled in the CCAA.[53]

BLM and USFS have entered into agreements to consult with the FWS voluntarily on candidate species and 'species of special concern.[54]

State and Local Voluntary Conservation Actions

The question of the effectiveness of voluntary versus regulatory conservation actions is difficult, and there is little literature that rigorously explores the issue. The argument for voluntary conservation is that regulatory conservation makes the species or its habitat a liability. Voluntary conservation removes the potential for the loss of property or its value and encourages behaviors that are beneficial to the species.

[50] The Service works with its partners to identify threats to candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements, and design and implement conservation measures and monitor their effectiveness. http://www.fws.gov/endangered/what-we-do/cca.html

[51] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf

[52] http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

[53] http://www.fws.gov/southwest/es/Documents/R2ES/LPC_FAQ_18July2012.pdf

[54] Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And Wildlife Service http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

The population review we referenced earlier[55] noted declines in lesser prairie chicken populations in the decades prior to its designation as a 'candidate species' and increases after designation and the onset of voluntary conservation actions.

The 5 states in the lesser prairie chicken range have implemented a number of conservation actions over the past fifteen years. The FWS has articulated a policy for evaluating those conservation actions. This policy, known as the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy")[56], is particularly important for conservation actions that are ongoing or proposed for the future.

The FWS's PECE Policy requires during listing decisions that the FWS evaluate whether "formalized conservation efforts" [57] ("FCEs") "contribute to making it unnecessary to list a species". The purpose of the policy is to ensure consistent and adequate evaluation of future or recently implemented conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents when making listing decisions. The policy is expected to facilitate the development by States and other entities of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.[58]

This policy applies to those conservation efforts that "have not yet been implemented or have been implemented but have not yet demonstrated whether they are effective at the time of a listing decision."[59]

When evaluating an FCE that is not yet implemented, the FWS must make this evaluation based on the "certainty of implementing the conservation effort and the certainty that the effort will be effective." [60]

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[55] An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens, A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group; Christian A. Hagen, Ph.D., Oregon State University, 500 SW Bond St, Bend, OR 97702

[56] 50 CFR Chapter IV, Federal Register / Vol. 68, No. 60 / Friday, March 28, 2003

[57] "conservation efforts as "specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species". Conservation efforts may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial actions." A formalized conservation effort is one "identified in a conservation agreement, conservation plan, management plan, or similar document." Id.

[58] http://www.sagebrushsea.org/esa/FWS_PECE_q&a.pdf

[59] Id.

[60] The PECE Policy states that the following factors will be considered: 1. Identified Parties, Funding and Resources necessary to implement the effort; 2. The legal authority of the parties to proceed with the FCE are described; 3. The legal procedural requirements (e.g. environmental review) necessary to implement the effort are described and within the means of the parties to accomplish; . 4. Authorizations (e.g., permits, landowner permission) necessary to implement the conservation effort are identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement

The majority the voluntary conservation actions could be considered ongoing, however, some such as the Interstate Working Group Range Wide Management Plan[61] and Oklahoma's CCCA have yet to be completed or implemented but would require a determination that there is high level of "certainty" of implementation given their near completion status and the large investment of resources.

In prior listing determinations, the FWS has declared that if a conservation plan cannot be demonstrated to be effective, it cannot be considered in a listing determination. This position is not supported by the plain language of the PECE policy. Further, it is demonstrably arbitrary in that most, if not all of the actions contemplated by these conservation plans are consistent with best management practices required by the FWS in their consultations with the federal land management agencies, in consultations which include the species and in documents sponsored by the FWS.[62]

Finally, we note that despite the assertions of the FWS as to efficacy of an ESA listing in protecting the species, the ESA provides very narrow protections, limited by the consultation process and the language of the ESA which does not provide regulatory requirements for enhancement or improvement, instead requiring that jeopardy of the continued existence of the species be avoided, and adverse modification and destruction of habitat be avoided.[63]

The limitations of the ESA in recovering species are aptly illustrated by the fact that of nearly 1,500 species listed less than 50 have recovered. Of that number only 20 actually recovered, the remainder were either extinct (9) or listed in error.[64] Voluntary conservation avoids the perverse incentives created by criminalization of accidental 'take' of

the effort will obtain these authorizations; 5. Voluntary participants are identified and methods (e.g. incentives) used to obtain necessary level of voluntary participation are described; 6. Regulatory mechanisms (e.g., laws, regulations, ordinances) necessary to implement the conservation effort are in place; 7. A high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding; 8. An implementation schedule (including incremental completion dates) for the conservation effort is provided; 9. The conservation agreement or plan that includes the conservation effort is approved by all parties to the agreement or plan.

[61] The type and level of voluntary participation (e.g., number of landowners allowing entry to their land, or number of participants agreeing to change timber management practices and acreage involved) necessary to implement the conservation effort is identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain that level of voluntary participation (e.g., an explanation of how incentives to be provided will result in the necessary level of voluntary participation). Id.

[62] Jamison, B. E., J. A. Dechant, D. H. Johnson, L. D. Igl, C. M. Goldade, and B. R. Euliss. 2002. Effects of management practices on grassland birds: Lesser Prairie-Chicken. Northern Prairie Wildlife Research Center, Jamestown, ND. 29 pages.

[63] The prohibition does not apply in the case of the lesser prairie chicken as the FWS has determined that designation of lesser prairie chicken habitat is 'not prudent' as there are no data to support a designation.

[64] http://www.ncpa.org/pub/st303?pg=5

species and harnesses the much broader power of states and local agencies to protect habitat on private lands. In the case of the lesser prairie chicken, where only 4% of its habitat is on federal land, the voluntary protection of habitat on private land is essential.

The fact that the affected states and landowners have been funding and participating in conservation activities beginning in 1996 with the formation of the lesser prairie chicken working group[65] and continuing to the present with the State of Oklahoma entering into a conservation agreement with the FWS demonstrates the commitment to species conservation. In the intervening 15 years, money time and effort have been expended to conserve the lesser prairie chicken.[66] If these efforts, which rely on the expert agency's recommendations, cannot be expected to succeed, then it brings into question the expertise the FWS brings to the discussion.

[65] http://www.wafwa.org/html/prairie_chicken.shtml

[66] See Appendix 7

Chart of Voluntary Conservation Actions[67]

VOLUNTARY CONSERVATION ACTIONS[68]
• Each State has prepared and/or participated in at least one conservation plan • Each State has prepared and/or participated preparation of at least one management plan • Each State has prepared and/or participated in development of at least one recovery plan • The five states participate in an Interstate Working Group to collaborate on conservation activities • Interstate Range Wide conservation plan • The states either individually and through the interagency group have funded or carried out research geared toward improving conservation techniques • All the affected states have a habitat restoration program • Several States have prepared guidelines and best management practices for natural resource development and some for the protection of the LPC specifically. • Each State has dedicated funding and multiple financial incentive programs to encourage habitat restoration on private lands, this can be used for lesser prairie chickens and other species as necessary.

Wind Industry Conservation Actions[69]

The FWS indicates wind power development is a primary concern with respect to the lesser prairie chicken. Their concern is based on the assumption that avoidance of vertical structures results in some as-yet unidentified threat to the species.[70] Because of the explicit statements in the proposed rule regarding concerns related to expansion of wind power and the lack of regulation related to that expansion, we examined regulation and voluntary conservation actions related to wind power explicitly.

[67] See Appendix 5 for a detailed list of voluntary conservation actions.
[68] Only those Federal Agencies have authority over major activities impacting lesser prairie chicken
[69] See Appendix 7
[70] The studies cited found lesser prairie chickens avoided vertical structures, but did not identify any adverse effects resulting from that avoidance.

We identified a significant commitment to conservation in general by the industry. In a letter to the Secretary of the Department of Interior, the American Wind Energy Association expresses that the " final version of the Guidelines on March 23rd, 2012 was the culmination of over 5 years of a painstaking, but collaborative, process between representatives of the wind energy industry" and regulatory agencies.[71] This dedication to the process should provide a high level of certainty with regarding to this FCE.

Below is a summary chart of activities.[72]

Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.
Wind Energy Mapping Tools	Playa Maps for Colorado, Kansas, Nebraska, New Mexico, Oklahoma and Texas by county.
Southern Plains Wind and Wildlife Planner	Southern Plains Wind and Wildlife Planner for a set of species and ecosystems in Colorado and New Mexico.
Southern Great Plains Crucial Habitat Assessment Tool for Lesser Prairie-Chicken	Led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[73]
North American Landbird Conservation Plan-co-authored by the FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [74]

[71] http://awea.org/newsroom/pressreleases/upload/AWEA-and-Member-Company-Letter-to-Salazar-re-Wind-Energy-Guidelines-May-15-2012.pdf
[72] See Appendix 7
[73] http://kars.ku.edu/geodata/maps/sgpchat/
[74] http://www.partnersinflight.org/cont_plan/#Access

FWS Wind Energy Guidelines	FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [75] FWS in its guidance document states that it is issuing the guidelines pursuant to its authority under the ESA. FWS claims authority given its mandate to identify and protect endangered and threatened species and to "provide means to conserve" their ecosystems. FWS cites the ESA as the authority that directs federal agencies to "utilize their authorities to conserve listed species" and states that FWS and other federal agencies are encouraged to "do the same with respect to 'candidate' species". [76] Industry Adoption of Wind Energy Guidelines which address comprehensive wildlife and habitat considerations and best management practices. :
FWS	Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.
BLM	Interim Wind Energy Development Policy The Interim Wind Energy Development Policy (IM 2003-020), was issued October 16, 2002. This document ensures application of the BLM Wind Energy Development policies and best management practices (BMPs) in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on BLM managed public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan must comply with the IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[77]

[75] http://www.fws.gov/windenergy/docs/WEG_final.pdf
[76] Id.
[77] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf

BLM	Wind Energy Development Policy This IM further clarifies the BLM Wind Energy Development policies and best management practices (BMPs) provided in the Wind Energy Development Programmatic Environmental Impact Statement (EIS) of June 2005. Issuance of this IM ensures BLM-wide consistency in the processing of right-of-way applications and the management of authorizations for wind energy site testing and development on the public lands. The initiation of any new planning effort to create, revise, or amend a BLM land use plan will comply with policy provided in this IM. Land use planning efforts already underway will be assessed on a case-by-case basis to determine any necessary modifications or amendments.[78]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are developing best management practices (BMPs) that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy from renewable sources by 2020 in a wildlife friendly manner.[79]
Recommendations To Minimize Adverse Impacts Of Wind Energy Development On Wildlife 2012	There is no statewide permitting authority in New Mexico with regard to wind development. However, the state has developed guidelines for use by wind project developers, their consultants, local government and the general public. New Mexico Department of Game and Fish offers guidance for projects and guidelines in their Habitat Handbook.[80]
Multi-State	On April 22, 2009 Interior Secretary Salazar announced $57.8

[78] http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf
[79] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml
[80] http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP. The planning proposal lands a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[81]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[82]

[81] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html
[82] http://kec.kansas.gov/reports/wind_siting_handbook.pdf

FERC Transmission Line Regulation	The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.[83]	
County Protections		
Union, New Mexico[84]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [85]
San Miguel, New Mexico	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [86]
Bent, Colorado	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.

[83] http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission.pdf
[84] http://nm-unioncounty.civiccities.com/directory.aspx
[85] http://www.unionnm.us/DocumentCenter/Home/View/9
[86] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf

CONCLUSION

The FWS has:

- limited or incomplete data on historic habitat loss,
- limited or incomplete data on the habitat requirements of the lesser prairie chicken and
- limited or incomplete data on the available habitat for the lesser prairie chicken.

The best available data find increasing populations across the range of the greater prairie chicken and low extinction probabilities. Genetic analysis demonstrates no loss in genetic diversity and no evidence of genetic isolation.

A review of the state and local efforts to conserve the lesser prairie chicken demonstrates robust statutory authority for protection of habitat on public and private land as well as legislative commitment to conservation of wildlife species and their habitat at the state level. These authorities exist whether the species is listed or even remains a candidate.

Voluntary conservation efforts are numerous and widespread, and range from individual land owners to developers of wind energy farms. These efforts are often developed in conjunction with the FWS and/or are consistent with the direction given in the publications sponsored or funded by the FWS which identify effective conservation measures. The effectiveness of these measures is provided support by the fact that increasing population numbers coincide with the advent of heightened awareness of the population declines of the lesser prairie chicken due to its identification as a 'candidate species' under the ESA.

There are no data that support the FWS assertion that habitat fragmentation and decline with related effects are threatening the lesser prairie chicken. There are data that demonstrate population growth, low extinction probabilities, and genetic robustness.

The FWS has failed to meet the requirements of the Act that listing be based solely on data showing that the species is adversely affected by one or more of the five factors enumerated inthe Act.

APPENDIX 1

The 84% reduction in the area historically occupied by lesser prairie chickens cited by the FWS is little more than a guess with an unknown error surrounding it. The FWS admits that "Very little information is available regarding the size of lesser prairie chicken populations prior to 1900." Robb and Schroeder (2005) stated: "Few records exist to verify the historical distribution of lesser prairie-chickens prior to European settlement because the geographic region that is generally regarded as historical range (southeastern Colorado, southwestern Kansas, western Oklahoma, northern Texas, and eastern New Mexico) was largely unexplored during the 1800s (Aldrich and Duvall 1955, Sharpe 1968). The first expeditions to explore Colorado tended to bypass the southeastern part of the state (Rockwell 1908), and it was not until 1914 that lesser prairie-chickens were recorded officially from Baca County (Lincoln 1918)."

As an example of the potential misuse of the uncertainty of the historical data, USFW wrote that "Litton (1978, p. 1) suggested that as many as two million birds may have occurred in Texas alone prior to 1900." Litton's paper was a non-peer reviewed article, and what Litton actually wrote was: "Records indicate there may have been as many as two million lesser prairie chickens in Texas prior to 1900, before exploitation by early-day sportsmen and market hunters". However, there is no reference by Litton as to what these "records" consisted of, and therefore it is not useful to repeat this number, as it is not verifiable and fails to meet the data standard of the ESA.

Even more potentially confounding is the apparent change in behavior of lesser prairie chickens. Jackson and DeArment (1963) stated that much of the range in southern Texas where maps show the bird as historically present were likely temporary wintering grounds; today the lesser prairie chicken is thought to be non-migratory. What percentage of this putative historic range includes temporary wintering or resting grounds? This lack of data makes it impossible to realistically reconstruct lesser prairie chicken behavior or range of over 100 years ago and extrapolate it to existing conditions.

APPENDIX 2

An Assessment of Population Dynamics and Persistence of Lesser Prairie-Chickens

A Recommendation and analysis to The Lesser Prairie-Chicken Interstate Working Group

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Issue: Each state monitors spring populations of lesser prairie-chickens with similar (but not exact) methods to detect and count birds on leks. Additionally, sampling effort has varied overtime with generally more extensive efforts in recent years. Thus far, comparison between or among states has not been possible because of these facts.

Need: A unifying analytic method for assessing trend of lesser prairie chicken populations among states and geographic regions is needed to evaluate past and future population performance as a result of conservation actions or changes in land use.

A proposed method: There have been 3 range-wide assessments of greater sage-grouse population dynamics and persistence (Connelly et al. 2004, WAFWA 2008, Garton et al. 2010), and similar issues of data consistency and variation in sampling effort were common to all three studies. Garton et al. (2010) is the only peer reviewed published article from the three, and was largely based on the analytic methods in Connelly et al (2004). Using population reconstruction from annual counts at leks, density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) models of population growth can be fit and population parameters of growth ($\square_t$), population equilibrium, and quasi-extinction probabilities can be estimated.

In this example, data were pooled by 4 geographic regions, sand sagebrush (CO, KS), CRP-shortgrass prairie (KS), mixed grass prairie (SE KS, OK, TX-Panhandle), and shinnery oak (NM, TX west) in which to estimate annual rates of change ($\square_t$), average growth rate (trend from 1997-2011), variation of ($\square_t$), quasi-extinction probability (population drops to 25% of equilibrium), and population equilibrium. Data across all regions was pooled to assess trend and estimate population parameters for the entire lesser prairie chicken range. Finally, concern has been generated regarding declines in populations in 2012. To address this concern, a worked example assuming a 50% decline (2012 trends have not been finalized yet) in trend rangewide occurred is provided to demonstrate what affect it may have on the entire range.

Lesser prairie chicken lek counts reported by individual states were summarized within ecologic regions and used to reconstruct an index to the historical abundance of the population within each zone. We treated the number of lesser prairie chicken counted

at leks in the final year as an index to the minimum number of lesser prairie chicken attending leks. Lek counts in each year were a cluster sample of lesser prairie chicken and thus treated by standard finite population sampling procedures (Scheafer et al. 1996: 297).

Sampling effort devoted to counting leks has varied enormously from year to year and grown appreciably in the last 5 years. To standardize estimates and remove bias due to variable sample sizes we treated the number of lesser prairie chickens counted in the initial count (or another base year if final year counts were inadequate) as the standard for projecting later counts by applying a ratio estimator (Scheafer et al. 1996: 200) to estimate the finite rate of change (λ_t) for the population between successive years as follows. Beginning with the initial year of a route (1997 or more recent), lesser prairie chicken counted along each route censused in both 1997 and 1998 were treated as cluster samples of individual lesser prairie chickens in successive years. The ratio of lesser prairie chickens counted in a pair of successive years estimates the finite rate of change at each route in that one year interval (λ_t). These ratios were combined across routes within a region for each year to estimate the finite rate of change for the entire population within a zone to estimate the finite rate of change for that management zone between successive years (e.g. 1997 to 1998):

$$\lambda(t) = \frac{\sum_{i=1}^{n} M_i(t+1)}{\sum_{i=1}^{n} M_i(t)}$$, where $M_i(t)$ = number of LPEC counted along route *i* in year *t*,

across *n* routes counted in both years *t* and *t+1*,

Because methodologies were not exact, an average λ_t was calculated among routes and states for each region. Unlike previous methods, that reconstructed populations from the penultimate year backwards, in this method the index to population size was projected forward from 1997 to assess trend since LESSER PRAIRIE CHICKEN were classified as a candidate as a threatened or endangered species. This approach does not affect the rates of change or persistence estimates, but provides a baseline more meaningful to the conservation question at hand. Because population sizes were not well described in 1997, and the method is based on proportional changes of ratios, all trends were assessed as a percentage of the 1997 index which was set to 100% (See Connelly et al. 2004). The index to population size for subsequent years was then calculated by taking the number of LESSER PRAIRIE CHICKENs counted in the initial year (1997) as a baseline estimate of population size within a region and projecting the next year's minimum LESSER PRAIRIE CHICKEN abundance by multiplying the 1997 abundance by the ratio estimator of the finite rate of change from 1997 to 1998 (e.g. finite rate of change of 0.81 between 1998 and 1999 suggested that the 19% fewer

LESSER PRAIRIE CHICKEN were counted at leks in 2000 than in 1999). This process was repeated for the change from 2000 to 2001 (finite rate of change of 1.015) yielding a breeding population index for a given zone in 2001 and so on up to 2011. Repeating this process for each management zone yielded a population index for each zone stretching from 1997 to 2011 for populations in all regions. These population indices provided the basis for all further analyses and modeling.

Fitting population growth models

Using the time series of population indices for each region, 2 stochastic population growth models were fit including: (1) exponential growth with process error (EGPE, Dennis et al. 1991), (2) exponential growth state space (EGSS, Staples et al. 2004) which incorporates both process and sampling error, and most importantly allows for the parsing of these error rates for more precise estimates of population persistence.

Results:

CRP-shortgrass.—There were 3 routes established to monitor trends of LESSER PRAIRIE CHICKEN in the CRP grasslands north of the Arkansas River in Kansas beginning in 2000. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 4.4% annually (Figure 1A; Table 1). The equilibrium of a density dependent population was approximately 99% of the baseline in 2000, and the probability of extinction (declining to 25% of equilibrium) was 2%.

Mixed-grass prairie.– There were 6 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS, OK, and TX, 2 of which began in 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 7.0% annually (Figure 1B; Table 1). The equilibrium of a density dependent population was approximately 229% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was <0.0001%.

Sand sagebrush prairie.– There were 7 routes to monitor LESSER PRAIRIE CHICKEN in the mixed-grass prairies of KS and CO both of which began prior to 1980 in KS. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 2.0% annually (Figure 1C; Table 1). The equilibrium of a density dependent population was approximately 183% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 48%.

Sand shinnery oak.– There were 29 routes to monitor LESSER PRAIRIE CHICKEN in shinnery oak habitat of NM and TX. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 5.1% annually (Figure 1D; Table 1). The equilibrium of a density dependent population was approximately 196% of the baseline

in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide.– There were 45 routes to monitor LESSER PRAIRIE CHICKEN across the range. The 10-yr average annual finite rate of population change (λ_t) indicated population growth of 10.6% annually (Figure 1E; Table 1). The equilibrium of a density dependent population was approximately 276% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was < 0.0001%.

Range-wide 2012.–Assuming a 50% decline in trend across the range, the 10-yr average annual finite rate of population change (λ_t) indicated population growth of 6.4% annually (Figure 1F; Table 1). The equilibrium of a density dependent population was approximately 262% of the baseline in 1997, and the probability of extinction (declining to 25% of equilibrium) was 3.3%.

Summary.– Regionally populations continue to show significant signs of population growth, however, because of low rates of growth and large variation in estimates of lambda, sand sagebrush habitat (14% of species distribution) was one region that indicated the greatest likelihood of reaching 25% or less of the equilibrium population size. Thus, 86% of the species' distribution exhibits population growth (>2% annually) with low probability of extinction. Range-wide analysis indicates the species as whole has grown at a rate of 10.6% since 1997 with low probability of extinction. Lastly, if the range-wide population trends did decrease by as much as 50% in 2012, populations are projected to be 73% greater than in 1997, and likelihood of population persistence remains high (>96%).

A peripheral examination of population trends prior to the 1997 candidate status recommendation, indicates that on average populations from 1980-1997 were declining at an average annual rate of 3.7%, post candidate status population growth was 6.9% increase annually.

Further refinements: There are 3 recommendations to make this modeling approach more rigorous with the existing data: 1) to analyze the data on a lek by lek analysis rather than at the route or county scale, 2) where longer term data exist develop models for longer time periods that specifically identify significant transitions in trend (upwards or downwards), to better understand temporal factors that may be affecting different historic periods and changes in land use, and 3) once population estimates are available from aerial surveys in 2012 then trend analyses and PVA can be conducted relative to population size and trends

beginning in 2012 and projecting backwards. This approach would be almost identical to that of greater sage-grouse PVA conducted by Garton et al. (2010).

Literature cited.

Connelly, J. W., S. T. Knick, M. A. Schroeder, and S. J. Stiver. 2004. Conservation assessment of greater sage-grouse and their habitats. Western Association of Fish and Wildlife Agencies. Cheyenne, Wyoming.

Garton, E. O., J. W. Connelly, C. A. Hagen, J. S. Horne, A. Moser, and M. A. Schroeder. 2010. Greater Sage-Grouse population dynamics and probability of persistence. Studies in Avian Biology 38: 293-382.

Western Association of Fish and Wildlife Agencies. 2008. Greater sage-grouse population trends an analysis of lek databases. Unpublished report, Cheyenne, Wyoming.

Figures

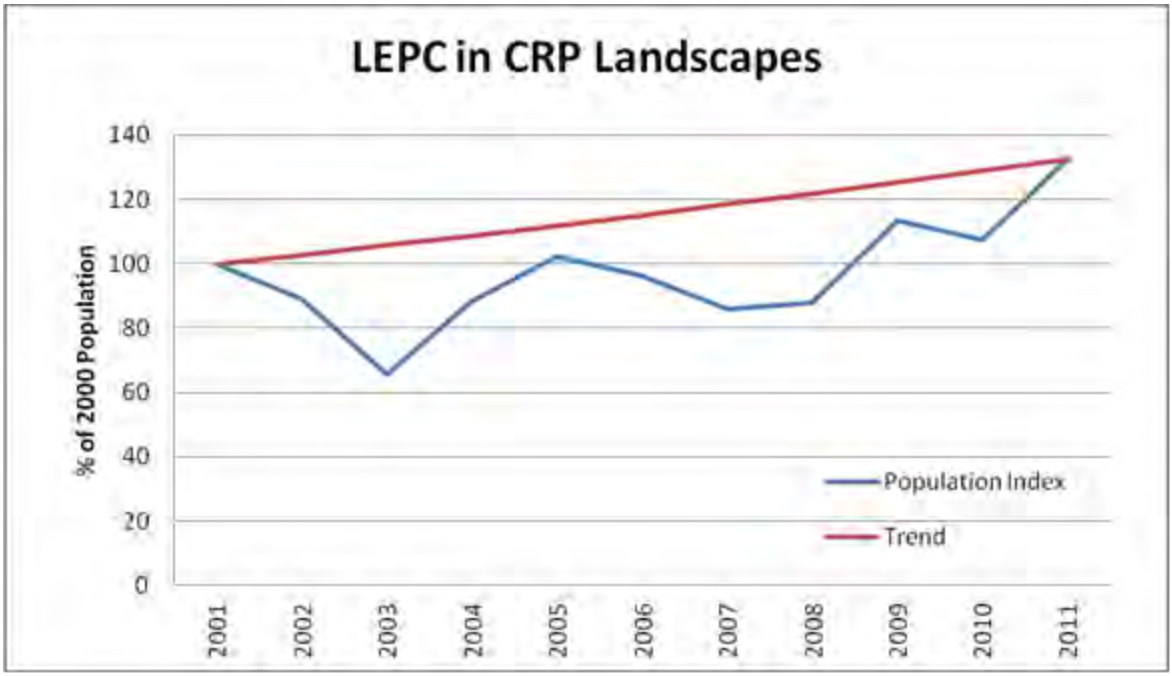


Figure 1A. Lesser prairie-population index for CRP Landscapes from 2001-2011, quantified as a percentage of the 2001 baseline population.

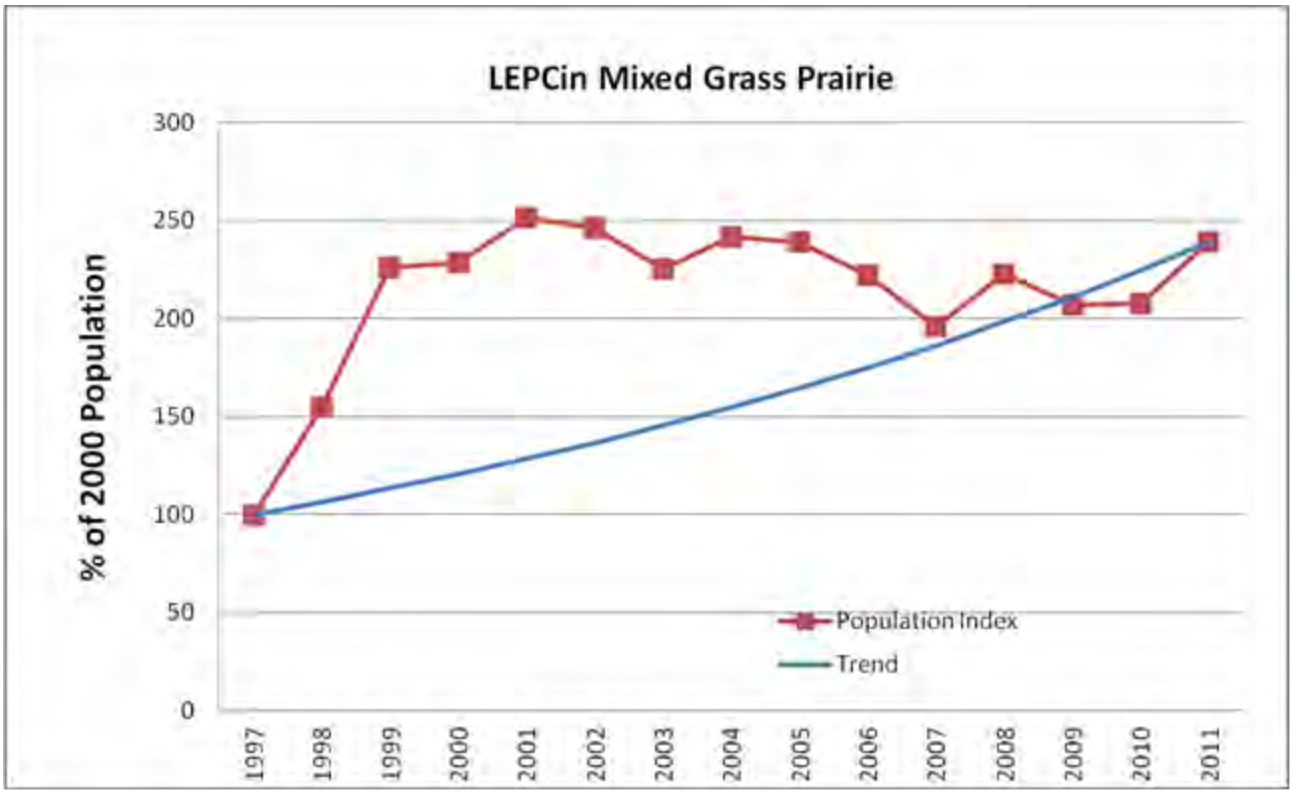


Figure 1B. Lesser prairie-chicken population index for mixed grass-prairie landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

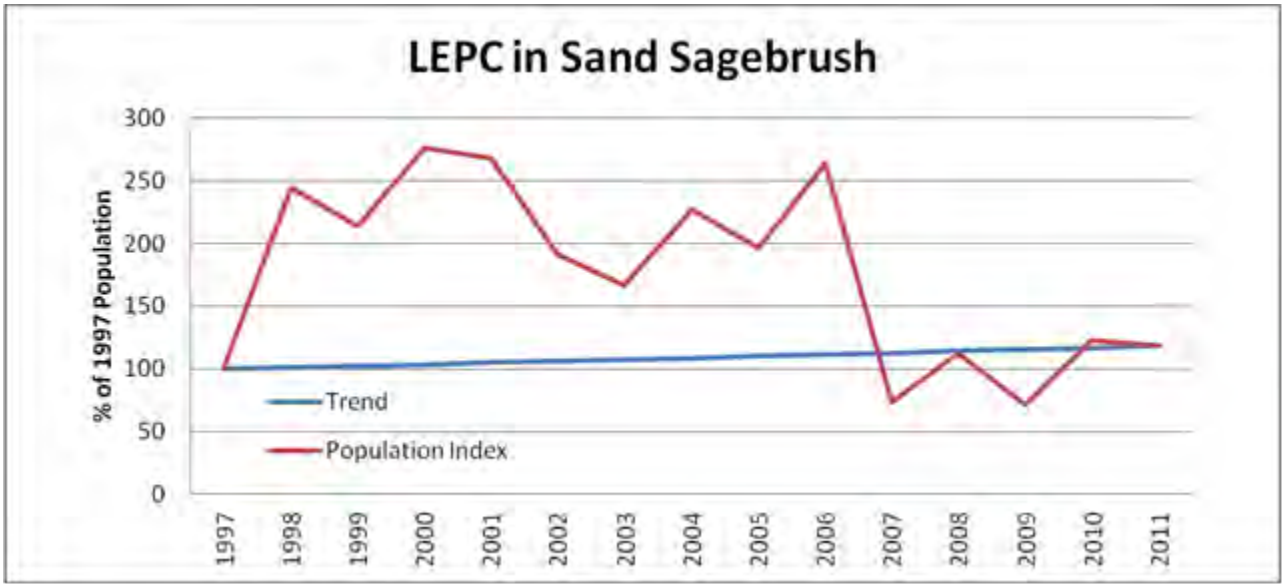


Figure 1C. Lesser prairie-chicken population index for sand sagebrush landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

Figure 1D. Lesser prairie-chicken population index for sand shinnery oak landscapes from 1997-2011, quantified as a percentage of the 1997 baseline population.

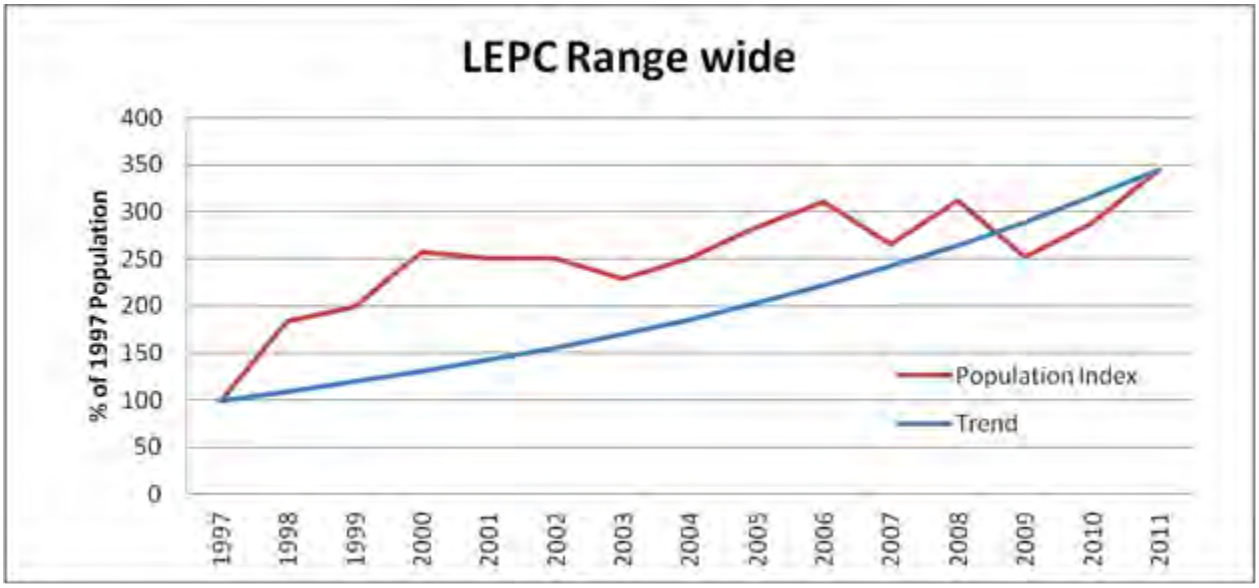


Figure 1E. Lesser prairie-chicken Range-wide population index from 1997-2011, quantified as a percentage of the 1997 baseline population.

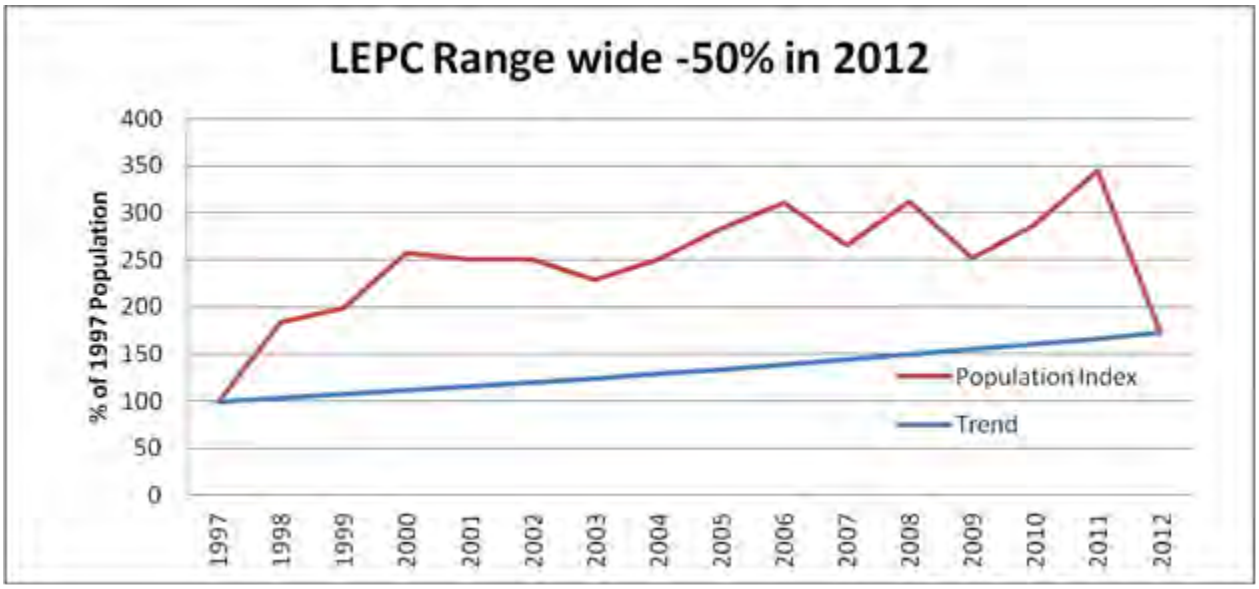


Figure 1F. Hypothetical lesser prairie-chicken Range-wide population index from 1997-2012 assuming a 50% decline from 2011-2012, quantified as a percentage of the 1997 baseline population.

Table 1. Parameter estimates from density dependent (Dennis et al. 1991) and independent (Staples et al. 2004) population models for Lesser Prairie-Chickens in 4 regional areas 1997-2011. Range-wide estimates are provided for the same time period, and a hypothetical example demonstrating what a 50% decline in 2012 might forecast for the species. Where, r = instantaneous rate of growth adjusted for sampling variation, se(r) standard error of r, r' = unadjusted instantaneous rate of growth, lambda = finite rate of population growth (exp(r)), nq = population equilibrium under density dependent model, ne(nu) = quasi-extinction threshold (25% of of nq), pi = probability of population reaching ne(nu), theta = time in which ne(nu) would be reached if threshold was reached, and %EOR = percentage of the Estimated Occupied Range these trend results represent.

Region	r	se(r)	r'	lambda	nq	ne(nu)	pi	theta	%EOR
Mixed	0.074	0.005	0.101	1.077	229	57	0.000	18.8	44%
Sage	0.020	0.077	0.022	1.020	183	46	0.482	68.5	14%
Oak	0.051	0.022	0.062	1.052	196	49	0.002	27.2	19%
CRP	0.044	0.032	0.059	1.045	99	25	0.021	31.2	24%
Range	0.106	0.038	0.114	1.112	276	69	0.000	13.0	100%
2012**	0.064	0.052	0.068	1.066	262	66	0.033	21.8	100%

APPENDIX 3

An evaluation of the historic range changes that have occurred in the Lesser Prairie Chicken since the Last Glacial Maximum.

Species have niches in ecological time and space that can be defined in various ways. Currently, a commonly accepted scientific approach is to use a technique called Ecological Niche Modeling (ENM) or to others, Species Distribution Models (SDM). Today, these techniques are considered part of biodiversity informatics.j

The approach involves taking a set of georeferenced locality points for a species, and then using a computer algorithm to build a model that predicts these points using current information on climate, such as temperature, rainfall, or degree of seasonality. The model then generates a predicted distribution of the species that can be tested by seeing how well known locality points (that were not part of the original model) are predicted.

One can then predict where the niche space for the species occurred at different points in time. Currently, readily available climate data exist for the Last Glacial Maximum (LGM; 21,000 years before present [ybp]) and the Last Interglacial (120,000 ybp). This gives a view of the species' range during the maximum southward extent of the last major north temperate glacier, and shows how and where the species was displaced to (if displaced at all).

We obtained a georeferenced list of 110 occurrences for the lesser prairie chicken (Table 1) from an online source of museum and observation records (Ornis-2). These span many years and give an indication of where the species occurred historically (since museum specimens started being preserved). We used the program Maxent to model distributions. After a preliminary analysis involving 10 independent runs, we selected climate layers that provided over 5% to the model (

The predicted current distribution of the lesser prairie chicken (Fig. 1) agrees well with known and recent historical distribution, with the exclusion of what is considered the southern part of the range in Texas. This might be because, as discussed elsewhere, it was mainly a non-breeding area. Locality points omitted from the model were predicted with 93% accuracy suggesting that the model performs very well.

The contribution of the climate variables to the model were: Mean Temperature of Driest Quarter (43%), Precipitation of Warmest Quarter (16.5%), Precipitation Seasonality (Coefficient of Variation) (15.9%), Mean Temperature of Warmest Quarter (13.4%), Temperature Seasonality (8.7%), and Isothermality (BIO2/BIO7) (2.5%). It appears that

lesser prairie chickens are considerably influenced by the temperature at the driest part of the year.

We used the model to predict the distribution of the lesser prairie chicken at the LGM, assuming that the niche has not evolved and that the same environmental parameters were present at both time periods. As might be expected during a time of southerly range displacements owing to glacial advances, the range of the species was shifted south and west (Fig. 1, blue). It also can be seen that the predicted range was considerably more fragmented and reduced in areal extent. This suggests that lesser prairie chickens have survived extended periods of range fragmentation.

Table 1. Longitude (first number) and latitude (second number) for 110 localities for lesser prairie chickens obtained from Ornis2 (http://ornis2.ornisnet.org/).

-104.3247985,38.4328835; -98.32064,38.49836; -100.35,37.283; -100.2670064,37.0826239; -101.3473741,38.4817103; -100.3709181,37.2370813; -96.5981521,38.3051704; -100.7333333,37.85; -100.986,37.88333333; -100.0233333,37.855; -101.05,37.81666667; -100.05,37.85; -100.75,37.85; -100.0166667,37.85; -100.7666667,37.86666667; -100.8166667,37.86666667; -100.7666667,37.88333333; -101.0833333,37.88333333; -101.9833333,37.9; -101.9666667,37.9; -100.0666667,37.83333333; -100.0666667,37.86666667; -100.7333333,37.83333333; -99.5334,38.1087; -100.2358583,37.1402; -100.570589,37.1033548; -100.4666672,37.25; -100.0237999,37.7580571; -100.4662,37.09608; -100.8722222,37.97166667; -100.9888889,37.79444444; -101.1336803,37.8512936; -101.04,37.84; -101.05,37.844; -100.8654953,37.974823; -100.1661233,37.10322; -102.58177,42.06867; -100.407486,40.0407579; -103.18355,33.62926; -103.3396721,33.6428738; -103.0999985,35.34999847; -104.2283,32.4206; -104.2667,32.45; -103.183052,33.629166; -103.2804947,33.543606; -103.1650051,33.6407777; -103.59829,35.719908; -104.2283325,32.42055511; -103.2659912,33.5871673; -103.1835594,33.6292667; -104.2448044,32.4501; -104.2456627,32.4522729; -106.8189278,36.2283497; -103.1877136,33.6512083; -103.3049766,33.6428738; -103.4949646,34.0890633; -104.4119186,33.602314; -103.3401489,33.644349; -103.2234191,33.6420625; -103.1925201,33.5293753; -103.760376,35.1201894; -104.6245622,32.4628466; -103.3917154,33.6437204; -103.14,33.6565; -103.1536667,33.70766667; -103.1095833,33.69303333; -103.144,33.71993333; -103.1740667,33.6883; -106.0253796,34.1656598; -103.1451667,33.64996667; -103.1391667,33.695685; -103.1406,33.70101667; -103.1105667,33.68353333; -103.1404333,33.64923333; -103.172,33.69523333; -103.1381,33.65913333; -103.1395,33.65883333; -103.1497833,33.70505; -103.1715167,33.69496667; -103.312382,33.6428738; -103.1148167,33.68505; -103.1274667,33.68211667; -103.05038,33.75831; -103.12661,33.85024; -103.12695,33.85074; -103.27935,33.62703333; -103.1144444,33.68583333; -103.1451667,33.66856667; -103.6326599,34.3133827; -99.77119,36.02616; -99.77119,35.9899; -99.67005,36.0529; -99.765129,35.8848778; -99.77119,36.03342; 9628.12,3649.21; -96.6503334,36.9375441; -99.65741,36.04264; -99.6818,36.00441; -99.64477,36.03238; -99.66392,36.00441; -99.64604,35.85937; -99.77119,35.93189; -99.7792053,36.2254423; -99.2710876,36.433437; -98.7157861,35.3080899; -98.4933319,29.4238892; -100.2709541,35.4453278; -101.6632921,30.6870249; -100.193,36.071; -96.262207,43.084937;

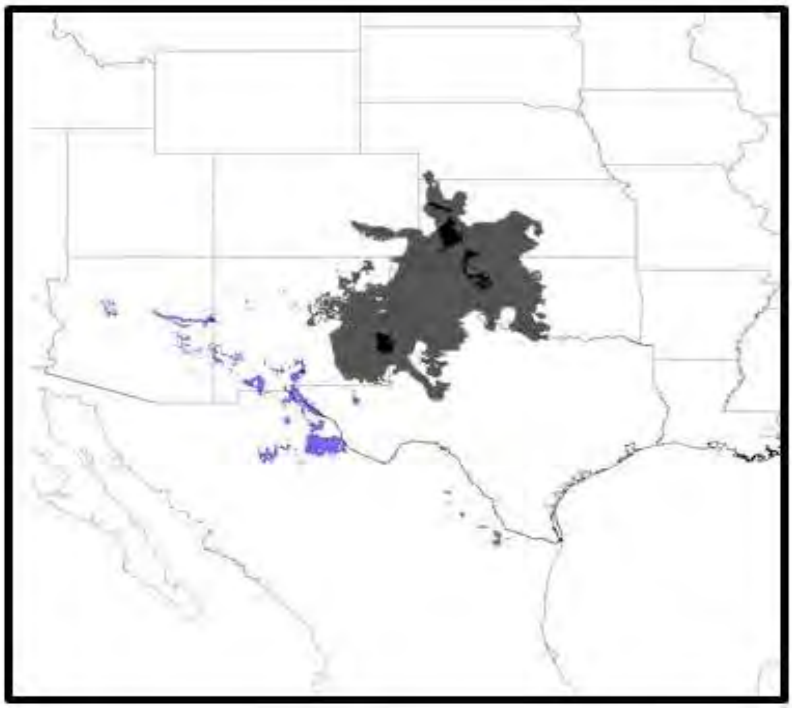


Figure 1. Predicted distribution of lesser prairie chicken at present (black, gray) and at Last Glacial Maximum (blue). For present distribution, black indicates area of highest predicted occurrence.

APPENDIX 4-- FEDERAL PROTECTIONS

Agency	Law/Mgt. Directive/Agreement	ESA Provisions
ALL	**National Environmental Policy Act of 1969 (NEPA) [(42 U.S.C. 4332(2)(C)** The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. By regulation, a Biological Assessment is prepared for "major construction activities". Under NEPA, those considered to be Federal actions significantly affecting the quality of the human environment as referred to meet NEPA requirements federal agencies prepare a detailed statement known as an Environmental Impact Statement (EIS). EPA reviews and comments on EISs prepared by other federal agencies, maintains a national filing system for all EISs, and assures that its own actions comply with NEPA.	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Take protection also provides limited habitat protection if the habitat alteration results in death of an individual. • In the case of the lesser prairie chicken, there no habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Protection of critical habitat is limited to habitat affected by a federal agency action,
	Federal Land Policy and Management Act of 1976", Sec. 101. [43 U.S.C. 1701 (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest; **…** (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat which are also affected by federal agency actions (moot, as

	atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;…(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;…[87]	the FWS is not designating for the lesser prairie chicken) • In Reviewing the activities of federal agencies, ESA limitations on take are only that it may not result in jeopardizing the continued existence of listed species, • IN the case of lesser prairie chicken, take is prohibited under state anti-poaching laws. • The ESA does not require comprehensive management plans.
ALL	**Executive Order 13112, February 3, 1999, "Invasive Species"** **Section 2. Federal Agency Duties** (a) Each Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law, (1) identify such actions;(2) subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv)	Executive Order 13112 requires that all federal agencies prevent degradation of all habitat (not only lesser prairie chicken habitat) by ensuring that invasive species are prevented and/or controlled. This EO requires restoration of habitat. • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for

[87] http://www.blm.gov/flpma/FLPMA.pdf

	provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and (3) not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has pre-scribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions. (b) Federal agencies shall pursue the duties set forth in this section in consultation with the Invasive Species Council, consistent with the Invasive Species Management Plan and in cooperation with stakeholders, as appropriate, and, as approved by the Department of State, when Federal agencies are working with international organizations and foreign nations.	the lesser prairie chicken) • In reviewing the activities of federal agencies, the limitations on take are only that it may not result in jeopardizing the continued existence of listed species,
BLM and FS	**Memorandum Of Agreement Endangered Species Act Section 7 Programmatic Consultations And Coordination Among Bureau Of Land Management, Forest Service, National Marine Fisheries Service And Fish And**	No additional protection under the ESA. The MOU provides for "voluntary" consultation on candidate species, such as a lesser prairie chicken. The primary functions of the ESA

	Wildlife Service[88] This MOA establishes interagency commitment to and guidance for the following: (1) Early interagency communication, coordination, consultation, and conferencing on candidate, proposed, and listed species to take place prior to and during plan/program proposal development… The scope of this MOA includes Land and Resource Management Plans prepared by the FS pursuant to the National Forest Management Act of 1976 [16 U.S.C. 1601-1614] and Resource Management Plans and Management Framework Plans prepared by the BLM pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701-1784]. The MOA may also be applied to other programmatic level proposals. These may include, but are not limited to, a recreation or grazing program, riparian restoration strategy, multi-year forest management activities, recovery strategy or other proposals. The Service provides this information related to "programattic biological opinions": Developing a programmatic biological opinion. Once the biological assessment is completed, a determination on the need for formal consultation will be made by the Service. Formal consultation is required when a Federal action is likely to adversely affect listed species. When it is determined that an action may affect, but is not likely to adversely affect listed	are to prohibit "take" of the listed species (which is addressed by each States wildlife code) and the "consultation" on federal lands. BLM Management Manual already prescribes such protections for 'special status species' of which the lesser Prairie Chicken is one. Further, under the MOA, consultation has already occurred for the federal lands under BLM management. The ESA provides only for protection for listed species by : • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • Does not require management plans • The ESA limits protection to listed species, their designated critical habitat where a federal

88 http://webcache.googleusercontent.com/search?q=cache:qn14gSVucroJ:www.fs.fed.us/biology/resources/pubs/tes/MOA-final_000830.rtf+&cd=1&hl=en&ct=clnk&gl=us

	species, the consultation between the action agency and the Service may be handled informally (see 50 CFR §402.11 for further information on the informal or early consultation process). If formal consultation is necessary, a programmatic biological opinion will be developed by the Service in consultation with the Agencies. Attachment 3 gives a template for a programmatic biological opinion. This programmatic biological opinion will: (1) describe all of the potential projects; (2) contain suggested avoidance/minimization measures, placed in the project description, if appropriate; (3) describe the status and environmental baseline of listed, proposed, and candidate species in the project area; (4) reiterate potential effects of the project actions as evaluated in the biological assessment; and, (5) possibly describe limits to the amount of project impacts, take, and habitat affected and/or lost. A jeopardy analysis will be done to determine whether the programmatic process should proceed (see jeopardy discussion below).[89]	action is affecting them. • In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being designated. Given the limitations of the ESA and the voluntary actions and agreements by the agencies primarily involved in the activities the rule finds are "threatening" the lesser prairie chicken, the ESA provides no additional protections to the species.
BLM	**Special Status Species Management-Handbook 6840[90]** The stated purpose of BLM Handbook 6840 ("Special Status Species Management Handbook" is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special	The ESA requires that the FWS be consulted on actions affecting listed species on federal lands. • The ESA limits protection to listed species, their

[89] http://www.fws.gov/endangered/esa-library/pdf/pages7-18.pdf

[90] http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	status species are: (1) species listed or proposed for listing under the Endangered Species Act (ESA), and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s). All Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.[91] In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA. Any obligation to conserve proposed critical habitat under this section is terminated at the time the proposal becomes final or the habitat is no longer proposed for listing. All federally designated candidate species, proposed species, and delisted species in the 5 years following their delisting shall be conserved as Bureau sensitive species. A. Designation of Bureau Sensitive Species. State Directors shall designate species within their respective States as	designated critical habitat where a federal action is affecting them. • Does not require management plans, . The BLM's Special Status Species Management Handbook outlines a policy that is much more inclusive and relates directly to species that are considered "sensitive" at a state level. Each of the states referenced in the proposed rule currently consider the lesser prairie chicken to be sensitive, thus, the current policy provides more protection than the ESA.

91 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2009.Par.13736.File.dat/IM2009-039_att1.pdf

	Bureau sensitive by using the following criteria. For species inhabiting multiple States, State Directors shall coordinate with one another in the designation of Bureau sensitive species so that species status is consistent across the species' range on BLM-administered lands, where appropriate.	
FERC	**Transmission Line Regulation** The transmission company is required to prepare environmental reports, which address water resources, fish, wildlife, vegetation, cultural resources, socioeconomics, geological resources, soils, land use, recreation, aesthetics, alternatives, reliability and safety, and design and engineering. The minimum filing requirements for these reports are described in section 380.16 of our regulations.	The proposed rule emphasizes the potential adverse effect of increased transmission as a result of transmission lines and implies that the proposed listing is the only protection available for lesser prairie chicken and their habitat. However, FERC requires consideration of wildlife and their habitat in considering siting and construction of these lines. In addition, because the permitting is undertaken by FERC, NEPA applies which would necessitate a full review of the effects on the lesser prairie chicken.
BLM, AFWA, WAFWA, FS	**Memorandum Of Understanding Among Association Of Fish And Wildlife Agencies (AFWA) And Western Association Of Fish And Wildlife Agencies (WAFWA) And U.S. Department Of Agriculture Forest Service (FS) And U.S. Department Of The Interior Bureau Of Land Management (BLM)** "The purpose of this Memorandum of Understanding (MOU) is to promote cooperative conservation of fish and	This MOU provides that these federal agencies will engage in cooperative activities for the benefit of wildlife, particularly priority wildlife impacted by energy development issues. We note this includes wind power. The ESA provides only for protection for listed species by reviewing the activities of federal agencies. The

	wildlife resources by facilitating communications and enhancing success in resolving issues related to energy development and its effect on fish, wildlife, and habitat."[92] The Parties' joint objectives are to: 1. Identify and define the key fish and wildlife habitat/energy development issues at the species, habitat, and wildlife community levels across state, administrative and district lines. 2. Develop communication systems to keep state fish and wildlife agencies, federal land management/permitting agencies, and the energy industry informed about and involved in programmatic issues related to maintenance and enhancement of fish, wildlife and habitat resources during energy development.	limitations on take are only that it may not result in jeopardizing the continued existence of the species • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • Protection of critical habitat is limited to habitat affected by a federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA regulatory provisions do not provide for enhancement of wildlife or its habitat.
DOT	**Department Of Transportation, Federal Highway Administration, 23 CFR Part 777, Mitigation of Impacts to Wetlands and Natural Habitat** The Federal Highway Administration (FHWA) provides stewardship over the construction, maintenance and preservation of the Nation's highways, bridges and tunnels. FHWA also conducts research and provides technical assistance to state and local agencies in	The ESA provides only for protection for listed species by: • Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, • In the case of the lesser prairie chicken, no

92 http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/ib_attachments/2009.Par.99939.File.dat/IB2009-072_att1.pdf

	an effort to improve safety, mobility, and livability, and to encourage innovation.[93] This regulation was developed to "provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal aid projects funded pursuant to provisions of title 23, U.S. Code." … In considering projects under this section, the following requirements must be met: (a) The reasonableness of the public expenditure and extent of Federal participation with title 23, U.S. Code, funds shall be directly related to: (1) The importance of the impacted wetlands and natural habitats; (2) The extent of highway impacts on the wetlands and natural habitats, as determined through an appropriate, interdisciplinary, impact assessment; and (3) Actions necessary to comply with the Clean Water Act, Section 404, the Endangered Species Act of 1973, and other relevant Federal statutes. (b) Evaluation of the importance of the impacted wetlands and natural habitats shall consider: (1) Wetland and natural habitat functional capacity; (2) Relative importance of these functions to the total wetland or natural habitat resource of the area; (3) Other factors such as uniqueness, esthetics, or cultural values; and (4) Input from the appropriate resource management agencies through interagency coordination. (c) A	habitat protections because no critical habitat is being designated. • Prohibiting "take" of the species. • Does not require management plans.

9393 https://www.fhwa.dot.gov/

	determination of the highway impact should focus on both the shortand long-term affects of the project on wetland or natural habitat functional capacity, consistent with 40 CFR part 1500, 40 CFR 1502.16, 33 CFR 320.4, and the FHWA's environmental compliance regulations, found at 23 CFR part 771.[94]	
BLM	**2008 Special Status Species Resource Management Plan Amendment (2008 RMPA)** Address land-use decisions affecting special status species, primarily the habitats of lesser prairie chickens and sand dune lizards. Established the Lesser Prairie-Chicken Area of Critical Environmental Concern (ACEC).[95] [96]	The Special Status Species Resource Management Plan Amendment by BLM identifies the requirement that BLM consult with the FWS on activities that may affect wildlife even if the species is not listed.
	2008 Designation of Area of Critical Environmental Concern[97] Area of Critical of Environmental Concern (ACEC) are special management areas designated by BLM to protect significant historic, cultural, or scenic values; fish and wildlife resources; natural process or systems; and/or natural hazards that:	• Any ESA habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken)

[94] http://www.gpo.gov/fdsys/pkg/FR-2000-12-29/pdf/00-33194.pdf#page=12
[95] http://www.blm.gov/nm/st/en/fo/Roswell_Field_Office/special_status_species.html
[96] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf
[97] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf

	• have more than locally significant qualities which give it special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource; • have qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change; • has been recognized as warranting protection in order to satisfy national priority concerns or to carry out the mandates of Federal Land Management and Practices Act (FLMPA); • has qualities which warrant highlighting in order to satisfy public or management concerns about safety and public welfare; and/or • poses a significant threat to human life and safety or to property.	
BLM	**Managing Structures for the Safety of Sage-grouse, Sharp-tailed grouse, and Lesser Prairie-chicken**[98] This Instruction Memorandum (IM) provides guidance to effectively address sage-grouse, sharp-tailed grouse, and lesser prairie-chicken collisions with fences and other structures on public land.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all lands managed by BLM.

98 http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-022.html

FWS	**FWS Wind Energy Guidelines** FWS has participated in numerous conservation efforts by providing guidance and recommendations. In 2012, FWS published guidelines for the wind energy industry. These "voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." [99] Best Management Practices, the FWS 2012 Wind Guidelines provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning.	The ESA can only apply conservation guidelines in consultations with federal agencies, on land designated as critical habitat. These guidelines apply to all affected lands.
BLM	**Reclamation and Best Management Practices Best Management Practices "BMP" for the Lesser Prairie Chicken** In "Appendix 5 Reclamation And Best Management Practices" to BLM's 2008 RMPA, BLM states that it will "incorporate appropriate Best Management Practices (BMPs" for the lesser prairie chicken " into proposed Applications for Permit to Drill (APDs) and associated rights-of-way (ROW) approvals after appropriate National Environmental Policy Act (NEPA) evaluation." [100]	

[99] http://www.fws.gov/windenergy/docs/WEG_final.pdf

[100] http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34869.File.dat/pdf_rmpa_final_document_11_07_app_5.pdf

APPENDIX 5-- STATE AND LOCAL PROTECTIONS

COLORADO

Applicable State Laws	Comparison to Applicable ESA provisions
WILDLIFE Colorado statutes provide intent to protect species and will require that "…, there shall be a continuous operation of planning, acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities."[101] There is no limitation on the wildlife or species this applies to.	The ESA provides for • No planning, acquisition or development of wildlife habitats • Protects only listed species and designated critical habitat. • Limits activities and protections to listed species and designated critical habitat.
LAND USE, CONSERVATION **Colorado has vested its local government with authority to regulate land use to consider wildlife habitat and species.** … Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;"[102]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
LOCAL GOVERNMENT, PLANNING AND	The ESA provides no authority to undertake such planning, aquisition,

[101] (Colorado Revised Statutes, Title 33, Article 1 http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[102] C.R.S. 29-20-104 (2012), Title 29. Government - Local, Land Use Control And Conservation, Article 20.Local Government Regulation of Land Use, Part 1. Local Government Land Use Control Enabling Act, 29-20-104. Powers of local governments. ... for local governments to regulate land use to protect wildlife habitat and wildlife species. Drostev. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003). http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

ZONING **Colorado law establishes a Commission with specific direction to consider protected species in municipality development.** (1) It is the duty of the commission to make and adopt a master plan for the physical development of the municipality. When a commission decides to adopt a master plan, the commission shall conduct public hearings, after notice of such public hearings …, prior to final adoption of a master plan …. Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall, after consideration of each of the following, where applicable or appropriate, show the commission's recommendations for the development of said municipality and outlying areas, including:… (II) The United States fish and wildlife service of the United States department of the interior and the parks and wildlife commission created in section 33-9-101, C.R.S., for locating areas inhabited by endangered or threatened species; [103]…	and management actions. Nor does the ESA require consultation on non-federal lands (absent a federal nexus).
WILDLIFE "(1) It is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors. It is further declared to be the policy of this state that there shall be provided a comprehensive program designed to offer the greatest possible variety of wildlife-related recreational opportunity to the people of this state and its visitors and that, to carry out such program and policy, there shall be a continuous operation of planning,	• The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a

[103] C.R.S. 30-28-106 (2012), Title 30. Government - County, County Planning And Building Codes, Article 28.County Planning And Building Codes, Part 1. County Planning, 30-28-106. Adoption of master plan

acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities. (2) All wildlife within this state not lawfully acquired and held by private ownership is declared to be the property of this state. Right, title, interest, acquisition, transfer, sale, importation, exportation, release, donation, or possession of wildlife is permitted only as provided in articles 1 to 6 of this title or in any rule of the parks and wildlife commission..[104]… Right to capture or kill exists only as permitted by statute."	federal agency action, • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. • Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE, ENDANGERED SPECIES **Colorado may protect species which do not qualify for federal ESA listing.** (1) On the basis of investigations of nongame wildlife provided for in section 33-2-104 and other available scientific and commercial data and after consultation with other state wildlife agencies, the Colorado water conservation board, the Colorado water and power development authority, water conservancy districts, and other water conservation districts of the state, and other water resource development agencies within the state, appropriate federal agencies, and other interested persons and organizations, the commission shall by regulation adopted pursuant to the procedures specified in sections 33-1-111 and 24-4-103, C.R.S., establish a list of those species and, where necessary, subspecies of wildlife indigenous to this state which are determined to be endangered or	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Colorado).

[104] C.R.S. 33-1-101 (2012), Title 33. Parks And Wildlife, Wildlife, Article 1.Wildlife - General Provisions, 33-1-101. Legislative declaration http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=&statecd=CO&codesec=33-1-101&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

threatened within this state, giving their common and scientific names by species and, where necessary, by subspecies…[105]	
WILDLIFE, ENDANGERED SPECIES, CONSERVATION (1) The division shall establish such programs including acquisition of land or aquatic habitat as are deemed necessary for management of nongame, endangered, or threatened wildlife. (2) In carrying out programs authorized by this section, the division may enter into agreements with federal agencies or political subdivisions of this state or with private persons for administration and management of any area established under this section or utilized for management of nongame, endangered, or threatened wildlife. (3) The commission may permit, under such terms and conditions as may be prescribed by regulation, the taking, possession, transportation, exportation, or shipment of species or subspecies of wildlife which appear on the state lists of endangered or threatened species for scientific, zoological, or educational purposes, for propagation in captivity of such wildlife, or for other special purposes.[106] ...	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
WILDLIFE, ENFORCEMENT **Colorado provides for criminal and civil**	The ESA provides protections only for species listed under its provisions.

[105] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-105. Endangered Or Threatened Species. http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-105&sessionyr=2013&Title=33&datatype=S&noheader=1&nojumpmsg=0

[106] C.R.S. 33-2-106 (2012), TITLE 33. PARKS AND WILDLIFE, WILDLIFE, ARTICLE 2. NONGAME AND ENDANGERED SPECIES CONSERVATION, 33-2-106. Management programs. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=23935&userid=PRODSG&cvfilename=&noheader=1&Interface=

penalties for all wildlife unlawfully 'taken', this provision would apply to lesser prairie chickens whether or not they are listed under the ESA Division action to recover possession and value of wildlife unlawfully taken : (1) The division may bring and maintain a civil action against any person, in the name of the people of the state, to recover possession or value or both possession and value of any wildlife taken in violation of articles 1 to 6 of this title. A writ of replevin may issue in such an action without bond. No previous demand for possession shall be necessary. If costs or damages are adjudged in favor of the defendant, the same shall be paid out of the wildlife cash fund. Neither the pendency of such civil action nor a criminal prosecution for the same taking shall be a bar to the other; nor shall anything in this section affect the right of seizure under other provisions of articles 1 to 6 of this title.[107]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES **Colorado can prohibit 'take' of any wildlife species they determine is in need of such protection;** **Colorado can manage any nongame wildlife they determine is in need of such management. Colorado also requires collection of biological and ecological data to prepare management actions.**	The ESA provides only for protection for listed species by : 1. Reviewing the activities of federal agencies. The limitations on take are only that it may not result in jeopardizing the continued existence of the species, 2. In the case of the lesser prairie chicken, no habitat protections because no critical habitat is being

[107] C.R.S. 33-6-110 (2012), Title 33. Parks And Wildlife, Wildlife, Article 6. Law Enforcement And Penalties - Wildlife, Part 1. General Provisions, 33-6-110. Division Action To Recover Possession And Value Of Wildlife Unlawfully Taken. http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24001&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(1) The division shall conduct investigations on nongame wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully. On the basis of such determinations, the commission shall issue regulations and develop management programs designed to ensure the continued ability of nongame wildlife to perpetuate themselves successfully. Such regulations shall set forth species or subspecies of nongame wildlife which the commission deems in need of management pursuant to this section, giving their common and scientific names by species and, where necessary, by subspecies. The commission shall conduct ongoing investigations of nongame wildlife and may from time to time amend such regulations by adding or deleting therefrom species or subspecies of nongame wildlife. (2) The commission shall by regulation establish limitations relating to the taking, possession, transportation, exportation, processing, sale or offering for sale, or shipment as may be deemed necessary to manage nongame wildlife. (3) Except as provided in regulations issued by the commission, it is unlawful for any person to take, possess, transport, export, process, sell or offer for sale, or ship nongame wildlife deemed by the commission to be in need of management pursuant to this section. Subject to the same exception, it is also unlawful for any common or contract carrier to knowingly	designated. 3. Prohibiting “take” of the species. 4. Does not require investigations of biological and ecological data to determine management measures necessary 5. Does not require management plans, . Absent a federal nexus, the ESA cannot regulate activities on non-federal lands.

transport or receive for shipment nongame wildlife deemed by the commission to be in need of management pursuant to this section.[108]	
WILDLIFE CONSERVATION, ENDANGERED SPECIES "1) "Management" means the collection and application of biological information for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels. The term includes the entire range of activities that constitute a modern, scientific resource program including, but not limited to, research, census, law enforcement, habitat acquisition and improvement, and education. Also included within the term, when and where appropriate, is the periodic or total protection of species or populations. "Management" may include artificial propagation to maintain threatened or endangered species populations, in concert with the exercise of water rights, and may also include restriction of stocking of species which are in competition with threatened or endangered species for the available habitat."[109]	The ESA • Only applies to listed species; • Does not require collection of information on listed species • Does not require the implementation of a scientific resource program, or any kind of organized management program. survival. The ESA cannot require participation of state and private actors in recovery activities on non-federal lands.
WILDLIFE, ENFORCEMENT Colorado prohibits 'take' of wildlife generally. Illegal sale of wildlife : (1) (a…, it is unlawful for	The ESA provides protections for listed species by prohibiting take only of listed species.:

[108] Colorado Statutes, Title 33. Parks And Wildlife, Wildlife, Article 2. Nongame And Endangered Species Conservation http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-2-104&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[109] Title 33. PARKS AND WILDLIFE, WILDLIFE, Article 2. Nongame And Endangered Species Conservation, § 33-2-103. Definitions http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=32-15-109&statecd=CO&sessionyr=2012&TOCId=23929&userid=GUEST9&cvfilename=&docname=&Interface=NLL&noheader=1

any person to knowingly sell or purchase, or knowingly offer for sale or purchase, wildlife or to solicit another person in the illegal hunting or taking of wildlife for the purposes of monetary or commercial gain or profit.[110] 2) Any person who violates this section: (a) With respect to big game, endangered species, or eagles, commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S. Upon such conviction, the commission may suspend any or all wildlife license privileges of the person for a minimum of one year to life. (b) With respect to all other wildlife, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and an assessment of twenty license suspension points.[111]	
PLANNING AND ZONING, LOCAL GOVERNMENT **Colorado regulates habitat destruction by mining operators:** (1) Every operator to whom a permit is issued pursuant to this article shall perform the reclamation prescribed by the reclamation plan adopted pursuant to this section….f) In those areas where revegetation is part of the reclamation plan, land shall be revegetated so that a diverse, effective, and long-lasting	1. The ESA provides protections for listed species by regulating activities of federal agencies 2. The ESA cannot require actors on Colorado public lands and private lands to engage in conservation actions.

[110] Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions
[111] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions 33-6-117. Willful Destruction Of Wildlife - Legislative Intent

vegetative cover is established that is capable of self-regeneration and is at least equal, with respect to the extent of cover, to the natural vegetation of the surrounding area. Species chosen for revegetation shall be compatible for the proposed post-extraction land use and shall be of adequate diversity to establish successful reclamation.[112]	
LAND USE, LOCAL GOVERNMENT **Protects public and private habitat of species from the actions of all operators.** Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (a) Regulating development and activities in hazardous areas; (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species;…[113]	ESA protects only those habitats designated as critical habitat through regulation of only federal agencies.
WILDLIFE CONSERVATION, FUNDING **Colorado provides a dedicated funding stream for wildlife conservation.** (1)(a) Except as provided in subsections (7) and (8) of this section, sections 33-1-112.5 and 33-6-105, and in part 7 of article 22 of title 39, C.R.S., all moneys received from wildlife license fees, and all moneys from all other wildlife sources, and all interest earned on such	The ESA provides no dedicated funding.

[112] Title 34. Mineral Resources Mines And Minerals Article 32.5. Colorado Land Reclamation Act For The Extraction Of Construction Materials C.R.S. 34-32.5-116 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=PRODSG&interface=NLL&statecd=CO&codesec=34-32.5-116&sessionyr=2012&Title=34&datatype=S&noheader=1&nojumpmsg=0

[113] C.R.S. 30-28-121 Title 30. Government - County County Planning And Building Codes Article 28.County Planning And Building Codes Part 1. County Planning, http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&statecd=CO&sessionyr=2012&TOCId=21086&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

moneys shall be deposited in the state treasury and credited to the wildlife cash fund, which fund is hereby created, and such moneys shall be utilized for expenditures authorized or contemplated by and not inconsistent with the provisions of articles 1 to 6 of this title for wildlife activities and functions and for the financing of impact assistance grants pursuant to part 3 of article 25 of title 30, C.R.S…. (b) There is hereby created a wildlife habitat account in the wildlife for future generations trust fund, created in paragraph (a) of this subsection (7). The state treasurer shall deduct five million dollars from the wildlife cash fund, created in subsection (1) of this section, and transfer such sum to the wildlife habitat account. The interest earned on such five million dollars shall be continuously appropriated and shall be used solely for operation and maintenance of properties, leases, and easements owned by the division. (8) (a) There is hereby created in the state treasury the habitat partnership cash fund. The moneys in the habitat partnership cash fund shall consist of those moneys annually transferred from the wildlife cash fund in accordance with paragraph (e) of this subsection (8) for the partnership program and any gifts, grants, donations, and reimbursements made to the program from other sources. The moneys in the fund shall be used in accordance with the duties of the habitat partnership council as specified in section 33-1-110 (7) and (8), including, but not limited to, reasonable and necessary expenses incurred by council members in the fulfillment of their duties, as approved by the director. All interest derived from the investment of moneys in the habitat partnership cash fund shall be	

credited to the fund. Any balance remaining in the fund at the end of any fiscal year shall remain in the fund subject to the limitations provided…[114]	
FUNDING ...(4) (a) (I) <u>All moneys received pursuant to the issuance of the Colorado wildlife habitat stamp shall be used for the benefit of wildlife habitat or access to wildlife habitat,</u> including costs associated with the operation and maintenance, such as weed control and fencing, of lands under the Colorado wildlife habitat protection program administered by the division. Revenues collected from the sale of the stamp are subject to annual appropriation….[115]	The ESA provides no dedicated funding.
WILDLIFE, CONSERVATION, FUNDING **Colorado legislature has expressed the priority for funding for the preservation of species of concern, including the LPC.** (1) The general assembly hereby finds, determines, and declares that: (a) Protecting wildlife habitat and obtaining public access are important elements to preserving wildlife and wildlife-related recreational opportunities in Colorado; (b) The general assembly specifically recognizes that hunting of big game species is an activity that hundreds of thousands of residents and visitors to Colorado enjoy, which contributes significantly to state and local economies; and (c) <u>Priorities for the expenditure of funds</u>	The ESA provides no dedicated funding.

114114114 Title 33. Parks And Wildlife Wildlife Article 1.Wildlife - General Provisions C.R.S. 33-1-112 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-1-112&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

115 Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees

generated from the sale of habitat stamps and Colorado wildlife passports shall include protecting big game winter range and migration corridors, acquiring public access to wildlife-related recreation, including fishing, hunting, and wildlife viewing, protecting habitat for species of concern, and preserving the diversity of wildlife enjoyed by Coloradans...[116]	
WILDLIFE, ENFORCEMENT On lands controlled by the Colorado parks and wildlife division, damage to property or habitat (1) It is unlawful for any person to remove, damage, deface, or destroy any real or personal property or wildlife habitat under the control of the division. Any person who violates this subsection (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. In addition, the court may require the defendant to reimburse the division for any damages.[117]	
LAND USE, NATURAL RESOURCES **Colorado specifically protects all wildlife habitat from adverse impacts from all oil and gas operations.** 1) This section shall be known and may be cited as the "Colorado Habitat Stewardship Act of 2007".	The ESA protects only critical habitat from the effects of federal actions. No critical habitat is being designated for lesser prairie chicken so no federal protection will ensue

[116] Title 33. Parks And Wildlife Wildlife Article 4. Licenses, Certificates, And Fees http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=33-4-102.7&sessionyr=2012&Title=33&datatype=S&noheader=1&nojumpmsg=0

[117] Title 33. Parks And Wildlife Wildlife Article 6. Law Enforcement And Penalties - Wildlife Part 1. General Provisions C.R.S. 33-6-129 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=24023&userid=PRODSG&cvfilename=&noheader=1&Interface=NLL

(2) The commission shall administer this article so as to minimize adverse impacts to wildlife resources affected by oil and gas operations. (3) In order to minimize adverse impacts to wildlife resources, the commission shall: (a) Establish a timely and efficient procedure for consultation with the parks and wildlife commission and division of parks and wildlife on decision-making that impacts wildlife resources;[118] (b) Provide for commission consultation and consent of the affected surface owner, or the surface owner's appointed tenant, on permit-specific conditions for wildlife habitat protection. Such conditions shall be discontinued when final reclamation has occurred....	
WILDLIFE CONSERVATION, LAND USE **Colorado requires that state lands be managed in a manner that protects wildlife habitat.** (1) The state board of land commissioners shall be composed of five members appointed by the governor,....(6) (a) The people of the state of Colorado have recognized in section 10 of article IX of the state constitution that the state school lands are an endowment of land assets held in a perpetual, intergenerational public trust for the support of public schools, which should not be significantly diminished; that the disposition and use of such lands should therefore benefit public schools including local school districts; and that the economic	The ESA only protects the designated critical habitat of a listed species from federal agency actions. No critical habitat is being designated for lesser prairie chickens.

[118] Title 34. Mineral Resources Oil And Natural Gas Article 60.Oil And Gas Conservation C.R.S. 34-60-128 (2012), http://search.jurisearch.com/NLLXML/getcode.asp?userid=GUEST9&interface=NLL&statecd=CO&codesec=34-60-128&sessionyr=2010&Title=34&datatype=S&noheader=1&nojumpmsg=0

productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. In recognition of these principles, the state board of land commissioners shall be governed by the standards set forth in section 10 of article IX of the state constitution in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.[119]	

[119] Title 36. Natural Resources - General Public Lands And Rivers Article 1.State Board Of Land Commissioners, C.R.S. 36-1-101.5 (2012) http://search.jurisearch.com/NLLXML/getcode.asp?datatype=S&codesec=35-49-104&statecd=CO&sessionyr=2012&TOCId=25658&userid=GUEST9&cvfilename=&docname=&Interface=&noheader=1

TEXAS

Applicable State Laws	Applicable ESA provisions
WILDLIFE **Texas requires a research program and funding to support it to develop wildlife research.** The Texas Agricultural Experiment Station, in consultation with the Agriculture and Wildlife Research and Management Advisory Committee established under Section 88.216, Education Code, shall develop and administer a program to finance agriculture and wildlife research that the Texas Agricultural Experiment Station determines to be of the highest scientific merit and to offer significant promise in providing new directions for long-term solutions to continued agriculture production, water availability, and wildlife habitat availability. [120]	The ESA does not require or fund a research program.
CONSERVATION **Texas protects Game Birds from catch, kill, or possession (dead or alive). Further protections are offered for the nest and eggs. Lesser prairie chickens are classified as Game Birds and are protected under the Texas statute.** GAME BIRDS. Wild turkey, wild ducks of all varieties, wild geese of all varieties, wild brant, wild grouse, wild prairie chickens, wild pheasants of all varieties, wild partridge, wild bobwhite quail, wild scaled quail, wild Mearn's quail, wild Gambel's quail, wild red-billed pigeons, wild band-tailed pigeons, wild mourning doves, wild white-winged doves, wild	. An ESA listing would provide only the limited additional protection of criminalizing accidental take.

[120] Agriculture Code Title 3. Agricultural Research And Promotion Chapter 50. Agriculture And Wildlife Research Program Sec.50.001. Program http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.50.pdf

white-fronted doves, wild snipe of all varieties, wild shore birds of all varieties, chachalacas, wild plover of all varieties, and wild sandhill cranes are game birds. … Sec. 64.003. DESTROYING NESTS OR EGGS. No person may destroy or take the nest, eggs, or young of any wild game bird, wild bird, or wild fowl protected by this code except as provided in this code. … Sec. 64.004. TRAPPING GAME BIRDS. No person may set a trap, net, or other device for taking game birds or take or snare a game bird by a device without obtaining a permit from the department. .. Sec. 64.005. PENALTY. A person who violates a provision of this subchapter commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … Sec. 64.007. POSSESSION OF LIVE GAME BIRDS. No person may possess a live game bird in this state except as authorized by this code.[121]	

[121] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation, Subtitle B. Hunting And Fishing, Chapter 64. Birds, Subchapter A. General Provisions. http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.64.htm#64.001

CONSERVATION, LOCAL GOVERNMENT **Texas requires control of noxious weeds [122] [123] and funding of that control.** "Board" means the board of directors of a district. (2) "District" means a noxious weed control district. … The legislature has determined that: (1) noxious weeds are present in this state to a degree that poses a threat to agriculture and is deleterious to the proper use of soil and other natural resources; and (2) reclamation of land from noxious weeds is a public right and duty in the interest of conservation and development of the natural resources of the state. The board may: (1)determine which noxious weeds are subject to control and what appropriate methods of control are to be used, including spraying, cutting, burning, tilling, or any other appropriate method; (2) prescribe specific areas in the district in which control measures are to be used; (3) prescribe the period during which control measures are to be used; and (4) incur expenses and take other actions necessary to carry out the purposes of this chapter.[124]	The ESA provides no authority or funding for control of noxious weeds.
PLANNING AND ZONING, LAND USE **Structures are listed as a threat to the LPC.**	

[122] Title 5. Production, Processing, And Sale Of Horticultural Products,Subtitle B. Horticultural Diseases And Pests, Chapter 78. Noxious Weed Control Districts http://www.statutes.legis.state.tx.us/Docs/AG/pdf/AG.78.pdf

[123] http://plants.usda.gov/java/noxious?rptType=State&statefips=48

[124] Agriculture Code ,Chapter 78. Noxious Weed Control Districts, Subchapter A. General Provisions http://law.justia.com/codes/texas/2005/ag/005.00.000078.00.html

Zoning regulations affecting the building of structures and location in Texas are adopted in accordance with the States comprehensive plan which provides for protection of the State's natural resources. Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:…(7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements. … The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land. [125]	
WILDLIFE, CONSERVATION **Texas Department of Parks and Wildlife provides local agencies recommendations information on wildlife protection to all government agencies that approve, permit, license or construct development projects.** "The department is the state agency with primary responsibility for protecting the state's fish and wildlife resources. (b)The department's resource protection activities include: (1)investigating fish kills and any type of pollution that may cause loss of fish or wildlife	The ESA provides consultation only through section 7 to federal agency actions that may affect listed species or their critical habitat. In the case of the lesser prairie chicken, since no critical habitat is being designated, no habitat protection is provided.

[125] Local Government Code Title 7. Regulation Of Land Use, Structures, Businesses, And Related Activities Subtitle A. Municipal Regulatory Authority http://www.statutes.legis.state.tx.us/Docs/LG/pdf/LG.211.pdf

resources, taking necessary action to identify the cause and party responsible for the fish kill or pollution, estimating the monetary value of lost resources, and seeking restoration through presentation of evidence to the agency responsible for permitting or through suit in county or district court; (2) providing recommendations that will protect fish and wildlife resources to local, state, and federal agencies that 1approve, permit, license, or construct developmental projects; (3)providing information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources;… [126]	
ENDANGERED SPECIES **Texas provides for listing of species based on the same factors as the ESA. Like Colorado, Texas may protect species which are only threatened in a portion of their range.** **Texas prohibits take of state listed species.** The director shall file with the secretary of state a list of fish or wildlife threatened with statewide extinction. (b)Fish or wildlife may be classified by the director as threatened with statewide extinction if the department finds that the continued existence of the fish or wildlife is endangered due to: (1)the destruction, drastic modification, or severe curtailment of its habitat; (2)its overutilization for commercial or sporting purposes; (3)disease or predation; or (4)other natural or man-made factors.	The ESA limits listing protections to species only if the at risk of extinction occurs in a significant portion of their range. The ESA cannot must consider the entirety of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Texas).if the species is at risk in only one portion of its range.

[126] Parks And Wildlife Code, Title 2. Parks And Wildlife Department, Chapter 12. Powers And Duties Concerning Wildlife, Subchapter A. General Powers And Duties http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.12.pdf

… No person may capture, trap, take, or kill, or attempt to capture, trap, take, or kill, endangered fish or wildlife. (b)No person may possess, sell, distribute, or offer or advertise for sale endangered fish or wildlife unless the fish or wildlife have been lawfully born and raised in captivity for commercial purposes under the provisions of this chapter. (c)No person may possess, sell, distribute, or offer or advertise for sale any goods made from endangered fish or wildlife[127]	
ENDANGERED SPECIES, CONSERVATION, FUNDING **Provides for dedicated funding of an endangered species account.** A peace officer who has arrested a person for a violation of this chapter may seize fish or wildlife or goods made from fish or wildlife taken, possessed, or made in violation of this chapter. (b) Property taken under this section shall be delivered to the department for holding pending disposition of the court proceedings. If the court determines that the property was taken, possessed, or made in violation of the provisions of this chapter, the department may dispose of the property under its regulations. The costs of the department in holding seized fish or wildlife during the pendency of the proceedings may, in appropriate cases, be assessed against the defendant. … . All revenue received under this chapter shall be deposited in the state treasury to the credit	The ESA provides no dedicated funding for ESA actions.

[127] Parks And Wildlife Code Title 5. Wildlife And Plant Conservation Subtitle B. Hunting And Fishing Chapter 68. Endangered Species http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf

of the special nongame and endangered species conservation account.[128]	
WILDLIFE, ENFORCEMENT **Texas may take action to refuse hunting or fishing licenses if outstanding violations of wildlife laws exist in other states.** On behalf of this state, the commission may enter into the Interstate Wildlife Violator Compact. (b) If necessary to protect the interests of this state, the commission may withdraw from the Interstate Wildlife Violator Compact in accordance with the terms of the compact. (c)The commission may take all actions necessary to implement this chapter, including the adoption of rules and the delegation of authority to the director.[129] (The Interstate Wildlife Violator Compact is an agreement that unresolved hunting and fishing violations in one state can affect a person's hunting or fishing privileges in other participating states. Any person whose license privileges or rights are suspended in a member state could also be denied future purchase of a license in Texas until they have satisfied suspension in the other state.)[130]	The ESA contains no regulatory provisions to protect wildlife generally.
WILDLIFE, ENFORCEMENT …, a person who violates a provision of Title 7 of this code commits an offense that is a Class C Parks and Wildlife Code misdemeanor. … A person who violates any of the following	The ESA prohibition against "take" is limited to listed species.

[128] Id, http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.68.pdf
[129] Parks And Wildlife Code Title 6. Compacts Chapter 92. Interstate Wildlife Violator Compact http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.92.pdf
[130] http://www.tpwd.state.tx.us/newsmedia/releases/?req=20091105g

provisions of Title 7 of this code commits an offense that is a Class B Parks and Wildlife Code misdemeanor: Section 131.011; 143.023; 229.021; 237.022; 334.041; or 350.021. [131]	
WILDLIFE, CONSERVATION **Texas law protects generally all indigenous species from collection, holding, possession, display, transport, release, or propagation.** In this subchapter, "protected wildlife" means all indigenous mammals, indigenous birds, indigenous reptiles, indigenous amphibians, indigenous fish, and other indigenous aquatic life the taking, collecting, holding, possession, propagation, release, display, or transport of which is governed by a provision of this code other than this subchapter or by a commission rule adopted under any provision of this code other than this subchapter and includes endangered species. … No person may collect, hold, possess, display, transport, release, or propagate protected wildlife for the purposes of this subchapter without a permit issued under this subchapter..[132]	The ESA protections are limited to listed species.
WILDLIFE, CONSERVATION, ENDANGERED SPECIES, LOCAL GOVERNMENT The criteria that the Texas Forest Service uses	The ESA authorizes the designation of critical habitat only for listed species.

[131] Parks And Wildlife Code, Title 7. Local And Special Laws, Chapter 355. Penalties For Violations Of Title 7, Parks And, Wildlife Code
http://www.statutes.legis.state.tx.us/Docs/PW/pdf/PW.355.pdf
[132] Parks And Wildlife Code, Title 5. Wildlife And Plant Conservation Subtitle A. Hunting And Fishing Licenses Chapter 43. Special Licenses And Permits Subchapter C. Permits For Scientific Research, Zoological Collection, Rehabilitation, And Educational Display
http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.43.htm

in determining CWHZ [Critical Habitat Wildlife Zone] upon request from a chief appraiser or taxing unit is set out as follows. (1) The presence of qualified endangered or threatened animal or plant, as defined in paragraph (2) of this section, in the zone and the existence of a plan to protect it must be evidenced by a memorandum of understanding, conservation agreements, or other documentation pertaining to the protection of such animal or plant life with a federal, state, or private organization with recognized responsibility for protecting this species. (2) The animal or plant is listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. §1531 et seq.) and its subsequent amendments, or as endangered und er Parks and Wildlife Code, §68.002, …[133]	
NATURAL RESOURCES, ENDANGERED SPECIES, WILDLIFE, CONSERVATION, LAND USE **Texas requires that applications for mining and reclamation authority explain how adverse wildlife impacts will be minimized using the best technology available. Texas also requires enhancement of the wildlife and environmental values if possible.** Each application shall contain a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on	The ESA allows control of federal agency actions and imposition of requirements to avoid jeopardizing the continued existence of a species and adverse modification of critical habitat. In the case of the lesser praire chicken since no critical habitat is designated, habitat will not be protected.

[133] Title 4 Agriculture Part 12 Texas A&M Forest Service Chapter 215 Forest Zone Determination Procedure Rule §215.9 The Criteria For Determining Critical Wildlife Habitat Zone Upon Request From A Chief Appraiser Or Taxing Unit http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=72782&p_tloc=&p_ploc=&pg=1&p_tac=72782&ti=4&pt=12&ch=215&rl=9&dt=&z_chk=3841529&z_contains=habitat

fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. [134]	
NATURAL RESOURCES, LAND USE **Texas protects wildlife habitat generally from surface mining and reclamation activities.** The operator of all surface mining and reclamation operations not otherwise exempted or excluded shall as a minimum: … (1) conduct surface mining operations in a manner consistent with prudent mining practice, so as to maximize the utilization and conservation of the resource being recovered so that reaffecting the land in the future through surface mining can be minimized; (a) The permit application shall, if required by the Commission, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation. (b) When a map or aerial photograph is	The ESA can only protect designated critical habitat from federal agency actions. There is no designation of critical habitat proposed for lesser prairie chickens, so no habitat protection will exist.

[134] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 12 Coal Mining Regulations Subchapter G Surface Coal Mining And Reclamation Operations, Permits, And Coal Exploration Procedures Systems Division 6 Surface Mining Permit Applications--Minimum Requirements For Reclamation And Operation Plan Rule §12.144, Fish And Wildlife Plan http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=7940&p_tloc=&p_ploc=&pg=1&p_tac=7940&ti=16&pt=1&ch=12&rl=144&dt=&z_chk=3841534&z_contains=habitat

required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under §12.133 of this title (relating to Fish and Wildlife Resources Information).; [135]	

[135] Title 16 Economic Regulation Part 1 Railroad Commission Of Texas Chapter 11 Surface Mining And Reclamation Division Subchapter C Substantive Rules--Uranium Exploration And Surface Mining Division 6 Uranium Surface Mining Reclamation Rule §11.152 Surface Mining Reclamation Standardshttp://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=2&p_dir=&p_rloc=148942&p_tloc=&p_ploc=&pg=1&p_tac=148942&ti=16&pt=1&ch=11&rl=152&dt=&z_chk=3841530&z_contains=habitat

OKLAHOMA

Applicable State Laws	Applicable ESA provisions
WILDLIFE, ENDANGERED SPECIES Under Oklahoma law, no person may possess, hunt, chase, harass, capture, shoot at, wound or kill, take or attempt to take, trap, or attempt to trap any endangered or threatened species or sub-species without specific written permission of the director.[136]	ESA provides similar protections for listed species.
WILDLIFE **Oklahoma offers protections for all "game birds".** "Game bird" is a bird species normally sought after by sportsmen, and includes only all species of brant, cranes, doves, ducks, gallinules, geese, grouse, partridge, pheasant, quail, prairie chickens, rails, snipes, swans, tinamous, wild turkeys, woodcock, and any part thereof.[137]	Only listed species are protected under the ESA.
WILDLIFE, **Oklahoma prohibits unauthorized "take".** "Hunting or taking" is pursuing, killing, capturing, trapping, snaring and netting wildlife, and all lesser acts such as disturbing, harrying, worrying or placing, setting, drawing or using any net, trap or other device used to take wildlife and includes specifically every attempt	The ESA prohibition against "take" applies only to listed species.

[136] Title 29. Game and Fish. Chapter 1. Oklahoma Wildlife Conservation Code. Article V. Game. Part 4. Section 5-412 - Prohibitions with Endangered or Threatened Species or Subspecies. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77803

[137] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-114 - Game Bird, http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77660

to take and every assistance to other persons in taking or attempting to take wild animals, except that the definitions of "taking" and "hunting" wildlife shall not include disturbing, harrying or worrying wild game in field trials or performance tests of dogs nor the act of any person in participating as owner, handler, trainer, official or member of an audience observing such trials, whether resident or nonresident, where wild game is not killed.[138]	
CONSERVATION **Oklahoma does not permit "take" of game birds during its closed season.** "Closed season" is all other times than open season, and is the period during which protected wildlife may not be lawfully taken.[139]	The ESA prohibition against take applies only to listed species.
HABITAT RESTORATION, WEED CONTROL, INVASIVE SPECIES The Forestry Division, in connection with the enforcement of the Oklahoma Forestry Code, shall have the following powers, authority, and duties: … 10. <u>To plan and conduct prescribed burning at the request and expense of landowners on public or private lands for the purpose of controlling Eastern Red Cedar and other invasive species, for hazardous fuel reduction, wildlife habitat manipulation, ecosystem restoration</u>, or achieving silvicultural objectives.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[138] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-118 - Hunting or Taking. http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=77665

[139] Title 29. Game and Fish , Chapter 1 - Oklahoma Wildlife Conservation Code, Article 2 - Words and Phrases, Section 2-104 - Closed Season. http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=77645

Forestry Division employees shall be protected under The Governmental Tort Claims Act and shall not be personally liable beyond the limits established therein for activities pursuant to this paragraph unless gross negligence is established in a competent court of law.[140]	
FUNDING, WILDLIFE CONSERVATION A. The Department of Wildlife Conservation is hereby authorized to issue an Oklahoma Wildlife Habitat Stamp to any person upon the voluntary payment of a fee of Ten Dollars ($10.00). Said fee shall be deposited in the Wildlife Land Acquisition Fund created in subsection C of this section. … C. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Land Acquisition Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received pursuant to the provisions of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such	• The ESA Provides no dedicated funding • The ESA has no authority to require States to participate in recovery activities.

[140] Title 2. Agriculture , Chapter 1 - Agricultural Code, Forestry Administration and Enforcement, Article 16 - Oklahoma Forestry , Code Section 16-8 - Powers of Division - Appointment of Forest Investigators and Rangers - Powers and Duties - Entry Upon Lands - Arrests, etc. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=465855&hits=1318+864+309+

investments shall be deposited in the Wildlife Land Acquisition Fund. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection D of this section. … D. The Wildlife Land Acquisition Fund shall be used by the Oklahoma Wildlife Conservation Commission for the acquisition on a willing-seller willing-buyer basis only, leasing, taking of easements, development, management, and enhancement of lands acquired pursuant to this section for the following purposes: Management of game animals, protected animals and birds, furbearing animals, game birds, fish, and their restoration, propagation, and protection; and Creation and management of public hunting, fishing, and trapping areas as places where the public may hunt, fish, or trap as authorized by law.[141]	
HABITAT, WILDLIFE, CONSERVATION A. In order to encourage wildlife habitat conservation on private lands, the Department of Wildlife Conservation shall establish a program for wildlife habitat maintenance, enhancement, development, preservation, restoration, and management on private lands. To implement the program, the Department shall enter into multiyear contracts for approved	The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. The ESA provides no protection for non-listed species and does not provide for the "restoration" or "development" of those non-listed

[141] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 4 – Licenses, Section 4-132 - Authority to Issue Oklahoma Wildlife Habitat Stamp - Rules and Regulations - Creation and Use of Wildlife Land Acquisition Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466381&hits=1386+783+726+629+70+15+

projects on privately owned lands detailing the landowners' responsibilities. B. The Department shall promulgate rules pursuant to the Administrative Procedures Act to implement the program. Such rules may provide for incentives to participate in the program.[142]…	species. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.
WILDLIFE Oklahoma law prohibits the knowing and willful killing or molestation of hawks, falcons, owls, or eagles, or their nests, eggs, or young. The only exceptions to this prohibition are the taking of a hawk or owl in the act of destroying domestic birds or fowl, or the use of hawks, owls, falcons, or eagles by licensed falconers. [143]	The ESA limits protection to listed species.
ENFORCEMENT, WILDLIFE, ENDANGERED SPECIES Oklahoma prohibits the possession of wildlife or parts during closed season, and any endangered or threatened species. Under these Oklahoma statutes, no person may possess any wildlife or parts thereof during the closed season, any endangered or threatened species or parts thereof at any time, or any native bear or native cat that will grow to reach the weight of 50 lbs. or more, with exceptions. A	The ESA limits protection only to listed species.

[142] Title 29. Game and Fish, Chapter 1, Oklahoma Wildlife Conservation Code, Article 3, Section 3-312 - "Program for Wildlife Habitat Development, Preservation, Restoration, and Management - Rules - Construction of Program.". http://www.oscn.net/applications/oscn/deliverdocument.asp?id=436091&hits=935+479+463+407+23+7+

[143] OK - Game Animals - Part 4. Protected Game. § 5-410. Hawks; falcons; owls; eagles

conviction could result in a fine of $100-$500 and/or by imprisonment up to 30 days. In addition, no person may buy, barter, trade, or sell all or any part of any fish or wildlife or the nest or eggs of any bird protected by law, with exceptions. A first violation could result in a fine of $100 to $500 and/or by imprisonment up to 60 days. [144]	
WILDLIFE, CONSERVATION, FUNDING A. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Heritage Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received from senior citizen lifetime licenses issued pursuant to the provisions of paragraphs 4 through 6 of subsection B of Section 4-114 of this title by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. Any interest or dividends accruing from such investments shall be deposited in the Wildlife Heritage Fund. Only interest and dividends derived from the principle can be expended and are hereby appropriated and may be budgeted and expended by the Oklahoma Wildlife Conservation Commission for the purposes specified in subsection B of this section. Any monies withdrawn from said fund by the	The ESA provides no dedicated funding and is limited in its application to listed species.

[144] OK - Wildlife - Part 5. Possession of Wildlife. OK ST T. 29 § 7-501 to 504

Oklahoma Wildlife Conservation Commission for investment pursuant to this subsection shall be deemed to be for the purposes specified in subsection B of this section. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.[145]	
WILDLIFE, ENFORCEMENT, ENDANGERED SPECIES **Oklahoma prohibits transportation of any wildlife out of Oklahoma.** Under these Oklahoma statutes, no common carrier may transport any wildlife or endangered or rare species, with exceptions. A violation could result in a fine of $25 to $100. In addition, no person may transport into or out of Oklahoma any wildlife or parts thereof, nests of wildlife, their eggs or their young, or any endangered or threatened species, with exceptions. A violation could result in a fine of $50 to $200, and/or imprisonment of 10 to 60 days. [146]	The ESA applies only to listed species.
WILDLIFE, CONSERVATION, FUNDING A. The Oklahoma Tax Commission shall include on each state individual income tax return form for tax years beginning after December 31, 2001, and each state corporate tax return form for tax years beginning after December 31, 2001, an opportunity for the taxpayer to donate	The ESA provides no dedicated funding.

[145] Title 29. Game and Fish Chapter 1 - Oklahoma Wildlife Conservation Code Article 4 - Licenses Section 4-134 - Creation and Use of Wildlife Heritage Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466383&hits=1344+1343+1124+1123+1094+1093+1032+1031+934+933+866+865+844+843+786+785+757+756+752+751+687+686+608+607+437+436+409+408+347+346+255+254+189+188+167+166+109+108+80+79+75+74+17+16+

[146] OK - Wildlife - Transportation of Wildlife OK ST T. 29 § 7-601 - 602

from a tax refund for the benefit of the Oklahoma Wildlife Diversity Program. B. For purposes of this section, "nongame wildlife" means any species of wildlife not legally classified as a game species or furbearer by statute or by rule adopted pursuant to statute. C. Except as otherwise provided for in this section, all monies generated pursuant to subsection A of this section shall be paid to the State Treasurer and placed to the credit of the Wildlife Diversity Fund. D. There is hereby created in the State Treasury a revolving fund for the Oklahoma Wildlife Conservation Commission to be designated the "Wildlife Diversity Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received under the provisions of paragraph 2 of subsection C of this section by the Oklahoma Wildlife Conservation Commission. The Oklahoma Wildlife Conservation Commission is hereby authorized to invest all or part of the monies of said fund in any investment permitted by a written investment policy adopted by the Wildlife Conservation Commission; provided, all investments shall be made in accordance with the Oklahoma Uniform Prudent Investor Act. …[147]	
CONSERVATION, WILDLIFE	• The ESA has no authority to require States to participate in

[147] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-310 - Wildlife Diversity Fund. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466370&hits=1486+1485+1480+1479+1020+1019+994+993+939+938+910+909+905+904+860+859+640+639+633+632+302+301+276+275+221+220+192+191+187+186+142+141+

A. The Wildlife Conservation Commission shall constitute an advisory, administrative and policymaking board for the protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of wildlife in this state as provided in the Oklahoma Wildlife Conservation Code. B. The Director shall consult with the Commission regarding the administration of the affairs of the Department of Wildlife Conservation. The Commission is authorized and empowered to require from the Director complete reports and information relative to the affairs of the Department at the time and in the manner the Commission may deem advisable. … D. In addition to the other powers and duties prescribed by law, the Commission shall: … 8. Supervise the establishment, extension, improvement, and operation of the wildlife refuges, propagation areas or stations, public hunting areas, public fishing areas, game management areas, and fish hatcheries; 9. Prescribe the manner of cooperation with the Oklahoma Tourism and Recreation Department, colleges and universities within the state, other state agencies, any agency of the federal government, and any city, town, school district, or any other agency or organization in study of conservation and propagation of wildlife and in the establishment, maintenance, and operation of visual educational facilities, recreational facilities, and hunting and fishing facilities, in the study and propagation of wildlife;	recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • The ESA requires only federal agencies consult and has no authority to require State or local governments to consult where there is no federal action. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and “enhanced”. • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

… 14. Publicize and encourage the conservation and appreciation of wildlife and all other natural resources; 15. Regulate the seasons and harvest of wildlife; 16. Promulgate rules to sell fishing and hunting licenses via the Internet;….[148]	
WILDLIFE, ENFORCEMENT A. Except as otherwise provided by law, <u>any person arrested for a violation of any section of the Oklahoma Wildlife Conservation Code shall be admitted to bail as follows:</u> <u>1. Whenever a person is charged for any violation of any of the wildlife laws of this state or rules adopted by the Wildlife Conservation Commission pursuant to law, which violation is punishable as a misdemeanor</u> and the person is not immediately taken into physical custody pursuant to state law, the officer shall prepare a written citation containing a notice to appear in court, the name and address of the person, the offense charged, the time and place where the person shall appear in court and any other pertinent information as may be necessary; 2. The arresting officer shall indicate on the citation the date of the arraignment. The person charged shall appear in person or by counsel at the stated time and place for arraignment.[149]	The ESA only provides protections for listed species.

[148] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103 - Functions, Powers, and Duties of the Commission. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466368&hits=1919+1918+1913+1912+991+990+968+967+936+935+872+871+865+864+57+56+36+35+4+3+

[149] Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 9 - Wildlife Bail Procedure Act, Section 9-112 - Admission to Bail for Violations of Wildlife Conservation Code. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=462892&hits=1526+1525+1498+1497+814+813+779+778+686+685+679+678+54+53+21+20+

CONSERVATION, HABITAT Oklahoma provides for private lands fish and wildlife habitat conservation and improvement programs which include maintenance, protection, enhancement and restoration for habitat generally including aquatic, riparian, upland, wetland and forest habitat. … conservation improvement contract requirements [150] (a) The following projects may be approved for Private Lands Fish and Wildlife Habitat Conservation and Improvement Programs (1) Aquatic Habitat maintenance, protection, enhancement, or restoration, (2) Riparian Habitat maintenance, protection, enhancement, or restoration (3) Upland Habitat maintenance, protection, enhancement, or restoration (4) Wetland Habitat maintenance, protection, enhancement, or restoration (5) Forest Habitat maintenance, protection, enhancement, or restoration, (6) Any other project which is deemed appropriate by the Department.	• The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them. • ESA does not offer programs to ensure that non-listed species and their habitats are protected and "enhanced". • The ESA cannot require even designated habitats be enhanced. Any enhancements identified through an ESA Recovery Plan are purely voluntary and cannot be enforced.

[150] 800:25-35-3. Approved projects and conservation improvement contract requirements http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_

KANSAS

Applicable State Laws	Applicable ESA provisions
CONSERVATION **Kansas requires programs, including land acquisition to conserve non-game and threatened and endangered species.** Same; programs for conservation. (a) The secretary shall establish such programs, including acquisition of land or aquatic habitat, as are deemed necessary for the conservation of nongame, threatened and endangered species. The secretary shall utilize all authority vested in the secretary by the laws of this state to carry out the purposes of this section with the exception that the secretary shall not utilize the power of eminent domain to carry out such programs unless a specific authorization and appropriation is made therefor by the legislature.[151]	The ESA provides no authority for establishment of programs or land adquisition for endangered species.
FUNDING, CONSERVATION **Kansas provides for species in need of conservation and allows tax credits for lands known to support populations of such species.** Tax credits for expenditures related to nongame (a) There shall be allowed two types of credits against the tax liability of a taxpayer imposed under the Kansas income tax act related to real property that is both: (1) Designated by the secretary of wildlife, parks and tourism pursuant to the nongame and endangered species conservation act as critical habitat for a threatened or endangered species	The ESA provides no tax credits and can only list species

[151] Article 9. - Licenses, Permits, Stamps And Other Issues 32-962.

or certified by the secretary of wildlife, parks and tourism as land known to support populations of species in need of conservation; and (2) included in management activities as part of a recovery plan, or an agreement identified in subsection (b) of K.S.A. 32-962 and amendments thereto, as approved by the secretary of wildlife and parks, for a species listed as threatened, endangered or in need of conservation pursuant to the nongame endangered species conservation act.[152]	
WILDLIFE, CONSERVATION **Kansas provides programs to allow species to sustain themselves, not recover. These protections are offered to non-listed species.** … (a) The secretary shall conduct investigations on nongame species in order to develop information relating to population, distribution, habitat needs, limiting factors and other biological and ecological data to determine conservation measures necessary for their continued ability to sustain themselves successfully. On the basis of such information and determinations, the secretary shall adopt rules and regulations pursuant to K.S.A. 32-963 which contain a list of the nongame species deemed by the secretary to be in need of conservation and shall develop conservation programs pursuant to K.S.A. 32-962 which are designed to insure the continued ability of such nongame species to perpetuate themselves	The ESA provides protections only for listed species and does not offer any program for species prior to their listing to ensure that they do not become endangered/threatened.

[152] Article 32. - Statute 79-32,203: Tax credits for expenditures related to nongame and endangered species.

successfully. The secretary shall conduct ongoing investigations of nongame species.[153]	
WILDLIFE (a) Commercialization of wildlife is knowingly committing any of the following, except as permitted by statute or rules and regulations: (1) Capturing, killing or possessing, for profit or commercial purposes, all or any part of any wildlife protected by this section; (2) selling, bartering, purchasing or offering to sell, barter or purchase, for profit or commercial purposes, all or any part of any wildlife protected by this section;[154]	The ESA provides protections only for listed species.
WILDLIFE, ENFORCEMENT Wildlife violator compact; enactment of compact. The wildlife violator compact is enacted into law and entered into by the State of Kansas with any and all jurisdictions legally joining therein in accordance with its terms.[155]	
WILDLIFE Unlawful possession of wildlife or wild turkey; refusal to allow inspection of property used in taking wildlife; penalties. (a) It is unlawful for any person to: ...	The Kansas statute provides penalties for any unlawful possession of wildlife, including wild turkey. The ESA only prohibits the "take" of listed species. Non-listed species are

[153] Article 9. - Licenses, Permits, Stamps And Other Issues 32-959.
[154] Article 10. - Enforcement , 32-1005. http://kslegislature.org/li/b2013_14/statute/032_000_0000_chapter/032_010_0000_article/032_010_0005_section/032_010_0005_k/
[155] Chapter 32 Article 10 »Section 61 » 32-1061. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0061_section/032_010_0061_k/

(4) possess any wildlife unlawfully killed or otherwise unlawfully taken outside this state;[156]	provide no protections.
LOCAL GOVERNMENT, WEED CONTROL Control and eradication of noxious weeds; payment of costs; sale of chemicals for use on private property, price. ... If the governing body of any political subdivision owning or supervising lands infested with noxious weeds within their jurisdiction fails to control such noxious weeds after 15 days' notice directing any such body to do so, the board of county commissioners shall proceed to have proper control and eradication methods used upon such lands,...[157]	Certain invasive species of plants are listed as potential threats to the habitat of the lesser prairie chicken. Kansas provides authority for its local governments to eradicate "noxious weeds" on private lands. The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
ENDANGERED SPECIES Nongame and endangered species conservation act; title. K.S.A. 32-957 through 32-963, 32-1009 through 32-1012, 32-1033 and K.S.A. 32-960a and 32-960b, and amendments thereto, shall be known and may be cited as the	The ESA allows limits listing to those species only if the risk of extinction occurs in a significant portion of their range. The ESA must consider the entirety

[156] Chapter 32 Article 10 »Section 4 32-1004. http://www.kslegislature.org/li_2012/b2011_12/statute/032_000_0000_chapter/032_010_0000_article/032_010_0004_section/032_010_0004_k/

[157] Chapter 2 Article 13 Section 19 WEEDS

nongame and endangered species conservation act.[158] As used in the nongame and endangered species conservation act: (a) "Conserve," "conserving" and "conservation" mean the use of all methods and procedures for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such numbers. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, regulated taking and, when and where appropriate, the periodic or total protection of species or populations of wildlife. With respect to threatened species and endangered species, the terms mean the use of all methods and procedures, including but not limited to those described above, which are necessary to bring any threatened or endangered species to the point at which the methods, procedures and measures provided for such species pursuant to the nongame and endangered species conservation act are no longer necessary. (b) "Ecosystem" means a system of living organisms and their environment, each influencing the existence of the other and both necessary for the maintenance of life. (c) "Endangered species" means any species of wildlife whose continued existence as a viable component of the state's wild fauna	of the range of a species in making a listing determination and cannot list the species only in specified areas (in this case Kansas). • The ESA cannot protect wildlife or its habitat generally unless the species is listed under the Act and critical habitat has been designated. • In the case of the proposed lesser prairie chicken, no critical habitat is being designated and so no habitat protection would flow from the designation. • Protection of critical habitat is limited to habitat affected by a federal agency action.

[158] Chapter 32 »Article 9 Section 57 Article 9. - Licenses, Permits, Stamps And Other Issues

is determined to be in jeopardy. That term also includes any species of wildlife determined to be an endangered species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (d) "Nongame species" means any species of wildlife not legally classified a game species, furbearer, threatened species or an endangered species by statute or by rule and regulation adopted pursuant to statute. (e) "Optimum carrying capacity" means that point at which a given habitat can support healthy populations of wildlife species, having regard to the total ecosystem, without diminishing the ability of the habitat to continue that function. (f) "Threatened species" means any species of wildlife which appears likely, within the foreseeable future, to become an endangered species. That term also includes any species of wildlife determined to be a threatened species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and amendments thereto. (g) "Wildlife" means any member of the animal kingdom, including, without limitation, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof. ….[159]	

[159] http://kansasstatutes.lesterama.org/Chapter_32/Article_9/#32-958

PLANNING AND ZONING ...(b) The planning commission may adopt and amend a comprehensive plan as a whole by a single resolution, ... In the preparation of such plan, the planning commission shall make or cause to be made comprehensive surveys and studies of past and present conditions and trends relating to land use, population and building intensity, public facilities, transportation and transportation facilities, **economic conditions, natural resources and may include any other element deemed necessary to the comprehensive plan**. Such proposed plan shall show the commission's recommendations for the development or redevelopment of the territory including: (a) The general location, extent and relationship of the use of land for agriculture, residence, business, industry, recreation, education, ... (f) utilization and conservation of natural resources; and (g) any other element deemed necessary to the proper development or redevelopment of the area.[160]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
LAND USE, PLANNING AND ZONING …construction of public facility or utility in conformance with comprehensive plan. (a) Except as provided in subsection (b), whenever the planning commission has adopted and certified the comprehensive plan for one or more major sections or functional subdivisions thereof, no public improvement, public facility or public utility of a type embraced within the recommendations of the comprehensive plan or portion thereof shall be constructed without first being submitted to and being approved by the	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.

[160] Chapter 12 Article 7 Section 47 Article 7. - Planning And Zoning 12-747.

planning commission as being in conformity with the plan.[161]	
LAND USE, PLANNING AND ZONING Zoning of land outside city limits; conditions and limitations; notice to county commissioners. Cities are hereby authorized to adopt zoning regulations affecting all or any designated portion of the land located outside the city but within three miles thereof under the following conditions Except for flood plain regulations in areas designated as a flood plain, nothing in this act shall be construed as authorizing any city to adopt regulations applying to or affecting any land in excess of three acres under one ownership which is used only for agricultural purposes: (a) The city has established a planning commission under the provisions of K.S.A. 12-702, and amendments thereto, which provides for the appointment of two commission members who reside outside the city but within the area subject to the zoning regulations of the city, or the city has established a joint, metropolitan or regional planning commission in cooperation with the county in which such city is located pursuant to the provisions of K.S.A. 12-718, and amendments thereto.[162]	The ESA provides • No private or local land use regulatory authority • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Fences composed of posts a In fences composed of posts and wires, the posts shall be of ordinary size for fencing purposes, and set in the ground at least two feet deep and not more	Local governments are permitted to regulate fence The ESA provides

[161] Chapter 12 Article 7 Section 48 Article 7. - Planning And Zoning
[162] Chapter 12 Article 7 Section 15b Article 7. - Planning And Zoning

than twelve feet apart, with holes through the posts or staples on the side not more than fifteen inches apart, to admit four separate strands of fence wire not smaller than No. 9, and shall be provided with rollers and levers, at suitable distances, to strain and hold the wire straight and firm.[163]	• No private or local land use regulatory authority • No authority to undertake such planning, aquisition, and management actions.
FUNDING, CONSERVATION Assent to wildlife restoration act; use of fees. (a) The state of Kansas hereby assents to the provisions of the wildlife restoration act (16 U.S.C. 669 et seq.), as amended. The secretary is hereby authorized and directed to perform such acts as necessary to the conduct and establishment of cooperative wildlife restoration projects, as defined in such act, in compliance with such act and with rules and regulations promulgated by the secretary of the interior thereunder. The state treasurer is hereby authorized to receive and disburse all money apportioned to the state in accordance with the provisions of such act.[164]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.
FUNDING, CONSERVATION Conservation fee fund; authorized expenditures; accounting procedures; reduction of fees and assessments, when. (a) There is hereby created in the state treasury the conservation fee fund. All deposits credited to the conservation fee fund shall be for the use of the state corporation commission in administering the provisions of K.S.A. 55-172 through 55-184, 55-601 through 55-613, 55-701 through 55-713, 55-901 and 55-1201 through 55-1205.[165]	• The ESA has no dedicated funding. • The ESA has no authority to require States to participate in recovery activities. • The ESA limits protection to listed species, their designated critical habitat where a federal action is affecting them.

[163] Home Statute Chapter 29 Article 1 Section 3 Fencing
[164] Chapter 32 Article 8 Section 28 Article 8. - Department Of Wildlife, Parks And Tourism
[165] Chapter 55 Article 1 Section 43 Article 1. - Oil And Gas Wells; Regulatory Provisions

LAND USE, PLANNING AND ZONING Application of intent to drill wells, required information; notification of surface owner; fee and contents; information to department of health and environment and county clerk; approval of application, when; conditions; compliance with rules and regulations. (a) Prior to the drilling of any well, every operator shall file an application of intent to drill with the commission. Such application shall include such information as required by the commission, including the name and address of the surface owner, and shall be on a form prescribed by the commission. Such application shall also include non-binding preliminary estimates of the location of roads of ingress or egress, any tank battery and any pipeline or electrical line. The commission shall, upon receipt of such application, send a copy of such application to the named surface owner, as well as the contact information, including name, address, phone number, fax or email address, for a designated representative of the applicant.[166]	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action. • No authority to undertake such planning, acquisition, and management actions.
PLANNING AND ZONING Removal of structures and abutments from lands after abandoning wells; exception. (a) Leaving the surface of lands with a part of the operating structure or other equipment intact after abandoning oil or gas wells is against public policy, and constitutes a public nuisance, and shall be hereafter prohibited. Whenever any lease operator abandons any oil or gas well, the lease operator, within six months thereafter, shall remove any rig, derrick or other operating structure, and all abutments and other obstacles of every kind or size used in the operation of such oil or gas lease, from the land upon which	The ESA provides • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.

[166] Chapter 55 Article 1 Section 51 Article 1. - Oil And Gas Wells; Regulatory Provisions

the well was theretofore operated, and shall grade the surface of the soil in such manner as to leave the land, as nearly as practicable, in the same condition after the removal of such structures, equipment and obstacles as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise.[167]	

[167] Chapter 55 »Article 1 »Section 77 Article 1. - Oil And Gas Wells; Regulatory Provisions

NEW MEXICO

Applicable State Laws	Applicable ESA provisions
WILDLIFE The game animals and quadrupeds, game birds and fowl, and game fish as herein defined shall be protected and hunting, taking, capturing, killing or possession, or attempt to hunt, take, capture or kill of any or all species named herein shall be regulated by the state game commission under the authority of Chapter 117 of the 1931 Session Laws of the state of New Mexico.	The ESA provides protections against take for only for listed species.
WILDLIFE, ENFORCEMENT **New Mexico regulates the LPC under its game laws. Which prohibit the "take" of species, including the LPC, without a permit.** A. Except as permitted by regulations adopted by the state game commission or as otherwise allowed by law, it is unlawful to: (1) hunt, take, capture, kill or attempt to take, capture or kill, at any time or in any manner, any game animal, game bird or game fish in the state; or (2) possess, offer for sale, sell, offer to purchase or purchase in the state all or any part of any game animal, game bird or game fish….[168]	The ESA only provides protections against "take" for listed species.
PLANNING AND ZONING, HABITAT **New Mexico has stated a clear preference for avoidance of wildlife areas in its**	The ESA Provides: • No private or local land use regulatory authority • Any habitat protection is limited to lands designated as critical

[168] NM Stat § 17-2-7 (1996 through 1st Sess 50th Legis)

development of utilities. Scenic enhancement: The following provisions for scenic enhancement shall apply for utility facility installation in cited areas: (1) The type and size of the utility facilities and the manner and extent to which they are permitted within areas of scenic enhancement and natural beauty may materially alter the scenic quality, appearance and view of highway roadsides and adjacent areas. Such areas include scenic strips, overlooks, rest areas, recreation areas and the rights-of-ways and adjacent highways. Also included are Sections of highways which pass through public parks, recreation areas, wildlife and waterfowl refuges and historic sites. Whenever possible, new utility installations within all such strips overlooks and areas shall be avoided.[169]	habitat (which the FWS is not designating for the lesser prairie chicken) • Any habitat protection is limited to only designated critical habitat affected by a federal action.
HABITAT, CONSERVATION **New Mexico requires that its wildlife department regulate "vehicle travel" on habitat for certain classes of species.** New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species. … "To provide a description of lands closed to vehicle travel under the Habitat Protection Act and to describe prohibited activities on said lands. [170]	The ESA provides not authority to regulate activities on non-federal lands, absent a federal nexus.
WILDLIFE, CONSERVATION,	The ESA provides no authority to

[169] Title 17: Public Utilities And Utility Services Chapter 4: Utility Rights Of Way And Easements Part 2 , Requirements For Occupancy Of State Highway System Right-Of-Way By Utility Facilities
[170] http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0002.htm

ENFORCEMENT **New Mexico state game commission has authority to establish rules to acquire lands and to prevent damage to wildlife and wildlife habitat on lands owned or controlled by the department.** New Mexico state game commission with the authority to acquire land and to establish rules and regulations that it may deem necessary to carry out the purposes of Chapter 17, NMSA 1978[171]	acquire lands or to establish regulations necessary to protect species. The only protections offered by the ESA provide protections from "take", allow designation of critical habitat, and require federal agencies consult.
WILDLIFE **LPC are game birds in New Mexico, and as such, they are protected. No game bird may be hunted during a closed season or without a permit.** **New Mexico has also established areas of LPC habitat, where the LPC are protected and season is only open for quails.** Season and hours: Upland game may be hunted or taken only during open seasons and only during the period from one-half hour before sunrise to one-half hour after sunset, unless otherwise specifically allowed by rule…. (1) On wildlife management areas, the lesser prairie-chicken areas, and the Sandhills Prairie conservation area hunting hours shall be from one-half hour before sunrise to one-half hour after sunset	ESA only prohibits "take" of listed species.

[171] Title 19 Natural Resources And Wildlife, Chapter 34 Wildlife Habitat And Lands, Part 4 Protection Of Department Of Game And Fish Lands. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.034.0004.htm

… **(e)** The state game commission owned lesser prairie-chicken areas shall be open for quail hunting during established seasons.[172]	
WILDLIFE, ENFORCEMENT **New Mexico also provides protections for wildlife and game animals on private lands.** It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on any private property that is in compliance with 30-14-1 and 30-14-6 NMSA 1978 posting requirements without possessing written permission from the landowner or person in control of the land or trespass rights, unless otherwise permitted in rule or statute. It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on private property if the consent to enter or remain has been denied or withdrawn by the owner or person in control of the land or trespass rights, per 30-14-1 NMSA 1978, unless otherwise permitted in rule or statute. … Any game animals, furbearers, game birds, or game fish taken in violation of this section shall be subject to seizure.[173]	The ESA provides protection against "take" only for listed species.
WILDLIFE, CONSERVATION, HABITAT New Mexico has designated the LPC as a	The ESA can only prohibit take and require federal agencies to consult on

[172] 19.31.5.9 Manner And Methods For Upland Game http://www.nmcpr.state.nm.us/nmregister/xxi/xxi15/19.31.5.htm

[173] Unlawful Taking Or Killing Of Game Animals, Furbearers, Game Birds, Or Game Fish On Private Land, [19.31.10.18 NMAC - N, 4-1-2009]. http://www.nmcpr.state.nm.us/nmac/parts/title19/19.031.0010.htm

"Species of Greatest Conservation Need (SGCN)" in its wildlife conservation strategy. New Mexico's wildlife conservation strategy demonstrates New Mexico's concern for wildlife habitat resources to keep wildlife populations healthy and sustainable and fully addresses eight essential elements established by Congress. It focuses on strategic actions intended to keep common species common and work to prevent wildlife from becoming endangered with a constructed framework for identifying species of greatest conservation need, the habitat treatments necessary to sustain them and other members of their ecological community.[174]	actions on federal lands. The ESA cannot require States to undertake independent conservation activities.
WILDLIFE, FUNDING **New Mexico requires local government to undertake activities to "promote" the health, safety and welfare of the State's wildlife.** It is the intent of the legislature by the passage of the Pollution Control Revenue Bond Act to authorize municipalities to acquire, own, lease or sell projects for the purpose of reducing, abating or preventing pollution, including, but not limited to, removing pollutants, contaminants or foreign substances from land, air or water, or removing or treating any substance in a processed material which otherwise would cause pollution when such material is used, to protect and promote the health, welfare and safety of the citizens of this state and its and wildlife, with the resultant higher level of employment and economic activity and stability. It is not intended hereby to authorize any municipality itself to operate any	The ESA requires consultation by federal agencies on actions that may affect listed species. The ESA provides no authority to require local municipalities to undertake projects to protect wildlife, absent a federal nexus.

[174]New Mexico Department of Game and Fish. 2006. Comprehensive Wildlife Conservation Strategy for New Mexico. New Mexico Department of Game and Fish. Santa Fe, New Mexico. 526 pp + appendices.

manufacturing, industrial or commercial enterprise. The provisions of the Pollution Control Revenue Bond Act shall be liberally construed in conformity with this intent.[175]	
WILDLIFE, HABITAT, CONSERVATION **New Mexico has established conservation districts to "enhance" wildlife and habitat.** A. The "conservation services division" is created within the department of game and fish. B. The conservation services division is responsible for: (1) management, enhancement, research and conservation of public wildlife habitat ; (2) the lease, purchase, enhancement and management of state wildlife habitat ; (3) assisting landowners in improving wildlife habitats; (4) development of educational programs related to conservation of wildlife and the environment, including the expanded dissemination of wildlife publications; and (5) communication and consultation with federal and other state agencies, local governments and communities, private organizations and affected interests responsible for habitat, wilderness, recreation, water quality and environmental protection to ensure comprehensive conservation services for	The ESA does not have a provision for the "enhancement" of a listed species. Only a prohibition against take and for activities that may allow "recovery".

[175] 3-59-3. Legislative intent.

hunters, anglers and nonconsumptive wildlife users.[176]	
WILDLIFE, FUNDING, HABITAT The purpose of the Game and Fish Bond Act is to provide for use of revenues derived from fees for hunting and fishing licenses to issue bonds to provide for fish hatcheries and rearing facilities, game and fish at acquisition, development and improvement projects and other similar capital outlay projects.[177]	The ESA does not provide dedicated funding.
WILDLIFE, ENDANGERED SPECIES, HABITAT **Requires studies to be conducted to determine the status and survival requirements of threatened and endangered species.** In addition to other powers and duties, the director (of fish and game): A. may acquire land or aquatic habitat interests for the conservation, management, restoration, propagation and protection of threatened or endangered species; and B. shall conduct studies to determine the status and requirements for survival of threatened or endangered species.[178]	The ESA cannot require a State to undertake conservation activities.

[176] 17-6-1 to 17-6-11 NMSA 1978] may be cited as the "Habitat Protection Act"; 17-1-5.1. Conservation services division; duties.
[177] 17-1-17. Purpose of act.
[178] 17-2-44. Director; land or aquatic habitat interest acquisition.

COUNTY AND LOCAL LAW

County	Authority	Synopsis
BERNALILLO COUNTY, NEW MEXICO		The Bernalillo County Open Space Master Naturalist Program aims to instill the pursuit of life-long learning and promote environmental stewardship. Participants are activity engaged through education and service dedicated to the beneficial management of natural resources on Open Space properties.
BERNALILLO COUNTY, NEW MEXICO	Code of Ordinances, Art. II, Sec. 58-46,	The purpose of this article is to promulgate laws that preserve Bernalillo County open space for the purposes for which they were acquired, including the protection of natural areas, cultural and historical sites, agricultural lands, wildlife habitat, water resources and viewsheds, the promotion of environmental education, and the provision of resource-based recreation.
BERNALILLO COUNTY, NEW MEXICO [179]	Sec. 58-107	No person shall harm, hunt, pursue, molest, harass, trap, collect or remove any mammal, bird, reptile or amphibian animals or eggs or young of such animals on/from open space lands.
Union, NEW MEXICO [180]	Ordinance # 40, Union County Wind Energy Siting Ordinance	Developed to assure production of wind energy is safe, effective and promote conservation. [181]

[179] http://library.municode.com/index.aspx?clientId=13071&stateId=31&stateName=New%20Mexico&p_PageAlias=all-county-ordinances
[180] http://nm-unioncounty.civiccities.com/directory.aspx
[181] http://www.unionnm.us/DocumentCenter/Home/View/9

Quay, NEW MEXICO	Quay County Comprehensive Plan	Once adopted, the Comprehensive Plan becomes the official policy of the County. It is passed as a resolution rather than an ordinance in order to maintain its flexibility and change as conditions and priorities change.
Eddy, NEW MEXICO	Ordinance 41, Land Use	The Eddy County Land Use Policies and Procedures was developed by Eddy Government to guide the use of public lands and cooperation with County, State and Federal governments. [182]
Eddy, NEW MEXICO	Comprehensive Plan	Ensures compliance with environmental standards and advocates the use of environmental studies in planning (page. 53). ... County/city cooperation in managing growth and development in the PPJ could include one or more of the following measures: ...proximity to environmentally sensitive lands or farmland. (p. 23)[183]
Eddy, NEW MEXICO	Ordinance 19, Regulating, Controlling the Growth and Removal of Plants	Encourages native plant growth[184]
Chaves, NEW MEXICO	Art. V, Area 1 Regulations	Designation of Wildlife Habitat[185]

182 http://www.co.eddy.nm.us/Ordinance%20pdfs/landuseO-02-41.pdf
183 http://www.co.eddy.nm.us/EddyCty-FinalRPT10-08.pdf
184 http://www.co.eddy.nm.us/Ordinance%20pdfs/weedsgrowthcontrolandremovalO-91-19.pdf
185 http://co.chaves.nm.us/~cochaves/pdf/ZoningOrdinance.pdf

Chaves, NEW MEXICO	Chaves County Comprehensive Plan and Zoning Report, 4-1	Public Land Policy[186]
Chaves, NEW MEXICO	Chaves County Public Lands Advisory Committee	A committee that coordinates with federal and state agencies on public land related issues, including environmental regulation. [187]
De Baca, NEW MEXICO		
San Miguel, NEW MEXICO	San Miguel County, NM Wind Energy Facilities Ordinance, No. SMC 10-14-03-ORD	Describes environmental scoping/planning/reporting required. [188]
	Regulating The Permitting, Placement, Construction And Modification Of Oil And Gas Drilling And Production	The purpose of this Ordinance to: 1. Provide for a permitting process for responsible oil and gas operations and allow responsible economic development within the County; 2. Protect the water, air, environment, wildlife and other natural and economic resources within the County;..[189]
Colorado		

[186] http://co.chaves.nm.us/~cochaves/pdf/Comprehensive_Plan.pdf
[187] http://co.chaves.nm.us/index.php/2012-05-03-17-38-37/planning-zoning
[188] http://www.smcounty.net/Web%20Docs/resolution%20no.%2002-08-11.pdf
[189] http://www.smcounty.net/Agenda/Oil%20and%20Gas%20Ordinance.pdf

Prowers, COLORADO		Utility and Development Permit Resolution and Prowers County Permitting & Development Guide including land use policy. [190]
Las Animas, COLORADO	Wildlife habitat analysis, special uses ect.	The Planning and Zoning Department is responsible for the administration and processing of applications for division of lands, subdivisions, rezoning and other land use cases.[191]
Bent, COLORADO	Zoning	Cooperates with federal agencies in planning for planning invasive species and wind farm programs.
Kiowa, COLORADO	Zoning and Planning	Approvals required from zoning and planning office commissioner
Otero, COLORADO	Areas having statewide impact or significance	Guidelines And Regulations For Areas And Activities Of State Interest County Of Otero State Of Colorado [192]

190 http://www.prowerscounty.net/Index.asp?HtAUNHADBcDIHwQ+NHADBcHt132i@330_DwVvZru3HhR7JKifAdCW2gmaUtOEnTljIqsXzyN8pcoB15YkQxe06bLFMSG49P+/

191 http://www.lasanimascounty.net/index.php/land-use-home

192 http://www.oterogov.com/images/LandUse/guidelinesregs20060814.pdf

Costilla, COLORADO		Comprehensive Plan outlines zoning, land use and environmental constraints.[193]
Pueblo, COLORADO	Rural land use plan, special uses	Title 17, Land Use and Zoning. The Rural Land Use process was adopted by Pueblo County to provide an alternative method of land division that encourages the clustering of single-family residential dwellings to maintain rural character, preserve open space, reduce the extension of roads and utilities, and offer landowners a new approach for developing the land without going through the full subdivision process. It provides a means of developing rural property while at the same time protecting wildlife habitat or critical areas, maintaining agricultural lands suitable for farming or ranching operations, and preserve and conserve water resources. In order to go through the Rural Land Use Process, the Cluster Development criteria must be met.[194] [195]
Oklahoma		
Roger Mills, OKLAHOMA	Zoning	Zoning permits and/or approval required for development
Greer, OKLAHOMA	Zoning	MAPC rezones for buildings , cell towers, and other structures. (Metropolitan action planning commission)

[193] http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Comprehensive+Plan+.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251756861482&ssbinary=true

[194] http://county.pueblo.org/government/county/department/planning-and-development/zoning

[195] http://county.pueblo.org/government/county/code/title17/chapter17-104

APPENDIX 6-- EXISTING CONSERVATION PROGRAMS

Name of program/Agency	Authority/Funding Source
FWS	
Four grant programs are available through the Cooperative Endangered Species Conservation Fund they include: Traditional" Conservation Grants, and; "Nontraditional" Grants: • Habitat Conservation Plan Land Acquisition • Habitat Conservation Planning Assistance • Recovery Land Acquisition Grants.)	ESA, Sec. 6 Support development of Habitat Conservation Plans (HCPs)federally listed threatened or endangered species, proposed and candidate species, and unlisted species proposed to be covered by the HCP.
USDA-	
Lesser Prairie Chicken Initiative	Prairie Chicken Initiative: The five states addressing Lesser Prairie Chicken habitat requested NRCS priority focus on improving habitat. NRCS and its conservation partners are helping farmers and ranchers enhance, restore and protect habitat for this sensitive and reclusive bird. For Fiscal Year 2013 Lesser Prairie-Chicken Initiative is funded under Wildlife Habitat Incentive Program.[196]
Wildlife Habitat Incentive Program	WHIP: The Food, Conservation, and Energy Act of 2008 reauthorized WHIP as a voluntary approach to improving wildlife habitat in our Nation. The Natural Resources Conservation Service administers WHIP to provide both technical assistance and up to 75 percent cost-share assistance to establish and improve fish and wildlife habitat..[197] In fiscal year 2011, the WHIP Program had a

[196] http://www.ks.nrcs.usda.gov/programs/lpci/index.html
[197] http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046975

<table>
<tr><td></td><td>U.S. total of 3,856 contracts, which represents 848,656 acres of land and a funding obligation of $60,580,860.

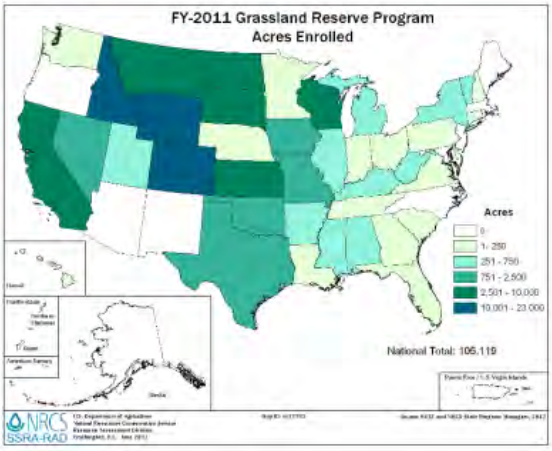
Contract Data for the impacted states[198]:
<table>
<tr><th>State</th><th># Contacts</th><th>Acres Enrolled</th><th>Funds Obligated</th></tr>
<tr><td>Colorado</td><td>12</td><td>15,655.9</td><td>$421,303</td></tr>
<tr><td>Kansas</td><td>119</td><td>23,799.1</td><td>$1,480,428</td></tr>
<tr><td>New Mexico</td><td>35</td><td>24,489.6</td><td>$779,789</td></tr>
<tr><td>Oklahoma</td><td>10</td><td>3,013.7</td><td>$185,084</td></tr>
<tr><td>Texas</td><td>283</td><td>317,448.9</td><td>$9,834,629</td></tr>
</table></td></tr>
<tr><td>Working Land for Wildlife</td><td>Working Lands for Wildlife is a new partnership between NRCS and the U.S. Fish and Wildlife Service (FWS) to combat the decline of seven specific wildlife species whose decline can be reversed and will benefit other species with similar habitat needs.

NRCS and FWS announced an agreement that will provide “long-term regulatory predictability for up to 30 years to farmers, ranchers and forest landowners participating in the U.S. Department of Agriculture's Working Lands for Wildlife (WLFW) Initiative.[199]

The agreement builds on a $33 million investment NRCS announced last spring dedicated toward producers who develop and implement conservation plans to manage and restore high-priority habitats for seven specific wildlife species across the country. The species are greater sage-grouse, New England cottontail,</td></tr>
</table>

198 http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/whip/?cid=stelprdb1046225

199 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

<table>
<tr><td></td><td>bog turtle, golden-winged warbler, gopher tortoise, lesser prairie-chicken and the Southwestern willow flycatcher."[200]</td></tr>
<tr><td>The Grassland Reserve Program (GRP)</td><td>GRP is a voluntary conservation program that emphasizes support for working grazing operations, enhancement of plant and animal biodiversity, and protection of grassland under threat of conversion to other uses.
2011 Easement Enrollment Data for impacted States:
<table>
<tr><th>State</th><th>Easements</th><th>Acres</th></tr>
<tr><td>Colorado</td><td>14</td><td>51,185</td></tr>
<tr><td>Kansas</td><td>74</td><td>42,133</td></tr>
<tr><td>Oklahoma</td><td>9</td><td>10,304</td></tr>
<tr><td>Texas</td><td>37</td><td>15,405</td></tr>
<tr><td>New Mexico</td><td>4</td><td>22,225[201]</td></tr>
</table>

</td></tr>
</table>

200 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/?cid=stelprdb1048842

201 http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/grassland/?cid=stelprdb1048273

State Acres for Wildlife Enhancement (SAFE) Approved Projects. SAFE is a voluntary program available under CRP's continuous sign-up, is designed to address state and regional high-priority wildlife objectives. Producers within a SAFE area can submit offers to voluntarily enroll acres in CRP contracts for 10-15 years.	In 2012, the SAFE Program identified the following priorities for the impacted States: [202] **Colorado Lesser Prairie Chicken SAFE** The goal of the Colorado Lesser Prairie Chicken SAFE is to restore and enhance 21,500 acres of short and midgrass sand sagebrush prairie to maintain and enhance lesser prairie chicken populations in Colorado. **Colorado Shortgrass Prairie SAFE** The goal of the Colorado Shortgrass Prairie SAFE is to preserve the integrity and expand the extent of shortgrass prairie managed for wildlife species in eastern Colorado. Project partners hope to accomplish this by enrolling 11,475 acres in CRP. **Kansas Upland Game Birds SAFE** The goal of the Kansas Upland Game Birds SAFE project is to improve populations of bobwhite quail and other grassland-associated wildlife by creating nesting/brood-rearing habitat on portions of crop fields. This SAFE effort will establish and maintain 30,100 acres in CRP consisting of diverse native grass and forb cover. Quail, pheasant and other grassland birds are species that will benefit from SAFE enrollments. **Kansas Lesser Prairie Chicken Habitat SAFE** The goal of the Kansas Lesser Prairie Chicken Habitat SAFE project is to enroll 30,000 acres in CRP to restore mixed-grass prairies to maintain and enhance lesser prairie chicken populations. The lesser prairie chicken is a candidate for federal listing as a threatened or endangered species. **New Mexico Lesser Prairie Chicken SAFE**

202 http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20110812_consv_en_safe.html

	The goal of the New Mexico Lesser Prairie Chicken SAFE project is to enroll 2,600 acres in CRP in the eastern part of the state to benefit the lesser prairie chicken by restoring native grasslands for breeding and brood-rearing. In eastern New Mexico, this bird and other species have been petitioned for listing under the Endangered Species Act. **Oklahoma Mixed Grass Prairie SAFE** The goal of the Oklahoma Mixed Grass Prairie SAFE project is to enroll 15,100 acres in CRP to restore mixed-grass prairie type associations in northwestern Oklahoma to benefit northern bobwhite, Cassin's sparrow and other grassland birds. **Texas Gulf Coast Prairies SAFE** The goal of the Texas Gulf Coast Prairies SAFE is to enroll 500 acres to restore grassland and shallow water habitats in the Gulf Coast Prairie region of Texas for a variety of bird species. **Texas Mixed Grass SAFE** The goal of the Texas Mixed Grass SAFE project is to enroll 78,400 acres in CRP to reconnect geographically and reproductively isolated populations of lesser prairie chickens by creating native mixed grass prairie and travel corridors. [203]

[203] ftp://ftp-fc.sc.egov.usda.gov/KS/Outgoing/Web_Files/Programs/lepc/2012/lpci_practices.pdf

APPENDIX 7 -- INDIVIDUAL, STATE AND REGIONAL VOLUNTARY ACTIONS

Name of program/Agency	Authority/Funding Source
The Western Governors Association Southern Great Plains Crucial Habitat Assessment Tool (SGP CHAT)	Range Wide 5 State Lesser Prairie Chicken Model – SGP CHAT is the result of phase one of a three-year WGA Wildlife Council project, led by the Oklahoma Department of Wildlife Conservation and the Kansas Department of Wildlife, Parks and Tourism. The purpose of the project is to model crucial habitat for the lesser prairie-chicken (LEPC) throughout its historical range create an online tool usable by conservation managers, industry, and the public that identifies priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning.[204] [205]
Lesser Prairie Chicken Initiative Kansas Field Training	Educational seminars related to the lesser prairie chicken. [206]
Wind Energy Siting Handbook: Guideline Options For Kansas Cities and Counties	This handbook offers voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy development in their areas. Power generation from wind is a new type of development in Kansas. In order for wind energy development to proceed in a manner that is carefully planned, inclusive, and expeditious, it is necessary to anticipate potential impacts and engage in a process that addresses various components and issues.[207]
Wildlife Habitat Evaluation Guide (WHEG)	The regionalized Wildlife Habitat Evaluation Guide (WHEG) for lesser prairie-chicken (LEPC) serves two functions: 1) use as a planning too lto identify limiting factors for LEPC; 2) and will be used to demonstrate what concerns/threats are most limiting range wide and how NRCS has addressed those on our LPCI contracts.[208]

[204] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[205] http://kars.ku.edu/geodata/maps/sgpchat/
[206] http://www.ksre.ksu.edu/doc13897.ashx
[207] http://kec.kansas.gov/reports/wind_siting_handbook.pdf
[208] http://www.ksre.ksu.edu/doc13898.ashx

	In 2000, the Association of Fish and Wildlife Agencies (AFWA) Teaming with Wildlife (TWW) coalition Representing more than 3,500 agencies, conservation groups and businesses led the passage of two important wildlife and fisheries conservation funding acts: Wildlife Conservation and Restoration Program(WCRP) and State Wildlife Grants(SWG) (TWW 2008 – 2011, see new TWW 2012). The following year, the United States' Congress required each state and territory to develop a "comprehensive wildlife conservation strategy" to guide the distribution of these funds(USFWS 2000). Eight elements of conservation success were identified by the US Fish and Wildlife Service (USFWS 2000) and a representative team from state fish and wildlife agencies and conservation organizations to guide the plans' development. The elements address species, habitats and communities, problems and issues, conservation actions, monitoring, plan reviews, coordination with conservation partners, and public involvement. SPECIES OF GREATEST CONSERVATION NEED (SGCN) Each state identified a list of species representative of the diversity, health and importance of the wildlife of their state. While the lists could include game and other state and federal regulated species, SGCN lists primarily focused on rare, declining, and vulnerable fish and wildlife species needing special attention for recovery, stability, and/or to prevent listings under state or federal regulation (e.g. Endangered Species Act). CONSERVATION ACTIONS AND MONITORING Conservation actions(e.g. research, survey, restoration, land or water protection, partnership-building) were defined to address the threats and issues which negatively affect species, habitats and systems. A baseline assessment of existing habitats was important for many states to define and prioritize where actions were most needed. For some states, this assessment could not be accomplished with the available data; therefore, baseline development itself became a conservation action. Actions were developed on

	the framework of existing conservation for each state: private landowner outreach, partnerships with other agencies and organizations, public involvement, legislative and regulatory support, to name a few. Measuring and reporting progress, lessons learned and successes ("effectiveness") is best accomplished through monitoring. This component is very important, yet frequently it is the most difficult to achieve due to very limited time, money and human resources. MOMENTUM 2005 – 2011 By 2006, 56 plans were created – one for each US state and territory – and approved by USFWS Regional review teams(TWW 2012). These plans were called State Wildlife Action Plans(SWAP) or Comprehensive Wildlife Conservation Strategies(CWCS). Since plans were approved, conservation partners and resource conservation agencies have seen the value in these plans grow as information resources, support or guidance for their conservation activities, and platforms for conservation practice improvement.[209]
Colorado Wildlife Action Plan	Submitted to the U.S. Fish and Wildlife Service on September 29, 2005, and it was finalized November 2, 2006. • 210 species were identified as Species of Greatest Conservation Need (SGCN). [210]
Interagency Group	W. Governor's Association Interstate Working Group
Upland Bird Grassland Habitat Strategy on the Eastern Plains	Grassland wildlife habitat conservation in eastern Colorado is implemented through a diverse mix of programs and efforts. Colorado Parks and Wildlife (CPW) has identified and prioritized areas of high upland wildlife habitat and population potential, which typically coincides with historic mid-grass or sand-sage prairie habitats.
Pheasant Habitat Improvement Program,	The Pheasant Habitat Improvement Program (PHIP) is a cooperative effort between the Colorado Parks and Wildlife,

[209] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_overview_2012.pdf
[210] http://wildlife.state.co.us/SiteCollectionDocuments/DOW/WildlifeSpecies/CWCS_FinalReport2006.pdf

(PHIP)	Pheasants Forever Inc., and local Pheasants Forever Chapters in Colorado. The program is designed to assist landowners in developing and enhancing habitat for ring-necked pheasants. PHIP is offered within the core pheasant range in Colorado, including the counties of Morgan, southeastern Weld, Logan, Phillips, Sedgwick, Yuma, Washington, Kit Carson, Cheyenne, Kiowa, Prowers and Baca.[211]
Private Lands Technical Assistance Programs	Private Landowner Assistance offers a wide variety of programs to assist private landowners on improving fisheries and wildlife on their property and can provide technical support and assistance on improving wildlife habitats.[212]
Habitat Partnership Program (HPP)	This grant is designed to encourage multiple entities to partner with the Habitat Partnership Program on large scale habitat improvement projects which, when completed, will provide benefits to livestock, private land owners, land managers, big game animals and other wildlife species. Habitat improvement projects include using mechanical and chemical tools to improve/increase available habitat and forage. Typical habitat improvement projects done by HPP include brush manipulation (hydroaxing, roller chopping, Lawson aerating, burning, etc), weed control using biological and chemical means, water developments (maintaining existing water sources and developing new ones), fertilizing and reseeding.[213]
Colorado Renewables and Conservation Collaborative	Five conservation groups and 10 leading wind energy companies in Colorado, along with Colorado Parks and Wildlife and other stakeholders are paving the way of our future by developing best management practices or BMPs that will be used to ensure wind farms and nature can coexist. The Colorado Renewables and Conservation Collaborative (CRCC) will help Colorado meet its renewable energy goal of obtaining 30 percent of its electrical energy

[211] http://wildlife.state.co.us/LANDWATER/PRIVATELANDPROGRAM/PHIP/Pages/PHIP.aspx
[212] http://www.kdwpt.state.ks.us/news/Services/Private-Landowner-Assistance
[213] http://www.riparianrestorationconnection.com/component/content/article/193-habitat-partnership-program-hpp-habitat-improvement-grant

	from renewable sources by 2020 in a wildlife friendly manner.[214]
LESSER PRAIRIE-CHICKEN WILDLIFE MANAGEMENT PLAN	The Texas Parks and Wildlife Department(TPWD) provides free technical assistance to landowners and land managers interested in wildlife management through the private lands enhancement program. Local biologists work with land owners to develop and then meet the wildlife management goals and objectives for all species of land owner interest on a given property. A wildlife management plan (WMP) can provide numerous benefits for landowners. Once implemented it improves habitat, potentially increases wildlife numbers, and can improve grazing resources. Additionally, use of a WMP promotes aesthetic value, and therefore can raise property value. The lesser prairie-chicken is a candidate species for listing under the Endangered Species Act. This particular WMP (specific to protecting and improving lesser prairie-chicken habitat) will fulfill the requirements for entering into a Candidate Conservation Agreement with Assurances(CCAA. [215]
Texas Conservation Agreement	CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES FOR LESSER PRAIRIE-CHICKENS between TEXAS PARKS AND WILDLIFE DEPARTMENT and U. S. FISH AND WILDLIFE SERVICE[216]
TEXAS CONSERVATIONACTIO N PLAN State/Multi-Region	Through the Texas Conservation Action Plan (TCAP), ecologists and other stakeholders all across the state have identified 1311 Species of Greatest Conservation Need (SGCN), 232 Rare Plant Communities, the best examples of habitats and those at risk, issues affecting our resources, and potential solutions to continue to protect lands and water for future generations of

[214] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/colorado/newsroom/wind-development-in-colorado.xml

[215] v http://www.tpwd.state.tx.us/publications/pwdforms/media/pwd_1046b_w7000_lesser_prairie_chicken_wmp.pdf

[216]http://www.tpwd.state.tx.us/huntwild/lesserprairiechicken/media/lpc_ccaa.pdf

	people, fish and wildlife. The challenges are many, but the landscape of conservation partners and opportunities is extensive. This plan is designed to help interested folks connect and put into practice the most needed conservation actions. [217]
An Assessment of Herbicide Treatment and Grazing on Lesser Prairie Chicken Survival, Nest Site Collection[218]	Blake Grisham- Department of Natural Resources Management, Texas Tech University [219]
Candidate Conservation Agreement With Assurances -Oklahoma	The U.S. Fish and Wildlife Service (Service) has approved the Oklahoma Department of Wildlife Conservation's (ODWC) Candidate Conservation Agreement with Assurances (CCAA) for the lesser prairie-chicken. - approved 2/5/13[220]
Great Plains HCP	HCPs are an integral component of an application for an Incidental Take Permit (ITP) under the federal Endangered Species Act (ESA). ITPs are a voluntary tool that non-federal entities may use to receive authorization for "take" of federally-listed (i.e., officially recognized as endangered or threatened) species of wildlife that may occur in connection with otherwise lawful activity. "Take" is defined in the ESA as, "…to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" with respect to federally-listed endangered species.[221]

[217] http://www.tpwd.state.tx.us/landwater/land/tcap/documents/tcap_statewide_multiregion_handbook.pdf
[218] http://www.ksre.ksu.edu/doc13892.ashx
[219] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1047721.pdf
[220] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04888.pdf
[221] http://www.greatplainswindhcp.org/documents/fact_sheet.pdf ; http://www.greatplainswindhcp.org/aboutthehcp.cfm

Oklahoma Conservation Commission	Commission created to assist with state conservation and education efforts and is an authorized rulemaking entity. [222] [223] The Oklahoma Conservation Commission and conservation districts accomplish conservation of renewable natural resources through soil and water conservation, landuse planning, small watershed upstream flood control, abandoned mine land reclamation, water quality monitoring, environmental education and wetlands conservation.
Ecology and Management of the Lesser Prai rie-Chick en[224]	Oklahoma Cooperative Extension Service, Division of Agricultural Sciences and Natural Resources, Oklahoma State University
Wildlife Credits Program	Offers stewardship payments to agricultural producers for work done to protect and expand habitat for the rare upland bird. Is made possible with an agreement between the Wildlife Department, Oklahoma Conservation Commission and the Oklahoma Association of Conservation Districts. [225]
Oklahoma Lesser Prairie Chicken Spatial Planning Tool	A System to Avoid or Minimize and Offset Negative Impacts of Development on the Lesser Prairie-Chicken (Tympanuchus pallidicinctus) through a Spatially-Based Planning Tool, Promoting Voluntary Offsets and Targeted Conservation Work: A Multi-Entity Collaboration in Oklahoma.[226]
Oklahoma Lesser Prairie Chicken Conservation Plan (OLEPCCP	a conservation plan to address the decline of the lesser prairie chicken (LEPC) in Oklahoma. The conservation plan will identify management strategies to improve LEPC population viability through improvements to LEPC habitat emphasizing tools and incentives to encourage landowners to partner with agencies in conservation efforts while achieving their land use needs.[227]

[222] http://www.ok.gov/conservation/
[223] http://www.ok.gov/conservation/About_Us/Rules_and_Rulemaking/index.html
[224] http://www.environment.ok.gov/documents/OKWindEnergy/EcologyMgmtLesserPrairieChicken.pdf
[225] http://www.wildlifedepartment.com/wildlifemgmt/lesser_chicken.htm
[226] http://www.wildlifedepartment.com/lepcdevelopmentplanning.htm
[227] http://www.wildlifedepartment.com/wildlifemgmt/lepc/cons_plan.htm

Habitat Evaluation Guide for the Lesser Prairie-chicken[228]	Guide for Management and Habitat Restoration co-authored by Oklahoma State University, George Miksh Avian Research Center, and the Nature Conservancy.
Eastern Ceder Removal	NRCS is using new technology to enhance existing satellite images to identify redcedar growth and estimate the inventory available for harvest. Counties that are included in this Cedar Mapping project: Cimarron, Ellis, Murray, Okfuskee, Pottawatomie, and Woodward.[229]
Lesser Prairie Chicken Initiative Core Conservation Practices	NRCS Programs for habitat restoration include: Brush Management, Early Succession Habitat Development, Firebreak , Fence, Obstruction Removal, Prescribed Grazing, Prescribed Burning, Range Planting, Restoration of Rare and Declining Habitat, Watering Facility supporting programs. [230]
Kansas Comprehensive Wildlife Conservation Plan[231]	The theme of Kansas' Comprehensive Wildlife Conservation Plan (CWCP) is "Keeping Common Species Common." A major premise of Kansas' approach to developing the CWCP was to use existing information - not to start from scratch or conduct new studies. The process relied heavily on experts and interested parties participating in the process to bring the best available information into the plan.
LONG-RANGE PLAN For The Management of Lesser Prairie Chickens in New Mexico 2002-2006	The goal of the plan is to satisfy the public's lesser prairie-chicken related recreational and ecological interests and resolve related socio-economic issues. A three-fold approach will be integral in achieving this: 1) We will obtain a better understanding of LPC abundance, distribution and population trends. 2) We will continue to seek public involvement in and support of LPC management efforts. 3) We will work with private landowners and land management

[228] ftp://wiley.kars.ku.edu/windresource/Habitat%20Evaluation%20Guide%20for%20the%20LPC.pdf
[229] http://boisecitynews2.wordpress.com/2009/03/03/oklahoma-launches-plan-to-battle-eastern-redcedar/
[230] http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcsdev11_023947.pdf
[231] http://kdwpt.state.ks.us/news/Services/Kansas-CWCP/Kansas-CWCP

	agencies to provide habitat necessary to ensure long-term conservation of LPC habitat.[232]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH[233]	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.
Southeast New Mexico Lesser Prairie-Chicken Working Group	NMDGF, as part of the Department's outreach efforts, NMDGF in collaboration with the USFWS, Bureau of Land Management (BLM), New Mexico State Land Office (SLO), and Wildlife Management Institute, proposed that a "Southeast New Mexico Lesser Prairie-Chicken Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LEPC in southeastern and east central New Mexico. The organizers hoped the various constituencies would be able to negotiate a collaborative plan that would, when implemented, improve the status of the species such that federal listing would no longer be warranted, while protecting the interests of the participating parties. In 2005, the Working Group adopted a conservation strategy and recommendations which laid out general approaches, priorities and parameters for achieving the goal of LEPC conservation and recovery while maintaining economic values and traditional land uses. The strategy document outlines and prioritizes a variety of recommended programs, projects, and practices for reducing threats to the LEPC while maintaining other uses of the land.
GIS habitat analysis for lesser prairie-chickens in southeastern New Mexico	Geographic Information System (GIS) habitat analyses for lesser prairie-chicken (LPCH, Tympanuchus pallidicinctus) conservation planning. The 876,799 ha study area included most of the occupied habitat for the LPCH in New Mexico. The objectives were to identify and quantify: 1. suitable LPCH habitat in New Mexico, 2. conversion of native

232 http://www.wildlife.state.nm.us/conservation/documents/PCLongRange.pdf

233 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	habitats, 3. potential for habitat restoration, and 4. unsuitable habitat available for oil and gas activities.[234]
Range-wide Population Estimation and Monitoring for LPC	A range-wide sampling framework and survey method is being developed to estimate total abundance of active leks for the population of LEPC. In addition, standard operating procedures are being developed for aerial surveys and ground truthing surveys.[235]
Interstate Collaboration Range Wide Conservation Plan	Lesser Prairie Chicken Interstate Working Group A focused conservation effort for LPC was described and approved by WAFWA through the Lesser prairie chicken conservation initiative (LPCCI) drafted by the Lesser Prairie Chicken Interstate Working Group (LPCIWG) in May 2008. The LPCIWG is one of the technical groups associated with the WAFWA Grassland Initiative and the 5 cooperating states have and continue to commit staff to this endeavor since it was formally established in 1996. The Lesser Prairie-Chicken (LPC) Interstate Working Group of the Western Association of Fish and Wildlife Agencies (WAFWA) is developing a range-wide conservation plan to increase the population of the LPC, in partnership within federal agencies and others. The states include Colorado, Kansas, New Mexico, Oklahoma and Texas. The conservation plan emphasizes tools and incentives to encourage landowners and others to voluntarily partner with agencies in LPC habitat conservation efforts, while also achieving their land use needs.236

[234] http://www.ksre.ksu.edu/doc13889.ashx
[235] http://www.wafwa.org/documents/Final_Study_Design_Appendices_12_8_2011.pdf
[236] http://www.wafwa.org/html/prairie_chicken.shtml

Memorandum Of Understanding For Conservation And Management Of Lesser Prairie-Chickens And Associated Species And Their Habitats	The purpose of this Memorandum of Understanding (MOU) is to provide, under auspices of the Western Association of Fish and Wildlife Agencies (WAFWA), for interagency cooperation in conservation and management of lesser prairie-chickens (Tympanuchus pallidicinctus) and associated species and their habitats across their current 5-state range (i.e. parts of Colorado, Kansas, New Mexico, Oklahoma, and Texas). The purpose of this MOU is also to provide for cooperation among participating agencies in the development and implementation of conservation programs for lesser prairie-chickens (LEPC) and their associated habitats. The participating agencies agree that cooperation is necessary to collect and analyze data on lesser prairie-chickens and their habitats, and to plan and implement actions necessary to establish and/or maintain viable LEPC populations that are sufficient to preclude present or future endangerment, within the constraints of approved budgets.[237]

[237] http://www.wafwa.org/documents/LPCCI_FINAL.pdf

New Mexico CCCA	This Candidate Conservation Agreement (CCA) for the LPC and the SDL represents a collaborative effort between the FWS, the Bureau of Land Management (BLM), and the Center of Excellence for Hazardous Materials Management (CEHMM). The CCA builds upon the BLMs "Special Status Species Resource Management Plan Amendment" (RMPA) (completed in April 2008) for southeast New Mexico. The RMPA established the foundational (minimum) requirements that will be applied to all future Federal activities, regardless of whether a permittee or lessee participates in this CCA. The strength of the CCA comes from the implementation of additional conservation measures that are additive, or above and beyond those foundational requirements established in the RMPA.[238] .As of July 15, 2012, thirty oil and gas companies are enrolled in the CCA/A for a total of 808,000 acres (the participating Federal agency in this case is the Bureau of Land Management (BLM)). In addition, forty-one New Mexico ranchers have enrolled a combined 1.5 million acres of rangeland in the CCA/A and the New Mexico State Land Office has enrolled 248,000 acres in the CCAA. Partners in the NM CCA/A include BLM, CEHMM (non-profit third party to manage funds and implement CCA/A's), New Mexico Department of Game and Fish (NMGF), New Mexico State Land Office and several oil-gas companies. The CCA/A includes the entire range of the lesser prairie-chicken in New Mexico.

[238] http://www.fws.gov/southwest/es/Documents/R2ES/LPC-SDL_CCA-CCAA_2008.pdf

North American Landbird Conservation Plan-co-authored by States, Industry and FWS	This North American Landbird Conservation Plan provides a continental synthesis of priorities and objectives that will guide landbird conservation actions at national and international scales. [239]
New Mexico LPC/SDL Working Group Conservation Plan	Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico In December, 2002, representatives of NMDGF, FWS, the Federal Bureau of Land Management (BLM), the New Mexico State Land Office (NMSLO), and the Wildlife Management Institute proposed that a "Working Group" of appropriate public and private stakeholders begin meeting to devise a conservation strategy for the LPC and SDL.[240]
Land Acquisition for Habitat	In May 2008, following an extensive public planning process, the Bureau of Land Management (BLM) designated an Area of Critical Environmental Concern (ACEC) about 35 miles east of Roswell. The designation is meant to provide much-needed habitat for two species being considered for listing under the Endangered Species Act: the Lesser Prairie-chicken and the sand dune lizard. To conserve this high value habitat, the BLM requested The Conservation Fund's assistance in acquiring key lands in and around the special area. The Fund has worked on several projects that together have protected about 58,000 acres of land.

[239] http://www.partnersinflight.org/cont_plan/#Access
[240] http://nwcos.org/Resources/LPC_SDL_Conservation_Strategy_CD.pdf

Land Acquisition for Habitat	The Johnson Ranch in southeastern New Mexico has been purchased by The Nature Conservancy. The 9,170 acre property contains critical habitat for 25 Species of Greatest Conservation Need—as identified in the state's Comprehensive Wildlife Conservation Strategy (also known as Wildlife Action Plan)—including the lesser prairie-chicken.
POWERLINE PROJECT GUIDELINES NEW MEXICO DEPARTMENT OF GAME AND FISH	Recommendations for conservation and development without wildlife disturbances. [241]
BASELINE WILDIFE STUDY GUIDELINE NEW MEXICO DEPARTMENT OF GAME AND FISH	This guideline is provided to assist in conducting inventories which thoroughly document wildlife and wildlife habitat presence, diversity, relative abundance, and distribution within the proposed project area and area of potential effects.[242]
RECOMMENDATIONS TO MINIMIZE ADVERSE IMPACTS OF WIND ENERGY DEVELOPMENT ON WILDLIFE 2012	The New Mexico Department of Game and Fish (NMDGF) does not have regulatory authority specific to wind power development, nor is there any other statewide permitting authority in New Mexico. The information in this guideline is intended for use by wind project developers, their consultants, local government and the general public. Developers are encouraged to contact NMDGF for project-specific comments and recommendations. Specific locations of listed species will be kept confidential, however other information shared with NMDGF may be accessible to the public through the NM Inspection of Public Records Act. NMDGF Guidelines referred to herein may be found in the

241 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/2007POWERLINEGUIDELINES.pdf

242 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WildlifeBaselineStudyGuidelinesand%20Appendix.pdf

	Habitat Handbook, under the Conservation tab on the Department website.[243]
Oklahoma Conservation Easement	The Oklahoma Wildlife Conservation Commission and the Department of Wildlife Conservation shall not enter into or approve a setback or conservation easement that includes a setback related to energy or agricultural structures and regarding a threatened, endangered or candidate species that is more restrictive than those created pursuant to federal law, rules or guidelines. B. Prior to entering into or approving a conservation easement or setback pursuant to subsection A of this section, the Commission and the Department shall review all information and studies presented to the Commission or Department by a public or private entity affected by the proposed conservation easement or setback.[244]
Colorado Conservation Easements	"Conservation easement in gross", for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural,

243 http://www.wildlife.state.nm.us/conservation/habitat_handbook/documents/WindEnergyGuidelines.htm

244 Title 29. Game and Fish, Chapter 1 - Oklahoma Wildlife Conservation Code, Article 3 - Wildlife Conservation Commission, Section 3-103b - Setback or Conservation Easement Related to Energy or Agricultural Structures and Threatened or Endangered Species. http://www.oscn.net/applications/oscn/deliverdocument.asp?id=466365&hits=481+480+475+474+260+259+253+252+189+188+182+181+12+11+5+4+

	horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.[245]
Colorado Conservation Easements	Nature of conservation easements in gross. (1) A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in section 38-30.5-102 and transferable by any lawful method for the transfer of interests in real property in this state. (2) A conservation easement in gross shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding that it may be negative in character. (3) A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it. (4) The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating the easement. (5) A conservation easement in gross that encumbers water or a water right as permitted by section 38-30.5-104 (1) may be created only by the voluntary act of the owner of the water or water right and may be made revocable by the instrument creating it.[246]
Colorado Conservation Easements	The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary. Further, the general assembly finds and declares that it is in the public interest to determine who may receive such easements and for what purpose such easements may be received.[247]

[245] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[246] http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/1315.pdf
[247] Title 38. PROPERTY - REAL AND PERSONAL, REAL PROPERTY, Interests in Land, Article 30.5. Conservation Easements.

Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP	Interior Secretary Salazar announces $57.8 million in grants for land acquisition, conservation planning for endangered species Multi-State Whooping Crane and Lesser Prairie-Chicken Wind Energy HCP- The planning proposal lands encompasses the whooping cranes migration route in the U.S. and their wintering grounds, along with containing a significant portion of current and historic habitat of the lesser prairie-chicken. This bi-regional HCP will be the first of its type in the country to involve alternative fuel sources and climate change issues while protecting imperiled species. The states involved are: Oklahoma, New Mexico, and Texas, North Dakota, South Dakota, Montana, Nebraska, Kansas and Colorado. Federal funding awarded: $1,080,990. The HCP Planning Assistance Grants Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach and similar planning activities. For example, the states of North Dakota, South Dakota, Montana, Nebraska, Kansas, Oklahoma, New Mexico, Colorado, and Texas will receive a total of $1,080,990 to assist in the development of a landscape level, multi-species HCP. The HCP will be designed to avoid and minimize impacts to endangered and threatened species associated with wind energy development. The HCP will encompass the whooping crane migration route in the U.S. and their wintering grounds, along with a significant portion of current and historic habitat of the lesser prairie-chicken. This multi-species HCP will be the first of its kind to involve alternative fuel sources and climate change issues while protecting imperiled species.[248]

http://search.jurisearch.com/NLLXML/getcode.asp?datatype=&statecd=CO&sessionyr=2012&TOCId=27609&userid=GUEST9&cvfilename=&noheader=1&Interface=NLL

[248] http://www.thecherokeean.com/news/2009-04-22/miscellaneous/conservation.html

APPENDIX 8-LITERATURE CITED

[Please note, where references are made to literature cited in the U.S. Fish and Wildlife Service's 2012 Proposed listing, for consistency, CESAR has adopted the abbreviated citation conventions used in that document.]

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March 10, 2014

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

RE: RIVERBANK ECOSYSTEMS' PUBLIC COMMENTS ADDRESSING THE NOTIC OF INTENT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR A HABITAT CONSERVATION PLAN FOR COMMERCIAL DEVELOPMENTS, INCLUDING ENERGY DEVELOPMENTS, AND AGRICULTURAL AND CONSERVATION ACTIVITIES WITHIN SIX STATES.

Dear Sir/Madam,

Please accept the following comments as the opinions of a professional scientist, conservationist, and ecosystems market practitioner. My academic background is in biology, ecosystems ecology, biogeochemistry and geomorphology. As a professional, I am an ecosystems market entrepreneur intimately familiar with market responses to ad hoc policy decisions by regulatory agencies. RiverBank Ecosystems (RiverBank), of which I am co-founder and President, is the sponsor of two approved stream mitigation banks (offsets for §404 and §401 of the Clean Water Act) in Texas. In addition, RiverBank has recently secured an option of conservation properties in the Sand Hills region of Yoakum County, Texas for the purposes of establishing a Lesser Prairie Chicken (LPC) conservation bank. We expect to submit a banking prospectus to Region 2 of the Fish and Wildlife Service (FWS) before the LPC listing decision.

As a result of recent conservation banking efforts, RiverBank has become familiar with the ecological, real estate and cultural conditions that will undoubtedly affect mitigation strategies should the species be listed. As a biologist and mitigation professional, I also have a strong sense of the LPC's risks should ineffective mitigation strategies be approved by FWS. It is from these perspectives that RiverBank provides these comments regarding

the proposed Stakeholder Conservation Plan (SCP), the Habitat Exchange Agreement (HEA) and the Habitat Quality Tool (HQT), collectively referred to as the Habitat Credit Exchange (HCEX). I sincerely hope these comments are useful for FWS, as they are designed to be both critical and solution oriented.

Before I begin enumerating my concerns and suggestions, please allow me to provide a few qualifying statements. First, I believe the effort and design of the HCEX is unprecedented and remarkable. The incorporation of a third party verifier and an exchange administrator potentially add significant improvements to more traditional environmental offset markets. Such a development in environmental market integrity is laudable, and I whole-heartedly believe such a design can prove remarkably effective. However, this design is only as effective for the LPC as the mitigation standards allow. Therefore, my comments are mostly critical of the mitigation standards, as I believe there are several fundamental flaws within these conservation initiatives, which need to be raised to the FWS's attention. While the tone of this letter may be terse in sections, I would like the readers to be aware my intent is not to condemn the HCEX. Instead, my intent is to uncover the HCP's shortcomings so these initiatives can be improved, and by extension, the LPC's chances for a full recovery.

This letter is also intended to help the FWS understand the market implications, from a conservation banker's perspective, associated with a simple approval of the HCEX. In the absence of significant modifications to the HCEX suffers from many of the same shortcomings as the Range-wide Plan (RWP; see RiverBank's public comment letter January 10, 2014 re: RWP, CCAA and 4(d) Rule). With it's legally unsupported confidentiality provisions, an emphasis on experimental short-term mitigation, and voluntary structure without any real enforcement mechanisms, the HCEX's resulting mitigation market will displace traditional conservation bankers, and with them, the higher, proven conservation standards the FWS has worked hard to establish over the years—mainly well-sited, permanent conservation. Moreover, the experimental conservation approaches represented by the HCEX, appear to be designed solely to produce a low-cost mitigation product of lower quality than traditional conservation banking credits.

The real price of inadequate mitigation is not a few failed entrepreneurial ventures (conservation banks); it is instead the listed species that bears the true costs. So please accept these comments as they are intended, critical and constructive. As I detail below, the FWS needs to find a policy solution that will allow the HCEX, the RWP and conservation bankers to co-exist in a post-listing environment, but such a policy will not be effective if there are not explicit policy preferences for permanent preservation-based conservation BEFORE impacts occur.

A CRITICAL ASSESSMENT

Unclear Goals and Objectives

The HCEX does not present quantifiable objectives. Performance standards are important in the effective evaluation of a conservation and compliance programs. However, the HCEX has left all such standards quite vague, potentially making evaluation problematic. This will

also hinder the application of the adaptive management program, which appears to more robust than the RWP's. In the absence of previously identified "triggers," an adaptive management plan may fail, as it may not initiate programmatic adjustments when necessary. As is the case with conservation banks, the FWS should require explicit, rigid, quantifiable performance standards upon which the HCEX can be evaluated once implemented.

Perhaps even more troubling is the fact that there appear to be no real avoidance and minimization standards in the HCEX. As BenDor and Woodruff (2014a; attached and incorporated herein) note, this is requisite in almost all environmental offset programs, as "an ounce of prevention is worth a pound of cure."

Outdated/Inaccurate Population Baseline Assumptions

A review of the best available science concerning LPC's population dynamics suggests the species is in rapid decline. As noted by McDonald et al. (2013), the LPC suffered an approximate 50% population loss from 2012 to 2013. In addition, McDonald et al. conclude the methods used in the 2013 survey are more accurate than the 2012 efforts, which serve as the basis for the HCEX baseline. From a legal perspective, Taylor (2014; attached and incorporated herein) concludes, "The Service [FWS] must use the best scientific information available when evaluating HCPs." It would appear that the use of inaccurate baseline population data ignores the best scientific information available.

Experimental Conservation

We have major concerns regarding the viability and potential efficacy of the HCEX mitigation strategy. <u>In particular, the use of "dynamic permanent" mitigation is an obvious departure from the status quo of species protection under the ESA.</u> This means that new lands must be encumbered as terms expire on other lands, producing an array of uncertainties regarding habitat protection. <u>The situation is further complicated by the realities that mitigation payments are made ONLY once, and offset provider participation is completely voluntary</u>. It is therefore reasonable to expect scenarios will arise, sooner or later, where securing new parcels to replace expired or terminated conservation agreements proves slower and more costly than anticipated. <u>The resulting losses suffered by the LPC will only be compounded by the FWS's inability to evaluate the HCEX's efficacy (confidentiality constraints mentioned above) and ultimately hold AHC accountable in the event of a mismanaged mitigation program.</u>

Conservation banks are void of these particular weaknesses, as they are planned, permitted and operated with discrete costs on predetermined parcels of land. These lands are permanently protected, funded and managed, reducing concerns permanent impacts are not offset in the future. <u>If the FWS approves the HCEX as is, without explicit preferences and requirements for conservation banks and permanent conservation (discussed further below), the mitigation outcomes will undoubtedly be hampered by the overreliance of short-term, moving conservation, which is nothing less than experimental (BenDor and Woodruff 2014b; attached and incorporated herein). If coupled with strict standards linked directly to LPC outcomes, perhaps approval on limited scales would be warranted; however, as proposed, the HCEX is shifting risks, normally born by mitigation providers</u>

directly to the LPC and the FWS. I cannot overemphasis the point here: extreme caution should be exercised with regard to term-conservation.

CONCLUSIONS AND SOLUTIONS

Environmental Policy Dictates Market Behavior

I cannot overstate the gravity of the decisions facing FWS with the listing, the HCEX, proposed 4(d) Rule and the RWP. As I discuss in detail above, there are numerous reasons for the conservation community to be concerned with the collective proposals. While I recognize and appreciate (to a certain extent) the need for FWS to make market decisions in an ad hoc manner, any such decision will dramatically affect mitigation outcomes, which in turn affects a species' chances of recovery in a post-listing environment. Should a poor decision be made now, the LPC's rapid decline will continue, potentially passing a threshold where recovery becomes impossible.

Environmental markets are not driven by consumer preference; they are driven by fiat. Meaning, a mitigation purchase is almost always an action of compliance. Therefore, policy must be designed to encourage the establishment and support of adequate and appropriate mitigation. I acknowledge that policy sometimes becomes overly burdensome, making compliance and economic development impracticable. Thus a balance should be struck between adequate-and-appropriate and affordable mitigation strategies, the proposed HCEX, the RWP, and the 4(d) Rule do not provide such a balance. Collectively they offer an inexpensive and potentially infinite source of empty mitigation, which is unlikely to support the LPC's recovery. Still, I believe the presence of the HCEX, the 4(d) Rule, and the RWP will be important for the LPC and the economy of the Southern Great Plains. Nevertheless, their presence should not supersede more reliable conservation solutions when and where available.

A Collaborative Solution

Conservation banks have proven successful for several other species in other parts of the country. Their reliance on permanent conservation, non-wasting endowments and adaptive management plans in the presence of rigid performance standards has produced a model that should not be excluded as a mitigation solution for the LPC, intentionally or unintentionally. Should the proposed HCEX, and 4(d) Rule be approved in the absence of an explicit preference for conservation bank credits when and where available, the HCEX and/or the RWP will be the market choices for compliance, as they will provide low-cost mitigation. Even worse, if the FWS allows the HCEX and the RWP to operate without substantive modifications in the absence of other policies governing mitigation market behavior, the LPC will lose in a potential "shell game" where the predominate mitigation program is haphazardly governed by malleable goals and little or no accountability.

In an effort to avoid the "shell game" scenario, **the FWS should publish a policy simultaneously with the approval of a significantly modified HCEX, 4 (d) Rule, and RWP that requires the utilization of released bank credits generated under FWS approved Conservation Banking Agreements when and where available.** The 4(d) Rule, a CCAA or the HCP component of the HCEX could be used as the vehicle for

compliance transactions (i.e., formally matching bank credits with impacts conducted under other programs like the 4(d) Rule and HCEX). If/when approved bank credits are not available, the RWP or HCEX should become the preferred source of offsets.

An arrangement of this nature will incentivize permanent conservation and stronghold establishment, directly authorized and evaluated by the FWS, while providing industry with guaranteed sources of offsets. More importantly, as multiple bankers are attempting to enter the LPC arena, this policy will drive preservation purchases in the near-term, quickly protecting and establishing the most important strongholds available.

Conclusion

I hope my comments are constructive for the LPC's cause as well AHC's and their industry partners. FWS has the authority to institute a mindful and nuanced suite of policies as part of any listing decision that will establish a sustainable mitigation market. Not only would my suggested policy solution provide the LPC with a real chance at recovery, it would provide the FWS with regulatory certainty, industry with a variety of avenues to procure mitigation, it will also diversify the market in the event of litigation.

Thank you for your consideration of my concerns and suggestions. I am available to answer any questions; so please do not hesitate to contact me.

Sincerely,

J. Adam Riggsbee, PhD
President

References

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March 10, 2014

Dear USFWS:

Attached please find a white paper submitted as part of the public comment period on the EDF/American Habitat Center's Habitat Credit Exchange (HCEX) market system, as documented in the *Stakeholder Conservation Plan* (SCP), *Habitat Exchange Agreement* (HEA), and *Habitat Quantification Tool* (HQT). As researchers with a combined 13 years of experience studying wetland, stream, and habitat offset markets across the United States, we are submitting this document to express significant issues with the Habitat Credit Exchange as it is currently designed.

Thank you for your consideration of these comments.

Sincerely,

Todd BenDor
Associate Professor
Department of City and Regional Planning
University of North Carolina at Chapel Hill

Sierra Woodruff
Doctoral Candidate
Curriculum for the Environment and Ecology
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Comments on the Environmental Defense Fund and American Habitat Center Habitat Credit Exchange (HCEX)

Stakeholder Conservation Plan (SCP)
Habitat Exchange Agreement (HEA)
Habitat Quantification Tool (HQT)

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Summary

On February 12, 2014, the American Habitat Center (AHC) and the Environmental Defense Fund (EDF) released three draft documents describing a Habitat Credit Exchange (HCEX) for the Lesser Prairie Chicken (LPC). These draft documents included the *Stakeholder Conservation Plan* (SCP), the *Habitat Exchange Agreement* (HEA), and the *Habitat Quantification Tool* (HQT). We refer to these documents collectively as describing the operation of the HCEX.

In part, the SCP represents an unprecedented market structure that we believe, if implemented with appropriately qualified administrators and third-party verifiers, represents a significant advancement in ecosystem service trading. In particular, the role of a third-party verifier and an exchange administrator add potential layers of accountability that currently do not exist within contemporary Endangered Species Act (ESA) and Clean Water Act markets, at least not at such broad scales. However, as we discuss in detail below, the integrity of this novel structure is likely to be undermined by low mitigation standards and under-qualified participants. So while we are impressed with the proposed market exchange design, it is only a means of administration and verification of external standards. Conservation outcomes of the LPC cannot be controlled by administration and verification; these will instead be determined by the external mitigation standards.

The stakeholder conservation plan (SCP), if endorsed by the FWS, would provide a mechanism for property owners to achieve compliance with the ESA through Candidate Conservation Agreement with Assurances (CCAA). By agreeing to comply with the plan's mitigation rules, property owners are allowed to continue covered activities that may result in incidental take of the species. By including a CCAA and HCP the plan allows for property owners to enroll before or after listing of the species. Enrolling in the HCP portion of the plan following the potential listing of the species is much more efficient than applying for a permit from ESA (p. 100).

Similar to our recent evaluation of the Western Association of Fish and Wildlife Association's (WAFWA) range-wide plan (RWP), we conducted an evaluation of these documents from the standpoint of researchers who focus on sensitive ecological and environmental systems and were not involved in the conception of design of the HCEX. We have modeled this analysis off of our previous evaluation of the RWP.

Our evaluation found a number of problems with the HCEX as it is currently designed. To detail our concerns, we have organized our evaluation into 10 major critiques as summarized below. Many of these critiques are similar to those of the RWP, while several are substantially different:

1. Confidentiality provisions –The confidentiality provisions in the HCEX are not appropriate for a government-promoted environmental program. These provisions 1) are vague regarding the information that will be kept away from regulators and scientific auditors, 2) represent a major departure from previous habitat trading schemes, 3) limit the public's access to information about critical species protection mechanisms, and 4) continue a disturbing precedent for secrecy in

environmental protection programs that has been the subject of litigation.

2. Scientific advisory apparatus + concerns over conflicts of interest - The proposed HCEX scientific advisory apparatus is vague and necessitates additional policy and economics expertise. Furthermore, the actors engaged in running the HCEX (variously referred to as the 'Exchange Administrator', 'permit-holder') need to be clarified. It appears that the exchange administrator is slated to be the *American Habitat Center*, an oil and gas industry group with no previous role in any environmental market or organization. Installing a market administrator with a reputation lacking independence appears to be a clear conflict of interest and will create trust problems among LPC stakeholders.

3. Unclear goals and objectives – The SCP goals diverge substantially from RWP goals in lacking any population objective for the future. Instead, emphasis is placed entirely on habitat with no real habitat quality goals. Objectives are not quantifiable or measurable to determine if the SCP is successful or not.

4. Calculation of credits and mitigation ratios + the use of crucial habitat assessment tool (CHAT) - All data used to define habitat and CHAT function is publicly available remote sensing data that may be erroneous. The RWP habitat quality metrics may have definitional problems. Mitigation ratios and temporal relationships are not determined scientifically.

5. Unclear Enforceability – The HCEX structure is entirely voluntary, with no enforcement mechanisms to implement a mitigation hierarchy (avoidance and minimization) or ensure compliance.

6: Lack of Avoidance/Minimization criteria – The SCP seems designed to streamline habitat impacts and offsets, without considering avoidance altogether or minimization. There seems to be no emphasis on these steps in a 'mitigation hierarchy' to avoid unnecessary impacts.

7: Additionality and interactions with other markets – The SCP explicitly suggests that credits could be resold into other ecosystem markets, highlighting an inconsistency in treatment of additionality provisions required by the SCP for other LPC conservation programs (i.e., conservation banking). LPC conservation credits should not be 'stacked' (i.e. also sold as carbon credits into the California market, etc.) without explicit requirements in the HCEX structure.

8: The risks of dynamic permanent mitigation – The extensive use of temporary offset contracts 1) is not supported by ecological literature, 2) is almost entirely un-tested in habitat markets, and 3) will not likely lead to positive conservation outcomes for the LPC. The use of this approach should be exercised with extreme caution, and should not be a major component of the conservation strategy, as it may risk further declines for the LPC (BenDor and Woodruff 2014).

9: The fallacy of temporary impacts and mitigation – The SCP gives no evidence that impacts can be temporary, or should be treated as such. It also gives no indication of how credits should be budgeted for the period where 'temporary' impacts are remediated, if this is at all possible.

10: Lack of interagency coordination – Like the RWP, the SCP misses an important opportunity to establish the Exchange Administrator as a centralized planning and management authority that helps local, state, and federal authorities collaborate and prioritize LPC conservation efforts.

Report Details

#1: Confidentiality issues

While the SCP includes more discussion of confidentiality than the WAFWA plan, it does not appear to have more relaxed confidentiality rules. "Confidential data regarding private property, or which would identify or lead to the identification of any private property, will not be released under any circumstances without specific written agreement from the private property owner or their designee" (P. 12). Quite simply, it is imperative for regulators and auditors to understand the locations of habitat impact and offset sites to understand habitat dynamics and movements, limiting compliance verification and adaptive management.

Participants enroll land to produce credits through performance contracts and conservation easements (p. 10). A management plan will be developed for each participating property. This plan (Appendix B. Exhibit A) includes a description of the property rights, goals for the property management, a description of existing conditions including current management practices, and conservation actions. Conservation actions are divided into required practices, which must be implemented for credits to be realized.

Question: Why are these participant management plans not public information?

Instead, the exchange administrator summarizes LPC information in an annual report to FWS that specifies: "the number of participants; the amount of enrolled acreage by Service Area; accountings of Credits that have been registered but have not been Transferred, credits transferred, credits retired for the Net Benefit of the Covered Species and Covered Habitat, and Credits in the Reserve Account; an accounting of Credits and funds from the Restoration Fund used in Remedial Actions; recommendations developed by the Science Committee[…]" (P. 16)

Question: Will the HCEX information management structure give the USFWS enough information to determine the outcomes of the habitat-trading system?

The confidentiality provisions of the SCP are not well-defined. Although substantially better than the WAFWA RWP, it is not clear how regulators will determine that no net-habitat loss is occurring in given service areas as maps will not be given to the USFWS.

Like the RWP, the SCP has not made a strong case for blanket confidentiality for participating landowners. The case for confidentiality should override a strong prevailing interest from regulators, the public, and other stakeholders in knowing where and when habitat are being restored or preserved to offset LPC damage. It is not clear that blanket confidentiality will drive landowner participation. It is clear that blanket confidentiality has been problematic for any entity hoping to determine whether the habitat trading system is functioning well – i.e. the regulatory and environmental community (see sage brush lizard discussion in Tesauge 2013).

This type of confidentiality provision is not present in conservation banking instruments (USFWS 2003), nor is it present in many other, well-established trading markets, where landowners readily participate without a need for blanket confidentiality (likely based on market prices for participation). Finally, while the SCP and HEA reference state privacy laws, it is not clear whether this type of federal program falls under those jurisdictions.

Conclusion: The confidentiality provisions in the HCEX are not appropriate for a government-promoted environmental program. These provisions 1) are vague regarding the information that will be kept away from regulators and scientific auditors, 2) represent a major departure from previous habitat trading schemes, 3) limit the public's access to information about critical species protection mechanisms, and 4) continue a disturbing precedent for secrecy in environmental protection programs that has been the subject of litigation.

#2: Science panel + concerns over conflicts of interest

The proposed HCEX scientific advisory apparatus is vague in that it does not discuss how the appointment process is to be conducted in an open and transparent process.

Questions: Who appoints scientific advisors for the HCEX? Why is the USFWS member non-voting?

We note that both the RWP and the SCP attempt to take away any direct intervention in the system from regulators.

Another issue is that the science panel does not seem to have any role for habitat market or economics experts. Like the RWP, this suggests a potential source of some of the problems that we will point out throughout this analysis; while there is significant biological expertise around the LPC, there does not seem to be expertise in designing markets that structure incentives to accomplish the goals of the HCEX. The lack of this expertise may raise concerns over the ability to effectively create the appropriate incentive scheme for property owners to engage in credit creation.

Furthermore, the actors engaged in running the HCEX (variously referred to as the 'Exchange Administrator', 'permit-holder') need to be clarified. It appears that the exchange administrator is slated to be the AHC, an organization that appears to have no previous track record of any type. What is "AHC"? What qualifications are given for running a market that may grow to be quite large and complex?

Of particular concern is that the AHC has no previous role in any environmental market or organization. A basic Google search yields only two entries for "American Habitat Center," both of which are Texas news articles revealing the organization to have been created by oil and gas industry lobbying groups. (See: http://www.texastribune.org/2013/08/27/energy-lobbyists-set-sights-lesser-prairie-chicken/ and http://amarillo.com/news/local-news/2014-02-07/groups-

announce-prairie-chicken-programs).

Installing a market administrator with a reputation lacking independence appears to be a clear conflict of interest and will create trust problems among non-industry LPC stakeholders and the appearance of industry 'self-regulation'.

This immediately becomes apparent during the four-paragraph attempt to discuss an 'alternatives analysis' (Section 12.1 on Pg. 97), which dismisses ESA goals off hand in lieu of straw-man arguments like "[h]alting development as a result of a listing decision was thus not a reasonable alternative..." and discussions of the national role of the regions agricultural, ranching, and hydro-carbon sector. This conflict of interest continues in the HEA, wherein the goals of the HCEX appear to turn towards enabling continued habitat impacts in a seamless manner (see section below on lack of impact avoidance and minimization procedures).

A plan such as the SCP should include a strong discussion of the role of the ESA in mediating economic growth and sensitive endangered populations, including the role of market-mechanisms in providing economic incentives to find alternatives to destroying habitat (evidence from decades of research into wetland and stream markets, cap-and-trade, payments for ecosystem services, etc.). Given that plans have long been acknowledged to relay the values of those creating them (Berke et al. 2006), the SCP reveals much of the AHC as a potential future market manager. It is not clear how the AHC will be able to balance 1) its clearly stated goals of minimizing barriers to continued LPC habitat impacts with 2) its responsibilities as Exchange Administrator.

#3: Unclear goals and objectives

The plan includes a robust discussion of areas for further research. In fact, one of the stated goals is to "Enhance knowledge and comprehensive understanding of the LEPC" (pg. 52). Areas for further research the plan identifies includes: (1) assessing the actual impacts of human disturbances; (2) the effectiveness of habitat restoration; and (3) LEPC Biology (gp. 74). New scientific information and results from program monitoring will be reviewed every year for the first three years, and at least every three years thereafter, to recommend modifications to the program.

While the plan does a good job of discussing goals (Pg. 51), the objectives that they propose are not quantifiable. Plan objectives typically seek to be specific, benchmarked and measurable points (Berke et al. 2006). The plan's adaptive management discussion (p. 75-78) is relatively strong, but the lack of quantifiable objectives may hinder adaptive management efforts as it will be impossible to determine if goals are being met.

On page 69, the SCP discusses how "3% of all Credits will be retained to promote conservation of the LEPC". This 'Restoration Fund' is intended to be an insurance mechanism for unforeseen circumstances like credit failure. It is unclear, however, exactly how these credits will be retained – who will purchase these credits? Or will this simply be a surplus on the market causing delays in the economic return for credit producers?

The financial goals of the exchange are not clear. While there is a fee to put credits on the exchange (p. 96), there is no discussion of incentives for credits. What are the payoffs for credit production? Furthermore, what is the logic in restricting credit re-sales? We've never seen these types of terms in an ecosystem market structure, and can only surmise they are intended to control credit price increases, thereby keeping mitigation prices as low as possible.

The plan offers avenues for undercutting some of its own goals. For example, the plan states that credits must be generated in the same geographic region of the impact (p. 65). The exchange also allows for buyers to aggregate credits produced in multiple locations to offset a single impact (p. 31). However, there are several service area exemptions (pg. 16), such as the restoration goals in the area have already been met or offsets outside the service area provide adequate ecological value.

Question: What evidence is required to allow exemptions to same-service area offsets?

Like the RWP, perhaps most challenging is the dismissive way that the SCP treats the precipitous recent decline in LPC population (Pg. 32). The plan does note that the LPC has been subject to population fluctuations in the past, this being said recent survey results indicate a 56% decline between 2007 and 2013. While past fluctuations may in part be due to unstandardized methods, recent data collection has been standardized. While the plan supports using habitat as a proxy for LEPC, and intends on using available survey and density data to estimate takes (p.85), the SCP seems to treat this substantial decline as a natural feature of the long-term population fluctuations of the species. The plan should focus more on goals around species count and stability. Aiming to conserve specific amounts of habitat while taking a certain number of individuals implies that species counts will continue to shrink and habitat compression will continue to occur in the face of all conservation efforts.

#4: Calculation of credits and mitigation ratios + the use of crucial habitat assessment tool (CHAT)

In absence of a better existing tool, the SCP uses the WAFWA CHAT to assign mitigation ratios. The SCP then appears to simplify the mitigation ratio by removing the multiplier for credits, thereby creating a rather confusing system for calculating credits.

Overall, we find the HQT complicated and lacking discussion of how credits are produced and measured. Also important is that the plan does not have a strong discussion of <u>mitigation ratios</u>.

The habitat quantification tool is used to combine quantity and quality of habitat into a single metric – "functional acre". The authors recognize they do not have complete information and the tool will have to be improved through adaptive management.

Our Interpretation of the calculation of Functional Acres:

The HQT combines data from four scales. The second order scale is intended to quantify and evaluate conditions that may affect LEPC performance and may assist in strategic planning (p. 15). Currently, the actual conditions that are important at the landscape scale for LPC success are poorly understood. The HQT states that they will use data driven processes to identify these important conditions, but in the meantime will use CHAT categories. Including conditions at the landscape scale may also help create incentives credits in the most important places for LPC populations and dis-incentivize impacts (p. 17). Currently the HQT uses the CHAT mitigation ratios, although they recognize that "CHAT does not provide a rigorously LEPC data-driven approach that meets the SCS Science Committee criteria for standardization, adaptability, or transparency" (P. 18).

The third order scale includes surrounding conditions that may relate to LEPC performance such as extent of native vegetation, patch size, developed land cover, etc. (p. 18). At this scale there are three important factors: (1) developed land cover and tree cover reduce the suitability of the site (2) quality of open land – this is confusing, but the HQT uses something like a centered scale where 1 = average quality, thus they can reward sites located in high quality locations; and (3) human modifications such as transmission lines, roads, fences, etc. reduce site quality by a certain percentage dependent on the modification density.

The fourth order, or local scale, includes conditions for both nesting and brood rearing. To evaluate the conditions at a site, the site is divided into sampling squares, some number of squares (sufficient to provide thorough coverage, but unspecified in the HQT) are randomly selected for sampling, 5-10 points within the square are randomly sampled. At each sampling point the maximum height of obstruction (MHO) by grass, MHO by taller grass and shrub, as well as forb cover is recorded. Measurements are adjusted to a standardized scale and then averaged. Then all squares are averaged together. This standardized score is than multiplied by acres to get functional acres.

The final functional acres also accounts for deductions on local scale due to human modification, and the third order measurements. This is all very complicated, but the SCP does a relatively good job of being transparent.

Questions:

- ***What remains unclear is what constitutes a credit?***
- ***At what point following a credit project or impact will assessments be done?***
- ***The HQT also includes the length of time an impact will be present (we address this later in section 8 on temporary impacts), but will credits to offset the life of impact need to be purchased upfront?***

Our major criticism here is the same as for the RWP:

1. *All data used to define habitat and CHAT function is publicly available remote sensing data.*
2. *Habitat quality seems to have definitional problems.*
3. *Mitigation ratios and temporal relationships are not determined scientifically.*

Given the importance of the CHAT determinations on substantive market policies and procedures, it seems that extensive efforts should be made to verify and improve the data used by the CHAT. Therefore, we also pose the same questions as before:

Questions:

- ***Is there a means of determining whether the remote sensing data are accurate?***
- ***Have any verification procedures been used (Have any field studies been conducted?)?***

While the CHAT categorization certainly creates higher mitigation requirements for the most valuable conservation areas, it may not go far enough. It is surprising that the only adjustments to this ratio are given based on the CHAT category of impacts. While we understand the basic, underlying logic at play, this appears to be a completely unscientific way of establishing mitigation ratios. Many studies exist, including Moilanen et al. (2009) and Bruggeman and Jones (2008), which help to more rigorously support mitigation ratio choices.

Relating to our previous critique of the temporary nature of WAFWA offsets:

Questions:

- ***How can the HCEX provide mitigation in advance (as required under USFWS conservation banking guidance) when they are not planning ahead of time for major impacts?***[1]
- ***How do mitigation ratios account for any of the uncertainty and temporal delays incurred through habitat restoration?***

In addition, the HCEX/CHAT/RWP fails to fully describe how CHAT categories are calculated and how they will change in the future. The rules for defining different categories are not explicit; what exactly qualifies as priority LPC areas? How is corridor defined in CHAT 2? How good a predictor of available and potential habitat is the maximum entropy model used in CHAT 3? Without these explicit definitions and rules it is unclear how these areas may shift overtime and under changing conditions. Likewise, although HCEX states that CHAT categorizations will be updated, no timeline is provided.

#5: Unclear Enforceability

Like the RWP and unlike conservation banking or wetland mitigation, the plan does not create clear shifts in liability between parties, nor are the plan provisions legally enforceable. "Each party shall have all remedies otherwise available to enforce the terms of this Plan and the Permits, except that no party shall be liable in damages for any breach of this Plan, any performance of failure to perform an obligation under this Plan, or any other cause of action arising from this Plan" (p. 102).

[1] Like the RWP, the HCEX will suffer from temporal lags from landowners signing up to offset impacts. See Section 9 for a discussion.

Property owner's compliance with mitigation requirements is "documented through reporting, compliance checks, photos and remote sensing" (p. 66). Like the RWP, the Exchange Administrator may suspend the coverage of property owners if they fail to fulfill their obligations of mitigation. Discussion of the procedure for removing coverage is discussed in the appendices, appendix B-1 p. 4 (or 151 of 282)

Credits have a staged release schedule. Some credits may be released immediately on the market following third party verification of habitat quality. Following this initial release, credits are released when 25, 50, 75, and 100 percent of maximum habitat performance specified in the customized management plan is reached (HEA p. 14). To release these credits, the participant must also secure 25, 50, 75, and 100 percent of required financial assurances and performance guarantees respectively. These financial guarantees may include surety with a bonding company, collateral assignment of a certificate of deposit, certified or cashier's check, letter of credit, cash, or participation in an insurance pool (HEA p. 31). Verification is required before additional credits may be released and every five years since the most recent verification. The exchange administrator may also randomly select properties for periodic verification (HEA p. 13).

It is encouraging to see at least some penalties for defaulting on credit agreements, as well as the required financial assurances. The exchange also establishes a "reserve account" to hold credits that are not used for mitigation, except during specific situations. These extra credits are paid for with a percentage of credits transferred in each transaction (Pg. 19). In the first year, 7% of credits transferred in each transaction are put in reserve, in the second year the percentage decreases to 6%, in the third it drops to 5% and 4% in the fourth. Credits in the reserve account may replace: credits damaged by force majeure, credits that have been used for mitigation and then damaged as a result of split estate and development of minerals on the property, credits that have been sold and then discovered to not meet the required criteria, credits that have been sold and removed due to premature termination of contract, and to bridge gaps in the coverage between subsequent term agreements (Pg. 20). Credits used to replace credits lost for non-compliance must be replaced within one year after the credits are used for mitigation (Pg. 21).

"The exchange administrator is responsible for ensuring that sufficient financial resources are in place to cover in the event that a participant in the Exchange does not fulfill the Participant's obligation to the Exchange (Pg. 27)." The exchange additionally establishes a "restoration fund" to provide funding for restoration projects for credit production. On page 7, the agreement discusses restoration in more detail stating that the committee recognizes restoration is more costly, may have time lags until credits are available for release, and that they may be particularly important in the recovery of LPC. A fee of 2.5% of the cost of the credits transferred in each transaction is deposited in the restoration fund (p. 22). This fund is used for the development of credits on restoration sites. 20% of the fund is also reserved to assist participants in recovering habitat quality following damage by Force Majeure.

If the Exchange Administrator or FWS determines that the Exchange is operating at a credit deficit, credit transfers exceed the credits authorized for release, all transfer of credits will immediately

cease, with remedial actions will be determined by the FWS and Exchange Administrator (p. 25). Once a site has been restored, the property will be evaluated by a third party verifier to determine the number of credits generated by the site (Appendix B). If a property is found to be in non-compliance, no additional credits will be released (how often are permits verified? A monitoring timeline is given, but if credits are bought/sold yearly, are verifications completed yearly? If not, why not?). The Exchange Agreement specifies a remedial action plan if participants fail to meet performance standards (p. 24-25), however, it is not clear how these remedial action plans will be used to help participants that fail to achieve the contract performance; the SCP/HEA contain few details, and it appears that the SCP intends to deal with these failures on a case by case basis.

One possible problem – it is clear that property owners can terminate their contractual relationship with the HCEX at any time and only be subject to partial loss of credits, as well as a relatively small early-termination fee. (Pg. 31). Participants financially liable for terminating their contract (either voluntarily or because of poor performance) must return a percentage (100, 75 or 50% depending on time of contract less than 30, 30-60, or more than 60% respectively) of the payments received under the contract and an additional percentage (25, 15, or 5) of the total contract amount as an administrative penalty. These funds will be used to secure replacement credits; any excess funds will be used to purchase credits for the reserve account. This means that owners can immediately, and without extensive penalty, cancel credits with little notice to the HCEX.

Questions: What are the possible ecological 'bottleneck' effects of this (see permanent dynamic mitigation section for discussion)? What does the HCEX plan on managing this? Will the 'reserve account' be able to cover this dynamic?

It is not clear how the HCEX will identify landowners and get them to agree to enter the program, which is a notoriously difficult part of conservation and mitigation banking. Fee and simple acquisition of land can be challenging in this area due to decoupling of surface and mineral owners. In cases that property owners do have "unified interests" property can be enrolled in perpetual preservation, and sell the generated credits (P.50). The Exchange Administrator facilitates the transfer of credits via requests for proposals, bid rounds, reverse auctions, and other unspecified means (p.10). The SCP/HEA do not specify how this process is initiated.

Question: Does the HCEX create strong enough incentives to establish credits?

#6: Lack of Avoidance/Minimization criteria

An important issue in the protection of the LPC involves avoiding and minimizing unnecessary habitat impacts. The SCP requires avoidance, minimization, and mitigation of impacts on enrolled property (Pg. 2). While it provides guidelines for all covered activities (Pg. 55 – 60), like the RWP, there is no metric of success.

Question: Where/when/how are impacts minimized? What should impacts be minimized in comparison too? Who determines if the construction was in fact minimized?

At no point is there a regulatory authority such as the US Army Corps of Engineers (in wetland and stream mitigation) to intervene when participants want to enter the market and determine that impacts are happening unnecessarily.

#7: Additionality and interactions with other markets

We appreciate the SCP's attempt to consider 'additionality' in restoration efforts for the LPC. The HCEX attempts to prevent duplication of conservation effort by requiring participants to disclose other property commitments such as participation in other federal and state programs (appendix B). If more credits are produced on a property than previously verified, the participant may request reevaluation at their own expense. Additional credits, based on new analysis, may be released (HEA p. 15). However, where conservation values has already been protected and restored, the property is not eligible to receive credits.

However, while the SCP specifically prevents 'double dipping' (selling the same credits multiple times through the HCEX), Pg. 2 of participation contract (Section 5) specifically allows credit stacking – the act of selling restoration work as multiple forms of credits – and thereby creating the possibility of double dipping into additional environmental markets. Robertson et al. (2014, In Press) discusses the immense ecological, bio-geochemical, regulatory, information technology, and philosophical problems with credit stacking. It is surprising to see its explicit allowance in the SCP. The USFWS should heed the warning of Robertson et al. (2014) and ban the use of credit stacking in the face of huge uncertainty around its use and abuse (see documentation of credit stacking abuse by the NC Legislature:
http://www.ncleg.net/PED/Reports/documents/Wetlands/Wetland_Report.pdf).

We can see this problem when we look at how credits are verified by a "Qualified Third Party Contractor" (p. 68) prior to being released on to the exchange. It is unclear if there is any measure in place to prevent restoration projects supported through other projects from selling credits, this is a violation of additionality of credits. On page 103: "If the Participant has received funding from other sources, such as Partners for Fish & Wildlife or NRCS, they may need to repay other funding sources in accordance with agreements the participant makes with these funding sources."

#8: The risks of dynamic permanent mitigation

Like the RWP, the SCP relies on the year-old concept of 'Dynamic permanent mitigation,' wherein mitigation is achieved by the use of credits produced in a series of term agreements such that the duration of the mitigation is permanent, or in the case of the HCEX, at least 30 years long (although the SCP defines permanent as a duration of 100 years or more, the HCEX is only set to be permitted for 30 years). Buyers must mitigate impacts for the length of the impact plus the time required for the land to recover to the baseline level of habitat quality (pg. 30). Credits may be purchased yearly to offset long-term impacts (pg. 27).

It is unclear if the length of contract is built into the credits produced. HQT is a calculation of functional-acreage, but does it include time? If 25% of site credits are released, does this refer to 25% of the credits produced over the entire life of the contract?

As we discussed in our analysis of the RWP, and have recently published in the peer-reviewed journal *Sustainability* (BenDor and Woodruff 2014), the use of temporary, serial offsets is likely to pose major impediments to long-term LPC viability.

The background on the lesser prairie chicken includes very little discussion of fidelity to nest sites, juvenile dispersal, or other biological characteristics that are likely to play an important role in the design of effective credit exchange. Literature on the LPC note extensive return behaviors to previous habitat (see van Pelt 2013); this contrasts starkly with the heavily migratory[2], saiga antelope of Uzbekistan that was the subject of the Bull et al. (2013) study used to justify dynamic permanent mitigation in the first place.

The Exchange will establish a non-wasting endowment fund to provide assurance of managing the participating properties and a wasting endowment for the acquisition of new contracts to ensure there are no gaps in dynamic permanent mitigation (Pg. 27).

Question: While the Exchange endeavors to prevent gaps in dynamic permanent mitigation, how will the HCEX structure avoid ecological bottleneck effects, whereby species are forced into smaller and smaller habitat areas during contract transition periods (see Bedward et al. 2009)?

The temporal component of credits and debits also remains unclear. Credits must be purchased prior to impact; this should ensure no time lags between impact and mitigation. However, buyers can stockpile credits by purchasing credits and holding them for up to three years. What type of temporal dynamic would this create?

Credits may also be retired for non-mitigation purposes to benefit the LPC (HEA Pg. 17). Furthermore, the protocol for retirement is not entirely clear – how will credits be selected for retirement? How will these retired credits be paid for?

Finally, credits may be resold through the exchange (and they must be sold if they have not been used within 3 years of purchase), but the price of credits being resold cannot exceed 110% of the original purchase price (p. 17). We assume that this price control is to prevent speculation within the exchange. This is fairly unorthodox in environmental/ecosystem markets. What is the reasoning for this requirement? It seems to artificially increase supply of credits.

[2] The plan area is greater than the species existing range. To account for the potential shift northward of the LPC range in response to climate change and drought conditions, northern areas were included in the plan area and may in the future may be eligible to sell credits on the exchange (SCP Pg. 34, also discussed in HQT pg. 11). The plan sites Elmore et al. (2013) to support this argument.

#9: The fallacy of temporary impacts and mitigation

Overall, the treatment of time is probably the biggest issue that we find in this plan. What is the time component of credits? Are credits sold every year? If so, it seems that verifications should be completed every year. For example, HQT modifications are explicitly designed to not apply retroactively to past credit calculations (HEA Pg. 21). If this is the case, does the term accounting change? How can offsets be meaningful designed if they are inflexible for transactions, yet are set in stone for quantification.

We recommend readers reference our previous white paper on the temporary nature of habitat impacts, which is largely based on BenDor's (2009) exploration of the time delays necessary to create mitigation. Additional literature in this area includes Moilanen et al. (2009) and Bruggeman and Jones (2008).

While these questions mirror those that pose on the badly-designed 'dynamic temporary mitigation' system in both the RWP and the SCP, the SCP seems to provide no guiding logic suggesting that temporary mitigation or the HQT matches the life history, biological, or ecological characteristics of the LPC**.** Unlike the RWP, the SCP explicitly considers some types of impacts to be 'temporary' (it is not clear which; Pg. 30). We are not aware of any evidence that oil, gas, or infrastructure impacts can, in fact, be considered to be anything other than permanent; that is, ample evidence (see van Pelt et al. 2013) seems to suggest that physical habitat impacts drive away LPC more or less permanently. The idea, put forth in the HQT, that impacts can be for some small set period of time, is not supported by the literature.

That being said, the LCP and HEA do not define when impacts will be considered to be temporary or permanent. That is, while property owners can purchase credits to offset impacts (prior to their impact; Pg. 64) through the exchange or other FWS approved conservation banks or exchange programs, it is unclear if credits are required for the entire life of the impact or just for each year of the impact. The HQT gives a detailed (yet confusing) example of the credit accounting around a 30-year impact (Section 3.4.1), but no consideration is given to the amount of theoretical time that it would take to remediate/restore the habitat damaged. For example, much of this example discounts the landscape fragmentation issues associated with long, narrow impacts. It is evident that the HQT lends no consideration of style or form of impacts on species movement or fragmentation.

Questions: Where is the evidence that physical impacts to LPC habitat from oil, gas, and infrastructure can be 'temporary' and can be remediated after potentially decades of intensive use? How does the HQT account for the length of time for remediation?

#10: Lack of interagency coordination

Unfortunately, like the RWP, the SCP fails to promote interagency coordination needed among state and federal agencies. However, unlike the RWP, the HCEX does not bring the major state fish and

wildlife agencies to the table. Even issues like continued hunting will add additional complexity to LPC management in this scenario. We re-iterate the major points made in our analysis of the RWP here for the HCEX.

In this discussion, we offer suggestions to improve LPC conservation proposals by drawing on recent work that highlights the role of large-scale planning and inter-institutional coordination in improving the function of restoration markets. Large-scale planning should be incorporated in order to: (1) overcome "thin markets", (2) resolve tension between keeping offsets near impacts and providing the greatest conservation benefit, and (3) provide greater institutional collaboration in protecting the LPC.

Unlike the HCEX, which allows credits to be sold prior to full implementation (diverging from requirements in the 2003 USFWS Guidance on Conservation Banking), many markets have required full establishment before credits can be sold into offset markets. Unfortunately, in this situation Landry et al. (2005) and Salzman and Ruhl (2000) note that offset markets can become "thin" markets, where low supply and demand leads to an inactive market. As a result, the creation of offset credits may be inhibited by reluctance to invest under uncertain demand.

One solution to this problem has been implemented in North Carolina, where a state agency, known as the NC Ecosystem Enhancement Program (EEP), acts as a credit re-seller, purchasing credits from wetland mitigation sites and selling them to buyers in need of offsets. Although the "Exchange Administrator" in the HCEX provide a similar service, the SCP unfortunately does not call for any of the planning activities of the EEP. The EEP draws on local transportation plans to estimate long-term future demand for restoration credits (Dye Management Group 2007). The EEP then competitively bids out restoration far in advance of impacts, specifying the number and type of credits needed and setting specific conditions for choosing a winning bid. Theoretically, the bidding process encourages greater competition on price and quality (Landry et al. 2005). In addition, the EEP effectively assumes the risk of over- or under-estimating the demand.

By implementing a hierarchical and intensive planning program for wetland, stream, nutrient and riparian buffer offsets, the EEP has also resolved issues between localized offsets and incentivizing large-scale mitigation projects. Most offset programs require that mitigation benefits accrue to impact areas, although they differ in how proximate offsets must be (McKenney and Kiesecker 2010).

Originally, the US wetlands mitigation policy called for mitigation activities adjacent or contiguous to the impact site when practicable. This approach was criticized for creating piecemeal mitigation projects with high failure rates and no appreciation for the greater watershed context. Since it was established in 2003, the EEP has attempted to site projects in sub-watersheds that would benefit most from restoration efforts. BenDor and Stewart (2011) describe the EEP's planning program in detail, wherein large-scale river-basin restoration identifies targeted local watersheds for increased scrutiny, some of which undergo intensive local watershed planning processes to identify valuable areas for restoration.

While the operation of this system has been marred by numerous operational problems (e.g. Dye Management Group 2007; BenDor et al. 2009; Templeton et al. 2008), the system won several national awards (EEP 2009) and places North Carolina in a very strong position to strategically implement Army Corps of Engineers and EPA's new requirements to use a watershed approach in managing wetland mitigation markets (Corps and EPA 2008).[3] Under the watershed approach, mitigation sites should be located within the same watershed as impact sites, but sited to provide the most services and best benefit the entire system (McKenney and Kiesecker 2010).

We can apply the benefits and drawbacks of this system to proposed LPC conservation efforts. Under the USFWS (2003) conservation bank guidance, banks should choose locations that provide for the long-term conservation of habitat and species. In practice, however, bankers have discretion to locate banks as long as they are sited within a 'service area' defined by the US Fish and Wildlife Service. The HCEX similarly lacks a method for prioritizing areas for conservation.

The SCP uses the Core Habitat Assessment Tool (CHAT) to prioritize areas for conservation, by increasing the impact multiplier while simultaneously discouraging development and incentivizing mitigation efforts. While CHAT helps target offsets in focal areas, this tool is based almost entirely on publicly available remote sensing data. Planning efforts such as those by the EEP vastly augment this data (whose accuracy or adequacy is not discussed in the WAFWA RWP). In addition, it is unclear if the suggested mitigation ratio is in fact high enough to effectively incentivize avoidance and conservation (a further critique of the CHAT categorization is provided in Section H of this comment).

Van Pelt et al. (2013) and USFWS (2012) identify varying sources of LPC mortality, including habitat fragmentation and sub-population isolation, and locally- or state-permitted development, hunting efforts, and roadway mortality. It is evident that there is a great need to coordinate the efforts of agencies overseeing these aspects of the LPC. BenDor and Doyle (2010) argue that this coordination establishes important information feedback mechanisms whereby these agencies are able to take into account the location and landscape arrangement of offset sites into *their* planning and management efforts. For example, Glista et al. (2009) notes important factors connecting road planning with wildlife road mortality and habitat fragmentation, which long-range planning processes could help to coordinate, thereby improving state departments of transportation planning efforts for LPC purposes. Without this coordination, many regulators and institutions managing landscape change can be blind to the importance and location of LPC habitat offsets (e.g., see BenDor and Doyle 2010).[4]

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[3] NRC (2001) note that the Corps and EPA can use a portion of their budget for watershed planning in wetland markets; however, for largely political reasons, watershed planning was not made a requirement in the 2008 wetland mitigation regulations, and the 'watershed approach' (the use of increased watershed information) was instead made a standard requirement.

[4] We see this in Polansky et al.'s (2008) discussion of the difficulties in accounting for externalities associated with spatial habitat management. The ecological or conservation value of any given private property is dependent on neighboring properties. As a result, land use decisions can produce benefits and costs for neighboring landowners, or externalities (Hartig and Drechsler 2009). Land uses that lower the habitat

Conversely, institutional coordination must also direct information on the actions of local, state, and federal agencies towards efforts to conserve the LPC. In this case, where information flows from other institutions into the market, information on development and landscape change projections help to estimate demands for LPC offsets and help systems to establish them in advance of impacts. [5] BenDor and Doyle (2010) argue that the lack of this feedback is a major hindrance to the operation of a mitigation banking system; depending on the landscape level impacts (e.g., fragmentation, water quality degradation, etc.) that other governments can have, conservation banking systems for the LPC may exhibit similar long-term viability problems. The USFWS should require that any market-based mechanism include well-conceived projections for future supply and demand for habitat offsets.

In correspondence between Keith Sexson to Regional Director Benjamin Tuggle (June 2, 2012), WAFWA argued that:

> Accomplishing landscape-level management requires state of the art tools, as well as coordination and engagement of agencies, NGO conservation partners, and industry.

<u>We completely agree, and strongly suggest that any plan for LPC conservation (particularly those utilizing market-based tools) helps to coordinate all of these actors</u> (see BenDor and Doyle 2010). However, these reports and continued planning and adaptive management efforts actually suggested in the RWP completely miss the work of other important planning organizations (such as the BLM, which has established a resource management plan in Oklahoma that gives special species status to the LPC). Detailed planning efforts could be undertaken by the HCEX to support a trading program. The model for this is the NC Ecosystem Enhancement Program, an agency that has attempted to run its own market (with numerous problems), as well as provide planning support to restoration efforts throughout the state (BenDor and Stewart 2011). This widespread and innovative planning activity creates a framework for interfacing with state departments of transportation, oil and gas licensing organizations (e.g., Texas Railroad Commission), and federal agencies also engaged in LPC management.

Therefore, the SCP is missing an important opportunity to improve interagency coordination and act as a model for future habitat trading programs.

Recommendations: Market-based efforts to conserve the LPC should leverage the EEP's approach to implement a targeted planning system that will:

1) Insert information on LPC management actions into the actions of local, state, and federal agencies (beyond the state wildlife agencies that are already involved).

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quality in surrounding parcels (e.g., because they create noise or pollution), act to lower the credit value for neighbors. Likewise, enrolling land in conservation may increase the ecological value of neighboring land.

[5] This is evident in the fact that the EEP fails to draw on local development plans, leading to poor estimates of future aquatic ecosystem impacts (BenDor and Doyle 2010),

2) Insert information on the actions into the actions of local, state, and federal agencies into efforts to conserve the LPC.

Along with these institutional coordination aspects, we also recommend an incentive system such as that studied by Hartig and Drechsler (2009), who found that simple spatial incentives to encourage clustered or connected conservation produce positive effects relative to no spatial incentives, especially for species limited by dispersal. Essentially, markets that consider spatial connectivity of LPC habitat would likely result in much better conservation outcomes. This could come in the form of incentives to governments or partnering organizations that construct infrastructure in clustered manners so as not to disconnect conservation areas.

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Article

Moving Targets and Biodiversity Offsets for Endangered Species Habitat: Is Lesser Prairie Chicken Habitat a Stock or Flow?

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Abstract: The US Fish and Wildlife Service will make an Endangered Species Act listing decision for the lesser prairie chicken (*Tympanuchus pallidicinctus*; "LPC") in March 2014. Based on the findings of a single, Uzbek antelope study, conservation plans put forth for the LPC propose to modify and re-position habitat in the landscape through a series of temporary preservation/restoration efforts. We argue that for certain species, including the LPC, dynamic habitat offsets represent a dangerous re-interpretation of habitat provision and recovery programs, which have nearly-universally viewed ecosystem offsets (habitat, wetlands, streams, *etc.*) as "stocks" that accumulate characteristics over time. Any effort to create a program of temporary, moving habitat offsets must consider species' (1) life history characteristics, (2) behavioral tendencies (e.g., avoidance of impacted areas, nesting/breeding site fidelity), and (3) habitat restoration characteristics, including long temporal lags in reoccupation. If misapplied, species recovery programs using temporary, moving habitat risk further population declines.

Keywords: endangered species; habitat offsets; environmental markets; dynamic habitat

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1. Introduction

The development and spread of wetland and stream mitigation in the United States has functioned as a model for emerging ecosystem markets, including water quality trading (e.g., nitrogen markets) [1] and endangered species habitat offsets (e.g., conservation banking) [2], in the United States and other nations (e.g., Australia, Brazil, Colombia, and South Africa). Substantial literature has focused on the use of biodiversity markets for conserving endangered species, whereby impacts to habitats are viewed as species "takes", and are required to be offset through habitat preservation and/or restoration in another location [2]. A good deal of work has attempted to draw connections between the type of market-based incentive mechanisms seen in wetland and stream markets with the specific habitat needs of species targeted for conservation [3].

In this paper, we will similarly remark on the nature of ecosystem markets, particularly as they can be viewed as "stocks" or "flows"; flows being trades of nearly instantaneously obtainable and transient commodities or conditions to be traded in a market, and stocks being the accumulations of those flows or conditions over longer time periods. In drawing this important distinction between different types of ecological markets, we pose a simple question—one whose answer may change depending on the exact policy application: Should the restoration or preservation of species habitat represent a "stock" or a "flow" of ecological services across the landscape?

We pose this question in response to the recently proposed application of the concepts introduced by Bull *et al.* [4] for a species potentially receiving federal protection under the Endangered Species Act. Bull *et al.* [4] provide insight into conservation techniques for species whose habitat is particularly difficult to safeguard. The authors propose the use of temporary habitat offsets that can shift along with species whose habitat "moves" in space, as a result of migratory behaviors or environmental changes (e.g., climate change). In developing their conception of dynamic habitat offsets, the authors cite Poiani *et al.* [5] who sampled 20 existing conservation projects, estimating that "…more than half would require major alterations if climate-change impacts were considered. In cases where species' ranges are projected to shift in response to climate change, mobile [protected areas] could facilitate conservation". Bull *et al.* [4] go on to argue that the effectiveness of permanent protected areas may be compromised when conservation targets are not stationary. For example, stationary protected areas fail to protect migratory species over their life cycle. Bull *et al.* [4] provide an interesting (and convincing) application of dynamic habitat offsets to the saiga antelope in Uzbekistan.

Our interest in dynamic habitat offsets arises from the recent range-wide plan created by the Western Association of Fish and Wildlife Agencies (WAFWA) to protect the lesser prairie chicken (*Tympanuchus pallidicinctus*; "LPC"), a member of the grouse family that has experienced precipitous decline over the last decade throughout its range in the United States Southern Great Plains [6,7]. This range-wide plan is innovative in many ways and represents an elevated level of coordination by the US states containing LPC habitat in an attempt to avert a potential collision between rapid energy production and LPC recovery. However, we would argue that the application of Bull *et al.*'s [4] species conservation insights to the LPC represent a dangerous re-interpretation of endangered species habitat provision (and endangered species conservation, generally) as a "flow" in the landscape.

The idea that habitat can be modified and spatially re-positioned through a series of *temporary* preservation/restoration efforts, is a substantial departure from previous recovery programs, which

have viewed ecosystem offsets (habitat, wetlands, streams, *etc.*) as "stocks" that accumulate characteristics over time [8]. In addition, the range-wide plan's proposed dynamic habitat offsets do not adequately consider the LPC's (1) life history characteristics, (2) behavioral tendencies (such as avoidance of previously impacted areas or inclinations towards specific nesting zones), and (3) habitat restoration characteristics, including long temporal lags in habitat establishment. While the Lesser Prairie-Chicken may be particularly ill-suited for temporary habitat offsets, the issues that arise in this case are not unique and must be considered in other habitat markets considering temporary habitat conservation to offset permanent impacts.

2. A Range-Wide Plan for Protecting the LPC

WAFWA's plan represents an effort by five state governments to preclude a formal listing of the LPC by the US Fish and Wildlife Service (FWS) under the US Endangered Species Act (16 USC 1531–1544). If formal listing is not avoided, and the LPC is listed as a "threatened" species (one step under an "endangered" determination), then WAFWA may be granted an exemption (known as a 4(d) ESA exemption) under its proposed plan. In this case, landowners participating in the WAFWA plan may continue development and landscape impacts as long as they comply with the plan (which is intended to have a net benefit for the species). Although the USFWS remains the ultimate arbiter of whether a species is being adequately protected, a 4(d) exemption would delegate much of the authority of LPC conservation to WAFWA.

WAFWA's plan heavily leverages biodiversity offsets (the terms "mitigation" and "offsets" are dependent on the specific market, but are used interchangeably here), whereby habitat that is impacted by development (typically oil and gas extraction or electric/road infrastructure), is offset by restoration or preservation of grasslands habitat elsewhere. However, unlike previous efforts to create permanent habitat restoration or preservation sites (as seen in the USFWS [8] *Guidance on Conservation Banking*), WAFWA [7] (p. 93), attempts to make offsets heavily dynamic in the landscape, drawing on the logic put forth by Bull *et al.* [4]:

- "The WAFWA Mitigation Framework will implement two separate mitigation trading markets, one based on short-term (5–10 years) contracts and another focusing on long-term conservation. The need for this two-market system is based on LPC biology, habitat stochasticity, and anticipation of population shifts brought on by changing climatic conditions. Unlike other grouse species, LPC appear to be adaptable to changing habitat conditions (*i.e.*, structure, grass species composition *etc.*), which can be created in a relatively short time period (within 2–8 years) […]."
- "This moving conservation concept is further supported by a recent study that cautions against using traditional conservation strategies involving static tools (e.g., protected areas that have fixed spatial boundaries). J.W. Bull *et al.* [4] discuss the difficulty of implementing conservation for "moving targets" such as migratory species or landscapes subject to environmental change. The observations made by J.W. Bull and others about landscapes are similar to those observed within the range of the LPC. They propose approaches for dealing with "moving" conservation targets by including mobile protected areas, which follow their targets across the landscape."

Bull *et al.*'s [4] study, which argues that flexibility in offsets are key to species conservation, is used to justify WAFWA's determination to implement 75% of all offsets as a series of temporary contracts with landowners. WAFWA may also place emphasis on temporary contracts because the majority of LPC habitat (95%) occurs on privately owned lands and effective conservation of LPC is likely to require significant support from private parties [7]. Permanent conservation is expensive and often requires extended management to maintain suitable habitat conditions for target species. Dynamic habitat conservation is intended to quickly affect change in habitat condition over a larger spatial extent. Due to the pervasiveness of these conservation challenges, temporary offsets suggested in the WAFWA plan seems to be indicative of future conservation offset efforts for other species [9]. The growing prevalence of temporary contracts in offset markets emphasizes the need for careful evaluation of the consequences of relying on dynamic habitat conservation to offset permanent impacts.

3. Ecosystem Markets: Trading Stocks or Flows

In exploring whether LPC habitat should be considered a "stock" or a "flow", we can draw on previous work in U.S. aquatic mitigation markets, which include U.S. Clean Water Act Section 404 (33 USC 1344) mitigation markets for wetlands and streams [10], and more recently, water quality offset markets [11]. Efforts to draw analogies and gain lessons from the nearly 30 years of wetland market implementation have included relevant work by Raffini and Robertson [12] and Robertson and Mikota [11], who explore policy differences between water quality trading and wetland markets.

Perhaps the most relevant difference is the fact that water quality markets, at least as they have been articulated under US Policy, are a function-based "flow" market, wherein trades are typically articulated as contracts leading to changes in land management actions that temporarily decrease water pollution, usually on a yearly basis. That is, payments lead to temporary improvements in water quality, which can be initiated or severed at any time, and which must be repeated year after year. A lack of trades can lead to low water quality in one year, and widespread and well-enforced contracts can lead to vast improvements in water quality the next year. Depending on the regulated water body (e.g., in-stream water *vs.* an estuary), the location and time extent of water quality management actions may be of little importance as long as the overall water quality in a water body is improved on an immediate time scale [13]. Water quality credits represent a function-based commodity defined by a single function: typically denitrification, phosphorus sequestration, or sediment retention [11]. The result of this is that the quality of water in a body (typically a river system) does not accumulate (at least not as interpretable under recent policies); it is an attribute of a continually flowing system.

This contrasts markets for wetlands or streams themselves, which trade credits based on overall conditions, "stocks" or a "bundle of functions". While single function measures, such as vegetation cover, may be used to assess mitigation sites, these serve as a proxy for a range of ecosystem functions [14]. Condition-based credits recognize that ecosystem functions are intertwined and that the complex connections between functions remain largely unknown and unquantified [11]. Restoration of wetlands and streams takes years or decades to produce adequate or stable ecological functions. If management actions cease, the wetland or stream ecosystem conditions deteriorate and cannot be immediately reversed the following year. As a result, wetland and stream markets that trade condition-based credits

operate inherently as "stocks" that accumulate energy inputs (e.g., plantings, hydrologic regime establishment, soil conditioning, *etc.*).

Robertson and Mikota [11] further argue that an important difference between markets for stocks (ecosystems) and flows (ecosystem outputs) is that flows are temporary, while stocks produce a permanent set of functions that are required to be protected and maintained for perpetuity. In the case of the LPC, we can consider both kinds of markets: as a stock, LPC credits represent functional habitat protected for perpetuity; as a flow, LPC credits represent species counts over a period of time (*i.e.*, "chicken-years"). Differently stated, when considering if a condition- *vs.* function-based metric is appropriate, we must consider whether we are interested (1) in the actual condition of LPC habitat, or (2) in the population (or other habitat outputs) of LPC on habitat sites.

4. Application to the LPC

A fundamental question that must be addressed while evaluating the design of any market-based habitat offset system for the LPC is: Is LPC habitat a stock or a flow?

The WAFWA range-wide plan, which is primarily based on Bull *et al.*'s [4] dynamic habitat offset concept, treats LPC habitat as if it is a flow, providing a single function similar to water quality offsets. The plan claims that temporary contracts allow flexibility to shift conservation areas as LPC range changes due to climate change. As such, habitat offsets can fluctuate between preserved/restored habitat and other uses based on contracts that can sequentially expire [7]. While short-term conservation contracts may be beneficial to allow for long-term LPC range change that may or may not happen, these benefits must be evaluated in light of (1) the cost of habitat turnover, (2) the ability of LPC to move across the landscape and utilize newly restored habitat, and (3) the likely effectiveness of monitoring efforts.

While the location and temporal extent of water quality projects are unimportant as long as nitrogen levels are reduced in the targeted water body, biodiversity is highly sensitive to both spatial and temporal allocation of habitat [13]. In biodiversity offset markets, each trade represents destruction of a habitat patch and the populations associated with that patch; created habitat patches on the other hand must become occupied before they can contribute to species survival. Due to the difficulty of habitat restoration, some offsets may never reach expected habitat quality or support LPC populations. Thus, even when the habitat area remains constant, spatial reallocation of habitat, or "habitat turnover", can be detrimental to species viability [13,15,16]. Consequently, offset trading may be able to achieve the no-net loss requirement in habitat, but will do so without producing the desired conservation benefit for the species.

In a market where habitat restoration is temporary, habitat turnover will be more rapid because not only do trades result in reallocation of habitat but also the termination and creation of restoration contracts. We should note that several historic conservation programs have also used voluntary short-term contracts to good effect. The Conservation Reserve Program, perhaps the largest conservation program in the U.S., provides incentives to farmers to convert their land back to native grasslands, usually enrolling areas that are not be ideal for crop production. The Conservation Reserve Program has historically had high rates of re-enrollment, with 10–15 years contracts that result in conservation for a longer duration. However, WAFWA's plan does not ensure the same success; first, WAFWA's

contract times are much shorter. Second, unlike the WAFWA plan, the Conservation Reserve Program has well-established mechanisms for enforcement of conservation standards. Lastly, and most importantly, the structure of these programs is fundamentally different; the conservation reserve program provides incentives for conservation (there is no damage being offset), while WAFWA uses short-term contracts to offset certain damage to LPC habitat. Voluntary, temporary contracts can play an important role in conservation, but using these mechanisms within an offset market may not result in the desired conservation benefit.

When we consider the specific life history characteristics of the LPC, habitat turnover caused by offsets and temporary contracts becomes even more problematic. LPC have high fidelity to breeding and nesting sites, returning to the same sites year after year, even when habitat becomes degraded [6]. Juvenile birds may choose new nesting sites, but their dispersal distances appear limited with an average dispersal distance of 5.3 miles [7]. High fidelity to nesting sites, low brood survival rates, and limited dispersal distances combine to call into question the LPC rate of dispersal and mobility in the landscape. The USFWS recognize the need for long-term protection to account for LPC biology [17], (p. 3):

> In addition to these size requirements, strongholds ["…areas managed or set aside for long-term LPC conservation and of sufficient size to support a viable population of LPC [7]"] must have long-term protection in place to address the species' relatively short life span, low nest success, high annual mortality, low recruitment, and high juvenile mortality. In the context of the lesser prairie-chicken, 10 to 15 years timeframes may be too short a period due to the species' life-history traits.

If the rate of landscape change is faster than the rate of dispersal, LPC may not be able to occupy new habitat patches, reproduce, and disperse before habitat becomes unsuitable and, consequently, regional populations may not survive [16]. Thus, the higher the rates of landscape change and habitat turnover, the lower the probability of regional population survival. These temporal effects can far outweigh the effects of habitat provision and location [15]. By mitigating permanent impacts with temporary, moving habitat WAFWA is suggesting a trade of certain habitat destruction for uncertain offsets.

While the biological consequences of high habitat turnover alone provide sufficient evidence to question the design of WAFWA habitat offset program, there are additional implementation drawbacks. If credits represent flows, then, similar to Robertson and Mikota's [11] argument in water quality markets, it will be difficult to monitor the status of these flow credits. It remains uncertain how to assure the production of "chicken-years" is actually occurring at credit-producing sites. For example, Dreschsler *et al.* [18] found information asymmetries that complicated contracting for species conservation, since landowners were found to have an incentive to overstate effort required and over-report their value of conservation. Moreover, while stock credits can use condition-based metrics for success, flows are function-based, namely chicken-years produced. While one could ideally assess the value of conservation by assessing its influence on species survival, direct monitoring may not be available or may be prohibitively expensive [19].

Can we treat LPC habitat as conditioned on management actions that can sequentially expire? Allowing the levels and locations of habitat to ebb and flow from year to year, fails to account for accumulations in terms of (1) learned avoidance behaviors [6] and (2) high site fidelity (e.g., leks, brooding, and nesting areas). Furthermore, the concept of habitat restoration needs to be evaluated in

terms of time lags between impacts and restoration—it does not make sense to implement (relatively) short-term contracts for habitat restoration, when land restoration itself can take years to establish basic vegetative communities [20]. In the case of the LPC, habitat restoration may take in excess of eight years to establish [7], and reoccupation may take even longer.

A small literature, particularly pertaining to compensatory wetland mitigation, has recently begun to address several pertinent issues relating to the temporal delays associated with offset markets. Quétier and Lavorel [21] and Bedward *et al.* [20] argue that time lags in the development of habitat means offset gains may take decades to materialize, even though biodiversity losses are immediate. While restoration takes time to be ecologically successful, impact permits are not typically withheld until a replacement is deemed successful [22]. Determining ways to handle these temporal losses are critically important for the effectiveness of offsets in sustaining species habitat; Bedward *et al.* [20] points out that the immediate decline in habitat availability created by these temporal lags may cause a critical bottleneck in the population size that can lead to regional extinction.

Another important issue arises in the context of the "inexact" science of habitat restoration and creation. Offset projects often fail to produce habitat that can sustain the target species at the original density, or at all (see wetland examples in [23]). This is often accounted for by offsetting larger areas of habitat than are lost (see [24] and [25] for a discussion of these "offset ratio" multipliers). Little work has studied these issues in the context of habitat offsets; unless habitat restoration or creation for the LPC is particularly easy, treating it as a flow will require consistent expansion of offset area.

5. USFWS Precedent: Endangered Species Habitat Is a Stock

Stock and flow considerations have already entered into past USFWS reasoning, particularly in requirements that conservation banks (formalized habitat offset sites, used extensively throughout the Western United States [26]) protect land permanently:

> At the time that the first credit in a bank or phase of a bank is sold, the land within the bank or its phase must be permanently protected through [permanent land purchases] or a conservation easement, with any land use restrictions set in perpetuity for the land legally established (USFWS 2003, p. 10).

The logic driving this dictum is echoed in 2008 regulations for wetland mitigation banks [26], which require permanent protections for aquatic ecosystem offsets, thereby specifically identifying them as a stock, which cannot reasonably be protected with temporary contracts.

The USFWS conservation banking guidance [8] goes on to note that:

> …[c]onsequently, once any credit in a given bank or phase is sold, the entire area is automatically and legally protected, regardless if the rest of the credits in the bank or phase are sold, thereby eliminating future fragmentation of habitat.

This explicit requirement for long-term protection for habitat banks echoes requirements for non-wasting endowments for long-term monitoring and maintenance on stream and wetland restoration sites [27].

6. Conclusions

The WAFWA range-wide plan has prompted coordination by the US states containing LPC habitat and represents an important attempt to avert a potential collision between rapid energy production and LPC recovery. Furthermore, Bull *et al.*'s [4] application of temporary offsets to species habitat impacts represents an innovative method for dealing with dynamic habitat requirements and changing environmental conditions. However, the U.S. Endangered Species Act considers habitat destruction to be an important element in endangered species population decline; as a result, the law (and policies emerging from the law) must explicitly consider habitat to be an integral part of the species' lifecycle and life history. In the case of the lesser prairie chicken, the species' habitat is clearly an ecosystem, whose functions accrue over time. As with nearly all other ecosystem-centered markets, including wetlands, streams, previous conservation banking efforts, and even carbon offset markets [28], LPC habitat should be considered as a stock for the purposes of species recovery policies. As a result, long-term site protections must be a key feature of any market-based policy for species protection, including the proposed WAFWA habitat offset market or any other proposed markets (e.g., Habitat Credit Exchange) that rely on this type of 'dynamic permanent offsets' or 'dynamic permanent mitigation'. The relative permanence of these protections should be in line with the species' life history and impact avoidance dynamics.

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Author Contributions

The authors contributed equally to this work. BenDor conceived of the article, reviewed plan documents and literature, and authored early drafts. Woodruff added critical intellectual content, reviewed plan documents and literature, and aided all stages of writing.

Conflicts of Interest

The authors declare no conflict of interest.

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Comments on the Stakeholder Conservation Plan and Habitat Exchange Agreement for the Lesser Prairie Chicken

Melinda E. Taylor[1]

March 10, 2014

The U.S. Fish and Wildlife Service (USFWS or Service) announced on February 7, 2014 that it planned to conduct scoping hearings on alternatives to include in the environmental impact statement on the American Habitat Center's draft Stakeholder Conservation Plan (SCP) for the lesser prairie chicken (LEPC).[2] This is a summary of recommendations for alternatives that the Service should consider during the National Environmental Policy Act's required environmental review process.[3] This document also includes comments on the substance of the provisions of the current drafts of the SCP and the Habitat Exchange Agreement (HEXA), which is incorporated by reference into the SCP. Unfortunately, the SCP falls short of meeting the Endangered Species Act's[4] requirements for habitat conservation plans and candidate conservation agreements with assurances. The HEXA would facilitate the use of term agreements with landowners to satisfy mitigation requirements, at the expense of proven, permanent conservation strategies. Such an approach would, and in fact already has, put the long-term survival of the species at risk.

Alternatives to the SCP

1. During the environmental review process, the Service must consider alternatives to the approach described in the SCP that are reasonable.[5] In this case, the Service should consider alternatives for the HCP that would provide a higher level of conservation than the SCP. To comply with NEPA and to analyze whether AHC's proposed mitigation meets the Endangered Species Act's "maximum extent practicable" standard, the Service must consider alternatives involving greater mitigation measures. *See* National Wildlife Federation v. Babbitt, 128 F. Supp. 2d 1274 (E.D. Calif. 2000) ("Thus, . . . the record should provide some basis for concluding, not just that the chosen mitigation fee and land preservation ratio are practicable, but that a higher fee and ratio would be impracticable.") Among other things, greater mitigation for the LEPC would emphasize permanent protection of high quality habitat and habitat suitable for restoration, rather than a series of term agreements.
2. The Service should consider alternatives for mitigation that are modeled on one or both of the standard approaches for regional HCPs:

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[2] 79 Fed. Reg. 7472 (Feb. 7, 2014).
[3] 42 U.S.C. §§ 4321-4370h.
[4] 16 U.S.C. § 1531-1544) (hereinafter "ESA")
[5] 40 C.F.R. § 1508.25(b)(2).

a. Establishment of a system of permanently protected preserves protected across the species' range, with limited take permitted outside of the preserves. The vast majority of regional HCPs are designed around this model.
b. Establishment of mandatory best management practices designed to minimize take and restore habitat for the covered species. Such BMPs can be paired with permanent protection of habitat. Regional habitat conservation plans such as the Plum Creek HCP and the Washington State HCP cover take associated with forest practices across large geographic areas through this approach.

3. The Service should consider an HCP alternative that would require that mitigation be accomplished through conservation banks. The banks would be established in conformance with the USFWS's 2003 conservation banking guidance.
4. The Service should consider an HCP alternative that requires that plan participants obtain permanent habitat credits from conservation banks or establish credits on mitigation lands that meet the minimum standards applicable to conservation banks for management, long-term funding through an endowment, and monitoring. This alternative approach would not permit the "self-generation" of credits, unless the credits met the minimum criteria. This alternative would be consistent with the Service's recently promulgated mitigation standards for the golden-cheeked warbler and black-capped vireo and the American burying beetle.[6]
5. The Service should consider an alternative in which the plan area is limited to the historic range of the LEPC. The Service's HCP Handbook provides that "HCP boundaries should encompass all areas within the applicant's project, land use area, or jurisdiction within which any permit or planned activities *likely to result in incidental take are expected to occur.*"[7] LEPCs have not been documented in Nebraska and there is nothing in the published scientific literature to justify the SCP's suggestion that the LEPC range is likely to extend to that state during the permit term.
6. The Service should consider an alternative that does not include confidentiality provisions for the plan participants, for the reasons described in the comments below.
7. The Service should consider an alternative that includes a detailed analysis of the actual costs associated with funding a series of shifting term agreements with landowners with a description of how the program will be implemented in perpetuity.
8. The Service should consider an alternative that contains quantifiable biological goals, so that progress toward meeting the goals can be monitored and evaluated. The main biological goal contained in the SCP is to reverse the decline of the LEPC and put the species on a "positive trajectory." Such vague language is inconsistent with the Service's Addendum to the HCP Handbook. Indeed, the Addendum provides that specific habitat goals are necessary for the USFWS's evaluation of the HCP: "The relationship of habitat goals to specific species will help the Services and applicant determine if a species is adequately covered by an HCP."[8]

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[6] *See* USFWS Southwest Region, Guidelines for the Establishment, Management, and Operations of Golden-cheeked Warbler and Black-capped Vireo Mitigation Lands (July 1, 2013) and Oil and Gas Industry Conservation Plan for the American Burying Beetle (DRAFT) (Feb. 21, 2014).

[7] U.S. Department of the Interior and Fish and Wildlife Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook (1996). (hereinafter HCP Handbook). (emphasis added).

[8] 65 Fed. Reg. 35,241, 35,245 (June 1, 2000).

Substantive Comments on the Draft SCP

The SCP does not comply with the legal requirements of the ESA or the provisions of the Service's HCP Handbook and Addendum to the Handbook in several important respects. As currently drafted, it does not meet the issuance criteria of Section 10(a)(2)(B) of the ESA.

First, the SCP is not based on the best scientific information about the LEPC's population levels. The Service must use the best scientific information available when evaluating HCPs.[9] USFWS's policy on information standards requires that "to assure the quality of the biological, ecological, and other information that is used by the Service in [its] implementation of the Act," the Service will require biologists to evaluate all scientific information "[t]o gather and impartially evaluate biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Service during [its] implementation of the Act."[10] The take estimates for agricultural activities in the SCP are based on survey and population density information in the 2012 survey data collected by McDonald, Griswold, Rintz, and Gardner of WEST, Inc. That take estimate ignores the 2013 survey results by McDonald, et al., which showed a 50% drop in the LEPC population range-wide.[11] The drop in population should be factored into estimates of population density for the bird across the range.

The plan lacks an estimate of the number of birds that will be taken in connection with oil and gas activities, relying instead on an estimate of acres of LEPC habitat that will be taken.[12] Relying on habitat as a proxy is acceptable in an HCP, provided that it is impracticable for the applicant to estimate how many individual birds will be taken. The SCP must provide an estimate of the number of birds that will be taken in association with oil and gas activities, as it has for agricultural activities. In addition, the SCP states that "Direct impacts from new oil and gas locations, including infrastructure. Average . . . three (3) acres."[13] The statement has no citation or explanation for support. It is unclear what is meant by a "new oil and gas location:" is it a well, a field, housing for workers, roads? Is the three acre estimate the basis for the acreage estimate of take in Table 1? How many wells are assumed in that take estimate? Much more information is necessary to evaluate the reliability of the take estimate for oil and gas activities.

The plan area described in the SCP includes the State of Nebraska.[14] The idea is that the permit area could be expanded someday, because the species' range may move northward. The potential for the range of the LEPC to move on the landscape is also the SCP's justification for its emphasis on short-term, shifting agreements with landowners. The only citations that the plan includes to support this idea are (1) an unpublished, not-yet-peer-reviewed paper by Elmore, et al. about historic shifts of LEPC populations; and (2) anecdotal accounts from the 1700s that LEPCs were sighted in Nebraska. Neither is a strong enough foundation to support the novel, temporary approach to conservation incorporated in the SCP. A recently published article by

[9] *See, e.g.,* 65 Fed. Reg. at 35,241.
[10] Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34,271 (July 1, 1994).
[11] The SCP drafters are apparently aware of the 2013 survey results; the 2013 report is cited in the SCP at p. 32. It is unclear why the drafters ignored the data when calculating estimated take from agricultural impacts.
[12] See Table 1 of SCP.
[13] SCP p. 41.
[14] SCP p. 34.

BenDor and Woodruff argues that it would be detrimental to the LEPC to base a conservation strategy primarily on temporary, moving agreements with landowners.[15]

The SCP lacks clear biological goals and targets. In comments on the Service's Proposed Rule to List the Lesser Prairie-Chicken as Threatened with a Special Rule, we described the shortcomings of the biological goals contained in the Lesser Prairie-Chicken Interstate Working Group's final Lesser Prairie-Chicken Range-Wide Conservation Plan. We criticized the methodology used to establish the goals, because it did not take into account the 2013 survey data, either. However, the Range-Wide Plan deserves credit for articulating specific habitat and population goals for the species, which can be used by the Service to evaluate the plan's effectiveness. There are no concrete goals at all in the SCP.

In order to issue an incidental take permit pursuant to Section 10 of the Endangered Species Act, the Service must make a series of findings.[16] Among other things, the Service must find that the applicant will, "to the maximum extent practicable, minimize and mitigate the impacts" of the permitted taking. The SCP does not contain enough information for the Service to make that finding.

The HCP Handbook explains that the Service must ultimately decide whether the mitigation proposed in an HCP meets the "maximum extent practicable" or "MEP" standard. The Handbook provides that "[t]o the extent . . . that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can reasonably be required by that applicant."[17]

It is not clear that the proposed conservation plan will provide "substantial benefits" to the species. There is uncertainty associated with (1) the number of landowners likely to participate; (2) the avoidance and minimization measures that the participants will choose to implement; (3) the extent to which the measures will result in benefits to the species; and (4) whether the species will be able to move across the landscape as landowners enter and exit the temporary mitigation agreements envisions by the plan.

The SCP contains estimates of the amount of take that will accompany various development activities in the species' range over the life of the permit. The SCP does not estimate how much of that take will be mitigated by the measures incorporated in the plan. Table 2 of the SCP includes conservation acreage if the estimated take is mitigated in accordance with the SCP. It is impossible for the Service to evaluate the actual potential benefit to the species without some idea of how many people and acres are likely to participate.

Section 8.4 suggests that avoidance and minimization measures may be all that are required for covered activities under the SCP.[18] Section 10(a)(1)(B) of the ESA, however,

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[15] BenDor, Todd K. and S. Woodruff, "Moving Targets and Biodiversity Offsets for Endangered Species Habitat: Is Lesser Prairie Chicken Habitat a Stock or Flow?" *Sustainability* 2014, *6*, 1250-1259; doi:10.3390/su6031250

[16] 16 U.S.C. § 1539 (a)(2)(B).

[17] HCP Handbook at 7-4.

[18] SCP p. 62.

requires minimization and mitigation. The term "avoidance" does not appear in Section 10; a strategy based on avoidance and minimization alone simply would not comply with the statute. A mitigation component is necessary to meet the Section 10(a) issuance criteria.

In addition, the avoidance and minimization techniques contained in the Conservation Measures lack precision. Many of the measures are written in broad and subjective terms. For example, in the Agriculture and Ranching section, the plan provides that "excessive" herbicide application will be avoided, not specifying what constitutes "excessive." Phrases like "when possible," "suggested," "when practical," and "where feasible" occur throughout the document, making it very difficult to evaluate whether a participant has actually complied with the measures. With such "soft" language, it is impossible for the Service to evaluate the SCP's bald assertion that the plan will protect 90% of the LEPC habitat in the permit area.

The SCP would establish a smorgasbord of compliance options for plan participants. After conforming with the avoidance and mitigation measures, the participants could acquire any necessary mitigation credits from the Habitat Exchange, established conservation banks or other "exchange programs," or self-generate credits.[19] The standards for the various credits would vary. The plan would not require permanent protection of habitat, regardless of the extent of the impact contemplated by a participant; rather, short-term contracts with landowners would generate credits that could be used to meet mitigation requirements even for permanent impacts.

This buffet-style approach would result in an extraordinary level of uncertainty for the species, whose response to shifting habitats is largely unknown, and for third-party mitigation providers, for whom it will be impossible to estimate demand. Without clear, unambiguous mitigation requirements, the market for credits is likely to be thin and market-based conservation will not realize its full potential.

The Service has never approved such a menu of compliance options in an HCP. The idea of using a series of moving, short-term contracts with landowners to generate credits that are fungible for temporary and permanent habitat impacts is also untested. To assess the value of off-site mitigation for species impacts, the Service must assess whether the gains from the mitigation areas are sufficient to offset the losses in the permit area. With the approach proposed in the SCP, that evaluation would simply not be possible. There is no basis for the Service to find that substantial benefits will accrue the LEPC as a result of this plan, or even for the Service to be sure that the approach will not lead to jeopardy for the species. The fact that the species's population has decreased to an historic low of only 17,000 birds underscores the urgency of implementing a conservation strategy based on what is known about the bird's habitat requirements, to maximize the probability of success. Now is not the time to experiment with new and unproven mitigation ideas, or to establish another program based on the types of government payments that have not succeeded in reversing the bird's decline to date.

The SCP's approach would be likely to discourage the establishment of an active market for conservation credits in the permit area. If plan participants have the option to self-generate credits at a lower cost than credits sold by a conservation bank, or even term credits through the HEXA for example, they presumably will choose to self-generate. The plan does not require that the self-generated credits be functionally equivalent to credits documented pursuant to the habitat

[19] SCP p. 62.

exchange or an established conservation bank, thereby putting the latter two mitigation options at a decided disadvantage. As discussed *infra* on page 2, the Service should require that all mitigation options in the SCP comply with the same minimum standards that conservation banks must meet for monitoring, funding, and the like. Such an approach would be consistent with the Service's recent mitigation policy for golden-cheeked warblers and black-capped vireos and the draft conservation plan for the oil and gas industry for the American burying beetle.[20]

The applicant justifies the lack of reliance on permanent preserves in the HCP on page 49 by stating that it would be a "challenge" to bind both surface and mineral rights owners to the terms of a conservation easement. The fact that there are numerous mineral rights holders in the LEPC's range would make it too complicated to use easements on a large scale. The applicant cites a paragraph from the HCP Handbook to justify its conclusion.

The paragraph cited by the applicant is actually in a section of the HCP Handbook that describes the *applicant's* obligations, not the mitigation provider's obligations (if a third party is used) with respect to the HCP. Specifically, in the paragraph immediately preceding the one quoted by the applicant in the SCP, the Handbook provides

> The applicant must ensure that the HCP will be carried out as specified. . . . The authority of the permit is a primary instrument for ensuring that the HCP will be implemented.[21]

The fact that it may be complicated or time-consuming to identify the various property interests associated with habitat does not eliminate the applicant's obligation to meet the MEP standard. In addition, there are dozens of habitat conservation plans in place around the country that create preserves on private lands with split mineral and surface estates. The Internal Revenue Service regulations provide that charitable deductions for donations of land with a severed mineral estate are permissible, provided that the impacts from mineral development are not "irremediably destructive of significant conservation interests."[22] The regulation supports the idea that the mere existence of a severed mineral estate does not make a parcel of land unsuitable for a conservation easement. In addition, it is possible in the design of a conservation easement on land with a split mineral estate to incorporate buffers, to minimize the possibility that drilling later will harm the conservation values of the property. AHC has not documented its assertion that a preserve system approach is not practical for the LEPC. Rather, the temporary term credit concept appears to be motivated by the desire to reduce compliance costs for the landowners at the cost of much less certainty for the LEPC.

The Service cannot evaluate whether AHC's SCP meets the MEP standard, because so little is known about AHC. According to press reports, the organization was incorporated in Colorado several months ago, but there appears to be no publicly available information about the structure of the organization, its board of directors, its assets, or its annual budget. The SCP mentions AHC's board, but provides the name of only one member. The Service has no way of

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[20] *See* USFWS Southwest Region, Guidelines for the Establishment, Management, and Operations of Golden-cheeked Warbler and Black-capped Vireo Mitigation Lands (July 1, 2013) and Oil and Gas Industry Conservation Plan for the American Burying Beetle (DRAFT) (Feb. 21, 2014).

[21] HCP Handbook 7-5.

[22] Treasury Regulation §170A-14 (need exact citation)

evaluating whether the mitigation proposed is the maximum extent practicable for AHC, or even whether AHC is capable of carrying out the mitigation measures described in the SCP. The permit applicant is responsible for enforcing the terms of the SCP. The Service cannot evaluate the AHC's ability to enforce without more information about the organization itself.

A related problem is the fact that the AHC does not identify the "qualified third party" contractor(s) that would carry out the conservation measures and mitigation program on the ground. The term "qualified third party contractor" is used numerous times in the document, but is never defined. Without information about the contractor's qualifications and background, it is impossible to evaluate the effectiveness of the program.

In addition to the MEP standard, the Service must find that the applicant "will ensure that adequate funding for the plan will be provided."[23] To make this finding, the Service must ensure that funding sources and levels proposed by the applicant are reliable and will meet the purpose of the HCP.[24] It is not possible to judge whether the levels would be adequate, based on the available information. The HCP must describe remedies for failure to meet the funding obligation by AHC, as required by the HCP Handbook.[25]

The SCP includes an "Impact Table" (Appendix E) that categorizes temporary and permanent impacts and direct and indirect impacts associated with various activities. The information in the table is not linked to the estimates of take in the SCP, or to the mitigation requirements for those activities. It is not clear what the table was intended to illustrate. There is no justification in the document or the table itself for classifying certain activities as causing "permanent" impacts and others as "temporary." The mitigation measures included in the SCP are similarly not linked to the table. The table should be revised and expanded, to explain the basis for the plan.

The confidentiality provisions in the SCP and Habitat Exchange Agreement are counter to the ESA and the federal Freedom of Information Act (FOIA). The ESA provides that applications for incidental take permits and all information received by the Service as part of the application shall be available to the public.[26] Information about the location of mitigation lands must be available to the public, so that the public can comment meaningfully on the plan. *See* Gerber v. Norton, 294 F.3d 173 (D.C. Cir. 2002). In an attempt to circumvent the plain language of the ESA, under the SCP the participants' names and information about their property would not be submitted to USFWS and so would be protected from public disclosure. The confidentiality provision tracks the provision contained in the conservation plan that USFWS approved for the Dune Sagebrush Lizard, which is currently the subject of federal litigation. The Service should insist that the confidentiality provisions be removed from the SCP and the HEXA.

The Service ordinarily requires annual or semi-annual surveys of endangered species on the properties of landowners participating in a conservation plan. The biologists conducting the surveys must hold an ESA section 10(a) permit. The biologist will certainly be required to report

[23] 16 U.S.C. §1539(a)(1)(B)) (iii).
[24] HCP Handbook 7-4.
[25] HCP Handbook 3-34.
[26] 16 U.S.C. § 1539(c).

species occurrences under the terms of his permit. The confidentiality provision in the SCP fails to recognize this obligation.

FOIA contains nine narrow exemptions to the disclosure requirement, none of which would apply to the identifying information about the SCP's and HEXA's participants. In *National Association of Homebuilders v. Norton,* the U.S. Court of Appeals for the D.C. Circuit held that the FWS could not withhold information about the location of properties that contained habitat for the endangered pygmy owl.[27] The court rejected the USFWS's arguments that the information was exempt from disclosure under FOIA's exemptions 3, 4, 5, or 6. The court specifically held that the location of the pygmy owls and the names of the property owners were not "commercial or financial information" covered by exemption 4.[28] The court also noted that the ESA contains no provision that would limit disclosure under FOIA pursuant to exemption 3 (Exemption 3 covers information that would be exempt from disclosure under another federal law.) The court explained that requiring the USFWS to disclose the names of the property owners and information about their properties would not constitute an unwarranted invasion of privacy and therefore subject to exemption 6. Information about the participants in the SCP and HEXA should be subject to public information requests.

Without specific information about the participants in the SCP, it will not be possible for USFWS to evaluate the efficacy of the conservation measures proposed in the plan. It is the Service's responsibility to gauge the biological effectiveness of the plan. To fulfill that responsibility, the Service must have complete, not aggregated, data.

Finally, the governance structure in the SCP is exceedingly complicated. The plan names several committees, a plan administrator, and USFWS in the governance provisions. It is linked to the HEXA, which itself has a complicated structure. Based on the information provided, it is difficult to evaluate the effectiveness of the governance and the capacity of the committees and permit holder to enforce the terms of the participants' cooperation agreements.

Habitat Exchange Agreement

The HEXA contains a number of well-crafted provisions that are clearly intended to promote conservation of the LEPC. It recognizes the role of permanent "static" mitigation in protecting the species. It would incorporate the habitat quantification tool, the use of which would provide a more sophisticated method for evaluating potential impacts to the species and appropriate mitigation. Unfortunately, the document has some significant problems that undermine its potential to provide a framework for the establishment of credits and a mechanism for ESA compliance.

Most fundamentally, the HEXA sanctions the use of "dynamic permanent mitigation," a novel idea that permanent mitigation can be accomplished through a perpetual series of short-term agreements with landowners. Under the HEXA, the Exchange Administrator would be responsible for ensuring that the stream of temporary credits continues in perpetuity. The plan participant is off the hook after it pays up front for permanent credits.

[27] 309 F.3d 26 (D.C. Cir. 2002).
[28] *Id.* at 38.

There are multiple problems with this idea. First, it will be difficult, if not impossible, for the Exchange Administrator to ensure that temporary agreements will be in place forever with landowners, to compensate for permanent impacts. Second, assessing the economic viability of such an approach would be very complicated, because presumably the price of the credits – a function of the price of land and management costs -- will change over time. Using approved conservation banks to achieve mitigation through the exchange would be much more straightforward and easier to implement.

The HEXA provides that the financial guarantees for dynamic permanent mitigation would be provided by the Exchange Administrator or the plan participant. The instrument envisions the use of a "wasting endowment" to pay for future credits associated with term agreements. Settling on the size of the wasting endowment will involve making predictions about land management practices in the future and land values that will no doubt change dramatically over time. The use of endowments to fund long-term management of conservation banks is well-understood and has a track record of success. If the Service approves the idea of dynamic permanent mitigation, it should require a large up-front endowment from the plan participant, which would take into account expected increases in land values, as well as the cost of management practices in perpetuity.

"Static permanent mitigation" is defined as credits produced through permanent protection of a participating property. In order to avoid confusion and the creation of a schism between properties upon which a conservation bank has been established and those with a simple easement, it would make sense to reference the Service's conservation banking guidance in this definition. With respect to permanent mitigation, the Exchange Agreement should specify that stand-alone easements, created without endowments, management plans, and other requirements that apply to conservation banks, will not be included in the exchange. The requirements that apply to conservation banks have been in place since 2003 and have a proven track record of generating conservation. To the extent that the HEXA includes provisions for credit generation that deviate from the banking guidance document, those provisions should be deleted or amended to be consistent with the guidance.

There are several provisions in the HEXA that limit the USFWS's ability to monitor and oversee its implementation. For example, in the "Transaction and Monitoring" section 2.03, the HEXA provides that the surface owner must consent in writing before the Service can enter her property to verify the credits that have been awarded. The Service must accept the word of a "certified verifier" about compliance. The Service should insist that this provision be deleted from the HEXA. As the federal agency charged with enforcing the ESA, the USFWS has the authority to inspect a property that has received credits under a plan it authorized. There is no legal justification for denying the Service the right to verify compliance.

The confidentiality provision in the HEXA is identical to the provision in the SCP. It should be stricken in its entirety, for the same reasons.

Conclusion

The SCP contains numerous legal shortcomings so that it fails to meet the ESA's standards for habitat conservation plans. It relies principally on a term mitigation strategy, that is unproven and unlikely to benefit the LEPC. It appears that the proposed creation of an entirely new type of term mitigation based on almost no science is really a cloaked attempt to achieve a lower compliance cost at the expense of the species. The Service should not put the species at risk by approving such an approach. The plan should be revised substantially. The HEXA, while clearly designed to promote conservation, is flawed and should be amended to focus less on dynamic permanent mitigation and more on tried and true methods of conservation, including habitat conservation banks.

JAKE LOPEZ
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Commissioner, District 2

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March 10, 2014

Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, NS 2042 – PDM
Arlington, VA 22203

RE: SCOPING ISSUES TO BE COORDINATED WITH ROOSEVELT COUNTY DURING THE PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT FOR THE STAKEHOLDERS CONSERVATION STRATEGY / AMERICAN HABITAT CENTER HABITAT CONSERVATION PLAN

RE: Docket No. FWS-RS-ES-2013-0134

Dear Sir or Madame;

This letter is in response to the U.S. Fish and Wildlife Service (Service) Federal Register Notice requesting comments on the issues to be considered during the scoping process "for the preparation of an environmental impact statement (EIS) on a proposed application for an Incidental Take Permit (ITP), including a Habitat Conservation Plan (HCP) under the Endangered Species Act …" (FR 2-7-2014 page 7472). Roosevelt County has reviewed the "Stakeholder Conservation Plan for the Lesser Prairie-Chicken" (hereafter known as "Stakeholder Plan") submitted by the American Habitat Center February 2014. Following are issues critical to the County that should be considered by the Service and coordinated with our County during the EIS process.

1. **The Stakeholder Plan is Duplicative and Unnecessary**

There are already several conservation programs in place for landowners, commercial energy developers, agriculture interests and conservationists to participate in for the purpose of conserving the Lesser Prairie Chicken (LPC) and its habitat. These are acknowledged in section 2.2 of the Plan, "Existing Conservation Plans for the LEPC" (Stakeholder page 16-24). Notably, the Range-wide Conservation Plan for the LPC (hereafter Range-wide Plan) was recently approved by the Service and over 2.5 million acres have already been enrolled.

The Range-wide Plan was prepared with the assistance of major energy interests as well as other agriculture interests for the purpose of providing a systematic means for them to actively participate in the conservation of the LPC. These are the same interests the Stakeholders Plan is targeting. Already, these companies have contributed the essential funding for the program. Importantly, the Range-wide Plan was prepared with the active participation of the five state agencies with management responsibility for the LPC and is to be managed by the Western Association of Fish and Wildlife Agencies (WAFWA). The Range-wide plan was prepared with complete transparency and heavy involvement of those interests that can directly impact the conservation of the LPC.

The Stakeholder Plan offers no new conservation measures or assurances that are not already being met by currently approved and active plans. The document states that its purpose is to (1) Conserve the LPC and, (2) allow uninterrupted economic development (page 24). A simple reading of the plans already active, as described in the previous section, demonstrate that these two purposes are currently being met. Preparing an EIS for the Stakeholder Plan is an unfortunate waste of taxpayer funds and agency time, as there is no compelling need for the Plan that is not already being met through other programs.

2. The Stakeholders Plan is Unrealistic

One of the key objectives of the Stakeholder Plan is to conserve 90% of the LPC habitat.

> *"The Plan will conserve nearly 90% of LEPC Habitat and will result in substantial enhancement of habitat through required avoidance, minimization and mitigation measures."* (page 50)

The devices they plan to utilize to conserve the habitat are through outright acquisition of the land or a permanent conservation easement.

> *"Many HCP's mitigate for loss of habitat through the preservation or permanent protection of similar habitat, sometimes in combination with other non-permanent measures. This preservation component is implemented through fee-simple acquisition of habitat or the use of perpetual conservation easements."* (page 49)

The total Estimated Occupied Range (EOR) of the LEPC as determined by the Service is 19,902,922 acres. The EOR range covers five states. It is a substantial area of land, and any program that boasts to be able to conserve 90%, or 17,912,623 acres of this area, should be questioned, especially when the vehicle to do so is through outright acquisition of the land or permanent easements. Massive buy-in from landowners and those who own property interests in this land must take place. Additionally, the idea that enough private landowners would voluntarily place a permanent easement or outright sell their land based on the assurances that they will not be further penalized if the LPC is listed, is a fantasy.

By their own acknowledgement, the Plan developers recognize that 95%, or 18,907,776 acres, of the LPC habitat is privately owned. "The EOR of the LEPC is spread over five states and is comprised of up to 95% private land ownership." (page 95) In order for them to own or

permanently control 90% of this they are planning to obtain the "voluntary" commitment of the landowners. However, they know this objective is unattainable and even acknowledge that acquiring the various property rights necessary to ensure full conservation of the land is an impossible task.

> *"Ownership and occupancy of these lands is not always limited to a single entity, but may be expressed through a complex and severed relationship of surface estate, mineral estate and surface and mineral leasehold interests. Any effort to create a permanent set-aside of meaningful acreage for the LEPC will require the written agreement from all interest holders, which may be an insurmountable task due to the inability to identify and obtain agreement of all owners of the surface and mineral estates."* (page 49)

And further;

> *"The establishment of a permanent preserve in most cases is a challenge due to the need to identify and acquire contractual commitments from both the surface owner and the mineral owner, which in this region are typically held by different people and entities. The task of determining who owns the interests and contact information for those property owners is a significant undertaking. Further,* ***the potential for property owners and other interest holders to delay or disrupt an acquisition program through reluctance or refusal to sell targeted or key properties*** *creates additional issues."* (page 49-50)

Clearly, the Plan developers know that acquiring 90% of the LPC habitat is an "insurmountable task." However, what is most disturbing is their acknowledgement that landowners may "delay," or "disrupt" the acquisition program through "reluctance" or "refusal" to sell the properties they have identified and targeted. The Plan claims to be a "voluntary" plan for landowners, yet, by their own admission, it is clear that this Plan will be utilized to "target" land within focal areas and that landowners will find themselves under immense pressure to enroll. Nowhere in the plan do they state that the species does not warrant listing, and the plan itself is not designed to "preclude" a listing. The Plan is designed to acquire 90% of the habitat through fee-simple acquisition or permanent conservation easements.

They benefit from the threat of listing the LPC in order to coerce landowners into "voluntarily" giving up their land.

The Plan developers know their objective of acquiring 90% of the habitat area is unrealistic and, therefore, have submitted a HCP that will fail. The Service should deny approving the plan based on the AHC's admission that landowners will be targeted and pressured into selling their land, an unconstitutional act.

3. The Plan's Minimum Goal of 20% Participation is also Unrealistic

As noted by the Plan developers above, acquiring agreement among the various owners of the property interests in any given parcel will be a dubious task, short of coercion. However, they

claim to already have assurances from property interest holders that cover 20% of the habitat. In a footnote on page 95, they claim:

> *"The assumption that 20% of Total Habitat Acreage will enroll in the Plan drives the $0.36 per acre Participation Fee calculations and is conservative based on the commitments currently obtained from stakeholders to participate in the Plan."*

Who are these committed participants? They are not revealed in the Plan. Because this 20% participation is necessary to meet the funding requirement, more than just a footnote ought to be required to ensure this obligation can be met, especially given that the Plan developers acknowledge how difficult it will be to get all property interests for any given parcel to agree to participate.

We can assume that the major oil and gas companies named in the cover letter that was submitted with the application might be these participants. What proof is being required that they will fulfill this obligation? Without this, the plan is meaningless and proper implementation is questionable.

4. The Stakeholder Plan Administrators and Benefactors are Not Transparent

The Plan has been submitted by the American Habitat Center (AHC), a non-profit entity, so they claim. However, there is no further detail as to who makes up the AHC. A number of questions are left open.

a. Who are the members of the Board of Directors for AHC?
b. Who are the "Stakeholders" that created the AHC and the Stakeholder Plan
c. Who will be appointed to the Oversight and Science Committees?
d. What type of non-profit entity is the AHC; a (c)(3),(4) etc?
e. In which state is the AHC incorporated?
f. Has the AHC provided the Service with its official Incorporation and Non-Profit Status documents?

Through press releases, the County has ascertained that several organizations have come together to create this plan, including the Environmental Defense Fund and some state cattlemen's and farming organizations. What is important for the Service to take into account is that these organizations can only make decisions that affect the Associations, not their members directly. Therefore, any commitment on behalf of the Associations that there will be widespread participation of its members should be discounted, unless proof is submitted by the AHC, whomever the actual members of this organization may be.

In addition, there are other non-transparent issues within the Habitat Exchange Agreement (HEA) attached to the Plan. The HEA is an agreement between the Habitat Exchange Administrator, whoever that is, and Region 2 and Region 6 of the U.S. Fish and Wildlife Service. Within the HEA, there will be an "Oversight Committee," a "Policy Committee," a "Resolution Committee," and a "Science Committee" all of which will be named at a later date.

Obviously, the AHC will carry a tremendous amount of influence determining who the "stakeholders" and representatives from the "conservation interests, industry, and agriculture" groups will be providing crucial oversight of the HEA and the Plan. This is totally unacceptable.

5. The AHC does not have Authority to Enforce the Stakeholders Plan Directly

Although we do not know who will ultimately govern the AHC, this entity is requesting to be approved as the permit holder of an Incidental Take Permit and enhancement of survival permit issued by the Service. Private groups can initiate an HCP without government participation, however, they must assure that they have the authority to enforce the permit. The Service Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 3-2 states that this is allowed "so long as the permittees have the authority to regulate or control all or applicable parts of the HCP and the conditions of the HCP are enforceable." The Stakeholder Plan assures they have this authority.

> *"The Permit Holder will enforce the Plan. By entering into clear enforceable CIs and CPs, Participants will contractually agree to perform the obligations required of them under the Plan and consent to enforcement of those obligations by the Permit Holder. See Section 8.8. FWS will also have clear and defined enforcement responsibilities and mechanisms with respect to the Plan and the permit issued to the Permit Holder under the Implementing Agreement. See Appendix K. The mechanisms available to the FWS include access to properties enrolled under the Plan, approval rights with respect to Credit-generation and release activities, and representation on the Oversight Committee and Science Committee. In these ways, enforcement of the Plan and increased compliance with the ESA in the Permit Area can be assured."* (page 4-5)

In other words, the AHC does not have the authority outright to enforce the plan; the landowners who participate will give up their right to control their land and provide this authority to the AHC. The only enforcement authority the AHC will have is through the acquiescence of landowner's rights to the AHC. The AHC has stated they will acquire this when landowners "voluntarily" enroll their land in the program, however, there is reasonable concern that landowners will be targeted and pressured into participating.

A participant in this plan can either be a landowner, leaseholder or holder of other property interests. Land sold will presumably be protected until program administers determine the conservation need is no longer relevant. Land placed in a permanent conservation easement will be held in perpetuity. However, if a landowner is covered under the AHC permit, this protection will only be guaranteed for 30 years. So, a landowner, leaseholder or other property interest holder is being asked to permanently give up their rights when the protection they are trading these rights for is only offered for 30 years. It is highly suspect that landowners will flock to sign up under this program once the full details of their commitment are revealed.

6. Key Issues that should be Studied and Analyzed during the EIS process

a. The Environmental Impact Statement needs to rigorously analyze the impact on the local economies within the plan area where private land will be targeted for acquisition, and

landowners refuse to sell. The direct, indirect and cumulative impact on the local economy needs to be analyzed when the targeted land is devalued by the action. Based on statements discussed earlier that are in the Stakeholder Plan, it is reasonable to presume that landowners will be targeted and pressured into selling key properties. This impact on the local economy must be studied. Additionally, the impact this will have on the culture of the community should be examined.

b. The Stakeholder Plan is relying solely on the science referenced in the Service's proposed rule to list the LPC as threatened. The Notice does not represent the best available science on the LPC as scientists have critically examined the notice and new data and studies have been brought forward. In the EIS analysis, two additional studies must be considered (documents attached):

   i. "Data Do Not Support the Listing of the Lesser Prairie Chicken," prepared by the Center for Environmental Science, Accuracy and Reliability (released in 2013)
   ii. Review of the Science Predicting Population Trends prepared by Darling Geomatics (March 2014)

Summary

We appreciate the Service giving strong consideration to the issues discussed above. It is our County's position that the application should be denied because the Stakeholder Plan provides no new conservation efforts that are not already being fulfilled through other plans.

Also, the preparers of the plan have not been transparent as to who they are and who will be governing the program. It concerns us greatly that the Service would be considering providing a non-existent entity with such a high responsibility as being a permit holder for a plan area that consists of six states.

Further, were are very concerned that landowners will be targeted by the group and coerced into participating in the Plan.

For these reasons the plan should be denied.

If your agency continues to move forward with the development of the Environmental Impact Statement for the Stakeholder plan, we respectfully request that this be done in coordination with our county as required under the National Environmental Policy Act.

Sincerely,

Charlene Webb
County Manager

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

March 10, 2014

Roosevelt County
109 West First Street
Portales, NM 88130

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

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

To Whom It May Concern:

On behalf of the Roosevelt County Board of Commissioners, the following comment is being submitted on the above-referenced U.S. Fish and Wildlife Service (USFWS) Notice of Intent (NOI). Roosevelt County, in Eastern New Mexico, will be primarily affected by potential issuance of federal permits associated with the potential listing of the Lesser Prairie Chicken (LPC) under the Endangered Species Act of 1973, as amended (ESA).

Roosevelt County is opposed to the USFWS proceeding with scoping the development of an Environmental Impact Statement to assess the potential impacts of the issuance of an Incidental Take Permit (ITP) under section 10 (a)(1)(B) of the ESA. We want to remind USFWS that such a permit associated with a Habitat Conservation Plan is only relevant and applicable if the Lesser Prairie Chicken is actually listed under the ESA. Because we believe a listing is not warranted and no such listing determination is made, this NOI and scoping action is premature and pre-decisional in nature.

As stated in previous comments by Roosevelt County we support implementation of local conservation efforts, which have proved to be successful. The WAFWA Range-wide Plan (RWP) as the voluntary conservation mechanism for long-term management and health of lesser prairie-chickens is one of those mechanisms that can support and expand the conservation efforts already in place in Eastern New Mexico. We believe all of the stakeholders across the five states and the species that RWP is providing substantive conservation benefits as defined in the ESA. The NOI, we believe, undermines the RWP with schemes that jeopardize future conservation of LPC. Therefore, Roosevelt County requests USFWS to determine and approve the No Action alternative and deny issuance of the ITP as described in the above-referenced docket number.

In closing, we want to reiterate the County's opposition to the listing of the LPC as threatened or endangered under the ESA. The success shown by the State of New Mexico as well as the other states in the implementation of the RWP since the USFWS endorsement in October 2013 is proof that local stakeholders and the States are competent and able to voluntarily conserve the LPC without the need for federal ESA protection. A decision to list the LPC as threatened or endangered is not warranted.

Sincerely,

Charlene Webb
Roosevelt County Manager
Roosevelt County, NM

RUSH COUNTY COMMISSION

RUSH COUNTY COURTHOUSE
715 Elm • P.O. Box 220
LA CROSSE, KANSAS 67548-0220

785-222-2126 *Fax 785-222-3559*

Leonard A. Mastroni • *Ken Urban* • *Dennis Elias*

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Rush County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the

EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of

$2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Dennis Elias

Leonard Mastroni

Ken Urban

Name: Kenny Salazar

Comments: The attached request for cooperating agency status is submitted on behalf of individual Soil and Water Conservation Districts by the New Mexico Association of Conservation Districts.

close window

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

March 4, 2014

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

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

To Whom It May Concern:

The New Mexico Association of Conservation Districts (NMACD) submits the following with reference to the Notice of Intent to prepare an Environmental Impact Statement (EIS) for a Habitat Conservation Plan (HCP) for lesser prairie-chicken within the states of New Mexico, Colorado, Texas, Kansas, Oklahoma, and Nebraska (Docket No. FWS-R2-ES-2013-0134). NMACD holds the mission of facilitating the conservation of the natural resources in New Mexico by providing opportunities and quality support to local conservation districts through representation and leadership. As such, NMACD reminds the US Fish and Wildlife Service (Service) of its obligation under the National Environmental Policy Act of 1969 (NEPA) to identify other governmental entities that have jurisdiction or special expertise regarding the social, economic, or environmental impacts associated with the proposed action requiring NEPA analysis (e.g., the proposed EIS). NMACD therefore requests designation of our individual member Soil and Water Conservation Districts (SWCD) within the historic range of the lesser prairie-chicken as cooperating agencies for scoping of the proposed EIS by the Service.

Collectively, the SWCD are authorized by the Soil and Water Conservation District Act (73-20-25 through 73-20-48 NMSA 1978) to conserve and develop the natural resources of the state, provide for flood control, preserve wildlife, protect the tax base and promote the health, safety and general welfare of the people of New Mexico. The scope of the proposed EIS has great bearing on defining the potential impacts of the untested and unproven conservation and mitigation scheme as described in the HCP. Such apparent and substantive proposed change of course from the five-state range-wide lesser prairie-chicken conservation plan (RWP) as the Service-endorsed in October 2013 cause NMACD great concern, both for the future of the conservation success of the RWP and for the individuals whose livelihoods depend on continuation of wise use of the natural resources in eastern New Mexico without broad and unjust implementation of the Endangered Species Act of 1973 (16 U.S.C. 1531-1544, 87 Stat. 884), as amended (ESA).

In closing, the NMACD reiterates our previous and unwavering opposition to listing the LPC as threatened or endangered under the ESA and requests NEPA-obligated cooperating agency status for each individual SWCD within the historic range of the lesser prairie-chicken (SWCD Regions IV, V and VI). Elected members within each SWCD have specific expertise relevant to the impacts of the proposed HCP on the local landscapes represented by each District. Their local and state knowledge will be invaluable

to the Service in scoping the potential impacts to be outlined in the proposed EIS. If you have any questions regarding our request, please let me know. I look forward to a timely response.

Sincerely,

Kenny Salazar, President
NM Association of Conservation Districts

BJORK ◆ LINDLEY ◆ LITTLE ◆ PC

LAWYERS

PETER A. BJORK†
LAURA LINDLEY
DAVID R. LITTLE
ROBERT C. MATHES†*
KATHLEEN C. SCHRODER
DARIN B. SCHEER†*
JILL D. CANTWAY†*
SARAH SORUM*
ANN EASTBURN*
HEATHER R. BULLER*
ALLISON F. PREISS
ERIN K. MURPHY†
TIMOTHY R. CANON II

†Also admitted in Wyoming
*Also admitted in the District of Columbia
*Also admitted in North Dakota
*Special Counsel
*Wyoming Resident Counsel

February 26, 2014

Uploaded to www.regulations.gov

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

Re: Docket No. FWS-R2-ES-2013-0134
Notice of Intent to Prepare an Environmental Impact Statement for the Stakeholder Conservation Strategy/American Habitat Center Habitat Conservation Plan

Dear Sir or Madam:

Bjork Lindley Little P.C. ("BLL") represents several oil and gas producers who operate and own interests in the range of the lesser prairie-chicken ("LPC"). BLL requests that you place us on your mailing list for the Environmental Impact Statement ("EIS") for the Stakeholder Conservation Strategy/American Habitat Center Habitat Conservation Plan so that we may be kept informed of this EIS process. Please contact us with any questions by phone at (303) 892-1400 or by email at kschroder@bjorklindley.com.

Very truly yours,

BJORK LINDLEY LITTLE P.C.

Kathleen C. Schroder

1600 STOUT STREET ◆ SUITE 1400 ◆ DENVER, COLORADO 80202-3110
TELEPHONE: 303-892-1400 ◆ FACSIMILE: 303-892-1401 ◆ www.bjorklindley.com

COMMISSIONERS:
James Minnix, District 1
Jerry W. Buxton, District 2
Gary A. Skibbe, District 3

COMMISSIONER'S MEETINGS
FIRST and THIRD TUESDAY
IN EACH MONTH

Scott County Clerk
303 Court Street
Scott City, KS 67871
Phone (620) 872-2420 Fax (620) 872-7145

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Scott County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

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In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
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- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Jerry Buxton

James Minnix

Gary Skibbe

Board of County Commissioners
STANTON COUNTY, KANSAS

BIG BOW: MARTIE FLOYD
MANTER: C. SHANNON DIMITT
STANTON: JOHN D. SMITH

P.O. Box 190
201 NORTH MAIN
JOHNSON, KS 67855-0190
(620) 492-2140

cc'd Susan T.

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Stanton County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

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This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

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USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Shannon Dimitt

Martie Floyd

John Smith

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

March 10, 2014

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

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

To Whom It May Concern:

The Southwest Quay Soil and Water Conservation District(SWQSWCD) on behalf of the landowners, farmers, and ranchers within the District, submits the following with reference to the Notice of Intent to prepare an Environmental Impact Statement (EIS) for a Habitat Conservation Plan (HCP) for lesser prairie-chicken within the states of New Mexico, Colorado, Texas, Kansas, Oklahoma, and Nebraska (Docket No. FWS-R2-ES-2013-0134). The US Fish and Wildlife Service (Service) has an obligation under the National Environmental Policy Act of 1969 (NEPA) to identify governmental entities that have jurisdiction or special expertise regarding the social, economic, or environmental impacts associated with the proposed action and alternatives requiring NEPA analysis (e.g., the proposed EIS).

We are concerned that an EIS for a HCP is being proposed and scoping has taken place before a decision for listing the LPC has been made. This schedule of events lead us to think the USFWS has already made the decision to list the LPC, yet has not published its decision. If the USFWS goes forward with the proposed EIS, SWQSWCD requests cooperating agency status for scoping, preparation, and writing of relevant portions of the proposed EIS where SWQSWCD has socio-economic expertise within the area of the conservation district.

In New Mexico the SWCD's are authorized by the Soil and Water Conservation District Act (73-20-25 through 73-20-48 NMSA 1978) to conserve and develop the natural resources of the state, provide for flood control, preserve wildlife, protect the tax base and promote the health, safety and general welfare of the people of New Mexico. The SWCD's local Boards consist of elected members with taxing authority and are a local governing entity under New Mexico statute. The scope of the proposed EIS has great bearing on defining the potential impacts of the untested and unproven conservation and mitigation scheme as described in the HCP. Such apparent and substantive proposed change of course from the five-state range-wide lesser prairie-chicken conservation plan (RWP), which was Service-endorsed in October 2013, cause SWQSWCD great concern, both for the future of the conservation success of the RWP and for the individual landowners whose livelihoods depend on continuation of wise use of the natural resources in the conservation district without broad and unjust implementation of the Endangered Species Act.

We ask that the RWP be considered during this scoping process and subsequent EIS as an alternative which would allow comparable analysis with the proposed HCP.

The SWQSWCD reiterates our previous opposition to listing the LPC as threatened under the ESA. The LPC is a state managed bird and recovery should be managed by the state. We oppose any future critical habitat designation beyond present occupied range. We do not believe the LPC warrants a listing of threatened due to lack of adequate scientific data of anthropogenic causes of population declines and we are concerned that inconsistent methodologies of

determining population numbers give a false indication or trendline of population decline . We ask the USFWS to delay the listing a minimum of two years to give the RWP ample opportunity to recover the LPC.

We again emphasize our request for cooperating agency status in the proposed EIS. Elected members within the SWQSWCD have specific expertise relevant to the impacts of the proposed EIS on the local landscape represented by our District. Their local and state knowledge will be invaluable to the Service in scoping the potential impacts to be outlined in the proposed EIS.

Sincerely,

Tom Sidwell, Chairman
Southwest Quay Soil and Water Conservation District

Board of
County Commissioners

Telephone 785-743-5775
Fax 785-743-5594
Lori Augustine, County Clerk

Trego County
216 Main Street
WaKeeney, KS 67672

Herbert Schwartzkopf, Ransom
Wesley Hobbs, WaKeeney
Dean L. Papes, WaKeeney

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Trego County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act*." The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

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The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

BOARD OF COUNTY COMMMISSIONERS
TREGO COUNTY, KANSAS

Dean L. Papes, Chairman

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522 Notre Dame Court, Cheyenne, Wyoming 82009, 307-631-4536, www.wafwa.org

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

March 10, 2014

To whom this may concern:

This letter is written in response to the United States Fish and Wildlife Service's (USFWS) February 7, 2014 notice of intent to prepare an Environmental Impact Statement for a Habitat Conservation Plan for Commercial Developments, including Energy Developments, and Agricultural and Energy Activities within six states (HCP). I am the Western Association of Fish and Wildlife Agencies (WAFWA) Director Sponsor of the Grassland Initiative and appreciate the opportunity to provide comment on the announcement of scoping meetings, and request for comments on the proposed incidental take permit directed to the lesser prairie chicken (LPC).

WAFWA is a strong advocate for the rights of states and provinces to manage fish and wildlife within their borders. WAFWA's membership includes 19 states and 4 Canadian provinces, spanning from Alaska to Texas and Saskatchewan to Hawaii. Our Association has been a key organization in promoting the principles of sound resource management and the building of partnerships at the regional, national and international levels to enhance wildlife conservation efforts and the protection of associated habitats in the public interest. This conservation commitment by WAFWA members was enhanced by the creation of the WAFWA Grassland Initiative (WGI) in 2005. This coordinated approach focusing on issues affecting grassland habitats has been successful in influencing the status of species at the landscape level by implementing conservation actions in a collective manner while sharing resources efficiently and strategically. The LPC is one of the species that falls under the WGI.

PUBLIC SCOPING PROCESS

The HCP being considered includes five states within the LPC range, and extends into Nebraska, which is currently not part of its historic or current range. While the Federal Register notice identified Nebraska as a possible expansion area, it is unclear how this would fit into the HCP effort and possible mitigation. In accordance with public notification guidelines for using local media to announce opportunities for public comment, a search of the internet did not show any Nebraska media coverage regarding scoping meetings in the neighboring states. Furthermore, some of the information presented at the public meetings was confusing as to the species being proposed for the permitting action. For example, while the written material said it was for the

LPC, the visuals on the posters and the presentation were primarily of greater prairie chicken, a species with overlapping range. We feel this creates an unnecessary opportunity for public confusion.

Additional scoping meetings need to be, and are requested by WAFWA, scheduled in all affected areas, including Nebraska, in order to provide an opportunity for broader and more meaningful involvement by all impacted states, local governments, landowners, industry and other interested parties. Broad public involvement is necessary and desirable as outlined in the NEPA process. Well planned efforts provide proper notice to all interested and potentially impacted parties and allow time for evaluation and response to the proposed action. Without it, the USFWS will not be able to develop a viable record and document the full range of applicable alternatives that must be analyzed and the extent to which new data and analyses are required.

INCIDENTAL PERMIT ASSESSMENT

Any enhancement of survival permit associated with the proposed HCP must be evaluated against all other USFWS-approved incidental take. This evaluation should take into account the WAFWA Lesser Prairie Chicken Range-wide Plan (RWP) for multiple industries, agriculture and other infrastructure, the New Mexico CCA and CCAA for oil and gas and agriculture, the Texas and Oklahoma agriculture CCAAs, as well as USDA/NRCS CRP/WHIP/EQIP and Lesser Prairie Chicken Initiative programs. The incidental take baseline, as well as practical conservation measures, has been previously established by USFWS approved or endorsed efforts. Total incidental take must be addressed with respect to this proposed action and its possible impacts to existing federal, state, and tribal programs.

PROPOSED TIMELINE

We believe the timeline presented does not adequately take into consideration the public process across six states. As already identified, we request another round of scoping meetings across the proposed six states. Adequate notification for meetings and their locations would ensure meaningful public participation, agency involvement, and adequate analysis of the complex environmental, social, and economic impacts that the proposed HCP will have on the 6 states impacted by the proposed regulatory and administrative actions.We strongly recommend that USFWS re-evaluate the proposed timeframe and publish one that is more consistent with Department of Interior NEPA guidelines.

INADEQUACY OF NO ACTION AND OTHER ALTERNATIVE DESCRIPTION IN SCOPING EFFORT

The February 7, Notice of Intent for the scoping and NEPA process does not discuss the "No Action Alternative and other reasonable alternatives to the Proposed Action." In particular, it does not reference the existing USFWS endorsed WAFWA RWP. Under the No Action and other Alternative, the RWP should be the starting place for such discussions. All other USFWS approved agreements for the LPC, as well as USDA/NRCS programs should also be described as alternatives.

The Proposed Action cannot be fully understood in the absence of information that provides stakeholders with a sufficient understanding of the proposed HCP, the RWP and other USFWS approved plans, their metrics, what they have already accomplished for LPC conservation and what they offer to stakeholders who engage in such plans. Stakeholders across the proposed six state area should be informed about the recent RWP developments, earlier New Mexico CCA and CCAA, Texas and Oklahoma CCAA and the recently approved oil and gas CCAA. As previously stated by WAFWA, the USFWS decision to proceed with an alternative conservation strategy or plan in the absence of a final ESA listing determination for the LPC causes considerable confusion among the many stakeholders who are seeking regulatory certainty and assurances provided by the RWP and complementary LPC programs.

COOPERATING AGENCY STATUS FOR ENVIRONMENTAL IMPACT STATEMENT

As allowed under this Notice of Intent, the state wildlife agencies of Colorado, Oklahoma, Kansas, Nebraska, Texas, and New Mexico request cooperating agency status for the preparation of the Environmental Impact Statement for this proposed action. We submit that if conservation of the LPC is to show long term success, a strong partnership will be necessary between the States and the USFWS. The elements of that partnership are stated in Section 6 (a-b) of the ESA. This section clearly directs a sense of cooperation between the USFWS and state fish and wildlife agencies, and provides the authority for the USFWS to carry that partnership forward. While Section 6 specifically refers to the conservation of endangered or threatened species, we would submit that this partnership can be demonstrated and authorized for species found to be not warranted because actions described through a mutual planning process provide for certain success.

We note that the LPC is a game bird that occurs across a landscape that is more than 95% private land. Any successful strategy to manage this species must have a strong central role for the State Fish and Wildlife Agencies across the five states in which the species occurs. We strongly believe the RWP is the foundation for any such strategy, whether the species is determined to be warranted for listing or not.

Sincerely,

Keith Sexson
WGI Director Sponsor

cc: LPC State Wildlife Directors
LPCIWG
Benjamin Tuggle, USFWS Region 2
Noreen Walsh, USFWS Region 6

COMMON GROUND CAPITAL

Public Comments Processing
Attn: Allison Arnold
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

Subject: Common Ground Capital, LLC Comments on proposed alternatives to be considered in the Environmental Impact Study to be prepared by the United States Fish & Wildlife Service in response to American Habitat Exchange Stakeholder Conservation Plan, Habitat Quantification Tool, and Environmental Defense Fund's Habitat Credit Exchange Draft Agreement

Dear Sir/Madam,

Thank you for the opportunity to suggest alternatives for the Service to evaluate in the environmental impact statement ("EIS") for American Habitat Exchange's Stakeholder Conservation Plan ("SCP), the Habitat Quantification Tool ("HQT"), and Habitat Credit Exchange Draft Agreement (HXEA) for the lesser-prairie chicken ("LEPC"). Common Ground Capital submits these comments pursuant to Section 102 of the National Environmental Policy Act ("NEPA"). The applicant provided the documents voluntarily by way of a posting to the public web site http://lepcstakeholderstrategy.com/. After discussions with USFWS personnel and the consultant hired by USFWS to perform the EIS, Common Ground Capital ("CGC") believed that it would benefit the Service's habitat conservation plan ("HCP") review process to provide detailed comments on all documents now in the hope that important substantive modifications may be made to improve the documents, achieve a more vigorous conservation outcome for the LEPC, and attain a higher degree of regulatory certainty for the oil and gas industry and other stakeholders.

Throughout the LPC listing process, CGC has consistently advocated for a robust, region-wide mitigation framework anchored in the USFWS' premier compensatory mitigation model of conservation banking. In addition, CGC has provided input and advocated for a regional conservation plan and free market species credit exchange structure that will provide the best chance of both a successful and sustainable outcome for the LEPC, while also establishing a level playing field for industry and mitigation providers and creating new income streams for landowners by monetizing the LEPC as a valuable ecosystem service. This goal was not achieved in the Range Wide Plan ("RWP") and CGC is hopeful that the USFWS will work with American Habitat Exchange to create a habitat conservation plan ("HCP") that is provides more certainty for all parties, especially prairie chickens.

The CGC team has worked tirelessly over the past two years to create an unparalleled conservation banking portfolio that will deliver a net conservation benefit to the LEPC. Specifically, the multiple conservation banks CGC is developing will play a major role in achieving the Lesser Prairie Chicken Stronghold Strategy (August 2012 USFWS White Paper) of

creating at least one permanently protected area using conservation banking standards of 25,000 -50,000 acres in each ecosystem over significant parts of the five state LEPC range.

CGC is grateful to our private landowner partners with whom we have worked for many months to develop relationships anchored in trust, transparency and our team's unique track record of delivering landscape scale conservation to benefit both Greater & Lesser Prairie Chickens in our previous capacities. To date, CGC and its landowner partners have executed letters of intent/long term option agreements to pursue conservation banks in three separate locations, across two states, in two different ecosystems totaling approximately 75,000 acres. CGC submitted a portfolio conservation bank agreement in April 2013 to the USFWS for its review and is targeting approval later this month or in early April of this year.

CGC would like to thank the applicant for including it in the policy committee stakeholder process over the past year, albeit in a non-voting capacity. While it will be obvious from reviewing the following comments on the SCP, HQT & Exchange and the suggested EIS alternatives that CGC does not support many aspects of the AHE proposals, CGC appreciates the opportunity to provide input.

CGC has organized its comments into four sections: (1) additional alternatives that should be evaluated during the EIS process; (2) Executive Summary of Observations from Review of the SCP, HQT and Exchange Draft Documents; (3) comments on the Habitat Quantification Tool; (4) third party academic reviews by Melinda Taylor, Senior Lecturer and Executive Director of the Center for Global Energy, International Arbitration, and Environmental Law, University of Texas School of Law; and Dr. Todd Bendor, Associate Professor, Department of City and Regional Planning, Institute for Energy and Environment, University of North Carolina at Chapel Hill; (Attachments A and B) and; (4) Dr. Bendor's recently published paper from the journal *Sustainability* entitled "Moving Targets and Biodiversity Offsets for Endangered Species Habitat: Is Lesser Prairie Chicken Habitat a Stock or Flow?" (Attachment C).

<u>Additional Alternatives to be included in the EIS Process</u>

1. During the NEPA environmental review process, the Service must consider alternatives to the approach described in the SCP that are reasonable.[1] In this case, the Service should consider alternatives for the HCP that would provide a <u>higher level of conservation than the SCP</u>.

2. The Service should consider alternatives for mitigation that are modeled on one or both of the standard approaches for regional HCPs:
    a. Establishment of a system of permanently protected preserves protected across the species' range, with limited take permitted outside of the preserves. The vast majority of regional HCPs are designed around this model.
    b. Establishment of <u>mandatory</u> best management practices designed to minimize take and restore habitat for the covered species. Such BMPs can be paired with permanent protection of habitat. Regional habitat conservation plans such as the

[1] 40 C.F.R. § 1508.25(b)(2).

Plum Creek HCP and the Washington State HCP cover take associated with forest practices across large geographic areas through this approach.

3. The Service should consider an HCP alternative that would require that mitigation be accomplished through conservation banks. The banks would be established in conformance with the USFWS's 2003 conservation banking guidance.

4. The Service should consider an HCP alternative that requires that plan participants obtain permanent habitat credits from conservation banks or establish credits on mitigation lands that meet the minimum standards applicable to conservation banks for management, long-term funding through an endowment, and monitoring. This alternative approach would not permit the "self-generation" of credits, unless the credits met the minimum criteria. This alternative would be consistent with the Service's recently promulgated mitigation standards for the golden-cheeked warbler and black-capped vireo and the American burying beetle.[2]

5. The Service should consider an alternative in which the plan area is limited to the historic range of the LEPC. The Service's HCP Handbook provides that "HCP boundaries should encompass all areas within the applicant's project, land use area, or jurisdiction within which any permit or planned activities *likely to result in incidental take are expected to occur.*"[3] LEPCs have not been documented in Nebraska and there is nothing in the published scientific literature to justify the SCP's suggestion that the LEPC range is likely to extend to that state during the permit term.

6. The Service should consider an alternative that does not include confidentiality provisions for the plan participants, for the reasons described in the detailed comments attached.

7. The Service should consider an alternative that includes a detailed analysis of the actual costs associated with funding a series of shifting term agreements with landowners with a description of how the program will be implemented in perpetuity.

8. The Service should consider an alternative that contains quantifiable biological goals, so that progress toward meeting the goals can be monitored and evaluated.

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[2] *See* USFWS Southwest Region, Guidelines for the Establishment, Management, and Operations of Golden-cheeked Warbler and Black-capped Vireo Mitigation Lands (July 1, 2013) and Oil and Gas Industry Conservation Plan for the American Burying Beetle (DRAFT) (Feb. 21, 2014).

[3] U.S. Department of the Interior and Fish and Wildlife Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook (1996). (hereinafter HCP Handbook). (emphasis added).

COMMON GROUND CAPITAL

Executive Summary of Observations from Review of the Range Wide Plan, SCP, HQT and Exchange Draft Documents

Throughout the AHE stakeholder process, there has been much private and public speculation regarding how the results of the effort would stack up against the Range Wide Plan. Not surprisingly, the AHE stakeholders believe that their plan is superior to the Range Wide Plan, primarily due to the use of the free market to determine compliance costs. Having participated in both efforts, it is apparent to CGC the plans are strikingly similar in certain respects and, unfortunately, neither is likely to result in significant, large-scale conservation for the LEPC over the long term, or the establishment of a healthy conservation mitigation market. In both cases, the proponents appear to have strayed from the original purpose of actually mitigating permanent or near-permanent destruction or adverse modification of habitat, and instead pursue measures that will primarily serve short-term socio-political interests to the long term detriment of the species.

The plans share the following characteristics:

- **>300 pages of unnecessarily complex documents** that will be very difficult for stakeholders to understand and implement over the 30 year permit terms.

- **Reliance on voluntary programs in an area of the country in which voluntary conservation for the LEPC has not achieved meaningful benefits for the species despite more than 10 years on the books.** Even though both plans are designed for a post-listing scenario the enforcement mechanisms are exceedingly weak for non-compliance.

- **LEPC conservation strategy in both plans ignores the devastating 2013 survey results.** Both plans assume an artificially high baseline population of 35,000 LEPC across the range (2012 survey) and estimated population densities based on that number, when the real baseline is only 17,000 LEPC (2013 survey). The conservation plans are inadequate from the start and the untested mitigation framework should be thrown out.

- **Both conservation plans were developed to minimize compliance costs, rather than achieve conservation benefits for the LEPC.** The driving forces behind development of the Range Wide Plan and the SCP were to minimize compliance costs and facilitate development and economic activity, rather than to develop a conservation strategy most likely to yield a net conservation benefit for the LEPC and provide robust regulatory assurances to the oil and gas industry and agricultural interests.

- **Both plans put undue emphasis on unproven assumptions about temporary impacts associated with certain activities and they rely to a large extent on term mitigation solutions:** The mitigation frameworks incorporated in both the Range Wide Plan and the SCP are based on government landowner payment programs (NRCS's Lesser Prairie Chicken Initiative (in the RWP) or FSA's Conservation Reserve Program (in the SCP)), versus tried and true traditional USFWS compensatory mitigation tools like conservation banking. Government, tax-payer sponsored conservation programs are an important

incentive tool for conservation, but they should not be used to satisfy the Endangered Species Act's requirement that "take" of listed species be mitigated. Proven mitigation standards and solutions such as conservation banking must be the core, versus merely an option, of any mitigation framework.

- **Both plans ignore the scientific studies that demonstrate the LEPC's reliance on large, intact, un-fragmented landscapes to successfully breed and thrive.** To support the new, unproven term-based mitigation framework, the Range Wide Plan relies on a single study performed on a migratory Antelope in Uzbekistan. The AHE SCP cites anecdotal accounts of LEPC sightings in Nebraska in the mid 1700s and an unpublished, not yet peer reviewed, single research paper to justify the term agreement approach. There is not enough science to support both plans' reliance on temporary, versus permanent, protection of the LEPC's habitat.

- **Both plans give short shrift to the stronghold strategy identified as a priority by the USFWS in August 2012.**

- **Both plan include unreasonable, illegal confidentiality provisions that would make it difficult for the USFWS to monitor compliance and enforce against violators and impossible for the public to evaluate the success of the mitigation.**

- **Both plans will be governed by overly complex structures with multiple layers of committees, oversight, and consultation.**

- **Neither plan/group has enough experience or qualifications to run comprehensive regional conservation plans and complex regional mitigation frameworks as proposed.**

- **The avoidance and minimization measures included in both plays are written in broad, loose language, making them weak and difficult to enforce.**

Despite these striking similarities, there are some important differences between the Range wide Plan and the SCP. Key differences in the RWP and SCP include:

- **The Range Wide Plan includes defined population and habitat targets by which success or failure can be measured**. In CGC's view, the RWP's targets are based on the wrong baseline population, and should be adjusted upward, but we note that the plan includes targets. The SCP has no concrete biological goals.

- **Inconsistent metrics are used in the plans**.

- **Oil and gas impacts are assumed to be permanent in the RWP, but appear to be considered temporary, for the most part in the SCP.** The RWP assumes that all impacts are permanent and therefore requires participants to acquire credits in perpetuity

(the credits may be a series of temporary credits that move across the landscape, a concept that we do not endorse). The SCP states that most impacts associated with oil and gas development are three acres and temporary, citing no reference to support this assertion.

- **SCP has embraced the proven power of the free market in the Exchange**. This should put much less risk on the bird than the government type payment system that the RWP relies on, as the market will ultimately dictate what it costs to get mitigation/conservation in place on the ground to offset the impacts. Unfortunately, the strategy detailed in the SCP will likely undermine the forecasted benefits of the Exchange, as the SCP proposes having multiple options for industry to achieve compliance outside the Exchange. Having too many compliance options will ultimately create thin markets or destroy market options altogether, because the size of the mitigation market across the range and the number of mitigation options available will result in very little demand for any single option. Under those circumstances, a competitive market place is unlikely to materialize. To have an effective market, there must be a clear set of rules to encourage multiple mitigation suppliers to enter the market.

- **SCP requires that the mitigation be on the ground before the impact occurs**. This is very important for the conservation benefit of the species. RWP is a classic "in lieu fee" program that will have classic, failing, in lieu fee results for the species. The first year waiver in the RWP mitigation program, which will allow industry to impact the landscape before the mitigation is in place, will only exacerbate the problem.

- **SCP incorporates the 2003 Conservation Banking Guidance as the single standard for all dynamic permanent mitigation**. The RWP does not.

<u>Comments on the Habitat Quantification Tool</u>

The SCP Habitat Quantification Tool (HQT) offers a refreshingly intuitive and logical, albeit lengthy, methodology for calculating debits and credits. CGC commends the contributing organizations and scientists that helped craft this framework. Unfortunately, despite the merits of the method, the numbers just don't add up to much; too few debits in, not enough credits out. Most of this inadequacy stems from the simple fact that mitigation ratios in the SCP are far too low, especially for CHAT levels 3 and 4, and the proposed avoidance and impact from anthropogenic features are severely curtailed from what accepted, peer-reviewed research would indicate is accurate. Based on our preliminary review, using the example scenario provided within the HQT, the funds generated from SCP's HQT would barely be enough to provide for permanent mitigation of surface damage acres, with nothing left to offset avoidance buffers.

While CGC supports some aspects of the methodology for the HQT, we cannot support an overall metric that will create a net loss for the species. We concur with others that the avoidance and impact distances proposed by Hagen et al. (2004) should be the starting basis for any LEPC mitigation or draft HCP based on the Service's Precautionary Principle. CGC does not support the concept of three ecoregions instead of four. While the gradient between the four

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eco-regions proposed in the RWP may not be distinct, we believe that it is important to have four eco-regions to ensure that adequate mitigation occurs near the source of the impacts for the benefit of local LEPC, and that mitigation dollars not be "shipped away" to more remote and politically convenient areas with lower development potential.

It is critical that substantial improvements be made to the SCP in all of the areas detailed above as well as the specific areas addressed by Melinda Taylor and Dr. Todd Bendor in the attached documents. Without these improvements the SCP should not be approved

Regards,

Wayne Walker
Principal
Common Ground Capital, LLC

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ATTACHMENT A

Comments on the Stakeholder Conservation Plan and Habitat Exchange Agreement for the Lesser Prairie Chicken

Melinda E. Taylor[1]

March 10, 2014

The U.S. Fish and Wildlife Service (USFWS or Service) announced on February 7, 2014 that it planned to conduct scoping hearings on alternatives to include in the environmental impact statement on the American Habitat Center's draft Stakeholder Conservation Plan (SCP) for the lesser prairie chicken (LEPC).[2] This is a summary of recommendations for alternatives that the Service should consider during the National Environmental Policy Act's required environmental review process.[3] This document also includes comments on the substance of the provisions of the current drafts of the SCP and the Habitat Exchange Agreement (HEXA), which is incorporated by reference into the SCP. Unfortunately, the SCP falls short of meeting the Endangered Species Act's[4] requirements for habitat conservation plans and candidate conservation agreements with assurances. The HEXA would facilitate the use of term agreements with landowners to satisfy mitigation requirements, at the expense of proven, permanent conservation strategies. Such an approach would, and in fact already has, put the long-term survival of the species at risk.

Alternatives to the SCP

1. During the environmental review process, the Service must consider alternatives to the approach described in the SCP that are reasonable.[5] In this case, the Service should consider alternatives for the HCP that would provide a higher level of conservation than the SCP. To comply with NEPA and to analyze whether AHC's proposed mitigation meets the Endangered Species Act's "maximum extent practicable" standard, the Service must consider alternatives involving greater mitigation measures. *See* National Wildlife Federation v. Babbitt, 128 F. Supp. 2d 1274 (E.D. Calif. 2000) ("Thus, . . . the record should provide some basis for concluding, not just that the chosen mitigation fee and land preservation ratio are practicable, but that a higher fee and ratio would be impracticable.") Among other things, greater mitigation for the LEPC would emphasize permanent protection of high quality habitat and habitat suitable for restoration, rather than a series of term agreements.
2. The Service should consider alternatives for mitigation that are modeled on one or both of the standard approaches for regional HCPs:

[1] Senior Lecturer and Executive Director, University of Texas School of Law. Taylor directs the Center for Global Energy, International Arbitration, and Environmental Law at UT and teaches and writes about environmental issues. The Center promotes and sponsors education, collaborative research, and policy analyses of issues related to the environment, energy, and dispute resolution. Prior to joining the faculty of the UT Law School, Taylor was a senior attorney and Director of the Ecosystem Restoration Program of the Environmental Defense Fund from 1993 – 2005.
[2] 79 Fed. Reg. 7472 (Feb. 7, 2014).
[3] 42 U.S.C. §§ 4321-4370h.
[4] 16 U.S.C. § 1531-1544) (hereinafter "ESA")
[5] 40 C.F.R. § 1508.25(b)(2).

a. Establishment of a system of permanently protected preserves protected across the species' range, with limited take permitted outside of the preserves. The vast majority of regional HCPs are designed around this model.
b. Establishment of mandatory best management practices designed to minimize take and restore habitat for the covered species. Such BMPs can be paired with permanent protection of habitat. Regional habitat conservation plans such as the Plum Creek HCP and the Washington State HCP cover take associated with forest practices across large geographic areas through this approach.

3. The Service should consider an HCP alternative that would require that mitigation be accomplished through conservation banks. The banks would be established in conformance with the USFWS's 2003 conservation banking guidance.
4. The Service should consider an HCP alternative that requires that plan participants obtain permanent habitat credits from conservation banks or establish credits on mitigation lands that meet the minimum standards applicable to conservation banks for management, long-term funding through an endowment, and monitoring. This alternative approach would not permit the "self-generation" of credits, unless the credits met the minimum criteria. This alternative would be consistent with the Service's recently promulgated mitigation standards for the golden-cheeked warbler and black-capped vireo and the American burying beetle.[6]
5. The Service should consider an alternative in which the plan area is limited to the historic range of the LEPC. The Service's HCP Handbook provides that "HCP boundaries should encompass all areas within the applicant's project, land use area, or jurisdiction within which any permit or planned activities *likely to result in incidental take are expected to occur.*"[7] LEPCs have not been documented in Nebraska and there is nothing in the published scientific literature to justify the SCP's suggestion that the LEPC range is likely to extend to that state during the permit term.
6. The Service should consider an alternative that does not include confidentiality provisions for the plan participants, for the reasons described in the comments below.
7. The Service should consider an alternative that includes a detailed analysis of the actual costs associated with funding a series of shifting term agreements with landowners with a description of how the program will be implemented in perpetuity.
8. The Service should consider an alternative that contains quantifiable biological goals, so that progress toward meeting the goals can be monitored and evaluated. The main biological goal contained in the SCP is to reverse the decline of the LEPC and put the species on a "positive trajectory." Such vague language is inconsistent with the Service's Addendum to the HCP Handbook. Indeed, the Addendum provides that specific habitat goals are necessary for the USFWS's evaluation of the HCP: "The relationship of habitat goals to specific species will help the Services and applicant determine if a species is adequately covered by an HCP."[8]

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[6] *See* USFWS Southwest Region, Guidelines for the Establishment, Management, and Operations of Golden-cheeked Warbler and Black-capped Vireo Mitigation Lands (July 1, 2013) and Oil and Gas Industry Conservation Plan for the American Burying Beetle (DRAFT) (Feb. 21, 2014).

[7] U.S. Department of the Interior and Fish and Wildlife Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook (1996). (hereinafter HCP Handbook). (emphasis added).

[8] 65 Fed. Reg. 35,241, 35,245 (June 1, 2000).

Substantive Comments on the Draft SCP

The SCP does not comply with the legal requirements of the ESA or the provisions of the Service's HCP Handbook and Addendum to the Handbook in several important respects. As currently drafted, it does not meet the issuance criteria of Section 10(a)(2)(B) of the ESA.

First, the SCP is not based on the best scientific information about the LEPC's population levels. The Service must use the best scientific information available when evaluating HCPs.[9] USFWS's policy on information standards requires that "to assure the quality of the biological, ecological, and other information that is used by the Service in [its] implementation of the Act," the Service will require biologists to evaluate all scientific information "[t]o gather and impartially evaluate biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Service during [its] implementation of the Act."[10] The take estimates for agricultural activities in the SCP are based on survey and population density information in the 2012 survey data collected by McDonald, Griswold, Rintz, and Gardner of WEST, Inc. That take estimate ignores the 2013 survey results by McDonald, et al., which showed a 50% drop in the LEPC population range-wide.[11] The drop in population should be factored into estimates of population density for the bird across the range.

The plan lacks an estimate of the number of birds that will be taken in connection with oil and gas activities, relying instead on an estimate of acres of LEPC habitat that will be taken.[12] Relying on habitat as a proxy is acceptable in an HCP, provided that it is impracticable for the applicant to estimate how many individual birds will be taken. The SCP must provide an estimate of the number of birds that will be taken in association with oil and gas activities, as it has for agricultural activities. In addition, the SCP states that "Direct impacts from new oil and gas locations, including infrastructure. Average . . . three (3) acres."[13] The statement has no citation or explanation for support. It is unclear what is meant by a "new oil and gas location:" is it a well, a field, housing for workers, roads? Is the three acre estimate the basis for the acreage estimate of take in Table 1? How many wells are assumed in that take estimate? Much more information is necessary to evaluate the reliability of the take estimate for oil and gas activities.

The plan area described in the SCP includes the State of Nebraska.[14] The idea is that the permit area could be expanded someday, because the species' range may move northward. The potential for the range of the LEPC to move on the landscape is also the SCP's justification for its emphasis on short-term, shifting agreements with landowners. The only citations that the plan includes to support this idea are (1) an unpublished, not-yet-peer-reviewed paper by Elmore, et al. about historic shifts of LEPC populations; and (2) anecdotal accounts from the 1700s that LEPCs were sighted in Nebraska. Neither is a strong enough foundation to support the novel, temporary approach to conservation incorporated in the SCP. A recently published article by

[9] *See, e.g.,* 65 Fed. Reg. at 35,241.
[10] Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34,271 (July 1, 1994).
[11] The SCP drafters are apparently aware of the 2013 survey results; the 2013 report is cited in the SCP at p. 32. It is unclear why the drafters ignored the data when calculating estimated take from agricultural impacts.
[12] See Table 1 of SCP.
[13] SCP p. 41.
[14] SCP p. 34.

BenDor and Woodruff argues that it would be detrimental to the LEPC to base a conservation strategy primarily on temporary, moving agreements with landowners.[15]

The SCP lacks clear biological goals and targets. In comments on the Service's Proposed Rule to List the Lesser Prairie-Chicken as Threatened with a Special Rule, we described the shortcomings of the biological goals contained in the Lesser Prairie-Chicken Interstate Working Group's final Lesser Prairie-Chicken Range-Wide Conservation Plan. We criticized the methodology used to establish the goals, because it did not take into account the 2013 survey data, either. However, the Range-Wide Plan deserves credit for articulating specific habitat and population goals for the species, which can be used by the Service to evaluate the plan's effectiveness. There are no concrete goals at all in the SCP.

In order to issue an incidental take permit pursuant to Section 10 of the Endangered Species Act, the Service must make a series of findings.[16] Among other things, the Service must find that the applicant will, "to the maximum extent practicable, minimize and mitigate the impacts" of the permitted taking. The SCP does not contain enough information for the Service to make that finding.

The HCP Handbook explains that the Service must ultimately decide whether the mitigation proposed in an HCP meets the "maximum extent practicable" or "MEP" standard. The Handbook provides that "[t]o the extent . . . that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can reasonably be required by that applicant."[17]

It is not clear that the proposed conservation plan will provide "substantial benefits" to the species. There is uncertainty associated with (1) the number of landowners likely to participate; (2) the avoidance and minimization measures that the participants will choose to implement; (3) the extent to which the measures will result in benefits to the species; and (4) whether the species will be able to move across the landscape as landowners enter and exit the temporary mitigation agreements envisions by the plan.

The SCP contains estimates of the amount of take that will accompany various development activities in the species' range over the life of the permit. The SCP does not estimate how much of that take will be mitigated by the measures incorporated in the plan. Table 2 of the SCP includes conservation acreage if the estimated take is mitigated in accordance with the SCP. It is impossible for the Service to evaluate the actual potential benefit to the species without some idea of how many people and acres are likely to participate.

Section 8.4 suggests that avoidance and minimization measures may be all that are required for covered activities under the SCP.[18] Section 10(a)(1)(B) of the ESA, however,

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[15] BenDor, Todd K. and S. Woodruff, "Moving Targets and Biodiversity Offsets for Endangered Species Habitat: Is Lesser Prairie Chicken Habitat a Stock or Flow?" *Sustainability* 2014, *6*, 1250-1259; doi:10.3390/su6031250

[16] 16 U.S.C. § 1539 (a)(2)(B).

[17] HCP Handbook at 7-4.

[18] SCP p. 62.

requires minimization and mitigation. The term "avoidance" does not appear in Section 10; a strategy based on avoidance and minimization alone simply would not comply with the statute. A mitigation component is necessary to meet the Section 10(a) issuance criteria.

In addition, the avoidance and minimization techniques contained in the Conservation Measures lack precision. Many of the measures are written in broad and subjective terms. For example, in the Agriculture and Ranching section, the plan provides that "excessive" herbicide application will be avoided, not specifying what constitutes "excessive." Phrases like "when possible," "suggested," "when practical," and "where feasible" occur throughout the document, making it very difficult to evaluate whether a participant has actually complied with the measures. With such "soft" language, it is impossible for the Service to evaluate the SCP's bald assertion that the plan will protect 90% of the LEPC habitat in the permit area.

The SCP would establish a smorgasbord of compliance options for plan participants. After conforming with the avoidance and mitigation measures, the participants could acquire any necessary mitigation credits from the Habitat Exchange, established conservation banks or other "exchange programs," or self-generate credits.[19] The standards for the various credits would vary. The plan would not require permanent protection of habitat, regardless of the extent of the impact contemplated by a participant; rather, short-term contracts with landowners would generate credits that could be used to meet mitigation requirements even for permanent impacts.

This buffet-style approach would result in an extraordinary level of uncertainty for the species, whose response to shifting habitats is largely unknown, and for third-party mitigation providers, for whom it will be impossible to estimate demand. Without clear, unambiguous mitigation requirements, the market for credits is likely to be thin and market-based conservation will not realize its full potential.

The Service has never approved such a menu of compliance options in an HCP. The idea of using a series of moving, short-term contracts with landowners to generate credits that are fungible for temporary and permanent habitat impacts is also untested. To assess the value of off-site mitigation for species impacts, the Service must assess whether the gains from the mitigation areas are sufficient to offset the losses in the permit area. With the approach proposed in the SCP, that evaluation would simply not be possible. There is no basis for the Service to find that substantial benefits will accrue the LEPC as a result of this plan, or even for the Service to be sure that the approach will not lead to jeopardy for the species. The fact that the species's population has decreased to an historic low of only 17,000 birds underscores the urgency of implementing a conservation strategy based on what is known about the bird's habitat requirements, to maximize the probability of success. Now is not the time to experiment with new and unproven mitigation ideas, or to establish another program based on the types of government payments that have not succeeded in reversing the bird's decline to date.

The SCP's approach would be likely to discourage the establishment of an active market for conservation credits in the permit area. If plan participants have the option to self-generate credits at a lower cost than credits sold by a conservation bank, or even term credits through the HEXA for example, they presumably will choose to self-generate. The plan does not require that the self-generated credits be functionally equivalent to credits documented pursuant to the habitat

[19] SCP p. 62.

exchange or an established conservation bank, thereby putting the latter two mitigation options at a decided disadvantage. As discussed *infra* on page 2, the Service should require that all mitigation options in the SCP comply with the same minimum standards that conservation banks must meet for monitoring, funding, and the like. Such an approach would be consistent with the Service's recent mitigation policy for golden-cheeked warblers and black-capped vireos and the draft conservation plan for the oil and gas industry for the American burying beetle.[20]

The applicant justifies the lack of reliance on permanent preserves in the HCP on page 49 by stating that it would be a "challenge" to bind both surface and mineral rights owners to the terms of a conservation easement. The fact that there are numerous mineral rights holders in the LEPC's range would make it too complicated to use easements on a large scale. The applicant cites a paragraph from the HCP Handbook to justify its conclusion.

The paragraph cited by the applicant is actually in a section of the HCP Handbook that describes the *applicant's* obligations, not the mitigation provider's obligations (if a third party is used) with respect to the HCP. Specifically, in the paragraph immediately preceding the one quoted by the applicant in the SCP, the Handbook provides

> The applicant must ensure that the HCP will be carried out as specified. . . . The authority of the permit is a primary instrument for ensuring that the HCP will be implemented.[21]

The fact that it may be complicated or time-consuming to identify the various property interests associated with habitat does not eliminate the applicant's obligation to meet the MEP standard. In addition, there are dozens of habitat conservation plans in place around the country that create preserves on private lands with split mineral and surface estates. The Internal Revenue Service regulations provide that charitable deductions for donations of land with a severed mineral estate are permissible, provided that the impacts from mineral development are not "irremediably destructive of significant conservation interests."[22] The regulation supports the idea that the mere existence of a severed mineral estate does not make a parcel of land unsuitable for a conservation easement. In addition, it is possible in the design of a conservation easement on land with a split mineral estate to incorporate buffers, to minimize the possibility that drilling later will harm the conservation values of the property. AHC has not documented its assertion that a preserve system approach is not practical for the LEPC. Rather, the temporary term credit concept appears to be motivated by the desire to reduce compliance costs for the landowners at the cost of much less certainty for the LEPC.

The Service cannot evaluate whether AHC's SCP meets the MEP standard, because so little is known about AHC. According to press reports, the organization was incorporated in Colorado several months ago, but there appears to be no publicly available information about the structure of the organization, its board of directors, its assets, or its annual budget. The SCP mentions AHC's board, but provides the name of only one member. The Service has no way of

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[20] *See* USFWS Southwest Region, Guidelines for the Establishment, Management, and Operations of Golden-cheeked Warbler and Black-capped Vireo Mitigation Lands (July 1, 2013) and Oil and Gas Industry Conservation Plan for the American Burying Beetle (DRAFT) (Feb. 21, 2014).

[21] HCP Handbook 7-5.

[22] Treasury Regulation §170A-14 (need exact citation)

evaluating whether the mitigation proposed is the maximum extent practicable for AHC, or even whether AHC is capable of carrying out the mitigation measures described in the SCP. The permit applicant is responsible for enforcing the terms of the SCP. The Service cannot evaluate the AHC's ability to enforce without more information about the organization itself.

A related problem is the fact that the AHC does not identify the "qualified third party" contractor(s) that would carry out the conservation measures and mitigation program on the ground. The term "qualified third party contractor" is used numerous times in the document, but is never defined. Without information about the contractor's qualifications and background, it is impossible to evaluate the effectiveness of the program.

In addition to the MEP standard, the Service must find that the applicant "will ensure that adequate funding for the plan will be provided."[23] To make this finding, the Service must ensure that funding sources and levels proposed by the applicant are reliable and will meet the purpose of the HCP.[24] It is not possible to judge whether the levels would be adequate, based on the available information. The HCP must describe remedies for failure to meet the funding obligation by AHC, as required by the HCP Handbook.[25]

The SCP includes an "Impact Table" (Appendix E) that categorizes temporary and permanent impacts and direct and indirect impacts associated with various activities. The information in the table is not linked to the estimates of take in the SCP, or to the mitigation requirements for those activities. It is not clear what the table was intended to illustrate. There is no justification in the document or the table itself for classifying certain activities as causing "permanent" impacts and others as "temporary." The mitigation measures included in the SCP are similarly not linked to the table. The table should be revised and expanded, to explain the basis for the plan.

The confidentiality provisions in the SCP and Habitat Exchange Agreement are counter to the ESA and the federal Freedom of Information Act (FOIA). The ESA provides that applications for incidental take permits and all information received by the Service as part of the application shall be available to the public.[26] Information about the location of mitigation lands must be available to the public, so that the public can comment meaningfully on the plan. *See* Gerber v. Norton, 294 F.3d 173 (D.C. Cir. 2002). In an attempt to circumvent the plain language of the ESA, under the SCP the participants' names and information about their property would not be submitted to USFWS and so would be protected from public disclosure. The confidentiality provision tracks the provision contained in the conservation plan that USFWS approved for the Dune Sagebrush Lizard, which is currently the subject of federal litigation. The Service should insist that the confidentiality provisions be removed from the SCP and the HEXA.

The Service ordinarily requires annual or semi-annual surveys of endangered species on the properties of landowners participating in a conservation plan. The biologists conducting the surveys must hold an ESA section 10(a) permit. The biologist will certainly be required to report

[23] 16 U.S.C. §1539(a)(1)(B)) (iii).
[24] HCP Handbook 7-4.
[25] HCP Handbook 3-34.
[26] 16 U.S.C. § 1539(c).

species occurrences under the terms of his permit. The confidentiality provision in the SCP fails to recognize this obligation.

FOIA contains nine narrow exemptions to the disclosure requirement, none of which would apply to the identifying information about the SCP's and HEXA's participants. In *National Association of Homebuilders v. Norton,* the U.S. Court of Appeals for the D.C. Circuit held that the FWS could not withhold information about the location of properties that contained habitat for the endangered pygmy owl.[27] The court rejected the USFWS's arguments that the information was exempt from disclosure under FOIA's exemptions 3, 4, 5, or 6. The court specifically held that the location of the pygmy owls and the names of the property owners were not "commercial or financial information" covered by exemption 4.[28] The court also noted that the ESA contains no provision that would limit disclosure under FOIA pursuant to exemption 3 (Exemption 3 covers information that would be exempt from disclosure under another federal law.) The court explained that requiring the USFWS to disclose the names of the property owners and information about their properties would not constitute an unwarranted invasion of privacy and therefore subject to exemption 6. Information about the participants in the SCP and HEXA should be subject to public information requests.

Without specific information about the participants in the SCP, it will not be possible for USFWS to evaluate the efficacy of the conservation measures proposed in the plan. It is the Service's responsibility to gauge the biological effectiveness of the plan. To fulfill that responsibility, the Service must have complete, not aggregated, data.

Finally, the governance structure in the SCP is exceedingly complicated. The plan names several committees, a plan administrator, and USFWS in the governance provisions. It is linked to the HEXA, which itself has a complicated structure. Based on the information provided, it is difficult to evaluate the effectiveness of the governance and the capacity of the committees and permit holder to enforce the terms of the participants' cooperation agreements.

Habitat Exchange Agreement

The HEXA contains a number of well-crafted provisions that are clearly intended to promote conservation of the LEPC. It recognizes the role of permanent "static" mitigation in protecting the species. It would incorporate the habitat quantification tool, the use of which would provide a more sophisticated method for evaluating potential impacts to the species and appropriate mitigation. Unfortunately, the document has some significant problems that undermine its potential to provide a framework for the establishment of credits and a mechanism for ESA compliance.

Most fundamentally, the HEXA sanctions the use of "dynamic permanent mitigation," a novel idea that permanent mitigation can be accomplished through a perpetual series of short-term agreements with landowners. Under the HEXA, the Exchange Administrator would be responsible for ensuring that the stream of temporary credits continues in perpetuity. The plan participant is off the hook after it pays up front for permanent credits.

[27] 309 F.3d 26 (D.C. Cir. 2002).
[28] *Id.* at 38.

There are multiple problems with this idea. First, it will be difficult, if not impossible, for the Exchange Administrator to ensure that temporary agreements will be in place forever with landowners, to compensate for permanent impacts. Second, assessing the economic viability of such an approach would be very complicated, because presumably the price of the credits – a function of the price of land and management costs -- will change over time. Using approved conservation banks to achieve mitigation through the exchange would be much more straightforward and easier to implement.

The HEXA provides that the financial guarantees for dynamic permanent mitigation would be provided by the Exchange Administrator or the plan participant. The instrument envisions the use of a "wasting endowment" to pay for future credits associated with term agreements. Settling on the size of the wasting endowment will involve making predictions about land management practices in the future and land values that will no doubt change dramatically over time. The use of endowments to fund long-term management of conservation banks is well-understood and has a track record of success. If the Service approves the idea of dynamic permanent mitigation, it should require a large up-front endowment from the plan participant, which would take into account expected increases in land values, as well as the cost of management practices in perpetuity.

"Static permanent mitigation" is defined as credits produced through permanent protection of a participating property. In order to avoid confusion and the creation of a schism between properties upon which a conservation bank has been established and those with a simple easement, it would make sense to reference the Service's conservation banking guidance in this definition. With respect to permanent mitigation, the Exchange Agreement should specify that stand-alone easements, created without endowments, management plans, and other requirements that apply to conservation banks, will not be included in the exchange. The requirements that apply to conservation banks have been in place since 2003 and have a proven track record of generating conservation. To the extent that the HEXA includes provisions for credit generation that deviate from the banking guidance document, those provisions should be deleted or amended to be consistent with the guidance.

There are several provisions in the HEXA that limit the USFWS's ability to monitor and oversee its implementation. For example, in the "Transaction and Monitoring" section 2.03, the HEXA provides that the surface owner must consent in writing before the Service can enter her property to verify the credits that have been awarded. The Service must accept the word of a "certified verifier" about compliance. The Service should insist that this provision be deleted from the HEXA. As the federal agency charged with enforcing the ESA, the USFWS has the authority to inspect a property that has received credits under a plan it authorized. There is no legal justification for denying the Service the right to verify compliance.

The confidentiality provision in the HEXA is identical to the provision in the SCP. It should be stricken in its entirety, for the same reasons.

<u>Conclusion</u>

The SCP contains numerous legal shortcomings so that it fails to meet the ESA's standards for habitat conservation plans. It relies principally on a term mitigation strategy, that is unproven and unlikely to benefit the LEPC. It appears that the proposed creation of an entirely new type of term mitigation based on almost no science is really a cloaked attempt to achieve a lower compliance cost at the expense of the species. The Service should not put the species at risk by approving such an approach. The plan should be revised substantially. The HEXA, while clearly designed to promote conservation, is flawed and should be amended to focus less on dynamic permanent mitigation and more on tried and true methods of conservation, including habitat conservation banks.

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ATTACHMENT B

The University
of North Carolina
at Chapel Hill

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March 10, 2014

Dear USFWS:

Attached please find a white paper submitted as part of the public comment period on the EDF/American Habitat Center's Habitat Credit Exchange (HCEX) market system, as documented in the *Stakeholder Conservation Plan* (SCP), *Habitat Exchange Agreement* (HEA), and *Habitat Quantification Tool* (HQT). As researchers with a combined 13 years of experience studying wetland, stream, and habitat offset markets across the United States, we are submitting this document to express significant issues with the Habitat Credit Exchange as it is currently designed.

Thank you for your consideration of these comments.

Sincerely,

Todd BenDor
Associate Professor
Department of City and Regional Planning
University of North Carolina at Chapel Hill

Sierra Woodruff
Doctoral Candidate
Curriculum for the Environment and Ecology
University of North Carolina at Chapel Hill

Comments on the Environmental Defense Fund and American Habitat Center Habitat Credit Exchange (HCEX)

Stakeholder Conservation Plan (SCP)
Habitat Exchange Agreement (HEA)
Habitat Quantification Tool (HQT)

Submitted by:

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Summary

On February 12, 2014, the American Habitat Center (AHC) and the Environmental Defense Fund (EDF) released three draft documents describing a Habitat Credit Exchange (HCEX) for the Lesser Prairie Chicken (LPC). These draft documents included the *Stakeholder Conservation Plan* (SCP), the *Habitat Exchange Agreement* (HEA), and the *Habitat Quantification Tool* (HQT). We refer to these documents collectively as describing the operation of the HCEX.

In part, the SCP represents an unprecedented market structure that we believe, if implemented with appropriately qualified administrators and third-party verifiers, represents a significant advancement in ecosystem service trading. In particular, the role of a third-party verifier and an exchange administrator add potential layers of accountability that currently do not exist within contemporary Endangered Species Act (ESA) and Clean Water Act markets, at least not at such broad scales. However, as we discuss in detail below, the integrity of this novel structure is likely to be undermined by low mitigation standards and under-qualified participants. So while we are impressed with the proposed market exchange design, it is only a means of administration and verification of external standards. Conservation outcomes of the LPC cannot be controlled by administration and verification; these will instead be determined by the external mitigation standards.

The stakeholder conservation plan (SCP), if endorsed by the FWS, would provide a mechanism for property owners to achieve compliance with the ESA through Candidate Conservation Agreement with Assurances (CCAA). By agreeing to comply with the plan's mitigation rules, property owners are allowed to continue covered activities that may result in incidental take of the species. By including a CCAA and HCP the plan allows for property owners to enroll before or after listing of the species. Enrolling in the HCP portion of the plan following the potential listing of the species is much more efficient than applying for a permit from ESA (p. 100).

Similar to our recent evaluation of the Western Association of Fish and Wildlife Association's (WAFWA) range-wide plan (RWP), we conducted an evaluation of these documents from the standpoint of researchers who focus on sensitive ecological and environmental systems and were not involved in the conception of design of the HCEX. We have modeled this analysis off of our previous evaluation of the RWP.

Our evaluation found a number of problems with the HCEX as it is currently designed. To detail our concerns, we have organized our evaluation into 10 major critiques as summarized below. Many of these critiques are similar to those of the RWP, while several are substantially different:

1. Confidentiality provisions –The confidentiality provisions in the HCEX are not appropriate for a government-promoted environmental program. These provisions 1) are vague regarding the information that will be kept away from regulators and scientific auditors, 2) represent a major departure from previous habitat trading schemes, 3) limit the public's access to information about critical species protection mechanisms, and 4) continue a disturbing precedent for secrecy in

environmental protection programs that has been the subject of litigation.

2. Scientific advisory apparatus + concerns over conflicts of interest - The proposed HCEX scientific advisory apparatus is vague and necessitates additional policy and economics expertise. Furthermore, the actors engaged in running the HCEX (variously referred to as the 'Exchange Administrator', 'permit-holder') need to be clarified. It appears that the exchange administrator is slated to be the *American Habitat Center*, an oil and gas industry group with no previous role in any environmental market or organization. Installing a market administrator with a reputation lacking independence appears to be a clear conflict of interest and will create trust problems among LPC stakeholders.

3. Unclear goals and objectives – The SCP goals diverge substantially from RWP goals in lacking any population objective for the future. Instead, emphasis is placed entirely on habitat with no real habitat quality goals. Objectives are not quantifiable or measurable to determine if the SCP is successful or not.

4. Calculation of credits and mitigation ratios + the use of crucial habitat assessment tool (CHAT) - All data used to define habitat and CHAT function is publicly available remote sensing data that may be erroneous. The RWP habitat quality metrics may have definitional problems. Mitigation ratios and temporal relationships are not determined scientifically.

5. Unclear Enforceability – The HCEX structure is entirely voluntary, with no enforcement mechanisms to implement a mitigation hierarchy (avoidance and minimization) or ensure compliance.

6: Lack of Avoidance/Minimization criteria – The SCP seems designed to streamline habitat impacts and offsets, without considering avoidance altogether or minimization. There seems to be no emphasis on these steps in a 'mitigation hierarchy' to avoid unnecessary impacts.

7: Additionality and interactions with other markets – The SCP explicitly suggests that credits could be resold into other ecosystem markets, highlighting an inconsistency in treatment of additionality provisions required by the SCP for other LPC conservation programs (i.e., conservation banking). LPC conservation credits should not be 'stacked' (i.e. also sold as carbon credits into the California market, etc.) without explicit requirements in the HCEX structure.

8: The risks of dynamic permanent mitigation – The extensive use of temporary offset contracts 1) is not supported by ecological literature, 2) is almost entirely un-tested in habitat markets, and 3) will not likely lead to positive conservation outcomes for the LPC. The use of this approach should be exercised with extreme caution, and should not be a major component of the conservation strategy, as it may risk further declines for the LPC (BenDor and Woodruff 2014).

9: The fallacy of temporary impacts and mitigation – The SCP gives no evidence that impacts can be temporary, or should be treated as such. It also gives no indication of how credits should be budgeted for the period where 'temporary' impacts are remediated, if this is at all possible.

10: Lack of interagency coordination – Like the RWP, the SCP misses an important opportunity to establish the Exchange Administrator as a centralized planning and management authority that helps local, state, and federal authorities collaborate and prioritize LPC conservation efforts.

Report Details

#1: Confidentiality issues

While the SCP includes more discussion of confidentiality than the WAFWA plan, it does not appear to have more relaxed confidentiality rules. "Confidential data regarding private property, or which would identify or lead to the identification of any private property, will not be released under any circumstances without specific written agreement from the private property owner or their designee" (P. 12). Quite simply, it is imperative for regulators and auditors to understand the locations of habitat impact and offset sites to understand habitat dynamics and movements, limiting compliance verification and adaptive management.

Participants enroll land to produce credits through performance contracts and conservation easements (p. 10). A management plan will be developed for each participating property. This plan (Appendix B. Exhibit A) includes a description of the property rights, goals for the property management, a description of existing conditions including current management practices, and conservation actions. Conservation actions are divided into required practices, which must be implemented for credits to be realized.

Question: Why are these participant management plans not public information?

Instead, the exchange administrator summarizes LPC information in an annual report to FWS that specifies: "the number of participants; the amount of enrolled acreage by Service Area; accountings of Credits that have been registered but have not been Transferred, credits transferred, credits retired for the Net Benefit of the Covered Species and Covered Habitat, and Credits in the Reserve Account; an accounting of Credits and funds from the Restoration Fund used in Remedial Actions; recommendations developed by the Science Committee[…]" (P. 16)

Question: Will the HCEX information management structure give the USFWS enough information to determine the outcomes of the habitat-trading system?

The confidentiality provisions of the SCP are not well-defined. Although substantially better than the WAFWA RWP, it is not clear how regulators will determine that no net-habitat loss is occurring in given service areas as maps will not be given to the USFWS.

Like the RWP, the SCP has not made a strong case for blanket confidentiality for participating landowners. The case for confidentiality should override a strong prevailing interest from regulators, the public, and other stakeholders in knowing where and when habitat are being restored or preserved to offset LPC damage. It is not clear that blanket confidentiality will drive landowner participation. It is clear that blanket confidentiality has been problematic for any entity hoping to determine whether the habitat trading system is functioning well – i.e. the regulatory and environmental community (see sage brush lizard discussion in Tesauge 2013).

This type of confidentiality provision is not present in conservation banking instruments (USFWS 2003), nor is it present in many other, well-established trading markets, where landowners readily participate without a need for blanket confidentiality (likely based on market prices for participation). Finally, while the SCP and HEA reference state privacy laws, it is not clear whether this type of federal program falls under those jurisdictions.

Conclusion: The confidentiality provisions in the HCEX are not appropriate for a government-promoted environmental program. These provisions 1) are vague regarding the information that will be kept away from regulators and scientific auditors, 2) represent a major departure from previous habitat trading schemes, 3) limit the public's access to information about critical species protection mechanisms, and 4) continue a disturbing precedent for secrecy in environmental protection programs that has been the subject of litigation.

#2: Science panel + concerns over conflicts of interest

The proposed HCEX scientific advisory apparatus is vague in that it does not discuss how the appointment process is to be conducted in an open and transparent process.

Questions: Who appoints scientific advisors for the HCEX? Why is the USFWS member non-voting?

We note that both the RWP and the SCP attempt to take away any direct intervention in the system from regulators.

Another issue is that the science panel does not seem to have any role for habitat market or economics experts. Like the RWP, this suggests a potential source of some of the problems that we will point out throughout this analysis; while there is significant biological expertise around the LPC, there does not seem to be expertise in designing markets that structure incentives to accomplish the goals of the HCEX. The lack of this expertise may raise concerns over the ability to effectively create the appropriate incentive scheme for property owners to engage in credit creation.

Furthermore, the actors engaged in running the HCEX (variously referred to as the 'Exchange Administrator', 'permit-holder') need to be clarified. It appears that the exchange administrator is slated to be the AHC, an organization that appears to have no previous track record of any type. What is "AHC"? What qualifications are given for running a market that may grow to be quite large and complex?

Of particular concern is that the AHC has no previous role in any environmental market or organization. A basic Google search yields only two entries for "American Habitat Center," both of which are Texas news articles revealing the organization to have been created by oil and gas industry lobbying groups. (See: http://www.texastribune.org/2013/08/27/energy-lobbyists-set-sights-lesser-prairie-chicken/ and http://amarillo.com/news/local-news/2014-02-07/groups-

announce-prairie-chicken-programs).

Installing a market administrator with a reputation lacking independence appears to be a clear conflict of interest and will create trust problems among non-industry LPC stakeholders and the appearance of industry 'self-regulation'.

This immediately becomes apparent during the four-paragraph attempt to discuss an 'alternatives analysis' (Section 12.1 on Pg. 97), which dismisses ESA goals off hand in lieu of straw-man arguments like "[h]alting development as a result of a listing decision was thus not a reasonable alternative..." and discussions of the national role of the regions agricultural, ranching, and hydro-carbon sector. This conflict of interest continues in the HEA, wherein the goals of the HCEX appear to turn towards enabling continued habitat impacts in a seamless manner (see section below on lack of impact avoidance and minimization procedures).

A plan such as the SCP should include a strong discussion of the role of the ESA in mediating economic growth and sensitive endangered populations, including the role of market-mechanisms in providing economic incentives to find alternatives to destroying habitat (evidence from decades of research into wetland and stream markets, cap-and-trade, payments for ecosystem services, etc.). Given that plans have long been acknowledged to relay the values of those creating them (Berke et al. 2006), the SCP reveals much of the AHC as a potential future market manager. It is not clear how the AHC will be able to balance 1) its clearly stated goals of minimizing barriers to continued LPC habitat impacts with 2) its responsibilities as Exchange Administrator.

#3: Unclear goals and objectives

The plan includes a robust discussion of areas for further research. In fact, one of the stated goals is to "Enhance knowledge and comprehensive understanding of the LEPC" (pg. 52). Areas for further research the plan identifies includes: (1) assessing the actual impacts of human disturbances; (2) the effectiveness of habitat restoration; and (3) LEPC Biology (gp. 74). New scientific information and results from program monitoring will be reviewed every year for the first three years, and at least every three years thereafter, to recommend modifications to the program.

While the plan does a good job of discussing goals (Pg. 51), the objectives that they propose are not quantifiable. Plan objectives typically seek to be specific, benchmarked and measurable points (Berke et al. 2006). The plan's adaptive management discussion (p. 75-78) is relatively strong, but the lack of quantifiable objectives may hinder adaptive management efforts as it will be impossible to determine if goals are being met.

On page 69, the SCP discusses how "3% of all Credits will be retained to promote conservation of the LEPC". This 'Restoration Fund' is intended to be an insurance mechanism for unforeseen circumstances like credit failure. It is unclear, however, exactly how these credits will be retained – who will purchase these credits? Or will this simply be a surplus on the market causing delays in the economic return for credit producers?

The financial goals of the exchange are not clear. While there is a fee to put credits on the exchange (p. 96), there is no discussion of incentives for credits. What are the payoffs for credit production? Furthermore, what is the logic in restricting credit re-sales? We've never seen these types of terms in an ecosystem market structure, and can only surmise they are intended to control credit price increases, thereby keeping mitigation prices as low as possible.

The plan offers avenues for undercutting some of its own goals. For example, the plan states that credits must be generated in the same geographic region of the impact (p. 65). The exchange also allows for buyers to aggregate credits produced in multiple locations to offset a single impact (p. 31). However, there are several service area exemptions (pg. 16), such as the restoration goals in the area have already been met or offsets outside the service area provide adequate ecological value.

Question: What evidence is required to allow exemptions to same-service area offsets?

Like the RWP, perhaps most challenging is the dismissive way that the SCP treats the precipitous recent decline in LPC population (Pg. 32). The plan does note that the LPC has been subject to population fluctuations in the past, this being said recent survey results indicate a 56% decline between 2007 and 2013. While past fluctuations may in part be due to unstandardized methods, recent data collection has been standardized. While the plan supports using habitat as a proxy for LEPC, and intends on using available survey and density data to estimate takes (p.85), the SCP seems to treat this substantial decline as a natural feature of the long-term population fluctuations of the species. The plan should focus more on goals around species count and stability. Aiming to conserve specific amounts of habitat while taking a certain number of individuals implies that species counts will continue to shrink and habitat compression will continue to occur in the face of all conservation efforts.

#4: Calculation of credits and mitigation ratios + the use of crucial habitat assessment tool (CHAT)

In absence of a better existing tool, the SCP uses the WAFWA CHAT to assign mitigation ratios. The SCP then appears to simplify the mitigation ratio by removing the multiplier for credits, thereby creating a rather confusing system for calculating credits.

Overall, we find the HQT complicated and lacking discussion of how credits are produced and measured. Also important is that the plan does not have a strong discussion of <u>mitigation ratios</u>.

The habitat quantification tool is used to combine quantity and quality of habitat into a single metric – "functional acre". The authors recognize they do not have complete information and the tool will have to be improved through adaptive management.

Our Interpretation of the calculation of Functional Acres:

The HQT combines data from four scales. The second order scale is intended to quantify and evaluate conditions that may affect LEPC performance and may assist in strategic planning (p. 15). Currently, the actual conditions that are important at the landscape scale for LPC success are poorly understood. The HQT states that they will use data driven processes to identify these important conditions, but in the meantime will use CHAT categories. Including conditions at the landscape scale may also help create incentives credits in the most important places for LPC populations and dis-incentivize impacts (p. 17). Currently the HQT uses the CHAT mitigation ratios, although they recognize that "CHAT does not provide a rigorously LEPC data-driven approach that meets the SCS Science Committee criteria for standardization, adaptability, or transparency" (P. 18).

The third order scale includes surrounding conditions that may relate to LEPC performance such as extent of native vegetation, patch size, developed land cover, etc. (p. 18). At this scale there are three important factors: (1) developed land cover and tree cover reduce the suitability of the site (2) quality of open land – this is confusing, but the HQT uses something like a centered scale where 1 = average quality, thus they can reward sites located in high quality locations; and (3) human modifications such as transmission lines, roads, fences, etc. reduce site quality by a certain percentage dependent on the modification density.

The fourth order, or local scale, includes conditions for both nesting and brood rearing. To evaluate the conditions at a site, the site is divided into sampling squares, some number of squares (sufficient to provide thorough coverage, but unspecified in the HQT) are randomly selected for sampling, 5-10 points within the square are randomly sampled. At each sampling point the maximum height of obstruction (MHO) by grass, MHO by taller grass and shrub, as well as forb cover is recorded. Measurements are adjusted to a standardized scale and then averaged. Then all squares are averaged together. This standardized score is than multiplied by acres to get functional acres.

The final functional acres also accounts for deductions on local scale due to human modification, and the third order measurements. This is all very complicated, but the SCP does a relatively good job of being transparent.

Questions:

- ***What remains unclear is what constitutes a credit?***
- ***At what point following a credit project or impact will assessments be done?***
- ***The HQT also includes the length of time an impact will be present (we address this later in section 8 on temporary impacts), but will credits to offset the life of impact need to be purchased upfront?***

Our major criticism here is the same as for the RWP:

1. *All data used to define habitat and CHAT function is publicly available remote sensing data.*
2. *Habitat quality seems to have definitional problems.*
3. *Mitigation ratios and temporal relationships are not determined scientifically.*

Given the importance of the CHAT determinations on substantive market policies and procedures, it seems that extensive efforts should be made to verify and improve the data used by the CHAT. Therefore, we also pose the same questions as before:

Questions:

- ***Is there a means of determining whether the remote sensing data are accurate?***
- ***Have any verification procedures been used (Have any field studies been conducted?)?***

While the CHAT categorization certainly creates higher mitigation requirements for the most valuable conservation areas, it may not go far enough. It is surprising that the only adjustments to this ratio are given based on the CHAT category of impacts. While we understand the basic, underlying logic at play, this appears to be a completely unscientific way of establishing mitigation ratios. Many studies exist, including Moilanen et al. (2009) and Bruggeman and Jones (2008), which help to more rigorously support mitigation ratio choices.

Relating to our previous critique of the temporary nature of WAFWA offsets:

Questions:

- ***How can the HCEX provide mitigation in advance (as required under USFWS conservation banking guidance) when they are not planning ahead of time for major impacts?***[1]
- ***How do mitigation ratios account for any of the uncertainty and temporal delays incurred through habitat restoration?***

In addition, the HCEX/CHAT/RWP fails to fully describe how CHAT categories are calculated and how they will change in the future. The rules for defining different categories are not explicit; what exactly qualifies as priority LPC areas? How is corridor defined in CHAT 2? How good a predictor of available and potential habitat is the maximum entropy model used in CHAT 3? Without these explicit definitions and rules it is unclear how these areas may shift overtime and under changing conditions. Likewise, although HCEX states that CHAT categorizations will be updated, no timeline is provided.

#5: Unclear Enforceability

Like the RWP and unlike conservation banking or wetland mitigation, the plan does not create clear shifts in liability between parties, nor are the plan provisions legally enforceable. "Each party shall have all remedies otherwise available to enforce the terms of this Plan and the Permits, except that no party shall be liable in damages for any breach of this Plan, any performance of failure to perform an obligation under this Plan, or any other cause of action arising from this Plan" (p. 102).

[1] Like the RWP, the HCEX will suffer from temporal lags from landowners signing up to offset impacts. See Section 9 for a discussion.

Property owner's compliance with mitigation requirements is "documented through reporting, compliance checks, photos and remote sensing" (p. 66). Like the RWP, the Exchange Administrator may suspend the coverage of property owners if they fail to fulfill their obligations of mitigation. Discussion of the procedure for removing coverage is discussed in the appendices, appendix B-1 p. 4 (or 151 of 282)

Credits have a staged release schedule. Some credits may be released immediately on the market following third party verification of habitat quality. Following this initial release, credits are released when 25, 50, 75, and 100 percent of maximum habitat performance specified in the customized management plan is reached (HEA p. 14). To release these credits, the participant must also secure 25, 50, 75, and 100 percent of required financial assurances and performance guarantees respectively. These financial guarantees may include surety with a bonding company, collateral assignment of a certificate of deposit, certified or cashier's check, letter of credit, cash, or participation in an insurance pool (HEA p. 31). Verification is required before additional credits may be released and every five years since the most recent verification. The exchange administrator may also randomly select properties for periodic verification (HEA p. 13).

It is encouraging to see at least some penalties for defaulting on credit agreements, as well as the required financial assurances. The exchange also establishes a "reserve account" to hold credits that are not used for mitigation, except during specific situations. These extra credits are paid for with a percentage of credits transferred in each transaction (Pg. 19). In the first year, 7% of credits transferred in each transaction are put in reserve, in the second year the percentage decreases to 6%, in the third it drops to 5% and 4% in the fourth. Credits in the reserve account may replace: credits damaged by force majeure, credits that have been used for mitigation and then damaged as a result of split estate and development of minerals on the property, credits that have been sold and then discovered to not meet the required criteria, credits that have been sold and removed due to premature termination of contract, and to bridge gaps in the coverage between subsequent term agreements (Pg. 20). Credits used to replace credits lost for non-compliance must be replaced within one year after the credits are used for mitigation (Pg. 21).

"The exchange administrator is responsible for ensuring that sufficient financial resources are in place to cover in the event that a participant in the Exchange does not fulfill the Participant's obligation to the Exchange (Pg. 27)." The exchange additionally establishes a "restoration fund" to provide funding for restoration projects for credit production. On page 7, the agreement discusses restoration in more detail stating that the committee recognizes restoration is more costly, may have time lags until credits are available for release, and that they may be particularly important in the recovery of LPC. A fee of 2.5% of the cost of the credits transferred in each transaction is deposited in the restoration fund (p. 22). This fund is used for the development of credits on restoration sites. 20% of the fund is also reserved to assist participants in recovering habitat quality following damage by Force Majeure.

If the Exchange Administrator or FWS determines that the Exchange is operating at a credit deficit, credit transfers exceed the credits authorized for release, all transfer of credits will immediately

cease, with remedial actions will be determined by the FWS and Exchange Administrator (p. 25). Once a site has been restored, the property will be evaluated by a third party verifier to determine the number of credits generated by the site (Appendix B). If a property is found to be in non-compliance, no additional credits will be released (how often are permits verified? A monitoring timeline is given, but if credits are bought/sold yearly, are verifications completed yearly? If not, why not?). The Exchange Agreement specifies a remedial action plan if participants fail to meet performance standards (p. 24-25), however, it is not clear how these remedial action plans will be used to help participants that fail to achieve the contract performance; the SCP/HEA contain few details, and it appears that the SCP intends to deal with these failures on a case by case basis.

One possible problem – it is clear that property owners can terminate their contractual relationship with the HCEX at any time and only be subject to partial loss of credits, as well as a relatively small early-termination fee. (Pg. 31). Participants financially liable for terminating their contract (either voluntarily or because of poor performance) must return a percentage (100, 75 or 50% depending on time of contract less than 30, 30-60, or more than 60% respectively) of the payments received under the contract and an additional percentage (25, 15, or 5) of the total contract amount as an administrative penalty. These funds will be used to secure replacement credits; any excess funds will be used to purchase credits for the reserve account. This means that owners can immediately, and without extensive penalty, cancel credits with little notice to the HCEX.

Questions: What are the possible ecological 'bottleneck' effects of this (see permanent dynamic mitigation section for discussion)? What does the HCEX plan on managing this? Will the 'reserve account' be able to cover this dynamic?

It is not clear how the HCEX will identify landowners and get them to agree to enter the program, which is a notoriously difficult part of conservation and mitigation banking. Fee and simple acquisition of land can be challenging in this area due to decoupling of surface and mineral owners. In cases that property owners do have "unified interests" property can be enrolled in perpetual preservation, and sell the generated credits (P.50). The Exchange Administrator facilitates the transfer of credits via requests for proposals, bid rounds, reverse auctions, and other unspecified means (p.10). The SCP/HEA do not specify how this process is initiated.

Question: Does the HCEX create strong enough incentives to establish credits?

#6: Lack of Avoidance/Minimization criteria

An important issue in the protection of the LPC involves avoiding and minimizing unnecessary habitat impacts. The SCP requires avoidance, minimization, and mitigation of impacts on enrolled property (Pg. 2). While it provides guidelines for all covered activities (Pg. 55 – 60), like the RWP, there is no metric of success.

Question: Where/when/how are impacts minimized? What should impacts be minimized in comparison too? Who determines if the construction was in fact minimized?

At no point is there a regulatory authority such as the US Army Corps of Engineers (in wetland and stream mitigation) to intervene when participants want to enter the market and determine that impacts are happening unnecessarily.

#7: Additionality and interactions with other markets

We appreciate the SCP's attempt to consider 'additionality' in restoration efforts for the LPC. The HCEX attempts to prevent duplication of conservation effort by requiring participants to disclose other property commitments such as participation in other federal and state programs (appendix B). If more credits are produced on a property than previously verified, the participant may request reevaluation at their own expense. Additional credits, based on new analysis, may be released (HEA p. 15). However, where conservation values has already been protected and restored, the property is not eligible to receive credits.

However, while the SCP specifically prevents 'double dipping' (selling the same credits multiple times through the HCEX), Pg. 2 of participation contract (Section 5) specifically allows credit stacking – the act of selling restoration work as multiple forms of credits – and thereby creating the possibility of double dipping into additional environmental markets. Robertson et al. (2014, In Press) discusses the immense ecological, bio-geochemical, regulatory, information technology, and philosophical problems with credit stacking. It is surprising to see its explicit allowance in the SCP. The USFWS should heed the warning of Robertson et al. (2014) and ban the use of credit stacking in the face of huge uncertainty around its use and abuse (see documentation of credit stacking abuse by the NC Legislature:
http://www.ncleg.net/PED/Reports/documents/Wetlands/Wetland_Report.pdf).

We can see this problem when we look at how credits are verified by a "Qualified Third Party Contractor" (p. 68) prior to being released on to the exchange. It is unclear if there is any measure in place to prevent restoration projects supported through other projects from selling credits, this is a violation of additionality of credits. On page 103: "If the Participant has received funding from other sources, such as Partners for Fish & Wildlife or NRCS, they may need to repay other funding sources in accordance with agreements the participant makes with these funding sources."

#8: The risks of dynamic permanent mitigation

Like the RWP, the SCP relies on the year-old concept of 'Dynamic permanent mitigation,' wherein mitigation is achieved by the use of credits produced in a series of term agreements such that the duration of the mitigation is permanent, or in the case of the HCEX, at least 30 years long (although the SCP defines permanent as a duration of 100 years or more, the HCEX is only set to be permitted for 30 years). Buyers must mitigate impacts for the length of the impact plus the time required for the land to recover to the baseline level of habitat quality (pg. 30). Credits may be purchased yearly to offset long-term impacts (pg. 27).

It is unclear if the length of contract is built into the credits produced. HQT is a calculation of functional-acreage, but does it include time? If 25% of site credits are released, does this refer to 25% of the credits produced over the entire life of the contract?

As we discussed in our analysis of the RWP, and have recently published in the peer-reviewed journal *Sustainability* (BenDor and Woodruff 2014), the use of temporary, serial offsets is likely to pose major impediments to long-term LPC viability.

The background on the lesser prairie chicken includes very little discussion of fidelity to nest sites, juvenile dispersal, or other biological characteristics that are likely to play an important role in the design of effective credit exchange. Literature on the LPC note extensive return behaviors to previous habitat (see van Pelt 2013); this contrasts starkly with the heavily migratory[2], saiga antelope of Uzbekistan that was the subject of the Bull et al. (2013) study used to justify dynamic permanent mitigation in the first place.

The Exchange will establish a non-wasting endowment fund to provide assurance of managing the participating properties and a wasting endowment for the acquisition of new contracts to ensure there are no gaps in dynamic permanent mitigation (Pg. 27).

Question: While the Exchange endeavors to prevent gaps in dynamic permanent mitigation, how will the HCEX structure avoid ecological bottleneck effects, whereby species are forced into smaller and smaller habitat areas during contract transition periods (see Bedward et al. 2009)?

The temporal component of credits and debits also remains unclear. Credits must be purchased prior to impact; this should ensure no time lags between impact and mitigation. However, buyers can stockpile credits by purchasing credits and holding them for up to three years. What type of temporal dynamic would this create?

Credits may also be retired for non-mitigation purposes to benefit the LPC (HEA Pg. 17). Furthermore, the protocol for retirement is not entirely clear – how will credits be selected for retirement? How will these retired credits be paid for?

Finally, credits may be resold through the exchange (and they must be sold if they have not been used within 3 years of purchase), but the price of credits being resold cannot exceed 110% of the original purchase price (p. 17). We assume that this price control is to prevent speculation within the exchange. This is fairly unorthodox in environmental/ecosystem markets. What is the reasoning for this requirement? It seems to artificially increase supply of credits.

[2] The plan area is greater than the species existing range. To account for the potential shift northward of the LPC range in response to climate change and drought conditions, northern areas were included in the plan area and may in the future may be eligible to sell credits on the exchange (SCP Pg. 34, also discussed in HQT pg. 11). The plan sites Elmore et al. (2013) to support this argument.

#9: The fallacy of temporary impacts and mitigation

Overall, the treatment of time is probably the biggest issue that we find in this plan. What is the time component of credits? Are credits sold every year? If so, it seems that verifications should be completed every year. For example, HQT modifications are explicitly designed to not apply retroactively to past credit calculations (HEA Pg. 21). If this is the case, does the term accounting change? How can offsets be meaningful designed if they are inflexible for transactions, yet are set in stone for quantification.

We recommend readers reference our previous white paper on the temporary nature of habitat impacts, which is largely based on BenDor's (2009) exploration of the time delays necessary to create mitigation. Additional literature in this area includes Moilanen et al. (2009) and Bruggeman and Jones (2008).

While these questions mirror those that pose on the badly-designed 'dynamic temporary mitigation' system in both the RWP and the SCP, the SCP seems to provide no guiding logic suggesting that temporary mitigation or the HQT matches the life history, biological, or ecological characteristics of the LPC**.** Unlike the RWP, the SCP explicitly considers some types of impacts to be 'temporary' (it is not clear which; Pg. 30). We are not aware of any evidence that oil, gas, or infrastructure impacts can, in fact, be considered to be anything other than permanent; that is, ample evidence (see van Pelt et al. 2013) seems to suggest that physical habitat impacts drive away LPC more or less permanently. The idea, put forth in the HQT, that impacts can be for some small set period of time, is not supported by the literature.

That being said, the LCP and HEA do not define when impacts will be considered to be temporary or permanent. That is, while property owners can purchase credits to offset impacts (prior to their impact; Pg. 64) through the exchange or other FWS approved conservation banks or exchange programs, it is unclear if credits are required for the entire life of the impact or just for each year of the impact. The HQT gives a detailed (yet confusing) example of the credit accounting around a 30-year impact (Section 3.4.1), but no consideration is given to the amount of theoretical time that it would take to remediate/restore the habitat damaged. For example, much of this example discounts the landscape fragmentation issues associated with long, narrow impacts. It is evident that the HQT lends no consideration of style or form of impacts on species movement or fragmentation.

Questions: Where is the evidence that physical impacts to LPC habitat from oil, gas, and infrastructure can be 'temporary' and can be remediated after potentially decades of intensive use? How does the HQT account for the length of time for remediation?

#10: Lack of interagency coordination

Unfortunately, like the RWP, the SCP fails to promote interagency coordination needed among state and federal agencies. However, unlike the RWP, the HCEX does not bring the major state fish and

wildlife agencies to the table. Even issues like continued hunting will add additional complexity to LPC management in this scenario. We re-iterate the major points made in our analysis of the RWP here for the HCEX.

In this discussion, we offer suggestions to improve LPC conservation proposals by drawing on recent work that highlights the role of large-scale planning and inter-institutional coordination in improving the function of restoration markets. Large-scale planning should be incorporated in order to: (1) overcome "thin markets", (2) resolve tension between keeping offsets near impacts and providing the greatest conservation benefit, and (3) provide greater institutional collaboration in protecting the LPC.

Unlike the HCEX, which allows credits to be sold prior to full implementation (diverging from requirements in the 2003 USFWS Guidance on Conservation Banking), many markets have required full establishment before credits can be sold into offset markets. Unfortunately, in this situation Landry et al. (2005) and Salzman and Ruhl (2000) note that offset markets can become "thin" markets, where low supply and demand leads to an inactive market. As a result, the creation of offset credits may be inhibited by reluctance to invest under uncertain demand.

One solution to this problem has been implemented in North Carolina, where a state agency, known as the NC Ecosystem Enhancement Program (EEP), acts as a credit re-seller, purchasing credits from wetland mitigation sites and selling them to buyers in need of offsets. Although the "Exchange Administrator" in the HCEX provide a similar service, the SCP unfortunately does not call for any of the planning activities of the EEP. The EEP draws on local transportation plans to estimate long-term future demand for restoration credits (Dye Management Group 2007). The EEP then competitively bids out restoration far in advance of impacts, specifying the number and type of credits needed and setting specific conditions for choosing a winning bid. Theoretically, the bidding process encourages greater competition on price and quality (Landry et al. 2005). In addition, the EEP effectively assumes the risk of over- or under-estimating the demand.

By implementing a hierarchical and intensive planning program for wetland, stream, nutrient and riparian buffer offsets, the EEP has also resolved issues between localized offsets and incentivizing large-scale mitigation projects. Most offset programs require that mitigation benefits accrue to impact areas, although they differ in how proximate offsets must be (McKenney and Kiesecker 2010).

Originally, the US wetlands mitigation policy called for mitigation activities adjacent or contiguous to the impact site when practicable. This approach was criticized for creating piecemeal mitigation projects with high failure rates and no appreciation for the greater watershed context. Since it was established in 2003, the EEP has attempted to site projects in sub-watersheds that would benefit most from restoration efforts. BenDor and Stewart (2011) describe the EEP's planning program in detail, wherein large-scale river-basin restoration identifies targeted local watersheds for increased scrutiny, some of which undergo intensive local watershed planning processes to identify valuable areas for restoration.

While the operation of this system has been marred by numerous operational problems (e.g. Dye Management Group 2007; BenDor et al. 2009; Templeton et al. 2008), the system won several national awards (EEP 2009) and places North Carolina in a very strong position to strategically implement Army Corps of Engineers and EPA's new requirements to use a watershed approach in managing wetland mitigation markets (Corps and EPA 2008).[3] Under the watershed approach, mitigation sites should be located within the same watershed as impact sites, but sited to provide the most services and best benefit the entire system (McKenney and Kiesecker 2010).

We can apply the benefits and drawbacks of this system to proposed LPC conservation efforts. Under the USFWS (2003) conservation bank guidance, banks should choose locations that provide for the long-term conservation of habitat and species. In practice, however, bankers have discretion to locate banks as long as they are sited within a 'service area' defined by the US Fish and Wildlife Service. The HCEX similarly lacks a method for prioritizing areas for conservation.

The SCP uses the Core Habitat Assessment Tool (CHAT) to prioritize areas for conservation, by increasing the impact multiplier while simultaneously discouraging development and incentivizing mitigation efforts. While CHAT helps target offsets in focal areas, this tool is based almost entirely on publicly available remote sensing data. Planning efforts such as those by the EEP vastly augment this data (whose accuracy or adequacy is not discussed in the WAFWA RWP). In addition, it is unclear if the suggested mitigation ratio is in fact high enough to effectively incentivize avoidance and conservation (a further critique of the CHAT categorization is provided in Section H of this comment).

Van Pelt et al. (2013) and USFWS (2012) identify varying sources of LPC mortality, including habitat fragmentation and sub-population isolation, and locally- or state-permitted development, hunting efforts, and roadway mortality. It is evident that there is a great need to coordinate the efforts of agencies overseeing these aspects of the LPC. BenDor and Doyle (2010) argue that this coordination establishes important information feedback mechanisms whereby these agencies are able to take into account the location and landscape arrangement of offset sites into *their* planning and management efforts. For example, Glista et al. (2009) notes important factors connecting road planning with wildlife road mortality and habitat fragmentation, which long-range planning processes could help to coordinate, thereby improving state departments of transportation planning efforts for LPC purposes. Without this coordination, many regulators and institutions managing landscape change can be blind to the importance and location of LPC habitat offsets (e.g., see BenDor and Doyle 2010).[4]

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[3] NRC (2001) note that the Corps and EPA can use a portion of their budget for watershed planning in wetland markets; however, for largely political reasons, watershed planning was not made a requirement in the 2008 wetland mitigation regulations, and the 'watershed approach' (the use of increased watershed information) was instead made a standard requirement.

[4] We see this in Polansky et al.'s (2008) discussion of the difficulties in accounting for externalities associated with spatial habitat management. The ecological or conservation value of any given private property is dependent on neighboring properties. As a result, land use decisions can produce benefits and costs for neighboring landowners, or externalities (Hartig and Drechsler 2009). Land uses that lower the habitat

Conversely, institutional coordination must also direct information on the actions of local, state, and federal agencies towards efforts to conserve the LPC. In this case, where information flows from other institutions into the market, information on development and landscape change projections help to estimate demands for LPC offsets and help systems to establish them in advance of impacts. [5] BenDor and Doyle (2010) argue that the lack of this feedback is a major hindrance to the operation of a mitigation banking system; depending on the landscape level impacts (e.g., fragmentation, water quality degradation, etc.) that other governments can have, conservation banking systems for the LPC may exhibit similar long-term viability problems. The USFWS should require that any market-based mechanism include well-conceived projections for future supply and demand for habitat offsets.

In correspondence between Keith Sexson to Regional Director Benjamin Tuggle (June 2, 2012), WAFWA argued that:

> Accomplishing landscape-level management requires state of the art tools, as well as coordination and engagement of agencies, NGO conservation partners, and industry.

<u>We completely agree, and strongly suggest that any plan for LPC conservation (particularly those utilizing market-based tools) helps to coordinate all of these actors</u> (see BenDor and Doyle 2010). However, these reports and continued planning and adaptive management efforts actually suggested in the RWP completely miss the work of other important planning organizations (such as the BLM, which has established a resource management plan in Oklahoma that gives special species status to the LPC). Detailed planning efforts could be undertaken by the HCEX to support a trading program. The model for this is the NC Ecosystem Enhancement Program, an agency that has attempted to run its own market (with numerous problems), as well as provide planning support to restoration efforts throughout the state (BenDor and Stewart 2011). This widespread and innovative planning activity creates a framework for interfacing with state departments of transportation, oil and gas licensing organizations (e.g., Texas Railroad Commission), and federal agencies also engaged in LPC management.

Therefore, the SCP is missing an important opportunity to improve interagency coordination and act as a model for future habitat trading programs.

Recommendations: Market-based efforts to conserve the LPC should leverage the EEP's approach to implement a targeted planning system that will:

1) Insert information on LPC management actions into the actions of local, state, and federal agencies (beyond the state wildlife agencies that are already involved).

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quality in surrounding parcels (e.g., because they create noise or pollution), act to lower the credit value for neighbors. Likewise, enrolling land in conservation may increase the ecological value of neighboring land.

[5] This is evident in the fact that the EEP fails to draw on local development plans, leading to poor estimates of future aquatic ecosystem impacts (BenDor and Doyle 2010),

2) Insert information on the actions into the actions of local, state, and federal agencies into efforts to conserve the LPC.

Along with these institutional coordination aspects, we also recommend an incentive system such as that studied by Hartig and Drechsler (2009), who found that simple spatial incentives to encourage clustered or connected conservation produce positive effects relative to no spatial incentives, especially for species limited by dispersal. Essentially, markets that consider spatial connectivity of LPC habitat would likely result in much better conservation outcomes. This could come in the form of incentives to governments or partnering organizations that construct infrastructure in clustered manners so as not to disconnect conservation areas.

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Article

Moving Targets and Biodiversity Offsets for Endangered Species Habitat: Is Lesser Prairie Chicken Habitat a Stock or Flow?

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Abstract: The US Fish and Wildlife Service will make an Endangered Species Act listing decision for the lesser prairie chicken (*Tympanuchus pallidicinctus*; "LPC") in March 2014. Based on the findings of a single, Uzbek antelope study, conservation plans put forth for the LPC propose to modify and re-position habitat in the landscape through a series of temporary preservation/restoration efforts. We argue that for certain species, including the LPC, dynamic habitat offsets represent a dangerous re-interpretation of habitat provision and recovery programs, which have nearly-universally viewed ecosystem offsets (habitat, wetlands, streams, *etc.*) as "stocks" that accumulate characteristics over time. Any effort to create a program of temporary, moving habitat offsets must consider species' (1) life history characteristics, (2) behavioral tendencies (e.g., avoidance of impacted areas, nesting/breeding site fidelity), and (3) habitat restoration characteristics, including long temporal lags in reoccupation. If misapplied, species recovery programs using temporary, moving habitat risk further population declines.

Keywords: endangered species; habitat offsets; environmental markets; dynamic habitat

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1. Introduction

The development and spread of wetland and stream mitigation in the United States has functioned as a model for emerging ecosystem markets, including water quality trading (e.g., nitrogen markets) [1] and endangered species habitat offsets (e.g., conservation banking) [2], in the United States and other nations (e.g., Australia, Brazil, Colombia, and South Africa). Substantial literature has focused on the use of biodiversity markets for conserving endangered species, whereby impacts to habitats are viewed as species "takes", and are required to be offset through habitat preservation and/or restoration in another location [2]. A good deal of work has attempted to draw connections between the type of market-based incentive mechanisms seen in wetland and stream markets with the specific habitat needs of species targeted for conservation [3].

In this paper, we will similarly remark on the nature of ecosystem markets, particularly as they can be viewed as "stocks" or "flows"; flows being trades of nearly instantaneously obtainable and transient commodities or conditions to be traded in a market, and stocks being the accumulations of those flows or conditions over longer time periods. In drawing this important distinction between different types of ecological markets, we pose a simple question—one whose answer may change depending on the exact policy application: Should the restoration or preservation of species habitat represent a "stock" or a "flow" of ecological services across the landscape?

We pose this question in response to the recently proposed application of the concepts introduced by Bull *et al.* [4] for a species potentially receiving federal protection under the Endangered Species Act. Bull *et al.* [4] provide insight into conservation techniques for species whose habitat is particularly difficult to safeguard. The authors propose the use of temporary habitat offsets that can shift along with species whose habitat "moves" in space, as a result of migratory behaviors or environmental changes (e.g., climate change). In developing their conception of dynamic habitat offsets, the authors cite Poiani *et al.* [5] who sampled 20 existing conservation projects, estimating that "…more than half would require major alterations if climate-change impacts were considered. In cases where species' ranges are projected to shift in response to climate change, mobile [protected areas] could facilitate conservation". Bull *et al.* [4] go on to argue that the effectiveness of permanent protected areas may be compromised when conservation targets are not stationary. For example, stationary protected areas fail to protect migratory species over their life cycle. Bull *et al.* [4] provide an interesting (and convincing) application of dynamic habitat offsets to the saiga antelope in Uzbekistan.

Our interest in dynamic habitat offsets arises from the recent range-wide plan created by the Western Association of Fish and Wildlife Agencies (WAFWA) to protect the lesser prairie chicken (*Tympanuchus pallidicinctus*; "LPC"), a member of the grouse family that has experienced precipitous decline over the last decade throughout its range in the United States Southern Great Plains [6,7]. This range-wide plan is innovative in many ways and represents an elevated level of coordination by the US states containing LPC habitat in an attempt to avert a potential collision between rapid energy production and LPC recovery. However, we would argue that the application of Bull *et al.*'s [4] species conservation insights to the LPC represent a dangerous re-interpretation of endangered species habitat provision (and endangered species conservation, generally) as a "flow" in the landscape.

The idea that habitat can be modified and spatially re-positioned through a series of *temporary* preservation/restoration efforts, is a substantial departure from previous recovery programs, which

have viewed ecosystem offsets (habitat, wetlands, streams, *etc.*) as "stocks" that accumulate characteristics over time [8]. In addition, the range-wide plan's proposed dynamic habitat offsets do not adequately consider the LPC's (1) life history characteristics, (2) behavioral tendencies (such as avoidance of previously impacted areas or inclinations towards specific nesting zones), and (3) habitat restoration characteristics, including long temporal lags in habitat establishment. While the Lesser Prairie-Chicken may be particularly ill-suited for temporary habitat offsets, the issues that arise in this case are not unique and must be considered in other habitat markets considering temporary habitat conservation to offset permanent impacts.

2. A Range-Wide Plan for Protecting the LPC

WAFWA's plan represents an effort by five state governments to preclude a formal listing of the LPC by the US Fish and Wildlife Service (FWS) under the US Endangered Species Act (16 USC 1531–1544). If formal listing is not avoided, and the LPC is listed as a "threatened" species (one step under an "endangered" determination), then WAFWA may be granted an exemption (known as a 4(d) ESA exemption) under its proposed plan. In this case, landowners participating in the WAFWA plan may continue development and landscape impacts as long as they comply with the plan (which is intended to have a net benefit for the species). Although the USFWS remains the ultimate arbiter of whether a species is being adequately protected, a 4(d) exemption would delegate much of the authority of LPC conservation to WAFWA.

WAFWA's plan heavily leverages biodiversity offsets (the terms "mitigation" and "offsets" are dependent on the specific market, but are used interchangeably here), whereby habitat that is impacted by development (typically oil and gas extraction or electric/road infrastructure), is offset by restoration or preservation of grasslands habitat elsewhere. However, unlike previous efforts to create permanent habitat restoration or preservation sites (as seen in the USFWS [8] *Guidance on Conservation Banking*), WAFWA [7] (p. 93), attempts to make offsets heavily dynamic in the landscape, drawing on the logic put forth by Bull *et al.* [4]:

- "The WAFWA Mitigation Framework will implement two separate mitigation trading markets, one based on short-term (5–10 years) contracts and another focusing on long-term conservation. The need for this two-market system is based on LPC biology, habitat stochasticity, and anticipation of population shifts brought on by changing climatic conditions. Unlike other grouse species, LPC appear to be adaptable to changing habitat conditions (*i.e.*, structure, grass species composition *etc.*), which can be created in a relatively short time period (within 2–8 years) […]."
- "This moving conservation concept is further supported by a recent study that cautions against using traditional conservation strategies involving static tools (e.g., protected areas that have fixed spatial boundaries). J.W. Bull *et al.* [4] discuss the difficulty of implementing conservation for "moving targets" such as migratory species or landscapes subject to environmental change. The observations made by J.W. Bull and others about landscapes are similar to those observed within the range of the LPC. They propose approaches for dealing with "moving" conservation targets by including mobile protected areas, which follow their targets across the landscape."

Bull *et al.*'s [4] study, which argues that flexibility in offsets are key to species conservation, is used to justify WAFWA's determination to implement 75% of all offsets as a series of temporary contracts with landowners. WAFWA may also place emphasis on temporary contracts because the majority of LPC habitat (95%) occurs on privately owned lands and effective conservation of LPC is likely to require significant support from private parties [7]. Permanent conservation is expensive and often requires extended management to maintain suitable habitat conditions for target species. Dynamic habitat conservation is intended to quickly affect change in habitat condition over a larger spatial extent. Due to the pervasiveness of these conservation challenges, temporary offsets suggested in the WAFWA plan seems to be indicative of future conservation offset efforts for other species [9]. The growing prevalence of temporary contracts in offset markets emphasizes the need for careful evaluation of the consequences of relying on dynamic habitat conservation to offset permanent impacts.

3. Ecosystem Markets: Trading Stocks or Flows

In exploring whether LPC habitat should be considered a "stock" or a "flow", we can draw on previous work in U.S. aquatic mitigation markets, which include U.S. Clean Water Act Section 404 (33 USC 1344) mitigation markets for wetlands and streams [10], and more recently, water quality offset markets [11]. Efforts to draw analogies and gain lessons from the nearly 30 years of wetland market implementation have included relevant work by Raffini and Robertson [12] and Robertson and Mikota [11], who explore policy differences between water quality trading and wetland markets.

Perhaps the most relevant difference is the fact that water quality markets, at least as they have been articulated under US Policy, are a function-based "flow" market, wherein trades are typically articulated as contracts leading to changes in land management actions that temporarily decrease water pollution, usually on a yearly basis. That is, payments lead to temporary improvements in water quality, which can be initiated or severed at any time, and which must be repeated year after year. A lack of trades can lead to low water quality in one year, and widespread and well-enforced contracts can lead to vast improvements in water quality the next year. Depending on the regulated water body (e.g., in-stream water *vs.* an estuary), the location and time extent of water quality management actions may be of little importance as long as the overall water quality in a water body is improved on an immediate time scale [13]. Water quality credits represent a function-based commodity defined by a single function: typically denitrification, phosphorus sequestration, or sediment retention [11]. The result of this is that the quality of water in a body (typically a river system) does not accumulate (at least not as interpretable under recent policies); it is an attribute of a continually flowing system.

This contrasts markets for wetlands or streams themselves, which trade credits based on overall conditions, "stocks" or a "bundle of functions". While single function measures, such as vegetation cover, may be used to assess mitigation sites, these serve as a proxy for a range of ecosystem functions [14]. Condition-based credits recognize that ecosystem functions are intertwined and that the complex connections between functions remain largely unknown and unquantified [11]. Restoration of wetlands and streams takes years or decades to produce adequate or stable ecological functions. If management actions cease, the wetland or stream ecosystem conditions deteriorate and cannot be immediately reversed the following year. As a result, wetland and stream markets that trade condition-based credits

operate inherently as "stocks" that accumulate energy inputs (e.g., plantings, hydrologic regime establishment, soil conditioning, *etc.*).

Robertson and Mikota [11] further argue that an important difference between markets for stocks (ecosystems) and flows (ecosystem outputs) is that flows are temporary, while stocks produce a permanent set of functions that are required to be protected and maintained for perpetuity. In the case of the LPC, we can consider both kinds of markets: as a stock, LPC credits represent functional habitat protected for perpetuity; as a flow, LPC credits represent species counts over a period of time (*i.e.*, "chicken-years"). Differently stated, when considering if a condition- *vs.* function-based metric is appropriate, we must consider whether we are interested (1) in the actual condition of LPC habitat, or (2) in the population (or other habitat outputs) of LPC on habitat sites.

4. Application to the LPC

A fundamental question that must be addressed while evaluating the design of any market-based habitat offset system for the LPC is: Is LPC habitat a stock or a flow?

The WAFWA range-wide plan, which is primarily based on Bull *et al.*'s [4] dynamic habitat offset concept, treats LPC habitat as if it is a flow, providing a single function similar to water quality offsets. The plan claims that temporary contracts allow flexibility to shift conservation areas as LPC range changes due to climate change. As such, habitat offsets can fluctuate between preserved/restored habitat and other uses based on contracts that can sequentially expire [7]. While short-term conservation contracts may be beneficial to allow for long-term LPC range change that may or may not happen, these benefits must be evaluated in light of (1) the cost of habitat turnover, (2) the ability of LPC to move across the landscape and utilize newly restored habitat, and (3) the likely effectiveness of monitoring efforts.

While the location and temporal extent of water quality projects are unimportant as long as nitrogen levels are reduced in the targeted water body, biodiversity is highly sensitive to both spatial and temporal allocation of habitat [13]. In biodiversity offset markets, each trade represents destruction of a habitat patch and the populations associated with that patch; created habitat patches on the other hand must become occupied before they can contribute to species survival. Due to the difficulty of habitat restoration, some offsets may never reach expected habitat quality or support LPC populations. Thus, even when the habitat area remains constant, spatial reallocation of habitat, or "habitat turnover", can be detrimental to species viability [13,15,16]. Consequently, offset trading may be able to achieve the no-net loss requirement in habitat, but will do so without producing the desired conservation benefit for the species.

In a market where habitat restoration is temporary, habitat turnover will be more rapid because not only do trades result in reallocation of habitat but also the termination and creation of restoration contracts. We should note that several historic conservation programs have also used voluntary short-term contracts to good effect. The Conservation Reserve Program, perhaps the largest conservation program in the U.S., provides incentives to farmers to convert their land back to native grasslands, usually enrolling areas that are not be ideal for crop production. The Conservation Reserve Program has historically had high rates of re-enrollment, with 10–15 years contracts that result in conservation for a longer duration. However, WAFWA's plan does not ensure the same success; first, WAFWA's

contract times are much shorter. Second, unlike the WAFWA plan, the Conservation Reserve Program has well-established mechanisms for enforcement of conservation standards. Lastly, and most importantly, the structure of these programs is fundamentally different; the conservation reserve program provides incentives for conservation (there is no damage being offset), while WAFWA uses short-term contracts to offset certain damage to LPC habitat. Voluntary, temporary contracts can play an important role in conservation, but using these mechanisms within an offset market may not result in the desired conservation benefit.

When we consider the specific life history characteristics of the LPC, habitat turnover caused by offsets and temporary contracts becomes even more problematic. LPC have high fidelity to breeding and nesting sites, returning to the same sites year after year, even when habitat becomes degraded [6]. Juvenile birds may choose new nesting sites, but their dispersal distances appear limited with an average dispersal distance of 5.3 miles [7]. High fidelity to nesting sites, low brood survival rates, and limited dispersal distances combine to call into question the LPC rate of dispersal and mobility in the landscape. The USFWS recognize the need for long-term protection to account for LPC biology [17], (p. 3):

> In addition to these size requirements, strongholds ["…areas managed or set aside for long-term LPC conservation and of sufficient size to support a viable population of LPC [7]"] must have long-term protection in place to address the species' relatively short life span, low nest success, high annual mortality, low recruitment, and high juvenile mortality. In the context of the lesser prairie-chicken, 10 to 15 years timeframes may be too short a period due to the species' life-history traits.

If the rate of landscape change is faster than the rate of dispersal, LPC may not be able to occupy new habitat patches, reproduce, and disperse before habitat becomes unsuitable and, consequently, regional populations may not survive [16]. Thus, the higher the rates of landscape change and habitat turnover, the lower the probability of regional population survival. These temporal effects can far outweigh the effects of habitat provision and location [15]. By mitigating permanent impacts with temporary, moving habitat WAFWA is suggesting a trade of certain habitat destruction for uncertain offsets.

While the biological consequences of high habitat turnover alone provide sufficient evidence to question the design of WAFWA habitat offset program, there are additional implementation drawbacks. If credits represent flows, then, similar to Robertson and Mikota's [11] argument in water quality markets, it will be difficult to monitor the status of these flow credits. It remains uncertain how to assure the production of "chicken-years" is actually occurring at credit-producing sites. For example, Dreschsler *et al.* [18] found information asymmetries that complicated contracting for species conservation, since landowners were found to have an incentive to overstate effort required and over-report their value of conservation. Moreover, while stock credits can use condition-based metrics for success, flows are function-based, namely chicken-years produced. While one could ideally assess the value of conservation by assessing its influence on species survival, direct monitoring may not be available or may be prohibitively expensive [19].

Can we treat LPC habitat as conditioned on management actions that can sequentially expire? Allowing the levels and locations of habitat to ebb and flow from year to year, fails to account for accumulations in terms of (1) learned avoidance behaviors [6] and (2) high site fidelity (e.g., leks, brooding, and nesting areas). Furthermore, the concept of habitat restoration needs to be evaluated in

terms of time lags between impacts and restoration—it does not make sense to implement (relatively) short-term contracts for habitat restoration, when land restoration itself can take years to establish basic vegetative communities [20]. In the case of the LPC, habitat restoration may take in excess of eight years to establish [7], and reoccupation may take even longer.

A small literature, particularly pertaining to compensatory wetland mitigation, has recently begun to address several pertinent issues relating to the temporal delays associated with offset markets. Quétier and Lavorel [21] and Bedward *et al.* [20] argue that time lags in the development of habitat means offset gains may take decades to materialize, even though biodiversity losses are immediate. While restoration takes time to be ecologically successful, impact permits are not typically withheld until a replacement is deemed successful [22]. Determining ways to handle these temporal losses are critically important for the effectiveness of offsets in sustaining species habitat; Bedward *et al.* [20] points out that the immediate decline in habitat availability created by these temporal lags may cause a critical bottleneck in the population size that can lead to regional extinction.

Another important issue arises in the context of the "inexact" science of habitat restoration and creation. Offset projects often fail to produce habitat that can sustain the target species at the original density, or at all (see wetland examples in [23]). This is often accounted for by offsetting larger areas of habitat than are lost (see [24] and [25] for a discussion of these "offset ratio" multipliers). Little work has studied these issues in the context of habitat offsets; unless habitat restoration or creation for the LPC is particularly easy, treating it as a flow will require consistent expansion of offset area.

5. USFWS Precedent: Endangered Species Habitat Is a Stock

Stock and flow considerations have already entered into past USFWS reasoning, particularly in requirements that conservation banks (formalized habitat offset sites, used extensively throughout the Western United States [26]) protect land permanently:

> At the time that the first credit in a bank or phase of a bank is sold, the land within the bank or its phase must be permanently protected through [permanent land purchases] or a conservation easement, with any land use restrictions set in perpetuity for the land legally established (USFWS 2003, p. 10).

The logic driving this dictum is echoed in 2008 regulations for wetland mitigation banks [26], which require permanent protections for aquatic ecosystem offsets, thereby specifically identifying them as a stock, which cannot reasonably be protected with temporary contracts.

The USFWS conservation banking guidance [8] goes on to note that:

> …[c]onsequently, once any credit in a given bank or phase is sold, the entire area is automatically and legally protected, regardless if the rest of the credits in the bank or phase are sold, thereby eliminating future fragmentation of habitat.

This explicit requirement for long-term protection for habitat banks echoes requirements for non-wasting endowments for long-term monitoring and maintenance on stream and wetland restoration sites [27].

6. Conclusions

The WAFWA range-wide plan has prompted coordination by the US states containing LPC habitat and represents an important attempt to avert a potential collision between rapid energy production and LPC recovery. Furthermore, Bull *et al.*'s [4] application of temporary offsets to species habitat impacts represents an innovative method for dealing with dynamic habitat requirements and changing environmental conditions. However, the U.S. Endangered Species Act considers habitat destruction to be an important element in endangered species population decline; as a result, the law (and policies emerging from the law) must explicitly consider habitat to be an integral part of the species' lifecycle and life history. In the case of the lesser prairie chicken, the species' habitat is clearly an ecosystem, whose functions accrue over time. As with nearly all other ecosystem-centered markets, including wetlands, streams, previous conservation banking efforts, and even carbon offset markets [28], LPC habitat should be considered as a stock for the purposes of species recovery policies. As a result, long-term site protections must be a key feature of any market-based policy for species protection, including the proposed WAFWA habitat offset market or any other proposed markets (e.g., Habitat Credit Exchange) that rely on this type of 'dynamic permanent offsets' or 'dynamic permanent mitigation'. The relative permanence of these protections should be in line with the species' life history and impact avoidance dynamics.

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Author Contributions

The authors contributed equally to this work. BenDor conceived of the article, reviewed plan documents and literature, and authored early drafts. Woodruff added critical intellectual content, reviewed plan documents and literature, and aided all stages of writing.

Conflicts of Interest

The authors declare no conflict of interest.

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Name: Anonymous 1 Anonymous

Comments: First and foremost, I would like to applaud this proposed legislation for the mere fact that takes into account the importance and relevance of its surrounding environment in conjunction to human development and activity. While I understand the importance of biodiversity and ecology, one has to understand as general population were as homo sapiens are projected to only increase in size and range. Thus I think it is important that for our own good and good of the environment at large we take cautious measures and actions to conserve what we have now in a sustainable measure while we simultaneously take into the account the surrounding environmental at large in terms of ecology, biodiversity, and ecosystem services. With that said I believe this proposal is a good step in the right direction for future environmental legislation. However, one thing this proposal could think about for future references is idea of looking the surrounding community and area of the proposed development schemes and what effect that said development might have on the community. For instance, if the proposed development scheme is opting to place a nuclear treatment facility near such and such area, I think its important to look into the economic, social, and cultural impacts of that said proposal on the community.

close window

Name: James Adams

Comments: As one Texas state wildlife biologist working on the lesser prairie chicken project explained to me, Garrett Hardin's Tragedy of the Commons might be a little communistic but, in his opinion, it was sound policy. I still don't know how the part about human activity being artificial fits into Hardin's resurrection of discredited Hegelian philosophy, and would like to know.

The Endangered Species Act, when used as suggested in this plan, denies the priority of the individual embodied in the US Constitutional prohibition against takings without just compensation. It's called the endangered species act, not the endangered habitat act. And we all know how animals especially l. p. chicken and pheasants adapt to human activity and, in fact, thrive in greater numbers than they do in the unmanaged wild where there is no natural balance, only a roller coaster of plenty, then starvation. Sequestering our natural resources impoverishes us. History repeatedly proves that only business development (private property and economic freedom, the source of our exceptionalism from Marx' suggestion that Communism is inevitable) adds wealth to the nation. Natural balance is untrue.
On the other hand, man's maize production allows them to winter over in great numbers. They live successfully in the oil patch near Bledsoe Texas and fly into the maize patches for food.

The government plan focuses on unconstitutionally vague notions of "take" in relation to habitat conditions in derogation of private property rights and economic freedom that do not track the statutory definition of the word take. For every instance of the take of the animal, us humans are deprived of just compensation because of the illegitimate taking of control of our private property. The plan acts as an extra-judicial condemnation but without compensation of our private property and threatens us with excessive fines and prison and even worse for resistance to federal authority. We bought the property so we could have unfettered control, absolute dominion over it, to use it the way we see fit, for our exclusive use and enjoyment and that is how our deeds read.

By putting the human on the same level as the animal's habitat de-humanizes us. To adapt what J. Roberts said in the dog fighting and animal crush videos cases, the ad hoc (made for a special purpose) balancing test (that Kagan advocated) that denies our sacred individual right to just compensation is startling and dangerous. Whether the ad hoc test appears in court argument or in statute, the constitution sets out fundamental law that neither may violate, no matter how tortured the form and sketchy the reasoning.
Hegelian economics are discredited world-wide and won't work in the US either. And talking debits, but not credits, without any numbers lends no economic credibility whatsoever to the plan. In my view, public officials who push Hegel's 200 year history of discredited views should be shown the door.

When activists inside and outside the government put an animal and its habitat in direct conflict with our federally protected human rights to use our property the way we see fit, the activists lower all the many millions of Americans to the level of the animal. That de-humanizes us. And we are then made subhuman by the overarching administrative state that maintains us in that less-than-human relationship. Hitler and other followers of Hegel proved that the power to force people to do "good" is the same power to force people to do bad.

The specific intent to de-humanize us can be seen in the fact that the Chinese ring necked pheasant was introduced through propagation thereby generating revenues consistent with our 200 year tradition of private property rights and became an unqualified economic success that increased the wealth of the nation. Yet, those proven methods are not being tried here.

Instead, by use of Hegel's illegitimate and brutal concept of mutual coercion, the Tragedy of the Commons, promises economic failure on the same scale as the 20 year old spotted owl fiasco which should be cleaned up before the agency is allowed to commit another major economic blunder during this our current economic crisis.

We know Hegel's views lead to brutality for the reason that his views engender an attitude of scarcity, where individual rights must be denied for the greater communist good. Watching the Germans and Russians brutalize each other justified by their competing Hegelian views during World War II should be ample warning that the American attitude of abundance, faith in God and government's unqualified duty to protect our sacred individual private property rights and

economic freedoms yields a far gentler nation than the Nazis or Communists ever managed to create.

James Adams
109 W. Washington Ave
Morton, Texas 79346

close window

Name: James Adams

Comments: Of all the plans, Natural Resource Solutions has the best one but that plan is still not adequate to remove the constitutional infirmity of the Endangered Species Act.

I my view, and I think others think so too, the US Congress exceeded its authority enacting the ad hoc balancing test in the Endangered Species Act.

J. Roberts found Kagan's ad hoc balancing test to be "startling and dangerous" as well should we view the ad hoc balancing test found in the Endangered Species Act 16 USC sec. 1533 (b) (2)

Within the context of an ad hoc balancing test please consider the following:

" "There, SG Kagan claimed that the dog fighting statute did not violate the Free Speech Clause. Chief Justice Roberts responded:

The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.” Brief for United States 8; see also id., at 12.

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." "

http://www.thecocklebur.com/supreme-court/kagan-reverses-course-in-first-amendmentvideo-game-case

close window

Name: Lea Soil and Water

Comments: To Whom It May Concern:

The Lea Soil and Water Conservation District (LSWCD) submits the following with reference to the Notice of Intent to prepare an Environmental Impact Statement (EIS) for a Habitat Conservation Plan (HCP) for lesser prairie-chicken within the states of New Mexico, Colorado, Texas, Kansas, Oklahoma, and Nebraska (Docket No. FWS-R2-ES-2013-0134). LSWCD holds the mission of facilitating the conservation of the natural resources in South Eastern New Mexico by providing opportunities and quality support to local citizens and agricultural producers through representation, technical and financial assistance, and leadership. As such, LSWCD reminds the US Fish and Wildlife Service (Service) of its obligation under the National Environmental Policy Act of 1969 (NEPA) to identify other governmental entities that have jurisdiction or special expertise regarding the social, economic, or environmental impacts associated with the proposed action requiring NEPA analysis (e.g., the proposed EIS). LSWCD therefore requests designation of our individual Soil and Water Conservation District (SWCD) within the historic range of the lesser prairie-chicken as a cooperating agency for scoping of the proposed EIS by the Service.

Collectively, the SWCDs are authorized by the Soil and Water Conservation District Act (73-20-25 through 73-20-48 NMSA 1978) to conserve and develop the natural resources of the state, provide for flood control, preserve wildlife, protect the tax base and promote the health, safety and general welfare of the people of New Mexico. The scope of the proposed EIS has great bearing on defining the potential impacts of the untested and unproven conservation and mitigation scheme as described in the HCP. Such apparent and substantive proposed change of course from the five-state range-wide lesser prairie-chicken conservation plan (RWP) as Service-endorsed in October 2013 causes LSWCD great concern, both for the future of the conservation success of the RWP and for the individuals whose livelihoods depend on continuation of wise use of the natural resources in eastern New Mexico without broad and unjust implementation of the Endangered Species Act of 1973 (16 U.S.C. 1531-1544, 87 Stat. 884), as amended (ESA).

In closing, the LSWCD reiterates our previous and unwavering opposition to listing the LPC as threatened or endangered under the ESA and requests cooperating agency status within the historic range of the lesser prairie-chicken (SWCD Region VI). Elected members within LSWCD have specific expertise relevant to the impacts of the proposed HCP on the local landscapes represented within the LSWCD boundaries. Their local and state knowledge will be invaluable to the Service in scoping the potential impacts to be outlined in the proposed EIS. If you have any questions regarding our request, please let me know. I look forward to a timely response.

Sincerely,

close window

Name: Jim Snipes

Comments: March 10, 2014

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

Re:EIS for the Stakeholder Conservation Strategy/American Habitat Center Habitat Conservation Plan for the Lesser Prairie Chicken

To Whom It May Concern:

Please accept these comments on behalf of the Kansas Farm Bureau, Kansas' largest general farm organization, with about 105,000 member families. The proposed listing of the Lesser Prairie Chicken (LPC) as threatened, affects thousands of our members in the western half of the state of Kansas. I serve on the policy committee for the Stakeholder Conservation Strategy and have attended meetings across the region in an effort to offer input for the development the Habitat Credit Exchange.

It is heartening to see organizations, like Farm Bureau and other agricultural organizations which represent landowners, working together with the oil and gas industry and the Environmental Defense Fund toward the common goal of preserving and restoring LPC populations and habitat.

At a time when there are never enough federal or state dollars for threatened and endangered species conservation, the Strategy may very well be the best model for species conservation for the future. This model is built to be robust, with thorough scrutiny and oversight, as the operating structure places the Service at the top of the Strategy.

Kansas Farm Bureau has enjoyed the opportunity to participate I this process and appreciates the level of cooperation and respect the stakeholders paid to one another. That the Strategy and this Environmental Impact Statement are being completed so quickly is evidence of how well everyone works together.

Following are some of the elements of the Habitat Exchange that we fine attractive:
• Dynamic permanent conservation offset. As we understand this entirely new concept, a dynamic permanent offset keeps the net conservation benefit constant, even though the offset may change from one piece of property to another, thus making the offset permanent. This will be managed by the Habitat Exchange Administrator.
• Free-market based buying and selling of credits and debits.
• Creation of the Habitat Quantification Tool.
• Creation of a Reserve Account to keep the net conservation benefit to the chicken whole when circumstances happen to a property owner which are beyond his control.

The entire process of creating the Habitat Conservation Program has been a pleasure. We do not wish to see the Lesser Prairie Chicken listed as threatened; however, we are hopeful this Strategy will be successful for the LPC, the environment and our landowner and producer members.

Thank you for your consideration in this matter.

Sincerely,
Jim Sipes
State Board Member
Kansas Farm Bureau

close window

Name: James Stone

Comments: Canines should be considered by all parties involved for the use of avoidance, minimization, and mitigation purposes. Specially trained canines could possibly be used to detect any potential development area for the presents of, or recent presents of the LPC. By deploying canines to detect the LPC in the development areas the incidental take of adults, as well as nests, will be dramatically reduced. The canines could possibly be used to detect any leks that may be in the ROW and could possibly be saved from development. Any positive findings could also be used for mitigation purposes as well. Attached is an one of many articles that explain how canines can benefit the world of environmental conservation.

Cabalk, M. E., J. C. Sagebiel, J. S. Heaton, and C. Valentin. 2008. Olfaction-based detection distance: a quantitative analysis of how far away dogs recognize tortoise odor and follow it to source. Sensors 8: 2214-2219.

close window

Name: Shawn Wade

Comments: RE:Docket No. FWS–R2–ES–2013–0134

To whom it may concern:

On behalf of the membership of Plains Cotton Growers, Inc. the following comments are provided in response to the request for comments regarding the scope of the Environmental Impact Statement to be drafted in conjunction with consideration of the request for issuance of a section 10(a)(1)(B) Incidental Take Permit supported by the regional Habitat Conservation Plan (HCP) for the lesser prairie-chicken. PCG represents landowners and cotton producers in a 41-county area of the Texas Panhandle and High Plains region, encompassing some 3.5-4 million acres of cotton production. It is important to note that we believe that current population trends will naturally reverse their current trajectory with the return of normal rainfall throughout the current occupied range and because of this do not believe that a listing the LEPC is warranted at this time. Unfortunately, the possibility that a listing will occur is significant enough that landowners need a full range of options available to them that can provide regulatory certainty and protection against legal action stemming from incidental impacts to the species.

The proposed listing the LEPC as a threatened species under the Endangered Species Act has the potential to significantly impact landowners and the rural communities they live in and support. An important component of the options referenced above is the inclusion of plans such as the proposed Stakeholder Conservation Strategy for the Lesser Prairie-chicken that can help landowners do more than simply avoid the legal pitfalls associated with impacts to a listed species, but also expand the range of options through which they can provide conservation to benefit the species.

During the development of the EIS reviewing the Stakeholder Strategy we encourage the FWS to fully consider the adverse impact that a listing of the lesser prairie-chicken would have on landowners, rural communities and the industries that support them, including local suppliers of agriculture goods and services as well as companies that are engaged in active energy exploration throughout the entirety of the LEPC range. It is important that in the event of a listing agriculture has the ability to maintain as much of its historic activity as possible, and where reductions are recommended to benefit the species, that landowners have the ability to offset those financial impacts with alternative sources of income. On the energy industry side of the ledger, future development and the associated income it can bring to local municipalities, school districts and hospital districts is critical to the residents of this area. It is our belief that given the structure of the Stakeholder Conservation Strategy, a balance between the local interests addressed above and the needs of the species can be struck that is ultimately beneficial for all.

It should be of interest to the FWS to see a diverse set of organizations representing agriculture, the oil and gas industry and the environment coming together to develop a balanced solution like the Stakeholder Conservation Strategy that can achieve the common goal of preserving and restoring LPC populations and habitat and protecting to the greatest extent possible the private property rights of landowners.

We believe that the Stakeholder Strategy may well be the model for incentive-based species conservation in the future. The first step in that process is the drafting of the EIS and we look forward to the opportunity to comment on it as soon as it becomes available.

Respectfully,
Shawn Wade.
Director of Policy Analysis & Research

close window

February 25, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

Re: FWS/R2/ES-ARD/056558
Via: Facsimile (505) 248-6915 and US Post

Dear Ms. Shaughnessy:

The Wallace County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The notification accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparation of an Environmental Impact Statement (EIS) during the Lesser Prairie Chicken Listing determination, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 this county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations and through the notification letter have accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link is established, we expect similar coordination efforts during future activities, consistent with the NRCP.

Currently, our county participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves to identify, assess and evaluate impacts to human and natural environments projected from contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally-available data and information be utilized in the process. This methodology affords side-by side comparison of all proposed alternatives, including cost considerations, implications to cultural resources, the effects of no-action, and reasonable steps required to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report called "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory, procedural and economic-impact requirements, and evaluation of historical experiences local officials have had with USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement, and a Habitat Conservation Tool; as a unit, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in a EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting the Draft EA places the USFWS-financed, 5-State WAFWA Rangewide Conservation Plan into the NEPA process - negating USFWSs federal register position that "*NEPA does not apply as a matter of law.*" For reasons detailed in the KNRC Comments, the Draft EA was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA remains insufficient to support a Finding of No Significant Impact (FONSI).

In contrast to information presented in the Draft EA, KNRC identified substantial cost impacts to regional communities arising from increased energy rates in the event mitigation proposed by 5-State Rangewide Conservation Plan were to be implemented. Similarly, testimony given at the KNRC Public Hearing identified potential land devaluations of $2.1B and significant, unaddressed implications arising from the here-to-fore unaddressed issue of Split Estates.

To be meaningful, the EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context alongside all reasonable alternatives (40 CFR §1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS Plan is unavailable to our County for review and consideration, we are not able to understand or meaningfully prepare for presentations proposed for the Draft EIS Scoping Meeting.

Considering the legal, procedural and technical aspects of the Lesser Prairie Chicken Listing Proposal, we recommend USFWS to include the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22, 2013 Conference Opinion by USFWS.

Cordially,

Bruce Buck

Michael Cowles

Adam Smith

Ford County Commission
100 Gunsmoke
Dodge City, KS 678O1

March 03, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

Re: FWS/R2/ES-ARD/056558
Via: Facsimile (505) 248-6915 and US Post

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We are engaged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations and through the notification letter have accepted responsibility to coordinate with our county as an individual, sovereign entity of government. Now that the coordination link is established, we expect similar coordination efforts during future activities, consistent with the NRCP.

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USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement, and a Habitat Conservation Tool; as a unit, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in a EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

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In contrast to information presented in the Draft EA, KNRC identified substantial cost impacts to regional communities arising from increased energy rates in the event mitigation proposed by 5-State Rangewide Conservation Plan were to be implemented. Similarly, testimony given at the KNRC Public Hearing identified potential land devaluations of $2.1B and significant, unaddressed implications arising from the here-to-fore unaddressed issue of Split Estates.

To be meaningful, the EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context alongside all reasonable alternatives (40 CFR §1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS Plan is unavailable to our County for review and consideration, we are not able to understand or meaningfully prepare for presentations proposed for the Draft EIS Scoping Meeting.

Considering the legal, procedural and technical aspects of the Lesser Prairie Chicken Listing Proposal, we recommend USFWS to include the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22, 2013 Conference Opinion by USFWS.

Cordially,

Chris Boys, Chairman

Danny Gillum, Commissioner

Shawn Tasset, Commissioner

Ellis County Commission

Barbara K. Wasinger, Chair
1204 Fort Street/PO Box 720
Hays, Kansas 67601
Ph: 785-621-4219

March 3, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Ellis County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar

coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10

Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Barbara K. Wasinger, Chair

Dean Haselhorst, Commissioner

Swede Holmgren, Commissioner

Phillips County
Commissioners

221 S. Interocean Ave., Holyoke, CO 80734
970-854-2454
970-854-3811 (F)
www.colorado.gov/phillipscounty

K. Joe Kinnie
Donald J. Lock
Harlan E. Stern

March 13, 2014

Michelle Shaughnessy
Assistant Regional Director
United State Department of the Interior
U.S. Fish and Wildlife Service
Ecological Services
P.O. Box. 1306, Room 6034
Albuquerque, NM 87103

Re: FWS/R2/ES-ARD/056558
Proposal for listing of the lesser prairie Chicken (LPC) as threatened under the Endangered Species Act on December 11, 2012

Dear Ms. Shaughnessy:

We were unable to attend any of the three public scoping meetings on this topic. We have instant concerns when species are placed on the endangered species list. We recognize the need to protect our wildlife, but also need to assure that other activities are not totally stopped because of overzealous requirements. There needs to be a fair and equitable balance between protection and carrying on with life.

Your letter indicates you are proposing a Stakeholder Conservation Strategy. While we are somewhat removed from the true historic range of the lesser prairie chicken, we would like to be kept up to date on drafts of the three components. The following comments were offered by the Local Colorado Parks and Wildlife Officer, Aimee Ryel, in our area:

"Northeastern Colorado Counties, including Phillips, are not in the historic range of Lesser Prairie Chickens. The historic range is southeastern Colorado. Our agency would like to maintain management and has worked with other states (Texas, Kansas and Oklahoma) on a management strategy to keep LPC off the list, but the final decision will come from the Fed's."

Future updates for Phillips County can be provided to our county administrator (Randy Schafer, 221 S. Interocean Ave., Holyoke, CO 80734 or randy.schafer@phillipscounty.co. Thank you.

Sincerely,

Harlan Stern
Chairman

Washington County, Colorado
Office of County Commissioners
150 Ash Avenue
Akron Colorado 80720
Ph: 970-345-2701 Fax: 970-345-2702

United States Department of the Interior
U.S. Fish and Wildlife Service
Ecological Services
P.O. Box 1306, Room 6034
Albuquerque, New Mexico 87103

In Reply To:
FWS/R2/ES-ARD/056558

To Whom It May Concern:

Washington County does not know of any documented sighting of the Lesser Prairie Chicken within the county boundaries.

However the process and the possible resulting regulations are items that the Board maintains a significant interest in. The three components which comprise a completed stakeholder conservation strategy should be land owner driven. The principle stakeholder is and should continue to be the owner. We fear an all encompassing region-wide plan(s) may be a determinant to the future ownership of private land.

Washington County would take similar positions on any potential listing of any threatened or endangered species. The primary positions being that the property owner is held liability free and not responsible for any resulting expenses.

Sincerely

David Foy

David Foy, Chairman
Board of Washington County Commissioners

United States Department of Agriculture
Forest Service
Southwestern Region Regional Office
333 Broadway SE
Albuquerque, NM 87102
FAX (505) 842-3800
V/TTY (505) 842-3292

File Code: 2670
Date: MAR 25 2014

Michelle Shaughnessy
Assistant Regional Director Ecological Services
U.S. Fish and Wildlife Service
P.O. Box 1306, Room 6034
Albuquerque, NM 87103

Dear Ms. Shaughnessy:

Thank you for your notification regarding the American Habitat Center's proposed regional, multi-state stakeholder conservation strategy (SCS). We appreciate the opportunity to provide input as part of your Scoping for the potential issuance of an incidental take permit in association with activities proposed in the SCS.

Since the activities included in the SCS, covered by the proposed incidental take permit, are associated with oil and gas and agricultural operations on private lands, they do not fall within the scope of the USDA Forest Service (USFS) authority. Similar activities on National Forest System lands would need to be covered separately under the provisions of Section 7 of the Endangered Species Act, as amended. Therefore, we do not have any issues or concerns with the proposed SCS and incidental take permit, beyond a general support for conservation practices benefiting Lesser Prairie Chicken recovery.

I would appreciate being kept in the loop as you develop your draft Environmental Impact Statement. If you believe that the USFS may have information that would be helpful to you, please contact either Susan S. Millsap or Steven R. Plunkett at the address above.

Sincerely,

Bobbi Barrera

BOBBI BARRERA
Acting Director, Wildlife, Fish, and Rare
Plants Program

cc: Elaine B Kohrman, Steven R Plunkett

FEB 27 2014

OFFICE OF PAWNEE COUNTY COMMISSIONERS

Telephone (620) 285-3721 | 715 Broadway, LARNED, KANSAS 67550-3098 | Fax (620) 285-2559

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Pawnee County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Kathy Bowman

Kathy Bowman

John C Haas

John Haas

Donna Pelton

Donna Pelton

Clark County Kansas

913 Highland Street
Ashland, KS 67831
www.clarkcountyks.com

February 19, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Clark County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Charles McKinney

Michael Myatt

Howard Wideman

BOARD OF COUNTY COMMISSIONERS

KEARNY COUNTY KANSAS

304 N MAIN ST

PO BOX 86

LAKIN KS 67860

February 19, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service
Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

Re: FWS/R2/ES-ARD/056558
Via: Facsimile (505) 248-6788 and US Post

Dear Ms. Shaughnessy:

The Finney County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The notification accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparation of an Environmental Impact Statement (EIS) during the Lesser Prairie Chicken Listing determination, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 this county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations and through the notification letter have accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link is established, we expect similar coordination efforts during future activities, consistent with the NRCP.

Currently, our county participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you

understand, the EIS process serves to identify, assess and evaluate impacts to human and natural environments projected from contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally-available data and information be utilized in the process. This methodology affords side-by side comparison of all proposed alternatives, including cost considerations, implications to cultural resources, the effects of no-action, and reasonable steps required to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report called "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

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To be meaningful, the EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context alongside all reasonable alternatives (40 CFR §1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS Plan is unavailable to our County for review and consideration, we are not able to understand or meaningfully prepare for presentations proposed for the Draft EIS Scoping Meeting.

Considering the legal, procedural and technical aspects of the Lesser Prairie Chicken Listing Proposal, we recommend USFWS to include the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22, 2013 Conference Opinion by USFWS.

Cordially,

Shannon McCormick, Member

Jerrad Webb, Member

Thomas W. Wright IV

Thomas W. Wright, IV, Chairman

BOARD OF COUNTY COMMISSIONERS

KEARNY COUNTY KANSAS

304 N MAIN ST

PO BOX 86

LAKIN KS 67860

February 19, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service
Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

Re: FWS/R2/ES-ARD/056558
Via: Facsimile (505) 248-6788 and US Post

Dear Ms. Shaughnessy:

The Kearny County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014, Federal Register Notice. The notification accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparation of an Environmental Impact Statement (EIS) during the Lesser Prairie Chicken Listing determination, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 this county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations and through the notification letter have accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link is established, we expect similar coordination efforts during future activities, consistent with the NRCP.

Currently, our county participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you

understand, the EIS process serves to identify, assess and evaluate impacts to human and natural environments projected from contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally-available data and information be utilized in the process. This methodology affords side-by side comparison of all proposed alternatives, including cost considerations, implications to cultural resources, the effects of no-action, and reasonable steps required to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report called "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act*." The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory, procedural and economic-impact requirements, and evaluation of historical experiences local officials have had with USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement, and a Habitat Conservation Tool; as a unit, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in a EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting the Draft EA places the USFWS-financed, 5-State WAFWA Rangewide Conservation Plan into the NEPA process - negating USFWSs federal register position that "*NEPA does not apply as a matter of law*." For reasons detailed in the KNRC Comments, the Draft EA was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA remains insufficient to support a Finding of No Significant Impact (FONSI).

In contrast to information presented in the Draft EA, KNRC identified substantial cost impacts to regional communities arising from increased energy rates in the event mitigation proposed by 5-State Rangewide Conservation Plan were to be implemented. Similarly, testimony given at the KNRC Public Hearing identified potential land devaluations of $2.1B and significant, unaddressed implications arising from the here-to-fore unaddressed issue of Split Estates.

To be meaningful, the EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context alongside all reasonable alternatives (40 CFR §1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS Plan is unavailable to our County for review and consideration, we are not able to understand or meaningfully prepare for presentations proposed for the Draft EIS Scoping Meeting.

Considering the legal, procedural and technical aspects of the Lesser Prairie Chicken Listing Proposal, we recommend USFWS to include the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22, 2013 Conference Opinion by USFWS.

Cordially,

Shannon McCormick, Member

Jerrad Webb, Member

Thomas W. Wright IV

Thomas W. Wright, IV, Chairman

Stevens County

200 E. 6th Street
Hugoton, KS 67951
Phone: 620-544-2541
Fax: 620-544-4094
Stevenscoclerk@hotmail.com

FAX

Fax Transmittal Form

To
Name: Michelle Shaughnessy
Organization Name/Dept: KNRC
CC:
Phone number:
Fax number: (505) 248-6915

From
Amy Jo Tharp
Clerk, Accounts Payable
Stevens County

Date sent: 2/18/14
Time sent: 3:00pm
# of pages including cover page: 4

Urgent
For Review
Please Comment
Please Reply

Message: RE: FWS/R2/ES-ARD/056558
Prairie Chickens

Thank you,

Amy Jo Tharp
Stevens County Clerk, Acct Pay

cc/Pam Bensel

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Stevens County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

James Bell

David Bozone

Pat Hall

SHERMAN COUNTY COMMISSION

Sherman County Commissioners
813 Broadway, Room 102
Goodland, KS 67735
Phone: 785-890-4807
Fax: 785-890-4809

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

COPY

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Sherman County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

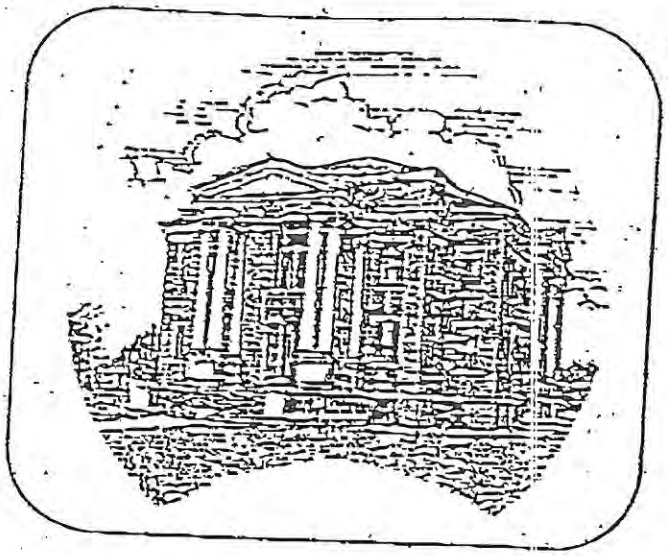
Cordially,

Larry Enfield

Steve Evert

Ken Klemm

Wichita County Courthouse
PO Box 968
Leoti, KS 67861
Telephone: 620.375.2731
Fax: 620.375.4350



Date: 2-18-14 Number of pages (including cover sheet): 4

To: Kansas Natural Resource Coalition

Attention: Michelle Shaughnessy

From: Carol Carey - Co Clerk
At the Wichita County Courthouse

Message: I will get a copy in the Mail on Wednesday.

Thanks,

Carol Carey - Clerk

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Wichita County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

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This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

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- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Steven Baker

Vic Case

Rex Whalen

LARRY D. POORE, Woodston
COMMISSIONER 1ST DISTRICT

JOHN RUDER, Plainville
COMMISSIONER 2ND DISTRICT

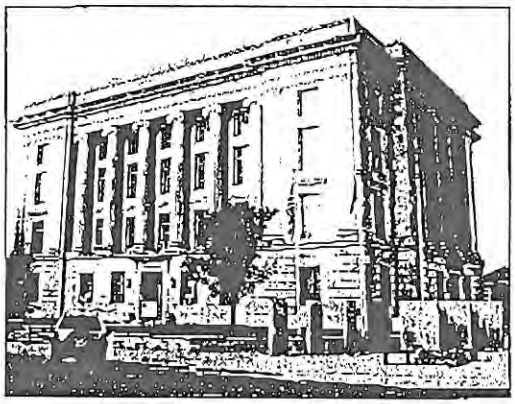
CORKY HAGAN, Plainville
COMMISSIONER 3RD DISTRICT

CLARA STRUTT, Stockton
COUNTY CLERK

KIMBERLY A. NORTHUP, Stockton
COUNTY TREASURER

ROSALEE SPRICK, Stockton
REGISTER OF DEEDS

COUNTY OF ROOKS



STOCKTON, KANSAS
67669

EDWARD E. BOUKER, Hays
CHIEF ADMINISTRATIVE JUDGE
23RD JUDICIAL DISTRICT

GLENN R. BRAUN, Hays
DISTRICT JUDGE

DOUGLAS E. BIGGE, Plainville
23RD DISTRICT MAGISTRATE JUDGE
POSITION 2

CONNIE M. STITHEM, Stockton
CLERK OF DISTRICT COURT

EDWARD C. HAGEMAN, Stockton
COUNTY ATTORNEY

GARY KNIGHT, Plainville
ROOKS COUNTY SHERIFF

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Rooks County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

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We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Corvin Hagan

Larry Poore

John Ruder

HAMILTON COUNTY

Hamilton County

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service
Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

Re: FWS/R2/ES-ARD/056558
Via: Facsimile (505) 248-6788 and US Post

Dear Ms. Shaughnessy:

The Hamilton County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The notification accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparation of an Environmental Impact Statement (EIS) during the Lesser Prairie Chicken Listing determination, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 this county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for requiring Government-to-Government Coordination during Major Federal Environmental Actions.
Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations and through the notification letter have accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link is established, we expect similar coordination efforts during future activities, consistent with the NRCP.

Currently, our county participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves to identify, assess and evaluate impacts to human and natural environments projected from contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally-available data and information be utilized in the process. This methodology affords side-by side comparison of all proposed alternatives, including cost considerations, implications to cultural resources, the effects of no-action, and reasonable steps required to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report called "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory, procedural and economic-impact requirements, and evaluation of historical experiences local officials have had with USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement, and a Habitat Conservation Tool; as a unit, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in a EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting the Draft EA places the USFWS-financed, 5-State WAFWA Rangewide Conservation Plan into the NEPA process - negating USFWSs federal register position that "*NEPA does not apply as a matter of law.*" For reasons detailed in the KNRC Comments, the Draft EA was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA remains insufficient to support a Finding of No Significant Impact (FONSI).

In contrast to information presented in the Draft EA, KNRC identified substantial cost impacts to regional communities arising from increased energy rates in the event mitigation proposed by 5-State Rangewide Conservation Plan were to be implemented. Similarly, testimony given at the KNRC Public Hearing identified potential land devaluations of $2.1B and significant, unaddressed implications arising from the here-to-fore unaddressed issue of Split Estates.

To be meaningful, the EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context alongside all reasonable alternatives (40 CFR §1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS Plan is unavailable to our County for review and consideration, we are not able to understand or meaningfully prepare for presentations proposed for the Draft EIS Scoping Meeting.

Considering the legal, procedural and technical aspects of the Lesser Prairie Chicken Listing Proposal, we recommend USFWS to include the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22, 2013 Conference Opinion by USFWS.

Cordially,

Keith Puckett, Chairman
Hamilton County Commission

FAX COVER SHEET

Kiowa County Clerk
211 E. Florida
PH: 620-723-3366 FX: 620-723-3234

Date: 2-21-14

To: Sheila

Attn:

Fax#: 505-248-6915

NUMBER OF PAGES (including cover sheet)

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Kiowa County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment.*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information*" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, a potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Ronald Freeman

Bert Lowrey

John Unruh

SHERIDAN **COUNTY**

925 9th Street
PO Box 899
Hoxie, Kansas 67740

Phone: (785) 675-2191
Fax: (785) 675-3487

SHERIDAN COUNTY BOARD OF COMMISSIONERS

Vic Bielser – 1st District Troy Dewey – 2nd District Doyle Kauk – 3rd District

February 24, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Sheridan County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS

Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

On November 7 and 8, 2013 our county participated in a Public Hearing that led to preparation of a report entitled "*Findings of Fact and Conclusions of Law - in Re : the advisability of listing the Lesser Prairie Chicken as a threatened species under the Endangered Species Act.*" The comprehensive, 2-day KNRC Public Hearing included testimony by ornithological and biological experts, KDWPT Staff, holistic conservation ranch managers, a land-finance manager, Endangered Species Act policy professionals, several Kansas state senators and representatives, and others.

The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

In December, 2013 KNRC commented to the public record on the "*Draft Oil and Gas Candidate Conservation Agreement with Assurances for the lesser Prairie Chicken; Draft Environmental Assessment,*" noting that document places the USFWS-financed 5-State Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies into the NEPA process, negating USFWSs federal register notification that "*NEPA does not apply as a matter of law.*" For reasons outlined in the KNRC Comments - which this county supports - the Draft Environmental Assessment was determined to be "*limited in scope, late in*

preparation, deficient of minimum CEQ Standards, lacking in meaningful consideration of human impacts, devoid of quality (or any) scientific information" and thus the EA is insufficient to support - or not - a Finding of No Significant Impact (FONSI).

In contrast to the limited Draft Environmental Assessment, KNRC documented substantial cost impacts to regional communities and populations arising from increased utility rates, potential land devaluation, of $2.1B, and significant, unaddressed implications of Split Estates that could arise were the 5-State Rangewide Conservation Plan to be implemented.

The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Vic Bielser

Troy Dewey

Doyle Kauk

BOARD OF COUNTY COMMISSIONERS
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Doug LaFreniere
Jim Rice

February 18, 2014

Michelle Shaughnessy, Assistant Regional Director
United States Department of Interior
US Fish and Wildlife Service, Ecological Services
PO Box 1306; Room 6034
Albuquerque, NM 87103

RE: FWS/R2/ES-ARD/056558

Dear Ms. Shaughnessy:

The Seward County Commission is in receipt of a Public Meeting notification sent as supplement to the February 7, 2014 Federal Register Notice. The invitation accepts applicability of the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) process for preparing Environmental Impact Statements (EIS) for the Lesser Prairie Chicken Listing, and announces Scoping for the multistate Stakeholder Conservation Strategy Plan (SCS) received by the Service on June 20, 2012.

In August, 2013 our county adopted as local ordinance the *Natural Resource Coordination Plan* (NRCP) and *Lesser Prairie Chicken Conservation, Management and Study Plan* (LPC Conservation Plan) prepared by the Kansas Natural Resource Coalition (KNRC). For its part, the NRCP contains multiple federal statutes, many Executive Orders, CEQ Regulations, and a Glossary of Terms that together form the basis for us requiring Government-to-Government Coordination during Major Federal Environmental Actions.

Following adoption, KNRC staff and President Ken Klemm met with USFWS leadership and Coordination for the Lesser Prairie Chicken listing proposal was established.

We are encouraged USFWS recognizes the applicability of NEPA statutes and CEQ Regulations to the entire Lesser Prairie Chicken Listing process, and through the invitation letter has accepted responsibility to coordinate with our county as an individual, sovereign entity of local government. Now that the coordination link has been established, we are expectant of similar coordination efforts during future activities that concern our county and are consistent with the NRCP.

Our county currently participates in the Kansas Natural Resource Coalition (KNRC) - a 33 member group that continues to represent our interests during the Lesser Prairie Chicken Listing Proposal. Please continue to work with KNRC and us in a mutual effort to facilitate the coordination process.

This correspondence summarizes our initial response, observations and the need for additional information in order to consider participation with USFWS in the Draft EIS Scoping process. As you understand, the EIS process serves as the primary mechanism to identify, assess and evaluate impacts to human and natural environments projected for contemplated major federal action. The NEPA Statutes and CEQ Regulations are specific that the EIS process be undertaken at the earliest possible point in a proposal process, that all reasonable alternatives be considered, and that locally available data and information be utilized for the process. This methodology affords side-by side comparison of the proposed action and alternatives, including a consideration of costs, implications to the cultural resources, and steps necessary to balance both the human and natural environments.

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The Public Hearing focused on procuring technical information, understanding relevant science, unearthing adherence to statutory procedural and economic-impact requirements, and evaluation of historical experience local officials have had with other USFWS programs.

Following a comprehensive review of the information, testimony and public record, the KNRC Hearing Council concluded science does not support listing of the Lesser Prairie Chicken as a Threatened Species under ESA, and existing state, federal and local programs are more than adequate to ensure its survival, preservation and viability. Similarly, the Hearing Council concluded minimum standards necessary to evaluate economic impacts, ensure social cohesiveness, protect public safety, consider cultural sensitivity, protect underprivileged citizens, ensure local voice and guard against private property takes have not been met, and so the 33-county KNRC has recommended against the advisability of listing the Lesser Prairie Chicken as a Threatened species under ESA.

USFWS has invited our county to participate in EIS Scoping of the Stakeholder Conservation Strategy, inclusive of a Conservation Plan, Habitat Exchange Agreement and a Habitat Conservation Tool; as a unity, the SCS package is designed to support an ESA Section 10 Incidental Take Permit. Because the Incidental-Take Permit Program results from a Threatened Listing Determination, our participation in an EIS Scoping process limited only to the SCS Plan would be tantamount to acceptance of a Threatened Determination for the Lesser Prairie Chicken - behavior counter to the clear position we have taken in the public record.

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The EIS process requires the consequences of proposed major federal action to be evaluated in an integrated context of all reasonable alternatives (1502.14), with the end goal of balancing human health and the environment. Similarly, because the Lesser Prairie Chicken proposal is both significant in its effect and controversial in its nature, an EIS is required for the 5-State WAFWA Rangewide Conservation Plan.

Because the SCS is unavailable for review and consideration, our county is not able to meaningfully respond to the presentations proposed for the EIS Scoping Meeting.

We encourage USFWS to consider the following documents in the EIS Scoping process:

- The multistate Stakeholder Conservation Strategy Plan;
- The October, 2013 Lesser Prairie Chicken Rangewide Conservation Plan by Western Association of Fish and Wildlife Agencies;
- The Lesser Prairie Chicken Conservation, Study and Management Plan by Kansas Natural Resource Coalition;
- Effects to the Human Environment posed by Conservation Practices 625 and 528 in the November 22 2013 Conference Opinion by USFWS.

Cordially,

Ada Linenbroker, Chair

C.J. Wettstein, Vice-Chair

Randy Malin

Doug LaFreniere

Jim Rice