

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**1. OKLAHOMA INDEPENDENT PETROLEUM
ASSOCIATION**

2. OKLAHOMA OIL AND GAS ASSOCIATION

**3. INTERNATIONAL ASSOCIATION OF
GEOPHYSICAL CONTRACTORS**

**4. INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA**

5. AMERICAN PETROLEUM INSTITUTE

6. WESTERN ENERGY ALLIANCE

vs.

1. DEPARTMENT OF THE INTERIOR

**2. SALLY JEWELL
Secretary, U.S. Department of Interior**

3. FISH & WILDLIFE SERVICE

**4. DANIEL M. ASHE
Director, U.S. Fish and Wildlife Service**

**5. GARY FRAZER, in his official capacity as
Assistant Director of the Fish and Wildlife Service**

**6. DIXIE PORTER, in her official capacity as the
Field Supervisor, Oklahoma Ecological Services
Field Office, Fish and Wildlife Service, Tulsa,
Oklahoma**

Defendants.

Case No. 14-CV-307-JHP-PJC

(Related to one cause of action in
Case No. 4:14-cv-00123-JHP-PJC)¹

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, for their cause of action, against Defendants, allege and state as follows:

¹ Of the seven counts alleged in Case No. 4:14-cv-00123-JHP-PJC, this action is related only to the count challenging the final listing of the Lesser Prairie Chicken under the Endangered Species Act.

BACKGROUND & INTRODUCTION

1. This case challenges the arbitrary and capricious decision of the U.S. Department of the Interior (“DOI”) and the U.S. Fish and Wildlife Service (“FWS” or “the Service”) (collectively, the “Defendants”) to list the lesser prairie chicken (*Tympanuchus pallidicinctus*) (hereafter “LPC”) as a threatened species pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* See Determination of Threatened Status for the Lesser Prairie-Chicken, 79 Fed. Reg. 19,997 (Apr. 10, 2014).

2. The LPC “is a species of prairie grouse endemic to the southern high plains of the United States . . .” (79 Fed. Reg. at 19,998), including expanding portions of Oklahoma, Kansas, New Mexico, Texas, and Colorado. 79 Fed. Reg. 20,009.

3. Notwithstanding the successful efforts of states, industry, and private landowners to conserve LPC habitat, WildEarth Guardians (“WEG”) sued DOI and FWS on September 1, 2010 for allegedly failing to make expeditious progress on the listing of the LPC. That action was subsequently consolidated in the U.S. District Court for the District of Columbia with several other cases initiated by WEG and Center for Biological Diversity (“CBD”). *In re Endangered Species Act Section 4 Deadline Litigation*, No.10-377 [EGS], MDL Docket No. 2165 (D.D.C. May 10, 2011) (“*Section 4 Deadline Litigation*”).

4. Pursuant to the terms ultimately settling the *Section 4 Deadline Litigation*, FWS published a proposed LPC listing on December 11, 2012, and a final listing on March 31, 2014. 77 Fed. Reg. 73,828 (Dec. 11, 2012). While this settlement precipitated the listing of the LPC, this complaint does not seek to set aside, or in any way alter, the terms of the *Section 4 Deadline Litigation* settlement agreement.

5. Further, in conjunction with the final listing, FWS finalized a special rule under ESA Section 4(d) (“4(d) Rule”) excluding from the ESA’s prohibitions certain use and development activities that are conducted in conjunction with enrollment in a conservation program. 79 Fed. Reg. 20,074 (April 10, 2014). As part of that rulemaking package, FWS also endorsed the Western Association of Fish and Wildlife Agencies’ (“WAFWA”) Lesser-Prairie Chicken Range-wide Conservation Plan (“Range-wide Plan”) as a conservation plan under which participants could adopt conservation and mitigation measures to avail themselves of the 4(d) Rule’s exclusions, and accepted comments on the 4(d) Rule for two additional comment periods. 78 Fed. Reg. 75,306 (Dec. 11, 2013); 79 Fed. Reg. 4,652 (Jan. 9, 2014).

6. While the final listing, the 4(d) Rule, and the Service’s endorsement of WAFWA’s Range-wide Plan collectively constitute the rulemaking package under which FWS made a decision to list the LPC as threatened under the ESA, *Plaintiffs herein challenge only the final listing decision* (79 Fed. Reg. 19,974). Plaintiffs support the 4(d) Rule’s recognition that the LPC can be protected through voluntary conservation measures and support the Service’s endorsement of WAFWA’s Range-wide Plan as one such measure, but challenge the Service’s arbitrary and capricious disregard for such measures in determining that listing the LPC was warranted.

7. In particular, Plaintiffs base their challenge to the final listing rule on:

a. Defendants’ threat analysis, which arbitrarily and capriciously ignored three decades of LPC population survey data demonstrating that LPC populations were among the highest ever surveyed in 2012, and any declines therefrom were representative of the natural year-over-year variability that FWS acknowledged;

b. Defendants' arbitrary and capricious dismissal of a key study estimating long-term LPC population increases as unpublished and un-reviewed while Defendants elsewhere rely extensively on unpublished and un-reviewed studies and surveys;

c. Defendants' arbitrary and capricious use of a historical LPC habitat baseline that predates European settlement to assess habitat declines, when the most recent and accurate data demonstrate that occupied LPC range has tripled since 1980;

d. Defendants' arbitrary and capricious failure to consider the cumulative impact of dozens of multijurisdictional pre- and post-proposal conservation efforts to protect the LPC and its habitat – efforts which the Service concedes exceed the protections FWS could provide through listing;²

e. Defendants' arbitrary and capricious decision to not avail itself of flexibility under the *Section 4 Deadline Litigation* settlement and the full review period available under the ESA that would have allowed for consideration of rapidly expanding conservation efforts mitigating and reversing threats to the LPC and LPC habitat; and,

f. After publishing a finding on July 9, 2013 that there was substantial disagreement regarding the accuracy and sufficiency of the data underpinning its proposed listing [79 Fed. Reg. at 19,975], Defendants' arbitrary and capricious finalization of the proposed listing without identifying any additional information capable of resolving the substantial disagreement in favor of listing – or refuting the extensive information weighing against listing the LPC.

² See Questions & Answers: Final Listing Determination and Special Rule for the Lesser Prairie-Chicken. http://www.fws.gov/southwest/es/documents/R2ES/LPC_FL_FAQs_FINAL_20140327.pdf (accessed June 6, 2014) (“Collectively, these various efforts are quite similar to a recovery plan, something that the Service normally prepares years after a species’ listing. This early identification of a strategy to recover the lesser prairie-chicken is likely to speed its eventual delisting.”)

8. Indeed, while the conservation status of the LPC improved exponentially since the 2012 proposal, the Service never meaningfully revisited the proposed rule's conclusion that the LPC was threatened. While the Service accepted comments on this proposed listing, it did not properly consider such comments or other best available scientific and commercial information, and instead selectively considered the range and population data on which its decision was based. Even though the unprecedented breadth and scope of the conservation programs under which landowners and stakeholders voluntarily agreed to protect LPC and LPC habitat so profoundly exceeded all expectations, FWS merely noted those efforts, their certain expansion before the ESA listing deadline, and arbitrarily and capriciously continued to finalize its proposed listing in the face of important new facts. The Service's final listing of the LPC as threatened is unlawful under the ESA and Administrative Procedure Act ("APA"), and is actionable under the APA.

JURISDICTION AND VENUE

9. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and the APA, 5 U.S.C. § 702 (judicial review of final agency action). In addition, 16 U.S.C. § 1540(c) confers jurisdiction to the "several district courts of the United States" over disputes regarding the ESA. This Court can grant declaratory relief and injunctive relief under 28 U.S.C. § 2201 and 28 U.S.C. § 2202, as well as relief under 5 U.S.C. §§ 701-706 for violations of, *inter alia*, the APA, 5 U.S.C. § 706.

10. Venue is proper in the Northern District of Oklahoma pursuant to 28 U.S.C. § 1391 because, by the Service's explicit direction and design, all acts and omissions giving rise to these claims originated in the Northern District of Oklahoma. The final agency action giving rise to this civil action was primarily managed out of the FWS Ecological Service Field Office at 9014

East 21st Street, Tulsa, Oklahoma (78 Fed. Reg. 19,974). All comments on the LPC Rulemaking Package (*i.e.*, the listing as threatened, the 4(d) Rule, and the endorsement of WAFWA's Range-wide Plan) were directed to the Service's Tulsa, Oklahoma field office. 77 Fed. Reg. at 73,828; 78 Fed. Reg. at 26,302 ; 78 Fed. Reg. at 75,306 ; 79 Fed. Reg. at 4,652. Both the final listing and the 4(d) Rule note that all "Comments and materials received, as well as supporting documentation used in preparing this final rule are available" *only at* the Service's field office in Tulsa, Oklahoma, and both rules list Alisa Shull, the Acting Field Supervisor in the Tulsa field office, as a point of contact for further inquiries. 79 Fed. Reg. at 19,974; 79 Fed. Reg. at 20074.

11. In addition to those Plaintiffs with members residing within the Northern District of Oklahoma, each of the Plaintiffs have member companies with offices and operations in the State of Oklahoma, as well as two Plaintiff organizations that maintain their headquarters in Oklahoma.

12. The LPC ranges throughout broad regions of Oklahoma, is protected by numerous conservation plans within Oklahoma, including plans implemented and overseen by the State of Oklahoma and the WAFWA Range-wide Plan, much of which was developed in meetings held in Oklahoma. Importantly, many landowners that enrolled land in the same conservation plans that FWS improperly failed to consider in listing the LPC as threatened under the ESA reside in Oklahoma.

PARTIES

13. Plaintiff OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION ("OIPA") represents approximately 2,750 small to large independent operators that are primarily involved

with the exploration and production of crude oil and natural gas in the state. In addition, OIPA represents a number of companies which provide services that support exploration and production activities. "Independent" producers are non-integrated companies which receive the majority of their revenues from production at the wellhead. They are exclusively in the exploration and production segment of the industry with no marketing or refining operations. Independent oil and gas companies range in size from large companies with thousands of employees to hundreds of smaller "mom and pop" type companies. In Oklahoma, independent producers make up the majority of the energy industry producing 96% of the state's crude oil and 88% of the state's natural gas. OIPA members are subject to the FWS regulations pertaining to the conservation of species, operate in the areas that the Service identifies as LPC habitat, and voluntarily participate in programs to protect and conserve the LPC and LPC habitat.

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

15. Plaintiff INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS (“IAGC”) is the international trade association representing the industry that provides geophysical services (geophysical data acquisition, processing and interpretation, geophysical information ownership and licensing, and associated services) to the oil and natural gas industry. IAGC member companies play an integral role in the successful exploration and development of hydrocarbon resources through the acquisition and processing of geophysical data. IAGC promotes the conduct of the geophysical industry in a professional, safe, and environmentally responsible manner. IAGC member companies are subject to the FWS regulations pertaining to the conservation of species and provide geophysical services in areas that the Service identifies as LPC habitat.

16. Plaintiff INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA (“IPAA”) represents thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, which will be significantly affected by federal action. Independent producers develop 95 percent of American oil and natural gas wells, produce 54 percent of American oil and produce 85 percent of American natural gas. IPAA member companies are subject to the FWS regulations pertaining to the conservation of species, operate in the areas that the Service identifies as LPC habitat, and voluntarily participate in programs to protect and conserve the LPC and LPC habitat.

17. Plaintiff AMERICAN PETROLEUM INSTITUTE (“API”) is a national trade association representing more than 600 member companies involved in all aspects of the oil and natural gas industry. Those members include producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API members are dedicated to meeting environmental requirements, while economically

developing and supplying energy resources for consumers. API member companies are subject to the FWS regulations pertaining to the conservation of species, operate in the areas that the Service identifies as LPC habitat, and voluntarily participate in programs to protect and conserve the LPC and LPC habitat.

18. Plaintiff WESTERN ENERGY ALLIANCE represents over 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Western Energy Alliance member companies have valid existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities operate in the areas that the Service identifies as LPC habitat, and voluntarily participate in programs to protect and conserve the LPC and LPC habitat.

19. Defendant DEPARTMENT OF THE INTERIOR (“Interior”) is the federal agency charged with administration of the ESA.

20. Defendant FISH & WILDLIFE SERVICE is a part of Interior that has been delegated the responsibility to implement much of the ESA.

21. Defendant SALLY JEWELL, United States Secretary of the Interior, is the highest ranking official within the U.S. Department of the Interior and, in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to terrestrial endangered and threatened species, and for compliance with all other federal laws applicable to the Department of the Interior. She is sued in her official capacity.

22. Defendant DANIEL M. ASHE is Director of the U.S. Fish and Wildlife Service, a federal agency within the Department of the Interior authorized and required by law to protect and

manage the fish, wildlife and native plant resources of the United States, including enforcing and implementing the ESA. The Service has primary authority for day-to-day administration of the ESA with respect to terrestrial species. He is sued in his official capacity.

23. Defendant GARY FRAZER is the Assistant Director for Endangered Species at FWS, and is sued in his official capacity. Assistant Director Frazer oversees the listing function of FWS under the ESA.

24. Defendant DIXIE PORTER is the Field Supervisor at the Oklahoma Ecological Services Field Office within the U.S. Fish and Wildlife Service, a federal agency within the Department of the Interior authorized and required by law to protect and manage the fish, wildlife and native plant resources of the United States, including enforcing and implementing the ESA. The Service has primary authority for day-to-day administration of the ESA with respect to terrestrial species. She is sued in her official capacity.

STATUTORY FRAMEWORK GIVING RISE TO PLAINTIFFS' CAUSES OF ACTION

25. The ESA defines an endangered species as a species that is in danger of extinction throughout all or a significant portion of its range and a threatened species as a species that is likely to become an endangered species in the foreseeable future. 16 U.S.C. § 1532(6),(20).

26. Within one year of issuing a proposed rule to list a species as threatened or endangered under the ESA, FWS must either withdraw or finalize the proposed listing, or, based on a finding that “there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination . . .” avail itself of a six-month extension to the one-year listing

deadline. 16 U.S.C. § 1532(b)(6)(A); (b)(6)(B)(i). The maximum time allowed under the ESA to conclude a listing rule, therefore, is 18 months.

27. The listing of a species under the ESA can have significant and immediate impacts on landowners and industries operating within the range of the listed species. Once a species is listed as threatened or endangered, the ESA imposes express “taking” prohibitions, including prohibiting actions “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in such conduct.” 16 U.S.C. § 1532(19). Under the Service’s regulations interpreting the ESA, “harm” can “include significant habitat modification or degradation.” 50 C.F.R. § 17.3. Landowners and industries operating in endangered species habitat can therefore be prohibited from modifying habitat and can be subject to penalties if they do so without authorization.

28. Section 4(d) of the ESA provides the FWS the discretion to issue such regulations necessary and advisable to provide for the conservation of threatened species. The Service’s longstanding regulations interpreting this provision automatically extend to threatened species all the ESA’s “take” prohibitions that would apply to endangered species, unless FWS issues a species rule under Section 4(d) to exclude certain activities from the ESA’s broad take prohibitions. 50 C.F.R. § 17.32.

29. In determining whether a species should be listed as endangered or threatened, the ESA requires FWS to consider five factors, including “the present or threatened destruction, modification, or curtailment of a species’ habitat range.” 16 U.S.C. § 1533(a)(1)(A). FWS has interpreted this provision to require the Service “to consider the conservation efforts of not only State and foreign governments but also of Federal agencies, Tribal governments, businesses,

organizations, or individuals that positively affect the species' status." 68 Fed. Reg. 15101, 15,113 (Mar. 28, 2003).

30. The ESA also requires that listing decisions be made "solely on the basis of the best scientific and commercial data . . . *and after taking into account those efforts, if any, being made by any state or foreign nation or political subdivision of a state or foreign nation to protect such species . . .*" 16 U.S.C. § 1533(b)(1)(A) (emphasis added). The plain language of the ESA thus requires the FWS to consider conservation measures undertaken by other entities in determining whether listing of a species is warranted.

31. The implementing regulations for the ESA similarly provide that the Secretary "*shall take 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 . . .*" 50 C.F.R. § 424.11(f) (emphasis added).

32. Pursuant to these requirements, the FWS and the National Marine Fisheries Service ("NMFS") adopted an approach to encourage the voluntary conservation of species before they are listed. In 1999, FWS and the NMFS issued a Joint Policy on Candidate Conservation Agreements with Assurances ("CCAA" or "Conservation Plans"). 64 Fed. Reg. 3276 (June 17, 1999). The policy's goal is to encourage states and private parties, on whose land habitat for candidate species is situated, to undertake measures to conserve candidate species by implementing mutually agreed upon conservation measures. In return, the policy establishes that participants obtain the certainty that they will not be required to undertake additional conservation measures should the species become listed in the future. *Id.* at 32,733-34. FWS

provides this certainty to participating landowners through the issuance of an enhancement of survival permit under Section 10 of the ESA. *Id.*

33. Once a CCAA is adopted, the Service's regulations provide for the issuance of an enhancement of survival permit if the candidate species is ultimately listed as endangered or threatened. 50 C.F.R. §§ 17.22(d), 17.32(d).

34. More importantly here, the Service's 2008 guidance on CCAAs makes clear that the principal goal of CCAAs is to render listing of a species *unnecessary* through coordination of conservation efforts with states, private landowners, and other non-federal partners. *See* FWS, Using Existing Tools to Expand Cooperative Conservation for Candidate Species Across Federal and non-Federal Lands 1, 2 (2008).

35. In 2003, the FWS and NMFS (collectively, the "Services") published a Joint Policy for the Evaluation of Conservation Efforts When Making Listing Decisions ("Conservation Evaluation Policy"), which "identifies criteria [the Services] will use in determining whether formalized conservation efforts that have yet to be implemented or to show effectiveness contribute to making listing a species as threatened or endangered unnecessary." 68 Fed. Reg. 15,100 (Mar. 28, 2003).

36. The Conservation Evaluation Policy sets forth two fundamental criteria that guide the Service's evaluation of whether new conservation measures may be considered in a listing decision: (1) the certainty that the conservation measure will be implemented; and (2) the certainty that the conservation measure will be effective. *Id.* Under the Conservation Evaluation Policy, the Service considers several criteria under each prong—implementation and

effectiveness—in order to determine whether a specific conservation effort can be considered in the context of a listing decision.

37. While the Conservation Evaluation Policy limits the Service’s consideration of conservation efforts to those which are reasonably certain to be implemented and which are similarly certain to benefit the species, *nothing* in the policy limits the Service to consider only those conservation efforts that are certain to eliminate *all* threats. *See* 68 Fed. Reg. 15,100 (Mar. 28, 2003). To the contrary, for purposes of evaluating potential efficacy, the Conservation Evaluation Policy requires only that the Service identify threats and conservation objectives, and evaluate whether the efforts “identify the appropriate steps to reduce threats to the species . . .” 68 Fed. Reg. at 15,101. Indeed, in making a listing decision, the Service must consider any conservation effort that the Service concludes “improves the status of the species at the time we make a listing determination.” 68 Fed. Reg. at 15,101.

38. While the ESA, and implementing regulations and guidance thereunder, provide the structural and analytical framework that the Service must apply when listing a species under the ESA, final listing decisions are reviewed under the APA.

39. “Under the APA, a reviewing court may set aside an administrative decision if the decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” *Osteopathic Founders Foundation v. Sebelius*, No. 06-CV-426-GKF-FHM (N.D. Okla. July 26, 2010) (citing *Via Christi Regional Medical Center, Inc. v. Leavitt*, 509 F.3d. 1259, 1271 (10th Cir. 2007); 7 U.S.C. § 706(2)(a). The APA “require[s] agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations.” *Osteopathic Founders Foundation* (quoting *Via Christi* at 1271).

40. Further, agency decisions are arbitrary and capricious if “the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or a product of agency expertise.” *Friends of the Bow v. Thompson*, 12 F.3d. 1210, 2015 (10th Cir. 1997) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

FACTUAL ALLEGATIONS

CANDIDATE SPECIES HISTORY:

41. The LPC “is a species of prairie grouse endemic to the southern high plains of the United States . . .” (79 Fed. Reg. at 19,998), including expanding portions of Oklahoma, Kansas, New Mexico, Texas, and Colorado. 79 Fed. Reg. 20,009. Suitable habitats for LPC include grasslands in Kansas, sagebrush habitat in Colorado, Kansas, Oklahoma, and Texas, and shinnery oak habitat in New Mexico, Oklahoma, and Texas. 79 Fed. Reg. at 20,006.

42. The LPC was first listed as a “candidate species” in 1998, after the Service determined that listing the LPC was warranted but precluded by higher priority listing actions, and was assigned a Listing Priority Number (“LPN”) of 8 on a 12-point scale under which “1” represents the highest priority and “12” represents the lowest priority. 63 Fed. Reg. 31,400 (June 9, 1998). FWS continued to assign the LPC an LPN of 8 until 2008, when the Service drastically changed the LPN from 8 to 2. 73 Fed. Reg. 75,176 (Dec. 10, 2008). According to FWS, the drastic LPN change was in response to presumed threats to LPC habitat from development, including wind energy structures, transmission lines, grassland conversion, and oil and gas development. 79 Fed. Reg. at 19,995.

43. Indeed, from the time the LPC was first considered a candidate species in 1998, the lack of reliable population surveys [79 Fed. Reg. 20,010] meant that potential threats to the LPC were merely inferred from presumed threats to LPC habitat *See* 77 Fed. Reg. at 72,830 (noting that changes in the LPC Listing Priority Number were based on expected development in LPC habitat); *See* also 77 Fed. Reg. at 73,851.

44. Nevertheless, before the LPC was considered a candidate species in 1998, a combination of federal, state, and private entities undertook efforts to conserve the LPC by protecting its habitat from fragmentation, degradation, and conversion. While many efforts were initiated prior to 1998, the 2008 change in listing priority was the catalyst for a significant expansion in proactive state and private party conservation efforts – an expansion that itself was dwarfed by the unprecedented conservation efforts that followed the proposed listing.

PRE-PROPOSAL CONSERVATION EFFORTS:

45. As far back as 1985, the U.S. Department of Agriculture’s (“USDA”) Farm Service Agency (“FSA”) began implementing the Conservation Reserve Program (“CRP”) under which agricultural landowners ultimately enhanced “millions of acres within the range of the lesser-prairie chicken.” 79 Fed. Reg. at 19,988. Similarly, the State Acres for Wildlife Enhancement Program (“SAFE”) is a coordinated state habitat improvement program that began in 2008 and, at the time of the final listing, had improved over 214,000 acres of LPC habitat. 79 Fed. Reg. at 19,988.

46. USDA’s Lesser Prairie Chicken Initiative (“LPC Initiative”) started in 2010 to provide technical and financial assistance to agricultural landowners to voluntarily protect and enhance LPC habitat. 79 Fed. Reg. at 19,989. Between 2010 and 2012, conservation contracts were

executed covering 942,572 acres and for which \$24.5 million has been committed to LPC conservation. 79 Fed. Reg. at 19,989.

47. Since 2004, the Sutton Center, a private, non-profit organization located in Bartlesville, Oklahoma, has been working to reduce LPC collision mortality by removing or marking barbed wire fences. 79 Fed. Reg. at 19,991. At the time FWS finalized the listing, the Sutton Center had removed or improved over 200 kilometers of fences, with the potential to reduce mortality on over 109,000 acres of LPC habitat. 79 Fed. Reg. at 19,991.

48. These are but a few of the multijurisdictional and voluntary efforts that were undertaken to protect the LPC before FWS even proposed to list the species under the ESA.

49. In addition to the extraordinary multijurisdictional efforts to protect and conserve LPC, states and private landowners therein undertook significant intrastate efforts to protect and conserve LPC by protecting LPC habitat. Prior to the proposed listing, Conservation Plans were implemented in Oklahoma, New Mexico, and Texas, and each of the five states in LPC range undertook meaningful research, funding, and conservation efforts. 79 Fed. Reg. at 19,992. In particular, the New Mexico Conservation Plan was developed to provide conservation benefits to both the LPC and the dunes sagebrush lizard (“DSL”), with which the LPC shares habitat and habitat needs. The private landowners, including many of Plaintiffs’ member companies, enrolled 1,740,000 acres in New Mexico’s ranching Conservation Plan and 875,000 acres in the oil and gas Conservation Plan. The state enrolled 248,000 acres of LPC habitat in the Conservation Plan, and the Bureau of Land Management (“BLM”), acting in conjunction with New Mexico, closed all future oil and gas leasing on 153,257 acres in New Mexican LPC/DSL habitat and ensured that 132,590 acres of un-leased federal land in New Mexican LPC/DSL

habitat would remain unleased. Importantly, based in large part on the widespread enrolment in the Conservation Plans in New Mexico, FWS withdrew its proposed “endangered” listing of the DSL and determined that no ESA listing was necessary for the DSL – a species with which the LPC shares the same shinnery oak dune habitat, the same alleged habitat-based threats, and many of the same conservation programs. 77 Fed. Reg. 36,872 (June 19, 2012).

50. Notwithstanding the level of conservation effort underway at all levels of government and with the full support of private landowners and industries like the oil and gas industry, on December 11, 2012, FWS proposed to list the LPC as threatened. 77 Fed. Reg. 73,828. Plaintiffs provided extensive comment on the proposed listing.

POST-PROPOSAL CONSERVATION EFFORTS:

51. Following the publication of the proposed LPC listing in December 2012, each of the pre-proposal conservation efforts continued to expand and important new initiatives were finalized and implemented. Among these measures was the WAFWA Range-wide Plan, which the FWS endorsed as providing a comprehensive framework for habitat conservation and mitigation. 79 Fed. Reg. at 19,990. With the substantial voluntary participation of Plaintiffs’ member companies, on the eve of the final listing, over 3.6 million acres were enrolled and nearly \$21 million in fees were raised for LPC habitat conservation under the Range-wide plan. See <http://www.wafwa.org/html/news.shtml> (accessed May 29, 2014).

52. In addition to the Range-wide Plan, in 2012, the FSA announced a new program to protect highly erodible land that it estimated could be used to protect 689,000 acres of LPC habitat. 79 Fed. Reg. at 19,988. Notably, this estimate was in addition to the substantial protections in place prior to publication of the proposed listing. Similarly, in 2013, 220,598

acres were enrolled in the LPC Initiative – a program in which nearly a million acres were already enrolled prior to listing. 79 Fed. Reg. at 19,989.

53. States also aggressively pursued intrastate programs to protect the LPC. Colorado instituted a Habitat Improvement Program for the LPC and enrolled over 11,000 acres and funded \$14 million in conservation easements to benefit the LPC. 79 Fed. Reg. at 19,993. Private landowners in Colorado also voluntarily protected an additional 23,000 acres through the Service’s Partners in Fish and Wildlife program (“PFW Program”), enrolled nearly 11,000 acres in the CRP SAFE program, and permanently protected an additional 11,000 acres of LPC habitat through perpetual easements. 79 Fed. Reg. at 19,993.

54. Kansas instituted a Conservation Plan for LPC conservation and developed a landowner incentive program (“Incentive Program”) under which 22,531 acres of LPC habitat was protected and improved. 79 Fed. Reg. at 19,993. Also, in 2013, 29 counties in Kansas developed a coordinated effort to protect and conserve LPC in an area that encompasses over 16 million acres. Private landowners in Kansas also enrolled nearly 140,000 acres in the PFW Program and 29,000 acres in SAFE. 79 Fed. Reg. at 19,993. Additionally, a non-profit organization accessed \$850,000 in grant funding to execute 43 separate rangeland improvement projects benefitting over 100,000 acres of LPC habitat. 79 Fed. Reg. at 19,993.

55. The majority of New Mexico’s effort was encompassed in the millions of acres protected under the Conservation Plans prior to the proposed listing. Subsequent to the Service’s listing proposal, however, BLM and New Mexico have begun improving LPC habitat through mesquite removal on 388,937 acres (with 347,091 additional acres scheduled for removal). 79 Fed. Reg. at 19,995. New Mexico has also purchased and/or permanently closed over 30,000 acres of LPC

habitat. 79 Fed. Reg. at 19,995. Private landowners in New Mexico also protected over 70,000 acres of LPC habitat under PFW Program, 2,600 acres under SAFE, and 28,000 acres as a permanent wildlife preserve. 79 Fed. Reg. at 19,995.

56. For its part, Oklahoma acquired and protected over 20,000 acres of LPC habitat, developed in conjunction with environmental groups a mitigation tool under which \$11.1 million has already been committed to LPC habitat mitigation, and enrolled 17,582 acres in its CCAA – which Oklahoma was attempting to expand when FWS issued the final listing. 79 Fed. Reg. at 19,995. Private landowners in Oklahoma also voluntarily enrolled over 96,000 acres of LPC habitat in the PFW and over 15,000 acres in SAFE. 79 Fed. Reg. at 19,996.

57. By December 2013, the Conservation Plan that Texas developed to protect the LPC encompassed 572,999 enrolled acres, with 12 more applications pending at the time FWS issued its final listing decision. 79 Fed. Reg. at 19,997. Texas also enrolled more than 14,000 acres in its LIP. 79 Fed. Reg. at 19,997. Private landowners in Texas also voluntarily protected over 131,000 acres of LPC habitat in the PFW, over 77,000 acres in SAFE, and nearly 11,000 as a permanent preserve. 79 Fed. Reg. at 19,997.

DEFENDANTS' FINAL LISTING DECISION:

58. Notwithstanding the level of conservation effort undertaken on top of the numerous conservation programs in place prior to the proposed listing and the unprecedented efforts undertaken by states, private landowners, and land use industries, on April 10, 2014, FWS issued a final rule to list the LPC as threatened under the ESA. 79 Fed. Reg. 19,974. The only meaningful recognition of these unprecedented conservation efforts was the simultaneously issued 4(d) Rule, which extended regulatory flexibility to owners and operators that enroll land

in certain conservation programs, and the Service's endorsement of the Range-wide Plan as one such conservation program. 79 Fed. Reg. 20,074. Plaintiffs support this 4(d) Rule, and the important flexibility provided therein, as well as the Service's recognition of the Range-wide Plan.

59. The Service's decision to list the LPC, however, was improper.

PREMATURE LISTING DECISION:

60. Under the ESA's listing deadlines, FWS did not need to make a final LPC listing decision until June 11, 2014. Yet, to comply with the *Section 4 Deadline Litigation* settlement, under which the Service could have sought deadline relief (and has done so in analogous circumstances), FWS announced its intention to finalize the "threatened" listing on March 27, 2014.

61. The Service's decision to list the LPC three months early unnecessarily and arbitrarily precluded consideration of the best available evidence on which FWS must base its listing. FWS itself noted throughout the preamble to the final rule numerous instances where information that could have changed the outcome of this listing was pending or would be available imminently: (a) the review of the habitat conservation plan ("HCP") for wind energy – one of the most significant threats alleged (expected April) (79 Fed. Reg. at 19,992); (b) the multi-sector HCP for O&G, agriculture, and other private interests (decision expected in Summer 2014) (*Id.*); (c) Common Ground Capital habitat banking agreement (Spring 2014) (*Id.*); (d) several other habitat banking requests (Spring 2014) (*Id.*); (e) decision to double the land eligible for the Oklahoma Conservation Plan from 200,000 acres to 400,000 acres (March 2014) (79 Fed. Reg. at 19,996); (f) changes to conservation program funding through the Agricultural Act of 2014; (79 Fed. Reg.

at 20,029); (g) four major ranching Conservation Plan enrollments pending in New Mexico (79 Fed. Reg. at 19,995); (h) “several applications” pending for enrollment in the Oklahoma Conservation Plan (79 Fed. Reg. at 19,996); and, (i) 12 applications for enrollment in the Texas Conservation Plan “currently being reviewed.” (79 Fed. Reg. at 19997).

62. FWS knew that important “best available evidence” was forthcoming within the ESA’s listing deadlines and further knew that protections available to the LPC were expanding rapidly. In fact, one of the greatest catalysts for conservation enrollment – the Service’s endorsement of WAFWA’s Range-wide Plan – occurred only a month before the final listing was released. The best scientific and commercial information available clearly demonstrated that threats to the LPC were diminishing and conservation efforts were expanding – FWS had an obligation to review the evidence made available through the full time authorized under the ESA in order to evaluate those recognized changes.

63. Not only did the final listing decision fail to account for the cumulative conservation benefit of a multitude of conservation efforts in place and expanding throughout LPC range, its threat analysis for the LPC was arbitrary, capricious, and not based on a comprehensive review and thorough analysis of the best available scientific and commercial data.

BEST INFORMATION AVAILABLE SHOWS LPC RANGE IS EXPANDING:

64. FWS considers the loss of historic range “to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating those trends)” 79 Fed. Reg. 20,016. Yet, the Service’s estimated 84% decline in occupied LPC range is measured from a “historic range” that predates European settlement of the Great Plains [79 Fed. Reg. at 20,008-20,009, 20,016] – hardly a relevant measure of present threat or evidence of a trend. On

the other hand, the Service's own docket demonstrates that between 1980 and 2012, LPC-occupied range *increased* 159%, with over 1,381,000 more acres between 2007 and 2012 alone. 79 Fed. Reg. at 20,016. The increase over this period totaled over 16,700 square miles (m²), or 10,688,000 acres - an area larger than the area of nine U.S. states.

BEST INFORMATION AVAILABLE SHOWS LPC POPULATIONS ARE STABILIZING, IF NOT GROWING:

65. While it did not do so for purposes of evaluating expanding LPC range, the Service considered the 2012 and 2013 range-wide surveys for purposes of assessing population trends. Here, though, despite acknowledging the significant natural year-over-year variability of LPC populations, the Service based its conclusion that LPC populations were declining almost exclusively on a one-year decline observed in the range-wide surveys conducted in 2012 and 2013. 79 Fed. Reg. at 20,011. In doing so, FWS ignored survey data from the 1960s, 1980, and 2003 that would have normalized the natural year-over-year variability and helped identify a population trend. Had FWS examined all the available survey data, it would have understood that the upper confidence interval of the 2012 survey (52,076) was less than 900 birds short of *the highest population level ever estimated* from a survey (between 44,400 and 52,900 birds in 1980), and that the difference between the 2012 lower confidence interval and the 2013 upper confidence interval was only 740 birds. 79 Fed. Reg. at 20,011. Given the LPC's natural population variability, it was arbitrary and capricious for FWS to ignore three decades of survey data to base its "population crash" conclusion on just two data points which, even viewed in isolation, suggest that, in 2013, LPC populations declined by as few as 740 birds from the second highest LPC population level ever estimated from a survey.

66. In addition to survey data suggesting long-term increases in LPC population levels, FWS capriciously dismissed modeling data supporting the observed long-term increases. Chief among those models was one developed by Christian A. Hagan, the Lesser Prairie Chicken Initiative's Science Advisor who authored more studies cited by FWS in the final listing than any other author. 79 Fed. Reg. 20,011. The Service, however, refused to consider this study, which showed that LPC populations have increased since 1997, because they considered it interim, and because it was unpublished and not peer reviewed. 79 Fed. Reg. at 20,011. FWS, however, considered a different modeling effort projecting population declines (Garton (2012)), that was also unpublished and not peer reviewed. 79 Fed. Reg. 20,011. The Service's refusal to consider the Hagan model is even more arbitrary and capricious because FWS elsewhere cited extensively to unpublished works that were not peer reviewed, *including the 2012 and 2013 surveys*, and multiple unpublished masters' theses that were also not peer reviewed. 79 Fed. Reg. 19,987. The Service is certainly not prohibited from dismissing the Hagan study, or any other study, as unreliable, but it must do so based on factors it applies consistently to all the studies it evaluates.

FWS NEVER RESOLVED SUBSTANTIAL DISAGREEMENT OVER BASIS FOR THE PROPOSED LISTING:

67. Many of the issues noted above were raised by commenters, each of the states within the range of the LPC, and at least one of the only two peer reviewers to examine the proposed listing. Yet FWS declined to substantively address those comments, opting instead to finalize the proposed listing in substantially the same form as it was proposed. 79 Fed. Reg. at 19,987-19,988. Importantly, FWS did so despite knowing that there was "substantial disagreement regarding the sufficiency or accuracy of the available data" underpinning its proposed listing. 79 Fed. Reg. at 19,975.

68. The Service’s “Literature Cited” for this rulemaking includes only a handful of studies released after the July 9, 2013 “substantial disagreement” finding – none of which could credibly be understood to resolve the substantial disagreement over the sufficiency or accuracy of the data available before July 9, 2013.

69. Indeed, the most significant new data made available to FWS after July 9, 2013 were statistics on the profound growth in the breadth and scope of the conservation agreements and measures in place to protect and conserve the LPC and LPC habitat. FWS classified these efforts as providing “a comprehensive framework for the conservation of the lesser-prairie chicken . . .” that are “quite similar to a recovery plan, something that the Service normally prepares years after a species’ listing.” *See* Questions and Answers: Final Listing Determination and Special Rule for the Lesser Prairie Chicken.

70. Yet, in spite of the record before it and the Service’s own recognition that the early identification and execution of voluntary conservation strategies exceeded any protections that FWS could bring to bear through listing under the ESA,³ FWS listed the LPC as threatened anyway.

71. Plaintiffs share Defendants’ deep interest in LPC conservation, and have demonstrated that commitment by voluntary undertaking unprecedented levels of LPC habitat protection and conservation funding. Indeed, from a very early stage, Plaintiffs’ members worked in close partnership with FWS and its dedicated staff to help conserve the LPC. Plaintiffs appreciate and

³ See Questions & Answers: Final Listing Determination and Special Rule for the Lesser Prairie-Chicken. http://www.fws.gov/southwest/es/documents/R2ES/LPC_FL_FAQs_FINAL_20140327.pdf (accessed June 6, 2014) (“Collectively, these various efforts are quite similar to a recovery plan, something that the Service normally prepares years after a species’ listing. This early identification of a strategy to recover the lesser prairie-chicken is likely to speed its eventual delisting.”)

support the Service's efforts to account for those profound efforts through the 4(d) Rule and the Service's recognition of the WAFWA Range-wide Plan. Those efforts, however, when viewed in conjunction with the Service's own record of increasing LPC range and long-term increases in LPC population, make withdrawing the proposed "threatened" listing the only rational and supportable outcome of this rulemaking. Defendants' failure to withdraw the proposed listing despite a record strongly supporting such a conclusion is arbitrary and capricious.

CLAIM FOR RELIEF

72. Plaintiffs incorporate by reference each and every allegation set forth in this Complaint as if set out in full below.

73. By listing the LPC as threatened under the ESA, FWS violated the APA and the ESA. The Service's listing was arbitrary, capricious, and contrary to the law. *See* 5 U.S.C. § 706.

74. In assessing ongoing and future threats to LPC populations, FWS did not rely on "best scientific and commercial data available" [16 U.S.C. §§ 1533(b)(1), (h)], and arbitrarily and capriciously failed to account fully for the cumulative protections afforded by dozens of conservation programs in place throughout the range of the LPC. The Service also failed to rely on "best scientific and commercial data available," by arbitrarily and capriciously finalizing the LPC listing months before the ESA listing deadlines, when the Service knew that rapid expansion in conservation programs occurring at the time would have provided further evidence on which to withdraw the proposed listing.

75. The Service also failed to rely on the "best scientific and commercial data available" and arbitrarily and capriciously considered range and population data that supported the proposed rule's conclusion that listing as threatened was warranted, while ignoring or dismissing

comparable or superior range and population data that undermined the Service's conclusion that listing as threatened was warranted.

76. The Service also arbitrarily and capriciously failed to rectify its conclusion from just eight months prior to listing that there was substantial disagreement regarding the sufficiency and accuracy of the data underpinning its proposed listing. Indeed, FWS points to no data that would remedy such disagreement in favor of persisting with the threatened listing, largely ignored the substantial new conservation data that weighed against listing, and, without explanation, issued a final listing that was, in all substantive respects, identical to the proposed listing for which FWS noted substantial disagreement regarding the sufficiency and accuracy of the data.

77. Accordingly, Defendants' decision to list the LPC as a threatened species under the ESA is arbitrary, capricious, contrary to law, and must be set aside pursuant to the APA. *See* 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court:

1. declare that Defendants' April 10, 2014 final rule to list the LPC as threatened violates the APA and the ESA;
2. vacate Defendants' April 10, 2014 final rule to list the LPC as threatened in accordance with the Court's ruling;
3. award Plaintiffs their costs and attorneys' fees; and
4. grant Plaintiffs such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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