



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 North Fairfax Drive  
MS 2042-PDM  
Arlington, Virginia 22203

**RE: American Petroleum Institute, America's Natural Gas Alliance, the Colorado Oil and Gas Association, International Association of Drilling Contractors, the Independent Petroleum Association of America, Mid-Continent Oil and Gas Association of Oklahoma, New Mexico Oil and Gas Association, Oklahoma Independent Petroleum Association, Panhandle Producers & Royalty Owners Association and Western Energy Alliance's Comments on the Proposed Special Rule under Section 4(d) of the ESA (78 Fed. Reg. 26302 (May 6, 2013)).**

Dear Sir/Madam:

The American Petroleum Institute, America's Natural Gas Alliance, the Colorado Oil and Gas Association, International Association of Drilling Contractors, the Independent Petroleum Association of America, Mid-Continent Oil and Gas Association of Oklahoma, New Mexico Oil

and Gas Association, Oklahoma Independent Petroleum Association, Panhandle Producers & Royalty Owners Association, and Western Energy Alliance (collectively “the Associations”) appreciate the opportunity to comment on the Fish and Wildlife Service’s (“FWS” or “the Service”) Proposed Special Rule under Section 4(d) of the Endangered Species Act (“ESA”) that would accompany the Service’s potential listing of the Lesser prairie-chicken (“LPC”) as threatened.<sup>1</sup> As detailed in the comments the Associations submitted on March 11, 2013, we believe FWS’s final determination must be that listing the LPC as “threatened” is not warranted.<sup>2</sup>

The oil and natural gas industry is committed to conservation of the LPC. Companies active in Colorado, Kansas, New Mexico, Oklahoma, and Texas implement LPC avoidance, minimization, and mitigation measures, and provide funding and support for important LPC conservation efforts throughout the region.

The American Petroleum Institute (“API”) is a national trade association representing more than 500 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 and operate in the areas that the Service identifies as LPC habitat.

America's Natural Gas Alliance (“ANGA”) represents North America’s largest independent natural gas exploration and production companies and works with industry, government and customer stakeholders to ensure continued availability and to promote increased use of our natural gas resources for a cleaner and more secure energy future. ANGA member companies are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The Colorado Oil & Gas Association (“COGA”) promotes the beneficial, efficient, responsible and environmentally sound development, production and use of Colorado oil and natural gas. COGA members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas the Service identifies as LPC habitat.

The International Association of Drilling Contractors (“IADC”) is a trade association representing the interests of drilling contractors, onshore and offshore, operating worldwide. IADC’s mission is to advance drilling and completion technology; improve industry health, safety, environmental and training practices; and champion sensible regulations and legislation which facilitate safe and efficient drilling. IADC members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The Independent Petroleum Association of America (“IPAA”) represents thousands of independent oil and natural gas explorers and producers, as well as the service and supply

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<sup>1</sup> 78 Fed. Reg. 26302 (May 6, 2013).

<sup>2</sup> 77 Fed. Reg. 73828 (Dec. 11, 2012).

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 members companies are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The Mid-Continent Oil and Gas Association of Oklahoma 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 Mid-Continent Oil and Gas Association is the oldest energy trade organization in the U.S. The Mid-Continent Oil and Gas Association of Oklahoma are dedicated to the advancement and improvement of the oil and gas industry within the State of Oklahoma and throughout the United States. The Mid-Continent 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. Mid-Continent Oil and Gas Association members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The New Mexico Oil and Gas Association ("NMOGA") is dedicated to promoting the safe and responsible development of oil and gas resources in New Mexico through advocacy, collaboration and education. NMOGA members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

The Oklahoma Independent Petroleum Association ("OIPA") represents approximately 2,550 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 and operate in the areas that the Service identifies as LPC habitat.

The Panhandle Producers & Royalty Owners Association ("PPROA") is the trade association representing independent oil and gas producers, support companies, and mineral royalty owners in the Texas Panhandle, western Oklahoma and southwestern Kansas since 1929. PPROA members are subject to the FWS regulations pertaining to the conservation of species and operate in the areas that the Service identifies as LPC habitat.

Western Energy Alliance ("WEA") 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 in areas with LPC habitat, and therefore will be significantly impacted by this rulemaking.

While the Associations appreciate the fact that the Service has proposed a 4(d) Special Rule, the rule outlined in the proposal is far too narrow and unnecessarily constrictive. If the FWS finalizes its rule to list the LPC as threatened, it should use the flexibility provided by such a listing to remove all prohibitions for takes incidental to lawfully conducted oil and gas operations.

## **I. SUMMARY**

As our previous comments set forth in great detail, the Associations believe that the FWS's final determination must be that listing the LPC as "threatened" is not warranted. If FWS cannot make this determination, it should extend the deadlines for a final listing decision by six months to allow stakeholders to comment on the potential impact of the final Range-Wide Plan on LPC listing status and to allow the Service the opportunity to process the application for the oil and gas CCAA that is attached to the Range-Wide Plan.

If the Service ultimately finalizes a "threatened" listing, the Associations would support the simultaneous publication of a special rule under Section 4(d) of the Act ("4(d) Special Rule") to remove prohibitions for takes incidental to lawfully conducted oil and gas operations, allow for continued enrollment in existing candidate conservation agreements ("CCAs") and candidate conservation agreements with assurances ("CCAAs"), and allow incidental take of LPC if the take results from implementation of a comprehensive LPC conservation program that was developed by an entity other than a state agency. The 4(d) Special Rule should also make clear that land users may still seek incidental take authorization through Section 10 permits.

## **II. THE 4(d) SPECIAL RULE SHOULD NOT PROHIBIT TAKES INCIDENTAL TO LAWFULLY CONDUCTED OIL AND GAS ACTIVITY**

The ESA defines a threatened species as one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range,"<sup>3</sup> and defines an endangered species as one that is "in danger of extinction throughout all or a significant portion of its range."<sup>4</sup> Section 9 of the ESA provides a blanket prohibition on the take of endangered species, but, under Section 4(d) of the ESA, "the Secretary shall issue such regulations as [s]he deems necessary and advisable to provide for the conservation" of threatened species. This provision provides the listing agencies broad discretion to establish a wide range of protective measures for the conservation of species - from narrowly tailored requirements to the full panoply of prohibitions provided to endangered species under Section 9. As noted by Congress in the House Report that accompanied the initial passage of the ESA:

. . . once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example,

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<sup>3</sup> 16 U.S.C. § 1532(20).

<sup>4</sup> 16 U.S.C. § 1532(6).

permit taking, but not importation of such species, or he may choose to prohibit both taking and importation but allow the transportation of such species . . .<sup>5</sup>

The Section 4(d) flexibility to narrowly tailor protections for threatened species and to opt against prohibiting all takes has been fully utilized by the listing agencies.<sup>6</sup> The listing agencies typically refrain from imposing full Section 9 take prohibitions when: (1) take is incidental to a lawfully conducted industrial sector activity; (2) where incidental take potentially attributable to the activity is negligible or not well understood; and, (3) where there are economic and policy reasons to avoid unnecessarily damaging regulations on an industry.<sup>7</sup> The Associations believe that these principals should inform the Service's delineation of the 4(d) Special Rule for the LPC by removing all prohibitions for takes incidental to lawfully conducted oil and gas operations, because lawfully conducted oil and gas activities already protect the environment, and the LPC habitat therein.

**A. Assumptions Made Concerning Takes From Oil and Gas Activities Are Unreasonably Overstated, Unsupported by Adequate Scientific or Technical Information, and Overlook Present Regulations and Mitigation Measures**

Inherent in the flexibility that Congress afforded the listing agencies is the ability and duty to tailor or withhold take protections for threatened species and ensure that prohibitions are based on necessity.<sup>8</sup> Such an evaluation of necessity requires an understanding of what threats to the LPC are truly attributable to oil and gas development and how those threats are already being addressed.

*i. Oil and Gas Industry Takes, To the Extent They Occur, Are Incidental Activities*

Any takes of the LPC from oil and gas operations are incidental to the development of the resource. This incidental take, to the extent it occurs, is the inevitable consequence of operating within the range of the species. As discussed below, the Associations believe that such incidental takes from the industry are likely negligible. Far from targeting the LPC for taking, the oil and gas industry is actively working to minimize its already negligible impact on the LPC.

*ii. The Service's Take Assumptions are for the Oil and Gas Industry are not Well Supported*

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<sup>5</sup> H.R. Rep. No. 412, 93<sup>rd</sup> Cong., 1st Sess. 1973

<sup>6</sup> *Alesa Valley Alliance v. Lautenbacher*, 2007 U.S. Dist Lexis 60203 (D.Or. 2007); *Washington Environmental Council v. NMFS*, 2002 U.S. Dist Lexis 5432 (W.D. Wash 2002); *State of Louisiana v. Verity*, 853 F.2d 322 (5<sup>th</sup> Cir. 1988).

<sup>7</sup> See *Utah Prairie Dog* (77 Fed. Reg. 46158 (Aug. 2, 2012)); *Central Population of the California Tiger Salamander* (69 Fed. Reg. 47212 (Aug 4, 2004)); *Preble's Meadow Jumping Mouse* (66 Fed. Reg. 28125 (May 22, 2011)), (67 Fed. Reg. 61531 (Oct. 1, 2002)), (69 Fed. Reg. 29101 (May 20, 2004)).

<sup>8</sup> 16 U.S.C. § 1533(d).

In its December 11, 2012, proposed listing, FWS alleged threats from oil and gas activities, but, in doing so, was unable to isolate potential impacts from oil and gas operations from other variables that may affect the LPC. As the Associations discussed in their March 11, 2013, comments, FWS relied on an analysis (Hunt & Best 2004) that lumped together multiple alleged threats to the LPC and attributed all of their effects to the oil and gas industry.<sup>9</sup> The study's "factor analysis" for oil and gas operations evaluated the total number of wells, total number of active wells, length of roads, presence of power lines, and noise levels in a presence/absence analysis at leks, but it did not discuss what threat they attributed to each sub-factor. As such, alleged threats that are not specific to oil and gas development, such as roads, power lines, and noise, may be improperly attributed exclusively to oil and gas development by this study.

Further, the study's reliance on presence/absence surveys without proper identification of a baseline does not allow accurate attribution of alleged threats to LPC absence. For instance, the study counts the number of abandoned leks near wells and attributes each of those lek abandonments to the presence of the well. However, the study's authors did not evaluate the lek abandonment rate in areas devoid of anthropogenic structure. There is no way to determine whether, or to what extent, the wells "caused" lek abandonment. These factors' cumulative effects, therefore, likely are overstated as being attributable to the oil and gas industry. Further still, the study also recognized the presence of active and occupied leks near oil and gas operations. Neither the study authors nor FWS attempted to explain how those LPC continue to thrive in the presence of threats identified by FWS.

As such, based on the information available in rulemaking record, FWS' assumptions about the incidental take that could be potentially attributable to oil and gas development are not well supported. As discussed below, however, there is evidence to suggest existing regulatory structures and industry practices already reduces any incidental LPC take to negligible levels.

*iii. Takes From Oil and Gas Activities Are Already Minimized*

While the Associations believe that FWS has not adequately supported its conclusions in the record showing the threats to the LPC caused by oil and gas development, they do not suggest that there is no potential for LPC takes from such development. The starting point, however, for the Service's evaluation of its proposed rule to delineate the activities necessary to minimize LPC take is to formulate an understanding of what is already being done.

Oil and gas development is a highly regulated activity that requires compliance with numerous federal, state, and local regulations, and permits issued pursuant to those regulations. These regulations, along with the oil and gas industry's commitment to environmental stewardship, already ensure that the land and water are protected; that wastes, emissions, and surface disturbances are minimized; and that land is returned to a natural state as soon as possible after development activity. Further, oil and gas companies also already implement, pursuant to the Migratory Bird Treaty Act of 1918<sup>10</sup>, measures to mitigate and avoid harm to migratory birds, which also protect the LPC. The existing legal requirements adequately protect the LPC.

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<sup>9</sup> Hunt & Best, 2004, at 128.

<sup>10</sup> 16 USC § 712.

In addition to these regulations, oil and gas companies have developed and utilize API Bulletin 75L, which includes numerous best practices for the safe and environmentally responsible development of oil and gas resources. Companies active in Colorado, Kansas, New Mexico, Oklahoma, and Texas also implement LPC avoidance, minimization, and mitigation measures, and provide funding and support for important LPC conservation efforts throughout the region.

Moreover, potential impacts from oil and gas operations on the LPC are further mitigated by technology. The footprints of drilling operations are decreasing because of advancements in the industry such as horizontal and directional drilling that allow multiple wells to be drilled in numerous directions from a single pad. Siting multiple wells from a single pad significantly reduces both the number of well pads as well the amount of supporting infrastructure needed to support those well pads. The ability to reduce the number of drill pads also minimizes vehicle traffic to field locations.

As such, the oil and gas industry is already minimizing its incidental take of LPC through existing regulations and permit requirements, environmental stewardship, voluntary conservation activities, and technological advances. The resulting negligible effect on LPC population that results from these programs should then be weighed against the economic impact of imposing additional regulation on the oil and gas industry.

**B. There Are Economic and Policy Reasons to Refrain From Imposing All Section 9 Take Prohibitions on Oil and Gas Activities**

This Administration has acknowledged the economic, employment, and national security benefits that come from a healthy domestic oil and gas industry.<sup>11</sup> Indeed, President Obama’s “All of the Above” energy strategy, while diversified, continues to rely heavily on oil and gas development to fuel America’s future.<sup>12</sup> The International Energy Agency estimates that the United States can be energy self-sufficient in seven years.<sup>13</sup> However, this estimate is premised on a regulatory structure that allows for increased oil and gas development and the elimination of regulatory hurdles that unnecessarily add costs to oil and gas development without concomitant environmental benefits—including benefits to species near oil and gas operations.

As explained above, the potential impact of the oil and gas industry on LPC status is poorly understood but likely to be negligible. The impacts, to the extent they exist, are already minimized and/or mitigated through a comprehensive overlay of federal state and local regulations, meaningful voluntary actions by the oil and gas industry, and technological advancements. Adding another layer of regulation on the oil and gas industry in a region that is key to America’s energy future and for which there is no clear environmental benefit runs counter to this Administration’s stated approach to energy and regulation.

**C. Allowing Take Incidental to Lawful Activity Is Consistent With FWS Practice In Analogous Circumstances**

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<sup>11</sup> <http://energy.gov/articles/president-obama-outline-plan-americas-energy-security> (last visited Jan. 12, 2013)

<sup>12</sup> “We need an energy strategy for the future – an all-of-the-above strategy for the 21st century that develops every source of American-made energy.” - President Barack Obama, March 15, 2012

<sup>13</sup> “World Energy Outlook, 2012” IEA (Nov. 12, 2012).

As stated several times throughout these comments, the Associations request a sector-specific special rule under Section 4(d) of the ESA that would allow take incidental to lawfully conducted oil and gas development activity. This approach has been utilized by FWS in a number of analogous circumstances wherein: (1) the activity was lawful; (2) the take was incidental; (3) the threat was negligible or not well understood; and (4) there were rational reasons to avoid subjecting that economic activity to additional regulation.

An examination of three of these prior 4(d) special rules helps demonstrate why this approach is appropriate here.

Utah Prairie Dog – The Utah prairie dog is analogous to the LPC because it is a largely ground-dwelling threatened species that can be taken by surface disturbances. On May 2, 2012, FWS finalized a 4(d) rule for the Utah prairie dog that exempted sector-wide incidental take from “normal agricultural practices” despite knowledge that such sector activity could “accidentally crush burrows or individual animals,” and that “normal irrigation practices” could flood individuals or make burrows uninhabitable.<sup>14</sup> FWS appropriately reasoned that “[w]hile it is possible that some incidental mortality or harassment results from these activities, no information indicates sizable or noteworthy impacts.”<sup>15</sup>

The same can be said of the oil and gas industry and the LPC. Oil and gas development requires some activities that could conceivably result in incidental LPC mortality or harassment, but FWS does not have any information to suggest that these incidental takes are at all sizable or noteworthy. The absence of such information (and, indeed, the existence of information that incidental takes from oil and gas operations is negligible) weighs strongly a sector-specific exclusion for lawfully conducted activities.

Central Population of the California Tiger Salamander (“tiger salamander”) – Like the LPC, FWS believed the tiger salamander faced a multitude of threats, mostly related to the adverse modification of habitat.<sup>16</sup> On August 4, 2004, FWS finalized a rule that exempted incidental take from the sector it considered the most widespread threat - “routine livestock ranching activities.”<sup>17</sup> In doing so, FWS recognized that certain of those routine livestock ranching activities, including the use of rodenticide, would incidentally take tiger salamanders. In establishing the 4(d) special rule, however, the Service recognized that “easing the general take prohibitions” would encourage landowners to help with the overall continued conservation of the species.<sup>18</sup>

Here, the justification for a sector-wide rule exempting lawful industry activities is even stronger. Oil and gas development is hardly most widespread threat to the LPC. As explained above, it is, at most, a negligible threat which is actively being mitigated. Like the ranchers in

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<sup>14</sup> 77 Fed. Reg. 46158. 46177. Significantly, the Utah prairie dog 4(d) Rule also allowed direct take though poisoning and other activities.

<sup>15</sup> *Id.* at 46178.

<sup>16</sup> 69 Fed. Reg. 47212.

<sup>17</sup> *Id.* at 47242.

<sup>18</sup> *Id.* at 47241.



the tiger salamander rule, easing the take prohibitions on the oil and gas industry will help foster the industry's continued interest in LPC conservation.

Preble's Meadow Jumping Mouse ("PMJM") – Like the LPC, PMJM habitat contains areas where there are significant interactions with humans and human development that result in incidental take of the species. FWS, recognizing the potential negative effect on landowners and the local economy, and lack of clear benefit to the species, issued a series of special rules under Section 4(d).<sup>19</sup> The rule allowed incidental take in a variety of circumstances, and, like the Utah prairie dog and the tiger salamander, also broadly allowed take incidental to lawfully conducted activities of other industry sectors – such as the agricultural and landscaping industries. FWS recognized that lawfully conducted activities in these sectors would cause some PMJM mortality and habitat destruction, but considered economic impacts on landowners and the local economy in using its discretion under Section 4(d) to tailor its take prohibitions and find a balance of conservation and economic activity.

This is precisely the approach that the Associations request for the LPC. Oil and gas development, like any economic activity that occurs within a species habitat, may result in some level of incidental take of that species. That mere potential for that incidental take, however, does not justify onerous take prohibitions. Instead, as it did with the PMJM, the Utah prairie dog, and the tiger salamander (and other species), FWS should craft a sector-specific 4(d) Special Rule that recognizes that incidental take that may be attributed to oil and gas operations is, at most, negligible, and balance that incidental take against the tremendous economic and employment benefits that oil and gas development afford communities in LPC habitat and throughout the country.

### **III. CONTINUED ENROLLMENT IN CANDIDATE CONSERVATION AGREEMENTS AND CANDIDATE CONSERVATION AGREEMENTS WITH ASSURANCES**

The Associations are pleased that FWS is considering allowing continued enrollment in candidate conservation agreements ("CCAs") and candidate conservation agreements with assurances ("CCAAs"). CCAs, and CCAAs are important programs that are currently effectively being utilized for LPC conservation. As we discussed in our March 11, 2013, comments, these measures should be fully considered and examined by the Service in determining status under ESA Section 4(a)(1).

The Associations further support continued enrollment of properties in any FWS approved CCAA - even after a decision to list has been reached. Voluntary programs such as these form the foundation of collaborative conservation and should be encouraged.

As FWS has stated, "[e]arly conservation efforts for declining species can be greatly expanded through a collaborative stewardship approach. A collaborative approach fosters cooperation and facilitates the exchange of ideas among private citizens, Federal agencies,

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<sup>19</sup> 66 Fed. Reg. 28125, 67 Fed. Reg. 61531, 69 Fed. Reg. 29101.

States, local governments, Tribes, businesses and organizations.”<sup>20</sup> The goal, therefore, should be to encourage, not discourage, voluntary conservation efforts.<sup>21</sup> Allowing continued enrollment in FWS approved LPC CCAs, CCAAs and HCPs is an important step in fostering such collaborative conservation, and the Associations strongly encourage FWS to allow this further enrollment.

#### **IV. THE 4(d) RULE SHOULD PROVIDE FOR INCREASED PERMITTING FLEXIBILITY FOR THE BENEFIT OF THE SPECIES**

The Associations maintain that a 4(d) rule should exempt oil and gas operations. If, however, the FWS elects to issue a 4(d) rule that authorizes take that is incidental to implementing comprehensive LPC conservation plan(s), the 4(d) rule should not be the sole mechanism to allow incidental take in the event the LPC is listed. Land users should have the opportunity to apply for a Section 10 permit and develop a habitat conservation plan or Safe Harbor Agreement.<sup>22</sup> Any final 4(d) special rule should make clear that land users may still seek incidental take authorization through Section 10 permits.

The Associations are pleased that FWS is considering expanding the scope of the 4(d) special rule to allow incidental take of LPC if the take results from implementation of a comprehensive LPC conservation program that was developed by an entity other than a State agency or their agents. The Associations support expanding the proposed rule to allow any conservation plan approved by FWS and determined to benefit the LPC be included in the exemption from take prohibition. This is consistent with the broad definition of conservation as defined in Section 3 of the ESA. There is no legal justification to require a conservation plan that benefits to the species to be developed by or in coordination with a State agency.

Similarly, the FWS must process an application for the oil and gas CCAA that is attached to the Range-wide Plan and associated enhancement of survival permit. If an application for a CCAA is submitted, FWS should initiate the NEPA review as expeditiously as possible in order to promote voluntary conservation that will contribute to the already significant conservation activities that preclude the need to list the LPC. Furthermore, a 4(d) rule authorizing a conservation plan across a five-state range has never been tested. In the event the 4(d) is challenged and operators have no mechanism for authorized incidental take, oil and gas development could be limited significantly throughout LPC range, resulting in significant economic consequences. Operators need to ensure that they may continue their operations without risking authorized take.

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<sup>20</sup> 64 Fed. Reg. 32726, 32727 (June 17, 1999). See also 69 Fed. Reg. 48570 (Aug. 10, 2004).

<sup>21</sup> Press Release, U.S. FWS, FWS Announces Joint Policies to Encourage Landowners to Protect Species (June 18, 1999) (“To encourage voluntary conservation efforts by property owners, the [FWS and NMFS] have published joint final policies for ‘Safe Harbor’ and ‘Candidate Conservation Agreements with Assurances’ under the Endangered Species Act. ‘The majority of endangered and threatened species occur on privately owned lands,’ said [FWS] Director Jamie Rappaport Clark. ‘Working with these landowners is critical to the recovery of many of our most vulnerable species.’”).

<sup>22</sup> 50 C.F.R. § 17.32(b), (c) (2012).

**V. THE FWS MUST ALLOW THE PUBLIC THE OPPORTUNITY TO COMMENT ON THE EFFECT OF THE FINAL RANGE-WIDE CONSERVATION PLAN FOR THE LESSER PRAIRIE-CHICKEN ON THE FWS'S LISTING DECISION**

Wildlife agencies from the states of New Mexico, Texas, Colorado, Kansas and Oklahoma are currently collaborating on the Range-wide Conservation Plan for the LPC ("Range-wide Plan")<sup>23</sup>, and several draft plans have been made available for public review. The Associations understand that several key elements of the Range-wide Plan are still in development, and the final Range-wide Plan has not yet been finalized or made available to the public. The Associations request that the FWS provide the public the opportunity to comment on the applicability of the final Range-wide Plan to the FWS's listing decision.

**VI. THE FWS MUST EXTEND THE DEADLINE FOR ITS LISTING DECISION BY SIX MONTHS**

As the Associations have consistently maintained, the best available scientific information clearly demonstrates that listing the LPC is not warranted. If the FWS cannot reach this determination, then it must extend the deadline for its listing decision by six months. The ESA allows the FWS to extend the one-year period in which it must make a listing decision by six months if "there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to" the listing determination.<sup>24</sup> A six-month extension would allow the Range-wide Plan to be completed, allow the finalization of a CCAA implementing the Range-wide Plan, and allow numerous ongoing scientific studies to be completed and peer-reviewed. This information would provide the Service with sufficient information to conclude that listing is not warranted. Moreover, the six-month extension should be from the date the proposed rule was published in the Federal Register (December 11, 2012) rather than the September 2013 date on which the Service arbitrarily agreed to reach a final decision in its settlement.

**VII. CONCLUSION**

As we have stated in our previous comments, the Associations and their respective members strongly urge the FWS to critically examine the data before it and publish a finding that listing is "not warranted." Any other conclusion is undermined by the best available science and a proper consideration of existing conservation measures intended to protect the LPC, as required by law and FWS's own policies.

If, at this time, FWS is unable to publish a finding that listing the LPC is "not warranted," it should, at a minimum, exercise its discretion to await finalization of the draft Range-wide Conservation Plan for the LPC that is under development by the Western Association of Fish & Wildlife Agencies. Any decision now would be premature because of the analysis of conservation efforts and data on the LPC and its habitat now taking place in the course of

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<sup>23</sup> This plan is a collaborative effort coordinated by the Ecosystem Management Research Institute working with the Western Association of Fish and Wildlife Agencies and the Lesser Prairie Chicken Interstate Working Group representing Kansas Department of Wildlife, Parks, and Tourism, Oklahoma Department of Wildlife Conservation, Colorado Parks and Wildlife, Texas Parks and Wildlife Department, and New Mexico Game, Fish and Parks.

<sup>24</sup> 16 U.S.C. § 1533(b)(6)(B)(i).

finalizing that Plan. If the FWS ultimately finalizes a “threatened” listing after awaiting additional data, it should simultaneously finalize a special rule under Section 4(d) of the Act to remove prohibitions for takes incidental to lawfully conducted oil and gas operations and that allows for any approved conservation plan that provides an effective conservation strategy and that allows continued enrollment of land in existing CCAs and CCAAs.

Respectfully submitted,

 American Petroleum Institute	 America’s Natural Gas Alliance
 International Association of Drilling Contractors	 Colorado Oil and Gas Association
 Independent Petroleum Association of America	 Mid-Continent Oil and Gas Association of Oklahoma
 New Mexico Oil and Gas Association	 Oklahoma Independent Petroleum Association
 Panhandle Producers & Royalty Owners Association	 Western Energy Alliance