

August 8, 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 Supplemental Comments on the proposed listing of the Lesser Prairie Chicken as threatened under the Endangered Species Act (77 Fed. Reg. 73828 (Dec. 11, 2012) *comment period extended at* 78 Fed. Reg. 41022 (July 9, 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 provide supplemental comments on the Fish and Wildlife Service's ("FWS" or "the Service") Proposed listing of the lesser prairie-chicken ("LPC") as threatened under the Endangered Species Act ("ESA").<sup>1</sup> As detailed in the comments the Associations submitted on March 11, 2013 that we herein supplement, we believe FWS's final determination must be that listing the LPC as "threatened" is not warranted. Additionally, as explained in our comments to the Service's proposed special rule under Section 4(d) of the ESA,<sup>2</sup> while the Associations appreciate the fact that the Service has proposed a 4(d) Special Rule, the rule outlined in the proposal was far too narrow and unnecessarily constrictive. If the FWS finalizes the proposed rule to list the LPC as threatened, it should to remove all prohibitions for takes incidental to lawfully conducted oil and gas operations.

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.

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<sup>1</sup> 77 Fed. Reg. 73828 (Dec. 11, 2012).

<sup>2</sup> 78 Fed. Reg. 26302 (May 6, 2013).

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 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.

## **I. SUPPLEMENTAL COMMENTS**

The Associations appreciate and support the Service’s extension by six months of the deadline for making a final listing determination for the LPC and its decision to allow further comment on this important proposal. As we explained in previous comments, the potential listing of the LPC may have profound economic impacts on landowners and industries in the range of the species. The significance of these impacts weighs heavily in favor of a reasoned analysis based on the most complete dataset possible. As the FWS itself notes, however, there is substantial disagreement regarding the sufficiency and accuracy of the available data relevant to the Service’s proposed listing decision.<sup>3</sup> This substantial disagreement underlies key premises of the Service’s proposal, including:

1. whether and to what extent habitat fragmentation, grassland conversion, and collision mortality are impacting LPC;
2. the extent to which existing and prospective conservation programs across numerous industry sectors (including oil and gas) may mitigate threats to the LPC;
3. the short-term and long-term population trends of the LPC, particularly as such trends potentially relate to climate change.<sup>4</sup>

To be clear, in order to justify a listing under the ESA, FWS must demonstrate that its final determination is grounded in the “best scientific and commercial data available.”<sup>5</sup> Yet, after extensive agency review and thousands of comments, there remains substantial disagreement about fundamental issues such as LPC abundance, the actual threat posed by those activities that FWS considers to have the gravest impact on LPC abundance, and the efficacy of the programs that mitigate those supposed threats. Without accurate and sufficient data on these three issues, there is no way FWS can show that the LPC meets any of the ESA’s five criteria for

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<sup>3</sup> 78 Fed. Reg. at 41022.

<sup>4</sup> 78 Fed. Reg. at 41023.

<sup>5</sup> 16 U.S.C. § 1533(b)(1)(A)

listing.<sup>6</sup> As such, unless the best scientific and commercial data available to the Service changes demonstrably in each of these key areas by March 30, 2014 (the deadline for a final determination), FWS must determine that listing the LPC as threatened is not warranted. A listing as threatened made in the face of this substantial disagreement regarding the sufficiency and accuracy of the data would necessarily be arbitrary, capricious, and not in accordance with the ESA.

The Associations have closely reviewed the data on which FWS based its proposal and are well versed on the materials submitted to the docket pursuant to its rulemaking. We continue to believe that the best available scientific and commercial information available require a determination that listing the LPC is not warranted at this time. Certainly, nothing filed in the docket since our initial comments on March 11, 2013 credibly cures the data deficiencies that FWS is attempting to address with this extension. If anything, the evidence weighing against a listing has been bolstered. As such, the Associations stand by their March 11, 2013 comments and the additional comments provided pursuant to Service's proposed special rule under Section 4(d) of the ESA,<sup>7</sup> and herein narrowly supplement those comments with new information on the treatment of uncertainty in climate modeling.

a. Climate Change

The Associations are aware of the recent publication of a study attempting to assess the potential role of climate change on the reproductive ecology of the LPC.<sup>8</sup> While we do not take exception with the broad conclusion that extreme climatic changes can have negative impacts on reproduction, including in LPC, the Associations urge FWS to consider the limitations of the study that are appropriately disclaimed by the authors and which are inherent in the methodology.

First of all, Grisham (2013) narrowly examined the potential impacts of significant changes in temperature and precipitation (caused by climate change) on clutch size, incubation start date, and nest survival. It, however, "did not consider annual survival of adults, chick survival, or the positive benefits of habitat management and conservation, which may ultimately offset the potentially negative effect of drought on nest survival."<sup>9</sup> As such, the study was narrowly focused on reproductive ecology and not the full life cycle of the LPC. Given the numerous variables created, some good and some bad, by climate change, and the potential adaptive behaviors that may be utilized by LPC at different life stages, it would be inappropriate and premature to extrapolate these findings to a broader conclusion that climate change is adversely impacting LPC abundance and survival.

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<sup>6</sup> 16 U.S.C. § 1533(1)(A)-(E); (1) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and, (5) other natural or man-made factors affecting the species' continued existence.

<sup>7</sup> 78 Fed. Reg. 26302 (May 6, 2013).

<sup>8</sup> Grisham, Blake A., *et al.* The Predicted Influence of Climate Change on Lesser-Prairie Chicken Reproductive Parameters (2013). Available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0068225>

<sup>9</sup> Grisham (2013) p. 1.

Further, Grisham (2013) narrowly focused on the Southern High Plains of Texas and New Mexico, which constitutes less than a third of LPC habitat, if one assumes that 100% of LPC habitat in Texas and New Mexico is on the Southern High Plains (which is not delineated in Grisham (2013)), and without counting more recently discovered occupied habitat in Nebraska.<sup>10</sup> This spatial limitation is potentially significant. The Southern High Plains region on the southernmost portion of the LPC's known habitat has historically been the hottest and driest portions of LPC habitat. It is therefore not entirely unexpected that there may be negative reproductive consequences if the hottest and driest fraction of LPC habitat became hotter and drier, but these results should not be directly extrapolated to surmise a negative impact within the relatively wetter and more temperate majority of LPC habitat. Indeed, the Service's population data, as well as the recent discovery of the LPC in Nebraska, may suggest that the LPC is undertaking an adaptive northern migration, perhaps in response to the La Nina event discussed in Grisham (2013). As with the limited scope of Grisham (2013), the limited spatial scale is not grounds for dismissing the study results. It is, however, grounds for context and precaution in properly understanding and utilizing its conclusions.

The methodology utilized in Grisham (2013) also suggests the need for precaution in utilizing and extrapolating its results. The study essentially relied on a three-step methodology. First, the three reproductive parameters (clutch size, incubation start date, and nest survival) were examined for LPC in the Southern High Plains of Texas and New Mexico during the 2001-2011 drought conditions.<sup>11</sup> Then, using a web-based tool (climatewizard.org) that attempts to downscale to local scales less granular global or continental climate model predictions for the years 2050 and 2080,<sup>12</sup> Grisham (2013) estimated projected future climatic conditions, presumably at the "Southern High Plains" scale.<sup>13</sup> Grisham (2013) then applied the results of the 2001-2011 analysis of drought impacts on LPC reproductive ecology and tried to gauge the future impacts on LPC reproductive ecology in the Southern High Plains based on climatewizard.org's forecasting results.

As discussed above, the study authors acknowledge that the 2001-2011 drought conditions were the result of La Nina,<sup>14</sup> a climatic event wherein unusually cold ocean temperatures in the eastern equatorial Pacific can lead to warmer and drier conditions in the Southwest U.S. (as well as wetter and cooler conditions elsewhere).<sup>15</sup> The National Oceanic and Atmospheric Administration has recorded La Nina events from as far back as 1904.<sup>16</sup> The

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<sup>10</sup> 77 Fed. Reg. at 73846. FWS calculates that the LPC presently occupies 25,101.4 square miles (not including Nebraska) and that 7,991 square miles, or 31.8% are in Texas and New Mexico. 77 Fed. Reg. at 73.846.

<sup>11</sup> Grisham (2013) p. 1.

<sup>12</sup> Grisham (2013) p. 2.

<sup>13</sup> Grisham (2013) p. 1.

<sup>14</sup> Grisham (2013) p. 6.

<sup>15</sup> <http://www.publicaffairs.noaa.gov/lanina.html> (accessed August 5, 2013)

<sup>16</sup> <http://www.publicaffairs.noaa.gov/lanina.html> (accessed August 5, 2013)

Associations do not offer this note of precaution to deny the existence of anthropogenic climate change. The Associations represent hundreds of individual companies with a wide range of views on climate change. This information is presented to suggest that routine climatic impacts such as drought in the Southwestern United States are often very difficult, if not impossible, to distinguish from those impacts that may be predicted based on anthropogenic climate change.

As mentioned above, those predicted future climatic impacts were provided by climatewizard.org. In Section VII of our March 11, 2013 comments, the Associations discuss in detail the extreme difficulty and uncertainty in downsizing global and larger-scale models. We will not repeat that discussion here. In evaluating the downscaling conducted by climatewizard.org, however, we note that there is a particular lack of information from which to accurately access the tool.

Climatewizard.org uses a particular type of downscaling that the model authors discuss briefly, but without details as to precision, accuracy, calibration, *etc.* This lack of details makes critical evaluation extremely challenging. Further, we presume the Grisham (2013) authors attempted to downsize climate impacts to the “Southern High Plains” region, but we do not know how that region was delineated, or, for instance, where climatewizard.org’s closest temperature and precipitation monitoring stations are located relative to the “Southern High Plains” region of interest. This data gap is significant because it is upon these data that climatewizard.org’s interpolation schemes rest for downscaling.

Again, these limitations and data gaps may not suggest that Grisham (2013) should be altogether disregarded but they do suggest that, in spite of this new study, the potential impact on LPC from future climate change remains uncertain and speculative. When faced with a similar uncertainty in assessing the potential future climate change threats on ribbon seals, the National Marine Fisheries Service (“NMFS”) very recently took a reasoned and rational approach that we herein note to FWS.<sup>17</sup>

b. NMFS Approach for Ribbon Seals

In its status review for the ribbon seal, NMFS conducted an analysis of, among other things, the risk to the ribbon seal of potential sea ice declines caused by climate change.<sup>18</sup> To determine whether the potential future threat from sea ice decline necessitated listing under the ESA, NMFS considered the spatial and temporal limitations of the climate modeling on which the sea ice declines were based as well as the adaptive behaviors of ribbon seals in times of abnormally low sea ice.

With respect to spatial limitations, NMFS acknowledged that “[c]limate models generally perform better on continental or larger scales” and recognized “that there are uncertainties

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<sup>17</sup> 78 Fed. Reg. 41371 (July 10, 2013).

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

associated with predictions based on hemispheric projections or indirect means.”<sup>19</sup> Significantly, NMFS’s biological review team (“BRT”) for the ribbon seal established performance criteria from which to judge the ability of the models to predict sea ice declines, and rejected numerous projections due to the coarse spatial resolution of the models.<sup>20</sup> For instance, “[d]ue to model deficiencies and the small size of the Sea of Okhotsk relative to the spatial resolution of the climate models, none of the models met the performance criteria for this region.”<sup>21</sup> According to the Encyclopedia Britannica, the Sea of Okhotsk is over 611,000 square miles,<sup>22</sup> about 25 times the size of what FWS considers to be the total range of the LPC.<sup>23</sup> Grisham (2013), using [climatewizard.org](http://climatewizard.org), attempted to predict climate impacts on less than a third of the total LPC range.

In addition to its consideration and discussion of the inherent uncertainty in modeling climate impacts at discrete spatial scales, NMFS also considered the potential impacts on ribbon seals if the sea ice declines did, in fact, occur. NMFS specifically found that “[t]here is some evidence from some very recent years with unusual sea ice conditions that ribbon seals may compensate for changes in sea ice, at least in part, by moving into areas with better ice...”<sup>24</sup> As discussed above, the newly discovered presence of LPC in Nebraska may indicate a similar type of compensation or adaptive movement, but was never considered or discussed by FWS. As FWS based the proposed LPC listing, at least in part on highly complex and inherently speculative climate modeling, the potential for such adaptive behaviors should be examined.

Predicting the climate on small spatial scales decades in the future is extremely difficult and uncertain. Predicting threats to species based on such models serves only to compound the difficulty and uncertainty. To be sure, such impacts should be examined to the extent scientific understanding allows, however, as NMFS’s discussion in the ribbon seal status review instructs, listing in the face of profound scientific uncertainty is not permitted under the ESA.

## **II. 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 scientific and commercial information available and the Service’s acknowledged concerns about the sufficiency and accuracy of key foundations of the proposed listing.

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<sup>19</sup> 78 Fed. Reg. at 41377. NMFS also noted the compounded uncertainty inherent in modeling climate impacts too far into the future. As these temporal limitations are discussed in the Associations’ March 11, 2013 comments, they will not be repeated here.

<sup>20</sup> 78 Fed. Reg. at 41377.

<sup>21</sup> 78 Fed. Reg. at 41377.

<sup>22</sup> <http://www.britannica.com/EBchecked/topic/426476/Sea-of-Okhotsk> (accessed Aug. 5, 2013).

<sup>23</sup> 77 Fed. Reg. at 73846.

<sup>24</sup> 78 Fed. Reg. at 41380.

If, however, FWS changes its view of the sufficiency and accuracy of the information on which it based its proposal and persists in listing the LPC as “threatened,” 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.

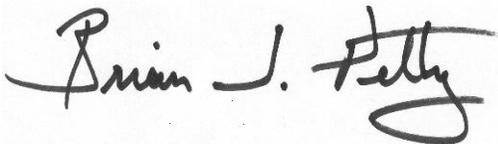
Respectfully submitted,



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