

USDA (FSA-NRCS-FS) Comments on DOI-FWS Proposed Rule to List the Lesser
Prairie Chicken as a Threatened Species

United States Department of Agriculture

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Public Comments Processing
Attn: FWS-R2-ES-2012-0071
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
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RE: United States Department of Agriculture Response to Lesser Prairie Chicken
Federal Register Proposed Rule (FWS-R2-ES-2012-0071: 450003113)

To Whom It May Concern:

The United States Department of Agriculture (USDA) appreciates the opportunity to provide comments on the proposed rule, published in the Federal Register on December 11, 2012, to list the lesser prairie chicken (*Tympanuchus pallidicinctus*) as threatened under the Endangered Species Act of 1973, as amended. The United States Department of Interior (DOI) Fish and Wildlife Service (FWS) is proposing listing the lesser prairie chicken (LEPC) as threatened at this time as a result of a significant change in its listing priority number (LPN). The FWS changed the LEPC LPN from an 8 to 2; a change brought about as a result of the perceived threat of further LEPC habitat fragmentation due to expanding energy and associated infrastructure development throughout the historic range of the LEPC.

The proposed rule to designate the LEPC as threatened, if finalized, will extend the protection of the ESA to the species. The FWS is requesting comments regarding the scientific methods to evaluate the status of the species and the specific information regarding the species status and trend relative to populations, habitat quality and management implications that address six basic types of information requested in the proposed rule.

Within USDA, three agencies, the Farm Service Agency (FSA), the Natural Resources Conservation Service (NRCS), and the Forest Service (FS) have programs or activities that would be impacted by the potential listing of the LEPC. USDA also notes that these programs or activities can be used to protect, enhance,

or restore LEPC habitat, thus minimizing or eliminating the need for the listing. Comments pertaining to the programs of these agencies are provided below.

Farm Service Agency

While the proposed rule describes in detail numerous threats to LEPC, USDA questions some of the assumptions regarding the Conservation Reserve Program (CRP) lands being used to support the proposed rule, particularly with respect to the consideration of agricultural and livestock operations contained therein.

The LEPC is found in suitable habitat on land that is 95% privately-owned. These are working lands. As we detail more fully below, without assurances that their cooperative conservation efforts regarding LEPC and associated good deeds will not go unpunished, USDA is concerned that the listing of LEPC may lead to a lack of interest among agricultural producers to participate in programs such as CRP and the Grassland Reserve Program (GRP). This would be detrimental to efforts to maintain, enhance, and restore habitat for the species. In these comments, we strongly urge FWS to ensure that landowners currently enrolled in CRP or who plan to enroll are provided regulatory assurance or exemptions to encourage continuing stewardship of these lands.

For over 27 years, CRP has proven to be an effective tool in establishing habitat for LEPC throughout its range, but especially in Kansas north of the Arkansas River. While there is fluidity in CRP enrollment as individual properties are enrolled in CRP and others come out of the program at the end of 10 to 15-year contracts, the total acres enrolled in CRP throughout the LEPC range has remained relatively constant at around 5.5 million acres since 1998. As noted more fully below, the proposed rule does not accurately characterize the future threat posed by the potential loss of CRP acres.

LEPC populations and occupied range have certainly been reduced from historic levels, but we have seen positive change, such as the expansion of occupied range in Kansas, as a result of voluntary, incentive-based approaches to LEPC conservation in recent years. In addition, the Range-wide Conservation Plan for the LEPC being developed by the LEPC Interstate Working Group, the Western Association of Fish and Wildlife Agencies (WAFWA), and the Ecosystem Management Research Institute, and the conference reports on LEPC being developed by both FSA and the NRCS, will significantly aid LEPC conservation efforts.

Our following comments are intended to clarify provisions pertaining to CRP contained in the proposed rule.

General CRP. CRP was established with the passage of the Food Security Act of 1985. Its original purpose was to reduce the production of surplus agricultural commodities by retiring marginal, highly erodible and other sensitive cropland and converting it to long-term conservation covers, either grasses or trees and, in so doing, reduce soil erosion and protect water resources. The Federal Agriculture Improvement and Reform Act of 1996 added enhancement of wildlife habitat as a co-equal objective of the CRP along with soil and water. The 1996 Farm Bill also provided USDA with the authority to develop targeted CRP initiatives to address environmental concerns of high priority associated with agricultural operations.

The CRP is a voluntary long-term land conservation program. Not all land is eligible to participate in the CRP. To be eligible, land must be either cropland planted or considered planted in 4 of the 6 crop years prior to the passage of the most current Farm Bill, in this case from 2002 to 2007, or marginal pastureland suitable for riparian or other buffers. In addition to be eligible for a general signup, cropland must be considered highly erodible (Erodibility Index of 8 or greater), be expiring CRP acreage, or be located in a national or State CRP conservation priority area.

Because not all offers to participate in CRP general signup can be accepted, applicants compete nationally by submitting offers to enter eligible land into the CRP during designated signup periods. Under CRP's general signup, landowner offers are ranked according to an Environmental Benefits Index (EBI). Use of the EBI ensures that the most environmentally sensitive lands relative to cost are selected and that all offers are considered fairly. FSA collects data and assigns points for each EBI factor based on the expected relative environmental benefits for the land and conservation practice offered. As noted above, those seeking to enroll land (and/or practices) beneficial to the LEPC receive additional points, boosting their enrollment chances. Each eligible offer is ranked in comparison to all other offers and selections are made from that ranking. FSA uses the following EBI factors to assess the environmental benefits for the land offered:

- Wildlife habitat benefits resulting from conservation covers on contract acreage;
- Water quality benefits from reduced erosion, runoff, and leaching;
- On-farm benefits from reduced erosion;

- Benefits that will likely endure beyond the contract period;
- Air quality benefits from reduced wind erosion; and
- Cost.

Continuous CRP. Certain CRP practices are of such environmental importance that producer offers for such practices can be accepted on a continuous basis without competition. Under Continuous CRP, environmentally desirable land devoted to certain conservation practices may be enrolled at any time. **Specific eligibility requirements apply,** but offers are not subject to competitive bidding. Additional incentives include a practice incentive payment (PIP) of 40 percent of the reimbursable cost associated with developing appropriate cover, and a one-time signing incentive payment (SIP) of up to \$150 per acre may also be offered.

Financial assistance to CRP participants is available in the form of annual rental payments throughout 10 to 15-year CRP contracts, cost share for cover establishment and management activities, and other incentives. The annual rental payments are based on the agricultural rental value of the land and are provided through the Commodity Credit Corporation (CCC).

Producers may offer land at these rates or may offer a lower rental rate to increase the likelihood that their offer to participate in CRP will be acceptable. CRP cost share is available to eligible participants in an amount not to exceed 50 percent of the eligible costs of establishing and managing the approved conservation practice. Additional incentives, such as the PIP and SIP, are also available to encourage producer interest in continuous CRP.

Technical assistance is provided to landowners to assist in developing and implementing conservation plans for their CRP contracts. These plans are developed by the NRCS, other conservation partners, or a USDA approved technical service provider in coordination with the landowner. The conservation plan is part of the CRP contract and details the seed mix to be used, required maintenance and mid-contract management activities, and other essential information for establishing, restoring, maintaining, or enhancing conservation covers for soil, water and wildlife benefits.

The **original CRP authority allowed for up to 45 million acres nationally** to be enrolled in the program. **Current CRP enrollment authority under the Food, Conservation, and Energy Act of 2008 is 32 million acres nationwide.** **Current CRP enrollment nationwide is slightly more than 27 million acres, of which approximately 5.5 million acres are located within the LEPC occupied range.**

The CRP, as implemented, provides predictable high-quality LEPC habitat. The program has evolved over time in a manner that benefits the LEPC to an even greater extent than in its early years. These actions include:

- Better targeting CRP outreach to encourage enrollment in the LEPC range— This includes offering additional points to those who offer land in the LEPC range, thereby improving the likelihood of contract acceptance and enrollment. Continuous signup initiatives such as State Acres for Wildlife (SAFE) have been designed to enhance important wildlife habitat. The five states with LEPC populations, Colorado, Kansas, New Mexico, Oklahoma, and Texas have each instituted SAFE initiatives to enhance or create LEPC habitat (table 1).
- Improving the quality of CRP covers for LEPC habitat—This includes providing incentives for landowners to establish native grass and other covers that benefit the LEPC. Landowners who submit offers to establish these covers improve the likelihood their land will be accepted for enrollment. Further, mid-contract management (for the LEPC region conservation practices to enhance vegetative covers to benefit the LEPC) is required on contracts enrolled since 2003.

Although the proposed rule is in many respects quite comprehensive, it does not accurately describe the scope and benefits of CRP to the LEPC range, including the content noted above. Further, the proposed rule at times relies on outdated data. For example, the discussion of the CRP under the ‘Summary of Factors Affecting the Species’ draws conclusions based on outdated survey data regarding expected re-enrollment, which leads to an incorrect interpretation of the impacts of CRP. In fact, CRP participants in the LEPC States have replaced expiring contracts through reenrollments and newly offered land at levels over 75 percent in every general signup since 1997. With this level of reenrollment and the substantial number of new CRP acres enrolled each year, the program offers predictability for LEPC habitat. See, for example, Garton (2012).

CRP Baseline Enrollment. Since 1995, CRP enrollment in the LEPC region has exceeded 5.5 million acres (Figures 1 and 2). With continued adaptive and proactive management, CRP enrollment will continue to provide essential habitat for the LEPC, as described below.

By 1995, 35 million acres were enrolled nationally in the CRP. Because the first contracts began expiring in 1995, surveys were conducted to estimate what landowners would do with their enrolled land post-expiration. The proposed rule references one of these surveys and accurately reports survey results showing that landowners were likely to return the CRP to crop production or use this land to graze livestock.

However, the survey results were not validated against landowner actions when contracts expired. Because the CRP was not re-authorized until the 1996 Farm Bill, the survey did not ask if the contract holder would reenroll in the program, and therefore does not reflect landowner behavior after CRP contracts expired. We currently have the actual history of enrollment, and it should be used rather than projections based on a survey from approximately two decades ago. Many of the original acres enrolled in the CRP are in the LEPC area and expired in 1997-2000. Signups 15, 16, 18, and 20, conducted in the 1997 through 2000 --the point in time when actual re-enrollment can first be gauged--accepted 29.1 million acres nationally (16.4 million, 5.8 million, 4.7, million, and 2.2 million acres respectively) and 6.2 million acres in the LEPC region (table 2). An examination of state-level CRP re-enrollment activity reveals that re-enrollment rates ranged from 63 percent for Oklahoma to 81 percent for Colorado, with a region wide average of 75 percent.

The proposed rule did not consider new acres entering the CRP. Combining signups 15, 16, 18, and 20, CRP had a net gain of 497,000 acres in the 5 LEPC states. No state had a net loss of CRP acres.

The proposed rule did not account for the quality of the cover. During Signups 15, 16, 18, and 20 (and in future signups), the Environmental Benefits Index (EBI) was used to rate and select CRP offers. As noted earlier, the EBI provides additional points for CRP offers that use native grass covers. In many cases, new native grass contracts substituted for expiring contracts using introduced grasses, and thus resulted in covers more suitable for LEPC.

The Heimlich and Kula, and the Deibel et al. studies suggest that years of high commodity prices would result in low CRP participation. That is not, however, our experience. Fiscal year 2012, for example, was a year with exceptionally high corn and wheat prices. In 2012, the LEPC states (Colorado, Kansas, New Mexico, Oklahoma, and Texas) had 2.2 million acres expiring from the CRP, and 1.9 million acres were accepted. This is 13 percent fewer acres than were expiring, but only a 3 percent reduction in CRP acres in the LEPC states overall.

Targeting. CRP from its inception targeted highly erodible land (HEL). Because the LEPC region is characterized by highly erodible soils, CRP enrollment in the region is high (see maps 1 and 2). As the conservation benefits associated with specific locations and certain practices were documented, FSA refined the targeting to encourage greater enrollment in these areas and using those practices. An environmental benefits index (EBI) was developed to encourage enrollment of those practices that provided better wildlife covers. Landowners offering to establish covers such as mixes of native grass and forbs were provided with more points increasing the likelihood their offers would be accepted. The EBI is considered responsible for the proportion of new CRP grassland acres in native grass cover increasing. Since 1997, 91 percent of new CRP contracts in the LEPC states, were planted to native grass (table 3).

Additionally, state and national conservation priority areas (CPA) were established, making cropland that is important for wildlife (or other environmental benefits) eligible for CRP. Additionally, land from these CPAs offered for enrollment receives additional EBI points, increasing the likelihood these offers will be accepted. Each of the five States with LEPC populations has established LEPC CPAs.

Initiatives. As the benefits to wildlife from installing specific practices in critical locations have been documented, FSA has developed initiatives to encourage adoption of these practices. The initiatives provide additional incentives for participation, by including these practices within the Continuous CRP allowing enrollment into the CRP at any time, and providing SIP and PIP payments under some initiatives.

For the LEPC, the CRP initiative of greatest importance is SAFE. On October 8, 2012, Secretary Vilsack announced the allocation of an additional 66,400 acres for LEPC SAFE. The additional allocation was made because enrollments in Kansas and Texas had exhausted the full acreage allocated to those states. The five LEPC states now have 214,000 acres allocated for LEPC SAFE initiatives, and have enrolled 116,825 acres as of January 31, 2013 (table 1). Under SAFE, new land entering CRP are offered SIP and PIP payments. State fish and wildlife agencies, non-profit organizations and other conservation partners work collaboratively with FSA to target CRP delivery to specific conservation practices and geographic areas where enrollment of eligible farm land in continuous CRP will provide significant wildlife value. FSA in cooperation with appropriate state fish and wildlife agencies and other conservation partners monitors SAFE and manages available acres to ensure that CRP goals and objectives are being met.

Other continuous sign-up initiatives that can establish covers beneficial for the LEPC are the Highly Erodible Land, Pollinator, and Non-flood Plain and Playa Wetlands initiatives. The Highly Erodible Land initiative seeks to protect the nation's most environmentally sensitive lands by permitting landowners to enroll up to 750,000 acres of land with an Erodibility Index (EI) of 20 or greater. Because the LEPC region closely overlays the Dust Bowl, there are a substantial number of acres in the LEPC region that are eligible to participate in the HEL initiative. The Pollinator and Non-flood Plain and Playa Wetlands initiatives also provide good LEPC habitat and are available in the LEPC region.

CRP Adaptive Vegetative Management. A conservation plan must be developed and approved before land is enrolled in the CRP. Conservation plans include all the practices necessary for the successful establishment and maintenance of the vegetative cover on all of the acres offered for CRP. NRCS or the Technical Service Provider (TSP) includes the following elements in the conservation plan:

- Ensures that the CRP cover will not be disturbed during the primary nesting or brood rearing season, as determined by FSA State Committee in consultation with the State Technical Committee,
- Includes required maintenance for weed, insect, and pest control,
- Includes application rates, such as the amount of seed mixes, lime, and fertilizer, that are consistent with practice specifications, and
- Ensures the plan meets the objectives of the Conservation Priority Area (in this case, LEPC).

The conservation practices in the plan are practices approved by the State Technical Committee as suitable for CRP vegetative covers in that State. It is important to recognize that the FWS is an important member of State Technical Committees and its expertise in the management of wildlife habitat is carefully considered when conservation practices are approved.

CRP Covers Over Time. CRP vegetative covers in the LEPC states have changed over time. USDA responded to information provided by NRCS, FWS, state fish and wildlife agencies, and conservation organizations indicating that native grass provided better wildlife habitat than introduced grasses. This information was used to construct an EBI that provided greater weight to diverse native grass covers. The effect of the EBI on CRP vegetative covers can be seen in Table 3. Between 1986 and 1991, 69 percent of grass covers established in the LEPC states were native grass. The variation among states at that time was considerable.

Although over 90 percent of the grass established in Kansas and New Mexico was native, only 40 percent of the grass in Oklahoma and 57 percent in Texas was native between 1986 and 1991. Over time, primarily because of the adoption of the EBI and the EBI's awarding of more point for native grass covers, the proportion of grass covers established under CRP increased. Since 1997, 91 percent of grass covers planted in the LEPC states is native grass, ranging from a low of 78 percent in Oklahoma to a high of 98 percent in Kansas.

Mid-Contract Management. All CRP participants with contracts effective beginning with signup 26 are required to perform at least 1 mid-contract management activity as part of their approved conservation plan. Fifty percent cost share payments are provided landowners for mid-contract management, and NRCS or the TSP conservationists work with participants to plan these activities. They include activities such as light disking, inter-seeding, prescribed burning, upland wildlife habitat management (for example, elimination of woody vegetation encroachment and spot spraying to eliminate invasive species), and other practices designed to ensure plant diversity, wildlife benefits, and enhancement of permanent cover. Management activities are site specific and must be completed before the end of year 6 for contracts with a 10 year contract length, or before the end of year 9 for contracts with a 15 year contract length.

Mid-contract management in the LEPC region is reflected by the number of acres of prescribed burning and upland wildlife habitat management practices. Since 2003, over 190,000 of CRP have been treated with prescribed burning and nearly 470,000 acres have received upland wildlife habitat management in the LEPC region (table 4). There are approximately 200,000 additional acres of pending for both the prescribed burning and upland wildlife habitat management practices in CRP conservation plans within the region.

Haying and Grazing. The CRP has always served as a forage safety net in times of drought or other emergency. Safeguarding wildlife are rules requiring no haying and grazing, except as approved through emergency authorization, during the primary nesting and brood rearing season, hay harvesting requirements that 50 percent of the field be left un-harvested, and grazing requirements restricting grazing intensity to 75 percent of carrying capacity. Haying and grazing of CRP land is limited to certain CRP program practices. Haying and grazing considerations are to be incorporated into the NRCS-approved conservation plan, adherence to which is a requirement of CRP contract compliance. Haying and grazing activities must maintain vegetative cover, minimize soil erosion, and protect water quality and wildlife habitat. The total number of days allowed for

haying and grazing of CRP is limited. Frequency of haying and grazing throughout the occupied range of the lesser prairie chicken is restricted due to the National Wildlife Federation (NWF) settlement. Before the NWF settlement, haying and grazing frequency was 1 out of every 3 years. After the NWF settlement on September 26, 2006, for haying it is 1 out of every 10 years and for grazing 1 out of every 5 years. Over the last 10 years, FSA estimates less than 5 percent of the CRP acreage in Colorado, Kansas, New Mexico, Oklahoma and Texas had managed haying and grazing activities.

CRP participants that hay or graze are usually required to forego a portion of their annual rental payment, usually 25 percent, though due to extreme drought conditions, the amount of annual payment reduction was reduced to 10 percent in 2012.

During periods of extreme weather events, such as drought, when emergency haying and grazing activities are authorized, considerably more CRP acres are hayed or grazed. Emergency haying and grazing is generally intended for periods of drought or excessive moisture of such magnitude that livestock producers nationally or across wide-ranging areas are faced with culling herds or livestock losses.

The highest proportion of CRP land used for haying and grazing in the LEPC range in recent years was observed in 2012 (23.0 percent), 2011 (20.9 percent), and 2006 (12.4 percent) when the region was suffering from drought conditions (table 5). In each of those drought years emergency grazing made up over 60 percent of the acres that were hayed or grazed. Throughout 2012, the occupied range of LEPC was classified as abnormally dry or worse. USDA shares FWS concerns that widespread haying and over-grazing of CRP under drought conditions may compromise the ability of these grasslands to provide year-round escape and thermal cover during the winter for LEPC at least until the return of normal precipitation patterns. FSA will work closely with NRCS, state fish and wildlife agencies, and other conservation partners to minimize long-term impact of emergency haying and grazing of CRP on LEPC habitat. It is the intention of USDA that haying and grazing be properly utilized to produce a mosaic of vegetation structure and composition to benefit LEPC.

Other Permissive Uses of CRP Land. The harvesting of biomass from CRP land is considered in a manner similar to managed haying. Managed harvesting, including harvest for biomass, is authorized no more frequently than 1 out of every 3 years. Managed harvesting is limited to a specific time period outside of the nesting and

brood-rearing season. Consideration of managed harvesting must be incorporated into the NRCS-approved conservation plan as appropriate.

The installation of commercial energy facilities and associated infrastructure is generally considered incompatible with lesser prairie chicken conservation as it contributes to further occupied habitat loss and fragmentation. The installation of windmills, wind turbines, wind-monitoring towers, or other wind-powered equipment outside of the primary nesting or brood-rearing season on CRP acreage on a case by case basis is consistent with CRP statute. Local FSA county committees may approve up to five acres per CRP contract of wind turbines on CRP acreage provided the environmental impacts have been considered. The five acre threshold is a cumulative figure that is calculated by totaling the square footage of land area devoted to the footprint of the wind generating device and any firebreak installed around the footprint. Access roads, transformers, and other ancillary equipment will not be considered in calculating the 5 acre threshold. For cases over 5 acres, authority for approval rests with FSA national headquarters.

Retention of Conservation Cover after CRP Contract Expiration. The proposed rule implies that once CRP acres come off contract that they are immediately returned to agricultural production. This does not appear to be the case however. An analysis that compared the location of expired CRP fields to 2010 National Agriculture Imagery Program (NAIP) imagery in Kansas found that 86% of the acreage was still in grass. Not only were these acres still in conservation cover, but that the native grass was located in areas of significant conservation need for LEPC. Across the entire LEPC range, a 2012 survey estimated that of CRP acreage that expired during the period of 2008 through 2011 that 73% of the acres in Colorado, 90% of the acres in Kansas, 97% of the acres in New Mexico, 90% of the acres in Oklahoma, and 80% of the acres in Texas were still in grass. The empirical evidence that the bulk of land leaving the CRP remains in grass covers is strong indication that the assumption that the land will be cultivated is incorrect.

Discussion. The FWS proposed rule for listing the LEPC as threatened characterizes CRP as temporarily restoring cropland to grasslands, and therefore subject to conversion back to cropland. A concern expressed by the proposed rule is that CRP will not provide increases in the extent of grassland within the LEPC range. This perspective based on outdated survey results, on one hand overlooks the established stability and predictability of CRP and on the other does not consider actions USDA is taking to enhance the quality of CRP covers and target critical LEPC areas.

Figures 1 and 2 clearly illustrate the stable influence of CRP on grassland covers in the LEPC range. Since 1997 when the first CRP contracts expired, the program has constantly maintained over 5.5 million acres of grassland in the LEPC region. The expiration of CRP contracts in the LEPC range has been held as a reason for considering the CRP enrollment as transitory (table 6). However, when the record of expiring acres, reenrollment and recruitment of new acres is examined, CRP is obviously a stabilizing influence on LEPC habitat. CRP lands will provide a tool to reduce habitat fragmentation and will furnish a mosaic of established and newly established native grass covers.

Further, Maps 1 and 2 demonstrate the focus USDA has placed on the LEPC range, with the 98 counties in the LEPC range accounting for 20 percent of CRP enrollment. Further, corn and soybeans are not viable cropping options in the LEPC range so with the long term contraction in wheat acreage, CRP is likely to remain a prominent feature within the landscape.

USDA has used and continues to use CRP to target LEPC habitat. On October 8, 2012, Secretary Vilsack announced 66,400 additional acres for the LEPC SAFE. This action designates these acres for LEPC wildlife habitat, and provides additional incentives to landowners who establish practices beneficial for LEPC. Additionally, the EBI used in the general signup provides additional points for landowners in the LEPC CPAs and establishing native grasses. These points increase the ability of landowners in the LEPC region to have their offers accepted. USDA will continue to identify and implement actions that enhance LEPC habitat.

A fundamental concern USDA has with the listing of the LEPC, is the potential impact on landowner willingness to participate in the CRP. If landowners perceive participation in CRP as exposing them to increased regulatory liability under the Endangered Species Act, then it is likely that they will be unwilling to enroll in the CRP. If this happens, the listing of the LEPC could have the perverse result of providing less certainty for maintaining LEPC populations. If the LEPC were listed, USDA would like to work with FWS to ensure that landowners currently enrolled in CRP and those who plan to enroll receive regulatory assurances such as those provided by the Safe Harbor Program, so that landowners are not punished for their past, current or future stewardship commitments. That is, landowners with expiring CRP contracts should have no greater regulatory liability under the ESA than those landowners who have not participated in the CRP.

With this in mind and in a manner similar to that taken by NRCS, FSA has initiated conferencing with the FWS to develop a conference report covering

landowner participation in CRP within the range of the LEPC. The conference report will outline FSA conservation program activities, practices and measures to be followed when establishing, restoring, maintaining or enhancing LEPC habitat. Our discussions to date indicate that the FWS feels that following these conservation measures will minimize or eliminate potential agricultural threats to the LEPC and eventually produce beneficial effects for the species.

Conclusion. USDA does not agree with many of the Fish and Wildlife Service's conclusions regarding CRP in the proposed listing. Specifically, USDA disagrees with FWS's contention that CRP's positive impact on the LEPC will necessarily and substantially shrink, that CRP expiration is a persistent and unmanageable threat, or that CRP grasslands will not continue to provide viable LEPC habitat into the foreseeable future. The history of CRP shows that CRP enrollment has been relatively constant in the region of the LEPC and that the program continues to provide significant benefits. For example, Garton found in 2012 that LEPC populations in proximity to CRP grasslands are projected to increase with virtually no likelihood of extirpation in the next 30 years.

USDA believes that our innovative approaches and development of targeted CRP initiatives has, in spite of declining national CRP enrollment caps, had a very positive impact on LEPC and disprove the dire predictions of some with respect to the impacts on the bird. In short, USDA believes that the proposed rule overlooks many of the recent successes in terms of LEPC conservation. In addition, USDA believes it is crucial that any listing decision for the LEPC ensure that measures are taken to maintain and enhance landowner willingness to participate in the CRP and to engage in conservation measures and management activities that benefit the LEPC.

In the event that the FWS determines that LEPC will be listed as a threatened species, USDA requests that a 4(d) special rule be incorporated into the final rule and promulgated to exempt incidental take of the LEPC resulting from routine farming and ranching activities, occurring on private or tribal lands, when applied as prescribed and conditioned by conservation practices and measures utilized by USDA and approved by the FWS. As the conservation practices and associated conservation measures are anticipated to result in positive LEPC population response, FSA requests that all lands where agricultural producers are implementing approved conservation practices and measures described in conference opinions be excluded from designation as critical habitat for LEPC.

Natural Resources Conservation Service

Introduction. Over the past several years, NRCS has been an active partner with FWS and landowners and managers, accelerating voluntary private lands conservation to benefit the LEPC and much has been done in that regard. While the proposed rule provides a substantial amount of information on the status of and threats facing the LEPC, there remains scientific disagreement and additional data that should be considered relative to: 1) recent and ongoing conservation actions; and 2) factors affecting the LEPC.

To accommodate consideration of this critical information, USDA recommends that FWS delay the final determination to incorporate the most recent conservation, scientific, and biological information into its regulatory determination for this species. Section 4(a)(6)¹ of the Endangered Species Act (ESA) allows an extension of up to 6 months, if there is scientific disagreement regarding the sufficiency or accuracy of the available data relevant to the determination, for the purposes of soliciting additional data (Federal Register Vol. 76:75858). USDA looks forward to working with FWS and providing new and relevant scientific information and assistance as needed so that the best determination can be made for the LEPC.

The following summarizes some of the additional information and key areas of scientific disagreement that are critical to consider as part of the FWS listing determination.

Recent and Ongoing Conservation Actions. Since 2008, when the change in listing priority signaled that a listing proposal should be imminent, significant conservation efforts have taken place, which have accelerated habitat conservation and abated threats. While the record considers many of these activities, USDA requests that the full range of voluntary private land conservation actions and effects data be considered.

In 2010, NRCS began its Lesser Prairie Chicken Initiative (LPCI), responding to the need identified by the Kansas Department of Wildlife, Parks and Tourism to maintain Conservation Reserve Program (CRP) fields as working grasslands to benefit the LEPC.

¹ Section 4 of the ESA: 4(a)(6)(A): “if the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.”

The LPCI was implemented in the five states where LEPC occurs. Since 2010, over \$23 million has been invested to apply conservation measures on nearly 1 million acres of land to improve LEPC habitat. In addition, easements that can protect habitat over the long term also are becoming part of the LPCI. New Mexico has used the Grasslands Reserve Program (GRP) in LEPC range. Nearly 34,600 acres are currently enrolled in easements in LEPC habitat areas (permanent easements on 17,289 acres, 30-year easements on 7,296 acres expiring in 2034, and 20-year easements on 10,006 acres expiring in 2029).

NRCS and partners have made available corresponding and significant increases in technical staffing to support private land implementation of conservation practices to benefit and reduce threats to the species. Currently, there are an additional 11 dedicated technical positions supported by 13 partners, and an additional eight Biologists hired by Pheasants Forever and Rocky Mountain Bird Observatory that work specifically in LEPC range.

Under Section 7(a)(4) of the Endangered Species Act, NRCS has “conferenced” with the FWS to include conservation measures for a suite of practices that ranchers can use to maintain the long term viability of their operations in a way that supports LEPC populations. Example practices include:

- Grazing management that improves LEPC habitat and rangeland health and allows for producers to better withstand drought conditions;
- Brush management to remove invasive species that limit LEPC habitat and decrease forage available for livestock;
- Fencing and water development carefully located, to allow expired CRP land to be retained as grass for habitat for LEPC and prescribed grazing.

The Conferencing activities between FWS and NRCS have yielded significant benefits to both the landowner and the bird. During conferencing, NRCS practices were reviewed and conservation measures were included to insure practices implemented as designed are benign or beneficial to LEPC. Further, current monitoring and outcome-based evaluations are conducted consistently across the range to facilitate the largest biological value and data that can be summarized across broad geographic regions. These practices and monitoring framework are outlined in a Conference Report completed by NRCS and FWS in June 2011. The monitoring and analysis following implementation of practices and conservation

measures provides a rich dataset that should be foundational in the FWS determination.

Through NRCS' prescribed grazing conservation practice, ranchers are managing grazing land use to maintain or improve watershed health. Through the LPCI contracts, the practice also must be implemented in a manner that benefits LEPC, including nesting and brood-rearing needs. Since 2008, over 1.2 million acres of prescribed grazing across the range and since 2010 over 520,000 acres of prescribed grazing have been implemented under the LPCI. In New Mexico alone, nearly 110,000 acres have been under deferred grazing for 10-12 month periods to provide improved nesting cover.

Also through LPCI, any new or existing fence within agreed-upon distances from known lek sites is marked or removed to help prevent potential collisions. To date, 324 miles of fence have been marked and 120 miles of fence removed. The benefit for LEPC is estimated to prevent between 700 and 900 collisions annually through this conservation measure.

Factors Affecting the LEPC Listing. Among the considerations in raising the listing priority number from 8 to 2 for the LEPC were assumptions regarding the threats facing the species, including habitat fragmentation, grassland conversion, grazing pressure, collision mortality, and shrub control. Many of these threats have been mitigated through the conservation actions outlined previously, while others warrant further evaluation in light of scientific disagreement.

Habitat fragmentation. The measure by which the Rule defines fragmentation appears to be in significant disagreement with population trend data. To date, there are no range-wide assessments that accurately characterize the extent, juxtaposition, and types of fragmentation that are associated with unoccupied LEPC habitat. Fuhlendorf et al. (2002) provides some insight, however that work did not address fragmentation associated with the mosaic of agriculture and CRP fields. Recent work by the 5-state wildlife agencies indicates that some of the most fragmented landscapes identified in the Rule are areas that host some of the highest densities of LEPCs (McDonald et al. in review). Furthermore, many of the threats identified to be significant to the persistence of LEPC in the foreseeable future (e.g., hybridization, hunting, nest parasitism) are based on an untested definition of fragmentation. In order to forecast as the FWS is required to for the Final Rule, a metric that is tied to the density or abundance of birds is needed before any determination is made.

Grassland Conversion. The limitations in comparing National Landcover Data (NLCD) sets from 1992 and 2006 and the absence of the transitional dataset (Coan et al. 2009) create significant scientific disagreement on the extent of grasslands change in the species' range. Authors of the interim NLCD (2001) noted that direct comparison of these two (NLCD 1992 and NLCD 2001 [same method as 2006]), and independently created land cover products is not recommended (Homer et al. 2007: 340). There exist additional datasets that should be evaluated to better describe the extent of agricultural conversion of native grasslands in LEPC range (Coan et al. 2009; Fry et al. 2011).

Similarly, there is scientific disagreement regarding the capacity of the Conservation Reserve Program (CRP) to provide significant, permanent increases in the extent of native grassland that could support the long-term persistence of the LEPC. An examination of current data of CRP acreages and LEPC populations indicates that CRP acreage has remained relatively stable over the past 20 years and LEPC populations in this region are projected to increase with virtually no likelihood of extirpation in the next 30-100 years (Garton 2012). An analysis that compared the location of expired CRP fields to the 2010 NAIP imagery in Kansas indicated that 86 percent of the acreage was still in grass. Not only were these acres still in grass cover but were located in areas of significant conservation need for LEPC, suggesting that the threat of grassland loss through expiration of CRP contracts requires further examination.

Livestock Grazing. There is significant scientific disagreement regarding the assumption that livestock grazing occurring over a large portion of the LEPC occupied area degrades habitat and causes population-level impacts on the LEPC. NRCS data refute this notion. Well-managed grazing lands can be high quality LEPC habitat. Further, NRCS has worked with ranchers to implement over 1 million acres of prescribed grazing management in the LEPC range, contributing to improved rangeland health. Using National Resource Inventory data, NRCS initial analyses show that rangeland health and vegetation conditions for LEPC are not as impacted or overgrazed as the proposed rule supposes.

Brush management. There is significant scientific disagreement with regard to the long-term effects of shinnery oak control on LEPC populations as well as additional data that should be considered in the record. Grisham (2012) demonstrates that with proper livestock management, 10 years post-treatment there are no negative effects of shinnery oak control on LEPC, and based on vegetation response, the activity could be beneficial. In addition, NRCS has had state level guidance for control of shinnery in the range of LEPC in Texas since 2001, and in

New Mexico since 2008. Also in place is new policy on brush management, and new science on proper methods of “control” and LEPC response to those methods that warrant consideration. Since 2008, NRCS and partners have treated nearly 600,000 acres, focusing on invasive cedar and mesquite, which has reduced the threat of wood invasion by 6 percent across the estimated occupied range of the LEPC.

Conclusion. In order to integrate additional data and resolve significant scientific disagreements, USDA recommends a 6 month delay in taking final action. In addition, during that time there are significant conservation operation opportunities to benefit the LEPC. Foremost is the completion of the FWS and NRCS work to transform the Conference Report to an Opinion, which will provide additional predictability and incentives for voluntary conservation to benefit the LEPC. NRCS will continue with financial and technical assistance as well by enrolling 2013 LPCI contracts. Over 80,000 acres of prescribed grazing and over 30,000 acres of brush management planned and contracted during previous LPCI enrollments will be implemented.

Also, States will finalize and begin implementation of their range-wide LEPC management plan that will create the opportunity for landowners to participate in a range-wide Candidate Conservation Agreement with Assurances (CCAA) that mirrors the conservation systems offered under LPCI. States expect a large amount of immediate participation. Planned research studies evaluating the impact of brush management, fence collisions, and grazing management will also begin in the next 6 months with great potential to inform the dialogue on the benefits of all of these efforts to LEPC populations.

Finally, in the event the FWS decides to proceed with listing the LEPC as a threatened species, USDA recommends that all lands (current and future) where USDA is working with ranchers and land managers to implement practices covered under the conference report/opinion be exempted from the listing requirements, per section 4(d) of the ESA, or that these landowners be provided regulatory assurances in some other way that ensures that they are not subject to increased regulatory liability under the Endangered Species Act as a result of their stewardship commitments. Additionally, USDA requests that all lands where agricultural producers are implementing approved conservation practices and measures described in conference opinions be excluded from designation as critical habitat for LEPC.

On all lands where operators are following the provisions of the conference report/opinion it has already been determined by the FWS as stated in the LEPC Conference Report: “Overall effective implementation of the NRCS conservation practices and their associated conservation measures described in this Report are anticipated to result in a positive population response by the species by reducing or eliminating potential adverse effects.” Excluding these agricultural conservation efforts will ensure that implementation and valuable conservation benefits continue uninterrupted.

Forest Service

In the interest of using the 'best available science', the USFWS ruling assessment process would benefit from use of the following publication:

Cushman, Samuel A.; Landguth, Erin L.; Flather, Curtis. 2010. Phase I: Climate change and connectivity: Assessing landscape and species vulnerability.

This research was conducted on 3 focal species of the Great Plains, including the Lesser Prairie Chicken. It assessed the interaction of climate change with human development on lesser prairie chicken habitat. It integrates expected changes in vegetation and land use patterns across the entire Great Plains, using state-of-the-art spatial analyses and modeling approaches to predict the effects of these changes on habitat area, fragmentation, and corridor network.

Please consider consultation with landscape ecologist, Dr. Samuel Cushman for more scientific information or analyses.

USDA offers comments on the status and trends of the LEPC and its habitat on national forest system (NFS) lands in the attached documents. USDA believes it is premature with respect to NFS activities to offer recommendations of a 4(d) rule pending the preparation of a draft final rule and a clearer understanding of the needs of the LEPC on NFS lands relative to the range-wide concerns. USDA would welcome such a discussion prior to finalization of the draft final rule.

Further, USDA recommends the FWS review the 2010 Resource Planning Act Assessment (RPA) Water report RMRS-GTR-295 as it contains pertinent information on drought projections for the area that is the home range of the LEPC. One of the Threat Factors in the listing proposal is 'drought'. In the RPA, you will find information on water trends at long temporal and large spatial scales, which will be a useful backdrop. The current proposal describes the future of drought in the Great Plains, in terms of future drought being "indicated" or "suggested", and the most recent publications FWS cites regarding future drought are from 2007 and 2009. The RPA is a more rigorous report, based on an enormous amount of data, that clearly projects drought will be a prominent factor in the future of the Great Plains, and it is a more recent publication (2012).

With respect to LEPC presence on NFS lands, the LEPC occurs on the Cimarron and Comanche National Grasslands (C&G NF&G) and does not occur on the Cibola National Forest and Grassland. On the C&G NF&G, the LEPC is a high

profile species and the FS has focused its conservation efforts on maintaining and improving habitat quality. In addition to habitat improvement efforts, the FS has also conducted annual lek counts. The attached documents summarize our annual LEPC counts, which give some indication of population trends. These documents also describe some recent impacts to available habitat, as well as conservation efforts aimed at improving available habitat.