IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

KANSAS NATURAL RESOURCE COALITION, *et al.*, Plaintiffs, v. UNITED STATES FISH AND WILDLIFE SERVICE; *et al*., Defendants.	No. 7:23-CV-00159-DC-RCG **ORAL HEARING REQUESTED**

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

MOTION FOR SUMMARY JUDGMENT 1

INTRODUCTION 1

LEGAL BACKGROUND 2

I. The Endangered Species Act 2

A. Listing of threatened or endangered species 2

B. The ESA's prohibition of "take" for endangered species 3

C. Protective regulation under ESA section 4(d) 4

D. The Service's historical "blanket" approach to ESA section 4(d) 5

II. The Regulatory Flexibility Act 5

STATEMENT OF FACTS 6

I. The Service's 2022 listing of two DPS of the lesser prairie-chicken 6

II. The 4(d) Rule for the Northern DPS of the lesser prairie-chicken 6

III. The Service's failure to conduct RFA analyses for the 4(d) Rule 8

IV. The Service's delay of the effective date for the 4(d) Rule 8

V. This Lawsuit 8

STANDING 9

I. The Landowners have standing 9

A. The Landowners are suffering an injury-in-fact 10

B. These injuries are caused by the 4(d) Rule and would be redressed by a favorable ruling 13

II. KNRC has associational standing to sue on behalf of its members 13

A. At least two of KNRC's member counties—Hodgeman County and Logan County—would have standing to sue in their own right 13

B. The interests at stake in this litigation are germane to KNRC's purpose 15

C. The claims asserted, and relief requested, do not require the participation of KNRC's individual members 16

STANDARD OF REVIEW 16

ARGUMENT 17

I. The 4(d) Rule violates the unambiguous requirements of the ESA 17

A. The Service violated the ESA's plain text by disclaiming the obligation to determine that extension of section 9's prohibitions was "necessary and advisable" 18

1. The ESA unambiguously requires the Service to consider whether extension of section 9's prohibitions is "necessary and advisable" 18

2. The Service's interpretation must be rejected pursuant to the constitutional avoidance canon 19

3. *Sweet Home* is unpersuasive 21

B. By refusing to consider economic costs, the Service violated the ESA's requirement that any section 4(d) rule be "necessary and advisable" 22

C. The ESA does not prohibit the consideration of economic costs when making decisions pursuant to section 4(d) 25

D. The 4(d) Rule must be rejected pursuant to the major questions doctrine 27

III. The Service ignored important aspects of the problem and failed to consider all relevant factors, rendering the 4(d) Rule arbitrary and capricious 29

IV. The Service violated the RFA 29

CONCLUSION 30

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Cases

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935).....20

Am. Stewards of Liberty v. U.S. Dep't of Interior,
370 F. Supp. 3d 711 (W.D. Tex. 2019).....16

Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n,
569 F.2d 831 (5th Cir. 1978).....22

Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.,
627 F.3d 547 (5th Cir. 2010).....16

Ass'n of Am. R.R.s v. U.S. Dep't of Transp.,
38 F.3d 582 (D.C. Cir. 1994).....12

Bennett v. Spear,
520 U.S. 154 (1997).....13

Blue Ocean Inst. v. Gutierrez,
585 F. Supp. 2d 36 (D.D.C. 2008).....16

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988).....21

Cargill v. Garland,
57 F.4th 447 (5th Cir. 2023), *certiorari granted*, 144 S. Ct. 374 (2023).....21

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984).....17

Clarke v. Commodity Futures Trading Comm'n,
74 F.4th 627 (5th Cir. 2023).....29

Clean Water Action v. U.S. Env't Prot. Agency,
936 F.3d 308 (5th Cir. 2019).....16

Contender Farms, LLP v. U.S. Dep't of Agric.,
779 F.3d 258 (5th Cir. 2015).....9, 12–13, 15

Corley v. United States,
556 U.S. 303 (2009).....27

Data Mktg. P'ship, LP v. U.S. Dep't of Lab.,
45 F.4th 846 (5th Cir. 2022).....30

Davis v. Mich. Dep't of Treasury,
489 U.S. 803 (1989).....19

Duarte ex rel. Duarte v. City of Lewisville,
759 F.3d 514 (5th Cir. 2014).....9

Fed. Election Comm'n v. Cruz,
596 U.S. 289 (2022).....2, 24

Fed. Energy Regulatory Comm'n v. Mississippi,
456 U.S. 742 (1982).....28

Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000).....26

Gulf Fishermen's Ass'n v. NMFS,
968 F.3d 454 (5th Cir. 2020).....27

Gundy v. United States,
139 S. Ct. 2116 (2019).....20

Hess v. Port Auth. Trans–Hudson Corp.,
513 U.S. 30 (1994).....28

Home Depot U. S. A., Inc. v. Jackson,
139 S. Ct. 1743 (2019).....19

Huawei Techs. USA, Inc. v. Fed. Commc'ns Comm'n,
2 F.4th 421 (5th Cir. 2021).....17, 29

Hunt v. Wash. State Apple Advertising Comm'n,
432 U.S. 333 (1977).....9, 13, 15–16

In re Washington Cattlemen's Ass'n,
No. 22-70194, 2022 WL 4393033 (9th Cir. Sept. 21, 2022).....5

Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.,
448 U.S. 607 (1980).....23

Inhance Techs., L.L.C. v. U.S. Env't Prot. Agency,
No. 23-60620, 2024 WL 1208967 (5th Cir. Mar. 21, 2024).....19

Jennings v. Rodriguez,
583 U.S. 281 (2018).....19

King v. Burwell,
576 U.S. 473 (2015).....26

La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n,
476 U.S. 355 (1986) 2, 24

League of United Latin Am. Citizens, Dist. 19 v. City of Boerne,
659 F.3d 421 (5th Cir. 2011) 13

Loper Bright Enters. v. Raimondo,
143 S. Ct. 2429 (2023) 21

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 9

Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce,
60 F.4th 956 (5th Cir. 2023) 22–24, 29

Michigan v. U.S. Env't Prot. Agency,
576 U.S. 743 (2015) 17, 22–23, 27, 29

Mistretta v. United States,
488 U.S. 361 (1989) 20

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010) 10

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 17, 29

N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, LLC,
76 F.4th 291 (4th Cir. 2023) 28

N.C. Fisheries Ass'n, Inc. v. Daley,
27 F. Supp. 2d 650 (E.D. Va. 1998) 30

Nat'l Grain & Feed Ass'n v. Occupational Safety & Health Admin.,
866 F.2d 717 (5th Cir. 1988) 22

Pan. Refining Co. v. Ryan,
293 U.S. 388 (1935) 20

Russello v. United States,
464 U.S. 16 (1983) 27

Sackett v. U.S. Env't Prot. Agency,
598 U.S. 651 (2023) 21–22

Sample v. Morrison,
406 F.3d 310 (5th Cir. 2005) 18

Skilling v. United States,
561 U.S. 358 (2010) 22

Sweet Home Chapter of Communities for a Great Or. v. Babbitt,
1 F.3d 1 (D.C. Cir. 1993) 21

Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n,
989 F.3d 368 (5th Cir. 2021) 22

Tex. Democratic Party v. Benkiser,
459 F.3d 582 (5th Cir. 2006) 9

Tex. Indep. Ginners Ass'n v. Marshall,
630 F.2d 398 (5th Cir. 1980) 22–24

Texas v. United States,
497 F.3d 491 (5th Cir. 2007) 17

United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.,
517 U.S. 544 (1996) 16

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
570 U.S. 338 (2013) 19

Util. Air Regul. Grp. v. U.S. Env't Prot. Agency,
573 U.S. 302 (2014) 27

VanDerStok v. Garland,
633 F. Supp. 3d 847 (N.D. Tex. 2022) 12

VanDerStok v. Garland,
No. 4:22-CV-00691-O, 2023 WL 4539591 (N.D. Tex. June 30, 2023),
affirmed in part, vacated in part on other grounds, 86 F.4th 179 (5th Cir. 2023) 12

West Virginia v. U.S. Env't Prot. Agency,
597 U.S. 697 (2022) 27–28

Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.,
139 S. Ct. 361 (2018) 16

Whitman v. Am. Trucking Ass'ns, Inc.,
531 U.S. 457 (2001) 28

Yates v. Collier,
868 F.3d 354 (5th Cir. 2017) 26

Statutes

5 U.S.C. § 601(3) 5, 10

5 U.S.C. § 601(5) 14

5 U.S.C. § 601(6) 5

5 U.S.C. § 603 .....8, 30

5 U.S.C. § 603(a) 5

5 U.S.C. § 604 30

5 U.S.C. § 604(a)(6) 6

5 U.S.C. § 605(b) 6, 8, 30

5 U.S.C. § 611(a)(1) 16

5 U.S.C. § 611(a)(4) 30

5 U.S.C. § 706 2

5 U.S.C. § 706(2) 30

5 U.S.C. § 706(2)(A) 16

5 U.S.C. § 706(2)(C) 16

16 U.S.C. § 1532(6) 3

16 U.S.C. § 1532(16) 2–3

16 U.S.C. § 1532(19) 3

16 U.S.C. § 1532(20) 3

16 U.S.C. § 1533(a) 2

16 U.S.C. § 1533(a)(1) 4, 25–26

16 U.S.C. § 1533(b)(1)(A) 4, 25–26

16 U.S.C. § 1533(b)(2) 26

16 U.S.C. § 1533(d) 4, 18, 25–26

16 U.S.C. § 1538(a) 3–4, 24

16 U.S.C. § 1539(a)(1)(B) 3

16 U.S.C. § 1540(a) 3

16 U.S.C. § 1540(b) 3, 21

16 U.S.C. § 1540(g) 3

16 U.S.C. § 1540(g)(2)(C) 8

16 U.S.C. § 1853(b)(14) 23

Regulations

13 C.F.R. § 121.201 .....10, 30

50 C.F.R. § 17.3 3

50 C.F.R. § 17.31 (2018) 5

50 C.F.R. § 17.32 3

50 C.F.R. § 17.41(k) 1

Rules

Fed. R. Civ. P. 56 1

Fed. R. Civ. P. 56(a) 16

Local Civil Rule 7 1

Other Authorities

40 Fed. Reg. 44,412 (Sept. 26, 1975) 5, 21

84 Fed. Reg. 44,753 (Aug. 27, 2019).....5–6

87 Fed. Reg. 72,674 (Nov. 25, 2022).....1

89 Fed. Reg. 7295 (Feb. 2, 2024) 3

89 Fed. Reg. 23,919 (Apr. 5, 2024) 5

Congressional Research Service, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980* (1982).....4, 19, 24

S. Rep. No. 93-307 (1973).....19

Scalia, Antonin & Garner, Bryan A.,
Reading Law: The Interpretation of Legal Texts (Thomas/West 2012) 26

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MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Local Civil Rule 7, and this Court's Scheduling Order, ECF No. 24, Plaintiffs Kansas Natural Resource Coalition (KNRC); Cameron Edwards; Lone Butte Farm, LLC; Schilling Land, LLC; and JDC Farms, Inc. (together, the "Counties and Private Landowners"), hereby move for summary judgment as to all Claims in their Complaint challenging the final rule, issued by Defendant the United States Fish and Wildlife Service (the "Service"), extending protective regulations to the Northern distinct population segment (DPS) of the lesser prairie-chicken pursuant to section 4(d) of the Endangered Species Act (ESA). *See* 87 Fed. Reg. 72,674, 72,748–55 (Nov. 25, 2022), *codified at* 50 C.F.R. § 17.41(k) ("4(d) Rule"). The Counties and Private Landowners are entitled to summary judgment because, in finalizing the 4(d) Rule, the Service violated the ESA, the Administrative Procedure Act (APA), and the Regulatory Flexibility Act (RFA). For the reasons set forth below, this Court should vacate the 4(d) Rule and remand it to the Service.

INTRODUCTION

The Counties and Private Landowners are a group of local governments and family businesses. For generations, the Edwards and Schilling families have operated ranching and farming businesses in western Kansas. KNRC is a coalition of county governments located throughout western and south-central Kansas that manage natural resources on behalf of, and provide essential services to, citizens like the Edwards and Schilling families.

The Counties and Private Landowners face many challenges. These challenges are often amplified by burdensome federal regulations, such as those imposed under the ESA. ESA regulations impose often insurmountable regulatory hurdles to day-to-day land use and resource management activities; force landowners to forgo economically beneficial activities; and expose the regulated public to potentially ruinous civil and even criminal penalties. *See infra* 3–4, 10–13.

It is therefore crucially important that, when considering the imposition of such burdens, federal decision-makers follow the requirements set forth by Congress. *See generally Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022) ("An agency . . . 'literally has no power to act' . . . unless and until Congress authorizes it to do so by statute." (quoting *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986))).

In November 2022 the goals of the Counties and Private Landowners were placed in jeopardy when the Service finalized a rule extending protective regulations to the Northern DPS of the lesser prairie-chicken, pursuant to ESA section 4(d). *See* FWS17970, FWS18040–41. The 4(d) Rule directly regulates and effectively prohibits a staggering array of ordinary land-use activities, *see* FWS18045, severely injuring the livelihoods of landowners such as the Schilling and Edwards families, and presenting significant challenges to KNRC's members in carrying out their official duties, *see infra* 10–15.

The 4(d) Rule is illegal for at least three reasons. ***First***, by refusing to consider the 4(d) Rule's costs, the Service violated the ESA's plain requirements. *See infra* 17–28. ***Second***, in finalizing the 4(d) Rule, the Service violated the basic principle of reasoned decision-making. *See infra* 29. And ***third***, the Service ignored the RFA's requirement that it consider impacts on small entities. *See infra* 29–30. For these reasons, this Court should grant the Counties and Private Landowners' Motion for Summary Judgment and vacate the 4(d) Rule. *See* 5 U.S.C. § 706.

LEGAL BACKGROUND

I. The Endangered Species Act

A. Listing of threatened or endangered species

Under Section 4(a) of the ESA, the Service determines whether to list a species as "threatened" or "endangered" based on certain factors. *See* 16 U.S.C. § 1533(a). A "species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any

species of vertebrate fish or wildlife which interbreeds when mature." *Id*. § 1532(16). A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *Id*. § 1532(6). A species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id*. § 1532(20).[1]

B. The ESA's prohibition of "take" for endangered species

The distinction between endangered and threatened status has significant implications for the direct regulation of private activity that the ESA authorizes. As an additional safeguard for endangered species, befitting their greater risk of extinction, section 9 of the ESA forbids the "take" of such species. *See* 16 U.S.C. §§ 1532(19); 1538(a). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id*. § 1532(19). The Service interprets its authority to regulate take broadly to include not only intentional actions to harm species, but also common land-use activities that might incidentally affect species through habitat modification. *See* 50 C.F.R. § 17.3 (defining "harm" for purposes of the take prohibition to include habitat modification). This take prohibition is backed by severe civil and even criminal penalties. *See* 16 U.S.C. § 1540(a)–(b). *See also* 89 Fed. Reg. 7295, 7296 (Feb. 2, 2024). And the ESA provides for citizen enforcement of its strict prohibitions. 16 U.S.C. § 1540(g). Although, under certain circumstances, a landowner may seek a permit to allow for incidental take of a species, *see id.* § 1539(a)(1)(B); 50 C.F.R. § 17.32, the process for obtaining such a permit is costly and burdensome, *see* FWS17361 (4(d) Guidance) (discussing requirements to obtain incidental take permit).

[1] The Service administers the ESA as to most terrestrial and freshwater species—on behalf of the Secretary of the Interior. The National Marine Fisheries Service (NMFS) administers the ESA as to most marine and anadromous species—on behalf of the Secretary of Commerce.

C. Protective regulation under ESA section 4(d)

Recognizing the take prohibition's stringency, Congress expressly limited its mandatory application to endangered species, explaining that it should "be absolutely enforced only for those species on the brink of extinction." Congressional Research Service, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980* (hereafter, "ESA Legislative History") at 357 (1982) (statement of Sen. Tunney). *See also* 16 U.S.C. § 1538(a). In section 4(d) of the ESA, Congress allowed that the take prohibition could be extended to particular threatened species, but only if "necessary and advisable to provide for the conservation" of that species. 16 U.S.C. § 1533(d).[2] Take of threatened species is presumptively unregulated in part because Congress wished for states to take the lead on regulating them. *See* ESA Legislative History, at 357 (statement of Sen. Tunney) ("States . . . are encouraged to use their discretion to promote the recovery of threatened species . . . .").

The extension of protective regulation to a threatened species, even when done concurrently with the listing of a species, is a necessarily distinct regulatory action, subject to a separate statutory standard. *Compare* 16 U.S.C. § 1533(a)(1), (b)(1)(A) (directing that listing determinations be made on the basis of five listing factors and "the best scientific and commercial data available") *with id.* § 1533(d) (directing that protective regulation may be extended to threatened species where the Service "deems [such regulation] necessary and advisable"). *See also* FWS17362 (4(d) Guidance) ("While the listing of a species as threatened under the Act is not a

[2] ESA section 4(d) reads in relevant part:

> Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) . . . or section 1538(a)(2) . . . with respect to endangered species . . . .

discretionary Federal action, the issuance of a 4(d) rule is . . . .").

D. The Service's historical "blanket" approach to ESA section 4(d)

Notwithstanding section 4(d)'s clear distinction, in 1975 the Service issued a regulation commonly known as the "blanket" 4(d) rule. *See* 40 Fed. Reg. 44,412, 44,414, 44,425 (Sept. 26, 1975), *codified at* 50 C.F.R. § 17.31 (2018). That rule prohibited take of all threatened species, including subsequently listed threatened species, unless the Service issued a separate "special" rule to relax the prohibition for a particular species. *See* 50 C.F.R. § 17.31 (2018).[3] This regulation was illegal. *See* Jonathan Wood, *Take it to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015). In 2019 the Service prospectively repealed it. 84 Fed. Reg. 44,753 (Aug. 27, 2019). The "blanket" approach was briefly revived between July 5, 2022, and September 21, 2022, following a district court's vacatur of the 2019 repeal, but a subsequent appellate decision ensured continued operation of the 2019 non-"blanket" approach. *See In re Washington Cattlemen's Ass'n*, No. 22-70194, 2022 WL 4393033, at *1 (9th Cir. Sept. 21, 2022).[4]

II. The Regulatory Flexibility Act

Congress passed the RFA to minimize unnecessary impacts of federal regulations on "small entit[ies]." A "small entity" is any small business, small organization, or small governmental organization. 5 U.S.C. § 601(3), (6). The RFA requires that, when an agency issues a proposed rule, it must also prepare an "initial regulatory flexibility analysis" describing impacts to small entities and assessing less burdensome alternatives. *See id.* § 603(a). The RFA also requires a final regulatory flexibility analysis when an agency adopts a final rule. This analysis

[3] NMFS has never had any such rule. *See* 84 Fed. Reg. 44,753, 44,754 (Aug. 27, 2019).

[4] On April 5, 2024, the Service issued a final rule to prospectively reinstate the "blanket" 4(d) rule for "newly listed threatened species." *See* 89 Fed. Reg. 23,919, 23,919.

must include, among other things, "a description of the steps the agency has taken to minimize the significant economic impact on small entities." *Id.* § 604(a)(6). These requirements apply unless the head of the agency correctly "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b).

STATEMENT OF FACTS

I. The Service's 2022 listing of two DPS of the lesser prairie-chicken

The lesser prairie-chicken is a species of grouse endemic to southeastern Colorado, southwestern Kansas, western Oklahoma, and the Panhandle and South Plains of Texas. FWS17971–72 (Final Rule). The lesser prairie-chicken relies upon open grassland and shrubland habitats. FWS17973.[5] On November 25, 2022, the Service finalized a rule to list two DPS of the lesser prairie-chicken under the ESA. *See* FWS17970, FWS18040–41 (Final Rule). The Service listed a Southern DPS—found in New Mexico and Texas—as endangered, and a Northern DPS—found in Colorado, Kansas, Oklahoma, and Texas—as threatened. *Id.*

II. The 4(d) Rule for the Northern DPS of the lesser prairie-chicken

In addition to listing the Northern DPS as threatened, the Service issued species-specific protections pursuant to section 4(d). FWS18044–48. The 4(d) Rule was promulgated under the 2019 non-"blanket" regime. *See* FWS17978–79 (Final Rule). That is, it operates to independently impose special protections, over and above the statutory default of no protection. *See* 84 Fed. Reg. at 44,753. *See also* FWS17351 (4(d) Guidance). The 4(d) Rule broadly prohibits "take" of the species. The lone exceptions are for: certain routine agricultural practices on existing cultivated lands; grazing pursuant to a site-specific grazing plan; and the implementation of prescribed fire

[5] The Service estimates that 97% of the species' range is under private ownership. *See* FWS17321 (Proposed Rule). As a result, cooperative efforts with landowners have been critical to the species' conservation. *See* FWS35517 (Colo. Dep't of Parks and Wildlife Comments).

for the purpose of grassland management. FWS18044–48.

The breadth of land-use activities regulated by the 4(d) Rule is staggering. Activities that may constitute take—and are therefore effectively prohibited—include (but are not limited to): cattle grazing activities not conducted in accordance with a site-specific grazing plan developed by an entity approved by the Service; conversion of native grassland to cropland or any other land use; seeding of non-native plant species in occupied habitat; herbicide applications resulting in sustained alteration of the lesser prairie-chicken's preferred vegetative features; the installation of power lines and fences (and other vertical structures, such as windmills); the ownership of existing power lines and fences (and other vertical structures) occasioning collisions with the lesser prairie-chicken; native shrub removal; insecticide applications killing native invertebrates upon which the species feeds; and motorized vehicle or machinery use causing the lesser prairie-chicken to avoid an area. *See* FWS18045 (Final Rule).

The 4(d) Rule therefore directly regulates—and effectively prohibits—an array of ordinary land-use activities that might "harm" the species by altering its habitat or disturbing its life processes. *See id*. Accordingly, it imposes significant direct regulatory burdens across Colorado, Kansas, Oklahoma, and Texas, and will inflict devastating harm on the industries that drive rural economies within this region.[6] Yet, the Service made no meaningful attempt to justify the 4(d) Rule under the ESA's "necessary and advisable" standard, beyond a vague conclusion that the rule "as a whole" satisfies the standard. FWS18045. Worse still, the Service disavowed any obligation to consider the costs associated with imposing such sweeping regulation. *See* FWS18013.

[6] *See* FWS35243 (Members of Congress Comments); FWS35365 (Wheat Growers' Comments); FWS35447–58 (Pacific Legal Foundation (PLF) Comments); FWS35562–73 (KNRC Comments); FWS35776 (Energy and Wildlife Action Coalition Comments); FWS39088 (Farm Bureau Comments); FWS39520–28 (Golden Spread Electric Cooperative Comments).

III. The Service's failure to conduct RFA analyses for the 4(d) Rule

When it proposed the 4(d) Rule, the Service did not include an initial regulatory flexibility analysis, as required by 5 U.S.C. § 603. *See* FWS17299–347 (Proposed Rule). Nor did it alternatively certify that the proposed 4(d) rule will not have a significant impact on a substantial number of small entities, as required by 5 U.S.C. § 605(b). *See id.* KNRC identified this omission and described the significant burdens that the proposed 4(d) rule would impose upon small entities. *See* FWS35456–57 (PLF Comments). Despite this, the Service refused to engage the RFA's requirements altogether when it published the final 4(d) Rule. *See* FWS18013.

IV. The Service's delay of the effective date for the 4(d) Rule

The 4(d) Rule was initially set to take effect on January 24, 2023. *See* FWS17970. However, on January 24, 2023, the Service delayed the 4(d) Rule's effective date until March 27, 2023. *See* FWS18059 (Delay Rule). In so doing, the Service belatedly recognized the significant compliance burdens created by the 4(d) Rule. *See* FWS18059–60 ("We recognize that these changes in status will result in questions and concerns about establishing compliance under the Act for grazing, energy development, infrastructure, and many other projects within the five States that comprise the range of the lesser prairie-chicken."). *See also* FWS18060 (acknowledging that, as of January 24, 2023, there was only "one Service-approved provider of grazing management plans" throughout the entire five-state region).

V. This Lawsuit

By letter dated April 12, 2023, the Counties and Private Landowners provided the Secretary of the Interior and the Director of the Service with written notice of the violations that are the subject of this lawsuit, in accordance with 16 U.S.C. § 1540(g)(2)(C). *See* ECF No. 1-1; ECF No. 12, ¶ 10. The Service responded to this notice in a letter maintaining that the 4(d) Rule was issued lawfully. *See* ECF No. 1-2; ECF No. 12, ¶ 10. Due to the Service's failure to take corrective

action, on July 20, 2023, the Counties and Private Landowners filed this action in the United States District Court for the District of Kansas. ECF No. 1. This action was transferred to this Court on October 16, 2023. The Counties and Private Landowners now move for summary judgment on all Claims.

STANDING

The Counties and Private Landowners have standing. To demonstrate standing, a plaintiff must demonstrate three elements: "(1) an actual or imminent injury that is concrete and particularized, (2) fairly traceable to the defendant's conduct, and (3) redressable by a judgment in the plaintiff['s] favor." *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 517 (5th Cir. 2014). *Accord Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An association may sue on its members' behalf "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). *See also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006). Where "the legality of government action or inaction" is being challenged, "there is ordinarily little question" of standing for a plaintiff who is the "object of the action (or forgone action) at issue." *Lujan*, 504 U.S. at 561–62. *See also Contender Farms, LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (reaffirming this principle) (quoting *Lujan*, 504 U.S. at 561–62). In the Fifth Circuit, "[w]hether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *Id.* at 265.

I. The Landowners have standing

Cameron Edwards is a farmer and cattle rancher from Logan County, Kansas. *See*

Declaration of Cameron Edwards (Edwards Decl.) ¶¶ 3, 4.[7] With his family, he owns Lone Butte Farm, LLC, a farming and ranching business that operates on approximately 7,000 acres of private land in Logan County, Kansas. *Id.* Much of this land was originally purchased by Mr. Edwards' grandfather and great-grandfather. *Id.* Ronald Schilling's family has been farming and ranching in western Kansas for five generations. *See* Declaration of Ronald Schilling (Schilling Decl.) ¶ 3. With his wife, Mr. Schilling owns JDC Farms Inc., a business that grows corn and raises cattle on approximately 10,000 acres of privately owned land in Wallace County, Kansas. Schilling Decl. ¶¶ 4, 5.[8] Both the Edwards and Schilling families have voluntarily conserved thousands of acres of native grassland habitat—grasslands essential to the Schilling and Edwards families' day-to-day operations, Edwards Decl. ¶¶ 7, 8; Schilling Decl. ¶¶ 7, 18, and, according to the Service, essential to the lesser prairie-chicken's conservation, FWS17973. Both the Edwards and Schilling families' properties are within the range maps published by the Service for the Northern DPS. Edwards Decl. ¶¶ 13, 14; Schilling Decl. ¶¶ 12, 13. Lone Butte Farm, LLC, and Schilling Land, LLC, are small businesses for purposes of the RFA. *See* Edwards Decl. ¶ 34; Schilling Decl. ¶ 20. *See also* 5 U.S.C. § 601(3) ("the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act . . . ."); 13 C.F.R. § 121.201 (detailing standards by which an entity will qualify as a "small business concern" for purposes of the Small Business Act).

A. The Landowners are suffering an injury-in-fact

The Edwards and Schilling families are injured by the 4(d) Rule in numerous ways. For

[7] The Court may consider evidence outside the administrative record for purposes of the standing inquiry. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 154–55 (2010).

[8] Lone Butte Farm, LLC, and Cameron Edwards will hereinafter be referred to as the "Edwards family." JDC Farms, Inc., and Schilling Land, LLC, will hereinafter be referred to as the "Schilling family."

example, the 4(d) Rule requires cattle ranchers wishing to avoid take liability to conduct grazing in accordance with a site-specific grazing plan. *See* FWS18045 (Final Rule). In 2022, Lone Bute Farm's Environmental Quality Incentives Program (EQIP) grant was amended to include a grazing plan, which, according to the Edwards family's understanding, brings their operations into compliance with the 4(d) Rule. Edwards Decl. ¶ 20. That amended grazing plan imposes mandatory conditions upon the Edwards family's operations to minimize grassland disturbance by, for example, limiting the amount of forage that may be used for grazing. *Id.* ¶¶ 21, 22. This restricts the Edwards family's flexibility to graze in the manner they choose. *Id.* ¶ 23. And because the EQIP grant expires on December 31, 2024, the 4(d) Rule will require the Edwards family to expend additional time and resources to seek a new grazing plan, at that time. *Id.* ¶¶ 12, 24.

Additionally, activities essential to the Edwards and Schilling families' operations, like the grading and repair of roads and trails throughout their properties, are heavily regulated—if not entirely prohibited—by the 4(d) Rule. *See* FWS 18045. *See also* Edwards Decl. ¶¶ 25, 26; Schilling Decl. ¶ 16. The Edwards family plans to grade and repair roads on their property this summer, and recently refurbished a grader for this purpose. Edwards Decl. ¶ 27. But due to the liability for take imposed by the 4(d) Rule, the Edwards family is hesitant to undertake this work, which will now require potentially costly modification to avoid any potential adverse habitat modification. *Id.*

The 4(d) Rule for the lesser prairie-chicken also hinders the Edwards and Schilling families' abilities to freely utilize their property to its highest and best use, and expand and diversify their businesses. *See* Edwards Decl. ¶¶ 28–31; Schilling Decl. ¶ 18. For example, the Edwards family's property contains both cropland and oil drilling potential, which they would like to expand. Edwards Decl. ¶¶ 28, 30. But because the conversion of grassland to cropland and oil drilling activities are both identified by the Service as threats to the lesser prairie-chicken, the

Edwards family is prevented from converting grasslands to cropland and are hindered in their ability to pursue additional oil drilling. *Id. See also* FWS 18045. Moreover, both the Edwards and Schilling families are subject to the threat of citizen suits and enforcement actions for any activity that may harm the lesser prairie-chicken or its habitat. *See* Edwards Decl. ¶ 33; Schilling Decl. ¶ 18.

The 4(d) Rule therefore imposes significant regulatory burdens on the Edwards and Schilling families' operations. They are the object of the 4(d) Rule and there is "little question" that the rule causes them harm. *See Contender Farms*, 779 F.3d at 264-66 (plaintiffs were the object of the regulation in part because they "participate in the type of events that the Regulation seeks to regulate"). Indeed, in the Fifth Circuit, "[a]n increased regulatory burden typically satisfies the injury in fact requirement." *Id.* at 266 (citing *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 38 F.3d 582 (D.C. Cir. 1994)). Such is the case here.

Additionally, the 4(d) Rule presents both the Edwards and Schilling families with an impossible choice: (1) comply with the 4(d) Rule and incur significant regulatory burdens; or (2) face significant civil or even criminal liability. "It is well established that a credible threat of government action, on its own, provides a plaintiff with a sufficient basis for bringing suit." *VanDerStok v. Garland*, No. 4:22-CV-00691-O, 2023 WL 4539591, at *11 (N.D. Tex. June 30, 2023), *affirmed in part, vacated in part on other grounds*, 86 F.4th 179 (5th Cir. 2023) (The "threat of civil or criminal penalties is a cognizable injury under Article III[.]"). *See also VanDerStok v. Garland*, 633 F. Supp. 3d 847, 857 (N.D. Tex. 2022) ("[A] plaintiff's purported choice to comply—or else—with a challenged government dictate, as evidenced by the plaintiffs' decision to desist from engaging in the regulated activity, is adequate to establish irreparable harm.").

B. These injuries are caused by the 4(d) Rule and would be redressed by a favorable ruling

There is no doubt that the 4(d) Rule is the cause of the Edwards and Schilling families' injuries. Here, "[c]ausation and redressability then flow naturally from the injury." *Contender Farms*, 779 F.3d at 266. Indeed, the Edwards and Schilling families would not have to change their farming and ranching activities, but for the 4(d) Rule's imposing liability for "take." And it is "likely, as opposed to merely speculative" that the Edwads and Schilling families' injuries "will be redressed by a favorable decision." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 431 (5th Cir. 2011) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). Here, the Edwards and Schilling families ask the Court to set aside or enjoin the 4(d) Rule. *See* ECF No. 1 at 29–31. Such relief would redress their injuries by immediately removing the significant regulatory burdens and prohibitions imposed by the 4(d) Rule.

II. KNRC has associational standing to sue on behalf of its members

A. At least two of KNRC's member counties—Hodgeman County and Logan County—would have standing to sue in their own right

KNRC is a coalition of thirty-one Boards of County Commissioners located throughout western and south-central Kansas. *See* Declaration of Tracey Barton (Barton Decl.) ¶ 5. Among KNRC's member counties are Hodgeman County and Logan County. *Id*. *See also* Declaration of Commissioner Michael MacNair (MacNair Decl.) ¶ 4; Declaration of Commissioner Cameron Edwards (Edwards Comm'r Decl.) ¶ 4. Both Hodgeman County and Logan County "have standing to sue in their own right." *Hunt*, 432 U.S. at 343.

Hodgeman County is located in southwest Kansas and contains vast prairie grasslands, MacNair Decl. ¶¶ 5, 10, the lesser prairie-chicken's primary habitat, as identified by the Service, FWS17973. Logan County is located in northwest Kansas, and likewise contains vast prairie grasslands. Edwards Comm'r Decl. ¶ 5. Both counties are home to sizeable populations of the

lesser prairie-chicken, and both counties are identified in the Service's published range maps for the Northern DPS. MacNair Decl. ¶ 10; Edwards Comm'r Decl. ¶ 10. Both Hodgeman County and Logan County are "small governmental jurisdictions" for purposes of the RFA. *See* Edwards Comm'r Decl. ¶ 5; MacNair Decl. ¶ 5. *See also* 5 U.S.C. § 601(5) (defining "small governmental jurisdiction" to mean any government of a city, county, town, township, village, school district, or special district, with a population of fewer than 50,000 people).

Hodgeman County and Logan County are injured by the rule in at least three ways.

First, both counties frequently utilize heavy machinery to repair roads located within grassland areas. *See* MacNair Decl. ¶¶ 13, 15, 16; Edwards Comm'r Decl. ¶¶ 13, 15. This essential service is particularly important to Hodgeman County, which has more gravel roads than any other county in Kansas. MacNair Decl. ¶ 15. Because the Service has identified road construction and anthropogenic noise as threats to the lesser prairie-chicken, FWS18045, at a minimum Hodgeman County and Logan County will have to modify their road repair and maintenance operations to avoid the potential for take of the lesser prairie-chicken—costing them both time and money. MacNair Decl. ¶ 15; Edwards Comm'r Decl. ¶ 15.

Second, both Hodgeman County and Logan County have noxious weed departments that oversee the spraying of weeds along roads within grassland habitats in their jurisdictions. MacNair Decl. ¶¶ 13, 17; Edwards Comm'r Decl. ¶¶ 13, 16. These activities are essential in keeping county roads and rights-of-way accessible and free from obstruction, especially in preparation for winter. MacNair Decl. ¶ 17. The Service identifies the spraying of noxious weeds as an activity that may harm the species. FWS18045. Because of this, Hodgeman County and Logan County will have to spend additional time and resources to modify their weed control activities to prevent the possibility of take of the lesser prairie-chicken—again costing them in both time and money.

MacNair Decl. ¶ 17; Edwards Comm'r Decl. ¶ 16.

Third, Hodgeman County and Logan County use and maintain radio towers for emergency services and approve the installation of transmission lines. MacNair Decl. ¶¶ 18, 19; Edwards Comm'r Decl. ¶¶ 17, 18. Because the 4(d) Rule identifies the erection and maintenance of vertical structures and transmission lines as threats to the lesser prairie-chicken, FWS18045, both counties will have to spend additional time and resources planning any radio tower maintenance, and when approving or reviewing permits for transmission lines. *Id.*

Because activities of the precise nature carried out by Hodgeman County and Logan County—when occurring within grassland areas—have been identified by the Service as activities leading to "take" of the species, *see* FWS18045, the 4(d) Rule directly regulates both counties in their official duties. Each county is the "object" of the 4(d) Rule, and there is "little question" that they have standing. *See Contender Farms*, 779 F.3d at 264–65. Similarly, just like the Edwards and Schilling families, both counties are faced with increased regulatory burdens and an impossible choice that is directly traceable to the 4(d) Rule. These injuries would be redressed through vacatur of the 4(d) Rule.

B. The interests at stake in this litigation are germane to KNRC's purpose

KNRC meets the second prong of the associational standing test—that "the interests it seeks to protect are germane to the organization's purpose." *Hunt*, 432 U.S. at 343. KNRC promotes local government participation in federal and state policy issues concerning natural resources. *See* Barton Decl. ¶ 7. And lesser prairie-chicken regulation and management is one of KNRC's key issue-areas. *Id.* ¶ 8. This lawsuit—which challenges the Service's illegal 4(d) Rule for the lesser prairie-chicken—is unquestionably "germane" to KNRC's purpose.

C. The claims asserted, and relief requested, do not require the participation of KNRC's individual members

Finally, KNRC meets the third prong of the associational standing test—that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. "'[I]ndividual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members[.]" *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) (quoting *Hunt*, 432 U.S. at 343). *See also Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010). KNRC seeks only prospective relief. *See* ECF No. 1 at 29–31.

STANDARD OF REVIEW

A motion for summary judgment must be granted when there is no genuine issue of material fact, such that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When summary judgment is sought in an action that is based on an administrative record, the motion serves as the "mechanism for deciding, as a matter of law, whether the agency's action is supported by the administrative record and consistent with the APA standard of review." *Am. Stewards of Liberty v. U.S. Dep't of Interior*, 370 F. Supp. 3d 711, 723 (W.D. Tex. 2019) (quoting *Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 41 (D.D.C. 2008)). Under the APA, a reviewing court "shall . . . hold unlawful and set aside" agency actions that are arbitrary and capricious, not in accordance with law, or in excess of statutory authority. 5 U.S.C. § 706(2)(A), (C). Agency decisions made pursuant to the ESA and RFA are reviewed according to the APA's standards. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 371 (2018); 5 U.S.C. § 611(a)(1).

"[A]gencies, as mere creatures of statute, must point to explicit Congressional authority justifying their decisions." *Clean Water Action v. U.S. Env't Prot. Agency*, 936 F.3d 308, 313 n.10 (5th Cir. 2019). Accordingly, when reviewing an agency's construction of a federal statute

pursuant to the APA's standard of review, a court "must give effect to the unambiguously expressed intent of Congress." *Texas v. United States*, 497 F.3d 491, 511 (5th Cir. 2007) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). Additionally, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Huawei Techs. USA, Inc. v. Fed. Commc'ns Comm'n*, 2 F.4th 421, 433–34 (5th Cir. 2021) (quoting *Michigan v. U.S. Env't Prot. Agency*, 576 U.S. 743, 750 (2015)). Agency action is therefore arbitrary and capricious where the agency fails to consider "all relevant factors" or ignores "important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 55 (1983).

ARGUMENT

I. The 4(d) Rule violates the unambiguous requirements of the ESA

In finalizing the 4(d) Rule, the Service violated the unambiguous requirements of the ESA and far exceeded its limited grant of authority to regulate, for four interrelated reasons: (A) by disclaiming any obligation to make a "necessary and advisable" determination to support the extension of section 9's prohibitions to the Northern DPS, the Service contravened the ESA's plain text, *see infra* 18–22; (B) although the Service posits that the 4(d) Rule "as a whole" satisfies the "necessary and advisable" standard, the Service's analysis is necessarily deficient because it failed to consider the costs of issuing the rule, in violation of the ESA's plain requirements, *see infra* 22–24; (C) in issuing the 4(d) Rule, the Service determined that it is prohibited from considering economic costs when making decisions pursuant to section 4(d), a position that finds no support in the text of the ESA, *see infra* 25–27; and (D) through the 4(d) Rule, the Service has claimed breathtaking authority to promulgate a regulation of vast economic and political significance, without reference to any clear statement from Congress, *see infra* 27–28.

A. The Service violated the ESA's plain text by disclaiming the obligation to determine that extension of section 9's prohibitions was "necessary and advisable"

ESA section 4(d) imposes an express statutory limitation on the Service's authority to extend section 9's take prohibition to a threatened species: the Service must first "deem[]" doing so to be "necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). Yet, in finalizing the 4(d) Rule, the Service disclaimed its obligation to make a "necessary and advisable" determination to support the extension of section 9's prohibitions—instead concluding that the grant of authority to extend section 9's take prohibition to threatened species, contained within the second sentence of section 4(d), functions as a separate grant that is untethered from the "necessary and advisable" standard contained within the first sentence of section 4(d). *See* FWS18044 ("The second sentence grants particularly broad discretion to the Service when adopting one or more of the prohibitions under section 9."). *See also* FWS17353 (4(d) Guidance) ("[T]he absence of any specific standards, in the second sentence grants us particularly broad discretion to put in place prohibitions with respect to threatened species that section 9 prohibits with respect to endangered species."). This reading must be rejected for three reasons: (1) it is contrary to the plain text of the ESA; (2) it cannot be sustained under the constitutional avoidance canon; and (3) the authority cited by the Service to support its interpretation is untenable under Supreme Court and Fifth Circuit case law.

1. The ESA unambiguously requires the Service to consider whether extension of section 9's prohibitions is "necessary and advisable"

"The appropriate starting point when interpreting any statute is its plain meaning." *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005). The first sentence of section 4(d) gives the agencies broad authority to adopt *any* kind of regulation when a species is listed as threatened if it is "necessary and advisable to provide for the conservation of [the] species." 16 U.S.C. § 1533(d). A

regulation prohibiting the take of any such species is merely a specific example of the type of regulation that could be adopted. Consequently, the power articulated in the second sentence must be a subset of that in the first sentence, and the first sentence's limitation—the requirement of a "necessary and advisable" finding—must apply to it. *See Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989))); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."). This reading is confirmed by the ESA's legislative history, which plainly conceives of the second sentence's power to prohibit take, as being subsumed by the authority granted in section 4(d)'s first sentence. *See* S. Rep. No. 93-307, at 8 (1973), *reprinted in* ESA Legislative History, *supra*, at 307 ("*Among other protective measures available*, [the Secretary] may make any or all of the acts and conduct defined as 'prohibited acts' . . . as to 'endangered species' also prohibited acts as to the particular threatened species." (emphasis added)).

2. The Service's interpretation must be rejected pursuant to the constitutional avoidance canon

Even if the text of section 4(d) were susceptible to the interpretation set forth by the Service, such a reading would raise significant concerns under the nondelegation doctrine, counseling that it be rejected pursuant to the canon of constitutional avoidance. *See Inhance Techs., L.L.C. v. U.S. Env't Prot. Agency*, No. 23-60620, 2024 WL 1208967, at *4 (5th Cir. Mar. 21, 2024) ("When statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018))). The

nondelegation doctrine forbids Congress from delegating its legislative power to any other branch. *See Mistretta v. United States*, 488 U.S. 361, 371–72 (1989). Hence, prior to delegating discretionary power to an administrative agency, Congress must first provide an "intelligible principle" to guide its exercise. *See Pan. Refining Co. v. Ryan*, 293 U.S. 388, 414–16 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–32 (1935).

The only principle to guide the Service's exercise of its power to extend protective regulations is the "necessary and advisable" standard contained in section 4(d)'s first sentence. The grant of authority in the second sentence, divorced from the limiting principle contained in the first, would authorize the Service to forbid or exert regulatory control over *any* activity that affects *any* threatened species, for any reason or no reason whatsoever. The Service could forbid private activity, or not, as it sees fit. Delegation of such unbounded authority would be a classic violation of the "intelligible principle" rule. *See Pan. Refining*, 293 U.S. at 415 (a grant of authority, which did "not qualify the President's authority," did "not state whether or in what circumstances or under what conditions the President" was to regulate, "establishe[d] no creterion [sic] to govern" the exercise of that power; and did "not require any finding by the President as a condition of his action," contained no intelligible principle). Indeed, it is difficult to imagine a more obvious example of an unconstitutional delegation of legislative power than that contained in the second sentence of section 4(d), standing alone. *See Gundy v. United States*, 139 S. Ct. 2116, 2131–37 (2019) (Gorsuch, J., dissenting) (determining that the most important inquiry for purposes of the nondelegation doctrine is whether Congress, and not the agency, has made the overarching policy choice). These constitutional problems can only be avoided by construing section 4(d)'s two sentences together so that the limits in the first sentence apply to any regulation authorized by the second. *See Mistretta*, 488 U.S. at 373 (invoking nondelegation doctrine in avoidance posture).

3. *Sweet Home* is unpersuasive

To support its implausible reading of section 4(d), the Service cites one decision from the District of Columbia Circuit deferring to the Service under *Chevron* on the reasonableness of interpreting the second sentence of section 4(d) as an independent and boundless grant of authority, divorced from the "necessary and advisable" standard in the first sentence. *See* FWS17353 (4(d) Guidance) (citing *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993)). *Sweet Home* does not withstand scrutiny. The foremost reason that *Sweet Home* is unpersuasive is that the plain text of section 4(d)—as reinforced by legislative history and the constitutional avoidance canon—forbids any such interpretation. *See supra* 18–22. But the decision in *Sweet Home* is also sharply inconsistent with Supreme Court and Fifth Circuit authority concerning the *Chevron* doctrine.[9] The Service offered no interpretation of section 4(d) in the regulation at issue in *Sweet Home*—that is, the Service's 1975 regulation extending the take prohibition to all threatened species. *See* 40 Fed. Reg. at 44,414. As such, the interpretation to which the court in *Sweet Home* deferred was articulated only as the Service's litigation position—to which no deference was owed. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). Moreover, "*Chevron* does not apply" where "the statutory language at issue implicates criminal penalties," *Cargill v. Garland*, 57 F.4th 447, 468 (5th Cir. 2023), *certiorari granted*, 144 S. Ct. 374 (2023) (collecting cases), as the ESA does, *see* 16 U.S.C. § 1540(b). *See also Sackett v. U.S. Env't Prot. Agency*, 598 U.S. 651, 681 (2023) ("Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered

[9] The Supreme Court recently heard oral argument in a case considering "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." *See Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023).

ordinary activities, we have been wary about going beyond what 'Congress certainly intended the statute to cover.'" (quoting *Skilling v. United States*, 561 U.S. 358, 404 (2010))).

B. By refusing to consider economic costs, the Service violated the ESA's requirement that any section 4(d) rule be "necessary and advisable"

Perhaps recognizing the untenability of its theory that the second sentence of section 4(d) authorizes the exercise of unbounded authority, the Service hedges—asserting that the 4(d) Rule "as a whole" satisfies the "necessary and advisable" standard. FWS18045. The Service's half-hearted "necessary and advisable" analysis is deficient—chiefly because it is devoid of any assessment of the costs of extending protective regulations to the Northern DPS.

In *Michigan*, the Supreme Court held that standards like "necessary and advisable" may give agencies broad discretion, but such discretion can only be exercised after thorough consideration of all relevant factors—especially costs imposed upon private parties. *See* 576 U.S. at 751–52 (discussing the phrase "appropriate and necessary" a phrase similarly as "broad and all-encompassing" as necessary and advisable that "[r]ead naturally . . . requires at least some attention to cost"); *id.* at 756 ("[T]he term ['Appropriate and necessary'] plainly subsumes consideration of cost."). The Fifth Circuit has applied this rule to an array of similarly worded statutes. *See Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce*, 60 F.4th 956, 965 (5th Cir. 2023) ("[W]e stress that the adjectives *necessary* and *appropriate* limit the authorization contained in this provision. . . . For this reason, the rule is authorized . . . only if it is necessary and appropriate, which at a minimum requires that its benefits reasonably outweigh its costs." (citing *Nat'l Grain & Feed Ass'n v. Occupational Safety & Health Admin.*, 866 F.2d 717, 733 (5th Cir. 1988)); *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 387 (5th Cir. 2021) ("We have required regulations to use a cost-benefit analysis based on the word 'reasonable.'" (citing *Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831, 844 (5th Cir. 1978))); *Tex.*

Indep. Ginners Ass'n v. Marshall, 630 F.2d 398, 410 (5th Cir. 1980) ("An occupational health standard is neither 'reasonably necessary' nor 'feasible,' as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits." (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 667 (1980) (Powell, J., concurring))).

Yet, in violation of this principle, the Service expressly disavowed any requirement that it consider the costs of the 4(d) Rule. *See* FWS18013. Instead, the Service focused exclusively (and vaguely) on the conservation *benefits* of extending protective regulation to the Northern DPS. *See* FWS18045–46. The Service's analysis consists of: a statement that a "range" of activities has the "potential to affect" the species; a list of virtually every form of productive land-use activity that might conceivably occur within the species' range; and a broad conclusion that regulation of all of these activities is justified to prevent "potential" harm to the species. *See id.* The Service addresses only one side of the ledger. And its vague reasoning and exclusive focus on *benefits* is an insufficient justification for extending the significant restrictions, and imposing the significant costs, associated with section 9's prohibitions of intentional and incidental take. To paraphrase *Michigan*, it is not "rational," never mind "advisable," to impose significant economic and other costs for meager benefits to a threatened species. *See Michigan*, 576 U.S. at 752 ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."). *See also Mexican Gulf Fishing Co.*, 60 F.4th at 966 (requiring government to demonstrate "meaningful benefit" as against expected costs in the context of the Magnuson-Stevens Fisheries Conservation and Management Act's grant to regulate where "necessary and appropriate for the conservation and management of the fishery" (quoting 16 U.S.C. § 1853(b)(14)). Indeed, if vague conservation benefit—with no concomitant balancing of costs—were enough to justify a section 4(d) rule, then Congress's

express decision to exclude threatened species from section 9's prohibition, *see* 16 U.S.C. § 1538(a), would make little sense. Instead, the logical reason for Congress to have done so is, as Senator Tunney explained at the time, to "minimize the use of the most stringent [federal] prohibitions" and preserve state "discretion to promote the recovery of threatened species." *See* ESA Legislative History, *supra*, at 357 (statement of Sen. Tunney).

It is true that the 4(d) Rule exempts a very small number of land-use activities from its restrictions. *See* FWS18045–46. However, the Service's approach to these exemptions further demonstrates the statutory deficiency in the Service's analysis. These exemptions were not the result of any meaningful assessment of benefits and costs. Instead, the Service simply assumed the benefits of broadly applying section 9's prohibitions, *see* FWS17354 (4(d) Guidance) ("[W]e have determined that in most cases, all of the prohibitions for endangered species will apply to a threatened species."); FWS17372 ("Therefore, our default should be to include each of the prohibitions . . . ."), before subjecting this broad prohibition to three narrow carve-outs, *see* FWS18045–46. But this approach—baldly assuming that full take protection is advisable by "default," and then narrowly exempting certain activities—is inadequate under the ESA's "necessary and advisable" standard, which places the burden *on the Service* to justify any protective regulation. *Cf. Mexican Gulf Fishing Co.*, 60 F.4th at 965 ("[W]e stress that the adjectives *necessary* and *appropriate* limit the authorization contained in this provision."); *Tex. Indep. Ginners Ass'n*, 630 F.2d at 409 ("The reasonably necessary or appropriate clause . . . imposes a substantive limitation upon the regulatory authority of OSHA . . ."). *Cf. also Cruz*, 596 U.S. at 301 ("An agency . . . 'literally has no power to act' . . . unless and until Congress authorizes it to do so by statute." (quoting *La. Pub. Serv. Comm'n*, 476 U.S. at 374)).

C. The ESA does not prohibit the consideration of economic costs when making decisions pursuant to section 4(d)

The Service musters a single justification for its refusal to consider costs: it contends that any decision to extend protective regulations to threatened species pursuant to section 4(d) is subject to section 4(b)(1)'s injunction that listing decisions made pursuant to Section 4(a)(1) must be made "solely on the basis of the best scientific and commercial data available." *See* FWS18013 (quoting 16 U.S.C. § 1533(b)(1)(A)). This justification finds no support in the text of the ESA.

The Counties and Private Landowners *do not contend* that the Service was required to consider costs when deciding whether to *list* the Northern DPS as threatened pursuant to section 4(a). But the text and structure of the ESA make clear that the extension of protective regulations to a threatened species via the issuance of a section 4(d) rule is an *independent* regulatory action that is subject to a statutory standard entirely distinct from that used for the listing of a species under section 4(a). There are at least two reasons for why this is so.

First, there is nothing in the text of sections 4(a)(1) or 4(b)(1) to suggest that section 4(d) determinations are subject to section 4(b)(1)'s prohibition of the consideration of costs. Section 4(a)(1) lists five factors that the Service must consider when determining whether a species is threatened or endangered. 16 U.S.C. § 1533(a)(1). Section 4(b)(1)(A) adds that "[t]he Secretary shall make *determinations required by subsection (a)(1)* solely on the basis of the best scientific and commercial data available to him." *Id.* § 1533(b)(1)(A) (emphasis added). Section 4(b)(1)(A)'s limitation is expressly directed to "determinations required by subsection (a)(1)." *See id.* But the Service's decision to extend protective regulations to a threatened species pursuant to section 4(d) is not a "determination[] [1] required by [2] subsection (a)(1)." *Id.* It is a determination [1] *permitted* by [2] *subsection (d)*. *Id.* § 1533(d). Nothing in subsection 4(b)(1) directs that determinations permitted by subsection (d) are covered by the former's limitation; the Service's

argument to the contrary must be rejected. *See Yates v. Collier*, 868 F.3d 354, 369 (5th Cir. 2017) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (Thomas/West 2012))).

Second, the structure and design of section 4 counsel against the Service's strained interpretation of section 4(d). *See King v. Burwell*, 576 U.S. 473, 486 (2015) (to ascertain a statute's plain meaning, a reviewing court must "read the words 'in their context and with a view to their place in the overall statutory scheme'" (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

Section 4 of the ESA delegates regulatory authority to the Service in three primary ways. First, pursuant to section 4(a)(1), the Service is authorized to list species as threatened or endangered. 16 U.S.C. § 1533(a)(1). Second, pursuant to section 4(b)(2), the Service is authorized to designate critical habitat for a listed species. *Id.* § 1533(b)(2). And third, pursuant to section 4(d), the Service is authorized to extend protective regulations to a species listed as threatened. *Id.* § 1533(d). Importantly, each grant of authority is explicitly subject to a distinct statutory standard. Section 4(a)(1) listing determinations must be made on the basis of the five listing factors and "the best scientific and commercial data available." *Id.* § 1533(a)(1), (b)(1)(A). Critical habitat designations made pursuant to section 4(b)(2) must be made "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact." *Id.* § 1533(b)(2). And decisions to extend protective regulations pursuant to section 4(d) must be made where the Secretary "deems [such regulation] necessary and advisable to provide for the conservation of such species." *Id.* § 1533(d).

To subject section 4(d) decisions to the same statutory standard as section 4(a) decisions—

as the Service has done—would ignore the ESA's explicit use of distinct terms to govern each exercise of authority in section 4. The Service's interpretation is flatly inconsistent with the ESA's text and structure. *Cf. Corley v. United States*, 556 U.S. 303, 315 (2009) (presuming that Congress uses "distinct terms . . . deliberately"); *Gulf Fishermen's Ass'n v. NMFS*, 968 F.3d 454, 466 (5th Cir. 2020) ("[W]here Congress includes particular language in one section of a statute but omits it in another, it is presumed that Congress acts intentionally and purposely [in the disparate inclusion or exclusion]." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Application of *Michigan*'s rule that standards like "necessary and advisable" require the consideration of costs, *see* 576 U.S. at 751–55, to *section 4(d) decisions*, plainly does not conflict with the requirement that *section 4(a) listing decisions* be based only upon biological considerations. The Service's outright refusal to consider costs violates the ESA.

D. The 4(d) Rule must be rejected pursuant to the major questions doctrine

The Service's broad interpretation of ESA section 4(d) as delegating it boundless authority to regulate, with no reference to cost, fails for an additional reason: the Supreme Court has admonished that, where an agency claims broad authority to exercise powers of "vast economic and political significance," it "must point to 'clear congressional authorization' for the power it claims." *West Virginia v. U.S. Env't Prot. Agency*, 597 U.S. 697, 716, 723 (2022) (quoting *Util. Air Regul. Grp. v. U.S. Env't Prot. Agency*, 573 U.S. 302, 324 (2014)). In the absence of such a clear statement, the agency necessarily lacks the authority it has claimed. *See id*.

In promulgating the 4(d) Rule, the Service: (1) contended that it possesses discretion unconstrained by the limiting language in the first sentence of section 4(d); and (2) argued that section 4(d) imposes no duty to justify regulation through an assessment of costs and benefits. *See supra* 17–27. The result of this broad view of the Service's authority is a regulation of "vast economic and political significance." *West Virginia*, 597 U.S. at 716, 723. Indeed, through the 4(d)

Rule, the Service categorically and indiscriminately forbids an enormous range of private land-use activities across a four-state region, *see* FWS18045 ("Such activities could include, but are not limited to . . . .")—regulation that is already having dramatic consequences for private landowners, small businesses, and local governmental jurisdictions, *cf.* FWS18059–60 (Delay Rule) ("We recognize that these changes in status will result in questions and concerns about establishing compliance under the Act for grazing, energy development, infrastructure, and many other projects within the five States that comprise the range of the lesser prairie-chicken."). Moreover, by its very nature, the 4(d) Rule trenches upon what is "perhaps the quintessential," *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 767 n.30 (1982), function of state and local governments—land-use regulation, *see Hess v. Port Auth. Trans–Hudson Corp.,* 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). *See also N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, LLC*, 76 F.4th 291, 297 (4th Cir. 2023) (invoking major questions doctrine where "the asserted power raise[d] federalism concerns.").

Yet, the Service has identified no clear statement authorizing it to exercise this sweeping power. *See* FWS18044 (vaguely asserting that "the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion"). And the text of ESA section 4(d) contains no such clear statement. Indeed, to the contrary, the first sentence of section 4(d) contains language expressly limiting the Service's authority to act, by requiring the Service to first make a finding that any protective regulation is "necessary and advisable." *See supra* 18–19. The Service's broad interpretation of the ESA, as set forth in the 4(d) Rule, must therefore be further rejected, pursuant to the major questions doctrine. *See West Virginia*, 597 U.S. at 723 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001))).

III. The Service ignored important aspects of the problem and failed to consider all relevant factors, rendering the 4(d) Rule arbitrary and capricious

The 4(d) Rule is also defective for an independent reason: in promulgating the 4(d) Rule, the Service failed to present "an adequate basis and explanation" for its decision, rendering the rule "arbitrary and capricious." *See Motor Vehicle Mfrs.*, 463 U.S. at 34. *See also Huawei Techs. USA, Inc.*, 2 F.4th at 433–34 ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (quoting *Michigan*, 576 U.S. at 750)). As discussed above, the Service categorically refused to consider the economic impacts of the 4(d) Rule. *See supra* 22–25. Such refusal amounts to a failure to consider "all relevant factors" and demonstrates that the Service ignored "important aspect[s] of the problem," rendering the 4(d) Rule arbitrary and capricious. *See Motor Vehicle Mfrs.*, 463 U.S. at 43, 55. *See also Michigan*, 576 U.S. at 753 ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."); *id.* at 765 (Kagan, J., dissenting) ("I agree with the majority—let there be no doubt about this—that . . . [the] regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*.'" (quoting *id.* at 749–51)); *Mexican Gulf Fishing Co.*, 60 F.4th at 973 ("This [arbitrary and capricious standard] includes, of course, considering the costs and benefits associated with the regulation."); *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 642 (5th Cir. 2023) (determining that the arbitrary and capricious standard requires "consideration of both sides of the cost-benefit ledger" (citing *Michigan*, 576 U.S. at 750–51)).

IV. The Service violated the RFA

The 4(d) Rule directly regulates and effectively forbids a wide variety of private activities, including those undertaken by small entities covered by the RFA. Farming operations and cattle ranching businesses with less than $2.5 million in annual revenue, and petroleum and natural gas

extraction businesses with fewer than 1,250 employees, are small entities for purposes of the RFA, *see* 13 C.F.R. § 121.201, and, according to the Service, engage in activities regulated under the 4(d) Rule, *see* FWS18045 (listing activities to be regulated). Likewise, numerous small governmental jurisdictions, including many of KNRC's member-counties, exist within the range of the Northern DPS, and the 4(d) Rule will impose extraordinary costs on activities performed by these counties. *See* FWS35456–57 (Comments of Pacific Legal Foundation).

Consequently, the 4(d) Rule directly regulates the activities of numerous small businesses and small governmental jurisdictions, and the Service was required to prepare initial and final regulatory flexibility analyses. *See* 5 U.S.C. §§ 603–604. Yet the Service has refused to do so. *See* FWS18013. Moreover, the Service has failed to certify that the 4(d) Rule will not have a significant impact on a substantial number of small entities, as required by 5 U.S.C. § 605(b). *See* FWS18013. The only justification that the Service musters for these failures is that the consideration of economic costs is forbidden when issuing a section 4(d) rule. *See id.* But as discussed above, there is no statutory support for this position, *see supra* 25–27, and the Service provides no additional rationale for its refusal to comply with the RFA. The 4(d) Rule was issued in violation of the RFA.

CONCLUSION

This Court should grant the Counties and Private Landowners' Motion for Summary Judgment as to all Claims and vacate the 4(d) Rule. *See* 5 U.S.C. § 706(2) (a court "shall" "hold unlawful and set aside" unlawful agency action); *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022) ("The default rule is that vacatur is the appropriate remedy." (collecting cases)). *See also N.C. Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650, 666 (E.D. Va. 1998) (determining that the RFA gives courts "considerable latitude" to order corrective action for violation of the RFA, including vacatur and remand (citing 5 U.S.C. § 611(a)(4)).

DATED: April 5, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

KANSAS NATURAL RESOURCE COALITION, et al., *Plaintiffs*, v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., *Defendants.*	)	No. 7:23-CV-00159-DC-RCG

DECLARATION OF TRACEY BARTON

I, TRACEY BARTON, am competent to testify and declare as follows:

1. I submit this Declaration in support of the Plaintiffs' Motion for Summary Judgment in the above-captioned case (Lawsuit).

2. I have personal knowledge of the facts stated in this Declaration, and if called as a witness, I could and would competently testify to these facts under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion.

3. I am the Executive Director of Kansas Natural Resource Coalition (KNRC). I have served in this position since January 2022.

4. In this position, I oversee the day-to-day operations of KNRC and communicate the decisions and positions taken by the organization. For example, I frequently meet with county commissioners for KNRC's member counties to discuss state, local, and federal issues of concern, including federal rules issued under the Endangered Species Act.

5. KNRC is a coalition of thirty-one Kansas Boards of County Commissioners located throughout western and south-central Kansas. Our member counties are: Barton, Clark, Coffey,

Comanche, Edwards, Finney, Ford, Gove, Graham, Haskell, Hodgeman, Kearny, Kiowa, Lane, Logan, Meade, Morton, Ness, Ottawa, Pawnee, Rooks, Rush, Russell, Seward, Sheridan, Sherman, Stafford, Stevens, Thomas, Trego, and Wallace.

6. These member counties fund and govern KNRC. KNRC is structured around a Central Policy Committee of one vote per member county. This Policy Committee elects KNRC's President, Vice President, Secretary, and Treasurer. The Policy Committee also approves KNRC's policy and budget, approves litigation, and responds to issues through KNRC's subcommittees.

7. KNRC sponsors and promotes local government participation in federal and state policy on conservation and natural resources issues. Key to KNRC's mission is the belief that local governments are in the best position to study, manage, and conserve natural resources, while also respecting private property rights, economic impacts, and other fundamental concerns.

8. One issue that KNRC has historically focused on is the status of the lesser prairie-chicken. KNRC devotes substantial resources to advocacy on regulatory issues pertaining to the lesser prairie-chicken, publishing information and performing research on the lesser prairie-chicken, including, but not limited to, a lesser-prairie chicken conservation, management, and study plan. KNRC has also engaged in litigation when its members were threatened by lesser prairie-chicken regulations. *See Kansas Nat. Res. Coal. v. U.S. Dep't of Interior*, 971 F.3d 1222 (10th Cir. 2020).

9. KNRC submitted comments in opposition to the proposed ESA Section 4(d) Rule for the Northern distinct population segment (DPS) of the lesser prairie-chicken.

10. I am aware that on November 25, 2022, the United States Fish and Wildlife Service finalized a rule adding two distinct population segments of the lesser prairie-chicken to the federal

list of threatened and endangered wildlife, while also issuing species-specific protections for the Northern DPS of the lesser prairie-chicken pursuant to ESA section 4(d).

11. I understand that these specific protections prohibit numerous activities within the lesser prairie-chicken's range, and thus understand the 4(d) Rule to operate as a direct regulation of KNRC's member counties' activities.

12. I also understand that the 4(d) Rule for the lesser prairie-chicken broadly prohibits "take" of the species, and that the term "take" is defined in the ESA as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). I understand that the Service has, through regulation, defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

13. I understand that the Service has identified habitat degradation, loss and fragmentation, road and electrical distribution lines, shrub control and eradication, fences, energy production activities, and anthropogenic noise, among other factors, to be threats to the lesser prairie-chicken.

14. I understand that the majority of KNRC's member counties are located within the areas identified in the Service's published range maps for the Northern DPS of the lesser-prairie chicken.

15. One such county is Logan County, overseen by Commissioner Cameron Edwards. Another is Hodgeman County, overseen by Commissioner Michael MacNair.

16. The 4(d) Rule for the lesser prairie-chicken harms KNRC's member counties—such as Logan and Hodgeman Counties—in several ways.

17. First, the 4(d) Rule for the lesser prairie-chicken frustrates the ability of KNRC's member counties to provide basic and essential services to their citizens.

18. For example, many of the activities that KNRC's member counties regularly engage in, like using heavy machinery to grade roads and maintain bridges and culverts, spraying herbicides to control noxious weeds in grassland areas, and building and maintaining radio towers for emergency management, may lead to incidental take of the species—at least according to the terms of the 4(d) Rule. Indeed, many such activities are specifically listed by the Service as threatening harm to the species. At the very least, due to the high risk of take associated with these activities, the 4(d) Rule will require KNRC's member counties to expend additional resources, for example, by modifying their road work activities so as not to disturb the lesser prairie-chicken or its habitat, or forego these services entirely.

19. Second, the 4(d) Rule frustrates existing cooperative efforts among its members to conserve the lesser prairie-chicken by imposing a federal mandate at the expense of local control.

20. Third, the 4(d) Rule negatively affects the industries, like ranching, farming, and energy development, that drive the local economies of KNRC's member counties, with a likely negative result on county tax revenue. For example, it is my understanding that the 4(d) Rule imposes additional regulatory requirements on ranchers by requiring ranchers wishing to avoid liability for take to conduct grazing in accordance with a site-specific grazing plan.

21. The 4(d) Rule also harms KNRC itself, by frustrating KNRC's objective to empower local communities to oversee and manage natural resources, thus requiring KNRC to expend additional resources advocating for and educating its member counties about the 4(d) Rule for the lesser prairie-chicken.

22. Each of KNRC's member counties has a population of under 50,000 people.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Larned, Kansas, on March 29, 2024.

TRACEY BARTON

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

KANSAS NATURAL RESOURCE COALITION, et al., *Plaintiffs*, v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., *Defendants.*	)	No. 7:23-CV-00159-DC-RCG

DECLARATION OF COMMISSIONER CAMERON EDWARDS

I, CAMERON EDWARDS, am competent to testify and declare as follows:

1. I submit this Declaration in support of the Plaintiffs' Motion for Summary Judgment in the above-captioned case (Lawsuit).

2. I have personal knowledge of the facts stated in this Declaration, and if called as a witness, I could and would competently testify to these facts under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion.

3. I am a County Commissioner for Logan County, Kansas. I have served in this position since 2017.

4. Logan County is one of the member counties of the Kansas Natural Resource Coalition (KNRC), and in my capacity as a Logan County Commissioner, I serve on the board of KNRC.

5. Logan County is in the northwest portion of Kansas. It was established in 1887 and is characterized by its plains and grasslands. Portions of the Smoky Hill River run through the County. Logan County has a rich history of cattle ranching and pioneer spirit. Many of Logan

County's residents, including myself, continue to run cattle and farm the land. Logan County has approximately 3,100 residents.

6. As a County Commissioner, I am responsible for overseeing the day-to-day management of Logan County in addition to addressing the concerns of County residents. My duties include, but are not limited to, participating in County planning projects for roads and infrastructure and generally managing County operations and business.

7. In my capacity as a County Commissioner, over the last seven years I have gained significant knowledge of, and experience with, the local, state, and federal regulatory conditions that affect Logan County. As a result of that experience, I have gained a deep, practical understanding of how federal statutes like the Endangered Species Act (ESA) and the Clean Water Act and their implementing regulations affect county operations, from consultation to permitting requirements.

8. I am aware that on November 25, 2022, the United States Fish and Wildlife Service finalized a rule adding two distinct population segments of the lesser prairie-chicken to the federal list of threatened and endangered wildlife, while also issuing species-specific protections for the Northern distinct population segment (DPS) of the lesser prairie-chicken pursuant to ESA Section 4(d) (the "4(d) Rule"). I understand this 4(d) Rule to prohibit numerous activities within the Northern DPS's range, and thus understand it to operate as a direct regulation of the activities Logan County undertakes in providing services to its residents.

9. For example, it is my understanding that the 4(d) Rule for the lesser prairie-chicken broadly prohibits "take" of the species, and that the term "take" is defined broadly in the ESA as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct," 16 U.S.C. § 1532(19). I understand that the Service has, through regulation,

defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

10. I have reviewed the Service's published range maps for the lesser prairie-chicken, available at 87 Fed. Reg. 72,678 and 87 Fed. Reg. 72,682. Logan County is within the Service's maps identifying the range of the Northern DPS of the lesser prairie-chicken. I also understand that there exist numerous robust populations of lesser prairie-chicken at various locations throughout Logan County's vast grasslands.

11. I understand that, as a result of the Service's listing of the Northern DPS of the lesser prairie-chicken, the ESA's Section 7 consultation process may be triggered for projects where Logan County must obtain a federal permit, like a dredge-and-fill permit under section 404 of the Clean Water Act.

12. I understand that the Service has identified habitat degradation, loss and fragmentation, petroleum and natural gas development, wind energy development and powerlines, roads and electrical distribution lines, shrub control and eradication, and anthropogenic noise, among other activities, to be threats to the lesser prairie-chicken.

13. I understand that, as a result of the 4(d) Rule for the lesser prairie-chicken, numerous ordinary activities undertaken by Logan County, like maintaining roads, bridges, and culverts, spraying for noxious weeds, overseeing the installation of powerlines, using motorized machinery that causes the lesser prairie-chicken to avoid an area, and maintaining the County's emergency radio towers, among other activities, could lead to "take" of the lesser prairie-chicken and are therefore now directly regulated, and effectively prohibited, by the federal government.

14. The 4(d) Rule for the lesser prairie-chicken imposes significant regulatory burdens on Logan County's operations in several ways.

15. First, road, bridge, and culvert maintenance are some of the most essential services provided by Logan County. Employees of the Logan County Road Department are on county roads daily operating trucks and heavy equipment, weather permitting. Because many of the roads in the County are unpaved, sand and gravel are often hauled to and from road stabilization and repair projects. But because of the 4(d) Rule, we are concerned that the normal duties of the Road Department may constitute "take" as that term is defined by the Service. At a minimum, the 4(d) Rule will require Logan County's Road Department to modify its operations to avoid the potential for take liability—leading to additional expense in both time and money.

16. Second, the Logan County Weed Department frequently sprays weeds and noxious plants alongside roads and ditches for maintenance purposes. It is my understanding that, under the broad definition of "take" set forth in the Service's implementing regulations and the 4(d) Rule, the Service's position is that these activities could lead to take of the species and are therefore now effectively prohibited due to the 4(d) Rule. At a minimum, the 4(d) Rule will require Logan County's Weed Department to modify its operations to avoid this potential for take liability—leading to additional expense in both time and money.

17. Third, Logan County has several radio towers used for emergency services that require maintenance. I understand that the Service has identified the erection of vertical structures as an activity that could potentially harm the lesser prairie-chicken by causing it to avoid an area—and could thus potentially constitute take. As such, due to the 4(d) Rule, Logan County will have to expend additional time and resources to prevent the possibility of "take" of the lesser prairie-chicken resulting from maintenance of these towers.

18. Fourth, Logan County contracts with providers and issues permits for the installation of transmission lines, electrical lines, and pipelines. I understand that the Service's position is that such activities could potentially harm the species and therefore constitute take. Due to the 4(d) Rule, Logan County will have to expend additional time and resources before approving these projects to prevent the possibility of "take" of the lesser prairie-chicken.

19. As such, the 4(d) Rule for the lesser prairie-chicken directly inhibits Logan County's ability to provide essential services to our residents—costing the County time, money, and other resources.

20. Finally, Logan County has several bridges that cross the Smoky Hill River and its tributaries. Should the County be required to obtain a Section 404 Clean Water Act permit for any potential repairs of these bridges, the Section 7 consultation process of the ESA will be triggered, and the 4(d) Rule will add additional expense and time to the permit process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Logan, County, on April 2, 2024.

Cameron Edwards
CAMERON EDWARDS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

KANSAS NATURAL RESOURCE COALITION, et al.,	)	
Plaintiffs,	)	
v.	)	No. 7:23-CV-00159-DC-RCG
UNITED STATES FISH AND WILDLIFE SERVICE, et al.,	)	
Defendants.	)	

DECLARATION OF COMMISSIONER MICHAEL MACNAIR

I, MICHAEL MACNAIR, am competent to testify and declare as follows:

1. I submit this Declaration in support of the Plaintiffs' Motion for Summary Judgment in the above-captioned case (Lawsuit).

2. I have personal knowledge of the facts stated in this Declaration and, if called as a witness, I could and would competently testify to these facts under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion.

3. I am a County Commissioner for Hodgeman County, Kansas. I have served in this position since 2011.

4. Hodgeman County is one of the member counties of the Kansas Natural Resource Coalition (KNRC).

5. Hodgeman County is in the southwest portion of Kansas. It was established in 1868 and formally organized in 1879. Hodgeman County is notable for several unique geographic features: its expansive prairie and grasslands; Horse Thief Canyon, a rugged natural rock foundation once rumored to harbor cattle rustlers; and various creeks and tributaries, including the

Pawnee River and Dry Creek. Historically, residents of Hodgeman were farmers and cattle ranchers, and many of the County's residents proudly continue this tradition today. Hodgeman County has approximately 1,700 residents.

6. As a County Commissioner, I am responsible for overseeing the day-to-day management of Hodgeman County in addition to addressing the concerns of County residents. My duties include, but are not limited to, participating in County planning projects, including for roads and infrastructure, and generally managing County operations and business.

7. In my Capacity as County Commissioner over the last thirteen years, I have gained significant knowledge of, and experience with, the local, state, and federal regulatory conditions that affect Hodgeman County. As a result of that experience, I have gained a deep, practical understanding of how federal statutes like the Endangered Species Act, the Clean Water Act, and their implementing regulations affect County operations, from consultation to permitting requirements.

8. I am aware that on November 25, 2022, the United States Fish and Wildlife Service finalized a rule adding two distinct population segments of the lesser prairie-chicken to the federal list of threatened and endangered wildlife, while also issuing species-specific protections for the Northern distinct population segment (DPS) of the lesser prairie-chicken pursuant to ESA Section 4(d) (the "4(d) Rule"). I understand this 4(d) Rule to prohibit numerous activities within the Northern DPS's range, thus operating as a direct regulation of the activities Hodgeman County undertakes in providing services to its residents.

9. For example, it is my understanding that the 4(d) Rule for the lesser prairie-chicken broadly prohibits "take" of the species, and that the term "take" is defined broadly in the ESA as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage

in any such conduct," 16 U.S.C. § 1532(19). I understand that the Service has through regulation defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

10. I have reviewed the Service's published range maps for the lesser prairie-chicken available at 87 Fed. Reg. 72,678 and 87 Fed. Reg. 72,682. Hodgeman County is within the Service's maps identifying the range of the Northern DPS of the lesser prairie-chicken at various locations throughout Hodgeman County's vast prairie grasslands. I am aware that there exist large populations of lesser prairie-chickens within the County's borders.

11. I understand that, as a result of the Service's listing of the Northern DPS of the lesser prairie-chicken, the ESA's Section 7 consultation process may be triggered for projects where Hodgeman County must obtain a federal permit, like a dredge-and-fill permit under Section 404 of the Clean Water Act.

12. I understand that the Service has identified habitat degradation, loss and fragmentation, petroleum and natural gas development, wind energy development and powerlines, roads and electrical distribution lines, shrub control and eradication, and anthropogenic noise, among other activities, to be threats to the lesser prairie-chicken—and thus activities that could lead to take of the species.

13. I understand that, as a result of the 4(d) Rule for the lesser prairie-chicken, numerous ordinary activities undertaken by Hodgeman County, like maintaining roads, bridges, and culverts, operating a sand mine, spraying for noxious weeds, overseeing the installation of powerlines, using motorized machinery that causes the lesser prairie-chicken to avoid an area, and maintaining the County's emergency radio towers, among other activities, could lead to "take" of

the lesser prairie-chicken and are therefore now directly regulated, and effectively prohibited, by the federal government.

14. The 4(d) Rule for the lesser prairie-chicken imposes significant regulatory burdens on Hodgeman County's operations in several ways.

15. First, road, bridge, and culvert maintenance are among the essential services provided by Hodgeman County. The Road and Bridge Supervisor facilitates road construction, repair, and maintenance of County roads, including the mowing of ditches, culvert areas, and bridge areas. Approximately 950 miles of roads in Hodgeman County are gravel roads—more than any other county in Kansas—and require frequent maintenance. As a result, the County operates heavy equipment to haul sand and gravel to and from road maintenance and stabilization projects. The County also owns and operates thirteen graders, which are used in County road projects. But because of the 4(d) Rule, we are hesitant to undertake these essential projects, due to the possibility that these ordinary activities could constitute "take" as that term is defined by the Service. At a minimum, the 4(d) Rule will require Hodgeman County to modify its operations to avoid the potential for take liability, for example by requiring the County to use less desirable alternatives to heavy machinery, or minimizing our heavy machinery use in grassland areas—leading to additional expense in both time and money.

16. Second, the maintenance of Hodgeman County's gravel roads requires large quantities of sand. The County operates a sand mine located on private property to meet its significant road repair needs. This sand mine is in a grassland area and requires the use of heavy machinery for dredging within the mine, and to obtain and haul the sand. It is my understanding that under the broad definition of "take" as set forth in the Service's implementing regulations and the 4(d) Rule, the Service's position is that these activities could lead to take of the species and are

therefore now effectively prohibited due to the 4(d) Rule. At a minimum, the 4(d) Rule will require Hodgeman County to modify its operations to avoid this potential for take liability, for example by requiring the County to use less desirable alternatives to heavy machinery or minimizing our heavy machinery use in grassland areas—leading to additional expense in both time and money.

17. Third, the County's Noxious Weed Director oversees the frequent spraying of weeds along culverts and roads in grassland areas. It is critical that weeds and grass be kept back from the roads to prevent dangerous snowdrifts that would obstruct County access in the winter. The County also has a contract with the State of Kansas to spray along State rights-of-way. It is my understanding that these activities could lead to take of the species and are therefore now effectively prohibited due to the 4(d) Rule, requiring Hodgeman County to modify its activities and expend time and resources to prevent take liability.

18. Fourth, the County has several radio towers used for our police force and emergency services that require maintenance. I understand that the Service has identified the erection of vertical structures as an activity that could potentially harm the lesser prairie-chicken by causing it to avoid an area—and could thus potentially constitute take. As such, due to the 4(d) Rule, we will have to expend additional time and resources to prevent the possibility of "take" of the lesser prairie-chicken resulting from our maintenance of these towers.

19. Fifth, Hodgeman County contracts with providers and issues permits for the installation of transmission lines, electrical lines, and pipelines, in addition to maintaining the corresponding rights-of-way. I understand that the Service's position is that such activities could potentially harm the species and therefore constitute take. Due to the 4(d) Rule, we will have to expend additional time and resources in our consideration and review of any such permits, to

ensure compliance with the 4(d) Rule before approving these projects to prevent the possibility of "take" of the lesser prairie-chicken.

20. Sixth, the County maintains several bridges over the waterways located within the County, including the Pawnee River. Should the County be required to obtain a Section 404 permit under the Clean Water Act for bridge projects or repairs, the Section 7 Consultation process of the ESA will be triggered. This would lead to additional expense and time in the permitting process.

21. Finally, Hodgeman County has great potential for wind power infrastructure. On information and belief, it is my understanding that, due to the presence of the lesser prairie-chicken—and potential liability associated with the 4(d) Rule—the wind energy industry is avoiding Hodgeman County for future projects. This has resulted, and will continue to result, in lost economic development opportunities for Hodgeman County's citizens, and reduce County tax revenue.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Hodgeman County, Kansas, on March 28th, 2024.

Michael MacNair

MICHAEL MACNAIR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

KANSAS NATURAL RESOURCE COALITION, et al.,	)	
Plaintiffs,	)	
v.	)	No. 7:23-CV-00159-DC-RCG
UNITED STATES FISH AND WILDLIFE SERVICE, et al.,	)	
Defendants.	)	

DECLARATION OF CAMERON EDWARDS

I, CAMERON EDWARDS, am competent to testify and declare as follows:

1. I submit this Declaration in support of the Plaintiffs' Motion for Summary Judgment in the above-captioned case (Lawsuit).

2. I have personal knowledge of the facts stated in this Declaration and, if called as a witness, I could and would competently testify to these facts under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion.

3. I am a farmer and cattle rancher. With my family, I own and operate Lone Butte Farm, LLC, a Kansas limited liability company. I am responsible for Lone Butte Farm's day-to-day operations.

4. Lone Butte Farm operates on approximately 7,000 acres of privately owned land in Logan County, Kansas, which it leases from myself and other members of my family. Much of this land was purchased by my grandfather and great-grandfather.

5. My family and I have worked on this land for three generations to produce food, fuel, and fiber.

6. In particular, Lone Butte Farm produces corn, wheat, sorghum, and cover crops. It also runs approximately 160 cattle (with the ability to run as many as 400) and has an oil well on the property.

7. In my experience, a healthy rangeland consisting of high-quality native grasslands is crucial to maintaining a healthy cattle herd. To that end, Lone Butte Farm has voluntarily maintained approximately 3,000 acres of its land as contiguous native grassland.

8. This native grassland is short grass prairie, consisting of buffalo grass, blue stem grass, and other indigenous grass species.

9. I am aware that on November 25, 2022, the United States Fish and Wildlife Service finalized a rule adding two distinct population segments of the lesser prairie-chicken to the federal list of threatened and endangered wildlife, while also issuing species-specific protections for the Northern distinct population segment (DPS) of the lesser prairie-chicken pursuant to Endangered Species Act (ESA) Section 4(d) (the "4(d) Rule"). I understand that these species-specific protections prohibit numerous activities within the lesser prairie-chicken's range, and thus the 4(d) Rule operates as a direct regulation of private activity.

10. For example, it is my understanding that the 4(d) Rule for the lesser prairie-chicken broadly prohibits "take" of the species, and that the term "take" is defined in the ESA to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). I understand that the Service has, through regulation, defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

11. I understand that the Service has identified habitat degradation, loss, and fragmentation, conversion of grasslands to cropland, energy production activities, livestock grazing, and other factors to be threats to the lesser prairie-chicken.

12. I understand that, as a result of the 4(d) Rule for the lesser prairie-chicken, numerous ordinary land-use activities, like grazing not conducted in accordance with a site-specific grazing plan developed by a Service-approved entity, converting native grassland to cropland or other land use, installation of fences, and the use of motorized machinery that causes the lesser prairie chicken to avoid an area, among other activities, are now effectively prohibited where these activities could harm the lesser prairie-chicken or modify its habitat.

13. I am also aware that the United States Fish and Wildlife Service identified the Short-Grass/CRP Mosaic Ecoregion in western Kansas as the area estimated to contain the greatest population of lesser prairie-chicken.

14. I have reviewed the United States Fish and Wildlife Service's published range maps for the lesser prairie-chicken, available at 87 Fed. Reg. 72,678 and 87 Fed. Reg. 72,682. Lone Butte Farm's land, including its native grassland, is within the Short-Grass/CRP Mosaic Ecoregion identified by the United States Fish and Wildlife Service.

15. I understand that the presence of large areas of native grasslands on Lone Butte Farm's private property is among the reasons the Service included our private property in published range maps for the lesser prairie-chicken.

16. I am personally familiar with Lone Butte Farm's operations and the lands upon which it operates, including its native grasslands, and regularly visit those lands for purposes of site management.

17. The 4(d) Rule for the lesser prairie-chicken imposes significant direct regulatory burdens on Lone Butte Farm.

18. It is my understanding that the 4(d) Rule requires ranchers wishing to avoid liability for take to conduct grazing activities in accordance with a site-specific grazing plan.

19. In 2020, Lone Butte Farm received a $25,000 Environmental Quality Incentives Program (EQIP) grant from the Natural Resources Conservation Service (NRCS) to improve a water line on our property.

20. In 2022, the conditions of our EQIP grant were amended to include a grazing plan, which I understand satisfies the grazing plan requirement under the 4(d) Rule.

21. It is my understanding that the EQIP grant is conditional on our compliance with the grazing plan.

22. The grazing plan requires Lone Butte Farm to expend additional time and resources to avoid grassland disturbance by placing limits on the forage that we may use for grazing. These limits eliminate our flexibility to make decisions regarding the location and forage needs of our herd.

23. These conditions on our grazing operations are particularly burdensome during periods of drought, as they restrict our ability to alter our operations to correspond to weather conditions. For example, we lose the ability to move our herd to desirable areas if doing so would result in grassland falling below the prescribed levels in the grazing plan.

24. The EQIP grant expires on December 31, 2024. At that time, we intend to seek a new grazing plan to satisfy the 4(d) Rule's grazing plan requirement. This will require us to expend additional time and resources that would not be necessary but for the 4(d) Rule.

25. In addition, it is my understanding that many of the normal farming and ranching activities we engage in on our private land, including operating motorized vehicles, maintaining trails, repairing and erecting vertical structures such as windmills and fences, and developing and maintaining existing oil and gas infrastructure, are heavily regulated or prohibited under the 4(d) Rule.

26. Grading and repairing roads and trails throughout our property is essential to Lone Butte Farm's business. This requires the use of heavy machinery like graders.

27. Recently, we refurbished a grader with the intention to engage in this essential work this summer. We spent considerable time and resources on this refurbishment. But because of the 4(d) Rule, we are hesitant to undertake this road grading project. At a minimum, the 4(d) Rule will require us to modify our road repair operations to avoid the potential for take liability resulting from adverse habitat modification under the 4(d) Rule.

28. Lone Butte Farm currently has one oil well located on our property, which is leased to an oil and gas business. There are, however, additional oil reserves on our land, which are currently not being exploited. However, due to the possibility that work associated with expanding these operations could constitute take under the 4(d) Rule, I have refrained from pursuing any further expansion of the leasing arrangement to include additional locations on the property.

29. It is also my understanding that, under the 4(d) Rule, the conversion of native grasslands to other uses could constitute take by destroying lesser prairie-chicken habitat, thus effectively prohibiting such conversion.

30. Our property includes a sizeable area of grassland that was previously in a Conservation Reserve Program (CRP). The highest and best use of this area, however, is to convert

the grasslands to cropland. Although this CRP is expired, we cannot convert this grassland to cropland due to the restrictions associated with the 4(d) Rule.

31. I believe that this effective prohibition on the conversion of grasslands to other uses will limit Lone Butte Farm's ability to expand and diversify its land-use operations and business. And it will cost us future revenue and profits.

32. The 4(d) Rule for the lesser prairie-chicken directly inhibits our ability to freely conduct our farming and grazing operations, make necessary improvements, and engage in routine management activities on our property.

33. We are subject to the threat of citizen suits and agency enforcement actions under the ESA for any activity that may harm the lesser prairie-chicken, including significant habitat modification or degradation. Indeed, we live in fear of being targeted by private groups for engaging in ordinary land-use activities within the grassland habitats on our property.

34. Lone Butte Farm, LLC, is a beef cattle ranching and corn farming operation with less than $2.5 million in annual receipts, and is an oil and gas extraction operation with fewer than 1,250 employees.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Logan, County, on April 2, 2024.

Cameron Edwards
CAMERON EDWARDS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

KANSAS NATURAL RESOURCE COALITION, et al.,	)	
Plaintiffs,	)	
v.	)	No. 7:23-CV-00159-DC-RCG
UNITED STATES FISH AND WILDLIFE SERVICE, et al.,	)	
Defendants.	)	

DECLARATION OF RONALD SCHILLING

I, RONALD SCHILLING, am competent to testify and declare as follows:

1. I submit this Declaration in support of Plaintiffs' Motion for Summary Judgment in the above-captioned case (Lawsuit).

2. I have personal knowledge of the facts stated in this Declaration, and if called as a witness, I could and would competently testify to these facts under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion.

3. I am a farmer and cattle rancher. My family has been farming and ranching in Western Kansas for five generations.

4. With my wife Marsha Schilling, I own JDC Farms, Inc., a Kansas for-profit corporation that grows corn and raises cattle on approximately 10,000 acres of privately owned land in Wallace County, Kansas.

5. This land is owned by Schilling Land, LLC, a Kansas limited liability company also owned by myself and my wife.

6. I am authorized to speak on behalf of Schilling Land, LLC, and JDC Farms, Inc., for purposes of this litigation.

7. In my experience, cattle thrive on high-quality native grasslands. To best support my cattle business, I have voluntarily conserved approximately 6,000 acres of native grassland on my property and converted large areas of previously cultivated farmland to grassland. Indeed, we continue to convert roughly 80 to 100 acres of cropland to grassland, per year.

8. I am aware that on November 25, 2022, the United States Fish and Wildlife Service finalized a rule adding two distinct population segments of the lesser prairie-chicken to the federal list of threatened and endangered wildlife, while also issuing species-specific protections for the lesser prairie-chicken pursuant to ESA Section 4(d). I understand that these species-specific protections prohibit numerous activities within the lesser prairie-chicken's range, and thus understand the 4(d) Rule to operate as a direct regulation of private activity.

9. For example, it is my understanding that the 4(d) Rule for the lesser prairie-chicken broadly prohibits "take" of the species, and that the term take is defined broadly in the ESA to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). I understand that the Service has through regulation defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

10. I understand that the Service has identified habitat degradation, loss, and fragmentation, conversion of grasslands to cropland, energy production activities, livestock grazing, and other factors to be threats to the lesser prairie-chicken.

11. I understand that, as a result of the 4(d) Rule for the lesser prairie-chicken, numerous ordinary land-use activities, like grazing not conducted in accordance with a site-specific grazing plan developed by a Service-approved entity, converting native grassland to cropland or other land use, installation of fences, and the use of motorized machinery that causes the lesser prairie-chicken to avoid an area, among other activities, could lead to take and are therefore now effectively prohibited.

12. I am aware that the Service identified the Short-Grass/CRP Ecoregion in Western Kansas as the area estimated to contain the greatest population of lesser prairie-chickens. I am aware that most, if not all, of Wallace County is contained within this ecoregion.

13. I understand that the presence of native grasslands in this region is among the reasons the Service included it in published range maps for the lesser prairie-chicken.

14. I am personally familiar with JDC Farms' operations and the lands upon which it operates, and regularly visit the land for purposes of site management.

15. The 4(d) Rule for the lesser prairie-chicken imposes significant regulatory burdens on JDC Farms' operations.

16. It is my understanding that many of the normal farming and ranching activities integral to JDC Farms' operations, including operating motorized vehicles and other equipment and machinery, maintaining trails, roads, and water pipelines, and repairing and erecting structures like fences, are heavily regulated if not entirely prohibited under the 4(d) Rule, where they occur in native grassland areas relied upon by the lesser prairie-chicken.

17. For example, JDC Farms rotates our cattle herd to different pastures on our property depending on the time of year. From roughly mid-April to November 1, our cattle graze on native grassland, and from early November to January 1, we run the cattle on pastures that were

previously planted to corn. The ability to rotate our cattle is central to our business. But because our cattle graze on native grasslands, which the 4(d) Rule has identified as essential to the lesser-prairie chicken, we are concerned that the 4(d) Rule for the lesser-prairie chicken will impact our ability to freely conduct our grazing operations, if we have to avoid certain grassland areas.

18. I have plans to convert more areas of my property to native grassland. My family and I cherish this land and believe in the importance of good stewardship, which for us includes expanding and maintaining native grasslands. But I am concerned that the 4(d) Rule for the lesser prairie-chicken makes such voluntary stewardship a liability, as I am subject to the threat of citizen suits and agency enforcement actions under the ESA for any activity that may harm the lesser prairie-chicken, especially activities conducted in native grassland areas.

19. I also intend to imminently apply for an Environmental Quality Incentives Plan (EQIP) grant from the Natural Resources Conservation Service, for approximately 960 acres of grazing land. I am concerned, however, that, given the location and character of this land, NRCS will require a 4(d)-Rule-compliant grazing plan as a condition to the grant. Any such condition would impose significant restrictions on our ability to freely and productively use our property.

20. Schilling Land, LLC, is a lessor of real estate property with less than $34.0 million in annual receipts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in _____, _____, on _____, 2024.

_____
RONALD SCHILLING

previously planted to corn. The ability to rotate our cattle is central to our business. But because our cattle graze on native grasslands, which the 4(d) Rule has identified as essential to the lesser-prairie chicken, we are concerned that the 4(d) Rule for the lesser-prairie chicken will impact our ability to freely conduct our grazing operations, if we have to avoid certain grassland areas.

18. I have plans to convert more areas of my property to native grassland. My family and I cherish this land and believe in the importance of good stewardship, which for us includes expanding and maintaining native grasslands. But I am concerned that the 4(d) Rule for the lesser prairie-chicken makes such voluntary stewardship a liability, as I am subject to the threat of citizen suits and agency enforcement actions under the ESA for any activity that may harm the lesser prairie-chicken, especially activities conducted in native grassland areas.

19. I also intend to imminently apply for an Environmental Quality Incentives Plan (EQIP) grant from the Natural Resources Conservation Service, for approximately 960 acres of grazing land. I am concerned, however, that, given the location and character of this land, NRCS will require a 4(d)-Rule-compliant grazing plan as a condition to the grant. Any such condition would impose significant restrictions on our ability to freely and productively use our property.

20. Schilling Land, LLC, is a lessor of real estate property with less than $34.0 million in annual receipts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Sherman, County Ks, on 4/3, 2024.

RONALD SCHILLING