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UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF UTAH, CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICES, et al., Defendants.	CASE NO. 2:13-cv-00278-DB-BCW **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to the Court's April 1, 2014 Order, ECF No. 61, Defendants United States Fish and Wildlife Service; Daniel M. Ashe, in his official capacity as Director of the U.S. Fish and Wildlife Service; Noreen Walsh, in her official capacity as Regional Director of U.S. Fish and Wildlife Service's Mountain-Prairie Region; the United States Department of the Interior; and S.M.R. Jewell, in her official capacity as Secretary of the Interior, hereby file this reply brief in support of Federal Defendants' cross-motion for summary judgment on all claims in PETPO's

Complaint. For the reasons set forth in the cross-motion and this reply brief, Defendants respectfully request that the Court grant summary judgment in favor of the Defendants.

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INTRODUCTION

PETPO challenges a single application of Section 4(d) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(d), to the Utah prairie dog ("prairie dog"), a species listed as "threatened." 50 C.F.R. § 17.40(g); 77 Fed. Reg. 46158 (Aug. 2, 2012) (the "Rule"). PETPO does not challenge the prairie dog's threatened status,[1] argue that the U.S. Fish and Wildlife Service's ("FWS") determinations are arbitrary and capricious, or that the Rule's procedures are unnecessary to conserve the species. In fact, it does not challenge the substance of the 4(d) Rule. Rather, PETPO's constitutional challenge to the 4(d) Rule springs from its fundamental disagreement with Congress and numerous courts that have recognized the value of ESA-listed species, including the prairie dog, as resources for numerous industries, including pharmaceuticals, agriculture, and tourism. *See, e.g.*, 16 U.S.C. § 1531(a)(2)-(3); ECF No. 56 (Defendants' Brief "Opp.") at 16, 25, 27, 35. Contrary to the conclusions of numerous courts, *see* Opp. at 20-21, PETPO asserts that Congress lacks the authority to protect these valuable resources by regulating the take of prairie dogs so that FWS may ensure the conservation of threatened species.

In its reply brief, ECF No. 59 ("R. Br."), PETPO misconstrues the facts, largely ignores relevant case law, relying instead on generalizations based on *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), and unsupported assertions that amount to little more than PETPO's own opinion. PETPO asks the Court to treat the single application—the Rule—of an ESA provision—Section 4(d)—like the statute at issue in *Lopez*, ignoring the U.S. Supreme Court's admonition in *Gonzales v. Raich*, 545 U.S. 1 (2005), that such comparisons are inappropriate.

Whether the Court isolates the application of ESA Section 4(d) to the prairie dog, as PETPO advocates, or views this Rule in light of the ESA's comprehensive statutory scheme to protect

[1] PETPO is barred by the six-year statute of limitations for civil actions against the United States from challenging FWS' determination that the prairie dog is a threatened species. 28 U.S.C. § 2401(a). FWS downlisted the prairie dog to threatened on May 29, 1984. 49 Fed. Reg. 22330.

endangered and threatened species as valuable resources, PETPO's claims fail. PETPO has failed to meet its heavy burden of showing that no rational basis exists for Congress' conclusion that extending ESA Section 9 prohibitions to intrastate endangered and threatened species, including the prairie dog, alone or "taken in the aggregate, substantially affect[s] interstate commerce." *See Raich*, 545 U.S. at 22. Moreover, PETPO still has failed to meet its burden to demonstrate standing. Accordingly, Federal Defendants' motion for summary judgment should be granted.

ARGUMENT

I. PETPO's myopic focus on *Lopez* and *Morrison* is misplaced

As in its opening brief, PETPO's reply ignores the relevant case law, alleging that those decisions do not address its arguments, without ever distinguishing those cases from the present one. In reality, PETPO's arguments have been raised time and again and rejected by every court to address them. Here, PETPO applies the wrong standard for assessing the constitutionality of the Rule. PETPO disagrees with what it describes as Defendants' "interpretation of *Raich*," arguing that *Lopez* and *Morrison* "concerned part of a larger statute that broadly regulated crime," and that if "defendants' interpretation of *Raich* was correct, then surely both the Gun Free School Zones Act and Violence Against Women Act should have been upheld as part of Congress' comprehensive scheme to regulate crime." R. Br. at 15. Federal Defendants' description of the statutes at issue in *Lopez* and *Morrison* as "single-subject statutes" (that are therefore distinguishable from the 4(d) Rule) is not our "interpretation"; rather it is *Raich*'s interpretation of *Lopez* and *Morrison*. In a strikingly similar situation, the Supreme Court in *Raich* described the respondents' arguments stating, "[i]n their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly." 545 U.S. at 23. The Supreme Court further stated:

> Those two cases, of course, are *Lopez*…and *Morrison*,....Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power,

> the courts have no power 'to excise, as trivial, individual instances' of the class.". At issue in *Lopez*...was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone.

Id. (emphasis added). Here, PETPO takes that same "myopic" view. Unlike the plaintiffs in *Lopez* or *Morrison*, PETPO merely challenges the application of ESA Section 4(d) to Utah prairie dogs. Thus, such reliance on *Lopez* and *Morrison* is misplaced.

II. The 4(d) Rule regulates activities that are part of an economic 'class of activities' that has a substantial effect on interstate commerce

PETPO once again isolates the 4(d) Rule from the ESA's take provisions, arguing that the Rule cannot be sustained under the Commerce Clause because it regulates "any" activity that harms the prairie dog. R. Br. at 1, 8.[2] PETPO's assertions are contradicted by *Raich*, in which the Supreme Court affirmed:

> As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have never required Congress to legislate with scientific exactitude. When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class.

545 U.S. at 17 (citations omitted). Consistent with *Raich*, this application of Section 4(d) cannot be divorced from the relevant ESA provisions (Sections 4(d) and 9) or from the ESA's comprehensive statutory scheme. *See* Opp. at 33-34.

In its opening brief, PETPO described the Fifth Circuit's analysis in *GDF* as "instructive" on the issue of regulation of economic activity and "compelled by the reasoning in *Lopez*. ECF No. 55-1 at 24.[3] Defendants responded showing that the Fifth Circuit held that "it is obvious that the

[2] PETPO abandons its argument that the Rule is unconstitutional because the prairie dog has no commercial value, an assertion Defendants easily refuted in their cross-motion, Opp. at 28-30. *Compare* ECF No. 55-1 at 25, 28, 30, 31, *with* ECF No. 59 at 12 (acknowledging the tourism value of the prairie dog). PETPO now argues that although the prairie dog has commercial value, *see* Opp. at 29-30, such commerce is "insubstantial." R. Br. at 1, 12.

[3] PETPO argues that its members' economic activity is irrelevant to this challenge and implies that the courts in *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), and *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), got the analysis wrong. R. Br. at 9. Even if the Court disagrees with *Rancho Viejo* and *Gibbs*, the circumstances in this case are similar to, and arguably more compelling than, those in *GDF*, which even PETPO characterized as consistent with *Lopez*. Here, there is demonstrated interstate commerce related to the prairie dog itself that would be affected by

majority of takes would result from economic activity," the concern over the loss of species and habitat resulting from development was reflected in the ESA's findings, and that the loss of habitat due to development was one of the threats to that species at issue. Opp. at 33-34. Finally, the Fifth Circuit noted that Section 9 "is economic in nature and supported by Congressional findings to that effect[,]" and held that the extension of take prohibitions to six species, when aggregated with the take of other listed species, substantially affected interstate commerce. 326 F.3d at 640-41. PETPO's response ignores this discussion entirely and in no way undercuts Defendants' arguments.

Similar to the circumstances in *GDF*, FWS previously determined that one of the primary threats to the prairie dog's conservation status is development and urbanization, AR2329. Thus, many of the actions that could result in the take of prairie dogs are commercial in nature, from farming to golfing. Moreover, Defendants have established that the prairie dog itself has commercial value. Thus, the regulation of activities that are likely to harm or kill the prairie dog, which helps to attract thousands of tourists to Utah, is certainly the regulation of "activities that substantially affect interstate commerce" or at least is the regulation of "an economic 'class of activities' that have a substantial effect on interstate commerce." *See Raich*, 545 U.S. at 17. Thus, the Rule challenged here does not "sweep[] in some economic activities," as PETPO argues; the Rule's primary purpose is to regulate those activities related to agriculture and urbanization that most affect prairie dogs. Even if the Court concludes that the 4(d) Rule itself does not have a substantial economic effect, the Rule is still a constitutional exercise of the Commerce Clause because the take of prairie dogs, by themselves and when aggregated with the take of other listed species, substantially affects interstate commerce. *See Raich*, 545 U.S. at 17; *see also GDF*, 326 F.3d at 640-41. Thus, PETPO's arguments must be rejected.

III. Section 9 prohibitions have a firm footing in the Commerce Clause

PETPO claims that any connection between prairie dog takes and interstate commerce is

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the removal of protections of 70% of the animals, protections that FWS determined were necessary for the conservation of the species and which PETPO does not challenge. *See* 16 U.S.C. § 1533(d).

attenuated. R. Br. at 10-14. PETPO essentially fails to address Defendants' argument that the relationship between interstate commerce and the ESA take provisions, which help ensure the continued existence of listed species as valuable resources, is not attenuated, and instead isolates this particular application of ESA Section 4(d). *See* Opp. at 36-37 (citing *GDF*, 326 F.3d at 640 (holding that "the link between species loss and a substantial commercial effect is not attenuated") and *Gibbs*, 214 F.3d at 492). In arguing that take of prairie dogs does not have a sufficiently substantial effect on interstate commerce, PETPO ignores the Supreme Court's affirmation that "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Raich*, 545 U.S. at 17. The only, rather strained, argument that PETPO makes that could be construed as addressing this point is that regulating the take of listed species is comparable to regulating violence perpetrated against women. R. Br. at 14. Addressing this claim strictly on its legal merits and not on PETPO's inartful simile, the obvious distinguishing factor here is that Congress and numerous courts have determined that listed species themselves are resources of commercial value to interstate commerce and thus, the protection of these resources is directly related to interstate commerce.

Even if the Court considers PETPO's arguments about the specific effects of the 4(d) Rule, such arguments are easily dismissed. It is clear that PETPO does not see either the commercial or biological value of the species. However, many people value the prairie dog and travel to Utah to view them. Opp. at 29-30. They may view prairie dogs on federal or non-federal lands and those tourists stay in private hotels, use private restaurants and transportation services, and engage in other commercial activities due to their desire to view prairie dogs and other Utah wildlife. PETPO argues that the motivation behind these visits is due to the federal government's promotion of the species and due to listing of the species as threatened. Neither of these points has any relevance because, in fact, thousands of tourists are visiting Utah each year in part to view prairie dogs and prairie dogs will remain listed as threatened regardless of the outcome of this lawsuit. Moreover,

regardless of PETPO's subjective view of the value of the prairie dog, Congress and numerous courts have recognized the value of all endangered and threatened species as valuable resources. PETPO's alarmist claim that, "[s]ince all species affect their ecosystem and biodiversity, defendants' argument would similarly support the authority to regulate any activity affecting any living thing," R. Br. at 13, is mere hyperbole and ignores the specific findings related to endangered and threatened species and the limitations set forth in the ESA. *See* Opp. at 4, 25-28, 35.

IV. The ESA is a comprehensive scheme that bears a substantial relation to commerce

PETPO utterly ignores the Congressional findings and Circuit opinions holding that the ESA is a comprehensive "regulatory statute [that] bears a substantial relation to commerce." *See* Opp. at 25-28. Nor does it substantively address the many cases that have concluded that Congress enacted the ESA, in part, to conserve endangered and threatened species and their habitat, as valuable resources for numerous industries. *See id*. Nor does it substantively address Defendants' argument that protecting species by regulating take, thereby helping to ensure the continued existence of listed species, is directly related to interstate commerce. *See GDF*, 326 F.3d at 640 (holding that "the link between species loss and a substantial commercial effect is not attenuated"). Instead, it relies on sweeping and meritless statements that offer no counterpoint to the body of case law, statutory evidence, and legislative history undergirding the constitutionality of the 4(d) Rule. *See* R. Br. at 3.

V. Congress may regulate the take of intrastate species, including the prairie dog, as a necessary part of a more general regulation of interstate commerce under the ESA

PETPO argues that the 4(d) Rule cannot be sustained under the Necessary and Proper Clause because Defendants have not shown that the 4(d) Rule is a necessary part of the ESA's general regulation of interstate commerce. R. Br. at 15. Once again, PETPO is misconstruing *Raich*. *See* 545 U.S. 17 (rejecting invitation to excise individual applications of a concededly valid comprehensive statutory scheme). Neither Congress nor FWS has to show that the individual application of ESA Section 4(d) is necessary to regulate economic activity under the ESA. *See id.* at 18-19 (noting that the Court "had no difficulty concluding that Congress had a rational basis for

believing that, when viewed in the aggregate, leaving home-consumed wheat[, a purely intrastate, non-commercial activity] outside the regulatory scheme would have a substantial influence on price and market conditions"). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to 'excise, as trivial, individual instances' of the class." *Id*. at 23; *see also Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1276 (11th Cir. 2007) (rejecting argument that the constitutionality of FWS' listing decision turns on the present or potential commercial value of the Alabama sturgeon alone). Here, the class of activities is the regulation of take of intrastate species under Sections 4(d) and 9, not just the single application of Section 4(d) to the prairie dog. *See* Opp. at 40-41.

Circuits addressing this very issue have determined that regulating take of intrastate species is an essential part of the ESA's economic regulatory scheme.[4] *See GDF*, 326 F.3d at 640; *Gibbs*, 214 F.3d at 497. Although PETPO may not value ESA-listed species,[5] including intrastate species making up 68% of all listed species, Congress and numerous courts do. Thus, in protecting the species' continued existence, the ESA is protecting recognized valuable resources for numerous industries and for the Nation in general, which is one of the primary goals of the ESA.[6]

VI. *Wyoming v. U.S. Dep't of Interior*

In our cross-motion, Defendants explained that, under different circumstances, the District of Wyoming determined that a Commerce Clause challenge to the ESA was "meritless." Opp. at 26 (citing *Wyoming v. U.S. Dep't of Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005), *aff'd*, 442 F.3d

[4] Thus, the fact that the prairie dog is not part of the wildlife trafficking trade is irrelevant because the regulation of take of prairie dogs specifically, and of listed species generally, is an essential part of the ESA's economic regulatory scheme. *See* R. Br. at 16.

[5] PETPO appears to make an exception for the species covered under the Bald and Golden Eagle Protection Act. R. Br. at 17. PETPO fails to address Defendants' showing that, although in some circumstances that Act may regulate those species as articles of commerce, the prohibitions in that conservation statute have been described as "sweepingly framed" and extending beyond commercial activities. *See* Opp. at 38-39.

[6] Accordingly, PETPO's argument that, "[i]f defendants were correct, the Supreme Court should have considered only whether regulating the purely intrastate cultivation and possession of marijuana was a rational means to further Congress' goal to conquer drug abuse," should similarly be dismissed as meritless. R. Br. at 15.

1262 (10th Cir. 2006)). Defendants also noted that on appeal, the Tenth Circuit, in a short opinion, specifically mentioned the district court's holding on the Commerce Clause challenge and then affirmed "the judgment of the District Court for substantially the same reasons given in its opinion." 442 F.3d at 1264. PETPO now argues that this case is irrelevant because on appeal Wyoming did not preserve its Commerce Clause argument. R. Br. at 7. However, the defendants did advance this Commerce Clause argument. Brief of Federal Appellees, 2005 WL 4976502 (Aug. 9, 2005). The Tenth Circuit at least did not disagree with the lower court's conclusion on that matter where the Tenth Circuit in a four-line summary of the district court's opinion mentioned the Commerce Clause determination specifically and then affirmed the lower court's decision citing the pages that included the discussion of the constitutionality of the ESA under the Commerce Clause. Defendants do not rely on the Tenth Circuit's decision, but rather simply bring it to this Court's attention.[7]

VII. PETPO has not met its burden of establishing Article III standing

PETPO still has failed to make the required showing that it is "'likely,' as opposed to merely 'speculative,' that [its members' alleged injuries] will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted); *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1166 (10th Cir. 2012). PETPO asserts that it has established redressability because the "requested relief would bring PETPO's members one important step closer to being able to use their property as they wish." R. Br. at 5. PETPO argues that "the state regulation applies as a consequence of, and relies upon, the federal prohibition." *Id.*; *see also id.* at 6 (claiming that the "application of the state regulation depends on the federal prohibitions"). PETPO also appears to argue that the State's recognition of the prairie dog as a "state sensitive species" is dependent on

[7] PETPO also attempts to discredit Defendants' assertion that the First Circuit affirmed the constitutionality of the ESA. R. Br. at 7. In *Strahan v. Coxe*, the First Circuit did note that the defendants "wisely do not challenge Congress' authority to enact" the ESA. 127 F.3d 155, 168 (1st Cir. 1997). However, the court addressed the constitutionality of the ESA in a later discussion of the defendants' Tenth Amendment challenge, stating that Congress has the authority under the Commerce Clause to regulate the Commonwealth pursuant to the ESA. *Id.* at 170.

FWS' regulation of take of prairie dogs. *Id.* PETPO's arguments lack any merit.

Utah recognizes "wildlife species or subspecies listed under the ESA, and now or previously present in Utah" as "state sensitive species." Utah Admin. Code R657-48(2)(o)(i). PETPO cannot challenge the listing decision and, thus, the prairie dog will continue to be regulated as a "state sensitive species." *Contra* R. Br. at 5. Nor is the state regulation affected by the litigation. The state regulation, in fact, pre-dates the challenged 4(d) Rule and has consistently been more protective of the species, a fact PETPO concedes. ECF No. 55-1 at 7. If the Court rules in PETPO's favor, arguably PETPO's members would be in a worse position. The state regulation prohibits the take of prairie dogs, unless a person first obtains a certificate of registration, which will not be issued unless the "taking will not further endanger the existence of the species,"[8] and one of the listed criteria is met. R657-19-6(1)(b)(i)-(iii). Thus, without the ESA mechanisms that make up the listed exceptions, the categorical ban would apply. A favorable decision in this case would not require the Utah Division of Wildlife Resources ("UDWR") to allow PETPO's members to take prairie dogs at will. *See US Magnesium*, 690 F.3d at 1166. Should Utah wish to provide alternative exemptions to its ban on the take of prairie dogs, it would need to amend the regulation to provide for that. However, PETPO has made no showing that the State intends to take these steps and such a showing is necessary. *See id.* ("When redressability depends on a third party and there is no evidence suggesting a likelihood that the third party will take the action necessary to afford the plaintiff relief, the plaintiff lacks standing."). The facts of this case are markedly different from those in *US Magnesium*, in which the plaintiff presented a declaration from the State that asserted that, depending on the outcome of the lawsuit, it intended to act in a manner consistent with the plaintiff's requested relief. *Id.* The Tenth Circuit also considered the State's stated opposition to the EPA's position. *Id.* In contrast, here PETPO presents no such evidence and UDWR has not only acted consistently with the federal government's determination that the prairie dog is a threatened

[8] It is also questionable whether one could establish that take would not "further endanger the existence of the species" after 70% of all prairie dogs have been stripped of ESA protections.

species that must be protected, but for years it has had a regulation in place that is more protective of prairie dogs than the ESA.

PETPO cites *Village of Arlington Heights*, which is inapposite. There, the Court concluded that plaintiff had standing in a housing development case because the challenged action stood as "an absolute barrier to constructing the housing" development that plaintiff had contracted to build. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977). The Court found persuasive that the impediments to complete redress, such as the need to secure financing and qualify for federal subsidies, were practical in nature and that "all housing developments are subject to some extent to similar uncertainties." *Id.* at 261-62. Here, redressability of PETPO's alleged harm is wholly speculative and dependent on the actions of the State and PETPO's successful challenge of the state regulation.[9] PETPO has not met its burden to show that "those choices have been or will be made in such manner as to produce causation and permit redressability of injury" and, thus the Court should grant summary judgment in favor of Defendants. *US Ecology v. U.S. Dep't of Interior*, 231 F.3d 20, 24-25 (D.C. Cir. 2000).[10]

CONCLUSION

For the reasons set forth in Defendants' cross-motion and this reply brief, Defendants respectfully request that the Court grant summary judgment in favor of Defendants.

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[9] PETPO also cites *Larson v. Valente*, 456 U.S. 228 (1982), which is similarly distinguishable. There, the challenged rule was the sole basis for the State defendant's attempt to compel registration of a church, the action that gave rise to the suit. *Id.* at 242-43. The Court stated that if the provision is declared unconstitutional, "the Church cannot be compelled to register and report under the Act unless the Church is determined not to be a religious organization[,]" and the lower court had already determined that the State bears a considerable burden in questioning a claim of religious status. *Id.* at 243.Unlike the highly speculative nature of the relief sought by PETPO, in *Larson* the plaintiff was almost assured of its relief because the State's task of establishing that an entity is not a religious organization was quite onerous. *Id*

[10] PETPO members are not forbidden from using or developing their property or providing municipal services. *Contra* R. Br. at 4. Property owners may seek take authorization for property development under permits issued by FWS to Iron County. Opp. at 8-9. For take authorized by the 4(d) Rule, PETPO members simply need to request authorization from FWS as PETPO member Cedar City recently did for the Cedar City cemetery and Golf Course. *See* Exhibit 1. Once the city installs the fence, it will be permitted to translocate prairie dogs from the specified areas and is "authorized to lethally remove" prairie dogs that reenter the specified area.

DATED this 2nd day of May, 2014.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT FOR THE

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PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICES, et al., Defendants.	CASE NO. 2:13-cv-00278-EJF **CERTIFICATE OF SERVICE**

I hereby certify that today I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Mary Hollingsworth
MARY HOLLINGSWORTH