

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

Civil Action No. \_\_\_\_\_

**FOREST GUARDIANS,**

Plaintiff,

v.

**BUREAU OF LAND MANAGEMENT, a federal agency within the Department of  
Interior, and LESLIE A. THEISS, Bureau of Land Management Carlsbad Field Office  
Field Manager,**

Defendant.

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**COMPLAINT**

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## I. INTRODUCTION

1. The Bureau of Land Management (“BLM”) and Leslie A. Theiss serving in her official capacity, (collectively referred to as the “Agency” or “Defendant”), violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, the Federal Lands Policy Management Act (“FLPMA”), 43 U.S.C. §§ 1701, *et seq.*, the Mineral Leasing Act, as amended by the Federal Onshore Oil and Gas Leasing Reform Act, 30 U.S.C. §§ 181, *et seq.* (“MLA”), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§701, *et seq.*, by unlawfully granting exceptions for oil and gas operators and lessees to surface occupancy requirements necessary for the protection of the species Lesser Prairie-Chicken (or LPC) found in the BLM’s Carlsbad Resource Area, Eddy and Lea Counties, New Mexico.
2. The BLM manages the federal lands at issue in this dispute. BLM Carlsbad Field Office Field Manager Leslie A. Theiss is the agency officer that signed approximately thirteen (13) exceptions in 2004 granting exemptions to mineral lease and Resource Management Plan (“RMP”) stipulations necessary for the protection of the species Lesser Prairie-Chicken. Ms. Theiss’ office is located in Carlsbad, New Mexico.
3. The Agency’s granting of exceptions to protective stipulations for the Lesser Prairie-Chicken violates NEPA’s requirement that agencies carefully gather and evaluate relevant information about the potential impact of a proposed agency action on the environment and ensure that the agency inform the public that it has considered environmental concerns in its decisionmaking process thereby guaranteeing that the public is involved in and aware of

agency processes. The Agency's decision to grant exceptions to the LPC timing restrictions violates FLPMA because it is not in conformance with the Carlsbad RMP, failed to engage in a balancing test in order to determine whether the stipulation exemption is in the public interest, and caused undue and unnecessary degradation of the environment. Lastly, the Agency's authorizations failed to comply with the public notice and participation requirements of the MLA, as amended.

4. With regard to surface use and occupancy requirements for oil and gas related activities on BLM lands, the BLM's Resource Management Plan ("RMP") for the Carlsbad Resource Area requires that,

Drilling for oil and gas, and 3-D geophysical exploration operations will not be allowed in Lesser Prairie-Chicken habitat during the period of March 15 through June 15, each year. During that period, other activities that produce noise or involve human activity, such as the maintenance of oil and gas facilities, geophysical exploration other than 3-D operations, and pipeline, road, and well pad construction, will be allowed except between 3:00 a.m. and 9:00 a.m. The 3:00 a.m. to 9:00 a.m. restriction will not apply to normal, around-the-clock operations, such as venting, flaring, or pumping, which do not require a human presence during the period. Additionally, no new drilling will be allowed within up to 200 meters of leks known at the time of permitting. Normal vehicle use on existing roads will not be restricted. Exhaust noise from pump jack engines must be muffled or otherwise controlled so as not to exceed 75 db measured at 30 feet from the source of the noise. Exceptions to these requirements will be considered for areas of no or low prairie-chicken booming activity, or unoccupied habitat, including leks, as determined at the time of permitting, or in emergency situations.

Carlsbad RMP Amendment Record of Decision (1997), at AP1-4 (hereinafter, "LPC Stipulation").

5. Upon information and belief, the Agency granted approximately thirteen (13) exceptions from the above surface use and occupancy requirement for the Lesser Prairie-Chicken in 2004 to oil and gas operators and lessees.

6. All of BLM's 2004 exceptions were signed by Leslie A. Theiss, BLM CFO Field Manager. The exceptions were granted primarily in the context of BLM's allowance of oil and gas drilling and exploration activities on BLM land in the Carlsbad Resource Area in Lesser Prairie-Chicken habitat.
7. No environmental analysis and/or public notice accompanied approval of the granting of the exceptions. Additionally, every exemption to the LPC stipulation requested by the oil and gas industry was granted in 2004.
8. Further, upon information and belief, the agency did not conduct surveys for Lesser Prairie-Chicken or their habitat prior to granting the exemptions.
9. All of the exceptions (and subsequent oil and gas activity) occurred in Eddy and southern Lea counties in New Mexico.
10. Similarly, and upon information and belief, the Agency has granted exceptions from protective surface occupancy stipulations for the Lesser Prairie-Chicken to oil and gas operators and lessees in 2000, 2001, 2002, 2003. These exceptions were granted in the absence of environmental analysis, public notification, and/or surveys for Lesser Prairie-Chicken.
11. These exceptions constitute final agency action.
12. Upon information and belief, exceptions have been granted by the Agency in March, 2005. Upon information and belief, additional exceptions will be granted by the Agency in 2005.
13. Forest Guardians (hereinafter "Plaintiff") asks that the Court declare unlawful, set aside, and enjoin the implementation of the Agency's decision granting exceptions to protective stipulations for the Lesser Prairie-Chicken and determine that Defendant: (1) violated

NEPA and its supporting regulations by failing to properly and fully analyze and take a hard look at the direct, indirect and cumulative environmental impacts of granting exceptions to surface use and occupancy requirements for Lesser Prairie-Chicken; (2) violated FLPMA and its supporting regulations by failing to comply with the non-discretionary requirements of the Carlsbad RMP, failed to engage in a balancing test in order to determine whether the stipulation exception is in the public interest, and prevent undue and unnecessary degradation of the environment; (3) violated the MLA by failing to comply with public notice and participation requirements; and, (4) violated the APA by taking actions and making findings and conclusions that are arbitrary, capricious, abusive of discretion, or otherwise not in accordance with law.

## **II. JURISDICTION AND VENUE**

14. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), and 5 U.S.C. §§ 701-706 (judicial review provisions of the Administrative Procedure Act). The Court may order relief pursuant to 28 U.S.C. § 2201 (declaratory judgments).
15. The final agency approval challenged in this complaint transpired in New Mexico. Venue in this Court is therefore proper under 28 U.S.C. § 1391(e).

## **III. PARTIES**

16. Plaintiff, FOREST GUARDIANS, is a Sante Fe, New Mexico-based nonprofit conservation organization, and has members throughout the southwest, including the Carlsbad, New Mexico that utilize and enjoy the BLM's Carlsbad Resource Area. Forest Guardians works to protect and restore the native biological diversity and watersheds of

the American Southwest; educate and enlist citizens to support protection of the forests, rivers, deserts and grasslands of this arid region; advocate for the principles of conservation biology in plans to restore degraded ecosystems and watersheds; enforce and strengthen environmental laws; and, support communities in efforts to protect their land and to practice and promote sustainable use of natural resources. Forest Guardians and its members work to protect public lands in the Carlsbad Resource Area and the native species of wildlife, fish, and plants that depend upon this unique region. Members and staff of Forest Guardians frequently recreate in the Carlsbad Resource Area, observe and attempt to observe wildlife and other native species, and plan to continue to do so in the future. Staff and members of Forest Guardians derive great enjoyment from recreating in the Carlsbad Resource Area and enjoy its natural wonders. Members also work to compel the BLM, which is charged with managing the BLM and its natural values, to follow the laws and policies designed to protect the health of this land. Through comments, public outreach and education, administrative appeals, and litigation where necessary, Forest Guardians and its members participate in the BLM's management of public lands and have done so for most of their 15-year history. Forest Guardians and its members administratively challenged the Roswell Resource Management Plan which also includes the LPC stipulations; has challenged leasing of more than a dozen parcels in the Carlsbad Resource Area on account of the impact of oil and gas on the Lesser Prairie-Chicken, and the problem of continued exemptions of prairie-chicken stipulations; and has proposed a Lesser Prairie-Chicken Area of Critical Environmental Concern ("ACEC") in the Roswell

and Carlsbad Resource Areas which includes 935 sq. km. of BLM land. This ACEC was proposed in large part to address the continued negative impacts of oil and gas on this imperiled grouse species. Additionally, Forest Guardians has been intimately involved in advocating for meaningful protections and safeguards for the Lesser Prairie-Chicken, including its listing under the Federal Endangered Species Act. The above-described scientific, educational, aesthetic, recreational, spiritual, and conservation interests of Forest Guardians and its members have been and are being adversely affected and irreparably injured by Defendant's decision granting exceptions to surface use and occupancy requirements for the Lesser Prairie-Chicken.

17. The Agency's approval of exceptions to these stipulations without performing required NEPA analysis, complying with FLPMA, and the MLA denies Plaintiff, and its members and staff, the right to informed decision-making and full disclosure under NEPA, as well as the right to meaningfully participate in the decision-making process. Therefore, Plaintiff's identified interests will be irreparably damaged by the Agency's failure to comply with Federal law.

18. The adverse environmental impacts which arise from the Agency's authorization of exceptions to protective stipulations for the Lesser Prairie-Chicken without complying with NEPA, FLPMA and MLA also harms the Plaintiff's aesthetic, and recreational interests in the public lands and resources which would be impacted by the proposed action.

19. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT is a federal agency

under the United States Department of Interior. The BLM is responsible for, among other things, conducting the required environmental analysis pursuant to NEPA for actions it approves which affect the lands and mineral resources under its supervision, including actions related to oil and gas operations in the Carlsbad Resource Area. BLM is also responsible for ensuring that its actions comply with its governing Resource Management Plan and do not cause undue and unnecessary degradation of the environment.

20. Defendant LESLIE A. THEISS is the Bureau of Land Management Carlsbad Field Office Field Manager. Ms. Theiss is responsible for ensuring compliance with federal law as it relates to actions of BLM within the Carlsbad Resource Area. Ms. Theiss signed and thereby authorized the decisions granting exceptions to protective stipulations for the Lesser Prairie-Chicken. Mr. Theiss' decision constitutes the final administrative determination of the BLM. Ms. Theiss is sued in her official capacity.

21. Upon information and belief, Tony Herrell has replaced Ms. Theiss as director of the BLM's Carlsbad Field Office.

## **VI. STATEMENT OF FACTS**

22. The Lesser Prairie-Chicken, *Tympanuchus pallidicinctus*, is a member of the grouse family Phasianidae. The Lesser Prairie-Chicken is an upland, grassland-nesting bird historically found in regions of Kansas, Colorado, Oklahoma, New Mexico, and Texas. Related to the sharp-tailed grouse and differing from the greater prairie-chicken in color, size, and primarily in range, the Lesser Prairie-Chicken is best known for its unique courtship displays and "booming" grounds. A highly social animal, the lesser prairie-chicken is most easily observed



in spring (March to June) when males gather to display and vocalize for females.



Photo: Two male lesser prairie-chickens during mating display. © Jess Alford.

23. “Average length ranges from 38-41 centimeters (15-16 inches) (Johnsgard 1973). The plumage of the lesser prairie-chicken is similar to that of the greater prairie-chicken, although it is somewhat lighter and is characterized by alternating brown and buff-colored barring. Males have long tufts of feathers on the sides of the neck which are erected during courtship display. Males also display yellow-orange eyecombs and reddish-purple air sacs during courtship displays (Copelin 1963, Johnsgard 1983). Lesser prairie-chickens were first described as a subspecies of the greater prairie-chicken (Ridgway 1873) but were granted

specific status in 1885 (Ridgway 1885).” 63 Fed. Reg. 31400, 31401 (1998)

24. The mating system of Lesser Prairie-Chickens is centered on their display grounds, which are called leks. A lek is an area in which several males gather to perform their elaborate mating display in Spring (March through June). The males have orange-colored sacs on their necks, which they inflate to make them more conspicuous. At the same time, they lower their heads, raise feathers on the backs of their necks, fan their tail feathers, make short jumps into the air, flap their wings, and rapidly stamp their feet on the ground. The males face off with each other in display contests and sometimes are aggressive toward each other. All of this activity is accompanied by a warbling gobble (or boom) that is somewhat reminiscent of a turkey, and may be audible for over a mile if not impeded by other noise. Female Lesser Prairie-Chickens are attracted to such behavior, especially the boom, and come to the lek and select a male. The mating takes place on the lek, usually in March through June, and the female then leaves to begin nesting. *See*, 63 Fed. Reg. 31400, 31401 (1998)
25. Males may live for five years, and, unless the lek is disturbed or becomes unproductive during mating because of noise disturbance, usually use the same lek throughout their lives. Leks are used by several generations of males, and some leks have been documented to remain active for fifty years. The lek is a large open area with little or no vegetation.
26. “After mating, the hen selects a nest site, usually 1-3 kilometers (km) (0.6-2 miles (mi)) from the lek (Giesen 1994b), and lays an average clutch of 10-14 eggs (Bent 1932, Taylor and Guthery 1980). Second nests may occur when the first attempt is unsuccessful. Incubation lasts 23-26 days, and young leave the nest within hours of hatching (Coats 1955). Broods

may remain with females for 6-8 weeks (Ehrlich et al. 1988). Campbell (1972) estimated a 65 percent annual mortality rate, and a 5-year maximum life span. Giesen (1997) provided a comprehensive summary of lesser prairie-chicken breeding behavior, habitat, and phenology.”

63 Fed. Reg. 31400, 31401 (1998)

27. Lesser Prairie-Chickens eat grasshoppers and other insects, seeds, leaves, waste grain, and the acorns and catkins of shinnery oak. *See*, 63 Fed. Reg. 31400, 31401 (1998)
28. As a year-round resident to their habitat, the breeding, summer, and winter ranges of the Lesser Prairie-Chicken are identical.
29. The minimum land area needed to maintain a breeding population of Lesser Prairie-Chickens is an area of prime nesting and brood-rearing cover approximately two-square miles (1,280 acres) in size, surrounded by a minimum of 10,000 acres of feeding and loafing habitat. Complexes of suitable Lesser Prairie-Chicken habitat of up to 25,000 acres provide optimum conditions for maintaining populations.
30. Historic Lesser Prairie-Chicken habitat includes the counties of Harding and Union on the north and Eddy and Lea counties on the south in New Mexico. In southeastern Colorado, it includes six counties, only four of which - Baca, Cheyenne, Prowers, and Kiowa – currently contain any population of the species. In Kansas, the Lesser Prairie-Chicken’s range covered southwestern quarter of the state bordering Oklahoma and Colorado. In Oklahoma, its range included the State’s panhandle and northwest counties. In Texas, the northeastern and southwestern counties of Hemphill, Lipscomb, Wheeler, Donley, Cochran, Yoakum, Gray, Hutchinson, Lamb, Motley, Hall, Dickens, Andrews, Dawson, Lynn, Terry, Hale, Roberts,

Ochiltree, King, Cottle, Hockley, and Gaines in the Texas panhandle.

31. The Lesser Prairie-Chicken has undergone severe declines in population. Populations likely exist in all of the states within its historic range except Nebraska, but total numbers are estimated to have declined by 97% since the 1800s, and Lesser Prairie-Chickens only occupy about 8% of the total land area in which they were once found. A concurrent decline has occurred in southeastern New Mexico. In the twentieth century, human influences such as the conversion of native rangelands to cropland, decline in habitat quality due to herbicide use, petroleum and mineral extraction activities, and excessive grazing of rangelands by livestock have contributed to this decline. In New Mexico, decline is partly attributable to dramatic increases in petroleum and mineral extraction activity.
32. “In New Mexico the lesser prairie-chicken is an upland game bird, although the hunting season was closed in 1996. Estimates of occupied range in New Mexico over the last century suggest a pattern of decline and increase, including reoccupation of former range (Ligon 1927, Snyder 1967, Sands 1968). In the 1950s, the population was estimated at 40,000-50,000 (Sands 1968) and by 1972, at 6,000-10,000 birds (Taylor and Guthery 1980 based on Campbell 1972). Survey data from 1971-1997 analyzed by the New Mexico Natural Heritage Institute show a clear decrease after 1988. During the 1990s, much greater survey efforts continually failed to yield increased numbers of prairie-chickens on traditional lek sites on Bureau of Land Management (BLM) administered property.” 63 Fed. Reg. 31400, 31402 (1998).
33. Between 1985 and 1990, there were a minimum of 35 documented booming grounds known

to be active within the Carlsbad Resource Area. From 1990 to the present, the number of active leks with the Carlsbad Resource Area has been decreasing. During 2002 lek surveys, only one active lek was documented and two single vocalizations of LPC were heard. During 2004 surveys, only two active leks were detected.

34. Construction of well locations and around-the-clock noise generated from drilling of the well impacts the Lesser Prairie-Chicken by reducing the establishment of seasonal booming grounds or leks, thus reducing reproductive success in the species. The noise generated by the drilling rig and/or propane/diesel operated pump jack motors (unmuffled) mask the booming of the male Lesser Prairie-Chicken and thus, the females cannot hear the booming. In turn, they do not arrive at the booming ground, and subsequently, there is no courtship interaction and no reproduction. With no reproduction and the resulting loss of recruitment into the local population, the booming ground will eventually become inactive because there are no young birds to replace the more mature birds when they die. Additionally, the vegetation depleted from surface disturbance decreases the area available for nesting, brooding and feeding activities.
35. The U.S. Fish and Wildlife Service determined that the Lesser Prairie-Chicken warranted listing under the federal Endangered Species Act (“ESA”) in 1998, but was precluded from actual listing by higher priority actions. 63 Fed. Reg. 31400-31406 (1998). The Lesser Prairie-Chicken has been a candidate for listing under the ESA since 1998. *Id.*; *accord*, 66 Fed. Reg. 1295 (2001) and 66 Fed. Reg. 54808 (2001).
36. BLM Manual 6840 contains the BLM’s policy for candidate species for listing as threatened

or endangered species under the ESA. According to BLM Manual 6840, “the BLM shall implement management plans that conserve candidate species and their habitats and shall ensure that actions authorized, funded, or carried out by the BLM do not contribute to the need for species to become listed.” BLM Manual 6840.06(C). Among other things, the agency must “evaluate the significance of lands administered by the BLM or actions undertaken by the BLM in maintaining and restoring the species.” BLM Manual 6840.06(C)(1). Further, where BLM authorized actions have a “significant effect” on the candidate species status, the BLM shall manage the habitat to conserve the species by “implementing range-wide or site-specific management plans, conservation strategies, and assessments for candidate species”, “[e]nsuring that BLM activities affecting the habitat of candidate species are carried out in a manner that is consistent with the objectives for managing those species”, and “[m]onitoring populations and habitats of candidate species to determine whether management objectives are being met.” BLM Manual 6840.06(C)(2).

37. In New Mexico, the Carlsbad Field Office of the Bureau of Land Management manages approximately 2 million acres of public land in Eddy, Lea, and southern Chavez counties. Public land comprises approximately 46 percent of the planning area. The Carlsbad Field Office BLM lands include Lesser Prairie-Chicken habitat in Eddy and Lea counties.
38. The BLM in its 1997 Amendment to the agency’s Resource Management Plan (“RMP”) for the Carlsbad Resource Area provided surface use and occupancy requirements for the Lesser Prairie-Chicken during breeding season.
39. BLM’s protective surface use and occupancy requirements for Lesser Prairie-Chicken are set

out in the BLM's RMP for the Carlsbad Resource Area. See, Carlsbad RMP Amendment Record of Decision (1997) at AP1-4.

40. According to the BLM, the LPC stipulation "will pertain only to oil and gas related activities" conducted in the Carlsbad Resource Area. Carlsbad RMP Amendment Record of Decision (1997) at AP1-1.

41. In 2004, the BLM Carlsbad Field Office granted the following exceptions to the Carlsbad RMP LPC stipulation:

- (a) March 7, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Yates Petroleum (Adeline ALN Fed #5, #6, #12);
- (b) March 7, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling to Gruy Petroleum (Mescalero 20 Fed 1);
- (c) March 7, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Samson Resources (New Mexico D Fed #2 and TSS Com #2);
- (d) March 7, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling to Edge Petroleum (Henshaw 7 Fed. #1);
- (e) March 7, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Oxy USA (Big Red Truck Fed #1);
- (f) March 7, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Mewbourne Oil Company (Tamano 15 Fed Com #2);
- (g) March 7, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Mack Energy Corporation (Fox Federal #5, Leopard Federal #1);
- (h) April 21, 2004, BLM granted an exception to the timing part of the LPC stipulation for 3-D geophysical exploration to Dawson Geophysical Company for areas of BLM lands within the Carlsbad Resource Area;
- (i) April 27, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Pecos Production (Baish #10);

- (j) April 30, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Samson Resources (Bandit 15 Fed Com #1);
- (k) May 14, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Samson Resources (Marverick 14 Fed Com #1);
- (l) May 18, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Bass Enterprises Production Company (Poker Lake Unit #197); and,
- (m) May 18, 2004, BLM granted an exception to the timing part of the LPC stipulation for drilling or 3-D geophysical exploration to Harvard Petroleum Corporation (James Federal #5).

42. All thirteen BLM exceptions were signed by Leslie A. Theiss, BLM CFO Field Manager.

43. All thirteen BLM exceptions were granted after BLM issued permits for oil and gas operations or exploration activity that adopted LPC stipulations as a condition of approval. None of the exceptions were granted for emergency situations.

44. The exceptions were granted primarily in the context of BLM's authorization of oil and gas drilling or exploration activity.

45. Upon information and belief, more exceptions to the LPC stipulation were granted in 2004.

46. Upon information and belief, every exception requested by industry was granted in 2004.

47. Upon information and belief, exceptions have been granted by the Agency in March, 2005.

Upon information and belief, additional exceptions will be granted by the Agency in 2005.

48. Upon information and belief, no environmental analysis and/or public notice accompanied the BLM's approval and granting of the exceptions.

49. Upon information and belief, no surveys for Lesser Prairie-Chicken were conducted and finalized prior to the granting of the exceptions. Specifically, the BLM failed to determine



Lesser Prairie-Chicken booming activity or occupied habitat at the time of or prior to the BLM's authorization sufficient to grant the exceptions.

50. All of the exceptions (and subsequent oil and gas activity) were authorized for BLM lands and occurred in Eddy and southern Lea counties.

51. Upon information and belief similar exceptions to BLM's LPC stipulation were granted in the years 2000, 2001, 2002, and 2003.

52. In 2000, approximately 88 exceptions to the LPC stipulation were granted. Of these 88, 71 were exceptions to the timing restriction for oil and gas and 3-D exploration, while 17 were exceptions to the 3am-9am restrictions on other oil and gas activities. In 2001, approximately 237 exceptions were granted. Of these 237, 134 were exceptions to the timing restriction for oil and gas and 3-D exploration, while 103 were exceptions to the 3am-9am restrictions on other oil and gas activities. In 2002, approximately 92 exceptions to LPC stipulations were granted, 91 of which were exceptions to the timing restriction for oil and gas and 3-D exploration, while one was an exception to the 3am-9am restriction on other oil and gas activities. In 2003, approximately 59 exceptions to LPC stipulations were granted.

53. On March 5, 2004, the BLM sent a letter to industry which,

outlines where the timing part of the Lesser Prairie-Chicken (LPC) stipulations or Conditions of Approval (COA) will be applied for the 2004 LPC breeding season. Areas identified for application of the time restriction (March 15- June 15, 2004), for round-the-clock drilling or construction activities or seismic operations have been identified on the enclosed maps based on criteria explained below.

*See March 5, 2004, BLM CFO Letter to Oil and Gas Industry Regarding LPC Stipulation and Maps and Exception Guidance for 2004 ("BLM's March LPC guidance letter").*

54. According to the BLM's March LPC guidance letter, the BLM's criteria for delineating the stipulated areas included (1) those areas that were identified in the 1988 Carlsbad RMP as "core" areas, have recent LPC activity, or are within a 2-mile radius of a previously known lek-site, or (2) those areas where LPC would likely be found given current habitat conditions or where no documentation exists of any survey efforts within suitable habitats. *Id.*
55. The BLM's March Guidance letter was not subject to public review and was issued without environmental analysis.
56. On July 29, 2004, the BLM issued the *2004 Lesser Prairie-Chicken Survey Report and Recommendations* ("2004 LPC Survey Report"). The 2004 Survey Report was issued almost two months after the BLM's granting of the thirteen or more exceptions to the LPC stipulation in 2004.
57. According to the 2004 LPC Survey Report, "The data collected during this survey season suggest that although audible survey techniques resulted in some confirmation of LPC presence in lands managed by BLM-CFO, other survey techniques should be explored until noise abatement programs are in effect."
58. According to the 2004 LPC Survey Report, "Lesser Prairie-Chicken (LPC) surveys were conducted from March 25, 2004 until May 15, 2004 by BLM personnel from the Carlsbad Field Office (CFO). A total of 118 individual routes were surveyed for audible LPC activity." *Id.* at 1. Approximately 331,997 acres were surveyed for audible LPC activity. *Id.* at 2.
59. According to the 2004 LPC Survey Report,
- Industrial noises were dominant throughout the survey area. At each listening point, the level

of ambient noise was recorded (Table 2, Fig. 1) with the source of noise(s). Survey data indicate that types of noise most encountered were unmuffled pump jacks and compressor stations (Table 2, Fig. 2). Both types of noise routinely impeded the surveyor's ability to hear on more than one listening point on a survey, thus emphasizing the size of the area impacted by the noise. In one instance, near QP-18 [one of two identified active booming grounds], surveyors could hear a compressor in the distance but no LPC vocalizations. During the survey, the compressor engine shut off. Moments later, LPC began vocalizing. It was the first time since 1988 that LPC were recorded being in the area (BLM-CFO unpublished data). After locating and actually viewing the LPC, it was determined that the lek was active (Fig. 3). Had the compressor not shut off, LPC would not have been confirmed as present there.

Id. at 3.

60. According to the BLM's LPC stipulation "Exhaust noise from pump jack engines must be muffled or otherwise controlled so as not to exceed 75 db measures at 30 feet from the source of the noise." Carlsbad RMP Amendment Record of Decision (1997) at AP1-4. Additionally, "During that period, other activities that produce noise or involve human activity, such as the maintenance of oil and gas facilities, geophysical exploration other than 3-D operations, and pipeline, road, and well pad construction, will not be allowed except between 3:00 a.m. and 9:00 a.m." Id.
61. Upon information and belief, the BLM has not complied or determined compliance with the noise limitations set in the LPC stipulation.
62. In November 2004, the Bureau of Land Management published a Notice of Intent in the Federal Register to amend its Resource Management Plans for its Roswell and Carlsbad field offices to address future management of habitat for the Lesser Prairie-Chicken and sand dune lizard.
63. In January 2005, the BLM released the *Special Status Species Resource Management Plan:*

*Analysis of Management Situation* (hereinafter, “2005 AMS”). The BLM issued the 2005 AMS because of the BLM’s decision to issue a Resource Management Plan Amendment for the Carlsbad and Roswell Field Offices. “The amendment is needed to keep the RMP’s current with the resource conditions and the habitat needs of special status species...The special status species of concern within the planning area are the lesser prairie-chicken and the sand dune lizard.” Id. at 1. “The purpose of [the 2005 AMS] report is to analyze the inventory and other information available to determine the ability of the planning area to respond to identified issues and opportunities. The analysis provides the basis for formulating reasonable alternatives, including the types of resources for development and protection. [cite omitted]” Id. at 1.

64. One of the key findings of the 2005 AMS is that “[a]ctions authorized by BLM in the Planning Area affect the habitat and populations of special status species” and “[c]urrent management decisions and prescriptions are not adequate to reduce the threats to these species.” 2005 AMS at 2.

65. Additionally, “Both the application of reasonable measures or COAs and the modification, exception or waiver of stipulated restrictions or requirements must first be based upon site-specific analysis of individual APDs, sundry notices, or PODs, including the necessary supporting NEPA documentation” 2005 AMS at 29.

66. Upon information and belief, the Agency will continue to grant exceptions from protective surface use and occupancy requirements for the Lesser Prairie-Chicken to oil and gas operators and lessees in 2005. Like the exceptions granted in 2004, exceptions issued in 2005

will be granted in the absence of environmental analysis, public notification, in violation of surface use and occupancy requirements, and/or without surveys for Lesser Prairie-Chicken. Granting of these exceptions by the Agency will, among other things, continue to exacerbate industrial noise conditions associated with drilling for oil and gas and 3-D geophysical exploration, and in so doing will continue to have an adverse and detrimental impact on Lesser Prairie-Chicken vocalizations and breeding.

## V. CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF

**Violation of the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*, and the Administrative Procedures Act: Defendant acted arbitrarily and capriciously by failing to conduct an environmental analysis and take a hard look at the direct, indirect and cumulative impacts of granting exceptions from protective surface use and occupancy requirements for Lesser Prairie-Chicken.**

67. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
68. The National Environmental Policy Act (“NEPA”) requires production of an Environmental Assessment (“EA”) and/or Environmental Impact Statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment...” 42 U.S.C. §4332(B). “Major Federal Actions” include “actions with effects that may be major and which are potentially subject to Federal control and responsibility” and “include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies...” 40 C.F.R. §1508.18.

69. The EA or EIS should assess: (1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and, (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. §4332(C).
70. Courts have interpreted NEPA and its implementing regulations as requiring that federal agencies take a "hard look" at environmental impacts of proposed projects and measures to mitigate these environmental impacts. Specifically, NEPA requires a federal agency to take a "hard look" at both the affected environment and the environmental impacts of a proposed action and the alternatives to that proposal.
71. In preparing an environmental analysis, a federal agency must analyze the direct, indirect, and cumulative impacts of agency actions. 40 C.F.R. §1508.25(c). Cumulative impacts "results from the incremental impact of the action when added to other past, present and foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. §1508.7.
72. In authorizing exceptions to the BLM's surface use and occupancy requirements for LPC, Defendant did not develop an EA or EIS.
73. In authorizing exceptions to the BLM's surface use and occupancy requirements for LPC, Defendant did not comply with NEPA.

74. Defendant failed to comply with NEPA by producing an EA or EIS, taking the required hard look at the environmental impacts of its action, and/or analyzing adequately the direct, indirect or cumulative impacts of its decision to waive LPC stipulations. See Carlsbad RMP Amendment Record of Decision (1997) at AP1-4.
75. In the alternative, Defendant failed to supplement existing EAs for Application for Permits to Drill ("APDs") or exploration activity as needed to address the direct, indirect or cumulative impacts of its decision to waive LPC stipulations.
76. Specifically, Defendant's decision to grant multiple exceptions to surface use and occupancy requirements for LPC was not properly analyzed under NEPA.
77. Defendant did not conduct an environmental analysis of the environmental impacts of authorizing oil and gas drilling or exploration activity during the March 15 through June 15 restriction periods, during the 3:00 a.m. and 9:00 a.m. restriction period, and/or in LPC habitat.
78. The Carlsbad RMP does not address the environmental impacts of exempting surface use and occupancy requirements for LPC.
79. As a result of its failure to conduct an environmental analysis and take a hard look at the direct, indirect, and cumulative impacts of its exception decisions, Defendant violated NEPA and its implementing regulations, acted arbitrarily and capriciously, abused its discretion, failed to act in accordance with law and therefore has violated the APA, 5 U.S.C. § 706(2)(A).

## **SECOND CLAIM FOR RELIEF**

**Violation of the National Environmental Policy Act and the Administrative Procedures**

**Act:** Defendant acted arbitrarily and capriciously by *failing to provide public participation opportunities in its decisions to grant exceptions to the BLM's surface use and occupancy requirements for LPC.*

80. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
81. The National Environmental Policy Act (“NEPA”) requires the BLM and other federal agencies to, in the fullest extent possible, “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. §1500.2(d)
82. Specifically, NEPA’s public participation regulations require the BLM to “(a) [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures” and to “(b) [p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.” 40 C.F.R. §1506.6(b).
83. “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. §1500.1(b).
84. NEPA regulations further state that a finding of no significant impact shall be made “available to the affected public” and that the public and other affected agencies shall be involved in NEPA procedures. See 40 C.F.R. §§ 1501.4(e)(1); 1506.6.
85. In authorizing exceptions to the BLM’s surface use and occupancy requirements for LPC, Defendant did not provide public notice and comment opportunities.



86. In this case, the BLM failed to meet its public participation requirements at every stage of the process under NEPA. NEPA's public participation requirements stem from BLM's decision to grant exceptions to BLM's LPC stipulations for drilling and exploration. The BLM failed to involve the public in these processes.

87. Defendant's action in failing to comply with NEPA is arbitrary and capricious, an abuse of discretion, and contrary to law in violation of the APA, 5 U.S.C. §§ 551 et seq., and are subject to judicial review thereunder.

### **THIRD CLAIM FOR RELIEF**

**Violation of the Federal Lands Policy and Management Act, 43 U.S.C. §§1701, et seq., and the Administrative Procedures Act: Defendant acted arbitrarily and capriciously by failing to comply with FLPMA's requirement that agencies act in conformance with their governing RMP.**

88. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

89. The Federal Lands Policy and Management Act ("FLPMA") and its implementing regulations require that "[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved [Resource Management] plan." 43 U.S.C. § 1732; 43 C.F.R. § 1610.5-3(a)

90. The BLM's RMP for the Carlsbad Resource Area specifically mandates that,

Drilling for oil and gas, and 3-D geophysical exploration operations will not be allowed in Lesser Prairie-Chicken Habitat during the period of March 15 through June 15, each year. During the period, other activities that produce noise or involve human activity, such as the maintenance of oil and gas facilities, geophysical exploration other than 3-D operations and pipeline, road and well pad construction, will not be allowed except between 3:00 a.m. and 9:00 a.m. The 3:00 a.m. and 9:00 a.m. restriction will not apply to normal,

around-the-clock operations, such as venting, flaring, or pumping, which do not require a human presence during the period. Additionally, no new drilling will be allowed within up to 200 meters of leks known at the time of permitting. Normal vehicle use on existing roads will not be restricted. Exhaust noise from pump Jack engines must be muffled or otherwise controlled so as not to exceed 75 db measures at 30 feet from the source of the noise. Exceptions to these requirements will be considered for areas of no or low Prairie-Chicken booming activity, or unoccupied habitat, including leks, as determined at the time of permitting, or in emergency situations.

Carlsbad RMP Amendment Record of Decision (1997) at AP1-4 (hereinafter, “LPC stipulation”).

91. The surface use and occupancy requirements of the BLM’s RMP are not aspirational goals, but non-discretionary duties or mandates. The LPC stipulation is a surface use and occupancy requirement. Defendant was under a duty to comply or demonstrate compliance with LPC stipulation.
92. Exceptions to the surface use and occupancy requirement of LPC “will be considered for areas of no or low Prairie-Chicken booming activity, or unoccupied habitat, including leks, as determined at the time of permitting, or in emergency situations.” Carlsbad RMP Amendment Record of Decision (1997) at AP1-4. No other exceptions to this stipulation are allowed in the BLM’s RMP.
93. Upon information and belief the BLM granted thirteen exceptions to the BLM’s LPC stipulation in 2004. These exceptions were final issuance of permits for oil and gas or exploration activities. These exceptions were not granted for emergency situations.
94. The BLM failed to comply with the LPC stipulation. The BLM failed to adequately determine at the time of granting exceptions to the LPC stipulation whether the areas

contained no or low Lesser Prairie-Chicken booming activity, or unoccupied habitat, including leks and/or whether emergency situations existed.

95. Upon information and belief, the BLM did not determine whether new drilling would occur within up to 200 meters of leks, did not conduct surveys for LPC prior to the granting of thirteen exceptions to the LPC stipulation in 2004, and/or the BLM failed to determine Lesser Prairie-Chicken booming activity or occupied habitat at the time of or prior to the BLM's authorization of exceptions to the LPC stipulation. Additionally, the BLM failed to determine whether exhaust noise limitations would be exceeded by granting of the exceptions.
96. Defendant's action in failing to comply with FLPMA is arbitrary and capricious, an abuse of discretion, and contrary to law in violation of the APA, 5 U.S.C. §§ 551 et seq., and are subject to judicial review thereunder.

#### **FOURTH CLAIM FOR RELIEF**

**Violation of the Federal Lands Policy and Management Act and the Administrative Procedures Act: Defendant acted arbitrarily and capriciously by *failing to comply with FLPMA's requirement that agencies engage in a balancing test to determine whether granting of exceptions to surface use and occupancy requirements is in the public interest and prevent undue and unnecessary degradation of the environment.***

97. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
98. FLPMA requires the BLM to "take any action necessary to prevent unnecessary and undue degradation ["UUD"] of the lands" managed by the agency. 43 U.S.C. §1732(b).
99. FLPMA vests the agency with the authority and obligation to disapprove of an otherwise permissible activity because the operation though arguably necessary for oil and gas

development would unduly harm or degrade the public land and its resources.

100. FLPMA also requires the BLM to "manage the public lands under principles of multiple use and sustained yield". 43 U.S.C. § 1732(a).

101. "Multiple use" is defined as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; ...the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; ...with consideration given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or greatest unit production." 43 U.S.C. § 1702(c).

102. FLPMA requires a case-by-case, site and project specific analysis (or balancing test) to determine whether an exception of surface use and occupancy requirements is in the public interest.

103. According to the BLM Manual 6840, which contains the BLM's policy for candidate species for listing as threatened or endangered species under the ESA "the BLM shall implement management plans that conserve candidate species and their habitats and shall ensure that actions authorized, funded, or carried out by the BLM do not contribute to the need for species to become listed." BLM Manual 6840.06(C). "Conserve" is defined broadly as "to use, or the use of, methods and procedures such that there is no longer any threat to their continued existence or need for continued listing as a special status species." BLM Manual 6840 (Glossary of Terms).
104. Here, the Lesser Prairie-Chicken is a candidate for listing under the ESA and thus the agency is under a duty to conserve the Lesser Prairie-Chicken and its habitat as well as ensure that BLM actions do not contribute to the need for the species to become listed under the ESA.
105. In this case, Defendant's grant of exceptions to the LPC stipulation causes undue and unnecessary degradation to the Lesser Prairie-Chicken and its habitat.
106. Between 1985 and 1990, there was a minimum of 35 documented booming grounds known to be active within the Carlsbad Resource Area. From 1990 to the present, the number of active leks with the Carlsbad Resource Area has been decreasing. During 2002 lek surveys, only one active lek was documented and two single vocalizations of LPC were heard. During 2004 surveys, two active leks were documented.
107. BLM failed to establish that granting exceptions to LPC stipulations (even if appropriate) will not result in undue and unnecessary degradation of Lesser Prairie-Chicken

and its habitat. Such a determination is particularly important where, as here, the LPC is managed by the BLM with the same level of protection as a threatened or endangered species under the ESA.

108. Additionally, BLM failed to undertake a project specific analysis (or balancing test) to determine whether granting an exception to surface use and occupancy requirements for LPC is in the public interest in violation of FLPMA.

109. In sum, Defendant's action in failing to comply with FLPMA is arbitrary and capricious, an abuse of discretion, and contrary to law in violation of the APA, 5 U.S.C. §§ 551 et seq., and are subject to judicial review thereunder.

#### **FIFTH CLAIM FOR RELIEF**

**Violation of the Mineral Leasing Act, as amended by the Federal Onshore Oil and Gas Leasing Reform Act, 30 U.S.C. §§ 181, et seq., and the Administrative Procedures Act: Defendant acted arbitrarily and capriciously by failing to comply with MLA's public notice and participation requirements.**

110. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

111. The Mineral Leasing Act ("MLA"), as amended by the Federal Onshore Oil and Gas Leasing Reform Act, 30 U.S.C. §§ 181, et seq., and its supporting regulations require that "At least 30 days before approving applications for permits to drill under the provisions of a lease or substantially modifying the terms of any lease issued under this section, the Secretary shall provide notice of the proposed action." 30 U.S.C. § 226(f).

112. “A stipulation included in an oil and gas lease shall be subject to modification or waiver only if the authorized officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if proposed operations would not cause unacceptable impacts...If subsequent to lease issuance the authorized officer determines that a modification or waiver of a lease term or stipulation is substantial, the modification or waiver shall be subject to public review for at least a 30-day period.” 43 C.F.R. §3101.1-4.

113. Defendant failed to comply with MLA.

114. Defendant’s action in failing to comply with MLA is arbitrary and capricious, an abuse of discretion, and contrary to law in violation of the APA, 5 U.S.C. §§ 551 et seq., and is subject to judicial review thereunder.

## **VI. REQUEST FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

1. Declare that Defendant violated the National Environmental Policy Act and Administrative Procedures Act by failing to conduct an environmental analysis and take a hard look at the direct, indirect and cumulative impacts of granting exceptions from protective surface occupancy stipulations for Lesser Prairie-Chicken and provide public participation opportunities in such decisions;
2. Declare that the Defendant violated the Federal Lands Policy and Management Act and Administrative Procedures Act by failing to comply with FLPMA’s requirement that

agencies act in conformance with their governing RMP, engage in a balancing test to determine if an exemption to a surface use and occupancy requirement is in the public interest, and prevent undue and unnecessary degradation;

3. Declare that the Defendant violated the Mineral Leasing Act and Administrative Procedures Act by failing to comply with public notice and participation requirements;
4. Void Defendant's granting of exceptions to the LPC stipulation and enjoin all such future exceptions performed without compliance with NEPA, FLPMA, and the MLA;
5. Order Defendant to comply with the requirements of NEPA, FLPMA, MLA, APA and their respective implementing regulations by performing the requisite duties there under when issuing exceptions to the LPC stipulation;
6. Grant the Plaintiff their costs of litigation, including reasonable attorney fees as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412; and
7. Grant Plaintiff such additional and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED on February \_\_, 2005

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