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December 19, 2008

VIA FEDERAL EXPRESS

Public Comments Processing
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, Virginia 22203

Re: Comments of Otero County on FWS' 90-Day Finding on
Otero County's Petition to Delist *Cirsium Vinaceum*
(Sacramento Mountains Thistle) [FWS-R2-ES-2008-0114]

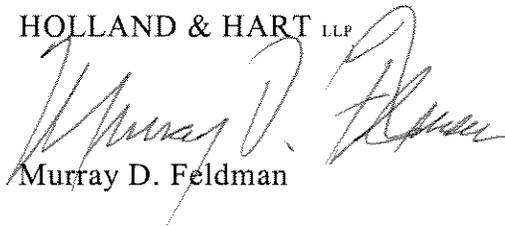
Dear Public Comments Processing:

I enclose the Comments of the Board of County Commissioners, Otero County, New Mexico ("Otero County") on this matter.

If you have any questions about these comments, please let me know. Additional contact information for Otero County and for Otero County's undersigned counsel is contained in the Comments at page 15.

Sincerely,

HOLLAND & HART LLP



Murray D. Feldman

MDF:st
Enclosure

cc: Daniel Bryant, Esq.
Mr. Timothy C. Smith

4410284_1

BEFORE THE SECRETARY,
UNITED STATES DEPARTMENT OF INTERIOR
UNITED STATES FISH AND WILDLIFE SERVICE

In Re Board of County Commissioners of)
Otero County, New Mexico ("Otero County"),)
)
Petitioner.)
)
)
_____)

**OTERO COUNTY'S COMMENTS ON FWS' 90-DAY FINDING ON OTERO COUNTY'S
PETITION TO DELIST THE SACRAMENTO MOUNTAINS THISTLE (*CIRSIMUM
VINACEUM*) FROM THE LIST OF ENDANGERED AND THREATENED PLANTS
UNDER THE ENDANGERED SPECIES ACT**

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December 19, 2008

Table of Contents

Introduction.....	1
Statutory and Regulatory Framework for Delisting.....	2
Comments on the 90-Day Finding.....	5
I. Threats to the thistle have been sufficiently reduced or eliminated	5
1. The thistle exhibits a great ability to reproduce and withstand threats, including those from insect infestation.....	5
2. The thistle exhibits extreme resiliency to impacts from recreation.....	6
3. The area where the thistle occurs is not under drought conditions	7
4. The thistle excludes other plants from its preferred habitat	8
5. Grazing disturbance by livestock is consistent with the continued viability of certain <i>Cirsium</i> species	9
II. The population and distribution of the thistle have increased and remain stable.....	9
1. Recent population data since 2003 indicate that numbers of localities of the species has increased and that thistle populations have increased	9
2. The FWS Recovery Plan standard for protection of 75 percent of known occupied habitat at the time of listing (or at the time the recovery plan was developed) has been achieved	10
3. The Forest Service reports that at least 40 thistle populations are isolated from heavy recreation use.....	13
Conclusion	14
Contact Information	15
References.....	16

Introduction

Petitioner Board of County Commissioners of Otero County, New Mexico (“Otero County”), submits these comments on the U.S. Fish and Wildlife Service’s (“FWS”) 90-day finding on Otero County’s petition (“Petition”) to delist the Sacramento Mountains thistle (*Cirsium vinaceum*) (“thistle”) from the List of Endangered and Threatened Plants under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.* 73 Fed. Reg. 66003 (Nov. 6, 2008) (“90-Day Finding”). Otero County represents the citizens and businesses of Otero County, New Mexico, and has a particular interest in the status of the thistle as the thistle occurs in Otero County.

On August 13, 2007, the Secretary of Interior (“Secretary”) received Otero County’s Petition to delist the thistle. *See* 73 Fed. Reg. at 66004; *see* Otero County, *Petition to Remove the Sacramento Mountains Thistle (Cirsium Vinaceum) from the List of Endangered and Threatened Plants Under the Endangered Species Act*, Aug. 7, 2007. The Secretary, acting through the FWS, found that the petition presented substantial information indicating that delisting of the thistle may be warranted. 73 Fed. Reg. at 66003. Pursuant to 16 U.S.C. § 1533(b)(3)(C)(ii), the FWS initiated a 12-month review of the status of the thistle to determine if delisting the species is warranted. *Id.* To ensure that the status review is complete and based on the best available scientific and commercial information, Otero County is submitting these comments with additional information on the status of the thistle. Otero County requests that the FWS find that the petitioned action is warranted by publishing in the Federal Register a proposed regulation to implement such action. *See* 16 U.S.C. § 1533(b)(3)(B)(ii).

The thistle's delisting is now warranted for at least two principal reasons: (1) the thistle has recovered to the point that protection under the ESA is no longer required; and (2) the initial classification of the thistle as threatened was in error because it was based on incomplete information and unrepresentative species population and occurrence data. The detailed reasons for delisting the thistle presented in the Petition and these comments include:

1. Threats to the thistle have been sufficiently reduced or eliminated:
 - The thistle exhibits a great ability to reproduce and withstand insect infestation;
 - The thistle exhibits an extreme resiliency to impacts from recreation;
 - The area where the thistle occurs is not under drought conditions;
 - The thistle excludes other plants from its preferred habitat; and
 - Grazing disturbance by livestock is consistent with the continued viability of certain *Cirsium* species.
2. The population and distribution of the thistle have increased and remain stable:
 - Recent population data indicate that numbers and localities of thistle have increased;
 - Seventy-five percent of the thistle habitat occupied at the time of listing has been permanently protected; and
 - At least 40 populations of thistle are isolated from recreation use.

For these reasons, as documented in the Petition and these comments, the FWS should find that delisting the Sacramento Mountains thistle is warranted.

Statutory and Regulatory Framework for Delisting

When the FWS determines that a petition to remove a species listed under the ESA presents substantial scientific or commercial information indicating that the requested delisting

may be warranted, the Secretary is then required to promptly commence a review of the status of the species. *See* 16 U.S.C. § 1533(b)(3)(C)(ii); USDI Fish and Wildlife Service, *Endangered Species Petition Management Guidance* (“1996 Petition Guidance”), July 1996, at 9-10.

Thereafter, the FWS must, within 12 months of initially receiving the petition, make a finding on the petition. *See* 16 U.S.C. § 1533(b)(3)(B)(i)-(iii); *1996 Petition Guidance* at 10. If the finding is that the petitioned action is warranted, the FWS must promptly publish in the Federal Register a proposed regulation to implement the petitioned action, thus concluding the petition review process. 16 U.S.C. § 1533(b)(3)(B)(ii); 50 C.F.R. § 424.14(b)(3)(ii); *1996 Petition Guidance* at 10, 17.

A species may be delisted if the “best scientific and commercial data available to the FWS after conducting the status review substantiates that the species is neither endangered or threatened because: (1) the species is considered to be extinct; (2) the species has recovered to the point that “protection under the Act is no longer required;” or (3) the initial classification of the species as endangered or threatened was in error. *See* 50 C.F.R. § 424.11(d)(1)-(3); *see also* *1996 Petition Guidance* at 17 (FWS will make a “warranted” finding if the status review provides information to conclude that the species has achieved the recovery objectives for delisting).

A species is considered to have recovered if the best scientific and commercial data available indicate that it is no longer endangered or threatened. *See* 50 C.F.R. § 424.11(d)(2); *see also* USDI Fish and Wildlife Service, *Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act*, 59 Fed. Reg. 34271 (July 1, 1994) (discussing “best scientific and commercial data”). Neither

the ESA nor the FWS' regulations define what constitutes the "best commercial and scientific data." However, the Supreme Court has observed that the "obvious purpose" of the best scientific and commercial data requirement "is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise . . . [and] to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

Importantly, recovery does not mean that all threats to a species have been eliminated. Rather, the threats must only be "sufficiently reduced" to delist a species. *See* USDI Fish and Wildlife Service, *Delisting a Species: Section 4 of the Endangered Species Act*, Endangered Species Program, Feb. 2004, 2 pp., at 1; *see also* USDI Fish and Wildlife Service, *Endangered Species Recovery Program*, Endangered Species Program, Aug. 2000, 2 pp., at 1. As stated by the FWS:

Recovery is the process by which the decline of an endangered or threatened species is arrested or reversed, and threats to its survival are neutralized, so that its long-term survival in nature can be ensured. The goal of this process is the maintenance of secure, self-sustaining wild populations of species with the minimum necessary investment of resources.

USDI Fish and Wildlife Service, *Policy and Guidelines for Planning and Coordinating Recovery of Endangered and Threatened Species ("1990 Recovery Policy")*, May 25, 1990, 14 pp., at 1.

Thus, recovery represents the point at which a species is no longer declining and threats to its survival have been addressed or sufficiently reduced, but not necessarily eliminated.

Comments on the 90-Day Finding

I. Threats to the thistle have been sufficiently reduced or eliminated.

1. The thistle exhibits a great ability to reproduce and withstand threats, including those from insect infestation.

The thistle is capable of clonal growth if leaves are cut when healthy and dropped into water. See Thomson, J. K. and L. F. Huenneke, *Demographic Study of *Cirsium vinaceum* and *Dipsacus sylvestris** (“*Demographic Study*”), Unpublished manuscript, Department of Biology, New Mexico State University, Las Cruces, New Mexico, 1990, at 10; Thomson J., *An Investigation of the Biology of *Cirsium vinaceum** (“*Biology of *Cirsium*”*), Master’s Thesis, New Mexico State University, Las Cruces, New Mexico, 1991, at 73. On one occasion, damage from livestock actually resulted in three rooting leaves, creating additional thistle growth in the damaged population. *Demographic Study* at 10; *Biology of *Cirsium** at 73-74. Although the thistle has the ability for clonal reproduction, the necessity for such behavior may be limited because of the “copious seed production and ease of germination” of the thistle. *Demographic Study* at 18. Further, it has been noted that “[s]eed survival by [the thistle] of temporarily unfavorable conditions is impressive.” *Biology of *Cirsium** at 43, 60 (the thistle grows “extremely well in artificial conditions”). With the thistle’s genetic and reproductive options, “it is, therefore, improbable that intrinsic factors (genetic and reproductive) threaten the long term viability of the species.” *Id.*

Recent observations further confirm that thistle rosettes can reproduce asexually from rhizomes to make adjacent clone rosettes. Sivinski R., *An Initial Survey of the Important Phytophagous Insect Fauna on Sacramento Mountains Thistle (*Cirsium vinaceum*: Asteraceae)*,

Section 6 Progress Report to U.S. Fish and Wildlife Service, Region 2, Albuquerque, NM, Sept. 30, 2007, at 14. The ability to reproduce asexually allows a population of thistle to persist for several years without making a seed at all. *Id.* Thus, even if thistle flower heads (seeds) fall victim to disease or predation, the thistle can survive. “No phytophagous insects have been found making significant use of the immature rosettes,” so the thistle appears to have a survival mechanism to withstand most insect infestations that may prey on the thistle flower heads (seeds). *Id.*

In general, “demographic and habitat studies indicate that [the thistle] is capable of withstanding relatively high intensity, low duration disturbance.” *Biology of Cirsium* at 90 (the thistle is a “hardy and easily manipulated plant”). Thus, the available science indicates that the thistle has a strong ability to withstand threats and can readily reproduce by different means under a number of different conditions.

2. The thistle exhibits extreme resiliency to impacts from recreation.

Scientists have noted that the thistle is extremely resilient to impacts from recreationists. On at least one occasion, recreationists cut a two-meter-wide path through a population of thistle for approximately 30 meters. *See Demographic Study* at 8. The thistle population was “severely trampled” and damaged. In one area, 22 rosettes including 4 flowering and 13 class 4 individuals (those plants over 70 centimeters in diameter) were severely damaged (the height of all plants were reduced to approximately 10 centimeters). *Id.* Despite this impact, “[n]o residual effect of the path could be detected the next year.” *Id.*

3. The area where the thistle occurs is not under drought conditions.

The FWS states in its 90-Day Finding that “[c]urrently, the region has been under drought conditions since 1999.” 73 Fed. Reg. at 66007. This statement is based on information from “Piechota et. al. 2004, pp. 303-305.” See *id.* (citing Piechota, T., J. Timilsena, G. Tootle, and H. Hidalgo, *The Western U.S. Drought: How Bad Is It?*, EOS, Vol. 85, No. 32, Aug. 10, 2004, pp. 303-305). This information is not specific to the area of New Mexico under consideration and is outdated. See Piechota et. al. (article from 2004 discusses drought in Upper and Lower Colorado River Basins, not in Otero County, New Mexico).

More recently available information on drought in the region where the thistle occurs indicates that Otero County, New Mexico is not under drought conditions. See New Mexico Drought Monitoring Work Group, *New Mexico Drought Status Report*, October 2008, at 2; see also National Oceanic and Atmospheric Administration, *U.S. Drought Monitor, New Mexico*, Dec. 9, 2008; National Oceanic and Atmospheric Administration, *Drought Termination and Amelioration*, Nov. 2008 (indicating that Otero County is not experiencing drought conditions). In fact, the village of Cloudcroft, located near where the thistle occurs, experienced its third highest summer precipitation total on record, and as of October 2008 precipitation in Cloudcroft was 123 percent of normal. New Mexico Drought Monitoring Work Group at 3. According to the United States “Seasonal Drought Outlook,” Otero County is not predicted to face drought in the beginning part of 2009, nor is Otero County expected to experience severe short-term or long-term drought. See National Weather Service, Climate Prediction Center, *U.S. Seasonal Drought Outlook*; National Oceanic and Atmospheric Administration, *U.S. Drought Monitor*, Dec. 16, 2008 (indicating short-term and long-term drought predictions for New Mexico).

The FWS further states that “[i]t is unclear how the springs in the Sacramento Mountains would respond to a combination of extended drought and an increase in the level of water withdrawals (e.g., diversions, groundwater pumping).” 73 Fed. Reg. at 66007. Presently, the springs in the Sacramento Mountains are not faced with extended drought conditions, nor are they predicted to experience such conditions. Further, the United States Forest Service (“Forest Service”) and the FWS may seek to limit increases in the level of water withdrawals to avoid or minimize their associated impacts. These agencies may file protests to the granting of any applications for water withdrawals pursuant to the agencies’ responsibilities to protect their state and federal water rights and other water-dependent resources of the agencies. *See* Office of the State Engineer, State of New Mexico, *Rules and Regulations Governing the Appropriation and Use of Ground Water in New Mexico*, § 1-7 (filing protests against applications for permits to appropriate ground water); *see also* N.M. Code R. § 19.26.2.12.E (protesting applications for permits to appropriate surface water). These agencies are required by law to manage, protect, and preserve all federal water rights and federal resources that fall under their jurisdiction. *See e.g., Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990); *United States v. New Mexico*, 438 U.S. 696 (1978). Thus, the Forest Service and the FWS may seek to limit water withdrawals to avoid or minimize impacts to the thistle.

4. The thistle excludes other plants from its preferred habitat.

Studies have shown that where the thistle occurs, it is overwhelmingly dominant over other plant species. *Biology of Cirsium* at 26. “Therefore, either those areas occupied by [the thistle] are stressful and it is one of the few plants that can tolerate these environments or [the thistle] is able to exclude other plants from its preferred habitat.” *Id.* Such information shows

that the thistle may out-compete other plant species in its habitat. *Id.*; *see also id.* at 41 (indicating that the thistle is a superior competitor for a wider range of conditions than *D. Sylvestris*, a teasel that competes with the thistle); *id.* at 59 (the thistle can “hold its own” vegetatively against *D. Sylvestris* in the field).

5. Grazing disturbance by livestock is consistent with the continued viability of certain *Cirsium* species.

In its 90-Day Finding, the FWS states that “a complex relationship exists among [the thistle], precipitation, and livestock herbivory.” 73 Fed. Reg. at 66008. As pointed out by the FWS, livestock herbivory does not necessarily reduce thistle populations. *Id.* Additional information shows that “grazing disturbance by livestock is necessary for the continued viability of certain *Cirsium* species.” *Biology of Cirsiium* at 4 (citations omitted). This information further indicates that livestock herbivory is not a significant threat to the thistle, and may even be a benefit.

II. The population and distribution of the thistle have increased and remain stable.

1. Recent population data since 2003 indicate that numbers of localities of the species has increased and that thistle populations have increased.

The Forest Service has performed surveys of thistle on at least three separate occasions in 2003, 2005 and 2007. *See* P. Barlow-Irick, *Survey data for Sacramento Mountains thistle (Cirsium vinaceum)*, Sept. 2003; P. Barlow-Irick, *Survey data for Sacramento Mountains thistle (Cirsium vinaceum)*, Sept. 2005; P. Barlow-Irick, *Inventory analysis for Cirsium vinaceum on the Lincoln National Forest*, Sept. 2007. Data from these surveys indicate that the thistle may occur

at at least 96 different known localities.¹ This information indicates that the number of localities of thistle has increased from the 86 localities of thistle previously reported in 2003. *See* 73 Fed. Reg. at 66005. Total thistle population numbers are not indicated in the survey data, but the survey data does indicate that there are a very large number of thistle localities, each containing tens to thousands of individuals. Additionally, the most recent “Forest Plan Monitoring and Evaluation Report” for the Lincoln National Forest concludes that “Sacramento Mountains thistle populations have slowly increased.” USDA Forest Service, *Forest Plan Monitoring and Evaluation Report Fiscal Year 2007*, Lincoln National Forest, Apr. 2008, at 2. Thus, current data reinforces the thistle population data presented in the Petition.

2. The FWS Recovery Plan standard for protection of 75 percent of known occupied habitat at the time of listing (or at the time the recovery plan was developed) has been achieved.

The FWS’ 90-Day Finding recognizes that one delisting goal in the recovery plan is the permanent protection of at least 75 percent of the known occupied thistle habitat. 73 Fed. Reg. at 66006; *see* USDI Fish and Wildlife Service, *Sacramento Mountains Thistle (Cirsium vinaceum) Recovery Plan (“Recovery Plan”)*, U.S. Fish and Wildlife Service, Albuquerque, New Mexico, Sept. 27, 1993, pp. 1-23. The 90-Day Finding states that “[u]sing the most current data presented by the petitioner, the achievement of 75 percent permanent protection for the known *C. vinaceum* occupied habitat area, number of localities, or number of plants would mean that 58 of an estimated 77 acres of occupied habitat, 64 of 86 occupied localities, or 262,500 to 300,000 of

¹ The 2003 survey data indicates that the thistle was present at 104 sampled localities, while the 2005 and 2007 data showed that the thistle present at 97 and 96 localities, respectively.

350,000 to 400,000 plants would have to be permanently protected.” 73 Fed. Reg. at 66006.

Based on this finding, the FWS concludes that “the information presented by the petitioner does not indicate that protection of 75 percent of known occupied habitat has been achieved.” *Id.*

But, “it does indicate that the amount of habitat in protected status has increased and that the extent of the threat of disruption or modification of habitat may be reduced.” *Id.*

However, in the 90-Day Finding the FWS uses the wrong baseline to determine achievement of 75 percent permanent protection for known occupied thistle habitat. Rather than determining 75 percent permanent protection based on the *current* occupied habitat area, the FWS should determine 75 percent permanent protection based on the known occupied habitats *at the time the thistle was listed or at the time the recovery plan was developed.*

Specifically, the recovery plan states that one of the criteria to meet the objective of the recovery plan was to:

Develop habitat management plans to alleviate threats to the species and ensure permanent protection of at least 75 percent of the *known* occupied habitats according to steps outlined in the plans.

See Recovery Plan at 9 (emphasis added). Criteria such as this must be, “precise, measurable criteria . . . that will allow the Service and others to objectively determine when recovery has been achieved.” *1990 Recovery Policy* at 4. By basing a 75 percent permanent protection on the *current* occupied habitat of thistle, the FWS would be using an ever-increasing target contrary to the purpose of the recovery plan to delineate specific management actions to be taken to permit delisting of the species. *See id.* at 1, 4 (management actions are intended to be precise and quantifiable). Consequently, every time a new *current* occupied habitat area is calculated, the

75 percent permanent protection objective will change. This is not the intent of the 75 percent objective in the recovery plan, nor is it consistent with FWS' past practices and guidance on recovery planning. *See id.* at 1, 4, I-11 (discussing the need for recovery objectives to set forth quantitative terms to determine when recovery is complete); *see also* 68 Fed. Reg. 57829, 57832 (Oct. 7, 2003) (delisting of Hoover's Woolly-star). For example, when the FWS delisted the Hoover's Woolly-star, it did so based, in part, on achievement of a habitat protection criterion using the habitat known *at the time of listing* as the baseline. 68 Fed. Reg. 57832. The baseline for calculating achievement of the 75 percent permanent protection criterion in the thistle recovery plan should be the known occupied thistle habitat *at the time the thistle was listed* or *at the time the recovery plan was developed*.

Using either of these baselines, the 75 percent permanent protection criterion has been achieved. As discussed in the Petition, many of the thistle habitats are protected by their isolation and unique topographic position. *See Petition* at 21. And, an additional 294 acres of thistle habitat that has been *protected*, compared to the 77 acres of *total* known habitat the plants had in 1993 when the recovery plan was developed. *See Petition* at 15, 23-24; *Recovery Plan* at 2. Thus, the required action of protecting at least 75 percent of the known occupied habitat has not only been met, but has been greatly exceeded.

Further, the 20 thistle populations known at the time of listing have expanded so that the thistle now occurs on at least 96 sites.² *See Petition* at 23-24; P. Barlow-Irick, Sept. 2007.

² The geographic distribution of the thistle has increased sizably. *See Petition* at 8. The distribution of the thistle has increased from 14 populations, as estimated in 1984, to over 86

(continued)

Thistle populations are now around 350,000 to 400,000 plants³ compared to the 10,000 to 15,000 plants estimated to exist when the thistle was listed.⁴ *See Petition* at 23-24. The thistle population has increased at least 11,666% from a total of 2,000 to 3,000 plants estimated in 1984 to the 350,000-400,000 plants estimated in 2003. *See Petition* at 3. These measures indicate achievement of the 75 percent permanent protection criterion in the recovery plan.⁵ Consequently, the FWS should find that protection of 75 percent of known occupied habitat at the time of listing (or at the time the recovery plan was developed) has been achieved.

3. The Forest Service reports that at least 40 thistle populations are isolated from heavy recreation use.

Although the FWS' 90-Day Finding does not find that overutilization for recreational purposes currently threatens the thistle, the Forest Service has indicated that there exist a large number of thistle populations isolated from heavy recreation use. *See Demographic Study* at 4.

population sites in the Lincoln National Forest alone, as of 2003. *See id.* Now, over 100 sites may occur. *See P. Barlow-Irick*, Sept. 2007.

³ As of 2003, an estimated population of 350,000 to 400,000 thistle plants occurred at 86 sites on the Lincoln National Forest. *See Petition* at 7.

⁴ At the time the thistle was proposed to be listed on May 16, 1984, there were 14 known populations, which contained a total of 2,000 to 3,000 plants. *See Petition* at 6. By the time the thistle was listed on June 16, 1987, there were 20 known populations, which contained a total of 10,000 to 15,000 sexually reproducing plants. *See id.* In 1993, the recovery plan documented 62 sites, with at least 49,000 plants growing on 58 sites located on the Lincoln National Forest. *See id.* at 6-7; *Recovery Plan* at 2.

⁵ These numbers do not take into account the number of thistle plants and sites located on private property and the Mescalero Apache Indian Reservation. *See Petition* at 7. Thus, the actual population of thistle exceeds 350,000 to 400,000 thistle plants and the thistle plants may occur at over 100 sites.

The Forest Service found that at least 40 populations were “large, and isolated from heavy recreation use.” *Id.* Thus, recreation overuse is not likely to become a threat to the thistle.

Conclusion

These comments, in combination with the Petition, present the best available scientific and commercial information documenting that delisting the thistle is warranted. The thistle is no longer a “threatened” species, as defined by the ESA, because it is not a “species which is likely to become an endangered species within the foreseeable future throughout all of a significant portion of its range.” 16 U.S.C. § 1532(19). The population of the thistle has increased substantially and remains stable at the highest it has ever been reported. Likewise, distribution of the thistle has increased, become more widespread, and continues to remain stable. Because the threats to the thistle have been eliminated or sufficiently reduced, the population and distribution of the thistle are likely to remain stable or continue to grow. Existing regulatory mechanisms will further ensure the long-term survival of the thistle.

Thus, the thistle has recovered to a point that protection under the ESA is no longer required. Also, the initial classification of the thistle as threatened was in error as it was based on incomplete information and unrepresentative species population and occurrence data.

For all these reasons, the FWS should find that the petitioned action is warranted and promptly publish a proposed regulation to remove the thistle from the List of Endangered and Threatened Plants.

Contact Information

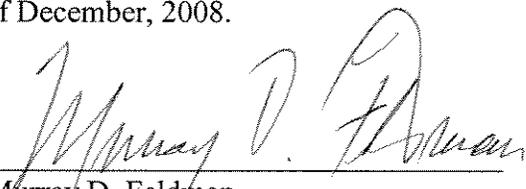
The name, address, telephone number, of Otero County is as follows:

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The address and contact information for counsel for Otero County submitting these comments are listed below, together with counsel's signature on behalf of the Board of County Commissioners of Otero County who have authorized the filing of these comments.

Copies of any of the materials cited or referenced in these comments may be obtained by contacting the undersigned counsel.

Respectfully submitted this 19th day of December, 2008.

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