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## The Fish and Wildlife Service Lists the Lesser Prairie-Chicken as a Threatened Species Under the Endangered Species Act

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*On March 21, 2014, the United States Fish and Wildlife Service (FWS) promulgated a final rule which lists the Lesser Prairie-Chicken (LPC) as a “threatened” species under the Endangered Species Act (ESA). Under the ESA, a species is threatened if it is likely to become endangered (and facing extinction) throughout all or a significant portion of its range. The rule has now been published in the Federal Register (79 FR 1974, April 10, 2014), and it will be effective on May 12, 2014. The listing will be located in the FWS rules at 50 CFR § 17.11(h).*

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### Background

The ESA was enacted “to provide a means whereby the ecosystems upon which endangered species and threatened species may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.”<sup>1</sup> The ESA is expansive, covering all fish or wildlife or plants. The FWS, acting on behalf of the Secretary of the Interior, is authorized to determine whether a particular species should be listed as endangered or threatened, and to designate “critical habitat” for the species. These listing determinations must be made solely on the basis of the best scientific and commercial data available; as a result, the administrative record is usually voluminous, and this is certainly true of the LPC listing.

Once a species is listed, the ESA prohibits the “taking” of a protected species, as well “harm” to a protected species. The FWS broadly defines “harm” to include habitat modification that kills or injures

 <sup>1</sup> The Act can be found at 16 USC §§1531-1544.

wildlife.<sup>2</sup> Consequently, federal agencies must consult with the FWS to ensure that their actions—including permit approvals and other authorizations—do not jeopardize listed species or adversely modify their “critical habitat.” The law also authorizes federal agencies to take affirmative actions that “seek to conserve endangered species and threatened species.”

According to the agency, the LPC occupies a five-state range that includes rural portions of Colorado, Kansas, New Mexico, Oklahoma, and Texas. The numbers of the species have been dwindling, and it is estimated that in 2012, only 45,000 of these birds populated these areas. Later estimates further reduced that number to 18,000. The primary threats to the LPC are habitat loss and fragmentation resulting from conversion of grasslands to agricultural uses, wind energy development (with their large and loud facilities), the ongoing drought in the southern Great Plains, the presence of roads and other man-made structure, and oil and gas exploration and production activities.

Under the law, a species can be determined to be endangered or threatened based on the FWS’s evaluation of five statutory factors. In this case, the FWS determined that the LPC was threatened because of the ongoing and probable future impacts of cumulative habitat loss and habitat fragmentation.

The ESA also acknowledges the value of voluntary conservation measures and encourages the States and interested parties, through system of incentives, to develop and maintain conservation programs. Accordingly, the FWS has adopted a policy endorsing the use of Candidate Conservation Agreements with Assurances (known as “CCAAs”). A CCAA allows the incidental taking of a listed species by an enrolled participant, if the participant is operating in compliance with the CCAA.

### The Rulemaking

The LPC’s listing completes a regulatory process that began in 1995 when a petition to list the LPC as “threatened” was submitted by the Biodiversity Legal Foundation and Marie E. Morrissey to the FWS. The proposed rule to list the LPC as threatened was published on December 11, 2012 (see 77 FR 73828). Thousands of comments were filed and several public meetings were held by the FWS. The FWS ultimately determined, on the basis of the comments and the best available science, that the LPC should be listed as a threatened (but not an endangered) species. But the FWS has not determined the LPC’s critical habitat, despite the recent listing.

In keeping with its CCAA policy, FWS proposed a special rule that would allow for an “incidental take” of the LPC when approved conservation plans and practices were followed. The proposed special rule was published in the Federal Register (see 78 FR 75306, December 11, 2013), and it was also promulgated as a final rule on April 10, 2014 (see 79 FR 20074). This rule is codified at 50 CFR §17.41(d).

The rule ratifies the Lesser Prairie-Chicken Interstate Working Group’s Lesser Prairie-Chicken Range-Wide Conservation Plan (Range-wide Oil and Gas CCAA). This 30-year agreement incorporates measures to address impacts to the LPC on non-federal lands located throughout the LPC’s range. Certain oil and gas activities, agricultural activities, wind, power, road and general activities in the LPC’s range may continue if the acting party is enrolled in—and in compliance with—the Range-wide Oil and Gas CCAA.<sup>3</sup>

By promulgating this special rule, the FWS has acknowledged that many significant programs have been undertaken by governmental agencies and private parties to conserve and restore the habitat of the LPC

<sup>2</sup> See 50 CFR §17.3.

<sup>3</sup> See Table 1 in preamble to the special rule, 79 FR 20074, 20075.

and to improve its status. The Range-wide Oil and Gas CCAA is being implemented by all of these parties, and the FWS will begin work on a “recovery plan” pursuant to the ESA, utilizing the services and expertise of many government agencies. However, it should be noted that the FWS has expressed some reservations regarding the long-term effectiveness of some Range-wide Oil and Gas CCAAs with respect to their continued funding and commitment to the preservation and protection of the LPC. These reservations also played a role in this listing determination.

Nevertheless, the FWS was quick to note that landowners and companies enrolled in the approved Range-wide Oil and Gas CCAAs can continue to manage their land or continue oil and gas operations without being required to take additional actions as a result of this listing. Also, landowners who have signed up under the Agreement in New Mexico, Oklahoma and Texas can continue to manage their land as before, as long as they continue to implement the terms and conditions of their agreement.

### Implications of the Listing

Accordingly, not only has the LPC been listed as a threatened species, its new status as a threatened species must now be considered in federal permitting matters—it will be part of the permitting process. This includes a consideration of ESA issues, as well as the rulemaking’s consistency with the requirements of other laws, in other permitting regimes. For example, the Clean Water Act, National Antiquities Act, the Historic Preservation Act, and the National Environmental Policy Act (NEPA). While the special rule and various conservation agreements will provide significant regulatory relief, the Range-wide Oil and Gas CCAA, as well as other CCAAs, will be tested as other federal agencies and interested parties consider whether it satisfies their view of the ESA as it pertains to other permits.

Also, at least four notices of intent to sue have already been filed—three by conservation groups and one by the State of Kansas. Challenges will likely dispute the FWS’s decision to: list the LPC; list LPC as threatened, not endangered; and to endorse the Range-wide Oil and Gas CCAA. Litigation is imminent.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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