Protecting the Lesser Prairie Chicken Under the Endangered Species Act: A Problem and an Opportunity for the Oil and Gas Industry

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I. Introduction

The brightest of President George H. W. Bush's thousand points of light were arrayed around the table. Those present included the Secretaries of the Departments of Interior and Agriculture and the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration. Principals sat at the table surrounded by their general counsels and scientists in the outer ring of chairs within whispering distance.[1] Convened for the Northern Spotted Owl, this was the "God Committee," so named because it held the god-like power to override the protections of the federal Endangered Species Act (ESA)[2] and allow actions that might cause the extinction of an entire species.[3]

The lead up to this meeting was intense. The timber industry in the Pacific Northwest was suffering increasing constraints placed upon it by judicial protection of the Northern Spotted Owl under the ESA.[4] But the available data, and thus the opinions of the government's lead scientists, pointed the causal finger at the timber industry for the species' decline.[5] In the end, despite strong political pressure and the prospect of severe regional economic consequences, the God Committee chose not to allow the continued, unmitigated logging of old growth forests inhabited by Northern Spotted Owls.[6]

The timber industry had lost this battle long before the God Committee was convened. They first sought to improve their practices,[7] then sought the God Committee's override, but ultimately failed to effectively remedy the habitat fragmentation that had brought the owl to the brink of extinction.[8] Following the God Committee's decision, a forest management plan was implemented, limiting logging on federal lands and providing extensive reserves for the Northern Spotted Owl and other endangered species.[9] While the massive job losses predicted by the timber industry did not materialize, many local logging communities were economically devastated.[10]

Today, it is a different bird affecting a different industry in a different region: the Lesser Prairie Chicken (LPC), *Tympanuchus pallidicinctus*, and the oil and gas activities in the Southwest. Currently, it is early in the ESA process; the LPC was only recently listed as "threatened" under the ESA in April of 2014, and the consequences of that listing for future projects have yet to be fully realized.[11]

But those who fail to learn the lesson of history are doomed to repeat it. Before the LPC declines to the point that more drastic measures become warranted—as happened in the case of the Northern Spotted Owl—industry and the Department of Interior need a strategy that both ensures the species' continued existence and allows oil and gas development and other industrial activities to continue in the five-state area the LPC occupies.

This Article offers ideas for such a strategy. Part II provides a general description of the ESA process. Part III discusses recent developments in the oil and gas industry, the biology of the LPC, and the intersection between the two. Part IV describes the LPC's listing under the ESA and the Range-wide Conservation Plan (RWP), a novel, voluntary collaboration among the five states comprising the LPC's range. Part V identifies challenges and opportunities for the oil and gas industry to help ensure the success of the RWP approach and avoid the potentially more stringent regulatory consequences of further decline of the LPC. In Part VI, this Article concludes that, notwithstanding these challenges, if the RWP succeeds in arresting the species' decline, it would represent a substantial victory for the voluntary conservation movement and the fundamental values of the ESA.

II. The Endangered Species Act

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species..."[12] A species may be listed under the ESA as: (1) "endangered" if it is at risk of extinction throughout all or a significant portion of its range; or (2) "threatened" if it is likely to become endangered throughout all or a significant portion of its range.[13]

The U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) are authorized, on their own or upon petition by any person, to determine whether a particular species should be listed as endangered or threatened.[14] To make this determination, a species may be listed based on overexploitation, habitat loss, disease, predation, inadequate protection by other regulatory mechanisms, or other natural or artificial factors.[15] Listing determinations must be made "solely on the basis of the best scientific and commercial data available."[16] The law also directs the U.S. Secretary of Interior ("Secretary") to designate a "critical habitat," and authorizes the FWS and NMFS to take affirmative actions that "seek to conserve endangered species and threatened species."[17] Because of the ESA's expansive protections, these determinations are often contentious.[18]

Once a species is listed as endangered, the ESA prohibits the "taking" of that species, which can include "harm" through significant degradation of the species' habitat as well as killing, injuring, harassing or capturing the species, without an incidental take permit or other authorization.[19] Incidental take permits are available under the ESA for private projects, and cover takings that are incidental to otherwise lawful actions, known as incidental takings.[20] Incidental take applicants must prepare a habitat conservation plan that details: (1) the impacts of the taking; (2) measures to minimize and mitigate the impact, and funding to support those measures; (3) the alternatives to the taking that the applicant considered and reasons such alternatives were not used; and (4) other measures the government may require as being necessary or appropriate for the plan's purpose.[21] Mitigation measures are species-specific, and may include preserving existing habitat, enhancing. or restoring degraded habitat, establishing buffer areas around existing habitat, or modifying land use practices.[22] The FWS or NMFS and designated state agencies monitor these projects for compliance.[23] In addition, other federal agencies must consult with the FWS or NMFS to ensure that their actions, including permit approvals, leasing of federal lands, and other authorizations granted to private parties, do not jeopardize listed species or adversely modify their critical habitat.[24]

Typically, incidental take authorizations for private industrial or other development projects are focused on the project application at hand.[25] So long as the project developer satisfies the requirements for avoidance, mitigation or compensation, or any combination thereof, of harm to the species as specified in the developer's permit or other approval, the developer will not be subject to agency enforcement action or citizen lawsuits.[26] In some circumstances, however, compliance with requirements established piecemeal, project-by-project, may not suffice to reverse a broad declining trend in a species' numbers.[27] If the population continues to diminish, notwithstanding project developers' full legal compliance with their permits and leases, the inevitable result is

more extensive agency management actions and more stringent regulatory requirements imposed on future projects.[28] In such cases, more active attempts to promote coordinated, range-wide protection and sustainable population increases may better serve the long-term interests of both the species and the industry.

The case in point is the LPC, a widely distributed but declining species that has come into direct conflict with expansion of the oil and gas industry in the southwestern United States.[29]

III. The Oil Industry Encounters the Lesser Prairie Chicken

A recent article describes the spectacular, unanticipated surge in domestic U.S. oil and gas production as "nothing short of astonishing":[30]

For the past three years, the United States has been the fastest growing hydrocarbon producer, and the trend is not likely to stop anytime soon. U.S. natural gas production has risen 25 percent since 2010... [and] U.S. oil production... has grown by 60 percent since 2008, climbing by three million barrels a day to more than eight million barrels a day.[31]

The Southwest is among the major regions contributing to this growth. For example, the magnitude of oil and gas activity in the State of Texas is documented by the well permitting statistics maintained by the Texas Railroad Commission.[32] The widespread use of hydraulic fracturing and directional drilling techniques, enabling exploitation of the vast reserves of oil and gas that can be found in shale rock formations located deep beneath the surface is a key contributor to current growth in domestic oil and gas production.[33] In addition to advances in technology, two provisions of the Energy Policy Act of 2005, which amended the Safe Drinking Water Act (SDWA) and the Clean Water Act (CWA), assisted new development of domestic oil and gas reserves.[34] The Energy Policy Act largely eliminated hydraulic fracturing from the federal SDWA regulatory program, leaving such regulation primarily to state agencies.[35] In addition, the Energy Policy Act exempted from CWA permitting authority the discharge of uncontaminated stormwater that occurs during the setting up and construction of oil and gas production facilities.[36]

As the oil and gas industry continues to expand in the Southwest, it has encountered the LPC. The LPC is a reclusive, fifteen-inch-long bird known for dramatic mating behavior, in which males gather together in groups on a display ground, or "lek," collectively displaying to attract females.[37] The species' range includes eastern New Mexico and Colorado, west and northwest Texas (including the Permian Basin, an important region for oil and gas production), and western Oklahoma and Kansas.[38]

Human development and habitat fragmentation have greatly affected the LPC. The LPC lives in shortgrass prairie, a biome largely composed of sage and shinnery oak, a shrub-like tree that rarely grows over a few feet tall.[39] Given their preference for low-vegetation landscape, the LPC avoids tall vertical structures such as drilling equipment, telephone poles, and wind turbines, perceiving these structures as roosts for predators.[40] Additionally, the birds are low-flying and may collide with even relatively low obstructions.[41] The species tends to die off or migrate away from areas where more than 30% of the land has been disturbed.[42] Otherwise suitable LPC habitat adjacent to tall structures is often uninhabited, and the birds may abandon their lekking grounds when oil and gas activity occurs nearby.[43]

The LPC population has been declining; in 2012, only an estimated 45,000 LPCs remained in their original range.[44] Oil and gas exploration and production activities are not the sole contributors to this decline. Other threats to the LPC include habitat loss and fragmentation resulting from conversion of grasslands to agricultural uses, wind energy development, the presence of roads and other man-made structures, and the ongoing drought in the southern Great Plains.[45] Nevertheless, the LPC's wide range within the same region as booming oil and gas development activity, when combined with the LPC's sensitivity to disturbance, poses a particular problem for the industry. Accordingly, in 2012, when the FWS proposed listing the LPC as "threatened" under the ESA, oil and gas interests, as well as agricultural, wind energy and other stakeholders, were concerned about the potential for new protective measures imposing constraints on their current and future operations.[46]

IV. Protecting the LPC Under the Endangered Species Act

On April 10, 2014, the FWS published two final rules listing the LPC as "threatened" under the ESA and adopting a special rule for its protection (as discussed below).[47] The FWS determined that the LPC was threatened because of "the ongoing and probable future impacts of cumulative habitat loss and [habitat]

fragmentation" caused by conversion of grasslands to agricultural use, the encroachment by invasive woody plants, and development associated with the energy industry, including roads and vertical structures such as towers, wells, fences, and buildings.[48]

As noted above, once a species is listed as endangered, the ESA prohibits the "taking" of that species, which includes harm through significant degradation of the species' habitat, without an incidental take permit or other authorization.[49] In contrast, when a species is listed as threatened (as is the LPC), section 4(d) of the ESA grants significant discretion to the FWS as to whether and to what extent the taking prohibition will apply.[50]

A. The 4(D) Rule

Section 4(d) of the ESA authorizes tailored special rules that the FWS deems "necessary and advisable" for protecting threatened species.[51] Absent a Section 4(d) rule, threatened species are entitled to all of the same protections as endangered species under federal.regulations.[52] Using its Section 4(d) authority, the FWS combined its LPC listing with a special rule that "provides measures that are necessary and advisable to provide for the conservation" of the species.[53]

The Section 4(d) rule for the LPC is unique in that it effectively transfers most of the responsibility for protecting the birds from the FWS to a novel, voluntary, multistate collaboration among the five LPC range states. Specifically, the Western Association of Fish and Wildlife Agencies (WAFWA), a non-profit, quasi-governmental organization that relies on the efforts of member states and provinces to accomplish its objectives,[54] will administer the plan for the LPC, review and approve LPC protection plans submitted by private parties and provide oversight and enforcement against parties that fail to comply with their approved plans.[55] Such plan approval and enforcement authority is normally reserved for the FWS, which has never made such a broad delegation of responsibility for a listed species, threatened or endangered.[56]

B. The Range-wide Conservation Plan

The centerpiece of the LPC's Section 4(d) rule is a highly detailed Range-Wide Conservation Plan (RWP) for the LPC developed by a group of state wildlife officials under the auspices of the LPC Interstate Working Group.[57] The RWP reflects a new trend at the FWS to use voluntary, market-based incentives for species conservation.[58] The FWS endorsed the RWP in October 2013, prior to listing the LPC as threatened.[59] However, the FWS has now formally recognized the RWP as the prime vehicle for implementing the LPC's Section 4(d) rule.[60]

To offset projected impacts to LPC habitat, the RWP forecasts a need to commit nearly six million acres of privately-owned land in Colorado, Kansas, New Mexico, Oklahoma, and Texas to LPC conservation over the next thirty years.[61] This acreage represents approximately 36% of the species' occupied range.[62] Because landowner participation is voluntary, the RWP cannot specify the precise location of the lands that will be enrolled. However, the RWP places priority on what are referred to as LPC Focal Areas and the Connectivity Zones that connect these Focal Areas and includes maps identifying Focal Areas and Connectivity Zones.[63]

The RWP depends on voluntary participation by two types of parties: 1) *private landowners* (offset unit generators) who will provide the conservation lands, and 2) *project developers* (impact unit generators) who will pay fees that will be used to fund the conservation efforts of participating landowners.[64] Developers whose projects cause unavoidable impacts to the LPC can remain in compliance with the ESA by paying mitigation fees to fund offsite conservation lands.[65] Private landowners providing conservation lands, called "offset units," will receive cost-capped payments (akin to rental payments) for their participation, funded by the project developers' fees.[66] The targeted project developer categories include: oil and gas, electric transmission lines, wind power, cell and radio towers, agricultural activities, road construction and general construction.[67] The oil and gas industry and others remain free to pursue more conventional approaches to ESA compliance; in fact, several energy companies are pursuing incidental take permits under ESA Section 10 and a programmatic Habitat Conservation Plan for their anticipated LPC impacts.[68] Nevertheless, most companies appear likely to opt in to the RWP.[69]

As noted above, private landowners are incentivized to enroll in the RWP by the prospect of funding from project developer fees.[70] The amount paid to landowners is fixed as specified in the RWP and is quite modest, slightly above the per-acre price paid currently by the U.S.

Department of Agriculture's Natural Resources Conservation Service to farmers and ranchers who agree to manage portions of their land for the benefit of the LPC.[71] In exchange, the landowner agrees to manage the affected acreage for the benefit of the LPC.[72] Landowners, with assistance from consultants and the staff of the non-profit organization that will administer the RWP, must submit site-specific plans to restore and protect LPC habitat on portions of their land, e.g. restricting cattle grazing and implementing measures to control invasive vegetation that threatens the particular vegetation species used by the LPC.[73]

A key goal of the RWP is the protection of large LPC "strongholds" in each of the four ecoregions wherein the LPC exists in significant numbers.[74] As envisioned by the RWP, each LPC stronghold would be in the 50,000-acre size range.[75] The RWP envisions that these strongholds would have long-term protections, either permanent or on a thirty-year term.[76] Each individual stronghold is intended to support a viable LPC population, requiring at least six to ten leks with an estimated minimum range of 25,000-50,000 acres depending on habitat quality.[77] Landowners would be paid a premium to conserve prime LPC habitat in stronghold areas.[78] Conversely, project developers would face higher mitigation expenses in stronghold areas.[79] The goal is to provide anchor habitat for the LPC that is protected from fragmentation in areas known to be favorable for LPC breeding success.[80]

C. Regulation Under WAFWA

The RWP is administered by the WAFWA, a non-profit organization founded in 1922 that today represents twenty-three fish and wildlife agencies across the western U.S. and Canada.[81] The organization encourages principles of sound resource management as well as inter-agency coordination for wildlife protection.[82] WAFWA is a strong advocate for state control of fish and wildlife resources.[83] Decision-making authority within WAFWA for the LPC has been delegated to the heads of the fish and wildlife agencies of the five LPC range states, forming the LPC Initiative Council.[84] Routine administrative matters are managed by the WAFWA staff, several of whom are housed within the various state fish and wildlife offices of the five states.[85] Though WAFWA is not a governmental entity, it will perform quasi-governmental functions under the RWP, such as approval of conservation plans, collection of mitigation fees, distribution of mitigation payments to landowners, and enforcement of the RWP in cases of non-compliance.[86] In short, it will look and act like a regional, single-purpose natural resource agency.

With respect to the LPC, to provide the funds needed to make the landowner payments, WAFWA collects fees from participating project developers whose activities affect LPC habitat.[87] To ensure a net benefit for the bird, an offset ratio of greater than 1:1 is used to calculate the amount of conservation funding needed to offset each acre of impact.[88] As part of the RWP's impact minimization plan, developers are required to avoid or minimize their own adverse impacts on LPC habitat to the extent practical and to mitigate any unavoidable impact by paying the fees to WAFWA.[89] WAFWA selects the lands that will receive payments based on a priority ranking process.[90] Project developers do not select the land that will receive payments from WAFWA.[91]

To participate in the RWP, landowners and project developers must submit a detailed Certificate of Participation to WAFWA.[92] In addition, project developers must accept the terms of a standard form Conservation Agreement with WAFWA that details the parties' rights and responsibilities.[93] For landowners, primary obligations include performing the specific habitat protection measures for which they will be paid and allowing access to the land for WAFWA inspection.[94] The details of the landowner's LPC-related commitments are embodied in a site-specific Conservation Plan.[95]

For project developers, the initial enrollment process entails: (1) identifying the land that will be enrolled; (2) paying a $2.25 per-acre annual enrollment fee to WAFWA for the first three years of enrollment; and (3) identifying the developer's required mitigation (in dollars) for unavoidable impacts to LPC habitat.[96] Project developers must also follow practices to avoid or minimize adverse impacts to LPC habitat; such as focusing development on lands that have already been altered or cultivated.[97]

Most of the complexity of the enrollment process is associated with the highly detailed metrics of computing the number of offset units that a particular landowner will create through the Conservation Plan or the number of impact units that a project developer will create by its

project.[98] These units must then be converted to dollars that must be paid by project developers or paid to conservation landowners.[99]

Four factors are considered in computing a project developer's required mitigation fees under the RWP.[100] The first factor is the cost of implementing habitat conservation practices as determined by the U.S. Department of Agriculture.[101] The RWP contains tables that list these cost factors for 2013/2014 for each of the four ecoregions covered by the RWP.[102] Costs range from approximately $20 to $50 per acre per year.[103] This cost factor is also used to calculate the amount that a developer must pay to WAFWA for its administrative fees, currently 12.5% of the average habitat management cost for the ecoregion in question.[104]

For the second factor, the RWP includes various "impact multipliers" designed to discourage development (i.e. require more mitigation) in higher priority LPC areas.'[105] This aspect of the RWP relies on the Southern Great Plains Critical Habitat Assessment Tool (CHAT), which establishes four categories of areas in the five-state area in terms of their general value as LPC habitat.[106] The mitigation ratio in CHAT category I, for example, is 2.5 to 1, meaning that 2.5 acres of mitigation funding must be provided by the developer for each acre of impact.[107] In CHAT category IV, the lowest value class, the ratio is 1.6 to 1.[108]

The third variable in computing a developer's mitigation fee is an assessment of the condition of the specific site or sites that the developer plans to develop, not just the CHAT category of the site.[109] Sites that score higher on this Habitat Evaluation Guide (HEG) test will require a higher mitigation fee than lower-ranking sites."[110] The HEG test is based primarily on the amount and quality of a site's vegetation as LPC habitat, as well as the quality of vegetation in the surrounding one-mile radius.[111]

The fourth factor is the degree to which the developer provides buffer space in its development plan to ensure that new structures, such as well pads, do not adversely affect LPC habitat suitability.[112] For well pads, the buffer is 200 meters.[113] The RWP presumes that all land within the buffer area is completely unusable by LPCs.[114]

Similar factors go into calculating the amount of money that a landowner can expect to generate by committing to the conservation of LPC habitat on his or her land.[115] The process begins by determining the amount of un-impacted land that the landowner proposes to include in the Conservation Plan.[116] The buffer distances mentioned above are used to determine whether land is or is not impacted by development infrastructure, such as well pads and transmission lines."[117] Next, the landowner performs the HEG test for each parcel of land in the Conservation Plan and proposes actions that could elevate the HEG score.[118] Higher-scoring land receives a higher payment than lower-scoring land.[119] Next, the landowner uses the CHAT map to determine the offset multiplier that applies.[120] In CHAT category I, the offset multiplier is 1.25, whereas in CHAT category IV, the multiplier is 0.8.[121] Finally, the RWP weighs certain practices more heavily than others based on the cost of carrying that practice out; this is taken into account in calculating the payment that the landowner can expect to receive.[122]

Once enrollment in the RWP is confirmed by WAFWA, following receipt of the party's Certificate of Participation and execution of the WAFWA Conservation Agreement, project developers are entitled to assurance from the FWS that they have satisfied the requirements of the ESA and that any incidental taking of LPCs in connection with their project will not be treated as a violation of the ESA Section 9 taking prohibition.[123] This assurance is the prime motivation for project developers to enroll in the RWP since, without the assurance, the developer could additionally be required to obtain an ESA incidental take permit.[124] To qualify for such assurance, the developer must comply with the LPC impact avoidance and minimization requirements of the WAFWA Agreement[125] in addition to paying the required fees to WAFWA. WAFWA then must secure mitigation sites for which developers have paid by signing up landowners in a timely manner.[126]

Oversight and enforcement rests with WAFWA.[127] If a landowner participant is found to be out of compliance, WAFWA's prime tool is to discontinue or reduce payments to that landowner.[128] For project developers, WAFWA has the authority to issue non-compliance letters and to seek resolution of the matter within a forty-five-day period.[129] Receipt of three unresolved non-compliance letters within a three-year period will constitute grounds for WAFWA to withdraw the participant's coverage under the RWP and the ESA assurances that go with it.[130]

In sum, the RWP envisions an elaborate voluntary market for LPC conservation, funded by developer impact fees and drawing participation by landowners who own LPC habitats and are willing to protect and enhance that habitat in return for cost-capped payments from WAFWA.[131] WAFWA takes administrative fees out of the incoming revenue to cover its program operating costs.[132] Compliance monitoring is based largely on self-reporting with WAFWA oversight.[133] WAFWA itself conducts compliance monitoring, both for private landowners and project developers.[134] WAFWA member state agencies are responsible for monitoring the overall success of the RWP.[135]

D. Challenges Ahead

Notwithstanding the RWP's positive elements, its design presents important challenges. First, the sheer complexity of the Plan document, which is over 300 pages in length, makes it difficult for most readers to understand.[136] As noted previously, the RWP is built around a highly detailed set of criteria for project developers to determine the fees they must pay and an equally detailed set of criteria for determining the value of the conservation commitments made by participating landowners.[137] If developers and landowners cannot understand the structure and metrics of the RWP, enrollment and Plan execution could be difficult to sustain.

Second, the RWP places its primary reliance upon enrolling landowners under five- or ten-year contracts.[138] While the RWP presumes that most adverse impacts will be permanent, only 25% of the projected conservation acres will be protected by perpetual easements.[139] The RWP targets the other 75% of conservation efforts to be in the form of term contracts that generate annual payments to participating landowners.[140] This strategy presumes that protected LPC habitat will shift to new locations as landowner participants move in and out of the program.[141] While the RWP describes this feature as positive for LPC conservation,[142] it is not clear how this approach to mitigation will achieve optimal or predictable long-term conservation outcomes for the species.

Third, it is not clear that WAFWA will have the resources to ensure that RWP participants will be held accountable for failure to fulfill the obligations to which they have committed under their enrollment submissions. The limited staff resources that will be assigned to the RWP effort, including two technical or biologist positions per ecoregion,[143] may not be sufficient to support an aggressive enforcement program. In addition, it is not clear how WAFWA may be held accountable if the RWP does not meet its LPC habitat protection goals or the population target of 67,000 birds.[144] The RWP proposes a highly detailed adaptive management process to address these kinds of uncertainties, and it will be important to watch how aggressively the organization moves to follow this process.[145]

Finally, there is a question as to whether the relatively low prices currently being offered to landowners by the RWP will entice significant numbers of landowners to participate on a long-term basis. The RWP's price structure is based on government-established payment levels as opposed to prices that landowners are necessarily willing to accept.[146] In other words, the RWP is not a wholly market-based framework.[147]

V. Opportunities for the Oil and Gas Industry

If the RWP and other voluntary LPC protection programs do not achieve meaningful long-term benefits, it is unlikely that the federal government will simply let the species continue to decline toward endangerment and, potentially, eventual extinction. If voluntary action fails to protect the LPC, industry will most likely face the consequences of stricter, less flexible regulation, such as a future petition to list the LPC as endangered and court challenges to implementation of the LPC's Section 4(d) rule. Because either outcome could significantly disrupt oil and gas development as well as other economic activity in the region, it is in the industry's long-term interest for the RWP program to work effectively to increase the LPC population and avoid such disruption. Annual surveys of estimated LPC population numbers will take on heightened significance in this respect. Likewise, the RWP's adaptive management procedures will be an important tool for addressing possible under-performance of the Plan.

Companies can consider prudent steps to help ensure that they gain the benefits of the RWP—regulatory certainty at a reasonable price—without contributing to outcomes that could be detrimental to the species' prospects and increase the likelihood of an eventual endangered listing.

First, developers operating in LPC country, especially those in prime LPC habitat, should consider active measures to limit the impacts of their activities on the species.[148] The

RWP provides a comprehensive list of measures that project developers can take to avoid or minimize their adverse impacts on the LPC.[149]

Second, where oil and gas development in LPC habitat cannot be avoided or minimized, companies may wish to take steps to ensure that WAFWA uses their fees for permanent, as opposed to temporary, habitat conservation. In particular, companies can urge WAFWA to adopt procedures that give developers a voice on the use of their payments for permanent protection of identified lands. As noted above, the RWP strategy presumes that protected LPC habitat will shift over time as participant landowners move in and out of the program, but it is not clear how this approach will achieve the maximum results for the species.

The RWP specifies that permanent conservation is to be carried out in accordance with the same standards that must be achieved by ESA "conservation banks."[150] Conservation banks are regulated enterprises that take advantage of growing private sector interest in the ecosystem conservation space.[151] In part because the creation and sale of species credits is a conservation bank's primary function, not just an ancillary source of revenue, such banks have been recognized as a superior approach to mitigation.[152] This recognized approach to conservation would be in the long-term best interest of industry, as it appears more likely to lead to sustainable LPC population increases and reduced risk of future, stricter regulation. Further, it is possible that, either the pending litigation (which challenges the promulgation of the LPC's Section 4(d) rule on its face), or future challenges to actions under the RWP may ultimately be successful.[153] Companies that have provided for designated permanent mitigation may find themselves less vulnerable to challenges to their reliance on the RWP than companies that undertook only temporary habitat conservation.

Third, companies should consider pursuing permanent conservation, in part, because this approach has worked before for the oil and gas industry for other ESA-listed species. For example, in 2012, TransCanada sought to complete the southern portion of its controversial Keystone XL pipeline running from Cushing, Oklahoma to Nederland, Texas.[154] A federally-listed endangered species, the American Burying Beetle, is present in an area in eastern Oklahoma through which the pipeline was sited to cross, potentially resulting in an incidental take of the species.[155] Working closely with FWS, TransCanada established a permittee-responsible conservation plan that protected prime beetle habitat in perpetuity.[156] The Keystone McAlester Conservation Area (KMCA) was created as a result.[157] Not only was TransCanada able to satisfy regulators and obtain an incidental take permit for this portion of its pipeline, but future permittees now have a vehicle for similar, permanent conservation measures at an American Burying Beetle Conservation Bank located adjacent to the KMCA.[158] While the species still faces challenges, this effort highlights an approach to protection of an ESA-listed species that enhances long-term recovery prospects.

Finally, industry needs to carefully monitor the success of the overall RWP effort and be prepared to reinforce weak spots that might develop during its implementation. For example, it may turn out that WAFWA lacks adequate staff resources to administer a voluntary program involving hundreds of participants and millions of dollars spread across five states. If so, it may be in the industry's best interests to provide technical or even financial support, over and above the administrative fees it is initially required to pay into WAFWA.

VI. Conclusion

Few species have presented conservation challenges under the ESA that are as difficult as those the LPC presents given the size of the bird's range and the overlap of its range with competing land uses, including, but by no means limited to, oil and gas development. The FWS may have disappointed the states and industry by listing the. LPC as threatened, but it has crafted a plan that delegates unprecedented implementation authority to a quasi-governmental, state-led authority, WAFWA. WAFWA will in turn administer a massive voluntary program to protect the LPC from habitat loss and fragmentation, its primary threats.[159]

This Article identifies several key challenges facing the RWP, primarily its reliance upon many short-term, low-cost, voluntary contracts with landowners to protect LPC habitat. It is not yet clear how such a decentralized approach to conservation can effectively combat habitat fragmentation to a degree large enough to protect the entire species. If the experiment does not succeed, and the LPC's numbers decline over the coming years, the LPC could indeed become a growth-limiting factor for the oil and gas industry in the economically active five-state

region that the species inhabits. On the other hand, if LPC numbers rise significantly, the RWP will represent a victory for the voluntary conservation movement and the fundamental values of the ESA. Such a success could then be replicated as an innovative approach to conservation for other wide ranging species under the ESA.

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Endnotes

1 Author Thomas Campbell was present at this God Committee meeting as the General Counsel of the National Oceanic and Atmospheric Administration.

2 16 U.S.C.A. §§ 1531-1544 (2008).

3 Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 687 (2007) ("Because it has the authority to approve the extinction of an endangered species, the Endangered Species Committee is colloquially described as the `God Squad' or `God Committee."); *see also* Erik M. Yuknis, Note, *Would a "God Squad" Exemption Under the Endangered Species Act Solve the California Water Crisis?*, 38 B.C. Envtl. Aff. L. Rev. 567, 582-83 (2011) (discussing the Northern Spotted Owl exemption process).

4 *See, e.g.*, Seattle Audubon Soc. v. Evans, 771 F.Supp. 1081 (W.D. Wash. 1991), *aff'd in part, rev'd in part*, 952 F.2d 297 (9th Cir. 1991).

5 *See* Interagency Scientific Comm. to Address the Conservation of the N. Spotted Owl, a Conservation Strategy for the N. Spotted Owl 1 (1990) [hereinafter ISC Report] (concluding that the spotted owl was "imperiled over significant portions of its range because of continuing losses of habitat from logging…"), *available at* http://www.fws. gov/wafwo/species/Fact%20sheets/NSO%20Interagency%20Conservation%20Strategy.pdf, *archived at* http://perma.cc/6XJ2-3LNP

6 Notice of Decision, 57 Fed. Reg. 23405, 23405-08 (Endangered Species Committee June 3, 1992) (rejecting exemptions for thirty-one of forty-four proposed timber sales and requiring mitigation measures for the thirteen sales which were approved). For a discussion of the intense political and economic pressure surrounding the God Committee proceedings, see Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Coto. L. Rev. 277, 333-44 (1993).

7 *See, e.g.*, James K. Agee et al., Creating a Forestry for the 21st Century: The Science of Ecosystem Management 431-33 (Kathryn A. Kohm & Jerry F. Franklin eds., Island Press 1997) (discussing the voluntary efforts of private forest landowners to establish new forestry practices to preserve wildlife habitat in the state of Washington during the late 1980s); Andrew Pollack, *Louisiana-Pacific Plans to End Clear-Cutting in California*, N.Y. Times (Mar. 7, 1991), http://www.nytimescom/1991/03/07/business/louisiana-pacific-plans to-end-clear-cutting-in-california.html.

8 ISC REPORT, *supra* note 5, at 22 (describing declining spotted owl populations due to habitat fragmentation caused by logging); Houck, *supra* note 6, at 288 ("Further information soon proved this confidence in existing management programs quite misplaced. The Owl was on the road to extinction and its listing could be avoided no longer.").

9 Erik Loomis & Ryan Edgington, *Lives Under the Canopy: Spotted Owls and Loggers in Western Forests*, 52 Nat Res. J. 99, 112 (2012).

10 *Id.* at 115.

11 Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Lesser Prairie-Chicken, 79 Fed. Reg. 19,974, 19,974-20,070 (April 10, 2014) (codified at 50 C.F.R. § 17.11); Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. 20,074-85 (April 10, 2014) (codified at 50 C.F.R. § 17.41).

12 16 U.S.C. § 1531(b) (1988).

13 *Id.* § 1532(6), (20).

14 *Id.* § 1533 (2003).

15 *Id.* § 1533(a)(1)(A)-(E); 16 U.S.C. § 1531(c)(1).

16 *Id.* § 1533(b)(1)(A).

17 *Id.* § 1532(5)(A), (C) (noting that critical habitat is "the specific areas within the geographical area occupied by the species at the time it is listed… [and] specific areas outside the geographical area occupied by the species at the time it is listed… upon a determination by the Secretary that such areas are essential for the conservation of the species." However, "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."); *id.* § 1533(3)(A) (indicating that the designation of critical habitat shall be made "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and other relevant impact, if specifying any particular areas as critical habitat unless he determines… that the failure to designate such area as critical habitat will result in the extinction of the species concerned."); *id.* § 1531(c) (1).

18 *See, e.g.*, Tenn. Valley Auth: v. Hill, 437 U.S. 153 (1978) (addressing the controversy surrounding the listing of the snail darter); Loomis & Edington, *supra* note 9, at 102; Yuknis, *supra* note 3, at 578-583.

19 16 U.S.C. § 1538 (1988); 16 U.S.C. § 1532(19); Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 708 (1995).

20 16 U.S.C. § 1538.

21 16 U.S.C. § 1539(a)(2) (1988).

22 U.S. Fish & Wildlife Serv., Endangered Species Permits: HCP - Frequently Asked Questions, http://www.fws.gov/midwest/endangered/permits/hcp/hcp_faqs.html (last updated

June 10, 2014), *archived at* http://perma.cc/3BED-G6S8.

23 *Id.*

24 16 U.S.C. § 1536(a)(2) (1988).

25 *See* Fish & Wildlife Serv., U.S. Dep't of the Interior, Habitat Conservation Planning and Incidental Take Permit Processing Handbook app. 17 (1996), *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf, *archived at* http://perma.cc/ 9XCC-ELZ3.

26 *See* 16 U.S.C. § 1538(a) (1988); 16 U.S.C. § 1540 (2002).

27 *See, e.g.*, Listing of Steller Sea Lions as Threatened Under Endangered Species Act with Protective Regulations, 55 Fed. Reg. 12,645, 12,645-62 (Apr. 5, 1990) (to be codified at 50 C.F.R. pt. 227); Threatened Fish and Wildlife: Change in Listing Status of Steller Sea Lions Under the Endangered Species Act, 62 Fed. Reg. 24,345, 24,345-55 (May 5, 1997) (codified at 50 C.F.R. at pts. 222 and 224); Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Loach Minnow, 51 Fed. Reg. 39,468, 39,468-78 (Oct. 28, 1986) (codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Spikedace, 51 Fed. Reg. 23,769, 23,769-81 (July 1, 1986) (codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Endangered Status and Designations of Critical Habitat for Spikedace and Loach Minnow: Final Rule, 77 Fed. Reg. 10,810, 10,810-10,932 (Feb. 23, 2012) (codified at 50 C.F.R. pt. 17).

28 For example, after changing the listing of the western population of steller sea lions from threatened to endangered, the United States government expanded the restrictions on fishing for species that serve as a food resource for the sea lion. *See, e.g.*, Fisheries of the Exclusive Economic Zone off Alaska; Steller Sea Lion Protection Measures for the Pollock Fisheries Off Alaska, 65 Fed. Reg. 3,892, 3,892-3,900 (Jan. 25, 2000) (codified at 50 C.F.R. pt. 679); Fisheries of the Exclusive Economic Zone Off Alaska; Steller Sea Lion Protection Measures for the Pollock Fisheries Off Alaska, 64 Fed. Reg. 3,437, 3,437-46 (Jan. 22, 1999) (codified at 50 C.F.R. pt. 679).

29 Another such example is the dune sagebrush lizard. *See* Nicholas Parke, *The Texas Oil and Gas Industry vs. the Dune Sagebrush Lizard: How the Texas Habitat Conservation Plan Saved More Than Just a Lizard*, 43 Tex. Envtl. L.J. 71, 71-99 (2012).

30 Edward L. Morse, *Welcome to the Revolution: Why Shale is the Next Shale*, Foreign Affairs 3-9 (May/June 2014), *available at* http://www.foreignaffairs.com/articles/141202/edward-l-morse/welcome-to-the-revolution, *archived at* http://perma.cc/9QTS-EUC6.

31 *Id.*

32 R.R. Comm'n of Tex., Summary of Drilling, Completion and Plugging Reports Processed (Aug. 2014), *available at* http://www.rrc.state.tx.us/media/23445/ogdc0814.pdf, *archived at* http://perma.cc/8FZ6-S2JZ.

33 *See* Mit Energy Initiative, The Future of Natural Gas: An Interdisciplinary MIT Study 17-52 (2011), *available at* https://mihi.mit.edu/system/files/NaturalGas_Report.pdf, *archived at* http://perma.cc/ZY59-YVYK.

34 U.S. Senate Comm. on Energy & Natural Res., The Energy Policy Act Of 2005 Anniversary Report 16-18 (2006), *available at* http://www.energy.senate.gov/public/ index.cfm/files/serve?File-id=F3ef8500-1a60-4c8b-b455-4279b8f86e6d, *archived at* http://perma.cc/9EQ2-U6FX; Uma Outka, Symposium, *Environmental Law and Fossil Fuels:. Barriers to Renewable Energy*, 65 Vand. L. Rev. 1679, 1706-10 (2012) (discussing the provisions of the Energy Policy Act of 2005 meant to encourage oil and gas development); Carrie Covington Doyle, Note & Comment, *The Modern Oil Shale Boom: An Opportunity for Thoughtful Mineral Development*. 20 Colo. J. Int'l Envtl. L. & Pol'y 253, 265-69 (2009) (discussing the effect of the Energy Policy Act of 2005 on the expansion of hydraulic fracturing in the oil and gas industries).

35 42 U.S.C. § 300h(d)(1)(B)(ii) (2005); *see also* Terry W. Roberson, *Environmental Concerns of Hydraulically Fracturing a Natural Gas Well*, 32 Utah. Envtl. L. Rev. 67, 77-83 (2012) (discussing the litigation precipitating congressional action to exempt hydraulic fracturing from SDWA).

36 33 U.S.C. §§ 1342(a)(1) & 1362(24) (2014); *see also* Roberson, *supra* note 35, at 83-85 (discussing the effect of the Energy Policy Act of 2005 on the CWA).

37 Div. Of Agric. Sci. & Natural Res., Okla. Coop. Extension Serv., Okla. State Univ., Habitat Evaluation Guide For The Lesser Prairie-Chicken 2-3 (2014), [hereinafter Habitat Evaluation], *available at* http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-6516/E-1014%20Lesser%20Prairie%o20Chicken.pdf, *archived at* http://perma.cc/L8KX-7VV2.

38 *Id.* at 2.

39 *Id.*

40 *Id.* at 9-11.

41 *Id.* at 9 (depicting special visibility measures for fences in LPC habitat to avoid collisions).

42 *Id.* at 15.

43 *Id.* at 10.

44 Endangered and Threatened Wildlife and Plants; Determination of Status for the Lesser Prairie-Chicken, 79 Fed. Reg. 19,974, 20,010 (April 10, 2014) (to be codified at 50 C.F.R. pt. 17).

45 Habitat Evaluation, *supra* note 37, at 2.

46 *See* Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. 73,828, 73,828-88 (December 11, 2012) (to be codified at 50 C.F.R. pt. 17). The proposed listing received 57,350 comments and eighty-five organizations or individuals provided comments at the February 2013 public hearings. These included letters from trade associations such as the Colorado Oil & Gas Association, ID FWS-R2-ES-2012-0071-0273, the Texas Oil and Gas Association, ID FWS-R2-ES-2012-0071-0439, and individual companies and mineral rights holders throughout the LPC's range.

47 Endangered and Threatened Wildlife and Plants; Determination of Status for the Lesser Prairie-Chicken, 79 Fed. Reg. at 19,974-20,070; Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. at 20,074, 20,074-85 (April 10, 2014) (to be codified at 50 C.F.R. pt. 17).

48 Determination of Status for the Lesser Prairie-Chicken, 79 Fed. Reg. at 19,974.

49 16 U.S.C. § 1538(a) (1988).

50 *See* 16 U.S.C. § 1533(d) (2003). The authority to promulgate special rules under this section applies only to threatened species. Species listed as endangered receive the full protection of the ESA, unmodified by any special rules. Additionally, a threatened species for which a special rule has not been promulgated enjoys the same protection as an endangered species. 50 C.F.R. § 17.31(a) (2012).

51 16 U.S.C. § 1533(d).

52 50 C.F.R. § 17.31.

53 Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. 20,074, 20,074 (April 10, 2014) (to be codified at 50 C.F.R. pt. 17).

54 Western Ass'n of Fish & Wildlife Agencies (WAFWA, Our Mission, http://www.wafwa.org/html/about.shtml (last visited Oct 13, 2014), *archived at* http://perma.cc/7FEQT46E. WAFWA itself has no binding authority.

55 Special Rule for the Lesser Prairie-Chicken, 79

Fed. Reg. at 20,075. The FWS will continue compliance monitoring activities in conjunction with WAFWA, but the lion's share of management activities for the LPC is now vested outside of the FWS. *Id*, at 20,082. WAFWA's role in the program is discussed in greater detail below.

56 The Section 4(d) rule has been challenged on these and other grounds by environmental groups. Complaint for Declaratory and Injunctive Relief, Defenders of Wildlife v. U.S. Fish & Wildlife Serv., No. 1:14-cv-1025 (D. D.C. June 17, 2014), *available at* http://www.biologicaldiversity.org/species/birds/pdfs/Complaint_lesser_prairie_chicken.pdf, *archived at* http://perma.cc/C88Z-GGMA. While the complaint specifically alleges violations of the Administrative Procedures Act, the National Environmental Policy Act, and the ESA, the initial sixty-day notice of intent to sue broadly asserted that the FWS had "unlawfully delegated its ESA authority to State wildlife agencies" Memorandum from Defenders of Wildlife et al. to Mr. Daniel M. Ashe, Dir., U.S. Fish & Wildlife Serv., and Sally Jewell, Sec'y, U.S. Dep't of the Interior, at 6 (April 10, 2014), *available at* http://www.biologicalcliversity.org/species/birds/pdfs/Lesser_Prairie_Chicken_60-day_Notice_4-10-2014.pdf, *archived at* http://perma.cc/E8MV-CLNR. Similarly, the FWS was challenged for relying on state conservation plans in withdrawing its proposed endangered listing of the dunes sagebrush lizard. Defenders of Wildlife v. Jewell, No.13.0919 (RC), 2014 WL 4829089, at *1 (D. D.C. Sept. 30, 2014). In that case, the court rejected plaintiffs' argument that implementation of the voluntary conservation plans was too speculative and uncertain, concluding that the FWS's reliance on the plans was reasonable and supported by the record. *Id.* at *8. *But see* Defenders of Wildlife v. Jewell, No 12-1833(ABJ), 2014 WL 4714847, at *13 (D. D.C. Sept. 23, 2014) (finding that the FWS inappropriately relied on state conservation measures for the gray wolf). Meanwhile, state, industry and rancher groups are challenging the listing of the LPC as threatened, charging that the FWS did not grant *enough* credence to conservation efforts already implemented at the state and industry level. *See* Amended Complaint for Declaratory and Injunctive Relief at 38-40, Oklahoma v. Jewell, No. 4:14-cv-00123-JHP-PJC (N.D. Okla. filed Apr. 1, 2014), *available at* http://ag.ks.gov/docs/default-source/documents/lesser-prairie-chicken-complaint.pdf, *archived at* http://perma.cc/Y6V4-JR2T; see also Oklahoma Independent Petroleum Association v. Department of Interior, No. 14-cv-307-JHP (N.D. Okla. filed June 8, 2014), Permian Basin Petroleum Association v. Department of Interior, No. 14-cv-0050 (W.D. Tex. Filed June 9, 2014) and Hutchinson v. Department of Interior, No. 14-cv-0509-JHP (N. D. Okla. Filed Aug. 27, 2014).

57 Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. at 20,074. The LPC Interstate Working Group was formed under the auspices of WAFWA. Lesser Prairie Chicken Interstate Working Group, http://www.wafwa.org/html/prairie_chicken.shtml (last visited Oct. 13, 2014), *archived at* http://perma.cc/6R4L-BALJ. The Working Group is a technical group associated with the WAFWA Grassland Initiative with five states committing staff to the group. *Id.*

58 *See also* Policy Regarding Voluntary Prelisting Conservation Actions, 79 Fed. Reg. 42,525, 42,525-32 (July 22, 2014).

59 Fish & Wildlife Serv., U.S. Fish and Wildlife Service Endorses Western Association of Fish And Wildlife Agencies Lesser Prairie-Chicken Range-Wide Conservation Plan 1 (Oct. 2013), *available at* http://www.fws.gov/southwest/es/Documents/R2ES/LPC_NR_WAFWA_ConservationPlan_230ct2013.pdf, *archived at* http://perma.cc/NJM8826X.

60 *See* Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. at 20,074, 20,078-79 (fully adopting the RWP as a Section 4(d) special rule).

61 Western Ass'n of Fish & Wildlife Agencies, The Lesser Prairie-Chicken Range-Wide Conservation Plan 27, 72 (2013) [hereinafter RWP], *available at* http://www.wafwa.org/documents/2013LPCR-WPfinalfor4drule12092013.pdf, *archived at* http://perma.cc/C2H3-LQYH.

62 *Id.* at 72-73.

63 *Id.* at 79.

64 *Id.* at 1.

65 *Id.* at 273-76.

66 *Id.* at 262-63.

67 *Id.* at 274.

68 *Id.* at 103. The ESA provides for some exception from liability for acts otherwise prohibited by the ESA contingent on the actor's submitting and adopting an approved Habitat Conservation Plan. 16 U.S.C. § 1539; *see supra* notes 21-22 and accompanying text.

69 *See* RWP, *supra note* 61, app. L at 39 (LPC working group estimated that oil and gas companies would be willing to enroll a minimum of five million acres).

70 RWP, *supra* note 61 and accompanying text.

71 Id. RWP, *supra* note 61, at 294-97.

72 *Id.* at 298-99.

73 *Id.* at 1-55 app. J. The Natural Resources Conservation Service has published guidance for conservation plans. *Id.*

74 *Id.* at 84 (recommending "strongholds" in each of the four ecoregions, which are shinnery oak, sand sagebrush, mixed grass, and short grass). While initial plans are intended to target existing large contiguous blocks of LPC habitat, the RWP envisions giving increased conservation priority to newly discovered occupied LPC habitat.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 84, 100.

79 *See id.* at 98, 235-37, 262 (giving higher habitat quality scores to lands within one mile of other potential habitat and using a habitat score to calculate the maximum mitigation fees).

80 *Id.* at 5, 93-94.

81 *Id.* app. L at 1, 4; Western Assn of Fish & Wildlife Agencies, Our History, http:// www.wafwa.org/html/history.shtml (last visited Oct. 13, 2014), *archived at* http://perma.cc/V67N-FCD4.

82 Western Ass'n of Fish & Wildlife Agencies, Our Mission, http://www.wafwa.org/ html/about.shtml, *archived at* http://perma.cc/7FEQ-T46E.

83 *Id.*

84 RWP, *supra* note 61, at 1, 111.

85 Western Ass'n of Fish & Wildlife Agencies, *supra* note 82.

86 *See* RWP, *supra* note 61, at app. L at 3.

87 *Id.* at 92-102.

88 *Id.* at 92.

89 *Id.* at 102-10. Avoidance measures include avoiding siting projects in focal areas or within 1.25 miles of known leks, focusing development on already altered or cultivated lands. *Id.* at, 107. Where avoidance is not possible, developers must minimize their impacts including using common rights of way for new infrastructure like roads, fences, and well pads. *Id.* at 108. Specifically, oil and gas developers may minimize their impacts by using directional drilling and clustering *Id.* at 108. When a developer still faces unavoidable impacts, the developer then mitigates through participation in the RWP. *Id.* at 108.

90 *Id.* at 262.

91 *Id.*

92 *Id.* at 1, 48, 215-30.

93 *Id.* at 1, 99, 183-214.

94 *Id.* at 193-94.

95 *Id.* at 100.

96 *Id.* at 212.

97 *Id.* at 107.

98 *Id.* at 232-43, 252-74.

99 *Id.* at 252-74.

100 *Id.* at 232.

101 *Id.*

102 *Id.* at 236.

103 *Id.*

104 *Id.* at 261.

105 *Id.* at 232.

106 *Id.* at 100, 232

107 *Id.* at 236.

108 *Id.*

109 *Id.* at 232.

110 *Id.* at 235-37.

111 *Id.* at 98-99.

112 *Id.* at 232.

113 *Id.* at 95.

114 *See id.* at 234.

115 *Id.* at 94-99.

116 *See id.* at 95.

117 *Id.*

118 *Id.* at 98.

119 *See id.* at 257-58.

120 *Id.* at 100.

121 *Id.*

122 *Id.* at 262-63.

123 *Id.* at 2, 205-09. To enroll in the RWP program, a non-federal property owner must complete a WAFWA Conservation Agreement (WCA) and a WAFWA Certificate of Participation (WCP) signed by WAFWA. *Id.* at 189.

124 *See generally id.* at 1-154.

125 *Id.* at 102-10, 197-201; *see also supra* note 89 and accompanying text.

126 *See* Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. 20,074-85 (April 10, 2014) (codified at 50 C.F.R. § 17.41).

127 RWP, *supra* note 61, at 122-27, 213-14, 227.

128 *See id.* at 124 (requiring compliance monitoring with a new habitat evaluation guide score which can be used to reduce the offset payment as discussed above).

129 *Id.* at 227.

130 *Id.*

131 *See id.* at 262-71. Payments are determined based on the ecoregion in which the offset unit is located and on the cost associated with implementing the prescribed conservation practice for the area. *Id.* at 263. Additionally, landowners placing their land under a perpetual conservation easement are entitled to a maximum of 50% of the fair market value for the area. *Id.* at 269.

132 *Id.* at 212.

133 *See id.* at 228.

134 *Id.* at 124. Private landowners must grant WAFWA personnel access to confirm compliance with RWP specifications. *Id.* Project developers are also monitored for compliance with their avoidance and mitigation measures. *Id.* If the project developer exceeds three notices of noncompliance and fails to address those measures within the allotted timeframe, the developer can be terminated from RWP coverage. *Id.* at 124-25.

135 *Id.* at 122.

136 *Id.* at 1-308.

137 *See id.* at 237-41, 262-71.

138 *Id.* at 93, 213.

139 *Id.* at 91.

140 *Id.*

141 *Id.*

142 *Id.* at 26 (indicating that range shifts may be beneficial due to changing climatic conditions).

143 *Id.* at app. L at 24.

144 *Id.* at 71.

145 *Id.* 116-21. For instance, in the event that an enrollee is not in compliance, the adaptive management plan requires sending a noncompliance letter or removal of certification. *Id.*, at 118. If the quality of offset acreage is less than that of impacted acreage on average, the RWP adaptive management plan calls for adjusting offset ratios, mitigation unit values, and prioritizing habitat quality when ranking landowner offers. *Id.* at 119.

146 *See id.* at 262-71.

147 The FWS acknowledged the potential success of the program is dependent on adequate enrollment. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Lesser Prairie-Chicken, 79 Fed. Reg. 19,974, 19,980 (Apr. 10, 2014) (codified at 50 C.F.R. pt. 17) ("In conclusion, we have a high level of certainty that the rangewide plan will improve the status of the species into the future if sufficient enrollment occurs and the plan is implemented accordingly. However, the rangewide plan has not contributed to the elimination or adequate reduction of the threats to the species at the current time to the point that the species does not meet the definition of threatened or endangered").

148 *See supra* note 89.

149 *Id.* at 197-201; *see also supra* note 89 for listed measures.

150 RWP, *supra* note 61, at 93. Conservation bank guidance requires a robust management plan, careful site selection, a sufficient buffer area around the bank, and extensive monitoring. U.S. Fish & Wildlife Serv., Guidance For The Establishment, Use, And Operation Of Conservation Banks 1-18 (2003) *available at* http://www.fws.gov/endangered/esa-library/pdf/Conservation_Banking_Guidance.pdf, *archived at* http://perma.cc/68UB688A; U.S. Fish & Wildlife Serv., Conservation Banking: Incentives For Stewardship 1-2, (2012), *available at* http://www.fws.gov/endangered/esa-library/pdf/conservation_ banking.pdf, *archived at* http://perma.cc/H5H3-QZWR.

151 *See* Conservation Banking: Incentives For Stewardship, *supra* note 150, at 1-2.

152 *See* Gregory M. Parkhurst & Jason F. Shogren, *Evaluating Incentive Mechanisms for Conserving Habitat*, 43 Nat. Resources J. 1093, 1147 (2003) ("When markets have many buyers and sellers such that the developmental pressure in the region is strong, conservation banking is the preferred mechanism for species protection.").

153 Defenders of Wildlife v. U.S. Fish & Wildlife Serv., No. 1:14-CV-1025 (D. D.C. filed July 17, 2014).

154 TransCanada Keystone Pipeline, LP, Final Habitat Conservation Plan: TransCanada Keystone Pipeline, LP Gulf Coast Project 3 (2012) [hereinafter TransCanada HCP] http://www.fws.gov/southwest/es/oklahoma/documents/te_species/keystone/final%20keystone%20hcp%2020121029.pdf, *archived at* http://perma.cc/796Z-N3MW.

155 *Id.*; Notice and Request for Comment for Draft Environmental Assessment and Draft Habitat Conservation Plan for TransCanada Keystone Pipeline's Gulf Coast Project in Oklahoma, 77 Fed. Reg. 49,824, 49,824 (August 17, 2012).

156 Notice and Request for Comment for Draft Environmental Assessment and Draft Habitat Conservation Plan for TransCanada Keystone Pipeline's Gulf Coast Project in Oklahoma, 77 Fed. Reg. at 49,824.

157 TransCanada HPC, *supra* note 154, at 64-65.

158 *Id.* at 64.

159 RWP, *supra* note 61, at 3.

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