

Locke Lord QuickStudy: Lek It or Not: ESA Listing of Lesser Prairie-Chicken Has Major Implications for Energy Projects in the Southwest

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On November 25, 2022, the U.S. Fish and Wildlife Service (the “Service”) published a final rule listing two Distinct Population Segments (“DPSs”) for the lesser prairie-chicken (*Tympanuchus pallidicinctus*, “LEPC”) under the Endangered Species Act of 1973 (“ESA”). Specifically, the Service is listing the Northern DPS as “threatened” and the Southern DPS as “endangered”. The listings become effective on January 24, 2023, and will have major ramifications for both renewable and conventional energy and infrastructure projects in the five states where the LEPC is present. Many planned and potentially operating projects will need to either take actions to avoid take of the LEPC or potentially pursue an incidental take permit (“ITP”) to avoid liability under the ESA.

LEPC in a Flash

The LEPC is a species of prairie grouse endemic to the southern and central high plains of the United States. It is a charismatic bird with a [flamboyant mating ritual](#) that males perform at breeding sites called “leks.” It is considered a “boom-bust” species with annual reproductive success tied to precipitation patterns. While historical estimates suggest the LEPC once numbered in the hundreds of thousands, its population has declined dramatically due to habitat loss and fragmentation. The Service estimates that LEPC habitat has been reduced by as much as 90 percent from its historical range.

The Southern DPS includes the Shinnery Oak Ecoregion in eastern New Mexico and southwestern Texas, while the Northern DPS includes the Sand Sagebrush Ecoregion, the Mixed-Grass Ecoregion, and the Short-Grass/Conservation Reserve Program Ecoregion in southeastern Colorado, central and western Kansas, western Oklahoma, and the northeastern Texas Panhandle. Together, the two DPSs encompass the entirety of the LEPC’s current range.

The LEPC was [previously listed as threatened by the USFWS in 2014](#) with a special take rule under section 4(d) of the ESA that authorized take by participants enrolled in and in compliance with the [Lesser Prairie-Chicken Range-Wide Conservation Plan](#) (“Range-Wide Plan”), a conservation framework developed by the Western Association of Fish & Wildlife Agencies. However, that listing was [vacated by a federal court](#) in late 2015 which found that the Service’s listing decision was arbitrary and capricious and not consistent with its own policies for evaluating voluntary conservation efforts. That [vacatur was later upheld](#) and the species was formally de-listed until the [Service proposed re-listing the species](#) on May 24, 2021. See our previous QuickStudies linked above for more on the original LEPC listing, the resulting litigation, and the re-listing proposal.

Implications for Industry

Potential for Take

The ESA makes it unlawful for any person to “take” a threatened or endangered species without a permit, where a “take” includes killing, hunting, harassing, and harming the species,^[1] or harming its habitat.^[2] A host of activities associated with conventional and renewable energy development can lead to takes prohibited by the ESA. For petroleum and natural gas production, well pad construction, seismic surveys, access road development, power line construction, pipeline corridors, and other activities can all result in direct loss of LEPC habitat. Wind energy development may also have negative impacts on the LEPC, principally from the presence of wind turbines, which the Service alleges interfere with LEPC breeding activity, as well as above-ground transmission lines. Construction or maintenance of pipeline and transmission line rights-of-way, solar or battery storage projects, or residential and commercial development could also impact LEPC habitat or disrupt LEPC feeding, breeding, and roosting, resulting in a prohibited take.

A New 4(d) Rule

In announcing the “threatened” listing for the northern DPS of the LEPC, the Service also issued a 4(d) rule that authorizes incidental take of LEPC resulting from three categories of activities: (1) continued routine agricultural practices on existing cultivated lands; (2) prescribed burns for grassland management; and (3) prescribed grazing following a site-specific grazing management plan developed by a Service-approved party. Significantly, the 4(d) rule for the Northern DPS does *not* automatically include activities carried out under the Range-Wide Plan. Although the final rule acknowledges that the Service’s previous 4(d) rule had exempted these activities from take,” the agency “reevaluated that decision based on ... a variety of deficiencies with the [Range-Wide Plan]” identified in a 2019 audit of the program and a [report finalized in December 2020](#).^[3]

Many commenters to the proposed listing rule argued that the 4(d) rule should include provisions allowing incidental take of LEPC due to energy infrastructure such as oil and gas exploration and production, renewable energy facilities, and transmission lines. But the Service declined these requests, finding that these activities “contribut[ed] to the primary threat of habitat loss and fragmentation to the [LEPC] currently and into the future... and continued unmitigated impacts are likely to result in an additional decline in the status of the species.” Even if the 4(d) rule had granted such relief, however, it would not have applied to the Southern DPS due to its listing as endangered rather than threatened. As a result, developers of energy and other types of projects within the range of the LEPC will need to either implement measures to avoid take or seek authorization for incidental take of LEPC.

Options for Take Authorization

Companies needing authorization for incidental take can seek individual ITPs for their projects, but obtaining an ITP can be costly and require several years of negotiation with the Service. Several programmatic mechanisms for obtaining take authorization are also available, including the following:

- The Service has developed conservation plans, known as Candidate Conservation Agreements with Assurances (“CCAAs”), that authorize incidental take from oil and gas activities by operators who enrolled in plans prior to the listing of the LEPC. One example is the CCAA for the LEPC between the Texas Parks and Wildlife Department and the Service, which is available [here](#).
- The Service has finalized a habitat conservation plan (“HCP”) and issued a section 10 permit for oil and gas upstream and midstream activities. The section 10 permit associated with this HCP authorizes incidental take of LEPC by parties who execute a certificate of inclusion with the permit holder and commit to conservation measures prescribed in the HCP. The HCP is available [here](#). Unlike the oil and gas CCAAs, however, parties may enroll in the HCP after the final rule takes effect.
- The Service has finalized an HCP and issued a section 10 permit for wind and solar energy, power lines, and communication towers. Like the oil and gas section 10 permit and HCP, the section 10 permit associated with this HCP authorizes incidental take of LEPC by parties who execute a certificate of inclusion with the permit holder and commit to conservation measures as provided in the HCP. The HCP and related materials are available [here](#). Parties may enroll in the HCP after the USFWS’s listing decision takes effect.

Although these programmatic permits provide ready-made options for obtaining take authorization without the multi-year process required to develop an individual HCP, that does not necessarily mean they are attractive options. Potential applicants need to review the terms conditions of these plans carefully with their consultants and counsel to understand the requirements and the restrictions they place on covered activities to determine if they present a commercially viable solution. Of particular concern is the way that required mitigation is calculated, and the costs of that mitigation, which can be quite substantial and often render a project uneconomic.

Additionally, companies that need new federal permits or rights-of-way may be able to obtain authorization through the consultation process that the federal agency is required to undertake with the Service under section 7 of the ESA. This process can have certain advantages including more definite time frames for Service review, and can result in an incidental take statement that provides take authorization in lieu of an ITP. This process may be an option in places such as New Mexico where the United States owns large swaths of land managed by the Bureau of Land Management (“BLM”); however, pursuing take authorization through section 7 involves its own set of considerations including heightened federal involvement.

Concluding Thoughts

It should be noted that the ESA does not require one to obtain a permit for activity that may result in incidental take of an endangered species, only for the incidental take itself. However, constructing a project that may result in take of LEPC, whether directly or through loss of habitat, can be a very risky proposition and not a realistic option for many developers, especially those that require financing. Lenders and investors are generally intolerant of material ESA risk, but avoiding take can be very disruptive to project economics, construction schedules, or both. Thus, many projects in the LEPC’s habitat may need to pursue incidental take authorization in one of the above forms to avoid enforcement or a citizen suit by project opponents or NGOs that could result in an injunction.

The issues companies must face for projects involving LEPC risk are much the same now as when the species was previously listed. Most notably, the Service takes an expansive view of what constitutes LEPC habitat, what activities may result in take, and how mitigation requirements are determined. Thus, the difficulty in avoiding take or obtaining take authorization lies not in the planning process itself, but in negotiating a reasonable conservation plan and associated mitigation solutions that make any kind of sense economically. Companies should seek the guidance of experienced consultants and counsel to navigate these issues. We encourage you to contact the authors with questions about this listing or to discuss your company's permitting or compliance needs.

[1] 16 U.S.C. § 1532(19).

[2] 50 C.F.R. § 17.3.

[3] ICF. 2020. Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances Realignment Phase 1 Findings and Recommendations December. Final. (ICF 00659.19.) Golden, Colorado. Prepared for Western Association of Fish and Wildlife Agencies, Boise, Idaho.

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