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# Lesser Prairie Chicken Listing Under the Endangered Species Act (ESA)

July 21, 2023

**Congressional Research Service**

<https://crsreports.congress.gov>

R47632



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## Lesser Prairie Chicken Listing Under the Endangered Species Act (ESA)

On November 25, 2022, the U.S. Fish and Wildlife Service (FWS) listed two populations of the lesser prairie chicken (LPC) pursuant to the Endangered Species Act (ESA; 16 U.S.C. §§1531 et seq.). Listing under the ESA provides tools to aid the species' conservation and recovery and to protect its habitat, but it could also affect both government and private activities in several states where LPCs are found.

The LPC is a species of grouse that is endemic to the southern and central high plains of the United States. From the 1960s to the mid-2010s, FWS tracked a significant decline in the LPC's population and habitat throughout its range. More recently, populations have been variable, leading to some uncertainty regarding population trends. According to FWS, habitat reduction and fragmentation are the primary causes of the LPC's population decline. Drought and other factors also account for some of the decline.

Congress has been interested in the LPC since FWS first listed it as threatened in 2014. Although that listing was ultimately vacated by a federal court, some in Congress had introduced bills to delist the LPC from the ESA (after its 2014 listing) and prevent future listings. This recent listing has caused some in Congress to express interest on how rules associated with the listing can potentially affect activities conducted by constituents such as farming, ranching, and mineral extraction, among others. Some others in Congress have expressed support for the listing.

The November 2022 listing identified two distinct population segments (DPSs) of the LPC—a Northern DPS and a Southern DPS. The Northern DPS is located in southeastern Colorado, western Kansas, western Oklahoma, and the northeast Texas Panhandle, whereas the Southern DPS is located in eastern New Mexico and the southwest Texas Panhandle. The two DPSs are subject to different levels of protection based on their listing status. The Southern DPS—listed as endangered—is automatically protected from all prohibited acts contained in Section 9 of the ESA. The Northern DPS—listed as threatened—is protected through a regulation from these prohibited acts, with certain exceptions; in particular, the prohibition on *take* (to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) does not apply to the Southern DPS with respect to routine agricultural practices on land cultivated within the last five years, prescribed fires, and grazing subject to approved grazing management plans. Actions that may incidentally take LPC in either the Southern DPS or the Northern DPS and that are not subject to one of the exceptions can occur only through the ESA's permitting process.

Prior to the 2022 FWS listing, the LPC was the subject of several candidate conservation agreements with assurances (CCAAs). CCAAs are voluntary agreements between FWS and landowners in which the landowner agrees to adopt certain land management practices to help conserve a species that is a candidate for listing under the ESA. If the landowner complies with the agreement and the species is subsequently listed as threatened or endangered, the landowner is not obligated to comply with additional regulations that may come with listing the species. The LPC was the subject of four programmatic CCAAs: two that covered oil and gas drilling and two that covered landowners. The CCAAs focused primarily on reducing habitat loss and habitat fragmentation, but they also included provisions to reduce noise and vehicle strikes during mating season. Over eleven million acres of LPC habitat were enrolled in the various CCAAs before FWS listed the LPC.

Shortly after the LPC was listed, the Senate passed a joint resolution pursuant to the Congressional Review Act that, if enacted, would nullify FWS's listing decision. The House version of the joint resolution is still pending. A bill to delist the LPC in Kansas, Oklahoma, Texas, Colorado, and New Mexico and prevent the listing of LPC populations in those same states in the future also has been introduced in the House. Arguments for and against these measures generally address issues that relate to whether the species should remain listed, the effect of the listing on rural economies and agriculture, and the science FWS used to determine the listing.

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## Introduction

The lesser prairie chicken (LPC; *Tympanuchus pallidicinctus*) is a species of grouse that is endemic to the southern and central high plains of the United States (see **Figure 2**). Based on data collected from 1960s to the present, the LPC's range-wide population and habitat have declined overall.<sup>1</sup> Some stakeholders note that population trends are less clear, with one study reporting that populations have remained stable and, in some regions, increased from 2013 to 2021.<sup>2</sup> Concerns over these population declines, which were primarily driven by habitat loss, prompted the 2022 listing of the LPC under the Endangered Species Act (ESA).<sup>3</sup> The U.S. Fish and Wildlife Service (FWS) promulgated a final rule listing the LPC on November 25, 2022.<sup>4</sup> The listing identifies two distinct population segments (DPSs) of the LPC—a Northern DPS and a Southern DPS.<sup>5</sup> FWS listed the Northern DPS as threatened and the Southern DPS as endangered.<sup>6</sup>

Some in Congress are interested in the listing of the LPC and the implementation of regulations associated with listing the LPC. The listing and regulations could affect many activities such as farming, ranching, and mineral extraction. Some Members contend that the LPC listing is unjustified and should be reversed. They argue that voluntary conservation efforts have stabilized, and in some areas, increased LPC population numbers and that the rule associated with the listing is flawed and its implementation unclear.<sup>7</sup> Other Members state that habitat loss and overall population declines support listing the LPC. They further contend that voluntary conservation programs have not yielded a significant rebound in the LPC population and that development has reduced LPC habitat and increased habitat fragmentation.<sup>8</sup>

This report provides background on the LPC, a summary and discussion of the final rule listing the LPC, and potential considerations for Congress regarding the LPC listing.

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<sup>1</sup> Anecdotal evidence suggests a decline in population until 1960, according to the U.S. Fish and Wildlife Service. After 1960, estimates of population and habitat decline are supported by field data. U.S. Fish & Wildlife Service (FWS), “Rule Implementing Threatened Status to Lesser Prairie-Chicken Population Segments,” 87 *Federal Register* 72674, November 25, 2022 (hereinafter, FWS, “Rule Implementing Threatened Status,” 87 *Federal Register* 72674).

<sup>2</sup> Kristen Nasman et al., *Range-Wide Population Size of the Lesser Prairie Chicken: 2012-2022* (Ft. Collins, CO: Western EcoSystems Technology, Inc., 2022), at [https://wafwa.org/wp-content/uploads/2022/11/LPC\\_RangeWidePopSize2012-2022.pdf](https://wafwa.org/wp-content/uploads/2022/11/LPC_RangeWidePopSize2012-2022.pdf).

<sup>3</sup> 16 U.S.C. §§1531-1544.

<sup>4</sup> FWS, “Rule Implementing Threatened Status,” 87 *Federal Register* 72674.

<sup>5</sup> A *distinct population segment* (DPS) refers to a vertebrate fish or wildlife population that is a discrete and significant segment of a species as a whole. 16 U.S.C. §1532(16). *Discreteness* is based on the population's separation from other populations of the species and may be “the consequence of physical, physiological, ecological, or behavioral factors.” U.S. Department of Justice, FWS, and National Oceanic and Atmospheric Administration, “Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act,” 61 *Federal Register* 4722, pp. 4722-25, February 7, 1996. The FWS evaluates significance based on biological and ecological factors. *Ibid.*

<sup>6</sup> A DPS may be listed as a species under the Endangered Species Act (ESA). See 16 U.S.C. §§1532(19), 1533(a).

<sup>7</sup> Providing for Congressional Disapproval under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the United States Fish and Wildlife Service Relating to “Endangered and Threatened Wildlife and Plants; Lesser Prairie Chicken; Threatened Status with Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment”, H.Rept. 118-94, pp. 2-4, June 6, 2023 (hereinafter Lesser Prairie Chicken House Report).

<sup>8</sup> *Ibid.*, pp. 10-12.

## Lesser Prairie Chicken Population History, Habitat, and Threats

According to FWS, the most important requirement for LPC habitat is large, intact, ecologically diverse grasslands.<sup>9</sup> The LPC's preferred habitat is mixed-grass prairies and shrublands. Most LPCs live for two to three years and reproduce in the spring and summer. Mating between LPCs occurs on leks, which are specific areas where males attempt to attract females to mate. Males show high fidelity to leks, often returning to the same lek multiple times to mate. Females generally build nests near leks.<sup>10</sup>

Much of the grasslands LPCs rely on have been altered by development (e.g., agriculture, roads, cities). Altered habitat can affect the LPC directly or indirectly. The removal or alteration of grasslands so that they are uninhabitable by the LPC directly affects the species, whereas the fragmentation or disturbance of intact grassland habitat (e.g., by noise, man-made structures, and vertical structures such as wind turbines) indirectly affects the species. The main driver of this habitat change is the conversion of grassland to cropland, according to scientists.<sup>11</sup> According to FWS, the majority of the current LPC range is on private lands that have been under some form of agricultural cultivation since the early 1900s.<sup>12</sup> According to some scientists, the estimated historical range of the LPC since European settlement has declined 83% with some estimates as high as 90%.<sup>13</sup> Presently, the LPC resides within four ecoregions, displayed in **Figure 2**.<sup>14</sup>

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<sup>9</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674, p. 72677.

<sup>10</sup> Jacquelyn M. Gehrt et al., "Looking at the Bigger Picture: How Abundance of Nesting and Brooding Habitat Influences Lek-Site Selection by Lesser Prairie-Chickens," *American Midland Naturalist*, vol. 183, no. 1 (Winter 2020), pp. 52-77

<sup>11</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674, p. 72686.

<sup>12</sup> *Ibid.*, p. 72685.

<sup>13</sup> *Ibid.*, p. 72677.

<sup>14</sup> These ecoregions include the Short-Grass Prairie in Kansas; Sand Sagebrush Prairie in Colorado, Kansas, and Oklahoma; Mixed-Grass Prairie in Kansas, Texas, and Oklahoma; and Shinnery Oak Prairie of New Mexico and Texas. U.S. FWS, *Species Status Assessment Report for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*)* (Washington, DC: U.S. FWS, 2022), p. iv, at <https://ecos.fws.gov/ServCat/DownloadFile/218039>.

**Figure 1. The Lesser Prairie Chicken**



**Source:** Greg Kamos, U.S. FWS.

The LPC's population decline apparently parallels the decline in its range. The LPC population has declined from historical levels since European settlement in the U.S., according to scientists and FWS, though these assertions rely on anecdotal evidence of population size before the 1960s.<sup>15</sup> According to FWS, monitoring was not consistent enough over an extended time period before the 1960s to precisely estimate long-term population trends from that period.<sup>16</sup> A survey on male LPCs from 1964 to 2016 provides a 52-year estimate of population trends. **Figure 3** shows a decline in males attending leks from 1964 to 2016, which some scientists argue is indicative of an overall population decline, according to FWS.<sup>17</sup> However, FWS notes that it has some concerns with methodologies and assumptions with this survey, including variation in survey efforts between states and the accuracy of source data used.<sup>18</sup>

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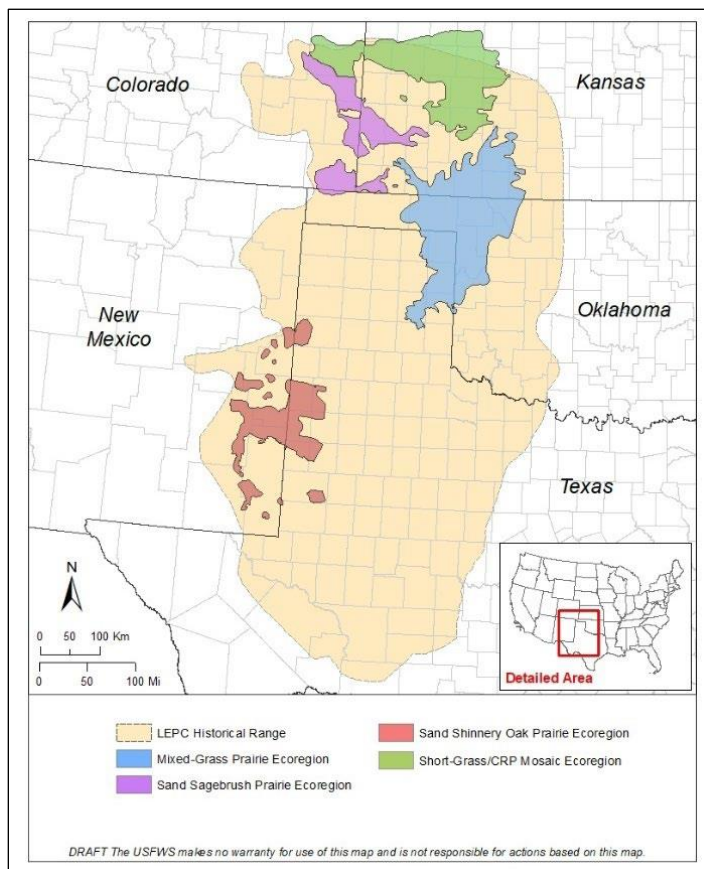
<sup>15</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674, p. 72677.

<sup>16</sup> *Ibid.*, p. 72676.

<sup>17</sup> *Ibid.*, based on a survey conducted by Christian Hagen et al., "Lesser Prairie-Chicken Population Forecasts and Extinction Risks: An Evaluation 5-Years Post-Catastrophic Drought," *Wildlife Society Bulletin*, vol. 41, no. 4 (2016), pp. 624-638.

<sup>18</sup> *Ibid.*

**Figure 2. Lesser Prairie Chicken Historical Range and Ecoregions**



**Source:** U.S. FWS, *Species Status Assessment Report for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*)* (Washington, DC: U.S. FWS, 2022), p. iv, at <https://ecos.fws.gov/ServCat/DownloadFile/218039>.

**Notes:** This is an estimated historical range of LPC and rough description of the current range. This is a draft map and no finalized version was available at the date when this report was published.

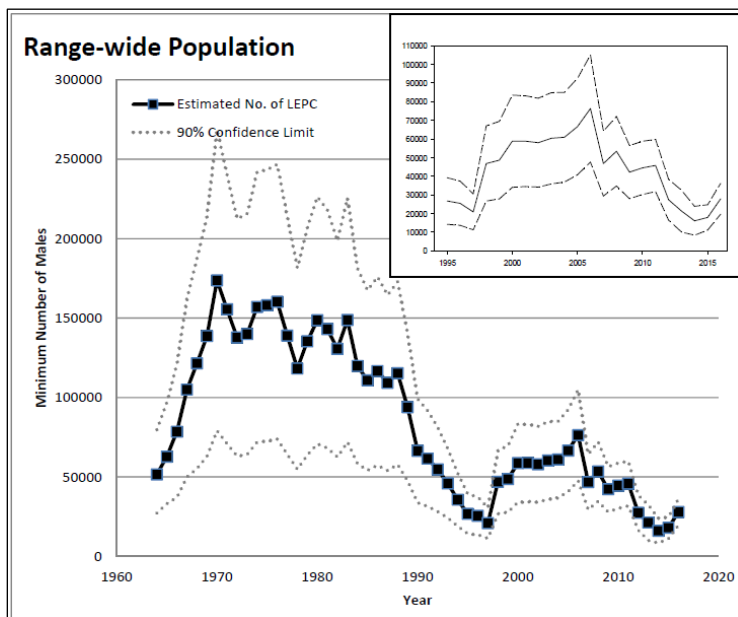
A second survey from 2012 to 2021 with different data estimated the LPC population increased from 2013 to approximately 2020 and decreased from 2020 to 2021.<sup>19</sup> The data points in this survey had wide confidence intervals, indicating a degree of uncertainty in the population size at each period; this uncertainty makes population trends difficult to determine and project.<sup>20</sup> Further, to the extent population size is determinable, there appears to be annual variability in the size. According to FWS, LPCs are a “boom or bust” species with a high degree of annual variation in population.<sup>21</sup> This characteristic might explain, in part, variation in LPC populations over time.

<sup>19</sup> Nasman et al., *Population Size of the Lesser Prairie Chicken*.

<sup>20</sup> FWS, “Rule Implementing Threatened Status,” 87 *Federal Register* 72674, p. 72676.

<sup>21</sup> *Ibid.*

**Figure 3. Lesser Prairie Chicken Male Population Attending Leks (1964-2016)**



**Source:** U.S. FWS, *Species Status Assessment Report for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*)* (Washington, DC: U.S. FWS, 2022), p. vii, at <https://ecos.fws.gov/ServCat/DownloadFile/218039>.

**Notes:** Estimated range-wide minimum number of lesser prairie chicken males attending leks 1964–2016 (ninety percent confidence interval) based on population reconstruction using aerial survey data. Lesser Prairie Chicken and the Endangered Species Act.

## FWS Listing Decision

FWS administers the ESA for terrestrial species, including the LPC. When a species, including a subspecies or DPS, is listed, the ESA’s protections apply to conserve the species and its ecosystem.<sup>22</sup> FWS lists a species as *endangered* if it determines the species is in danger of extinction in all or a significant portion of its range; it lists a species as *threatened* if the species is likely to become endangered in the foreseeable future. FWS makes these determinations based on an analysis of threats to the species that fall within one or more of the following factors:<sup>23</sup>

- The present or threatened destruction, modification, or curtailment of the species’ habitat or range
- The species’ overuse for commercial, recreational, scientific, or educational purposes
- Disease or predation affecting the species
- Inadequate existing regulatory mechanisms protecting the species
- Other natural or man-made factors affecting the species’ continued existence<sup>24</sup>

<sup>22</sup> See generally 16 U.S.C. §§1531-1533. For more information on the ESA, including the process for listing species, see CRS Report R46677, *The Endangered Species Act: Overview and Implementation*, by Pervaze A. Sheikh and Erin H. Ward.

<sup>23</sup> 16 U.S.C. §1532(6), (20).

<sup>24</sup> *Ibid.*, §1533(a)(1).



The listing process under the ESA relies on the best available scientific and commercial data, using information to which FWS has access, and information obtained from the public through the agency rulemaking process.<sup>25</sup>

In its rulemakings to list the LPC, FWS identified the loss of large, connected areas of grassland and shrubland habitat as the primary threat to LPC populations.<sup>26</sup> Other factors affect the LPC's habitat and population size, including livestock grazing, petroleum and natural gas production, wind energy development, fire, roads and transmission lines, among others.<sup>27</sup> In addition, FWS noted that it examined the effects of noise, extreme weather, and existing regulatory mechanisms, including conservation programs, on the LPC before making a listing determination.<sup>28</sup>

In 2014, FWS issued a final rule listing the LPC as threatened;<sup>29</sup> that listing rule was vacated by a federal district court the following year.<sup>30</sup> Environmental groups subsequently filed a lawsuit to require FWS to conduct a status review of the LPC.<sup>31</sup> The lawsuit resulted in a settlement in which FWS agreed to review the LPC's status and determine whether to list it under the ESA by May 2021.<sup>32</sup> On November 25, 2022, FWS issued its final rule listing the Northern DPS as threatened and the Southern DPS as endangered.<sup>33</sup> The Southern DPS includes LPC in eastern New Mexico and the southwest Texas Panhandle.<sup>34</sup> The Northern DPS includes LPC in southeastern Colorado, western Kansas, western Oklahoma and the northeast Texas Panhandle.<sup>35</sup> (See **Figure 4**.) FWS determined that the loss, fragmentation, and degradation of habitat are the primary threats for both DPSs and that the rate of habitat loss is projected to outpace conservation efforts for the LPC. FWS also found that the Southern DPS was particularly vulnerable to severe drought,<sup>36</sup> had low resiliency to events driven by drought and climate change, and had low redundancy.<sup>37</sup> The Northern DPS exhibited greater redundancy than the Southern DPS, but FWS expected habitat loss and degradation to continue into the foreseeable future, reducing the Northern DPS's population over time.<sup>38</sup>

FWS did not designate critical habitat for either DPS.<sup>39</sup> FWS stated that the designation of critical habitat was prudent but not determinable because the information needed to analyze the impacts

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<sup>25</sup> *Ibid.*, §1534(b)(1)(A).

<sup>26</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674.

<sup>27</sup> *Ibid.*, pp. 72685-98.

<sup>28</sup> *Ibid.*, p. 72690.

<sup>29</sup> U.S. FWS, "Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Lesser Prairie-Chicken," 79 *Federal Register* 19974, April 10, 2014. In 1998, FWS had determined that the LPC was eligible for listing but precluded from being listed by other agency priorities. See U.S. FWS, "Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to List the Lesser Prairie Chicken as Threatened and Designate Critical Habitat," 63 *Federal Register* 31400, proposed June 9, 1998.

<sup>30</sup> *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700, 704 (W.D. Tex. 2015).

<sup>31</sup> *Complaint, Defenders of Wildlife v. Bernhardt*, No. 19-1709 (D.D.C. filed Jun. 12, 2019).

<sup>32</sup> Scott Streater, "Lawsuit Prods FWS to Finalize Lesser Prairie Chicken Rule," E&E News PM, October 25, 2022, at <https://subscriber.politicopro.com/article/eenews/2022/10/25/lawsuit-prods-fws-to-finalize-lesser-prairie-chicken-rule-00063390>.

<sup>33</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

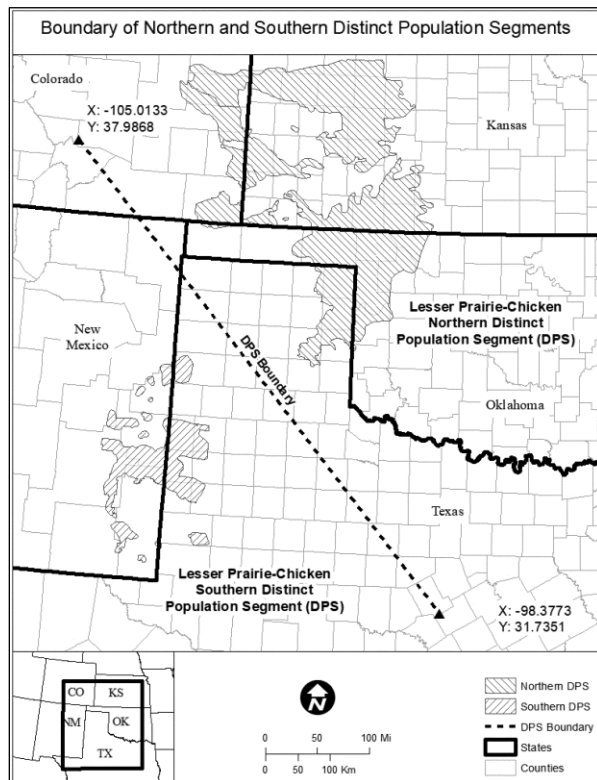
<sup>37</sup> *Redundancy* describes the ability of a population (or species) to withstand losses due to catastrophic events.

<sup>38</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674.

<sup>39</sup> *Ibid.*, p. 72746.

of designation was not sufficient.<sup>40</sup> The ESA requires that if critical habitat is not determinable, FWS has one year to determine critical habitat.<sup>41</sup>

**Figure 4. Boundary of Northern and Southern Distinct Population Segments of the Lesser Prairie Chicken**



**Source:** U.S. FWS, “Rule Implementing Threatened Status to Lesser Prairie-Chicken Population Segments,” 87 *Federal Register* 72674, November 25, 2022.

## Northern DPS 4(d) Rule

FWS listed the Northern DPS as threatened and issued a 4(d) rule for the species.<sup>42</sup> Although species listed as endangered automatically are protected from all the prohibited acts contained in Section 9 of the ESA, species listed as threatened are not.<sup>43</sup> If a species is listed as threatened, FWS may promulgate a regulation that extends protections that generally apply to endangered species to the threatened species.<sup>44</sup> Regulations extending protections to threatened species are known as *species-specific rules* or *4(d) rules*, after the section of the ESA that permits FWS to

<sup>40</sup> Ibid.

<sup>41</sup> 16 U.S.C. §1533(b)(6)(C)(ii).

<sup>42</sup> FWS, “Rule Implementing Threatened Status,” 87 *Federal Register* 72674, p. 72750.

<sup>43</sup> See 16 U.S.C. §§1533(d), 1538(a)(1). Protections in Section 9 of the ESA include a prohibition on “take” of an endangered species without a permit. Ibid., §1538(a)(1). The ESA defines *take* to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Ibid., §1532(19).

<sup>44</sup> 16 U.S.C. §1533(d) directs FWS to issue regulations for threatened species as it “deems necessary and advisable to provide for the conservation of [the] species” and provides that FWS may extend prohibitions that apply to endangered species to threatened species.

promulgate such rules.<sup>45</sup> The 4(d) rule for the Northern DPS of the LPC generally incorporates all prohibitions found in Section 9 of the ESA, with three exceptions.<sup>46</sup>

First, the rule does not prohibit take if the take is incidental to routine agricultural practices on cultivated lands.<sup>47</sup> This exception applies to agricultural land that was cultivated (i.e., tilled, planted, or harvested) anytime within the five years preceding the routine agricultural practice that otherwise may result in take.<sup>48</sup> For example, land newly converted from grassland to agricultural land (i.e., converted after the rule was finalized) would not be exempt from the prohibition of take under Section 9 of the ESA.<sup>49</sup> Land that has been left fallow for five years or longer also would not be exempt from the take prohibition. Farmers who want to engage in agricultural activities that are not exempt under the rule, however, could apply for an incidental take permit under Section 10 of the ESA to exempt their otherwise legal agricultural activities from the prohibition on taking LCPs.<sup>50</sup>

To the extent those agricultural activities require other federal agency involvement (e.g., federal permits or funding), the potential impact on the listed species and any incidental take authorization would be considered in the Section 7 consultation process. Section 7 of the ESA requires federal agencies to engage in consultation with FWS (or the National Marine Fisheries Service for most aquatic species) to ensure a federal action is “not likely to jeopardize the continued existence” of any endangered or threatened species or “adversely modify” critical habitat.<sup>51</sup> If adverse effects to a species or critical habitat are likely, FWS can issue an incidental take statement identifying the anticipated level of take and exempting the agency action from the ESA’s prohibitions on take in Section 9.<sup>52</sup>

Second, the rule does not prohibit take that is incidental to a prescribed fire being used for grassland or shrub land management. Activities covered by the rule include “[c]onstruction and maintenance of fuel breaks, [i]mplementation of the fire and all associated actions,” and “[a]ny necessary monitoring.”<sup>53</sup>

Third, the rule exempts prescribed grazing from the take prohibitions, provided the grazing is conducted by a land manager implementing a grazing management plan developed by a third

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<sup>45</sup> See ESA §4(d), 16 U.S.C. §1533(d). In 1975, FWS promulgated a regulation known as the *blanket 4(d) rule*, which extended nearly all of the prohibitions provided for wildlife species listed as endangered to wildlife species listed as threatened, unless the Service promulgated a species-specific 4(d) rule. 40 *Federal Register* 44425, September 26, 1975. The blanket 4(d) rules provided de facto protections to FWS-listed threatened species, unless a species-specific 4(d) rule superseded the blanket rule for that species. In 2019, however, FWS modified its regulations to no longer employ the blanket 4(d) rule. U.S. FWS, “Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants,” 84 *Federal Register* 44753, August 27, 2019. For more information on the Endangered Species Act and its implementing regulations, see CRS Report R46677, *The Endangered Species Act: Overview and Implementation*, by Pervaze A. Sheikh and Erin H. Ward.

<sup>46</sup> FWS, “Rule Implementing Threatened Status,” 87 *Federal Register* 72674, pp. 72750-51.

<sup>47</sup> *Ibid.* Routine agricultural practices include “[p]lowing, drilling, disking, mowing, or other mechanical manipulation and management of lands.” They also include “[r]outine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as building, irrigation conveyance structures, fences, and roads.” Finally, the use of chemicals “in direct support of cultivated agriculture when done in accordance with label recommendations” is included as a routine agricultural practice. Only lands that meet the definition of *cropland* as defined in 7 C.F.R. §718.2 are eligible for the exception. *Ibid.*, p. 72751.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* See 16 U.S.C. §1539(a).

<sup>51</sup> *Ibid.*, §1536(a)(2).

<sup>52</sup> *Ibid.*, §1536(b)(4).

<sup>53</sup> FWS, “Rule Implementing Threatened Status,” 87 *Federal Register* 72674, p. 72751.

party that FWS has approved for the specific purposes of the LPC rule.<sup>54</sup> Those management plans must address site-specific conditions and potential impacts resulting from the (1) the physical effect of cattle on vegetation and soils (e.g., trampling, consuming), (2) the trampling of LPC nests, (3) construction and maintenance of infrastructure to support grazing (e.g., fences and water channels), and (4) other routine activities to support grazing (e.g., feeding, monitoring, moving livestock). The plan must be reviewed every five years.<sup>55</sup> FWS maintains a list of parties that have been approved to develop grazing management plans on its website.<sup>56</sup> As of July 20, 2023, FWS had not listed any approved parties.<sup>57</sup>

## Incidental Take Permits and Habitat Conservation Plans

Nonfederal parties subject to the prohibitions in the 4(d) rule and Section 9 of the ESA, must obtain a permit before conducting activities that do not have a federal nexus (e.g., no federal loan or permit) and might result in the take of either DPS of the LPC.<sup>58</sup> Section 10 of the ESA allows FWS to issue permits for activities otherwise prohibited by the ESA for certain purposes, including take of a listed species that “is incidental to ... an otherwise lawful activity.”<sup>59</sup> These permits are known as *incidental take permits* (ITPs).

To obtain an ITP, the applicant must submit an application and a habitat conservation plan (HCP) to FWS.<sup>60</sup> The HCP describes the anticipated effects of the applicant’s proposed action on listed species.<sup>61</sup> It also includes steps the applicant plans to take to minimize and mitigate the impact, funding for the mitigation, alternatives to the action that were considered and rejected, and any other measures FWS may require.<sup>62</sup> In addition, an HCP must include biological goals for the relevant species, adaptive management provisions, monitoring protocols, and permit duration that reflect the conservation strategy of the relevant species. Applications for ITPs are subject to publication in the *Federal Register* and a thirty-day public comment period.<sup>63</sup>

Once submitted, FWS evaluates the application and the HCP to ensure

- the taking of species will be incidental to an otherwise legal action;
- the applicant will minimize and mitigate the action’s effects on species to the maximum extent practicable;
- the applicant will ensure there will be adequate funding of the HCP, including any mitigation measures; and

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> FWS, “Frequently Asked Questions: Listing of Lesser Prairie-Chicken Under the Endangered Species Act with 4(d) Rule,” November 17, 2022, at <https://www.fws.gov/story/2022-11/lesser-prairie-chicken-listing-faqs>.

<sup>57</sup> See “Conserving the Lesser Prairie-Chicken,” U.S. FWS, at <https://www.fws.gov/lpc> (last visited June 8, 2023).

<sup>58</sup> 16 U.S.C. §1539(a).

<sup>59</sup> Ibid., §1539(a)(1)(B).

<sup>60</sup> Ibid., §1539(a)(2)(A); 50 C.F.R. §17.3.

<sup>61</sup> 16 U.S.C. §1539(a)(2)(A).

<sup>62</sup> Ibid.

<sup>63</sup> 50 C.F.R. §17.22; FWS, “Habitat Conservation Plans Under the Endangered Species Act,” October 2021, at <https://www.fws.gov/sites/default/files/documents/habitat-conservation-plan-fact-sheet.pdf>.

- the taking of species will not appreciably reduce the survival and recovery of the species in the wild.

The applicant also must comply with any other measure prescribed by FWS.<sup>64</sup>

Currently, FWS has approved two industry-wide programmatic ITPs and HCPs—one for oil and gas development and another for renewable energy development—that members of the relevant industries can use for projects that may affect LPC.<sup>65</sup> Oil and gas or renewable energy developers can receive coverage under the ITP and HCP for a particular project by submitting a certificate of inclusion to the permit holder that complies with the HCP.<sup>66</sup> Projects can be enrolled at any time.

Participation in the ITPs and HCPs that FWS has already approved is voluntary. A project developer may choose to submit its own ITP application with an HCP it developed in lieu of participating in the existing industry-wide ITPs and HCPs.

## Candidate Conservation Agreements with Assurances

Before the LPC was listed, several candidate conservation agreements with assurances (CCAAs) were implemented with the aim of conserving the LPC and its habitat. CCAAs are voluntary agreements between FWS and private landowners in which the landowner agrees to carry out certain actions intended to conserve a species that is a candidate for listing under the ESA. In return, FWS provides an assurance that, so long as the landowner implements the agreement, the landowner is not required to modify or add to those activities if the candidate species is subsequently listed as threatened or endangered.<sup>67</sup> If the species is subsequently listed, participants in a CCAA are exempt from the requirement to secure an ITP for incidental take of the species so long as the take is in compliance with the terms of the CCAA.<sup>68</sup>

Once a CCAA is created, FWS issues an Enhancement of Survival Permit authorized under Section 10(a)(1)(A) of the ESA;<sup>69</sup> the permit specifies the conservation measures identified in the agreement, contains assurances that FWS will not require any additional conservation measures without the relevant party's consent, and authorizes a level of incidental take of the listed species. If the species is subsequently listed, the terms of the permit go into effect.<sup>70</sup>

Four programmatic CCAAs—two for oil and gas companies throughout the LPC's range and one each for landowners in Texas and Oklahoma—address conservation of the LPC.<sup>71</sup> The CCAAs

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<sup>64</sup> 16 U.S.C. §1539(a)(2)(B).

<sup>65</sup> See FWS, "Partners in Lesser Prairie-Chicken Conservation," at <https://www.fws.gov/lpc/partners-lpc-conservation> (last visited July 5, 2023).

<sup>66</sup> LPC Conservation LLC holds the master permit for both industries. See *ibid.* For an example of a master HCP, see LPC Conservation LLC, *Oil and Gas Habitat Conservation Plan for the Lesser Prairie-Chicken* (Western EcoSystems Technology, Inc., 2022), at [https://www.fws.gov/sites/default/files/documents/508%20Compliant%20Final%20LEPC%20OG%20HCP\\_05.9.2022\\_0.pdf](https://www.fws.gov/sites/default/files/documents/508%20Compliant%20Final%20LEPC%20OG%20HCP_05.9.2022_0.pdf).

<sup>67</sup> 50 C.F.R. §§17.3, 17.22(b)(5), 17.32(b)(5). CCAAs are generally created in hopes that such conservation activities prevent the species from needing to be listed. See CRS Report R46677, *The Endangered Species Act: Overview and Implementation*, by Pervaze A. Sheikh and Erin H. Ward.

<sup>68</sup> 50 C.F.R. §§17.3, 17.22(b)(5), 17.32(b)(5).

<sup>69</sup> See 16 U.S.C. §1539(a)(1)(A).

<sup>70</sup> 50 C.F.R. §17.22(d)(1).

<sup>71</sup> See "Partners in Lesser Prairie-Chicken Conservation." The Western Association of Fish and Wildlife Agencies (continued...)

specifies avoidance and mitigation measures to conserve the LPC. These measures include reducing habitat fragmentation by concentrating land disturbance in areas that have already been disturbed by prior development and reducing disturbance to nests and breeding sites by limiting activities and traffic in those areas.<sup>72</sup> Landowners enrolled in a CCAA and compliant with its terms are not required to change their conservation activities now that FWS has listed the LPC. Over 11 million acres have been enrolled across the four CCAAs.<sup>73</sup>

## Considerations for Congress

Members of Congress have introduced legislation in the 118<sup>th</sup> Congress that would address the LPC listing. H.R. 248 would direct the Secretary of the Interior to delist the LPC populations in Kansas, Oklahoma, Texas, Colorado, and New Mexico and would prevent any future listing of LPC populations in those states. Further, two proposed joint resolutions (S.J.Res. 9 and H.J.Res. 29) introduced pursuant to the Congressional Review Act would nullify the rule listing the LPC and possibly prevent any substantially similar listing rule in the future.<sup>74</sup> The Senate passed S.J.Res. 9 on May 3, 2023. The House version of the resolution is still pending.<sup>75</sup> Further, an Interior, Environment, and Related Agencies Appropriations for FY2024 bill was reported out of the House Committee on Appropriations with a provision that would prohibit funds made available by the bill (if enacted), and any other act, to implement, administer, or enforce the final rule listing the LPC under the ESA.<sup>76</sup>

In considering these and other measures addressing the LPC, Congress may evaluate arguments for and against the listing that stakeholders—including Members of Congress—have made. These arguments generally relate to whether the species should remain listed, the effect of the listing on rural economies and agriculture, and the science FWS used to support the listing.

## Listing the LPC Under the ESA

The listing of the LPC under the ESA is controversial. FWS identified the loss of large, connected areas of grassland and shrubland habitat as the primary threat to LPC population and as a reason for listing the species as threatened under the ESA.

According to FWS, the principal arguments in favor of listing the LPC under the ESA are that the LPC population and its range have declined over time, despite existing efforts to conserve the

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CCAA closed its enrollment in 2019, but landowners who are already enrolled can add additional acreage to the CCAA. *Ibid.*

<sup>72</sup> FWS, “Western Association of Fish & Wildlife Agencies, Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie Chicken (*Tympanuchus pallidicinctus*) in Colorado, Kansas, New Mexico, Oklahoma and Texas (Western Association of Fish and Wildlife Agencies, 2014),” pp. 16-18 (listing conservation measures), at [https://wafwa.org/wpdm-package/range-wide-oil-gas-candidate-conservation-agreement-with-assurances-for-the-lesser-prairie-chicken/?wpdmdl=23006&refresh=6409eb43461221678371651&ind=1652297845773&filename=LPCRWP\\_CCAA-with-CI\\_02282014.pdf](https://wafwa.org/wpdm-package/range-wide-oil-gas-candidate-conservation-agreement-with-assurances-for-the-lesser-prairie-chicken/?wpdmdl=23006&refresh=6409eb43461221678371651&ind=1652297845773&filename=LPCRWP_CCAA-with-CI_02282014.pdf).

<sup>73</sup> *Ibid.*

<sup>74</sup> For more information about the effect of a Congressional Review Act resolution, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

<sup>75</sup> Some Members of Congress view the Congressional Review Act as a tool to delist species they feel were inappropriately listed, while others are reluctant to set a precedent for overriding listing decisions under the ESA. See U.S. Congress, House Committee on Natural Resources, *Full Committee Markup*, hearing on H.J. Res. 2, 118<sup>th</sup> Cong., April 27, 2023.

<sup>76</sup> The bill was reported out of the House Interior Appropriations Committee on July 19, 2023. No bill number is assigned to the bill as of date of publication of this report.

species. According to scientists, between 83% and 90% of the LPC's historical range has been lost within the last century, with thousands of acres of habitat converted to agriculture.<sup>77</sup> Further, some stakeholders have claimed that voluntary conservation measures have not worked and the data gathered by FWS supports listing the LPC. In light of these facts and arguments, some stakeholders contend that the ESA's protections will lead to better management of the species and prevent its extinction.<sup>78</sup>

By contrast, some stakeholders opposed to the listing contend that, despite this historical loss of LPC habitat, current and future management of the LPC by states pursuant to existing conservation agreements is sufficient to conserve the species and is more effective than federal management through the ESA.<sup>79</sup> For example, the Attorney General of Kansas sent a notice of intent (NOI) to sue the Department of the Interior claiming, among other arguments, that FWS did not adequately consider preexisting and ongoing voluntary conservation and mitigation measures in Kansas before listing the Northern DPS.<sup>80</sup> The NOI asserted that these conservation efforts were sufficient to conserve the LPC without listing the species under the ESA. Likewise, some Members of Congress have opposed the listing on the grounds that LPC conservation efforts have stabilized LPC populations, and that the 4(d) rule unnecessarily restricts grazing.<sup>81</sup>

In its listing decision, FWS noted that its status review of the LPC considered state and private efforts to conserve the species and that, even taking those measures into account, the relevant legal factors warranted listing the LPC under the ESA.<sup>82</sup> Some Members of Congress have endorsed this view.<sup>83</sup>

## **Economic Effect of Listing**

Congress may also take interest in the economic effect of the listing on agriculture and rural economies. Some stakeholders argue that the listing of the LPC will stress rural economies in the region and alienate producers who have voluntarily worked on conservation projects to support the LPC.<sup>84</sup> These stakeholders assert that although exemptions for certain activities may be available, those exemptions will face regulatory hurdles or will not apply everywhere.<sup>85</sup> Further, they argue, HCP conservation measures might increase the costs of their operations.

These concerns may be tempered by elements of the listing that aim, in part, to lower its economic burden on farmers. For example, no new requirements are imposed on anyone covered

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<sup>77</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674, p. 72676, and Christian Hagen and Kenneth Giesen, *Lesser prairie-chicken (Tympanuchus pallidicinctus)*, Cornell Lab of Ornithology, The Birds of North America, Ithaca, NY, 2005.

<sup>78</sup> National Audubon Society "5 Reasons Why It's Time to List the Lesser Prairie Chicken," April 19, 2021, at <https://nm.audubon.org/news/5-reasons-why-its-time-list-lesser-prairie-chicken>.

<sup>79</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674, p. 72711.

<sup>80</sup> Letter from Kris Kobach, Attorney General, State of Kansas, to Deb Haaland, Secretary, U.S. Department of the Interior, and Martha Williams, Director, U.S. Fish & Wildlife Service, "Re: Notice of Intent to File Suit under the Endangered Species Act in Connection with the Status of the Lesser Prairie-Chicken," January 30, 2023, at <https://bit.ly/3HKoIk5>. The States of Texas and Oklahoma also sent letters to the Department of the Interior indicating a notice of intent to sue based on the LPC listing.

<sup>81</sup> Lesser Prairie Chicken House Report, pp. 2-4.

<sup>82</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674, p. 72711.

<sup>83</sup> House Committee on Natural Resources, *Full Committee Markup*, hearing on H.J. Res. 2.

<sup>84</sup> FWS, "Rule Implementing Threatened Status," 87 *Federal Register* 72674, p. 72677.

<sup>85</sup> National Cattlemen & Beef Association and Public Lands Council, "NCBA and PLC Denounce ESA Listing of Lesser Prairie Chicken," *National Cattlemen & Beef Association*, November 28, 2022, at <https://www.ncba.org/ncba-news/news-releases/news/details/32110/ncba-and-plc-denounce-esa-listing-of-lesser-prairie-chicken>.

by the CCAAs if the participants are in compliance with those agreements. Further, the 4(d) rule allows exemptions from take, such as for grazing practices, if a Service-approved site-specific grazing plan is in place. However, some stakeholders note that it is unclear what the plan must include and the specific steps for creating and approving such a plan, thus making it difficult to assess the economic consequences.<sup>86</sup>

For lands not exempt by the 4(d) rule or existing agreements and ITPs, private landowners whose agricultural or other practices may affect LPC can obtain a Section 10 ITP under the ESA. This would allow stakeholders to continue their operations, though it may require the implementation of additional mitigation measures.

Specific to energy production, some other stakeholders assert that the economic burden of the listing for energy companies is overstated. They contend that the amount of land where energy activities would be affected by this listing is small compared to the land available for energy production derived from oil and gas and wind power.<sup>87</sup>

### **Scientific Basis for the Listing**

The science supporting the listing of the LPC has been subject to debate among stakeholders. Some stakeholders have also questioned the science that FWS used to make the listing decision, specifically estimates of past population trends, projected population sizes, and the effect of non-anthropogenic factors on populations. For example, some assert that LPC populations have been stable or increasing over the past few years and that this shows the effectiveness of voluntary conservation programs in place before the listing.<sup>88</sup> Further, some stakeholders contend that LPC habitat and populations in Kansas were either stable or growing and that LPCs in Kansas should not be included in the listing (in order for FWS to list a DPS, the DPS must meet the regulatory criteria for a DPS regardless of state political boundaries).<sup>89</sup> Other stakeholders argued that non-anthropogenic factors, such as drought, appear to be significant drivers affecting LPC populations, and that curtailing or regulating activities such as ranching and oil and gas production was not necessary for conservation or recovery.<sup>90</sup>

In contrast, the long-term decline of the LPC population and loss of its habitat is the primary argument several stakeholders and FWS have used to justify the listing of the LPC under the ESA.<sup>91</sup> Specifically, FWS noted that long-term population trends of the LPC are declining and are associated with a loss of habitat availability and connectivity. FWS also asserted that the long-term perspective outweighs short-term trends noted in recent studies.<sup>92</sup> FWS explained that the best scientific and commercial data available on the five listing factors supported its decision to list the species and create the 4(d) rule.<sup>93</sup>

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<sup>86</sup> Shelby Haganauer and Daniel Munch, “Lesser Prairie Chicken Rule Pressures Fragile Rural Economies,” American Farm Bureau Federation, January 19, 2023, at <https://www.fb.org/market-intel/lesser-prairie-chicken-rule-pressures-fragile-rural-economies>.

<sup>87</sup> National Audubon Society “5 Reasons Why It’s Time to List the Lesser Prairie Chicken,” April 19, 2021, at <https://nm.audubon.org/news/5-reasons-why-its-time-list-lesser-prairie-chicken>.

<sup>88</sup> See, for example, FWS, “Rule Implementing Threatened Status,” 87 *Federal Register* 72674, p. 72723.

<sup>89</sup> *Ibid.*, p. 72712.

<sup>90</sup> *Ibid.*

<sup>91</sup> See, for example, FWS, “U.S. Fish and Wildlife Service Lists the Lesser Prairie Chicken Under the Endangered Species Act,” November 17, 2022, at <https://www.fws.gov/press-release/2022-11/lesser-prairie-chicken-listed-under-endangered-species-act>.

<sup>92</sup> FWS, “Rule Implementing Threatened Status,” 87 *Federal Register* 72674, p. 72713.

<sup>93</sup> *Ibid.*, p. 72716.



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