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## **Siting Insights: Looking Back and Looking Ahead at Key Environmental Developments**

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## Chicken Not-So-Little: “Threatened” Listing for Lesser Prairie-Chicken Has Big Implications

By: M. Benjamin Cowan and Anna R. Kuperstein

On April 10, 2014, the U.S. Fish and Wildlife Service (FWS or the Service) published a long-awaited **final rule** listing the lesser prairie chicken (LPC) as a “threatened” species under the Endangered Species Act (ESA). The LPC’s habitat stretches throughout Colorado, Kansas, New Mexico, Oklahoma and Texas. The rule specifically identifies wind energy development, and oil and gas development as “two of the more significant threats” to the species.

The listing takes effect on May 12, 2014. As of that date, no person may “take” the LPC without a permit, where a “take” includes killing, hunting, harassing, and harming the species,<sup>1</sup> or harming its habitat.<sup>2</sup> Any company conducting activities within LPC habitat is at risk of causing a take, and thus of violating the ESA. However, in conjunction with the listing decision, the FWS also issued a “**4(d) special rule**,” also known as a “4(d) rule” or “special take rule,” which offers protections for certain entities that cause the incidental “take” of a LPC. The 4(d) rule provides that an unpermitted “take” of a LPC is not a violation of the ESA if it occurs in the context of (1) certain agricultural activities, or (2) activities covered by the **Lesser Prairie-Chicken Range-Wide Conservation Plan** (Range-Wide Plan), when undertaken by participants enrolled in and complying with the Range-Wide Plan.

The Range-Wide Plan has been developed by the Western Association of Fish & Wildlife Agencies, which includes representatives of the state wildlife agencies of the five states within the LPC’s range. It applies to several different types of activities, including oil and gas operations, agricultural activities, wind power, and cell and radio towers. To receive protection from liability under the Range-Wide Plan, the above-listed operations must comply with numerous operational restrictions designed to avoid LPC habitat loss, collision and other sources of mortality, and disturbance of breeding activity. The operational restrictions include:

- Avoid non-emergency operations between March 1 and July 15 (breeding season) within 1.25 miles of leks.<sup>3</sup> Otherwise, non-emergency operations should be conducted between 3:00-9:00 am.
- For oil and gas, use direct drilling and clustering.
- Ensure that new oil and gas infrastructure is located outside of focal areas, connectivity zones, high-probability lek, and nest habitat.
- Within 1.25 miles of leks, ensure that new distribution lines are buried, and that noise levels remain at or below 75 decibels.

Additionally, the covered states have individually imposed additional measures to minimize impacts to LPC, such as Colorado’s best management practices for the oil and gas industry (limit well-pad density in LPC nesting habitat, limit proximity of compressor stations to LPC lek sites, etc.). Thus, participants in the Range-Wide Plan should carefully examine state-level restrictions that could impact their operations.



For each property enrolled in the Range-Wide Plan, the property owner must pay an **annual enrollment fee** for the first three years of its participation. For oil and gas or wind energy leases, the enrollment fee is \$2.25 per gross acre; for the other activities, flat fees range from \$5,000-\$20,000. In addition to enrollment fees, new development also must pay **mitigation fees** to compensate for its impact on LPC habitat. Mitigation fees vary widely depending on several factors, but can be significant.<sup>4</sup> For example, the mitigation fee for large compressor sites, wind turbine towers or high voltage transmission lines in high quality habitat within the mixed grass ecoregion exceeds \$1 million. For similar facilities in other ecoregions the mitigation fee may range from \$400,000 to over \$700,000.

While participation in the Range-Wide Plan, and thus liability for these fees and operational restrictions is optional, participants in the Range-Wide Plan are shielded from liability for the “taking” of a LPC by the 4(d) rule. Without this protection, an entity that “takes” a LPC is subject to **potentially significant** civil or criminal liability under the ESA.

As is frequently the case with significant new listings, the Service’s listing decision is already being challenged in court through a collective action by the states of Oklahoma, Kansas, and North Dakota, as well as the Domestic Energy Producers Alliance and the Oklahoma Farm Bureau. The **complaint** accuses FWS of entering into “private settlements with special-interest litigants,” rather than developing rules based on the best available science. On the other side of the fence, three conservation groups announced their **intent to sue** the FWS over its decision to list the LPC as threatened rather than endangered, which could have required even more stringent restrictions on activities on the LPC habitat, and would have precluded the special take rule because (4)d rules can provide take authorization only for species listed as threatened, not endangered.

While these lawsuits are pending, implementation of the “threatened” listing is expected to go forward. Thus, companies with operations that may affect the LPC or its habitat need to quickly develop an appropriate strategy for ensuring their compliance with the ESA. That may involve avoidance of LPC habitat altogether, enrolling in the Range-Wide Plan, or seeking participation in one of several other conservation plans for LPC that are currently under development or consideration by various companies or industry groups, such as the wind industry’s Great Plains Habitat Conservation Plan. Looking forward, careful planning must be given to future development within the range of the LPC, particularly if coverage under the Range-Wide Plan is the only option available for a project, as the impact of the operational restrictions can be significant, and mitigation fees for new development in high quality habitat areas can be substantial. Collectively, this may be enough to tip the scales against many potential projects.

Locke Lord’s environmental attorneys have been advising numerous companies in both the oil and gas and renewables industries on their LPC obligations and planning, and can provide additional information and insight on these issues as well as strategic options for ESA compliance with respect to the LPC and other protected species.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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#### **Endnotes**

1 16 U.S.C. § 1532(19).

2 50 C.F.R. § 17.3.

3 *Leks* are sites where male LPCs congregate to perform mating displays.

4 *Mitigation fees depend on the ecoregion in which the property is located; the number of acres being impacted; the quality of existing habitat on the impacted acres; the ecological significance to the LPC of the property being impacted.*

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