

# Client Alert

December 2016

## **US Fish and Wildlife Service Issues Finding That Lesser Prairie-Chicken “May Warrant” Relisting Under the Endangered Species Act**

On November 30, 2016, the US Fish and Wildlife Service (the Service) [published a notice in the Federal Register](#) announcing its finding that a September 2016 petition filed by several environmental groups “presents substantial scientific or commercial information” indicating that listing of the lesser prairie-chicken (LPC) under the Endangered Species Act (ESA) “may be warranted.” The Service has initiated a 12-month status review to determine whether listing the LPC is warranted. The Service has requested that information relevant to the status review be submitted by January 30, 2017, in order to be considered during the status review.

The environmental groups’ petition follows a district court’s decision to set aside a prior threatened listing of the LPC under the ESA. On April 10, 2014, the Service issued a final rule listing the LPC as threatened in the five states that comprise the current and historic range for the species: Colorado, Kansas, New Mexico, Oklahoma and Texas. 79 Fed. Reg. 19,974 (Apr. 10, 2014). The Permian Basin Petroleum Association and four New Mexico counties challenged that listing decision, arguing that listing of the species was not warranted. On September 1, 2015, the US District Court for the Western District of Texas set aside the listing based on its determination that the Service failed to adequately consider the prospective impact of conservation efforts, including the Lesser Prairie-Chicken Range-wide Conservation Plan (the Range-wide Plan) — a voluntary and incentive-based conservation program developed and administered by state wildlife agencies in the five states included in the species’ range — on LPC population and habitat. As a result of the decision, the Service issued a final rule formally removing the LPC from the list of endangered and threatened species in July 2016. 81 Fed. Reg. 47,047 (July 20, 2016).

On September 8, 2016, several environmental groups filed a petition asking the Service to list the LPC as endangered under the ESA and to designate critical habitat for the LPC concurrently with the listing. In their petition, environmental groups identified habitat fragmentation, oil and gas development and wind energy development, among other factors, as threats to the species’ habitat or range. In response to the petition, the Service concluded that listing “may be warranted” based on three of the five factors set forth in Section 4(a)(1) of the ESA that guide the Service’s determination of whether a species is endangered or threatened: (1) “the present or threatened destruction, modification, or curtailment of its habitat or range”; (2) “the inadequacy of existing regulatory mechanisms”; and (3) “other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1).

The Service will now undertake a status review to determine whether the LPC should be listed as endangered or threatened, or not listed under the ESA. If the LPC is listed as endangered, as petitioners request, it will receive greater protection than if it is relisted as threatened. When the Service listed the LPC as threatened in 2014, it also finalized a special rule under Section 4(d) of the ESA that provided that incidental take of the LPC was not prohibited in certain circumstances, including where take was incidental to otherwise lawful activities conducted by a participant enrolled in and operating in compliance with the Range-wide Plan. If the LPC is listed as endangered, take of the LPC will be prohibited in all circumstances unless specifically authorized by an incidental take permit issued by the Service.

A decision to relist the LPC under the ESA could hamper development, including oil and gas and wind energy projects, in the five states that comprise the LPC's range. Impacts on development could be even greater if the Service designates critical habitat for the LPC concurrently with the listing. The vigor with which the Service will pursue the status review — and the outcome of the status review — under the incoming Trump administration is an open question. Now that the Service has initiated a status review of the LPC, however, it will have to complete the review within the 12-month period provided by ESA Section 4(b)(3)(B), or it will almost certainly face litigation to compel it to complete the review and issue a listing decision.

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