



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R2–ES–2012–0071]

[4500030113]

RIN 1018–AY21

Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; revision and reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose a revised special rule under authority of section 4(d) of the Endangered Species Act of 1973, as amended (Act),

that provides measures that are necessary and advisable to provide for the conservation of the lesser prairie-chicken (*Tympanuchus pallidicinctus*). In addition, we announce the reopening of the public comment period on the December 11, 2012, proposed rule to list the lesser prairie-chicken as a threatened species under the Act. We also announce the availability of the final Lesser Prairie-Chicken Range-Wide Conservation Plan, which has been prepared by the Lesser Prairie-Chicken Interstate Working Group, and our endorsement of the plan, and request comments on the plan as it relates to our determination of status under section 4(a)(1) of the Act.

DATES: We will accept comments on this proposed rule received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. In addition, the comment period on the proposed rule published December 11, 2012 (77 FR 73828) is reopened until [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **ADDRESSES** by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter FWS–R2–ES–2012–0071, which is the docket number for this rulemaking. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2012–0071; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by one of the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Jontie Aldrich, Field Supervisor, Oklahoma Ecological Services Field Office, 9014 East 21st Street, Tulsa, OK 74129; by telephone 918–581–7458 or by facsimile 918–581–7467. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

To allow the public to comment simultaneously on this revised proposed 4(d) special rule and the proposed listing rule, we also announce the reopening of the comment period on the Service's December 11, 2012, proposed rule to list the lesser prairie-chicken as a threatened species under the Act. We intend to finalize the revised proposed 4(d) special rule concurrent with the final listing rule, if the results of our final listing determination conclude that threatened species status is appropriate and if we determine that this revised proposed 4(d) special rule is appropriate following public comment. Any final action resulting from the proposed rules will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, general public, and other interested parties concerning the proposed listing rule and revised proposed 4(d) special rule. We particularly seek comments regarding:

- (1) The historical and current status and distribution of the lesser prairie-chicken, its biology and ecology, specific threats (or lack thereof) and regulations that may be addressing those threats and ongoing conservation measures for the species and its habitat.

(2) Information relevant to the factors that are the basis for making a listing determination for a species under section 4(a) of the Act, which are:

- (a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;
- (b) Overutilization for commercial, recreational, scientific, or educational purposes;
- (c) Disease or predation;
- (d) The inadequacy of existing regulatory mechanisms; or
- (e) Other natural or manmade factors affecting its continued existence and threats to the species or its habitat.

(3) Application of the Lesser Prairie-Chicken Interstate Working Group's final Lesser Prairie-Chicken Range-Wide Conservation Plan to our determination of status under section 4(a)(1) of the Act, particularly comments or information to help us assess the certainty that the plan will be effective in conserving the lesser prairie-chicken and will be implemented.

(4) Which areas would be appropriate as critical habitat for the species and why areas should or should not be proposed for designation as critical habitat, including whether any threats to the species from human activity would be expected to increase due to the designation and whether that increase in threat would outweigh the benefit of designation such that the designation of critical habitat may not be prudent.

(5) Specific information on:

- (a) The amount and distribution of habitat for the lesser prairie-chicken;
- (b) What may constitute “physical or biological features essential to the conservation of the species,” within the geographical range currently occupied by the species;
- (c) Where these features are currently found;
- (d) Whether any of these features may require special management considerations or protection;
- (e) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why; and
- (f) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(6) Information on the projected and reasonably likely impacts of climate change on the lesser prairie-chicken and its habitat.

(7) Whether measures outlined in this revised proposed 4(d) special rule are necessary and advisable for the conservation and management of the lesser prairie-chicken.

(8) Whether the provision related to the continuation of routine agricultural practices on existing cultivated lands should more clearly differentiate between row crop

agriculture and other cropped areas, such as managed grasslands, forage, or other untilled crops.

(9) Whether the provision related to the continuation of routine agricultural practices on existing cultivated lands should be revised to include spatial or temporal restrictions or deferments.

(10) Additional provisions the Service may wish to consider for a 4(d) special rule in order to conserve, recover, and manage the lesser prairie-chicken.

We will consider all comments and information received during our preparation of a final determination on the status of the species and the 4(d) special rule. Accordingly, the final decision may differ from this proposal.

Please note that comments merely stating support for or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made “solely on the basis of the best scientific and commercial data available.”

You may submit your comments and materials concerning this revised proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments

only by the methods described in **ADDRESSES**.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this revised proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

A settlement agreement in *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10–377 (EGS), MDL Docket No. 2165 (D.D.C. May 10, 2011) was reached with WildEarth Guardians in which we agreed to submit a proposed listing rule

for the lesser prairie-chicken to the **Federal Register** for publication by September 30, 2012. On September 27, 2012, the settlement agreement was modified to require that the proposed listing rule be submitted to the **Federal Register** on or before November 29, 2012. We submitted the proposed listing rule to the **Federal Register** on November 29, 2012; on December 11, 2012, we published in the **Federal Register** a proposed rule to list the lesser prairie-chicken as a threatened species under the Act (77 FR 73828). The proposed listing rule had a 90-day comment period, ending March 11, 2013. We held a public meeting and hearing in Woodward, Oklahoma, on February 5, 2013; in Garden City, Kansas, on February 7, 2013; in Lubbock, Texas, on February 11, 2013; and in Roswell, New Mexico, on February 12, 2013. On May 6, 2013, we reopened the public comment period on the proposed listing rule and proposed a special rule under the authority of section 4(d) of the Act (78 FR 26302).

Section 4(b)(6) of the Act and its implementing regulation, 50 C.F.R. 424.17(a), requires that we take one of three actions within 1 year of a proposed listing: (1) Finalize the proposed listing; (2) withdraw the proposed listing; or (3) extend the final determination by not more than 6 months, if there is substantial disagreement among scientists knowledgeable about the species regarding the sufficiency or accuracy of the available data relevant to the determination, for the purposes of soliciting additional data. On July 9, 2013, we published in the **Federal Register** an announcement of a 6-month extension of the final determination of whether to list the lesser prairie-chicken as a threatened species, and we reopened the public comment period on the proposed rule to

list the species (78 FR 41022). As noted in the proposed listing rule (77 FR 73828), we were previously required by the terms of judicially approved settlement agreement to make a final determination on the lesser prairie-chicken proposed listing rule no later than September 30, 2013. With the 6-month extension, we will make a final determination on the proposed rule no later than March 31, 2014.

For information on previous Federal actions pertaining to the lesser prairie-chicken, please refer to the proposed listing rule, which we published in the **Federal Register** on December 11, 2012 (77 FR 73828).

Background

This document discusses only those topics directly relevant to the revised proposed 4(d) special rule for the lesser prairie-chicken. For more information on the lesser prairie-chicken and its habitat, please refer to the December 11, 2012, proposed listing rule (77 FR 73828), which is available online at <http://www.regulations.gov> (at Docket Number FWS-R2-ES-2012-0071) or from the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

As discussed in the proposed listing rule, the primary factors supporting the proposed threatened species status for the lesser prairie-chicken are the impacts of cumulative habitat loss and fragmentation. These impacts are the result of conversion of

grasslands to agricultural uses; encroachment by invasive woody plants; wind energy development; petroleum production; and presence of roads and manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings.

The Act does not specify particular prohibitions, or exceptions to those prohibitions, for threatened species. Instead, under section 4(d) of the Act, the Secretary of the Interior has the discretion to issue such regulations as [s]he deems necessary and advisable to provide for the conservation of such species. The Secretary also has the discretion to prohibit by regulation with respect to any threatened species, any act prohibited under section 9(a)(1) of the Act. Exercising this discretion, the Service developed general prohibitions (50 CFR 17.31) and exceptions to those prohibitions (50 CFR 17.32) under the Act that apply to most threatened species. Alternately, for other threatened species, the Service may develop specific prohibitions and exceptions that are tailored to the specific conservation needs of the species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into a special rule under section 4(d) of the Act, but the 4(d) special rule will also include provisions that are tailored to the specific conservation needs of the threatened species and may be more or less restrictive than the general provisions at 50 CFR 17.31.

At the time of the proposed listing rule, we indicated that we would consider whether to subsequently propose a 4(d) special rule for the lesser prairie-chicken. In that

proposed rule, we solicited public comments as to which prohibitions, and exceptions to those prohibitions, are necessary and advisable to provide for the conservation of the lesser prairie-chicken. In recognition of conservation efforts that provide for conservation and management of the lesser prairie-chicken and its habitat in a manner consistent with the purposes of the Act, we then published in the **Federal Register** a proposed 4(d) special rule on May 6, 2013 (78 FR 26302). We are now proposing a revised 4(d) special rule to outline the prohibitions, and exceptions to those prohibitions, necessary and advisable for the conservation of the lesser prairie-chicken.

Since the time of the proposed listing rule and proposed 4(d) special rule, the Lesser Prairie-Chicken Interstate Working Group, in association with the Western Association of Fish and Wildlife Agencies, finalized the Lesser Prairie-Chicken Range-Wide Conservation Plan. On October 23, 2013, the Service announced our endorsement of the Lesser Prairie-Chicken Range-Wide Conservation Plan (dated September 2013) as a comprehensive conservation program that reflects a sound conservation design and strategy that, when implemented, will provide a net conservation benefit to the lesser prairie-chicken. We would like to consider the conservation measures in this plan in our final listing determination for the lesser prairie-chicken. As such, we are reopening the comment period to allow the public an opportunity to provide comment on the final plan as it applies to our determination of status under section 4(a)(1) of the Act, particularly comments or information to help us assess the certainty that the Lesser Prairie-Chicken Range-Wide Conservation Plan will be effective in conserving the lesser prairie-chicken

and will be implemented. The final plan is available on the Internet in Docket No. FWS–R2–ES–2012–0071 at <http://www.regulations.gov>.

Provisions of the Proposed 4(d) Special Rule for the Lesser Prairie-Chicken

Under section 4(d) of the Act, the Secretary may publish a special rule that modifies the standard protections for threatened species with special measures tailored to the conservation of the species that are determined to be necessary and advisable. Under this revised proposed 4(d) special rule, the Service proposes that all of the prohibitions under 50 CFR 17.31 and 17.32 will apply to the lesser prairie-chicken, except as noted below. The revised proposed 4(d) special rule will not remove or alter in any way the consultation requirements under section 7 of the Act.

Lesser Prairie-Chicken Range-Wide Conservation Plan

The Service proposes that take incidental to activities conducted by a participant enrolled in, and operating in compliance with the Lesser Prairie-Chicken Interstate Working Group’s Lesser Prairie-Chicken Range-Wide Conservation Plan will not be prohibited. The Service proposes this provision of the revised 4(d) special rule in recognition of the significant conservation planning efforts of the five state wildlife agencies within the range of the lesser prairie-chicken. The Service has worked closely with the Lesser Prairie-Chicken Interstate Working Group in the development of the final

Lesser Prairie-Chicken Range-wide Conservation Plan. The plan identifies a two-pronged strategy for lesser prairie-chicken conservation: (1) the coordinated implementation of incentive-based landowner programs and (2) the implementation of an impact framework reducing threats and providing for off-site mitigation opportunities. Table 1 identifies the covered activities, arranged by industry, under the Lesser Prairie-Chicken Range-Wide Conservation Plan.

Table 1. Activities covered under the Lesser Prairie-Chicken Range-Wide Conservation Plan.

Oil and Gas Activities
Seismic and Land Surveying
Construction
Drilling, Completion, and Workovers (Re-Completion)
Operations and Maintenance
Plugging and Remediation
Agricultural Activities
Brush Management
Building and Maintaining Fences and Livestock Structures
Grazing
Water/windmill
Disturbance Practices
Crop Production
Wind Power, Cell and Radio Towers, and Power Line Activities
Construction
Operations and Maintenance
Decommissioning and Remediation
Road Activities
Construction
Operations and Maintenance

Decommissioning and Remediation
General Activities
OHV Activity
General Construction
Hunter harvest (incidental to legal hunting of greater prairie-chickens)
Other Land Management (such as prescribed burns, predator management, and remediation of impacted habitat back to baseline conditions)

On May 6, 2013 (78 FR 26302), the Service proposed a 4(d) rule for the lesser prairie-chicken that stated incidental take of the lesser prairie-chicken would not be considered a violation of section 9 of the Act if the take results from implementation of a comprehensive lesser prairie-chicken conservation program that:

(A) Was developed by or in coordination with the State agency or agencies, or their agent(s), responsible for the management and conservation of fish and wildlife within the affected State(s);

(B) Has a clear mechanism for enrollment of participating landowners; and

(C) Was determined by the Service to provide a net conservation benefit to the lesser prairie chicken, in consideration of the following:

(1) Comprehensively addresses all of the threats affecting the lesser prairie-chicken within the program area;

(2) Establishes objective, measurable biological goals and objectives for population and habitat necessary to ensure a net conservation benefit, and provides the mechanisms by which those goals and objectives will be achieved;

(3) Includes the administrative and funding mechanisms necessary for effectively

implementing all elements of the program, including enrollment of participating landowners, monitoring of program activities, and enforcement of program requirements;

(4) Employs an adaptive management strategy to ensure future program adaptation as necessary and appropriate; and

(5) Includes appropriate monitoring of effectiveness and compliance.

(D) Is periodically reviewed by the Service as meeting the objective for which it was originally established under paragraph (a)(2)(i)(B) of this section.

In working with the Lesser Prairie-Chicken Interstate Working Group, we later reviewed the Lesser Prairie-Chicken Range-wide Conservation Plan in light of the criteria that were published in the May 6, 2013, proposed 4(d) rule. The plan includes a strategy to address threats to the prairie-chicken throughout its range, establishes measurable biological goals and objectives for population and habitat, provides the framework to achieve those goals and objectives, demonstrates the administrative and financial mechanisms necessary for successful implementation, and includes adequate monitoring and adaptive management provisions. For these reasons, on October 23, 2013, the Service announced our endorsement of the Lesser Prairie-Chicken Range-Wide Conservation Plan (dated September 2013; any subsequent versions of the Lesser Prairie-Chicken Range-Wide Conservation Plan will be considered under the same criteria identified above) as a comprehensive conservation program that reflects a sound conservation design and strategy that, when implemented, will provide a net conservation benefit to the lesser prairie-chicken. Ultimately, the Lesser Prairie-Chicken Range-Wide

Conservation Plan is one that, when implemented, addresses the conservation needs of the lesser prairie-chicken.

The Service is including this provision of the revised proposed 4(d) rule to encourage participants of the Service-endorsed Lesser Prairie-Chicken Range-Wide Conservation Plan to improve habitat conditions and the status of the species across its entire range. The Service has determined that the Lesser Prairie-Chicken Range-Wide Conservation Plan is expected to provide a net conservation benefit to the lesser prairie-chicken population. Conservation, as defined in section 3(3) of the Act, means “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary.” The final Lesser Prairie-Chicken Range-Wide Conservation Plan must also be periodically reviewed by the Service and determined that it continues to provide a net conservation benefit to the lesser prairie-chicken. As a result of this provision, the Service expects that rangewide conservation actions will be implemented with a high level of certainty that the program will provide for the conservation of the lesser prairie-chicken.

Agricultural Activities Conducted in Accordance with NRCS's Lesser Prairie-Chicken Initiative and Related NRCS Lesser Prairie-Chicken Conservation Activities

The Service proposes that take of the lesser prairie-chicken will not be prohibited

provided the take is incidental to the conditioned conservation practices that are carried out in accordance with a conservation plan developed by the U.S. Department of Agriculture's NRCS in connection with NRCS's LPCI and related NRCS activities focused on lesser prairie-chicken conservation that provide financial or technical assistance, and which were developed in coordination with the Service.

The LPCI and related NRCS activities provide financial and technical assistance to participating landowners to implement practices beneficial to the lesser prairie-chicken that also contribute to the sustainability of landowners' agricultural operations. Conservation practices, such as brush management, prescribed grazing, range planting, prescribed burning, and restoration of rare and declining habitats, are used to treat upland wildlife habitat concerns identified as limiting factors for the lesser prairie-chicken during the conservation planning process. This conservation initiative promotes implementation of specific conservation practices to manage, enhance, and expand their habitats within the context of sustainable ranching.

The vast majority of lesser prairie-chicken habitat occurs on privately owned and operated lands across the five-state range; therefore, the voluntary actions of private landowners are key to maintaining, enhancing, restoring, and reconnecting habitat for the species. The overall goal of the LPCI is to increase lesser prairie-chicken abundance and distribution through habitat improvements by addressing local and landscape threats. Over the long term, it is anticipated that the LPCI will facilitate the expansion of lesser

prairie-chicken range into suitable portions of the historic range as habitat conditions improve and threats are reduced or eliminated.

The Service issued a conference report to the NRCS in connection with the NRCS's LPCI on June 30, 2011

(http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1044884.pdf), in which the Service determined that the proposed action, which incorporates the procedures, practice standards, and conservation measures of the LPCI, is not likely to jeopardize the continued existence of the lesser prairie-chicken. On November 22, 2013, the Service issued a Conference Opinion for the NRCS's LPCI and associated procedures, conservation practices, and conservation measures. Conference procedures under section 7 of the Act are required only when a Federal agency (action agency) proposes an activity that is likely to jeopardize the continued existence of a species that has been proposed for listing under the Act or when the proposed activity is likely to destroy or adversely modify proposed critical habitat. However, conference procedures may also be used to assist an action agency in planning a proposed action so that potential conflicts may be identified and resolved early in the planning process. During the conference, the Service may provide recommendations on ways to avoid or minimize adverse effects of the proposed action. The conclusions reached during a conference and any subsequent recommendations are then provided to the action agency in a conference report.

The November 22, 2013, conference opinion builds upon, refines, and updates the

2011 conference report in several ways, including the addition of four conservation practices to the 23 evaluated in the amended conference report, the establishment of a new method of determining when the conservation measures are to be applied, an estimate of incidental take, and an associated Incidental Take Statement that covers take of lesser prairie-chicken by cooperators who implement the described conservation practices and measures.

In the conference opinion, the Service states that implementation of the NRCS conservation practices and their associated conservation measures described in the conference opinion are anticipated to result in a positive population response by the species by reducing or eliminating adverse effects. Furthermore, the Service states that overwhelming conservation benefits of implementation of the proposed action within selected priority areas, maintenance of existing habitat, and enhancement of marginal habitat will outweigh short-term negative impacts to individual lesser prairie-chickens. Implementation of the LPCI is expected to result in more of the threats that adversely affect populations being managed, more habitat under the appropriate management prescriptions, and more information being developed and disseminated on the compatibility of sustainable ranching operations on the persistence of this species across the landscape. Through the conference opinion, the Service ultimately finds that effective implementation of conservation practice standards and associated conservation measures for the LPCI are anticipated to result in a positive population response by the species as threats are reduced, most notably in addressing habitat fragmentation and

improvement of habitat conditions across the landscape.

Therefore, this provision of the revised proposed 4(d) special rule for conservation practices associated with NRCS's LPCI and related NRCS activities focused on lesser prairie-chicken conservation will promote conservation of the species by encouraging landowners and ranchers to continue managing the remaining landscape in ways that meet the needs of their operation while simultaneously providing suitable habitat for the lesser prairie-chicken. By reducing threats to the species including habitat fragmentation and by promoting the improvement of habitat conditions across the species' landscape, the LPCI and related NRCS activities focused on lesser prairie-chicken conservation are expected to provide for the conservation of the lesser prairie-chicken.

Continuation of Routine Agricultural Practices on Existing Cultivated Lands

The Service proposes that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to activities that are conducted during the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, hay, or forage production. These lands must meet the definition of cropland as defined in 7 CFR 718.2, and, in addition, must have been cultivated, meaning tilled, planted, or harvested, within the previous 5 years. Thus, this provision does not include take coverage for any new conversion of grasslands into agriculture.

Lesser prairie-chickens are known to travel from native rangeland and Conservation Reserve Program lands (CRP), which provide cover types that support lesser prairie-chicken nesting and brood rearing, to forage within cultivated fields supporting small grains, alfalfa, and hay production. Lesser prairie-chickens are also known to maintain lek sites up to a half mile (0.8 kilometers) from rangelands and CRP fields within these cultivated areas, and they may be present during farming operations. Thus, existing cultivated lands, although not a native habitat type, may provide food resources for lesser prairie-chickens during key times in the life cycle of the species. These existing cultivated lands are compatible with the conservation of the lesser prairie-chicken.

Routine agricultural activities proposed to be covered by this provision include:

- (1) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands in cultivation, provided that the harvest of cultivated lands is conducted by methods that allow wildlife to flush and escape, such as starting operations in the middle of the field and working outward, or by modifying equipment to include flush bar attachments.
- (2) Routine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as irrigation

conveyance structures and roads.

Similar to the discussion above for conservation practices carried out through the LPCI, this provision of the revised proposed 4(d) special rule for agricultural activities will promote conservation of the species by encouraging landowners and farmers to continue managing the remaining landscape in ways that meet the needs of their operation while simultaneously providing habitat and food resources for the lesser prairie-chicken. In addition to providing food sources during the species' life cycle, existing cultivated agricultural land may promote conservation of the species by discouraging inappropriate agricultural practices that are incompatible with the lesser prairie-chicken's habitat needs within the landscape.

Proposed Determination

Section 4(d) of the Act states that “the Secretary shall issue such regulations as [s]he deems necessary and advisable to provide for the conservation” of species listed as a threatened species. Conservation is defined in the Act to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.” Additionally, section 4(d) states that the Secretary “may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1).”

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, the Secretary may find that it is necessary and advisable not to include a taking prohibition, or to include a limited taking prohibition. See *Alsea Valley Alliance v. Lautenbacher*, 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, and 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002). In addition, as affirmed in *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988), the rule need not address all the threats to the species. As noted by Congress when the Act was initially enacted, "once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. [S]he may, for example, permit taking, but not importation of such species," or [s]he may choose to forbid both taking and importation but allow the transportation of such species, as long as the measures will "serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act" (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Section 9 prohibitions make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, shoot, wound, kill, trap, capture, or collect; or attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as an endangered species, without written

authorization. It also is illegal under section 9(a)(1) of the Act to possess, sell, deliver, carry, transport, or ship any such wildlife that is taken illegally. Prohibited actions consistent with section 9 of the Act are outlined for threatened species in 50 CFR 17.31(a) and (b). This revised proposed 4(d) special rule proposes that all prohibitions in 50 CFR 17.31(a) and (b) will apply to the lesser prairie-chicken, except in three instances.

First, we propose that none of the provisions in 50 CFR 17.31 would apply to conservation practices that are conducted by a participant in, and operating in compliance with, Lesser Prairie-Chicken Interstate Working Group's Lesser Prairie-Chicken Range-Wide Conservation Plan. The plan reflects a sound conservation design and strategy and is expected to provide a net conservation benefit for the lesser prairie-chicken. Actions in the comprehensive plan will ultimately contribute to the conservation of the species. Conservation is defined in section 3(3) of the Act as "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary." As a result of this provision, the Service expects that rangewide conservation actions will be implemented with a high level of certainty that the program will provide for the conservation of the lesser prairie-chicken.

Second, we also propose that none of the provisions in 50 CFR 17.31 would apply to the conditioned conservation practices that are carried out in accordance with a

conservation plan developed by the NRCS in connection with the LPCI. According to the proposed listing rule, the primary factors supporting the proposed threatened status for the lesser prairie-chicken are the impacts of cumulative habitat loss and fragmentation. Allowing the continuation of agricultural operations consistent with these criteria encourages landowners to continue managing the remaining landscape in ways that meet the needs of their operation while simultaneously providing suitable habitat for the lesser prairie-chicken. Implementation of conservation practice standards and associated conservation measures for the LPCI are anticipated to result in a positive population response by the species as threats are reduced, most notably in addressing habitat fragmentation and improvement of habitat conditions across the landscape. Therefore, conservation practices carried out through the LPCI will ultimately contribute to the conservation of the species.

Finally, we propose that none of the provisions in 50 CFR 17.31 would apply to actions that result from activities associated with the continuation of routine agricultural practices, as specified above, on existing cultivated lands that are in row crop, hay, or forage production. These lands must meet the definition of cropland as defined in 7 CFR 718.2, and, in addition, must have been cultivated, meaning tilled, planted, or harvested, within the previous 5 years. This provision of the revised proposed 4(d) special rule for agricultural activities will promote conservation of the species by encouraging landowners and farmers to continue managing the remaining landscape in ways that meet the needs of their operation while simultaneously providing habitat and food resources

for the lesser prairie-chicken.

Based on the rationale explained above, the provisions included in this revised proposed 4(d) special rule are necessary and advisable to provide for the conservation of the lesser prairie-chicken. Nothing in this proposed 4(d) special rule changes in any way the recovery planning provisions of section 4(f) and consultation requirements under section 7 of the Act or the ability of the Service to enter into partnerships for the management and protection of the lesser prairie-chicken.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this revised proposed rule. The purpose of such review is to ensure that our determination of status for this species is based on scientifically sound data, assumptions, and analyses. We will send peer reviewers copies of this revised proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the reopening of the public comment period, on our use and interpretation of the science used in developing our proposed rule to list the lesser prairie-chicken and this proposed 4(d) special rule.

We will consider all comments and information we receive during the comment

period on this revised proposed rule during preparation of a final rulemaking.

Accordingly, the final decision may differ from this proposal.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must: (a) be logically organized; (b) use the active voice to address readers directly; (c) use clear language rather than jargon; (d) be divided into short sections and sentences; and (e) use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). We intend to incorporate this revised proposed 4(d) special rule into our final determination concerning the listing of the species or withdrawal of the proposal if new information is provided that supports that decision.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951),

Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

By letter dated April 19, 2011, we contacted known tribal governments throughout the historical range of the lesser prairie-chicken. We sought their input on our development of a proposed rule to list the lesser prairie-chicken and encouraged them to contact the Oklahoma Ecological Services Field Office if any portion of our request was unclear or to request additional information. We did not receive any comments regarding this request.

References Cited

A complete list of all references cited in this proposed rule is available on the Internet at <http://www.regulations.gov> at Docket No. FWS-R2-ES-2012-0071 or upon request from the Field Supervisor, Oklahoma Ecological Services Field Office (see **FOR**

FURTHER INFORMATION CONTACT).

Authors

The primary authors of this proposed rule are the staff members of the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 78 FR 26302 (May 6, 2013), as follows:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

2. Amend § 17.41 by revising paragraph (a) to read as follows:

§ 17.41 Special rules—birds.

(a) Lesser prairie-chicken (*Tympanuchus pallidicinctus*).

(1) *Prohibitions.* Except as noted in paragraphs (a)(2)(i), (a)(2)(ii), and (a)(2)(iii) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 apply to the lesser prairie-chicken.

(2) *Exemptions from prohibitions.* Incidental take of the lesser prairie-chicken will not be considered a violation of section 9 of the Act if the take occurs:

(i) On privately owned, State, or county land from activities that are conducted by a participant enrolled in, and operating in compliance with, the Lesser Prairie-Chicken Interstate Working Group's Lesser Prairie-Chicken Range-Wide Conservation Plan, as endorsed by the U.S. Fish and Wildlife Service.

(ii) On privately owned agricultural land from the following conservation practices that are carried out in accordance with a conservation plan developed by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) in connection with NRCS's Lesser Prairie-Chicken Initiative and related NRCS activities that provide financial or technical assistance to support lesser prairie-chicken conservation, and which were developed in coordination with the U.S. Fish and Wildlife Service:

- (A) Upland wildlife habitat management;
- (B) Prescribed grazing;
- (C) Restoration and management of rare and declining habitats;

- (D) Access control;
- (E) Forage harvest management;
- (F) Prescribed burning;
- (G) Brush management;
- (H) Firebreaks;
- (I) Cover crops;
- (J) Critical area planting;
- (K) Forage and biomass planting;
- (L) Range planting;
- (M) Watering facilities;
- (N) Spring development;
- (O) Pumping plants;
- (P) Water wells;
- (Q) Pipelines;
- (R) Grade stabilization structures;
- (S) Fences;
- (T) Obstruction removal;
- (U) Herbaceous weed control;
- (V) Ponds;
- (W) Tree and Shrub Planting;
- (X) Heavy Use Protection;
- (Y) Woody Residue Treatment;
- (Z) Well Decommissioning;

(AA) Conservation Cover.

(iii) As a result of the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, hay, or forage production that meet the definition of cropland at 7 CFR 718.2, and, in addition, must have been cultivated, meaning tilled, planted, or harvested, within the previous 5 years. Activities covered by this provision include:

(A) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands in cultivation, provided that the harvest of cultivated lands is conducted by methods that allow wildlife to flush and escape, such as starting operations in the middle of the field and working outward, or by modifying equipment to include flush bar attachments.

(B) Routine activities in direct support of cultivated agriculture, including replacement, upgrades, maintenance, and operation of existing infrastructure such as irrigation conveyance structures and roads.

* * * * *

Dated: December 6, 2013.

Signed: Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

Billing Code 4310-55

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