

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2012–0071]

[4500030113]

RIN 1018–AY21

Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, finalize a 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).

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: This final rule is available on the Internet at <http://www.regulations.gov> under Docket No. FWS–R2–ES–2012–0071 and at <https://www.fws.gov/southwest/es/LPC.html>.

Comments and materials we received are available for public inspection at <http://www.regulations.gov>. All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Oklahoma Ecological Services Field Office, 9014 East 21st Street, Tulsa, OK 74129; telephone 918–581–7458; facsimile 918–581–7467.

FOR FURTHER INFORMATION CONTACT: Alisa Shull, Field Supervisor, Oklahoma Ecological Services Field Office, 9014 East 21st Street, Tulsa, OK 74129; telephone 918–581–7458; 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:

Previous Federal Actions

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). On May 6, 2013, we published in the **Federal Register** a proposed special rule under section 4(d) of the Act (16 U.S.C. 1531 et seq.) for the lesser prairie-chicken (78 FR 26302), and we accepted public comments on our proposal for 45 days, ending June 20, 2013. On December 11, 2013, we proposed to revise the special rule (78 FR 75306), and we accepted public comments on that revised proposal for 30 days, ending January 10, 2014. On January 29, 2014, we reopened the public comment period on the proposed revised special rule for 2 weeks, ending February 12, 2014 (79 FR 4652). Elsewhere in today's **Federal Register**, we published a final rule to list the lesser prairie-chicken as a threatened species. Please see the final listing rule for additional information concerning previous Federal actions for the lesser prairie-chicken.

Background

This document discusses only those topics directly relevant to the special rule under section 4(d) of the Act for the lesser prairie-chicken (which we refer to as the “4(d) special rule” in this document). For more information on the lesser prairie-chicken and its habitat, please refer to the final listing rule published elsewhere in today's **Federal Register**, which is also available online at <http://www.regulations.gov> (at Docket No. FWS-R2-ES-2012-0071) or from the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

As discussed in the final listing rule, the primary factors supporting the 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.

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 are finalizing a 4(d) special rule which outlines the prohibitions, and exceptions to those

prohibitions, necessary and advisable for the conservation of the lesser prairie-chicken.

Summary of Changes from the Revised Proposed Rule

Based on information we received in public comments (see **Summary of Comments and Recommendations**), we revised the provisions of the 4(d) special rule to provide greater clarity around the activities that are covered by this rule.

Provisions of the 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 4(d) special rule, the Service provides that all of the prohibitions under 50 CFR 17.31 and 17.32 will apply to the lesser prairie-chicken, except as noted below. This 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 final 4(d) special rule provides 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 (rangewide plan) will not be prohibited. The Service has included this provision in the final 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.

Description of the Rangewide Plan

The rangewide plan is a voluntary conservation strategy that establishes a mitigation framework which is administered by the Western Association of Fish and Wildlife Agencies (WAFWA) for the purpose of allowing plan participants the opportunity to mitigate any unavoidable impacts of a particular activity on the lesser prairie-chicken and provides financial incentives to landowners who voluntarily participate and manage their property for the benefit of the lesser prairie-chicken. More specifically, the rangewide plan:

- (1) Identifies rangewide ecoregional goals for the lesser prairie-chicken.
- (2) Identifies desired habitat amounts and conditions to achieve the population goals.
- (3) Uses a decision support tool that identifies focal areas and connectivity zones where lesser prairie-chicken conservation actions will be emphasized to produce the habitat conditions required to conserve the species at sustainable levels.
- (4) Enhances programs and cooperative efforts to encourage and expand voluntary landowner cooperation in the development and maintenance of the desired habitat conditions.
- (5) Promotes agreements designed to avoid and minimize impacts to lesser prairie-chicken habitat from various development activities and, where avoidance is not possible, mitigate impacts.
- (6) Establishes a mitigation framework administered by WAFWA that could be used by

any entity to offset impacts to lesser prairie-chicken habitat with offsite mitigation.

(7) Identifies research needs and implements monitoring.

(8) Develops an adaptive management framework that will incorporate monitoring and new information into future adjustments to the conservation strategy to maximize benefits to the lesser prairie-chicken.

(9) Addresses input and suggestions from agencies, organizations, landowners, industries, other stakeholders, and the general public on the conservation plan for the lesser prairie-chicken.

The rangewide plan identifies rangewide and ecoregional population goals for the lesser prairie-chicken and the amount and condition of habitat desired to achieve those population goals, including focal areas and connectivity zones where much of the conservation would be targeted. The rangewide population goal, based on an annual spring average over a 10-year time frame, is set at 67,000 birds. The rangewide plan identifies four ecoregions as described by McDonald *et al.* (2012, p. 7): the Shinnery Oak Prairie Region (eastern New Mexico and southwest Texas panhandle), the Sand Sagebrush Prairie Region (southeastern Colorado, southwestern Kansas, and western Oklahoma panhandle), the Mixed Grass Prairie Region (northeastern Texas panhandle, western Oklahoma, and south central Kansas), and the Short Grass/CRP Mosaic region (northwestern Kansas). The ecoregional specific goals have been set at 8,000 birds in the Shinnery Oak Prairie Region, 10,000 birds for the Sand Sagebrush Prairie Region, 24,000 birds in the Mixed Grass Prairie Region, and 25,000 the Short Grass/CRP Mosaic region. These ecoregional goals and the overall rangewide population goal may be adjusted after the first 10 years of implementation using principles of adaptive management.

The rangewide plan incorporates a focal area strategy as a mechanism to identify and target the population and habitat goals established by the plan. This focal area strategy is intended to direct conservation efforts into high-priority areas and facilitate creation of large blocks of quality habitat, in contrast to untargeted conservation efforts spread across larger areas that typically result in smaller, less contiguous blocks of appropriately managed habitat. These focal areas typically have the following characteristics: Average focal area size is at least 20,234 hectares (ha) (50,000 acres (ac)); at least 70 percent of habitat within each focal area is high quality; and focal area has enhanced connectivity, with each focal area generally located no more than 32 kilometers (km) (20 miles (mi)) apart and connected by delineated zones between neighboring focal areas that provide suitable habitat and allow for movement between the focal areas. Citing Hagen *et al.* (in review), the rangewide plan describes quality lesser prairie-chicken habitat as habitats generally considered to have vegetation conditions that support greater than 35 percent canopy cover of grasses, shrubs, and forbs, consisting of greater than 50 percent composition of preferred species of shrubs and grasses, and have the appropriate structure to provide intermixed nesting and brooding habitat. The corridors connecting the focal areas also generally have certain characteristics: Habitat within the identified corridors consists of at least 40 percent good to high quality habitat; distances between existing habitat patches are no more than 3.2 km (2 mi) apart; corridor widths are at least 8 km (5 mi); and habitat contains few, if any, barriers to lesser prairie-chicken movement. The lack of an identified connection between focal areas in the Shinnery Oak Prairie Region with focal areas in the remaining regions is the obvious exception to the identified focal area guidelines. The Shinnery Oak Prairie Region is separated from the other regions by a distance of over 300 km (200 mi) of unfavorable land uses and very little suitable lesser prairie-chicken habitat.

Table 1 identifies the covered activities, arranged by industry, under the rangewide plan. While the covered activities are arranged by industry for convenience, any of the activities may be conducted by any enrolled participant.

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
Off-highway Vehicle (OHV) Activity
General Construction
Hunter Harvest (incidental to legal hunting of greater prairie-chickens where the

ranges of the two species overlap)
Other Land Management (such as prescribed burns, game and predator management, and remediation of impacted habitat back to baseline conditions)

The mitigation framework used in the rangewide plan incentivizes avoidance and minimization of impacts to lesser prairie-chicken habitat. The metrics system within this framework provides a pathway to mitigate for all impacts to habitat through a biologically based system that incorporates space, time, and habitat quality. It also implements an offset-to-impact mitigation ratio of 2-to-1 to ensure that offsets are greater than impacts, resulting in a net conservation benefit for the lesser prairie-chicken. Mitigation fees will be split between permanent conservation efforts (25 percent) and short-term management contracts (75 percent) that will shift on the landscape over time within the action area identified in the rangewide plan. Mitigation dollars will be offered to landowners within the lesser prairie-chicken range for voluntarily implementing conservation practices that benefit the species. Landowner payments will be calculated based on the landowner's acreage and its location and habitat quality. To incentivize conservation in the best places for lesser prairie-chickens, landowners in high-priority locations with optimal habitat will be paid 125 percent of the standard cost of implementing the needed conservation practice, as defined by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS).

The rangewide plan incorporates principles of adaptive management in several circumstances. The primary reason for using adaptive management in the rangewide plan is to allow for changes in the conservation measures that may be necessary to reach the stated population goals. The mitigation and conservation activities implemented under the rangewide plan will be monitored to identify whether they are producing the required results. Some of the

factors that will be evaluated regularly under the rangewide plan include estimates of lesser prairie-chicken population size, progress toward habitat goals, conservation practice costs, avoidance of high priority conservation areas, and management prescriptions. Using this information, every 5 years, a science subcommittee under WAFWA will conduct a rigorous review to assess, among other things, the progress toward achieving the stated population and habitat goals of the rangewide plan. New standards will be considered (1) for conservation practices that have not maintained lesser prairie-chicken habitat quality in at least 3 of 5 years where maintenance of habitat quality was the desired outcome, and (2) for practices that have not resulted in at least a measurable level of improvement in lesser prairie-chicken habitat quality where such improvements were the desired outcome.

Evaluation of the Rangewide Plan

On May 6, 2013 (78 FR 26302), the Service proposed a 4(d) special 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.

In working with the Lesser Prairie-Chicken Interstate Working Group, we later reviewed the rangewide plan in light of the criteria that were published in the May 6, 2013, proposed 4(d) special rule. The plan includes a strategy to address threats to the lesser 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. Furthermore, we understand all permanent habitat offset units will meet the Service's conservation banking standards, including:

(1) real estate assurance in the form of a perpetual conservation easement grant held by a

qualified third party and recorded in the county in which the offset unit is located (or other equivalent appropriate land protection instrument); (2) development of a land management plan that includes an adaptive management strategy and identifies all tasks and associated costs necessary to operate, manage, monitor, and report on the habitat offset unit; (3) a long-term funding mechanism (i.e., endowment) adequately sized to fund all tasks identified in the land management plan, to be held by an entity qualified to manage and disburse such funds; and (4) all other measures required under Service mitigation policies. In addition, credits may not be generated on habitat offset units from Federal funds such as cost share and easement programs that provide landowners with funding for habitat improvements and improved land use practices (e.g., the U.S. Department of Agriculture's Conservation Reserve Program, the Service's Partners for Wildlife Program).

For these reasons, on October 23, 2013, the Service announced our endorsement of the rangewide plan 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 rangewide plan is one that, when implemented, will address the conservation needs of the lesser prairie-chicken.

Accordingly, on December 11, 2013, we published in the **Federal Register** (78 FR 75306) a revised proposed 4(d) special rule to specifically exempt from the prohibitions of section 9 of the Act take that occurs 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.

The Service included this provision of the 4(d) special rule to encourage participants of the Service-endorsed rangewide plan to improve habitat conditions and the status of the species across its entire range. The Service has determined that the rangewide 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.” Through adaptive management, the rangewide plan will also be periodically reviewed by WAFWA and the Service to ensure it continues to provide a net conservation benefit to the lesser prairie-chicken. As a result of this adaptive management provision, the Service expects that rangewide conservation actions 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

This final 4(d) special rule provides 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 NRCS in connection with NRCS's Lesser Prairie-Chicken Initiative (LPCI) and related NRCS activities focused on lesser prairie-chicken conservation consistent with the provisions of the November 22, 2013,

conference opinion that was developed in coordination with the Service. Conditioned conservation practices are NRCS standard conservation practices to which the Service and NRCS have added specific requirements in the form of conservation measures so that when the measure is followed, impacts to the lesser prairie-chicken will be avoided or minimized.

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 lesser prairie-chicken 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-level threats. Over the long term, the Service and NRCS anticipate 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.

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 Service issued a conference report to 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 (https://www.fws.gov/southwest/es/Documents/R2ES/LPC_NRCS_CO_FINAL_22Nov2013.pdf).

The November 22, 2013, conference opinion builds upon, refines, and updates the 2011 conference report in several ways, including the addition of 4 conservation practices to the 23 evaluated in the 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 November 22, 2013, 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 management of more of the threats that adversely affect populations, more habitat under the appropriate management prescriptions, and the development and dissemination of more information on the compatibility of sustainable ranching operations and 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 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

This final 4(d) special rule provides 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, seed-drilled untilled 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 5 years preceding the proposed routine agricultural practice that may otherwise result in take. 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 ½ 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. These existing cultivated lands are compatible with the conservation of the lesser prairie-chicken.

Routine agricultural activities covered by this provision include:

(1) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands.

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

(3) Use of chemicals in direct support of cultivated agriculture when done in accordance with label recommendations.

Similar to the discussion above for conservation practices carried out in coordination with NRCS, this provision of the 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 agricultural operations while simultaneously providing 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.

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) of the Act states that the Secretary “may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) [of the Act].”

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, hunt, 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 4(d) special rule provides that all of the prohibitions in 50 CFR 17.31(a) and (b) will apply to the lesser prairie-chicken, except in three instances.

First, none of the provisions in 50 CFR 17.31 apply to conservation practices 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. 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 rangewide 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 the conservation actions will provide for the conservation of the lesser prairie-chicken.

Second, none of the provisions in 50 CFR 17.31 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 or any NRCS assistance consistent with the November 22, 2013, conference opinion. According to the final listing rule, the primary factors supporting the threatened species 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 consistent with the LPCI and November 22, 2013, conference opinion will ultimately contribute to the conservation of the species.

Finally, none of the provisions in 50 CFR 17.31 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, seed-drilled untilled 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 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 the 4(d) special rule are necessary and advisable to provide for the conservation of the lesser prairie-chicken. Nothing in this 4(d) special rule changes in any way the recovery planning provisions of section 4(f) of the Act or the 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.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed 4(d) special rule for the lesser prairie-chicken during four comment periods: May 6 to June 20, 2013; July 9 to August 8, 2013; December 11, 2013, to January 10, 2014; and January 29 to February 12, 2014. We also contacted appropriate Federal, Tribal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed listing rule, proposed 4(d) special rule, draft rangewide conservation plan, and final rangewide conservation plan during the respective comment periods.

Over the course of the four comment periods, we received approximately 56,450 comment submissions. Of these, approximately 56,150 were form letters. All substantive information provided during these comment periods has either been incorporated directly into this final rule or is addressed below. Comments from State agencies are grouped separately.

Comments from States

(1) *Comment:* In order to ensure proper assessment of recovery goals and habitat quality, the Service should not endorse or approve any other plans, permits, or tools that do not follow the same metrics contained in the rangewide plan.

Our Response: In accordance with section 10 of the Act, the Service must process any permit application associated with a habitat conservation plan (HCP). The HCP may include metrics that differ from the rangewide plan as long as the HCP meets the issuance criteria. If the issuance criteria in section 10 of the Act are met, then the Service must issue the permit.

Additionally, we recognize that there may be numerous alternatives to, or variations of, the rangewide plan that could provide a net conservation benefit to the species. Regarding the possibility of the Service endorsing other plans or tools, the Service will assess each of those as submitted for our review and will evaluate each on the fact-specific metrics contained in that plan.

(2) *Comment:* The NRCS provision of the 4(d) special rule should be expanded to include all actions that are consistent with LPCI.

Our Response: It is our intention that this provision would apply to any conservation practices consistent with LPCI as well as related NRCS activities focused on lesser prairie-

chicken conservation consistent with the provisions of the November 22, 2013, conference opinion that was developed in coordination with the Service. We have revised the NRCS provision of the 4(d) special rule to clarify that the provision includes all activities that are carried out in accordance with a conservation plan providing for lesser prairie-chicken conservation developed by NRCS in coordination with the Service.

(3) *Comment:* The 4(d) special rule should more generally cover all grazing and ranching practices. Landowners who are managing lands appropriately should not have to sign on to a government plan to receive protections.

Our Response: We have determined that properly managed grazing is consistent with conservation of the lesser prairie-chicken. However, improperly managed grazing can impact lesser prairie-chickens or render their habitats uninhabitable. By covering landowners participating in the rangewide plan and NRCS programs in the final 4(d) special rule, we have ensured that grazing is being conducted in a manner compatible with the conservation of the lesser prairie-chicken. The rangewide plan and NRCS provisions of the 4(d) special rule address grazing and ranching. Additionally, individuals previously enrolled in one of the candidate conservation agreements with assurances (CCAAs), who are implementing their plans accordingly, have incidental take coverage through the incidental take permit associated with the CCAA. Individuals who did not choose to participate in the CCAAs and who do not wish to participate in the rangewide plan or other Federal conservation programs may pursue a traditional HCP and associated incidental take permit for their activities.

(4) *Comment:* The requirement that lands must have been cultivated in the last 5 years is an unnecessary limitation on the cultivated lands provision. The provision should cover lands that have been cultivated in the last 10 years, or that have never been cultivated.

Our Response: The intention of this provision is to allow for continued agricultural practices on existing cultivated lands, not to allow for new conversion of grasslands to cultivation. Existing cultivated lands are of low value to lesser prairie-chickens, although they may provide food resources for lesser prairie-chickens at some times. Conversely, lands that have not been cultivated in 5 years or more may have developed habitat qualities that are of higher value to lesser prairie-chickens; therefore, the amount of take caused by conversion back to cultivation may not be insignificant. Generally speaking, lands that are in continuing agricultural use would not be rested or remain fallow for more than 4 to 5 years; thus we believe the 5-year limitation best supports the intent of this provision.

(5) *Comment:* Limitations on cultivation practices (e.g., starting in the center of a field, use of flush bars) are not “normal” farming practice. This provision needs reconsideration and clarification.

Our Response: Upon further review, we have determined that these limitations were unnecessary. They were intended to limit the level of take that would occur on lands subject to routine, continuing agricultural practices; however, since we already determined that the take associated with those routine practices would be limited generally, we have determined that the limitations are unnecessary and revised the cultivated lands provision accordingly.

(6) *Comment:* The cultivated lands provision should specifically note that use of chemicals on cultivated lands is allowed.

Our Response: Use of chemicals as a routine agricultural practice is covered under the cultivated lands provision. We have revised the text of the rule to be more precise on this issue.

(7) *Comment:* The 4(d) special rule should include a provision to cover activities consistent with the Conservation Reserve Program (CRP) and incidental take for landowners choosing to remove their lands from CRP practices.

Our Response: The Service anticipates that incidental take of lesser prairie-chicken associated with CRP activities, including returning lands enrolled in CRP to cropland after CRP contract expiration, will be addressed through section 7 of the Act. In January 2013, the Farm Services Agency engaged the Service in a collaborative effort to develop a conference opinion to address CRP implementation on lands occurring within the range of the lesser prairie-chicken. The conference opinion is intended to evaluate the cumulative landscape-level effects of CRP implementation on the lesser prairie-chicken, prescribe conservation measures to avoid or minimize any adverse effects of CRP implementation, and, if appropriate, provide incidental take coverage to CRP participants who adhere to the conditions in the conservation opinion.

Public Comments

(8) *Comment:* The 4(d) special rule should not preclude or interfere with the Service's ability to issue section 10 incidental take permits.

Our Response: Nothing in the 4(d) special rule precludes the Service from continuing to issue permits under the traditional incidental take permitting tools (e.g., HCPs, safe harbor agreements (SHAs)).

(9) *Comment:* The Service has failed to comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 et seq.).

Our Response: We have determined that environmental assessments and environmental impact statements, as defined under the authority of NEPA, need not be prepared in connection with listing a species as an endangered or threatened species under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). As documented in the Service's Endangered Species Listing Handbook (Service 1994), it is the position of the Service that rules promulgated under section 4(d) of the Act concurrently with listing of the species fall under the same rationale as outlined in the October 25, 1983, determination; thus preparation of an environmental assessment for the 4(d) special rule for the lesser prairie-chicken is not required.

(10) *Comment:* A rule promulgated pursuant to section 4(d) of the Act must "provide for the conservation" of a species. The Service is inappropriately relying on a net conservation benefit standard in developing this 4(d) special rule. A rule with a net conservation benefit is not

the same as a rule promulgated for the conservation of the species.

Our Response: The Service believes that a net conservation benefit standard is “necessary and advisable for the conservation” of the lesser prairie-chicken. A net conservation benefit standard allows for the Service to evaluate the conservation action and determine whether, overall, the action provides for the conservation of the species. In other words, the action may have some negative effects to the species but in combination with the positive effects, the positive outweighs the negative providing for the conservation of the species overall or a net conservation benefit.

(11) *Comment:* The Service has failed to complete a section 7 consultation on the 4(d) special rule.

Our Response: Section 7 consultation on the development of a rule to list a species under the Act is not required. Under the Act, we are to base listing decisions on the best available scientific and commercial information. If a species warrants listing under the Act based on a review of the best available scientific and commercial information, the Service must list the species, if not precluded by other higher priority listing actions. In other words, the Service does not have discretion to not list a species in consideration of other information, including the results of a section 7 analysis. This 4(d) special rule is being promulgated concurrent with the listing of the species, and by extension, is therefore also not subject to section 7 consultation requirements.

(12) *Comment:* This Service has not coordinated adequately with local governments.

Our Response: We have coordinated extensively with the public, local governments, industry, academia, and other Federal agencies. Specifically, in accordance with the Act and Service policies and guidelines, we published legal notices and provided notice to affected counties. Additionally, we requested written comments from the public on the proposed listing of the lesser prairie-chicken and proposed 4(d) special rule during four comment periods: May 6 to June 20, 2013; July 9 to August 8, 2013; December 11, 2013, to January 10, 2014; and January 29 to February 12, 2014.

(13) *Comment:* The Service must clarify to which version of the rangewide plan the 4(d) special rule refers.

Our Response: By using the phrase “as endorsed by the U.S. Fish and Wildlife Service” to describe the rangewide plan, this final 4(d) special rule provides that take incidental to activities conducted by participants enrolled in the October 2013 version of WAFWA’s “Lesser Prairie-Chicken Range-Wide Conservation Plan” is not prohibited. The October 2013 version of the rangewide plan was made, and remains, available on <http://www.regulations.gov> under Docket No. FWS–R2–ES–2012–0071 as a supporting material for our January 29, 2014, **Federal Register** publication (79 FR 4652).

(14) *Comment:* The rangewide plan does not contain an effective strategy to achieve its goals and therefore will not support conservation of the lesser prairie-chicken.

Our Response: As stated in the October 23, 2013, endorsement letter, the Service believes the rangewide plan reflects a sound conservation design and strategy that, when implemented, will provide a net conservation benefit to the lesser prairie-chicken. To the extent that there may be uncertainty as to the effectiveness of the strategy, the plan contains adaptive management provisions that allow flexibility in its implementation over time to ensure that the plan results in improvement of the status of the species towards the habitat and population goals therein.

(15) *Comment:* Several commenters offered alternative plans and mitigation strategies to the one in the rangewide plan.

Our Response: We recognize that there may be numerous alternatives to, or variations of, the rangewide plan that could provide a net conservation benefit to the species. However, as discussed above, we have determined that the endorsed rangewide plan provides a net conservation benefit to the species and is an appropriate provision of this 4(d) special rule. Regarding the possibility of the Service endorsing other plans or tools, the Service will assess each of those as submitted for our review and will evaluate each on the fact-specific metrics contained in that plan.

(16) *Comment:* The Service has inappropriately relied on the draft criteria from its May 6, 2013, proposed 4(d) special rule (78 FR 26302) to evaluate the rangewide plan. These criteria were never finalized and relying on them is contrary to the Administrative Procedure Act.

Our Response: On May 6, 2013, the Service proposed criteria that could be used to evaluate whether a planning effort resulted in a net conservation benefit to the lesser prairie-chicken (78 FR 26302). We evaluated the rangewide plan against these criteria and determined that the rangewide plan would provide a net conservation benefit to the species. In our December 11, 2013, revised proposed rule (78 FR 75306), we revised the proposed 4(d) special rule to be specific to the rangewide plan and published our analysis of net conservation benefit. In total, we requested written comments from the public on the proposed 4(d) special rule during four comment periods: May 6 to June 20, 2013; July 9 to August 8, 2013; December 11, 2013, to January 10, 2014; and January 29 to February 12, 2014. Given that both the criteria and our analysis of the rangewide plan under the criteria have been made available for public notice and comment, we believe our actions comply with the requirements of the Administrative Procedure Act (5 U.S.C. subchapter II), and we rely on this analysis in our final rule.

(17) *Comment:* What will the process be for WAFWA to make future adjustments or modifications to the rangewide plan? If the rangewide plan is revised, will activities conducted under the plan continue to be covered by the provisions of the 4(d) special rule?

Our Response: The rangewide plan includes an adaptive management provision that allows for adjustments based on new information. Changes are expected to the rangewide plan, as needed, according to that process. Given that the endorsed plan includes adaptive management and that changes were contemplated as part of the implementation of the plan, as long as the new changes are incorporated into the plan, then the 4(d) special rule will continue to

cover the activities of enrolled participants. Significant modifications to the rangewide plan that are outside the bounds of the adaptive management provisions of the plan would require additional review by the Service and may require revision of the 4(d) special rule.

(18) *Comment:* The rangewide plan will not result in conservation of the species because participation in the plan is voluntary. Enrollment, payment of mitigation fees, implementation of conservation practices, and implementation of avoidance, minimization, and mitigation measures are all voluntary.

Our Response: Each participant who chooses to enroll in the rangewide plan will sign a certificate of participation. This certificate of participation will outline either the specific avoidance, minimization, and mitigation measures (for impact participants) or conservation practices (for offset participants) that each participant has agreed to implement on his or her lands. The activities identified in each of these certificates of participation are not voluntary. In summary, while enrollment in the rangewide plan is indeed voluntary, implementation of conservation measures is not voluntary once enrolled.

(19) *Comment:* Conservation banking, consistent with the Service's conservation banking guidance, is the only mitigation solution that can achieve a net conservation benefit to the species with certainty and long-term accountability.

Our Response: Conservation banking is a tool that can provide a net conservation benefit to a species by reducing the threat of fragmentation and habitat loss through perpetual

conservation. However, it is not the only tool available that can achieve a net conservation benefit to the species with certainty and long-term accountability. Given the specific biology, life history, and threats facing a species, many other tools may also be appropriate to offset negative impacts and provide a net conservation benefit. For example, our experience has shown that HCPs can provide a net conservation benefit, and not all HCPs include conservation banking. This is a species-specific determination based on the threats acting on that species.

(20) *Comment:* Conservation of lesser prairie-chickens cannot be achieved through term or temporary mitigation. Short-term offsets in the form of 5-year contracts are not effective mitigation for permanent impacts.

Our Response: The rangewide plan is designed to deliver permanent mitigation for permanent impacts, but, in some cases, the impacts will be offset through the use of short-term (5-10 year) contracts. Each acre of impact will be offset by 2 acres of offset, due to the 2-to-1 offset-to-impact ratio in the rangewide plan. These offset acres are secured through contracts between WAFWA and landowners. Some of the contracts (up to 75 percent) will be short-term contracts. When a contract for a short-term offset unit is due to expire, the need to mitigate the original impact does not go away. Rather, WAFWA will offer to extend the contract, and if the landowner does not wish to extend, WAFWA will find a new land base to apply those offset contracts. In this way, WAFWA will maintain the necessary amount of offset units over time, resulting in permanent mitigation for permanent impacts.

For example, Participant A is an impact participant who has been assessed 500 acres of

impact on his or her enrolled property. WAFWA will need to secure 1,000 offset acres (due to the 2:1 offset-to-impact ratio) for the impacts from Participant A. Participant B enrolls 1,000 acres as offset through a short-term 5-year contract (i.e., until the end of 2020). In 2020, Participant B chooses not to renew the contract. WAFWA must then find a new 1,000 acres of offset to cover the original 500 acres of impact from Participant A. Participant C signs an agreement for 1,000 acres for a 10-year contract, which shifts the offset of Participant A's impact from Participant B to Participant C. This scenario would repeat itself, as presented in the rangewide plan, in perpetuity, thus achieving permanent, but not static, mitigation.

(21) *Comment:* It is not appropriate to use short-term contracts for restoration because restoration of lesser prairie-chicken habitat may take many years to be achieved.

Our Response: The rangewide plan recognizes that short-term contracts may not immediately realize the benefits of restoration practices. Because of this recognition, contracts for participants employing restoration practices require a minimum 10-year term. Furthermore, the calculation of offset credits is based on habitat quality, which is evaluated annually. Thus, generation of offset credits on lands under restoration contract is determined based on annual habitat quality and does not overestimate the contribution of lands that are still in an improvement phase. In other words, lands that are in an improvement phase do not count fully toward tallies of offset acreage.

(22) *Comment:* In reference to WAFWA and the rangewide plan, the Federal Government cannot delegate regulatory authority over American citizens to a foreign

government or multinational organization, nor can the Federal Government commandeer State agencies in an attempt to regulate the conduct of American citizens.

Our Response: The Service is not attempting to use the rangewide plan to regulate the public, nor are we attempting to use the rangewide plan as a vehicle to commandeer State agencies. The rangewide plan is a voluntary agreement between WAFWA and the participants and is being administered voluntarily by WAFWA, not under Service regulation. The plan can provide an alternative to the need to seek an incidental take permit from the Service in some situations, but is not in itself regulatory.

(23) *Comment:* How does WAFWA intend to enforce the rangewide plan?

Our Response: As discussed in the rangewide plan, WAFWA will conduct compliance monitoring to confirm adherence to the rangewide plan. Any participant who does not comply with the agreed-upon avoidance and minimization measures that are appropriate for their impacts in their signed certificate will receive a notice of non-compliance from the rangewide plan administrators. This notice will include a detailed list of measures that the participant must address and a reasonable timeline in which to address them. If, during the duration of the agreement, the participant receives a total of three notices of noncompliance and fails to address those measures within the allotted timeframe, it will constitute grounds for the termination of participation and rangewide plan coverage. Participants enrolled on both sides of the framework (i.e., impacts and offsets) have incentive to remain enrolled in the plan. Participants enrolled on the impact side, if terminated, will forfeit any enrollment or mitigation fees paid and will be then

subject to the full take prohibitions of the Act. Participants enrolled on the offset side, if terminated, will forego any incentive payments and will also then be subject to the full take prohibitions of the Act.

(24) *Comment:* The rangewide plan provision of the 4(d) special rule represents a radical departure from the Service's historical mitigation policies and sets a questionable precedent for future conservation efforts.

Our Response: Section 4(d) of the Act provides an opportunity for the Service to tailor the necessary conservation measures to a threatened species. We have concluded that the mitigation framework in the rangewide plan is an appropriate tool to use as a part of the conservation strategy for the lesser prairie-chicken.

(25) *Comment:* The population goals and conservation strategy in the rangewide plan do not take into account the results of the 2013 lesser prairie-chicken population surveys.

Our Response: The rangewide plan was in the final stages of approval when the 2013 survey results were released; thus the final results are not fully incorporated into the plan. However, the adaptive management process in the plan allows for future consideration of the 2013 survey data, survey data from subsequent years, and any other relevant scientific information that may become available over time.

(26) *Comment:* The confidentiality provisions found in the rangewide plan are not

appropriate or implementable. The confidentiality provisions will not allow outside parties to monitor the implementation of the plan. Further, the provisions cannot be implemented as written due to requirements under the Freedom of Information Act (FOIA; 5 U.S.C. 552, as amended).

Our Response: As discussed in the rangewide plan, WAFWA will allow access to confidential and sensitive business information only to the relevant State fish and wildlife agency, the Service, employees or agents of WAFWA, and the participant that provided the information. WAFWA will use a password-protected database to maintain this information so that it can be viewed for relevant monitoring purposes but not downloaded, possessed, or distributed. This provision was developed with full recognition of the FOIA requirements of Federal agencies, thus the careful controls on the content of materials shared with the Service.

While this system may make monitoring of implementation by outside entities challenging, it is a necessary provision given the preponderance of private lands within the range of the lesser prairie-chicken. This information, limited as it may be, can be more useful than we would have been able to gather otherwise from private landowners. Finally, one of the most important pieces of information to monitor is the overall status of the species in response to rangewide plan, which will continue to occur through aerial surveys, the results of which will be shared widely.

(27) *Comment:* How were the population goals for the lesser prairie-chicken in the rangewide plan developed?

Our Response: As discussed in the rangewide plan, a science team under WAFWA's Interstate Working Group was tasked with developing the population goals. The science team reviewed the available population information and analyses, and recommended a rangewide population goal of 67,000 birds as an annual spring average over a 10 year-time frame. The science team felt that this goal was both attainable and sustainable considering that the rangewide population had been above this level as recently as 2006. This goal was determined to meet the following population objectives:

- Increase populations to ensure a sustainable, long-term population within each of the four delineated ecoregions for the next 10 years of the rangewide plan's implementation;
- Maintain and expand the current distribution of the lesser prairie-chicken across its estimated occupied range; and
- Maintain higher population sizes in areas where lesser prairie-chickens currently occur and are stable.

(28) *Comment:* The population goals for the lesser-prairie chicken in the rangewide plan are too low.

Our Response: The rangewide plan includes a rangewide population goal of 67,000 birds as an annual spring average over a 10-year time frame. This means that over the course of 10 years, the average of the population estimates for each of those 10 years must be at least 67,000. In practice, this means the population estimate needs to stabilize at or above 67,000 birds, not merely reach it once. Use of a 10-year average as a goal provides a good indicator of the

stability of the population over time because the population numbers can vary widely from one year to the next naturally based on climatic conditions. The Service believes the strategy in the rangewide plan, including the population goals, will provide a net conservation benefit to the species. The adaptive management provisions in the rangewide plan allow the population goals to be revised if new science or implementation monitoring determines that the goals are not sufficient to support conservation of the lesser prairie-chicken.

(29) Comment: The rangewide plan has a duration of 30 years. What happens at the end of that period? Can the plan be renewed? Will the participants need to pursue alternative coverage for incidental take at that time?

Our Response: The endorsed rangewide plan has a 30-year term. The rangewide plan notes that “at the end of the term, the [rangewide plan] Administrator may apply to the [Service] to renew the [rangewide plan] and any associated permits or [certificates of participation]. The [rangewide plan] Administrator will apply for a renewal at least 30 days prior to the expiration of the [rangewide plan]. The [rangewide plan] Administrator and Participants may continue the activities authorized by the [rangewide plan] until the Service acts on the application for renewal. If approved, any assurances and permit language agreed to at the time of the renewal request will be honored by the [Service]. The [Service] may also deny renewal of the [rangewide plan] or have the option of terminating it.” In the event that the rangewide plan is not renewed, at the time of the rangewide plan’s expiration, participants in the plan would no longer be exempt from the general take prohibition of 50 CFR 17.31 and 50 CFR 17.32.

(30) *Comment:* The 4(d) special rule should be revised to include periodic review of the performance of the rangewide plan by the Service and the ability to modify or revoke the rangewide plan provision of the 4(d) special rule if the implementation of the rangewide plan is not achieving its conservation goals.

Our Response: The Service believes that the rangewide plan establishes appropriate measures to evaluate whether the conservation efforts are proceeding as planned. Those measures include establishing committees that will monitor the implementation effort, of which the Service will be a member. Further, the Service has the discretion to revise or remove the 4(d) special rule at any time if it is determined that the rangewide plan is no longer meeting the intent of the regulation.

(31) *Comment:* Harvest of native grass hay crop should be specifically covered under the 4(d) special rule.

Our Response: The Service believes that a blanket provision under the 4(d) special rule for native grass hay crop would not support the conservation of the lesser prairie-chicken. Areas of native grass can and do support the life-history needs of the lesser prairie-chicken. Unmitigated harvest of these areas is likely to result in continued range reductions and decline in the status of the species. As a result, this activity is better addressed through the rangewide plan, an incidental take permit, or another mechanism designed to offset the threats from these activities through compensatory mitigation.

(32) *Comment:* The Service should reassess the definition of cultivated lands to further clarify or expand it to include “seed-drilled untilled crop.”

Our Response: We have clarified the description of cultivated lands in this final 4(d) special rule and preamble to specifically include seed-drilled untilled crop production (e.g., wheat).

(33) *Comment:* The Service should clarify what it means by “cultivated ... within the previous 5 years.”

Our Response: When referring to lands that have been cultivated with the previous 5 years, the Service intends that the cultivated lands provision should only apply to lands that have been cultivated within the 5 years prior to the action occurring that may otherwise result in take of the lesser prairie-chicken. For example, if a landowner wished to cultivate lands in 2020, those lands must have been cultivated at some point between 2015 and 2020 in order to be covered by this 4(d) special rule. This results in a “rolling” 5-year time period for applicability of this 4(d) special rule.

(34) *Comment:* The Service should clarify which activities are allowed under the cultivated lands provision.

Our Response: The Service intends that all routine activities in support of existing agricultural practices within the footprint of existing developments are allowed under this

provision, including actual management of cultivated lands and maintenance of infrastructure to support the agricultural practices. The text of the rule has been revised to clarify this.

(35) *Comment:* Comments were submitted both for and against inclusion of provisions in the 4(d) special rule for:

- Criteria that would allow approval of plans completed in the future;
- Direct hunting of lesser prairie-chickens;
- Continued enrollment in candidate conservation agreements with assurances

(CCAAs); and

- Incidental take when in accordance with applicable State law for education or scientific purpose, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act.

Our Response: We solicited and considered public comment on the inclusion of these provisions. We have determined that it is not necessary to include such provisions in the final 4(d) special rule, as the suite of provisions currently included in the 4(d) rule, in combination with other ongoing conservation efforts, appropriately supports the conservation of the species.

(36) *Comment:* The Service should include provisions in the 4(d) special rule for any other comprehensive plans that provide a net conservation benefit to the lesser prairie-chicken, similar to WAFWA's rangewide plan.

Our Response: There are several other comprehensive plans in development that may be

determined in the future to support conservation of the lesser prairie-chicken; however, these efforts are not far enough along in the development process to be considered under the 4(d) special rule at this time.

(37) Comment: The 4(d) special rule should include provisions allowing incidental take of lesser prairie-chickens as a result of development and operation of oil and gas production and wind energy generation facilities. Incidental take from these operations does not present a risk to the species.

Our Response: The 4(d) special rule includes provisions for development and operation of oil and gas production and wind energy generation through the mitigation framework in the rangewide plan. The Service does not believe that blanket provisions under a 4(d) special rule for these sectors would support conservation of the species. These activities are two of the primary threats to the lesser prairie-chicken into the future (see the final listing rule published elsewhere in today's **Federal Register**), and continued unmitigated impacts are likely to result in an additional decline in the status of the species. As a result, these sectors are better addressed through the rangewide plan, an incidental take permit, or another mechanism designed to offset the threats from these activities through compensatory mitigation.

(38) Comment: A provision should be developed in the 4(d) special rule that would serve to exempt or "grandfather" projects that are pending or otherwise in progress.

Our Response: While we recognize that the period following the listing of a species can

be challenging with regards to incidental take coverage, we do not believe that such a blanket provision would support the conservation of the lesser prairie-chicken. The rangewide plan provision of the 4(d) special rule provides a mechanism for exempting take for many ongoing activities, and WAFWA is actively enrolling participants as of the time of listing.

Required Determinations

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). It is the position of the Service that rules promulgated under section 4(d) of the Act concurrently with listing of the species fall under the same rationale as outlined in the October 25, 1983, determination.

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. We continued to keep tribal governments informed by providing notifications of each new or reopened public comment period, including those specifically pertaining to the 4(d) special rule, and requesting their input. We did not receive any requests or comments as a result of our request.

References Cited

A complete list of all references cited in this rule is available on the Internet at <http://www.regulations.gov> under 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 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.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

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 adding paragraph (d) to read as follows:

§ 17.41 Special rules—birds.

* * * * *

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

(1) *Prohibitions.* Except as noted in paragraphs (d)(2)(i), (d)(2)(ii), and (d)(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 conditioned conservation practices that are carried out in accordance with a conservation plan providing for lesser prairie-chicken conservation developed by the U.S. Department of Agriculture's Natural Resources Conservation Service 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, seed-drilled untilled 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 5 years preceding the proposed routine agricultural practice that may otherwise result in take. Activities covered by this provision include:

(A) Plowing, drilling, disking, mowing, or other mechanical manipulation and management of lands in cultivation.

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

(C) Use of chemicals in direct support of cultivated agriculture when done in accordance with label recommendations.

* * * * *

Dated: March 23, 2014

/s/ Daniel M. Ashe

Director, U.S. Fish and Wildlife Service

Billing Code 4310–55