



United States Department of the Interior



FISH AND WILDLIFE SERVICE
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In Reply Refer to:

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Memorandum

To: Regional Director, Southwest Regional Office, Albuquerque, New Mexico

Through: Assistant Regional Director – Ecological Services, Southwest Regional Office, Albuquerque, New Mexico

From: Field Supervisor

Subject: Findings and Recommendations on Issuance of an Incidental Take Permit (ES89394D) for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*; LEPC) to LPC Conservation, LLC for the Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan for the Lesser Prairie-Chicken, covering portions of Texas, New Mexico, Oklahoma, Kansas, and Colorado.

I. DESCRIPTION OF PROPOSAL

LPC Conservation, LLC (LPCC, LLC) has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit (ITP) under section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (ESA)(16 U.S.C. §1531-1544). Such permits authorize take that is incidental to otherwise lawful activities (50 CFR 17.3). The requested ITP, which is for a period of 30 years, would authorize incidental take of the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*; LEPC), should the species be listed under section 4 of the ESA during the life of the ITP.

The *Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan* (HCP) has been analyzed under the National Environmental Policy Act of 1969 (NEPA). The accompanying HCP, incorporated herein by reference, describes measures to minimize and mitigate impacts from any expected incidental take of the LEPC.

The issuance of an ITP under section 10(a)(1)(B) of the ESA would authorize incidental take of LEPC during the implementation of Covered Activities (see below) upon any potential effective

listing of the LEPC under section 4 of the ESA. The Permit Area of the HCP includes portions of eastern New Mexico, the Plains and the panhandle of Texas, western Oklahoma, central and eastern Kansas, and western Colorado.

Covered Activities include the types of activities commonly associated with wind, solar, power line, and communication tower development that can affect potentially suitable LEPC habitat, as well as grassland improvement and management activities that, while expected to result in a long-term benefit for LEPC, may have temporary adverse effects upon initial implementation. These activities primarily include 1) site preparation, 2) construction of temporary infrastructure to support construction, 3) construction of project infrastructure, 4) project repairs, repowering, decommissioning, or post-construction restoration of temporarily disturbed areas, 5) fire management, 6) erosion control, 7) mechanical brush control, 8) herbicide treatments, 9) grazing management, 10) range plantings, 11) forage harvest management, and 12) fence installation. A full description of the Covered Activities can be found in Section 2.0 of the HCP.

The estimated potential take of, and impacts to, LEPC that could result from Covered Activities will be measured using acres of suitable LEPC habitat (as defined in Section 4.4 of the HCP) affected by individual projects participating in the HCP as a surrogate for direct take of LEPC individuals. A surrogate is required for the following reasons: 1) it is difficult to determine LEPC numbers at a site and predict how many individuals would be taken by development of wind, solar, power line, and communication tower projects within the Permit Area or implementation of grassland improvement and management activities; 2) the location and amount of suitable LEPC habitat can be readily quantified using geographic information systems (GIS) data; and 3) habitat loss and fragmentation is the primary threat affecting LEPC populations (79 FR 19973 [April 10, 2014]). Thus, because it is impracticable to express take or conservation benefits in terms of individuals, both the impacts of activities and the mitigation of those impacts are measured in acres of habitat.

There is a causal link between construction of anthropogenic features described in the covered activities and that may rise to the level of take of LEPC as these development activities may result in habitat modification or degradation that significantly impairs the essential behavioral patterns of the LEPC. For instance, the infrastructure associated with the development of wind energy, including roads and powerlines, has been documented to result in avoidance of otherwise suitable habitat by grouse (USFWS 2021). Use of a surrogate for expressing take is consistent with current USFWS guidance that acknowledges that when the numerical amount of anticipated incidental take of individuals is difficult to determine, the acres of habitat affected may then be substituted as a surrogate for take prediction, as provided in Section 8.2.2 of the HCP Handbook (USFWS and NMFS 2016).

We anticipate that Covered Activities will affect a total of 500,000 acres of suitable LEPC habitat (300,000 acres of suitable LEPC habitat in the Northern Distinct Population Segment (DPS) and 200,000 of suitable LEPC habitat in the Southern DPS) within the Plan/Permit Area over the 30-year term of the ITP. Effects from Covered Activities will likely result in a reduction of breeding, feeding, and/or sheltering habitat for the LEPC through habitat loss. The applicant developed an HCP to ensure their proposal minimizes and mitigates, to the maximum

extent practicable, all the effects of incidental take of the LEPC from activities described in the HCP under section 10(a)(1)(B) of the ESA.

A total of 59 federally listed, proposed, or candidate species may occur within the Plan/Permit Area (see Attachment B of the HCP). Of these, 17 species occur within suitable LEPC habitat as defined in the HCP. As discussed in Section 1.7 of the HCP, the ITP would only authorize incidental take of LEPC associated with otherwise lawful activities. Projects seeking to enroll in the HCP and obtain coverage would be required to provide documentation of ESA compliance for species not covered under the ITP as part of the application package, which would be reviewed by both the Applicant and the Service prior to approval (see Section 8.4 of the HCP). Considering that no other species are covered in the HCP or ITP, the “No Surprises Rule,” (codified at 50 CFR 17.22 b) are only applicable for the LEPC.

The Renewable (Wind and Solar) Energy, Power Line, and Communication Tower HCP fully describes the applicant’s minimization/mitigation strategy for the LEPC.

Analysis of Effects

The Service fully analyzed the effects of the proposed action on the LEPC in our EA and conference opinion (CO) for the proposed action. We incorporate both documents herein by reference.

Full implementation of the HCP is expected to potentially effect 500,00 acres of suitable LEPC habitat (300,000 acres of suitable LEPC habitat in the Northern DPS and 200,000 of suitable LEPC habitat in the Southern DPS), resulting in take in the form of harm. Mitigation is being accomplished by acquiring strategically located, permanent mitigation to fully offset take both spatially and temporally. Once take is quantified, using habitat as a proxy, that take must be mitigated for using the tiered mitigation system established within the HCP based upon the relative value of the habitat as defined by the Southern Great Plains Crucial Habitat Assessment Tool. Impacts to higher priority areas will require higher mitigation ratios as compared to impacts in lower priority areas. Overall, the mitigation ratios average 2 acres of mitigation for every 1 acre of impact. Additionally, all impacts must be offset using mitigation occurring in a priority area of equivalent or higher value areas as defined by the Southern Great Plains CHAT. The HCP requires all mitigation be in place and meeting performance standards prior to impacts occurring to ensure there is no temporal loss for the species. After year 5, or the first 50,000 acres of mitigation are sold, for every 1 acre of impact the HCP requires mitigation includes a minimum of 1 acre of restoration to result in no net loss of habitat. The remainder of the required mitigation can be targeted at additional restoration efforts or habitat enhancement.

Impacts to the Northern DPS of the LEPC habitat proposed in the HCP is estimated to be less than 10 percent of all species habitat within Northern DPS. Impacts to the Southern DPS of the LEPC habitat proposed in the HCP is estimated to be less than 20 percent of all species habitat with this Southern DPS. Based on the distribution of the LEPC and its habitat and mitigation requirements described in the HCP, the Service has determined that the amount of requested incidental take for the both the Northern and Southern DPS of the LEPC is so minor that it is not

likely to jeopardize the species in either DPS. Critical habitat has not been designated for the species therefore no adverse modification of critical habitat will occur.

II. PUBLIC COMMENT

A Notice of Availability of the HCP and accompanying EA was published in the Federal Register on April 14, 2021 (86 FR 19634). The public comment period closed on May 14, 2021.

We received 16 comment letters from the public during the public comment period. We received public comments regarding the ability to the FWS to approve an HCP for an unlisted species, coordination with the State Wildlife Agencies, metrics used to quantify take, and mitigation requirements. Our responses to public comments are attached to the final EA.

III. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

1. The proposed taking will be incidental to otherwise lawful activities.

We find that the take will be incidental to otherwise lawful activities, including activities required for construction, operations, and maintenance of wind, solar, and transmission line development as well as management actions on mitigation lands (see section 2 of the HCP for a complete discussion of covered activities). The take of individual LEPC will be primarily due to the indirect impacts of habitat destruction and/or alteration.

2. To the maximum extent practicable, avoid, minimize, and mitigate for the impacts of such taking.

LPCC, LLC has committed, to the maximum extent practicable, to minimize and mitigate the effects of taking LEPC. To minimize impacts, the HCP is designed to encourage avoidance of LEPC habitat and minimization when complete avoidance cannot be accomplished by the utilization of the methodology to quantify impacts and the tiered mitigation ratios. This system results in projects which are strategically located to occur in lower priority areas that have existing impacts, and would require less mitigation than would projects built in higher priority areas with fewer existing impacts. Additionally, the HCP requires noise and timing restrictions during the breeding season to further minimize impacts. The mitigation is commensurate with the level of take anticipated. In addition, LPCC, LLC has included provisions for changed circumstances that are foreseeable. These strategies will ensure that impacts from the proposed taking are minimized and mitigated to the maximum extent practicable. For a complete discussion on the proposed minimization and mitigation actions see section 5 in the HCP.

3. Ensure adequate funding for the plan will be provided.

The total cumulative cost of implementing the HCP for the 30-year period is approximately \$3,625,755,592, assuming full utilization of all take. LPCC, LLC has incorporated these costs into the project's capital costs. For a complete discussion on funding see section 7 of

the HCP.

4. The proposed taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

As the Federal action agency considering whether to issue an ITP to LPCC, LLC, we have reviewed the proposed action under section 7 of the ESA. Our conference opinion concluded that issuance of the ITP will not jeopardize the continued existence of the covered species in the wild. No critical habitat has been designated for the covered species, thus none will be affected. The HCP only covers the LEPC; participants must avoid or receive separate take authorization, as necessary for other federally listed species that occur within their respective project area(s) in order to be eligible for enrollment in the HCP. Therefore, the LEPC is the only species addressed in the conference opinion. Prior to enrollment in the HCP, all prospective participants must provide documentation of ESA compliance for species not covered under the ITP. Therefore, the issuance of the ITP will not result in jeopardy of non-covered listed species and no adverse modification of any designated critical habitat within the permit area is expected.

5. The Applicant has met other requirements imposed by the Secretary of the Interior, such as monitoring and reporting.

We assisted LPCC, LLC in the development of their HCP. We commented on draft documents, participated in numerous meetings and conference calls, and worked closely with LPCC, LLC during every step of plan and document preparation, so that conservation of the covered species would be assured and recovery would not be precluded by the covered activities. The HCP incorporates our recommendations for minimization and mitigation of impacts, as well as steps to monitor the effects of the HCP and ensure success. Monitoring, as well as coordination and reporting mechanisms, have been designed to ensure that changes in conservation measures can be implemented if proposed measures prove ineffective (adaptive management) or impacts exceed estimates (changed circumstances). It is our position that no additional measures are required to implement the intent and purpose of the HCP and its associated ITP.

6. The Secretary of the Interior has received assurances that the plan will be implemented.

Chapters 4 and 5 of the HCP address the implementation, including identifying how LPCC, LLC will ensure that avoidance and minimization measures will be properly implemented. This plan for implementation provides assurances to the Service that LPCC, LLC will fully implement the HCP.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

We have no evidence that the ITP should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21 (b)-(c). The LPCC, LLC has met the criteria for the issuance of the ITP

and does not have any disqualifying factors that would prevent the ITP from being issued under current regulations.

V. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, we recommend issuance of an ITP to authorize incidental taking of the LEPC by LPCC, LLC, in accordance with the HCP and biological opinion.

Deputy Regional Director,
Southwest Region

Date