



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE



New Mexico Ecological Services Field Office  
2105 Osuna Road NE  
Albuquerque, New Mexico 87113  
Telephone 505-346-2525 Fax 505-346-2542  
[www.fws.gov/southwest/es/newmexico](http://www.fws.gov/southwest/es/newmexico)

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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: Project Leader, New Mexico Ecological Services Field Office, Albuquerque, New Mexico

**SHAWN SARTORIUS** Digitally signed by SHAWN SARTORIUS  
Date: 2022.07.05 10:46:26 -06'00'

Subject: Findings and Recommendations on Issuance of an Amended 10(a)(1)(A) Enhancement of Survival Permit for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) and Dunes Sagebrush Lizard (*Sceloporus arenicolus*) to the Center for Excellence for the *Amended Candidate Conservation Agreement and Candidate Conservation Agreement with Assurances for the Conservation of the Lesser Prairie Chicken and Dunes Sagebrush Lizard in Southeastern New Mexico*

The U.S. Fish and Wildlife Service's (Service) New Mexico Ecological Services Field Office has worked with Center of Excellence for Hazardous Materials Management (Center of Excellence/Applicant) to amend the Candidate Conservation Agreement and Candidate Conservation Agreement with Assurances (collectively referred to as Conservation Agreements) for the lesser prairie-chicken (*Tympanuchus pallidicinctus*) and the dunes sagebrush lizard (*Sceloporus arenicolus*) (sagebrush lizard), formerly known as the sand dune lizard, in seven counties in southeastern New Mexico. The Candidate Conservation Agreement and the Candidate Conservation Agreement with Assurances are separate agreements; the Candidate Conservation Agreement applies to participants on Federal lands, and the Candidate Conservation Agreement with Assurances applies to participants on State and/or private lands. The Services now proposes to issue an amended Enhancement of Survival Permit (Permit) for

the remainder of the Permit term to the Center of Excellence for the lesser prairie-chicken and the dunes sagebrush lizard, in association with the Candidate Conservation Agreement with Assurances. The Service is authorized to complete this action under the authority of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act). The lesser prairie-chicken is currently proposed for listing under the Act as two Distinct Population Segments. The Northern Distinct Population Segment encompasses the northern range of the prairie-chicken in western Oklahoma, southeastern Colorado, western Kansas, and the north Texas panhandle. The Southern Distinct Population Segment encompasses the southern range of the lesser prairie-chicken in the sand shinnery oak prairie ecoregion of eastern New Mexico and the western panhandle of Texas. The status of the dunes sagebrush lizard is currently under review by the Service and is not currently listed as federally threatened or endangered pursuant to the Act. The Center of Excellence and the Service, with assistance from the Bureau of Land Management, are the parties to the Conservation Agreements, which have a 20-year duration. The amended Permit is a necessary component for implementation of the amended Candidate Conservation Agreement with Assurances, and the application and proposed amended Candidate Conservation Agreement with Assurances meets the regulatory and statutory standards required for issuance of the requested Permit.

## **I. DESCRIPTION OF PROPOSAL**

Participants and others in the industry have approached the Center of Excellence and the Service requesting changes to the Conservation Agreements. The Center of Excellence subsequently submitted an application to the Service to amend their section 10(a)(1)(A) permit. The Permit would support the amended Candidate Conservation Agreement with Assurances for the lesser prairie-chicken and dunes sagebrush lizard in the southeastern section of the state within portions of the counties of Lea, Eddy, De Baca, Curry, Roosevelt, Quay, and Chaves in New Mexico. The amendments would: add an enrollment option to cover all activities for participants in the covered area, reclassify habitat categories based on lesser prairie-chicken habitat and lek locations, add certificates of participation and/or inclusion tailored to companies that develop linear infrastructure (e.g., midstream, electrical distribution, and utility) associated with oil and gas development, reduce enrollment fees for select new parcel-by-parcel enrollees, and add an annual inflation/deflation adjustment for all habitat conservation fees. The primary objective of the amendments are to remove barriers to increased participation in the Conservation Agreements, thereby resulting in a greater conservation benefit to both species. Increased enrollment in the Conservation Agreements for lesser prairie-chicken and dunes sagebrush lizard is expected to eliminate or reduce threats to the lesser prairie-chicken and dunes sagebrush lizard within the Covered Area. The Candidate Conservation Agreement with Assurances will continue the successful cooperative recovery efforts for the lesser prairie-chicken and dunes sagebrush lizard that have been accomplished to date through conservation actions that would not otherwise be required through the Act. With the issuance of the amended Permit, the Service will provide assurances to the Center of Excellence that no additional conservation measures would be required beyond those specified in the Candidate Conservation Agreement with Assurances should the species become listed in the future as long as the Center of Excellence implements

and maintains the conservation measures specified in the Candidate Conservation Agreement with Assurances in good faith.

The continued implementation of the Conservation Agreements and the amended Conservation Agreements are expected to serve as a vehicle to remove or reduce threats on enrolled properties and stabilize, if not expand, lesser prairie-chicken and dunes sagebrush lizard populations through implementation of the conservation actions described in the Conservation Agreements. The amended Candidate Conservation Agreement with Assurances, combined with the amended companion Candidate Conservation Agreement with the Bureau of Land Management, Service, and the Center of Excellence for conservation on Federal lands, is likely to increase cooperative conservation efforts in lesser prairie-chicken and dunes sagebrush lizard habitat in southeastern New Mexico. The Permit would authorize incidental take associated with implementation of conservation commitments and measures described in the Candidate Conservation Agreement with Assurances and land uses, primarily oil and gas development and ranching, on the enrolled properties. The Permit would not become effective unless listing of the lesser prairie-chicken and/or the dunes sagebrush lizard occurs during the permit term.

#### Analysis of Effects

The Service has analyzed the potential impact of the amended Candidate Conservation Agreement with Assurances on the human environment and has concluded in its National Environmental Policy Act analysis that there will be no individual or cumulative significant effects on the environment caused by this action. The Service recommends Permit issuance based on the adequacy of the amended Candidate Conservation Agreement with Assurances as measured against the Service's final Candidate Conservation Agreement with Assurances policy (63 FR 32726-32736) and the expected net conservation benefit to the lesser prairie-chicken and dunes sagebrush lizard that is expected to be achieved through implementation of conservation actions and provisions contained in the amended Candidate Conservation Agreement with Assurances.

## **II. PUBLIC COMMENTS**

A Notice of Availability of the Draft Environmental Assessment and amendments was published in the Federal Register on February 9, 2022, and comments were accepted through March 11, 2022. Due to technical issues, the public comment period was extended through March 18, 2022. The Draft Environmental Assessment and amendments were published to the Service's New Mexico Ecological Services website (<https://www.fws.gov/office/new-mexico-ecological-services>). The Conservation Agreements, along with the original conference opinion, Environmental Assessment, Finding of No Significant Impact, and Findings document are published at [https://ecos.fws.gov/ecp/report/conservation-plan?plan\\_id=4213](https://ecos.fws.gov/ecp/report/conservation-plan?plan_id=4213).

We received six comment letters from individuals and non-governmental organizations. The comments received on the draft Environmental Assessment and amendments can be found in Appendix 1 of the Final Environmental Assessment. The letters received are on file in the project file in the New Mexico Ecological Services Field Office, Albuquerque, New Mexico.

### III. ISSUANCE CRITERIA-ANALYSIS AND FINDINGS

The applicant has met all application requirements for the Permit. In addition, the applicant has met all issuance criteria for the Permit contained in 50 CFR 17.22(d)(1) and 17.32(d)(1) or 50 CFR Part 222. These criteria are detailed below.

1. The taking of the above listed species will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Candidate Conservation Agreement with Assurances (50 CFR 17.22(d)(2)(i) and 17.32(d)(2)(i)).

The Service finds that the potential take of lesser prairie-chicken and dunes sagebrush lizard is incidental to otherwise lawful activities. These activities would occur as a result of implementation of the Candidate Conservation Agreement with Assurances. The Permit would include incidental take associated with implementation of conservation commitments and measures described in the Candidate Conservation Agreement with Assurances and land uses, primarily oil and gas development and ranching, on the enrolled properties. Incidental take authorized under the Permit would be in the form of harm and mortality associated with the conservation activities and documented levels of land use in each participant's Certificate of Inclusion.

2. The implementation of the terms of the Candidate Conservation Agreement with Assurances is reasonably expected to provide a net conservation benefit to the affected covered species by contributing to the conservation of the species included in the permit, and the Candidate Conservation Agreement with Assurances otherwise complies with the Candidate Conservation Agreement with Assurances policy available from the Service; (50 CFR 17.22(d)(2)(ii) and 17.32(d)(2)(ii)).

Conservation implemented under the Candidate Conservation Agreement with Assurances is intended to provide a net conservation benefit to the lesser prairie-chicken and dunes sagebrush lizard relative to the environmental baseline, which is marked by the absence of Federal regulatory and land management authority to conserve and protect unlisted species and their habitat on state and private property in southeastern New Mexico. The proposed action includes approval and implementation of a voluntary conservation program that would be reasonably expected to provide a net conservation benefit to the lesser prairie-chicken and dunes sagebrush lizard, the effects of which include minimizing impacts to relevant environmental resources associated with those legally allowable activities by non-Federal property owners.

The existing Conservation Agreements have assisted in the conservation of the lesser prairie-chicken and dunes sagebrush lizard by shifting energy development from areas of the greatest negative impact on the species and their habitat, to areas where impacts to the species and their habitat are lessened. At the same time, these Agreements are focusing habitat improvement projects on areas that currently support lesser prairie-chicken and dunes sagebrush lizard individuals and have the ability to support species populations.

Consequently, the Conservation Agreements will continue to provide a net conservation benefit by enhancing and restoring habitat, reducing fragmentation, and maintaining and

increasing populations. The amendments will help further the conservation benefit to the species by increasing enrollment.

Since inception, there have been approximately 84,194 acres (34,072 hectares) impacted by development on enrolled lands covered under the Conservation Agreements. Most of these impacts occurred in areas that, while included in the planning area for the Conservation Agreements, are not occupied by either species. Specifically, for the lesser prairie-chicken, most of the development covered under the Conservation Agreements (72,071 acres (29,166 hectares)) have occurred in the Habitat Evaluation Areas, Sparse and Scattered Population Area, Isolated Population Area, Estimated Occupied Range Plus 10 miles, and historical range, which are areas that are not occupied and likely did not support viable lesser prairie-chicken populations when those impacts occurred. When the spatial location of these impacts is considered, it becomes apparent that only 12,123 acres of impacts under the Conservation Agreements have occurred in areas that support lesser prairie-chicken populations (Core Management Area and Primary Population Area and the Estimated Occupied Range).

While approximately only 12,123 acres (4,906 hectares) of impacts under the Conservation Agreements have occurred in areas that have the potential to support lesser prairie-chickens, approximately 29,889 acres (12,096 hectares) out of 30,856 acres (12,378 hectares) of restoration funded by conservation fees have occurred in areas (Core Management Area and Primary Population Area and Estimated Occupied Range) that are immediately adjacent to or in close proximity to occupied lesser prairie-chicken habitat. These funds have been targeted in areas to maximize the conservation benefit to the lesser prairie-chicken by increasing the amount of suitable habitat and reducing fragmentation.

For the dunes sagebrush lizard, participants in the Conservation Agreements have agreed to various habitat avoidance conservation measures, including no surface occupancy within a recommended distance of 200 meters of occupied or suitable sagebrush lizard habitat. Prior to construction, the Center of Excellence attends site visits to ensure Participants avoid suitable habitat. Since inception, 503 federal wells, 84 state wells, and 92 rights-of-way, have been moved outside of sagebrush lizard habitat during the planning stage. Additionally, 4,354 acres of seismic data acquisition has been relocated out of sagebrush lizard habitat. The sagebrush lizard has also directly benefitted by restoration of habitat through the removal of 159.2 acres of roads, pads, and caliche to date.

3. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of the survival and recovery in the wild of any species (50 CFR 17.22(d)(2)(iii) and 17.32(d)(2)(iii)).

The Act's legislative history establishes the intent of Congress that this issuance criteria be identical to a regulatory finding of no "jeopardy" under section 7 (a)(2) of the Act. As a result, issuance of this section 10(a)(1)(A) Permit was reviewed by the Service according to provisions of section 7 of the Act. In the Intra-Service Section 7 Conference Opinion, which is attached hereto, and incorporated herein by reference, the Service concludes that issuance of a Permit will not jeopardize the continued existence of the lesser prairie-chicken or dunes

sagebrush lizard or any other federally-listed species within the area covered by the Conservation Agreements. The taking associated with the implementation of the Candidate Conservation Agreement with Assurances will be incidental to efforts associated with changes in land use practices and conservation actions for lesser prairie-chicken and dunes sagebrush lizard in their historic range, and gathering important biological information necessary to continue conservation efforts for the species.

4. Implementing the Candidate Conservation Agreement with Assurances is consistent with applicable Federal, State, and Tribal laws and regulations (50 CFR 17.22(d)(2)(iv) and 17.32(d)(2)(iv)).

The Service is unaware of any law or regulation that would prevent the implementation of the amended Candidate Conservation Agreement with Assurances, and the accompanying amended Permit. The Permit will include conditions that revoke the take provisions of the Permit if any applicable State, Federal or tribal law or regulation is broken.

5. Implementing the terms of the Candidate Conservation Agreement with Assurances will not be in conflict with any ongoing conservation programs for species covered by the permit (50 CFR 17.22(d)(2)(v)).

The Candidate Conservation Agreement with Assurances for the lesser prairie-chicken and dunes sagebrush lizard furthers ongoing conservation activities for the species' conservation and is essential in developing a model agreement that can be used to facilitate additional conservation agreements within the historic range of the lesser prairie-chicken and sagebrush lizard. In 2008, the Service and the Bureau of Land Management developed a Candidate Conservation Agreement to implement similar conservation measures on Federal lands, within the seven counties in New Mexico covered by the Conservation Agreements.

6. The Applicant has shown capability for and commitment to implementing all of the terms of the Candidate Conservation Agreement with Assurances (50 CFR 17.22(d)(2)(vi) and 17.32(d)(2)(vi)).

The Center of Excellence has been the administrator of the Conservation Agreements since inception of the Conservation Agreements in 2008. Since then, the Center of Excellence has successfully administered the Conservation Agreements and has demonstrated their ability to work effectively with landowners and the industry to implement conservation commitments through the Conservation Agreements. Part of the offset of impacts on Federal lands is compensation through funds, in-kind services, or conservation lands. The funds and in-kind services may be used to implement conservation actions on non-Federal lands. The Center of Excellence also receives assistance from the Bureau of Land Management, the Service, and New Mexico Department of Game and Fish in determining conservation priorities. Based on conservation measures described in the Candidate Conservation Agreement with Assurances and provisions of the Permit, the Service does not expect any unforeseen circumstances to occur that would preclude the Applicant's funding and implementation of the amended Conservation Agreements.

#### **IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS-ANALYSIS AND FINDINGS**

The Service has no evidence that the permit application should be denied on the basis of criteria and conditions set forth in 50 CFR, 13.21 (b-c). The Center of Excellence has met the criteria for the issuance of the Permit and does not have any disqualifying factors that would prevent the Permit from being issued under current regulations.

#### **V. RECOMMENDATIONS ON ISSUANCE OF PERMIT**

Based on our findings with respect to the Enhancement of Survival Permit Application, the amended Candidate Conservation Agreement with Assurances, and the associated Conference Opinion, the issuance of a section 10(a)(1)(A) Enhancement of Survival Permit to the Center of Excellence is recommended.

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Deputy Regional Director,  
Southwest Region

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Date