



United States Department of the Interior FISH AND WILDLIFE SERVICE



In Reply Refer To:
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May 3, 2022

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, Oklahoma Ecological Services Field Office, Tulsa, Oklahoma

Subject: Findings and Recommendations on Issuance of an Amended Enhancement of Survival Permit Associated with the Amended Oklahoma Agricultural Candidate Conservation Agreement with Assurances for Lesser Prairie-Chickens

I. DESCRIPTION OF PROPOSAL

The Oklahoma Department of Wildlife Conservation (Department) has applied to the U.S. Fish and Wildlife Service (Service) for an amendment to their existing Enhancement of Survival Permit (Permit) under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 USC 1531 *et seq*; Act). An enhancement of survival permit authorizes take that is incidental to otherwise lawful activities (50 CFR 17.3). The Department currently holds a Permit (TE72923A-1) that authorizes incidental take of the lesser-prairie chicken (*Tympanuchus pallidicinctus*) for agricultural activities across 14 counties in Oklahoma on up to 400,000 acres. The requested amended Permit, which retains the original of 25 year period, would authorize incidental take of the LEPC on up to 1,000,000 acres and require appropriate conservation measures to ensure a net conservation benefit. The Permit, if issued, would not become effective until such time as the LEPC may become listed, in accordance with section 10(a)(1)(A) of the Act and the Service's Candidate Conservation Agreement with Assurances final rule (81 FR 95164). An intra-Service section 7 consultation (*i.e.*, conference opinion) has been completed on the issuance of the amended Permit.

The original Oklahoma Agricultural Candidate Conservation Agreement with Assurances (CCAA) was analyzed under the National Environmental Policy Act of 1969 (NEPA), with an Environmental Assessment and Findings of No Significant Impact issued on January 25, 2013 (Service 2013a, 2013b). The CCAA amendment qualifies as low-effect and therefore NEPA alternatives need not be considered. Therefore, the CCAA and Permit amendments have been categorically excluded from analysis under NEPA.



The issuance of an amended Permit under section 10(a)(1)(A) of the Act would authorize incidental take of LEPC during the implementation of Covered Activities (see below). The Planning Area of the CCAA includes all portions of Alfalfa, Beaver, Beckham, Cimarron, Custer, Dewey, Ellis, Harper, Major, Roger Mills, Texas, Washita, Woods and Woodward counties in Oklahoma. Covered Activities include the following conservation measures to facilitate LEPC habitat conservation, restoration, and/or enhancement within the Planning Area: Prescribed fire, grazing activities, herbicide use, haying, brush management, fencing, range planting, cultivation and tillage practices, establishment of food plots, and other soil disturbance activities.

The Service anticipates incidental take of the LEPC will result from implementation of the CCAA on all enrolled lands. Incidental take is expected to result from habitat enhancement, restoration, and monitoring activities necessary to implement the CCAA, as well as ongoing otherwise lawful agricultural operations and limited construction. The estimated anticipated level of incidental take associated with the CCAA is directly related to the number of landowners and amount and habitat quality of acreages covered under the management plans linked to the CCAA. Accurately estimating the total number of participants is impossible at this time. However, the maximum amount of incidental take anticipated to occur with the amendment of this CCAA can be roughly estimated using the full extent of the Estimated Occupied Range (EOR) of the LEPC in the Planning Area, which is 1 million acres. If, on average, LEPC densities are about 2 birds per square mile in good quality habitat, there could be as many as 3,125 birds within the entire Planning Area. Because only a portion (25 percent) of the Planning Area is occupied and habitat quality for the LEPC varies considerably throughout the Planning Area, the actual number of LEPCs within the Planning Area is expected to be much less than 3,125 birds.

Under a worst case scenario, all 3,125 birds might be taken in the form of harm and direct mortality. However, because the CCAA is a conservation program developed for the benefit of the LEPC, the worst case scenario is not anticipated to occur. Lacking a more precise estimate of incidental take, we anticipate that no more than 5 percent of nests with eggs or broods/year and no more than 5 percent of LEPCs/year would be taken on enrolled lands due to the implementation of conservation measures and from ongoing otherwise lawful agricultural, recreational, and limited-development activities. Based on current conditions, we assume that 3,125 LEPCs might occur on the acres expected to be enrolled over the life of the program and that these 3,125 birds, under optimum conditions, would construct about 1,562 nests/year. Therefore, we anticipate that, on average, no more than 78 nests with eggs or broods/year would be taken in the form of mortality. We also anticipate that no more than an average of 156 LEPCs/year would be taken in the form of mortality.

Minimization Practices

Where a conservation measure is anticipated to result in adverse effects to the LEPC, minimization practices have been identified and made a part of that measure to eliminate or minimize the potential adverse effects of the identified measure. Minimization practices associated with specific conservation measures are provided in the original CCAA and would carry forward unchanged in the amended CCAA.

Other species listed as candidates, threatened, or endangered under the Act that may occur in the planning area are: whooping crane (*Grus americana*; endangered), Arkansas River shiner (*Notropis girardi*; threatened) with designated critical habitat, piping plover (*Charadrius melodus*; threatened) and the monarch butterfly (*Danaus plexippus*; candidate). We do not expect any incidental take of these species from implementation of the CCAA or destruction or adverse modification of Arkansas River shiner critical habitat. However, considering these species are not covered in the original CCAA or Permit, the “No Surprises Rule,” (codified at 50 CFR 17.22(d)) are not applicable for these species.

Analysis of Effects

The Service fully analyzed the effects of the proposed action on the LEPC in our low-effect screening form (Service 2022a) and intra-Service conference opinion for the proposed action (Service 2022b). We incorporate both documents herein by reference. We evaluated the proposed plan area for federally-listed threatened or endangered species and designated critical habitat and we do not expect adverse effects to any other species or critical habitat except to the LEPC.

After reviewing the current status of the LEPC, the environmental baseline for the action area, the effects of the proposed action, and the cumulative effects, the Service’s conference opinion concluded that the action, as proposed, is not likely to jeopardize the continued existence of the LEPC within the Northern Distinct Population Segment. No critical habitat has been designated for the species; therefore, none will be affected. The conservation measures associated with implementation of the CCAA will reduce the direct and indirect effects to the LEPC. Through these conservation measures, the CCAA will result in a net conservation benefit.

II. PUBLIC COMMENT

A Notice of Availability of the application to amend the Permit and associated CCAA, and the accompanying low-effect screening form was published in the Federal Register on January 18, 2022 (87 FR 2635). The public comment period closed on February 17, 2022.

We received two comments from the public during the public comment period. One comment was non-substantive and the second comment was in support of the amendment to the CCAA. These comments did not warrant an explicit response, and as such, are not addressed in this document.

III. ENHANCEMENT OF SURVIVAL PERMIT CRITERIA – ANALYSIS AND FINDINGS

Section 10(a)(1)(A) of the Act requires that the Service determine, after public comment, that issuance criteria (50 CFR 17.22(c)) are satisfied before a permit can be issued. The issuance criteria and our analysis and findings follow.

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)).

We find that the potential take of LEPC would be incidental to otherwise lawful activities. These activities would result from an Applicant's operations and maintenance activities, as described in the CCAA. The amended Permit would include incidental take associated with implementation of conservation measures described in the CCAA, as well as existing land uses, on the enrolled properties. Incidental take authorized under the Permit would be in the form of harm (i.e., injury and mortality) associated with the conservation activities and documented operations and maintenance land use activities.

2. The CCAA complies with the requirements of the Candidate Conservation Agreement with Assurances policy (50 CFR 17.22(d)(2)(ii)).

The Department has developed the CCAA according to the requirements in the implementing regulations and the issuance criteria for an amended Permit. We expect a net conservation benefit for the LEPC from implementing the CCAA in the form of avoiding negative impacts, minimizing habitat degradation, conserving viable LEPC populations, and providing data to inform additional conservation needs of the species.

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)).

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, the Service evaluated the proposed action according to provisions of section 7 of the Act. In the associated intra-Service section 7 conference opinion, which is incorporated herein by reference, the Service concluded that issuance of the amended Permit will not jeopardize the continued existence of the LEPC. The taking associated with implementation of the CCAA will be incidental to efforts associated with changes in operations and maintenance practices for the LEPC, and will provide important distributional information necessary to inform other 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)).

We are unaware of any law or regulation that would prevent implementation of the CCAA and the accompanying amended Permit. The Permit includes conditions that revoke the take provisions of the Permit if any applicable State, Federal, or Tribal law or law is broken.

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

The CCAA for the LEPC does not conflict with any other conservation programs within the species' range. Implementing the proposed CCAA will contribute to LEPC conservation

within Oklahoma, and also contribute to the larger conservation effort for the species across the rest of its range within Colorado, Kansas, New Mexico, and Texas.

6. The Applicant has shown capability for and commitment to implementing all of the terms of the Candidate Conservation Agreement with Assurances.

The Department is committed to the CCAA, and funds to accomplish the agreement and implementation of the conservation measures, including minimal materials expenses, will be accomplished by internal Applicant's staff, and will not require expenditure of funds associated with outside services or third party consultants. Annually, the Department will budget for activities associated with implementation of the conservation measures and use funding from their established operations and maintenance budget that is in place. Based on conservation measures described in the CCAA and provisions of the Permit, we do not expect any unforeseen circumstances to occur that would preclude the Department's funding and implementation of the CCAA. All assurances and the Permit coverage are based on proper implementation of the CCAA.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

We have no evidence that the amended Permit should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21(b)-(c). The Department has met the criteria for the issuance of the amended Permit and does not have any disqualifying factors that would prevent the amended Permit 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 amended Permit to authorize incidental taking of the LEPC by the Department, in accordance with the amended CCAA and conference opinion.

Ken Collins, Field Supervisor,
Oklahoma Ecological Services Field Office

Date

Literature Cited

- U.S. Fish and Wildlife Service (Service). 2013a. Final Environmental Assessment for Issuance of an Endangered Species Act Section 10(a)(1)(A) Enhancement of Survival Permit Associated with a Candidate Conservation Agreement with Assurances for the Oklahoma Department of Wildlife conservation to Conserve the Lesser Prairie-Chicken in the State of Oklahoma.
- U.S. Fish and Wildlife Service (Service). 2013b. Finding of no Significant Impact for Issuance of an Endangered Species Act Section 10(a)(1)(A) Enhancement of Survival Permit and Implementation of a Candidate Conservation Agreement with Assurances (CCAA) for the Conservation of the Lesser Prairie-Chicken in Oklahoma.
- U.S. Fish and Wildlife Service (Service). 2022a. Low-Effect Incidental Take Permit Determination and National Environmental Policy Act (NEPA) Environmental Action Statement Screening Form for the Amendment to the Agricultural Candidate Conservation Agreement with Assurances (CCAA) for Lesser Prairie Chickens.
- U.S. Fish and Wildlife Service (Service). 2022b. Intra-Service Section 7 Conference Opinion on Issuance of an Amended Enhancement of Survival Permit Associated with the Amended Oklahoma Agricultural Candidate Conservation Agreement with Assurances for Lesser Prairie-Chickens.