



# Court Vacates Final Rule Listing Lesser Prairie Chicken

09.03.2015 | By **Brooke M. Marcus**

On September 1, the U.S. District Court for the Western District of Texas, Midland Division vacated the U.S. Fish and Wildlife Service's ("Service") Final Rule listing the Lesser Prairie Chicken ("LPC") as threatened. The Service had published its final rule listing the LPC as threatened on April 10, 2014 amidst significant controversy as to whether the listing was needed. In conjunction with the decision to list the LPC as a threatened species, the Service issued a "special take rule" under section 4(d) of the Endangered Species Act. The 4(d) Rule allowed those who participate in the Western Association of Wildlife Agencies ("WAFWA") Range-wide Plan ("Plan") to be exempt from the ESA Section 9 prohibition.

WAFWA's initial intent for developing the Plan was to prevent a LPC listing through voluntary conservation efforts. As we've seen similar efforts have been made for the dunes sagebrush lizard and the greater sage grouse with success in the former instance and yet to be seen in the latter. After the April 2014 listing, several lawsuits were filed challenging the Service's decision from all angles. This week's ruling is the result of a challenge from the Permian Basin Petroleum Association and several New Mexico counties. Plaintiffs challenged the Service's listing decision on three grounds: (1) whether the Service properly followed the Service's own regulations for evaluating conservation efforts; (2) whether the Service provided a rational decision to list the LPC as threatened based on the best available science; and (3) whether the Service properly responded to Plaintiffs' comments during the rulemaking process. The court denied Plaintiffs claims on the latter two grounds, but held in favor of Plaintiffs on the first ground and vacated the listing.

In 2003, the Service promulgated a "Policy for Evaluation of Conservation Efforts When Making Listing Decisions" known as the "PECE Policy." The PECE Policy sets forth a two part evaluation: (1) whether the conservation plan will be implemented; and (2) whether the conservation effort will be effective. The two-part evaluation includes consideration of fifteen criteria. The court found that the Service improperly conducted a PECE evaluation when considering the Plan, and that such failure invalidated the Service's listing decision.

The court pointed to a number of errors in the Service's PECE evaluation. The court questioned the Service's assumption that not listing the LPC would remove any incentive for industry to enroll in the Plan, and found that the assumption was unsupported and lacking analysis. This assumption, in turn, carried over to the first prong of the PECE analysis. The court also found the Service's assessment of the second PECE prong to be arbitrary and capricious. In particular, the court focused on the Service's failure to account for a main component of the Plan – how additional habitat and access to that habitat is created to ameliorate the effects of drought and habitat fragmentation. The court also emphasized the Service's failure to analyze the projected effects of the Plan beyond the present and short term. Finding that the Service's errors in its PECE analysis of the Plan "tainted critical findings and determinations, resulting in an unwarranted final rule listing the LPC as a threatened species," the court vacated the listing decision.

The implications of this decision are significant. The LPC listing significantly affected several industries across the species' five-state range (Texas, Oklahoma, Colorado, Kansas, New Mexico). In the Plan's 2014 annual progress report, WAFWA reported receiving over \$45 million in enrollment and impact fees from over 174 different companies participating in the Plan. It is possible the Service may move to stay vacatur of the listing rule while it appeals the district court's decision. The Service could also invoke its emergency listing provisions and emergency list the LPC for 270 days. However, it is also possible the Service could undertake a new PECE evaluation of the Plan, take into consideration the \$45 million in enrollment and increased LPC population over this past year, and issue a rule declining to list the LPC. For the moment, however, the LPC is not protected under the ESA.