



Designation and Regulation: An Alternate Endangered Species Act Strategy

By: [Theresa Sauer](#)

The U.S. Fish and Wildlife Service (Service) is responsible for providing federal protection to species under the Endangered Species Act (ESA), and can either list an imperiled species as “threatened” or “endangered” under the terms of the Act. However, where at risk species have sufficient conservation measures in place, such as was recently determined for the greater sage-grouse, the Service has the option to not list a species and instead review a “not warranted” listing decision again in five years. Yet the Service commonly lists an at risk species as threatened, allowing for a certain measure of protection for the species, and follows the threatened listing with a corresponding rule allowing for continued development in the species habitat pursuant to an existing conservation strategy. This trend gives the Service regulatory control over the species through the listing and through certain oversight of conservation measures approved through the special rulemaking.

Most recently, the Service on January 14, 2016 announced a final rule allowing development activities within northern long-eared bat habitat pursuant to certain restrictions, including not removing trees within habitat within a designated white-noise syndrome zone.¹ This designation falls on the heels of the Service listing the northern long-eared bat as threatened on April 2, 2015, which impacts multiple industries including oil and gas, mining, and logging.

Another recent example is the Service’s listing of the lesser prairie-chicken as threatened, and a concurrent special rule allowing continued oil and gas development within lesser prairie-chicken habitat upon enrollment in a specified conservation plan.²

The special rulemaking that the Service uses to allow continued development within a threatened species’ habitat is often called a 4(d) Rule, which refers to Section 4(d) of the ESA.³ Section 4(d) allows the Secretary of the Interior, through delegation to the Service to “issue such regulations as [the Secretary] deems necessary and advisable to provide for the conservation of” threatened species.⁴

¹ 81 Fed. Reg. 1900 (Jan. 14, 2016).

² See 79 Fed. Reg. 19974 (Apr. 10, 2014) (threatened listing); 79 Fed. Reg. 20074 (Apr. 10, 2014) (special rule). Currently, the lesser prairie-chicken is not listed based on a federal court order from the Western District of Texas. The Service is contesting this order.

³ 16 U.S.C. § 1533(d).

⁴ *Id.*

A 4(d) Rule allows for take⁵ of *threatened* species incidental to certain specified activities.⁶ For example, 4(d) rules may allow for incidental take resulting from routine oil and gas activities,⁷ ranching activities,⁸ agricultural activities,⁹ airport operations,¹⁰ rodent and noxious weed control,¹¹ and from activities pursuant to specific conservation plans.¹²

A 4(d) Rule for a particular species may provide for take incidental to specific routine activities, pursuant to designated conservation plans, or pursuant to a conservation plan under development at the time the rule is promulgated that will meet certain defined criteria (e.g. support or participation by applicable state agencies) upon finalization.

For some, the 4(d) Rule appears to offer regulatory flexibility and allows individuals to continue to operate on lands within a listed species' habitat. Others, however, view a 4(d) Rule as effectively a "Trojan horse" offering only hollow protections while allowing substantial development activity to the detriment of the species. Advocates for listing a species argue that the threatened listing is not providing enough protection.¹³ Conversely, those opposing a listing argue that a threatened listing is not warranted, and any 4(d) Rule codifying existing conservation efforts creates unnecessary federal oversight and wastes federal resources.¹⁴

There are a few rare species, such as the greater sage-grouse, mentioned above, and the dunes sagebrush lizard, that have escaped the threatened designation with corresponding 4(d) Rule. However, these instances are rare. Industry should be aware of candidate species under review by the Service for ESA designation, and be active in developing conservation plans that can either prevent a listing, such as was the case with the dunes sagebrush lizard, or that can become part of a 4(d) Rule allowing continued development within a threatened species' habitat.

For more information on ESA listings and the Service's corresponding use of 4(d) rules, please contact [Theresa Sauer](#).

⁵ Take is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

⁶ See 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.40 - 17.48. This provision does not apply to *endangered* species.

⁷ See 50 C.F.R. § 17.41(d) (providing for routine oil and gas operations pursuant to certain restrictions for participants in the Lesser Prairie-Chicken Interstate Working Group's Lesser Prairie-Chicken Range-Wide Conservation Plan) (lesser prairie-chicken).

⁸ See 50 C.F.R. § 17.43(d) (California red-legged frog).

⁹ See 50 C.F.R. § 17.41(a) (streaked horned lark); § 17.40(l) (Preble's meadow jumping mouse).

¹⁰ See 50 C.F.R. § 17.41(a) (streaked horned lark).

¹¹ See 50 C.F.R. § 17.40(l) (Preble's meadow jumping mouse)

¹² See 50 C.F.R. § 17.40(q) (polar bear).

¹³ See Bruce Finley, *Gunnison Sage Grouse Battle Heats up with Two Lawsuits Filed Tuesday*, DENVER POST, Jan. 21, 2015, DENVERPOST.COM, www.denverpost.com/environment/ci_27360104/gunnison-sage-grouse-battle-heats-up-two-lawsuits.

¹⁴ *Id.*