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Fish and Wildlife Service Issues Policy Regarding Voluntary Prelisting Conservation Actions

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On January 18, 2017, the U.S. Fish and Wildlife Service ("FWS") published Director's Order No. 218, issuing its final Policy Regarding Voluntary Prelisting Conservation Actions (the "Order"). The Order finalizes the 2014 draft policy allowing states to develop conservation programs for species that have not yet been listed as threatened or endangered under the Endangered Species Act ("ESA"). The policy allows landowners to receive conservation credits for voluntary conservation actions, if those actions are performed in conjunction with the state-administered program. Theoretically, the earned credits can later be traded or redeemed to offset or mitigate actions considered detrimental to a species should that species eventually be listed under the ESA.

While the Order is not confined to any particular unlisted species, FWS developed the original draft policy at the time it was working with BLM on federal land use plan amendments and negotiating with the states on the adequacy of their state conservation programs for greater sage-grouse and other species. The Order is best understood within this broader context, particularly given prior efforts by FWS to dictate the parameters of conservation programs and habitat exchange mechanisms for unlisted species where the state, and not the federal government, has primary jurisdiction.

The Order does not lay out a clear path to obtaining, redeeming, or trading credits, leaving most of the logistics regarding implementation to the states, but it does impose a "net conservation benefit" standard for application of credits. Many, including those in the industry, have challenged implementation of a net conservation benefit standard as inconsistent with Sections 7 and 10 of the ESA. As defined by the Order, the benefits of the conservation action must be functionally greater than the perceived detriment for the action for which the credit is used. In contrast, Section 7 of the ESA only requires that an action not jeopardize the continued existence of the species or destroy or adversely modify critical habitat, and Section 10 only requires that incidental take be minimized and mitigated to the maximum extent practicable.

The Order prescribes other requirements for landowners to redeem credits, including that the action must be: (1) beneficial to an unlisted species that is or may become a candidate for listing under the ESA; (2) started prior to a final listing as threatened or endangered; (3) part of a qualifying, established state or multi-state species conservation strategy that meets FWS's

requirements; and (4) not already required by any federal, state or local law, regulation, permit, or other regulatory mechanism.

In addition, the Order will deny credits to any voluntary conservation actions taken before January 18, 2017, arbitrarily denying the benefit of voluntary conservation actions undertaken by the industry prior to the effective date of the Order.

For more information regarding Order 218, available here, please contact Bret Sumner and Theresa Sauer.