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Energy in the Law

Chicken Little and the Falling Sky: One Settlement Equals Four New Lawsuits

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A preview of the long-term future of Endangered Species Act (ESA) litigation is being played out in the recent and numerous legal challenges filed against the U.S. Fish and Wildlife Service (FWS) regarding its recent decision to list the lesser prairie-chicken (LEPC) as a threatened species.

This LEPC litigation is a harbinger of a deluge of ESA lawsuits that will inundate FWS over the course of the next several years for a variety of other plant and wildlife species. This barrage of ESA litigation will further undermine regulatory certainty and slow FWS decision-making, to the detriment of oil and gas, and other development in the United States.

By way of background, in 2011, FWS and the U.S. Department of the Interior (DOI) entered into settlements with WildEarth Guardians (WEG) and the Center for Biological Diversity (CBD) regarding 290 candidate species under review for ESA listing. The LEPC was one of these 290 species. FWS settled these cases under the guise of reducing future ESA-related litigation. Yet, no good intentions go unpunished. In the case of the LEPC alone, one settlement has resulted in at least four additional lawsuits.

Under the settlements, FWS agreed to render decisions on whether listing was "warranted" or "not warranted" for 290 candidate species. This settlement detailed a specific chronological schedule of deadlines for these listing decisions for each species.

Additionally, the settlements require that candidate species subject to the settlements (Settlement Species) cannot remain "candidate species" beyond the date set for each Settlement Species' listing deadline, contrary to the

provisions of the ESA.

In the case of the LEPC, in the settlements, FWS agreed to propose a listing decision on the species in 2012, with a final determination in 2013. FWS announced its final decision to list the LEPC as threatened on March 27, 2014, and issued a final rule on April 10, 2014.¹ The listing decision for the LEPC went into effect on May 12, 2014.²

FWS's final listing decision has raised the ire of the affected states, agriculture and industry, as well as WEG, CBD and the Defenders of Wildlife – the very same environmental organizations who sued to require FWS to make a listing decision. A series of legal challenges ensued.

First, on March 17, 2014, the State of Oklahoma and Domestic Energy Producers Alliance filed suit against the DOI and FWS challenging FWS's ESA settlements and its requirement to make listing decisions on 290 species without utilizing the option of maintaining the species as a candidate species under the ESA. The LEPC, a candidate species at the time the suit was initiated, is one of the species at the heart of this lawsuit. The States of Kansas and North Dakota and the Oklahoma Farm Bureau joined the suit as plaintiffs in an amended complaint on April 1, 2014. The State of Nebraska is also acting as an intervenor plaintiff in the matter.

In this lawsuit, plaintiffs are asking the court to declare that FWS violated the ESA, the Administrative Procedure Act (APA), and the U.S. Constitution by agreeing to the WEG and CBD settlements and amending ESA timelines and procedures for listing decisions. Plaintiffs are additionally asking the court to vacate and remand any FWS listing decision on a Settlement Species located within any plaintiff state boundaries, including the LEPC, and enjoin FWS from making further listing decisions on Settlement Species pursuant to the terms of the WEG and CBD settlements. This matter was filed in the U.S. District Court for the Northern District of Oklahoma. The court is currently considering a motion by FWS to change venue to the U.S. District Court for the District of Columbia.

Second, on June 6, 2014, the Oklahoma Independent Petroleum Association, Oklahoma Oil and Gas Association, International Association of Geophysical Contractors, Independent Petroleum Association of America, American Petroleum Institute, and Western Energy Alliance filed suit against the DOI

¹ 79 Fed. Reg. 19,973 (Apr. 10, 2014).

² 79 Fed. Reg. 19,974.

and FWS, challenging the LEPC listing decision. These organizations are requesting the court find that FWS's LEPC listing decision violates the APA and ESA, and seek to have the court vacate FWS's LEPC final listing decision. This matter was filed in the U.S. District Court for the Northern District of Oklahoma.

Third, on June 9, 2014, the Permian Basin Petroleum Association and four New Mexico counties (Chaves, Roosevelt, Eddy, and Lea) filed suit against DOI and FWS, similarly challenging the LEPC listing decision and asking the court to vacate the LEPC listing decision based on violations of the ESA and APA. This matter was filed in the U.S. District Court for the Western District of Texas.

Fourth, and most recently, despite obtaining a listing decision within the time frame specified in their settlement with FWS, on June 17, 2014 Defenders of Wildlife, CBD and WEG filed suit against DOI and FWS, also challenging the LEPC listing decision. This lawsuit alleges, however, that FWS did not go far enough. Plaintiffs are asking the court to find that FWS's decision to list the LEPC as threatened instead of endangered violates the ESA and APA, and therefore plaintiffs seek to have the court order FWS to reconsider the listing decision and issue a new final determination within six months.

Additionally, plaintiffs are challenging the promulgation of the rulemaking under section 4(d) of the ESA that is related to the LEPC threatened listing, arguing that the amount of take authorized in the rulemaking has not been properly analyzed and will result in an unwarranted population decline.³ Plaintiffs are asking the court to vacate the 4(d) rule and eliminate this option for authorized take of the LEPC. Plaintiffs allege that FWS violated the National Environmental Policy Act (NEPA), the ESA and the APA in promulgating an ESA section 4(d) special rule, 16 U.S.C. § 1533(d), for the LEPC that allows for incidental take of the species by the oil and gas industry through enrollment in the LEPC Interstate Working Group's LEPC Range-Wide Conservation Plan, better known as the Western Association of Fish and Wildlife Agencies Range-Wide Plan. This matter was filed in the U.S. District Court for the District of Columbia.

The Federal Register notice listing the final rule for the threatened

³ Plaintiffs intend that FWS will declare the LEPC endangered. If that happens, a 4(d) rule would not be available as the statute and its implementing regulations only allow FWS to authorize take pursuant to an approved conservation plan for a *threatened* species and not an *endangered* species.

determination is available [here](#); the notice listing the final rule for the 4(d) special rule is available [here](#).

The LEPC legal challenges underscore that ESA litigation will continue to increase over the next several years, as FWS issues new listing decisions for a variety of Settlement Species. This will result in further burdens on FWS staff, and result in even more delays for FWS decision-making, such as project-level section 7 consultation. These delays will result in further regulatory uncertainty, and may even impede business planning in certain instances. Companies should monitor the FWS listing decisions and resulting litigation for species located within or near their areas of operations.

For further information on the LEPC listing decision, related ESA lawsuits, or other ESA issues, please contact [Bret Sumner](#) or [Theresa Sauer](#).

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