



Comment on Proposed 4(d) Rule for the Lesser Prairie-Chicken

Property and Environment Research Center (PERC)

Bozeman, Montana

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Main Points:

- Making species a liability for states and landowners discourages conservation
- The Endangered Species Act requires the Service to consider how 4(d) rules affect private landowners' incentives to conserve and recover species
- Section 4(d) is also a federalism provision intended to encourage state-led recovery
- Therefore, any 4(d) rule for the lesser prairie-chicken should seek to reward and encourage state and voluntary conservation efforts

The Property and Environment Research Center (PERC) respectfully submits this comment to the Fish and Wildlife Service regarding the proposed 4(d) rule for the northern distinct population segment of the lesser prairie-chicken.¹

When Endangered Species Act regulations make listed species a liability for states and private landowners, these regulations can discourage conservation. 4(d) rules offer a potential opportunity to mitigate this problem by better aligning the incentives of states and private landowners with the interests of rare species. However, this goal can only be achieved if the Service thinks carefully and creatively about when to issue 4(d) rules and how to craft them. To comply with the statute's text and purpose, any 4(d) rule for the lesser prairie-chicken should be focused on encouraging and rewarding voluntary conservation efforts by states and private landowners.

¹ Docket No. FWS-R2-ES-2021-0015, 86 Fed. Reg. 29,432 (June 1, 2021).

The Property and Environment Research Center

PERC is a nonprofit research institute located in Bozeman, Montana, that develops market-based solutions to environmental problems. Founded in 1980, PERC's mission is to improve environmental quality through markets, entrepreneurship, and property rights. PERC and its affiliated scholars have produced extensive research on the Endangered Species Act, including research showing how Section 4(d) rules could better incentivize states and private landowners to recover endangered and threatened species.² PERC scholars have given congressional testimony on the importance of state and private conservation and how federal regulation can disincentivize this work.³ And PERC has regularly participated in the rulemaking process and litigation to emphasize the importance of property rights and incentives to effective conservation.

Making species a liability discourages conservation

As the proposed listing rule observes, “the vast majority of lesser prairie-chicken and their habitat occurs on private lands.”⁴ Therefore, the species' conservation and

² See, e.g., Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC POLICY REPORT (April 2018), available at <https://www.perc.org/2018/04/24/the-road-to-recovery>; Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Threatened Species Under the Endangered Species Act*, 33 PACE ENVTL. L. REV. 23 (2015). See also, e.g., Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons From the Dusky Gopher Frog*, 51 ENVTL. L. REP. 10,565 (2021); Hannah Downey, *Easements for Endangered Species: A Collaborative Approach to Saving the Lesser Prairie Chicken*, PERC CASE STUDY (2017), available at <https://www.perc.org/2017/12/06/easements-for-endangered-species/>; Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (2011); Terry Anderson & Reed Watson, *An Economic Perspective on Environmental Federalism: The Optimal Locus of Endangered Species Authority*, in THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT (2011); Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC POLICY SERIES (1995), <https://www.perc.org/sites/default/files/Endangered%20Species%20Act.pdf>.

³ See, e.g., Brian Yablonski, Testimony before the U.S. House Comm. on Natural Res. Forum on the 30 by 30 Initiative (May 6, 2021), available at <https://perc.org/2021/05/06/private-land-stewardship-is-the-next-frontier-of-conservation-and-a-critical-component-to-achieving-30-by-30/>; Catherine E. Semcer, Testimony before the U.S. House Comm. on Natural Res. Hearing on Wildlife Trafficking (Apr. 28, 2021), available at <https://perc.org/2021/04/28/increase-economic-opportunity-to-curtail-poaching-and-reduce-illegal-wildlife-trade/>; Jonathan Wood, Testimony before the U.S. House Comm. on Natural Res. Hearing on the "Tribal Heritage and Grizzly Bear Protection Act" (May 15, 2019), available at <https://perc.org/2019/05/15/grizzly-bear-recovery-and-management/>.

⁴ 86 Fed. Reg. at 29,454.

recovery depend on the incentives for private landowners to protect and restore habitat rather than to destroy it.

Endangered Species Act regulations can significantly affect these incentives. Punitive regulations that restrict land use where a species is present make the species a liability for landowners rather than an asset. For that reason, such regulations may encourage preemptive habitat destruction and discourage habitat restoration.⁵ They can also breed distrust and ill will between the Service, states, and private landowners.⁶

4(d) rules could, if properly implemented, overcome these challenges and better align the incentives of landowners with the interests of rare species.⁷ Such rules should reward landowners for their role in recovering species by providing meaningful regulatory relief as the species' status improves. Likewise, they should encourage landowners to prevent a threatened species' further slide by reserving the Endangered Species Act's strictest regulations in case the species is later uplisted to endangered. 4(d) rules should also encourage development of state capacity to manage species, as well as trust in state leadership, by gradually ceding authority as populations meet recovery benchmarks.⁸

Unfortunately, the Service has not utilized Section 4(d) this way. Instead, it has historically applied a blanket rule under which endangered and threatened species were presumptively regulated the same. This approach blunted incentives for landowners to prevent a threatened species' slide or to recover endangered species.⁹

⁵ See *Road to Recovery*, *supra* n.2, at 14; Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. LAW & ECON. 27 (2003). See also *Critical Habitat's "Private Land Problem"*, *supra* n.2 at 10,569–73.

⁶ See Lauren K. Ward, et al., *Family Forest Landowners and the Endangered Species Act: Assessing Potential Incentive Programs*, 116 J. OF FORESTRY 529 (2018); Megan E. Hansen, et al., *Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species*, CGO POLICY PAPER (2018), <https://www.thecgo.org/wp-content/uploads/2020/10/Cooperative-Conservation.pdf>.

⁷ See *Road to Recovery*, *supra* n.2, at 14–15.

⁸ See, e.g., PERC Comment on 5-Year Status Review of Grizzly Bear, Dkt. No. FWS-R6-ES-2019-N144 (Mar. 16, 2020), available at <https://www.perc.org/wp-content/uploads/2020/03/public-comment-grizzly-bear-status-review.pdf>.

⁹ See generally *Road to Recovery*, *supra* n.2. See also Fish & Wildlife Serv., *Regulations for Prohibitions to Threatened Wildlife and Plants*, 84 Fed. Reg. 44,753 (Aug. 26, 2019) (repealing the blanket rule to “incentivize[]” landowners “to take actions that would improve the status of endangered species”

In 2019, the Service repealed this rule but it continues to generally regulate threatened species the same as endangered species with limited exemptions and after giving little or no consideration of states' and landowners' incentives.¹⁰

This indifference to incentives explains why only three percent of listed species have recovered over the last half-century. To achieve better results, the Service should ensure that 4(d) rules are crafted to best encourage states and private landowners to restore habitat and recover species.

Section 4(d) requires the Service to analyze how rules affect private landowners' incentives

Precursors to the Endangered Species Act of 1973 regulated only federal activities and federal land.¹¹ Congress did not lightly extend regulation to private land. Instead, it intentionally—and explicitly—limited the statute's "take" prohibition to endangered species.¹² As Senator Tunney, the ESA's floor manager in the Senate, explained, Congress distinguished endangered and threatened species in this way to "minimiz[e] use of the most stringent prohibitions. . . [P]rohibitions against taking must be absolutely enforced only for those species on the brink of extinction."¹³ In other words, the take prohibition is supposed to function as the last line of defense to prevent extinctions.

through "the possibility of downlisting the species to threatened and potentially receiving regulatory relief in the resulting 4(d) rule").

¹⁰ While acknowledging the importance of grazing and habitat restoration efforts to lesser prairie-chicken conservation, the proposed rule offers no explanation why these activities should be strictly regulated. Instead, the Service asked the wrong question: whether an exception from an otherwise broad take prohibition should be created for this activity. *See* 86 Fed. Reg. at 29,475–77. *Cf.* Comment from Turner Enterprises, Inc. and Turner Endangered Species Fund, Dkt. No. FWS-R2-ES-2021-0015 (Aug. 17, 2021), *available at* <https://www.regulations.gov/comment/FWS-R2-ES-2021-0015-0319> (criticizing the proposed regulation of beneficial grazing); Comment from the Nature Conservancy at 3, Dkt. No. FWS-R2-ES-2021-0015 (Aug. 2, 2021), *available at* <https://www.regulations.gov/comment/FWS-R2-ES-2021-0015-0290> (similarly criticizing the proposed regulation of beneficial grazing as likely to "result in a net conservation loss").

¹¹ *See Take It to the Limit*, *supra* n.2, at 25–28.

¹² 16 U.S.C. § 1538(a).

¹³ Congressional Research Service, A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 358 (statement of Sen. Tunney) (hereinafter "ESA LEGISLATIVE HISTORY").

Congress authorized the Service to prohibit take of threatened species by regulation but only if “necessary and advisable to provide for the conservation” of that species.¹⁴ While other Endangered Species Act provisions may foreclose cost considerations, this “necessary and advisable” standard unambiguously requires analysis of the costs 4(d) rules impose on landowners.¹⁵ Moreover, Section 4(d)’s reference to “conservation” requires consideration of how these costs affect the incentives for private landowners to restore habitat and recover species. Congress defined conservation as the steps “necessary to bring an endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”¹⁶ In other words, Section 4(d) rules should create the incentives necessary to recover species and delist them, not assert federal control over virtually every activity that incidentally affects a threatened species.

As explained above, species recovery depends on the incentives for landowners to engage in habitat restoration and other recovery efforts, especially species found principally on private land like the lesser prairie-chicken. If a 4(d) rule makes a species a liability for landowners rather than encouraging habitat restoration and other recovery efforts, it fails the Endangered Species Act’s text and purposes.

Section 4(d) rules should encourage state leadership on recovering threatened species

Congress has incorporated federalism principles into most federal environmental laws.¹⁷ The Endangered Species Act is no exception. The statute directs the Service to “cooperate” with states “to the maximum extent practicable[.]”¹⁸ And the statute

¹⁴ 16 U.S.C. § 1533(d). See S. Rep. No. 93-307, at 8 (1973), reprinted in ESA LEGISLATIVE HISTORY, *supra* n.13, at 307. See also *Take It to the Limit*, *supra* n.2, at 28–43.

¹⁵ See *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (“One would not say that it is even rational, never mind ‘appropriate,’” to ignore costs.). Compare 16 U.S.C. § 1533(d) (“necessary and advisable”) with 42 U.S.C. § 7412(n)(1)(A) (“appropriate and necessary”). See also *Take It to the Limit*, *supra* n.2, at 33–34. Additionally, other statutes require consideration of specific types of costs imposed by 4(d) rules. See Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (requiring analysis of costs imposed on a substantial number of small entities, such as family farms, ranches, and timber operations).

¹⁶ 16 U.S.C. § 1532(3).

¹⁷ See generally Robert C. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MARYLAND L. REV. 1141 (1995).

¹⁸ 16 U.S.C. § 1535(a).

explicitly requires the Service to enter “cooperative agreements” with states that develop programs to conserve resident endangered and threatened species.¹⁹

Section 4(d) was intended to play a critical role in this federalism framework. As Senator Tunney explained during the congressional debate over the Act, Congress distinguished regulation of endangered and threatened species to “encourage[]” states “to use their discretion to promote the recovery of threatened species[.]”²⁰ Section 4(d) pursues this goal by giving states a veto over federal take regulations for threatened species.²¹ In states that have a cooperative agreement, 4(d) rules regulating take “shall apply . . . only to the extent that such regulations have also been adopted by such state.”²²

“To date, however, the intent of Congress” as expressed in sections 4(d) and 6 “has not been fully realized[.]”²³ Instead of states deciding whether take of resident threatened species should be regulated, the Service’s implementation of Section 4(d) has discouraged state innovation by effectively preempting any approaches that do not mirror federal regulations.²⁴

While broader reforms to the Service’s approach to Section 4(d) and 6 are beyond the scope of the proposed rule, there are nonetheless opportunities for 4(d) rules to advance the provision’s federalism purpose. 4(d) rules can exempt activity covered by a state conservation program.²⁵ They could transition management authority to states as a species hits recovery benchmarks or take that authority away should a

¹⁹ *Id.* § 1535(c) (If a state conservation program meets five criteria, the Service “*shall* enter into a cooperative agreement” with the state. (emphasis added))

²⁰ ESA LEGISLATIVE HISTORY at 358.

²¹ *Id.* § 1533(d).

²² *Id.*

²³ See Temple Stoellinger, *Wildlife Issues are Local – So Why Isn’t ESA Implementation?*, 44 ECOLOGY LAW QUARTERLY 681, 723 (2017).

²⁴ See *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992) (adopting the Service’s argument that the Endangered Species Act’s preemption provision overrides the state’s power to veto 4(d) rules).

²⁵ See Temple Stoellinger, et al., *Improving Cooperative State and Federal Species Conservation Efforts*, 20 WYO. L. REV. 183, 203–04 (2020); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 NYU ENVTL. L.J. 179, 214–15 (2005).

species decline.²⁶ And the Service could also initially forgo regulating take to allow states to develop and implement their own innovative conservation strategies.²⁷ Each of these approaches creates an incentive for states to develop innovative and effective conservation programs. Given Section 4(d)'s clear purpose of promoting federalism in species conservation, a 4(d) rule adopted without considering these options is contrary to the Endangered Species Act's text and structure.

Any 4(d) rule for the lesser prairie-chicken should focus on encouraging state and voluntary conservation efforts

4(d) rules are most likely to further species recovery when, rather than making the species a liability, they create incentives for states and landowners to recover species and restore habitat. Unfortunately, the proposed lesser prairie-chicken rule appears not to have been crafted with these critical factors in mind.

Instead, the proffered justification for the proposed rule is largely boilerplate copied from prior proposals for dissimilar species,²⁸ save for a few vague statements that the Service believes “that this rule as a whole satisfies the requirement in section 4(d)” and that the rule “would promote conservation of the Northern DPS of the lesser prairie-chicken.”²⁹ Indeed, most of the analysis in the proposed rule is devoted to whether particular activities should be exempt from regulation, rather than justifying the rule the Service proposes to impose on states and landowners.³⁰ By failing to properly analyze the proposed rule's consistency with Section 4(d)'s text and

²⁶ See *Improving Cooperative State and Federal Species Conservation Efforts*, *supra* n.25, at 204.

²⁷ The Service takes a similar approach when it declines to list a species under the Policy for Evaluation of Conservation Efforts During Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2003). However, a threatened listing without a 4(d) rule may be more beneficial for a species than declining to list it under the PECE Rule because the listing would discourage backsliding and provide regular federal monitoring through status-reviews. See *Road to Recovery*, *supra* n.2, at 21.

²⁸ Compare 86 Fed. Reg. at 29,474–75 with Proposed Listing and 4(d) Rule for the Panama City Crayfish, 86 Fed. Reg. 19,838, 19,844 (2021).

²⁹ 86 Fed. Reg. at 29,475.

³⁰ *Id.* at 29,475–77.

its federalism and species-recovery purposes, the Service has overlooked at least four important factors, which would leave any final rule vulnerable to legal challenge.³¹

First, as the Service acknowledges in the listing analysis, states and private landowners have undertaken significant efforts to conserve the lesser prairie-chicken.³² And the best available scientific evidence suggests that the lesser prairie-chicken population has steadily increased since these conservation efforts began.³³ Yet the Service's discussion of the proposed 4(d) rule makes no mention of these efforts, their results, or how the 4(d) rule will affect them. Perhaps these efforts have been inadequate to avoid a listing, but that does not mean that the Service can ignore them when crafting a 4(d) rule. The rule that best promotes the lesser prairie-chicken's conservation may be one that limits federal regulation and cedes authority to states as populations achieve objective recovery benchmarks.³⁴

Second, the Service recognizes that the effects of grazing on lesser prairie-chicken varies "based on conditions at the local level" but gives no consideration to states' and local governments' ability to tailor solutions to these local conditions.³⁵ This is one of the principal benefits of federalism.³⁶ Indeed, despite concluding that "broad determinations" about grazing "would not be beneficial to the species[.]" the Service proposes precisely such a broad determination: that any incidental take related to grazing should be prohibited by the 4(d) rule.³⁷ Yet it offers no analysis to reconcile this apparent contradiction.

³¹ See *Michigan*, 576 U.S. at 750 (agency action "is lawful only if it rests 'on a consideration of the relevant factors'").

³² See 86 Fed. Reg. at 29,454–56.

³³ *Id.* at 29,436.

³⁴ For instance, the Service has for other species limited 4(d) rules to regulating intentional take, thereby ceding all regulation of incidental take to states. See, e.g., Reclassification of the American Burying Beetle from Endangered to Threatened With a Section 4(d) Rule, 85 Fed. Reg. 65,241 (Oct. 15, 2020) (declining to regulate incidental take in the Southern Plains area except on certain conservation lands). Cf. PERC Grizzly Comment, *supra* n.8 (urging the Service cede authority back to states as grizzly populations reach objective recovery benchmarks).

³⁵ *Id.* at 29,476.

³⁶ See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

³⁷ See 86 Fed. Reg. at 29,476.

Third, the Service proposes to make the species a liability for ranchers by exposing their operations to take liability, despite acknowledging the importance of maintaining ranching operations to preserve grassland habitat.³⁸ As Turner Enterprises, Inc. and Turner Endangered Species Fund explain in their comment, the proposed rule would “almost indefensibl[y]” penalize “one of the land management activities that has likely been responsible for maintaining the species to date.”³⁹ The Service should not lightly impose such burdens on landowners whose goodwill and cooperation may determine whether the species can recover. And it should certainly not—indeed, legally cannot—do so without first analyzing the likely effect of a rule on ranchers' incentives to restore habitat and recover the species.⁴⁰

Finally, the proposed 4(d) rule would restrict habitat restoration efforts without any clear benefit to the species. Converting croplands to grasslands is identified as a beneficial restoration action. But the proposed 4(d) rule would nonetheless prohibit such action if it results in any form of minor incidental take. The Service suggests that landowners engaged in these activities need not worry because lesser prairie-chickens are not present in areas requiring restoration, a prediction that could equally justify a decision not to regulate this activity.⁴¹ Moreover, the Service puts all the risk that its prediction may prove false on the landowner. And, elsewhere in the proposed rule, the Service contradicts the basis of this prediction, acknowledging that lesser prairie-chickens regularly occupy croplands for forage and to access leks.⁴²

Considering the concerns highlighted above, PERC urges the Service to reconsider the extent to which the proposed rule makes the lesser prairie-chicken a liability for the very landowners on whom its recovery depends. It also recommends greater consideration of the role that states are already playing in conserving the species and how a 4(d) rule may best help rather than hinder these state efforts, as well as voluntary private conservation efforts.

³⁸ *See id.* at 29,475.

³⁹ *See* Comment from Turner Enterprises, Inc. and Turner Endangered Species Fund, *supra* n.10.

⁴⁰ 16 U.S.C. § 1533(d). *See* 16 U.S.C. § 1532(3) (defining “conservation” as recovery-focused); *Road to Recovery*, *supra* n.2; *Take It to the Limit*, *supra* n.2.

⁴¹ *Id.* at 29,475.

⁴² *Id.* at 29,476.