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# Foulston Siefkin Issue Alert



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## Why did the Lesser Prairie-Chicken cross the road?

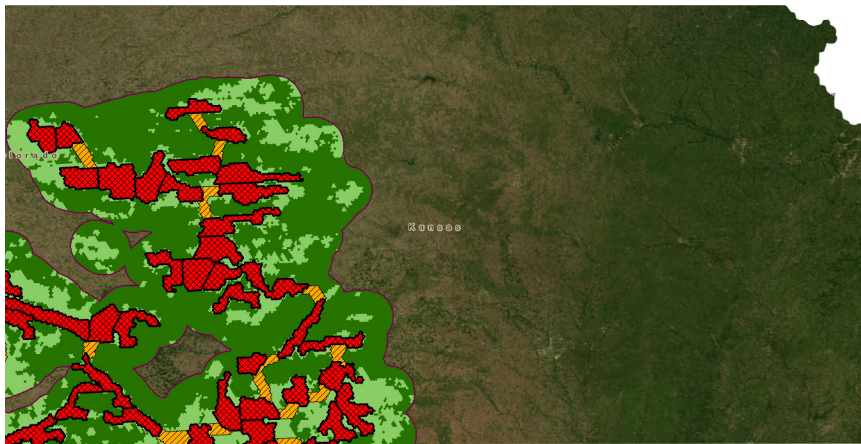
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by David M. Traster

**Answer:** Because a Lesser Prairie-Chicken, now an Endangered Species Act “threatened species,” can do whatever it wants . . . on your land, on land that you operate, even on land where you provide services. But this is no joke—harming this bird, or just harming its now-protected habitat, can result in substantial monetary penalties or even land you in prison.

So if you own, lease, provide service to or have any other interest

in western-Kansas land designated on this unofficial map or if you have existing operations, plans to expand, or to start new developments in any of these areas, proceed with caution because it is now illegal to “take” a Lesser Prairie-Chicken. This means that you cannot harm, harass, or kill a bird.



### Lesser Prairie-Chicken habitat is protected too

But “harming” or “harassing” includes more than direct harm. It includes disrupting or modifying the bird’s breeding, feeding, or sheltering habits, and even modifying its habitat, which includes sand/sagebrush prairie in southwest Kansas, mixed-grass prairie in south-central Kansas, and

Potential Lesser Prairie-Chicken range habitat land includes parts of 35 Kansas counties: Barber, Barton, Clark, Comanche, Edwards, Finney, Ford, Gove, Graham, Grant, Gray, Greeley, Hamilton, Haskell, Hodgeman, Kearny, Lane, Logan, Meade, Morton, Ness, Pawnee, Rooks, Rush, Scott, Seward, Sheridan, Sherman, Stafford, Stanton, Stevens, Thomas, Trego, Wallace, and Wichita. Click [HERE](#) to access the unofficial interactive map to zoom in on your property.

short-grass/CRP in northwest Kansas. So direct harm or merely disturbing range-land habitat violates the Endangered Species Act and can result in per “take” \$25,000 civil penalties, \$50,000 criminal penalties, and a one-year prison sentence.

### **Who’s affected?**

While the primary concern is about new activities that might affect Lesser Prairie-Chickens, the new prohibitions apply to new and some parts of existing activities such as:

- Oil and gas development and production including seismic testing, land surveying, construction, drilling, completion, workovers, operations and maintenance, plugging and remediation.
- Wind, cell, and radio towers, and power lines including construction, operation and maintenance, decommissioning and removal.
- Agricultural activities including brush management, building and maintaining fences and livestock enclosures, grazing, water supply and windmill operation, maintenance and repair.
- Road construction, operation and maintenance, and off-highway vehicle use.
- General construction and other land management including prescribed burns, game and predator management, and remediation of impacted habitat.
- Hunting Lesser Prairie-Chickens is prohibited. Because their ranges overlap, care must be taken to avoid inadvertent takes while hunting Greater Prairie-Chickens.

Because any activity near a Lesser Prairie-Chicken or any disturbance of its habitat, whether birds are present or not, could be a “take,” anyone operating any kind of existing facility, or who is in the process of planning a new or expanded operation, must proceed with caution. And because every situation is unique, acceptable practices will depend on the location and the type of activity.

### **Farming exemption**

Existing agricultural practices on cultivated land are exempt. Farmers cannot hunt or otherwise intentionally harm a Lesser Prairie-Chicken, and can only expand or change existing operations by following specific guidelines. But an “incidental take” during continued routine agricultural practices on cultivated lands in row crop, seed-drilled untilled crop, hay, or forage production where cultivation has taken place within the last 5 years, does not violate the Endangered Species Act. This includes plowing, drilling, disking, mowing, or other mechanical manipulation; management of lands in cultivation; routine activities in direct support of cultivated agriculture including replacement, upgrades, maintenance, and operation of existing infrastructure such as buildings, irrigation systems, fences, and roads; and use of chemicals in direct support of cultivated agriculture when done in accordance with label recommendations.

### **No Oil and Gas or Wind exemptions**

Unlike farming, the U.S. Fish and Wildlife Service declined to exempt the oil and gas and wind industries, stating that they are two of the primary threats to the species and are likely to result in additional population declines if left unchecked. Instead, the Service stated that these sectors are better addressed through the Lesser Prairie-Chicken Range-Wide Conservation Plan developed by a non-profit Wyoming corporation called the Western Association of Fish and Wildlife Agencies (“WAFWA”), an incidental take permit, or “other” undefined mechanisms designed to offset the threats from these activities.

### **There is a safe haven, of sorts**

Enrollment in and compliance with the terms of WAFWA’s Range-Wide Conservation Plan will protect you if an incidental take occurs. The plan requires you to avoid impacts where possible, minimize unavoidable impacts, and pay WAFWA to develop and maintain compensating habitat when impacts occur.

### **What if you own potential Lesser Prairie-Chicken habitat that is not developed or farmed?**

WAFWA is looking for suitable land to provide mitigation. You may enroll in programs that pay you to convert your property into high-quality habitat for periods ranging from as few as five years, or by signing a perpetual conservation easement. These agreements warrant careful review. Among several other concerns, they are agreements with a private, non-profit Wyoming corporation not registered to do business in Kansas.

## Legal challenges

Kansas Attorney General Derek Schmidt has joined Oklahoma and North Dakota, the Domestic Energy Producers Alliance, and the Oklahoma Farm Bureau to challenge the listing with a lawsuit filed in the United States District Court in Tulsa.

KIOGA has announced that the Kansas Attorney General also intends to file suit in Kansas seeking to enforce new Kansas legislation asserting that the federal government does not have the authority to regulate the Lesser Prairie-Chicken in the state. See [House Bill 2051](#), signed by the governor last week. Reliance on this legislation is ill advised at this time.

## For further information

For specific help with your additional Lesser Prairie-Chicken questions: please contact [David Traster](#). Click [here](#) for David's contact information. David, who grew up in Ulysses and began his practice in Hugoton, has 33 years of legal experience, concentrating his practice on environmental, water, and regulatory and administrative law.

## Our firm's team on this issue also includes:

[Trish Voth Blankenship](#) co-leads our firm's real estate practice, and heads up our wind energy practice. Trish's background includes growing up on a still-thriving farm in central Kansas, and obtaining Washburn Law School's Agricultural Law Certificate. Click [here](#) for Trish's contact information.

[Karl Hesse](#) is a 22-year lawyer, a key member of our firm's real estate practice and energy practice working with oil and gas, pipelines, and wind. His experience in the energy industry began at Koch Industries, where he ultimately became General Counsel for Koch Oil Company and Koch Refining Company after developing skills in both the trial and business legal departments. Click [here](#) for Karl's contact information.

[Larry Rapp](#), with 35 years of legal experience, leads our Agribusiness practice and counsels farmers and livestock producers on a variety of legal issues. Click [here](#) for Larry's contact information.

[Joel Griffiths](#) supports the team and clients with research assistance. Joel hails from Norton, KS. Click [here](#) for Joel's contact information.

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*Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Wichita, Kansas City, and Topeka, Foulston Siefkin provides a full range of legal services to clients in the areas of Administrative & Regulatory, Agribusiness, Antitrust & Trade Regulation, Appellate Law, Banking & Financial Services, Commercial & Complex Litigation, Construction, Creditors' Rights & Bankruptcy, E-Commerce, Education & Public Entity, Elder Law, Emerging Small Business, Employee Benefits & ERISA, Employment & Labor, Energy, Environmental, Estate Planning & Probate, Family Business Enterprise, Franchise, General Business, Government Investigations & White Collar Defense, Health Care, Immigration, Insurance Defense Litigation, Insurance Regulatory, Intellectual Property, Life Sciences & Biotechnology, Mediation/Dispute Resolution, Mergers & Acquisitions, Native American Law, OSHA, Public Policy and Government Relations, Product Liability, Professional Malpractice, Real Estate, Securities, Tax Exempt Organizations, Taxation, Water Rights, and Workers Compensation. This document has been prepared by Foulston Siefkin for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.*