

FWS 90-Day Finding Concludes Listing Wyoming Pocket Gopher May Be Warranted

FWS 90-Day Finding Concludes Listing Wyoming Pocket Gopher May Be Warranted

Insight — 2/12/2009 12:00:00 AM

On February 10, 2009, the U.S. Fish & Wildlife Service ("FWS") announced its 90-day finding on a petition to list the Wyoming pocket gopher (*Thomomys clusius*) as threatened or endangered under the Endangered Species Act.¹ The FWS found that the petition presented substantial scientific or commercial information indicating that listing the species may be warranted and initiated a status review.

When making 90-day findings on petitions to list, the FWS uses five threat factors to determine if listing a species as threatened² or endangered³ under section 4(a)(1) of the Act may be warranted.⁴ The five factors are:

1. The present or threatened destruction, modification, or curtailment of the species' habitat or range;
2. Overutilization for commercial, recreational, scientific, or educational purposes;
3. Disease or predation;
4. The inadequacy of existing regulatory mechanisms; or
5. Other natural or manmade factors affecting its continued existence and threats to the species or its habitat.⁵

While the petition asserted that listing was warranted based on all five threat factors, the FWS found that listing may be warranted only on the basis of the first factor.⁶ The petition claimed that alteration of the species' habitat as a result of oil and gas development in Wyoming was the primary threat to the species, given the species' limited range. Based on its evaluation of the information contained in the petition, the FWS found that the petition presented substantial scientific and commercial information indicating that listing the Wyoming pocket gopher as threatened or endangered may be warranted due to habitat threats from oil and gas exploration and development. Specifically, the FWS indicated that "[o]il and gas developments could fragment habitat, directly impact soil and vegetation in the footprint of development sites, and cause negative impacts that are not understood at this time, such as creation of ground vibrations and increased noxious weeds."⁷

FWS is soliciting comments on its 90-day finding until April 13, 2009. Following its review of comments, FWS will issue a 12-month finding to determine if the petitioned action is warranted and will make a determination on critical habitat for the species if, and when, it initiates a

listing action.⁸ If FWS decides to list the pocket gopher as threatened or endangered, such listing may have an impact on oil and gas development in Wyoming.

¹ See 74 Fed. Reg. 6556 (Feb. 10, 2009).

² A "threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20); 50 C.F.R. § 424.02(m).

³ An "endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6); 50 C.F.R. § 424.02(e).

⁴ 16 U.S.C. § 1531–1544.

⁵ 16 U.S.C. § 1533(a)(1); 50 C.F.R. §424.11(c).

⁶ The FWS found the information presented under the last factor was insufficient. The information contained in the petition was intended to demonstrate the susceptibility of the species to stochastic events due to its small population and limited distribution. Nevertheless, the FWS indicated that it will investigate and analyze further the information in its 12-month finding.

⁷ 74 Fed. Reg. at 6560.

⁸ See *id.* at 6558.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.