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U.S. Department of Interior
ATTN: Docket ID No. FWS-R2-ES-2021-0015
Proposed Rule to List the Lesser Prairie Chicken as Threatened in the Northern Distinct Population Segment and as Endangered in the Southern Distinct Population Segment
July 30, 2021

Greetings! On behalf of the nearly 3,500 members of the Kansas Independent Oil & Gas Association (KIOGA), I submit these comments to the United States Department of Interior (DOI) to address concerns related to the proposal to list the Lesser Prairie Chicken (LPC) as threatened in the northern Distinct Population Segment (DPS) and as endangered in the southern DPS of the LPC.

The oil and natural gas industry in Kansas supports over 118,000 jobs in Kansas, over \$3 billion in family income, and over \$1.4 billion in state and local tax revenue. The average Kansas oil well produces 2 barrels of per day and the average natural gas well produces 29 Mcf of natural gas per day. The small businesses that produce Kansas wells account for 92% of the oil and 63% of the natural gas produced in Kansas.

I am providing general comments about the regulatory environment in which the Kansas oil and gas industry operate and how that environment impacts small oil and gas exploration and production (E&P) businesses in Kansas. I am willing to provide additional details, upon request, related to any of the comments that have been submitted. The comments below are not intended to indicate that all federal regulations should be eliminated, or that Americans are better off without a regulatory framework for businesses to operate. The comments highlight several concerns with the LPC proposal that we believe should be reviewed and corrected. These areas have an impact on large companies in the oil and gas industry, but have a much greater impact on the small businesses within the same industry. I submit these comments to address opportunities for the oil and gas business segment in Kansas to work with regulators. Protecting the environment and species is in the best interest of our industry. Taking care of the environment is part of our goal as good corporate citizens. The owners and employees of Kansas oil and gas producing companies live in the same communities that they drill and operate oil and gas wells. They have a vested interest in not adversely impacting the environment or in which they and their families live.

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Background

The Lesser Prairie Chicken (*Tympanuchus pallidicinctus*) is a upland prairie grouse species displaying some of the most extraordinary mating rituals in the avian world. On early spring Kansas mornings, groups of male Lesser Prairie Chickens can be found at lek sites exhibiting elaborate dancing and vocalizations designed to attract females. Kansans care about preservation of the Lesser Prairie Chicken (LPC) within the context of respect for private landholders, balanced environmental stewardship, the right of sovereign State and Local governments to govern their own regions, and sound scientific judgment.

The LPC is known to occupy areas in Eastern Colorado, Northern Texas, Eastern New Mexico, Western Oklahoma and Western Kansas. The majority (>80%) of land within known LPC range is privately owned, with the exception of significant parcels of BLM land in eastern New Mexico. The historical LPC range prior to 1960 is speculative and population (census) counts are limited, qualitative and speculative.

Currently, the LPC is found in four ecoregions called *Sand Shinnery Oak*, *Mixed Grass Prairie*, *Shortgrass*, and *Sandsage Prairie*. Of the four ecoregions, the LPC in Kansas is displaying good recovery and populations not previously observed north of the Arkansas River are being counted, even as far north as Interstate 70. It is noteworthy that the highest population density of LPCs being observed in Kansas are in areas *previously undocumented* by this species, demonstrating their resilience, adaptability and ability to migrate to conditions better suited for sustainability.

Drought - From 2006 through 2013, nearly the entire ecoregion occupied by the LPC was in a severe drought comparable to those of the 1930s and 1950s. During all three periods the Palmer Drought Severity Index (PDSI) throughout most of the Great Plains exceeded “-4,” classified as “*severe to extreme*.”

LPC census counts during and immediately following the droughts of the 1930s and 1950s demonstrate LPC populations fluctuate widely, experiencing significant decline during dry periods and recovering remarkably following drought events.¹ Similarly, during drought periods LPCs have been observed to permanently relocate considerable distances to more preferable habitat (Copelin 1963, Riley et al. 1994).

We were astonished not to find *any* literature discussion - and the associated impacts - of the decade-long drying of the Arkansas River between Deerfield and Great Bend Kansas, which particularly augments the ongoing drought season (Schwilling, 1955).

Ring-Necked Pheasant - In 1906 the Ring-Necked Pheasant (*Phasianus colchicus*) was introduced in 84 Kansas Counties, and it is found throughout the range of the LPC. Ring-Necked Pheasants are hearty, prolific and have been documented as being both aggressive^{2,3} and parasitic to the nests of Lesser Prairie Chickens.⁴ Holt, in particular, studied aggressive Pheasant behavior toward LPCs during breeding activities noting that *“Disturbance of leks during breeding season could prevent breeding activities and have a negative impact on populations.”* Other studies also support this conclusion. Because steep decline of the LPC populations correlates well with introduction of Ring-Necked Pheasants and the droughts of 1930s and 1950s, it is highly probable the cumulative impacts of those events, coupled with habitat losses from native land conversions (1950 – 1995) are the primary contributors to the observed reduction in LPC populations.

Habitat Degradation – The primary anthropogenic (man induced) mechanism contributing to regional decline of LPC populations is conversion of land from native prairie to agriculture and rangeland uses. The trend in native prairie conversions, and associated LPC habitat degradation, leveled off in the 1990s and in the case of the NRCS CRP Program, has even reversed (Rogers and Hoffman 2005).

In contrast to native prairie conversions from agricultural activities, land-use allocations for roadways, oil and gas exploration, wind generation, transmission line service roads and similar industrial uses are localized in scale and miniscule in area. While anthropogenic activities can affect the *nest selection* process, they typically do not affect *nest success* (brood numbers) – meaning that LPCs prefer quieter neighborhoods, with a minimum of threats, given a choice.

In its Federal Register Notification, the U.S. Fish & Wildlife Service (USFWS) is basing the substance of its proposed LPC Listing as attributable to: *“the historical, ongoing and probable future impacts of habitat loss and fragmentation resulting from conversion of grassland to agricultural uses; encroachment by invasive woody plants; wind energy development; petroleum production; and presence of roads and manmade structures including towers, utility lines, fences, turbines, wells and buildings.”*

Fragmentation of LPC habitat has occurred primarily through conversion of native prairie to agriculture, which combined with the stressors of extreme drought and aggression by Ring-necked Pheasants, contributed to overall population decline of the LPC in 2006-2013. While anthropogenic sources do present logistical impediments to LPC movement, literature clearly demonstrates LPCs to navigate across *all* anthropogenic sources in search of forage (Copelin 1963, Taylor and Guthery, 1980), winter riparian corridors (Schwilling, 1955), and more preferred, mixed-grass habitat.

Today, LPC habitat losses and fragmentation appear to be reversing. Programs for control of invasive flora are ongoing and most western-Kansas Counties have entire Departments dedicated to invasive plant control.

USFWS proposes to list the LPC out of concern for anticipated habitat losses from wind farm construction and operation, fragmentation from transmission line corridors and roadways, and impacts by petroleum production and transmission.

Environmental Petitions and Lawsuits - The status of the LPC has long been a focus of environmental petitions and lawsuits, pursued the past 25 years by environmental advocacy organizations, with heightened legal activity experienced over the past decade. Notably, in 2014, the USFWS issued a final rule listing the LPC as a threatened species under the ESA (79 FR 19973) and concurrently published a final 4(d) rule for the bird (79 FR 20073). However, on September 1, 2015, this final listing rule for the LPC was vacated by the United States District Court for the Western District of Texas, which also mooted the final 4(d) rule. On July 20, 2016, the USFWS published in the Federal Register a final rule that removed the LPC from the List of Endangered and Threatened Wildlife in accordance with the court decision (81 FR 47047).

Discussion

Enacted in 1973, the Endangered Species Act (ESA) was devised to protect species believed to be on the brink of extinction. Since then, the consequences of the law have reached beyond original intent. The U.S. Fish & Wildlife Service (USFWS) administers the act. When a species is listed as “endangered” or “threatened”, the USFWS moves to protect it by prohibiting a “taking” – any action on public or private land that would harass, harm, wound, kill, or modify its habitat – or making special provisions for incidental “taking”.

In Kansas, the listing of the lesser prairie chicken as “threatened” could have serious consequences for many oil and gas operators, farmers, and others. The USFWS decided to list the lesser prairie chicken as “threatened” in March 2014, but not because the animal was close to extinction or because of human actions. The listing decision was made because the USFWS was fixated more on meeting the mega-settlement deadlines set with environmental special-interest groups than the agency was in allowing adequate time for consideration of existing state conservation efforts. What’s most disconcerting is the decision, which could have had dire consequences for economic development and private property rights, provided no additional protection for the lesser prairie chicken.

For oil and gas operators, big or small, the ESA is becoming a huge problem. Operating or just living within the area of an endangered or threatened species’ habitat becomes hazardous because your operations may impact a protected animal that could result in enforcement actions that include criminal liability. You might conduct oil field or farming operations that create sounds that disturb lesser prairie chickens or engage in field operations too early in the morning. Nearly any activity that could disturb the animal and its habitat becomes a jurisdictional hurdle.

The ESA was enacted in 1973 to protect animal and plant species at risk of extinction due to habitat changes or loss. While minor updates have been made, the law itself has largely remained unchanged for nearly five decades. Unfortunately, the ESA has evolved into a litigation tool used by some environmental organizations to advance an agenda that impedes American oil and natural gas production – destroying economic growth and job creation while diverting hundreds of millions of taxpayer dollars away from species recovery.

Despite the significant amount of taxpayer dollars spent in the name of the ESA, the law has failed at its underlining mission of recovering and delisting species. Less than 2% of all listed species have been removed from ESA protection since 1973. Perhaps even more troubling, the data and science used to justify endangered species regulatory actions, such as critical habitat designations, is not publicly available for analysis.

Independent oil and natural gas producers are good stewards of our land and are committed to protecting the environment. Energy production and species conservation can go hand and hand.

Stakeholders in Kansas have seen significant progress made in improving LPC population and securing its future. The LPC population has increased by approximately 71% since the peak of the drought in 2013 without ESA regulations in place due to increased rainfall and on-the-ground conservation measures. A heavy-handed approach to list the LPC as Threatened/Endangered in spite of the unprecedented level of voluntary conservation efforts only reduce the incentive for stakeholders to pursue future initiatives to preserve the species and send a strong signal to those working to preserve species nationwide that no amount of private investment or voluntary conservation could satisfy the federal government. If the listing of a species is viewed as inevitable, stakeholders lose the incentive to invest in private, voluntary conservation efforts.

DOI and USFWS has a methodology that permits discretion to prioritize critically impaired species, while giving lower priority to those species for which conservation efforts are in place. There are already extensive LPC proactive conservation efforts, by states, landowners, and stakeholders underway or being developed that benefit the LPC. Therefore, the LPC should be a low priority species for the USFWS.

The DOI has an opportunity to chart a different course to reduce regulatory burdens and encourages stakeholder involvement in the conservation of our nation's wildlife species. KIOGA encourages DOI to collaborate with stakeholders on positive solutions that protect the species without causing unnecessary harm to the livelihoods of the people of our states. We encourage DOI to consider changes to the way they list threatened/endangered species to address habitat determination, species listing priorities, and the listing species recovery process. We suggest DOI:

1. Allow the consideration of economics in making listing determinations;
2. Revise the habitat determination by requiring that habitat actually be inhabited by the species to be considered as such;
3. Modifying the requirements for the de-listing process to be more in line with those for listing a species as threatened or endangered.

Many of those represented in this document reside on and/or conduct business operations on property held in our families for *generations*. For Kansans, we are concerned for the Lesser Prairie Chicken because it is part of our heritage and neighborhoods.

KIOGA has long advocated that the best scientific and commercial information available demonstrates that the LPC does not meet the ESA's definitions of either a threatened or endangered species. The LPC has rebounded from historic lows, and through a combination of public and private efforts, the LPC is now better protected than at any previous time. A listing as threatened or endangered will not provide any additional conservation benefits above what already exists.

Objective review of the Public Record and simple, down-home knowledge of this bird indicate LPC population declines are a result of drought, loss of habitat from native prairie conversions, and stressors from aggression/parasitism by Ring-necked Pheasants. LPCs display a general avoidance of buildings, pump jacks and power-line corridors – and this fact neither makes these fixtures a barrier nor imparts culpability for their presence.

Concern is expressed about the apparent unbalanced – perhaps even biased – focus away from natural LPC stressors and fragmentation toward future, perceived impacts. Because habitat fragmentation is complete and empirical data from specific anthropogenic sources is conflicting and often anecdotal, a Threatened Listing of the LPC would be premature, - or perhaps even elongate recovery of the Lesser Prairie Chicken.

Concluding Remarks

We concur with the Conservation recommendations explicitly outlined by C.H. Hagen, B. Jamison, K. Giesen and T. Riley:⁵

“We recommend that each State develop and implement conservation plans for LPCHs. These Plans should use local groups comprised of representatives from all interested stakeholders to identify and solve regional issues within ecological regions. Conservation Plans should include 1) quantity of habitat remaining in each state, 2) common problems involved in conserving the LPCH, and 3) conditions needed to maintain healthy populations.”

and believe the best conservation approach to include a collaboration of local, state and regional initiatives. Many Conservation Agreements (CCAs) are already in place, others are still in progress.

USFWS is constrained to base final action for the LPC on the *best scientific and commercially available data available*. We respectfully submit that a complete Body of such information is not currently available, and as such, we encourage USFWS to issue a “Not-Warranted” determination for this Action.

Contact Information

For further information or any questions, please contact Edward Cross, President, Kansas Independent Oil & Gas Association, 800 SW Jackson Street, Suite 1400, Topeka, Kansas 66612 (785-232-7772; email ed@kioga.org).

Sincerely,

Handwritten signature of Edward P. Cross in black ink.

Edward P. Cross, President
Kansas Independent Oil & Gas Association

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2 Vance, D. Russel, and Ronald L. Westemeier. 1979. Interactions of pheasants and prairie chickens in Illinois. *Wildlife Society Bulletin* 7(4):221-225.

3 Holt, R.D., Matthew J. Butler, Warren B. Ballard, Curtis A. Kukul, and Heather Whitlaw. 2010. Disturbance of lekking lesser prairie-chickens by ring-necked pheasants. *Western North American Naturalist* 70(2):241-244.

4 Westemeier, R.L., et.al. 1998. Parasitism of greater prairie chick nests by ring-necked pheasants. *Journal of Wildlife Management* 62(3):861.

5 Hagen, Christian A., Brent E. Jamison, Kenneth M. Giesen, and Terry Z. Riley. 2004. Guidelines for managing lesser prairie chicken populations and their habitats. *Wildlife Society Bulletin* 32(1): pps 76.

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