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Testimony to Kansas House Agriculture & Natural Resources Committee

Senate Concurrent Resolution 1602

A Concurrent Resolution disapproving the designation of the lesser prairie chicken as a threatened species in Kansas by the United State Fish and Wildlife Service and supporting efforts to remove such designation

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Good afternoon Chair Rahjes, Vice Chair Moser and members of the committee. I am Edward Cross, President of the Kansas Independent Oil & Gas Association (KIOGA). KIOGA represents thousands of independent oil and natural gas explorers and producers, as well as allied service and supply companies. With nearly 3,000 members across the entire state, KIOGA is the lead state and national advocate for the Kansas independent oil and natural gas industry. I submit this testimony expressing our support for Senate Concurrent Resolution 1602 (SCR 1602) and urge the Committee to pass SCR 1602.

The U.S. Fish & Wildlife Service (USFWS) announced on November 17, 2022 that they will list the Lesser Prairie Chicken (LPC) as a threatened/endangered species and be covered by protections from the Endangered Species Act (ESA). The USFWS said they will list the LPC as “Threatened” in the northern distinct population segment and list the LPC as “endangered” in the southern distinct population segment. The northern segment includes Kansas. The LPC listing was to become effective January 24, 2023. On January 20th, the USFWS extended the effective date of the listing to March 27, 2023.

Effective March 27, 2023, the USFWS has made it illegal under the ESA to harm, or so much as disturb the normal habits of an LPC. The penalties for doing so can be very costly. KIOGA cannot opine as to the likelihood or level of enforcement of the LPC regulations. Historically, federal migratory bird regulations have been aggressively enforced.

Listing of the LPC as a “threatened” species in Kansas under the ESA makes it illegal to “take” an LPC. “Take” means to harm and harass, as well as kill. “Harass” is defined to include annoying an animal to such an extent as to disrupt its normal breeding, feeding, or sheltering habits. Therefore, after March 27, 2023, it will be illegal to so much as disrupt the normal habits of a LPC in much of western Kansas.

Penalties for violating the taking rules are severe. For each knowing violation, the ESA imposes up to (1) a \$25,000 civil penalty; (2) a \$50,000 criminal penalty; and (3) one year in prison. The ESA also authorizes private parties to sue an operator who violates the taking rules to enforce the Act.

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 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 addition, once a listing occurs, no federal agency can issue other necessary permits for activity near the species’ habitat area without first consulting with the USFWS to see how that permitted activity may affect the endangered or threatened species or result in a taking. The potential for economic harm is evident.

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 USFWS promulgated approved conservation plans to provide regulatory assurances to continue operations and development in the LPC habitat areas. These plans impose restrictions on oil/gas operations and requires payment of significant fees for new drilling or construction projects. These imposed conservation programs and compensatory permit requirements on privately held agricultural and energy producing lands constitutes a privilege tax for funding of government wildlife conservation programs. Over time, these conservation programs create winners/losers, transition private working lands to centralized land-use planning, and increase government control over private property and commercial activities.

Ultimately, it is a business decision whether to enroll in a conservation plan, and if so, which plan is best. An operator must weigh the risk of not having whatever protections a conservation plan provides with the costs and operational burdens the plan imposes if you enroll.

The status of the LPC has long been a focus of environmental petitions and lawsuits, pursued the past 25 years by environmental advocacy organizations. Notably, in 2014, the USFWS issued a final rule listing the LPC as a threatened species under the ESA and concurrently published a final 4(d) rule for the bird. However, in September 2015, this final listing rule for the LPC was vacated by the US District Court for the Western District of Texas, which also mooted the final 4(d) rule. In July 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.

The USFWS accepted comments in 2021 and 2022 regarding the new proposed rule to list the LPC. KIOGA submitted comprehensive comments during the comment periods providing a body of information to support a “Not Warranted” USFWS determination for listing the LPC.

KIOGA’s comments specifically underscored 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. None of the five factors utilized by the USFWS under the ESA to determine if a species is endangered or threatened are present in the case of the LPC in the northern distinct population segment. The LPC has a stable and growing habitat and range. There is no overutilization that places the species at risk. There is no disease or predation beyond the typical norm. There are adequate existing regulatory mechanisms in place that have already produced demonstrable successes. And there are no other natural or manmade factors that affect the continued viability of the species. In short, there is no basis for action under the ESA and its implementing regulations.

KIOGA met with USFWS officials in 2022 underscoring that 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.

U.S. Senator Marshall (R-KS) introduced a Congressional Review Act (CRA) challenge to the listing of the LPC. Congressman Tracey Mann (R-KS) introduced a measure in the U.S. House to prohibit the U.S. Interior Secretary and U.S. Commerce Secretary from listing a species as threatened or endangered under the ESA without congressional approval. Congress Ron Estes (R-KS) introduced a measure in the U.S. House that would delist the LPC and put the LPC habitat protection under local control.

KIOGA continues to engage and respond to the USFWS decision to list the lesser prairie chicken as threatened in Kansas. KIOGA has taken several actions including joining a legal challenge - as a plaintiff - led by the Permian Basin Petroleum Association. A Notice of Intent to file suit was filed by the industry group the USFWS and U.S. Department of Interior on January 19, 2023. We also encouraged the Kansas Attorney General to file a legal challenge to the lesser prairie chicken listing on behalf of the State of Kansas. Kansas Attorney General Kris Kobach filed a Notice of Intent to file suit under the Endangered Species Act in connection with the status of the lesser prairie chicken on January 30, 2023.

Respectfully, we urge the Committee to pass SCR 1602. Thank you.