



Since 1894

To: House Agriculture and Natural Resources Committee
Rep. Sharon Schwartz, Chair

From: Aaron M. Popelka, V.P. of Legal and Governmental Affairs, Kansas Livestock Association

Re: **HB 2362 AN ACT AN ACT concerning wildlife, parks, recreation and tourism; relating to endangered species conservation.**

Date: February 25, 2013

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 5,500 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, dairy production, grazing land management and diversified farming operations.

Thank you, Chairwoman Schwartz and members of the Committee, my name is Aaron Popelka and I am with the Kansas Livestock Association (KLA). KLA appears to today as a proponent of HB 2362. KLA requested this legislation because recent experiences with the Kansas Nongame and Endangered Species Conservation Act (KNESCA) by KLA members demonstrated the KNESCA is in need of some subtle, but necessary reforms.

Before describing how HB 2362 reforms the KNESCA, the committee should understand how this issue came to light. Last year, two KLA members were constructing and expanding feedyards in southwest Kansas. To protect state waters from potential nutrient runoff from the feedyard, each facility installed a wastewater containment structure as required by state law. The feedyard construction, including the wastewater containment structures, was privately funded on private property. After completing construction of the wastewater containment structures, the KLA members applied for a Kansas Department of Agriculture, Division of Water Resources (DWR) dam safety permit from the Chief Engineer. This permit can be lawfully obtained post-construction.

As part of the permit process DWR must submit the permit to other state agencies for comment under the Kansas Environmental Coordination Act, K.S.A. 82a-325 *et. seq.* During this multi-agency review, the Kansas Department of Wildlife, Parks, and Tourism (KDWPT) reviewed the DWR dam safety permit application and sent notice to the KLA members that they had to apply for a KNESCA action permit as a result of the feedyard construction. The action permit was necessary because the privately built feedyard was disturbing the habitat of the longnose snake, a threatened species under the KNESCA. To date, KDWPT has yet to find one of these snakes on our members' properties. One of the feedyard owners was told that mitigation measures contained in the permit would require him to pay KDWPT \$50,000 or place a quarter section of

pasture in a permanent conservation easement that would, in effect, render the land economically useless as a result of the easement restrictions.

Following the KDWPT letter, KLA legal staff began researching the KNESCA and its supporting regulations. What we found was troubling. First, the longnose snake, which caused this crisis is listed as "common; widespread and abundant" across the U.S. by Natureserve, a database utilized by the U.S. Fish and Wildlife Service to identify the prevalence and health of a species in the U.S. It also indicated the range of the longnose snake scarcely touches the southwest portion of Kansas. Therefore, the snake was listed simply because the state has a minimal number of this species in the outer reaches of its range that touch Kansas, not because it is in any way threatened with extinction.

Next, KLA discovered that habitat of threatened and endangered species under the KNESCA was not accurately being published. When the feedyard design engineers conducted research to determine whether threatened or endangered species were in the area of the development, the KDWPT website said the affected county was in the "known historic range" of the longnose snake, but the county was not designated as critical habitat. In addition, the website stated: "Knowledge of current longnose snake populations is too limited to designate specific areas of critical habitat."

This brought KLA staff to our next question: How was habitat determined and regulated? Research indicated that under K.S.A. 32-960a, KDWPT is directed to conduct what are called recovery plans for each species listed as threatened or endangered. These plans are supposed to receive public hearing to allow KDWPT to gather public comments. The comments are supposed to help shape how KNESCA permits are to be issued and mitigation measures constructed. In addition, the recovery plans are also required to balance the biological needs of a species with the social and economic conditions of an affected area. Such a plan was not conducted for the longnose snake and has not been completed for most of the species listed as threatened or endangered under the KNESCA. Instead of utilizing the recovery plan process, KDWPT staff has been unilaterally making mitigation decision without weighing the effect on social or economic needs of affected rural communities.

KLA's habitat research also uncovered that KDWPT, through regulation, was regulating habitat more strictly than the federal government under the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et. seq.* The KNESCA does not once mention the word habitat. Instead, regulation of habitat was created by KDWPT through regulations. If the KDWPT's regulations are examined closely, the rules demonstrate that KDWPT has given itself authority to regulate all habitat of a threatened or endangered species, rather than limiting the authority to critical habitat contained in the ESA. Critical habitat is only such habitat "essential to conservation of the species" 16 U.S.C. § 1532(5)(A).

As a result of KLA's research and the experience of our members, KLA devised HB 2362. Before discussing our proposed changes to the KNESCA, the Committee should know what HB 2362 does not do. It does NOT repeal the KNESCA, it does NOT prohibit regulation of legitimately threatened or endangered species, and it does NOT exempt feedyards from obtaining a permit or complying with mitigation measures.

HB 2362 proposes the following changes to the KNESCA:

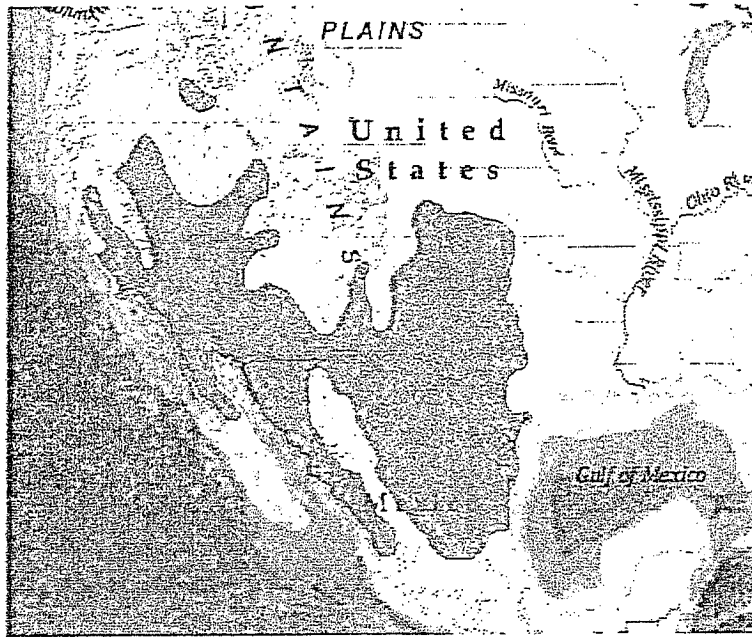
- Page 1, line 23 – This places in statute a definition of “critical habitat” that is identical to the definition found in the ESA. Kansas statutes currently do not define “habitat” or “critical habitat” and KDWPT developed a definition of regulated habitat stricter than the ESA.
- Page 2, line 25 – Section 2 changes how KDWPT would analyze whether to list a species as threatened or endangered. It would require KDWPT to look at the prevalence of the species in other areas of the country, not just Kansas, to avoid listing of a healthy species. It also prohibits KDWPT from listing a species that is common, widespread, abundant, or uncommon but not rare.
- Page 4, line 34 – Paragraph (2) directs the KDWPT to begin a review of currently listed species, consistent with the terms of HB 2362, within 90 days of the bill becoming effective. It does not require completion of the KDWPT review within 90 days. It simply requires the process to commence.
- Page 5, line 31 – Requires KDWPT to publish in the Kansas Register and its website statutorily required recovery plans. These are currently not published.
- Page 5, line 40 – Limits KDWPT regulation of habitat to only critical habitat. *See supra*, page 1.
- Page 6, line 17 – Prohibits KDWPT from requiring a KNESCA action permit for privately funded projects on private land if the owner lawfully obtains a state construction permit after construction is complete (i.e. DWR dam safety permit).
- Page 7, line 8 – Prohibits KDWPT from requiring permits or developing mitigation measures, except to prevent intentional killing of a listed species, until a recovery plan is completed. Currently, KDWPT career staff is unilaterally deciding when to issue permits and the extent of mitigation measures without following statutory requirements for public hearings and consideration of social and economic factors affecting rural communities.

Finally, KLA would like to thank KDWPT Secretary Robin Jennison and KDWPT Chief Legal Counsel Chris Tymeson for their efforts to assist KLA’s members when these issues were discovered. Both went to work changing internal KDWPT policy and the KLA members have successfully avoided regulatory disaster. However, changing internal policy is easily changed by a subsequent secretary, and substantive problems with the KNESCA continue to exist. KLA believes the legislature needs to clarify and reform the law to prevent future problems.

Thank you for the opportunity to submit testimony. KLA urges the committee to pass HB 2362 favorably and we look forward to answering any questions the Committee may have.

Longnose Snake (*Rhinocheilus Lecontei*) Research

Has a Global Rank of G5 → Secure – Common; widespread and abundant
(<http://www.natureserve.org/explorer/granks.htm>)



Area population map

Source: <http://maps.iucnredlist.org/map.html?id=63909>