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Public Comments Processing
Attn: FWS-R2-ES-2021-0015
U.S. Fish and Wildlife Service
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September 1, 2021

RE: Federal Docket #: FWS-R2-ES-2021-0015 Federal Register Notice for Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status with Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment

Dear Sir or Madam:

The Kansas Department of Wildlife and Parks (KDWP) submits these comments on the U.S. Fish and Wildlife Service's (Service) proposed rule to list the lesser prairie-chicken (LPC) as a threatened species in the Northern Distinct Population Segment (DPS), endangered in the Southern DPS, and the proposed 4(d) special rule for the Northern DPS. Herein, KDWP comments directly on the proposal to list the Northern DPS—which encompasses LPC habitat in Kansas within the Sand Sagebrush, Mixed Grass, and Shortgrass/CRP Mosaic Ecoregions.

KDWP believes the LPC does not warrant any federal protections under the Endangered Species Act (ESA) because the available information does not indicate the species is "likely to become an endangered species within the foreseeable future throughout all or a signification portion of its range". We acknowledge long-term population declines have occurred throughout the species' range—however, populations have stabilized, management efforts have been implemented to specifically conserve and enhance LPC habitat, and there is little threat of extinction in the "foreseeable future"—especially in the Northern DPS. Additionally, populations have expanded in Kansas to the extent that an entire ecoregion was recently defined to describe the habitats being utilized that were not historically inhabited by the species.

Whether a listing is determined to be warranted or not, the state wildlife management agencies remain the best source of management authority and conservation actions for the LPC. KDWP has surveyed and monitored LPC leks and occurrences in Kansas since 1964, creating one of the most extensive and robust datasets available for examining LPC population trends, habitat use and distribution. Additionally, KDWP has funded and implemented the most extensive series of LPC research studies in the recent past, earning it the 2019 Wildlife Restoration Award from The Wildlife Society. These studies served as a foundation for the most exhaustive book written about LPCs, *Ecology and conservation of Lesser Prairie-Chickens* (Haukos and Boal 2016). More recently (August 2021),

theses have been completed for two state-funded projects that have greatly furthered our collective understanding of LPC ecology and responses to wildfire (becoming more common with climate change) and translocation (Parker 2021, Teige 2021). States have much more flexibility than the Service for funding and implementing research projects that are both timely and relevant to the management and conservation of the species.

If the species is listed, state wildlife management goals are more difficult to accomplish. In the proposed rule, the Service acknowledges the vital role private landowners will continue to play in providing habitat for LPC in the future. However, the Service does not have the staffing in Kansas (or elsewhere in the LPC range) to do the amount of work they deem necessary to counteract habitat loss. State wildlife management agencies have the technical expertise and long-standing relationships with landowners that is necessary to accomplish the task of increasing habitat quality and reversing habitat loss trends. By listing the LPC, the Service will make these tasks more difficult due to mistrust and a lack of developed relationships with the landowners that are critical to the success of the species.

A listing will also negatively impact state agencies through our application and review of funding grants to implement research and management activities. In most instances, state agencies are responsible for ensuring management on state-managed lands as well as private land programs are meeting requirements allowed within a potential 4(d) rule and/or other agreements that may provide additional exclusions. This will require additional work to develop programmatic agreements or biological opinions for habitat management programs, resulting in additional cost and delayed implementation of programs that may be impacted by additional restrictions.

KDWP has played a major role in the development and implementation of the Lesser Prairie-Chicken Range-wide Conservation Plan (RWP, Van Pelt et al. 2013)—a first-of-its kind conservation plan that not only outlined the needs of the species, threats to populations, and population and habitat goals, but also provided a funding mechanism for directly providing conservation for the species through a mitigation framework. The RWP serves as a standard for all conservation organizations—including the Service—when discussing and recommending areas to target conservation efforts, as well as areas to avoid when siting industry developments and infrastructure. The RWP identifies a process and committee structure for discussing, recommending, and changing aspects of the RWP, and these committees have been actively filled with a variety of stakeholders and interests.

One example of the states' role in furthering the goals of the RWP is the development and engagement of LPC State Implementation Teams. In Kansas, the LPC State Implementation Team has met quarterly since 2019 and includes members from the state and local offices of NRCS, FSA, USFWS (Ecological Services and Partners for Fish and Wildlife), NGOs (Playa Lakes Joint Venture, Pheasants Forever/Quail Forever, The Nature Conservancy), Kansas Cooperative Fish and Wildlife Research Unit, Kansas State University and KDWP. The Kansas team has discussed important research findings and how recommended management activities can be implemented, provided recommendations to the FSA Kansas State Technical Committee, reviewed priority area designations and provided a venue for the continued discussion of LPC issues and challenges throughout the state. This is one of many examples of states taking a proactive role in LPC management in a manner that the Service has not begun to develop.

While the Service provides opportunities for regulatory assurances via a variety of mechanisms associated with the ESA (e.g., 4(d) rule, Habitat Conservation Plans, Candidate Conservation Agreements with Assurances, Safe Harbor Agreements), these tools are costly and time-intensive to develop and implement. If a listing occurs, it will be imperative that the Service provide the funding and staffing necessary to develop and implement such programs to provide the necessary and warranted assurances to landowners for the positive impacts they are having for LPC, as well as conservation activities that are benefiting the species.

Finally, there must be more and improved coordination among federal agencies—regardless of whether the LPC is listed. As an example, the Service acknowledges the positive role FSA's Conservation Reserve Program (CRP) has in LPC management and conservation. However, when completing the Species Status Assessment (SSA), the Service was not able to obtain CRP enrollment data to better inform the geospatial analysis. While KDWP does not question the results of the geospatial analysis used in the SSA, the lack of coordination among federal agencies is disheartening. This becomes more concerning when looking to the future of Farm Bill conservation programs and the importance of these programs to all wildlife management—not just LPC.

Distinct Population Segments

While KDWP maintains the species should not be listed—if it is listed—we agree that distinct population segments (DPS) should be designated. As such, we agree that the three ecoregions in Kansas are included in the Northern DPS and as such should be analyzed in policy decisions separately from the Southern DPS.

Analytical Approach: Species Status Assessment

The USFWS LPC Species Status Assessment (SSA) relies heavily on data from the states within the species range. KDWP has shown a concerted effort to monitor and conserve LPC for more than fifty years. During this time, Kansas is the only state to document range expansion (as well as further population expansion into Colorado from the expanded Kansas range). Within this expanded range, populations have been relatively stable, given the boom-bust nature of the species. Kansas data also demonstrate stability in the Kansas portion of the Mixed Grass Ecoregion. Moreover, an increase in targeted conservation programs due to decreasing groundwater aquifer levels are likely to lead to restoration of cropland acres to native grasses within the Sand Sagebrush Ecoregion. While difficult to quantify, it is not unreasonable to expect expanded habitat availability for the species and associated population increases within this ecoregion in the future, given the conservation status and interest in LPC and water issues.

Because the Service does not consistently monitor LPC populations and/or habitat, they are required to seek information from state wildlife agencies, other federal agencies, and other organizations providing LPC conservation and management. While state wildlife agencies have collaborated extensively with the Service in the development of the SSA and many other LPC policy discussions and decisions, there is a lack of similar coordination from federal agencies. This is a shortcoming of the SSA process. For example, USDA's Farm Services Agency did not provide relevant Conservation Reserve Program (CRP) data for use in the habitat analysis portion of the SSA. Because CRP fields has been documented to be critical for LPC across the range, this lack of coordination and cooperation among federal agencies results in a SSA product that does not reflect the best available information. Similarly, USDA Natural Resources Conservation Service (NRCS)

did not provide relevant habitat restoration and enhancement efforts to the Service beyond the Lesser Prairie-Chicken Initiative (LPCI) for inclusion in the SSA—thereby not providing information relevant to other programs, including Environment Quality Incentives Program (EQIP) Grazing Lands Health and Wildlife programs. These issues are not unique to the LPC SSA but reflect a shortcoming of the SSA process and result in a lack of incorporation of the best available information when analyzing, summarizing and reviewing the status of a species.

Request for Clarification
If the species is listed, KDWP requests clarification from the Service concerning how the greater prairie-chicken season and hunt units will be addressed in northwestern Kansas and any potential incidental take associated with legal hunting of other game species in southwest Kansas. We request the Service provide clear documentation that is easily accessible for both KDWP and the public using FAQs, other relevant informational products, and language in the listing decision.

Additionally, we offer the following information as specifically requested in the proposed listing:

The species' biology, range, and population trends, including:

No additional information.

Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

New and ongoing research funded by KDWP has provided new insights into LPC responses to wildfires (Parker 2021) and translocation (Teige 2021).

Genetics and taxonomy;

KDWP and CPW have contracted with Sara Oyler-McCance (U.S. Geological Survey) to conduct a genetic analysis of feathers collected from LPC translocated from the Short-grass prairie/CRP Ecoregion to the Sand Sagebrush Ecoregion between 2016-2019. The analysis also included feather samples collected in 2020 on leks established through the translocation. In addition, CPW and KDWP submitted feathers collected prior to the translocation and on leks outside of the translocation area. As anticipated, preliminary analyses document that the genetics of the translocated birds are characteristic of Shortgrass/CRP Ecoregion. Similarly, genetic makeup of the feathers collected in 2020 on the translocation-established leks within the Sand Sagebrush Ecoregion are characteristic of the Short-grass/CRP Ecoregion. Feather samples in this current analysis were compared to samples previously analyzed as part of the range-wide LPC genetic structure (Oyler-McCance et al. 2016). KDWP and CPW are currently working with Dr. Oyler-McCance to finalize the genetics report from the translocation. We will provide the final report as soon as it is complete.

Historical and current range, including distribution patterns;

No additional information.

Historical and current population levels, and current and projected trends; and

KDWP has surveyed and monitored LPC leks in Kansas since 1964, creating one of the most extensive and robust datasets available for examining LPC population trends. Reports and data are available upon request or at https://ksoutdoors.com/Services/Research-Publications/Wildlife-Research-Surveys/Upland-Bird and the Kansas Natural Resources Planner.

KDWP, CPW, and Kansas State University (KSU) continue to monitor all leks associated with the Sand Sagebrush translocation effort. From 2016-2019, 411 LPC were translocated from the Short-grass/CRP ecoregion to the Comanche and Cimarron National Grasslands in the Sand Sagebrush Ecoregion. In 2020, one year after the final release, biologists documented 115 males on 20 leks in the release area. In 2021, biologists documented 65 males (28 in Colorado and 37 in Kansas) on 15 leks in the release area. Two theses have been completed (Berigan 2019, Teige 2021) and are available upon request.

The five LPC state wildlife agencies continue their commitment to conduct 10 years of range-wide aerial surveys. Surveys have now been completed from 2012-2021 (except 2019). WAFWA has provided 2021 population estimates and a final report to the Service.

Past and ongoing conservation measures for the species, its habitat, or both.

In 2014, the KDWP rebranded the Kansas State Wildlife Habitat Incentives Program (Kansas WHIP) to the Habitat First program, allowing for KDWP to leverage the previous State funds (used for Kansas WHIP) to additional funding available through the WSFR grant program. The Habitat First program includes the implementation of habitat management practices that include native grass/forb plantings, CRP disking, planting cover crops, tree and brush management, prescribed fire, and use exclusion (livestock exclusion). The Habitat First program has improved about 12,000 ac (4,856 ha) in the LPC range since 2014. Prior to 2014, the Kansas WHIP program had improved 30,284 ac (12,255 ha) in LPC range.

In addition, KDWP was provided an opportunity through contributions from the Comanche Pool Prairie Resource Foundation to leverage additional WSFR funds in 2016. These funds were matched with voluntary cost share contributions from landowners to implement management practices that include tree and brush removal (pre- and post-wildfire), prescribed fire, and native grass planting within the Red Hills Ecoregion. The Kansas Prescribed Fire Council and USFWS Kansas Partners for Fish and Wildlife (PFW) program collaborated with KDWP staff to engage landowners in ongoing conservation delivery efforts. Since implementation in 2016, contracts are currently obligated to complete the direct implementation of 19,655 ac (7,954 ha) with additional funding to be obligated to additional projects soon.

KDWP continues to provide input priority areas and practices to benefit LPC, both through the Kansas LPC State Implementation Team and through the FSA Kansas Technical Committee.

The KDWP State Wildlife Action Plan (Rohweder 2015) uses a hierarchial classification system that divides Kansas into three conservation regions: (1) Shortgrass Prairie, (2) Central Mixed-Grass Prairie, and (3) Eastern Tallgrass Prairie. Within each region, geographically explicit areas described to target conservation efforts. These Ecological Focus Areas represent landscapes where conservation actions can be applied to maximize benefits to Kansas wildlife, including LPC. For each EFA, priority habitats and conservation actions are described.

KDWP, Colorado Parks and Wildlife and Kansas State University (KSU) continue to monitor all leks associated with the Sand Sagebrush translocation effort. From 2016-2019, 411 LPC were translocated from the Short-grass/CRP ecoregion to the Comanche and Cimarron National Grasslands in the Sand Sagebrush Ecoregion. In 2020, one year after the final release, biologists documented 115 males on 20 leks in the release area. In 2021, biologists documented 65 males (28 in Colorado and 37 in Kansas) on 15 leks in the release area. Graduate students at KSU are finalizing their research results from the translocation. Two theses have been completed (Berigan 2019, Teige 2021) with a manuscript submitted for publication. These documents are available upon request.

Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the adequacy of existing regulatory mechanisms, or other natural or manmade factors.

Kansas has several regulatory mechanisms in place that are providing adequate protections for LPC in Kansas. The Kansas Nongame and Endangered Species Conservation Act (KNESCA) of 1975 (Kansas Statutes Annotated 32-957 through 32-963 and associated Kansas Administrative Regulations 115-15-1 through 115-15-4) provides KDWP with the authority to designate both "Threatened" and "Endangered" status, conserve, manage, and regulate listed species and associated state designated critical habitat in Kansas. The existing regulatory structure provides the opportunity for internal (KDWP) and external petitions to assess population status and potentially add new species to the lists of "Threatened" or "Endangered" wildlife within the state's borders. If the species were to be successfully petitioned for protection via the KNESCA, this existing regulatory structure would provide KDWP with the authority to maintain existing critical habitat, designate new critical habitat areas for the species (as needed), and require avoidance, minimization, and/or mitigation for impacts to those critical habitats. The KNESCA would also provide the necessary authorities to allow KDWP to develop and implement plans/programs for the recovery of the species within the state's boundaries.

The LPC hunting season in southwest Kansas has been closed since 2014—even though research and survey efforts have indicated legal pursuit and harvest does not negatively impact LPC populations (Haukos et al. 2016).

KDWP has assisted and collaborated with researchers conducting a parasitological and infectious disease survey of LPC across their range. While research and analysis are ongoing, the following description is a summary of ongoing research and survey efforts being conducted in the LPC range by researchers at Texas Tech University and Kansas State University (B. Grisham, personal communication).

Using samples collected from March-April 2012-2014 and 2018-2019, we conducted a parasitological and infectious disease survey of Lesser Prairie-Chickens across the southern portion of their range in Texas and New Mexico. To identify nematode parasites present in this population, 7 frozen archived birds collected from 2012-2018 were submitted for necropsy to Sam Houston State University, and fecal samples collected from leks were tested for parasites using PCR. Blood, fecal, and cloacal and choanal swabs from captured birds were tested for exposure or infection with select viruses and bacteria recognized to be of importance to prairie grouse. Samples from frozen archived birds and birds collected with a collection permit in spring 2020 and 2021 are currently being analyzed. Additional information is available upon request.

Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and existing conservation measures and regulations that may be addressing those threats.

Collection, exhibition, and trade of LPC is prohibited by KDWP without issuance of a Scientific Collection Permit (K.S.A. 32-807, 32-952, and 32-1002).

The LPC is currently considered as a Species of Greatest Conservation Need (SGCN) as defined by the Kansas State Wildlife Action Plan (SWAP). Using the WAFWA CHAT and data for existing contiguous native grasslands, the Kansas SWAP has identified several Ecological Focus Areas (EFA) which overlap the LPC range in Kansas. The SWAP also notes conservation issues and activities which seek to highlight threats to LPC and other SGCN, ways to restore or improve habitat for those species, and work to focus conservation efforts within the EFA landscapes. This allows Kansas to seek additional grant funding for conservation of SGCN, focuses work and program enrollments from conservation partners (e.g., USDA Environmental Quality Incentives Program-Wildlife), and takes a proactive approach to future conservation activities and focus areas if additional funding mechanisms avail themselves in the future (e.g., passage of the Recovering America's Wildlife Act).

Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

The five LPC state wildlife agencies continue their commitment to conduct 10 years of range-wide aerial surveys. Surveys have now been completed from 2012-2021 (except for 2019) and states are pursuing funding for 2022. WAFWA provided initial 2021 population estimates to the Service on June 30, 2021. A final report has been submitted to Service.

Information on regulations that are necessary and advisable to provide for the conservation of the Northern DPS of the lesser prairie-chicken and that the Service can consider in developing a 4(d) rule for the DPS. In particular, information concerning the extent to which we should include any of the prohibitions associated with section 9 in the 4(d) rule or whether any other forms of take should be excepted from the prohibitions in the 4(d) rule.

If the proposed listing is finalized, a blanket exemption for grazing should be provided in a 4(d) rule. While the Service has noted that granting a blanket 4(d) exemption for grazing is not the best tool to encourage and/or regulate grazing in the LPC range, they have not offered any alternative methods for addressing grazing and providing assurances to landowners. The Service has also noted that some existing rangeland is of low enough quality that it would not currently be considered habitat for the species. However, they cannot assess habitat quality at the landscape scale to inform landowners if their grazing lands would currently be considered as "habitat". Without any baseline data, it would be nearly impossible to determine if inappropriate grazing management has resulted in "take" pre- or post-listing (e.g., Was the parcel considered habitat when the species was listed or was it already too degraded?). The Service also does not have the staff to enforce take related to inappropriate grazing or develop plans/programs to provide coverage for suitable grazing management. Furthermore, the failure to exempt grazing activities is likely to exacerbate landowner hesitancy to work with the Service and their partners on conservation activities and may make it

more difficult to implement conservation plans to restore habitat. Alternative methods are costly and do not lend themselves to proactive, meaningful conservation with regulatory assurances.

As noted in the SSA, woody plant encroachment is a primary threat to LPC habitat and populations. KDWP requests mechanical removal of undesirable woody vegetation such as eastern red cedar (*Juniperus virginiana*), Russian olive (*Elaeagnus angustifolia*), black locust (*Robinia pseudoacacia*) and others (including native and non-native species) be included in the final 4(d) rule. Removing woody vegetation is a direct habitat restoration activity that benefits LPC and all efforts to curb woody vegetation encroachment should be promoted. Similarly, KDWP requests a provision for herbicide applications that target specific species of trees and non-native grasses be considered and included in a final 4(d) rule. The current proposed 4(d) rule only allows for chemical application that is directly related to agricultural practices. Targeted herbicide application in native prairie and grassland habitats can be crucial for removing undesirable trees (e.g., Eastern Redcedar, Black Locust, Siberian Elm, and Russian Olive) as well as invasive grasses including Yellow Bluestem (*Bothriochloa ischaemum*) and positively benefit LPC habitat.

KDWP supports the proposed 4(d) rule exceptions allowing continued agricultural practices on currently cultivated lands and the use of prescribed fire as a habitat management activity.

Information on whether an exception from the prohibitions associated with section 9 should be included in the 4(d) rule for the Northern DPS for industry and/or landowner participants who are enrolled in and operating in compliance with the mitigation framework included in the Range-Wide Conservation Plan for the Lesser Prairie-Chicken being administered by the Western Association of Fish and Wildlife Agencies but who do not have incidental take coverage via the companion Candidate Conservation Agreement with Assurances covering oil and gas activities.

KDWP strongly recommends the Service continue to work with WAFWA, industry participants, and landowner participants to encourage beneficial voluntary actions taken under the RWP, including providing incidental take coverage like that provided to oil and gas participants. State and Service leadership endorsed the RWP in 2013. This allowed industry and landowners to enroll in the RWP for potential take coverage through WAFWA Certificates of Participation in the WAFWA Conservation Agreement (WCA) built around the mitigation framework in the RWP. From 2014-2016 industry and landowners enrolled with the understanding of a 4(d) exemption covering RWP participants.

As a member on the WAFWA LPC Initiative Council, KDWP remains committed to the RWP as a tool for LPC conservation, voluntary landowner LPC habitat enhancement, and effective mitigation of industry impacts. KDWP is committed to working with LPC state wildlife agency partners, the Service, WAFWA personnel, and industry to reconcile the issues identified by the Service and the WAFWA Audit to insure continued administration of the RWP for both the Candidate Conservation Agreement with Assurances (CCAA) and the RWP WCA. WAFWA has developed a Net Conservation Benefits Analysis to transparently quantify the impacts and offsets of the RWP mitigation program. KDWP believes the RWP has provided a conservation benefit to LPC through conservation offsets, minimization efforts such as co-location, and mitigation of 2:1 offset habitat unit to impact habitat unit. Furthermore, because the Service endorsed the RWP in 2013, industry enrolled in the RWP with the understanding of legal assurances through WCA coverage in a 4(d) rule. Therefore, KDWP strongly recommends including language in the final 4(d) rule to provide

similar coverage for RWP WCA industry participants. Inclusion is both necessary and advisable because of prior commitments to industry participants as well as documented conservation benefit to LPC.

KDWP strongly recommends the Service include 4(d) language to explicitly provide coverage for landowners providing conservation offsets through the RWP. Participating landowners are required to manage their property to provide habitat for LPC. Some practices required by the WAFWA Conservation Agreements may result in short term take of LPC; however, the long-term beneficial impacts would outweigh the short-term impact. Inclusion of an exemption providing coverage for landowners participating in the RWP is both necessary and advisable. If coverage for RWP participants via a final 4(d) rule is not deemed possible, KDWP recommends the Service work with WAFWA to develop other options for coverage of potential take as well as assurances for regulatory predictability for industry AND landowner participants participating and in compliance with the RWP.

Which areas would be appropriate as critical habitat for the species and why areas should or should not be proposed for designation as critical habitat in the future, including whether there are threats to the species from human activity that would be expected to increase due to the designation and whether that increase in threat would outweigh the benefit of designation such that the designation of critical habitat may not be prudent.

Given the relative stability of LPC populations in Kansas, critical habitat should not be designated within the Northern DPS and/or Kansas. Efforts should instead be focused on proactive engagement of landowners to provide quality habitat within focal areas and connectivity zones identified in the RWP.

The amount and distribution of habitat for the lesser prairie-chicken which should be considered for proposed critical habitat;

The LPC Interstate Working Group continues to monitor and assess habitat as described in the RWP (Van Pelt et al. 2013). This process results in updates to the Focal Areas and Connectivity Zones and are updated on the CHAT website for reference by conservation partners and industry for targeting conservation efforts and informing development siting decisions.

Closing Remarks

KDWP reiterates our long-term commitment to LPC populations and habitats within Kansas and throughout the range. KDWP will continue our leadership and technical assistance roles in LPC habitat management through our Habitat First program and interactions with the USDA, as well as continuing our roles in the WAFWA RWP and Mitigation Program. We appreciate the Service's coordination efforts to date and look forward to continuing our collaborative efforts to conserve and restore LPC habitat in the future.

Sincerely,

Brad Loveless, Secretary

cc: Mike Miller, Assistant Secretary
Chris Tymeson, Chief Legal Counsel
Jake George, Wildlife Division Director
Rich Schultheis, Assistant Wildlife Division Director
Chris Berens, Ecological Services Section Chief
Kent Fricke, Small Game Coordinator

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