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January 30, 2023

The Honorable Deb Haaland
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
*By Email: exsec@ios.doi.gov, Deb_Haaland@ios.doi.gov
and Certified U.S. Mail (return receipt requested)*

The Honorable Martha Williams
Director
U.S. Fish & Wildlife Service
1849 C Street NW, Room 3331
Washington, D.C. 20240
*By email: fws_director@fws.gov, Martha_Williams@fws.gov
Certified U.S. Mail (return receipt requested)*

**RE: Notice of Intent to File Suit under the Endangered Species Act in Connection
with the Status of the Lesser Prairie-Chicken**

Dear Secretary Haaland and Director Williams:

This letter serves as written notice of my intent to sue you on behalf of the State of Kansas for failing to follow Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, with regard to the Final Rule the U.S. Fish and Wildlife Service (“Service”) issued on November 25, 2022.¹ Among other things, the Final Rule divides the Lesser Prairie-Chicken (“LPC”) into a “Northern Distinct Population Segment” (“NDPS”) and a “Southern Distinct Population Segment” (“SDPS”),² determines threatened status for the NDPS³ and endangered status for the SDPS,⁴ adds

¹ See 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, 87 Fed. Reg. 72,674 to 72,755 (Nov. 25, 2022), *available at* <https://www.govinfo.gov/content/pkg/FR-2022-11-25/pdf/2022-25214.pdf> [hereinafter “Final Rule”].

² See *id.* at 72674, 72,679-82, 72,738.

³ See *id.* at 72,674.

⁴ See *id.*

both so-called “segments” “to the List of Endangered and Threatened Wildlife,”⁵ and provides under the authority of Section 4 for “measures that are necessary and advisable to provide for the conservation of the [NDPS].”⁶ The Final Rule is effective March 27, 2023.⁷

Through the Kansas Department of Wildlife and Parks (“KDWP”), the State has worked with federal agencies (including the Service), regional organizations, the wildlife agencies of other states, nonprofit organizations, educational institutions, industry, and private landowners to conserve the LPC and its habitat.⁸ These joint efforts have resulted in or can be associated with the stabilization of the LPC’s population and the expansion of its range in Kansas.⁹

Also, as “[t]he vast majority of land within the known LPC range in Kansas is privately owned,”¹⁰ managing the LPC’s population and range at the state level through the KDWP personnel who have relationships with private landowners is essential. The Final Rule imperils the relationships the KDWP has established with private landowners as well as the voluntary actions those landowners have taken in connection with the effective and first-of-its-kind LPC Range-Wide Conservation Plan (“RWP”)—which the KDWP played a major role in developing and implementing.¹¹

Although they care about the LPC,¹² Kansans also care about private-property rights¹³ and rely on industries like farming, ranching, wind, and mineral extraction for jobs, food, energy, and economic prosperity.¹⁴ In addition to imperiling each of the foregoing, the Final Rule violates

⁵ See *id.*

⁶ See *id.*

⁷ See Press Release, U.S. Fish & Wildlife Service, Service Extends Effective Date for Lesser Prairie-Chicken Listing ¶ 1 (Jan. 23, 2023), available at <https://www.fws.gov/press-release/2023-01/service-extends-effective-date-lesser-prairie-chicken-listing>. The Final Rule was originally to be effective January 24, 2023. See Final Rule, *supra* note 1, at 72,674.

⁸ See KAN. DEP’T OF WILDLIFE & PARKS, 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 2, 5, 8-9 (Sept. 1, 2021), available at <https://www.regulations.gov/comment/FWS-R2-ES-2021-0015-0397> [hereinafter “KDWP Comment”].

⁹ See *id.* at 1, 3.

¹⁰ See OFFICE OF THE KAN. ATT’Y GEN., RE: FWS-R2-ES-2021-0015-0285 – PROPOSED LISTING OF THE NORTHERN DISTINCT POPULATION SEGMENT OF THE LESSER PRAIRIE-CHICKEN AS A THREATENED SPECIES UNDER SECTION 4(D) OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED 2 (Sept. 1, 2021), available at <https://www.regulations.gov/comment/FWS-R2-ES-2021-0015-0373>.

¹¹ See KDWP Comment, *supra* note 8, at 2, 8-9.

¹² See, e.g., U.S. DEP’T OF AGRIC., NATURAL RES. CONSERVATION SERV., LESSER PRAIRIE-CHICKEN: 2021 PROGRESS REPORT 2 (2021), available at https://www.nrcs.usda.gov/sites/default/files/2022-10/Lesser%20Prairie%20Chicken_Scorecard_2022.pdf (featuring photograph of Kansas landowner participating in Lesser Prairie-Chicken Initiative).

¹³ See, e.g., [K.S.A. § 77-702](#) (declaring it to be Kansas public policy “that state agencies . . . anticipate, be sensitive to and account for the obligations imposed by . . . [the U.S. and Kansas] constitution[s]” and declaring further that “the express purpose of th[e Private Property Protection Act is] to reduce the risk of undue or inadvertent burdens on private property rights resulting from certain lawful governmental actions”).

¹⁴ See AGRICULTURE, <https://www.kansascommerce.gov/industry/agriculture/> (last visited Jan. 17, 2023); ENERGY & NATURAL RESOURCES, <https://www.kansascommerce.gov/industry/energy-natural-resources/> (last visited Jan. 17, 2023).

Section 4 of the ESA as well as the ESA’s implementing regulations.¹⁵

ARGUMENT

In a letter to you dated January 19, 2023, the State of Texas outlined several ways in which the Final Rule violates the ESA as well as Texas’s grounds for suit. In a letter to you dated the same date (drafted by Kelly Hart & Hallman LLP), the Permian Basin Petroleum Association and five other organizations outlined other ways in which the Final Rule violates the ESA as well as those organizations’ grounds for suit. Kansas hereby joins each of those letters. Kansas also asserts the following additional problems with the Final Rule:

Failure to Adequately Consider Pre-Existing and Ongoing Voluntary Measures

The Service did not adequately take into account Kansas’s pre-existing and ongoing conservation and mitigation measures. Among other things, the KDWP commented in response to the proposed version of the Final Rule that it has monitored and conserved the LPC since the 1960s¹⁶ and that, in connection with the RWP, Kansas’s LPC population has stabilized and its range has expanded.¹⁷ However, the Final Rule either mischaracterized the RWP’s effectiveness or in several instances did not dispute the proposition that the RWP caused or can be linked to the stabilization of Kansas’s LPC population.¹⁸

Furthermore, the Final Rule’s conclusions about the future effectiveness of the RWP are doubtful speculation at best and contrary to actual, demonstrated experience from the RWP’s implementation. Thus, those conclusions are not based on “the best scientific and commercial data available.”¹⁹ Listing the LPC therefore violates the ESA, which requires the Service to “determine whether any species is an endangered species or a threatened species” only “*after*,” among other things, “taking into account those efforts . . . being made by any [s]tate . . . to protect such species.”²⁰ It also violates the ESA’s implementing regulations, which require the Service to “take into account, in [determining that a species is endangered or threatened], those efforts . . . being made by any [s]tate . . . to protect such species[.]”²¹

Relatedly, the Service discounted the connection between the RWP and the LPC’s recent bounce-back and stabilization because of the Service’s focus on supposed “long-term” data over more recent aerial surveys.²² However, the Service admits in the Final Rule that historical data is (or can be) conjectural and poorly documented²³ and that aerial surveys provide the most statistically

¹⁵ Kansas does not intend to waive any claim(s) it may have under the U.S. Constitution, the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, or other law, which may be asserted without the prior notice required by Section 11 of the ESA. *See, e.g., All. for the Wild Rockies v. U.S. Dep’t of Agric.*, 772 F.3d 592, 601-04 (9th Cir. 2014).

¹⁶ *See* KDWP Comment, *supra* note 8, at 1, 3.

¹⁷ *See id.*

¹⁸ *See* Final Rule, *supra* note 1, at 72,695-697, 72,715, 72,729-730.

¹⁹ *See* 16 U.S.C. § 1533(b)(1)(A) and (b)(2).

²⁰ *See id.* at § 1533(a)(1) and (b)(1)(A) (emphasis added).

²¹ *See* 50 C.F.R. § 424.11(c) and (g).

²² *See* Final Rule, *supra* note 1, at 72,713-14.

²³ *See id.* at 72,676, 72,686-87, 72,689, 72,711, 72,713.

reliable evidence available.²⁴ Thus, the Service’s decision to rely on supposed “long-term” data is not based on the best scientific data available and, indeed, is a rejection of the same.

Restricting Human Activity Despite Causation by Natural Factors

The protective measures the Final Rule imposes, e.g., the new exception from the Section 9 take prohibition for take incidental to grazing management when land managers follow a site-specific grazing plan developed by a Service-approved third party,²⁵ cannot reasonably be understood as necessary and advisable to provide for the conservation of the LPC. As the Service admits in the Final Rule, LPC populations are substantially driven by precipitation patterns.²⁶ Indeed, the dramatic rise in LPC populations following the end of the 2009-2012 drought and the return of sufficient rainfall²⁷ suggests strongly that the same will occur when the current drought ends. Yet the protective measures the Final Rule imposes apply entirely to human activity that is unconnected to and does not directly affect precipitation patterns.

CONCLUSION

Kansans care about the LPC and have successfully managed and conserved its so-called “NDPS”. At the same time, Kansans care about private property rights as well as feeding their families, having jobs, having access to a range of energy sources, and advancing and maintaining the economic prosperity of Kansas. Farming, ranching, wind energy, and fossil fuels are inextricably linked to those things. In addition to imperiling the foregoing, the Final Rule is unlawful for the reasons explained above.

If the Service does not withdraw the Final Rule, Kansas intends to file suit in federal court seeking declaratory relief, injunctive relief, and litigation costs, as appropriate under the ESA. Kansas may also bring additional claims under the U.S. Constitution, the Administrative Procedure Act, or other law.

I look forward to receiving a response from and working with the Service so that it will not be necessary to take further legal action in connection with this matter.

Sincerely,



Kris Kobach
Kansas Attorney General

²⁴ See *id.* at 72,714.

²⁵ See *id.* at 72,675.

²⁶ See *id.* at 72,693-94, 72,706-07, 72,713-14, 72,722.

²⁷ See *id.* at 72,713.