

Testimony of Don Hineman
Farmer and Rancher
Dighton, Kansas
Before the Subcommittee on Water, Wildlife and Fisheries
Committee on Natural Resources
U.S. House of Representatives
April 18, 2023

Re: Hearing on H.J. Res. 29, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the United States Fish and Wildlife Service relating to "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".

Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee, thank you for the opportunity to testify today in support of H.J. Res. 29, a resolution to disapprove the U.S. Fish and Wildlife Service (FWS) final rule titled: "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" (hereinafter "Final Rule").

I am Don Hineman, a rancher and farmer in Lane County Kansas, where some of the land we operate on today was first homesteaded by my great-grandfather in 1886. I have been active in both Kansas Livestock Association and National Cattlemen's Beef Association and served as President of KLA in 2001. My commitment to industry organizations continues to this day, as I presently serve on the Legislative Committee for National Sorghum Producers. I served in the Kansas House of Representatives from 2009 until 2021, when I retired (voluntarily). I held the office of Kansas House Majority Leader in 2017 and 2018.

I believe this rule, if allowed to stand, will not only adversely affect me and my neighbors, but it will also hinder, not help, further recovery of the lesser prairie chicken (LPC). To understand, the Subcommittee must recognize the scope of activities aimed at conserving the LPC prior to the Final Rule and what has happened since the rule was proposed.

Prior to the Final Rule, significant voluntary conservation efforts were geared toward the LPC. Farmers and ranchers, like me, took advantage of U.S. Department of Agriculture (USDA) conservation programs like the Conservation Reserve Program (CRP), the Conservation Stewardship Program (CSP), and the Environmental Quality Incentives Program (EQIP).

USDA, through CRP, contracts with farmers on a ten to fifteen-year basis to plant environmentally sensitive farmland to perennial, native vegetation, in exchange for an annual rental payment. Production of commodity crops, except managed grazing or haying under a conservation plan, is prohibited. I believe CRP has resulted in significant benefit to the LPC in my area. However, CRP acres are being threatened because Congress, in the last Farm Bill, decreased the rental rates compared to fair market rental rates. This policy decision, in addition

to eliminating certain mid-contract maintenance cost-share payments and high commodity prices, has led some expiring CRP acres to return to crop production.

The Conservation Stewardship Program, unlike CRP, provides incentive payments to farmers to adopt conservation practices on working lands. CSP practices, like no-till on cropland and rotational grazing on pasture, provide additional habitat and food sources for the LPC.

In addition to USDA conservation programs, a regional voluntary conservation plan, known as The Lesser Prairie-Chicken Range-Wide Conservation Plan (Range-Wide Plan)¹ was undertaken by the Western Association of Fish and Wildlife Agencies (WAFWA). The Range-Wide Plan was coupled with the Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances (CCAA).²

The Range-Wide Plan and CCAA established a framework where the oil and gas industry could identify a location for development and determine if it would have an impact on the LPC using a matrix in the Range-Wide Plan. Based on the level of potential impact at the development site, the oil and gas developer could make a mitigation payment into the conservation fund in exchange for take protections in the event of a listing. Those oil and gas mitigation funds were then available for WAFWA to contract with farmers and ranchers to apply on-the-ground conservation activities to benefit the LPC. This could include prescribed burns, removal of brush adverse to the LPC, other land management strategies like grazing plans, and even long-term conservation easements. This structure raised approximately \$65 million and according to WAFWA, “As of December 31, 2022, there were 126 industry Participants¹ with 5,707,580 acres of industry leased or controlled private lands enrolled in the CCAA.”³

The previously mentioned voluntary efforts were simultaneously at work as early as 2013. According to annual WAFWA surveys the LPC numbers grew from approximately 16,724 total population in 2013 to 36,278 in 2020.⁴ While recent WAFWA surveys showed a decline in the population in the last year, WAFWA stated: “An estimated total population decrease of 6,913 LPC was observed from 2021 to 2022 (20.6% decrease); however, this decrease was not statistically significant at the 90% confidence level (90% CI: -22,205, 6,328).” Certainly, the previous year’s decline and what is likely to be a decline in the coming year can be directly linked to severe drought in the region. The fact that declines have not been worse in the face of this historic drought, is a credit to the conservation that has already been put on the ground.

In 2021, in the face of an increasing LPC population and significant voluntary conservation efforts, the FWS decided to propose listing the LPC as threatened and endangered species under the Endangered Species Act (ESA), despite having a previous listing invalidated by a federal court in 2016. Part of the 2016 federal court decision to vacate the previous LPC listing decision was the failure of the FWS to consider voluntary conservation efforts and the impact of those

¹ https://wafwa.org/wp-content/uploads/2013/10/LesserPrairieChicken_RangeWideConservationPlan_2013.pdf

² https://wafwa.org/wpdm-package/range-wide-oil-gas-candidate-conservation-agreement-with-assurances-for-the-lesser-prairie-chicken/?wpdmdl=23006&refresh=643874519f1ca1681421393&ind=1652297845773&filename=LPCRWP_CCAA-with-CI_02282014.pdf

³ <https://wafwa.org/wp-content/uploads/2023/03/WAFWA-2022-LPC-CCAA-Annual-Report-03.31.2023.pdf>

⁴ https://wafwa.org/wp-content/uploads/2022/11/LPC_RangeWidePopSize2012-2022.pdf

efforts on the species. It appears that FWS has once again attempted a listing of the LPC without fully considering voluntary conservation and its impact on the LPC population.

Once the LPC listing proposal was announced, it began to have an impact on voluntary conservation activities. Under the threat of civil enforcement actions, no farmer, rancher, or landowner wants to voluntarily raise their hand and acknowledge the presence of a threatened or endangered species. Residents of western Kansas are an independent group, and the potential of having FWS restrict activities on private property is something that will make landowners avoid cooperative agreements, whether it is with a public or private entity.

One particular part of the Final Rule that is especially burdensome on ranchers is the portion of the Final Rule known as the 4(d) Rule. Section 4(d) of the ESA allows the FWS to develop regulations for threatened species “advisable to provide for the conservation of such species.” This often takes the form of incidental take protections. In the Final Rule, the FWS extended incidental take protections to routine agricultural activities associated with cultivated agriculture. The FWS extended this protection to farmers while acknowledging:

Lesser prairie-chickens travel from native rangeland and CRP lands, which provide cover types that support lesser prairie-chicken nesting and broodrearing, to forage within cultivated fields supporting small grains, alfalfa, and hay production. Lesser prairie chickens also maintain lek sites within these cultivated areas, and they may be present during farming operations.⁵

As both a farmer and a rancher, I appreciate this incidental take protection for cultivated land, but I am significantly disappointed the FWS did not extend this protection to my native grass acres used for grazing cattle. The FWS notes that habitat loss is a major factor in the decline of the species population. If that is the case, why would an agency go out of its way to subject ranchers to the threat of civil enforcement, despite their native range acres being the sole reason the LPC continues to exist today? To make matter worse, in the Final Rule, the FWS said the only way ranchers could get incidental take protection, is if the landowner follows a “a site-specific grazing plan developed by a ‘Service-approved party.’” Under the Final Rule a “Service-approved party” means “the individual or entity must possess adequate training or experience, typically 5 years or more, in the fields of wildlife management, biology, or range ecology.” Not only is the FWS forcing ranchers to subject their management decisions to a government approved third-party with no ranching experience, but as of today, the FWS has yet to designate a single Service-approved party.

The lack of any meaningful incidental take mechanism leaves ranchers exposed to severe fines despite having managed their land for years to sustain the existing LPC populations. It would only reason, that in the absence of private Service-approved parties, the USDA, Natural Resource Conservation Service (NRCS) technicians could easily provide this type of assistance, but NRCS has declined to become a Service-approved party under the 4(d) rule citing lack of capacity.

⁵ 87 Fed. Reg. 29476 (June 1, 2021).

Even though the 4(d) protections for ranchers in Kansas, Colorado, and Oklahoma is a deeply flawed system, ranchers and farmers in Texas and New Mexico are in a far worse situation. These producers have no incidental take protection opportunities because they are located in what is called the Southern Distinct Population Segment (DPS). FWS took the unprecedented step to create two distinct populations regions, despite offering no evidence that the species are genetically different. It then deemed the Southern DPS endangered and the Northern DPS threatened. This simply defies logic and puts all of agriculture in the Southern DPS at risk.

Given the failure of the FWS to properly consider voluntary conservation efforts and its failure to provide adequate protections for ranchers who are currently conserving the bird, I believe that H.J. Res. 29 is the appropriate response to the misguided Final Rule for listing of the LPC as threatened and endangered. I ask the Natural Resources Committee to approve H.J. Res. 29 favorable for passage as soon as possible.