TAKINGS ASSESSMENT STATEMENT

K.A.R. 115-15-1. Threatened and endangered species; general provisions.
K.A.R. 115-15-2. Nongame species; general provisions.

BACKGROUND: The Private Property Protection Act, K.S.A. 77-701 *et seq*., requires state agencies to evaluate certain governmental actions to determine whether such actions may constitute a taking, and to make the resulting written report available for public inspection. Guidelines to evaluate such governmental actions were established by the Attorney General and published in the Kansas Register on December 21, 1995. Before a state agency initiates a governmental action, it shall prepare a written report, following the Attorney General's guidelines, and make the report available for public inspection. Two regulations affecting species receiving some level of protected status based on their need for conservation, K.A.R. 115-15-1 and K.A.R. 115-15-2, and jointly assessed in this statement.

ANALYSIS: The analysis used follows the sequence and the scope of the questions from the "Takings Checklist" contained in the Attorney General's Guidelines.

1. Does the government action result in a permanent or temporary physical occupation or invasion of private property?

2. Does the governmental action deny or abrogate a fundamental property right?

3. Does the governmental action deprive the owner of all economically viable uses of the property?

4. Does the governmental action substantially further a legitimate interest?

5. Are the proscribed uses or physical occupation part of a preexisting limitation on the landowner's title?

K.A.R. 115-15-1 identifies species classified as endangered or threatened in Kansas, as required by, and according to the factors listed in K.S.A. 32-960. K.S.A. 32-960 requires the agency secretary to determine whether any species of indigenous wildlife is a threatened or endangered species because of any of the statutorily imposed factors:

(1) the present or threatened destruction, modification or curtailment of its habitat or range;
(2) the over utilization of such species for commercial, sporting, scientific, educational or other purposes;
(3) disease or predation;
(4) the inadequacy of existing regulatory mechanisms; or
(5) the presence of other natural or man-made factors affecting its continued existence within this state.

The secretary's determination is to be made on the basis of the best scientific, commercial and

other data available to the secretary, and after consultation, as appropriate, with federal agencies, other interested state agencies and interested persons and organizations.

K.A.R. 115-15-2 identifies species in need of conservation, as required by, and according to the factors in K.S.A. 32-959(a). The law stipulates that this determination shall be on the basis of information related to population, distribution, habitat needs, limiting factors and other biological and ecological data concerning nongame species, gathered to determine conservation measures necessary for their continued ability to sustain themselves successfully. Species listed in this classification are not considered to be at the level of danger of threatened or endangered species, and do not receive the same level of legal protection.

1. Do the proposed amendments result in a permanent or temporary physical occupation or invasion of private property?

The listing of a species as threatened, endangered, or in need of conservation does not require an "occupation or invasion" of private property. Investigations surveying for the presence, or absence, of a species are among the statutorily available and authorized activities available to the agency pursuant to K.S.A. 32-959, and that activity does not rise to a level constituting an occupation or invasion. Typically, agency personnel seek consent of the landowner, or manager prior to conducting an inspection. If such consent is withheld, then the agency endeavors to work through a third party intermediary (such as a watershed district or a NRCS representative) to explain to the property owner the relevancy of such inspection to activities beneficial to the property owner. If those efforts fail to generate a consent, then the agency typically relies on other scientific data.

2. Do the proposed amendments deny or abrogate a fundamental property right?

Protected fundamental property interests include the right to possess property, the right to exclude others from the property and the right to dispose of the property. By state law, ownership of all wildlife is declared to be in the state, regardless of whether it is listed or not (K.S.A. 32-703). Consequently, the listing of a species as threatened or endangered does not dispose or otherwise impair a property owner's continuing existing use of private property.

Listing a species as threatened or endangered (but not as a species in need of conservation) could have certain indirect effects on the use of a person's property, if a proposed use of the property would result in the alteration of the listed species' habitat or destruction of individuals of the species. Any person sponsoring or responsible for a publicly funded action of this sort, or an action requiring a permit from another state or federal permit from another state or federal government agency, must apply for a permit from the department, pursuant to K.A.R. 115-15-3. However, this permit is not required for normal farming and ranching practices, or for development of residential and commercial property on privately-owned property financed with private, nonpublic funds, unless a permit is required by another state or federal agency, or unless the action would involve an intentional taking (defined as an act or attempt that is willful and done for the purpose of taking a threatened or endangered species). Pursuant to K.A.R. 115-15-3(d), the secretary is obligated to issue a permit for which a timely and complete application has been submitted, if the proposed action meets with two conditions. First, the application must

describe in the action plan sufficient mitigating or compensating measures to ensure protection of critical habitats and listed species, and assurances that such measures will remain in effect. Second, the proposed activity must comply with all federal laws protecting listed species.

The mere listing of a species as threatened, endangered or in need of conservation does not require any action by a property owner. Only if the property owner elects to undertake publicly funded activity that could result in the taking of a threatened or endangered species would a permit be required. In addition, these permits are not required for certain actions, and department regulation states that, in any case, law enforcement action would only be taken in cases involving intentional takings.

3. Do the proposed amendments deprive the owner of all economically viable uses of the property?

The listing of a species as threatened, endangered, or in need of conservation does not, itself, have any impact on the use of property. However, as noted above, a permit may be required if a proposed use would result in the alteration of a threatened or endangered species' habitat or the destruction of an individual of the species. Again, management of private property for normal farming or ranching uses would not be impaired by the listing of a threatened or endangered species, even if such practices were publicly funded or state or federally assisted, unless an intentional taking were involved. In addition, development of residential or commercial property would not be impaired unless publicly funded or an intentional taking were involved.

In addition, no use of private property could ever be restricted under these regulations unless it were publicly funded, state or federally assisted, or destroyed individuals of any listed species. All other economically viable uses of the property not within these categories are still available to the landowner. Furthermore, any use proposed action that would fall within these categories will still receive a permit to proceed, as long as sufficient mitigating or compensating measures are incorporated within the proposed action. Therefore, even in such cases, the regulation would not deprive a property of all economically viable use.

4. Do the proposed amendments substantially further a legitimate state interest?

The general governmental purposes for listing of any threatened or endangered species have been articulated in the Congressional findings and declaration of policies in the Federal Endangered Species Act of 1973 (16 U.S.C.A. 1531). Congress found that "various species of fish, wildlife and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," and that "other species of fish, wildlife and plants have been so depleted in numbers that they are in danger of or threatened with extinction," and such species are of "esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people." Such findings adopted at a national level have equal applicability at the state level.

State statute makes determination of threatened or endangered species by the secretary obligatory, and not merely optional. See K.S.A. 32-960(a) (the secretary shall determine

whether any species of wildlife indigenous to the state is a threatened species...) (emphasis added). The Kansas Legislature by statutorily adopting these obligatory requirements and imposing them upon the secretary evidenced that such conservation and protection provisions furthered a legitimate state interest.

A further legitimate state interest is served because federal agencies are directed by statutory federal policy (16 U.S.C.A. 1531(c)) to use their authority in furtherance of the stated federal policy of conserving ecosystems of threatened and endangered species. State law or regulation respecting a threatened species may be more restrictive, but can not be less restrictive than federal law or regulation (16 U.S.C.A. 1535(f)). The Secretary of Interior may enter into cooperative agreements with a state, provided that state "establishes and maintains an adequate and active program for the conservation of endangered and threatened species" (16 U.S.C.A. 1535(c)). With such cooperative agreements come substantial financial assistance to the state to develop conservation programs. The cost sharing for such programs has 75% of the cost being borne by the federal government. Therefore, a determination by the Secretary of Interior that a state was not maintaining an "adequate or active" program could place in potential jeopardy substantial federal assistance to the state.

5. Are any proscribed uses or physical occupation from the proposed amendments part of a preexisting limitation on the landowner's title?

As described above, the listing of a threatened or endangered species does not result in a permanent or temporary physical occupation on private property without consent of the landowner or manager. Second, as described above, the regulations do not deprive an owner of all economically viable uses of the property.

Even if limited proscriptions would exist, however (due to the involvement of public funding, for example), they may be part of a preexisting limitation on the landowner's title. For example, to the extent a landowner is also within a watershed district, and such district wishes to use federal assistance for construction of watershed structures (dams or impoundments), then the statutory rights of the watershed district may be pre-existing limitations that limit the impact of a listing of a species as threatened or endangered. Specifically, K.S.A. 24-1209 vests in an incorporated watershed district the power "where the construction, improvement or operation of such works causes the substantial displacement of a wildlife habitat and when required by the soil conservation service of the United States department of agriculture as a condition precedent of the release of federal funds for such works, to acquire land for the purpose of restoring such wildlife habitat." The watershed district authorizing statutes contemplate that conservation or protection of wildlife habitat may be a factor in the siting and design of structures or impoundments and further, that certain mitigating conditions may have to be developed to gain approval by a federal funding source. Therefore, even if the listing of a threatened or endangered species were to create some limitations on the use of the property, it might not necessarily impose more of a burden for property already within a watershed district.

Also, watershed developments fall within the existing scope of the Kansas Water Projects Environmental Coordination Act (K.S.A. 82a-325, *et seq*.). Such Coordination Act requires the consideration of the environmental effects of any water development project. By statutory

definition, the department is an environmental review agency, to whom watershed development projects must be submitted for review and comment. K.S.A. 82a-326(b)(1) and 82a-327. Permissible consideration for such review include:

(a) beneficial and adverse environmental effects of proposed project on fish and wildlife;
(b) means and methods to reduce adverse environmental effects; and
(c) alternatives to a proposed project with significant adverse environmental effects.

Therefore, construction of a watershed dam could require the district to file an application for and obtain a permit if a threatened or endangered species were present, but due to the existing limitation under the Kansas Water Projects Environmental Coordination Act, the impact of such listing is reduced in this context.

Finally, any possible limitation would only occur if the proposed use of the property would impact a listed species. If another listed species already exists in the same habitat as the newly listed species, restrictions on the use of the property, if any, would be pre-existing. For certain of the proposed species for listing (e.g. the Silver chub, in the Kansas and Missouri Rivers), that would normally be the case.

CONCLUSION: Based on the foregoing analysis, the agency believes that the proposed amendments to K.A.R. 115-15-1 and to K.A.R. 115-15-2 do not constitute a taking of private property.