

115-15-2. Nongame species; general provisions. (a) The following species shall be designated nongame species in need of conservation within the boundaries of the state of Kansas.

(1) Invertebrates

~~Cylindrical papershell mussel, *Anodontooides ferussacianus* (I. Lea, 1834)~~

Snuffbox mussel, *Epioblasma triquetra* (Rafinesque, 1820)

Wartyback mussel, ~~*Quadrula*~~ *Cyclonaias nodulata* (Rafinesque, 1820)

Spike mussel, *Elliptio dilatata* (Rafinesque, 1820)

~~Wabash pigtoe mussel, *Fusconaia flava* (Rafinesque, 1820)~~

Fatmucket mussel, *Lampsilis siliquoidea* (Barnes, 1823)

Yellow sandshell mussel, *Lampsilis teres* (Rafinesque, 1820)

Washboard mussel, *Megalonaias nervosa* (Rafinesque, 1820)

Round pigtoe mussel, *Pleurobema sintoxia* (Conrad, 1834)

Creeper mussel, *Strophitus undulatus* (Say, 1817)

Fawnsfoot mussel, *Truncilla donaciformis* (I. Lea, 1828)

Deertoe mussel, *Truncilla truncata* (Rafinesque, 1820)

Ozark emerald dragonfly, *Somatochlora ozarkensis* (Bird, 1833)

Gray petaltail dragonfly, *Tachopteryx thoreyi* (Hagen in Selys, 1857)

Prairie mole cricket, *Gryllotalpa major* (Saussure, 1874)

Neosho midget crayfish, *Orconectes macrus* (Williams, 1952)

(2) Fish

Arkansas darter, *Etheostoma cragini* (Gilbert, 1885)

Banded darter, *Etheostoma zonale* (Cope, 1868)

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Banded sculpin, *Cottus carolinae* (Gill, 1861)
Black redhorse, *Moxostoma duquesnei* (Le Sueur, 1817)
Blue sucker, *Cycleptus elongatus* (Le Sueur, 1817)
Western blacknose dace, *Rhinichthys obtusus* (Agassiz, 1854)
Bluntnose darter, *Etheostoma chlorosoma* (Hay, 1881)
Brassy minnow, *Hybognathus hankinsoni* (Hubbs, 1929)
Gravel chub, *Erimystax x-punctatus* (Hubbs and Crowe, 1956)
Greenside darter, *Etheostoma blennioides* (Rafinesque, 1819)
Highfin carpsucker, *Carpionodes velifer* (Rafinesque, 1820)
Northern hog sucker, *Hypentelium nigricans* (Le Sueur, 1817)
Ozark minnow, *Notropis nubilus* (Forbes, 1878)
River darter, *Percina shumardi* (Girard, 1859)
River redhorse, *Moxostoma carinatum* (Cope, 1870)
River shiner, *Notropis blennioides* (Girard, 1856)
Slough darter, *Etheostoma gracile* (Girard, 1859)
Highland darter, *Etheostoma teddyroosevelt* (Jordan, 1877)
Spotfin shiner, *Cyprinella spiloptera* (Cope, 1868)
Spotted sucker, *Minytrema melanops* (Rafinesque, 1820)
Sunburst darter, *Etheostoma mihileze* (Agassiz, 1854)
Tadpole madtom, *Noturus gyrinus* (Mitchill, 1817)
Brindled madtom, *Noturus miurus* (Jordan, 1877)

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Bigeye shiner, *Notropis boops* (Gilbert, 1884)

Redfin darter, *Etheostoma whipplei* (Girard, 1859)

Lake Sturgeon, *Acipenser fulvescens* (Rafinesque, 1817)

Striped shiner, *Luxilus chrysocephalus* (Rafinesque, 1820)

Common shiner, *Luxilus cornutus* (Mitchill, 1817)

Southern Redbelly Dace, *Chrosomus erythrogaster* (Rafinesque, 1820)

Cardinal Shiner, *Luxilus cardinalis* (Mayden, 1988)

Johnny Darter, *Etheostoma nigrum* (Rafinesque, 1820)

Chestnut lamprey, *Ichthyomyzon castaneus* (Girard, 1858)

Silverband shiner, *Notropis shumardi* (Girard, 1856)

(3) Amphibians

Red-spotted toad, *Anaxyrus punctatus* (Baird and Girard, 1852)

Crawfish frog, *Lithobates ~~areolata~~ areolatus* (Baird and Girard, 1852)

Spring peeper, *Pseudacris crucifer* (Wied-Neuwied, 1838)

(4) Reptiles

Rough earth-snake earthsnake, ~~Virginia~~ *Haldea striatula* (Linnaeus, 1766)

~~Western hognose~~ Plains hog-nosed snake, *Heterodon nasicus* (Baird and Girard, 1852)

Timber rattlesnake, *Crotalus horridus* (Linnaeus, 1758)

~~Eastern hognose~~ hog-nosed snake, *Heterodon platirhinos* (Latreille, 1801)

Glossy snake, *Arizona elegans* (Kennicott, 1859)

~~Chihuahuan night snake~~ nightsnake, *Hypsiglena jani* (Duges, 1865)

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Redbelly Red-bellied snake, *Storeria occipitomaculata* (Storer, 1839)

Longnose Long-nosed snake, *Rhinocheilus lecontei* (Baird and Girard, 1853)

Smooth earth ~~snake~~ earthsnake, *Virginia valeriae* (Baird and Girard, 1853)

(5) Birds

Bobolink, *Dolichonyx oryzivorus* (Linnaeus, 1758)

Cerulean warbler, *Setophaga cerulea* (Wilson, 1810)

Curve-billed thrasher, *Toxostoma curvirostre* (Swainson, 1827)

Ferruginous hawk, *Buteo regalis* (Gray, 1844)

Golden eagle, *Aquila chrysaetos* (Linnaeus, 1758)

Short-eared owl, *Asio flammeus* (Pontoppidan, 1763)

Henslow's sparrow, *Ammodramus henslowii* (Audubon, 1829)

Ladder-backed woodpecker, *Picoides scalaris* (Wagler, 1829)

Long-billed curlew, *Numerius americanus* (Bechstein, 1812)

Mountain plover, *Charadrius montanus* (Townsend, 1837)

Chihuahuan raven, *Corvus cryptoleucus* (Couch, 1854)

Black tern, *Chlidonias niger* (Linnaeus, 1758)

Black rail, *Laterallus jamaicensis* (Gmelin, 1789)

Eastern whip-poor-will, *Antrostomas vociferus* (Wilson, 1812)

Yellow-throated warbler, *Setophaga dominica* (Linnaeus, 1776)

(6) Mammals

Franklin's ground squirrel, *Poliocitellus franklinii* (Sabine, 1822)

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Pallid bat, *Antrozous pallidus* (LeConte, 1856)

Southern bog lemming, *Synaptomys cooperi* (Baird, 1858)

Southern flying squirrel, *Glaucomys volans* (Linnaeus, 1758)

Texas mouse, *Peromyscus attwateri* (J.A. Allen, 1895)

Townsend's big-eared bat, *Corynorhinus townsendii* (Cooper, 1837)

Northern long-eared bat, *Myotis septentrionalis* (Trouessart, 1897)

(7) Turtles

Alligator snapping turtle, *Macrochelys temminckii* (Troost, in Harlan, 1835)

(b) Any nongame species in need of conservation taken during established trapping seasons, authorized commercial wildlife operations, fishing by hook and line, ~~bait fish~~ baitfish seining, or other lawful activity shall not be unlawfully taken if immediately released.

(c) Any nongame species in need of conservation in possession before the effective date of this regulation and not prohibited by any previous regulation of the department or national listings may be retained in possession if either of the following conditions is met:

(1) An application of affidavit to that effect has been filed with and approved by the secretary before January 1, 1990, that states the circumstances of how the species came into possession.

(2) Possession of the animal has been previously approved by the department. (Authorized by K.S.A. 32-959 and 32-963; implementing K.S.A. 32-959 and K.S.A. ~~2013~~ 2018 Supp. 32-1009; effective Oct. 30, 1989; amended Aug. 31, 1992; amended Nov. 29, 1999; amended Feb. 18, 2005; amended July 24, 2009; amended Nov. 14, 2014; amended P-_____.)

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**Kansas Administrative Regulations
Economic Impact Statement
For the Kansas Division of the Budget**

KDWPT
Agency

Christopher J Tymeson
Agency Contact

785-296-1032
Contact Phone Number

K.A.R. 115-15-2
K.A.R. Number(s)

Submit a hard copy of the proposed rule(s) and regulation(s) and any external documents that the proposed rule(s) and regulation(s) would adopt, along with the following to: Division of the Budget
900 SW Jackson, Room 504-N
Topeka, KS 66612

I. Brief description of the proposed rule(s) and regulation(s).

This permanent regulation designates species classified as species in need of conservation in Kansas. The proposed amendments to the regulation would list one species, the Arkansas darter, from threatened to SINC and remove one species, the Wabash pigtoe mussel.

The Kansas Nongame and Endangered Species Act, K.S.A. 32-957 et seq., requires the department to adopt rules and regulations “which contain a list of the nongame species deemed by the secretary to be in need of conservation” (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.

K.S.A. 32-960(a). The law stipulates that the secretary make the above determinations on the basis of the best scientific, commercial, and other data available to the secretary after consultation, as appropriate, with federal agencies, other interested state agencies and interested persons and organizations. In addition, the secretary is required to take into consideration those actions, if any, being carried out or about to be carried out by the federal government, by other states, by other agencies of this state or political subdivisions thereof, or by nongovernmental persons or organizations which may affect the species under consideration.

II. Statement by the agency if the rule(s) and regulation(s) is mandated by the federal government and a statement if approach chosen to address the policy issue is different from that utilized by agencies of contiguous states or the federal government. (If the approach is different, then include a statement of why the Kansas rule and regulation proposed is different)

This is not a federal mandate. State law or regulation respecting a threatened or endangered species may be more restrictive, but cannot 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. Missouri, Oklahoma, Nebraska and Colorado all have varying regulations dealing with endangered and threatened species. Colorado lists the Arkansas Darter as a threatened species.

III. Agency analysis specifically addressing following:

A. The extent to which the rule(s) and regulation(s) will enhance or restrict business activities and growth;

The proposed amendments to the regulation would not enhance or restrict business activity. SINC species do not require the same review of projects that may affect the species' habitat or status as do threatened or endangered species.

B. The economic effect, including a detailed quantification of implementation and compliance costs, on the specific businesses, sectors, public utility ratepayers, individuals, and local governments that would be affected by the proposed rule and regulation and on the state economy as a whole;

The proposed amendments to the regulation would not have implementation or compliance costs on any sector. SINC species do not require the same review of projects that may affect the species' habitat or status as do threatened or endangered species.

C. Businesses that would be directly affected by the proposed rule and regulation;

None. SINC species do not require the same review of projects that may affect the species' habitat or status as do threatened or endangered species.

D. Benefits of the proposed rule(s) and regulation(s) compared to the costs;

No costs are associated with this proposal except to the department. SINC species do not require the same review of projects that may affect the species' habitat or status as do threatened or endangered species.

E. Measures taken by the agency to minimize the cost and impact of the proposed rule(s) and regulation(s) on business and economic development within the State of Kansas, local government, and individuals;

The review process is extensive in order to ensure compliance with the law as well as ensure species are properly listed or delisted. K.S.A. 32-960(d) requires that every five years the secretary shall conduct a review of the species listed . . . and shall submit any proposed changes in the listings . . . to federal and state agencies and local and tribal governments and to all individuals and organizations that have requested notification of departmental action. In February of 2018, the five-year review of Kansas threatened, endangered and species in need of conservation list was initiated. Following a statewide news release, the blank petitions were made available on the Kansas Department of Wildlife, Parks and Tourism website. Completed petitions were requested by July 31, 2018. This initial process provides opportunity for submitting a petition for removal or addition of species to the Kansas list. By July 31, 2018, three species had been petitioned. State law also provides that petitions may be submitted outside of the five-year review process.

In September 2018, the department completed a preliminary review that determined which petitions were sufficient to warrant



further review for a possible listing status change. This preliminary review was conducted by a scientific task committee composed of personnel from the U.S. Fish and Wildlife service, universities, the Kansas Biological Survey, and the department. The scientific task committee determined that sufficient data existed to further consider whether a listing change action is warranted for three species: the Arkansas Darter, Cylindrical Papershell Mussel and Wabash Pigtoe Mussel.

As a component of the prescribed process, notice was published in the on the Department's website, informing the public that these species were being considered for listing actions, and that the department was obtaining a scientific review of these species' status from sources outside the agency. The notice also informed the public of four public meetings, to be conducted 90 days before submission of any proposed listing to the Wildlife and Parks Commission. Similar information was sent to federal and state agencies and local governments that may be affected by the proposed listings actions, as well as to individuals and organizations that had requested notification of proposed listing actions. Finally, this information was included in a news release sent to local newspapers and radio stations, as well as in the department's December 18, 2018 statewide news release.

Public informational meetings were held January 16, 2019 in Topeka, January 23, 2019 in Pittsburg, January 24, 2019 in Hays and January 25, 2019 in Pratt. These locations were selected based on their proximity to areas that may be affected by the proposed listing actions. At each meeting, department staff discussed the laws and procedures for listing a species as threatened or endangered, and reviewed each species' description, distribution, life history, and habitat. Staff emphasized that this was merely the beginning of the listing process, and that the public was invited to submit information for scientific review regarding each species' status.

In addition to other public notification efforts, information about each species proposed for listing was made available to the public at department offices, the department website and at public meetings of the Wildlife, Parks and Tourism Commission.

Finally, the scientific task committee sent information concerning the proposed listings to individuals and organizations believed to have knowledge and scientific information about one or more of the species in question. These individuals and organizations were asked to rate the species from zero (species in no danger) to ten (species near extirpation) for 17 different categories, using the Species Evaluation Categories endorsed by the Commission in the fall of 1997. These numerical evaluations, along with any other biological and scientific information submitted by the public, were collected by the scientific task committee over the 90-day public comment period to formulate recommendations to the Secretary.

Using this collected information, the scientific task committee finalized recommendations in May of 2019, and provided them to department administration. These recommendations were presented to the Wildlife and Parks Commission and to the public at the June 13, 2019 Commission meeting in Salina. Taking into consideration the feedback received at that meeting, the department has proceeded to develop regulatory actions.



Finally, after implementation of the regulation, the agency works with project sponsors to first avoid sensitive areas, then minimize impacts on sensitive areas and if no other alternative exists, works to mitigate habitat losses.

F. An estimate, expressed as a total dollar figure, of the total annual implementation and compliance costs that are reasonably expected to be incurred by or passed along to business, local governments, or members of the public.

There are no annual implementation and compliance costs associated with this proposal. SINC species do not require the same review of projects that may affect the species' habitat or status as do threatened or endangered species.

An estimate, expressed as a total dollar figure, of the total implementation and compliance costs that are reasonably expected to be incurred by or passed along to business, local governments, or members of the public.

There are no annual implementation and compliance costs associated with this proposal. SINC species do not require the same review of projects that may affect the species' habitat or status as do threatened or endangered species.

Do the above total implementation and compliance costs exceed \$3.0 million over any two-year period?

YES NO

Give a detailed statement of the data and methodology used in estimating the above cost estimate.

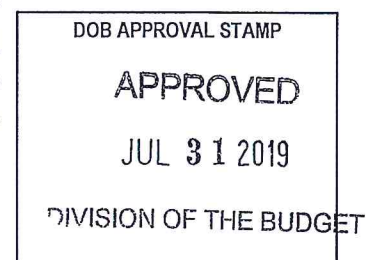
There are no implementation or compliance costs with this proposal at the current time.

Prior to the submission or resubmission of the proposed rule(s) and regulation(s), did the agency hold a public hearing if the total implementation and compliance costs exceed \$3.0 million over any two-year period to find that the estimated costs have been accurately determined and are necessary for achieving legislative intent? If applicable, document when the public hearing was held, those in attendance, and any pertinent information from the hearing.

YES NO

The agency held public hearings on this regulation on January 17, 2019 in Lawrence, where 4 members of the public signed the attendance roster, on March 28 in Topeka, where 12 members of the public signed the attendance roster, on April 25 in Colby, where 4 members of the public signed the attendance roster, and on June 13 in Salina, where 5 members of the public signed the attendance roster. The agency will also hold hearings on August 15 in Overland Park, September 19 in Great Bend, and November 14 in Scott City.

G. If the proposed rule(s) and regulation(s) increases or decreases revenues of cities, counties or school districts, or imposes functions or responsibilities on cities, counties or school districts that will increase expenditures or fiscal liability, describe how the state agency consulted with the League of Kansas



Municipalities, Kansas Association of Counties, and/or the Kansas Association of School Boards.

The agency provided information directly to the League of Kansas Municipalities and the Kansas Association of Counties.

- H. Describe how the agency consulted and solicited information from businesses, associations, local governments, state agencies, or institutions and members of the public that may be affected by the proposed rule(s) and regulation(s).**

News releases to every newspaper in the state, discussion at prior KDWPT Commission public hearings and meetings, which are broadcast online, specific meetings for T&E species listings and delistings, publication in the Kansas Register and publication on the Department's website. The Department also notifies the Governor's office of surrounding states. This information is detailed above as well.

- I. For environmental rule(s) and regulation(s) describe the costs that would likely accrue if the proposed rule(s) and regulation(s) are not adopted, as well as the persons would bear the costs and would be affected by the failure to adopt the rule(s) and regulation(s).**

For species proposed as listing, the federal government still has the ability to list the species. In some cases, listing of at-risk species at the state level with adequate protections has prevented the listing at the federal level. And without adequate protection and monitoring, the species could disappear from Kansas.

As is required by state law, a recovery plan was already developed for the Arkansas Darter by the agency. The estimated cost of monitoring and complying with the recovery plan is an additional \$1000 for administrative costs and \$1000 for staff field time.



ENVIRONMENTAL BENEFIT STATEMENT

K.A.R. 115-15-2. Nongame species; general provisions.

REGULATION DESCRIPTION: This permanent regulation designates species classified as species in need of conservation in Kansas (“SINC species”). An environmental benefit statement is required by law when amending an environmental rule or regulation. A regulation adopted by the Secretary of Wildlife, Parks and tourism concerning threatened or endangered species of wildlife is defined as an environmental rule or regulation. Although a SINC species is not a threatened or endangered species, and does not receive the same protections from other regulations requiring permit review for actions that affect threatened or endangered species, the list may be considered one that concerns threatened or endangered wildlife. Consequently, this environmental benefit statement has been prepared. The proposed amendments to the regulation are as follows:

- Add one new SINC species: Arkansas Darter, *Etheostoma cragini*
- Remove one SINC species: Wabash Pigtoe, *Fusconaia flava*

In conjunction with these proposed amendments, the department is also proposing amendments to K.A.R. 115-15-1, which includes the lists of threatened and endangered species in Kansas. Proposed amendments to that regulation include adding the Cylindrical papershell mussel to endangered status and removing the Arkansas Darter from threatened status.

The Kansas Nongame and Endangered Species Act, K.S.A. 32-957 et seq., requires the department to adopt rules and regulations “which contain a list of the nongame species deemed by the secretary to be in need of conservation” (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.

The current proposed amendments stem from petitions for listing actions received by the department by July 31, 2018, as well as federal threatened and endangered species listings. Since that time, the department has held various public meetings, collected data, and received official recommendations from a task force composed of personnel from the U.S. Fish and Wildlife Service, universities, the Kansas Biological Survey, and the department. In making its recommendation to the department, that task force collected numerical ratings from individuals and companies believed to have knowledge and scientific information about one or more of the species in question, over a 90-day public comment period.

Taking into consideration response from the Wildlife and Parks Commission, the general public, and the task force recommendations, the department has developed these proposed

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regulatory amendments. A description of the species and related information, as well as a description of the risk or threat to the species and the need for the regulatory amendment, is included for each of the species in question.

Arkansas Darter (*Etheostoma cragini*)

- Federal Status: Not listed
- Current Kansas Listing Status: Threatened
- Proposed Listing Action: Downlist the species to SINC
- Description: The upper body is brown, and its back has many fine, black specks. It has a dark, vertical wedge-shaped spot beneath its eye. Its body has 12 to 14 dusky stripes along the sides.
- Size: Adults grow to about 2.5 inches length in body.
- Habitat: The Arkansas darter's range includes sites in extreme northwestern Arkansas, southwestern Missouri, and northeastern Oklahoma, within the Neosho River watershed. It also occurs in a number of watersheds and isolated streams in eastern Colorado, south-central and southwestern Kansas, and the Cimarron watershed in northwest Oklahoma.
- Reproduction: Spawning occurs March through May.
- Food: Aquatic insects.

Threat to the species and need for the regulatory amendment: The Arkansas darter is recommended for downlisting as distribution is widespread and more-fully documented than when it was first listed in 1978. The fish has shown ability to recover quickly from drought and is tolerant of stressful conditions. The potential lowering of water levels in streams and potential development are the primary threats to the species.

Wabash Pigtoe Mussel (*Fusconaia flava*)

- Federal Status: None
- Current Kansas Listing Status: SINC
- Proposed Listing Action: De-list from SINC
- Description: Smooth, heavy-shelled freshwater mussel.
- Size: It can grow to 5 inches in length
- Habitat: Gravelly substrates in the rivers of eastern Kansas
- Reproduction: Requires a fish host
- Food: Filter feeder

Threat to the species and need for the regulatory amendment: Long-term data for the species shows dramatic density increase at 8 sites in the Verdigris river and at some locations, it is the most numerous mussel present. There is no longer any commercial exploitation of mussels in Kansas and host fishes are not a limiting factor for this mussel. Due to robust numbers, it does not compare to other more uncommon mussels on the SINC list.

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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 first 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, are 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.

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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 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-

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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.

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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.

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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 Shoal chub, in the Kansas River), 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.

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