

SESSION OF 2014

**CONFERENCE COMMITTEE REPORT BRIEF  
SENATE SUBSTITUTE FOR SUBSTITUTE FOR HOUSE  
BILL NO. 2051**

As Agreed to May 1, 2014

**Brief\***

Senate Sub. for Sub. for HB 2051 would establish the State Sovereignty Over Non-Migratory Wildlife Act.

The bill contains a provision which would establish that the Legislature declares the authority for the State Sovereignty Over Non-Migratory Wildlife Act comes from the 10<sup>th</sup> Amendment to the *U.S. Constitution* and Article II, Section 1 of the *Kansas Constitution*.

The bill also would establish the state as having the sole regulatory authority to govern the management, habitats, hunting, and possession of lesser and greater prairie chickens that exist within the state. In addition, the bill would establish that lesser and greater prairie chickens and their habitats existing within the state are not subject to the Endangered Species Act of 1973 (Act) or to any federal regulations or executive actions related to the Act. Any federal regulation or executive action pertaining to the federal Act that purports to regulate the lesser or greater prairie chicken, their habitats, farming practices that affect these species, or other human activity that affect these species are to have no effect within Kansas.

The bill also would allow the county or district attorney, or the Kansas Attorney General, to seek to enjoin any official,

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agent, employee of the federal government, or employees of corporations providing services on behalf of the federal government from enforcing any federal regulation or executive action pertaining to the Act that purports to regulate the lesser or greater prairie chicken, their habitats, farming practices that affect these species, or other human activity having an impact on these species within Kansas.

The bill would provide that its provisions must not be construed to infringe on the authority of the U.S. Department of Agriculture, the U.S. Environmental Protection Agency, or state agencies that have delegated authority to administer the federal Water Pollution Prevention and Control Act or the Clean Air Act when the entities are administering conservation programs or engaging in other activities that may apply to the lesser or greater prairie chicken, their habitats, farming practices that affect these species, or other human activity having an impact on these species or their habitats within Kansas.

In addition, the bill would not be construed to infringe on the authority of the Kansas Department of Wildlife, Parks and Tourism (KDWPT) or any citizen participating in a management plan or a conservation plan pertaining to the lesser prairie chicken that may be developed in conjunction with the U.S. Fish and Wildlife Service (USFWS) and applies to the lesser or greater prairie chicken, their habitats, farming practices that affect these species, or other human activity having an impact on these species or their habitats within Kansas.

Further, the bill would create a severability clause, maintaining the remaining provisions of the bill in the event any of the sections of the bill are found to be invalid.

The bill would be in effect upon publication in the *Kansas Register*.

## **Conference Committee Action**

The Conference Committee agreed to the House version of the bill, with the following additional language from the Senate version of the bill:

- The Legislature declares the authority for the State Sovereignty Over Non-migratory Wildlife Act comes from the *U.S. Constitution* and the *Kansas Constitution*;
- The sole regulatory authority to govern the management, habitats, hunting, and possession of lesser and greater prairie chickens that exist within the state is possessed by the State of Kansas, acting through the Legislature and KDWP; and
- A county or district attorney, in addition to the Attorney General, may seek injunctive relief to enjoin enforcement of the Act.

## **Background**

The bill was introduced by the Senate Committee on Federal and State Affairs.

Prior to the introduction of the bill, the Senate Committee on Natural Resources held a joint informational hearing with the Senate Committee on Agriculture and the House Committee on Agriculture and Natural Resources on the lesser prairie chicken and the possible listing of the species under the Endangered Species Act of 1973, as amended (Act). KDWP presented information regarding a five-state comprehensive plan titled “The Lesser Prairie Chicken Range-wide Conservation Plan” (Plan). KDWP representatives explained that wildlife conservation officials from Colorado, Kansas, New Mexico, Oklahoma, and Texas worked together during 2013 to create the Plan, which, if implemented in a timely manner, could preclude the need to

list the lesser prairie chicken under the Act. The KDWPT representative stated the goal of the Plan is to conserve the lesser prairie chicken for future generations while facilitating continued and uninterrupted economic activity throughout the entire five-state lesser prairie chicken range.

At the Senate Committee hearing on the bill, Secretary of State Kris Kobach provided comments in favor of the bill, stating he drafted the bill to protect Kansas' sovereignty. Secretary Kobach stated the Act was originally based on the premise that Congress was using its power to regulate interstate commerce under Article I, Section 8 of the *U.S. Constitution*. The Secretary stated the prairie chicken does not migrate from state to state and does not use waterways, navigable or otherwise; therefore, the prairie chicken is not part of interstate commerce and cannot be regulated by the federal government.

Representatives of the Kansas Farm Bureau and Kansas Electric Cooperatives, Inc., (KEC) also provided proponent testimony at the Senate Committee hearing. The representative of Kansas Farm Bureau stated the potential listing of the lesser prairie chicken as a threatened species under the Act is a concern, as it could have an impact on agriculture activities, continued mineral development, and the placing of transmission lines and wind turbines. The Kansas Farm Bureau representative stated the KDWPT has attempted to convince the USFWS that prolonged drought conditions have had a greater impact on lesser prairie chicken populations than any single factor; however, the representative stated Kansas Farm Bureau believed the USFWS will list the species.

A representative of KEC stated the Plan will impose significant costs on developers of home sites, new roads, and required utilities. In addition, the representative stated KEC believes it is imperative that the USFWS demonstrate sound science and validate the lesser prairie chicken is truly threatened. The representative stated the KEC believes numerous conservation steps are already in place and should be given a chance to work.

The Senate Committee of the Whole amended the bill to strike provisions that would not allow officials, agents, or employees of the state to enforce any federal law or regulation that specifically regulates in the state the lesser prairie chicken and greater prairie chicken, their habitats, farming practices, or other human activity that affects both species.

At the hearing on the bill before the House Committee on Agriculture and Natural Resources, proponents included Senator Powell, Secretary of State Kobach, and representatives of the American Royalty Council and the Kansas Farm Bureau. Neutral conferees on the bill included representatives of the KDWPT and the Kansas Livestock Association. Written neutral testimony was provided by the KEC. Opponents included a representative from Audubon of Kansas, a law student, and a citizen from Shawnee County. Written testimony in opposition to the bill was provided by the Kansas Sierra Club.

The House Committee on Agriculture and Natural Resources amended the bill to delete the provision outlining the constitutional authority for the State to enact the State Sovereignty over Non-Migratory Wildlife Act; to eliminate language that indicates the lesser prairie chicken lives its entire life in the state; to clarify that prairie chickens are not subject to the federal Endangered Species Act or any federal regulation or executive action under the authority of Congress to regulate interstate commerce; to delete the provision that made it unlawful for persons associated with the federal government to enforce or attempt to enforce laws or regulations dealing with prairie chickens; to delete the provisions that made violation a severity level 10, nonperson felony; to add provisions clarifying there is no intent to infringe upon certain activities by the U.S. Department of Agriculture, the U.S. Environmental Protection Agency dealing with the Water Pollution Prevention and Control Act and the Clean Air Act, and the KDWPT; and to make the bill effective upon publication in the *Kansas Register*.

The USFWS listed the lesser prairie chicken as a threatened species on March 27, 2014, after the House and Senate committees held hearings on the bill, but prior to the House committee taking action on the bill.

The revised fiscal note on the introduced version of the bill provided by the Division of the Budget states the KDWPT expects passage of the bill will result in litigation with the federal government; however, litigation would be handled by the Office of the Attorney General. The Office of the Attorney General states the litigation would be handled in-house but was unable to estimate the costs of the litigation. In addition, the fiscal note discusses various impacts with regard to possible prison and bed space impacts, for which no fiscal impact can be determined. No updated fiscal note is available for the most recent version of the bill.

State sovereignty; lesser prairie chickens; greater prairie chickens; federal Endangered Species Act of 1973

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