



August 31, 2021

U.S. Fish and Wildlife Service  
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**RE: Comments by Kansas Electric Cooperatives, Inc., and Others Regarding the June 1, 2021, Notice of Proposed Rule to List Two Distinct Population Segments (DPS) of the Lesser Prairie Chicken Under the Endangered Species Act and Proposed Issuance of a Proposed 4(d) Rule for the Northern DPS (“proposed rule”).<sup>1</sup>**

**Docket No. FWS-R2-ES-2021-0015**

**Comments submitted by:** Kansas Electric Cooperatives, Inc. on behalf of all our electric cooperative members<sup>2</sup> and joined by Alfalfa Electric Cooperative, Inc.; CMS Electric Cooperative, Inc.; Lane-Scott Electric Cooperative, Inc.; Midwest Energy, Inc.; Ninnescah Rural Electric Cooperative, Inc.; Prairie Land Electric Cooperative, Inc.; Rolling Hills Electric Cooperative, Inc.; Pioneer Electric Cooperative, Inc.; Southern Pioneer Electric Company;<sup>3</sup> Sunflower Electric Power Corporation; The Victory Electric Cooperative Association, Inc.; Tri-County Electric Cooperative, Inc.; Western Cooperative Electric Association, Inc.; Wheatland Electric Cooperative, Inc.; and Kansas Municipal Utilities, Inc. (collectively referred to as “KEC”).

## **I. Introduction**

KEC submits these comments in response to the United States Fish and Wildlife Service’s (“USFWS” or “the Service”) June 1, 2021, notice of a proposed rule to list two distinct population segments (“DPS”) of the lesser prairie-chicken (“LEPC”) and to issue a proposed 4(d) rule for the northern distinct population segment. KEC is particularly interested in the proposal to list the LEPC as threatened in the northern DPS, as the entire state of Kansas lies within the northern DPS.

KEC is concerned that the terms of the listing proposal will impose unnecessary financial burdens on cooperatives and their consumer-member owners without producing commensurate benefits to the LEPC. Electric co-ops need cost-effective means that balance the needs of the species with

<sup>1</sup> Proposed Rule, 86 Federal Register 29432, (June 1, 2021).

<sup>2</sup> See Appendix A for a list of KEC’s member cooperatives for the year 2021.

<sup>3</sup> Southern Pioneer is a not-for-profit electric utility solely owned by Pioneer Electric Cooperative. Southern Pioneer, itself, is not a member of KEC, but Pioneer Electric Cooperative is a KEC member. Pioneer is also a member of NRECA, but Southern Pioneer is not. For purposes of these comments, Southern Pioneer and the data related to their service territory is included as if they were an individual KEC distribution cooperative/member.

the needs of our consumer-members who reside and work within the bird's range.

## II. KEC, our members, and our connection to NRECA. Joined by KMU

Kansas Electric Cooperatives, Inc. (KEC) is the statewide service organization for the rural electric distribution, transmission, and generation cooperatives in Kansas. Formed in 1941, KEC represents the interests of, and provides services, support, programs, and training to, the rural electric cooperatives operating in Kansas. The services provided by KEC include, but are not limited to, legal assistance, regulatory support, education, training and safety programs, communications services, legislative research, and lobbying. Each KEC member holds a certificate to transact business as an electric utility in the State of Kansas. For distribution co-ops, as the sole retail electric supplier in that certificated territory, they are obligated to provide electric service in that territory.<sup>4</sup>

KEC's member cooperatives provide electric service in 103 of Kansas' 105 counties and in every Kansas county overlapping LEPC habitat. We believe sixteen<sup>5</sup> distribution or generation and transmission (G&T) cooperatives serve in and around the three LEPC ecoregions in Kansas.<sup>6</sup> Kansas is the only one of the five states with identified LEPC habitat encompassing three distinct ecoregions: sand sagebrush prairie, mixed-grass prairie, and short-grass CRP mosaic regions. As such, this rulemaking has a decided impact on KEC member electric cooperatives and the consumer-members they serve.

KEC and all the cooperative entities providing service in and around the Kansas ecoregions are also members of the National Rural Electric Cooperative Association (NRECA). NRECA has submitted comments in this docket. As NRECA members, KEC and our member cooperatives endorse NRECA's comments and incorporate them by reference herein, in addition to the comments we provide in this statement.

Kansas Municipal Utilities, Inc. (KMU) joins with KEC and their affiliated utilities in these comments. KMU is the statewide association representing Kansas cities and other public or not-for-profit agencies involved in the ownership and operation of municipal utilities. KMU members provide electric, gas, water, wastewater, stormwater, and/or telecommunications services in more than 185 communities across Kansas. Formed in 1928, KMU provides assistance and information to member municipal utilities with regard to legislative and regulatory issues, training and educational programs, and numerous other services toward the advancement of municipal utilities and their customer-owners.

Although the text of these comments speaks mainly in terms of cooperatives and cooperative members (consumer-members), the concepts and concerns expressed herein, particularly as they relate to financial burdens and the need for a variety of cost-effective conservation tools, largely pertain to any member-owned, not-for-profit utility. Much like cooperatives that are owned by their consumer-members, municipal utilities are also owned by the consumer-members of the communities they serve. We understand that area inside our cities' municipal boundaries is unlikely to be considered LEPC habitat, but the service lines and facilities which support these municipal utilities will, in many places, transect lands that may be LEPC habitat. As such, KMU joins in support of KEC's comments.

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<sup>4</sup> Kansas Retail Electric Suppliers Act, K.S.A. 66-1,170 et seq.

<sup>5</sup> In our request for an extension of the comment period, we indicated fourteen electric co-ops have some amount of service territory that is also identified as part of an LEPC ecoregion. On further review, we believe it is 16 co-ops. (*Support for Request for Extension of Comment Period Regarding the June 1, 2021, Notice of Proposed Rule Listing Two Distinct Population Segments of the Lesser Prairie Chicken Under the Endangered Species Act and Proposed Issuance of a Section 4(d) Rule, filed July 21, 2021*). See also Footnote 2 above.

<sup>6</sup> KEC relied on the map depicted in the proposed rule along with the Southern Great Plains – Crucial Habitat Assessment Tool (<https://www.sgpchat.org/>) for making this determination.

### **III. KEC has historically engaged in the Service's LEPC reviews and engaged in previous rule makings individually and through NRECA**

KEC, working collectively with our member cooperatives, has been involved in discussions and engaged in previous efforts to list the LEPC as threatened or endangered. As an individual association, and as a member cooperative of NRECA, KEC has participated in informal and formal opportunities to ensure cooperatives' concerns are considered. While we will not include an exhaustive list of our LEPC engagements over the years, we will note a few for purposes of illustration.

In 2013, several Kansas counties filed for coordination with the USFWS. Those counties then hosted public hearings on November 7 and 8, 2013, in Garden City, Kansas. KEC appeared at that hearing and offered comments on the advisability of listing the LEPC as a threatened species. KEC has testified before the Kansas legislature regarding proposed state-level legislation related to the LEPC and worked with public and private stakeholders on LEPC efforts. KEC also participated in discussions and actively encouraged cooperative membership in the Western Association of Fish and Wildlife Agencies (WAFWA) regarding their Range-Wide Management Plan.

### **IV. Co-op and municipal presence in and around the 39-county LEPC region/area**

KEC members serve Kansans in 103 of 105 Kansas counties, which encompasses roughly 80% of the landmass in the entire state. We have identified 39 Kansas counties that have some overlap with LEPC habitat.<sup>7</sup> These 39 counties are served by 14 distribution cooperatives, 13 of which have service territory overlapping LEPC habitat. The majority of the 13 distribution co-ops are owners of, and receive wholesale power from, one of two G&Ts headquartered in Kansas. Nine cooperatives have all, or a vast majority of, their Kansas service territory within the boundaries of the 39 LEPC counties. Six of these nine co-ops are member-owners of one of the G&Ts and that G&T's major generating plant is located in a LEPC county. Two co-ops have less than half their service territory falling within the 39-county area. KEC's two Oklahoma-headquartered cooperatives serving in Kansas have all their Kansas service territory within the 39-county area. The remaining Kansas-based G&T has two members with less than half their territory within the 39 LEPC counties, one member with all their service territory in the LEPC counties, and one member with nearly all their service territory within the LEPC counties.

Statewide KEC member cooperatives maintain more than 84,000 miles of line to carry electricity to more than 300,000 meters<sup>8</sup>. Together, cooperatives with service territory in the LEPC area maintain more than 51,000 miles of line and serve 200,000 consumer meters<sup>9</sup>.

In addition to electric service, more and more electric cooperatives are deploying or investigating the feasibility of offering broadband service. Nationally, over 200 electric co-ops are deploying broadband services. Another 100 are examining the feasibility of offering such service. KEC has two member cooperatives that currently offer broadband services, one of which provides that service within the LEPC area. That cooperative went live with broadband service in 2001 and now connects more than 3,500 consumers, businesses, and government entities to reliable broadband services.

For purposes of these comments, we include broadband service and infrastructure within our discussions of electric service and infrastructure.

Within these 39 counties, 46 cities operate one or more municipal electric, natural gas, water, wastewater, or telecommunications utilities.

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<sup>7</sup> *Id.*

<sup>8</sup> Data from 26 co-ops. KEC's Kansas headquartered co-ops only. KEC's two Oklahoma headquartered cooperatives' line miles are not included in these numbers.

<sup>9</sup> *Id.*

**V. Co-op members bear the costs of operating a cooperative. Co-ops serve in sparsely populated areas and many areas have declining populations and/or significant poverty rates.**

**a. Cooperative consumer-owners who bear the cost of operating the cooperative.**

The rural electric cooperatives serving Kansas, like other cooperatives, are private, not-for-profit corporations owned and controlled by the consumer-members they serve. Kansas cooperatives are democratically controlled, with each member having one vote. Thus, members are on an equal footing in terms of control, regardless of the amount of electricity they use.

As member-owned corporations, electric cooperatives do not have outside shareholders. The costs of operating the not-for-profit cooperatives are borne by the members, so there is a natural incentive to keep rates affordable while ensuring safe and reliable service. The consumer-members pay for the cost of service through their electric rates.

Likewise, municipal utilities are owned and operated by the communities that they serve and do not have outside shareholders or investors. All of the cost of operating a municipal utility is ultimately borne by the citizens of the community they serve.

**b. Kansas cooperatives serve the most sparsely populated areas of Kansas and many of the counties in and around the LEPC ecoregions have declining populations and/or significant poverty rates.**

Typically, cooperatives serve in areas with low population densities which also means the number of customers per mile of electric line (line density) is also low. That holds true for the distribution co-ops serving in and around the LEPC ecoregions. The median line density for these cooperatives is 3.5 meters per mile of line. That stands in stark contrast to the national average for IOUs which is roughly 34 per line mile.

Electric utilities recover both the fixed and variable costs of providing electric service to members. Low line density means fixed costs are spread over fewer customers and/or kilowatt hours when compared to higher population areas served by IOUs. As the number of customers and/or kilowatt hours sold decline, those remaining on the system must cover a larger portion of the fixed costs.

Much of the 39-county LEPC area is, in fact, sparsely populated and recently released numbers from the 2020 U.S. Census<sup>10</sup> indicate most of these counties are experiencing further population declines when you examine the changes from 2010 to 2020. Only 10 of the 39 counties saw any population increase and that ranged from a low of 0.2% to a high of 4.6%, with median growth at 1.5%. While any population increase in the region was modest, the rate of population decreases was much more significant in many counties.

Twenty-nine of the 39 LEPC counties declined in population between 2010 and 2020. The losses ranged from a low of -1.4% to a high of -16.5%. Seven counties had less than a 5% decrease in population. Eleven counties saw a population loss between 5 and 10%. Eleven counties experienced losses exceeding 10%.

Not only are there fewer and fewer people in Western Kansas as a whole, but many of those also living in the area experience financial hardships. In examining economic data<sup>11</sup> on the 39 Kansas

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<sup>10</sup> Population numbers in this section are from 2020 Population and Housing State Data – Kansas, U.S. Census Bureau, August 2021. <https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html>.

<sup>11</sup> U.S. Census American Community Survey (ACS) 5-Year estimates is a data set representative of less populous areas. The most current (2019) survey covers 2015-2019. For comparison using the 2019 ACS 1-Year estimate, 12.3% of the general U.S. population lived at or below the federal poverty line and 28.9% were considered low income, living at or below 200% of the federal poverty line.

counties in the LEPC area, 31 of the 39 Kansas counties that overlap the LEPC range have persistent low-income populations that exceed the federal percentage, ranging from 28.9% to 44.7% considered low income. Ten of the 39 counties have 12.3% to 20.0% of their populations living at or below the federal poverty line.

Twenty-six Kansas counties with significant low-income populations have more than 50% of the county included in the LEPC range - 50.8% to 100% - including seven with 100% of the county included in the range. Eight Kansas counties with significant poverty populations have more than 50% of the county included in the LEPC range - 73.5% to 99.8% - including four with over 95% of the county included in the LEPC range.

As described earlier in these comments, electric cooperative members ultimately bear all the costs the cooperative incurs to provide electric service to consumer-members. Thus, these consumers will be the ones shouldering the financial obligations if the cooperative's cost of service increases due to additional regulatory burdens, such as changes in operations or costs of mitigation, associated with listing the LEPC as threatened or endangered. The population and poverty statistics noted above illustrate that many cooperative members already struggle financially, and higher utility bills will only add to their strain. Thus, it is critically important that if the LEPC is listed as a threatened species in Kansas, adequate and workable exceptions under the 4(d) rule must be in place to avoid onerous financial and logistical burdens on cooperatives that drive up costs for consumer-members, many of whom can least afford such increases.

## **VI. Comments on the proposed listing and 4(d) rule**

We do agree with the Service that "lesser prairie-chicken in the Northern DPS are not currently in danger of extinction, and thus the Northern DPS does not meet the definition of endangered."<sup>12</sup> Additionally, KEC joins with NRECA in calling on the Service to pursue additional analysis on whether the LEPC warrants listing. We note NRECA raises valid questions regarding the Service's analysis and conclusions and, although we will not reiterate them herein, we echo those concerns.

KEC encourages voluntary conservation measures, including public-private initiatives, to protect the LEPC. We believe these efforts, when implemented appropriately, can have positive impacts on chicken populations and habitat. We fear that listing the species as threatened or endangered could hamper such initiatives.

Although we do not support listing the LEPC at this time, should the Service do so, it is critical for cooperatives that a threatened listing be accompanied by an adequate and workable 4(d) rule. KEC supports the use of species-specific 4(d) rules to identify activities that would or would not be subject to the take prohibitions under Section 9 of the Endangered Species Act. We believe that, should the LEPC be listed, a tailored 4(d) rule would be appropriate, both biologically and legally. KEC is committed to work with the Service, either individually and/or through NRECA, to ensure a 4(d) rule is adequate and workable for meeting the needs of cooperatives and their consumer-owners operating/living in the LEPC range.

The provisions in the proposed 4(d) rule noted within the larger proposed rule<sup>13</sup> require expansion and clarification to ensure cooperatives can continue to provide consumer-members with safe, reliable energy at an affordable price. This is particularly true as it relates to cooperatives' ability to respond to outages and emergency situations.

In concert with NRECA, the KEC recommends any 4(d) rule for the LEPC should be limited to habitat consistent with the narrative descriptions in the Species Status Assessment Report for the

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<sup>12</sup> Proposed Rule, at pg. 29472.

<sup>13</sup> *Id.*, at 29476-29479.

Lesser Prairie-Chicken (SSA).<sup>14</sup> The rule should clarify that activities conducted on land outside of, or not considered as, habitat, are not restricted. The rule should clarify that existing roadways and infrastructure, and their associated buffers, are not habitat and that maintenance, improvements or response to emergencies should not be prohibited or limited. Such clarification would help ensure activities required by other agencies, such as vegetation management, can be conducted without fear of violating one law/regulation to comply with another. At a minimum, the rule should also contain specific exemptions for:

- Existing infrastructure and associated buffers;
- New activities/infrastructure within the footprint (buffer) of existing infrastructure or on areas that do not meet the definition of habitat;
- New activities/infrastructure within a reasonable, science-based buffer around stands of mesquite, eastern red cedar, and other invasive woody vegetation;
- Routine maintenance, recovery and improvements to existing infrastructure, including but not limited to those necessary for vegetation management and wildfire mitigation; and
- New distribution lines.

The Service notes in the proposed rule, “ ... no data were available to quantify the potential independent impacts of distribution lines on habitat loss and fragmentation.”<sup>15</sup> Without scientific data, the Service should clarify distribution lines are not habitat and provide an exclusion for such lines.

Infrastructure should include, but not be limited to, distribution or transmission lines, substations, electric facilities, electric cooperative communications equipment or broadband facilities or equipment.

KEC encourages the Service to extend 4(d) exemptions to:

- Projects that are under construction at the time a final rule is effective;
- Projects not yet under construction but in late-stage planning; and
- Activities conducted in habitat, or what would otherwise be habitat, if surveys demonstrate LEPC absence.

It is also imperative that mitigation options be workable and feasible. As noted above, cooperative consumer-members bear the cost of co-op operations, and many co-op members are financially constrained. Additionally, the ability to provide service in a timely manner where new construction is required is critical and delays can have significant financial and, likely more importantly, quality of life impacts. Mitigation efforts that dramatically increase costs or construction time can unduly burden utility providers and their consumer-members.

The proposed rule and the SSA repeatedly note electric lines could be buried. While there may be limited instances where that is an appropriate approach, it is not a workable or feasible alternative in most cases. In an anecdotal survey of KEC members serving in the 39 county LEPC area, co-ops estimated the additional costs of burying line could be two to five times higher than constructing overhead lines and going underground could double the construction time. Additionally, the suggestion seems to ignore the disruption to habitat that could occur from trenching and burying line or digging out line should a repair be needed.

Cooperatives need options for maintaining, repairing and constructing infrastructure in order to meet their obligation to provide power within their service territory. Each cooperative has its own unique customer demographic, load profile and geographic composition. That is why it is critical that the Service not impose “one-size fits all” solutions for addressing LEPC concerns.

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<sup>14</sup> Species Status Assessment Report for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*), Version 2.2, U.S. Fish and Wildlife Service, March 2021.

<sup>15</sup> Proposed Rule, at pg. 29464.

KEC members are concerned about the potential impacts an LEPC listing could have on developing future electric generation, including large-scale solar and wind development. Renewable energy development, especially wind, relies on a robust transmission system to move power. Continued growth in wind energy is expected to require additional transmission capacity. For Kansas electric consumers, transmission costs are a significant part of the overall cost of delivered energy. Listing the LEPC as a threatened or endangered species would likely drive those transmission costs higher.

KEC stands ready to work along with our associated cooperatives and the Service to advance workable and feasible solutions to support the LEPC while ensuring cooperatives can fulfill their obligation to provide safe, reliable electric service under a regulatory framework that allows for continued affordability.

We are available to discuss our comments or answer any questions that you or your team might have. You may contact me [lkaufman@kec.org](mailto:lkaufman@kec.org) or by phone at 785-478-4554.

Respectfully submitted,

*Leslie J. Kaufman*

Leslie J. Kaufman  
Vice President of Government  
Relations and Legal Counsel  
Kansas Electric Cooperatives, Inc.

**ATTACHMENT A**  
**2021 Members**  
**Kansas Electric Cooperatives, Inc.**

**Cooperative Name and Headquarters City**

4 Rivers Electric Cooperative, Inc., Lebo, KS  
Alfalfa Electric Cooperative, Inc., Cherokee, OK  
Ark Valley Electric Cooperative, Assn., Inc., Hutchinson, KS  
Bluestem Electric Cooperative, Inc., Wamego, KS  
Brown-Atchison Electric Cooperative Assn., Inc., Horton, KS  
Butler Electric Cooperative Assn., Inc., El Dorado, KS  
Caney Valley Electric Cooperative Assn., Inc., Cedar Vale, KS  
CMS Electric Cooperative, Inc., Meade, KS  
Doniphan Electric Cooperative Assn., Inc., Troy, KS  
DSO Electric Cooperative, Inc., Solomon, KS  
Flint Hills Rural Electric Cooperative Assn., Inc., Council Grove, KS  
FreeState Electric Cooperative, Inc., McLouth, KS  
Heartland Rural Electric Cooperative, Inc., Girard, KS  
KAMO Electric Cooperative, Inc., Vinita, OK  
Kansas Electric Power Cooperative, Inc. (KEPCo), Topeka, KS  
Lane-Scott Electric Cooperative, Inc., Dighton, KS  
Midwest Energy, Inc., Hays, KS  
Nemaha-Marshall Electric Cooperative Assn., Inc., Axtell, KS  
Ninnescah Rural Electric Cooperative Assn., Inc., Pratt, KS  
Pioneer Electric Cooperative, Inc., Ulysses, KS  
Prairie Land Electric Cooperative, Inc., Norton, KS  
Rolling Hills Electric Cooperative, Inc., Beloit, KS  
Sedgwick County Electric Cooperative Assn., Inc., Cheney, KS  
Sumner-Cowley Electric Cooperative, Inc., Wellington, KS  
Sunflower Electric Power Corporation, Hays, KS  
Tri-County Electric Cooperative, Inc., Hooker, OK  
Twin Valley Electric Cooperative, Inc., Altamont, KS  
Victory Electric Cooperative Assn., Inc., Dodge City, KS  
Western Cooperative Electric Assn., Inc., WaKeeney, KS  
Wheatland Electric Cooperative, Inc., Scott City, KS