

JUN 23 2023

IN THE SUPREME COURT OF THE STATE OF KANSAS KS DEPT AGRICULTURE

AUDUBON OF KANSAS, INC.

Petitioner,

v.

EARL B. LEWIS, in his official capacity
as Chief Engineer, Kansas Department
of Agriculture, Division of Water Resources,

Respondent.

Original Action No. _____

PETITION FOR WRIT OF MANDAMUS AND DECLARATORY JUDGMENT

COMES NOW Petitioner, Audubon of Kansas, Inc. ("Petitioner" or "AOK"), and respectfully brings this action in mandamus seeking an order requiring Respondent Earl B. Lewis, chief engineer of the Kansas Department of Agriculture, Division of Water Resources ("KDA-DWR") to administer immediately all junior water rights in the Rattlesnake Creek Basin ("Basin") that KDA-DWR has determined to have impaired and to be impairing the senior water right ("Refuge Water Right") held by the United States Department of Interior, Fish & Wildlife Service ("Service") for the benefit of the Quivira National Wildlife Refuge ("Refuge"), until the Refuge Water Right is no longer impaired. AOK also seeks three declarations of law and other relief as this Court deems just and proper.

In support of this Petition, Petitioner alleges and states as follows:

I. JURISDICTION & PARTIES

1. This Court has original jurisdiction over Petitioner's mandamus action under Article III, § 3 of the Kansas Constitution, K.S.A. 60-801 *et seq.*, and Kansas Supreme Court Rule 9.01.

2. Pursuant to Kansas Supreme Court Rule 9.01(a), Petitioner is filing a Memorandum in Support of this Petition ("Memorandum") together with documentary evidence supporting the facts alleged.

3. For reasons described in the Memorandum, an original action in this Court for mandamus is necessary because Petitioner cannot obtain adequate relief in district court or the Court of Appeals. *See* Sup. Ct. R. 9.01(b).

4. This Court can take original jurisdiction under the declaratory judgment statute where relief can be obtained through mandamus. *Johnson County Sports Authority v. Shanahan*, 210 Kan. 253, 259 (1972); K.S.A. 60-1701.

5. AOK is a 501(c)(3) nonprofit organization incorporated in Kansas and serves approximately 5,000 members. AOK's purpose is to promote the enjoyment, understanding, protection, and restoration of natural ecosystems across Kansas, Nebraska, and the central Great Plains, and engages in conservation work to protect and advocate on behalf of migratory birds and their habitats. AOK owns and maintains nature sanctuaries where its members enjoy birding and natural history activities, and further provides education and information to its members and the public through action alerts, press releases, facts sheets, and letters to lawmakers. AOK and its members regularly visit, use, and enjoy the Refuge for bird watching and other recreational, aesthetic, scientific, educational, and spiritual purposes, and AOK's members will continue to do so on a regular basis indefinitely. The chronic, serious, and ongoing impairment of the Refuge Water Right threatens to destroy the Refuge and take the many endangered and threatened species that depend upon it, thereby threatening the conservation activities and interests of AOK and its members.

6. Respondent Earl B. Lewis ("Lewis") has been the chief engineer of KDA-DWR since October 2020, and is charged under the Kansas Water Appropriation Act, K.S.A. 82a-701 *et seq.* ("KWAA"), with jurisdiction over Kansas waters and the protection of Kansas water rights, which are real property rights protected under state and federal law. Although Kansas law requires his office to be located in Topeka, K.S.A. §§ 74-506b, 74-505, he may be served at 1320 Research Park Drive, 3rd Floor, Manhattan, KS 66502. *See* K.S.A. 60-205; Sup. Ct. R. 1.11(a).

II. STATEMENT OF FACTS

7. The Refuge was established by the federal government in May, 1955 as an inviolate sanctuary for migratory birds, and for the protection of fish and wildlife resources. The Refuge is recognized as one of only thirty "Wetlands of International Importance" under international treaty, and provides vital habitat for a wide array of endangered and threatened species that rely upon the natural flows of Rattlesnake Creek and the groundwater-dependent ecosystem of the Rattlesnake Creek Basin ("Basin").

8. The Service holds the Refuge Water Right, File No. 7,571, an appropriation water right pursuant to the KWAA. *See Exhibit A.* The Refuge Water Right is a permanent, real property right with the following attributes according to its Certificate of Appropriation: a priority date of August 15, 1957, senior to approximately 95% of all water rights within the Basin; an authorized quantity of 14,632 acre-feet of annual diversion and beneficial use; a maximum diversion rate of 300 cubic feet per second; three points of diversion from the surface waters of Rattlesnake Creek, a surface water tributary of the Arkansas River; and places of beneficial use consisting of Refuge wetlands, the Little Salt Marsh, and Refuge management areas within the Refuge.

9. Despite these explicit attributes, which entitle the Refuge Water Right to comprehensive protection from impairment by junior rights, it has chronically suffered debilitating shortages since the 1980s as a result of junior groundwater pumping.

10. In 2013, the Service filed a formal request for an impairment investigation, pursuant to K.S.A. 82a-706b and K.A.R. 5-4-1, from the chief engineer, citing water shortages and declining streamflows that had crippled the Refuge Water Right, threatening the endangered species at the Refuge. **Exhibit B.**

11. In 2016, Lewis's predecessor as chief engineer, David W. Barfield, issued a final report finding that the Refuge Water Right was impaired, chronically and seriously, as a result of junior groundwater pumping, attached herein as **Exhibit C.** Using the most complete pumping data and the most sophisticated groundwater modeling tools available within Kansas, KDA-DWR concluded that junior appropriators were pumping 30,000 to 60,000 acre-feet of water per year "that would have otherwise flowed through or past the Refuge." **Exhibit C, p. 12.** The Impairment Report further concluded that "while it will take years, reductions in groundwater pumping will restore streamflow at the Refuge." **Exhibit C, p. 3.**

12. Upon the chief engineer's finding that a senior water right is impaired by the diversion of water by junior water rights, the senior right is entitled to file a request with KDA-DWR to secure water. Upon the filing of such a request, the chief engineer must act to shut off, or "administer," junior water rights that he has determined are impairing the senior right. K.S.A. 82a-706b, K.A.R. 5-4-1. For a more detailed description of this procedure, see Part III below.

13. KDA-DWR has never fulfilled this ministerial, non-discretionary duty to protect the Refuge Water Right. After the Service, in late 2016, signaled its intent to file a request to secure water in 2017, *See Exhibit D*, former chief engineer Barfield issued a notice, attached herein as

Exhibit E, announcing KDA-DWR would not administer junior water rights in the Basin in 2017, even if the Service filed such a request:

Since it is late in the year and many producers have already made cropping decisions and purchases for the coming year, we will not administer the basin's impairing water rights during the 2017 irrigation season.

14. The Service submitted a request to secure water on January 17, 2017, but in light of the chief engineer's prior statements that no administration of junior rights in the Basin would take place in 2017, the Service postdated its request to 2018. **Exhibit F**.

15. On September 6, 2017, AOK wrote former chief engineer Barfield, insisting upon the need to administer junior water rights in light of the legal protections to which the Refuge was entitled under state and federal law. **Exhibit G**. On September 29, 2017, Barfield responded that it was "premature" to administer junior rights in light of local efforts to develop substitute water supplies for the Refuge. **Exhibit H**.

16. As detailed in Part III below, the KWAA allows for such substitute, or "augmentation" water supplies, but under very narrow terms which have not been met in the Basin. K.S.A. 82a-706b(a)(2).

17. On December 13, 2017, Dr. Jackie McClaskey, former Secretary of KDA, promised local irrigators holding junior rights in the Basin that KDA-DWR would "not impose strict administration of water rights on January 1, 2018," and did not "have any intent to do so in the immediate future" while they developed an "augmentation" alternative. **Exhibit I**. McClaskey's letter did state, however, that it would be critical that some "formal action to address the impairment begin in 2018" in light of KDA-DWR's "statutory duty to secure water to senior water rights."

18. The Kansas secretary of agriculture has no jurisdiction over the administration of water rights, K.S.A. §§ 82a-706, 82a-706b, and lacks the power to administratively review such priority administration, *id.*, 82a-1901, but former chief engineer Barfield did not contest her assumption of his exclusive duties under the KWAA.

19. On August 17, 2018, AOK again sent former chief engineer Barfield a letter describing how he was abdicating his legal duties under the KWAA to administer junior rights to protect the Refuge Water Right. **Exhibit J.** Ten days later, KDA-DWR's chief legal counsel described local efforts to develop "augmentation," but made clear that if those efforts failed, "much more significant pumping reductions will be required." **Exhibit K.**

20. After no water rights were administered in the Basin in 2017 or 2018, and having rejected local "augmentation" efforts, the Service in late 2018 submitted yet another request to secure water for 2019. **Exhibit L.**

21. Chief engineer Barfield did not administer junior water rights in the Basin in 2019, even though his 2016 Impairment Report generally indicated which rights were impairing the Refuge Water Right, and concluded that priority administration would be effective in addressing the impairment. *See Exhibit C, p. 6.*

22. By August, 2019—over three years after the issuance of the KDA-DWR Impairment Report—former chief engineer Barfield had finally prepared a plan to administer junior water rights to resolve the impairment of the Refuge Water Right. *See Exhibit M.* His announcement immediately provoked a political response. U.S. Senator Jerry Moran announced in October 2019 that he had secured a tentative deal with the Service to avoid the administration of junior rights in the Basin. **Exhibit N.**

23. In July, 2020, the Service entered into a Memorandum of Agreement (“2020 MOA”) with Big Bend Groundwater Management District No. 5 (“GMD5”), an entity which represents local groundwater irrigators. **Exhibit O.** The 2020 MOA consummated the bargain announced by Senator Moran in 2019. The Service agreed not to submit requests to secure water with KDA-DWR in either 2020 or 2021. In exchange, GMD5 promised to develop an “augmentation” plan that, by providing substitute water supplies to the Refuge, could potentially avoid the administration of junior water rights whose use was impairing the Refuge Water Right.

24. In early 2021, AOK filed a federal lawsuit challenging the 2020 MOA, and pursued the matter through the appeal process with the 10th Circuit. *Audubon of Kansas, Inc. v. United States Dep’t of Interior*, 67 F.4th 1093 (10th Cir. 2023); *Audubon of Kansas, Inc. v. United States Dep’t of Interior*, 568 F.Supp.3d 1167 (D. Kan. 2021).

25. On January 5, 2022, the Service wrote to GMD5, characterizing the 2020 MOA as having “culminated,” but stating nonetheless that the Service would not file a request to secure water in 2022 so long as GMD5 continued to make adequate progress toward a workable plan for “augmentation” in the Basin. **Exhibit P.**

26. On February 10, 2023, the Service changed course. It filed a request to secure water with KDA-DWR, including correspondence expressing the agency’s disapproval over GMD5’s efforts to develop “augmentation.” **Exhibit Q.**

27. On March 6, 2023, GMD5 wrote the Service requesting it to withdraw its request to secure water. GMD5 claimed that any administration of water rights in the Basin would jeopardize local efforts to develop an “augmentation” plan. **Exhibit R.**

28. On April 10, 2023—the ten-year anniversary of the Service’s filing a request with KDA-DWR for an impairment investigation—Respondent Lewis issued a public statement in his

official capacity as chief engineer that “no actions to administer junior water rights with respect to the [Service’s] Request to Secure Water are planned during 2023,” claiming that further technical review was still necessary. **Exhibit S; Exhibit B.**

29. As a consequence of chief engineer Lewis’s refusal to protect the Refuge Water Right, groundwater pumping continues unabated in the Basin, diverting water to which the Refuge Water Right is entitled and depleting the Basin by between 30,000 and 60,000 acre-feet annually, even as the Basin is currently suffering from Condition D3, that of “Extreme Drought” according to the National Drought Monitor. *See* <https://droughtmonitor.unl.edu/CurrentMap/StateDroughtMonitor.aspx?KS> (last accessed June 16, 2023).

III. GROUNDS FOR RELIEF

30. Pursuant to the authority delegated by the Kansas Legislature in the KWAA, the chief engineer of KDA-DWR “*shall* enforce and administer the laws of this state pertaining to the beneficial use of water and *shall* control, conserve, regulate, allot and aid in the distribution of water resources of the state for the benefit and beneficial uses of all of its inhabitants *in accordance with the rights of priority of appropriation.*” K.S.A. 82a-706 (emphases added).

31. K.S.A. 82a-706b(a) declares it unlawful “for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same.”

32. Where the holder of a senior water right believes that his right is suffering impairment due to the diversion of water by junior water right holders, the senior water right holder may protect the senior right by filing a complaint with the chief engineer, which triggers his duty to investigate the impairment. K.A.R. 5-4-1.

33. After investigating the impairment pursuant to K.A.R. 5-4-1, the chief engineer is required to issue a final report on the matter. If he concludes that the senior water right is impaired by junior rights, the holder of the impaired senior right may file a request to secure water. K.A.R. 5-4-1(d).

34. Upon receipt of the senior water right holder's filing of a request to secure water, "the chief engineer . . . *shall*, as may be necessary to secure water to the person having the prior right to its use [. . .] :

- (1) direct that the headgates, valves, or other controlling works of any ditch, conduit, pipe, well or structure be opened, closed, adjusted or regulated; or
- (2) within the rattlesnake creek subbasin located in hydrologic unit code 11030009, allow augmentation for replacement in time, location and quantity of the unlawful diversion, *if such replacement is available and offered voluntarily.*"

K.S.A. 82a-706b(a)(1)-(2) (emphasis added).

35. As further detailed in the Memorandum, this statutory duty is ministerial, non-discretionary, and immediate. A fundamental purpose of the prior appropriation doctrine, as codified in the KWAA, is to quickly and decisively protect water rights according to their respective temporal priorities during times of shortage: "the first in time is the first in right." *Id.*, 82a-707(c). The chief engineer has no authority under the KWAA to choose inaction as a valid response to a properly submitted request to secure water.

36. The plain language of K.S.A. 706b(a)(1) imposes the chief engineer's duty to act immediately: the chief engineer shall "direct that the headgates, valves, or other controlling works of any ditch, conduit, pipe, well or structure be opened, closed, adjusted or regulated" This language is plainly predicated upon the assumption that the impairing junior rights are in operation during irrigation season: the "headgates, valves," and wells that are in operation must be "closed,

adjusted or regulated” There is no language allowing for delays or postponements in priority administration, because such delay would condone the illegal diversion of water by junior rights holders. This is clearly forbidden by the statute, which makes it unlawful for “for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same.” *Id.*, 82a-706b(a). The prevention of unlawful, junior diversions thus requires immediate administration. This is consistent with Kansas water law that dates back to 1886 and was intentionally retained with the enactment of the KWAA in 1945. *Id.*, 42-329.

37. The prior appropriation doctrine does not meddle with equity. The KWAA permits neither speculations about the hardships that might flow from the administration of junior rights nor comparisons of their relative economic value to influence the chief engineer’s discretion. “The date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights.” *Id.*, 82a-707(b).

38. Instead, the chief engineer’s decision-making authority must always be carried out “in accordance with the rights of priority of appropriation.” K.S.A. 82a-706. Chief engineer Lewis’s express decision to take no action in response to the Service’s present request to secure water is a clear breach of this non-discretionary duty, a duty which he has acknowledged. *See Exhibit S.*

39. The seniority and the impairment of the Refuge Water Right are undisputed. Neither chief engineer Lewis, nor the Service, nor GMD5 disputes the analyses and findings contained in the Impairment Report, which details how the Refuge Water Right has been chronically impaired for decades. KDA-DWR has studied the problem extensively, using sophisticated and uncontested groundwater models initially developed by GMD5. It concluded in 2016 that “[l]ong term

RECEIVED WATER RESOURCES

JUN 23 2023

KS DEPT AGRICULTURE

reductions in upstream, junior groundwater pumping and/or use of augmentation appear to be the only practical physical remedies to the impairment of the Refuge's water right." **Exhibit C, p. 4.** KDA-DWR has developed a plan for priority administration that former chief engineer Barfield was prepared to deploy, after having ignored prior formal requests by the Service from 2017 to 2019. **Exhibit M.**

40. The KWAA does, however, contain one limited and potential exception to the rule and remedy of priority administration. In 2015, in response to the impairment of the Refuge Water Right, the Kansas Legislature amended K.S.A. 82a-706b to add subsection (a)(2). This subsection permits "augmentation" in lieu of priority administration—but only within the Basin. The term "augmentation" is neither defined nor explained, in either statute or regulation. It is a term of art in western water law, with dramatically different meanings from state to state. In Kansas, "augmentation" appears to be an alternative to priority administration, provided that three conditions are met. First, it can only take place in the Basin. K.S.A. 82a-706b(a)(2) Second, it must somehow satisfy the impaired water right by providing water supplies "for the replacement in time, location and quantity of the unlawful diversion [of water by junior rights]. . . ." *Id.* Finally, augmentation or "such replacement" must both be "available and offered voluntarily." *Id.*

41. But this exception does not apply in this case, because there is no "augmentation" to serve as an alternative to priority administration. As a factual matter, neither KDA-DWR nor the Service has approved or accepted any "augmentation" in the Basin. KDA-DWR has yet to accept any "augmentation" put forth by GMD5 or holders of water rights in the Basin. The Service filed its request to secure water in 2023 after determining that "augmentation," a principal goal of the 2020 MOA, was not a viable solution to the impairment of the Refuge. **Exhibit Q; Exhibit O.**

42. As a legal matter, subsection 2 of K.S.A. 82a-706b(a) must be read in harmony with its surrounding provisions. It requires the chief engineer to proceed with priority administration under subsection 1 if “augmentation” is not “available and offered voluntarily” at the time the chief engineer makes “a determination of an unlawful diversion.” *Id.*, 82a-706b(a). The statute does not allow the chief engineer to avoid enforcing priority administration under subsection 1 in the hope that augmentation may become a feasible option later. Thus, there is neither a factual nor a legal basis for chief engineer Lewis to delay the performance of his non-discretionary duties under the KWAA.

43. The Respondent may claim the authority to delay priority administration according to K.A.R. 5-4-1(e)(3), which purportedly allows him to consider shutting down juniors “the next year and rotating water use among rights.” But this regulatory allowance is clearly inconsistent with the clear statutory commands for immediate priority administration under the KWAA, and for the reasons detailed in the Memorandum, it is thereby void.

IV. PRAYER FOR RELIEF

WHEREFORE, for the reasons stated herein and in its Memorandum in Support filed herewith, Petitioner seeks the following relief:

- a. An order requiring Respondent Lewis to administer immediately all junior water rights in the Basin that KDA-DWR has found to be impairing the Refuge Water Right until such time as the Refuge Water Right is no longer impaired.
- b. A declaration that the chief engineer violates his non-discretionary duties pursuant to K.S.A. §§ 82a-706 and 82a-706b when the holder of an impaired senior water right files a request to secure water and the chief engineer decides not to administer

junior rights, thus knowingly allowing such junior rights to continue unlawfully diverting water by preventing water from moving to the senior right.

- c. A declaration that K.S.A. 82a-706b requires the chief engineer to administer immediately junior water rights in the Basin in the manner provided by subsection (a)(1) when “augmentation” under subsection (a)(2) is not “available and offered voluntarily” at the time the chief engineer determines that a senior water right has been impaired by junior rights.
- d. A declaration that K.A.R. 5-4-1(e)(3) is void because it contradicts and is inconsistent with the statutory powers of the chief engineer pursuant to K.S.A. §§ 42-329, 82a-706, and 82a-706b.
- e. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ Burke W. Griggs

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of June, 2023, a copy of the above and foregoing was sent by U.S. First Class Mail, postage prepaid to:

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