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**Lana Arrowsmith**, On-site Niobrara Coordinator

September 6, 2017

BY E-MAIL (PDF) AND U.S. MAIL

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## *Re: Quivira National Wildlife Refuge Impairment Negotiations*

Dear Mr. Barfield:

On May 13, 2016, Audubon of Kansas (AOK) submitted a comment letter to the Division of Water Resources (DWR) emphasizing the importance of the Quivira National Wildlife Refuge (Refuge). (For ease of reference, we have attached that letter to this one.) Writing on behalf of AOK and our members, we appreciate both your recognition of the Refuge's importance and the seriousness with which you are assessing the many challenges involved in protecting the Refuge's senior surface water right.

However, AOK has become concerned that DWR, Big Bend Groundwater Management District No. 5 (GMD5), and the U.S. Fish & Wildlife Service (Service) are not addressing multiple and fundamental legal issues that demand attention for the adequate protection of the Refuge's water right—a right that secures the lifeblood upon which the Refuge depends. Based upon the materials which DWR has posted on its Quivira website as of August 17, 2017, these negotiations appear to have remained limited to technical questions concerning the parties' preferred solutions, including augmentation. Unfortunately, these negotiations appear to be neglecting federal law: law that prohibits any reduction of the Refuge's water right, law that prohibits augmentation and other encumbrances upon Refuge property, and law that requires environmental and administrative review. Likewise, the correspondence among the interested parties appears to neglect both federal and state law requirements that impose non-discretionary duties of natural resources managers at both the federal and state levels to protect the Refuge and its water right.

Because AOK has become concerned by this apparent inattention to the binding law, we have prepared this letter. Part I of this letter summarizes the legal issues involved. Part II distills this binding law into a series of required elements for the successful resolution of the Refuge's impairment. Part III proposes several solutions to that impairment. The letter closes with a request: in light of the severity of the Refuge's impairment, but also in

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Audubon of Kansas is a nonprofit membership organization devoted to wildlife and prairie conservation in Kansas and America's heartland. Audubon chapters in Kansas include: Burroughs A.S. - Kansas City; Jayhawk A.S. - Lawrence; Northern Flint Hills A.S. - Manhattan; Smoky Hills A.S. - Salina; Sperry-Galligar A.S. - Pittsburg; Southeast Kansas A.S. - Parsons; Topeka A.S.; and Wichita A.S.

light of local irrigators' need to plan for the 2018 irrigation season, AOK hereby requests a full response from DWR by **October 1, 2017**, informing AOK and the public of DWR's positions on these relevant legal issues and its intended solutions. AOK understands that DWR, the Service, and the relevant irrigation interests may be avoiding discussion of the law that governs this situation, perhaps out of an abundance of caution if litigation is to commence; but AOK believes that the public interest requires such an open, forthright, and candid discussion.

## **I. Legal protections to which the Refuge is entitled under federal and state law.**

As a federal wildlife refuge holding a senior surface water right under Kansas law, the Refuge is entitled to substantial protections under both federal and state law. This section summarizes the eleven most prominent of these protections.

At the outset, we want to stress that the Refuge is entitled to special protections under federal law: it cannot be treated in the same way as a state-law appropriation right holder that does not enjoy these federal protections.

### *a. Protections under federal law.*

- i. The Refuge is entitled to full ecological and hydrological sustainability pursuant to the National Wildlife Refuge System Improvement Act.

Pursuant to the National Wildlife Refuge System Improvement Act (NWRSIA) (1997), the Refuge is entitled to full ecological sustainability. NWRSIA requires that the Secretary of the Interior, in managing wildlife refuges, "ensure that the biological integrity, diversity, and environmental health of the [National Wildlife Refuge] System are maintained for the benefit of present and future generations of Americans . . ." 16 U.S.C. § 668dd(a)(4)(B). In stark contrast to other federal public lands statutes such as those governing the national forests, this requirement is not subject to cost-benefit analysis or other multiple-use compromises. The biological integrity of the Refuge—a wetland of international importance for migratory birds—depends primarily on the long-term hydrological integrity of its water supply. Unfortunately, that hydrological integrity has become damaged by excessive groundwater pumping by junior irrigators in the Rattlesnake Creek Basin (Basin), which explains the Service's decision to bring its impairment complaint. But the mandate in NWRSIA is clear: any resolution of this impairment situation that compromises the hydrological integrity of the Refuge's water right compromises and harms the biological integrity of the Refuge, and thus violates the act. Given this federal mandate, a resolution of the Refuge's impairment situation that includes augmentation plans would be unacceptable. From a water-quantity standpoint, such plans do little more than replace depleted surface flows with more groundwater pumping, which in turn depletes the groundwater baseflows upon which the alluvial system depends. From a water-quality standpoint, augmentation plans would not duplicate the mixture of salt and fresh water upon which the habitat of the Refuge depends.

- ii. The Migratory Bird Treaty Act prohibits the parties from reaching a settlement that harms the Refuge's bird life.

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The Migratory Bird Treaty Act (MBTA) prohibits the “take” of any migratory bird—that is, any action that kills or harms such a bird—“by any means or in any manner . . . .” 16 U.S.C. § 703. The Refuge harbors hundreds of migratory bird species listed at 50 C.F.R. § 10.13. There is no exemption in the MBTA for farmers, state officers, or federal agencies. Thus, a negotiated resolution of the Refuge’s impairment situation that results in the “take” of any migratory bird dependent upon the Refuge will make the Service, DWR and other parties to such an agreement potential violators of the MBTA. The taking of a migratory bird is not justifiable under the MBTA: there is no right to harm or to kill federally protected wildlife in defense of property. *Christy v. Hodel*, 857 F.2d 1324, 1329-1330 (9<sup>th</sup> Cir. 1988), *cert. denied*, 480 U.S. 114 (1989). Such violations would subject the parties to the criminal penalty provisions of the MBTA. 16 U.S.C. § 707(a).

iii. The Endangered Species Act requires the full protection of Refuge habitat, including the protection of the Refuge’s water right at its full quantities.

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543, is the most powerful federal statute governing any decisions made regarding the protection of the Refuge’s water right. It protects listed species, whether threatened or endangered, according to a series of procedural and substantive protections, most notably by prohibiting actions which place listed species “in jeopardy” or which result in the “take” of any endangered species. (As you are aware from AOK’s 2016 letter, the Refuge harbors numerous species listed as either threatened or endangered.) Under the “no jeopardy” provision in Section 7 of the ESA, state and federal agencies must not adversely modify critical habitat that is essential for the listed species’ recovery. Section 9 of the ESA, which prohibits the taking of any endangered species, applies to both public and private lands. “Take” is defined in the ESA to include “harm,” 16 U.S.C. § 1539, and “harm” includes significant habitat modification on both public and private lands. Thus, regulatory actions that threaten the Refuge’s water right—including the approval of existing or increased levels of groundwater pumping, or the distortion of the Refuge’s hydrological balance between surface and groundwater—would be construed by a federal court as a violation of the “take” prohibition under Section 9 of the ESA. Any such violation would likely result in a permanent injunction against the regulatory actions that caused jeopardy and the taking of endangered species, as well as the imposition of criminal and civil penalties.

iv. Pursuant to the requirements of federal law, the Refuge may require more water supplies than those granted under its state law appropriation water right.

The sustainability mandate of NWRSIA, together with the standards set forth under the MBTA and the ESA, raise the issue of whether the Refuge has sufficient water supplies to meet these federal requirements. Given the long history of impairment of the Refuge’s state-law appropriation water right, the priority and authorized quantities of that right may be insufficient to meet the Refuge’s purposes. Addressing this problem may well require the Refuge to obtain additional water rights, whether under federal law, state law, or both. Under the doctrine of federal reserved water rights, the Refuge may be entitled to federal water rights sufficient to meet the purposes of the Refuge—since reserved water rights can be implied from the purposes of NWRSIA, the MBTA, and the ESA. *Winters v. United States*, 207 U.S. 564 (1908); *Potlatch* RECEIVED

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*Corp. v. United States*, 12 P.3d 1256 (2000). Alternatively, the Service may need to acquire additional water rights under state law—rights of sufficient priority and quantity to protect the Refuge—to fulfill the sustainability requirements under NRWSIA and the standards of the MBTA and the ESA. Whether through the recognition of federal reserved rights or the purchase of senior state-law appropriation rights, the Refuge may need to obtain additional water rights. Failure to do so likely violates federal law.

- v. Federal law prohibits the disposition of any federal property, including the diminution of the Refuge's water right or the burdening of Refuge land with easements.

The Service owns the Refuge's state-law water rights, which are statutorily defined as real property rights under the Kansas Water Appropriation Act (KWAA). K.S.A. § 82a-701(g). Federal law clearly prohibits the disposition of federal property—the Refuge's water right—and disposition includes the diminution of that water right. Thus, neither the Service nor DWR can dispose of or diminish the Refuge's water right by negotiation; neither can they place a burden (such as an easement for augmentation purposes) on Refuge land that diminishes the value of the Refuge's property. Only Congress, and not an executive branch agency such as Interior or the Service, can authorize the disposition of federal property. This rule dates back at least to *Gibson v. Chouteau*, 80 U.S. 92, 99 (1871), and is regularly cited in modern environmental litigation. The parties should keep this rule in mind: any such disposition or diminution would require Congressional approval, which would be unlikely in this case given the statutory authorities described above.

- vi. Changes in refuge operations trigger procedural protections for the Refuge under federal administrative law.

Both the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) require the Service to conduct administrative review of any proposed resolution of the Refuge's impairment. A change in Refuge operations, including a change in the operational dynamics of the Refuge's water right, constitutes “major federal action” that would trigger NEPA review. *Middle Rio Grande Conservancy District v. Norton*, 794 F.3d 1220 (10<sup>th</sup> Cir. 2002). Moreover, an agreement between the Service and DWR would qualify as an “agency action” subject to review under the APA. *Industrial Safety Equipment Association v. Environmental Protection Agency*, 656 F.Supp. 852, 855 (D.D.C. 1987), *aff'd*, 837 F.2d 1115 (D.C.Cir. 1988). Finally, such an agreement between federal and state entities cannot delegate federal regulatory authority over the Refuge to the State of Kansas—even though DWR has jurisdiction over its water right. *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554, 566 (D.C.Cir. 2004), *cert. denied*, 543 U.S. 925 (2004). The parties should keep these procedural requirements in mind as they conduct negotiations to protect the Refuge and its water rights.

b. *Protections under State Law.*

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- i. Because DWR's impairment investigations have determined that groundwater pumping is impairing the Refuge's water right, the Refuge and AOK are entitled to an injunction prohibiting that pumping.

As you are well aware, the KWAA provides multiple protections for senior water rights owners. The most powerful of these protections is that of injunctive relief prohibiting junior water rights holders from impairing the Refuge's water rights. K.S.A. §§ 82a-716a, 82a-717. Such a right was recently and comprehensively affirmed in *Garetson v. American Warrior*, 51 Kan.App.2d 370 (2015). (Notably, the court's clear defense of senior rights against compromise in *Garetson* aligns well with the federal statutory mandate for uncompromised sustainability in NWRSIA.) While both K.S.A. §§ 82a-716a and 82a-717 were amended in 2017, these amendments would not apply to the Refuge's impairment situation for two reasons. First, the Refuge, unlike the plaintiffs in *Garetson*, have maintained their pursuit of the administrative remedy for impairment set forth in the KWAA, by engaging the provisions of K.A.R. § 5-4-1. Second, because this investigation began before the 2017 amendments to the KWAA, these statutory amendments, which are prospective in their application, do not apply to this situation.

If the Service decides to seek injunctive relief through the courts, it would likely obtain injunctive relief similar to that ordered in *Garetson*. Moreover, given the Kansas Supreme Court's subordination of the KWAA to the Kansas Judicial Review Act (KJRA) in *Cochran v. Dep't of Agriculture*, 291 Kan. 898 (2011), it is likely that AOK would have standing to bring an action for injunctive relief on behalf of the Refuge pursuant to state law.

- ii. The augmentation option provided for in K.S.A. § 82a-706b(a)(2) is not permissible because it must yield to contrary federal law.

The parties to the impairment negotiations have repeatedly discussed stream augmentation as a possible full or partial remedy for the depletion of the surface waters of the Basin, surface waters upon which the Refuge depends. (See, e.g., E-mail from Mike Oldham, FWS, to Orrin Feril, manager of GMD5, December 13, 2016). The Kansas Legislature enacted K.S.A. § 82a-706b(a)(2) in 2015 to specifically allow for augmentation in the Basin, perhaps with a mind to resolving the impairment of the Refuge's water right. Regardless of its intent, the provision has no force in this situation: it must yield to the federal statutory mandates described above in Section I.a, pursuant to the Supremacy Clause in the U.S. Constitution. U.S. Const., art. VI, cl. 2. Because K.S.A. § 82a-706b(a)(2) cannot apply to this situation, the minimum desirable streamflows for the Basin set forth in K.S.A. § 82a-703c must be met from streamflow levels without the aid of augmentation.

- iii. The chief engineer cannot suspend his duty to protect senior water rights, and the Secretary of Agriculture cannot suspend it for him.

AOK is troubled by the express decision made by the Kansas Department of Agriculture (KDA) not to administer junior water rights in the Basin during 2017—even though KDA acknowledges that junior groundwater rights are impairing the Refuge's senior water right. (Letter from Secretary McClaskey to GMD5, December 8, 2016, at 1). While KDA may have made this decision in the hope of advancing negotiations, the decision violates the KWAA.

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Under the KWAA, the chief engineer has the statutory and non-discretionary duty to administer junior water rights that are impairing a senior right. K.S.A. § 82a-706. Nothing in the KWAA abridges the property rights of senior water rights holders. *Id.*, § 82a-721a. Thus, were the Refuge to request administration of junior groundwater rights in 2017—a request which seems both reasonable and necessary, given DWR’s impairment reports—then the chief engineer would be required to administer those junior rights to remove the impairment of the Refuge’s water right. While the chief engineer is afforded considerable deference in determining how to resolve the impairment, he cannot avoid resolving it. And while the Secretary of Agriculture can review certain decisions made by the chief engineer, she cannot foreclose the clear statutory protections afforded to senior water rights holders. Pursuant to both the federal law of standing and Kansas law, the Service, AOK, or any other similarly situated third party could bring a mandamus action to ensure that DWR fulfills its duties in 2017 and 2018.

- iv. DWR’s impairment findings may place a duty upon the chief engineer to initiate proceedings for an Intensive Groundwater Use Control Area (IGUCA), pursuant to the Groundwater Management District Act, K.S.A. § 82a-1020 *et seq.* (GMD Act).

DWR’s investigation of the impairment of the Refuge’s senior surface water right has produced two impairment reports. Together, these reports found decisively that groundwater pumping in the Basin is impairing the Refuge’s water right. These findings have been made pursuant to the KWAA; but because they align with the findings necessary to initiate proceedings for the establishment of an IGUCA pursuant to the GMD Act, K.S.A. § 82a-1036, they may require the chief engineer to initiate IGUCA proceedings. As DWR’s impairment reports make clear, groundwater levels in the Basin are declining and have declined excessively, K.S.A. § 82a-1036(a); the rate of withdrawal of groundwater within the Basin equals or exceeds the rate of recharge, *id.*, § 82a-1036(b); and unreasonable deterioration of the quality of water is occurring in the Basin—deterioration in the form of distorting the balance of saline and fresh water upon which the Refuge depends, *id.* § 82a-1036(d). The Refuge has not, apparently, requested the initiation of IGUCA proceedings; neither GMD5 nor irrigators within GMD5 have done so either, which is their right pursuant to K.S.A. § 82a-1036. Nor has GMD5 requested the initiation of proceedings for a Local Enhanced Management Area (LEMA) pursuant to K.S.A. § 82a-1041. Given the authoritativeness of DWR’s impairment findings, it is clear that the chief engineer must take action consistent with those findings. If he declines to initiate IGUCA proceedings, then he may risk neglecting his duties under both the KWAA and the GMD Act to follow the statutory dictates of the KWAA. K.S.A. §§ 82a-706, 82a-716, 82a-717, 82a-721a, 82a-1020, 82a-1039. Regulatory inaction constitutes action under state and federal administrative law.

- v. The chief engineer may be prohibited from reducing the original quantification of the Refuge’s state-law water right.

DWR should keep in mind that the Refuge may be entitled to a larger annual authorized quantity for its water right than the quantity that appears in its water rights certificate. In *Clawson v. DWR*, 49 Kan.App.2d 789 (2013), the Kansas Court of Appeals effectively negated the statutory and regulatory provisions by which the annual authorized quantities of an Approval

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of Application may be reduced during the perfection period. Pursuant to *Clawson*, a court could well find that the perfected quantification of the Refuge's 1957 water right (14,632 acre-feet per year, at a maximum rate of 300 cubic feet per second) must give way to the amounts described in the Refuge's approval of application—an original amount of 22,000 acre-feet annually, as GMD5 has noted. (Second Stakeholder Proposal in Connection with USFWS Impairment Complaint, February 15, 2017, at 2). DWR should take this matter under consideration as it evaluates the various proposals provided so far by the Service and GMD5.

## **II. The required elements for the adequate protection of the Refuge's impaired water right.**

Given the federal and state laws described in Section I, DWR must proceed according to their requirements. Because the Refuge is a federal wildlife refuge afforded specific protections under federal law, any negotiated resolution that violates that law will likely be enjoined and reversed. To comply with these statutory requirements, the adequate protection of the Refuge requires the protection of the sustainability of the hydrological system of the Basin upon which the Refuge depends. The KWAA similarly requires the full protections afforded to senior surface water rights holders. Together, that protection requires the following elements:

- a. The Refuge's state-law water right must be protected at its full authorized quantity and rate of diversion. There can be no compromises to this right, which is owned by the Service.
- b. To meet the sustainability mandate of NWRSIA and the standards set forth in the MBTA and the ESA, the Refuge's state-law water right must be protected as a surface water right, drawing its full authorized quantity and rate of diversion from the Basin, without short-term hydrological compromises such as stream augmentation produced by further groundwater pumping. Such pumping only serves to accelerate the depletion of the Basin's water supplies as a hydrological whole, and to distort the saltwater/freshwater mixture that is critical to Refuge habitat.
- c. DWR's first duty is to protect the Refuge's senior water right. However, given the long history of impairment of that right, the Service and DWR must together consider whether the Refuge requires additional water rights—whether under the doctrine of federal reserved water rights, or through the purchase, lease, or other transfer of state-law appropriation rights. In either case, these additional rights must be of sufficient priority and quantity to meet the requirements of the Refuge. If the Refuge's water right is insufficient to protect the Refuge from chronic impairment, then the Service must obtain additional water rights.
- d. The failure to protect the Refuge's water supplies has caused considerable harm to the Refuge for decades. That harm continues and accumulates, as the water and habitat conditions at the Refuge deteriorate further. Thus, a successful resolution of the Refuge's impairment situation requires an adequate restoration plan to compensate the Refuge for the harms it has already suffered. As conditions

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continue to deteriorate, more water supplies than those secured under the Refuge's water right will likely be needed to effect that restoration. Failure to restore will incur liability according to the statutes described in Section I.a.

- e. Pursuant to *Clawson*, DWR and the Service must evaluate whether the Refuge is entitled to an authorized quantity and rate of diversion that are greater than the quantity and rate described in its water rights certificate. The decision in *Clawson* likely requires protection of the Refuge's water right at its originally approved, unperfected quantity of 22,000 acre-feet per year.

### **III. Acceptable Resolutions of the Refuge's Impairment Complaint.**

AOK sees three potential pathways that would resolve the Refuge's impairment complaint in accordance with federal and state law. While the parties may have been discussing these (and potentially other) pathways, AOK wants to make clear that the Refuge, as a federal wildlife refuge governed by federal law, cannot be treated in the same way as a state-law appropriation right holder that does not enjoy the federal protections set forth in Section I.a. This point cannot be emphasized too strongly.

#### *a. Administration of Junior Water Rights pursuant to the KWAA.*

First, as set forth above in Section I.b., the chief engineer has the duty to protect senior surface rights pursuant to both the KWAA and the GMD Act. In the event that neither GMD5, nor a petition by its irrigators, nor the chief engineer initiates proceedings to form an IGUCA, or in the event that GMD5 does not initiate proceedings to form a LEMA, then the only remaining option is priority administration of water rights in the Basin. If priority administration is the only available resolution, then neither the chief engineer nor the Secretary of Agriculture has the legal ability to refuse to administer water rights. KDA should retract its illegal promise not to administer water rights in 2017, and should make so such promise hereafter.

#### *b. Initiation of Proceedings to form an IGUCA in the Basin.*

DWR has employed the IGUCA mechanism in groundwater-dependent surface water systems throughout Kansas—in particular, the Walnut Creek IGUCA, which has restored some degree of hydrological balance and sustainability to protect the groundwater-dependent ecosystem of the Cheyenne Bottoms. There is no reason why a similar resolution would not work in the Basin, provided it complies with federal law. The Refuge cannot have its senior surface water right diminished in any way as part of these proceedings. While the GMD Act contemplates the possibility of an IGUCA order that does not strictly follow priority administration, K.S.A. § 82a-1038, the Refuge cannot, for the reasons set forth above in Section I.a., suffer any qualitative or quantitative reduction in its senior surface water right.

#### *c. Initiation of Proceedings to form a LEMA in the Basin.*

Because neither of the above options may be amenable to DWR, GMD5, or irrigators within GMD5, DWR should encourage GMD5 to develop a local management plan pursuant to

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K.S.A. § 82a-1041 and initiate proceedings for the formation of a LEMA within the Basin. Given the greater flexibility afforded to groundwater irrigators under the LEMA statute, this may be the preferred option. Again, however, such a local management plan must abide by the same federal law that protects the Refuge from any qualitative or quantitative diminution of its senior surface water right.

In light of the clear legal mandates set forth in Section I, AOK is very disappointed by the LEMA proposals that GMD5 has recently submitted to DWR. (GMD5 Proposal to remedy impairment to QNWR, August 11, 2017; Second Stakeholder Proposal in Connection with USFWS Impairment Complaint, February 15, 2017). These proposals are facially defective under both federal and state law. A temporary LEMA, by definition, fails to meet the statutory requirements for permanent sustainability under NWRSIA, the MBTA, and the ESA, as well as the state law requirements under both the KWAA and the GMD Act. As set forth above, augmentation is not a legal option in the Basin because it runs afoul of the Supremacy Clause and thus must defer to federal statutes mandating sustainability and hydrological and biological integrity. The removal of “end-guns” on irrigation systems will provide only a minuscule reduction in the pumping that is impairing the Refuge. However, AOK is heartened by GMD5’s willingness to transfer water rights from within GMD5 to the Refuge, whether through the transfer of water rights from the Central Kansas Water Bank Association or through the purchase of junior water rights. Finally, the Refuge likely requires additional water rights for the restoration of its habitat and the dependable sustainability of the Refuge as a whole over the long term.

Across these three pathways, DWR must keep in mind that it has both the duty to address both the immediate impairment of the Refuge and the duty to resolve the long-term causes of that impairment—excessive groundwater pumping by junior water rights holders over the past several decades at least. Regarding the pathway of water rights administration, injunctive relief for the overuse of water extends to retrospective relief. *Texas v. New Mexico*, 482 U.S. 124, 129 (1987). The IGUCA and LEMA pathways similarly require regulatory actions that resolve long-term impairment by restoring the sustainability of whatever water supplies are necessary for the permanent protection of the Refuge.

AOK requests from DWR a full written response to the legal issues set forth in this letter, and its position on what DWR sees as acceptable resolutions, no later than **October 1, 2017**.

In closing, AOK would like to extend its appreciation to DWR, the Service, and GMD5 for its attention to this important matter.

Sincerely,



Mr. Ron Klataske  
Executive Director  
Audubon of Kansas



Ms. Margy Stewart  
Chair, Board of Trustees  
Audubon of Kansas

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Attachment:  
Letter from AOK to DWR, May 13, 2016

cc:

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David W. Barfield, P.E.  
Chief Engineer  
Division of Water Resources  
Kansas Department of Agriculture  
1320 Research Par Drive  
Manhattan, KS 66502

May 13, 2016

Dear Mr. Barfield:

The purpose of this letter is to comment on the "Claim of Water Right Impairment, In the Matter of Water Right File No. 7,571, Owned and operated by U.S. Fish and Wildlife Service."

Audubon of Kansas, Inc. urges the Kansas Department of Agriculture (KDA) Division of Water Resources (DWR) to implement all necessary measures, regulations and water rights to fully restore water flows in Rattlesnake Creek to provide the U.S. Fish and Wildlife Service (Service) with flows sufficient to provide for the senior water right for the Quivira National Wildlife Refuge (Refuge). As acknowledged in the Initial Report of the Chief Engineer, Prepared pursuant to K.A.R. 5-4-1 Concerning a Claim of Water Right Impairment, In the Matter of Water Right File No. 7,571, Owned and operated by U.S. Fish and Wildlife Service published December 2, 2015, the Service's water right is senior in priority to approximately 95 percent of the water rights in the Rattlesnake Creek Basin.

The report finds the Refuge's water supply "has been regularly and substantially impacted by junior groundwater pumping." According to the report, over the 34 years reviewed, shortages of greater than 3,000 acre-feet occurred in 18 years. Impairment of the Refuge's water right has become increasingly frequent and severe as hundreds of irrigation wells with junior water rights have been approved by the DWR, resulting in the cumulative lowering of groundwater levels and instream flows in the Rattlesnake Creek Basin.

Audubon of Kansas urges that the water right for the Quivira National Wildlife Refuge be fully protected and provided for prior to depleting consumption by junior water rights users.

Audubon of Kansas does not support the suggestion that the severe impairment of the Refuge water right (due to over-pumping of groundwater in the Rattlesnake Creek Basin) can be satisfactorily solved by pumping groundwater into the Refuge. In addition to the astronomical cost of installation and ongoing operations/maintenance, this approach would ignore the fact that depleting the groundwater and stream flows will further diminish ground water levels and adversely impact and/or destroy the stream, wetlands, wet meadows and other ecological values associated with the Refuge and other areas within the Rattlesnake Creek Basin.

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The Quivira National Wildlife Refuge was established in 1955 to protect migratory waterfowl. Its 7,000 acres of wetlands attract hundreds of thousands of ducks and geese of thirty different species, shorebirds, wading birds (including tens of thousands of Sandhill Cranes, and Whooping Cranes) and water birds annually. Its location in the middle of the Central Flyway places it in the primary pathway for many species of migrating birds. Over 340 species of birds have been recorded at Quivira. It's 22,135 acres feature a unique combination of rare inland salt marsh and sand prairie.

In terms of protection of, and management for, species of concern, several official levels of Threatened and Endangered status are recognized within the United States and within the State of Kansas. An Endangered species is one that is in danger of becoming extinct; a Threatened species is one whose population levels are low enough where the species could become Endangered. A Federal Candidate species is one that is under review for listing as a Threatened or Endangered species. In several cases, Quivira has been designated as Critical Habitat for certain species, either at the national or state level (or both).

Whooping Cranes are an endangered species that consistently utilize Quivira as an important migratory habitat. The tallest North American bird, and one of the rarest, they once numbered as few as 16. Whooping Cranes occur regularly at Quivira each fall and spring. Fall migration use typically occurs from late October through late November, while spring migration occurs from late March through early April. Whooping Cranes utilize Quivira's shallow wetlands and lake borders for feeding and overnight roosting.

Inland populations of Least Terns are typically found along large river systems. Interior Least Terns have been declining and are classified as Endangered nationally and in the state of Kansas. Quivira hosts a nesting population of these birds, in both the Big and Little Salt Marsh areas. Least Terns occur at the Refuge during the spring, summer and early fall.

The Western Snowy Plover is classified as Threatened in Kansas. This small, whitish shorebird occurs at Quivira from spring through early fall, and nests regularly on sand flats, primarily in the Big Salt Marsh area. Their populations have suffered declines similar to those of the Interior Least Tern, with whom they share habitat.

Many other "Species of Greatest Conservation Concern" depend on habitat at Quivira. The Piping Plover, a small shorebird similar to the Snowy Plover, occurs at Quivira occasionally during migration. The State of Kansas recognizes Species in Need of Conservation (SINC) throughout the state. Species with that status that occur at Quivira include: Black Rail, Black Tern, Eastern Hognose Snake, Western Hognose Snake, Ferruginous Hawk, Golden Eagle, Long-billed Curlew, Short-eared Owl, and Southern Bog Lemming.

Tens of thousands of shorebirds—shorebirds of thirty different species --rely on the wetlands and water-associated habitats of the Quivira National Wildlife Refuge. Shorebirds are a large and diverse group of birds that typically feed on shorelines, mudflats, and in shallow water. The group includes, but is not limited to, plovers, sandpipers, phalaropes, yellowlegs, and snipe. Although located in the center of the Great Plains, Quivira is uniquely situated in the center of the Central Flyway, one of the busiest of North America's four migration pathways. An oasis in the prairie, Quivira attracts migrating shorebirds by the tens of thousands in aggregate both spring and fall.

Beginning as early as February, Greater and Lesser Yellowlegs, along with a few other sandpipers, begin appearing on their northward journey. Numbers of species and birds increase until a peak in mid-May, when shorebirds can be found just about anywhere there is water at Quivira. There is a short lull of just a few weeks during June, after which the "fall" southward migration begins for many species by early July. This period of shorebird occurrence typically peaks in late August and September.

Shorebirds do not just occur as migrants at Quivira. Several species use Quivira's wetlands to nest. These are extant breeding populations, where the next nearest breeding populations may be hundreds of miles from Quivira. Nesting species include Wilson's Phalarope, Snowy Plover, American Avocet, and Black-necked Stilt.

Inland Salt Marshes are rare in the United States. The presence of Inland Salt Marshes contributes to the uniqueness of Quivira. Quivira's wetlands are unique due to the high concentration of salt in many areas. Subterranean salt deposits are near enough to the surface in the Quivira area to affect the groundwater that percolates to the surface. Salinity (or salt) levels in the water varies depending on rainfall, runoff from rainfall, and the depth of the water.

Many areas have a high enough salinity to support salt-tolerant plant species such as inland salt grass (*Distichlis spicata*), alkali sacaton (*Sporobolus airoides*), and seepweed (*Suaeda caceoliformis*).

Once dotted with active sand dunes, Quivira is also home to a unique prairie community called Sand Prairie. In the pre-settlement era of Kansas, prairie covered most of the state. During this time, much of the area south of the "great bend" of the Arkansas River consisted of plains with scattered active sand dunes. Once inactive, these dunes were covered with prairie grasses and forbs. This Sand Prairie is a unique and uncommon ecosystem in North America.

The Quivira National Wildlife Refuge is among thirty **"Wetlands of International Importance,"** as designated under an international treaty signed in 1971. The Ramsar convention on wetlands, signed by 160 countries, provides the framework

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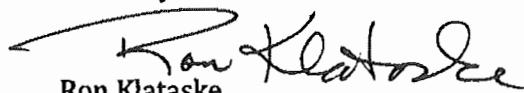
for national action and international cooperation for the conservation and wise use of wetlands and their resources.

Quivira was also designated in 1994 as part of the **Western Hemisphere Shorebird Reserve Network**. The designation is based on the fact that Quivira supports more than 500,000 shorebirds annually. Shorebirds are among nature's most ambitious, long-distance migrants. But their numbers are dropping quickly with some species projected to go extinct within our lifetime. Protecting these birds is an important international conservation priority that requires proactive and coordinated efforts within each of the countries these birds fly through during their vast, nearly pole-to-pole migrations.

Quivira was also designated as a **Globally Important Bird Area** by the American Bird Conservancy in 2001.

It is critical that the State of Kansas recognizes that the Quivira National Wildlife Refuge is critically important for migratory birds from a state, national, international and global perspective. Restoring the Service's water rights and making flows available to the Refuge is a legal and ecologically essential responsibility of the Kansas Department of Agriculture, Division of Water Resources.

Sincerely,



Ron Klataske  
Executive Director  
Audubon of Kansas

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