

August 27, 2019

VIA EMAIL TO: David.Barfield@ks.gov

Mr. David Barfield
Chief Engineer
Kansas Department of Agriculture
Division of Water Resources
1320 Research Park Drive
Manhattan, Kansas 66502

Re: Proposed Remedy for the Impairment of Quivira National Wildlife Refuge Water Right File No. 7,571

Dear Chief Engineer Barfield:

The undersigned organizations, while recognizing there are significant challenges to resolving the water right impairment associated with Quivira National Wildlife Refuge, are disappointed in your recent announcement to begin administration of water rights under the Kansas prior appropriation law in regard to the impairment of Water Right File No. 7,571. We ask you to consider an alternative approach to allow a more collaborative solution that more adequately complies with Kansas law and avoids unnecessary litigation and regulation.

Currently, stakeholders in the agricultural industry and conservation community are working on voluntary efforts, including an augmentation project, phreatophyte removal, irrigation efficiency measures, and a voluntary water right buyout program. These market-based, community-driven, solutions need the support of you and the Kansas Department of Agriculture, Division of Water Resources (DWR), as well as additional time to fully develop prior to any administration of water rights. The sooner DWR provides technical assistance and the necessary approval of the augmentation well field component, the sooner Water Right File No. 7,571 can have a timely solution. A plan and a process for augmentation has been discussed (including in the Legislature) for many years, and yet the local stakeholders who will be responsible for privately funding, operating, and maintaining an augmentation project have been given little direction or technical assistance from the State of Kansas. While augmentation may not provide complete long-term resolution, it is an available and effective immediate action.

Based on groundwater model interpretations of Balleau Groundwater, Inc., augmentation can provide an adequate source of water to contemporaneously remedy the impairment finding of the Quivira water right. Once augmentation is allowed to solve the present impairment, attention can then be given to water right retirements, technological and water use efficiency advancements, utilization of a water bank, and other water-saving concepts that can be incorporated into the Big Bend Groundwater Management District 5 (GMD 5) Management Program to address basin groundwater conditions and streamflow depletions.

From our perspective, the Chief Engineer's role is to address the Rattlesnake Creek basin's present water sustainability issues, not those in the extended future, by first ensuring the needs of

the senior water right holder are satisfied as stipulated in the Certificate of Appropriation for Water Right, File No. 7,571. This is an annual requirement, not a perennial mandate, as is clearly evidenced by the abundant streamflow this year. Establishing augmentation first to supplement any deficient Rattlesnake Creek surface water supply will then allow GMD 5 to develop a comprehensive locally-based solution to address long-term future sustainability issues.

Although you rejected GMD 5's recent Local Enhanced Management Area (LEMA) plan, with some modifications, this local effort can achieve additional conservation. LEMAs were approved by the Kansas legislature in 2012 with the support of organizations like ours. The agriculture community's support of the LEMA law was conditioned on the process being locally driven by water users to control conservation of their own water resource. LEMAs were never envisioned as being a remedy for impairment. The law, as it was crafted, affords the Chief Engineer a limited role in the LEMA process and these limits should be closely followed.

We are also concerned that your proposed administration of junior water rights may violate the Kansas prior appropriation law. Kansas has long recognized the prior appropriation doctrine.¹ This doctrine, also known as "first in time, first in right," recognizes that "[t]he first person to divert water from any source and use it for beneficial purposes has prior right thereto."² Kansas courts have routinely recognized that the "rule gives greater certainty of rights while affording a more flexible administration of the law and encourages free enterprise by protecting a developer's investment."³

The prior appropriation doctrine mandates that if an impairment occurs, the most junior right is curtailed, or if necessary enjoined from pumping, until the impaired senior right is satisfied. If the senior right is not satisfied by prohibiting the most junior right from pumping, curtailment progresses to the next most junior water right, and so on, until the authorized quantity of the impaired senior water right is satisfied. From your recent announcement on August 8, 2019, it appears that you are going to proportionately curtail all water rights junior to the Quivira water right, depending on location of the water right from the stream and the seniority of the water right relative to the Quivira right, with the most junior water rights receiving a larger curtailment than the least junior water rights. While in your opinion this may be a politically palatable option to remedy the Quivira impairment, it is not allowed under Kansas prior appropriation law and will most certainly draw a legal challenge. Such a challenge would only delay any real conservation in the basin.

If you desire to proportionally ration water across the basin, another potential option exists in K.S.A. 82a-1036, which allows the chief engineer to initiate an Intensive Groundwater Use

¹ K.S.A. 82a-707 (Supp. 2018) (stating: "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."); *see also* K.S.A. 82a-701 (Supp. 2018) (defining "appropriation right" as "a right, acquired under the provisions of article 7 of chapter 82a of the Kansas Statutes Annotated, and amendments thereto, to divert from a definite water supply a specific quantity of water at a specific rate of diversion, *provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate to such supply*, and to apply such water to a specific beneficial use or uses *in preference to all appropriations right of later date.*") (emphasis added).

² *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 229 (1981).

³ *Id.*; *see also Clawson v. State*, 49 Kan. App. 2d 789, 797 (Kan. App. 2013).

Control Area (IGUCA) upon his own investigation and findings. While we do not believe that such a heavy-handed approach is desirable or necessary at this time, given the water that can be delivered through augmentation and voluntary water right retirements, this is an available regulatory tool, and it is one DWR has used previously.

Our preferred alternative would be to allow augmentation, followed by a water right retirement program and efficiency measures to address the contemporary impairment issue. Then development of locally-based conservation efforts can be developed to address the longer-term water sustainability issues in the basin, like a GMD 5 LEMA that meets the legal requirements of the statute and the practical needs of the basin, or a regionally developed Water Conservation Area. If plans for stream augmentation and water right retirements show progress and can deliver the necessary water to Quivira in the near term, no further action is required by you or DWR.

If you would agree to indefinitely suspend notice to water right owners of administration of water rights, we stand ready to work with all interested parties to implement both near-term solutions like augmentation, and longer-term solutions such as voluntary water right retirement and other locally-led conservation efforts. Conversely, we are concerned that moving forward with water right administration could significantly inhibit collaborative efforts for long-term sustainability in the basin.

Sincerely,



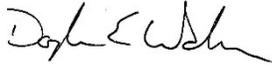
Matt Teagarden
CEO
Kansas Livestock Association



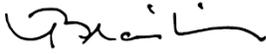
Robert Manes
Director
The Nature Conservancy of Kansas



Justin Knopf
President
Kansas Association of Wheat Growers



Douglas E. Wareham
President and CEO
Kansas Bankers Association



Brandi Miller
President and CEO
Kansas Cooperative Council



Steve Rome
President
Kansas Corn Growers Association



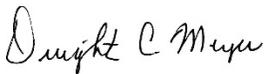
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Ken Winter
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President-CEO
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Dwight C. Meyer
President
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Cc: Mike Beam, Secretary, Kansas Department of Agriculture