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LEGAL SECTION  
KS DEPT. OF AGRICULTURE

August 17, 2018

BY E-MAIL AND U.S. MAIL

Ms. Noreen Walsh  
Regional Director, Mountain-Prairie Region  
U. S. Fish and Wildlife Service  
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Mr. David W. Barfield, P.E.  
Chief Engineer, Division of Water Resources  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502  
[david.barfield@ks.gov](mailto:david.barfield@ks.gov)

*Re: Quivira National Wildlife Refuge, Water Right File No. 7,571*

Dear Ms. Walsh and Mr. Barfield:

The undersigned is counsel for Audubon of Kansas ("AOK"). On September 6, 2017, AOK wrote the Division of Water Resources ("DWR") a detailed letter setting forth the applicable law concerning the impairment of Water Right File No. 7,571, which is owned by the United States Fish and Wildlife Service ("Service") on behalf of Quivira National Wildlife Refuge ("Refuge"). The Service and the Department of Interior's Office of the Solicitor were copied on that letter. In that letter, AOK asked DWR to respond fully to that letter, and to provide a plan to protect the Refuge's water right in accordance with the law. The response of DWR was completely inadequate; the Service did not respond at all. The Service's inaction has violated federal law, while DWR's conduct has ignored the dictates of both federal and state law. Please allow me to summarize the abdication of your respective legal duties.

Starting in 1986, the Service made known to DWR that the Refuge's water right was suffering severe water shortages as a consequence of junior groundwater pumping in the Rattlesnake Creek Basin. Efforts by the Service and other stakeholders to effect voluntary reductions in junior groundwater rights failed.

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After three decades of such ineffectiveness, the Service finally filed an impairment complaint with DWR on April 8, 2013, pursuant to K.A.R. § 5-4-1.

In response to that complaint, Mr. Barfield issued a final report on July 15, 2016, finding the Refuge's water right to be impaired. "Final 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, July 15, 2016." ("Final Report of Impairment"). That was more than two years ago.

Since the issuance of the Final Report of Impairment, the Service has not filed a request to secure water pursuant to K.A.R. § 5-4-1, which is the expected response from a senior water right holder whose right the chief engineer has found to be impaired. The Service has allowed its water usage to be diminished for two years since then as a consequence—in violation of multiple provisions of federal law.

On December 8, 2016, Secretary McClaskey of the Kansas Department of Agriculture ("KDA") made the express decision not to administer junior water rights in the Rattlesnake Creek Basin during 2017. As detailed in AOK's earlier letter, there is no legal basis for this decision under the Kansas Water Appropriation Act ("KWAA"), K.S.A. § 82a-701 *et seq.*, or any other law. Mr. Barfield abdicated his duties as chief engineer and condoned the secretary's usurpation of the chief engineer's statutory duty to protect water rights according to priority of appropriation.

That abdication continued. On September 29, 2017, writing on KDA stationery, Mr. Barfield deferred much of the Refuge's impairment matter to Big Bend Groundwater Management District No. 5 (GMD5), a body composed of groundwater irrigation interests that has no regulatory authority over water rights. GMD5 has been preparing various iterations of a Local Enhanced Management Area ("LEMA") management plan pursuant to K.S.A. § 82a-1041, a management option that is voluntary and does not follow the doctrine of prior appropriation. The chief engineer's response to AOK's letter concluded that DWR "believe[s] it is premature to determine that either the process or the product of this [LEMA] process is insufficient."

Subsequent events belie Mr. Barfield's conclusion. On December 13, 2017, DWR and KDA repeated the Secretary's promise of December 8, 2016 not to administer water rights to protect the Refuge during 2018—a second flagrant violation of the KWAA, which confers upon the chief engineer the non-discretionary duty to protect water rights according to the doctrine of priority of appropriation. K.S.A. § 82a-706.

On February 15, 2018, GMD5 submitted a draft "Request for Rattlesnake LEMA" to DWR. Like GMD5's earlier proposal of September 8, 2016, this management plan contains no date certain, no fixed reductions, no firm commitments, and numerous technical and legal speculations.

Mr. Barfield responded to this plan with a power point presentation of February 16, 2018. In this presentation, he proposed a start date of 2020 for a GMD5 LEMA at the earliest. Further, DWR's goal for such a LEMA is little more than to reduce the rate of increase of groundwater depletions. Based on DWR's own evaluation of the situation, it appears that DWR will be satisfied with (a) waiting two more years to remedy the impairment of the Refuge, and only then (b) taking steps that do not reverse these depletions. If these are DWR's standards, then the chief engineer and KDA have committed DWR to condone the permanent impairment of a senior surface water right, in patent violation of federal and state law.

On March 13, 2018, Governor Colyer issued Executive Order 18-11, a Drought Declaration for all of Kansas. Stafford County, where most of the Refuge is located, is under a Drought Emergency according to that declaration. That declaration, which remains in effect, has had no apparent effect on the Service's or DWR's response to the Refuge's ongoing impairment.

Despite the clear mandates of federal and state law, despite the issuance of the Final Impairment Report, and despite the Governor's drought emergency declaration for Stafford County, both the Service and DWR have abdicated their clear legal duties to protect the Refuge and its lifeblood—its senior water right. These duties, as set forth in AOK's previous letter, are clearly mandated. Indeed, as DWR states on its own website, at <http://agriculture.ks.gov/divisions-programs/dwr/water-appropriation/impairment-complaints>:

A founding principle of Kansas water law is first in time, first in right. That means water rights are assigned a priority date to establish who has first right to water. This allows the Division of Water Resources to protect a sometimes scarce water resource for those who established their rights first from those who came along later.

In times of plenty, there may be enough water to satisfy all water rights. However, in times of water scarcity, those who have earlier, or more senior, water rights are entitled to satisfy those rights before those who have rights junior to them.

Based upon this recitation of the record, the following facts are undeniable.

1. Federal wildlife and environmental law require Interior and DWR to protect the Refuge and the species which depend upon it.
2. The KWAA requires the chief engineer to protect senior water rights according to the doctrine of priority of appropriation.
3. The Final Report of Impairment found that the Refuge's senior 1957 surface water right is being impaired by junior groundwater irrigators in the Rattlesnake Creek Basin.
4. The Final Report of Impairment concedes that "none of the pumping shutoff scenarios produce an effective baseflow response for two to three years." Final Report of Impairment, p. 47.

5. Over two years since the Final Report of Impairment was issued, the Service has failed to request the protection of its water right.
6. Junior groundwater pumping that the chief engineer has found to be impairing the Refuge's water right has continued, undiminished, since the issuance of the Final Report of Impairment.
7. KDA and DWR have repeatedly committed to avoid protecting the Refuge's senior water right by administering junior water rights, in patent violation of the KWAA.
8. In so committing to avoid the law, KDA and DWR have deferred to GMD5, an entity with no regulatory authority under the KWAA, in the politic hope that GMD5 will author a LEMA that resolves the impairment of the Refuge's water right, starting in 2020 at the earliest.
9. Despite his own findings quoted above in Paragraph 4, the chief engineer has defined that satisfactory resolution as one that waits until 2020 to begin, and does nothing more than reduce the rate of groundwater depletion beneath and surrounding the Refuge.

These facts support one equally undeniable conclusion: the Service and DWR have deliberately abdicated their respective duties under state and federal law to protect the Refuge and its senior water right.

It is well past time to protect that right by obeying the law. On behalf of AOK, I demand that Interior, the Service, and DWR perform the following duties:

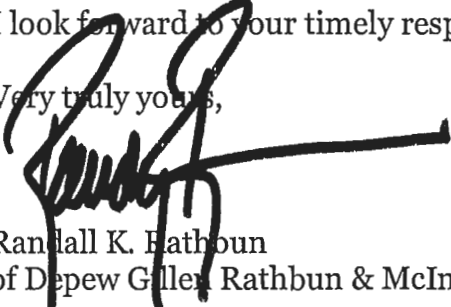
1. That the Service file, within thirty days of receipt of this letter, a Request to Secure Water for years 2018 and 2019 in response to DWR's impairment finding, pursuant to K.A.R. § 5-4-1(d). The Service's request must require the protection of its water right at its full approved quantities, taking into account its 2018 water usage so far. The form required by this regulation is enclosed with this letter. In the event the Service decides not to file a Request, I demand that it provide a full explanation, with authority, for its decision.
2. That, in the event that the Service fails to file such a request, that DWR respond to AOK's Request to Secure Water, which is also enclosed with this letter. AOK has standing to file this request pursuant to the citizen standing provisions of federal wildlife and environmental law and pursuant to *Cochran v. Dep't of Agriculture*, 291 Kan. 898 (2011), which subordinates the standing requirements of the KWAA to the Kansas Judicial Review Act. (Because AOK lacks water usage information for the water right, some of these sections are blank.) In the event that DWR decides not to act upon this request, I demand that it provide a full explanation, with authority for its decision, within thirty days' receipt of this letter.

3. That, in light of Mr. Barfield's own findings in the Final Report of Impairment, that DWR issue an order by October 1, 2018, setting forth the priority administration for 2019 of all junior water rights in the Rattlesnake Creek Basin that are impairing the Refuge's senior water right, to protect that right at its full approved annual quantity of 22,200 acre-feet at a diversion rate of 300 cubic feet per second.

This time AOK expects a satisfactory response from the Service and DWR. If either agency fails to follow the law and protect the Refuge's water right—a right owned in trust for the American people—then I will pursue legal remedies on behalf of AOK to remedy that failure. Those remedies will include an injunction forbidding the diversion of water by any junior water rights in the Rattlesnake Creek Basin for 2019, in accordance with the rights of priority of appropriation. Finally, I am certain that you recall that the federal environmental statutes upon which we rely provide for an award of attorneys' fees to the prevailing party.

I look forward to your timely responses.

Very truly yours,



Randall K. Rathbun  
of Depew Gillet Rathbun & McInteer LC

RKR:kgm

enclosures:

Request to Secure Water Pursuant to K.A.R. § 5-4-1 (blank)

Request to Secure Water Pursuant to K.A.R. § 5-4-1, filed on behalf of the Refuge by AOK

cc:

Mr. Ron Klataske, Executive Director, Audubon of Kansas

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

Mr. Mike Oldham

Project Leader and Refuge Manager

Quivira National Wildlife Refuge

U.S. Fish & Wildlife Service

1434 NE 80<sup>th</sup> St.

Stafford, Kansas 67578

United States Department of the Interior

Office of the Solicitor

Rocky Mountain Region

755 Parfet St.

Lakewood, Colorado 80215

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109 SW 10<sup>th</sup> Ave., Second Floor  
Topeka, Kansas 66612

Ms. Jackie McClaskey, Secretary  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502

Mr. Kenneth Titus, Chief Legal Counsel  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502

Mr. Orin Feril, Manager  
Big Bend Groundwater Management District No. 5  
125 South Main St.  
Stafford, Kansas 67578

REQUEST TO SECURE WATER

To: Chief Engineer
Division of Water Resources
Kansas Department of Agriculture
(or his or her authorized agent)

(Date)

1. I am presenting the following information as the basis for action on my request to secure water:

That pursuant to K.S.A. 82a-701 et. seq., a water right, identified as follows, has been established:

a. Vested Right

File No. County Source
Quantity Rate

b. Appropriation Right

File No. Priority Date
Status
Source Quantity Rate

2. That the authorized place of use for the water right is:

3. A. That the appurtenant to the water right described in paragraphs 1 and 2 is owned by:

Name Address
Name Address

B. That the land described in paragraph 2 is owned by:
(If different than owner of water right)

Name Address
Name Address

4. That the undersigned, (if not the owner) has an interest in the above-described land and water right as follows:

(tenant, lessee, buyer, contract or other)

5. That during this calendar year acre-feet of water has been used under this right.

6. That the undersigned has need for acre-feet of water at a rate of g.p.m. for purposes at locations described as follows:

No. of Acres: Kind of Crop:

7. That I am prepared to, and will, in the exercise of my water right described above, apply to beneficial use all water available to me at a rate of \_\_\_\_\_ g.p.m. or less, commencing at \_\_\_\_\_ o'clock A.M./P.M. on \_\_\_\_\_, 20\_\_\_\_.

8. That I have been informed that water is available from the source of supply in the amount of:

<u>Date</u>	<u>Estimated Flow</u>	<u>Location</u>
_____	_____	_____
_____	_____	_____

9. That I have been informed that water is, or was, being diverted from the source of supply as follows:

<u>Date</u>	<u>Water Right</u>	<u>Name</u>	<u>Estimated Rate of Diversion</u>
_____	_____	_____	_____
_____	_____	_____	_____

10. That I have advised the persons listed below of my need for water and my intention to exercise my water right:

<u>Name of Person</u>	<u>Date</u>	<u>Agreeable – Yes Or No</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

I request in accordance with the provisions of K.S.A. 82a-706b, that the Chief Engineer or his or her authorized agent open, close, adjust or regulate the headgates, valves, or other controlling works of any ditch, canal, conduit, pipe, well, or structure as may be necessary to secure water to which I am entitled:

\_\_\_\_\_  
Signature

State of Kansas )  
County of \_\_\_\_\_ ) SS

\_\_\_\_\_ by me being duly sworn, declare that the information is true and correct to the best of his or her knowledge and belief.

\_\_\_\_\_  
Affiant's Signature

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
Notary Public

My Commission Expires \_\_\_\_\_.



REQUEST TO SECURE WATER

To: Chief Engineer
Division of Water Resources
Kansas Department of Agriculture
(or his or her authorized agent)

August 17, 2018
(Date)

1. I am presenting the following information as the basis for action on my request to secure water:

That pursuant to K.S.A. 82a-701 et. seq., a water right, identified as follows, has been established:

- a. Vested Right
File No. County Source
Quantity Rate
b. Appropriation Right
File No. 7,571 Priority Date August 15, 1957
Status Impaired
Rattlesnake Creek 22,000 acre-feet 300 cfs
Source Quantity Rate

2. That the authorized place of use for the water right is: Quivira National Wildlife Refuge

3. A. That the appurtenant to the water right described in paragraphs 1 and 2 is owned by:

U.S. Fish & Wildlife Service 1434 BE 80th St., Stafford, KS 67578
Name Address
Name Address

B. That the land described in paragraph 2 is owned by:
(If different than owner of water right)

Name Address
Name Address

4. That the undersigned, (if not the owner) has an interest in the above-described land and water right as follows:
Audubon of Kansas, pursuant to 16 U.S.C. 1538(g).
(tenant, lessee, buyer, contract or other)

5. That during this calendar year \_\_\_ acre-feet of water has been used under this right.

6. That the undersigned has need for \_\_\_ acre-feet of water at a rate of \_\_\_ g.p.m. for \_\_\_ purposes
at locations described as follows:

No. of Acres: \_\_\_ Kind of Crop: \_\_\_

7. That I am prepared to, and will, in the exercise of my water right described above, apply to beneficial use all water available to me at a rate of \_\_\_\_\_ g.p.m. or less, commencing at \_\_\_\_\_ o'clock A.M./P.M. on \_\_\_\_\_, 20\_\_\_\_.
8. That I have been informed that water is available from the source of supply in the amount of:

<u>Date</u>	<u>Estimated Flow</u>	<u>Location</u>
<u>See Final Report of Impairment, issued by DWR July 15, 2016</u>		
_____	_____	_____
_____	_____	_____

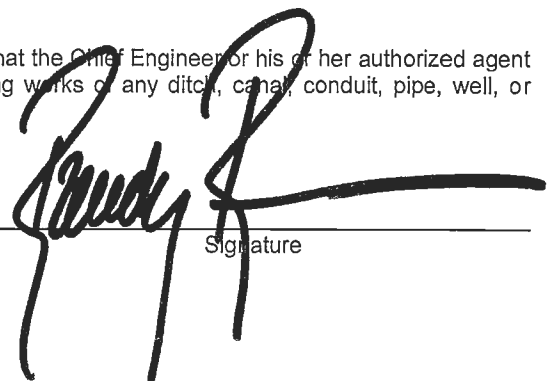
9. That I have been informed that water is, or was, being diverted from the source of supply as follows:

<u>Date</u>	<u>Water Right</u>	<u>Name</u>	<u>Estimated Rate of Diversion</u>
_____	_____	_____	_____
_____	_____	_____	_____

10. That I have advised the persons listed below of my need for water and my intention to exercise my water right:

<u>Name of Person</u>	<u>Date</u>	<u>Agreeable – Yes Or No</u>
<u>David W. Barfield, P. E.</u>	<u>August 17, 2018</u>	_____
<u>Noreen Walsh</u>	<u>August 17, 2019</u>	_____
_____	_____	_____

I request in accordance with the provisions of K.S.A. 82a-706b, that the Chief Engineer or his or her authorized agent open, close, adjust or regulate the headgates, valves, or other controlling works of any ditch, canal, conduit, pipe, well, or structure as may be necessary to secure water to which I am entitled:

  
 \_\_\_\_\_  
 Signature

State of Kansas )  
 County of Sedgewick ) SS

\_\_\_\_\_ by me being duly sworn, declare that the information is true and correct to the best of his or her knowledge and belief.

\_\_\_\_\_  
 Affiant's Signature

Subscribed and sworn to before me this 17th day of August, 2018

  
 \_\_\_\_\_  
 Notary Public

My Commission Expires 8-6-22

