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Aug 23 2019

Big Bend GMD #5

August 16, 2019

BY EMAIL AND U.S. MAIL

Mr. David W. Barfield, Chief Engineer
Kansas Department of Agriculture, Division of Water Resources
David.Barfield@ks.gov
1320 Research Park Drive
Manhattan, Kansas 66506

Mr. Mike Beam, Secretary of Agriculture
AgSecretary@ks.gov
1320 Research Park Drive
Manhattan, Kansas 66506

Re: In the Matter of the U.S. Fish and Wildlife Service's Impairment Complaint filed on behalf of the Quivira National Wildlife Refuge, File No. 7,571.

Dear Mr. Barfield and Secretary Beam,

As you both know, Audubon of Kansas ("AOK") has been following the developments and proceedings related to the impairment of the Quivira National Wildlife Refuge ("Refuge") with great interest. We appreciate the time and effort that the Department of Agriculture ("KDA") and the Division of Water Resources ("DWR") have devoted to responding to our written statements submitted to KDA and DWR about the impairment of the Refuge's water rights, and to meeting with AOK at your offices in Manhattan earlier this year. AOK has had similarly fruitful meetings and conversations with WaterPack, a consortium of irrigators within GMD5.

And so we read with interest Mr. Barfield's letter of July 30, 2019, to the Big Bend Groundwater Management District No. 5 ("GMD5"), in which DWR formally rejected the Local Enhanced Management Plan that GMD5 proposed earlier this year. As you know, our extensive earlier written comments submitted to KDA-DWR have repeatedly articulated our position regarding what would constitute an acceptable plan, under the federal and state laws that govern the Refuge and its senior surface water right. Based on KDA-DWR's responses to AOK's written and in-person statements, we believe KDA-DWR has taken those statements under consideration, as has GMD5.

On August 14, 2019, GMD5 filed a Petition for Review and a Petition for Stay in response to your July 30, 2019 letter. AOK learned of the letter from DWR on or about August 8, 2019, when, to the best of AOK's knowledge, it was posted on the DWR website and circulated. This

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delay effectively prohibited AOK from intervening and filing a Petition for Administrative Review within the 15-day window allowed pursuant to K.S.A. § 77-527. While this lapse in time does not affect AOK's ability to challenge KDA-DWR's final agency action or actions related to the Refuge in the future, it is nonetheless concerning.

The purpose of this letter is thus twofold.

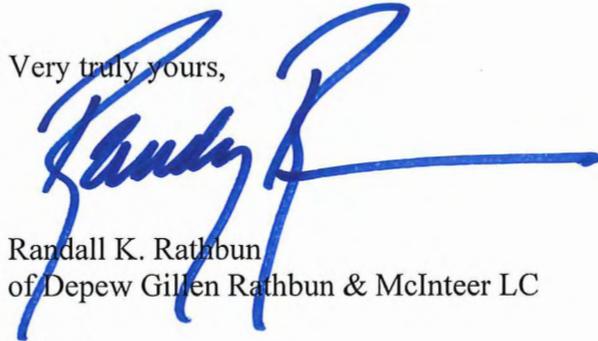
First, AOK requests from KDA-DWR an acknowledgment that AOK qualifies as a party to the proceedings related to the above-captioned matter, pursuant to the Kansas Judicial Review Act ("KJRA"), specifically K.S.A. § 77-611(b). That subsection confers statutory standing to obtain judicial review of final or non-final agency action to "a person who was a party to the agency proceedings that led to the agency action . . ." *Id.* Kansas courts have consistently construed the term "party to the agency proceedings," as that term is used in that subsection, as "a person to whom the agency action is specifically directed" or "a person named as a party to any agency proceeding or allowed to intervene *or participate as a party in the proceeding.*" *Cochran v. State, Dept. of Agr., Div. of Water Resources*, 291 Kan. 898, 905 (2011) (citing K.S.A. § 77-602(f)(2) and *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 752 (2008) (emphasis supplied by the court)). The court in *Bremby* found that the Kansas legislature intended the term "proceeding" as it is used in the KJRA to "be read broadly to refer to *the process* by which an agency carries out its statutory duties," and further, that an interested person's "submission of written comments during a public notice and comment period and all persons' comments made during a public hearing held by an agency both qualify as participation within the meaning of the KJRA's standing requirements." *Id.*, (quoting *Bremby*, 286 Kan. at 758, 761). That KDA-DWR receives input from such a party and considers that input are sufficient; there is no requirement of a public notice and comment process for such party to obtain standing under the KJRA. *Id.*, at 906. Similarly, where a party lacks administrative remedies to exhaust prior to judicial review, there is no additional requirement of exhaustion. *Id.*, at 908 (construing K.S.A. § 77-612 and citing numerous authorities).

Like the plaintiffs in *Cochran*, AOK has provided input to KDA-DWR during its consideration of agency action, and KDA-DWR has considered that input during the proceedings related to the impairment of the Refuge's water rights. At this stage, AOK lacks the administrative remedies available to GMD5, which proposed the Local Enhanced Management Plan. Because the KJRA is the statutory scheme for judicial review under the Kansas Water Appropriation Act, the KJRA confers standing upon AOK to seek judicial review of KDA-DWR's determinations pursuant to the KJRA. *Id.*, at 907. This is clearly settled law. (AOK also enjoys traditional common-law standing under federal and state law, according to the court's discussion in *Cochran*, *see id.*, at 909-910.)

Second, because AOK does enjoy statutory standing under the KJRA, AOK hereby requests that it be notified of KDA-DWR orders and decisions at the same time, and through the same process, as it timely notifies GMD5, the U.S. Fish and Wildlife Service, and other parties to this proceeding. This notification will be especially important given your intent to issue administrative orders relating to the Refuge on September 1, 2019. You may notify AOK electronically and by mail through this office.

In closing, AOK commends your intent to protect the Refuge's senior surface water rights. Please contact this office if you have any questions regarding this letter. We look forward to your response—and your recognition.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Randall K. Rathbun". The signature is stylized with a large, looping initial "R" and a long horizontal stroke extending to the right.

Randall K. Rathbun
of Depew Gillen Rathbun & McInter LC

RKR:kgm