



September 19, 2023

Mr. Earl D. Lewis Jr., P.E.
Chief Engineer
Kansas Department of Agriculture
Division of Water Resources
1320 Research Park Drive
Manhattan, KS 66502

RE: Comments on the Draft *Supplement to Technical Report on a Claim of Water Right Impairment, dated July 2016 for Water Right File No. 7,571 for Quantification of the Impairment of Water Right File No. 7,571 for 2008-2020* and Related Topics

Dear Mr. Lewis:

The Kansas Natural Resource Coalition (KNRC) submits these comments in response to the Kansas Department of Agriculture (KDA) Division of Water Resources (DWR) draft *Supplement to Technical Report on a Claim of Water Right Impairment, dated July 2016 for Water Right File No. 7,571 for Quantification of the Impairment of Water Right File No. 7,571 for 2008-2020*.

KNRC functions as an instrumentality of thirty Kansas boards of county commissioners primarily located in central and western Kansas. KNRC sponsors, promotes, and engages in meaningful government-to-government participation between its member counties and federal and/or state executive branch agencies during administrative policymaking and actions.¹ Through their responsibilities for protecting their respective human environments and natural environments and for ensuring the success of their local economies KNRC's member county boards of county commissioners have material interests in agriculture and inputs to agricultural activities including the availability of adequate water for optimal agricultural production. They also have material interests in the adequate provision of water for municipal purposes and for other purposes for which water rights have been issued by the State of Kansas within their respective jurisdictions.

On August 21, 2023, you issued a letter² to all water right holders whose water rights are junior to those of the U.S. Fish and Wildlife Service (FWS), individually informing them that administrative action may be taken in regard to their water rights as part of a plan to remedy impairment of the FWS senior water right described in File

¹ Through adoption of land use, conservation, and coordination plans into local land use ordinances KNRC has established a government-to-government prerogative with Kansas Department of Agriculture as an instrumentality of its member county governments. This limited governmental prerogative, long recognized by state law, the departments of Interior, Agriculture and in the public record, distinguishes KNRC from the public, environmental groups, or associations for purposes of meaningful participation in public policy activities, accessing Kansas Department of Agriculture data and science, and promoting collective positions by Kansas county governments.

² Kansas Department of Agriculture letter dated August 21, 2023, from Chief Engineer Earl D. Lewis, Jr. to individual water right holders junior to FWS Water Right, File No. 7,751 for the Quivira National Wildlife Refuge.

Steering Committee Members

Gary Hayzlett, President (Kearny) | Bob Rein, Vice President (Pawnee) | Marcus Rogge, Treasurer (Haskell)
Jim Daily (Clark) | Cameron Edwards (Logan) | Larry Townsend (Wallace)

Number 7,751 for the Quivira National Wildlife Refuge (QNWR). This letter is pursuant to the FWS water right call letter dated February 10, 2023,³ in which FWS declared that:

“... this request is the only means left to FWS to fully remedy our impairment.”

KNRC does not concur with FWS opinion because although FWS states that it will continue to support the National Environmental Policy Act (NEPA) environmental assessment (EA) process, it is issuing its demand prior to any final decision being made for the EA process or the issuance of the EA’s record of decision (ROD) for the process. FWS is also unwilling to wait for the completion of studies relating to the feasibility of an augmentation wellfield that would potentially play a significant role in remedying impairment of the FWS QNWR water right without harming junior water right holders.

Although the KDA-DWR letter of August 21, 2023, invites the affected public to comment on the DWR’s draft supplement to the division’s 2016 final impairment report, it is in the context of simultaneously warning the junior water rights holders that administrative action could be taken in regard to their water rights. KNRC understands this to mean that questions or comments regarding the broader context of the impairment issue and the potential effects not only to the individual junior water right holders but also the effects to the human environments and local economies within affected local jurisdictions. We note that portions of this broadened context are reflected in other comments already submitted to DWR and/or FWS such as the September 1, 2023, letter to FWS Director Martha Williams⁴ from five counties, seven cities, four economic development agencies, and three school districts in affected jurisdictions and the September 8, 2023, letter from Kansas Governor Laura Kelly to FWS Director Williams⁵. Many of these comments concern the many significantly adverse impacts to the human environments and local economies that would foreseeably result from the administrative actions resulting from the call for full satisfaction of the FWS water right call.

KNRC recommends adding additional context in regard to food security challenges resulting from supply chain breakdowns and administratively-driven pressures both domestically and internationally in combination with numerous regional military conflicts around the world (most notably between Ukraine and Russia). Maintaining the highest possible level of agricultural production in the region affected by this FWS water rights call is a necessary mitigation for the increasing food security issues we are experiencing and expect to continue for the foreseeable future.

In reviewing the DWR draft *Supplement to Technical Report on a Claim of Water Right Impairment, dated July 2016 for Water Right File No. 7,571 for Quantification of the Impairment of Water Right File No. 7,571 for 2008-2020*, KNRC notes that the impairment quantifications rely on modeling and that the 2023 update to the model extends the record through the end of 2020. Should administrative action(s) ultimately be determined actually necessary, KNRC expects that the action(s) be based on the actual recorded individual water right pumping, not on modeling.

³ U.S. Fish and Wildlife Service letter from Director Martha Williams to Earl Lewis, Chief Engineer, Kansas Department of Agriculture, Division of Water Resources.

⁴ September 1, 2023 letter from concerned local governments and associated organizations to FWS Director Martha Williams requesting reprieve from the FWS February 10, 2023 QNWR water rights call.

⁵ September 8, 2023 letter from Kansas Governor Laura Kelly to FWS Director Martha Williams requesting reprieve from the FWS February 10, 2023 QNWR water rights call.

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KNRC is encouraged by KDA-DWR's addition of a new case wherein the QNWR's water right is not impaired if the gaged flow was greater than 80% of the mean flow for that refuge management period when FWS diverted less than 80% of the available gaged flow. It is also encouraging to note that the supplemental analysis recognizes that there have been times when FWS chose not to divert available water because of operational decisions setting conditions where available water was not needed for satisfactory operation of the refuge. This leads KNRC to conclude that the impairments have not resulted in damage to the refuge or its overall operation in support of the migratory flyway and populations of species that inhabit or occasionally use refuge resources during migration.

One of the tenets of water rights administration is that water allocated in a water right be put to beneficial use. Given the health and sustainability of the aquifer serving Rattlesnake Creek and the QNWR and the fact that sufficient water was determined to be sufficient to issue water rights junior to Water Right File No. 7,571, KNRC requests information concerning whether it is KDA-DWR's understanding of how often QNWR uses the entirety of its 14,632 water right. This question arises because the FWS letter of February 10, 2023, fails to assert that the stated impairment has caused damage to the refuge or its resources, or has caused harm to populations of species inhabiting or transiting the refuge. Absent evidence of such damage or harm would lead to a logical conclusion that administrative action regarding junior water rights in the near term would be premature and cause unnecessary harm to existing agricultural operations served by any of the junior water rights without consequent tangible benefit to the operational viability of the QNWR or its resident and transitory wildlife populations.

The FWS justification for their apparently premature water right call⁶ is that no alternative exists under the EA "... that will provide complete remedy for the impairment of FWS's senior water right. The absence of such an alternative is of interest because in its Rattlesnake Creek Watershed Plan and Environmental Assessment presentation on January 13, 2022, the Big Bend Groundwater Management District #5 (GMD 5) offered these alternatives:⁷

- No action;
- Rattlesnake Creek augmentation wellfield and groundwater use reduction alternative;
- Groundwater use reduction alternative;
- **Other solutions proposed by the public or resource agencies;**

FWS apparently had the option to add its preferred alternative to the EA process from its inception. If the agency wanted to negotiate its preferred outcome, why did it not add its alternative to the list?

Subsequent to the FWS demand letter, GMD 5 held a project update on July 18, 2023, during which it reported that it submitted a request to the U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS) to elevate the Rattlesnake Creek Watershed plan from an EA to a full environmental impact statement in May 2023 based on information gathered in a feasibility study. One impact from this change will be

⁶ FWS failed to ensure inclusion of its preferred alternative in the EA alternatives list, was unwilling to allow the EA to be completed and the EA's record of decision to be published and was unwilling to await the implementation of a groundwater augmentation wellfield to determine whether the combined GMD5 actions would satisfy its senior water right.

⁷ Big Bend Groundwater Management District #5 PowerPoint presentation slide 13, January 13, 2022.

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the necessary timeline extension that will be required for the Rattlesnake Creek Watershed planning process and subsequent augmentation wellfield implementation.

KNRC and its affected member counties desire to engage with KDA-DWR and GMD 5 with the Rattlesnake Creek Watershed planning process on a government-to-government basis going forward to ensure each affected member county's material interests are represented to the planning and NEPA processes involved.⁸ The affected counties are well versed in the social, economic, and environmental aspects of the process, with particular detailed knowledge regarding the agricultural, municipal, social, and economic conditions within their respective jurisdictions.

Sincerely,

Tracey Barton
Executive Director

Cc: KNRC Steering Committee
Stafford County Board of County Commissioners
Pawnee County Board of County Commissioners
Barton County Board of County Commissioners
Edwards County Board of County Commissioners
Kiowa County Board of County Commissioners
Pratt County Board of County Commissioners
Big Bend Groundwater Management District #5
Kansas Farm Bureau

⁸ 42 U.S.C. § 4331. *Congressional declaration of national environmental policy.*

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