



VIA ELECTRONIC TRANSMISSION

September 19, 2023

Division of Water Resources
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502-5000

Re: Draft supplement (the **Draft Supplement**) to the Technical Report on a Claim of Water Right Impairment dated July 2016 made part of the Final Report of the Chief Engineer Concerning a Claim of Water Right Impairment, dated July, 2016, regarding Water Right File No. 7,571 (**2016 Report**) used by the U.S. Fish and Wildlife Service (the **Service**), at the Quivira National Wildlife Refuge (**Refuge**).

Dear Chief Engineer Lewis:

Members of the Water Protection Association of Central Kansas (**Water PACK**) own water rights throughout the Rattlesnake Creek sub-basin (the **Basin**). Many of Water PACK's members are also small towns, counties, rural school districts, county hospitals, conservation groups, hunters, agribusinesses, and financial institutions with interests in the benefits of irrigated production. Water PACK's lender members in particular help its producer members with capital secured by irrigated land, grain, inputs, cattle, storage, and farm equipment. As such, any change to the *status quo* with respect to the Refuge will impact Water PACK members' property, collateral, and ability to operate, as well as those who depend upon Water PACK's members for their livelihoods and essential services.

Producers with water rights affiliated with the Kansas Corn Growers Association (**KCGA**) likewise have a vested interest in the stability of the Basin. Water quantity is a key issue for such growers, as is protecting water quality through improved farming practices, using best management practices for pesticides and fertilizers, employing conservation measures like reduced and no-till farming, and installing riparian buffers. By controlling sedimentation and pesticide runoff, Kansas corn producers provide future access to crop protection tools and ultimately the use of land to produce needed crops.

Taxes, fees, and assessments paid by members of both our organizations fund healthcare, elementary schools, economic development, wildlife conservation, and fire protection in areas considered [low income or "severely distressed" by the U.S. Treasury Department](#). Continued access to fresh water is crucial to the survival of our communities, to private property rights, and to individual rights, especially in times of continued drought and increased fire risk.¹ Through a soft landing, Kansas can avoid tipping over

¹ Marc Sallinger, *Water Supplies in Louisville, Superior Almost Ran Dry as Firefighters Battled Marshall Fire Flames*, 9 NEWS, Jan. 18, 2022, available at <https://www.9news.com/article/news/local/wildfire/marshall-fire/louisville-superior-water-supply-marshall-fire/73-e9c78aea-fec0-4bef-bdc0-e484bdf9df1a>; Michael Stavola, *Large Fires on the Rise*, HUTCHINSON NEWS, July 16, 2017, <https://www.hutchnews.com/story/news/state/2017/07/16/six-largest-fires-in-kansas-history-came-within-past-21-years/20252730007/>; Kansas Forest Service, *Kansas Forest Action Plan: the Agency's Road Map*, https://www.kansasforests.org/about/kfs_docs/KSForestActionPlan.html (last visited Aug. 23,

the agricultural economy and creating dust bowls like those in Crowley County, Colorado, where lack of water left only the prisons standing as a going concern.²

Proposed cuts in water use tied to the Draft Supplement present an imminent threat to our members and the continued health of our communities. Senator Moran recently noted the following:

Using corn growing in Pratt as an example, and knowing agricultural production has a 1.72 multiplier effect on economic output, even a 60 percent reduction in planted irrigated acres of corn will result in over \$41 million in lost economic activity. Extrapolating these numbers among commodity and livestock production in all eight GMD5 counties would mean the potential loss of hundreds, if not a billion dollars in lost economic activity. That drop in economic activity also erodes the tax base, lowers school enrollment and harms local businesses.³

Indeed, a 30% reduction in water use was expected to decrease producer returns by \$40.33 per acre in 2018 dollars.⁴ Similarly, a total loss of irrigation was projected to decrease total farm operating expenditures in GMD5 by \$259.8 million (from \$1.29 billion).⁵ We now project an \$884MM decline in property values within the Basin wrought by what appears to be an expected 48% cut from existing allocations.

Given the risks posed by the Service's call for water, Water PACK and KCGA appreciated the opportunity to preview your Draft Supplement during the meeting held in Salina on Friday, August 4, 2023. However, the Salina meeting with you, Secretary Beam, and Division of Water Resources (**DWR**) staff did not touch upon the economic impacts of planned cuts in the Basin. Instead, DWR personnel referenced a new, unpublished, and unapproved hydrological model (the **Draft Model**) of Big Bend Groundwater Management District No. 5 (**GMD5**) derived from an older approved model developed by Balleau Groundwater Inc. (the **Balleau Model**). The Draft Model appears to form the basis for the Draft Supplement and evidently incorporates data for the 2008-2020 period which suggests that stream-flows at Zenith have continued to decline by 400 acre-feet per year since publication of the 2016 Report. At Salina, we also heard that DWR expects to assess whether the Service is impaired based on the operational schedule employed by the Refuge, evapotranspiration from Refuge impoundments, and (crucially) whether groundwater diversions caused shortfalls at the Refuge, the latter based solely on DWR's interpretation of hydrological models and not physical testing.

2023); KAN. BILL OF RIGHTS §§ 17, 21; K.S.A. 82a-702 ("All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.").

² George Oamek, *Let's Avoid Buy & Dry*, IRRIGATION TODAY, Feb. 16, 2023, available at <https://irrigationtoday.org/features/lets-avoid-buy-dry/>; Sofia Jeremias, *Will the West Figure Out How to Share Water?* DESERET NEWS, Nov. 11, 2020, <https://www.deseret.com/indepth/2020/11/11/21513056/will-the-west-figure-out-how-to-share-water>.

³ Jerry Moran, *Finding common ground over Quivira Water Rights*, GREAT BEND TRIBUNE, Aug. 30, 2023, <https://www.gbtribune.com/opinion/finding-common-ground-over-quivira-water-rights/>.

⁴ Nathan P. Hendricks, et al., *The Value of Water in GMD5*, at ii, Dec. 20, 2018.

⁵ *Id.* at 32.

Based on statements made in Salina and other circumstances extant, we do not expect that direct administration of water rights tied to the Draft Supplement or the 2016 Report can withstand review under K.S.A. 82a-1903, the Kansas Judicial Review Act (**KJRA**), the Kansas Water Appropriation Act (**KWAA**), the Kansas Private Property Protection Act (**KPPPA**), the Due Process Clause, the Takings Clause, the Contracts Clause, the Kansas Bill of Rights, or the public trust doctrine. As organizations specifically mentioned in the 2016 Report,⁶ we therefore urge you to address and reconsider the following concerns in relation to the 2016 Report and the Draft Supplement:

- Assessment of impairment is a quasi-judicial function limited to the authorities granted to you by the legislature.⁷ Much like a purely judicial proceeding, a quasi-judicial proceeding "requires a weighing of the evidence, a balancing of the equities, an application of rules, regulations and ordinances to facts, and a resolution of specific issues."⁸ Despite the finality required under DWR's impairment investigation regulations, the Draft Supplement effectively re-opens the 2016 Report, adopting a quasi-legislative approach to resolution of the Service's complaint.⁹ In particular, the Draft Supplement relies upon the newer Draft Model to adjust the findings set forth in the 2016 Report, in essence via introduction of new evidence and a new approach to assessing impairment.¹⁰ The 2016 Report however relied upon the Balleau Model, a rule and regulation of wide scope used as the basis for the GMD5 management program, GMD5 regulations, and final orders applicable to water rights with points of diversion in GMD5, including both the disputed change orders for the R9 Ranch and the pending Hays/Russell transfer application. Before replacing, amending, or supplanting the Balleau Model through the Draft Model or the Draft Supplement, let alone employing a quasi-legislative approach to quasi-judicial findings identified in the 2016 Report, you must comply with your enabling authorities, including but not limited to K.S.A. 82a-706a, K.S.A. 82a-1903, the Kansas Rules and Regulations Filing Act, Section 82a-1029 of the Kansas Groundwater Management District Act (the **GMD Act**), and Due Process Clause

⁶ See K.S.A. 77-611.

⁷ *Reifschneider v. Kansas State Lottery*, 266 Kan. 338, 334 (1998) (distinguishing between quasi-legislative and quasi-judicial proceedings); See Kan. Att'y Gen. Op. 97-41 (explaining distinctions between quasi-legislative and quasi-judicial functions undertaken by Kansas administrative agencies); *Clawson v. DWR*, 315 P.3d 896, 905 (Kan. App. 2013) ("It is a well-established rule of law that Kansas administrative agencies have no common-law powers."); K.A.R. 5-4-1; K.A.R. 5-4-1a.

⁸ *Golden v. City of Overland Park*, 224 Kan. 591, 597 (1978) (emphasis supplied).

⁹ See Kan. Att'y Gen. Op. 97-41.

¹⁰ See, e.g., Sam Perkins, Update to GMD5 groundwater model scenarios produced by KDA-DWR at 1 (Aug. 7, 2017) ("After completion of the investigation, which found that impairment had occurred, additional model scenarios were developed beginning in September 2016 to help determine the spatial extent and distribution of pumping impacts to Rattlesnake C (RSC) streamflow, primarily at the Zenith gage, which lies just above diversions to QWR."), https://sftp.kda.ks.gov:4443/20170619.GMD5model_backup/memo_update_of_GMD5_gwModel_scenarios_2017_0807.docx.

requirements, as use of an unapproved “rule and regulation”¹¹ of such broad scope, together with any *de facto* amendments to the GMD5 management program or the 2016 Report must abide by applicable law.¹²

- Assuming for a moment that you may revisit a “final report” for an impairment determination based on some authority in the KWAA or the GMD Act,¹³ more than 30 days must be afforded to interested stakeholders to receive, assess, and provide input on any action built on the Draft Model. Notably, Water PACK received incomplete files related to the Draft Model on September 12, 2023 despite submitting a Kansas Open Records Act (**KORA**) request on August 14, 2023, files that omitted any description of new model runs prepared by DWR in connection with the Draft Supplement, let alone a new approach to measurement of impairment at the Refuge.¹⁴ Based on what we have reviewed from the Draft Supplement and the limited time afforded to review files produced in response to our KORA request, it remains unclear whether the adjustments/recalibration to the Draft Model are final and complete. DWR’s KORA response also omits explanations as to how the changes made for the 2008-2020 period impact model calibration or reliability for the period prior to 2008 that is contained in the 2016 Report. Further, as far as we can tell, there has been no formal report describing the update process, new scenarios, or results derived from this Draft Model, only slides delivered pursuant to an earlier KORA response from GMD5 that are labeled DRAFT. However, based on what we have learned from examination of the model files available to Water PACK in connection with the R9 Ranch matter, streamflow conditions in the Basin are very important in determining the degree of impact associated with potential reductions in pumping. If the Draft Model is now the basis for DWR’s approach to the Service’s complaint, it would behoove DWR to make public a report regarding any new model runs associated with the Draft Supplement, as any other approach is unlawful, unreasonable, arbitrary, and capricious, as well as contrary to the KJRA and Due Process Clauses. Regardless, as noted above, undertaking a regulatory approach to an alleged impairment based on unpublished standards would violate the holdings in *Moser* and *Ivy*, as well as your duties as

¹¹ K.S.A. 77-415(c)(4) (“‘Rule and regulation,’ ‘rule,’ and ‘regulation’ means a standard, requirement or other policy of general application that has the force and effect of law, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation.”).

¹² See *Sierra Club v. Moser*, 298 Kan. 22, 310 P.3d 360 (2013); *Clawson v. DWR*, 49 Kan.App.2d 789 (2013); *Clark v. Ivy*, 240 Kan. 195, 206, 727 P.2d 493 (1986) (“Members of the public, and others affected thereby, should not be subjected to agency rules and regulations whose existence is known only by agency personnel.”); *Director of Taxation, Dept. of Rev. v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 459 (1984) (“[A]n administrative agency may not under the guise of a regulation or order substitute its judgment for that of the legislature. It may not exercise its powers derived from the legislature to modify, alter, or enlarge the legislative act which is being administered.”).

¹³ *Id.*; see also K.S.A. 82a-717a(b)(2)(C)(impairment investigations must be completed within 12 months absent notice of good cause for extension).

¹⁴ Metadata for the files produced in response to the KORA request indicates that they were generated the morning of September 6, 2023 but held until September 11, 2023.

Chief Engineer to adopt and enforce reasonable standards for the achievement of the purposes of the KWAA.¹⁵

- For purposes of preserving such arguments, we note that the KWAA has since its inception limited the time allowed for perfection of an appropriation to a “reasonable period”.¹⁶ Yet both the Draft Supplement and the 2016 Report ignore key elements of the five-decade process attending certification of the Service’s water right, the material defects in the 2016 Report described in this letter, and continued tinkering with the Balleau Model by DWR staff. In particular, both documents overlook:
 - the primacy of hundreds of water rights¹⁷ perfected between the initial filing of the Services’ request to appropriate water on August 15, 1957 and the Service’s final certificate of appropriation dated April 10, 1996;
 - impairment as an annual proposition measured in terms of how much water can be diverted under the specific conditions of a particular water right in any given calendar year, and not a multi-year calculation;¹⁸ and
 - procedural defects attending perfection of the Service’s water right and the Service’s handling of water at the Refuge.¹⁹

The two documents also rely solely upon hydrological models without undertaking physical investigations of impairment required by K.A.R. 5-4-1(b) and, by extension, K.A.R. 5-4-1a.²⁰ A proper physical investigation of the Refuge would have examined issues including but not limited to:

¹⁵ “The chief engineer shall adopt, amend, promulgate, and enforce such **reasonable** rules, regulations, and standards necessary for the discharge of his or her duties and for the achievement of the purposes of this act pertaining to the control, conservation, regulation, allotment, and distribution of the water resources of the state.” K.S.A. 82a-706a (emphasis supplied).

¹⁶ K.S.A. 82a-713.

¹⁷ K.S.A. 82a-711a; K.S.A. 82a-701(f); *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343 (Kan. 1989) (“To establish a property interest in a particular benefit, appellant must have a ‘legitimate claim of entitlement to it.’”).

¹⁸ See K.A.R. 5-4-1(e)(3), (5); K.S.A. 82a-701(f); see also Comment on the Draft Supplement by the Hinkle Law Firm submitted on behalf of Kent Moore, Suzanne Moore, Steve Maechten, and their affiliates dated September 19, 2023, which is incorporated by this reference.

¹⁹ See K.S.A. 82a-706a, K.S.A. 82a-710, K.S.A. 82a-711, K.S.A. 82a-713, K.S.A. 82a-714, K.S.A. 82a-718; and K.A.R. 5-1-1(mmmm).

²⁰ See 2016 Report at 24-27; see also *Garetson Bros. v. Am. Warrior Inc.*, 347 P.3d 687, 696 (Kan. App. 2015) (noting requirement for physical investigation of impairment in cases where the State is not a party). Such physical investigations are especially important in light of new data from GMD5 indicating that recharge curves for region 9 of the Balleau Model did not accurately predict stream flow at Zenith during the 2008-2020 period.

- lack of reliable metering at the Refuge inlet, diversion works, or impoundments;²¹
- installation of the Zenith gage in 1973 and its effects on data used in either model;
- intermittent stream-flows in the Rattlesnake Creek; and
- evapotranspiration from Refuge impoundments.

It also remains unclear which laws and regulations should apply to any administration of the Basin based on the decades-long period preceding the 2016 Report and a raft of intervening changes to regulations applicable to potentially impacted water rights. Failure to consider such aspects of the Service's water right or other affected water rights in the context of the 2016 Report or the Draft Supplement would, upon issuance of an order,²² give rise to relief under every element set forth in 77-621(c) of the KJRA; yield an uncompensated taking of private property/collateral;²³ violate the KPPPA; ignore Due Process Clause requirements; and otherwise violate the Contract Clause of the U.S. Constitution.

- The Draft Supplement (and, by extension, the 2016 Report) alleges impairment of the Service's water right prior to the 1987 year of record and, according to linear trend lines, shows at most a 200 acre-foot annual increase in shortfall. Any allegation of increasing impairment beyond the 200 acre-foot threshold involving measurements prior to the 1996 year of perfection is unreasonable, unlawful, and based upon a determination of fact not supported to the appropriate standard of proof. See K.S.A. 77-621(c); K.S.A. 82a-706a.
- The Draft Supplement omits references to economic considerations pertinent to the original appropriation of the Refuge water right and other water rights in the Basin. Yet the GMD Act, GMD5 regulations, the 2018 GMD5 Management Plan,²⁴ and laws applicable to original appropriations²⁵ all reference economic considerations applicable to original appropriations and the role of GMDs in Kansas water policy. To the same effect is Section 77-706 of the KPPPA, which requires production of a written economic impact report in connection with agency actions that may constitute a taking, such as proposed rules and regulations like the Draft Supplement, the Draft Model, or ensuing administration orders issued in the absence of any physical investigation of the alleged impairment.
- The Draft Supplement and recent conversations with DWR staff indicate that the alleged impairment stems from a decline in the regional water table. Impairments tied to declines in a regional water table require compliance with K.A.R. 5-4-1a, which covers regional impairments,

²¹ K.S.A. 82a-706c.

²² K.S.A. 82a-724; K.S.A. 82a-1901.

²³ See K.S.A. 26-513.

²⁴ "Sustainable water supplies are needed for all uses including domestic, municipal, industrial, recreational, and agricultural. Sustainable yield is defined in the District's rules and regulations 'means the long-term yield of the source of supply, including hydraulically connected surface water or groundwater, allowing for the reasonable raising and lowering of the water table'". GMD5 Revised Management Program at 13 (2018).

²⁵ K.S.A. 82a-711, K.S.A. 82a-711a.

and not K.A.R. 5-4-1, which addresses direct impairment and forms the stated basis for the 2016 Report.

- Assessing whether the Service is impaired based upon the operations plan for the Refuge would unlawfully delegate your authority to a federal agency in a manner that imperils our members' ability to plan, plant, and harvest a crop, let alone raise cattle or provide water to municipal water systems increasingly threatened by drought.²⁶ You should instead assess impairment based upon whether the Refuge diverts or wastes water, while requiring the Service to implement published conservation plans authorized by K.S.A. 82a-733.
- The Draft Supplement and the 2016 Report unreasonably fail to account for the effects of enhanced recharge from irrigation in the High Plains Aquifer,²⁷ planned depletion in Southwest Kansas Groundwater Management District No. 3,²⁸ futility of calls,²⁹ and your predecessors' failure to conserve water in the Arkansas River.³⁰
- Planned administration of the Basin based upon the Draft Supplement stands at odds with the stated purpose of the Department of Agriculture; that is, "[t]o serve, promote and support agriculture for the benefit of Kansas and its citizens."³¹ Legislative dictates imposed on the Department³² and DWR require a broader and more reasoned approach to Refuge-related orders affecting the Basin.

To be clear, both Water PACK and KCGA remain committed to fashioning a remedy or a settlement that limits the economic impact of proposed reductions, respects private property rights, and follows proper procedure, all while recognizing the hand that you have been dealt. By the same token, however, we believe that any orders issued in response to the Service's requests must address the concerns raised in

²⁶ *Olathe Community Hospital v. Kansas Corp. Com.*, 232 Kan. 161, 167 (1982).

²⁷ Dylan Riley, et al., *The Impact of Land Cover on Groundwater Recharge in The High Plains: An Application to the Conservation Reserve Program*, SCIENCE OF THE TOTAL ENVIRONMENT, Dec. 15, 2019, available at <https://pubmed.ncbi.nlm.nih.gov/31442730/>.

²⁸ KANSAS WATER AUTHORITY, 2023 ANNUAL REPORT, p. 3, available at https://kwo.ks.gov/docs/default-source/kansas-water-authority-page/annual-report-2023-final_010523.pdf.

²⁹ See, e.g., Colorado Division of Water Resources, Written Instruction and Order 2015-03, Amended 2023, DIVERSIONS OF WATER DURING A "FUTILE CALL DETERMINATION", available at https://dnrweblink.state.co.us/dwr/0/edoc/2815456/DWR_2815456.pdf.

³⁰ DONALD O. WHITTEMORE, ET AL., KANSAS DEPARTMENT OF AGRICULTURE-DIVISION OF WATER RESOURCES & THE KANSAS WATER OFFICE, NUMERICAL MODEL OF THE MIDDLE ARKANSAS RIVER SUBBASIN, p. 92 (2006) ("The decrease in the net lateral flow decreases the ground-water flow into the Rattlesnake Creek subbasin."); see also *Kansas v. Colorado*, 543 U.S. 86 (2004); *Kansas v. Colorado*, 533 U.S. 1 (2001); *Kansas v. Colorado*, 514 U.S. 673 (1995).

³¹ KDA, *2023 Goals and Objectives*, available at [2023-goals-and-objectives.pdf \(ks.gov\)](https://ks.gov/2023-goals-and-objectives.pdf).

³² See K.S.A. 2-1902.

this letter, other comments on the Draft Supplement from partner organizations, and prior letters from Water PACK, KCGA, and GMD5 set forth in the 2016 Report.³³

In conclusion, we thank you for your continued efforts to resolve the conflict between the Service and other parties impacted by planned orders. We also ask that you continue to maintain open lines of communication with us, perhaps in the context of confidential settlement communications that could afford more open conversations regarding acceptable plans for the Basin. Regardless of whether you opt to accept our invitation, however, we do ask that you follow the law, the economics, and the science, and we stand ready to help you do so.

Please feel free to contact us with any further questions or concerns.

Water PACK



Pat Janssen, its President

Kansas Corn Growers Association



Brent Rogers, its President

³³ Such prior comments are incorporated in this letter by this reference, together with comments in the 2016 Report from Stafford County Farm Bureau, Kansas Corn Growers Association, and ILS.