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September 22, 2023

Martha Williams, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Re: Audubon of Kansas' Position on Quivira National Wildlife Refuge's Water Impairment

Dear Director Williams,

Audubon of Kansas (AOK) commends the U.S. Fish and Wildlife Service (the Service) for showing leadership at Quivira National Wildlife Refuge (Refuge) by submitting a request to secure water to protect its senior water right. By making the request, the Service is demonstrating its commitment to its mission “to conserve, protect, and enhance fish, wildlife, plants, and their habitats” and vision, which is “known for our scientific excellence, stewardship of lands and natural resources, dedicated professionals, and commitment to public service.” By securing water for the Refuge, the Service is ensuring that the natural resource will be available “for the continuing benefit of the American people” by providing wildlife viewing and hunting opportunities and supporting the local economy through ecotourism.

AOK is aware that the Service has been pressured to extend the timeline for protection and restoration of the Service's senior water right to allow for “collaboration” and “innovative solutions” (Letter from Kansas Governor Laura Kelly, Sept. 8, 2023). The Service may be tempted to extend the timeline in accordance with its good intentions to “work with others” and its hopeful vision to be a “trusted partner.” However, AOK would like to remind the Service that collaboration has been tried multiple times over the last several decades—and has failed every time. The Service must provide leadership on this issue.

Below, we outline the well-documented facts and history of the Refuge and the Refuge water right, as acknowledged and thoroughly described by an impartial third party, the United States Court of Appeals for the Tenth Circuit, through its published opinion issued earlier this year in *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093 (10th Cir. 2023) [hereinafter “2023 Opinion”].

1. The Refuge is one of the premier wetlands in North America and the World supplying critical resources during breeding and migration.

“Since its creation in 1955, the Refuge has earned regional, national, and global renown as an important natural resource. Its saline wetlands provide shelter for endangered birds, including the whooping crane, the piping plover, the interior least tern, and the bald eagle. The migratory birds that visit the Refuge need ‘flooded conditions at proper times during the year, particularly during spring and fall migration.’” [2023 Opinion at 1096-97].



2. The Refuge's water resources have been declining since the 1980's, due to groundwater depletions induced by junior groundwater pumping.

"Beginning in the 1980s, the Service expressed concerns to the Water Division and the Big Bend Groundwater Management District #5 (Big Bend) that junior rights-holders were pumping groundwater out of priority, preventing the Refuge from fully exercising its water right In 2013, the Service requested that the Water Division investigate the impairment of the Refuge water right, citing water shortages in the late summer and declining stream flows that threatened the endangered species in the Refuge. In 2016, the Water Division released an impairment report, finding that 'the Refuge's water supply has been regularly and substantially impacted by junior groundwater pumping.'" [2023 Opinion at 1097].

3. Decades of reliance on voluntary and cooperative agreements with local stakeholders designed to avoid priority administration of water rights have consistently failed to remedy the chronic impairment of the Refuge's senior water right, leading to the Service's decision to file a request to secure water in early 2023.

"The Service's complaints [in the 1980s] launched a decades-long dialogue between the Service, the Water Division, and Big Bend about how to protect the Refuge water right. Together they tried various solutions, including a partnership with local water users in 1994 and a twelve-year management plan beginning in 2000. But by 2012, these solutions had done little to alleviate the Service's main concern—that junior rights holders were depleting its senior water right to Rattlesnake Creek by pumping groundwater out of priority." [2023 Opinion at 1097].

On February 10, 2023, the Service filed a request to secure water with the Water Division explaining that "'no alternative exists' [to priority administration] 'that will provide complete remedy for the impairment of the Service's senior water right' . . . [and] requesting its water right 'is the only means left to fully remedy [the] impairment.'" [2023 Opinion at 1101].

4. Immediate action is needed to protect threatened and endangered species that use Quivira.

"Because groundwater moves slowly over time, the Water Division [has] estimated that, even if all junior rights-holders immediately stopped pumping out of priority, it would take at least two years (possibly even decades) to restore the streamflow to the Refuge and Rattlesnake Creek." [2023 Opinion at 1097-98].

AOK and its members hold interests in the Refuge that align with the conservation and recreational purposes that the Refuge's protected status under federal law was intended to promote. These include: AOK hosting our annual birding festival each November, the Celebration of Cranes; providing guided field trips through the Refuge for novice bird watchers hoping to witness federally endangered Whooping Cranes on their migration through Kansas; our Kansas Lek Treks Prairie-Chicken Festival, which AOK has held each spring, and has led to numerous participants deciding to tour of the Refuge in years past; and of course, the countless individual trips that our members take to visit and enjoy the Refuge year-round. AOK's interests are further connected to the Refuge by virtue of the birds that pass through AOK's own wildlife sanctuaries throughout the region on their way to and from Quivira during periods of migration, as documented by AOK's use of motus tower technology (motus.org).

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AOK urges the Service to recognize the extensive efforts it has already made attempting to appease local interests that do not recognize or align with the Service's duty to protect the Refuge. AOK commends the Service for refusing to reverse the course set by its pending request to secure water. The 2016 Impairment Report issued by KDA-DWR, and recently affirmed in an update from August 2023, reveals the dire state of water rights over-appropriation and over-pumping. KDA-DWR's own engineers and water experts recognize that junior pumping is depriving the Rattlesnake Creek Basin of between 30,000 and 60,000 acre-feet of water annually. It would be devastating to see the Service once again fall back into its prior—and completely futile—habit of placing the adverse (and legally indefensible) interests of junior water rights holders above the requirements of federal wildlife law, the interests of the Refuge, and the survival of the endangered species which depend upon it. The need for leadership from this Service is necessary to ensure the Refuge remains a dependable rest stop for the many rare and endangered species of migratory birds that, in turn, attract tourism to this renowned wetland from around the world.

The Service cannot invite or condone delay from the Water Division in the administration of impairing junior rights, or simply withdraw its request to secure water for the Refuge's senior water right for the foreseeable future. Nor can it buckle to the pressure of renewed calls for "collaborative" efforts with Big Bend. Why? Because such a retreat would openly contradict the legal position of the United States Department of Justice (USDOJ). As the Service is fully aware, the USDOJ filed a copy of the Service's request to secure water with the Tenth Circuit in February 2023, while our lawsuit against the Department of the Interior was still pending. USDOJ made that filing to argue that the Service's request mooted the case. The Tenth Circuit essentially agreed and dismissed AOK's case on mootness grounds. It dismissed because it believed, correctly, that KDA-DWR was legally required to promptly act upon that request, as is the standard operating procedure in prior appropriation jurisdictions. As the Tenth Circuit observed:

"[A]fter providing us with the February 2023 letter, the Service argues that Audubon's claims are moot because [n]ot only have the [MOA] and any perceived commitments in the 2022 letter to [Big Bend] . . . expired on their own terms, but the Service has also now filed a request to secure water for 2023—the relief requested by [Audubon] In 2022, the Service told Big Bend it saw no need for a renewed MOA. And in 2023, the Service ended its bargain with Big Bend to withhold from requesting the Refuge water right while Big Bend completes NEPA review. NEPA review is expected to conclude in 2023, and the Service has decided that an augmentation wellfield alone won't resolve the impairment of the Refuge water right. It's doubtful that the Service will renew the MOA or create a new agreement with Big Bend with the same terms." [2023 Opinion at 1101, 1104].

Given the recent flurry of public statements made by Kansas politicians and groundwater irrigation interests on this matter, and public correspondence addressed to the Service calling on the Service to withdraw its request, it is all too easy to see the same patterns emerging that led the Service to withdraw its prior request to secure water in 2019. We trust that the Service now knows better than to do this. We trust that the Service recognizes the indisputable and unchallenged facts of the Refuge Water Right's impairment, and the legal clarity of its right to immediate protection under federal and Kansas law. We also trust that the Service recognizes that KDA-DWR's delay in administering junior rights for an entire irrigation season has cost the Refuge another year of water—in one of the worst droughts in decades. This is nothing less than the toleration of state confiscation of a property interest. Yet ever since the filing of its request to secure water in February of 2023, the Service has not offered any further public statement or comment on the matter. As a result, AOK—and the public in general—does not know about the Service's position regarding how it will protect the Refuge and the Refuge Water Right.

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The Service has, above all, a duty to the Refuge and to the public. We understand that the Service has been meeting with private irrigation interests, KDA-DWR, and political staffers who oppose the protection of the Refuge and its senior water right. AOK would respectfully request a similar opportunity to meet with the Service to discuss the impairment of the Refuge water right, so that AOK and its members can learn about the Service's position and its commitment to the Refuge.

At great cost, AOK has fought for the Refuge—because the Service would not do so. We applaud your newfound commitment to protect the Refuge and its senior water right, and urge you to continue to place your legal obligations above private interests.

Sincerely,

Jacqueline Augustine, Ph.D. Biology from Kansas State
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cc: Governor Laura Kelly