

AOK'S LAWSUIT ON BEHALF OF QUIVIRA NATIONAL WILDLIFE REFUGE SENIOR WATER RIGHT

DYLAN WHEELER

Quivira National Wildlife Refuge, comprising 22,000 acres in central Kansas, is one of the key stops for migrating waterfowl along the Central Flyway. Each spring thousands of birds—including federally endangered Whooping Cranes—visit the shallow, slightly salty marshes on the refuge to rest and feed on their way north. Each fall, Whooping Cranes and thousands of Sandhill Cranes, shorebirds and waterfowl rest and feed around the refuge as they travel south. The marsh became part of the National Wildlife Refuge System in 1955, but today faces the prospect of vastly reduced water availability.

Much of the water for Quivira comes from surface flow, predominantly inflow from Rattlesnake Creek. But in the past three decades, available water resources for the refuge have been greatly reduced primarily due to upstream pumping from irrigation wells along the course of Rattlesnake Creek. Those wells take water from the alluvial aquifer that neighbors the creek, thus effectively diminishing streamflow that would otherwise enter the refuge.

In early 2021, Audubon of Kansas initiated a lawsuit in the United States District Court for the District of Kansas centered around the management of the refuge's water resources by responsible federal and state agencies. The lawsuit arose following the execution of an agreement on July 25, 2020 between the United States Fish and Wildlife Service ("USFWS") and the Big Bend Groundwater Management District No. 5 ("GMD5") directed toward addressing the longstanding impairment of the state water right held by the Service for the benefit of Quivira.

That agreement stipulated that USFWS would agree not to request enforcement of its water right in at least 2020 and 2021 to provide GMD5 time to come up with an augmentation plan that would resolve the Refuge's water shortage without having to limit the diversions of water to the junior water right holders. The agreement, however, permitted discretion to USFWS to continually renew its commitment not to enforce its water right for successive years while GMD5 works on developing a streamflow augmentation project.

The augmentation plan envisioned by GMD5 would consist of drilling well fields outside the Rattlesnake Creek basin south of Quivira and delivering water from those wells into Rattlesnake Creek at the point where it flows into the refuge. It is unclear at this point whether adequate water of sufficient quality may be available under this proposed method to cure the refuge's longstanding water problem. Besides the quantity of water available, there is concern whether the water to be brought into the refuge under GMD5's proposed augmentation plan would have levels of salinity analogous to the water historically available from Rattlesnake Creek, which is one of the distinguishing features of the Quivira marsh ecosystem.

Water rights in Kansas are administered by the Kansas Department of Agriculture, Division of Water Resources ("KDA- DWR") in accordance with the provisions of the Kansas Water Appropriation Act ("KWAA"). The administration of state water rights under KWAA is guided by the "prior appropriation" doctrine, a system that follows the basic principle of "first in time, first in right."

Under this system of water management, an application must be submitted to KDA-DWR outlining the proposed source and amount of water an individual or entity seeks to divert for their intended use. The date such an application is granted gives the water right holder senior priority over all other water rights later obtained in the same water resource. Thus, when a particular water source cannot provide adequate quantities of water to all permitted users therein, a senior water right holder has the right to request KDA-DWR to place restrictions on junior water right holders whose diversions are impairing the ability of the senior water right holder to receive its full allotment of water.

USFWS obtained the right to divert surface water from Rattlesnake Creek in 1957. The water right held by USFWS for its mission of federal wildlife management at Quivira is senior in priority to 95% of all water rights held in the Basin.

As deep-well irrigation in the Rattlesnake Creek watershed has proliferated, less and less water has been available to the Little Salt Marsh and the Big Salt Marsh at Quivira, especially in recent years. **Under the law, it is the duty of the USFWS to vindicate the senior water right of Quivira, but political pressure has made the federal agency reluctant to push the marsh's claim.** In fact, it appeared that KDA-DWR was about to move forward with an administrative order to regulate junior water rights in October 2019 when Senator Jerry Moran and Aurelia Skipwith—the Trump administration's nominee to be director of the USFWS—intervened to short-circuit that move and send the issue back for negotiations over “augmentation” of Rattlesnake Creek and “voluntary water conservation efforts” by local stakeholders within GMD5, whose Local Enhanced Management Area proposal had already been rejected by the KDA-DWR as inadequate.

Through its lawsuit, AOK challenged USFWS's July 25, 2020 agreement with GMD5 and its historic management practices as failing to satisfy its duties under a variety of federal environmental legislation—chiefly, the National Wildlife Refuge System and Improvement Act of 1997 (“NWRISA”). The lawsuit invoked the right to judicial review under the Administrative Procedures Act (“APA”) seeking, among other things, a declaration that USFWS's agreement and management practices ran afoul of NWRISA's mandate to acquire and maintain adequate water resources under state law that are necessary for the purposes of an individual federal wildlife refuge.

On October 20, 2021, Judge Holly Teeter of the District Court of Kansas issued an opinion dismissing AOK's lawsuit after adopting the Service's position that its 2020 agreement with GMD5 did not constitute “final agency action” necessary for review under the APA. Judge Teeter further agreed with the Service's position that the language of NWRISA's mandates provides broad discretion to the Service in determining whether and how it will satisfy its duties under these provisions.

AOK subsequently appealed the dismissal of its claims to the United States Court of Appeals for the 10th Circuit. Through its appeal, AOK challenges the underlying rationale behind the district court's determination that the case is not yet ripe for judicial review and other related holdings. Oral arguments were held on November 15, 2022 at the Bryon White United States Courthouse in Denver, Colorado. Professor Burke Griggs of Washburn University School of Law argued on behalf of AOK before the 10th Circuit panel of judges assigned to the appeal for decision, which remains pending at this time.