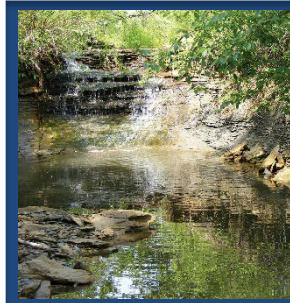




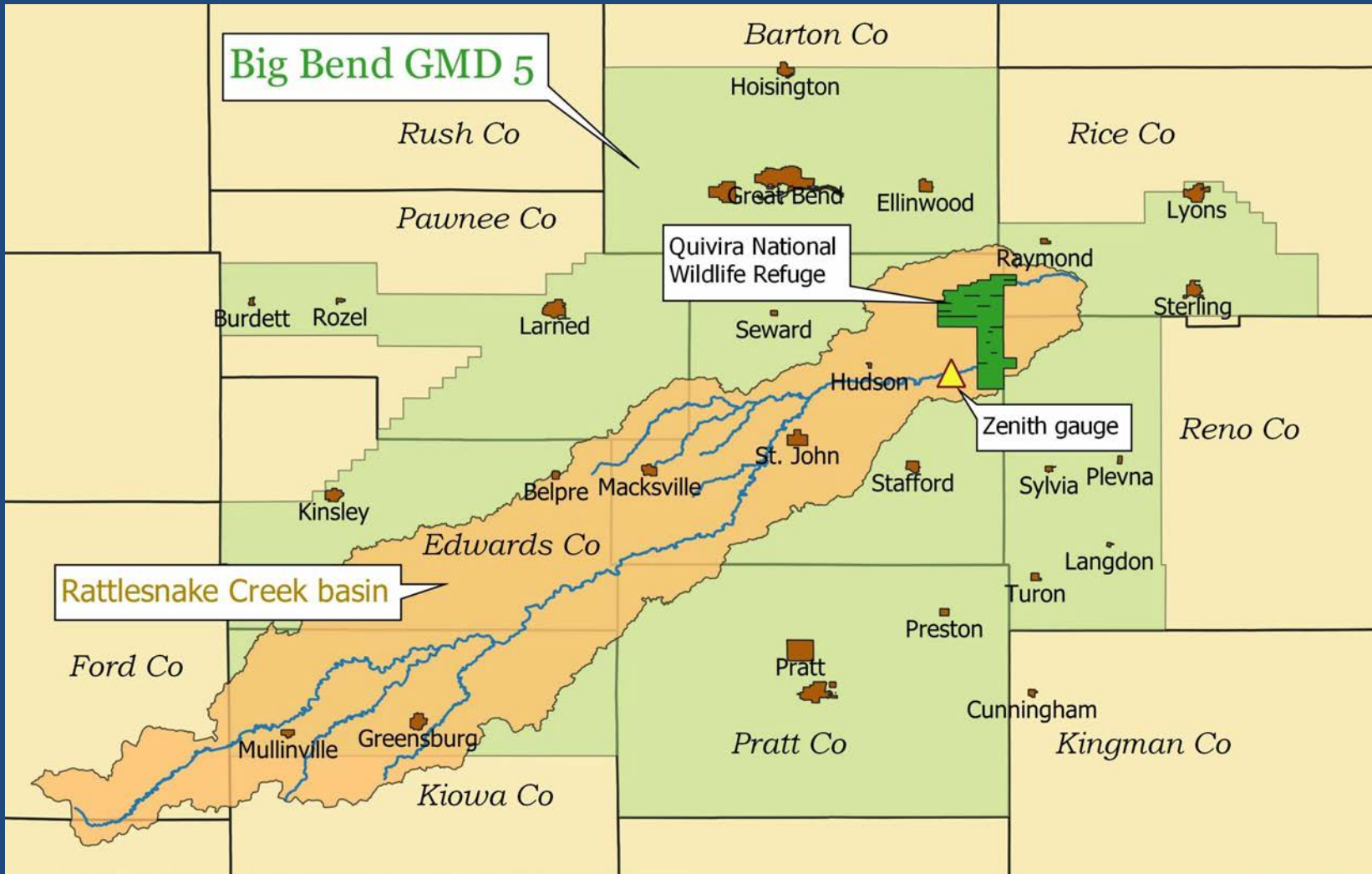
SERVING
THE STATE'S
LARGEST INDUSTRY...
AGRICULTURE



Audubon of Kansas, Inc. v.
United States Department of
the Interior, *et al.*
(U.S. District of Kansas)

2:21-CV-02025-HLT-JPO

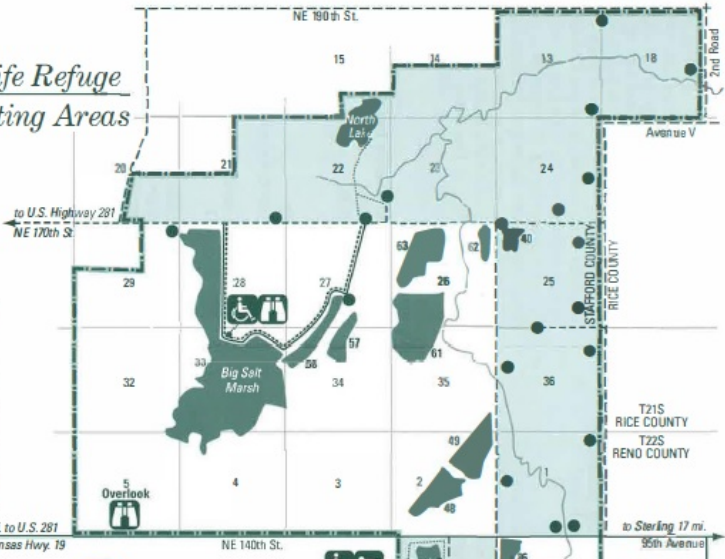
Kenneth Titus, Chief Counsel
Kansas Department of Agriculture
WSWC – June 24, 2021



Quivira

National Wildlife Refuge

Fishing & Hunting Areas



Signs and Boundaries
Signs are useful tools in regulating the use of a public area. Obey all posted signs. The wording of the sign applies to the area located behind the sign, with the exception of parking signs.

The signs shown below are only a few of the signs you will see on the Refuge.



Entry permitted in accordance with Refuge regulations.



All entry prohibited.



Hunting, weapons, and game retrieval prohibited.

- Legend**
- Refuge boundary
 - Paved road
 - Gravel road
 - Wildlife drive
 - Foot path
 - Section line
 - Public hunting area
 - Water unit
 - Refuge headquarters and visitor center
 - Parking
 - Restroom
 - Linked symbols designate accessible features
 - Photo blind
 - Hunting blind
 - Spotting scope
 - Fishing area

STOP Read all regulations in this leaflet before you hunt or fish.





Established under authority of the
Migratory Bird Treaty Act

Quivira National Wildlife Refuge
consists of approximately 7,000
acres of wetlands within a total
Refuge area of 22,135 acres.



Rattlesnake Creek

Minimum Desirable Streamflow – Nov-Jan 15 CFS



0 CFS

RSC Partnership Goal - 25 CFS in January



94 CFS



6 CFS



269 CFS

Rattlesnake Creek – Zenith Gage

Average Discharge Rate by Month (CFS)	Jan.	Feb.	Mar.	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
48 Year Average	30	36	49	56	74	65	58	19	14	32	25	30
10 Year Average 2011-2020	15.8	18.7	19.2	24.1	46.8	25.5	19.5	10.1	11.5	11.5	8.7	12.4

Refuge Water Right

- Water Right, File No. 7,571
- Priority Date – August 15, 1957
- Senior to 95% of Water Rights in the Basin
- Perfected in 1987 for 14,632 acre-feet of surface water (including Little Salt Marsh storage and evaporation).

Water Right Administration in KS

- KSA 82a-706b

(a) It shall be unlawful for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same.... Upon making a determination of an unlawful diversion, the chief engineer or the chief engineer's authorized agents, shall, as may be necessary to secure water to the person having the prior right to its use...

(1) Direct that the headgates, valves or other controlling works of any ditch, canal, conduit, pipe, well or structure be opened, closed, adjusted or regulated; or

(2) within the rattlesnake creek subbasin located in hydrologic unit code 11030009, allow augmentation for the replacement in time, location and quantity of the unlawful diversion, if such replacement is available and offered voluntarily.

- KAR 5-4-1

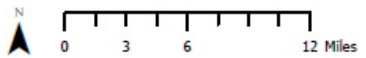
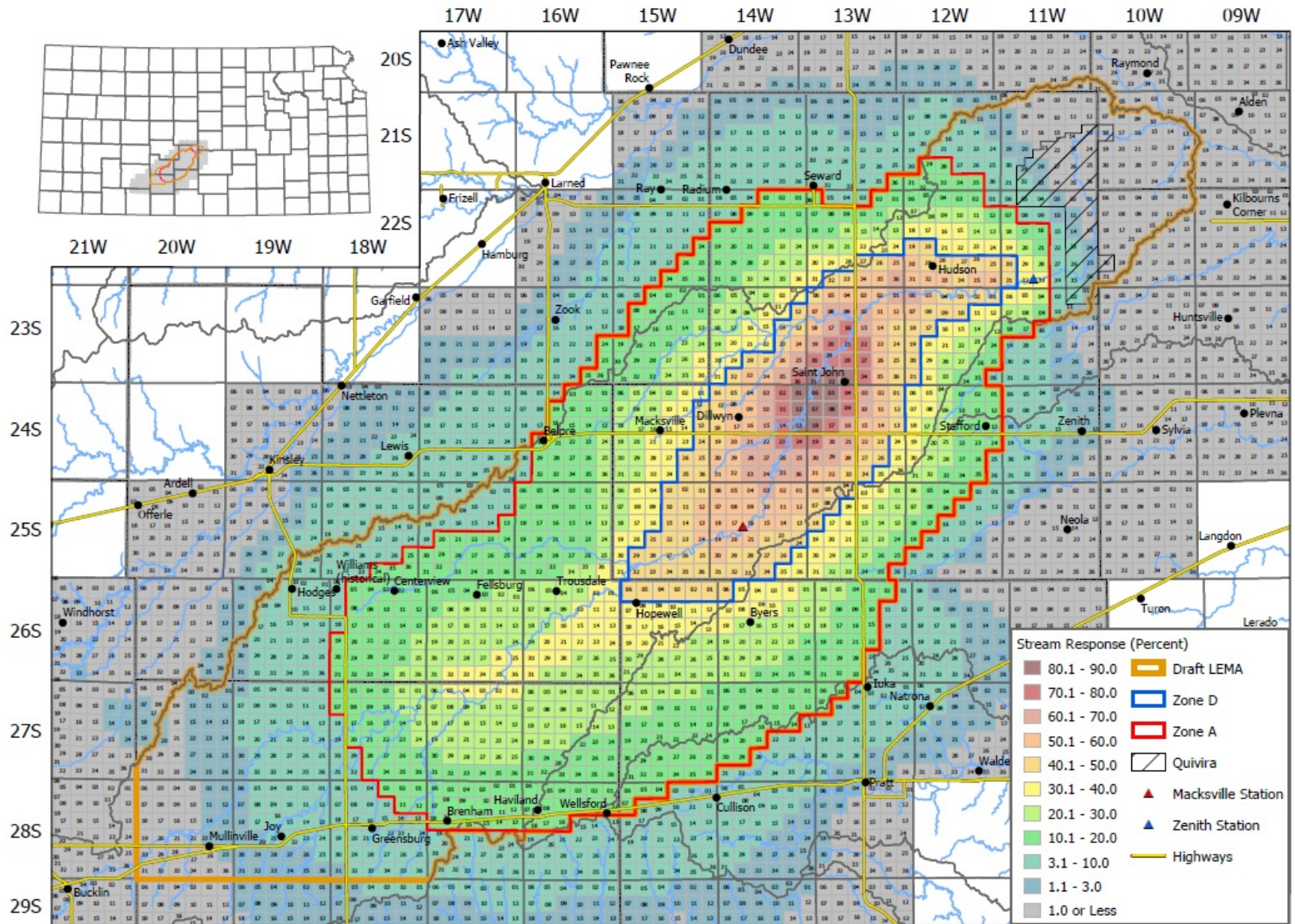
Requires a complaint, investigation, report, consultation with local GMD, and a request to secure water from the impaired water right owner.

Timeline to Litigation

- Concerns about impairment from groundwater pumping as early as 1986.
- Following administration via Intensive Groundwater Use Control Area on nearby Walnut Creek – the voluntary Rattlesnake Creek Partnership is formed in 1993 with USFWS, KDA-DWR, GMD No. 5.
- The RSC Partnership failed to meet its goals and ended in 2012, followed by a formal impairment complaint by the USFWS.
- Final impairment report is issued in July 2016 finds reductions in RSC streamflow due to groundwater pumping of 30,000 to 60,000 acre-feet per year over 1995-2007. Further, over a 34 year review period, impairment of the Refuge's water right was greater than 3,000 acre-feet in 18 of those years, and depletions to streamflow continue to increase each year.
- GMD No. 5 begins negotiations with the USFWS to provide additional water via an augmentation system from August 2016 to March 2017.
- KDA-DWR develops a minimum acceptable solution of 15% reduction in use in addition to augmentation, which is expected to halve future increases in depletions.
- GMD No. 5 attempted to develop a Local Enhanced Management Area to implement the reductions but failed to meet the statutory criteria including in an initial review.
- Fall of 2019, KDA-DWR is prepared to administer the basin for 2020, but USFWS withdraws their request to secure water and in July 2020 enters an MOA with GMD No. 5.

Rattlesnake Creek Streamflow Response Regions

1998 - 2007 average streamflow response (pct) at Zenith gage as calculated using the GMD No. 5 model.



Features on this map represent conditions as of the date of the map and are subject to change.

USFWS & GMD No. 5 MOA

- USFWS and GMD No. 5 negotiated from Fall 2019 to July 2020 before reaching an agreement.
- KDA-DWR did not participate in any of the negotiations.
- Elements of the MOA
 - GMD No. 5 shall design and construct an augmentation wellfield with a capacity of 15 cfs.
 - Submit a workplan for with an implementation schedule, including at least dates for project design, engineering plans, and construction dates within 12 months.
 - GMD No. 5 will use “reasonable” efforts to develop a water rights purchase program to retire 2,500 acre-feet from sensitive areas or upon failure to reach this goal, attempt to incentivize removal of endguns.
 - USFWS shall attempt to maximize on refuge storage.
 - Not submit a request to secure water in 2020 and 2021.
- USFWS has not submitted a request to secure water.
- GMD No. 5 has been approved for a grant from USDA-NRCS for development of a watershed plan to include an EA and design engineering of augmentation.

Basics of the Lawsuit

- AOK filed a complaint on January 15, 2021, against DOI, USFWS, Kansas Secretary of Agriculture, and the Chief Engineer.
- This was just five days before the new administration took over.
- GMD No. 5 filed a motion to intervene on March 9, 2021 (Granted unopposed).
- AOK alleged violations by both the state and federal defendants of:
 - National Wildlife Refuge Service Improvement Act
 - NEPA
 - APA
 - ESA
 - Common law prohibition on disposition of federal property
- Additionally, AOK asserted a right to a larger federal reserved water right or a request for the USFWS to acquire additional state water rights.



Requests for Relief

- Declaratory Judgements that:
 - NWRSA was violated by refusing to protect a water right;
 - Which in turn resulted in a taking of wildlife and violation of the ESA;
 - Affirmative duty to protect the historic hydrological conditions of refuge in place prior to human settlement;
 - Refuge has a valid claim to a reserved water right equal to the water available prior to human settlement;
 - The 2020 MOA is void and was entered into without authority as a delegation of federal authority;
 - The 2020 MOA was a major federal action that required an EA;
 - The decision not protect the water right constitutes disposal of federal property;
 - NWRSA requires the Chief Engineer to issue orders to administer junior water rights; and
 - Any order of the Chief Engineer that condones any depletions beneath the supply prior to human settlement violates the NWRSA.

Injunctions

- Injunctions to:
 - Government defendants cannot take any action that impairs the “restoration, protection, and maintenance of the hydrologic conditions” necessary to protect the NWR SIA required historic conditions;
 - Federal defendants shall immediately restore (by all affirmative actions necessary) the historic hydrological conditions at the Refuge prior to human settlement;
 - USFWS shall immediately obtain additional water rights;
 - All water rights found to be impairing shall be immediately prohibiting from diverting any water until the court approves an administration plan;

Mandamus

- Orders that the:
 - Federal defendants immediately fulfill their “non-discretionary” duty to protect the Refuge water right by seeking full administration of the basin; and
 - Chief Engineer shall fulfill his non-discretionary duty to comply with this request and fully administer all junior water rights identified in the impairment report.

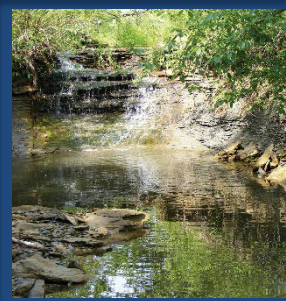
Since the initial complaint...

- AOK failed to provide the required 60-day notice before pursuing their ESA claim and has filed an amended petition dropping those allegations.
 - Have since sent the feds an ESA notice letter and are expected to refile these claims.
- AOK has admitted they cannot request a federal court to order mandamus against a state officer.
- Federal motion to dismiss (all actions are discretionary and non-reviewable)
 - No agency action
 - No action is subject to NEPA
 - No disposition of federal property

- Kansas motion to dismiss
 - 11th Amendment Immunity
 - No violation of federal law by a state officer has occurred
 - Failure to state a claim for which relief can be granted
 - Secretary of Ag has no authority; No duty by Chief Engineer to act; no actual injury presented
 - Lack of subject matter jurisdiction
 - AOK has no right to bring private actions under NWRISA, APA, NEPA, and disposition of property against State officials.
 - AOK has no standing to request a reserved water right on behalf of feds
 - Failure to join all indispensable parties
 - All other water right owners in the basin
- AOK has suggested they will seek an injunction against irrigation in the basin by July 1 and is opposing the state and federal motions to stay discovery.



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Questions?

Agriculture.ks.gov