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STATE OF KANSAS
BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE

In the Matter of the City of Wichita's	**)**	
Phase II Aquifer Storage and Recovery Project	**)**	**Case No. 18 Water 14014**
In Harvey and Sedgwick Counties, Kansas.	**)**	

Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.

BRIEF

COMES NOW Equus Beds Groundwater Management District Number 2 (hereinafter "the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., Leland Rolfs of Leland Rolfs Consulting, and David Stucky, with its Brief in support of its position, as follows:

I. Facts

Only a brief recitation of facts will be included in this Brief. This Brief also does not seek to apply the facts of the case to the criteria outlined in this Brief as that is already done in the expert reports and prior filings of the District. Additionally, if the hearing moves forward, the District will address the facts at the hearing through the law cited in this Brief and through the prior filings of the District. With that in mind, the following brief recitation of facts is germane to this Brief:

1. The City previously entered into Memorandums of Understanding (hereinafter "MOUs") with the District that included numerous conditions including as part of the City's Commitment in Issue No. 6 of the Phase II MOU, that the City can only pump recharge credits when the groundwater levels are above the historic low level (i.e the currently established minimum index levels). (*See* MOUs.)

2. On March 12, 2018, the City submitted to the Chief Engineer of the Division of Water Resources a proposal titled "ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits" (hereinafter "the Proposal"). (*See* City's ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits.)
3. The Proposal seeks to lower the minimum index levels in the City of Wichita ASR Project basin storage area of the Equus Beds Aquifer (hereinafter "the Aquifer"). (*See id*.)
4. The Proposal seeks to allow the City to divert water from the Little Arkansas River directly to the City of Wichita for municipal use, while at the same time accumulating Aquifer Maintenance Credits (hereinafter "AMCs"). (*See id*.)
5. The AMCs will allow the City to later withdraw groundwater from the Aquifer. (*See id*.)
6. The City has not filed a change application or new water appropriation application along with its Proposal. (*See id*.)
7. The Proposal, if approved as proposed, would also allow the City to withdraw its AMCs without filing any new or change applications, as required by the Kansas Water Appropriation Act. (*See id*.)
8. The Proposal does not address minimum desirable streamflow. (*See id*.)
9. The Proposal does not adequately consider water quality. (*See id*.)
10. The Proposal only pays lip service to the public interest or impairment. (*See id*.)
11. Numerous errors and issues exist with the City's Model. (*See* District's Expert Reports.)

12. The City's Proposal will cause harm to the Aquifer. (*See id*.)

II. Incorporation of Prior Motions and Expert Reports

Most of the facts and points of law central to the District's position are already spelled out in extensive detail in the District's previous motions and expert reports. Thus, the District hereby fully incorporates into this Brief the facts and law from those prior motions and expert reports. Thus, only a cursory partial summary of those points will be included in this Brief.

The District has afforded the Chief Engineer ample reasons to deny the Proposal on its face. As briefed extensively, per *Clawson*, the Chief Engineer does not have authority to now alter City's permits unless a change is sought. The City's Proposal will result in an unauthorized and compensable taking. The City's request stabs the very heart of the Kansas Water Appropriation Act in numerous ways. If granted, the City would have two beneficial uses of the same gallon of water diverted from the Little Arkansas River and the withdrawal of AMCs would adversely impact the rights of senior water users. Additionally, the City's Proposal is just a thinly veiled attempt to push through passive recharge credits, and these are expressly forbidden for numerous reasons. Finally, and most importantly, no statute, regulation, or other law allows for the approach that the City is asking the Chief Engineer to adopt. This is all fleshed out in great detail in the District's motions.

As indicated previously, in reaching a decision, the Chief Engineer must make a determination regarding the nature of the beneficial use sought by the City. This is summed up aptly in *F. Arthur Stone & Sons v. Gibson*, 230 Kan 224, 231, 630 P.2d 1164 (1981). In that case, in determining the initial lens through which every water right should be assessed, the Kansas Supreme Court wrote, that a fact finder must consider "'the basis of the interest of the people of the state without losing sight of the beneficial use the individual is making or has the

right to make of the water.'" *Id*. (*quoting State, ex rel. v. Knapp*, 167 Kan. 546, 555, 207 P.2d 440 (1949)). Here, as a threshold matter, the Chief Engineer must make a determination as to how the water will be used by the City and the nature of the beneficial use. The Chief Engineer must also ensure that the AMC Proposal fits within one of the categories of beneficial uses recognized by Kansas law.

Further, as indicated in prior motions, *Clawson* makes it clear that "a person seeking to appropriate water, other than for domestic use, must file an application with the chief engineer." *Clawson v. State*, 49 Kan. App. 2d 789, 798, 315 P.3d 896 (2013). As explained in the expert reports and the motions filed by the District, there is no question that the City is appropriating water through the use of AMCs. Thus, new applications must be filed. Even if the Chief Engineer moves beyond this fatal flaw with the City's Proposal, the City cannot meet its burden at the administrative hearing.

III. Further Analysis

Although, as explained above, the District has provided ample reasons why this hearing cannot move forward, this brief will address the standards the Chief Engineer must access if the City is given an opportunity to meet its burden. At a bare minimum, the City must demonstrate that its Proposal does not "impair an existing water right or prejudicially and unreasonably affect the public interest." *Clawson*, 49 Kan. App. 2d at 798. Indeed, DWR has previously opined that the City must hurdle this bar to prove the merit of the Proposal.

a. City's Burden of Proof

In an agency action of this nature, under Kansas law it is clear that the City of Wichita has the burden of proof. Indeed, the hearing schedule indicated that the City must show "by a preponderance of the evidence that the proposed change to the project should be approved." *See*

Order to Modify Hearing and Schedule, Sept. 27, 2018; Pre-Hearing Conference Order, July 23, 2018. Thus, the City has the burden of proof to demonstrate that each element, outlined below, is adequately addressed and there is no impairment or detriment to the public interest.

b. Impairment

In this case, it is the City's burden to demonstrate that its actions will not impair the water rights of other users in the District. The City has not adequately addressed this matter in its Proposal. Likewise, the City's "experts" have declined to expound on this crucial issue. Thus, the City cannot demonstrate this fact at the hearing.

Kansas law undoubtedly requires the City to demonstrate that its actions will not cause impairment. K.S.A. 82a-711(c) clarifies that "impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit." The Kansas Court of Appeals very recently twice addressed the definition of impairment in the companion cases of *Garetson Brothers v. American Warrior, Inc.*, 51 Kan. App. 2d 370, 347 P.3d 687 (2015); *Garetson Bros. v. Am. Warrior, Inc.*, __ Kan App. 2d __, __ P.3d __, 2019 Kan. App. LEXIS 3, at *57 (Ct. App. Jan. 11, 2019). In those cases, the court adopted a very broad definition of the word "impairment" as it relates to water rights. *Id*. Two panels of the court held that an aggrieved party need only show that the offending party's approach "diminishes, weakens, or injures" the aggrieved party's rights. *Id*. Thus, this standard is now entrenched law.

In summary, only a minimal showing is required that the City's Proposal causes impairment. As indicated in the District's expert reports, there is amble evidence that the Proposal will unreasonably lower the static water level, adversely impact streamflow, and

diminish water quality. Regardless, however, it is the City's burden of proof on this issue and the City simply cannot demonstrate this burden. The City's Proposal should be denied for this reason. If a hearing is necessitated, then the District will produce evidence demonstrating impairment. The District will prove that the City's Proposal will adversely impact water quality and the overall water supply.

c. The Public Interest

The City must also demonstrate that its Proposal will not prejudicially and unreasonably impact the public interest. The Kansas Water Appropriation Act does not provide a succinct definition of "public interest." However, the Kansas Supreme Court has helped to define the broad scope of the "public interest where no apparent definition exists. *Harris Enterprises, Inc. v. Moore*, 241 Kan. 59, 66, 734 P.2d 1083 (1987). The Court has indicated that a public interest must "be a matter which affects a right or expectancy of the community at large and must derive meaning within the legislative purpose embodied in the statute." *Id*. *Wheatland Elec. Coop., Inc. v. Polansky*, 46 Kan. App. 2d 746, 754, 265 P.3d 1194 (2011) further supports a liberal standard in demonstrating impact to the public interest when the court indicated that "public interest could be hindered by the increased drain on a shared water resource" and that the "chief engineer [should] consider these real-world concerns." Thus, the breadth of the "public interest" is extensive and the Chief Engineer should give broad consideration to any factors that demonstrate that the public interest will be impacted.

Fortunately, the Kansas legislature has adopted a statute that outlines the playbook the Chief Engineer must follow when considering the public interest. K.S.A. 2012 Supp. 82a-711(b), states:

> In ascertaining whether a proposed use will prejudicially and unreasonably affect the public interest, the chief engineer shall take into consideration:

(1) Established minimum desirable streamflow requirements;
(2) the area, safe yield and recharge rate of the appropriate water supply;
(3) the priority of existing claims of all persons to use the water of the appropriate water supply;
(4) the amount of each claim to use water from the appropriate water supply; and
(5) all other matters pertaining to such question.

Thus, the City must carefully address each of these factors to prove the merit of its Proposal. If the City is unable to demonstrate to the satisfaction of the Chief Engineer that each of these factors is addressed, the Proposal must be denied.

i. Minimum Desirable Streamflow

Several statutes address minimum desirable streamflow. See e.g., K.S.A. 82a-703a, 703b, and 703c. The Chief Engineer must carefully examine and apply each of these statutes. Indeed, K.S.A. 82a-703c defines minimum desirable streamflow for the Little Arkansas River, for example. The Chief Engineer must ensure that the City has shown, in a very technical sense, that its Proposal will not adversely impact the minimum desirable streamflow for the various streams impacted in the basin area.

ii. Safe Yield and Recharge

The District has already addressed the issue of safe yield in prior motions. This matter has not even been addressed by the City. Indeed, new safe yield calculations are crucial to determine how the new Proposal will impact safe yield. Undoubtedly, the City's Proposal will alter the Aquifer's ability to be sustainable and achieve a safe yield balance, as the accumulation and use of AMCs will allow additional groundwater to be withdrawn from an area that has already been shown to be over-appropriated. By definition, the City's Proposal allows the City to drain the Aquifer without re-charging it in the first place. The City undoubtedly cannot demonstrate these factors through its Proposal.

iii. Priority of Other Water Users

If a hearing is necessary, it will be shown that other users have priority to use the Aquifer over the City's AMCs. This can be shown by the seniority of other water rights. However, it can also be shown based on the hierarchy of beneficial uses. Indeed, domestic wells have a superior right to that of the City. Again, AMCs are not even a defined use.

iv. The Amount of Each Claim to Use Water

The City has not demonstrated its claim to use groundwater through the accumulation of AMCs. In fact, except for the City's existing native water rights, the City has no claim to groundwater in the aquifer pursuant to the ASR Project, except for physical source water that the City has injected into the aquifer (subject to the approved accounting procedure). Especially during times of drought when the Aquifer is being impacted the most, the City cannot and should not have any claim to use groundwater pursuant to the ASR Project for which the city did not prior physically artificially recharge the aquifer. To do so infringes on the existing water rights of others, which are property rights of the landowners.

v. Other Matters

The District has outlined numerous other concerns in its prior motions. These can all be considered by the Chief Engineer has matters demonstrating impairment. For example, there will be evidence of the economic detriment that will be caused by the City's Proposal. The Chief Engineer must consider all this evidence and ensure there is not *any* evidence that the City's Proposal will unreasonably and prejudicially impact the public interest. This is a standard the City cannot meet with its unsubstantiated and reckless Proposal.

d. It Is a Groundwater Management District's Function to Assess and Monitor the City's Proposal

The City proposes to modify two of the most fundamental conditions of the ASR water permits: how recharge credits can be accumulated and under what conditions the recharge credits can be withdrawn. While K.S.A. 82a-706 defines the chief engineer's duties related to the beneficial use of water and the priority of appropriation of water rights, it is in fact the District that was given the power of management of the groundwater resources pursuant to K.S.A. 82a-1020. Specifically, the Kansas Legislation recognized the need for the formation of special districts to manage the groundwater resources. In the case of the Equus Beds Groundwater Management District, the District was formed in 1975 to properly manage the Equus Beds Aquifer. An aquifer storage and recovery (ASR) project is clearly aquifer management. While the chief engineer can effectuate an ASR project by issuing water permits, the management of the aquifer, and therefore the ASR project, is clearly in the purview of District. In fact, K.S.A. 82a-1020 clearly advises that the groundwater management district's formation is "…to establish the right of local water users to determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas." Determining how recharge credits can be accumulated and when they can be used is clearly the role of the District and not the role of a hearing officer to decide. The following analysis should be considered through this lens.

e. The Chief Engineer Has Leeway to Impose Restrictions and Limitations on the City's Proposal Up Front

The *Wheatland* case further specifies the Chief Engineer's ability to set limitations on the City's use of the water up front, prior to modifying a permit or water right. 46 Kan. App. 2d at 753. It merits noting that *Wheatland* further supports the argument that the City must file a

change application. *Id*. However, the case also indicates that when changes are made to a water right the Chief Engineer can impose new restrictions including, but not limited to, changing the quantity and rate of diversion. *Id*. In that case, citing K.A.R. 5-5-8(b), the Court of Appeals opined that "the chief engineer is allowed to place *the terms, conditions, and limitations* on the application that he or she *deems necessary to protect the public interest*." *Id*. (emphasis added). This is because that "[d]ifferent uses demand different quantities of water and return different amount of water back into the ecosystem." *Id*. Thus, the Chief Engineer must consider "existing water rights and the public" in shaping new restrictions. *Id*. *Wheatland* dealt with a vested right—a right superior to the City's permit—and still held that "a vested right does not confer upon the owner the supreme right to make *any* use of the water." *Id*. (emphasis in original).

Thus, certainly in this case, the City does not have an unfettered right to alter how it diverts and uses the water. *See id*. Notwithstanding all the prior arguments made by the District, if the Chief Engineer chooses to entertain the City's Proposal, the Chief Engineer can and must place restrictions on the City's Proposal and use of the water. *See id*.

Here, the Chief Engineer should impose a whole variety of restrictions on the City's Proposal. Indeed, some of these restrictions are addressed in DWR's Brief. However, as will be shown through the expert reports and testimony, numerous other restrictions must be imposed. Some of those restrictions will be discussed below.

f. The Chief Engineer Must Impose a Monitoring Plan

The Chief Engineer has the power to impose a monitoring plan. Per the *Clawson* case, however, the monitoring plan must be reasonably defined. Here, the District will make numerous recommendations at the hearing, if necessary, regarding how a monitoring plan should

be administered. Additionally, as explained above, enforcement of the monitoring plan must be the function of the District.

g. The Chief Engineer Could Potentially Convert the City's Proposal into a Multi-year Flex Account or a Term Permit that Is Very Short in Duration

Again, it is our firm position that the Chief Engineer should not approve the City's Proposal. However, in the event the Chief Engineer chooses to do so, at the very least, the Chief Engineer should limit the duration of the City's Proposal so further evaluation can be conducted. There is no need to leave the fate of the Aquifer in the hands of a Model only seeking to blindly *project* what future harms may occur. Rather, the Chief Engineer should adopt a Proposal that allows for continued monitoring and the ability to enforce safeguards.

Per *Clawson*, the only logical way to accomplish this approach is to adopt a Proposal that has only a very limited duration so further monitoring can be conducted. Both a multi-year flex account or a term permit could accomplish this objective. Per *Wheatland*, the Chief Engineer could potentially seek to significantly alter the City's Proposal into one of these approaches. At the very least, if the Chief Engineer approves the City's Proposal, it must do so with a very limited duration in mind so further evaluation and study can occur.

IV. Conclusion

Again, it is the District's position that the Chief Engineer should not even consider the City's Proposal in the first place. However, in the event the Chief Engineer invites consideration of the Proposal, then the District respectfully asks that the Chief Engineer fully consider all of the factors outlined in this Brief and apply them to an analysis of the City's Proposal.

RESPECTFULLY SUBMITTED,

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