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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.

MEMORANDUM IN SUPPORT OF REVISED MOTION FOR SUMMARY JUDGMENT

COMES NOW the 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 Memorandum in Support of Revised Motion for Summary Judgment. In support of said Motion, Movant states as follows:

Statement of Uncontroverted Facts

1. On March 12, 2018, the City of Wichita (hereinafter "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 "Proposal"). (Previously Uncontroverted by City.)
2. The Proposal requested that the Minimum Index Levels be lowered for the ASR Phase II recharge credit recovery water permits. (Previously Uncontroverted by City.)

3. The Proposal requested that the City be authorized to accumulate Aquifer Maintenance Credits (hereinafter "AMCs"). (City of Wichita's Further Response to Summary Judgment Motion of Equus Beds Groundwater Management District No. 2, dated 4/1/19.)
4. The proposed accounting method for AMCs would allow the City to accumulate recharge credits for diverting water from the Little Arkansas River and pumping it directly to the City for municipal use, instead of physically recharging the Aquifer with source water. (*Id.*; City of Wichita's Supplemental Responses to Requests 1 and 2 of Equus Beds Groundwater Management District No. 2's Second Requests for Admission; *see also* 6-1-2018 Letter from Chief Engineer; DWR's answers to the District's written Discovery; Deposition of Lane Letourneau.)
5. In doing so, the City would not actually physically recharge the Aquifer with source water from the Little Arkansas River when an AMC is accumulated. (City of Wichita's Supplemental Responses to Requests 1 and 2 of Equus Beds Groundwater Management District No. 2's Second Requests for Admission.)
6. The City further admits that AMCs are not "based on the entry of water into the Aquifer through gravity flow." (*Id.*)
7. In the above scenario, the City's Proposal is merely based on "water left in storage" in the Aquifer, that already existed, and was not put there by the City in the first place. (*Id.*)
8. The City would accumulate groundwater AMCs for this source surface water diverted from the Little Arkansas River and sent directly to the City, pursuant to the terms of the Proposal. (*Id.*; City of Wichita's Supplemental Responses to Requests 1 and 2 of

Equus Beds Groundwater Management District No. 2's Second Requests for Admission; *see also* 6-1-2018 Letter from Chief Engineer; DWR's answers to the District's written Discovery; Deposition of Lane Letourneau.)

Analysis

I. Standard Governing a Summary Judgment Motion

The standards governing a summary judgment motion are well known. The rules could be succinctly summarized as follows:

> When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.

Shamberg, Johnson & Bergman, Chtd. v. Oliver, 289 Kan. 891, 900, 220 P.3d 333 (2009).

Indeed, the Hearing Officer can apply these standards when ruling on the District's Motion.

II. The ASR Program, Pursuant to Phases I and II, Actually Physically Recharges the Aquifer

The ASR program, as authorized in Phases I and II, was designed to allow the City to take actual physical surface water from the Little Arkansas River, treat it as needed, and inject it into the Equus Beds Aquifer. The City was then authorized to withdraw the recharge credit based on the physical recharge water that it had actually put in storage, and then divert that water to the City. This is consistent with the KWAA and its regulations.

III. The City's Proposal Expands the Consumptive Use and Allows for Two Beneficial Uses

Another bedrock principle of Kansas water law is that once a permit is granted, no changes may be made to it that would expand the quantity of water diverted or the quantity of water consumed. "The extent of consumptive use shall not be increased substantially after a vested right has been determined or the time allowed in which to perfect the water right has expired, including any authorized extension of time to perfect the water right." *See* K.A.R. 5-5-3. What the City is proposing to do to accumulate AMCs is to divert surface water from the Little Arkansas River and send it directly to the City for municipal use. Thereby, by use of AMCs, the City will get permission from the Chief Engineer to later divert native groundwater from the Equus Beds Aquifer that the City never put there in the first place. Thus, in essence, the City can pump a gallon of surface water directly to the City and, through the accumulation of AMCs, receive credit to later pump *another* gallon (less any loss) of groundwater from the Aquifer. This expands the consumptive use of the City's permit(s) and is thus not allowed by Kansas law, without the filing and approval of a new appropriation application or change application.

IV. AMCs are Inconsistent with Current Regulations

The proposed Aquifer Maintenance Credits are inconsistent with current statutes and regulations in a number of obvious ways:

1. As a foundational principle, K.A.R. 5-12-1(a) reads: "An operator may store water in an aquifer storage and recovery system under a permit to appropriate water for artificial recharge if the water appropriated is source water."
2. "Source Water," as defined by KA.R. 5-1-1(yyy), "means water used for artificial recharge that meets the following conditions: (1) Is available for appropriation for

beneficial use; (2) is above-base flow stage in the stream; (3) is not needed to satisfy minimum desirable streamflow requirements; and (4) will not degrade the ambient groundwater quality in the basin storage area." The proposed accumulation of AMC's does not meet the definition of "Source Water" found in K.A.R. 5-1-1(yyy), as the source water from the Little Arkansas River is not being used for artificial recharge when AMCs are accumulated; rather the source water is being used directly for municipal use. Additionally, the definition of source water does not include an offset for water **not pumped** from the Aquifer, as proposed by the City with its Proposal.

3. "Artificial Recharge" as defined by K.A.R. 5-22-1(f) and K.A.R. 5-1-1(g) "means the use of source water to artificially replenish the water supply of the aquifer." The proposed accumulation of AMCs does not meet the definition of "Artificial Recharge," as the source water from the Little Arkansas River is not being used to artificially replenish the water supply of the Aquifer but is instead being diverted directly to the City.
4. "Aquifer storage" as defined by K.A.R. 5-22-1(c) and K.A.R. 5-1-1(e) "means the act of storing water in the unsaturated portion of an aquifer by artificial recharge for subsequent diversion and beneficial use." The proposed accumulation of AMCs does not meet the definition of "Aquifer Storage" found in K.A.R. 5-22-1(c) and K.A.R. 5-1-1(e), as the source water from the Little Arkansas River is not being stored in the unsaturated portion of the Equus Beds Aquifer by artificial recharge; rather, it is being used directly for municipal use.

5. "Aquifer storage and recovery system" as defined by K.A.R. 5-22-1(d) and K.A.R. 5-1-1(f) "means a physical infrastructure that meets the following conditions: (1) Is constructed and operated for artificial recharge, storage, and recovery of source water; and (2) Consists of apparatus for diversion, treatment, recharge, storage, extraction, and distribution." Here, it is uncontroverted that with the accumulation of AMCs no artificial recharge or storage of source water will occur.
6. "'Recharge credit' means the quantity of water that is stored in the basin storage area and that is available for subsequent appropriation for beneficial use by the operator of the aquifer storage and recovery system." K.A.R. 5-1-1(mmm) and K.A.R. 5-22-1(ee). With the City's Proposal, no water is actually being physically stored in the Aquifer which would qualify as a "recharge credit" as defined by these regulations.

Thus, for very obvious, fundamental reasons, summary judgment should be granted in the District's favor. No further analysis is required.

However, a more in-depth statutory construction and examination of regulations further supports this conclusion. K.A.R. 5-22-1(f) and K.A.R 5-1-1(g) both refer to artificially replenishing the ***aquifer***. Further, the entire set of regulations deal with "*aquifer* storage and recovery." *See, e.g.*, K.A.R. 5-12-1 *et seq*. (emphasis added). A regulation can be construed by looking at titles and plain language. Indeed, there would be no reason to even refer to the term "aquifer" in the regulations if the intent of the regulations was not to require water to be stored in an aquifer.

These regulations further specify that an accounting method must be used to quantify the water injected into the aquifer. K.A.R. 5-12-2 defines the accounting of water in the context of water "entering and leaving the basin storage area." Additionally, K.A.R. 5-12-2 requires the

accounting to include the amount of "artificial recharge." K.A.R. 5-1-1(k) and K.A.R 5-22-1(l) indicates that a "basin storage area" means "the portion of the *aquifer* used for aquifer storage..." *Id.* (emphasis added). Again, this further clarifies that the source water must actually be put in the aquifer to accumulate recharge credits that can be later withdrawn from the aquifer.

The regulations are also predicated on the use of "source water" per K.A.R. 5-1-1(g) and K.A.R 5-22-1(f). The definition of source water found in K.A.R. 5-1-1(yyy) further contemplates that the water will be stored in the aquifer, because a condition is that the source water "will not degrade the ambient groundwater quality of the basin storage area." Again, there would be no mandate regarding the quality of water in the aquifer if it wasn't contemplated that the water was actually injected into the aquifer.

K.A.R. 5-1-1(e) and K.A.R. 5-22-1(c) also refers to "artificial recharge" and the plain language indicates that an aquifer will be recharged. The ordinary meaning of recharge refers to the "act of recharging" or restoring. *Webster's Dictionary.* K.A.R. 5-21-1(f) and K.A.R. 5-1-1(g) further clarifies by using the terms "the use of source water to artificially replenish the water supply in an aquifer." Indeed, the City's approach is analogous to receiving cash, spending it, and then asking to withdraw that same amount of money from the bank, even though it was never deposited there in the first place.

As indicated above, K.A.R. 5-1-1(mmm) and K.A.R. 5-22-1(ee) both specify that a credit is derived from water put into a basin storage area and "available for *subsequent* appropriation." *Id.* (emphasis added). Again, the word "subsequent" has significance pursuant to the plain language of the regulation. The water must actually be injected into the aquifer for *later* use.

Finally, K.A.R. 5-21-1(c) and K.A.R. 5-1-1(e) refers to "aquifer storage" in the context of water being placed in the "unsaturated portion" of an aquifer. Again, the term "unsaturated"

would not be used if it wasn't contemplated that the water would actually be injected into the aquifer. This same definition uses similar language found in other sections that refers to the aquifer being artificially recharged for subsequent diversion. Further, no other statutes or regulations provide a vehicle for the AMC approach proposed by the City. Thus, it is obvious that the current state of statutes and regulations do not provide a clear framework for the City's Proposal.

V. Conclusions

The proposed AMC's are not authorized by, nor consistent with, the provisions of the Kansas Water Appropriation Act and its corresponding regulations. In contravention of what is currently authorized by the law, AMCs do not result in source water being physically injected into the Aquifer and thus no storage in the Aquifer occurs. Consequently, at this juncture, the District's Revised Motion for Summary Judgment must be granted. The District respectfully asks that this Revised Motion be granted, in full or in part, in advance of the hearing to save all parties the time and money involved in preparing for the hearing.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian, Leland Rolfs, and David J. Stucky, do hereby certify that a true and correct copy of the above was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; (_x__) email; and/or (___) hand delivery on the 25th day of September, 2019, to:

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