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IN THE NINTH JUDICIAL DISTRICT
DISTRICT COURT OF HARVEY COUNTY, KANSAS

EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NUMBER 2, Plaintiffs, vs. EARL D. LEWIS, JR., P.E., THE CHIEF ENGINEER OF THE KANSAS DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, in his official capacity, Defendant.	Case No. 2022-CV-000091

Pursuant to K.S.A. Chapter 77

DEFENDANT CHIEF ENGINEER'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

COMES NOW, Defendant Earl D. Lewis, Jr., P.E., Chief Engineer, Division of Water Resources, Kansas Department of Agriculture ("Chief Engineer"), by and through counsel, Kenneth B. Titus and Stephanie A. Kramer, and pursuant to K.S.A. 60-212(b) and Supreme Court Rule 133, moves the Court for an order to dismiss the Petition for Judicial Review ("Petition"), filed by Equus Beds Groundwater Management District Number 2 ("Plaintiff"). An order to dismiss is proper because Plaintiff has failed to state a claim for which relief can be granted, Plaintiff's claims are not justiciable, and this Court lacks subject-matter jurisdiction

because Plaintiff lacks standing to bring its claims. The Chief Engineer also files herein his Memorandum in Support of his Motion to Dismiss, which more fully explains why he is entitled to an order of dismissal.

WHEREFORE, the Chief Engineer requests an order to dismiss Plaintiff's Petition.

MEMORANDUM IN SUPPORT

I. Nature of the Case

This case arises from a proposal submitted by the City of Wichita ("City") regarding proposed modifications to the City's Aquifer Storage and Recovery ("ASR") Project, which operates in the City's wellfield located in Harvey County, Kansas. Petition for Judicial Review ("Petition"), ¶¶ 7, 26, and 37. Following the submission of the City's proposal, the previous Chief Engineer decided it would be beneficial to hold a public hearing to consider the proposal prior to issuing an order approving or rejecting it. *Id.* at ¶ 68.b; K.A.R. 5-14-3a. On March 19, 2019, about one year after the City submitted its proposal, the Chief Engineer delegated authority to conduct a hearing and provide recommendations to Constance Owen ("Presiding Officer"). Petition at ¶12. The Presiding Officer conducted an extensive hearing over the course of three years from 2019-2021, including delays due to COVID-19 pandemic restrictions. *Id*. at ¶¶ 14, 15. During this time, Plaintiff filed a motion to dismiss, arguing that the City had failed to file the proper applications and consequently lacked standing to have the Chief Engineer consider the requests contained in the proposal. *Id.* at ¶¶ 11, 16, 22. Further, the Plaintiff maintained this position throughout the course of the hearings, requesting a ruling on the motion to dismiss multiple times. *Id.* at ¶¶ 16, 22.

Ultimately, the Presiding Officer issued recommendations to the Chief Engineer and recommended that the "the Chief Engineer dismiss the Proposal on the grounds that the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq*. ["KWAA"] does not allow the proposed fundamental changes to the City's water appropriation permits to be requested absent the filing of new applications pursuant to K.S.A. 82a-711," essentially the exact recommendation that Plaintiff requested in its motion to dismiss. *Id.* at ¶ 68.h; Recommendations on City of Wichita's Proposed Modifications at 4. Despite going on to provide factual findings on the merits of the Proposal, the Presiding Officer recommended such findings only be adopted if the Chief Engineer declined to dismiss the Proposal on the grounds that new applications were required to have been filed. *Id.* On June 21, 2022, the Chief Engineer issued his Final Order and adopted the primary recommendation of the Presiding Officer, dismissing the Proposal for jurisdictional reasons due to new applications being required. *See generally*, Petition, Exhibit A – Final Order.

Plaintiff now comes before this Court and asks this Court to retroactively vacate Plaintiff's own motion to dismiss after it was granted and seeks to have this Court extra-statutorily bestow authority onto the Chief Engineer by requiring him to make a decision on the merits of a proposal that was not properly before him. Due to the issues posed by the unusual procedural position Plaintiff has staked out, Plaintiff has failed to state a claim upon which relief can be granted. Plaintiff's claims should also be dismissed for lack of justiciability and lack of subject-matter jurisdiction, as will be set out more fully in this memorandum.

II. Applicability of K.S.A. 60-212(b)

K.S.A. 60-212(b), which governs a motion to dismiss civil actions for failure to state a claim upon which relief can be granted and for lack of subject-matter jurisdiction, properly

applies to Plaintiff's Petition and to this Motion. Although Plaintiff's Petition was filed pursuant to the Kansas Judicial Review Act, K.S.A. 77-601 *et seq*. ("KJRA"), the Kansas Rules of Civil Procedure may be used to supplement the provisions of the KJRA. The "rules of civil procedure can supplement the [KJRA] where necessary to fill in the gaps, but the Code of Civil Procedure cannot alter or override express provisions of the KJRA." *White v. Kansas Dept. of Revenue*, 38 Kan.App.2d 11, 18; 163 P.3d 320. *See also, Pieren-Abbot v. Kansas Dept. of Revenue*, 279 Kan. 83, 97; 106 P.3d 492; *Rodenbaugh v. Kansas Employment Sec. Bd. of Review*, 52 Kan.App.2d 621, 628; 372 P.3d 1252; and *Seaman Unified School Dist. No. 345 v. Kansas Com'n on Human Rights*, 26 Kan.App.2d 521, 524; 990 P.2d 155 (motion for summary judgment applicable to KJRA). The rules of civil procedure have been applied in numerous types of KJRA cases, and since the KJRA does not provide for a specific dismissal procedure, this motion to dismiss, pursuant to K.S.A. 60-212(b), is proper.

III. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted

When considering dismissal pursuant to K.S.A. 60-212(b)(6), courts may review a motion to dismiss for failure to state a claim by accepting all facts alleged by the plaintiff as true, along with any inferences that may be drawn, to determine whether, upon plaintiff's theory or upon on any other possible theory, the facts state any claim for which relief can be granted. *Cohen v. Battaglia*, 296 Kan. 542, 545-546; 293 P.3d 752. "A petition will not be dismissed for failure to state a claim upon which relief can be granted, unless it appears to a certainty that plaintiff is not entitled to relief under any state of facts which could be proved in support of the claim." *Keith v. Schiefen-Stockham Ins. Agency, Inc.*, 209 Kan. 537, 540, 298 P.2d 265 (1982).

Pursuant to K.S.A. 60-212(b)(6), Plaintiff fails to state a claim upon which relief can be granted. Plaintiff requests that the Court order the Chief Engineer to make multiple factual

determinations regarding the City's Proposal beyond the procedural matter upon which the Chief Engineer and the Presiding Officer decided the case. Petition, ¶ 130.This position is wholly inconsistent with the position the Plaintiff has advanced since the City's Proposal was first submitted. Throughout the entirety of these proceedings, Plaintiff demanded that the City's Proposal be dismissed because it was not properly submitted to the Chief Engineer. Plaintiff has consistently argued that the Chief Engineer lacked authority to consider the City's Proposal and even that the City further lacked standing to advance its Proposal in the first place. *Id.* at ¶ 68.c; Motion to Dismiss, Section III, IV, and VIII. Since the final agency action subject to review is the Chief Engineer's dismissal of the Proposal, the only appealable remedy available to Plaintiff would be to reverse the dismissal that Plaintiff itself has advocated for (something they did not request in their Petition) and for this Court to find that the Chief Engineer *does* have jurisdiction to make findings on the merits of the Proposal.

Plaintiff further cites K.S.A. 77-526 in support of its request for additional factual findings, which requires a final agency order to include "separately stated, findings of fact, conclusions of law, and policy reasons for the decision…." Petition, ¶ 78. However, neither that statute nor the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.* ("KAPA"), support Plaintiff's argument that the Chief Engineer should be required to make the additional factual findings for which Plaintiff advocates.

First and foremost, the Chief Engineer's Final Order does contain findings of fact, conclusions of law, and policy reasons for the Chief Engineer's decision as required by K.S.A. 77-526, and Plaintiff does not cite any other statutory or regulatory authority in support of its argument that the Chief Engineer should be required to make further factual findings. Plaintiff's Petition certainly does not provide any authority that would expand the Chief Engineer's

jurisdiction to allow a full review of the Proposal. As such, considering the motion to dismiss was filed by the Plaintiff, it is unclear what possible relief could be afforded to the Plaintiff while still upholding Plaintiff's own motion to dismiss for lack of jurisdiction.

Second, KAPA only applies when "other statutes expressly provide that the provisions of [KAPA] govern proceedings under those statutes." K.S.A. 77-503. K.S.A. 82a-1901, which is the only statute to apply KAPA to the review and hearing of orders issued under the KWAA, does not make KAPA applicable to the hearing and order held regarding the City's Proposal. Therefore, K.S.A. 77-526 is inapplicable to the Chief Engineer's Final Order even if it is read to require findings beyond those that were contained in that order.

It is also worth noting that, while this was an administrative proceeding, it is widely accepted that judicial bodies, or those administrative bodies serving a quasi-judicial function, need only decide the issues necessary to resolve a case. For example, the Kansas Supreme Court has held that the Kansas Court of Appeals deviated from best practices by opining on the merits of a case after determining it lacked jurisdiction:

> [T]he Court of Appeals did not properly decide the substantial competent evidence issue because it had already determined it was without jurisdiction. When the Court of Appeals finds it lacks jurisdiction over a case, it must dismiss the appeal. *See Kaelter v. Sokol*, 301 Kan. 247, Syl. ¶ 1, 340 P.3d 1210 (2015). And once a Court of Appeals panel concludes jurisdiction is lacking, the better practice is not to proceed to opine about the merits of the issues." *Matter of Est. of Lentz*, 312 Kan. 490, 504, 476 P.3d 1151, 1160 (2020).

In the Chief Engineer's Final Order, there are no findings of fact or conclusions of law adopted that deal with the merits of the City's Proposal, even though there are some aspects of the Proposal discussed in order to determine proper jurisdiction. *See*, Petition, Exhibit A, Sections II and V. The *Lentz* holding indicates that discussion of the merits of a case insofar as is necessary to determine jurisdiction is proper—the *Lentz* Court held only that factual analyses

undertaken after the Court of Appeals had determined jurisdiction did not exist were improper. *See id.* Additionally, in the slightly different but still informative context of ruling on a motion to dismiss for lack of personal jurisdiction, the Kansas Supreme Court has cited a long line of federal cases, including U.S. Supreme Court decisions, that indicate that determination of factual issues is appropriate and even necessary insofar as a determination of jurisdiction is dependent upon them. *See Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 264, 275 P.3d 869, 876 (2012).

Accordingly, even granting liberal interpretation to the Plaintiff's Petition and assuming all facts beyond mere legal conclusions are true, Plaintiff's extensive briefing of facts need not even be considered because it was Plaintiff's motion to dismiss and their own arguments for lack of jurisdiction that were ultimately adopted. In the absence of statutory authority that gives the Chief Engineer the ability to review the merits of the Proposal and make factual findings beyond what he did in the Final Order, the Plaintiff has failed to state a claim upon which relief may be granted.

IV. Plaintiff's Claim is Not Justiciable

The Kansas Constitution requires that, in order for a Plaintiff to proceed with a lawsuit, an actual case or controversy be presented, and not just a request for an advisory opinion. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897-898. (Challenge to a statutory provision requiring the Attorney General to file a case on behalf of the state to determine the constitutionality of a new statute without an underlying case or injury.) The question presented must be justiciable, and as a "part of the Kansas case-or-controversy requirement, courts require [that]: (a) parties must have standing; (b) issues cannot be moot; (c) issues must be ripe; and (d) issues cannot present a political question." *Id.* at 896. While there are less rigorous requirements for declaratory judgment cases, an actual case or controversy is still required. *State ex rel.*

Morrison v. Sebelius at 897. Plaintiff's claims fail the standing, mootness, and ripeness elements of the case-or-controversy requirements.

Relevant to standing in this case, though Plaintiff has filed this action under the authority of the KJRA, it is not relieved from meeting the common law standing requirements that apply to all cases in Kansas.[1] In *Sierra Club v. Moser*, the Sierra Club sought to establish standing under the KJRA to challenge a permit issued by a state agency. 298 Kan. 22; 310 P.3d 360. Although the Sierra Club met the statutory requirements for standing under the applicable act concerning air quality, it still had to establish common law standing to sustain an action under the KJRA: "In order to have standing to file an action in a Kansas court, Sierra Club must demonstrate that it also meets common-law or traditional standing requirements…." *Id*. at 32-33. *See also, Cochran v. State, Depart. Of Agr., Div. of Water Resources*, 291 Kan. 898, 908-909; 249 P.3d 434 ("It is important to emphasize that in addition to the statutory qualifications conferring standing, a party seeking judicial review…must demonstrate he or she also meets the traditional requirements for standing.").

There are two types of common law standing—individual standing and associational standing. To establish common law or traditional standing, "a person suing individually must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. *Sierra Club*, 298 Kan. 22, 33. Further, "To establish a cognizable injury, a party must establish a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct." *Id.* An association "has standing to sue on behalf of its members when (1) the members have standing to sue individually; (2) the

[1] Plaintiff was invited to participate in the public hearing on the City's proposal by the Chief Engineer, and therefore as a participant of the administrative proceedings and according to *Cochran v. State, Depart. Of Agr., Div. of Water Resources*, 291 Kan. 898,908-909; 249 P.3d 434, Plaintiff meets the standing requirements of the KJRA, but that alone is not enough to meet the requirements for common law standing.

interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *Id.*

A case is moot when "'it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights.'" *State v. Roat*, 311 Kan. 581, 584, 466 P.3d 439, 443 (2020); *citing State v. Montgomery*, 295 Kan. 837, 840-41, 286 P.3d 866 (2012). The doctrine of ripeness is designed to prevent courts from "entangling themselves in abstract disagreements." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 892, 179 P.3d 366, 380 (2008). To be ripe, "issues must have taken shape and be concrete rather than hypothetical and abstract." *Id.*

Whether a claim is justiciable is a question of law, and a court's review of such a question is "plenary." *Gannon v. State*, 298 Kan. 1107, 1118, 319 P.3d 1196, 1208 (2014); *citing Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 254–55, 990 A.2d 206 (2010). Plaintiff here fails the first three prongs of the case-or-controversy requirement: Plaintiff does not have either individual or associational standing, and the issues it has raised are either moot or not yet ripe. As such, Plaintiff's Petition constitutes a non-justiciable request for an advisory opinion.

1. Plaintiff has failed to establish that it has individual standing because it has failed to establish an injury-in-fact.

The Plaintiff is a statutorily created district with limited powers, and neither the district as an entity nor its property have suffered (nor has Plaintiff alleged) any actual harm as a result of the full consideration (and ultimate denial) of the City's Proposal. In fact, Plaintiff has essentially waived any claim to individual standing by claiming to represent all water users within its

boundaries and perhaps even the resource itself (without statutory authority to do so). *See e.g.*, Petition, ¶ 1 ("for the betterment of the vital groundwater resource and many constituents that rely on it…") and ¶ 127, ("Thus, the District was forced to assume the role of the Agency, and protect the Aquifer…"). Although it is unclear why Plaintiff would need to "assume the role of the Agency" when it was the agency that initiated the hearing procedure to fully evaluate the Proposal in the first place. *Id.* Plaintiff owns no water rights or other property that would be directly impacted by the City's Proposal. The Plaintiff was invited to participate in the hearing, as it does have a legislative directive to "provide advice and assistance in the management of drainage problems, storage, groundwater recharge, surface water management, and all other appropriate matters of concern to the district" (K.S.A. 82a-1028(m)), but it goes a step too far to allow Plaintiff to litigate issues between its own constituents when the district itself as an entity has suffered no harm as a result of the Chief Engineer's Final Order. Based on Plaintiff's own pleadings, they are not purporting to represent the district as an individual entity and there has been no injury in fact suffered by the Plaintiff.

2. Plaintiff fails to establish that it has associational standing to represent water users within Groundwater Management District No. 2.

To meet the first prong of the associational standing test, "the association must show that it or one of its members has suffered actual or threatened injury—*i.e.*, the association or one of its members must have suffered cognizable injury or have been threatened with an impending, probable injury and the injury or threatened injury must be *caused by the complained-of act or omission*." *Sierra Club v. Moser*, 289 Kan. 22, 33 (*emphasis added*). Citing other related cases, the court noted that "allegations of *possible future injury* do not satisfy requirements of standing"; a "threatened injury must be 'certainly impending' to constitute injury in fact.'" *Id.*

(*emphasis added.*) Again, in this case, it is not clear that a legally recognized injury has been suffered by Plaintiff or any water right owners within the district. The Proposal was dismissed as requested by Plaintiff, thereby removing any threat of the harm Plaintiff believes the City's Proposal will cause. The specific action subject to challenge under the KJRA is the Chief Engineer's Final Order, but the Final Order actually removes all threat of immediate harm to any water user that Plaintiff could ostensibly represent. This Court should not take up speculative claims about future unknown injuries. It is important to emphasize that the underlying action that the Plaintiff has appealed is the *dismissal* of the City's Proposal.

The second prong of the associational standing test requires that the interests the association is seeking to protect be germane to the organization's purpose. The issue at hand does involve water resources and the related issues set forth in the legislative policy describing the formation of groundwater management districts. *See* K.S.A 82a-1020. However, groundwater management districts only have the powers expressly granted them by the Legislature. The Groundwater District Management Act, K.S.A. 82a-1020, *et seq*. ("GMD Act") provides only one mandatory duty to districts, which is to prepare a management program, which "shall include information as to the groundwater management program to be undertaken by the districts and such maps, geological information, and other data as may be necessary for the formulation of such a program." K.S.A. 82a-1021(a)(8). The district otherwise has powers similar to other municipalities, although *lacking home rule authority* like cities and counties, to raise fees and acquire property to implement the approved management program. K.S.A. 82a-1028.

However, Plaintiff is not attempting to carry out its single mandatory duty or exercise any of its statutorily granted powers by bringing this case. Plaintiff was allowed to provide advice at the public hearing, but its attempt to bring this lawsuit (and in doing so taking on individual

constituent interests at the district court level) goes far beyond that. By advancing this case, Plaintiff is attempting to represent the interests of some water right owners and district constituents against fellow constituents. Accordingly, none of the relief requested would benefit Plaintiff directly; rather, it would be to the benefit of some of the district's constituents and at the expense of others. Plaintiff is not statutorily authorized to advance such an action, particularly when no specific district interest is harmed.

While having the ability to be a party to judicial review in this situation may be germane to Plaintiff's own interpretation of their purposes in the most general sense, an interpretation that would allow that appears to directly contradict the statutory limitations on groundwater management districts put in place by the Legislature. An entity that requires statutory authorization to act cannot claim an action is germane to their purposes if they are not statutorily authorized to take such action. Moreover, K.S.A. 82a-1039 states that "[n]othing in [the GMD Act] shall be construed as limiting or affecting any duty or power of the chief engineer granted pursuant to the [KWAA]." Plaintiff should not be allowed to exceed its statutory authority as a mechanism to limit (or expand the jurisdiction of) a decision of the Chief Engineer (*i.e.*, the Chief Engineer's determination that he has no jurisdiction to consider the merits of the Proposal) without establishing standing to do so. There is no way to characterize this case other than as Plaintiff representing the interests of *some but not all* constituents of the district and exceeding explicit statutory limits on its authority in doing so. There is thus no way to characterize Plaintiff's pursuit of this case as being germane to the statutorily defined purposes of a groundwater management district.

The final prong required for traditional associational standing requires that neither the claim asserted, nor the relief requested, require the participation of individual members of the

association asserting standing. Even if Plaintiff can meet the first two prongs of the associational standing test, they most clearly fail to meet the third prong. The Kansas Supreme Court extensively examined the third prong of associational standing in *312 Education Ass'n v. U.S.D.* No. 312, 273 Kan. 875 (2002), a case where a teacher's professional association filed an action against a school district contesting the pay step a teacher was placed on, requesting that, in response to a newly hired teacher who was placed on a higher step than expected, either all teachers in the district be moved up one pay step or all first year teachers be moved up one pay step. *Id*., 875-877. There are two elements of this prong that must be considered in the present context to determine whether Plaintiff can establish associational standing. First, it must be determined whether the claim itself requires individual participation, and second, it must be determined whether the relief requested requires individual participation. *Id*. at 886. In the present case, both the claim asserted and the relief requested require the participation of individual members of the district.

The crux of Plaintiff's claims as they relate to the rights of Plaintiff's constituents, that the Proposal will impair individual water right holders within the district, requires the individual participation of district members. In order to determine whether the Proposal will cause impairment of existing water rights, the owners of those water rights (constituents of the district) must individually present evidence of the alleged harm that will result. Further, the City (also a constituent of the district) must submit its own evidence that impairment would not occur to properly determine whether the Proposal would cause injury to existing water rights. This is akin to the scenario that was present in *Warth v. Seldin*, 422 U.S. at 515–16, 95 S.Ct. 2197, a case that was cited by the *312 EA* court and wherein the U.S. Supreme Court found a lack of associational standing:

> [W]hatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.

Any proceeding in which it would be possible to ascertain the nature and extent of any individualized injury suffered here would necessarily create a directly adversarial proceeding *amongst* district members. Plaintiff cannot make a claim on behalf of one member that results in legal action against another member under the guise of associational standing and still purport that such action was undertaken for the benefit of the district as a whole. The nature of the claim asserted here requires action be taken by the individual affected members.

The outcome of the legal analysis regarding the nature of the relief requested is similar. "Whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." *312 EA*, 273 Kan. 875 at 885. In *312 EA*, the requested remedy to increase the pay step placement of all teachers or only first year teachers would not have necessarily benefited every member of the association, but more importantly, it would not have harmed any member as the lone teacher that triggered the dispute could have potentially maintained his existing pay step. *Id*. at 884. That is not the case with the request made by Plaintiff. In the present case, Plaintiff claims standing to challenge a Proposal submitted by an applicant who is a member of and ostensibly represented by Plaintiff.

Although not specifically stated as such, Plaintiff is essentially attempting to stand in for some water right owners within the district against other water right owners in the district. It is certainly appropriate for Plaintiff to provide input regarding matters like the one at issue here but Plaintiff cannot directly represent some users against others because all local users have the right to fair representation by Plaintiff. Here, Plaintiff has not requested a general remedy for the

district, but rather is claiming to represent one faction of an adversarial subset of district constituents. Plaintiff's pursuit of this lawsuit as Plaintiff has framed it will therefore result in the spending of some constituents' tax dollars against themselves, and any decision that is rendered could thus be harmful to one or more of Plaintiff's constituents. This would be a particularly unacceptable outcome here considering there has been no violation of the KWAA and there is in fact no proposal left to consider. There is no outcome of Plaintiff's request that can, by the very nature of the claim and relief sought, be beneficial to the groundwater management district as a whole. Arguably, this is why a groundwater management district's ability to represent individual members and their claims is statutorily limited. It certainly supports a conclusion that individual participation by each affected water right owner is required here and that Plaintiff lacks traditional associational standing to bring this action.

Additionally, looking to the *312 EA* Court, regarding the nature of the relief requested, "*Warth* appears to make the crucial standing test to be whether the relief requested inures to the benefit of the members of the association actually injured." *Id.* at 885. Accordingly, the "nature of the relief requested" prong of the associational standing test also requires an actual injury to at least one of a plaintiff association's members. As discussed, no injury-in-fact to Plaintiff or any member it purports to represent has occurred here. Plaintiff does not have associational standing to bring its claims by virtue of the nature of the relief it has requested, and in fact fails all prongs of the associational standing test.

3. Plaintiff's claims are either moot or not yet ripe.

In addition to Plaintiff's lack of standing, the issues raised in Plaintiff's Petition are not justiciable because they are either moot or not yet ripe. First, the issues are moot, because all the relief requested by Plaintiff requires the Chief Engineer to have proper jurisdiction to consider

the merits of the City's proposal. The Proposal was dismissed and is no longer before the Chief Engineer. There were no applications presented that could have been approved under any set of facts (because they were not appropriately filed). Absent such applications, the issue is moot, and any issues arising from a hypothetical future proposal are not yet ripe. There is no way to know what any future proposal may look like or even if one will be submitted at all. Now that it has been made clear that the Proposal was not properly submitted, the City may well not resubmit a new proposal or may make considerable modifications to their next proposal. The fact is that neither the Chief Engineer nor the Plaintiff know what any a future proposal might contain. There is no case or controversy that could be solved by delving into the myriad of factual findings Plaintiff requests.

The Plaintiff, alleging no injury-in-fact and failing to state a claim or request relief that does not require participation by individual affected water right owners, cannot establish either common law individual standing or associational standing to bring this case. Further, without the ability for the Chief Engineer to establish jurisdiction over the City's Proposal, any request for factual findings is either moot or not yet ripe as it is unknown when, if ever, a valid proposal will be before the Chief Engineer.

V. This Court Lacks Subject-Matter Jurisdiction Over Plaintiff's Case Because Plaintiff Lacks Standing

Because Plaintiff lacks standing to bring its claims as set out above, this Court also lacks subject-matter jurisdiction to hear Plaintiff's case. Standing is a component of subject-matter jurisdiction as well as a requirement for a case or controversy. *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33, 49 (2015). Subject-matter jurisdiction

"cannot be waived, and its nonexistence may be challenged at any time." *State v. Dunn*, 304 Kan. 773, 784, 375 P.3d 332, 341 (2016). A court must dismiss a case when it lacks subject-matter jurisdiction. *In re T.S.W.*, 294 Kan. 423, 432, 276 P.3d 133, 140 (2012). Standing as an element of subject-matter jurisdiction "is a question of law subject to unlimited review" just as standing for purposes of justiciability is. *Creecy v. Kansas Dep't of Revenue*, 310 Kan. 454, 460, 447 P.3d 959, 965 (2019). Plaintiff lacks standing for all of the reasons set out herein, and the Court should therefore dismiss Plaintiff's claims due to lack of subject-matter jurisdiction.

VI. Conclusion

The Petition filed by Plaintiff requests relief on five counts, all of which request specific factual findings regarding the City's proposal. However, in seeking this relief, Plaintiff asks the Court to throw aside Plaintiff's own motion to dismiss, which was adopted by both the Presiding Officer and the Chief Engineer. Although Plaintiff will likely dispute this characterization, without properly establishing authority for the Chief Engineer to consider the merits of the City's proposal, there is no relief requested that can be provided. Further, Plaintiff fails to meet standing requirements and it is a government entity without statutory authority to bring this case. Specifically, Plaintiff is not authorized to assume associational standing and pit its voting and tax paying constituents with individualized claims against one another, and neither the district itself nor any of its members have suffered any injury-in-fact. The issues Plaintiff has raised are also either moot because Plaintiff's motion to dismiss was granted or will not be ripe until a new proposal is properly before the Chief Engineer. This Court also lacks subject matter jurisdiction because of Plaintiff's lack of standing. Therefore, Plaintiff's Petition should be dismissed.

PRAYER FOR RELIEF

WHEREFORE, the Chief Engineer prays that the Court deny any and all relief sought by Plaintiffs and dismiss their Petition.

ALTERNATIVELY, if Plaintiff can establish proper standing and has stated a claim for which relief might be granted, then the Chief Engineer prays that the Court limit the issues under review to whether there is statutory authority to allow the Chief Engineer to consider the merits of a proposal that was not properly filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th of August 2022, I certify the above *Motion to Dismiss and Memorandum in Support Thereof* was electronically filed with the Clerk of the Court and that the below-listed parties were notified of the same via the Court's electronic filing system:

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