IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
CIVIL DEPARTMENT

AUDUBON OF KANSAS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. SN-2023-CV-000420
	)	
EARL LEWIS, in his official capacity as Chief Engineer, Kansas Department of Agriculture, Division of Water Resources,	)	
	)	
Defendant.	)	

Pursuant to K.S.A. Chapter 60

MEMORANDUM IN SUPPORT OF AUDUBON OF KANSAS, INC'S MOTION FOR PEREMPTORY ORDER OF MANDAMUS

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INTRODUCTION

The Quivira National Wildlife Refuge ("Refuge") is a wetland of international importance. Its saline wetlands provide critical shelter and habitat for numerous threatened and endangered species, including the whooping crane, the piping plover, the interior least tern, and the bald eagle. To protect these wetlands, the U.S. Fish & Wildlife Service ("Service"), which owns the Refuge, obtained a water right ("Refuge Water Right") pursuant to the Kansas Water Appropriation Act, K.S.A. 82a-701 *et seq.* ("KWAA"). The Refuge Water Right has a 1957 priority entitling the Service to divert over 14,000 acre-feet per year ("AF/Y") from Rattlesnake Creek, a tributary of the Arkansas River. These water supplies depend upon groundwater within the Rattlesnake Creek Basin ("Basin"). But since 1957, the chief engineer of the Kansas Department of Agriculture, Division of Water Resources ("KDA-DWR") has granted more water rights than the Basin can sustain—a condition known as over-appropriation. After decades of groundwater pumping by junior rights, Rattlesnake Creek barely runs, crippling the Refuge Water Right.

In 2013, the Service finally decided to protect the Refuge Water Right by filing a request with KDA-DWR to conduct an impairment investigation. After three years of study, the previous chief engineer, David Barfield, issued an impairment report in 2016 ("Impairment Report," excerpted as **Exhibit C**),[1] which reached two essential conclusions. First, the Refuge Water Right is chronically and seriously impaired by junior groundwater pumping, which has been depleting the Basin of between 30,000 and 60,000 AF/Y for years.[2] Second, the impairment can be resolved

[1] All exhibits cited throughout this memorandum are those original exhibits attached with Plaintiff's Petition and designated Exhibits A-S, each of which Plaintiff incorporates herein by reference in their entirety.

[2] This is an extraordinary level of depletion. By way of comparison, it vastly exceeds the annual violations of the Pecos River Compact due to over-pumping by New Mexico between 1950 and 1983, *Texas v. New Mexico,* 482 U.S. 124, 127-28 (1987) (approximately 10,000 AF/Y); and the annual depletions of stateline flows suffered by Kansas due to groundwater pumping by Colorado in violation of the Arkansas River Compact between 1950 and 1996, *Kansas v. Colorado,* 556 U.S. 98, 103 (1999) (approximately 9,106 AF/Y). The groundwater depletions at the Refuge likely exceed Nebraska's overuse due to groundwater pumping in violation of the Republican River Compact, *Kansas v.*

by reducing juniors' groundwater pumping in the Basin. **Exhibits C, M**. The Impairment Report is conclusive: its data, groundwater modeling, and technical analyses have not been questioned.

For the next seven years, the Service and KDA-DWR vacillated about whether and how to protect the Refuge Water Right. The Service filed repeated requests to secure water in the wake of the Impairment Report. **Exhibits F, L**. By 2019, chief engineer Barfield developed a comprehensive plan to administer junior water rights according to the analyses and findings of the Impairment Report. On February 6, 2023, the Service filed its most recent request to secure water—well in advance of irrigation season, which typically begins in late May. **Exhibit Q**. Yet in April, shortly before irrigation season was to begin, chief engineer Lewis issued a public statement promising junior water rights holders in the Basin that he would not administer their rights in 2023. **Exhibit S**.

The court cannot condone the chief engineer's refusal to perform his mandatory, non-discretionary, and immediate duty to protect senior water rights. Since 1945, the bedrock principle of the KWAA has been clear and uncompromising: "first in time, first in right," without regard for economic consequences. K.S.A. 82a-707(c); *Garetson Bros. v. American Warrior, Inc.*, 51 Kan.App.2d 370, 381-82, 347 P.3d 687 (2015). The chief engineer has exclusive jurisdiction over water rights and shall administer them "in accordance with the rights of priority of appropriation." K.S.A. 82a-706. When he concludes that a senior right is impaired—when pumping by junior rights "diminishes, weakens, or injures the prior right," *Garetson,* 51 Kan.App.2d at 389—and the senior water right holder files a request to secure water, the chief engineer must immediately protect the senior water right by shutting down juniors' diversions. K.S.A. 82a-706b. The entire prior appropriation system depends upon the performance of this duty, which prevents unlawful

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Nebraska, 135 S. Ct. 1042, 1053 (2015) (approximately 35,435 AF/Y for 2005 and 2006)—the largest annual interstate compact violations due to groundwater pumping in the history of interstate compact litigation.

diversions by junior rights. *Id.* Without it, our system of property rights in water use breaks down. The priority of a water right is the "most important stick in the water rights bundle." *Navajo Dev. Co., Inc. v. Sanderson,* 655 P.2d 1374, 1377-78 (Colo. 1982). Priority is "property in itself," a water right's "chief value," and so to deprive a senior right of its priority is to take "a most valuable property right." *High Country Citizens' Alliance v. Norton,* 448 F.Supp.2d 1235, 1253 (D. Colo. 2006). There is no clearer example in Kansas law of a public officer's mandatory, non-discretionary duty.

Former chief engineer Barfield authored the 2016 Impairment Report and the 2019 administration plan. In developing both, the chief engineer enjoys discretion owing to his water resources expertise; he is a classified officer. K.S.A. 74-506d. But paralysis cannot follow analysis. Upon a finding of impairment and a senior's request to secure water, the chief engineer must immediately act. There is no legal or factual basis to avoid or delay priority administration in the Basin.

In this case, Plaintiff seeks an order of mandamus directing Defendant Lewis to administer immediately all junior water rights in the Basin that are impairing the Refuge Water Right until it is no longer impaired. Plaintiff also seeks several declarations clarifying this duty, and costs. For the reasons set forth below, Plaintiff seeks a peremptory order of mandamus pursuant to K.S.A. 60-802(b), but the arguments contained in this Memorandum support all of the relief which Plaintiff seeks. An order of mandamus is necessary because of Defendant's and KDA-DWR's willful and well-documented refusal to administer junior water rights in the Basin since 2016. The court's immediate intervention by a peremptory order is necessary to protect the rule of law and to resolve this significant public issue before another year of drought inflicts irreparable harm to the Refuge, the Refuge Water Right, and the endangered and threatened species which rely upon both.

Junior irrigators may experience inconvenience and additional economic burden as a result of priority administration, but they have no legal basis for contesting it. Had the chief engineer acted as the law requires, they could have avoided or limited the consequences of his willful inaction. Accordingly, Plaintiff respectfully requests the court to review this matter and issue a peremptory order of mandamus and declaratory relief as expeditiously as possible.

STATEMENT OF FACTS

Plaintiff AOK has fully set forth the relevant facts of this case in its Petition, and hereby incorporates the same and all exhibits discussed therein into this Memorandum by reference.

ARGUMENT & AUTHORITIES

I. A peremptory order of mandamus is necessary in this case.

a. Legal Standard.

An action in mandamus is an appropriate vehicle to compel the performance of a clearly defined duty unlawfully withheld by a public officer. K.S.A. 60-801; *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 697, 957 P.2d 379 (1998). A mandamus order can only compel "ministerial" acts, those which the officer must perform "upon a given set of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion about the propriety or impropriety of the act to be performed." *Schmidtlien Elec., Inc. v. Greathouse*, 278 Kan. 810, 833, 104 P.3d 378 (2005). When the right to require the performance of the act which the defendant is required to perform is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory order or mandamus may be allowed in the first instance. K.S.A. 60-802(a)-(b).

While a private person is not typically entitled to invoke mandamus to compel the performance of a duty owed to the public generally, the oft-stated exception exists for cases where

the plaintiff shows an "injury or interest specific and peculiar to himself, and not one that he shares with the community in general." *Stephens v. Van Arsdale*, 227 Kan. 676, 683, 608 P.2d 972 (1980). Furthermore, the Kansas Supreme Court has recognized that:

> Mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business, notwithstanding the fact there also exists an adequate remedy at law.
>
> The use of mandamus to secure a speedy adjudication of questions of law for the guidance of state officers and official boards in the discharge of their duties is common in this state.

Stephens, 227 Kan. at 682 (quoting *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 239, 436 P.2d 982 (1968)).

b. Plaintiff holds an interest specific and peculiar to itself that is threatened by Defendant's failure to protect the Refuge Water Right.

As stated above, a private individual must show "an injury or interest peculiar to himself" for the remedy of mandamus to be available, and "[w]hether or not a private individual has brought himself within the narrow limits of the well-established rule must be determined from the particular facts of each individual case." *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 243, 436 P.2d 982 (1968). In other words, Plaintiff must show it has standing to sue. Plaintiff's particular interest in the enforcement of the prior appropriation doctrine under the KWAA, necessary for the protection of the Refuge Water Right, undoubtedly satisfies the standard.

Plaintiff holds a strong interest in the survival of the Refuge. AOK owns and maintains nature sanctuaries across the Central Flyway, where its members enjoy birding and natural history activities, and provides education and information to its members and the public through action alerts, press releases, facts sheets, and letters to lawmakers. AOK regularly hosts events at the Refuge as part of its educational initiatives to encourage its members and the public to appreciate

the Refuge and the many endangered and threatened species that rely upon it. Since at least 2016, Plaintiff has dedicated extensive resources and time towards protection of the Refuge. From its series of advocacy letters exchanged with KDA-DWR to the pursuit of its federal lawsuit, AOK has placed itself squarely in the middle of the controversy surrounding the Refuge Water Right. *See* **Exhibits G, H, J, K**. The chronic, serious, and ongoing impairment of the Refuge Water Right threatens to destroy the Refuge and take the many endangered and threatened species that rely upon it, thereby threatening the nature sanctuaries, conservation activities, and interests of AOK and its members. Its standing to seek declaratory and injunctive relief in federal court on these grounds was never disputed. *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093 (10th Cir. 2023); *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 568 F.Supp.3d 1167 (D. Kan. 2021).

c. Defendant's refusal to administer junior water rights in the Basin is a recurring and ongoing issue of significant statewide concern.

It is unlawful for KDA-DWR to delay protection of the Refuge Water Right after ten years and in the face of repeated requests to secure water, because delay enables further unlawful diversions by junior rights. K.S.A. 82a-706b. KDA-DWR has rationalized delay on the grounds that the interests of junior water right holders, agribusinesses, and their lobbies take priority over the Refuge Water Right. *See, e.g.,* **Exhibit E**. This rationalization is sound politics, but it is legally groundless.

"The date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights." K.S.A. 82a-707(b). Economic considerations play no role in the state's duty to protect senior water rights from impairment by junior rights. *Garetson Bros. v. American Warrior, Inc.*, 51 Kan.App.2d 370, 388-89, 347 P.3d 687 (2015). As Justice Oliver Wendell Holmes stated,

"few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished." *Hudson Cnty. Water Co. v. McCarter,* 209 U.S. 349, 356 (1908). The waters of Kansas and the water rights that depend upon them face grave risk if the chief engineer is allowed to skirt his clear, non-discretionary duty.

This case thus raises issues of the greatest public importance statewide. There is an obvious need for an authoritative interpretation of the chief engineer's duties under the KWAA to expedite the resolution of this important issue of public concern. *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003) (stating "[n]umerous prior decisions have recognized mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business, notwithstanding the fact that there also exists an adequate remedy at law"). The KWAA dedicates "[a]ll water within the state of Kansas . . . to the use of the people of the state . . . ." K.S.A. 82a-702. The chief engineer "shall enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources . . . in accordance with the rights of priority of appropriation." *Id.,* 82a-706. K.S.A. 82a-706b clearly requires the chief engineer to immediately administer junior rights. The court must state plainly that the law means what it says—and order that the law be enforced.

d. There is no other adequate remedy at law available to Plaintiff.

Mandamus has typically been viewed as a proper remedy only where a party has "a want of any other appropriate and adequate remedy." *See State v. McDaniels*, 237 Kan. 767, 771-72, 703 P.2d 789 (1985). Plaintiff clearly lacks any adequate remedy to challenge the inaction of the chief engineer in this case. Plaintiff does not own a water right in the Basin, and is instead seeking

to protect the water right held by a federal agency. No provision of the KWAA confers standing on Plaintiff to seek administrative review of the chief engineer's decisions in such circumstances, nor is there any applicable provision of the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.*, that confers statutory standing to pursue the relief sought. As described more fully in Part II.g below, mandamus is a long-accepted procedure in prior appropriation jurisdictions for protecting senior water rights impaired by juniors.

Furthermore, Kansas courts have repeatedly held that there is no adequate remedy at law for a senior water right whose use is impaired by a junior right's pumping, and have issued both temporary and permanent injunctions shutting down junior rights accordingly. *Garetson Bros. v. American Warrior, Inc.*, 51 Kan.App.2d 370, 347 P.3d 687 (2015); *Garetson Brothers v. American Warrior, Inc.*, 56 Kan.App.2d 623, 435 P.3d 1153 (2019). *See* Part II.f.

e. Timely resolution by peremptory order is necessary due to the severity of drought and the magnitude of the Refuge Water Right's impairment.

Time is of the essence in this case due to the severity of the current drought and the magnitude of the Refuge Water Right's impairment. If the chief engineer does not protect the Refuge Water Right, the Refuge and its dependent endangered species are at risk. As a result of the Defendant's failure to protect the Refuge Water Right, the Refuge is suffering from water depletions of between 30,000 to 60,000 acre-feet per year, irreparably harming the Refuge, the real property of the Refuge Water Right, and the endangered species which depend upon Refuge wetland habitat. **Exhibit C.** The Refuge area is in a condition of exceptional drought—precisely the time when the property protections afforded senior rights are most valuable. Pet., ¶ 28; K.S.A. §§ 82a-706b, 82a-707(c).

Furthermore, delay threatens at least two serious legal consequences for the State of Kansas. First, if the chief engineer continues to refuse to protect the Refuge Water Right, and

significant habitat modification or degradation kills or injures whooping cranes or other endangered species as a result, then the State of Kansas will be subject to substantial criminal and civil penalties pursuant to the federal Endangered Species Act, which forbids the "take" of an endangered species by direct or indirect actions. 16 U.S.C. 1538(a)(1)(B); 50 C.F.R. 17.3 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. For a Great Oregon,* 515 U.S. 687, 704 (1995); *Aransas Project v. Shaw,* 775 F.3d 641, 646 (5th Cir. 2014). Harm to whooping cranes, other endangered species, and the habitat of the Refuge resulting from the continuing impairment of the Refuge Water Right are not only foreseeable; they have been foreseen for decades and described by KDA-DWR itself. **Exhibit C**.

Second, if the court does not promptly order the Defendant to perform his clear, non-discretionary duties, the failure to protect the Refuge Water Right eviscerates the property protections afforded to senior water rights in Kansas, and exposes the State to liability for the unconstitutional, pretextual taking of private property. K.S.A. §§ 82a-701(g), 82a-706, 82a-706b, 82a-707. By willfully refusing to administer junior water rights in the Basin, Defendant has knowingly allowed water that would otherwise be used by the Refuge Water Right to flow to junior rights, which is expressly forbidden under K.S.A. 82a-706b. By this willful refusal to protect the Refuge Water Right, Defendant has thereby chosen to redistribute water from an owner (the Service) to other private parties (those owning junior water rights that are impairing the Refuge Water Right). This redistribution serves no public purpose or public use. Thus, Defendant's willful refusal violates the U.S. Constitution, the Kansas Constitution, and Kansas statute, all of which require that such takings must be for "public use." U.S. CONST. amend. V; KAN. CONST. art. 12, § 4; K.S.A. 26-513(a); *Isely v. City of Wichita,* 38 Kan.App.2d 1022, 1025 174 P.3d 919 (2008). This Court can end these violations by peremptory order.

II. The KWAA confers upon the chief engineer the non-discretionary duty to administer immediately junior water rights whenever he determines that they are impairing a senior right and the holder of that right files a request to secure water.

a. The non-discretionary duty to immediately administer junior rights has been a fundamental component of Kansas water law since 1886.

The inaction of Defendant contradicts over 130 years of explicit and consistent law in Kansas. In 1886, Kansas adopted the prior appropriation doctrine for western Kansas. L. 1886, ch. 115, § 1; K.S.A. §§ 42-301 to 42-311. Article IV of Chapter 133 of the Laws of 1891, subsequently brought into the Revised Statutes of 1923, appears in its present form at K.S.A. 42-329, and is the bedrock of the non-discretionary duty to immediately administer junior rights:

> The waters of the several streams and sources of supply shall be distributed among the several canals, ditches, conduits and other works so that the proprietors of each of said works, and those entitled to water therefrom, shall, as nearly as may be, and to the extent of their needs, at all times receive and enjoy the waters to which they are severally entitled; and whenever it shall appear that there is flowing into any such works, water to which the proprietor of any other such works having a prior right is entitled, and that such other works having priority of right is not receiving the water necessary for the consumers of water therefrom, and which ought to flow to the same, the head gate of such works having the excess, and being subsequent in right, shall be closed or partly closed, so that a sufficient amount of water of such stream or source of supply may pass and flow to the said works having the priority of right, to the amount to which the same shall be entitled; and if the proprietors of any such works having such excess and being subsequent in right shall fail or refuse to turn out such supply of water when requested by the party entitled to receive the same so to do, the head gate or waste gate of the works receiving such excess shall be so set and locked by the officer authorized by law to perform such duty as to permit a sufficient amount of said water to pass and flow to the party having the right to receive the same.

K.S.A. 42-329. The legislature retained this statute with the enactment of the KWAA in 1945, and alongside the KWAA's significant amendments in 1957. As detailed below, its clear statement of duty served as a blueprint for K.S.A. 82a-706b. Indeed, the Kansas Water Resources Board ("Water Board") emphasized that "[s]o significantly interesting are the provisions of this [statutory] section pertaining to administration of water rights that there is compelling need to

reproduce this section." KANSAS WATER RESOURCES BOARD, REPORT ON THE LAWS PERTAINING TO THE BENEFICIAL USE OF WATER 108 (1956) ("1956 REPORT").

K.S.A. 42-329 has four notable components. First, as indicated by the repeated use of the imperative "shall," the statute imposes a non-discretionary duty. Second, that duty is immediate and constant, requiring that senior water rights "at all times" receive the waters to which they are entitled, "to the extent of their needs," "whenever" junior water rights are diverting and the senior water right is not receiving its necessary water supplies.[3] Third, it explicitly states the manner in which the duty is to be accomplished, by physically closing juniors' diversion works. Finally, it states a clear penalty for noncompliance: if juniors refuse the senior's request to secure water, juniors' diversion works shall be locked by "the officer authorized by law to perform such duty . . . ." K.S.A. 42-329.

Who, then, is the "officer authorized by law" to perform this immediate and non-discretionary duty? Between 1891 and 1945, it was the district courts, which held exclusive jurisdiction to protect senior rights through the appointment of water bailiffs authorized to shut down juniors' diversions. K.S.A. 42-3,109. During this time, Kansas reformed its water law bureaucracy, first establishing the Kansas water commission in 1917 (L. 1917, Ch. 172) and then consolidating it with the division of irrigation in creating KDA-DWR in 1927. L. 1927, Ch. 293, § 1; K.S.A. 74-506a. All duties, powers, and authority of these earlier agencies were transferred to KDA-DWR, and the former commissions were abolished. L. 1927 Ch. 293, §§ 2-3, K.S.A. §§ 74-506b, 74-506c.

[3] A contemporary statute, still in effect at K.S.A. 42-398, affirms the immediacy of this duty: it authorizes water bailiffs and other officers to "enter upon any premises where such [junior] well is situated," and "at "any reasonable hour of the day or night . . . ."

With the enactment of the KWAA in 1945, K.S.A. 42-3,109, was abolished, but the legislature retained K.S.A. 42-329 and its requirement to immediately administer junior water rights when required to satisfy prior rights. However, the officer charged with performing that duty was not made explicit, despite the general delegation under the KWAA of enforcement authority to the chief engineer pursuant to K.S.A. 82a-706. In 1956, the Water Board stressed the need for clarity on the issue:

> This much seems certain: Operation under G.S. 1949, 42-329—which pertains to administration—would strengthen the meaning and effect of all water rights in the state, would give needed protective assistance to state water users, and would further the interests of the state in water conservation, in the prevention of waste, and in the efficient management of the water resources of the state. To insure application of the statute, the legislature could simply and clearly designate the state officer authorized, empowered, and directed to carry out the duties specified in G.S. 1949, 42-329. Its logical choice, of course, would be the officer who is in the best position to carry out those duties—the officer who deals constantly with the determination, approval, and regulation of water rights—the man whose office contains the technical data necessary to effectuate the policies declared—the chief engineer of the division of water resources of the state board of agriculture.

1956 REPORT, at 110. In recommending draft legislation, the board explicitly tied K.S.A. 42-329 to the new legislation conferring this duty squarely upon the chief engineer. *Id.*, at 116-17.

The legislature generally agreed with this recommendation, and in 1957 enacted K.S.A. 82a-706b. While K.S.A. 82a-706 sets forth general duties of the chief engineer, Section 706b describes the chief engineer's specific duty to administer junior rights, in language substantively identical to the requirements set forth in K.S.A. 42-329. Its original and relevant passages are as follows:

> (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 . . . .
>
> (b) The chief engineer, or the chief engineer's authorized agents, shall deliver a copy of such a directive to the persons involved either personally or by mail or by attaching a copy to such headgates, valves or other controlling works to which it applies and such directive shall be legal notice to all persons involved in the diversion and distribution of the water of the ditch, canal, conduit, pipe, well or structure. For the purpose of making investigations of diversions and delivering directives as provided herein and determining compliance therewith, the chief engineer or the chief engineer's authorized agents shall have the right of access and entry upon private property.

K.S.A. 82a-706b. The statute incorporated other statutory language contained in Chapter 42, most notably that forbidding and penalizing unauthorized diversions by junior rights, and entitling senior rights to immediate relief. *See, e.g.*, K.S.A. §§ 42-395 to 42-399, 42-3,100 to 42-3101. It has been properly described as a "mandate" by legal scholars. WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES III.307 (1972-77). In 2015, it was amended to allow for "augmentation," an alternative that, as described below and in the Petition, does not apply in this case. L. 2015, ch. 60, § 1.

This history indicates over 130 years of the legislature's consistent and unwavering commitment to the immediate protection of senior water rights from the illegal and impairing diversions by junior rights. K.S.A. 82a-706b articulates precisely what has been Kansas law since 1886, and imposes that clear, non-discretionary duty upon the chief engineer. None of this should be a surprise to any water right owner in Kansas. As Professor John Peck has stressed: "Cutting back water rights on a strict priority basis is exactly what each Kansas water appropriator expected when obtaining a permit. See Kan. Stat. Ann. §§ 82a-706, 706b, 707, 711, & 711a (1997). This expectation is a condition of each water right, either expressly or by implication." John C. Peck, *Property Rights in Groundwater—Some Lessons from the Kansas Experience,* 12 KAN. J. L. &

PUB. POL'Y 493, 509, at n. 133 (2003). Failure to perform this duty to administer junior rights does more than harm the senior right: it is a violation of the KWAA itself, which forbids the diversion of water by junior rights at the expense of senior rights. K.S.A. 82a-706b.

b. All of the statutory and regulatory requirements for engaging the chief engineer's duty to administer junior rights have been met: there are no alternatives or exceptions to priority administration.

K.S.A. §§ 82a-706, 82a-706b, and K.A.R. 5-4-1 work in tandem to protect senior water rights. *Garetson Bros. v. American Warrior, Inc.,* 51 Kan.App.2d 370, 382, 347 P.3d 687, 694-95 (2015). The Service requested an impairment investigation pursuant to K.A.R. 5-4-1(a) in 2013, which former chief engineer Barfield completed with the publication of a final impairment report pursuant to K.A.R. 5-4-1(b)-(c). **Exhibit C**. The Service has repeatedly filed requests to secure water pursuant to K.A.R. 5-4-1(d), most recently in 2023. **Exhibits F, L, Q**. Because the Refuge Water Right holds the beneficial use of recreational use, the Service's requests do not expire and do not need to be renewed annually, unlike requests to secure water to satisfy irrigation use rights. K.A.R. 5-4-1(d). In sum, the Service fulfilled all regulatory requirements to trigger action from the chief engineer pursuant to his general duties under K.S.A. 82a-706 and his specific duties under 82a-706b. It did so three months ago. **Exhibit Q.**

There is no legal justification for the Defendant's present delay and inaction. In 2016 chief engineer Barfield determined that the Refuge Water Right is impaired pursuant to K.A.R. 5-4-1(c), thereby "making a determination of an unlawful diversion" by junior rights pursuant to K.S.A. 82a-706b(a). **Exhibit C**. Thus, the chief engineer "shall direct" the junior rights to be shut down, K.S.A. 82a-706b(a)(1), and "shall give a written notice and directive" to junior water rights whose "use of water must be curtailed to secure water to satisfy the complainant's prior rights." K.A.R.

5-4-1(e)(1). The local groundwater management district has been repeatedly consulted pursuant to K.A.R. 5-4-1(e)(2). **Exhibits D, E, F, H, I K, M, R.**

Because the Service has fully complied with K.A.R. 5-4-1, the chief engineer must immediately administer junior water rights that are impairing the senior right. K.S.A. 82a-706b(a)(1). The alternative to priority administration, that of "augmentation" pursuant to K.S.A. 82a-706b(a)(2), is not available, for the reasons and facts stated in the Petition. Thus, there is no alternative for the Defendant than to immediately issue curtailment orders shutting down junior rights pursuant to K.S.A. 82a-706b and K.A.R. 5-4-1(e)(1).

c. Defendant recognizes that this duty is non-discretionary.

Defendant Lewis has dedicated his career to serving the state in water matters, at both KDA-DWR and the Kansas Water Office. As the current chief engineer, he has repeatedly testified before the Kansas Legislature. On March 7, 2023, he testified to the House Water Committee. His testimony demonstrates his understanding that his duty to protect the Refuge Water Right is not discretionary:

> **Chief Engineer Lewis:** The purpose of the impairment and then the call for water is really, it's a regulatory process, right? But the regulatory process rests with the division of water resources and the chief engineer. So I think the court getting involved really. . . the situation there could be if we don't do our statutory duty . . . then I think we are open to litigation, uh primarily by a senior water holder. And again this is just in anywhere and not just in this case. But if we don't do our duty as laid out in 706b where it says we shall take action, then I think the court could step in . . . . We have a whole host . . . I think their options are much more strict "first in time, first in right."
>
> And again just to kind of give you a scope, we've been participating in the environmental assessment . . . hopefully leading to an augmentation project, and one of the things they have to look at is what if it doesn't happen? . . . The modeling would say that to do a strict first in time first in right, we need to shut off on the order of 810 wells for no less than two years in order to get that water level to recover to a point where the streamflow is being supported to a level that the Refuge's water right can be sustained . . . certainly we want to avoid that if possible . . . .

Representative Bloom: The junior wells, they're all used for food production, right?

Chief Engineer Lewis: Not all of them.

Representative Bloom: What are they used for?

Chief Engineer Lewis: Well, the majority are for irrigation, but I mean there's certainly stock water, there's municipal, there's some other recreation. The majority are for irrigation though.

. . .

Representative Bloom: And the world's food supply is, like, two weeks. In your opinion, when does food trump recreation?

Chief Engineer Lewis: Under the law? Never. It is first in time first in right regardless of use . . . It is first in time first in right regardless of what type of use, regardless of what type of economic activity it is, regardless of anything other than "who got the water right first, who got it second." It's a very harsh system, but it's a system that's used across the western United States.

KS Legislature, *House Water Committee 03/07/2023*, YouTube (March 7, 2023), https://www.youtube.com/watch?v=3oU8oqZMZnc&t=1832s (1:04:36 – 1:08:00).

Defendant knows that the law requires him to act, how the law requires him to act, and that his statutory duty does not permit "his own judgment or opinion about the propriety or impropriety of the act to be performed" to prevent him from acting. *See Schmidtlien Elec., Inc. v. Greathouse*, 278 Kan. 810, 833, 104 P.3d 378 (2005).

d. The Tenth Circuit's construction of the chief engineer's immediate and non-discretionary duties pursuant to K.S.A. 82a-706b is correct.

The United States Court of Appeals for the Tenth Circuit recently interpreted K.S.A. 82a-706b as conferring upon the chief engineer the immediate and non-discretionary duty to protect the Refuge Water Right. In 2021, Plaintiff filed suit in federal court seeking, among other remedies, an order requiring the protection of the Refuge Water Right. The Tenth Circuit recently dismissed the case as moot, basing its dismissal upon two findings. As a matter of fact, it found

that the 2020 MOA, which sought to accomplish "augmentation" pursuant to K.S.A. 82a-706b(a)(2), was no longer operative: "all material terms of the MOA have since expired . . . ." *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093, 1103 (10th Cir. 2023). As a matter of law, the Tenth Circuit held that the Service's 2023 request to secure water imposed upon the chief engineer the non-discretionary duty to administer water rights by priority. *Audubon of Kansas, Inc.*, 67 F.4th at 1106-07. The Tenth Circuit observed that under K.S.A. §§ 82a-706 and 82a-706b:

> Though the Water Division may exercise discretion in administering water rights, it still 'ha[s] a legal obligation to secure water to senior users." App. vol. 2 at 383. Under Kansas law, the chief engineer of the Water Division "*shall* enforce and administer [Kansas] laws . . . pertaining to the beneficial use of water and *shall* control, conserve, regulate, allot and aid in the distribution of water resources . . . in accordance with the rights of priority of appropriation." Kan. Stat. Ann. § 706 (emphases added). In the Rattlesnake Creek subbasin, the chief engineer can choose to combat unlawful diversion of water by allowing augmentation "if … available and offered voluntarily." § 82a-706b(a)(2). Still, the chief engineer must honor the law on priority water rights. § 82a-706. We read the statute to mean that if an augmentation remedy isn't available in the Rattlesnake Creek subbasin, the chief engineer must, as needed to protect senior water rights from unlawful diversions, "[d]irect that the headgates, valves or other controlling works of any ditch, canal, conduit, pipe, well or structure be opened, closed, adjusted or regulated." § 82a-706b(a)(1). A senior rights-holder triggers this process by filing a request to secure water. *Id.*

The Tenth Circuit also stressed that KDA-DWR understands "the balance between its discretionary and nondiscretionary powers" as articulated in a letter it sent to GMD5 in 2017. *Id.* at 1107; **Exhibit I**. "This letter reflects the Water Division's understanding that, without the [2020 MOA], the Water Division would have to act to protect the Service's water right upon the Service's request. And the Water Division's past actions support this understanding." *Id.* The Tenth Circuit deemed it necessary to emphasize the non-discretionary nature of the chief engineer's duty in this regard:

> The Water Division enjoys limited discretion under Kansas law, but it always must protect senior water rights above junior rights. *See* § 82a-706 (explaining that the chief engineer must "control, conserve, regulate, allot, and aid in the distribution of the water resources of this state . . . in accordance with the rights of priority of appropriation"). [. . . .] And what's more, the court order Audubon seeks will likely result in enforcement of the Refuge water right because the Water Division must honor senior water rights first. § 82a-706 . . . . *Id.*

The Tenth Circuit's reading of K.S.A. §§ 82a-706 and 82a-706b is the only valid reading of these statutes: upon KDA-DWR's making an impairment finding and the impaired senior water right holder's filing of a request to secure water, the chief engineer must immediately administer all junior water rights whose use is impairing the senior right. As set forth below, this reading is also consistent with how courts have interpreted similar provisions within the KWAA, and with the doctrine of prior appropriation across the West.[4]

e. The immediate administration of junior rights to protect an impaired senior right is also the correct remedy for common-law actions taken pursuant to K.S.A. §§ 82a-716, 82a-717a, and 82a-706d.

Parts II.a-b explained how Kansas law has long provided for the immediate protection of senior water rights by a state officer. K.S.A. §§ 42-329, 82a-706, 82a-706b. The KWAA contains two other, parallel avenues for obtaining similar, immediate relief. The first, located at K.S.A. §§ 82a-716 and 717a, allows "common law claimants" to protect their property rights. These statutes, enacted as part of the KWAA in 1945, allow senior water rights holders to injunctive relief against junior rights holders by pursuing actions directly in the district courts. K.S.A. 82a-716. During the pendency of the chief engineer's investigations, the complainant may petition the chief engineer for a temporary curtailment order shutting down junior rights. K.S.A. 82a-717a(b)(3).

[4] The Honorable Judge Gregory A. Phillips, author of the Tenth Circuit opinion, previously served as Wyoming Attorney General between 2011 and 2013. The State of Wyoming established the prior appropriation doctrine in its constitution at statehood in 1890. WYO. CONST. art. 1, § 31, and art. VIII *passim*. In his capacity as Attorney General, he defended the state in *Montana v. Wyoming & South Dakota,* No. 137 Orig., a case which substantially engaged the operation of the prior appropriation doctrine across the Yellowstone River Basin in Wyoming and Montana. 563 U.S. 368 (2011); 138 S.Ct. 758 (2018).

The second avenue involves the attorney general. Upon request of the chief engineer, "the attorney general shall bring suit in the state of Kansas, in courts of competent jurisdiction to enjoin the unlawful appropriation, diversion, use of the waters of the state, and waste or loss thereof." K.S.A. 82a-706d. While the attorney general is a distinct office from the chief engineer, the use of the term "enjoin" further affirms the legislature's intent to require immediate administration, as recognized by the Kansas legislature in 1957, when it enacted both K.S.A. 82a-706b and 82a-706d. L. 1957, ch. 539, §§ 10, 12.

These parallel avenues explicitly provide for temporary and permanent administrative and injunctive relief, further undergirding the immediacy of the chief engineer's duties pursuant to K.S.A. 82a-706b.

f. As the* Garetson *decisions make clear, the KWAA requires the immediate administration of junior water rights found to be impairing a senior right.

In *Garetson Bros. v. American Warrior, Inc.*, 51 Kan.App.2d 370, 347 P.3d 687 (2015) (*"Garetson I"*), and again in *Garetson Brothers v. American Warrior, Inc.*, 56 Kan.App.2d 623, 435 P.3d 1153 (2019) (*"Garetson II"*), the Kansas Court of Appeals resolved a dispute between a senior water rights holder and a junior water rights holder, in a lawsuit arising under K.S.A. §§ 82a-716 and 82a-717a. The case construed these statutory sections according to the bedrock principle of "first in time, first in right," K.S.A. 82a-707(c), and explicitly rejected the junior's claims that courts should consider economic equities in fashioning an appropriate remedy for the impaired senior right. *Garetson I,* 51 Kan.App.2d at 388-89. In *Garetson I,* the Court of Appeals affirmed the trial court's granting of a preliminary injunction forbidding the junior right from pumping; in *Garetson II,* it affirmed the trial court's granting of a permanent injunction ordering the same. *Id.,* at 392; *Garetson II,* 56 Kan.App.2d at 653. The Court of Appeals also established a straightforward definition for what "impairment" means: it is the condition suffered by a prior right

when diversion by junior rights "diminishes, weakens, or injures the prior right." *Garetson I,* 51 Kan.App.2d at 389; *Garetson II,* 56 Kan.App.2d at 650.

For the purposes of AOK's motion, the *Garetson* decisions provide a useful guide to how the KWAA requires the immediate administration of junior water rights found to be impairing a senior right. AOK seeks immediate relief for serious, longstanding, and irreparable harm: the impairment of the Refuge Water Right. As detailed above, the Refuge Water Right is entitled to immediate and full protection as a matter of law, and equity plays no role. K.S.A. §§ 82a-706, 82a-706b, 42-329, 82a-707(c). Nonetheless, the relief sought in this motion, a peremptory order of mandamus, is substantively similar to that of a preliminary injunction—an order directing the defendant to do a certain act. K.S.A. §§ 60-801 (order of mandamus); 60-901 (definition of injunction). Both avenues of relief—whether obtained from the chief engineer via K.S.A. 82a-706b or from the courts via K.S.A. §§ 82a-716 and 82a-717a—depend upon the same bedrock principle of the KWAA: "first in time is first in right." K.S.A. 82a-707(c). As such, the *Garetson* cases provide authoritative statements on how that principle applies to support immediate relief by a peremptory order of mandamus. A summary of the injunctive relief granted in *Garetson* may assist the Court by explaining how AOK similarly qualifies for a peremptory order of mandamus.

To obtain injunctive relief, the movant must show (1) substantial likelihood of success on the merits; (2) a reasonable probability of irreparable future injury to the movant; (3) an action at law will not provide an adequate remedy; (4) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (5) the injunction, if issued, would not be adverse to the public interest. *Garetson I,* 51 Kan.App.2d at 390. The plaintiff in *Garetson,* the holder of a senior water right impaired by junior rights, easily met these elements

and obtained both temporary and permanent injunctions requiring the junior rights to shut down. Both injunctions were upheld on appeal.

Regarding the first element, the *Garetson* cases made clear that, when the holder of a senior water right seeks the administration of junior rights that are impairing the senior right, there is more than a substantial likelihood of success on the merits. In *Garetson I*, the Court of Appeals affirmed the district court's granting of a temporary injunction barring junior water right holders from pumping, based upon the KWAA's mandate to protect senior water rights once they have been found to be impaired by junior rights; the principle of "first in time, first in right" is clear and unambiguous. *Garetson I*, 51 Kan.App.2d at 388-89. The district court made a similar conclusion in later issuing a permanent injunction: the fact of impairment alone was sufficient. "[P]laintiff succeeds on the merits of their claim, which is, their senior water right . . . is being impaired by an appropriator with a later priority of right." *Garetson Brothers et al. v. American Warrior, Inc. et al.*, Case No. 2012-CV-000009, at *13-14 (Kan. 26th Jud. Dist. Ct. Feb. 1, 2017), attached hereto.

Regarding the second element, the impairment of a senior water right qualified as irreparable harm. The district court found that the senior water right holder in that case "would suffer irreparable harm if its 'first in time water right is being depleted year after year as a result of ongoing impairment . . . ." *Garetson I,* 51 Kan.App.2d at 379. As detailed above and in the Petition, KDA-DWR's Impairment Report of 2016 found that the Refuge Water right was suffering year after year of depletions due to impairment by junior wells' pumping. **Exhibit C.** The Impairment Report's analyses and conclusions have not been disputed. In deciding the issue of a permanent injunction, the district court in *Garetson* stated:

> Without a permanent injunction, the increasing decline in the water table and loss of time to utilize a first in time water right is unretrievable. To protect the plaintiffs' water right . . . pumping by Defendant's water right . . . must be curtailed. The court finds plaintiff will suffer irreparable injury unless an injunction issues.

Garetson Brothers et al. v. American Warrior, Inc. et al., Case No. 2012-CV-000009, at *15 (Kan. 26th Jud. Dist. Ct. Feb. 1, 2017).

Regarding the third element, the district court in *Garetson* found that the threatened injury to the senior water right holder outweighed the alleged damage to the junior right holder, as the senior right "continues to be depleted at a rate that would take years to recharge . . . ." *Garetson I,* 51 Kan.App.2d at 379. This finding in *Garetson* aligns with the conclusions of the Impairment Report in this case, which documents how the Refuge Water Right continues to be depleted at a rate that will take multiple years to address. **Exhibit C.** Indeed, junior rights are entitled to water only after senior rights have exercised theirs: there are no equitable considerations to be made under the prior appropriation doctrine as set forth in K.S.A. §§ 82a-706 and 82a-706b. In issuing the permanent injunction, the district court in *Garetson* fully recognized the clarity of the prior appropriation doctrine:

> The threatened injury to plaintiffs outweighs the alleged damage to the defendants as the plaintiffs' first in time water right continues to be depleted at a rate that would take years to recharge. The first in time water right status tips the scale in plaintiffs' favor. Defendants' rights are not entitled to protection to the detriment of plaintiffs' vested [senior] right. It is not equitable to allow defendants with a junior water right to successfully grow their crop, while plaintiff, with a first in time water right, is left with insufficient water. The injury to plaintiffs' first in time water right is not theoretical.

Garetson Brothers et al. v. American Warrior, Inc. et al., Case No. 2012-CV-000009, at *15 (Kan. 26th Jud. Dist. Ct. Feb. 1, 2017).

Regarding the fourth element, the trial court in *Garetson I* found that "the law does not provide an adequate remedy because impairment 'is continuous and . . . is of such character that [the senior right holder] cannot be compensated by any ordinary standard of value or damages.'" *Garetson I,* 51 Kan.App.2d at 379. The same reasoning applies in this case, given the chronic and

serious impairment of the Refuge Water Right. In issuing the permanent injunction in *Garetson,* the district court was acutely aware of the lack of an adequate remedy at law:

> An action at law does not provide an adequate remedy because once Plaintiffs' first in time water right is not recognized and the water stops . . . their first in time water right is meaningless. Furthermore, no court can adequately compensate for the ongoing loss of water suffered by the plaintiffs. Without an injunction curtailing water usage by a junior right who is impairing a senior right, the senior water holder is placed in the position of having to return year after year to incur expense to pursue an injunction.
>
> The act complained of is continuous and the impairment is of such character plaintiffs cannot be compensated by any ordinary standard of value or damages. For this reason an action at law will not provide an adequate remedy. *See Tharp v. Sieverling,* 128 Kan. 235 (1929); *F. Arthur Stone & Sons v. Gibson,* 230 Kan. 224, 233-234, 630 P.2d 1164, 1172, 1981 Kan. LEXIS 262 (Kan. 1981).

Garetson Brothers et al. v. American Warrior, Inc. et al., Case No. 2012-CV-000009, at *16 (Kan. 26th Jud. Dist. Ct. Feb. 1, 2017).

Regarding the fifth element, that of the public interest, the district court in *Garetson* stressed that "'knowledge that first in time water rights will have precedent fosters certainty and allows remedies that hopefully will slow down the depletion of the aquifer . . . .'" *Garetson I,* 51 Kan.App.2d at 379. A similar element exists for mandamus, which serves the public by providing an authoritative interpretation of the chief engineer's duties under the KWAA to expedite the resolution of this important issue of public concern. *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003) (stating "[n]umerous prior decisions have recognized mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business, notwithstanding the fact that there also exists an adequate remedy at law").

This review of the *Garetson* decisions provides compelling authority for this court to issue similar relief in the form of a peremptory order of mandamus. It also reveals how quickly the

district court moved to protect an impaired senior right. In *Garetson I,* KDA-DWR issued a preliminary impairment finding on April 3, 2013; the plaintiff promptly filed for a temporary injunction shutting down the junior right. On May 16, the trial court held an evidentiary hearing on the motion, and issued its first temporary injunction the very next day—a mere six weeks after the impairment finding by KDA-DWR. *Garetson I,* at 374. After KDA-DWR issued its final impairment report on March 31, 2014, affirming its earlier determination, the trial court considered plaintiff's second motion for a temporary injunction, and issued it on May 5, 2014—five weeks after the final impairment finding. *Garetson II,* at 628. After *Garetson I* was decided, the trial court conducted a three-day trial in October 2016, and on February 1, 2017, it issued a permanent injunction against the junior right—less than four months after trial. *Garetson Brothers et al. v. American Warrior, Inc. et al.*, Case No. 2012-CV-000009, at *1, 17 (Kan. 26th Jud. Dist. Ct. Feb. 1, 2017). The *Garetson* cases are textbook examples of the prior appropriation doctrine in action. REED D. BENSON, BURKE W. GRIGGS, & A. DAN TARLOCK, WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 351-56 (8th ed., 2021).

They also reveal, by contrast, KDA-DWR's open dereliction of its statutory duties. K.S.A. 82a-706b and K.A.R. 5-4-1 set forth the rules and procedures for the chief engineer to determine and resolve impairment. The plaintiffs in *Garetson I* and *II* chose the parallel, slower, procedures of K.S.A. §§ 82a-716 and 717a—by going to court instead of KDA-DWR. Yet they were twice able to obtain injunctive relief shutting down junior wells *less than six weeks* after KDA-DWR had determined impairment. Unlike the chief engineer, who must be an expert in water resources management and who leads an entire division full of "expert assistants," K.S.A. 74-506d, district court judges rarely have such expertise. Why, then, has KDA-DWR delayed, despite its expertise, and despite the immediate duties and procedures required and prescribed by K.S.A. 82a-706b and

K.A.R. 5-4-1? Political pressures by Kansas Governors, secretaries of agriculture, and Senator Moran played a significant role in intimidating the chief engineer's office from exercising his duties as the law requires. **Exhibits E, I, K, N, R, S.** But the chief engineer has no legal excuse. Ever since KDA-DWR determined that the Refuge Water Right was impaired in 2016, the Service has repeatedly filed numerous annual requests to secure water. **Exhibits F, L.** It filed its most recent request on February 10, 2023—nearly five months ago. **Exhibit Q.** Given the long-recognized severity of the Refuge Water Right's impairment and the clear mandates for immediate action described in K.S.A. §§ 42-329 and 82a-706b, this court must order KDA-DWR to act immediately.

g. Kansas water law is consistent with other prior appropriation jurisdictions in requiring the immediate administration of junior rights to protect senior water rights in times of shortage.

Other prior appropriation jurisdictions similarly require the state water engineer to immediately administer junior rights. Idaho, which like Kansas defines water rights as real property rights and has codified the prior appropriation doctrine for both surface and groundwater, provides a most apt line of cases. In *Musser v. Higginson,* 125 Idaho 392, 871 P.2d 809 (1994), the Idaho Supreme Court affirmed the issuance of a writ of mandate ordering the director of the state's department of water resources to shut down junior groundwater rights that were impairing a senior surface right pursuant to the relevant statute, whose substance is essentially identical to the mandates contained in K.S.A. §§ 42-329, 82a-706, and 82a-706b:

> It shall be the duty of the director of the department of water resources to have immediate direction and control of the distribution of water from all of the streams, rivers, lakes, ground water and other natural water sources in this state to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water shall be accomplished either (1) by watermasters . . . or (2) directly by employees of the department of water resources under authority of the director . . . . The director must execute the laws relative to the distribution of water in accordance with the rights of prior appropriation . . . ."

Idaho Code § 42-602. The district court issued a writ of mandate commanding the director to "immediately comply" with the statute according to the prior appropriation doctrine. *Musser,* 871 P.2d at 811. In affirming, the Idaho Supreme Court concluded "that the director's duty to distribute water pursuant to this statute is a clear legal duty." It had little patience with the contention that the director was entitled to discretion in responding to senior rights' calls for water.

> For more than three-quarters of a century, the Court has adhered to the following principle: "The fact that certain details are left to the discretion of the authorities does not prevent relief by *mandamus*." *Beem v. Davis,* 31 Idaho 730, 736, 175 P. 959, 961 (1918) (emphasis in original). *See also Moerder v. City of Moscow,* 74 Idaho 410, 415, 263 P.2d 993, 998 (1953) ("Public officials may, under some circumstances, be compelled by writ of mandate to perform their official duties, although the details of such performance are left to their discretion.") This principle applies in this case. The director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water. *Id.,* at 813.

In defending the right of senior rights to obtain immediate relief through priority administration, the Idaho Supreme Court has repeatedly stressed that the failure to administer junior rights is a clear taking of property. "In Idaho, water rights are real property." *Olson v. Idaho Dept. of Water Resources,* 105 Idaho 98, 101, 666 P.2d 188 (1983); Idaho Code § 55-101. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor." *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336 (1915). "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dept. of Water Resources,* 103 Idaho 384, 388, 647 P.2d 1256 (1982). "When there is insufficient water to satisfy both the senior appropriator's and the junior appropriator's water rights, giving the junior appropriator a preference to the use of water constitutes a taking for which compensation must be paid." *Clear*

Springs Foods, Inc., v. Spackman, 150 Idaho 790, 798, 252 P.3d 71 (2011) (citing *Montpelier Milling Co. v. City of Montpelier,* 19 Idaho 212, 219, 113 P. 741(1911)).

Western courts have consistently required immediate priority administration despite the economic consequences for junior rights. That is because the prior appropriation doctrine demands it. K.S.A. 82a-707(c). After the Colorado Supreme Court held that junior water rights without an augmentation plan could not avoid priority administration, the state engineer shut down junior wells across the Arkansas and South Platte River Basins, including 3,700 out of the 8,200 permitted wells in the South Platte alluvium. *Kobobel v. Dep't of Natural Resources,* 249 P.3d 1127, 1136 (Colo. 2011); *Simpson v. Bijou Irrigation Co.,* 69 P.3d 50 (Colo. 2003); *Empire Lodge Homeowners' Ass'n v. Moyer,* 39 P.3d 1139 (Colo. 2001). In *Kobobel,* junior rights holders claimed that priority administration constituted a regulatory taking, but the Colorado Supreme Court decisively rejected that claim:

> We are not unmindful of the devastating impact that the cease and desist orders have had on the [junior] well owners, who find themselves without irrigation water from their wells. However, to conclude that the State's cease and desist orders here amounted to an unconstitutional taking necessarily would require us to rule that the well owners had an unfettered right to use water in derogation of senior water rights holders. Such a ruling would disregard Colorado's time-honored prior appropriation doctrine.

Kobobel, 249 P.3d at 1139. When groundwater pumpers in Idaho sought to avoid priority administration to protect senior surface rights in the Snake River Basin, they similarly invoked the economic value of their rights. But the Idaho Supreme Court rejected this argument, and upheld the state water engineer's order to administer junior rights. Considerations of economic impact are inconsistent with the doctrine of first in time, first in right. *Clear Springs Foods, Inc. v. Spackman,* 150 Idaho 790, 802, 252 P.3d 71 (2011).

h. K.A.R. 5-4-1(e)(3) contradicts and is inconsistent with the statutory powers of the chief engineer and is thereby void.

As detailed above, K.S.A. §§ 82a-706, 82a-706b, and 42-329 impose the non-discretionary duty to immediately administer by priority all junior water rights determined to be impairing a senior right until that right is no longer impaired. *See* Parts II.a-b. Yet K.A.R. 5-4-1(e)(3) provides that the chief engineer "may consider regulating the impairing rights the next year and rotating water use among rights." The Defendant may be depending upon this subsection, but he has not cited it. **Exhibit S.** But for the reasons set forth below, it is both legally void and factually inapplicable.

K.A.R. 5-4-1(e)(3) contradicts the clear language and meaning of the aforementioned statutes and is thereby void. "Those rules or regulations that go beyond the statutory authorization [of the agency] violate the statute, or are inconsistent with the statutory powers of the agency, have been found void." *Pemco, Inc., v. Kansas Dept. of Revenue,* 258 Kan. 717, 720, 907 P.2d 863 (1995). An administrative agency with the power to adopt regulations lacks the authority "to adopt regulations which exceed the statutory authority granted in the first instance. As said in *Grauer,* 'water cannot rise above its source.'" *Wesley Medical Center v. Clark,* 234 Kan. 13, 18-19, 669 P.2d (1983) (quoting *Grauer v. Director of Revenue*, 193 Kan. 605, 608, 396 P.2d 260 (1964)).

There is no statutory authority for any delay or avoidance of priority administration in this case. Under K.S.A. 82a-706, the chief engineer "*shall* enforce and administer" Kansas water law, and "*shall* control, conserve, regulate, and aid in the distribution of water . . . in accordance with the rights of prior appropriation." (emphases added.) The right to require the administration of juniors is clear: "the first in time is the first in right." K.S.A. 82a-707(c). As described above, K.S.A. §§ 82a-706b and 42-439 mandate the specific and immediate performance of these duties. None of these statutes mentions or impliedly countenances delay; delay is legally intolerable.

How do we know this? Because where the legislature has allowed deviation from the strict rule of immediate priority administration, it has made that allowance clear. It did so in K.S.A. 82a-706b(a)(2), by providing for "augmentation" as a potential alternative; but as a factual matter, augmentation is not an available alternative in this case, and so priority administration must take place. **Exhibit Q; Exhibit O;** *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093, 1106-07 (10th Cir. 2023). Elsewhere, the legislature has provided for alternatives to strict priority administration. In the statutes setting forth the procedures for establishing Intensive Groundwater Use Areas and Local Enhanced Management Areas, the chief engineer is explicitly allowed to order the rotation of water rights and to deviate from strict priority administration "insofar as may be reasonably done . . . ." K.S.A. §§ 82a-1038(b)(2), (b)(4), 82a-1041(f)(2), (f)(4). But neither statute applies in this case, because neither such area has been established within the Basin. Hence, the regulatory allowance for rotation and delay in K.A.R. 5-4-1(e) has no application to K.S.A. 82a-706b and is thereby void.

Finally, even if this court were to consider granting the chief engineer this contradictory regulatory leeway, as a factual matter the chief engineer has already exhausted it: neither former chief engineer Barfield nor Defendant has issued any curtailment orders pursuant to K.A.R. 5-4-1(e)(1) since at least 2016, when Barfield issued the Impairment Report. Defendant's time is up: any delay enables unlawful diversions by junior rights, in clear violation of K.S.A. 82a-706b(a). The chief engineer's statutory duty is to enforce and administer the KWAA, not to avoid and violate it. K.S.A. 82a-706.

III. Because Defendant has no valid excuse for not performing his clear duties, a peremptory order of mandamus should issue in this case.

a. *There is no legal basis for delay.*

As detailed above in Part II, the chief engineer has always had the non-discretionary duty to immediately administer junior water rights when he finds that they are impairing a senior water right and the owner of that right files a request to secure water. There is no legal basis for delaying the issuance of a peremptory order. The Defendant's statutory duties are clear, K.S.A. §§ 82a-706, 82a-706b, and 42-329, and they broker no exception or excuse. Based on the repeated public statements by the Defendant, there is no legal dispute over their meaning.

b. There is no evidentiary basis for delay.

Nor is there any evidentiary basis for delay. There are no relevant facts to dispute in this case. All of the exhibits in support of the Petition and Memorandum are publicly available documents which KDA-DWR has posted on its website, at https://agriculture.ks.gov/divisions-programs/dwr/water-appropriation/impairment-complaints/quivira-national-wildlife-refuge (last accessed July 7, 2023). KDA-DWR either authored or formally acknowledged the most important of these: (1) **Exhibit C,** the 2013 KDA-DWR Impairment Report finding that the Refuge Water Right is impaired; (2) **Exhibit Q,** the February 10, 2023 Request to Secure Water filed by the owner of the Refuge Water Right, the U.S. Fish and Wildlife Service, and accepted by KDA-DWR; and (3) **Exhibit S,** Defendant's public statement of April 10, 2023 to junior water rights holders that he would not administer their rights. This Court may take judicial notice of these public documents.

c. There is no factual basis for delay, because the chief engineer has a complete plan to administer junior rights across the Basin.

As described in the Petition, former chief engineer Barfield and his staff at KDA-DWR developed a complete plan in 2019 to administer the junior rights in the Basin that are impairing the Refuge Water Right. **Exhibit M**. This plan is based upon the groundwater model developed by GMD5 and modified by KDA-DWR, and uses the analyses that produced the conclusions contained in the Impairment Report. Neither the plan, the modeling, nor their underlying data have been disputed since 2019.

Kansas water-use data is the envy of the world. KDA-DWR has complete information on every non-domestic water right in the Basin: every well must be permitted and metered, and every right owner must submit water use reports annually. **Exhibit C**; K.S.A. §§ 82a-728, 82a-732. Furthermore, the Kansas Geological Survey has developed the Kansas Master Groundwater Well Inventory, a central repository that combines the state's groundwater well datasets within a single resource. *See* https://geohydro.kgs.ku.edu/geohydro/master_well/index.cfm. Using these and other resources, KDA-DWR has a complete and effective understanding of the hydrogeological dynamics of the Basin—more than enough to deploy the 2019 administration plan immediately. As KDA-DWR itself has publicized, it has pinpointed every water right that is impairing the Refuge Water Right. **Exhibit M**. Most importantly, this data reveals a shocking decline in groundwater levels in the Basin—as much as ten feet annually. Kansas Geological Survey, *Groundwater levels fall across western and south-central Kansas,* at https://www.kgs.ku.edu/General/News/2023/water-levels.html. Despite the chief engineer's claims that more information is needed, **Exhibit S**, there is no defensible excuse for delay in implementing the 2019 administration plan. It can be deployed today.

CONCLUSION

Kansas law imposes upon the chief engineer the non-discretionary duty to administer immediately water rights according to priority whenever he determines that a senior water right is impaired by junior rights and the holder of a senior right files a request to secure water. The chief engineer has determined that the Refuge Water Right is impaired, and the Service has filed a request to secure water. The final step is not discretionary and is long overdue. Because KDA-DWR "always must protect senior water rights above junior rights" pursuant to K.S.A. 82a-706b, *Audubon,* 67 F.4th at 1107, Defendant must now immediately administer the junior rights KDA-DWR has known since at least 2019 to be impairing the Refuge Water Right. But he continues to defy the law, despite its unambiguous clarity and his own awareness of the mandatory, non-discretionary, and immediate duties which the law imposes upon him. Therefore, this court must issue a peremptory order of mandamus requiring the Defendant to immediately administer junior water rights in the Basin that are impairing the Refuge Water Right until the right is no longer impaired, issue declarations of law to that effect, and award the Plaintiff its costs, including reasonable attorneys' fees. The Defendant can immediately comply with such an order because KDA-DWR has a complete plan ready to deploy across the Basin.

The KWAA and the office of the chief engineer exist to protect property rights according to the prior appropriation doctrine—immediately, decisively, and completely. K.S.A. §§ 82a-701(g), 82a-706, 82a-706b, 82a-707(c), 42-329. Defendant cannot be allowed to rationalize the intentional destruction of private property rights by delay and inaction, thus allowing junior rights to pump at the expense of the Refuge Water Right, because the KWAA expressly forbids it. K.S.A. 82a-706b. On the contrary, the KWAA demands action. It is well past time to stop admiring the

problem of the impairment of the Refuge Water Right. It is now time for this court to enforce the law: first in time, first in right, and right now.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of July, 2023, a copy of the above and foregoing was sent by U.S. First Class Mail, postage prepaid to:

Earl Lewis, Chief Engineer
Division of Water Resources
Kansas Department of Agriculture
1320 Research Drive, 3rd Floor
Manhattan, KS 66502

/s/ Dylan P. Wheeler
Dylan P. Wheeler

Unpublished Opinion

Garetson Brothers et al. v. American Warrior, Inc. et al., Case No. 2012-CV-000009 (Kan. 26th Jud. Dist. Ct. Feb. 1, 2017).

Court: Haskell County District Court

Case Number: 2012-CV-000009

Case Title: Garetson Brothers vs. Kelly Unruh, etal.

Type: Permanent Injunction Decision

SO ORDERED.

/s/ Honorable Linda P. Gilmore, District Court Judge

IN THE DISTRICT COURT OF HASKELL COUNTY, KANSAS

GARETSON BROTHERS and, FORELAND REAL ESTATE, LLC PLAINTIFFS	)	
V.	)	12-CV-9
AMERICAN WARRIOR, INC., Successor in interest to KELLY AND DIANA UNRUH; and RICK KOEHN, DEFENDANTS	)	

PERMANENT INJUNCTION DECISION

This matter comes on for hearing on October 17, 2016. The Plaintiffs Garetson Brothers and Foreland Real Estate, LLC (Garetson), appear by and through Lynn D. Preheim and Frank Basgall of Stinson Leonard Street, LLP of Wichita, Kansas. Defendant American Warrior, Inc. (AWI), appears by and through Gerald A. Schultz and Zachary D. Schultz of Schultz Law Office, P.A. Defendant Rick Koehn (Koehn), appears in person and by and through counsel, Nathanial C. Foreman and Lane L. Frymire of Yoxall, Antrim, Foreman & Frymire, LLP.

I. CASE HISTORY AND PROCEDURAL BACKGROUND

On March 14, 2005, Garetson filed a complaint with Kansas Department of Agriculture's Division of Water Resources (DWR) alleging two neighboring junior water rights, Nos. 10,467 and 25,275, had impaired their senior vested water right, HS 003. (Pl. Exh. 103, Final DWR Report, p. 1) These three water rights, HS 003, 10,467 and 25,275 are used for crop irrigation and all are located in Groundwater Management District 3 in Southwest Kansas, overlying the Ogallala Aquifer. HS 003 became a vested water right in 1950 and is permitted to pump 240 acre feet at a rate of 600 gallons per minute. (Trial Transcript, 10/17/16, p. 140, ln. 2-7).

Garetson subsequently withdrew their complaint in 2007. However, DWR continued to investigate, monitor and record data from the wells at issue and three other neighboring wells from 2005 to present. In 2005, DWR installed water level monitoring equipment which over time allowed DWR to determine the degree of well-to-well interference between HS 003 and the nearest five water rights: 10,035, 10,467; 11,750; 19,032 and 25,275.

On May 1, 2012, seven years after Garetson filed their initial complaint with DWR, Garetson filed this law suit alleging impairment of senior water right HS 003 by water rights Nos. 10, 467 and 25, 275 owned by Kelly and Diana Unruh. The Unruhs filed an answer on June 11, 2012, in which they admitted to owning the two junior water rights, but denied the allegations of impairment. For whatever reasons, in his answer, Unruh misrepresented facts to the court and plaintiff when he stated he owned water rights that he had already sold to AWI on May 30, 2012. *See Answer and Plaintiff Exh.205, 206.* This misrepresentation of ownership in the Answer was not cured for over a year after the filing of the lawsuit. *See Amended Petition*, August 5, 2013. AWI was aware of the pending water right dispute when it purchased the property. (Trial Transcript, 10/17/16, p. 151, ln. 8-20).

On November 29, 2012, in a phone conference with District Judge Bradley Ambrosier, the Garetsons and Unruhs announced to the court they agreed to the appointment of DWR as a fact finder in the case. The court appointed DWR as the agreed upon fact finder, directed DWR to submit a report to the court and set the case for review in March of 2013. At some point, District Judge Ambrosier conflicted off the case when he became aware a former client, Cecil. O'Brate, owner and officer of AWI, was somehow involved. District Judge Clinton B. Peterson heard the motion for temporary injunction on May 20, 2013. *(See also Pl. Exh. 203, 207)* During the hearing, it was disclosed to Judge Peterson that Unruhs sold the property and

junior water rights to AWI on May 30, 2012, which was before the Unruhs had filed their answer in this case.

First Temporary Injunction- May 2013

DWR filed its preliminary fact finder report ("First Report) on April 1, 2013. (P. Exh. 101) DWR's first report was entered into evidence without objection. Garetson's motion for temporary injunction was granted. The district court ordered "the defendants (Unruh), their successors, their tenets [sic], and their agents...to refrain from pumping Well 10,467 and Well 25,257." The district court joined Cecil O'Brate, as owner and C.E.O. of AWI, as a defendant. A motion to establish bond was filed by the Unruhs on June 3, 2013.

District Judge Linda P. Gilmore was subsequently assigned to the case. On July 11, 2013, numerous procedural motions were set for hearing. The Unruh's requested a continuance on their motion for bond. On August 5, 2013, Garetson filed an amended petition naming AWI and Koehn, the tenant farming on AWI's land, as defendants. Cecil O'Brate was dismissed as an individual defendant and Unruhs were no longer a named defendant. On October 14, 2013, Garetson transferred its senior water right to Foreland Real Estate, LLC (FRE), who joined the lawsuit as a named plaintiff.

The court heard numerous motions November 3, 2013, and vacated the 2013 temporary injunction because the tenant Koehn had not received notice of the proceeding which ultimately shut the water supply off to his crop. Because the temporary injunction was vacated, the court saw no need to set a bond. The district court also appointed and directed DWR to "continue to investigate and report upon any or all of the physical facts concerning the water rights referenced in this case" pursuant to the procedure set forth in K.S.A. 82a-725. Specifically, the order provided:

> "The report shall set forth findings of fact in regard to the degree HS-003 is being impaired by water rights 10,467 and 25, 257. The report shall set forth the opinions of DWR regarding whether any such impairment...[is] a substantial impairment to HS-003. If DWR concludes substantial impairment to HS-003 exists, DWR shall advise as to recommended remedies to curtail the substantial impairment to HS-003 and explain why these remedies are recommended." *See* Pl. Exh. 104, P. 6.

Second Temporary Injunction- 2014

DWR filed a second report on March 27, 2014. The parties received a copy of the report from DWR and were allowed to file objections with DWR and exceptions with the district court as set forth by K.S.A. 82a-725. DWR reviewed the submitted objections and made appropriate changes to the report it felt necessary from those objections. (Trial Transcript, 10/17/16, p. 75, ln. 6-15)

Garetson's second motion for temporary injunction was heard on April 30, 2014. On May 5, 2014, the court issued a temporary injunction, set a bond and ordered AWI and its tenant to curtail use of water right 10,467 and 25,257.

Interlocutory Appeal

An interlocutory appeal was filed concerning whether the district court abused its discretion in issuing a temporary injunction and to address evidentiary matters. The appellate court held that using the ordinary definition of impair, the legislature intended that the holder of a senior water right may seek injunctive relief to protect against a diversion of water by a holder of a junior water right when that diversion diminishes, weakens, or injures the prior right. The court declined AWI's invitation to add the "beyond a reasonable economic limit" language and stated the legislature did not give the word "impair" a special definition in the statute. *Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370, 389, 347 P.3d 687, 698 (2015), review denied (Jan. 25, 2016)).

II. STATEMENTS OF FACTS

1. Garetson is the owner of File No. HS 003, a vested water right authorized to pump water at a quantity of 240 acre-feet at a rate of 600 gallons per minute. (Trial Transcript, 10/17/16, p. 133, 1n. 24-p.134, ln. 6, p. 140, ln. 2-7))

2. HS 003 is operating at a point of diversion approved by DWR, being used in an appropriate place of use and in compliance with its permit. (Trial Transcript, 10/17/16, p.140, ln. 8-15)

3. Neither a permit to appropriate water nor a certificate of appropriation guarantees that water will always be available to any permit holder. (Pl. Ex. 103, Final DWR Report, p. iii).

4. All water rights issued by DWR are subject to all vested rights and prior appropriations at the time they are issued. (Trial Transcript, 10/17/16, p. 148, ln. 8-15).

5. No one in Kansas owns the water. Water permit holders simply have the right to use water. (Tr. Transcript, 10-17-16, p. 95, ln. 6-12).

6. Water Right File Nos. 10, 467 ad 25, 275 are referred to together as AWI's water rights. Water Right File Nos. 10, 035; 11, 750 and 19,032 are other neighboring water rights. The following six water files HS 003, 10,467 and 25,275, 10,035; 11,750 and 19,032 are referred to together as the neighborhood. (Pl. Exh. 103, Final DWR Report, p. iii)

7. Water right No. 8157 is not part of the neighborhood because it is not in the same compartment as the neighborhood, there are no significant drawdowns observed which show No. 8157 affects HS 003 and 8157 does not impair HS 003. (Pl. Exh. 103, Final DWR Report, p. iii, p. 8; Transcript 10/19/16, p. 116, ln 3-12).

8. No. 8157 is authorized to use water from two wells: one which is the same well

authorized under HS 003, and another well about one mile south. (Pl. Ex. 103, Final DWR Report, p. iii).

9. No. 8157 and HS 003 are separately metered and owned by separate entities. (Trial Transcript, 10/19/16, p. 152).

10. The rate of water extraction from the aquifer greatly exceeds the rate of recharge to the aquifer. The aquifer has declined about six feet on average each year in this area for the last five years. (Pl. Exh. 103, Final DWR report, p. ii, p. 4)

11. The groundwater system in the area recharges somewhere in the range of 0.1 inch to 1.0 inch per year. (Pl. Exh. 103, Final DWR Report, p. ii and p. 3) The water replenishing the area of concern is less than 100 acre-feet per year compared with pumping that has been between 1,200 and 1,500 acre-feet per year in recent history for the six water rights studied in the DWR report. (Pl. Exh. 103, Final DWR Report, p. ii, p. 2-3) The imbalance between the rate of recharge with the rate of pumping has let to substantial declines in groundwater levels over the decades, reducing well yields. (Pl . Exh. 103, Final DWR Report, p. ii and 7)

12. Scientists with Kansas Groundwater Services (KGS) have found that, if recent practices continue, well operators in the area are facing the imminent end of the productive life of the isolated compartment of aquifer that they share. (Pl. Exh. 103, Final DWR Report, p. ii, p. 4).

13. In November 2013, DWR's step draw down test found a maximum sustained pumping rate of 404 gallons per minute ("gpm") for HS 003. While HS 003 is authorized at the rate of 600 gpm, DWR does not believe 600 gpm can be sustained in the current hydrologic setting. (Pl. Exh. 103, Final DWR Report, p. iii-iv, p. 7-8)

14. Due to pre-irrigation season and early irrigation season pumping, HS 003 was not able to pump after July 1, 2013, despite the injunction placed on AWI's water rights in late May of 2013. (Pl. Exh. 103, Final DWR Report, p. iv, p. 6).

15. Even when No. 25, 275 did not operate in 2013 and No. 10,467 did not operate after May 26, 2013, other neighboring water rights also caused significant, and at times impairing, levels of drawdown at No. HS 003. (Pl. Exh. 103, Final DWR Report, p.iii, p.5)

16. Although the area has been severely dewatered, DWR finds that with careful regulation of use, there may be sufficient remaining water supply to fulfill No. HS 003's water right and to provide a limited supply to one other neighborhood water right. (Pl. Exh. 103, Final DWR Report, p. ii, p.11, p.16)

17. DWR found that File No. HS 003 is being impaired when the operations of any of the other Neighborhood wells, including AWI's Water Rights, the Other Neighboring Water Rights, or any combination thereof prevents File No. HS 003 from pumping 240 acre-feet at 404 gpm during the irrigation season. (Pl. Exh. 103, Final DWR Report, p. 8)

18. DWR utilized the Theis equation to analyze and simulate the drawdown at HS 003 caused by pumping at the other neighborhood water rights. (Pl. Ex. 103, Final DWR Report, p. 6-7) Drawdowns, meter readings, pumping rates, and pumping time data gathered at each of the neighborhood water rights during the first 80 days of the irrigation season in 2013 were analyzed and AQTESOLV software utilized. (Pl. Ex. 103, Final DW Report, p. 6-12) DWR concluded by May 26, 2013 water right numbers HS 003; 10,467; 25,275; 10, 035; 11, 750 and 19,032 (the "Neighborhood") pumped about 430 acre feet and HS 003 could not pump more than about 300 gpm. (Pl. Ex. 103, Final DWR Report, p. 6)

19. Because AWI's Water Rights are closer than water right numbers 10,035; 11,750; and 19,032 ("Other Neighboring Water Rights"), the pumping from AWI's Water Rights is more immediate on HS 003. (Pl. Ex. 103, Final DWR Report, p. iv)

20. When all Neighborhood Water Rights are operating, AWI's Water Rights account for about half of the impact at HS 003. (Pl. Ex. 103, Final DWR Report, p. iv)

21. AWI's water right 10,467 exerts a 16% impact on HS 003. (Pl. Exh. 103, Final DWR Report, A-6 attachment)

22. AWI's Water Right 25, 275 exerts a 7% impact on HS 003. (DWR final Report, A-6 attachment).

23. Since AWI's wells were shut off, Garetsons have been able to pump HS 003 longer and pump a higher quantity of water. (Trial Transcript, 10/17/16, p. 148, ln. 8-15)

24. AWI's water rights could not operate without impairing HS 003. (Pl. Ex. 103, Final DWR Report, p.14)

25. DWR concluded that HS 003 has been substantially impaired by operation of the AWI's Water Rights and the Other Neighboring Water Rights. (Pl. Exh. 103, Final DWR Report, p. iv, p. 16)

26. HS 003 can be satisfied if the other wells in the neighborhood are not operating. (Trial Transcript, 10/17/16, p. 37, ln. 1-6; Ex. 103, Final DWR Report, p. ii, p. 15)

27. If none of the Neighborhood Water Rights pumped beginning in 2018, HS 003 could likely continue to pump 404 gpm for 240 acre-feet per year until 2028. (Pl. Ex. 103, Final DWR Report, p.15).

28. HS 003 is worse and weakened when AWI's water rights are operating. (Trial Transcript, 10/17/16, p. 36-37, ln. 1-6; Pl. Ex. 103, p. 3; Transcript, 10/19/16, p. 165, ln. 1-8)

29. The continued operation of AWI's water rights would lessen, diminish and weaken HS 003. (Trial Transcript, 10/17/16, p. 39, ln. 9-12; Trial Transcript, 10/19/16, p. 165, ln. 1-8.)

30. Dr. Rainwater opined that the DWR final report is not scientifically reliable for numerous reasons. (Trial Transcript, 10-19-16, p. 58, ln. 18-20; p. 62, ln. 22- p. 64, ln. 12, p. 75, ln 14-p. 76, ln. 3, Def. Exh. 308, Dr. Rainwater Memorandum)

31. Dr. Rainwater did not challenge the factual and statistical.data, but disagreed with the interpretation of that data. (Trial transcript, 10/19/16, p. 117, ln. 15-20). Dr. Rainwater accepted DWR drawdown tests at their face value. (Trial Transcript, 10/19/16, p. 116, ln. 1-25)

32. Dr. Rainwater noted the observed draw down at HS 003 also included both draw down in the aquifer as well as energy losses within HS 003 well itself. Dr. Rainwater concluded HS 003's sizable draw down is due to its' own construction and aquifer limitations. (Def. Exh. 308, Dr. Rainwater Memorandum, p. 2)

33. DWR employee, John Munson, testified the formulas utilized do assume everything is absolutely the same and agrees this is not possible in the "real world." Munson testified DWR's findings are as accurate as they can be given the fact that no model is perfect. (Trial Transcript, 10-19-16, p. 65, 11-26, p. 66, ln 1-6, p. 67, ln 1-12)

34. DWR never did a physical inspection of the HS-003 well to ensure it was working properly. (Trial Transcript, 10-17-16, p. 41, ln 9, p. 43, ln. 9).

35. Dr. Rainwater could not provide any computations to determine amount of impairment by the alleged improper well construction. (Trial Transcript, 10/19/16, p. 164, ln. 12)

36. The well bowls were previously replaced. (Trial Transcript, 10-18-16, p. 35, ln. 5-7) The screening used in the well has the most open area to allow water to pass through. (Trial Transcript, 10-18-16, p. 29, ln. 1-25)

37. Dr. Rainwater does not suggest an alternate equation for use by DWR and does not state in his report how this should have been done. (Trial Transcript, 10/19/16, p. 126, ln. 1-25). Dr. Rainwater recognized that every well causes draw down and some of its own impairment.

38. DWR proposed two remedies to cure impairment of HS 003. One remedy is to rotate which of the other water rights in the neighborhood is allowed to operate based on seniority and distance from File No. HS 003. The second remedy is protect and prolong File No HS 003's water right by curtailing all of the other water rights in the neighborhood. (Pl. Exh. 103, Final DWR Report, p. 17)

III. LEGAL ANALYSIS

A. Doctrine of Unclean Hands

In the pretrial order, the doctrine of unclean hands was raised as an issue of law. The clean hands doctrine is based upon the maxim of equity that he who comes into equity must come with clean hands. It provides, in substance, that no person can obtain affirmative relief in equity with respect to a transaction in which he has, himself, been guilty of inequitable conduct. The clean hands maxim is not a binding rule, but is to be applied in the sound discretion of the court. *Green v. Higgins*, 217 Kan. 217, 218, 535 P.2d 446, 447, 1975 Kan. LEXIS 427, (Kan. 1975) The doctrine of "clean hands" is applied sparingly and only to "willful conduct which is fraudulent, illegal or unconscionable" that "shock[s] the moral sensibilities of the judge." *Green v. Higgins*, 217 Kan. 217, 221, 535 P.2d 446 (1975); *In re Plaschka, 2010 Kan. App. Unpub.*

LEXIS 611, 237 P.3d 1272 (Kan. Ct. App. 2010)

The clean hands doctrine does not bar the plaintiff from obtaining an equitable injunction against the defendant for impairment of their senior water right. The court does not find the conduct of plaintiff was willful conduct that is fraudulent, illegal or unconscionable, nor does it shock the moral sensibilities of the court. The doctrine of clean hands does not bar Plaintiff from the relief sought.

B. Requirements for permanent injunction

K.S.A. 82a-716 provides an appropriator shall have the right to injunctive relief to protect his or her prior right of beneficial use as against use by an appropriator with a later priority of right. The statute clearly provides authority for plaintiffs to request an injunction to protect their first in time water right. Thus, impairment of a first in time water right is an act for which an injunction remedy exists under the KWAA. A holder of a senior water right may seek injunctive relief to protect against diversion of water by a holder of a junior water right when that diversion diminishes, weakens, or injures the prior right. *Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370, 389, 347 P.3d 687 (2014), review denied (Jan. 25, 2016).

The standard for a permanent injunction is essentially the same as the standard for a preliminary injunction, except that the plaintiff must actually succeed on the merits. *Steffes v. City of Lawrence*, 284 Kan. 380, 381, 160 P.3d 843, 846, 2007 Kan. LEXIS 367 (Kan. 2007); *Tyler v. Kansas Lottery*, 14 F. Supp. 2d 1220, 1223 (D. Kan. 1998); *Amoco Production Co., v. Village of Gambell, Alaska*, 480 U.S. 531, 546, n. 12, 94 L. Ed 2d 542, 107 S. Ct. 1396(1987)(citing *University of Texas v. Camenisch*, 451 U.S. 390, 392, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981).

At trial, the burden of proof in an injunction action is upon the movant. *Unified School District v. McKinney*, 236 Kan. 224, 227 (1984). In defining this burden, it has been generally held that the movant must establish a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought. *General Bldg. Contrs., L.L.C. v. Bd of Shawnee County Comm'rs*, 275 Kan. 525 (2003); *Wichita Wire, Inc. v. Lenox Manuf.,* 11 Kan App. 2 459; 726 P.2d 287; 1986 Kan. App. LEXIS 1439 (1986).

Before granting an injunction, the trial court must find the movant has satisfied five prerequisites: (1) the movant prevails on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; (4) a showing the injunction, if issued, would not be adverse to the public interest; (5) an action at law will not provide an adequate remedy. *Wichita Wire Inc. v. Lenox Manuf.*, 11 Kan. App. 2d 459, 726 P.2d 287; 1986 Kan. App. LEXIS 1439 (1986); *Steffes v. Lawrence*, 284 Kan. 380 (2007)(citing *Board of Leavenworth County Comm'rs v. Whitson*, 281 Kan. At 683)

1. ***Success on the merits***

Based on the evidence presented and the statements of facts, the Court finds that plaintiff has met their burden of proof and plaintiff's senior water right HS 003 has been impaired by defendants' junior water rights, 10,467 and 25,275. Using the ordinary definition of impair, the legislature intended that the holder of a senior water right may seek injunctive relief to protect against a diversion of water by a holder of a junior water right when that diversion diminishes, weakens, or injures the prior right. The court of appeals declined AWI's invitation to add the words "beyond a reasonable economic limit" and noted the legislature did not give the word

"impair" a special definition in the statute. *Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370, 389, 347 P.3d 687, 698 (2015), review denied (Jan. 25, 2016)).

Defendants argue HS 003 and No. 8157 are combined and thus HS 003 is not impaired. While Garetson used their landlord's water No. 8,157 to meet their crop needs, Garetson did so only after their landlord's crops were fully watered to place her in the best position. To maintain their relationship with their landlord, they cannot abuse the water usage or risk the loss of their landlord's good will. If Plaintiff utilized their landlord's water right no. 8157 to water everything on Section 36, their landlord could terminate their landlord-tenant relationship with Garetsons at any time. While Garetsons have been fortunate enough their landlord has allowed them to utilize water right no. 8157 in the past, this simply means the landlord has enough and is willing to share. The court continues to disregard the speculation or possibility that plaintiff could use their landlord's water at no. 8157 in the future if an injunction did not issue and focuses on water right HS 003 and whether it is impaired by AWI's rights.

While Dr. Rainwater's academic credentials are noteworthy, his testimony and opinions lacked the seasoning of someone with real life experience who is actively engaged in the field. The court was not persuaded the water well utilized by HS 003 was improperly constructed or a poor well site. The court found Danny Dunham to be a credible witness when he discussed drilling multiple dry holes, replacing the well bowls, and the type of screening used in the well. The court also noted Dr. Rainwater accepted DWR draw down tests at their face value, accepted DWRs factual and statistical data, agreed AWI's water rights communicated with HS 003 and agreed when AWI's rights are in use they affect the ability to use HS 003. After weighing the testimony and credibility of all the witnesses and the evidence presented, the court finds plaintiff

succeeds on the merits of their claim, which is, their senior water right HS 003 is being impaired by an appropriator with a later priority of right. *See Court's Statement of Facts.*

2. ***Showing that the movant will suffer irreparable injury unless the injunction issues.***

Defendants state granting an injunction would not prevent the irreparable injury to HS 003 because plaintiff will still not have enough water due to the draw down caused by the other water rights in the neighborhood. Therefore, Defendants argue because HS 003 will be impaired anyway, AWI's impairment is not irreparable and the cessation of pumping from AWI's water rights will not provide a remedy that will allow Plaintiffs to realize the authorized rate and quantity of HS 003. Defendants may be correct that plaintiffs' will not be able to realize the authorized rate and quantity of HS 003 even with the shut down of AWI's water rights. However, the irreparable harm to plaintiff still exists in that their first in time water right is being depleted year after year as a result of ongoing impairment from AWI's less senior water rights. The court rejects the premise that a junior water right should be allowed to continue to impair a senior water right because other junior water rights in the neighborhood are also impairing a senior water right. The injury resulting from AWI's impairment is still irreparable even if others are contributing to that impairment. Plaintiffs remedy is to address alleged impairment of other junior rights in the neighborhood in a separate action.

The aquifer is dropping and recharge is slow. Every year the aquifer in this area drops an average of six feet. Recharge to the groundwater system in the area is estimated in the range of .1 inch to 1.0 inch per year. Plaintiff can not protect its vested first in time water right without enjoining the defendants junior water rights. HS 003 water right is irreparably harmed by the rapid loss caused by the over watering in the aquifer for its' crops for this and future

growing seasons. Without a permanent injunction, the increasing decline in the water table and loss of time to utilize a first in time water right is unretrievable. To protect the plaintiffs' water right at HS 003, pumping by Defendant's water right no. 10,467 and no. 25,275 must be curtailed. The court finds plaintiff will suffer irreparable injury unless an injunction issues.

3. ***Threatened injury to Plaintiffs outweighs whatever alleged damage the proposed injunction may cause Defendants.***

The threatened injury to plaintiffs outweighs the alleged damage to the defendants as the plaintiffs' first in time water right continues to be depleted at a rate that would take years to recharge. The first in time water right status tips the scale in plaintiffs' favor. Defendants' rights are not entitled to protection to the detriment of plaintiffs' vested right. It is not equitable to allow defendants with a junior water right to successfully grow their crop, while plaintiff, with a first in time water right, is left with insufficient water. The injury to plaintiffs' first in time water right is not theoretical. DWRs two reports are consistent that HS 003 water right is being impaired, the aquifer is dropping six feet a year, the well used by HS 003 shut off in 2013 and HS 003 has been used for a longer period of time at a higher quantity since AWI's rights were shut off. For each subsequent year since AWI's rights were curtailed, HS 003 has been able to pump water from its' well at a higher quantity for a longer period of time. AWI purchased its water rights with knowledge those rights were junior to HS 003 and there was pending litigation regarding impairment of HS 003.

4. ***Injunction not adverse to the public interest.***

The court finds that public interest lies with enforcement of the Act and protection of senior water rights that are first in time and first in right. An injunction to protect Plaintiffs'

vested water right would not be adverse to the public interest. The DWR report and projections are bleak as it is apparent the water is being depleted at a rate which can not be recharged. As the race to the bottom of the aquifer takes place, the only certainty in the system is to honor the system of first in time, first in right.

The knowledge that first in time water rights will have precedent fosters certainty and allows remedies that hopefully will slow down the depletion of the aquifer. Land sales could be made with the knowledge that prior in time water rights will be upheld over less senior water rights which provides some certainty and stability in land prices.

5. ***An action at law will not provide an adequate remedy.***

An action at law does not provide an adequate remedy because once Plaintiffs' first in time water right is not recognized and the water stops pumping, their land values will decrease as their first in time water right is meaningless. Furthermore, no court can adequately compensate for the ongoing loss of water suffered by the plaintiffs. Without an injunction curtailing water usage by a junior right who is impairing a senior right, the senior water holder in placed in the position of having to return year after year to incur expense to pursue an injunction.

The act complained of is continuous and the impairment is of such a character plaintiffs' cannot be compensated by any ordinary standard of value or damages. For this reason an action at law will not provide an adequate remedy. *See Tharp v. Sieverling*, 128 Kan. 235 (1929); *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 233-234, 630 P.2d 1164, 1172, 1981 Kan. LEXIS 262 (Kan. 1981).

IV. REMEDIES:

Plaintiffs have met their burden of proof and established the necessary elements to show they are entitled to an injunction. The Plaintiffs are granted a permanent injunction and Defendants' shall not utilize junior rights no. 10,467 and no. 25,275 through the present place of use due to impairment of HS 003.

The court notes in DWR's proposed remedies, the only other suggested alternate remedy to total curtailment is to allow only one other of the five neighboring water rights to operate yearly, possibly on a rotating basis. DWR suggests the one neighboring well allowed to operate be determined based on the basis of seniority or distance from File No. HS 003. The court notes the next water right with senior priority in the neighboring group of wells is 10,035, which also happens to be the furthest distance from HS 003. (Pl. Exh. 103, Final DWR Report, p. 14, table) Based upon this alternate proposed DWR remedy, AWI's water right 10,467 and 25,275 are neither the next priority right or the farthest water right from HS-003.

This court does not wish to draft an order that would micro manage future use of no. 10,467 and no. 25,275. At an unknown future time AWI's rights may no longer impair HS 003. Should this unlikely event occur, the court trusts a procedure exists to address this situation in the KWAA.

V. SHOULD DAMAGES BE AWARDED FOR THE 2013 BOND

a) Whether the injunction was wrongfully issued.

Where a restraining order or temporary injunction is wrongfully issued, all expenses incurred therein, which are recoverable on the bond then given, may be recovered whether the

determination that the order was wrongfully issued is in the final trial of the case or on a separate hearing pursuant to an application to set aside or vacate the order. *Alder and Ludwig, v. City of Florence, Kansas*, 194 Kan. 104, 397 P.2d 375; 1964 Kan. LEXIS 457 (1964); *Messmer v. Kansas Wheat Growers Ass'n* , 129 Kan. 220, 282 Pac. 728 (1929); *Harlow v. Mason,* 98 Kan. 353, 157 Pac. 1175 (1916). It is quite uniformly held that expenses and attorney's fees may be recovered on the dissolution or vacation of a restraining order or temporary injunction when the same was wrongfully obtained. *See Messmer v. Kansas Wheat Growers Ass'n., supra.*

In *Hayworth,* the injunction was dissolved because of the unanimous jury verdict rejecting plaintiffs' claim and accepting defendant's claim, and awarding him damages. In light of the jury's verdict, plaintiffs' procurement of the temporary injunction prohibiting the sale of the cattle was wrongful. *Hayworth v. Schoonover*, 2000 Kan. App. Unpub. LEXIS 1084 (2000). *See also Newbern v. Service Pipe Line and Mining Co.*, 126 Kan. 76, 79, 267 Pac. 29 (1928) (the trial resulted in a judgment to the effect that the restraining order ought not to have been granted.") *See also DeWerff v. Schartz,* , 12 Kan. App. 2d 553,560 (1988) (final order which ordered defendants to control pumping of water under certain conditions was indicative that restraining order prohibiting *all* pumping was wrongfully issued).

In *Krause*, the city obtained a temporary injunction prohibiting Krauss from interfering with the installation of a pipe in the city's easement across his land. The case was tried and the court took the matter under advisement. Nearly two years later, the court determined the case was moot, dismissed the case, and dissolved the injunction. The Supreme Court rejected Krauss' argument the dismissal was a judicial determination that the injunction was wrongfully issued. *See City of Wichita v. Krause*, 190 Kan. 635 (1963).

The 2013 temporary injunction was issued in May of 2013. The 2013 injunction was set aside in November of 2013 because there was no reasonable notice to the party to be enjoined [tenant Koehn] and no opportunity to be heard. The court recognizes the injunction was not vacated based upon the merits of the evidence presented, but rather failure to provide notice. Regardless, the court finds the injunction was wrongfully issued in that it wrongfully enjoined Koehn, as a tenant. Koehn obeyed the injunction and suffered loss as a result.

b) Who was bound by the 2013 injunction.

Generally all defendants who have been enjoined by an order wrongfully obtained, and have obeyed the injunction, and who in consequence of the allowance of the injunction and their obedience thereto, have suffered loss, can claim and recover damages on a bond given for their protection. On the other hand, one not a party to the suit, or who is not a necessary or proper party, is not, in general, entitled to damages. Only persons, who are fairly within the covenant of an injunction bond can sue thereon. *Alder and Ludwig v. City of Florence*, 194 Kan. 104, 397 P.2d 375; 1964 Kan. LEXIS 457 (1964); *Kennedy v. Liggett*, 132 Kan. 413, 295 Pac. 675 (1931).

The *Alder* court noted bond is designed to secure to the party injured the damages he might sustain if it finally be decided that the injunction ought not to have been granted. In *Alder*, the Utilities Service Company, not being a party to the injunction action and not having been restrained or enjoined by the action of the court, was beyond the protection afforded in the bond to the party injured. In *Alder*, the City was the only party protected by the bond. Recovery was limited to the specific provisions of the bond, the conditions imposed therein, and the provision of the statute pursuant to which the bond was given. *Id.*

The 2013 injunction enjoined Kelly Unruh and Diana Unruh, and "their successors, their

tenets [sic] and their agents from pumping water from the wells associated with water rights nos. 10,467 and 25,275. Koehn was clearly bound by the 2013 injunction based on the language used by the court and he followed the injunction.

c) ***Whether damages should be awarded for the wrongful issuance of the 2013 injunction where a bond was never set.***

K.S.A. 60-903 (f) provides "the court may issue a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully restrained.

K.S.A. 60-905 (b) provides that no temporary injunction shall operate unless the party obtaining the same shall give an undertaking with one or more sufficient sureties in an amount fixed and approved by the judge of the court, securing to the party injured the damages such injured party may sustain including attorney fees if it be finally determined that the injunction should not have been granted." K.S.A. 60-905(b). *See Idbeis vs. Wichita Surgical Specialists*, 185 Kan. 485, 173 P.3d 642 (2007); *Omni Outdoor v. City of Topeka*, 241 Kan. 132, 734 P.2d 1133, 1987 Kan. Lexis 300 (1987).

In the *DeWerff* case, two defendants pumped water from their property which would travel towards the plaintiffs' property. Plaintiffs filed their petition and procured a restraining order without filing a bond which enjoined defendants from pumping water. *DeWerff v. Schartz*, 12 Kan. App. 2d 553, 751 P.2d 1047 (1988). After trial, the court ordered a permanent injunction which allowed defendants to pump water under certain conditions and awarded damages to defendants. The Plaintiffs argued defendants must prove the order was procured with malice to obtain a damages award.

Kansas recognizes the rule that malice is required to maintain an action for wrongful procurement of a restraining order issued without a bond. But, when a bond is posted, malice is not required. *See Hayworth v. Schoonover,* 2000 Kan. App. Unpub. LEXIS 1084 (2000), citing *DeWarff v. Schartz*, 12 Kan. App. 2d at 558-59; *Alder v. City of Florence*, 194 Kan. 104, 110, 397 P.2d 375 (1964), citing *Jacobs v. Greening*, 109 Kan. 674, 676, 202 Pac. 72 (1921) ("Stated in other words, it has been held that no action for the wrongful procurement of a restraining order and/or temporary injunction (other than upon a bond) is maintainable without a showing of malice"). The malice requirement applies to both restraining orders and temporary orders issued without a bond. To establish malice, it must be shown that the restraining order was obtained for any improper or wrongful motive. *See Nelson v. Miller*, 227 Kan. 271, 278, 607 P.2d 438 (1980).

The *DeWarff* court stated:

> Although we may question the results in Alder and Jacobs, the rule in those cases has not been modified. We are bound by it. We nevertheless must wonder how many trial judges realize when issuing restraining orders without bonds that they are denying the restrained party the opportunity to recover damages unless that party proves malice. *DeWerff v. Schartz*, 12 Kan. App. 2d 553, 558-559, 751 P.2d 1047, 1051, 1988 Kan. App. LEXIS 130, *12-14 (Kan. Ct. App. 1988).

The 2013 temporary injunction hearing was held on May 20, 2013. Thereafter, Unruhs filed a motion for bond on June 3, 2013. The motion was set for hearing on July 11, 2013 when Unruhs requested a continuance. (Transcript, July 11, 2013, p. 8). Unruhs were subsequently removed from the case in August through the filing of an Amended Petition because Unruhs did not own the land in question. Subsequently, after AWI "officially" joined the case, they filed a motion to establish bond on September 9, 2013, along with motion to vacate the temporary

injunction. Multiple motions were heard on November 5, 2013 and a decision to vacate the injunction was filed November 26, 2013. In the midst of multiple changes of counsel, the dismissal of the 2013 injunction and addition of multiple parties and three different judges, a bond ultimately was never set in regard to the 2013 injunction. *See Case History and Background*. Since no bond was set, a party must prove malice to recover damages.

The court has reviewed case law concerning malice. *See Nelson v. Miller*, 227 Kan. 271, 278, 607 P.2d 438 (1980). This court can not find from the evidence presented that Plaintiffs initiated this lawsuit for any reason other than securing the proper adjudication of the claim. Nor does the court find the plaintiff started proceedings because of hostility or ill will or to solely deprive the defendants of the beneficial use of their property. Finally, the court does not find the claim was brought to force a settlement with no relation to the claim. The request for damages is denied.

Linda P. Gilmore
District Judge

CERTIFICATE OF SERVICE:

I hereby certify that on this 1st day of February, 2017, a true and correct copy of the above order was e-filed with the court with corresponding e-filed copies to:

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Linda Gilmore

Linda Gilmore, District Judge