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CASE NUMBER: 2022-CV-000091

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

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

Pursuant to K.S.A. Chapter 77

DEFENDANT CHIEF ENGINEER'S REPLY TO EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NUMBER 2'S RESPONSE TO THE CHIEF ENGINEER'S MOTION TO DISMISS

COMES NOW, Defendant Earl D. Lewis, Jr., P.E., Chief Engineer, Division of Water Resources, Kansas Department of Agriculture ("Chief Engineer"), by and through counsel, Kenneth B. Titus and Stephanie A. Kramer, and hereby offers this Reply to the Response to the Chief Engineer's Motion to Dismiss, filed by Equus Beds Groundwater Management District Number 2 ("Plaintiff") on August 29, 2022.

I. Plaintiff Still Fails to State a Claim for Which Relief Can Be Granted.

The primary argument submitted by the Chief Engineer in his Motion to Dismiss, filed on August 12, 2022, is that the Plaintiff has failed to state a claim upon which relief can be granted and that this action should be dismissed pursuant to K.S.A. 60-212(b)(6). The agency action for which judicial review has been sought is the Chief Engineer's dismissal of the City of Wichita's proposal regarding its Aquifer Storage and Recovery project. As is fully explained in the Motion to Dismiss, the Chief Engineer adopted the recommendation of the hearing officer and dismissed the proposal because it was not properly submitted as a new application. Motion to Dismiss at 3. The Chief Engineer further maintained that without a proper application, he lacks jurisdiction to further consider the merits of any proposal. *Id.* at 6-7.

The Plaintiff plainly states that it "certainly agrees with the ruling in this regard and in no way is seeking to abandon [the dismissal] or vacate this part of the ruling." Response at 6. Therefore, it is Plaintiff's own position that the dismissal was proper, and Plaintiff does not seek a review of the outcome of the Chief Engineer's decision. Plaintiff expends much effort to describe hypothetical circumstances that might need to be considered *if* new applications are ever filed, but in the absence of a valid application, the Chief Engineer has no authority to simply issue an order regarding a hypothetical proposal not properly filed with him. Plaintiff provides no jurisdictional authority for the issuance of such an order and, moreover, repeatedly encourages this Court to deviate from general rules of judicial practice in forcing the Chief Engineer to issue one. Plaintiff notes that it is "the general rule that a party cannot appeal from a judgment in his favor…." but argues that an exception should be applied here because, ostensibly, Plaintiff has been "denied the balance" of the result it sought, "with the result that injustice has been done" to it. Response at 11. That is simply not accurate. The Chief Engineer's

Final Order granted Plaintiff *exactly* the result it sought throughout the proceedings that gave rise to this matter—the complete dismissal of the City's proposal. The Chief Engineer did not have jurisdiction to make any findings beyond those contained in the Final Order, and Plaintiff has not cited any authority that would allow this Court to require him to make any such findings now. Finally, the facts of this case do not justify this Court deviating from well-established standard practice by reviewing a decision that granted an appellant exactly what it asked for from a lower tribunal.

Regarding the Final Order's discussion of factual issues to the extent the same was necessary in order to determine whether the proposal was properly submitted and the Chief Engineer's citation to *Matter of Est. of Lentz*, 312 Kan. 490, 504, 476 P.3d 1151, 1160 (2020), in his Motion to Dismiss, both parties acknowledge it is the better practice not to delve into factual issues in the absence of jurisdiction. However, Plaintiff insists such practice be ignored and, further, fails in its attempt to distinguish *Lentz* from this matter. *Id*. at 12. Plaintiff would have the Court disregard the Chief Engineer's citation to the *Lentz* case on the grounds that that ruling pertained to permissible discussion of factual issues versus jurisdictional ones by an appellate court, as opposed to by a trial court that is acting as a fact-finder. *Id.* The problem with Plaintiff's analysis is that the Chief Engineer was not the fact-finder at the administrative hearing that resulted in his Final Order, and this Court is likewise not the fact-finder in this matter. *Lentz* is, at the very least, instructive here, and its holding indicates that this Court should not delve into the myriad factual issues that Plaintiff advocates for it to determine when all parties agree that the City's proposal was properly dismissed on jurisdictional grounds.

Case law further provides that it would be a waste of judicial resources to review a decision that all parties essentially agree is correct, even if they disagree on the reasoning that led

to that decision. There are numerous factual circumstances where this principal applies, as the Supreme Court of Kansas has "often stated, a trial court's reason for its decision is immaterial if the ruling is correct for any reason." *Lacy v. Kansas Dental Bd.*, 274 Kan. 1031, 1044, 58 P.3d 668 (2002); *see also Montoy v. State*, 278 Kan. 765, 768, 102 P.3d 1158 (2005) ("If a court reaches the right result, its decision will be upheld even though the trial court relied upon the wrong ground or assigned erroneous reasons for its decision.)" and *Atkins v. Webcon*, 308 Kan. 92, 97, 419 P.3d 1 (2018) ("When an agency tribunal reaches the right result, its decision will be upheld even though the tribunal relied upon the wrong ground or assigned erroneous reasons for its decision."). No party here has claimed that the dismissal of the proposal for lack of jurisdiction was improper, and that result should therefore not be reviewed.

Finally, Plaintiff insists that the Court read additional meaning into the straightforward recommendation of the presiding officer that the proposal be dismissed because the Kansas Water Appropriation Act, K.S.A. 82a-701 *et seq.* ("KWAA"), required a new application to be filed. *Id.* Plaintiff seems to argue that the presiding officer recommended that the City's proposal could be dismissed for the jurisdictional reasons that she primarily cited *and* "alternatively" on other grounds, but that is not the case. The presiding officer was clear that the Chief Engineer should dismiss the City's proposal based on jurisdiction. Only if the Chief Engineer determined that the proposal was not required to be dismissed on threshold jurisdictional grounds should the numerous factual grounds be considered. Since all parties agree there is no jurisdiction for consideration of the proposal, the alternative recommendations of the presiding officer need not be considered.

II. Plaintiff Fails to Establish its Standing to Bring this Case

Plaintiff's Response fails to establish Plaintiff's standing to bring this case. First, Plaintiff still has presented no evidence that it has suffered an injury-in-fact and no evidence of any property right owned by the district that would be impacted by the Chief Engineer's decision to dismiss the proposal. Plaintiff's citation to the organic statute establishing groundwater management districts hardly suffices to provide grounds for an injury. Additionally, Plaintiff has failed to establish that the participation of individual water right owners is not required here. Plaintiff simply writes off the assertion that if any damages were to occur, they would be incurred in the form of the impairment of individual water rights, the owners of which would each be impacted differently and would each need to present their own claims accordingly and have them adjudicated individually. Plaintiff admits individual water right owners did participate in the hearing process and could have brought forward their complaints but chose not to. *Id.* at 23. In light of that, the district cannot now present blanket claims regarding hypothetical future injury on behalf of any number of undefined water right owners.

Further, Plaintiff fails to address the Chief Engineer's argument that Plaintiff does not have standing here because, in the absence of home rule authority, groundwater management districts have only the authority explicitly granted to them by the Kansas Legislature. "Local governments are considered creatures of the state as well as subdivisions of the state and as such are dependent upon the state for their existence, structure and scope of powers." Kansas Local Government Law, Sixth Edition, Michael R. Heim (2018), pp. 3-1 and 3-2, *citing Hunter v. Pittsburg*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907). More specifically:

> "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of

> the declared objects and purposes of the corporation-not simply convenient, but indispensable. *Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied* .... These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations .... " *Id*. at 3-02, *citing* Dillon, *Municipal Corporations,* Sec. 237 (5th ed. 1911)(*emphasis added*).

The only mandatory duty of a groundwater management district is to develop a management plan, and Plaintiff cites no statutory authority that allows groundwater management districts to make decisions regarding individual water rights, as distinguished from their authority to advise and recommend. Moreover, the Groundwater Management District Act makes clear that any action taken pursuant to the statutory authority that a Groundwater Management District does have cannot be used to limit the Chief Engineer's ultimate authority. K.S.A. 82a-1039. Finally, the district cannot personify the state's water resources and stand in as representative for an inanimate object; rather it must present an actual injury in order to advance its case. It has failed to do so. In the absence of statutory authority to represent individual water right owners that might present an injury-in-fact, the requirement of K.S.A. 82a-1039 that groundwater management districts not take actions that limit the authority of the Chief Engineer, and the lack of authorization to represent the "aquifer" itself in judicial proceedings, it is difficult to find any grounds upon which Plaintiff might bring this particular case forward.

III. Plaintiff Misunderstands the Relationship Between the Chief Engineer and the Division of Water Resources.

Primarily for the Court's clarification, Plaintiff's pleadings illustrate a lack of understanding of the hearing process Plaintiff engaged in by conflating the actions and roles of the Chief Engineer and the Division of Water Resources ("DWR"). The Chief Engineer is responsible for administration of the KWAA and is the default presiding officer when matters related to the KWAA are administratively reviewed. K.S.A. 82a-706, K.S.A. 82a-1901, K.A.R.

5-14-3, and K.A.R. 5-14-3a. This matter was delegated to an independent presiding officer to conduct the hearing and provide recommendations to the Chief Engineer. Once that occurred, the Chief Engineer was separated from the staff of DWR. Notice of such separation was provided in the pre-hearing order and the order of delegation to the presiding officer, and DWR was designated a formal party to the hearing. In this case, the presiding officer (and ultimately the Chief Engineer) ruled against many of the positions advocated by DWR. However, since the Chief Engineer and DWR were separate entities in the hearing process, that is not indicative of any inconsistency by the Chief Engineer. The fact that the Chief Engineer did not defer to DWR illustrates the independence of the hearing process rather than that some inconsistency by the Chief Engineer created such a "tragic" victory for the Plaintiff. Response at 1.

IV. Conclusion

Plaintiff has failed to address the key arguments raised by the Chief Engineer that support dismissal of this case. First, Plaintiff continues to maintain that the proposal was properly dismissed and that the City of Wichita did not properly submit a new application to the Chief Engineer. The Chief Engineer agrees with that contention, as is reflected in the Final Order that reached the exact result Plaintiff advocated for throughout these proceedings. Both parties agree the Chief Engineer had no jurisdiction to consider the proposal, and Plaintiff provides no additional statutory authority that would allow the Chief Engineer to rule on a proposal not properly before him. The only rationale that Plaintiff can muster as to why this Court should continue to a review this case when all parties agree that the ultimate outcome of the Chief Engineer's Final Order was correct is to encourage the Court to break all applicable general rules of jurisprudence on this topic.

Second, Plaintiff has failed to establish that it has standing to advance this case. Plaintiff has not and cannot establish that it has suffered an injury-in-fact. If there is any harm suffered, it will be to the individual water right owners whose individual participation in a case such as this is required and whose hypothetical future claims of impairment would have to be examined on a case-by-case basis. Plaintiff has also failed to make any argument that overcomes the clear statutory limitation that restricts Plaintiff from taking the kind of action it seeks to take here and a clear lack of any explicit authority (including home rule authority) to bring this case.

Finally, Plaintiff has convoluted the roles of the Chief Engineer and DWR throughout its pleadings. DWR was a party to the hearing proceedings and did not somehow act improperly merely by making arguments that Plaintiff disagreed with. Likewise, the Chief Engineer did not act improperly by ultimately disagreeing with the positions advanced by DWR; rather, the fact that he did so illustrates his independence in deciding this matter at the administrative level. For all the reasons set out herein, the Chief Engineer's Motion to Dismiss should be granted.

WHEREFORE, the Chief Engineer's prays the Court grant the Chief Engineer's Motion to Dismiss, and for such other and further relief and the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th of September 2022, I certify the above *Reply to Equus Bed Groundwater Management District Number 2's Response to the Chief Engineer's Motion to Dismiss and Memorandum in Support Thereof* was electronically filed with the Clerk of the Court and that the below-listed parties were notified of the same via the Court's electronic filing system:

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