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CASE NUMBER: 2022-CV-000091

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

EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NUMBER 2,	Plaintiff
	Case No. 2022-CV-91
vs.	
EARL D. LEWIS JR., P.E., THE CHIEF ENGINEER OF THE STATE OF KANSAS, DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, in his official capacity	Defendant

Pursuant to K.S.A. Chapter 77-601 et. seq.

RESPONSE TO MOTION TO DISMISS

COMES NOW Equus Beds Groundwater Management District Number 2 (hereinafter "the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., and David Stucky, with its Response to Defendant Chief Engineer's Motion to Dismiss, as follows:

I. Background

It is indeed tragic that the Division of Water Resources' (the "DWR") wholehearted support for the City of Wichita's (the "City") ill-advised Proposal forced the District and the Intervenors into protracted litigation to protect the Aquifer and the various constituents that depend on its viability in the future. Although also very complex in its scope, this case is also very simple to understand on a surface level. The City's existing ASR water permits authorize the City to receive recharge water credits for taking overflow surface water from the Little Arkansas River and injecting it into the Aquifer and storing that water for subsequent

withdrawal. Highly simplified, with the new Proposal, the City also desires recharge credits for pumping the source water (Little Arkansas River surface water) directly to the City for municipal purposes, without injecting or storing any surface water in the Aquifer. Thus, even the simplest of understandings magnifies the fact that the City was seeking to improperly expand its consumptive use of groundwater to the detriment of other users. Moreover, the City's proposed actions violated years of established water law precedent, committed torcher to definitive Kansas statutes and regulations, and undermined basic principles of equity and fairness.

The District never wanted this fight. With the DWR and the City advancing this united front and DWR leading the City down a primrose path, the District originally was left with no choice but to provide the lone voice to protect the Aquifer. The District assessment payers and the users of the Aquifer are very fortunate that the District took this position. Above all, the DWR forcing the District through a Hearing should not be in vain. Good can come out of this Hearing process and this Court has the opportunity to resolve critical issues and set new precedent. Consequently, the District will make short shrift of the DWR's arguments raised in its Motion to Dismiss.

The District incorporates by reference the background, definitions, and facts outlined in its Petition for Judicial Review (the "Petition"). Those same facts will not be restated in this Response. However, just a few additional comments on the District's Motion to Dismiss—which the District filed almost three and a half years ago—are warranted. As noted by the DWR, the District certainly raised the need for a new application at that time. However, the DWR and the City vehemently argued against that position through written responses and in oral arguments. The District renewed that same argument multiple times throughout the hearing process. And numerous times both the DWR and the City vigorously argued that this was not a

reason for dismissal. Based on the positions of the City and the DWR, the argument was taken under advisement and, for practical purposes, was *functionally* denied at those times since the time and expense of a Hearing was still required.

Thus, the diametrically opposed position of the City/the DWR (that no new application was needed) to the District forced all parties to proceed to a Hearing. It is frankly astonishing that one of the DWR attorneys that so staunchly argued against the District's position in this regard now uses that same argument as a sword to attempt to eliminate the District's ability to have other critical issues resolved. In fact, that same attorney that continuously contended that a new application was unnecessary, has now completely reversed course and signed the Chief Engineer's Final Order—after forcing a protracted Hearing and the countless hours that emanated from the Hearing process and its aftermath.

The District also raised a variety of other arguments in its Motion to Dismiss. Those arguments are identified below. It also merits noting that the granting of any of these arguments could have disposed with the need for a Hearing. Again, the DWR and the City opposed these positions when the District first raised them. And, again, the DWR and the City aggressively contended the arguments lacked merit each time the District renewed its Motion to Dismiss. As also noted in the Petition, the District filed a Motion for Summary Judgment. This Motion advanced a whole variety of additional legal arguments that allowed the Hearing Officer to prevent the case from proceeding to Hearing. Again, the DWR and the City tersely opposed these arguments and convinced the Hearing Officer that a Hearing was necessary to resolve the issues both factually and legally through an evidentiary process. Again, each time the theories outlined in the Motion for Summary Judgment were renewed by the District, the City and the DWR opposed them.

Thus, any insinuation that the District forced the Hearing in this case in the DWR's Motion to Dismiss is, quite frankly, comical. As the record overwhelmingly reflects, just the opposite is the case. The DWR even writes in its brief that the District didn't need to assume the role of the agency because it sought the hearing process. DWR's Motion to Dismiss, pg. 10. Indeed, if the DWR had received its wishes at any stage in the proceedings, the case would have been resolved in favor of the City. An actual review of the record will undoubtedly mirror this fact and the Court will understand the District's crucial role in this case in protecting the Aquifer, as the DWR was virtually lockstep with the City on every argument raised by the City and failed to properly review the City's Proposal. In contrast, a review of the voluminous record, or even just a "quick" read of the Hearing Officer's nearly 200-page opinion, will elucidate the merit of the District's position on virtually every issue raised, and the District's vital agency function in protecting the Aquifer.

II. Additional Law Governing a Court's Flexibility with Respect to a Motion to Dismiss

Courts have routinely held that when a movant files a motion to dismiss late within proceedings, it is well within a court's power to dismiss the motion, even if valid jurisdictional arguments exist. *See, e.g., Francis v. Ingles*, 1 Fed. Appx. 152, 154 (4th Cir. 2001); *Skinner v. First Am. Bank of Va.*, 64 F.3d 659 (4th Cir. 1995); *Chamberlain Group, Inc. v. Techtronic Industries Co.*, 935 F.3d 1341, 1351 (Fed. Cir. 2019); *In re Orlandi*, 612 B.R. 372, 379 (B.A.P. 6th Cir. 2020). The rationale is that after extensive discovery has occurred, or even a trial, it would be "untimely" and a "waste of judicial resources." *See id*.

In this situation, there is certainly no contention that the District's Motion to Dismiss was untimely filed. In fact, it was filed very early in the proceedings. The goal of the District's motion was to avoid the time and expense of having a protracted hearing process. Instead, after

the motion was taken under advisement, extensive discovery occurred including written discovery, a deposition, and the preparation and disclosure of various expert reports. Then the parties engaged in over two weeks of a hearing and the extensive preparation that emanates from such an involved proceeding. The parties all filed prehearing briefs and very lengthy findings of fact and conclusions of law after the Hearing. It suffices to say, that the *vast majority* of the amount of time the District spent in the case occurred *after* the District filed its pretrial motions.

While the District is not contending that a pretrial issue couldn't be taken under advisement, the District is maintaining that other issues should also be resolved. This is to avoid wasting judicial resources since this case already proceeded to Hearing. As indicated, ruling on other issues is well within the Court's province.

Further, motions to dismiss "may be granted only in the clearest of cases and must be denied when additional facts obviously are required before an ultimate judgment may be formed." *Wrenn v. State*, 561 F.Supp. 1216, 1220 (D. Kan. 1983) (applying Kansas law). "In other words, any doubt or ambiguity about the claim must be resolved in favor of the plaintiff." *S.A.I., Inc. v. General Elec. Railcar Services*, 935 F.Supp. 1150, 1152 (D. Kan. 1996) (applying Kansas law). As applied to this case, the DWR's Motion to Dismiss should be construed against the DWR and if the Court has any uncertainty about the DWR's arguments, it should rule in the District's favor. As explained in detail below, however, this is not even a close decision and the DWR's Motion should be clearly denied.

III. The Ruling that a New Application Is Required Does Not Preclude Adjudication of Other Critical Threshold Issues

a. The District Raised Other Critical Threshold Arguments in Its Motion to Dismiss and Motion for Summary Judgment

The District acknowledges that it contended that the City was required to file a new application. The District certainly agrees with the ruling in this regard and in no way is seeking to abandon this argument or vacate this part of the ruling. But the District raised many other dispositive threshold arguments that are simultaneously ripe for consideration. The DWR improperly insinuates that the need for a new application was the only jurisdictional argument raised by the District. In those motions filed prior to the Hearing, the District contended that 1) the City's concept violated the Kansas Water Appropriation Act, 2) was a passive recharge credit, 3) violated safe yield, and 4) was prohibited by the regulations governing Aquifer Storage and Recovery. Each will be addressed in detail below and each was fully briefed prior to the Hearing. All of these arguments, except perhaps safe yield, can be disposed of through just a threshold consideration of the City's Proposal. In fact, arguably, the illegality of the City's Proposal could be determined prior to even considering whether the City can then theoretically file an application. If the City's concept is illegal on its face, no filing of a subsequent application will cure this legal malady and these threshold concepts are ripe for review now.

Consider for example an analogy. Take a water user that commenced pumping water without applying for a permit, exceeded a water quantity that would ever be imaginably authorized in the area, and then reversed the water meter to cover up the gross over-appropriation. The DWR would not step in and just observe that no application was filed and end the analysis. Of course the DWR would cite the individual for other violations of the Kansas Water Appropriation Act. Likewise, in this situation, the Chief Engineer could, at the very least,

have adjudicated other key threshold arguments that were raised in the dispositive motions filed by the District and argued prior to the Hearing.

Here, the District argued that the City lacked standing to pursue its Proposal on numerous grounds. Chief among those concerns was the fact that the City's Proposal is illegal because it is prohibited by the Aquifer Storage and Recovery rules and regulations, K.A.R. 5-1-1 *et. seq.* Whether the City pays lip service to water quality or impairment in a future Proposal is wholly irrelevant to this determination. The regulatory concepts can be determined now based on the face of the City's Proposal. The City's Proposal seeks an Aquifer Maintenance Credit ("AMC") for water left in storage by the City that the City could have legally pumped by their existing native water rights, but chose not to pump. Instead, the surface water is diverted from the Little Arkansas River directly to the City for municipal use, while the City neither injects nor stores water in the Aquifer, but the City somehow wants to claim accumulation of recharge credits without artificially recharging any water.

As indicated by the District, among many detailed statutory construction arguments, the current regulations deal with Aquifer *Storage* and *Recovery*—neither of which will occur in this case. *See id*. The City's Proposal doesn't seek to inject any source water into the Aquifer. *See* K.A.R. 5-1-1(yyy). The City's Proposal does not result in any artificial recharge. *See, e.g.*, K.A.R. §§ 5-22-1(f); 5-1-1(g). There is no storage of water. *See, e.g.*, K.A.R. §§ 5-1-1(k); 5-1-1(e); 5-22-1(c); 5-22-1(l). The definition of aquifer storage and recovery accounting under these regulations takes into account water entering and leaving the Aquifer, and specifically the amount of water artificially recharged. K.A.R. § 5-12-2. The regulations consider water being injected into an unsaturated portion of an Aquifer for subsequent recovery. *See, e.g.*, K.A.R. §§ 5-1-1(mmm); 5-22-1(l); 5-22-1(ee). The City's Proposal, on its face, is in stark violation of the

Aquifer Storage and Recovery regulations. A ruling on the illegality of this concept could preclude the City from even wasting its time to file an application in the future, because the concept is blatantly illegal on its face. A ruling on this issue now will save countless time and expense addressing these issues in the future, and they have already been fully briefed and litigated. It is a threshold issue that can and should have been addressed long before the matter ever advanced to a public Hearing.

Likewise, the District hammered on how the City's Proposal violated the Kansas Water Appropriation Act. On its face, the City's Proposal sought to double the consumptive use of water, sought a new form of appropriation, violated safe yield, and violated the concept of first in time, first in right—the bedrock of prior appropriation. Again, these arguments were all threshold considerations raised in the pretrial motions that could be easily addressed simultaneously with the argument of whether a new application was required. In fact, this was the request of the District in those early motions.

Additionally, the District indicated that the City's AMC Proposal was nothing more than a rank passive recharge credit. Again, the DWR has maintained the position that passive recharge credits are prohibited. The idea of giving credit for water that the City could have pumped but chose not to pump is a textbook definition of a passive recharge credit. Again, this is a determination that can and should have been made prior to the matter ever proceeding to Hearing.

Finally, if the District was asked to run a safe yield calculation prior to the City filing its Proposal, the District could have aptly advised the City that its Proposal would be in violation of this foundational requirement. The City seeks to obtain phantom credits and additional water in an area already heavily overappropriated. Had the City followed the proper process, this issue

should have been resolved early in the proceedings and, indeed, was raised by the District prior to the Hearing. That said, unlike the other arguments raised by the District, the District acknowledges that this may not be a foundational argument that precludes the City's very standing to pursue its Proposal. However, the fact that it is illegal on its face and there is no statutory mechanism to advance the Proposal, does undermine the City's ability to pursue such a Proposal now or in the future. These issues are ripe for consideration and should be addressed now. There is nothing that will change the outcome of these arguments in the future. The District respectfully renews its request for a declaratory ruling on these subjects.

b. The Chief Engineer Delved into Facts Far Beyond Just Ones Needed to Determine Jurisdiction

The DWR contends that the Chief Engineer only considered facts germane to its determination of whether the City should have filed a new application. This is simply not the case. The Chief Engineer did not devote 17 pages in a ruling to just analyzing whether a new application was required. Rather, the Chief Engineer waded into other critical aspects of the case. For example, the Chief Engineer wrote, "Based upon the conflicting testimony adopted, it is unclear if AMCs are truly passive recharge credits or something else..." Chief Engineer's Order to Dismiss, pg. 16. The Chief Engineer indicates that he was unable to make this determination and it was unclear. *Id*. The District contends that it was abundantly obvious from the record that the City's AMC Proposal is a passive recharge credit. As an extension of the Chief Engineer's opining on this subject, the District is now asking the Court to make a declaratory ruling on this issue to resolve the matter. Likewise, a review of the Chief Engineer's Order will quickly dispose with the argument that the Chief Engineer only opined on facts germane to whether the City should have filed a new application. Thus, additional issues are ripe for consideration.

c. Facts Raised at Hearing/Trial Can Be Used to Expand on the Arguments Raised by the District in the Pretrial Motions

As indicated, a variety of arguments raised by the District in its pretrial motions are undoubtedly ripe for consideration. Additionally, it is well established law that if a case proceeds to trial and a motion to dismiss is taken under advisement, a judge can then use any facts from the trial to inform a ruling on the motion to dismiss. *See, e.g., A. & N. Club v. Great American Insurance Company*, 6th Cir. 1968, 404 F.2d 100, 103; *Wealden Corp. v. Schwey*, 482 F.2d 550, 551–52 (5th Cir. 1973). In this case, the exhibits and testimony presented at trial solidified the arguments raised by the District in its pretrial motions. Indeed, the evidence undoubtedly supported the illegality of the City's Proposal and that it is in violation of the Kansas Water Appropriation Act in numerous respects, and contrary to the governing regulations. The testimony pronounced that the Proposal sought nothing more than rank passive recharge credits. The evidence indicated that the Proposal violated safe yield and was in contravention of prior commitments with respect to spacing waivers.

All this evidence can and should be used for a ruling on the straightforward arguments raised by the District in its pretrial motions. The DWR acknowledges in its Motion that a "determination of factual issues is appropriate and even necessary" to inform a ruling on jurisdictional issues. *DWR's Motion to Dismiss*, pg. 7. When ruling on a motion to dismiss after a trial has occurred, a "trial court is entitled to take into consideration all the evidence presented before and after the initial motion." *Wealden Corp. v. Schwey*, 482 F.2d 550, 552 (5th Cir. 1973); *see also A&N Club v. Great American Insurance Company*, 404 F.2d 100, 103 (6th Cir. 1968). Thus, the facts raised at trial are germane to these arguments. The lack of an application—although one of many grounds to deny the City's Proposal—does not preclude an analysis of these other critical threshold arguments. Indeed, the Trial Court should use its

declaratory judgment powers to reach a decision on these critical issues. Moreover, the Chief Engineer should have applied the facts supported at the Hearing to rule on all these foundational pretrial motion arguments. Merely ruling on the fact that a new application is needed just kicks the can down the road on these issues and leaves resolution for a later day. The equities of the case dictate that these issues be resolved now.

"While it is the general rule that a party cannot appeal from a judgment in his favor, the rule is not absolute, and where a judgment gives the successful party only part of that which he seeks and denies him the balance, with the result that injustice has been done him, he may appeal from the entire judgment." *Auto. Ins. Co. of Hartford, Conn. v. Barnes-Manley Wet Wash Laundry Co.*, 168 F.2d 381, 386 (10th Cir. 1948); *see also United States v. Dashiel*, 70 U.S. 688, 701, 18 L.Ed. 268 (1865); *Scott v. Partview Realty & Improvement Co.*, 241 Mo. 112, 145 S.W. 48, 50 (1912); *Zigler v. Erier Corporation*, 102 Fla. 981, 136 So. 718, 719 (1931); *Houchin Sales Co. v. Angert*, 11 F.2d 115, 119 (8th Cir. 1926); *Shaheen v. Hershfield*, 247 Mass. 543, 142 N.E. 761, 762 (1924); *Blanchard v. Neill*, 83 N.J.Eq. 446, 91 A. 811 (1914). As explained in great detail in this Response, the District was prejudiced in the sense that it was required to engage in a protracted Hearing process to protect the Aquifer after its original Motion to Dismiss was originally functionally denied due to the arguments of the DWR and the City. The mere fact that the DWR has flipped on its position of whether a new application was required, and the Chief Engineer has now ruled in the District's favor, does not preclude analysis of other issues. The District does agree with the DWR that this was a matter of great public importance. One of the rationales advanced for the public Hearing was for public relations purposes and to allow the public to hear all the issues get addressed in an evidentiary format. Now the District, and the public, deserves an adjudication of the key matters raised at the Hearing.

d. The Hearing Officer's Ruling Did Not Preclude an Analysis of Other Issues

The DWR incorrectly characterizes the Hearing Officer's Order as precluding the ability to delve into other substantive issues. While it is true that the Hearing Officer states that a new application should have been filed, she indicates that "alternative[ly]" the case can be decided on other grounds. Hearing Officer's Recommendations, pg. 182. Nowhere in her ruling does she dictate that the Chief Engineer cannot consider other issues. If this was her intent, she would not have labored to assemble an almost 200-page ruling.

e. Even in a Ruling on Jurisdictional Grounds, a Fact Finder Can Opine on Other Dispositive Issues

The DWR cites no law for the proposition that a fact finder is precluded from ruling on dispositive issues just because a jurisdictional issue is raised. The case cited by DWR, *Matter of Est. of Lentz*, 312 Kan. 490, 504, 476 P.3d 1151, 1160 (2020), is in an appellate context, not a trial court context. Indeed, it is axiomatic that there is a major distinction between a trial court, which functions as a fact finder, and an appellate court, that does not have that role. Even so, the case cited by the DWR merely indicates that it is the "better practice" not to delve into substantive issues. *See id*. Such an analysis of substantive arguments is not precluded by this case.

In this situation, the District indeed asked that the City's Proposal be dismissed on multiple grounds prior to the Hearing. However, the DWR—including one of the very attorneys that signed the Motion to Dismiss—argued vigorously against the reasons articulated in the pretrial motions filed by the District, including the notion that a new application was needed. Instead, the DWR and the City insisted that a Hearing/trial was necessary to resolve all the issues. And, to the dismay of the District, a "trial" indeed occurred—over two full weeks of it. It is now almost amazing that the DWR's attorney is now contending that no substantive

arguments from the Hearing can be considered because a new application should have been filed. Although the District would relish this Court considering all the issues raised at the Hearing and the District is overwhelmingly confident in those positions and the evidence and testimony presented, the District is satisfied with this Court merely resolving all the arguments raised in the District's pretrial motions. Again, those arguments equally informed questions of standing and jurisdiction. Moreover, resolution of those issues will help eliminate another inevitable two weeks of trial in the future and save taxpayer money and judicial resources.

The District pushed for the Motion to Dismiss to be resolved prior to the Hearing. The DWR staunchly opposed this position and, as a consequence of the DWR's efforts, the Hearing Officer agreed that the case should go to a full evidentiary Hearing to resolve "matters of public importance." This position by the DWR functionally decided the Motion to Dismiss at that stage in the proceedings by forcing a full Hearing. Consequently, the Court should have full latitude to resolve the all the other issues raised at the Hearing so the protracted Hearing process was not simply a waste of all the parties' time and effort.

f. More Latitude Is Afforded in Declaratory Judgment Proceedings

The DWR correctly acknowledges that there are "less rigorous requirements for declaratory judgment cases." *DWR's Motion to Dismiss*, pg. 7. The Kansas Supreme Court, in fact, has directly opined verbatim that "less rigorous requirements have been imposed in declaratory judgement cases." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897, 179 P.3d 366, 382–83 (2008). Declaratory judgments only require "two disputants, each of whom sincerely believes in the rightfulness of his own claim" and not a resolution of abstract questions. *State ex rel. Hopkins v. Grove*, 109 Kan. 619, 623, 201 P. 82 (1921).

The United States Supreme Court has held that declaratory judgments do not warrant drawing the "brightest of lines" to determine what constitutes an Article III case or controversy, and thus the standards are more liberally construed. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128, 127 S.Ct. 764 (2007). The Court has identified four factors to apply in reaching this determination: 1) a "definite and concrete" dispute, 2) that touches on "the legal relations of parties having adverse legal interests," that 3) was "real and substantial," and in the declaratory judgment context only means that the controversy was "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," and 4) the opinion must merely provide "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id*. The Kansas Supreme Court has adopted this standard. *See Sebelius*, 285 Kan. At 890.

"The standard of review on whether a declaratory judgment action rises to the level of an actual controversy is abuse of discretion." *T.S.I. Holdings, Inc. v. Jenkins*, 260 Kan. 703, 721–22, 924 P.2d 1239, 1251 (1996). A declaratory action is oftentimes used in Kansas where "rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise." K.S.A. § 60-1704. However, declaratory relief can be broadly granted when "a judgment will terminate the controversy or *remove an uncertainty*." K.S.A. § 60-1707 (emphasis added). Thus, this Court should have flexibility to make an equitable ruling to resolve these issues.

In this case, the City sought changes to its ASR water permits through a lengthy Proposal that was filed with the DWR. That Proposal was fully litigated. A room full of expert witnesses testified regarding the merits of the City's Proposal. Thus, there is nothing "hypothetical" or "speculative" about the fact pattern in this case. The facts are certainly "definite and concrete"

and "real and substantial." And this case is certainly not an advisory opinion as it seeks to have this Court adjudicate real facts and a real controversy, apply existing statutes, regulations, and law, and is not designed to merely advise the legislature on future laws or render hypothetical opinions. *See Sebelius*, 285 Kan. At 875-905. Here, the Court can rule on numerous critical aspects of AMCs and "terminate a controversy" in this regard and "remove future uncertainty." *See* K.S.A. § 60-1707. Indeed, the DWR and the City still ostensibly disagree with the District on the proper interpretation and resolution of the substantive issues in this case.[1] This will resolve the issues raised in this case, ensure that the "trial" forced by the DWR and the City was not in vain, preserve future taxpayer money, and conserve judicial resources.

IV. The District's Response to the DWR's General Standing Arguments

The DWR's general arguments against the District's standing are somewhat stunning in scope. Fortunately, each of these arguments are easily addressed and can be disposed of by the Court. Although difficult to understand the contention, the DWR appears to argue that the District lacks standing in these proceedings due to the mere fact the District does not own a water right. The DWR then contends that the DWR was promoting its function of protecting the Aquifer because it originally sought the hearing process. While the DWR did participate in the hearing process, the record will reflect that the DWR supported the City's arguments in absolutely every stage in the proceedings. In fact, if the DWR had gotten its way, the case would have been resolved in the City's favor without a Hearing, or immediately during the hearing process. It was only due to the opposition of the District, and eventually the intervenors, that a neutral fact finder could independently opine in favor of the District on virtually all the arguments raised by the District. And, although this was the obvious outcome based on the

[1]If not, the City, the District, and the DWR should just file a journal entry reflecting agreement on the issues and that the District was correct in its interpretation of the law.

testimony, evidence, and logic of the various positions, and the Hearing Officer's almost 200-page ruling opined on almost all the issues correctly, the DWR argued through its counsel for a different outcome all the way to the bitter end.

a. The District Is Not Precluded Standing for this Appeal Because It Took a Position Contrary to One User of the Aquifer

The DWR contends that the District's position is pitting certain constituents against others. This is, frankly, a shocking position. The only party that would be adversely impacted in this case by the District's position was the City. In fact, even other local governments/municipalities voiced opposition to the City's Proposal. By this logic, neither the District nor the DWR would ever have the authority to recommend denial of or deny an application or a water right because it would advance a position contrary to at least one constituent of the Aquifer. Of course, taking this argument to its logical conclusion is nonsensical. It would effectively eliminate the role of the District or the DWR to ever render a decision or opinion contrary to a constituent, even if that constituent is advancing an agenda harmful to the Aquifer. Certainly, this is an illogical outcome.

Moreover, it is simply amazing that the DWR would even have the audacity to raise this argument. The DWR remained in a parallel universe with the City and argued in favor of the City throughout the proceedings. Indeed, as the record clearly reflects, this position was detrimental to the Aquifer and every other person or entity that uses it. So, if the DWR's arguments are even afforded a shred of credibility in this regard—as they clearly should not be—by the DWR's own logic it should be the party that would be eliminated from this appeal. However, the District acknowledges that this would be a ludicrous result on any level.

The DWR likewise contends the District is litigating against the City. Again, this case was not an effort to litigate against the City. It was simply about advancing a position to protect

the Aquifer. As explained below, it is the District's role to advance a position for or against proposals seeking to appropriate water from the Aquifer or change existing water permits and rights. That is exactly what the District did in this situation. Indeed, a review of the Hearing Officer's lengthy ruling exemplifies the meritorious nature of the District's positions. Further, the City is not even a party to this appeal.

The District's analysis during the Hearing was based on objective hydrologic principles and the established rules and regulations, not based on pushing the subjective agenda of one party. That said, there is nothing in K.S.A. 82a-1020 *et seq*. that limits any action of the District simply because it might be adverse to <u>*a*</u> member. Certainly, when the District requests that the Chief Engineer adopt rules and regulations that have the effect of limiting new water appropriations or placing limitations on well spacing or well relocations, or that the Chief Engineer establish a special management area in the District that closes the area to new water permit applications, such acts, by definition, will be adverse to at least one member (and possibly numerous members). And the DWR has never questioned the District's authority to pursue these steps. In fact, DWR has supported these actions. Consequently, the argument that the District lacks standing merely because one member may have an adverse interest cannot be given an ounce of serious consideration.

b. The District has a Vital Role in Helping Resolve Issues Concerning Water Rights Within the Aquifer and Matters that Impact the Aquifer

The Groundwater Management District (GMD) Act K.S.A. 82a-1020 states that "…*a need exists for the creation of special districts for the proper management of the groundwater resources of the state*…" and further sets as state policy that GMDs are formed "… *to establish the right of local water users to determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of*

Kansas." Id. (emphasis added). It is important to note that "the right" established in this law is a noun and therefore considered in the following context: "As a noun, and taken in a concrete sense, a power, privilege, faculty, or demand, inherent in one person and incident upon another." Black's Law Dictionary, 6th Addition, pg. 1324. The "person" in this definition is a GMD, which is a "*special district*" that is an independent, special governmental agency that exists separately from other local governments such as county, municipal, township, or school district governments. GMDs have substantial administrative and fiscal independence to accomplish the functions specified in K.S.A. 82a-1020, that include:

- *for the proper management of the groundwater resources of the state;*
- *for the conservation of groundwater resources;*
- *for the prevention of economic deterioration;*
- *for associated endeavors within the state of Kansas through the stabilization of agriculture; and*
- *to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets.*

Id. K.S.A. 82a-1028 enumerates the powers of GMDs, which include a number of items including, but not limited to, the ability to sue and be sued, maintain an office and staff, levy water user charges and land assessments and, for the purposes of this case, probably the most important found in subsection (m): "*provide advice and assistance in the management of drainage problems, storage, groundwater recharge, surface water management, and all other appropriate matters of concern to the district*." *Id*. (emphasis added).

Administrative decisions of the chief engineer office can have a substantial effect on the success of a local groundwater management program and the local public interest, necessitating GMD involvement as a power that was obviously implied in legislative policy. The District was formed in 1975 at the request of local landowners and groundwater users. The District's approved Management Program states that the purpose of the District *"… is to properly manage*

groundwater resources of the District for the benefit of the resource and the public interest." The goal of the District, as also specified in the District's Management Program, is "*…to manage the groundwater supplies within its boundaries by balancing groundwater withdrawals with annual recharge to the aquifer to prevent groundwater mining and protect the natural water quality of the aquifer and remediate groundwater contamination.*" *Id*.

To help effectuate its goals, the District has state-approved rules and regulations dealing with water appropriation, abandoned and inactive wells, and cathodic protection boreholes. These rules and regulations have all been properly promulgated and approved through the various state agencies (the Division of Water Resources, the Kansas Department of Health and Environment, and the Kansas Corporation Commission, respectively). The District evaluates water appropriation and change applications using the District's Management program and the District's water appropriation rules and regulations to determine compliance and provides a recommendation to the DWR pursuant to K.A.R. 5-22-12. It is primarily through this same lens that the District evaluated the City's Proposal. The District's recommendation of denial was wholeheartedly consistent with the Districts' Management Program purpose and goals, the District's water appropriation rules and regulations, and the GMD Act, K.S.A. 82a-1028(m), quoted above. Thus, any argument by the DWR in its Motion to Dismiss that undermines the District's vital function as an agency, and thus strip the District of standing, is *way* off base.

c. The District Clearly Has Associational Standing and Standing in General

The DWR cites the case of *312 Education Ass'n v. U.S.D. No. 312*, 273 Kan. 875 (2002) for the proposition that the District does not have associational standing. The DWR indicates that associational standing existed in that case and the teacher's association had standing because it was advocating a pay raise for *all* teachers. Thus, all the members of the association were

benefited equally, and it was not contrary to any one member. However, the corollary to the case at hand would be if one teacher took a position contrary to the association and sought a 500-fold pay increase, and argued that all the other teachers should take a pay cut to accommodate this exorbitant raise. Even if one teacher took an irrational position contrary to the association, the association would still have associational standing. The same is true here. Just because one constituent of the Aquifer—the City—took a position that was contrary to the interests of all the other users of the Aquifer and detrimental to the health of the Aquifer itself, does not preclude the District from having associational standing. This argument obviously has no merit.

Moreover, the DWR never challenged the District's standing to be involved in this case at any prior time. Such an argument should not be seriously raised at this late juncture and has no merit. As acknowledged by the DWR, the District had standing to participate in the hearing process, which means the District has standing to pursue the appeal. A decision of the trial court/fact finder does not become a final decision until the period for appeal has run, and the case has not been appealed, or the case has been appealed and finally adjudicated. K.S.A. § 60–254(a); *Grimmett v. S & W Auto Sales Co.,* 26 Kan. App. 2d 482, 484 (Kan. 1999); *Osborn v. Electric Corp. of Kansas City*, 23 Kan.App.2d 868, 872, rev. denied 262 Kan. —— (Kan. 1997). Thus, the Chief Engineer's opinion isn't a "final order" (although it was a final order in the sense that all administrative remedies had been exhausted) because the District timely filed an appeal. Because the opinion isn't a final order, the contentions and factual bases are still at issue, which means the District has the same standing it had when the hearing process originated. The District had standing then, so it has standing now.

Further, the definition of an "aggrieved" party is defined broadly. The definitions of the terms "aggrieved" and "aggrieved person" in the current version of *Black's Law Dictionary* are:

> **aggrieved** *adj*. (16c) **1.** (Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights. **2.** (Of a person) angry or sad on grounds of perceived unfair treatment.
>
> **aggrieved party.** (17c) A party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment. — Also termed *party aggrieved*; *person aggrieved.*

Black's Law Dictionary (11th ed. 2019). The concept of an aggrieved party as being a "party entitled to a remedy" is greater than the limited concept of only a person whose personal or property rights are affected. In *Tri-County Concerned Citizens, Inc. v. Board of County Commissioners of Harper County*, 32 Kan. App. 2d 1168 (2004), in a zoning context, the Kansas Court of Appeals interpreted K.S.A. 12-760, an appeal statute very similar to K.S.A. 82a-708b to interpret the word "aggrieved." At the time it was before the court, K.S.A. 12-760 provided in part: "Within 30 days of the final decision of the city or county, *any person aggrieved thereby* may maintain an action in the district court of the county to determine the reasonableness of such final decision." Id. (emphasis added). The court in *Tri-County* construed the word "aggrieved" by reference to a Kansas Supreme Court decision of *Fairfax Drainage District v. City of Kansas City,* 190 Kan. 308, 314–15, 374 P.2d 35 (1962), where the court approved the following definition of "aggrieved:"

> A party is aggrieved whose legal right is invaded by an act complained of or whose pecuniary interest is directly affected by the order. The term refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of some burden or obligation. In this sense it does not refer to persons who may happen to entertain desires on the subject, but only to those who have rights which may be enforced at law and whose pecuniary interest may be affected.

Of note is that an aggrieved party includes a party "whose legal right is invaded by an act complained of" as an alternative to an adverse effect on a pecuniary interest. This alternative approach is consistent with the *Black's Law Dictionary* definitions cited above.

The District does not need to demonstrate that it was personally aggrieved because *numerous* aggrieved members provide standing vicariously. In *Tri-County* the standing of Tri-County Concerned Citizens, Inc. was challenged because it had no individual right invaded by the zoning action. The *Tri-County* court determined Tri-County Concerned Citizens, Inc. had associational standing by and through its individual members, who were aggrieved in the sense of the loss of a pecuniary interest:

> In the case of an association such as Concerned Citizens, we employ a three-part test in determining whether an association has standing to sue on behalf of its members: (1) the members must have standing to sue individually; (2) the interests the association seeks to protect must be germane to the organization's stated purpose; and (3) neither the claim asserted nor the relief requested require participation of individual members. *NEA–Coffeyville v. U.S.D. No. 445*, 268 Kan. 384, 387, 996 P.2d 821 (2000).
>
> Applying these various criteria, we are convinced that Concerned Citizens has standing to challenge the zoning decision. It is beyond question that WCKI's application generated significant public interest due to perceptions that the project had major implications for the County. Moreover, Concerned Citizens appears to have fulfilled all the requirements for standing: (1) The individual members of the association have standing in their individual capacity since they live within 1,000 feet of the landfill; property owners this close to a landfill site are aggrieved because they potentially suffer a substantial grievance and a loss of a pecuniary interest. (2) Since the stated purpose of the corporation is to protect the environment, the prosecution of this lawsuit is wholly consistent with the association's purpose. (3) The participation of the individual members is not necessarily required.
>
> We conclude that the district court did not err in rejecting the challenge to plaintiffs' standing to maintain this action.

Tri-County Concerned Citizens, 32 Kan. App. 2d at 1174 (emphasis added). Here, the only relevant question is whether other members of the District have wells that could be adversely impacted by the City's Proposal. As supported by the Hearing record and the analysis of the Hearing Officer, this answer is a deafening **YES**. In *Board of County Commissioners of Sumner County v. Bremby*, 286 Kan. 745, 764 (2008), the county met

the association standing test on its petition alleging a proposed landfill could contaminate water, if the site fails certain regulatory and environmental standards. Here, the record clearly established the impacts of the City's Proposal on impairment, water quality, and a whole variety of other rights of members of the District. Thus, the associational standing test is clearly met.

Even if the District did not have associational standing, as supported above, it would still have standing as an "person aggrieved" by virtue of its statutory rights embodied in K.S.A. 82a-1020, specifically the proper management and conservation of groundwater resources, the prevention of economic deterioration and associated endeavors that will be invaded if the proposed change impairs another water right. Again, the record is replete with evidence of how users of the Aquifer would be detrimentally impacted by the City's Proposal. However, there is no need to even engage in a discussion of whether the District is an aggrieved party itself since it meets the associational standing test.

The DWR further contends that individual water right holders should be a part of this appeal. Again, this can't be a serious contention given the District's role in resolving water rights matters in the Aquifer. Further, individual water right owners participated in the hearing process in numerous ways. The evidence overwhelmingly supported that these individual water right holders—other than the City—would be detrimentally impacted by the City's Proposal. A wealth of expert testimony and exhibits established this fact.

Fortunately, once again, the Kansas Supreme Court has already resolved whether individual members of the District must be included to afford the District with standing. In *Sierra Club v. Moser*, 298 Kan. 298 Kan. 22 (2013), the Court relied on *Tri-County Concerned Citizens* to resolve whether to require participation of the appealing association's members.

The Court stated, "Finally, since Tri-County challenged the permit as arbitrary and capricious because it was issued on faulty environmental studies, that claim did not require the participation of its individual members." *Id*. Here, at the Hearing, the wealth of the evidence advanced to demonstrate the detriments of the City's Proposal was presented by the District. No testimony of individual members was necessary to most of these claims. Thus, for all the reasons articulated above, the District overwhelmingly has standing to pursue this appeal having refuted each contention raised by the DWR.

V. Attorney and Expert Witness Fees Should Be Awarded to the District

At the very least, attorney and expert witness fees should be awarded in this case for the reasons previously advanced by the District and not ruled on by the Chief Engineer. At the very least, the District would have standing to appeal an award of fees because "a fee award is independent of the merits of the case." *See, e.g., Cheng v. GAF Corp.*, 713 F.2d 886, 893 (2d Cir. 1983). The DWR adamantly opposed the District's argument that a new application was required or the other grounds for dismissal identified by the District in its pretrial motions. Thus, the DWR substantially helped push the matter to go to a lengthy Hearing. Now, at the 11th hour, the DWR has completely flipped its position and has contended that the Hearing should be rendered wholly irrelevant because it was wrong as an agency in its long-maintained position that a new application wasn't required. So, the DWR is now arguing that the Hearing—which it pushed for—was a futile and useless exercise because the District was originally correct in its position. The DWR's determination comes after countless resources were spent on the Hearing. Indeed, there should be some recourse for the DWR long advocating in favor of the City in all regards. That remedy is attorney and expert witness fees awarded to the District. As supported in the District's Petition for Judicial Review and its Motion for Reconsideration/Clarification, for

Ruling on the Substantive Issues, and for Attorney/Expert Witness Fees, if the Court determines that this case isn't ripe for further declaratory rulings, then attorney fees should be awarded (or perhaps regardless of the Court's ruling on the other dispositive issues).

VI. Preservation of Record

If the Court determines this case should not proceed, then it should at least rule that the record should be applicable in future proceedings. Despite posturing that it is impossible to predict what the City will do in the future, one doesn't need a crystal ball to appreciate the fact that the City will undoubtedly file a new application and pursue this exact proposal in the future (except for a few minor tweaks like at least mentioning water quality or impairment). Thus, the almost two weeks of a Hearing should not be for naught, and the record should be preserved for use in later proceedings. Again, the District believes that this case should proceed for the reasons articulated above and that this position is an absolute last resort.

VII. Conclusion

For all the reasons articulated above, the District respectfully requests that the DWR's Motion to Dismiss be denied, that the Petition for Judicial Review proceed to adjudication, that the Court grant the arguments raised by the District in this Response, and for all further relief the Court deems just and equitable.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian and David J. Stucky, do hereby certify that a true and correct copy of the above Response to Motion to Dismiss was electronically filed with the Clerk of the District Court of Harvey County, Kansas, by the eFlex system, which will send electronic notification to the following attorneys of record on the 29th day of August, 2022:

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