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CLERK OF THE HARVEY COUNTY DISTRICT COURT
CASE NUMBER: 2022-CV-000091
PII COMPLIANT

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

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| 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.

**ADDITIONAL COMMENTS TO 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 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 Additional Comments to Defendant Chief Engineer's Reply to the District's Response to the Chief Engineer's Motion to Dismiss, as follows

## I. Opening Comments

The District recognizes the need for pleadings to end with respect to the Chief Engineer's Motion to Dismiss. Thus, the District will only advance a few clarifying comments. All definitions and capitalized terms will be adopted from previous pleadings. However, it merits noting that the Chief Engineer responded to very few of the District's substantive contentions

raised in the District's lengthy responsive pleading. Thus, most of the District's arguments remain undisputed. The District also recognizes that, at the very least, the Court will need to review the agency record to make a proper decision. However, the District is confident that a thorough review of the transcript, the accompanying exhibits, and the corresponding pleadings will reveal that this case can and *should* be resolved on more substantive grounds than merely a ruling on the procedural defect of the City failing to file a new application. The former Chief Engineer publicly and formally opined that it was his belief, along with that of his agency, that AMCs are not passive recharge credits and are authorized by statutes and regulations. This Court has an opportunity to rectify this attempt to misconstrue the law and finally resolve these critical issues of great public importance.

## II. Clarifications Regarding the DWR's New Argument that Because the Right Result Was Reached, the Decision Should Not Be Subject to Appeal

The Chief Engineer continues to assert that the City's failure to file an application eliminates further jurisdiction and precludes additional analysis. The agency also expands on the District's contentions and now, for the first time, essentially advances the position that a meritorious party can't appeal a "correct" outcome even if the decision was based on erroneous facts. These arguments are easily distinguished.

The Chief Engineer writes, "Case law further provides that it would be a waste of judicial resources to review a decision that all parties essentially agree is correct,[1] even if they disagree on the reasoning that led to that decision." The District can understand that this may be true when a tribunal rules on ultimate matters raised at a trial or hearing on the merits. In that situation, the outcome of the ruling would resolve the matter and res judicata would preclude

[1]It is impossible to imagine that either the City or the DWR somehow now agree with the final outcome after arguing against all the contentions advanced by the District and arguing for a different result.

nearly identical issues from being litigated by those parties in the future. In such a scenario, judicial resources would be saved because claim preclusion would avoid another costly hearing or trial.

However, in this case, if the case is dismissed *solely* based on the City's failure to file an application, *everything else* is conceivably left to be litigated at a later date. This scenario is not one where there will be no harm, thus no foul. In fact, just the contrary. The District will be gravely prejudiced. It suffices to say that the Chief Engineer's ruling, while it results in the dismissal of the City's case, is essentially a gift to the City—and a nightmare for the District—because all of the District's other meritorious arguments were ignored. At a subsequent point in time, *of course* the City and the DWR will contend that the only matter where issue preclusion applies is with respect to the need to file a new application. And *of course* the City will avoid this argument and correctively file a new application.

Regardless of whether the City pursues an identical proposal or slightly alters its course, the City and the DWR will both contend that the City is not collaterally estopped from pursuing *any other* aspect of its current Proposal. Consequently, this protracted Hearing process and the approximately two weeks of actual Hearing will all be for not. Everything germane to the Proposal will be at issue again in the future. Instead, numerous arguments were fully litigated at the Hearing and are ripe for a declaratory judgment now. At the very least, multiple other jurisdictional contentions should be considered. This Court has the opportunity to save taxpayer money and to preclude countless resources from being invested in resolving identical (or nearly identical) issues in the future.

## III. Comments Regarding the DWR's Ongoing Contention that the District Lacks Standing to Participate as a Party in Virtually Any Proceeding Based on the DWR's Perceived Limitations on the District's Authority

The Chief Engineer does not expand on any of his previous arguments for why the District lacks standing. Instead, the Chief Engineer merely rewarms some of the same contentions—i.e. the District doesn't own a water right, the District isn't an aggrieved party, the District lacks home rule authority, etc. In the process, among many other unrefuted contentions by the District, the Chief Engineer neglects to counter the District's associational standing arguments in any respect, wholeheartedly ignores the law cited by the District with respect to a groundwater management district's authority, and fails to explain how the District could somehow have standing during the Hearing process but would suddenly lose it during the appeal process (for reasons that have nothing to do with the arguments raised on appeal). Based on the Chief Engineer having failed to counter any of these concepts, the District doesn't need to comment further and simply stands by the arguments it raised with respect to standing in its previous pleading. For obvious reasons, none of these standing arguments raised by the Chief Engineer should merit a dismissal of this appeal.

## IV. An Understanding of the Distinction Between the DWR and the Chief Engineer

In a final effort to pin the tail on the metaphorical donkey, the Chief Engineer wildly asserts that the District lacked an understanding of the functions of the DWR and the Chief Engineer. Even if true, this contention is wholly irrelevant and a red herring to the matters before the Court. That said, this notion couldn't be further from the case. For example, the District readily recognizes that the DWR argued until the bitter end[2] that the City wasn't required to file a new application and it was indeed the Chief Engineer that finally ruled against that

[2]Indeed, the DWR vigorously opposed this notion from prior to the time the District formally raised the argument in its Motion to Dismiss, until during closing arguments and in post-Hearing briefs.

absurd contention. And the District appreciates the fact that the Hearing Officer, in her almost 200-page opinion, ruled against virtually every argument advanced by the City and the DWR. Thus, the District made it very clear that it was the DWR that took an arbitrary and capricious approach throughout the Hearing process and readily acknowledges that the Chief Engineer correctly ruled on one important distinction advanced by the District. However, the District maintains that this was just one of many arguments advanced by the District that would have been simultaneously ripe for consideration. The District respectfully requests that this Court exercise its declaratory powers and make a ruling on some of the other critical matters raised of public interest.

## V. Conclusion

For the reasons articulated, the District prays that the Court deny the Chief Engineer's Motion to Dismiss and proceed with a substantive analysis of the issues before the Court, and for such further just and equitable relief as deemed proper by the Court.

RESPECTFULLY SUBMITTED:

/s/ Thomas A. Adrian
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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 Additional Comments 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 13th day of September, 2022:

Kenneth B. Titus, Chief Legal Counsel
Stephanie Kramer
Division of Water Resources
*Attorneys for Earl D. Lewis Jr., P.E., Chief Engineer*

And by mail, postage prepaid and properly addressed by depositing a courtesy copy of the same in the U.S. mail to:

City of Wichita
Brian McLeod
Department of Public Works & Utilities
455 North Main Street
Wichita, Kansas 67202

Richard Basore, Josh Carmichael, Judy Carmichael, Bill Carp, Carol Denno, Steve Jacob, Terry Jacob, Michael J. McGinn, Bradley Ott, Tracy Pribbenow and David Wendling
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120 SW 10th Ave., 2nd Floor
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and the original sent by (___) mail, (___) fax, (___) email, and/or (__x__) electronically filed to/with:
Harvey County District Court, Ninth Judicial District
Newton, Kansas

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