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**STATE OF KANSAS
BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE**

In the Matter of the City of Wichita's)
Phase II Aquifer Storage and Recovery Project) Case No. 18 Water 14014
In Harvey and Sedgwick Counties, Kansas.)

Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.

MOTION FOR SUMMARY JUDGMENT

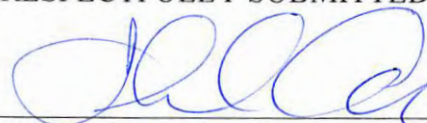
Comes now the Equus Beds Groundwater Management District No. 2 (hereinafter “the District”) pursuant to K.S.A. 60-256, and other authority, and respectfully requests the Chief Engineer to grant the District’s Motion for Summary Judgment as there are no relevant genuine issues of material fact. The District moves the Chief Engineer, as a matter of law, to deny the City of Wichita’s (hereinafter “the City”) March 12, 2018, ASR Permit Modification Proposal which includes requests to (1) lower the Minimum Index Levels; and (2) allow the City to accumulate Aquifer Maintenance Credits (hereinafter “AMCs”) for diverting surface water from the Little Arkansas River during times when recharge capacity in the Equus Beds Aquifer (hereinafter “Aquifer”) is limited, sending it directly to the City for municipal use, and accumulating AMCs which would allow the City to later withdraw those credits from the Aquifer without having first recharged the Aquifer with real physical source water. The City proposes to be allowed to do this without filing any new or change applications as required by the Kansas Water Appropriation Act. (hereinafter “KWAA”).

The basis for this Motion for Summary Judgment is that, as a matter of law, the City's proposed changes:

- (1) To allow expansion of the consumptive use of a water right **without filing a new application or change application**, which is contrary to the Kansas Water Appropriation Act (KWAA) K.S.A. 82a-701 et seq. and the regulations promulgated thereunder, namely K.A.R. 5-1-1 and 5-12-1 through 5-12-4, and K.A.R. 5-22-7.
- (2) To fundamentally modify the existing ASR Phase II approved ASR water permits without filing any change or new applications.
- (3) Accumulation and use of **AMCs are not authorized** by the Kansas Water Appropriation Act, and the regulations promulgated thereunder.
- (4) Accumulation and use of **AMCs are inconsistent in general with the principles of the Prior Appropriation Doctrine**, specifically that these changes would allow an increase in the consumptive use of the City's water rights under their initial priority in a manner that will cause impairment of water rights in existence at the time of the request.
- (5) Are in direct contradiction to the prior orders of the Chief Engineer in Phase I and Phase II of the City's Aquifer Storage and Recovery (ASR) project prohibiting use of "passive credits" in this ASR project.

WHEREFORE, the District moves the Chief Engineer to grant its Motion for Summary Judgment and deny the City of Wichita's ASR Permit Modification Proposal, as submitted to the Chief Engineer on March 12, 2018, seeking to lower the Minimum Index Levels and allow the City to accumulate Aquifer Maintenance Credits, and for such other relief as the Chief Engineer deems just and equitable.

RESPECTFULLY SUBMITTED,



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Management District Number 2

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 was served by () mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; () fax; (x) email; and/or () hand delivery on the 11th day of March, 2019, to:

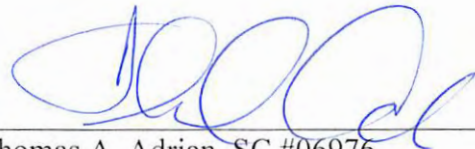
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4. AMCs would allow the City to accumulate, during times of limited recharge capacity in the Equus Beds Aquifer (hereinafter “Aquifer”), recharge credits for diverting water from the Little Arkansas River, treating it, and pumping it directly to the City for municipal use, instead of physically recharging the Aquifer with the source surface water. (*See id.*; 6-1-2018 Letter from Chief Engineer; DWR’s answers to the District’s written Discovery; City’s answers to the District’s written Discovery: Deposition of Lane Letourneau.)
5. The City, without ever actually physically recharging the Aquifer with source treated surface water from the Little Arkansas River, is requesting authority to withdraw the AMCs from the Aquifer at any time in the future, even during a severe drought. (*See id.*; DWR’s answers to the District’s written Discovery; City’s answers to the District’s written Discovery; Deposition of Lane Letourneau.)
6. The City would be allowed to withdraw at least up to 19,000 acre-feet annually using the City’s existing ASR Phase II recharge withdrawal water permits, per the Proposal. (*See* DWR’s Amended and Supplemental Response to Interrogatory No. 16 of the Second Set of Interrogatories propounded upon DWR by the Equus Beds Groundwater Management District No. 2.; Proposal.)
7. The City’s Proposal does not address water quality. (*See* Proposal.)
8. The City’s Proposal does not consider impairment. (*See id.*)
9. The City’s Proposal does not take into account the impact on minimum desirable streamflow. (*See id.*)
10. The City’s Proposal does not address the unreasonable raising and lowering of the static water level. (*See id.*)

11. The DWR has indicated that it will determine the circumstances under which AMCs can be withdrawn at a later time. (*See id.*: DWR’s answers to the District’s written Discovery.)

Analysis

I. Standard Governing a Summary Judgment Motion

The standards governing a summary judgment motion are well known. The rules could be succinctly summarized as follows:

When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.

Shamberg, Johnson & Bergman, Chtd. v. Oliver, 289 Kan. 891, 900, 220 P.3d 333 (2009).

Indeed, the Chief Engineer can apply these standards when ruling on the District's Motion)

II. Relevant Statutes and Background

In Kansas, all water belongs to the State, not to individual landowners. K.S.A. 82a-702. That section states: “All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.” Even though landowners do not own the water, “all waters within the state may be appropriated for beneficial use.” K.S.A. 82-703 and 82a-707(a).

Kansas has adopted the Kansas Water Appropriation Act (hereinafter “KWAA”), found at K.S.A. 82a-701, *et seq.* Under the KWAA, the Chief Engineer is authorized to “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 of this state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation.” K.S.A. 82a-706. This power is amplified by the language, “This [water appropriation] act shall be construed liberally to effectuate the purposes hereof, and the enumeration of specific powers in this act shall not operate to restrict the meaning of any general grant of power contained in this act or to exclude other powers comprehended in such a general grant.” K.S.A. 82a-721. The Chief Engineer is further authorized to “adopt, amend, promulgate, and enforce such reasonable rules, regulations, and standards necessary for the discharge of his or her duties and for the achievement of the purposes of this act pertaining to the control, conservation, regulation, allotment, and distribution of the water resources of the state.” K.S.A. 82a-706a.

It was pursuant to the above authority that the Chief Engineer adopted regulations authorizing Aquifer Storage and Recovery Permitting. *See* K.A.R. 5-12-1 through K.A.R. 5-12-4, and K.A.R. 5-22-1, 5-22-7, 5-22-10, and 5-22-17. In accordance with the KWAA and the ASR regulations (enumerated below), the Chief Engineer issued the original approvals for Wichita to operate its Phase I and Phase II of its ASR project.

K.S.A. 82a-708b provides the sole legal authority for making changes to any existing water right. “(a) Any owner of a water right may change the place of use, point of diversion or the use made of the water, provided such **owner shall**:

- (1) Apply in writing to the chief engineer for approval of such proposed change,
- (2) **Demonstrate** to the chief engineer that any proposed change is **reasonable** and **will not impair existing rights**.
- (3) Demonstrate to the chief engineer that any proposed change relates to the **same local source of supply** as that to which the water right relates.
- (4) ...The chief engineer shall approve or reject the application for change in accordance with the **provisions and procedures** prescribed for **processing original applications to appropriate water....**” (Emphasis supplied)

If a water right is to be changed pursuant to K.S.A. 82a-708b, the provisions for processing a new application to appropriate water, found at K.S.A. 82a-708a, 82a-709 through 714, and the appropriate regulations, must also be followed.

The Chief Engineer must consider various factors in approving the City's Proposal. Among other things, K.S.A. 82a-711(a) provides, "If a proposed use **neither impairs a use under an existing water right nor prejudicially and unreasonably affects the public interest**, the chief engineer shall approve all applications for such use made in good faith in proper form which contemplate the utilization of water for beneficial purposes, within reasonable limitations..." *Id.* (Emphasis supplied). Subsection (b) provides:

In ascertaining whether a proposed use will prejudicially and unreasonably affect the public interest, the chief engineer shall take into consideration:

- (1) established minimum desirable streamflow requirements;
- (2) the area, safe yield and recharge of the appropriate water supply;
- (3) the priority of existing claims of all persons to use the water of the appropriate water supply;
- (4) the amount of each claim to use water from the appropriate water supply; and
- (5) all other matters pertaining to such question.

Subsection (c) concludes:

With regard to whether a proposed use will impair a use under an existing water right, provides that: impairment shall include: the **unreasonable raising and lowering of the static water level or the unreasonable increase or decrease of the streamflow** or the **unreasonable deterioration of the water quality** at the water user's point of diversion beyond a reasonable economic limit.

Id. (Emphasis supplied).

So, by combining the provisions of K.S.A. 82a-708b and K.S.A. 82a-711, if a water right owner proposes a change to an existing water right, the **burden is on the owner** of the water right **to demonstrate** to the chief engineer that the proposed change:

- (1) Is reasonable,

- (2) Will not impair existing water rights [meaning all water rights, permits, and applications with a priority date senior to the change application (senior water rights) not just those senior to the original priority],
- (3) Will not prejudicially and unreasonably affect the public interest,
- (4) Will not cause an unreasonable raising and lowering of the static water level,
- (5) Will not cause an unreasonable increase or decrease of the streamflow,
- (6) Will not cause the unreasonable deterioration of the water quality beyond a reasonable economic limit,
- (7) Will withhold from appropriation that amount of water necessary to establish and maintain for the identified watercourse the minimum desired streamflow, and

The Chief Engineer must fully employ this analysis in reaching a conclusion at the administrative hearing and the City must demonstrate each of these factors. The failure of the City to prove its case with respect to all of these factors, mandates denial of the City's Proposal.

III. Regulations

There are several Rules and Regulations that were established when the City's ASR Project was first being considered and permitted. These include, but are not limited to:

1. K.A.R. 5-12-1(a) states that: "An operator may store water in an aquifer storage and recovery system under a permit to appropriate water for artificial recharge if the water appropriated is source water."
2. "Aquifer storage and recovery system" as defined by K.A.R. 5-22-1(d) and K.A.R. 5-1-1(f) "means a physical infrastructure that meets the following conditions: (1) Is

constructed and operated for artificial recharge, storage, and recovery of source water; and (2) Consists of apparatus for diversion, treatment, recharge, storage, extraction, and distribution.”

3. “Artificial Recharge” as defined by K.A.R. 5-22-1(f) and K.A.R. 5-1-1(g) “means the use of source water to artificially replenish the water supply of the aquifer.”
4. “Aquifer storage” as defined by K.A.R. 5-22-1(c) and K.A.R. 5-1-1(e) “means the act of storing water in the unsaturated portion of an aquifer by artificial recharge for subsequent diversion and beneficial use.”
5. “Recharge Credit” as defined by K.A.R. 5-22-1(ee) and K.A.R. 5-1-1(mmm) “means the quantity of water that is stored in a basin storage area and that is available for subsequent appropriation for beneficial use by an operator of the aquifer storage and recovery system.”
6. “Source Water” as defined by K.A.R. 5-1-1(yyy) “means water used for artificial recharge that meets the following conditions: (1) Is available for appropriation for beneficial use; (2) is above-base flow stage in the stream; (3) is not needed to satisfy minimum desirable streamflow requirements; and (4) will not degrade the ambient groundwater quality in the basin storage area.”

Each of these regulations will be analyzed in later detail in this Memorandum.

Analysis

I. The ASR Program, Pursuant to Phases I and II, Actually Physically Recharges the Aquifer

The ASR program, as authorized in Phases I and II, was designed to allow the City to take actual physical surface water from the Little Arkansas River, treat it, and inject it into the Equus Beds Aquifer. The City was then authorized to withdraw the physical recharge water that

it had actually put in storage, and then divert it to the City. This is consistent with the KWAA and its regulations. Generally, throughout the western United States, when a water right owner exercises his or her usufructary water right by diverting water and taking it under control, it then becomes the personal property of the water right owner until the owner again loses control of it. *E.g. Department of Ecology v. United States Bureau of Reclamation*, 118 Wash. 2d 761, 827 P.2d 275 (1992). Throughout the western United States, including Kansas, water right owners are allowed to divert and store water in reservoirs, usually surface reservoirs, and later divert it from the reservoir for consumptive use. *E.g. K.A.R. 5-6-1 through 5-6-11*

Kansas law also provides that, “Any person may conduct water into and along any of the natural streams or channels of the state, and may withdraw all such waters so by him turned into such channel at any point desired, without regard to prior appropriations of water from said stream, due allowance being made for evaporation and seepage.” K.S.A. 42-303. In Kansas, a water right owner may divert surface water, particularly at a time of surplus, store it, and then release it into a stream or river to convey it to another site where it would again be diverted and used by the water right owner.

Phase I and II of the ASR program were authorized with exactly those principles in mind. *See K.A.R. 5-12-1 through 5-12-4*. The ASR regulations are clearly based on having a water right owner deposit real physical water into an aquifer, and not get fictional credits to later divert water from the Aquifer for delivering water directly to the City.

On the other hand, neither the KWAA nor any of the regulations adopted pursuant to it, expressly authorize the use or concept of AMCs. Phases I and II of the City’s ASR program authorize diversion of surface water from the Little Arkansas River, treating and storing it in the Equus Beds Aquifer, and later diverting it by means of wells to be used for municipal use by the

City. Under this scenario, the City never loses control of its water and is allowed to continue to use the stored water (subject to the required annual accounting report and Chief Engineer's determination of the amount of established recharge credits based on physical source water injection and losses) until it loses possession of it after being used for municipal purposes. As indicated below, the AMC Proposal stands in stark contrast to this concept.

II. The City's Proposal Expands the Consumptive Use and Allows for Two Beneficial Uses

Another bedrock principle of Kansas water law is that once a permit is granted, no changes may be made to it that would expand the quantity of water diverted or the quantity of water consumed. "The extent of consumptive use shall not be increased substantially after a vested right has been determined or the time allowed in which to perfect the water right has expired, including any authorized extension of time to perfect the water right." *See* K.A.R. 5-5-3. Kansas regulations also prohibit material expansion of the authorized place of use for irrigation. Expanding the authorized place of use for irrigation would allow the water right owner to consistently apply a higher percentage of his water right more frequently than he would have been able to do had the place of use not been expanded. Consequently, a Kansas regulation provides generally that an application to increase an irrigation place of use may not be enlarged by 10 acres or 10 percent of the base acres, whichever is less. *See* K.A.R. 5-5-11.

There are two real types of water in the Aquifer: 1) native groundwater and 2) physical recharge credits. The first type of water in the Aquifer is native groundwater that has naturally entered into the Aquifer, which is subject to the priority system. The second type of water is physical recharge credits, which is treated surface water that the City has physically injected into the aquifer and is personal property of the City as long as it remains within its control. Subject to the approved ASR permits and Orders, it may be pumped at any time, except when the static

water level is below the established minimum index levels, which represent the historic lowest groundwater levels in the ASR basin storage area of the Aquifer.

What the City is proposing to do to accumulate AMCs is to divert surface water from the Little Arkansas River, treat it and send it directly to the City for municipal use. Thereby, by use of AMCs, the City will get permission from the Chief Engineer to later divert native groundwater from the Equus Beds Aquifer that the City never put there in the first place.

Water Permit No. 46,627 authorizes the use of water for two beneficial uses: 1) artificial recharge and 2) municipal use. The permit does not authorize AMCs as a beneficial use, because AMCs are neither artificial recharge nor municipal use and AMCs are not one of the 14 beneficial uses found in K.AR. 5-1-1(o). If the accumulation of AMCs is approved, the City would be authorized to divert surface water from the Little Arkansas River, treat it, and pump it to the City for municipal use, which is clearly already allowed. However, at the same time the treated surface water was being used for municipal use, the same surface water would be counted as a recharge credit (minus any initial loss). It is impossible for the same water to be used simultaneously for two different uses—in this case, for municipal use and for the accumulation of AMCs. Additionally, the City's recharge credits recovery water permits authorize the withdrawal of groundwater recharge credits, not AMCs. AMCs are a different source of water for which no definition exists in Kansas statutes or regulations. Changing the source of water to AMCs is not allowed pursuant to K.S.A. 82a-708(b), as the proposed change does not relate to the same local source of supply. The City's Proposal should be denied for these reasons and summary judgment granted in the District's favor.

Additionally, the proposed lowering of the Minimum Index Levels would also expand the quantity of water that the City could divert from the Aquifer. Currently, the City cannot recover

(pump) recharge credits if the static water level is below the historic low groundwater elevation (current established minimum index levels). The City's Proposal would lower the minimum index levels between 9.10 feet and 23.42 feet depending upon Index Cell, thus allowing the City to pump more groundwater than currently allowed. As shown in the expert report from Dave M. Romero, Balleau Groundwater, Inc., the proposed lowering of the minimum index levels would expand the City's ability to pump recharge credits by 79,500 acre-feet compared to the current minimum index levels.

III. The City's Proposal is Subject to Safe Yield and thus the Aquifer is Closed to New Appropriations

The water the City is asking to divert using its AMCs is the native groundwater present in the Aquifer, which is there as a result of recharge from precipitation, the required return flow from other water rights in the area, and from other sources. To divert such native groundwater, the City is required to file new¹ applications to divert native water from the Equus Beds. Those applications diverting water are subject to the District's regulations requiring new applications to meet the safe yield regulations of the District. K.A.R. 5-22-7.

As Tim Boese, Manager of the District, explained in his expert report, based on safe yield evaluations conducted previously by the District, there is no groundwater available for appropriation in the City's Equus Beds Aquifer well field area and therefore new groundwater appropriations cannot be approved, except for recovery of recharge credits established as a result of actual physical artificial recharge.

AMCs would allow appropriation of groundwater where there is no groundwater available for appropriation due to the safe yield regulations. This is not in the public interest as provided by K.A.R. 5-3-9 (b), which states that "Unless otherwise provided by regulation, it

¹This is addressed in the District's Motion to Dismiss.

shall be considered to be in the public interest that only the safe yield of any sources of water supply...shall be appropriated.” K.A.R. 5-22-7(a) provides, subject to certain exceptions, “The sum of prior appropriations shall not exceed the allowable safe-yield amount for that area of consideration.” K.A.R. 5-22-7(b) does exempt the application for an aquifer storage and recovery well from the safe yield regulation, but only based on the ASR regulations and Memorandums of Understanding (MOUs) in place or being drafted at the time this regulation was adopted, and was clearly contemplated to include the aquifer being artificially recharged by a source water being physically injected into the aquifer. Further, the concept of AMCs had not been proposed when K.A.R. 5-22-7(b) was conceived and approved.

Allowing natural groundwater to be diverted, instead of physical artificial recharge water, would be a fundamental change in the regulations of ASR projects. To allow the City to divert AMCs would be to allow the City to divert native groundwater which other water right holders in the Aquifer have a prior right to divert, and should be subject to the safe yield analysis. This is yet another reason that summary judgment is appropriate in the District’s favor.

IV. The City has Failed to Address Requisite Factors in Its Proposal Germane to Altering a Permit

As indicated previously, the City must demonstrate that its Proposal will not impair the rights of other water users. K.S.A. 82a-711(a). This includes taking into account water quality and the impact on minimum desirable streamflow. The City must also demonstrate that the Proposal is reasonable, will not cause the unreasonable raising or lowering of the static water level, and will not prejudicially and unreasonably affect the public interest. *See id.* The City’s Proposal fails to take into account these factors. Thus, summary judgment should be granted for this reason as it is explicitly required by statute. This is yet another fatal flaw in the City’s Proposal.

V. AMCs are Inconsistent with Current Regulations

The proposed Aquifer Maintenance Credits are not consistent with the rules and regulations adopted by the Chief Engineer in the following obvious ways:

1. The proposed accumulation of AMC's does not meet the definition of "Source Water" found in K.A.R. 5-1-1(yyy), as the source water from the Little Arkansas River is not being used for artificial recharge when AMCs would be accumulated; rather the source water is being used for municipal use.
2. The proposed accumulation of AMCs does not meet the definition of "Artificial Recharge" found in K.A.R. 5-22-1(f) and K.A.R. 5-1-1(g), as the source water from the Little Arkansas River is not being used to artificially replenish the water supply of the aquifer; rather, the source water is being used for municipal use.
3. The proposed accumulation of AMC's does not meet the definition of "Aquifer Storage" found in K.A.R. 5-22-1(c) and K.A.R. 5-1-1(e), as the source water from the Little Arkansas River is not being stored in the unsaturated portion of the Equus Beds Aquifer by artificial recharge; rather, it is being used for municipal use.
4. AMCs are a different source of water for which no definition exists in Kansas statutes or regulations, unlike "groundwater," "surface water," and "recharge credits," which are all defined in K.A.R. 5-1-1.
5. "Recharge credit" means the quantity of water that is stored in the basin storage area and that is available for subsequent appropriation for beneficial use by the operator of the aquifer storage and recovery system." K.A.R. 5-1-1(mmm) and K.A.R. 5-22-1(ee). With the City's Proposal, no water is actually being physically stored in the Aquifer which would qualify as a "recharge credit" as defined by these regulations.

6. Clearly, AMCs do not meet this definition of Source Water. In particular, the definition of source water does not include an offset for water **not pumped** from the Aquifer, as proposed by the Wichita ASR.

Thus, for very obvious, fundamental reasons, summary judgment should be granted in the District's favor. No further analysis is required.

However, a more in-depth statutory construction further supports this conclusion. K.A.R. 5-22-1(f) and K.A.R. 5-1-1(g) both refer to artificially replenishing the *aquifer*. Further, the entire set of regulations deal with “*aquifer* storage and recovery.” *See, e.g.,* K.A.R. 5-12-1 *et seq.* (emphasis added). A regulation can be construed by looking at titles and plain language. Indeed, there would be no reason to even refer to the term “aquifer” in the regulations if the intent of the regulations was not to require water to be stored in an aquifer.

These statutes further specify that an accounting method must be used to quantify the water injected into the aquifer. K.A.R. 5-12-2 defines the accounting of water in the context of water “entering and leaving the basin storage area.” Additionally, K.A.R. 5-12-2 requires the accounting to include the amount of “artificial recharge.” K.A.R. 5-1-1(k) and K.A.R. 5-22-1(l) indicates that a “basin storage area” means “the portion of the *aquifer* used for aquifer storage...” *Id.* (emphasis added). Again, this further clarifies that the source water must actually be put in the aquifer.

The regulations are also predicated on the use of “source water” per K.A.R. 5-1-1(g) and K.A.R. 5-22-1(f). The definition of source water found in K.A.R. 5-1-1(yyy) further contemplates that the water will be stored in the aquifer, because a condition is that the source water “will not degrade the ambient groundwater quality of the basin storage area.” Again, there

would be no mandate regarding the quality of water in the aquifer if it wasn't contemplated that the water was actually injected into the aquifer.

K.A.R. 5-1-1(e) and K.A.R. 5-22-1(c) also refers to "artificial recharge" and the plain language indicates that an aquifer will be recharged. The ordinary meaning of recharge refers to the "act of recharging" or restoring. *Webster's Dictionary*. K.A.R. 5-21-1(f) and K.A.R. 5-1-1(g) further clarifies by using the terms "the use of source water to artificially replenish the water supply in an aquifer." Indeed, the City's approach is analogous to running a machine directly off of an electrical hookup instead of first recharging the battery and allowing the machine to operate remotely from the battery.

As indicated above, K.A.R. 5-1-1(mmm) and K.A.R. 5-22-1(ee) both specify that a credit is derived from water put into a basin storage area and "available for *subsequent* appropriation." *Id.* (emphasis added). Again, the word "subsequent" has significance pursuant to the plain language of the regulation. The water must actually be injected into the aquifer for *later* use.

Finally, K.A.R. 5-21-1(c) and K.A.R. 5-1-1(e) refers to "aquifer storage" in the context of water being placed in the "unsaturated portion" of an aquifer. Again, the term "unsaturated" would not be used if it wasn't contemplated that the water would actually be injected into the aquifer. This same definition uses similar language found in other sections that refers to the aquifer being artificially recharged for subsequent diversion. Further, no other statutes or regulations provide a vehicle for the AMC approach proposed by the City. Thus, it is obvious that the current state of statutes and regulations do not provide a clear framework for the City's Proposal.

To allow the City to divert such water without filing new applications to appropriate the native groundwater in the Aquifer, undermines the entire process for permitting water rights in

the area. If the AMC program is approved, the City will not be diverting fictitious water, or even water it had artificially recharged, it will be diverting real physical, native groundwater which other water right holders in the Aquifer have a priority to divert. The City has proposed NO plan as to how it will offset its use of AMC credits, and therefore the Chief Engineer should not approve the City's project to accumulate AMCs. Summary judgment is appropriate against the City on this issue.

VI. The Chief Engineer is Precluded from Granting the City's Proposal While Later Determining the Circumstances Under Which AMCs Can Be Withdrawn

As indicated in the District's Motion to Dismiss, the Chief Engineer cannot grant a permit and then later alter it. *See Clawson v. State*, 49 Kan. App. 2d 789, 792, 315 P.3d 896 (2013). DWR has repeatedly said that if it grants the City's Proposal, the conditions under which AMCs can be withdrawn will be determined at a later time. This approach is fatal pursuant to *Clawson*. The Chief Engineer cannot determine these issues in a piecemeal fashion. In order to properly retain jurisdiction, all issues must be adjudicated at the same time.

VII. The City's Proposal Seeks Passive Recharge Credits

In Phase I and perhaps in Phase II of the City's ASR project, it appears that the City expressly sought approval of "passive recharge credits," but that request for passive recharge credits was expressly denied when the Chief Engineer approved Phases I and II of the City's ASR program. In the Chief Engineer's Findings, Conclusions and Order, dated August 8, 2005, concerning Phase I, there are four places where the issue of passive credits was discussed:

1. On page 2 it listed the issues to be addressed in the public hearing, including, "Will the City be considered to be recharging water into the Equus Beds by the concept of 'passive recharge?' –i.e., water which the City could have legally pumped, but did not pump."
2. On page 9 it states, "42. The final amended M.O.U. between the City and GMD #2 did not contain an agreement or recommendation concerning the City's request for passive recharge **credit (credits for not pumping City wells in the basin storage area)** and deferred the matter to the Chief Engineer." (Emphasis supplied)

3. On page 11, the Chief Engineer concludes, “3. That passive recharge credits should not be allowed because they are not ‘artificial recharge’ as defined in K.A.R. 5-1-1, because no source water is being artificially recharged to create those credits.”
4. Then finally, on page 14, the Chief Engineer decides, “2. That passive recharge credits shall not be allowed.”

(*Id.*) So, in the Findings, Conclusions and Order approving Phase I of the City’s ASR, dated August 8, 2005, the Chief Engineer orders that **passive recharge** credits (credits for water which the City legally could have pumped, but did not pump) **shall not be allowed**.

Subsequently, in the Chief Engineer’s Findings and Order for the City of Wichita’s Aquifer Storage and Recovery Project-Phase II, dated September 18, 2009, “passive credits” was mentioned twice. Specifically, in paragraph 11 of the Findings, page 2, the Chief engineer finds,

11. That as referenced by GMD #2 in their recommendation of approval, and to maintain consistency with the Phase I ASR project, the new applications shall be subject to the pertinent conditions established in the ‘Original Order’, and as modified by the August 1, 2006 (‘Modified Order’), more specifically identified as follows: A. That passive recharge credits shall not be allowed.

Thus, through the orders of the Chief Engineer in approving Phases I and II of the City’s ASR project, the Chief Engineer expressly denied allowing the City to have “passive recharge credits.” The reason given was that they do not constitute ‘artificial recharge’ as defined in K.A.R. 5-1-1, because no source water is being artificially recharged to create those credits. K.A.R. 5-1-1 (g) provides, “‘Artificial recharge’ means the use of source water to artificially replenish the water supply in an aquifer.”

The City’s proposal to obtain AMCs is exactly what is termed “passive recharge credits” in the Phase I and II orders, and AMCs still fail to overcome the reason “passive recharge credits” were denied in the first instances, namely that no water is being used to artificially replenish the water supply in the aquifer. To approve AMCs now would fly in the face of

existing statutes and regulations and directly contradict the Chief Engineer's orders approving Phase I and Phase II of the City's ASR program.

To sum up our position, the former Chief Engineer, David Pope, who initially authorized the City's ASR Project, concluded in his expert report that:

1. Passive Recharge Credits are prohibited by the Orders issued by the Chief Engineer approving Phase I and Phase II of the City's ASR program. If the ASR Project is not adding physical recharge, then the AMCs, that allow credits for not pumping City wells in the basin storage area, are passive recharge that should not be allowed.
2. The concept of a "functionally equivalent method" to accumulate and account for recharge credits would not be in the public interest and should not be allowed, due to the potential adverse impacts to the aquifer and other water right holders, especially during periods of extensive drought.

(Id.) The City's Proposal to accumulate AMCs by diverting water directly to the City while declining to inject water into the Aquifer for storage, is the textbook definition of passive recharge credits. Because the City's Proposal is nothing other than passive recharge credits, summary judgment should be granted on this issue.

VIII. Conclusions

The proposed AMC's are not authorized by, nor consistent with, the provisions of the Kansas Water Appropriation Act and its regulations, and are contradictory to the Chief Engineer's orders approving Phases I and II of the City's ASR project. AMCs are a different source of water and a different beneficial use for which no definition exists in Kansas statutes or regulations. Additionally, lowering of the minimum index levels would expand the City's ASR Phase II recharge credit withdrawal permits. The City has not met the burden to show that the proposed changes of both lowering the minimum index levels and allowing the accumulation and pumping of AMCs:

1. Is reasonable,

2. Will not impair existing water rights,
3. Will not prejudicially and unreasonably affect the public interest,
4. Will not cause an unreasonable raising and lowering of the static water level,
5. Will not cause an unreasonable increase or decrease of the streamflow, and
6. Will not cause the unreasonable deterioration of the water quality beyond a reasonable economic limit.

Accordingly, The Chief Engineer should deny the City's Proposal to lower the minimum index levels and allow the accumulation and pumping of AMCs and grant summary judgment on this issue.

RESPECTFULLY SUBMITTED,



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Management District Number 2

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 was served by () mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; () fax; (x) email; and/or () hand delivery on the 11th day of March, 2019, to:

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