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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 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., Leland Rolfs of Leland Rolfs Consulting, and David Stucky, with its Motion to Dismiss. In support of such Motion, Movant states as follows:

Background and Facts

I. Facts Germane to the Motion to Dismiss Based on the Face of the City’s Proposal

- a. The City previously entered into Memorandums of Understanding hereinafter “(MOUs)” with the District that included numerous conditions including as part of the City’s Commitment in Issue No. 6 of the Phase II MOU, that the City can only pump recharge credits when the groundwater levels are above the historic low level (i.e the currently established minimum index levels). (See MOUs.)
- b. On March 12, 2018, the City submitted to the Chief Engineer of the Division of Water Resources a proposal titled “ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits” (hereinafter “the

Proposal”). (*See* City’s ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits.)

- c. The Proposal seeks to lower the minimum index levels in the City of Wichita ASR Project basin storage area of the Equus Beds Aquifer (hereinafter “the Aquifer”). (*See id.*)
- d. The Proposal seeks to allow the City to divert water from the Little Arkansas River directly to the City of Wichita for municipal use, while at the same time accumulating Aquifer Maintenance Credits (hereinafter “AMCs”). (*See id.*)
- e. The AMCs will allow the City to later withdraw groundwater from the Aquifer. (*See id.*)
- f. The City has not filed a change application or new water appropriation application along with its Proposal. (*See id.*)
- g. The Proposal, if approved as proposed, would also allow the City to withdraw its AMCs without filing any new or change applications, as required by the Kansas Water Appropriation Act. (*See id.*)

Analysis

II. Standard

Again, it is recognized that this hearing process is not strictly governed by the rules of civil procedure. However, the parties mainly adopted those rules. Thus, this Motion is styled pursuant to K.S.A. 60-212 and K.S.A. 60-241.

III. The City's Failure to Seek a Change Application Is Fatal to the City's Request

In this case, the City has not filed a change application with DWR. K.S.A. 82a-708b provides the sole legal authority for making changes to any existing water right. That statute promulgates:

- (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....**

Id. (Emphasis supplied). If an applicant desires to change a water right 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.

In Kansas, once a water right is acquired, the only three attributes of a water right that may be changed are the: (1) the authorized point of diversion, (2) the authorized place of use, and (3) the use made of the water. K.S.A. 82a-708b. Otherwise, no other changes to a water right are expressly authorized by the Kansas Water Appropriation Act hereinafter "(KWAA)." This requirement is there to prevent any change in the operation of a water right to the detriment of all water rights, permits, and applications in existence as of the date of the change application (senior water rights).

The proposed AMC program will have the effect of allowing the City to use its water to accumulate AMCs—arguably not a beneficial use recognized by law—and to increase its consumptive use under its existing water rights, without filing either a new or change application. This is something that could not be done even if the City filed a change application,

so it should be unlawful to do so without filing a new or change application. Any change in the operation of an existing water right cannot impair a water right in existence at the time the change is requested. K.S.A. 82a-708b(a)(2).

At the very least, on the face of the City's Proposal, the City will alter the methodology in which water is diverted from the Aquifer. The City will be allowed to first divert water directly from the Little Arkansas River and pump the water directly to the City. Later, the City will be allowed to divert native groundwater from the Aquifer directly to the City without first adding to the groundwater supply by injecting source water from the Little Arkansas River into the Aquifer. In the case of the City's existing 30 ASR recharge credit withdrawal permits, this amounts to up to 19,000 acre-feet per year. This constitutes two sources of water and at least two points of diversion. Thus, at the very least, this is tantamount to changing the point of diversion and the source of supply.

De minimus changes can be made to existing water rights without the filing of a change application through a Finding and Order issued by the Chief Engineer, but such changes are usually to correct errors, like obtaining better information as to where a well or place of use is actually located or correcting typos. Additionally, other type of changes can be made through Findings and Orders, such as dividing a water right into two or more rights and reducing a water right's place of use, quantity, etc. However, none of these types of changes allow expansion of a water right, altering the point of diversion, or changing the local source of supply. The maximum annual quantity cannot be increased, and the consumptive use cannot be increased (for example, in the case of an irrigation water right, the irrigated acres may be increased only a nominal amount, e.g. 10 acres or 10 percent, whichever is less). The priority date also cannot be changed.

DWR has adopted the proper change application form that must be filed if a water user wishes to change a permit or water right. DWR has also adopted the proper new appropriation form that must be filed if a person wishes to apply for a permit to appropriate water. These forms can be found on DWR's website. The City has failed to file a new or change application. Thus, the City's Proposal must be dismissed as facially defective.

IV. The Chief Engineer Does Not Have Authority to Alter the City's Permit Absent A Change Application Being Filed

The Kansas Court of Appeals has made it abundantly clear that water rights or permits may not later be altered by the Chief Engineer after they have been granted. *See Clawson v. State*, 49 Kan. App. 2d 789, 792, 315 P.3d 896 (2013). Indeed, this conclusion makes sense as it offers predictability to both the applicant and the surrounding water users. In *Clawson*, Mary Clawson "obtained 10 approvals and permits from the chief engineer of the DWR to appropriate water." *Id.* At 792. In doing so, the chief engineer imposed a monitoring plan to retain jurisdiction to alter aspects of the permits, as deemed necessary, at a later time. *Id.* Ms. Clawson argued that the chief engineer lacked authority to later alter her permits. *Id.* At 793. The Kansas Court of Appeals agreed. *Id.*

In reaching this conclusion, the Court of Appeals labored to examine various statutes and laws germane to water rights. As stated in *Clawson*, "[T]he KWAA does not give the chief engineer carte blanche authority to alter water appropriations." *Id.* at 807. The *Clawson* case only identifies a handful of reasons the chief engineer can alter a permit or water right, absent a change application being filed, including abandonment and the ability to suspend a water right. *Id.* Instead, the court concludes that "the KWAA does not authorize the chief engineer to reevaluate and reconsider an approval once a permit has been issued." *Id.*

In this situation, the City is seeking to alter water permits after they have been previously approved subject to a variety of conditions. Indeed, the City is seeking to lower the established aquifer minimum index levels that govern when the City can pump groundwater recharge credits, alter the nature of the source water, change how the water is diverted, and eliminate the need to physically recharge the Aquifer to establish recharge credits. If the City's Proposal is approved, the City would be allowed to obtain multiple beneficial uses for any surface water diverted from the Little Arkansas River when the Aquifer's artificial recharge capacity is limited as determined by the City. By necessity, this fundamentally requires an altering of the water permits already granted to the City. There is certainly no other way to construe the City's Proposal. Thus, based on *Clawson*, the City's Proposal must be dismissed on its face. To the extent the City or DWR argues that no change application is required because the City is merely altering a water permit, this argument is to no effect under *Clawson*. The City's Proposal must still be dismissed on its face.

V. The City's Proposal Constitutes an Unauthorized Taking

Lowering the minimum index groundwater levels and allowing the City to deplete the Aquifer further based on recharge credits accumulated for source water never injected into the Aquifer, will violate the Takings Clause of the Federal and State Constitution.¹ The Takings Clause of the Fifth Amendment of the United States Constitution ensures that "private property [shall not] be taken for public use, without just compensation." The Kansas Supreme Court has afforded broad deference to this federal right. As stated in *Creegan v. State*:

Even though fundamental principles of State property law may define property rights, the Takings Clause nevertheless limits a State's authority to redefine preexisting property rights. Thus, 'a State, by *ipse dixit*, may not transform private property into public property without compensation,' *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S. Ct. 446, 66 L. Ed. 2d 358

¹Neither the City nor DWR has pursued any action under the Kansas Eminent Domain Procedure Act.

(1980), nor can it ‘sidestep the Takings Clause by disavowing traditional property interests long recognized under state law,’ *Phillips*, 524 U.S. at 167, 118 S. Ct. 1925.

305 Kan. 1156, 1170, 391 P.3d 36 (2017). In *Creegan*, the Court construed broadly what types of rights are subject to the Takings Clause and ruled that “[the bottom line is that it matters not whether the right held by [the aggrieved party] . . . is further identified as a real property interest or a contract right.” *Id.* at 1171. Rather, any interference by the state with such rights sets up the state for an inverse condemnation claim and the need to pay just compensation. *Id.*

This City’s Proposal, if approved by the Chief Engineer, will undoubtedly constitute a taking of private property of the surrounding groundwater water users. The groundwater being “taken” in exchange for the surface water diverted to the City, will be native groundwater already inherently in the Aquifer. This is water to which all the surrounding groundwater users have prior rights to. The City’s proposal will allow the City to take this groundwater while never actually physically injecting source water into the Aquifer for storage. This constitutes a taking of private property and subjects both the City and DWR to inverse condemnation claims. For this reason, the City’s Proposal must be dismissed on its face.

Additionally, the City’s Proposal essentially changes a contractual obligation entered into by the City with the District in the form of prior MOUs. As indicated in the prior ASR Phase II MOU, the District agreed to grant well spacing waivers for proposed recharge and recovery wells that otherwise comply with all other District regulations. The City, in Phase II MOU Issue No. 6, specifically states that the City can only pump recharge credits when the groundwater levels are above the historic low level (i.e. the currently established minimum index levels). These two conditions of the ASR Phase II MOU are connected – The City agrees that the

recharge credits won't be pumped below the established minimum index water levels, and the District agrees to grant spacing waivers based, in part, on this guarantee. As indicated in *Creegan*, this violation of a contractual obligation triggers the Takings Clause. The City's Proposal clearly triggers the Takings Clause and must be dismissed pursuant the Takings Clause of the United States Constitution and Kansas law.

VI. The City's Proposal, on Its Face, Fundamentally Violates the Kansas Water Appropriate Act

Kansas public policy, unchanged since 1945, mandates the use of the prior appropriation doctrine when there is insufficient water available for all appropriators. The prior appropriation doctrine permeates the Kansas Water Appropriation Act, K.S.A. 82a-701, et seq., and is fundamental Kansas public policy that is binding on all water users and government agencies, including the Chief Engineer, the Division of Water Resources ("DWR") and GMD4. K.S.A. 82a-703b(b); 82a-706; 82a706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a712; 82a-716; 82a-717a; 82a-742; 82a-745; 82a-1020; 82a-1028(n) and (o); 82a-1029; 82a1039; and the April 13, 2018, Order, pp. 4-5, ¶ 4.

Lowering the static water level, while allowing the City to divert native groundwater—that may be subject to more senior rights—based on AMCs accumulated for source water never injected into the Aquifer, flies in the face of the Kansas Water Appropriate Act. Thus, based on the face of the Proposal, it must be dismissed.

VII. The City's Proposal Violates Procedural Due Process

One of the themes advanced by both the District and the Intervenors is the lightning speed in which they have been forced to litigate this matter. Indeed, the District's experts were only able to submit preliminary reports on the eve of the deadline or even after the initial deadline. The parties, and their attorneys, were then given minimal time to analyze those reports and allow

the experts to refine them. What the City has taken years and years to analyze, the District has been forced to compress into a mere fraction of the time. Additionally, the motion deadline and the discovery period made it difficult for the District to fully execute its strategy. Thus, the District believes that its procedural due process rights were violated based on the nature of the hearing schedule.

VIII. The City Lacks Standing to Advance Its Proposal

Standing is a jurisdictional issue that is properly asserted in a motion to dismiss. *See Moorhouse v. City of Wichita*, 259 Kan. 570, 574 (1996). “[I]f a person does not have standing to challenge an action or to request a particular type of relief, then ‘there is no justiciable case or controversy’ and the suit must be dismissed.” *Bd. of County Comm'rs v. Bremby*, 2008 Kan. LEXIS 392, 402 (Kan. 2008) (citing *Kansas Bar Ass'n v. Judges of the Third Judicial Dist.*, 270 Kan. 489, 490, 14 P.3d 1154 (2000)). When a party lacking standing to pursue an adjudication nevertheless seeks relief, “it is tantamount to a request for an advisory opinion.” *Id.* The interest or prospective injury to the party cannot be speculative. *Varney Bus. Servs. v. Pottroff*, 275 Kan. 20, 30 (Kan. 2002).

The City further lacks standing to pursue its Proposal. As indicated previously, the City cannot seek to alter a water right or permit without properly filing for a change application. Further, per *Clawson*, absent a change application being filed the Chief Engineer has no authority to alter a permit. DWR has indicated that the circumstances under which an AMC is withdrawn can be determined at a later time. Thus, the City is simply seeking what is tantamount to an advisory opinion from the Chief Engineer. Additionally, the City has not filed a new groundwater appropriation application for additional groundwater withdrawal. Further,

many details of the City's proposal are theoretical and speculative. Thus, based on the law cited above, the City does not have standing to advance its proposal.

IX. Conclusion

WHEREFORE, for the above reasons, the District respectfully asks the Chief Engineer to dismiss the City's Proposal on its face.

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


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