

**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

CITY’S RESPONSE TO THE DISTRICT’S PROPOSED FINDINGS & CONCLUSIONS

The City responds to the District’s referenced numbered paragraphs as indicated, but should not be regarded as implicitly accepting any paragraphs unaddressed. A significant number of the District’s proposed findings inaccurately characterize or are unsupported by the referenced testimony but it is not possible to discuss all of them in a 30-page response.

The District’s Proposed Findings of Fact

5. The water quality provisions of the Phase I MOU provided that the City would treat injected water to drinking water standards. It also provided that if the Phase I operations degraded the water in any domestic wells that met the then current drinking water standards so that the water did not meet those standards, the City would provide and install a home water treatment system to bring the water back to drinking water standards or provide other appropriate remedies to replace the domestic water supply with water that meets the drinking water standard without additional cost to the resident (Phase I MOU, p. 3 of 4, Issue 8 and Issue 9). The instant case deals with proposed modifications to the City’s ASR Phase II permits (Vol. I, p. 7, lines 10-13). Notably, in the Findings for the Initial Order approving the ASR Phase I permits, Finding No. 42 noted that, “The final amended M.O.U. between the City and GMO #2 did not contain an agreement or recommendation concerning the City's request for passive recharge credits (credits for not pumping City wells in the basin storage area) and deferred the matter to the Chief Engineer” (August 8, 2005 Findings, Conclusions and Initial Order, p. 9 of 21).

8. The statement in the letter signed by Mr. Jacobs was as follows:

During the discussion and approval process for the Phase I ASR applications, DWR staff and the City agreed that using the 1993 levels as the bottom of the basin storage area *was a reasonable and conservative number at the time*. This decision was partially based on the fact that water levels could have been much lower in years after 1993 if the City had not made the unilateral decision to temporarily reduce water use from the Equus Beds Aquifer (Equus Beds). Thus the total storage volume was estimated based on historic "high" or pre-development water levels and the 1993 water levels as estimated by USGS. It should be noted that the established 1993 water levels are under review by USGS, DWR and GMD2 (City Exhibit 19, p. 2; emphasis added).

9. Mr. Jacobs did not opine that not dropping below the 1993 levels was in the public interest.

What he wrote was:

A primary purpose of Phase I of the ASR project was to begin the formation of a freshwater barrier to the salt water contamination moving towards the wellfield from the Burrton area. *Both Conclusion No. 13 and Order No. 8, stem from the principle that withdrawal of recharge credits during periods when water levels are below those that existed in 1993 would not serve the public interest because it would deteriorate any established hydraulic barrier created from recharge injection*. Therefore, the limitations to the recharge credit withdrawal relative to the lowest index water levels for Phase I (January 1993) were largely based on maintaining water quality in the City's well field with a hydraulic barrier. However, it should be noted that water levels in the barrier area can experience significant declines during dry or drought periods, even without the removal of recharge credited from ASR Phase 1 wells (City Exhibit 19, p. 4; emphasis added).

Mr. Jacobs was simply referencing the "public interest" language in the findings and order for Phase I, and pointing out that when originally adopted, they were tied to the purpose of Phase I, which was creating the hydraulic barrier (City Exhibit 19, p. 4). Mr. Jacobs also went on to note that when the Phase II permits were issued, the limitation related to the lower index levels was basically just duplicated in those permits (City Exhibit 19, p. 4). He then pointed out that the 2011-2012 drought and the increased irrigation use during that event had raised the prospect that water levels would be reduced below the 1993 levels by the conduct of other users even though the City was using only a part of its allocation in the area (City Exhibit 19, p. 4). Mr. Jacobs then went on to state:

The recent water level changes demonstrate that it is appropriate to make modifications to the administration of the City's ASR project. It is now apparent that increased water use from irrigation users during drought conditions can cause

significant declines in water levels not considered when the ASR appropriations were granted, and that the City should be in a position to recover available recharge credits even when water levels are below the 1993 index water levels (City Exhibit 19, p. 4).

Further, Mr. Henry's testimony in the context of the questions he answered would have related to the City's position "at that time" that the Phase I permits were issued, not at the time Mr. Jacobs was writing the letter (Vol. III, p. 576, line 24, through 577, line 4). Likewise, the ambiguous "during this period" in the last sentence of the District's paragraph 9 obscures that Mr. Henry was again talking about when the Phase I permits were issued. The hydraulic barrier was a focus of Phase I and the Phase I infrastructure (Vol. III, p. 580, lines 5-16). Accordingly, under the City's Proposal the Phase I permit conditions will not be modified (Vol. I, p. 189, lines 9-19; p. 200, lines 11-22).

10. Actually, although the letter written by Mr. Jacobs recognized that the 1993 index levels were part of the Phase II permit conditions, it was explaining some of the reasons why the index levels need to be modified (City Exhibit 19).

12. Physical injection can be metered (Vol. II, p. 340, line 8). Accumulation of recharge credits cannot be metered, as this determination would be made through the annual accounting process (Vol. II, p. 340, lines 6-9).

19. The "mutually exclusive" is a characterization not testified to by the witness. The witness stated that the use under discussion was a municipal use (Vol. VII, p. 1912, line 14, through p. 1913, line 4).

21. Notably, the Phase II MOU contained no agreement to permanently establish specific lower index levels. The language in subparagraph A.6. simply acknowledged the then-existing lower index levels, stating, "Because the project recharge and recovery wells can only be pumped if water levels in the aquifer are higher than the historic low level, no impairment is expected." (Phase II MOU, subparagraph A.6.). It is significant that the District agreed to this language, because it recognizes that whether the City pumps 40,000 AF or 120,000 AF, so long as the water levels "are higher than the historic lower level, no impairment is expected." (Phase II MOU, subparagraph A.6.).

It follows that in a scenario wherein the AMCs are approved but the proposed lower index levels are not, so that AMCs would only be recovered when the aquifer is at levels higher than the historic lower level, “no impairment is expected” (See Phase II MOU, subparagraph A.6.). Significantly, the language does not say impairment would be expected if the index levels were lowered (Phase II MOU, subparagraph A.6.). Language in subparagraph B.2. recognized that commitments set forth in the MOU remained subject to state law and regulations and the orders of DWR (Phase II MOU, subparagraph B.2.). So, if there were a state regulation that allowed the lower index levels to be set on a different basis, and the Hearing Officer found on the evidence of record that the levels should be reset as requested in the Proposal, that would not be contrary to anything in the Phase II MOU (Phase II MOU, subparagraphs A.6. and B.2.). The District appears to have abandoned the Phase II MOU by never participating in the periodic joint reassessment provided for in the MOU (See Phase II MOU, subparagraph B.5.). However, the City has agreed to a protective permit condition for domestic wells within 660 feet of ASR physical recharge sites (Vol. V, p. 1265, line 2, through p. 1266, line 9).

22. The issue here was that counsel garbled Mr. McCormick’s prior testimony. Mr. McCormick testified that the City and other users could pump below the 1993 levels and even to the proposed lower levels *with their native rights*, under the existing permits (Vol. V, p. 1225, through p. 1226, line 4). He also specifically recognized that letting the City *recover credits* below the 1993 levels was a change from existing permit conditions (Vol. V., p. 1266, lines 5-10).

However, while questioning Mr. Letourneau, counsel stated, “Mr. McCormick testified that he didn’t believe it was a condition of ASR Phase II to assure that we wouldn’t drop below the 1993 levels. Having reviewed Exhibit 53 and Exhibit 57, do you believe that, in fact, it is a requirement that with respect to ASR Phase II we not drop below the 1993 levels?” (Vol. V, p. 1313, lines 3-9). After obtaining an affirmative response from Mr. Letourneau, counsel followed with, “And to the extent that Mr. McCormick’s testimony stated otherwise, you would disagree with that testimony, correct?” (Vol. V, p. 1313, lines 16-18).

Of course, Mr. McCormick's testimony had not "stated otherwise" (Vol. V. p. 1266, lines 5-10). Counsel confused the concept of pumping below the 1993 levels using native rights with the concept of taking credits below the 1993 levels. Mr. Letourneau did not testify that Mr. McCormick "testified incorrectly" to anything. He merely testified that "to the extent" Mr. McCormick gave testimony as it was misstated by counsel, he would disagree with it (Vol. V, p. 1313, lines 16-18).

23. This is entirely incorrect. Referring back a few pages, it is clear that the order under discussion was the Phase I Order, not the Phase II Order (Vol. V, p. 1597, lines 2-17). The language referring to public interest was read by counsel as, "if the project is operated so the recharge credits cannot be withdrawn if the static water level in index well is below the lowest index water level for that index well, the public interest in not diverting Equus Beds groundwater will be protected." (Vol. V, p. 1597, lines 11-17). Notably, the language did not say that the public interest would not be protected if credits were recovered at a lower level (Vol. V, p. 1597, lines 11-17). Further, there was no similar language in the Phase II Order, in which the language setting the lower index levels was, "The recharge credits may be withdrawn from a cell only when recharge credits are determined to be available from the cell and the static water level at its index well is above the lowest index level; however, water may be recharged when the static water level is below the lowest index level in that well" (September 18, 2009 Initial Order, p. 5, ¶ 8).

24. The District is not the authority that grants spacing waivers, as that is within the purview of the chief engineer (Vol. VII, p. 1840, line 15, through p. 1842, line 2).

25. Significantly, neither the District nor any of the Intervenors appear among the addressees of the waiver request letters (District Exhibit 57).

34. The statement that the District had desired to remain part of the discussions is not supported by the referenced testimony (Vol. V, p. 1386, lines 8-15).

35. The first sentence does not accurately present the testimony of the witness (Vol. V, p. 1385, lines 5-13). The plethora of material errors in the District's Proposed Findings and Conclusions

(at least ten in the 35 paragraphs up to this point) detract from the suggestion that additional involvement of the District would have furthered avoidance of errors.

39. Nonuse by irrigators does not appear to be a significant factor in the recovery of the aquifer, given that irrigation use trended above 1992 use during most of the 1993 to 2016 period (See Vol. I, p. 146, line 16, through p. 147, line 16, and City Exhibit 1, p.3-3, Figure 12).

42. The testimony referenced in this paragraph was the opinion of Mr. Boese. Mr. Letourneau testified that AMCs are an accounting modification (Vol. VII, p. 1687, line 17). AMCs would simply allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2). Mr. Letourneau opined that the Proposal is neither a new application nor a change application (Vol. VII, p. 1658, lines 3-7), and noted that the City is not seeking to divert additional water (Vol. VII, p. 1658, lines 16-18).

43. Mr. Boese very helpfully identified K.A.R. 5-7-5, which he acknowledged allows for changes in an existing water right reducing authorized quantity, rate of diversion, place of use and point of diversion (Vol. XI, p. 2866, line 23, through p. 2867, line 11). The regulation is irreconcilable with the District's interpretation of the *Clawson* case, and also with the District's contention that K.S.A. 82-708(b) is exclusive (See, K.A.R. 5-7-5).

47. But the statute does not exclude other permit modifications (See, K.S.A. 82a-708(b) and K.A.R. 5-7-5).

57. Withdrawal of AMCs would be subject to the same annual limits as physical recharge credits (Vol. VII, p. 1663, lines 3-6). The Balleau Groundwater analysis does not distinguish between physical credits and AMCs (District Exhibit 68). AMCs simply allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2). The District has not shown that any special additional limits on withdrawal of AMCs are needed (entire record).

Particularly if the 1993 index levels are not lowered, as the District knows and has admitted that if credits are not taken below the 1993 levels, no impairment is expected (Phase II MOU, subparagraph A.6.).

58. But the Proposal provides for basing the AMCs on the metered source water diverted directly to the City (City Exhibit 1, p. 3-6, proposed condition 6), subject to initial and recurring losses (City Exhibit 1, p. 4-3, second paragraph).

61. But the diversion from the river can and will be metered (City Exhibit 1, p. 3-6, proposed condition 6).

62. Mr. Pajor also indicated that other gallon would be the gallon that the City did not take at the time of the initial demand because it was able to meet the demand with an additional source (Vol. I, p. 245, lines 4-24). The reference to “a feeble attempt to analogize” is not a fact, but District argumentativeness (District proposed finding ¶ 62).

63. The “subsequent gallon” would be the gallon that the City did not take at the time of the initial demand because it was able to meet the demand with an additional source (Vol. I, p. 245, lines 4-24). It would also not actually be a full gallon, because of imputed leakage (Vol. VII, p. 1737, lines 19-20).

64. At hearing, the District objected to analogies based on bottles of water, on the grounds that the aquifer is more complex than a bottle of water (Vol. 1, p. 179, lines 18-22). Now that the District has reconsidered and recognizes the propriety of such analogies, it is worth noting that through another analogy based on a bottle of water, Mr. Pajor later demonstrated how AMCs are functional equivalents of physical recharge and have the same effect on the aquifer (Vol. II, p. 301, line 13, through p. 302, line 8).

65. It is key to the concept of AMCs that they allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2). Consequently, Mr. Pajor’s

reference in the cited testimony as to another user's ability to "leave a credit" is positing a user that has both a source and permit for physical recharge and recharge credits, and is not simply suggesting credits for nonuse or for use from other sources (Vol. II, P. 367, line 18, through p. 368, line 3).

66. through 68. The District is again missing the key distinction between a credit based on storage due to mere nonuse of water, as opposed to a credit for storage that results from direct use of other water that could have been used to create a credit under existing permits by pumping a hole and then filling it. AMCs are not designed simply as credits for nonuse. They are designed to allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2).

70. The witness did not say the City could "double its consumptive use" (Vol. VII, p. 1737, lines 8-20). The witness understands that AMCs simply allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2).

72. This is a distortion of the testimony. The witness did not admit (or even say) anything about an AMC being "fundamentally different from a physical recharge credit" (Vol. VII, p. 1665, line 21, through p. 1666, line 2).

74. It is not really accurate to suggest an AMC is "created" at the time the City consumes Little Arkansas River water for municipal use, because that is only the metered diversion, and would be subject to imputed losses in the process of calculating credits (City Exhibit 1, p. 4-3, second paragraph), and that calculation would only be performed annually, with the effect that the credits would not be accrued and could not be drawn prior to the preparation of the annual accounting report (City Exhibit 1, p. 4-8, second paragraph).

75. Mr. Pajor never testified that the City was doubling consumptive use (Vol. I, p. 142, line 4, through Vol. II, p. 381, line 10). In fact, it is not, because AMCs simply allow the City to obtain

the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2).

77. No. Mr. Pajor did not acknowledge water would be “taken from other users,” he simply agreed with counsel’s premise that it would be “taken from water that’s already dedicated to those many somebodies” (Vol. II, p. 338, lines 104). Mr. Pajor also pointed out that the same issue already exists for physical recharge credits (Vol. II, p. 337, lines 2-10).

78. Mr. Letourneau also pointed out that the definition of recharge credits refers to water that is stored, not water that is injected (Vol. VII, p. 1730, lines 6-9).

79. To the extent the District and Intervenors have become obsessed with the cap and have problems with it, the City is willing to withdraw the proposed creation of the 120,000 AF cap and continue without a cap on credit accumulation.

80. There is no cap under the current permits (Vol. 1, p. 158, lines 18-22).

81. The City would need to draw an aggregate total of 50,849 acre feet of credits during the second through sixth years of the modeled 1% drought (Proposal, City Exhibit 1, p. 2-10, Table 2-5, with correction to 5th year credits noted in testimony at Vol. III, p. 715, lines 1-18). Mr. Pajor later corrected his 50,000 AF reference to 60,000 AF (Vol. I, p. 195, lines 21-23, and p. 222, lines 22-23).

83. There are also physical recharge credits available under the ASR Phase I permits, and the withdrawal limit for both phases is the 19,000 AF. As to the District’s associated footnote, unsupported by a citation to the record, the confusion once again originated with the District’s counsel misstating prior testimony, as follows: “You were asked a question a little bit ago about 19,000 acre feet that could be pumped under the existing permits *pursuant to ASR Phase II*” (Vol. II, p. 364, lines 15-18, emphasis added). In fact, the question previously asked of the witness had not been specific to Phase II, and the 19,000 AF answer was correct as actually given by the witness (Vol. II, p. 306, lines 5-18). Counsel’s misstatement was what clouded the record, and the District

has since compounded error upon error upon error by seeking to blame a City witness (and also DWR) for the District's own mistake (Vol. VIII, p. 2267, lines 12 and 13).

84. This is not a new issue with AMCs, as the physical credits under the existing permits are not confined to use in a drought scenario (September 18, 2009 Initial Order, pp 1-7). However, the City would be open to an appropriately crafted permit restriction limiting use of credits to defined drought conditions (Vol. II, p. 310 line 20, through p. 311, line 14).

87. The second sentence is hopelessly garbled, makes no sense, does not accurately describe the simplified accounting method and does not match City Exhibit 1 or the testimony referenced in support (R. Vol. IV, p. 1093, line 10 through p. 1095, line 14).

90. The grant funding was not obtained (Vol. II, p. 348, lines 5-6) and the assertion is irrelevant.

91. Bank storage wells might or might not increase the City's capacity to accumulate AMCs, but also would potentially increase its capacity to obtain physical recharge credits (Vol. II, p. 348, lines 20-24).

92. Mr. Pajor was correct (City Exhibit 1, p. 2-23, Section 2.6).

94. Recharge credits are the most expensive water in the City's portfolio and the City has no motivation to expend them in anything except a critical condition to its customers (Vol. I, p. 259, lines 18-24).

95. Yes, the benefit is in not being under pressure to draw the credits when there is not a need for them in order to avoid losing them (See, Vol. I, p. 183, lines 10-16).

96. Again, credits are the City's most expensive water (Vol. I, p. 259, lines 18-24).

100. The District has not explained why there would need to be discussion of the impact of withdrawing AMCs. The rate of accrual of all recharge credits could not exceed the constructed physical diversion capacity of the ASR system including direct surface water diversions and future bank storage wells, and would be limited to the rate and quantity authorized by Water Right No.

46627 (Proposal, City Exhibit 1, p. 3-6, Section 3.4, proposed condition 2). All credits, including AMCs, would continue to be subject to the existing annual limits on withdrawal (Vol. VII, p. 1663, lines 3-6). AMCs simply allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2). The Balleau Groundwater analysis does not distinguish between physical credits and AMCs (District Exhibit 68).

101. Mr. Pajor also addressed a simple hypothetical during his testimony. Using an analogy based on a bottle of water, Mr. Pajor noted that AMCs are functional equivalents of physical recharge and have the same effect on the aquifer, in much the same way that a bottle full of water that has not been touched is just as full as a bottle that has been drained and refilled (Vol. II, p. 301, line 13, through p. 302, line 8).

102. But the KWAA is about the dedication of the use of water, not preservation of aquifers in an unused condition (See, K.S.A. 82a-702).

104. Mainly, the aquifer has recovered due to the management practices of the City (See Vol. 1, p. 145, lines 15-25; Proposal, City Exhibit 1, p. 3-3, Figure 12; Vol. 1, p. 146, lines 1-25; Proposal, City Exhibit 1, p. 3-4, Figure 13).

107. Indeed. As Mr. George Austin recognized in his testimony, if the chloride migration rate for 1998 was consistent with the annual average migration rate for the 1995-2005 time period in which 1998 was included, chloride migration resulting from drawing water levels down to 1998 levels for a period of twenty years would be about 264 feet per year, or a mile of chloride migration (Vol. XII, p. 3159, line 22 through p. 3160, line 6).

114. Unsupported by any citation to the record.

115. through 122. But the District did not have its modeling expert review Mr. Macey's work, and so, does not know if there was any substantive issue with the results of his modeling (Vol. X, p. 2638, line 12).

120. and 121. The District has failed to explain how the "110%," identified as a typo (Vol. III, p. 635, lines 17-18) was of any material significance.

122. Mr. Macey's testimony appears to reflect that he did account for the E&S well field and Bentley reserve when the model indicated water would be available from those sources (Vol. III, p. 635, line 20, through p. 636, line 7).

123. and 124. These "errors" were also typos, corrected in the course of witness testimony (Vol. III, p. 715, lines 1-18; Vol. III, p. 740, lines 5-24). The District has failed to explain how these typos are of any material significance.

125. through 131. Balleau Groundwater essentially ran the same model Burns and McDonnell did, but with the addition of information on the depth of individual wells in each grid square (Vol. X, p. 2583, line 3, through p. 2585, line 25). Balleau Groundwater reported that differences between their model simulations and the City's were not enough to affect their overall conclusions (District Exhibit 68, p. 2 of 16, lines 54-58).

132. The City is unaware of any MODLFLOW model. This reference seems to be some sort of error on the part of the District.

132. through 134. If the District meant to refer to the MODFLOW model, it is noteworthy that Balleau Groundwater also ran the MODFLOW model using the 1998 water levels as starting levels (Vol. IX, p. 2497, line 22 through p. 2498, line 4). The reason that the modelers are all using the 1998 starting levels is they cannot assume AMCs will be approved, and so assumed existing permit conditions, using water levels reduced to 1998 levels to allow accumulation of credits by physical recharge (See, Proposal, p. 2-11, Section 2.4.2). Use of the 1998 levels is based on comparison of plant capacity and historical water levels by which the City determined which historical water levels would best accommodate 30 MGD of recharge (Proposal, City Exhibit 1, p. 2-11, Section 2.4.2; Vol. I, p. 159, lines 14-20). That has been explained in the Proposal from the start (Proposal, City Exhibit 1, p. 2-11, Section 2.4.2).

134. The City has no opportunity to respond with that modeling, because the District has forced the whole analysis into a formal litigation process, and the expert witness deadlines are past (February 15, 2019 Order Extending Deadline for Expert Reports). Likewise, because of the District's attack on intra-agency communications about the hearing, Mr. Letourneau has no access to DWR staff modelers (Vol. VIII, p. 1978, lines 6-10).

135. through 139. This is more of the inexplicable fixation with the 120,000 AF cap. The cap cannot be harmful to anyone, because there is no cap under the existing permits (Vol. 1, p. 158, lines 18-22). However, the City is willing to proceed with no cap if that is deemed preferable. In paragraph 137, the 50,000 AF should be 60,000 AF (Vol. I, p. 195, lines 21-23, and p. 222, lines 22-23).

140. through 144. Fortunately, the District's issues have been addressed by supplemental evidence in addition to the Proposal. Because adverse MDS impacts would be infrequent, DWR rationally considered that most of the time, the impact of the Proposal will be favorable (Vol. VII, p. 1675, line 20 through p. 1676, line 2). Also, DWR does not protect Minimum Desirable Streamflow by denying applications, but approves applications with conditions relating to Minimum Desirable Streamflow, and administers as necessary to protect Minimum Desirable Streamflow as though it were an appropriation right if flows at the gage go below for a given number of days (Vol. VII, p. 1681, line 22 through p. 1682, line 8).

AMCs cannot cause any harms, as they simply allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2). All of the harms assessed in the Balleau Groundwater modeling were based on modeling pumping down to the proposed lower levels, and did not differentiate AMCs from physical recharge credits (District's Exhibit 68).

Although the District's counsel attempted to phrase questions to attribute harms to AMCs, Mr. Romero testified that irrespective of the nature of the credit, the effects would be the same (Vol. X, p. 2561, lines 13-18).

144. Mr. Henry's testimony addressed impacts of "short duration uses" as the District's proposed finding reflects. Mr. George Austin recognized in his testimony that if the aquifer were pumped back down to pre-1992 water levels, and hence, to higher rates of chloride migration, but remained there for a period of only a year or two, one could expect perhaps a few hundred feet of chloride migration as a result (Vol. XII, p. 3158, lines 1-14). By contrast, Mr. Austin also recognized that if the chloride migration rate for 1998 was consistent with the annual average migration rate for the 1995-2005 time period in which 1998 was included, chloride migration resulting from drawing water levels down to 1998 levels for a period of twenty years would be about 264 feet per year, or a mile of chloride migration (Vol. XII, p. 3159, line 22 through p. 3160, line 6).

145. through 148. Reanalysis by DWR modelers is precluded by Mr. Letourneau having no access to communicate with them (Vol. VIII, p. 1978, lines 6-10). In any event, it is not necessary because of the Balleau Groundwater modeling. This modeling was very conservative in that Balleau modeled the City pumping its full 40,000 AF rights for all eight years of the modeled period (Vol. IX, p. 2496, lines 13-16), plus 94,400 AF of credits (Vol. IX, p. 2504, line 19), or 414,000 AF altogether. Their simulation was not designed to show impacts of the City's projected drought response, but to evaluate the impacts of pumping all the way to the proposed new lower index levels (District Exhibit 68, p. 4 of 16, lines 98-100 and 106-107).

Even so, Balleau Groundwater's assessment of individual well impacts with all that pumping was that an additional six wells would be impacted by pumping down to the new lower levels (District Exhibit 68, p. 12 of 16, lines 353-354). All six are domestic wells (Exhibit 68, Figure 7). It appears that at five of the six (all except the well in index cell 20) are within 660 feet of City wells (Exhibit 68, Figure 7), and so would be protected by proposed permit conditions, leaving in question only a single well.

Well.

That does not seem so bad. There is no indication who owns that well, but it probably is not the District, as it has not asserted any water rights of its own in this case. There is no indication that the well, which is a domestic well, fully penetrates the aquifer for purposes on K.A.R. 5-4-1. The issues concerning it probably could be addressed by extending to that well the same protection as the wells within 660 feet of ASR wells.

149. through 155. The foregoing discussion has addressed the modeling done by Balleau Groundwater, and given what that modeling actually shows in terms of the limited effects of pumping all the way to the lower levels, the District's continuing criticisms of the City's modeling and DWR's evaluation of the City's modeling is irrelevant. In paragraph 153, Mr. Romero's reference to "a new diversion of water" is only his characterization. The City is not precluded from pumping below the 1993 index levels with its native rights levels (Vol. III, p. 539, lines 13-15).

156. and 157. These paragraphs amount to Tim Boese opining to some of the District's arguments.

158. through 161. Neither Mr. Romero nor Mr. Boese considered how the limited duration and infrequent occurrence of the impacts modeled by the Balleau pumping scenario would cause them to compare with the impacts of keeping the aquifer at 1998 levels for a long period of years. Mr. Austin acknowledged in his testimony that the impact of the latter scenario could be worse (Vol. XII, p. 3158, lines 1-14; Vol. XII, p. 3159, line 22 through p. 3160, line 6).

162. No. Mr. Letourneau did not testify that it was the District's function to determine if the Proposal resulted in a regional lowering of the water table, but simply recognized that in cases where there is impairment due to a general, regional lowering of the water table, and the area subject to the complaint is in a groundwater management district, the district is to make recommendations on satisfaction of senior rights (Vol. VII, p. 1925, lines 11-25). K.A.R. 5-4-1a, on its face, belies the District's claim. First, K.A.R. 5-4-1a(a) shows that this regulation only applies to complaints of existing impairment (non-existent as to the Proposal). Second, it provides that when a complaint is

submitted, the procedure specified in K.A.R. 5-4-1 must be followed until it is determined that the impairment is caused substantially by a regional lowering of the water table. That determination would be made pursuant to K.A.R. 5-4-1 by the chief engineer. Only then would the case potentially come to the groundwater management district under K.A.R. 5-5-1a(b)(1) for a recommendation. This is another substantial error by the District.

166. Equating loss of a well's water column with "impairment" is another error by the District, as any such determination would need to be made consistent with K.S.A. 82a-711 and K.A.R. 5-4-1. The portion of the paragraph speculating that the number of impacted wells may be higher is simply unfounded speculation.

167. As it relates to additional wells impacted by the change to the proposed lower levels, Mr. Romero demonstrated that one such well greater than 660 feet from a City pumping well can be impacted by City pumping (District Exhibit 68, Figure 7).

168. We will only ever know for certain if the domestic well cannot be extended at such time (if ever) as the well is someday impacted and the owner submits a complaint pursuant to K.A.R. 5-4-1 to determine the issue of impairment.

169. This paragraph is highly inaccurate. In the cited testimony, Dr. Akhbari does not agree with, or even address, Mr. Romero's conclusions about anything (Vol. II, p. 383, line 10, through p. 389, line 25). His attacks on the MODFLOW model are effectively attacks on Mr. Romero's work, because Balleau Groundwater used that same model (Vol. IX, p. 2582, line 15, through p. 2586, line 13). Mr. Romero, who was the later witness, did not concur with Dr. Akhbari at all (Vol. IX, p. 2584, line 12, through p. 2586, line 13; p. 2587, line 8, through 2588, line 17).

170. and 171. As noted in the preceding paragraph and the testimony cited therein, Mr. Romero, who actually did modeling work for this case, and used the same model used by Burns & McDonnell, substantially disagreed with Dr. Ahkbari's analysis and conclusions concerning the model.

173. No citation to any supporting evidence.

174. to 184. References in these paragraphs to the District granting waivers are mistaken.

The District is not the authority that grants spacing waivers, as that is within the purview of the chief engineer (Vol. VII, p. 1840, line 15, through p. 1842, line 2). Normal spacing requirements for domestic wells are 660 feet (Vol. II p. 321, lines 15-19; VII, p. 1926, lines 9-11). Accordingly, the proposed permit conditions would protect domestic well owners, including the well owners who signed spacing waivers, from issues with quality or quantity of water, such that DWR believes any vestigial spacing concern (if such exists) should be waived (Vol. VII, p.1842, line 3, through p. 1843, line 4). Notably, none of the well owners shown on the old letters requesting spacing waivers (District Exhibit 57) have raised any complaint about the waivers. The District was not one of the well owners (District Exhibit 57) and has no standing (and no rational basis) to raise the issue where the well owners have not.

185. through 194. The use of “eluded” in place of “alluded” in paragraph 185 is another error by the District. Recharge credits are not subject to safe yield analysis, and if AMCs are allowed as recharge credits, they will not be subject to safe yield analysis (Vol. VI, p. 1500, lines 8-12; p. 1510, lines 19-25). AMCs simply allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2). An AMC cannot have any greater impact on safe yield than a physical recharge credit generated by withdrawing water and then replacing that water (Vol. VII, p. 1875, line 7 through p. 1876, line 1).

In Paragraph 192, the statement that Mr. Letourneau agreed with Mr. Boese’s testimony on safe yield is incorrect and not supported by the referenced testimony. Note that Mr. Letourneau’s referenced testimony, in Volume V of the Transcript, was occurring on the morning of 11 February 2020 (Vol. V, p. 1134, line 19), but Mr. Boese would not be called to testify until the morning of 3 March 2020 (Vol. VIII, p. 2001, lines 15-17). Hence, it is not surprising that Mr. Letourneau’s

referenced testimony does not actually mention Mr. Boese's testimony, or even Mr. Boese, at all (Vol. V., p. 1321, line 5 through P. 1323, line 6, and p. 1327, line 18, through p. 1328, line 10).

Similarly, but less obvious, with respect to the District's paragraph 194, Mr. Letourneau did not testify that it was the District's initial decision whether AMCs meet the safe yield requirements. If one begins on page 1511 of the Transcript and reads the testimony in context, Mr. Letourneau simply recognized that when an application is filed for water rights in the groundwater management district, the District makes a determination whether or not safe yield applies (Vol. VI, p. 1511, line 10, through p. 1512, line 5). He did not reference AMCs at all, and did not say that it was the District's initial decision whether AMCs meet safe yield requirements (Vol. VI, p. 1511, line 10, through p. 1512, line 5).

195. through 202. The issues relating to Minimum Desirable Streamflow have been adequately covered in the City's Proposed Findings and Conclusions, and in DWR's post-hearing brief. However, an additional point is warranted with respect to the District's paragraph 197. It may well be the case that modeled river depletion would have been greater based on the City pumping 120,000 AF in credits during the simulated drought. However, the point unrecognized in that contention is that Mr. Romero's own report and testimony reflects that, even by pumping every possible gallon, all the way to the proposed lower limits, the City could only recover an aggregate 94,400 AF in credits (Vol. IX, p. 2504, line 19; District Exhibit 68, p. 5, line 150, through p. 6, line 158). In other words, even though the District and Intervenors keep making the argument, it is impossible to pump 120,000 AF of credits under the modified permit conditions requested in the Proposal, because the proposed lower limits stop aggregate credit recovery at 94,400 AF (See Vol. IX, p. 2504, line 19; District Exhibit 68, p. 5, line 150, through p. 6, line 158). The District's persistence in arguing impacts of 120,000 AF of credit withdrawals when its own expert has shown such would not be possible reflects that the District is uninterested in objective or scientific analysis.

203. through 211. The District's complaints about DWR's lack of modeling are academic, given the City's modeling and the results of the further modeling performed by Balleau Groundwater. Although the District complains about DWR not conducting additional review (District's proposed finding ¶ 210), the District does not explain what still needs to be done given the additional modeling work performed by Balleau Groundwater (District's proposed finding ¶210). Notably, Mr. Letourneau's testimony concluded on 3 March 2020 (Vol. VIII, p. 2001, line 3). Mr. Romero was not called to testify until the next day (Vol. IX, p. 2424, lines 2-4). During all of Mr. Latourneau's testimony, counsel never asked if Mr. Latourneau had a copy of Mr. Romero's report, or had read that report, or whether any of the content of the Balleau Groundwater modeling and report might alleviate any of Mr. Letourneau's concerns (Vol. V, p. 1230, line 7, through Vol. VIII, p. 2001, line 3). The District also did not recall Mr. Latourneau as part of its case-in-chief after Mr. Romero testified, to determine if the testimony concerning Balleau Groundwater's modeling work addressed any of Mr. Latourneau's previously-expressed concerns (Vol. X, p. 2696, line 8, through Vol. XI, p. 3068, line 12). Instead, the District keeps pressing for unspecified additional review (District's proposed finding ¶ 210), even though Mr. Letourneau has disclosed that he has no access to DWR modelers (Vol. VIII, p. 1978, lines 6-10).

211. The notion of having to have a "corrected Proposal" also does not make sense as a precondition of evaluating the Proposal, because the corrections have been noted in the testimony of witnesses (Vol. III, p. 715, lines 1-18; Vol. III, p. 740, lines 5-24). If, as a housekeeping matter, DWR wants to require corrected pages as part of any final action, that is more formal than substantive and should not prevent determination of the issues, given that the corrected information is already of record.

212 through 239. The District first sprung this issue of "practical saturated thickness" at hearing, during the cross-examination of Daniel Clement (Vol. IV, p. 985, lines 2-3), after all deadlines for experts and expert reports had passed (February 15, 2019 Order Extending Deadline for

Expert Reports). As a consequence, neither the City nor DWR had any opportunity to direct discovery requests to the issue or obtain an expert assessment of lithographic conditions at individual well sites.

However, the balance of the evidence of record still shows that this issue should not preclude approval of the City's Proposal. First, the Balleau Groundwater modeling shows that the result of pumping all the way down to the proposed lower limits could impact the water columns of six additional wells (i.e., six wells beyond those that would be impacted by the City's exercise of its native rights)(District Exhibit 68, p. 12 of 16, lines 353-354). All six are domestic wells (Exhibit 68, Figure 7). The record does not reflect whether any of these wells fully penetrate the aquifer, but we know that they are domestic wells (Exhibit 68, Figure 7). We also know they are in index cells 10, 16, 20, 27 and 28 (District Exhibit 68, Figure 7). Remaining saturated thickness in those index cells at the proposed lower levels would be 76%, 72%, 83%, 83% and 78%, respectively (City Exhibit 1, p. 2-25, Table 2-11). The remaining aquifer saturated thickness in feet for each index cell is 165, 131, 197, 197 and 148, respectively (City Exhibit 1, p. 2-25, Table 2-11). Mr. Clement was of the view that the data developed on remaining saturated thickness would enable the lowering of wells that may be impacted (Vol. IV, pp. 1000-1002).

It is possible that lithography could limit the extension of a well, and also theoretically possible that lithography could render impossible the relocation of the well anywhere on the owner's land, but there is no information in the record to indicate that this is true as to any of the six impacted domestic wells, and the USGS model does include lithologic data from which the bedrock elevations are interpolated (Vol. III, P. 784, lines 16-20). Moreover, the District is resting its conclusion of "impairment" entirely on Mr. Romero's testimony that losing their water columns constitutes "impairment" of these wells (District's proposed finding ¶ 166). Pursuant to K.S.A. 82a-711 and K.A.R. 5-4-1, Mr. Romero's ostensible conclusion is legally incorrect. Further, Mr. Romero acknowledged that the conclusion was based on counsel's characterization of wells losing their water

column as being an “impairment,” and that if “impairment” was not defined as wells losing their water column, he could not say these wells are “impaired” (Vol. X, p. 2604, line 21, through p. 2606, line 22).

As with all the other impacts modeled by Balleau Groundwater, the projected impacts on the six domestic wells are not impacts of the AMCs, but of pumping the aquifer all the way to the new lower limits (District Exhibit 68, p. 4 of 16, lines 98-100 and 106-107). As the District has acknowledged, if credits are not taken while water levels are below the 1993 index levels, no impairment is expected (Phase II MOU, subparagraph A.6.).

247. through 251. Basing the credit retention on 1998 levels was an intentional feature of the simplified method, to avoid a penalty in the form of the higher leakage that occurs when the aquifer is kept full (Vol. V, p. 1186, line 15, through p. 1187, line 11; p. 1205, line 19 through p. 1206, line 5).

252. The testimony referred to showed one (1) error, not “numerous errors,” that related to percentage of losses, so once again, the error here is in the District’s statement (District’s proposed finding ¶ 252, identifying one error, on p. 4-2 of the Proposal). Indeed, as of this point, only 53 pages into in the District’s Proposed Findings and Conclusions, the District has made at least 32 substantive errors, including several of considerable magnitude, plus the two typographical errors with “MODLFOW” and “eluded.” As the District only managed to find one substantive error and four typographical errors in the 55 pages comprising the narrative of the City’s Proposal (City Exhibit 1, cover page through p. 4-8), the District’s demonstrated error rate is exponentially greater than the City’s.

255. The “expressing shaky confidence” characterization is injected by the District, and not anything to which the witness testified (Vol. V, p. 1191, line 25, through p. 1192, line 7).

262. Three landowners testified as part of the Intervenor's case in chief (Vol. XII, p. 3213, line 13, through Vol XIII, p. 3462, line 17). This case is about proposed modifications to the City's Phase II permits (Vol. I, p. 10, lines 16-19).

263. and 264. The referenced testimony is from Mr. Carp, so the references to "these landowners" represents another error by the District.

270. In the referenced testimony, Mr. Pope did not say that "the City's Proposal constituted an unauthorized taking," but he opined that use of AMCs would be "taking water, then, that the water right holders were entitled to pump" (Vol. X, 2727, lines 2-4).

271. through 313. These paragraphs reflect that a great deal of the time and testimony during the hearing was focused on witnesses testifying to the various legal arguments of the various parties. In *Glassman v. Costello*, 267 Kan. 509, 986 P.2d 1050 (1999), the Kansas Supreme Court stated, in most relevant part: "While witnesses may be permitted, in a proper case, to give an opinion on the ultimate *fact* involved in the case, there is a strong consensus among jurisdictions, amounting to a general rule, that witnesses may not give an opinion on a question of domestic law or on matters which involve questions of law." *Glassman v. Costello*, 267 Kan. 509, 528 (citing, 31A Am.Jur.2d, Expert and Opinion Evidence, § 136, pp. 143-144).

When the rule is disregarded, it does not follow that the resulting testimony establishes the meaning or effect of any statute to which it is directed. The courts do not defer to the expertise of agency staff as to interpretations of statutes. *Kansas Department of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010).

The courts do still afford substantial deference to an agency's interpretation of its own regulations, unless the interpretation is clearly erroneous or inconsistent with the regulation. *State ex rel. Bremby v. Lindemuth*, 47 Ka. App. 2d 386, 388, 281 P. 3d 534 (2011). However, this relates to the agency's current interpretations of its own regulations, and not to past interpretations of former agency staff. The doctrine of *stare decisis* is inapplicable to decisions of administrative tribunals in

Kansas. There is simply no rule that an administrative agency cannot refuse to follow a ruling of its predecessor in a different case. *In re. Gentsler Eye Center & Clinic//Gentsler Medical Care Facility*, 40 Kan. App. 2d 411, 419, 192 P.3d 666 (2008).

Consequently, the notion that that Mr. Boese and Mr. Pope are somehow or another "the supreme authority on the interpretation of the relevant statutes and regulations" as the District suggests in its proposed finding paragraph 294, is misplaced. Also, it is important to remember that Mr. Boese, when asked to support his opinion on takings with actual legal authority, was unable to do so, and was unable to even identify the elements of a compensable taking, and also evaded the question as to whether he could identify any legal rule against takings (Vol. IX, p. 2413, line 18, through 2417, line 14). Despite the District's attempts to cast Mr. Boese as an expert, it is clear that he lacked qualifications and basic knowledge to support some of the opinions in his expert report. Mr. Pope, for his part, treated the basis for AMCs as conceptually no different from situations where other water users have sought a credit for not pumping one source due to use of another (Vol. X, p. 2720, lines 11-18). In so doing, he missed the relevance of the distinction that the "other source" involved for AMCs is the very same source the City would use for physical recharge if space in the aquifer were available.

Paragraphs 314. through 320. This purpose of this hearing is not to evaluate the District's suggestions as to how it thinks the City's drought planning should be redirected. Also, none of the alternatives proposed by the District address the associated concern of pairing ASR with a purpose that economically justifies its operation and maintenance. All of these suggested alternatives are distractions from the issues in the case and are not relevant to the points that have been identified for determination.

323. The City would be open to an appropriately crafted permit restriction limiting use of credits to defined drought conditions (Vol. II, p. 310 line 20, through p. 311, line 14).

324. If this condition is incorporated, it should be on a well-by-well basis, rather than requiring native rights at all wells to be exhausted before credits can be taken at any (See, Vol. VII, p. 1883, line 4, through p. 1884, line 25).

325. This proposed condition is currently unworkable. Under current treatment plant limitations, the City cannot treat water drawn solely from the Equus beds to water quality requirements (Vol. VIII, p. 557, lines 12-25). Further, the requirement to exhaust all other sources before drawing credits is not a condition of the existing permits (September 18, 2009 Initial Order). It cannot be a necessary additional condition for AMCs because, as Mr. Romero recognized, the impact of drawing credits is not different for AMCs than for other credits (Vol. X, p. 2561, lines 13-18).

The District's Arguments and Conclusions of Law

Little space remains to address these. In addition to what has been covered in the City's Proposed Findings and Conclusions, the City incorporates by reference the analysis in DWR's Post-Hearing Brief, disposing of many of the District's contentions.

The District is significantly mistaken as to some basic facts, and has not been careful with its accuracy in describing testimony of record. It is likely that this will be an even greater problem in the District's final submission, to which it knows there can be no reply. The frequency and magnitude of the errors in the District's Proposed Findings, and its persistence in arguing impacts of a 120,000 AF withdrawal of credits that its own expert showed to be impossible are very troubling. They reflect that the District is not engaged in an objective, regulatory or scientific inquiry, but has predetermined a desired outcome and is striving by any and all possible means to reach that outcome.

On the facts of this case, the City has met its burdens, which entail a "preponderance" or "more likely than not" showing that the City's contentions are correct. AMCs give rise to no different impacts than other credits (Vol. X, p. 2561, lines 13-18). Further, under the Proposal, the rate of accrual of all recharge credits could not exceed the constructed physical diversion capacity of the ASR system including direct surface water diversions and future bank storage wells, and would be

limited to the rate and quantity authorized by Water Right No. 46627 (Proposal, City Exhibit 1, p. 3-6, Section 3.4, proposed condition 2). AMCs simply allow the City to obtain the same credits it could obtain under its existing permits, but without pumping a hole in the aquifer to create capacity for physical recharge (Vol. V, p. 1288, line 12 through p. 1289, line 2). An AMC cannot have any greater impact on safe yield than a physical recharge credit generated by withdrawing water and then replacing that water (Vol. VII, p. 1875, line 7 through p. 1876, line 1). Notably, as is recited in the findings for the approval of ASR Phase I, the District ultimately took a neutral position on the passive recharge credits involved in that case (August 8, 2005 Findings, Conclusions and Initial Order, p. 9 of 21). This is inexplicable unless the District had already concluded that even the purely passive recharge credits then under consideration could not adversely affect safe yield or impair existing rights.

In fact, without knowing whether passive recharge credits would be approved in Phase I, the District had signed the Phase I MOU, stipulating that, “Because the project recharge and recovery wells can only be pumped if water levels in the aquifer are higher than the historic low level, no impairment is expected.” (Phase II MOU, subparagraph A.6.) The District knew then, just as it knows now, that if the lower index levels are not changed, there is no potential for any kind of recharge credits to cause impairment. AMCs, standing alone, pose no adverse impacts. Accordingly, DWR’s construction of its applicable regulations to allow the permit changes requested for AMCs is a more sensible construction than that urged by the District, and is also more in keeping with the public interest and the core purposes of the KWAA.

All of the impacts modeled by Balleau Groundwater are impacts of the lower index levels, not of AMCs (District Exhibit 68). They are not modeled on withdrawals projected in the Proposal, because instead of modeling the withdrawals projected as needed to meet demand on the City’s Table 2-5, Balleau modeled the City pumping its full 40,000 AF rights for all eight years of the modeled period (Vol. IX, p. 2496, lines 13-16). Their simulation was not designed to show impacts of the

projected City drought response, but to evaluate the impacts of pumping all the way to the proposed new lower index levels (District Exhibit 68, p. 4 of 16, lines 98-100 and 106-107). Even so, the modeled impact was that six wells, all domestic wells, might lose their water columns (District Exhibit 68, p. 12 of 16, lines 353-354, and Figure 7). It appears that five of the six (all except the well in index cell 20) are within 660 feet of City wells (Exhibit 68, Figure 7), and so would be protected by proposed permit conditions. Those protections could be extended to the sixth well too, although there is no indication that any of the domestic wells would be “impaired” within the meaning of K.S.A. 82a-711(c) and K.A.R. 5-4-1. Given the remaining saturated thickness of the aquifer, it is probable the wells could be extended or relocated (City Exhibit 1, p. 2-25, Table 2-11; Vol. IV, pp. 1000-1002).

Mr. Joe Pajor testified that in his estimation, AMCs would only be used and withdrawn about once every hundred years (Vol. II, p. 365, lines 10-19). Accordingly, chloride impacts and impacts on minimum desirable streamflow would be infrequent. The infrequent chloride impacts from withdrawing credits to the proposed lower levels might be a few hundred feet of chloride migration (Vol. XII, p. 3158, lines 1-14).

The modeled MDS impacts would also be infrequent, and DWR staff reasonably concluded that most of the time, the impact of the Proposal will be favorable (Vol. VII, p. 1675, line 20 through p. 1676, line 2). Also, DWR does not protect Minimum Desirable Streamflow by denying applications, but approves applications with conditions relating to Minimum Desirable Streamflow, and administers as necessary to protect Minimum Desirable Streamflow as though it were an appropriation right if flows at the gage go below a certain number of days (Vol. VII, p. 1681, line 22 through p. 1682, line 8).

Consequently, although adjusting the lower index levels could have detrimental impacts, they would be infrequent, and would be outweighed by the more frequent benefits from removing the pressure to draw credits in droughts of short duration. Particularly as to MDS, DWR does not deny

permits due to potential adverse impacts during droughts, but deals with such issues through real time administration (Vol. VII, p. 1681, line 22 through p. 1682, line 8, p. 1879, lines 11-25). The same rationale would logically apply to dealing with infrequent potential chloride impacts.

Based on the facts developed at hearing, the AMCs standing alone present no risks of adverse impacts, and the proposed adjustment to the lower index levels present infrequent impacts which do not threaten “impairment.” The record establishes that the Proposal should be approved.

As to the “standing” argument raised by the District, the suggestion that the *Clawson* case bars the Proposal is erroneous for the reasons set forth in the City’s Proposed Findings and Conclusions. As the owner of the ASR Phase II permits, the City was the proper party to submit the Proposal. Originally, of course, the broader concept of litigation “standing” was not even at issue. It was the District that forced the Proposal into elaborate and costly litigation procedures. The City as the party responding to a challenge directed at its Proposal inherently has standing to defend. Further, the City additionally has standing under the principles articulated in *Cochran v. Department of Agriculture, Division of Water Resources*, 291 Kan. 898, at 908. The evidence of record establishes that recharge cannot occur under the existing permits without lowering water levels in the aquifer (Vol. I, p. 151, line 19 through p. 152, line 8; Vol. 1, p. 242, lines 15-23), and the District’s own modeling confirms that credits in excess of 14,900 AF would be stranded by the 1993 index levels (Vol. IX, p. 2504, lines 6-14).

It is actually the District that has a standing problem in this case, as neither the District nor Intervenors can be harmed by the AMCs, and the District, which is not the owner of any potentially impacted wells or water rights, also cannot be harmed by adjustment of the lower index levels. In addition, the District has special problems arising from the Kansas Local Government Ethics Law that may preclude consideration of the positions put forth as positions of the District in this case.

Michael McGinn and Robert Seiler were included among the movants in Intervenors’ October 15, 2018 Motion to Intervene. The Motion recited that the movants named therein were

landowners and that the Proposal, if approved, would impair or impede their ability to protect their respective property interests (Motion to Intervene, ¶ 7). It also stated that the movants' water rights would be substantially affected by the Proposal (Motion to Intervene, ¶ 9). Mr. McGinn signed the Motion as holder of permit # 32875, and a joint owner of Permits # 32790, #49102 and #29488 (Motion to Intervene, p. 11-12). Mr. Seiler signed it as owner of permits #37612 and #22902 (Motion to Intervene, p. 18). In their subsequent, November 3, 2018 Motion to Withdraw as A Party, Michael McGinn and Robert Seiler, who had entered the case on October 26, 2018, disclosed that they were members of the District board, and sought leave to withdraw from the case in an effort to mitigate aspects of the associated conflict of interest (Motion to Withdraw as a Party, ¶¶ 1-3). However, the premise that this allowed them to remain on the District board and to continue to participate in executive sessions and in the direction of the District's litigation decisions and budget decisions related to this case does not necessarily follow.

In the case of *Dowling Realty v. City of Shawnee*, 32 Kan. App. 2d 536, 542-543 (2004), a planning commissioner named Tubbesing, who left the bench and spoke in favor of a proposal in which he had a substantial interest, was held to have "acted upon" the matter for purposes of K.S.A. 75-4305, even though he did not participate in the vote. The court held that although the planning commission's decision was objectively reasonable, the commissioner had violated K.S.A. 75-4305. In its disposition, the court stated:

We remand the case to the trial court with directions to send it back to the Commission to redo the entire process since it was tainted from the very beginning. All future proceedings must be conducted without Tubbesing as long as he remains on the Commission. *Dowling Realty v. City of Shawnee*, 32 Kan. App. 2d 536, at 546.

The implications of this ruling for the present case is that all of the District's actions and decisions in relation to this case, including expenditures for experts and counsel, and directions as to substantive arguments to pursue, may be similarly tainted by conflict. This raises an issue as to whether the positions taken in the motions and arguments filed on behalf of the District really are valid or

legitimate positions of the governmental entity on whose behalf they have been submitted. Under the circumstances of this case, it would be prudent to seek guidance from the Kansas Attorney General's Office before accepting those filings as lawfully adopted positions of the District.

Respectfully submitted,

Office of the City Attorney
of the City of Wichita, Kansas

By /s/ Brian K. McLeod
Brian K. McLeod, SC # 14026

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he transmitted the above and foregoing City's Response to the District's Proposed Findings and Conclusions by electronic mail on this 4th day of October, 2021, for filing, to ConnieOwen@everestkc.net and served the same upon counsel for the other parties herein by electronic mail addressed to:

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