

**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.

REPLY BRIEF OF DWR

COMES NOW, the Kansas Department of Agriculture, Division of Water Resources (“DWR”), by and through counsel, Stephanie A. Murray, and submits this Reply Brief in the above-captioned matter. This Reply addresses the proposed findings of fact and conclusions of law and the briefs in support thereof submitted by all other parties in this matter.

I. INTRODUCTION

In their Briefs, the District and the Intervenors continue to advocate for the City’s Proposal to be dismissed, raising many of the same arguments that were already raised in the District’s Motion to Dismiss. DWR has already addressed most of those arguments, and many of them it does not feel the need to discuss in more detail in this Reply. Issues that DWR will not devote substantial time to in this Reply include the fact that the Proposal does not constitute a new appropriation of water and that K.S.A. 82a-709 and K.S.A. 82a-711, as well as the regulations pertaining to safe yield and some aquifer storage and recovery-specific regulations, are thus not applicable; that the City is permitted to increase its consumptive use of water under the Proposal; that the Proposal does not constitute a request for a true “change” as that word is used in K.S.A. 82a-708b, and that statute also does not apply to the Proposal; that the City’s modeling work nonetheless constitutes an adequate showing that the Proposal satisfies the relevant criteria of K.S.A. 82a-708b; that AMCs are not prohibited; that the *Clawson* case does

not apply here; and that the minimum desirable streamflow, Takings Clause, and standing arguments raised by the District and the Intervenors are off-base.¹

The District's and the Intervenors' Briefs also raise some new arguments or make new points to advance already-raised arguments. DWR will address those points in greater detail herein. First, the District and the Intervenors continue to raise arguments regarding prior administrative decisions made by the City, which are not at issue in this hearing. Both of those parties also continue to argue that the Proposal should be rejected because it lacks certain accompanying defined permit conditions. Further, the District persists in mischaracterizing its own authority and inexplicably invokes the Kansas Administrative Procedure Act ("KAPA") to argue that the channels through which the City sought review of the Proposal were improper. Several of these arguments are utterly far-fetched, and none of them are grounds for the Proposal to be dismissed.

Additionally, the District and the Intervenors persist in mischaracterizing relevant facts and continue to argue for the application of laws that do not actually govern the Proposal. Specifically, the District mischaracterizes current Project operations under Phase II, and both the District and the Intervenors continue to advance errant arguments regarding the beneficial use of water the City would make under the Proposal, the amount of water the City would be entitled to under the Proposal, passive recharge, impairment, minimum desirable streamflow ("MDS"), and practical saturated thickness. Additionally, the District and the Intervenors make numerous arguments related to the adequacy of the modeling work that the City performed to support the

¹The Intervenors write in their Brief that "new appropriations, or increases in consumptive use in the well field area have been denied due to Safe Yield as early as the 1980's. Intervenors' Proposed Findings of Fact and Conclusions of Law, p. 17, para. 67. It is true that DWR has for some time denied applications for new appropriations in the Wichita Wellfield area that would have increased the overall consumptive use of that area. However, the owners of existing, unperfected water rights in the area have always been permitted to increase their individual consumptive use under those water rights.

Proposal, and the adequacy of DWR’s initial review of the Proposal. Both the District and the Intervenors make further arguments regarding fairness and the uniform application of relevant law to both the City and other area water users. Finally, the District misconstrues hearing testimony and misstates the law in numerous places throughout its Brief.

II. OTHER POSSIBLE DROUGHT PLANNING APPROACHES AVAILABLE TO THE CITY ARE IRRELEVANT.

Both the District’s and the Intervenors’ Briefs argue that the City should explore other drought planning strategies rather than pursuing the Proposal. Specifically, the District argues that the City should pursue desalinating water from the Burrton salt plume, reclaiming more industrial water, constructing more bank storage wells, or constructing more recharge basins in the Aquifer.² The Intervenors also argue that the City “has many alternative options available to satisfy its desire to secure water in the event of a 1% drought.”³ As discussed in DWR’s brief, other approaches that the City could have taken to improve its water management are really not relevant here.⁴ The City’s administrators weighed all of their options and elected to pursue the Project and the Proposal.⁵ The District also argues that the City should pursue a multi-year flex account (“MYFA”) rather than the Proposal.⁶ DWR’s Brief sets out in detail why a MYFA is not a viable option for the City here.⁷ Other drought planning options available to the City are not before the Presiding Officer in this matter, and any arguments related to that topic are simply not relevant.

²District’s Proposed Findings, Conclusions, and Brief, p. 67-68, paras 314-315.

³Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 97, para. 118.

⁴Transcript, Vol. I, p. 153, ll. 5-9; p. 157, ll. 15-16

⁵*Id.*

⁶District’s Proposed Findings, Conclusions, and Brief, p. 97.

⁷Brief in Support of Proposed Findings of Fact and Conclusions of Law of DWR, pp. 54-55.

III. DETERMINING NECESSARY PERMIT CONDITIONS IS THE PURPOSE OF THESE PROCEEDINGS—AND THE DISTRICT ADVOCATES FOR SOME CONDITIONS THAT ARE UNNECESSARY.

The District and the Intervenors also continue to argue that the Proposal should be dismissed because it lacks certain permit conditions.⁸ For example, the District argues that the Proposal is defective because it “fails to address the circumstances under which the City can and should withdraw AMC’s in the future.”⁹ DWR does agree that a permit condition requiring the City to fully exercise its native water rights before withdrawing any recharge credits would be appropriate. However, the fact that such a condition did not exist at the beginning of these proceedings is not a reason to deny the Proposal. Such a permit can easily be crafted and included in any recommendation or order in this matter. Broadly, the argument that the Proposal should be dismissed on the grounds that it lacks adequate accompanying permit conditions disregards the entire purpose of these proceedings, which has always been to determine permit conditions that would make the Proposal most prudent.

Further, these arguments by the District illustrate how much more productive these proceedings could have been if the District had been willing to engage in a meaningful discussion of permit conditions from the beginning, rather than simply muddying the waters with its numerous off-base arguments advocating for the Proposal’s dismissal. The District has refused to engage in a productive discussion regarding permit conditions and now expects credence to be given to its argument that the Proposal is defective because it lacks adequate permit conditions. The irony of that position speaks for itself.

The District also complains that, under the Proposal, it would be “the City’s sole decision whether to pump down the Aquifer or be a good steward of the resource and that there is “no

⁸See District’s Proposed Findings, Conclusions, and Brief, p. 69-70.

⁹*Id.* at p. 12, para. 57.

guarantee” that the City will “manage the Aquifer in a manner that aspires to keep the Aquifer full.”¹⁰ The Intervenors similarly write, “Nothing in the City’s Proposal requires the City to maintain a full Aquifer, limits the City’s ability to withdraw native rights or restricts the City from withdrawing recharge credits.”¹¹ These things are true, but they are also true of all water rights and water right owners. DWR does not prescribe to owners of multiple water rights how they should use or manage those rights. DWR requires water right owners to operate within the terms, conditions, and limitations set forth in their water right permits, which are prescribed to protect each water right’s water source, and in turn, other users of that source. Here, the relevant permit terms, conditions, and limitations will remain the same as they have always been. Moreover, a permit condition requiring the City to use its native water rights before it withdraws recharge credits would prescribe water rights management much more than DWR normally does. Similarly, DWR does require any water user to guarantee that they will not exercise their water rights to the fullest extent they are allowed to unless it is absolutely necessary to do so, and there is no reason to require such a thing of the City here. Finally, the City has been an exemplary steward of the Aquifer, and DWR has no reason to believe that will change with the Proposal.

The District also argues that the justification advanced by the City related to the AMC aspect of the Proposal (keeping the Aquifer full for a longer period of time) does not apply to the minimum index aspect of the Proposal, as “there was no analysis or modeling produced by the City that demonstrated how waiting longer to withdraw credits would somehow benefit the Aquifer during an extreme drought.”¹² For one thing, this argument misses the entire point of the minimum index aspect of the Proposal, which is not simply that it would allow the City to wait

¹⁰*Id.* at p. 21, para. 94; p. 71.

¹¹Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 20, para. 75.

¹²District’s Proposed Findings, Conclusions, and Brief, p. 78.

longer to withdraw accumulated credits, but that the City might end up not needing to withdraw those credits at all. This is obviously beneficial to the Aquifer, and no modeling or analysis is needed to make that determination. Even if credits eventually do need to be withdrawn, it is simply common sense that keeping an Aquifer as full as possible as a drought progresses is beneficial. The bottom line is that lowered minimum index levels would not harm the Aquifer because the Project would still operate in only the top 20 percent of the Aquifer, even under the Proposal.

Additionally, the District and the Intervenors consistently disregard the fact the City itself has proposed permit conditions that would require it to continue to physically recharge the Aquifer when it is possible to do so and would not allow AMCs to be generated unless the Aquifer is functionally full. DWR agrees that such a permit condition is necessary and fully expects that any order approving the Proposal would contain such terms. This is why statements such as the one by the Intervenors that “the proposed modification simplify and greatly accelerate the City’s ability to accumulate recharge credits without any obligation to recharge the Aquifer” are misleading.¹³ The City’s obligation to recharge the Aquifer when it wants to generate a credit only goes away if the Aquifer is functionally full to start with. The determination of appropriate permit conditions is one of the main purposes of these proceedings, and the District’s own behavior is a large part of the reason more concrete permit conditions have not been crafted to this point. In any case, the lack of permit conditions at the outset of the proceedings is not a reason for the Proposal to be dismissed.

IV. THE DISTRICT MISCHARACTERIZES RELEVANT BACKGROUND FACTS AND CURRENT PHASE II OPERATIONS.

As to the background events giving rise to the Proposal, it is enlightening that the District

¹³Intervenor’s Proposed Findings of Fact and Conclusions of Law, p. 96, para. 117.

attributes the “hole” in the Aquifer that existed in January 1993 solely to the City and its use of its native Equus Beds water rights, while crediting “natural recharge and the sustainable water practices of the various constituents of the Aquifer” for the subsequent rebound in water levels.¹⁴ To blame water level declines entirely on the City (and then not even credit it specifically for recharge) is patently disingenuous. The fact is that all water users in the Equus Beds contributed to the Aquifer’s decline prior to 1993, and the City’s subsequent water management, namely its increased reliance on Cheney Reservoir, was the most significant factor in facilitating recharge and the Aquifer’s eventual recovery.¹⁵ That the District cannot even acknowledge this and has attempted to frame the entire situation the way it has is illustrative of the District’s conduct throughout this process and its inability to view the Proposal through an unbiased lens.

The District also mischaracterizes the City’s current operation of the Project. Paragraph 101 of the District’s Brief is based on a series of hypothetical questions posed to Mr. Letourneau regarding the withdrawal of AMCs.¹⁶ The hypothetical the District relies on is foundationally flawed when used for the purpose of drawing a comparison to the AMC aspect of the Proposal. The hypothetical at issue was as follows:

Q. Okay. So we have -- it's 10 feet above bedrock, let's say we inject an acre-foot of water into this 1-acre area. If we were to subtract out any kind of storage coefficients, if we assume that we can subtract out storage coefficients for sand and gravel, would you agree with me that the water level would go up by a foot?

A. Yes.

Q. Okay. So at that point, as we've injected in the water, we're now at 11 feet. Then let's say down the road that the same amount of recharge credits that were injected are taken out and let's say that we don't have to worry about gradational losses.

A. Okay.

¹⁴District’s Proposed Findings, Conclusions, and Brief, p. 1, para. 2.

¹⁵See Transcript, Volume I, p. 145, lines 15-25; Transcript, Volume I, p. 146, lines 1-25; Transcript, Volume I, p. 271, lines 11-14.

¹⁶District’s Proposed Findings, Conclusions, and Brief, p. 23, para. 101.

Q. Let's say that that same amount is taken out in the future, what is the water level back to in this 1-acre area?

A. 10 feet above bedrock.

Q. Now let's talk about the same concept with respect to an aquifer maintenance credit. Let's say we start at water level of 10 feet below the bedrock, right?

A. Okay.

Q. And then let's say that the City sends a gallon of water to -- to the City for municipal use, they've taken it out of the Little Arkansas River, they've treated it, they send it directly to the City for use, would you agree with me that the level of this aquifer -- or this water level in our hypothetical is still 10 feet, would you agree?

A. Yes.

Q. Now let's say in the future the City cashes in this credit and they're going to take out the corresponding amount they sent to the City for use, would you agree with me now the water level would drop to 9 feet?

A. Yes.¹⁷

In the first part of the District's hypothetical, which ostensibly represents current Phase II operations, the Aquifer's water level starts at ten feet above bedrock. Water is then injected, raising the water table to eleven feet above bedrock. A physical recharge credit is then later withdrawn, returning the water table to ten feet above bedrock. This hypothetical does not accurately represent the way the City would have to approach this situation under current Phase II operations. In the District's hypothetical, injection is the first step in this process, but the Aquifer is currently so full that the City cannot inject water without first withdrawing water. In order to inject one acre-foot of water, the City would have to first withdraw one acre-foot, which in the District's hypothetical would lower the Aquifer's water table to nine feet above bedrock before any injection occurs.

Thus, in reality, the Aquifer's water table is lowered to nine feet above bedrock in both situations presented by the District. The only difference is that, in the first scenario, the withdrawal of water is undertaken for the sole purpose of creating space in the Aquifer for

¹⁷Transcript, Vol. VIII, p. 1981, l. 9 – p. 1982, l. 22.

injection, while in the second scenario, water is withdrawn because the use of that water is actually necessary to meet the City's consumer demand. The District's cited hypothetical scenario actually illustrates exactly why the City has pursued the Proposal, and the District's reliance on such a fundamentally flawed hypothetical illustrates that it either does not understand or has knowingly disregarded the most basic aspects of the Project and the Proposal.

V. THE DISTRICT ERRONEOUSLY INVOKES THE KANSAS ADMINISTRATIVE PROCEDURE ACT AND MISCHARACTERIZES ITS OWN AUTHORITY.

The District persists in mischaracterizing its own authority regarding the Project and the Proposal, and its new arguments are even more patently inaccurate than those it has raised previously. The District claims that review of the Proposal has violated the Kansas Administrative Procedure Act and also makes repeated reference to the District's authority to grant spacing waiver. These arguments are inaccurate. KAPA does not apply to this stage of the proceedings in any way, and the District does not have the authority to grant spacing waivers.

a. The Kansas Administrative Procedure Act is Inapplicable to this Stage of these Proceedings.

DWR's Brief has already addressed the fact that the District has patently misconstrued its own authority by claiming that it is within the purview of the District to determine how recharge credits can be accumulated and when they can be withdrawn.¹⁸ However, it is necessary to address here in more detail the District's absolutely outlandish claim that the City "failed to pursue proper administrative channels" pursuant to the Kansas Administrative Procedure Act ("KAPA") when it sought review of the Proposal.¹⁹ The District argues that KAPA "embodies [the] principle" that the City "should have started its review with the District."²⁰ It is difficult to even know how to respond to such a wildly incorrect and wholly inapplicable argument. The District is not an executive branch agency and therefore is not subject to KAPA.²¹ Moreover, KAPA governs the review of agency actions.²² No agency action, final or otherwise,

¹⁸Brief in Support of Proposed Findings of Fact and Conclusions of Law of DWR, pp. 20-21.

¹⁹District's Proposed Findings, Conclusions, and Brief, p. 86.

²⁰*Id.*

²¹*See* K.S.A. 77-501, *et seq.*

²²*See id.*

has been taken here—the entire purpose of these proceedings is so that the Presiding Officer can write recommendations upon which agency action will ultimately be based. KAPA has no bearing on the proceedings at this juncture at all. The District’s entire KAPA argument is baffling at best and serves only to illustrate the extent to which the District is willing to disregard relevant arguments and authority to advance its “kitchen sink” approach to having the Proposal rejected.

b. The District Does Not Have the Authority to Grant Spacing Waivers.

The District misstates the law again in its discussion of spacing waivers. The District’s Brief references “...the granting of spacing waivers *by the District...*” and also states, “Mr. Boese determined that spacing waivers previously granted do not apply to AMC withdrawals, and new spacing waivers *from the District* would be required (emphasis added).”²³ The District also writes, “Additionally, since the granting of spacing waivers *by the District* was also based on recharge credits not being withdrawn....(emphasis added)”²⁴ Spacing waivers are not granted by the District. They are granted by DWR. K.A.R. 5-10-4 provides, “the Chief Engineer may grant an exemption or waiver from any regulation adopted by the Chief Engineer if it is shown that the granting of such exemption or waiver will not prejudicially nor unreasonably affect the public interest and that it will not impair an existing water right.”²⁵

It is true that DWR would not generally waive a regulation if it had received a contrary recommendation from a groundwater management district. However, DWR is authorized to do so. K.A.R. 5-22-2 governs well spacing requirements within the District and provides that the minimum spacing of nondomestic wells shall be 660 feet from all domestic wells.²⁶ Because this requirement is contained in a regulation adopted by the Chief Engineer, the Chief Engineer could waive it if he determined that doing so would not prejudicially or unreasonably affect the public interest and would not cause impairment.

²³District’s Proposed Findings, Conclusions, and Brief, p. 37, para. 183.

²⁴*Id.* at p. 38, para. 184.

²⁵K.A.R. 5-10-4.

²⁶K.A.R. 5-22-2.

DWR does not believe that the City's water use under the Proposal will harm the public interest or cause impairment.

Additionally, it has been well-documented that the City has expressed its willingness to enter into MOU terms that would require it to make whole any domestic water right owner whose well is within 660 feet of a Project well and is negatively impacted by the City's water use under the Proposal. Even if an MOU to that effect between the City and the District does not materialize, permit conditions to the same effect could easily be included in any order approving the Proposal. Particularly with such a provision in place, it is very unlikely that the granting of spacing waivers here would harm the public interest or cause impairment. Moreover, the District's conduct throughout the proceedings (refusing to engage in productive discussion of permit conditions and blatantly mischaracterizing facts, law, and the hearing record) has made this a scenario where unilateral waiver of a regulation could be appropriate and necessary. Even aside from the substantive issue of whether spacing waivers should be granted, this is yet another instance of the District misrepresenting the law as to a process it should be very familiar with.

VI. THE DISTRICT AND THE INTERVENORS MISCHARACTERIZE NUMEROUS ASPECTS OF THE PROPOSAL AND MISAPPLY RELEVANT LAWS.

The District and the Intervenor continue to argue that the Proposal would constitute a new appropriation, that it will allow the City to make unauthorized uses of its water, that the accumulation of AMCs would constitute passive recharge, that the proposed accounting method is inaccurate, that the City's water use under the Proposal will result in impairment to existing area water rights, that the Proposal should be denied due to practical saturated thickness concerns, and that the City's modeling work and DWR's review of that modeling was inadequate. None of those arguments are accurate.

a. The Proposal does not Constitute a New Appropriation.

The District and the Intervenor continue to argue that the Proposal would constitute a new appropriation. That is not the case—the Proposal will not give the City access to any more water than it is currently entitled to use. The Intervenor particularly make numerous references to additional appropriations, and the District and the Intervenor both continue to discuss the

proposed 120,000 acre-feet cap on recharge credit accumulation in the context of an additional appropriation. The Intervenors write that “the City’s Proposal seeks the ability to accumulate and withdraw up to 120,00 acre-feet of water, subject only to individual permit requirements.”²⁷ As DWR’s Brief discusses at length, the Proposal does not seek to withdraw 120,000 acre-feet of recharge credits. The proposed cap applies to overall recharge credit accumulation, not to water use. Moreover, the cited sentence by the Intervenors treats the relevant individual permit requirements as though they are merely an afterthought. To the contrary, permit requirements such as authorized quantity and rate are the bedrock of every water right, and the specific permit requirements at issue here are the very reason that the City will not, in fact, ever be permitted to withdraw 120,000 acre-feet of recharge credits at a time.

The District alleges that the City offered “contradicting” testimony regarding how the cap was determined, and the Intervenors cite testimony that the City is not likely to need 120,000 acre-feet of recharge credits, even during severe drought.²⁸ Again, because the 120,000 acre-feet number pertains to recharge credit accumulation and does not pertain to actual water use, DWR does not feel that this number is even all that critical to the Proposal. Additionally, the 120,000 acre-feet cap would simply impose a limit where none currently exists.²⁹ For those reasons, DWR is not concerned to any substantial degree with how the City determined this number, even if the City did in fact present conflicting testimony in that regard. For the same reasons, DWR is also not concerned by the testimony that the City is not likely to need 120,000 acre-feet of recharge credits, even in extreme drought. While DWR does not think it would be inappropriate to lower

²⁷Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 54, para. 234.

²⁸District’s Proposed Findings, Conclusions, and Brief, p. 18, para. 80; Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 16, para. 59.

²⁹The Intervenors cite testimony by Mr. Romero that “the current minimum index levels act as a cap or physical limitation on the recovery of credits.” Intervenor’s Proposed Findings of Fact and Conclusions of Law, p. 16, para. 59. A limitation on the recovery of credits is not relevant to the 120,000 acre-feet cap related to the accumulation of credits, and the minimum index levels are not even needed act as some sort of de facto cap on credit recovery—the quantity and rate limitations of the Project recharge and recovery wells already do that.

the 120,000 acre-feet cap somewhat, the cap as proposed is not unreasonable and does not warrant the Proposal's dismissal.

Related to the issue of the amount of water the City would be entitled to under the Proposal, the District's Brief sets out a scenario that the City could undertake now under current Phase II operations: in a single year, the City could take 10,000 acre-feet of water out of the Aquifer using its native water rights in the Equus Beds Wellfield and then, in the same year, fully recharge the Aquifer through the injection of Little Arkansas River surface water.³⁰ What the District leaves out of this scenario is that by fully recharging the Aquifer, the City would be entitled to subsequently (immediately if it so chose) withdraw a corresponding amount of water from the BSA in the form of physical recharge credits. In the District's scenario this would presumably be an additional 10,000 acre-feet of water. Accordingly, a total of 20,000 acre-feet of water would be withdrawn from the BSA and the Aquifer for consumptive municipal use, and the Aquifer's water table would be lowered, raised, and lowered again.

The District compares this situation to what it apparently believes is some sort of doomsday scenario that the City could undertake under the Proposal, where, in one year, the City could take 10,000 acre-feet of water out of the Aquifer using its native water rights in the Equus Beds Wellfield, accumulate 10,000 acre-feet of AMCs by diverting Little Arkansas River Surface, and then subsequently take the 10,000 acre-feet of water it had accumulated in AMCs out of the BSA.³¹ The end-result in this scenario is, again, that 20,000 acre-feet of water is withdrawn from the Aquifer for consumptive municipal use. The difference between this scenario and the first scenario the District sets out is that, here, the Aquifer's water table has not been raised and lowered multiple times purely for the purpose of injection, and the AMC water would remain in the Aquifer longer than the physical recharge credits would in the first scenario, if one assumes that the City is able to satisfy its municipal need with Little Arkansas River surface

³⁰District's Proposed Findings, Conclusions, and Brief, p. 71.

³¹*Id.*

water rather than injecting that water for physical recharge and finding itself still in need of an equivalent amount of water for municipal use. So, the District is correct in its assertion that there would be “no way to preclude the City from pursuing such an approach” under the Proposal. However, the District fails to acknowledge that there is no way to preclude the City from doing the exact same thing now and that the scenario under the Proposal is better for the overall health of the Aquifer.

The Intervenors write that “AMCs will allow a substantially larger quantity of groundwater to be withdrawn from the EBWF area during a drought when the demand for and value of water are at the highest points.³² It is worth noting that the “substantially larger” quantity of water that the Intervenors refer to still represents a quantity of water that the City would be *entitled* to—AMC withdrawals will be limited to the amount of water that the City could have physically injected, and each recharge and recovery well will still be governed by its annual authorized quantity and rate limitations. The alternative is that the City is either required to raise and lower the Aquifer’s water table solely for the purpose of injection or that the Project recharge and recovery wells will be de facto prevented from pumping their authorized quantity each year.

Additionally, K.A.R. 5-22-14, the regulation that the District argues bars the City from projecting its water demands into 2060, applies only to new appropriations.³³ Finally, it is worth noting that the Intervenors’ argument “that due process demands that new appropriations be available to all and not exclusively available to the City” is off-base because the Proposal is not a new appropriation.

b. The Uses the City Will Make of its Water under the Proposal are Permissible.

DWR’s Brief addresses the District’s and Intervenors’ “two-for-one” argument in detail, but it is necessary here to expand on the District’s arguments regarding the uses the City would make of its water under the Proposal. The District again illustrates its lack of basic understanding of the Proposal with its

³²Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 50, para. 215.

³³District’s Proposed Findings, Conclusions, and Brief, p. 72; K.A.R. 5-22-14.

citation to what it believes to be an “illuminating” exchange wherein Mr. Letourneau testified that “water left in the Aquifer for purposes of an accounting process” would not be a beneficial use of water recognized by the Kansas Water Appropriation Act (“KWAA”).³⁴ It is unclear what is supposed to have been so illuminating about this testimony, as the beneficial use of the City’s AMC water under the Proposal would not be “for purposes of an accounting process,” and no one has ever claimed that that would be the case. As discussed in DWR’s Brief, AMC water under the Proposal would be stored in the BSA for eventual municipal use, the same end-result consumptive use that the City makes of all its Project water now. The District apparently cannot even make up its mind which completely off-base argument best excuses its total disregard of this fact, as it also continues to make the alternative claim that the unauthorized use the City is attempting to make of its water would be “to accumulate AMCs.”³⁵

Relatedly, the District cites testimony wherein Mr. Pajor agreed that currently, when the City takes Little Arkansas River surface water diversions directly to town, that water is not considered to have been used for recharge.³⁶ The District uses this testimony to support its conclusion that “...using ASR II ground rules as a baseline, drawing parallels between past diversions to the City from the Little Arkansas River to the City’s current Proposal, would not allow for AMCs.”³⁷ The District again misses the point that because the City did not possess physical infrastructure connecting the river to the BSA at the time Phase II was approved, currently-allowed Phase II operations do not actually parallel the Proposal in this regard.

Further, because water withdrawn from the BSA based on the accumulation of AMCs would be used for municipal use, such water would not “fall low on the list of priorities,” as the District alleges.³⁸ The District is entirely off-base in making this argument at all. For one thing, K.S.A. 82a-707(b), the statute the District cites to support its contention in this regard, applies only “when supply is not sufficient

³⁴District’s Proposed Findings, Conclusions, and Brief, p. 64, para. 300.

³⁵District’s Motion to Dismiss, p. 3; District’s Proposed Findings, Conclusions, and Brief, p. 91.

³⁶District’s Proposed Findings, Conclusions, and Brief, p. 12, para. 55.

³⁷*Id.*

³⁸District’s Proposed Findings, Conclusions, and Brief, p. 91.

to satisfy all water rights.”³⁹ Further, the priority of uses set out in that statute applies only in the narrow context of determining priority among water rights with the same date of priority.⁴⁰ Outside of that context, all rights relevant to water right usage when supply is not sufficient to satisfy all users are to be determined based on the date of priority—the purpose of use is not to be considered.⁴¹ Even if a scenario did arise where the use of water that the City obtains through AMCs needed to be considered (which would require that there be an impairment and that there be a resulting dispute between two or more water rights with the same date of priority), that use would be municipal use, which is the second-highest priority use after domestic use.⁴² The District’s and the Intervenors’ arguments regarding unauthorized use of water are not accurate. The type of end-result consumptive use made of the City’s Project water, as well as the number of consumptive uses made of such water, would be the same under the Proposal as it is now.

c. The Accumulation of AMCs will not Constitute Passive Recharge.

In its arguments regarding passive recharge, the District acknowledges that DWR determined that AMCs as proposed here would not constitute passive recharge because all the water at issue would utilize existing Project infrastructure.⁴³ However, the District makes no attempt to reconcile this fact with its argument that AMCs would constitute passive recharge, instead merely continuing to cite examples of passive recharge where the water source at issue is completely unconnected to any Project infrastructure (and in some cases where the City does not even own water rights allowing it to use that source).⁴⁴ The District attempts to draw parallels between these scenarios and the Proposal by citing Mr. Letourneau’s testimony that the City *could* treat water from Cheney Reservoir, El Dorado Reservoir, or the Arkansas

³⁹K.S.A. 82a-707.

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³District’s Proposed Findings, Conclusions, and Brief, p. 67, para. 312.

⁴⁴*See id.* at p. 64, para. 303 (citing testimony that crediting the City in the Equus Beds Wellfield for using water from Cheney Reservoir rather than the Aquifer would constitute passive recharge); p. 67, para. 313 (citing testimony that crediting the City in the Equus Beds Wellfield for using Cheney Reservoir, El Dorado Reservoir, or the Big Arkansas River instead of the Aquifer would amount to passive recharge).

River at its Project treatment facility.⁴⁵ In doing so, the District fails to account for the basic fact that the real difference between its example scenarios and the Proposal is that treatment of Little Arkansas River surface water at the City’s Project treatment plant is not just a mere hypothetical possibility—physical infrastructure connecting the Little Arkansas River and the Project treatment plant already exists, and the water rights that would be used to generate AMCs are the exact same rights that are currently used to generate physical recharge credits. That is why the recharge contemplated in the context of AMCs is not passive.

Relatedly, the District writes that Mr. Letourneau “admitted that ultimately the *only* distinction with respect to the City’s Proposal that exempted it from the definition of passive recharge credit was the source of water as ‘coming from the Little Ark.’” (emphasis in original).⁴⁶ For one thing, Mr. Letourneau never even said the word “only” in the relevant testimony, and it is thus misleading for the District to have italicized that word. For another thing, the District completely omits part of the relevant sentence, which contains testimony that directly contradicts the District’s argument. The entirety of the relevant testimony was as follows:

Q. So in your view, then, the distinction here with respect to the Little Arkansas River, is the distinction the nature of where the water is coming from then?

A. Well, it's the start of the ASR, I mean, yeah, it's coming from the Little Ark, **ASR diversion, treated at the ASR facility**, there's just not space in the aquifer. That's what it boils down to.⁴⁷

Additionally, immediately prior to the above testimony Mr. Letourneau had testified, “everything other than diversions from the Little Ark **through the ASR diversion works** would be considered passive recharge credits right now.” Accordingly, Mr. Letourneau made clear that it was the presence of physical Project infrastructure, not merely the water source being the Little Arkansas River, that led DWR to the conclusion that AMCs as proposed would not constitute passive recharge.

⁴⁵*Id.* at p. 67, para. 313.

⁴⁶*Id.*

⁴⁷Transcript, Vol. VII, p. 1655, ll. 20-24.

For many of the same reasons set out above, the statement by the Intervenors that “a passive recharge credit is when source water is not injected into the aquifer,” while perhaps an accurate statement of what was considered passive recharge when Chief Engineer Pope approved Phase I, does not fully capture the concept of passive recharge.⁴⁸ As DWR’s Brief explains, the Project and the state of the Aquifer has evolved immensely since Chief Engineer Pope wrote the Phase I Findings and Orders. It is simply not a sound argument to say that Chief Engineer Pope envisioned the present scenario when he contemplated passive recharge at that time. Further, Mr. Pope’s testimony that “getting credit for not pumping a well can really lead to unintended consequences,” which the Intervenors cite, is not concerning to DWR.⁴⁹ The only “consequence” that can logically follow from this scenario is that other water users in the state could build an aquifer storage recovery system and receive credit for pumping that system’s surface water source rather than its groundwater source. That is an outcome that DWR is more than comfortable with.

The Intervenors argue that the accounting procedure the City has proposed for the creation of AMCs “does not...cause source water (water diverted from the Little Arkansas River) to enter the storage volume of the basin storage area.”⁵⁰ As discussed in DWR’s Brief, while DWR acknowledges that physical injection of Little Arkansas River surface water into the BSA will not occur when the City accumulates AMCs under the Proposal, the proposed accounting method will ensure that all AMC water that is withdrawn is water that would have been diverted from the river if the City was forced to pump the BSA down to make space for injection. This is why DWR has always been of the opinion that water withdrawn based on the accumulation of AMCs under the Proposal should not be considered native Equus Beds water. For that reason and for all of the reasons set out herein relating to physical Project infrastructure, recharge is not necessarily passive just because source water was not physically injected into the Aquifer.

⁴⁸Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 9, para. 29.

⁴⁹*Id.* at p. 24, para 95.

⁵⁰*Id.* at p. 10, para. 30.

d. The City's Proposed Accounting Method is Adequate.

Related to the issue of passive recharge, the District and the Intervenor both criticize the adequacy of the AMC accounting method proposed by the City. First, the District's argument that "there would be no ability to meter water as it is diverted into the Aquifer, as with ASR Phase II water," disregards the entire purpose of the new proposed AMC accounting method.⁵¹ The District also cites testimony that the City's actual physical recharge credit retention has historically been around 63-64 percent. However, this fact is really not relevant in and of itself because it says nothing about the correlation between that number and the proposed AMC accounting method—had AMC retention been calculated for the same time frame, it likely also would have been around 63-64 percent.

The District and the Intervenor also allege that the initial loss value of five percent and annual recurring loss value of three percent proposed for the AMC accounting does not match actual recharge credit loss values, with the Intervenor writing, "an initial 5% loss for AMCs based on what retention might look like if the aquifer were at the theoretical perfect level for artificial recharge is not based on actual measurements or a generally accepted engineering methodology, it is merely the city's ideal scenario rather than actual measurements or sound engineering."⁵² However, the way the five percent initial loss value was determined was explored during the hearing: the City could retain 95% of its recharge credits if it pumped the Aquifer down to 1998 levels in order to reduce the amount of water lost from the Aquifer to the river.⁵³ As the Intervenor point out, "a natural consequence of a fuller aquifer is that more water will be discharged to the stream, [and] physically you have a higher quantity of recharge credits being lost to streamflow."⁵⁴ Thus, the City is credited with 95% recharge credit retention in order to avoid a scenario where the City is incentivized to pump the Aquifer down in order to achieve a water table where its credit retention is maximized.⁵⁵ In light of this testimony, the District's allegation that the

⁵¹District's Proposed Findings, Conclusions, and Brief, p. 13, para. 58.

⁵²Intervenor's Proposed Findings of Fact and Conclusions of Law, p. 85, para. 79.

⁵³Transcript, Vol. VII, p. 1887, ll. 3-21.

⁵⁴Intervenor's Proposed Findings of Fact and Conclusions of Law, p. 28, para. 118.

⁵⁵*Id.*

City “could not explain the defensibility of using the 1998 groundwater levels as a baseline for physical recharge operations...” is inaccurate.⁵⁶ Some amount of approximation is necessary when dealing with AMC accounting, but DWR still feels that the proposed AMC accounting method closely approximates actual physical recharge credit retention and was established using sound and reasonable methods.

The Intervenors also cite K.A.R. 5-12-1(d)(1), which states, “If more than one application for a permit to appropriate water for artificial recharge relates to the same aquifer storage and recovery system, each application shall use the same methodology for accounting water stored in the basin storage area.”⁵⁷ This regulation does not bar the proposed AMC accounting method because, as discussed in DWR’s Brief, AMCs would not constitute artificial recharge, but rather would simply be a “recharge credit.” The only water for which the City gets the beneficial use of artificial recharge is water that it physically injects into the BSA under current Phase I and Phase II operations, and all such physically injected water will continue to be accounted for using the same method. K.A.R. 5-12-1(d)(1) does not bar the proposed AMC accounting method, which is reasonable and permissible.

e. The District and the Intervenors Continues to Disregard DWR’s Existing Impairment Procedures.

The District also raises its impairment arguments again in its Brief, once again completely disregarding DWR’s established impairment procedures. The District writes that Mr. Clement testified that “if impairment occurred to another user, the City could drill the impacted well deeper, however, he could not guarantee the Aquifer would yield sufficient water or acceptable quality just by drilling deeper” but that “[Mr. Clement] failed to identify any other solution.”⁵⁸ The Intervenors similarly write that “if impairment is defined in the sense of wells losing their water column, then lowering the Aquifer to the proposed index levels would cause impairment.”⁵⁹

⁵⁶District’s Proposed Findings, Conclusions, and Brief, p. 28, para. 132.

⁵⁷Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 10, para 31.

⁵⁸District’s Proposed Findings, Conclusions, and Brief, p. 51, paras 240-241.

⁵⁹Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 45, para. 194.

First, impairment is not defined in the sense of wells losing their water column. As discussed in DWR's Brief, a well that reaches usable water if it is drilled deeper is not legally impaired. This is not at odds with the holding in *Garetson Bros. v. Am. Warrior, Inc.*, wherein the Kansas Court of Appeals defined impairment to mean water use by a junior water right owner that "diminishes, weakens, or injures the prior right."⁶⁰ Rather, the *Garetson* holding should be read together with DWR's existing impairment regulations to reach the conclusion that a water right that has been impacted in some way by a junior right is not truly diminished, weakened, or injured just because it has been drilled deeper. This outcome makes sense, as, again, it encourages the full development of the water of the state. Moreover, permit conditions requiring the City to compensate another user who finds themselves faced with having to drill a well deeper can easily be crafted. Further, the "other solution" that is available when drilling deeper does not allow a well to reach water if DWR's impairment procedures. As has been discussed at length, those procedures are intended to allow DWR to remedy a specific impairment that has been shown to exist. They are not intended to be used to preemptively deny water use when no concrete evidence that impairment is even likely has been shown.

The Intervenor's Brief raises concerns regarding the redress available to an impaired, allegedly impaired, or otherwise impacted landowner during the time that it would take the City to address an issue or DWR to complete an impairment investigation, arguing that "[N]either the City nor DWR presented a cure for the injury caused while waiting for the City to address domestic well issues or during the impairment process." The private right of action provided by K.S.A. 82a-716 provides the cure that the Intervenor is concerned about.⁶¹ Such an action would provide a forum for making determinations regarding the value of the specific water right at issue and the amount of the specific affected landowner's damages, which as the Intervenor's

⁶⁰56 Kan. App. 2d 623, 648; Intervenor's Proposed Findings of Fact and Conclusions of Law, p. 66, para. 18.

⁶¹See K.S.A. 82a-716.

Brief discusses, can be very difficult to quantify as a general matter.⁶² Overall, DWR still feels that actual legal impairment is very unlikely to occur as a result of the Proposal, and, moreover, DWR is confident that adequate procedures exist to remedy an impairment or an otherwise damaged landowner if such becomes necessary.

f. Practical Saturated Thickness Concerns do not Warrant the Proposal's Dismissal.

The District and the Intervenors continue to argue that the Proposal should be dismissed due to the impact that the City's water use under the Proposal would have on the practical saturated thickness of the Aquifer. On this topic, the District's Brief makes much of the monitoring well logs that the District introduced during the hearing.⁶³ The District says that Mr. Letourneau testified that he "could not say that the New Minimum Index Level was in the public interest" after reviewing these well logs.⁶⁴ Mr. Letourneau actually said that he could not say that the new minimum index levels were *not* in the public interest without further review.⁶⁵ Moreover, Mr. Letourneau's testimony when he was asked as a witness to quickly evaluate a document he had not spent time reviewing before does not override the totality of the hearing record in this matter, which indicates that further review by DWR, particularly on the subject of practical saturated thickness, is not necessary.

Cross examination of Mr. Letourneau revealed that this well log data does not bolster the District's case to the extent that the District's lengthy recitation of it implies. First, the relevant wells are not production wells, but observation wells used for environmental monitoring purposes.⁶⁶ Mr. Letourneau testified that environmental monitoring wells are not relevant to a determination of practical saturated thickness.⁶⁷ Additionally, for each well that the District cites

⁶²See Intervenors' Proposed Findings of Fact and Conclusions of Law, p. 52, para. 228.

⁶³District's Proposed Findings, Conclusions, and Brief, pp. 45-50.

⁶⁴*Id.* at p. 49, para. 223.

⁶⁵Transcript, Vol. VI, p. 1604, ll. 5-8.

⁶⁶Transcript. Vol. VIII, p. 1990, ll. 3-5, p. 1991, l. 1.

⁶⁷*Id.* at p. 1991, ll. 11-15.

the practical saturated thickness of, the District relied on a single data point in an index cell.⁶⁸ Mr. Letourneau testified that lithographic data from a single data point in an index cell cannot be used to determine the lithography for an entire index cell.⁶⁹ Further, Mr. Letourneau testified that the practical saturated thickness shown on each well log offered by the District was adequate for each well.⁷⁰

The District says that Mr. Oleen “accused” it of cherry-picking results as to this well-log testimony, but an examination of the record reveals that the District did in fact clearly cherry-pick these well logs for the purpose of exaggerating something that is actually a non-issue. As has been noted numerous times, the Proposal will leave the Aquifer 80 percent full even at the end of one percent drought in which the City has used all of the water the Proposal would entitle it to. Nothing about the monitoring well data put forward by the District changes DWR’s opinion that the issue of practical saturated thickness does not pose any grounds for dismissal of the Proposal.

g. The Proposal will Benefit Water Quality More than it will Harm it.

The District and the Intervenors both make much of the various evidence presented that withdrawals of water under the Proposal during a one-percent drought would likely accelerate the migration of the Burrton salt plume. DWR acknowledges that that is likely during the worst years of a severe drought. However, DWR believes that the benefits the Proposal will provide by allowing the Aquifer to be maintained at a full level (and not requiring the water table to be raised and lowered repeatedly) during the 99 percent of the time that the area is not experiencing a one percent drought outweighs the potential harms posed by the one percent drought scenario. Additionally, salt plume migration is likely to accelerate during a severe drought even if the Proposal is not approved, as the City would likely pump its native water rights in the Equus Beds Wellfield harder than normal, and other area users would likely do the same with their irrigation rights.

⁶⁸*Id.*, ll. 2-4.

⁶⁹Transcript, Vol. VII, p. 1991, ll. 5-10.

⁷⁰*Id.* at p. 1990, ll. 18-22.

The District cites testimony from Mr. Henry that, during the planning for Phase I, the City was concerned that withdrawing water below the lowest established minimum index level could adversely impact water quality.⁷¹ However, such testimony should not be taken to mean that the City has the same concerns about lowering this minimum index levels within the current context of the Project. Mr. Henry expanded on the cited testimony just a few questions later by saying, “It [withdrawing water below the Phase I minimum index levels] could [impact water quality], but you have to consider that in the context of operations when it comes to the Proposal. Because with the current terms and conditions it would result in lower aquifer levels. In the context of the Proposal, the lower index levels would result in higher aquifer levels.”⁷² It is true that water quality could be impacted during a severe drought, but the water quality benefits the Proposal will present the vast majority of the time outweigh that potential harm.

Related to the issue of water quality, the Intervenors point out that the City’s existing Phase I and Phase II permits were subject to approval from the Kansas Department of Health and Environment (“KDHE”) and that KDHE approval has not been sought in relation to the Proposal.⁷³ This is true, but the reason KDHE approval has not been sought as to the Proposal is because the KDHE approval that was required for the Phase I and Phase II permits related to the quality of water injected in to the BSA—such water was required to meet or exceed drinking water standards. Nothing about the Proposal changes that aspect of the Project, and additional approval from KDHE as it relates to the Proposal is thus not necessary.⁷⁴

h. The City’s Modeling Work was Adequate.

The District’s Brief criticizes the adequacy of the City’s modeling work, including its drought modeling and the inherent adequacy of the MODFLOW model.⁷⁵ First, the District criticizes the City’s drought modeling on the grounds that it used a more severe drought than a one-percent drought would

⁷¹District’s Proposed Findings, Conclusions, and Brief, p. 3, para. 9.

⁷²Transcript, Vol. III, p. 580, ll. 16-22.

⁷³Intervenors Proposed Findings of Fact and Conclusions of Law, p. 35, para. 147.

⁷⁴Transcript, Vol. VIII, p. 1997, ll. 21-24.

⁷⁵District’s Proposed Findings, Conclusions, and Brief, pp. 72-73.

actually represent and that the City’s actual population growth has “flat-lined” compared to its projections.⁷⁶ Even if both of those things are true, they are not shortcomings of the Proposal—they simply mean that there is likely to be even more water left in the Aquifer at the end of a one-percent drought than the modeling shows. The District also points out that State of Kansas guidelines only require cities to plan for a 2 percent drought, but this is not evidence that the City’s planning was inappropriate.⁷⁷ The City should not be penalized for essentially attempting to be more prepared than state guidelines require. The District further attempts to bolster its case in regards to the adequacy of the City’s drought modeling by citing Mr. Winchester’s testimony that “there is no such thing as a normal or average one percent drought.”⁷⁸ This testimony does not actually help the District’s case—instead it illustrates exactly why it is so important for a municipality to have policy-making leeway in matters of drought planning and water resource management, which, in the City’s case, affect the health and welfare of hundreds of thousands of people.

The District also argues that the City “failed to account for additional sources of supply available to it...such as the Bentley Reserve and E&S wellfields.”⁷⁹ It is true that the Proposal does not account for significant water being available to the City from the Bentley Reserve Wellfield or the E&S Wellfield. However, again, this is not evidence of a deficiency. As Mr. Letourneau testified, the water quality in the Bentley Reserve Wellfield is sub-par, and the quantity available from the E&S Wellfield is not substantial.⁸⁰ Mr. Letourneau also did not testify that the City “should” have accounted for those water

⁷⁶*Id.* at p. 24, para. 109; p. 25, para. 112; p. 26, para. 118; Transcript, Vol. V, pp. 1286-1287, ll. 19-6. Mr. Winchester testified that he had used the 1933-1940 drought, which represents a more severe drought than a one-percent drought, in his simulations. The 2011-2012 drought repeated four times, which the City used in its modeling to simulate an eight year one-percent drought, represents even more severe drought conditions than the 1933-1940 drought.

⁷⁷District’s Proposed Findings, Conclusions, and Brig, p. 8, para. 37.

⁷⁸*Id.* at p. 25, para. 111.

⁷⁹*Id.* at p. 26, para. 122.

⁸⁰Transcript, Vol. V, p. 1368, ll. 11-19. Mr. McCormick expanded on the quantity and quality of water available from the Bentley and E&S wellfields, saying, “The E&S well field is a alluvial wellfield, it is a shallow aquifer at that location that very, very much relies on surface water flows for support. And what we know is that during lower flows, the water quality in the Arkansas River gets poor. We also know that during lower flows, the capacity of the well field diminishes greatly. So that is the reason it is not necessarily a firm source of supply because of both the water quality challenges and the shallow aquifer at that particular location. If we don’t have sustained river flows, we don’t have the water quality that makes it a viable source or a good source of water for the City, nor do we have the

sources in the Proposal, as the District states he did. While Mr. Letourneau did agree that the City “could have” accounted for the Bentley Reserve Wellfield and the E&S Wellfield in its modeling, the totality of his testimony in that regard was that “...the quantities are so small, I don’t know if it would have made a difference either way.”⁸¹ The fact that the City’s modeling did not account for significant water availability from the Bentley Reserve Wellfield or the E&S Wellfield does not reflect a shortcoming of the Proposal—it simply reflects the reality of the City’s available water resources. The District also argues that the City’s model failed to adequately account for impact to minimum desirable streamflow, water quality, or impairment. DWR’s Brief addresses all of those issues in detail.

The District also argues that the MODFLOW model is inherently inadequate, but the District’s own experts contradicted each other on this point, and the District’s most credentialed modeler testified the City’s model was reasonably suitable for its purpose. Mr. Romero testified that he believed the City’s modeling work in conjunction with determining the new proposed minimum index levels was done reasonably and that the City’s modeling work was reasonably valid.⁸² Additionally, despite Dr. Akhbari’s opinion that the modified USGS model used by the City is “incapable” of determining drawdowns at individual wells, Mr. Romero, who has much more real-world modeling experience than Dr. Akhbari, testified that, in his opinion, “it is suitable to use the model to understand drawdown that happens in well areas” and that, in fact, he himself had used the model for this purpose.⁸³ Mr. Romero further testified that he did not recalibrate the model for the type of well-by-well analysis that Dr. Akhbari believed was necessary before using the model and that he did not think doing so was necessary for the analysis he was performing.⁸⁴

yield that we would like to see from that particular well field during drought. So in other words, as things get drier, very, very much that well field gets poor in yield and water quality both.” Transcript, Vol. IV, p. 882, ll. 3-21. As to the Bentley reserve wellfield, Mr. McCormick said, “So that would refer to, there are a string of wells that I believe have a specific trigger relative to the flow in the Arkansas River; I’m not sure if it’s an elevation or if it’s a flow level. But if flow does not exceed a certain point or if the river elevation does not exceed a certain point, those wells cannot come on by their permit conditions.” Transcript, Vol. IV, pp. 883, ll. 1-7.

⁸¹Transcript, Vol. V, p. 1369, ll. 5-7.

⁸²Transcript, Vol. X, p. 2566, ll. 1-10.

⁸³*Id.* at p. 2583, ll. 17-18; p. 2584, ll. 4-11.

⁸⁴*Id.* at pp. 2587, l. 8 – p. 2588, l. 1.

Further, Mr. McCormick testified at length as to the relative lack of value in pursuing the alternative modeling scenarios advocated for by the District and the Intervenors. For example, when asked whether it would have been beneficial to “alter the different pumping scenarios in the modeling,” Mr. McCormick replied, “I don’t believe it would provide significant water level changes in this instance...the amount of water over that period of time, I don’t believe would result in significant water level changes.”⁸⁵ On the utility of modeling various different scenarios or undertaking the type of well-by-well analysis the District advocates for, Mr. McCormick testified, “Basically, you get down into the weeds so far that...the precision of your answer doesn’t change much...you could go to a lot of effort...with diminishing return on the value of your answer...we have DWR reported values that I think are adequately representative...we’re not talking about, in my opinion, substantial water level changes to justify going at a water-right-by-water-right basis and doing an examination.”⁸⁶

When asked whether the City could have better predicted “what return flows would look like during a wet year versus a drought year as far as modeling goes,” Mr. McCormick replied, “In this instance taking a basin water approach, probably not...again, relative to the value of the improvement of the model results, you could probably do it. I just...wouldn’t at this level [of] detail.”⁸⁷ All of this testimony by credentialed and experienced modelers illustrates very clearly what an unrealistic standard the District and Intervenors would have the City held to in terms of modeling and only bolsters DWR’s initial conclusion that the City’s modeling work was more than adequate.

The District and the Intervenors also criticize the ten-foot contingency that the City added to its model, arguing that the City “did not provide a scientific justification” for such contingency.⁸⁸ However, Mr. Clement did testify about the justifications for the proposed contingency, saying that the City added the contingency to account for future changes in pumping by “ag and other interests” and “...we wanted to be prepared for distribution of pumping, any changes in future ag pumping that may occur and changes

⁸⁵Transcript. Vol. IV, p. 868, ll. 23-24; p. 869, ll. 23-25.

⁸⁶*Id.* at p. 870, ll. 17-22; p. 871, ll. 1-12.

⁸⁷*Id.* at p. 880, ll. 9-18.

⁸⁸Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 33, para. 139.

in multiyear flex accounts....”⁸⁹ Mr. McCormick testified, “...you predict things that you can control. I cannot control what an individual ag user does or doesn’t do, whether they enroll in a multi-year flex account or they don’t.”⁹⁰ The 10-foot contingency is reasonable when one considers that the City had to attempt to account for potential changes in water use by so many different types of entities over time. Further, the issue of the contingency is tied to the latitude that a municipality should have in drought planning. As DWR has previously discussed, significant latitude in this area is necessary. DWR does not feel there is anything unreasonable about the 10-foot contingency.

i. DWR’s Review of the Proposal and the Supporting Modeling was Adequate and Unbiased.

In addition to alleging shortcomings with the City’s modeling itself, the District also seems to imply bias on the part of DWR in evaluating the Proposal and its accompanying modeling work. The District writes in its Brief that Chief Engineer Barfield “acknowledged his support for the...Proposal some time before it was submitted. As early as 2017, he promoted the idea behind the Proposal through both letters and during public meetings.”⁹¹ The District notes that, in contrast to Chief Engineer Barfield’s initially expressed support regarding the Proposal, DWR “remained neutral” in advance of the hearings regarding Phase I and Phase II of the Project.⁹² Chief Engineer Barfield never actually exhibited any bias in this matter. While he did make the statements quoted above, he was, throughout this process, very clear that he was committed to holding a public hearing regarding the Proposal. From the beginning, Chief Engineer Barfield explicitly acknowledged the need to gather information and determine permit conditions that would best ensure the protection of existing water rights.⁹³ Moreover, that the District even spends time on this point (when Chief Engineer Barfield has been retired from DWR for more than a

⁸⁹Transcript, Vol. III, p. 739, ll. 12-15.

⁹⁰Transcript, Vol. IV, p. 870, ll. 10-13.

⁹¹District’s Proposed Findings, Conclusions, and Brief, p. 2, para. 98.

⁹²*Id.*

⁹³Letter from David W. Barfield, Chief Engineer, Kan. Dep’t of Agric. Div. of Water Res., to Groundwater Management Dist. No. 2, June 1, 2018 (on file with the Kan. Dep’t of Agric.). In a letter to the District very early on in this process, Chief Engineer Barfield wrote, “I do believe that the public process is important in considering these changes. There may well be additional terms and conditions that will improve the accounting of AMCs or other changes that will better serve the public’s interest. That is why I am committed to holding an informational meeting and a public hearing prior to final consideration of Wichita’s proposed project.” *Id.*

year and recused himself as Presiding Officer in this matter more than two years ago) again illustrates the District's determination to focus these proceedings on baseless grievances rather than engage in meaningful dialogue.⁹⁴

Related to the issue of bias, the District attempts to paint DWR's initial review of the Proposal as inadequate, relying on Mr. Letourneau's testimony that "he had not performed any modeling of the City's Proposal nor had [he] analyzed any of the City's modeling" to support its position that DWR's review of the City's modeling work was inadequate.⁹⁵ This contention is ridiculous. Mr. Letourneau is not a modeler. He is not even an engineer. He does not do any modeling work or review models for DWR, and there is no reason that he would have done so in this case. Additionally, as Mr. Letourneau testified, DWR would not have performed additional modeling or independent calculations when using an already-approved model such as this one.⁹⁶ A lack of modeling work conducted by Mr. Letourneau personally says precisely nothing about the adequacy of DWR's review of the Proposal overall.

Additionally, Mr. Letourneau's testimony that he was unaware what work DWR's modelers had done regarding the Proposal is not the damning evidence of inadequate review that the District seems to believe it is. The District's and Intervenors' Briefs conveniently omit testimony wherein Mr. Letourneau stated he was aware of at least five DWR modelers who had reviewed the City's model.⁹⁷ Further, as the District is well aware, Mr. Letourneau was prohibited from discussing this matter with the DWR modeling team that worked on the Proposal once preparations for formal proceedings were underway. Given that the District filed a motion to ensure Chief Engineer Barfield's impartiality based partially upon deposition testimony that the District argued indicated Mr. Letourneau intended to speak to Chief Engineer Barfield about this

⁹⁴See Notice of Delegation and Temporary Postponement, March 19, 2019.

⁹⁵District's Proposed Findings, Conclusions, and Brief, p. 41, para. 203.

⁹⁶Transcript, Vol. XV, p. 1528, ll. 13-23.

⁹⁷Transcript, Vol. V, p. 1370, ll. 2-3; p. 1372, ll. 16-19. Mr. Letourneau testified that DWR modelers Sam Perkins, Jim Bagley, Chris Beightel, and Ginger Pugh would have reviewed the City's modeling work.

matter, one can only imagine the accusations of bias that would have ensued had Mr. Letourneau claimed to be knowledgeable about the modeling work DWR had done regarding the Proposal. The District's attempt to have it both ways by now arguing that Mr. Letourneau's lack of knowledge indicates lack of attention to the Proposal by DWR is disingenuous and inaccurate.

In a further attempt to make DWR's review of the City's modeling work appear inadequate, the District points out that Mr. Letourneau testified that DWR had not considered the impact of the withdrawal of AMCs on minimum desirable streamflow.⁹⁸ However, as discussed extensively in DWR's Brief, this testimony was consistent with DWR's standard procedures—Mr. Letourneau also testified that DWR does not typically consider MDS even for new applications to appropriate water, which, as discussed in DWR's Brief, the Proposal does not constitute.⁹⁹ Additionally, Mr. Letourneau testified that DWR does not ever administer groundwater rights in the Equus Beds Wellfield in order to restore MDS on the Little Arkansas River.¹⁰⁰ Further, as discussed in DWR's Brief, the City's Phase II Little Arkansas River surface water intake right will, by the terms of its own permit, cease diversions well before MDS is impacted.¹⁰¹ In light of all those factors, there was no reason DWR would have considered the Proposal's potential impact to MDS during its initial review.

VII. ARGUMENTS RELATED TO FUTURE PROJECT PERMITS ARE NOT RELEVANT.

A new argument advanced in the District's Brief is that the "potential for harm" under the Proposal is "greater in the future."¹⁰² The District mentions the City's plans for Phase III of the Project and argues that, because the future construction of additional bank storage wells could give the City the potential to accumulate (and ostensibly withdraw) AMCs at a faster rate in the future, the harms that the

⁹⁸District's Proposed Findings, Conclusions, and Brief, pp. 42-43, para. 207.

⁹⁹Transcript, Vol. VII, p. 1876, ll. 10-15.

¹⁰⁰Transcript, Volume VII, p. 1754, lines 8-25; Transcript, Volume VII, p. 1755, lines 1-8.

¹⁰¹See Approval of Application and Permit to Proceed for Water Right File number 46,627, issued by David W. Barfield, Chief Engineer, Kan. Dep't of Agric., Div. of Water Res., Sept. 18, 2009.

¹⁰²District's Proposed Findings, Conclusions, and Brief, p. 79.

District alleges the Proposal will cause to the Aquifer will be correspondingly accelerated in the future.¹⁰³ Any new bank storage wells or other Project-related permit the City wishes to obtain, along with any future modifications to the Project, would be carefully considered at the time they are proposed and are not the topic of these proceedings. This aspect of the District's argument is simply not relevant to the Proposal currently at issue.

Relatedly, the District argues that the Proposal does not adequately clarify whether it would apply to future Project applications.¹⁰⁴ This argument is irrelevant, and the District misstates the hearing record in making it. First, whether the terms of this Proposal would apply to any "ASR Phase III" or future Phase II applications is properly made at the time any such applications are considered. As Mr. Pajor testified, the City has not filed such applications yet, and there is no certainty that it ever will.¹⁰⁵ Additionally, the District alleges that Mr. Pajor testified that the proposed modifications would apply to "all ASR Phase II and all future ASR permits sought by the City."¹⁰⁶ To the contrary, Mr. Pajor actually repeatedly said that he did not know or could not give an opinion as to whether the Proposal's terms would apply to any hypothetical future applications.¹⁰⁷ Further, the portion of the record that the District cites to attempt to say that Mr. Pajor testified that the Proposal would apply to all of the City's future permits actually simply states that an early draft DWR order "refer[ed] to all existing permits of the City..."¹⁰⁸ Aside from this blatant misrepresentation of the record, a draft order is obviously not binding in any way. The District's arguments pertaining to future applications or permits are inaccurate and irrelevant.

VIII. THE PROPOSAL WILL NOT RESULT IN UNFAIR TREATMENT AMONG WATER USERS.

The District and the Intervenors also bring up issues of equal treatment among water users in several different places within its Brief, arguing that approving the Proposal would result

¹⁰³*Id.* at p. 20, p. 79.

¹⁰⁴*Id.* at p. 21, para. 92.

¹⁰⁵Transcript, Vol. II, p. 346, ll. 20-23.

¹⁰⁶District's Proposed Findings, Conclusions, and Brief, p. 20, para. 89.

¹⁰⁷Transcript, Vol. II, p. 346, ll. 20-23; p. 347, ll. 4-10.

¹⁰⁸*Id.* at p. 347, ll. 11-17.

in unfairly favorable treatment for the City. In support of this contention, the District cites testimony wherein Mr. Pajor and Mr. Letourneau both testified that irrigators should not be credited for leaving water in an aquifer and also recounts testimony wherein several of the Intervenors testified that they “felt like the rules were not being equally applied to them and to the City.”¹⁰⁹ The District touts Mr. Pajor’s testimony in this regard as “illuminating,” but the only thing that it actually sheds light on is the District’s willful disregard for the realities of the Proposal.

The point is not that the City would be receiving credit in the BSA simply for conserving water or using a source other than the Aquifer, as the Intervenors’ Brief provides many examples of irrigators and other agricultural users doing. Of course, DWR wishes to encourage all water conservation efforts, but the point here is that the City would be receiving credit in the BSA for using an alternative source that is *connected* to the Aquifer by infrastructure provided by the City. It is not unfair to treat an irrigator who does not possess anything resembling an aquifer storage and recovery system differently from a large municipality that has developed the means to artificially connect a river to an aquifer. If any water user developed an aquifer storage and recovery system, DWR would consider it, and that user could potentially receive credit in an aquifer for using a surface water source instead. However, as Mr. Pajor testified to, since no other water user in the state currently has such a system, comparisons in this regard are simply not apt.¹¹⁰ Again, this argument illustrates either a lack of understanding of or a refusal to acknowledge the most basic aspects of the Project.

Additionally, the Intervenors argue that “AMCs do not store water in the unsaturated portion of the aquifer” but fail to acknowledge that currently there is no unsaturated portion of the Aquifer, due largely to the good management practices (and the Project-related injection

¹⁰⁹District’s Proposed Findings, Conclusions, and Brief, pp. 15-16, paras 65-67; p. 55, para. 267.

¹¹⁰Transcript. Vol. II, p. 367, l. 18 – p. 368, l. 3.

capabilities) of the City.¹¹¹ To reject the City’s attempt to use the Project to its full potential (particularly when doing so will serve a universal benefit) simply because not all water users have the means to create a similar system would not be a sound outcome from a policy perspective.

It is also not DWR’s opinion that the City has violated existing MOU terms or “walked away from prior commitments made to landowners,” as the District alleges.¹¹² DWR has always believed that the Proposal should not be approved absent either the renegotiation of relevant MOU terms or the inclusion of permit conditions that achieve the same ends as existing MOU terms. As discussed, permit conditions that ensure the same protections as the City’s existing MOU commitments can be included in any order ultimately approving the Proposal. Additionally, DWR does not feel that the City has “thumbed its nose” prior orders from the agency.¹¹³ The City has not taken any action that is in violation of existing Project permits, and it is not a violation of any existing orders for the City to simply request its existing permits be modified. The City has not been a bad actor in this regard, as the District alleges, and the Proposal will not produce inequitable results.

IX. THE DISTRICT’S BRIEF MISCONSTRUES THE HEARING RECORD IN NUMEROUS PLACES.

Finally, DWR feels it necessary to point out that the District’s Brief misconstrues the hearing record and applicable laws in numerous places in addition to those already mentioned. For example, the District reiterates its claim that “the City committed to the fact that it would only withdraw recharge credits if the static water level in each index well was above that established minimum level.”¹¹⁴ As discussed in DWR’s Brief, that statement is demonstrably untrue. The City never agreed that it would not withdraw water below the currently-established Phase II index levels—it was ordered not to do so by the Chief Engineer when Phase II was approved, and it is that very order that the City now seeks to have

¹¹¹Intervenors’ Proposed Findings of Fact and Conclusions of Law, p. 50, para. 216.

¹¹²District’s Proposed Findings, Conclusions, and Brief, p. 94.

¹¹³*Id.*

¹¹⁴*Id.* at p. 3, para. 10.

modified with the Proposal. Following the paragraph regarding the City's alleged commitment pertaining to minimum index levels, the District sets forth testimony outlining the current operation of the Project under Phase II and in several places uses quotation marks to set off the District's counsel's questions in an attempt to make it seem as though the quoted language was actually Mr. Letourneau's testimony.¹¹⁵ That issue aside, DWR simply wishes to point out that, while this testimony may accurately reflect current Phase II operations, it should not be taken as evidence that current Phase II principles are required to be applied going forward and that the Proposal is therefore somehow impermissible. Changing some aspects of current Phase II is the very point of the Proposal.

The District also cites Mr. Letourneau's testimony that, on average, irrigators statewide use approximately 65-70 percent of their annual authorized quantity each year and claims that Mr. Letourneau pointed to that fact as a reason for the Aquifer's recovery.¹¹⁶ That is a patently misleading recitation of the record. Mr. Letourneau was speaking about statewide average use, not use by Equus Beds irrigators specifically, when he gave the relevant testimony, and nowhere did he actually cite the 65-70 percent number as a reason for the Aquifer's recovery.¹¹⁷ Next, the District writes that "Mr. Letourneau agreed that the DWR's support [for the Proposal] was based *solely* on the belief that the Aquifer would be kept full while AMCs are accumulated and did not consider any other outcomes of the City's Proposal, and DWR did not cite any other reasons for its support."¹¹⁸ This assertion is also blatantly misleading, as the District attempts to make it seem as though Mr. Letourneau testified that DWR did not consider anything other than Aquifer levels in its entire review of the Proposal. What Mr. Letourneau was actually asked when he testified that DWR had only considered the Aquifer being managed at a fuller level was what factors DWR had weighed when considering whether the Proposal was *in the public interest*.¹¹⁹ The cited line of questioning was not directed at what factors DWR had taken into account when considering

¹¹⁵*Id.* at pp. 3-6.

¹¹⁶*Id.* at p. 8, para 39.

¹¹⁷See Transcript, Vol. VII, p. 1749, ll. 6-13.

¹¹⁸District's Proposed Findings, Conclusions, and Brief, p. 22, para. 99.

¹¹⁹Transcript, Vol. V, pp. 1403-1405.

whether the Proposal was reasonable on the whole.¹²⁰ The public interest is only one aspect of the Proposal, and Mr. Letourneau’s answer makes perfect sense when considered in the proper context—Aquifer fullness is by far the most important aspect of a public interest determination here because all other topics relevant to the public interest stem from the Aquifer’s water table. DWR in fact considered many other factors when determining whether the Proposal was reasonable overall, which have been set out repeatedly. Those factors include the fact that the Proposal is unlikely to cause impairment to existing water rights and the fact that it will not allow the City to use any more water than it is already entitled to.

The very next paragraph of the District’s Brief is even more egregiously misconstrued. The District alleges that Mr. Letourneau “agreed during his cross-examination...that there had been ‘little discussion’ about the impacts of withdrawing the corresponding water associated with an AMC.”¹²¹ This paragraph immediately follows the paragraph regarding DWR’s internal consideration of the Proposal and is a clear attempt to imply that Mr. Letourneau testified that DWR had not discussed the impacts of the City withdrawing AMCs under the Proposal. That is a completely inaccurate characterization of Mr. Letourneau’s testimony. The line of questioning that the District cites was actually about the depth of discussion that had been devoted to various topics at that point *during the hearing itself*—it had nothing to do with what DWR had or had not discussed internally regarding the Proposal prior to the hearing. Mr. Letourneau simply answered “yes” when the District’s counsel asked him, “*with respect to this hearing, we’ve talked a lot about the – how an AMC, an aquifer maintenance credit, would be accumulated and the fact that it leaves water in the aquifer. However, we’ve had very little discussion about the impacts that would occur when one actually withdraws that water from the aquifer. Would you agree that there’s been less discussion of that aspect?*”¹²² Clearly, neither the question nor Mr. Letourneau’s corresponding answer concerned DWR’s pre-hearing review of the Proposal at all. That the District has the gall to try to mischaracterize Mr. Letourneau’s testimony to this degree is, frankly, astounding.

¹²⁰*Id.*

¹²¹District’s Proposed Findings, Conclusions, and Brief, pp. 22-23, para. 100.

¹²²Transcript, Vol. VI, p. 1660, ll. 3-12.

The District also takes the completely ridiculous position that an objection by DWR counsel during Mr. Letourneau's cross-examination "undermined" Mr. Letourneau's "credibility" on the subject of relevant DWR requirements and "paved the way" for Mr. Pope and Mr. Boese to be considered the "supreme authority" on the relevant statutes and regulations.¹²³ This assertion is ludicrous. The objection at issue was made on the basis of the relevant line of questioning calling for a legal conclusion and did not reflect "concern" on the part of DWR regarding Mr. Letourneau's "credibility" as to the regulations he has dealt with day in and day out for over 30 years. Any suggestion to the contrary is an insult to the expertise of DWR. Additionally, when the question was rephrased following DWR's objection, Mr. Letourneau gave a lengthy answer that illustrates his "credibility" on this topic.

It is not surprising that the District omitted any citation to this testimony, as it both bolsters Mr. Letourneau's experience and expertise on the topic and illustrates the ridiculousness of the District's insistence that physical injection into the Aquifer should be required in all cases. When asked whether he interpreted the word "storage" to contemplate "water...put in [the] unsaturated portion of the aquifer," Mr. Letourneau stated, "Yes, but I have to add that because part of the aquifer maintenance credit was not requiring the City to unsaturate the portion of the Aquifer just to put water back into it. So you're correct [that] the unsaturated portion of the Aquifer is the dewatered space in the Aquifer to put a physical recharge credit in. We just didn't want to require the City to unsaturate that to put water back in."¹²⁴

In support of its argument that physical injection of water into the BSA is always required in order for the City's operation of the Project to be lawful, the District quotes the following testimony from Mr. Letourneau:

Q: So my question is if there's a concern here about degrading water quality in the groundwater of a basin storage area, doesn't that contemplate putting this source water that we got from this overflow into an aquifer?

A: Yes, or not take it out. Either not take it out or whatever you put in has to be as good or better.¹²⁵

¹²³District's Proposed Findings, Conclusions, and Brief, p. 62, para. 294.

¹²⁴Transcript, Vol. VII, pp. 1732-1733, ll. 11-5.

¹²⁵District's Proposed Findings, Conclusions, and Brief, p. 63, para. 297.

The District sets out this testimony and then provides a completely inaccurate restatement of it, writing, “So in other words, to qualify under the Aquifer Storage and Recovery Statutes, water must be injected into the Aquifer for storage.” The District’s use of the phrase “in other words” is baffling, as its summary patently does not reflect the words Mr. Letourneau actually said. Mr. Letourneau clearly did not testify that water “must be injected” in order to “qualify under the Aquifer Storage and Recovery statutes—he clearly testified that water quality could be protected either by injecting Little Arkansas River surface water into the BSA or by leaving groundwater stored in the BSA in place there.

In the very next paragraph of its Brief, the District uses Mr. Letourneau’s testimony out of context in an attempt to support its position that physical injection of water should be required in all cases. The District writes, “Mr. Letourneau summed up another portion of the relevant statutes in a manner that necessitated the need for physical recharge to qualify under the Aquifer Storage and Recovery Statutes, stating: ‘well my thought on that is it took an appropriation to put the water in—it took an appropriation to pump it back out and use it for municipal use.’”¹²⁶ Mr. Letourneau was not testifying that physical injection was necessary in order for “storage” to be accomplished. In fact, in the very question that Mr. Letourneau was responding to, the District’s counsel said, “...So I guess my question is if there’s some sort of act that occurs of storing water in a basin storage area, whatever that act is, *and of course we may disagree on what that act constitutes*, what is meant by this concept of subsequent appropriation as outlined in this regulation?” (emphasis added).¹²⁷

Mr. Letourneau then gave the testimony that the District cites by way of explaining that removing water from the BSA was the “subsequent appropriation” contemplated in the relevant regulation. While it does not do so very clearly, presumably the District intends to highlight Mr. Letourneau’s testimony that “it took an appropriation to put the water in...” and argue that Mr. Letourneau thereby testified that the initial appropriation he referenced was necessarily physical injection into the BSA. That is not the case. When the Aquifer is too full for water to be injected, the initial appropriation would be the withdrawal of

¹²⁶*Id.* at p. 63, para. 298.

¹²⁷Transcript, Vol. VIII, p. 1960, ll. 9-23.

surface water from the Little Arkansas River and the “subsequent appropriation” would be the withdrawal of groundwater from the BSA in the form of an AMC.

The District also completely mischaracterizes Mr. Letourneau’s testimony (not to mention relevant regulations and the District’s own authority) in recounting a discussion concerning the possibility for impairment under the Proposal and how a determination of impairment is made. The District writes, “Mr. Letourneau identified that it was the District’s function to make a determination if the Proposal resulted in a regional lowering of the water table.”¹²⁸ That is not what Mr. Letourneau testified to, and, more importantly, it is not accurate. Mr. Letourneau’s testimony regarded the authority given to the District by K.A.R. 5-4-1a, which governs “distribution of water between users when a prior right is being impaired due to a regional lowering of the water table.” K.A.R. 5-4-1a provides that, once it is determined that an impairment within a groundwater management district is caused by a regional lowering of the water table, “the GMD board shall recommend the steps necessary to satisfy senior water rights.”¹²⁹

The exact lines of testimony that the District cites in its Brief are as follows:

A. And, yes, David, that [K.A.R. 5-4-1a] -- it does talk about impaired -- prior right being impaired due to a regional lowering of the water table, and (b)(1) talks about if the area of complaint is located within the boundaries of a groundwater management district, the GMD Board shall **recommend** steps necessary to satisfy senior water rights.

Q. So in other words, when we're talking about a general regional lowering or -- lowering of the water table, if we're in a groundwater management district, it's the job of the GMD to make a **recommendation** in that regard. Is that a true statement?

A. That's true.

Mr. Letourneau’s testimony itself accurately summarized K.A.R. 5-4-1a, but the District attempts in its Brief to cite such testimony for the proposition that the District has the authority to determine whether the Proposal will cause a regional lowering of the Aquifer’s water table. Such a proposition is unabashedly dishonest in light of the record. It is also patently incorrect, given that K.A.R. 5-4-1 makes clear that it is the Chief Engineer who is to determine whether an

¹²⁸District’s Proposed Findings, Conclusions, and Brief, p. 33, para. 162.

¹²⁹K.A.R. 5-4-1a.

impairment is due to a regional lowering of the water table.¹³⁰ Again, the District has resorted to misconstruing hearing testimony because the fact of the matter is that the actual testimony (not to mention applicable laws) simply do not support its position.

X. CONCLUSION

Overall, the Briefs of the District and the Intervenors do not raise any issues that DWR has not already devoted substantial time and thought to, and DWR's opinion that the City's Proposal is reasonable and lawful has not changed. As discussed in DWR's Brief, the Proposal does not constitute a new appropriation of water or a true statutory change to any existing Project water rights, the City is permitted to increase its consumptive use under its existing unperfected water rights, AMCs as proposed do not contravene the KWAA, and the *Clawson* holding does not apply to the Proposal. The minimum desirable streamflow, Takings Clause, and standing arguments advanced by the District and the Intervenors are inaccurate and do not support rejection of the Proposal. Additionally, as discussed in greater detail herein, other potential drought planning alternatives available to the City are not relevant, and determining appropriate permit conditions to accompany the Proposal has always been one of the primary purposes of these proceedings. The District cites hearing testimony that fundamentally mischaracterized background facts giving rise to the Proposal and current Phase II operations.

The District's Brief also repeatedly misstates its own authority and invokes laws that are wholly inapplicable to these proceedings. The uses the City would make of its water under the Proposal would be permissible, and the proposed method for accumulating AMCs would not amount to passive recharge. Further, the District and the Intervenors continue to mischaracterize true legal impairment and also disregard DWR's existing impairment procedures. The Proposal is unlikely to result in impairment, and DWR's existing statutes, regulations, and procedures will provide an adequate remedy in the event impairment does occur. The Proposal should not be

¹³⁰See K.A.R. 5-4-1.

rejected due to practical saturated thickness concerns, and it is not likely to result in environmental or water quality harm. The City's modeling work conducted in support of the Proposal was adequate and reasonable, and DWR's review of such modeling and the Proposal itself was adequate and unbiased. The District's arguments related to future hypothetical applications or permits are not relevant. The Proposal will not result in unfair treatment among water users. Finally, the District's multiple patently inaccurate recitations of the hearing record speaks for itself.

DWR does believe a permit condition requiring the City to exhaust its native water rights before it withdraws recharge credits would be appropriate, but DWR otherwise feels that its previously-submitted Proposed Findings of Fact and Conclusions of Law set out all of the permit conditions that DWR feels are necessary to adequately ensure the protection of existing area water rights under the Proposal. DWR still believes the Proposal is reasonable and lawful and believes that it should be approved subject to said permit conditions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 4th day of October 2021, the above *Reply Brief of DWR* was electronically filed with the Presiding Officer for this matter and that copies were sent via e-mail to the following:

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