

III. City's Burden of Proof

The Intervenors provide the best roadmap of any party regarding the burden of proof of the City. The Intervenors identify the Orders of both former Chief Engineer Barfield and the current Hearing Officer to support their contentions. (Intervenor's Findings, p. 5, fact 15 (quoting prior Hearing Orders).) Indeed, the District agrees that the City must comply with the requirements of K.S.A. 82a-708(b), K.S.A. 82a-711, and the provisions of the Aquifer Storage and Recovery regulations. (*See id.*) These points are outlined in detail in the District's Findings. Again, it also merits providing a reminder that the District wasn't required to model or prove anything. Rather, the City must prove all of these outlined elements by a "preponderance of the evidence." (*Id.*)

In contrast, DWR continues to assert that K.S.A. 82a-708b doesn't apply. This insults former Chief Engineer Barfield and the current Hearing Officer that has adopted this standard for the City's burden through multiple Orders. DWR's argument ignores that two of the most fundamental aspects of the prior permit(s) is being changed: (1) how recharge credits are accumulated through the elimination of actual physical recharge, (2) when recharge credits can be withdrawn by the drastic lowering of the minimum index level. DWR then bizarrely states that K.S.A. 82a-711 does not apply to the Proposal because no new appropriation application was filed and that K.S.A. 82a-711 was considered when the original ASR permits were approved (DWR's Brief, page 40). As previously stated, numerous hearing orders all state that the Proposal must meet the requirement of K.S.A. 82a-708b. The following excerpt is from the May 1, 2019 Prehearing order:

"...the City shall bear the burden of proof, proving by a preponderance of the evidence that the proposed changes to the project should be approved. K.A.R. 5-14-3a(n)(1). The proposed changes must meet the requirements set forth for Aquifer Storage and Recovery projects in K.A.R. 5-12-1, *et al.* and the

requirements set forth in K.S.A. 82a-708b, including that the proposed changes are reasonable and will not cause impairment and that the proposed changes relate to the same local source of supply. Whether or not a change is reasonable should consider the effect upon the public interest.”

A review of K.S.A. 708b shows that it requires the applicant to demonstrate to the chief engineer that the proposed change is reasonable, will not impair existing rights, and that the change relates to the same local source of supply. K.S.A. 82a-708b further states: “The chief engineer shall approve or reject the application for change in accordance with the provisions and procedures prescribed for processing original applications for permission to appropriate water.” K.S.A. 82a-711 is certainly the main statute regarding the processing of appropriation applications and sets the standards that must be met for approval. Indeed, K.S.A. 82a-711(b) identifies the items that the Chief Engineer must take into consideration in determining if a proposed use will prejudicially and unreasonably affect the public interest. These include MDS, safe yield, and prior rights. K.S.A. 82a-711(c) elucidates what impairment includes.

Incredibly, the case of *Clawson v. State*, 49 Kan. App. 2d 789 (2013) completely supports the District’s contentions. In *Clawson*, the court indicates that concepts such as MDS and safe yield must be considered up front when granting a water right. *Id.* at 806. As observed by the Court, “The statute specifically requires the chief engineer to consider senior water rights and the public interest prior to granting a water right.” *Id.* Again, as the City is fundamentally changing the major aspects of its permits, these concepts must be reconsidered.

IV. AMCs

The Intervenor’s devote an entire section of their Findings to providing an overview of AMCs. The District feels like some elaboration on some of those points is warranted. First, the Intervenor’s argue that AMCs have been around, in concept, for almost 15 years. (Intervenor’s Findings, p. 6, fact 17.) The District agrees with this point and furthers that the City realized

early on that it would not be able to accumulate enough recharge credits without passive recharge credits/AMCs. In fact, in some field notes from the City's ASR Program Management dated July 25, 2003, that the District believes were admitted (but had trouble confirming), the City identifies that if the basin storage area was reduced by a mere four feet in depth, that there would not be enough storage capacity to justify the project. (City's Exhibit 1, and accompany documents.)¹ A review of the index cell monitoring wells (IW monitoring wells) hydrographs, submitted by the District, clearly shows that the basin storage area water levels had significantly recovered (increased) much greater than four feet prior to the permitting and construction of Phase II. (District Exhibit 60.) The original Phase II permits were approved in 2009 and Phase II construction was completed in 2012. If the City knew as early as 2003 that there was not enough storage capacity in the Aquifer for Phase II recharge operations, then either the City had extremely poor planning and built Phase II anyway, or knew that they would have to somehow advance the concept of passive recharge credits/AMCs in the future. Either way, the District agrees that the City intended to breathe life into the concept of passive recharge credits and AMCs for some time—long before the 2011-2012 drought.

Citing Mr. Letourneau, the Intervenors next contend, "The accumulation of AMCs is not limited by, or correlated to, the amount the City could have pumped from the aquifer but didn't." (Intervenors' Findings, p. 6, fact 18.) The Intervenors further point out that the City has touted AMCs as an "offset by a reduction in pumping from Wichita's Equus Beds water rights." (*See id.* at p. 14, fact 52 (quoting City's Exhibit 1.) The Intervenors conclude, "The water diverted and sent directly to town may or may not offset what the City could have pumped from the

¹Certainly, this reference can be disregarded if the document was not admitted. Based on the way the City's exhibits were labeled in the notebooks and admitted during the Hearing, the District genuinely had difficulty ascertaining in good faith if this document was admitted. However, it is not material to the argument regardless.

aquifer. There is no requirement for the City to reduce pumping from the Equus Beds to accumulate AMCs.” (*Id.* at p. 14, fact 53.)

Although briefly mentioned in the Intervenors’ Findings, this is perhaps one of the most critical points in the entire Hearing. Mr. Letourneau admitted that the accumulation of AMCs is mutually exclusive from offsets in the City’s pumping of its native water rights. (*See id.*) In other words, the City can fully pump its native rights in a year while still accumulating as many AMCs as physically possible. Therefore, there is no guarantee whatsoever that the City’s accumulation of AMCs will offset pumping. This undermines the City’s entire argument regarding the benefit of its Proposal. Because January water-level measurements are proposed to be used to determine the aquifer’s physical recharge capacity for the entire year, and if and how much AMCs can be accumulated during the entire year, the City can pump down the Aquifer periodically throughout the year, while benefitting from its natural recharge and also accumulate AMCs. (*See Proposal*, page 3-7.) Neither the City nor DWR offer any permit condition that will ensure that the City will offset pumping pursuant to its Proposal. Even if this was a condition, it would be difficult to enforce. Would offsets in groundwater pumping be calculated based off of authorized quantity or a historic average use? Obviously, the latter would make more sense to solidify the integrity of the City’s arguments. However, this was never addressed during the Hearing. Again, this is perhaps one of the most critical points testified to by Mr. Letourneau as it undermines almost all the arguments the City makes to support the benefits of its Proposal.

The Intervenors drive home the point: “The only basis provided by DWR to support its determination AMCs serve the public interest is because it facilitates a fuller aquifer. 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 existing recharge credits.”

(DWR's Findings, p. 20, fact 75.) The District also agrees with this contention. As it argues, neither the City nor DWR evaluated the impacts of *pumping* AMCs or pumping recharge credits to the lowered minimum index levels. The City's flawed logic on only focusing on the accumulation of AMCs is tantamount to throwing an unwanted object into the air to temporarily get "rid" of it while forgetting that gravity will quickly force it back down.

Also citing Mr. Letourneau, the Intervenor's write, "AMCs seek to convert Equus Beds water into recharge credits by agency action with an accounting methodology." (Intervenor's Findings, p. 7, fact 20.) Thus, the source of water changes with AMCs from that of physical recharge credits. The Intervenor's drive home this point while summarizing yet another part of Mr. Letourneau's testimony where he states the same thing: "Mr. Letourneau testified as DWR's expert witness, that when an AMC is withdrawn from the aquifer the source of supply changes." (Intervenor's Findings, p. 9, fact 27.)

The District also previously argued this fact. However, it merits repeating because it is fundamental to an understanding of the City's Proposal and it is supported by DWR's sole witness. As quoted from the Hearing Orders in the Intervenor's Findings, the City must prove "that the proposed changes relat[e] to the same local source of supply." (*Id.*, p. 5, fact 15.) Here, by Mr. Letourneau's own admission, the source of supply changes with AMCs, from water injected into the basin storage area through physical recharge credits, to native groundwater with AMCs. (*See, e.g., id.*, p. 7, fact 20.) Despite this very obvious pivotal distinction, the City and DWR think that it is curative to simply "relabel" the water as AMCs through an accounting function. (*See id.*; Testimony of Pajor, R. Vol. II, p. 326, ll. 16-22.) If money is stolen from shareholders in a corporation, it doesn't make it suddenly legal if the corporation relabels the money on its accounting spreadsheets. In fact, we know from history and common sense, that

clever accounting functions offer little protection from criminal investigations by the IRS, prosecutors, and other government enforcement agencies. Likewise, the City cannot relabel the water and change the source of supply through a new accounting feature. Consequently, the City simply is unable to meet its burden of proof on this point and it is fatal to the City's Proposal.

V. Permit Conditions

The Intervenors discuss permit conditions in a number of sections of their Findings. As indicated, the Intervenors have questioned the enforceability of some of the City's permit conditions and believe additional conditions are warranted. One permit condition DWR identifies is that "[t]he rate of accrual of all recharge credits cannot exceed the constructed physical diversion capacity of ASR system... and will be limited to the rate and quantity authorized by Water Right No. 46,627.²" (DWR's Findings, p. 6, fact 5.b.) This is obviously not an enforceable condition and the city could easily expand its physical diversion capacity of the ASR system. This proposed condition does not speak to the real heart of the matter: when the City withdraws these recharge credits. Currently, under the existing Phase II recharge credit withdrawal permits, the City can pump up to 18,000 acre-feet annually if there are recharge credits accumulated and available. The City originally applied for a significant number of additional water rights and can again in the future. Thus, the City can easily expand its recharge credit diversion capacity in the future. Also, DWR maintains that a limit on recharge credits of 120,000 acre feet is reasonable. However, once again, DWR's only witness could state how the proposed cap was determined or this was the appropriate cap. (District's Brief, p. 13.) Further, it is unclear how the new concept of rotational pumping will be administered but this may be a good condition. Finally, it appears that DWR is implicitly suggesting a new permit

²Surface Water Permit No. 46,627 authorizes an annual diversion of 45,230 acre-feet at a maximum diversion rate of 41,667 gallons per minute from the Little Arkansas

condition that the Aquifer must be “mostly” full before going into a drought, so there is a semblance of credibility to the City’s modeling with respect to AMCs.

VI. ASR Regulations, Functional Equivalent, and Passive Recharge Credits

The Intervenors quoted David Pope for the proposition “once you adopt a rule and regulation, then you must follow that rule and regulation until such time as it’s changed or amended.” (Intervenors’ Findings, p. 8, fact 24.) In this case, the City and DWR have promoted the functional equivalent concept. As indicated repeatedly by the District, the City has attempted to rewrite regulations and circumvent the clear intent of the Aquifer Storage and Recovery Act. Both former Chief Engineer Pope and District Manager Boese both testified that AMCs are not the functional equivalent of artificial recharge. (Pope Expert Report; Boese Expert Report; District’s Findings, pp. 58-59.) The superior expert testimony of Mr. Boese and Mr. Pope regarding statutory construction should be afforded difference, and the Hearing Officer should determine that AMCs are prohibited by Kansas law.

The Intervenors also succinctly conceptualize why AMCs are passive recharge credits. As highlighted by the Intervenors, Mr. Letourneau testified that passive recharge credits are when source water is not injected into the Aquifer. (Intervenors’ Findings, p. 9, fact 29; Testimony of Letourneau, Vol. VII, p. 1631, ll. 2-19.) As an extension of this, Mr. Letourneau further indicated that “recharged” means water placed into the Aquifer for storage. (Testimony of Letourneau, Vol. VII, p. 1631, ll. 20-25.) When it quacks like a duck, it’s a duck. However, Mr. Letourneau ignored this obvious principle, and despite him placing AMCs inside the ambit of passive recharge credits with virtually every definition or statement he uttered on the subject (other than the source of the water coming from the river and the ASR infrastructure), Mr. Letourneau still indicated that AMCs should not be characterized as passive recharge credits.

This argument is like saying that if a chicken chooses to drink from the water (source) dish (infrastructure) devoted to the dog, then the chicken suddenly should be labeled as a dog. Obviously, this defies common sense, as does the argument that AMCs are anything other than rank passive recharge credits. Again, all parties agree that passive recharge credits are illegal and strictly prohibited. The City's Proposal should be denied for this reason.

VII. Water Level

The Intervenors' agree with the District that the City's Proposal will deplete water levels. DWR's primary position is that the Proposal will be beneficial 99 percent of the time and also that the Little Arkansas River will be "gaining water" 99 percent of the time. (See, e.g., DWR's Findings, p. 12, DWR's Brief, p. 23) Again, DWR does not adequately support this proposition or even explain the new testimony regarding how the City's Proposal will somehow miraculously be beneficial 99 percent of the time. In fact, DWR's citations in support of these ridiculous claims do not mention the Proposal being beneficial 99 percent of the time or the river gaining water 99 percent of time.

Also, DWR's 99 percent notion not only defies the testimony, but also simple math. It was established and testified to during the Hearing that the City's modeled 8-year drought³ would occur, on average, once every 100 years. Thus, at the very least, the City's Proposal will not be beneficial eight percent of the time when the City is withdrawing recharge credits and/or pumping their native water rights fully or near fully. However, an assumption that the Aquifer would remain full all the other 92 years (92 percent of the time), or that the Little Arkansas River is always gaining water during the other 92 years is simply ridiculous, as the City's own expert, Mr. Winchester, testified that there will also be 2 and 5 percent droughts, for example.

³Despite DWR's statement that it can only be 8 years (DWR's Brief, p. 9), Mr. Winchester clarified that a 1 percent drought could also be longer or shorter than 8 years. (Testimony of Winchester, R. Vol. 1, p. 121, ll. 8-19.)

Thus, even if DWR’s assumption is afforded merit, there may only be a handful of years that the Aquifer will be potentially “benefitted” in a 100-year period. Again, the City failed to address this at all either through modeling or through testimony and no statistical analysis of the “percentage of benefit” was established. The City did not address or model during what other times they would pump recharge credits, such as during other drought scenarios, other times Cheney Reservoir use could be diminished, or if the population and/or industry that the City supplies water to increases.

The “benefit” identified by the City is based on the notion that, if it doesn’t have to strand credits, it will help keep the Aquifer full. (DWR’s Findings, p. 4, fact 6.) Again, there was no statistical analysis or mathematical “game theory” offered by the City to support when, how, and why this would occur. As explained by the Intervenors, DWR has not even identified this as a permit condition to incentivize the City’s purported beneficial planning, and there is no guarantee that the motivations for this single touted benefit will remain as leadership within the City shifts over time. Instead, DWR simply argues that the raising and lowering of the water table is bad for the “health” of the Aquifer. (*See* DWR’s Brief, pp. 10, 29.) Again, there is absolutely no citation for this proposition, which makes sense as this is brand new testimony raised in DWR’s Brief. Indeed, there was no modeling or argument produced by the City or DWR supporting how the lowering and raising of the water table in small increments is somehow detrimental.⁴

The fact is that logic supports that a lesser impact to the Aquifer might actually occur if the City engages in small, incremental segments of raising and lowering of the water table. For

⁴As established elsewhere in this Response, the City has only been able to accumulate 6,372.2 acre feet of credits through 2016 (8,150.5 acre-feet through 2019 based on draft 2019 Accounting report) despite its ability to lower the water table and its recent willingness to do so in an effort to facilitate the production of recharge credits.

example, if the City has 40,000 acre feet of native water rights and wants to accumulate 5,000 acre feet of credits, with AMCs it can keep its native water right intact, generate 5,000 acre feet in credits, and then pump all of its native water rights. With the Proposal, the net impact to the Aquifer would be a depletion of 45,000 acre feet. With the current ASR Phase II Order, if the City pumped down the Aquifer by 5,000 acre feet to create space to generate 5,000 acre feet in recharge credits by artificial recharge (physical injection), it would have only 35,000 acre feet of native water rights left. Thus, under this scenario, if the City cashed in its credits and pumped all its native water rights, it would only be an impact to the Aquifer of 40,000 acre feet. This delta of 5,000 acre feet supports that the harm to the Aquifer may actually be less than that existing under the Proposal, even if the City has to occasionally somewhat reduce the water level to accumulate physical recharge credits. Moreover, the City testified that it could develop the infrastructure to allow it to both recharge the Aquifer and withdraw native water at the same time. If the dollars spent on the Proposal were instead invested in this infrastructure, all the concerns of the City would evaporate, and the City could conceivably eliminate harm to the Aquifer.

VIII. Consumptive Use

The Intervenors mention that the “AMC concept increases the consumptive use of existing water rights in likely violation of Kansas Regulations.” (Intervenors’ Findings, p. 14, fact 54.) Of course, the District agrees with this statement except the District contends AMCs *will* violate Kansas Regulations in this regard. This argument is well supported in the other filings of the District. Irrigators and other users do not get credit for water not pumped or returned to the Aquifer. Likewise, owners of irrigation water rights cannot change the use made of water or change the place of use, if it increases the consumptive use. (*See* K.A.R. 5-5-9; 5-5-

10; 5-5-11.) In fact, these regulations have detailed, specific calculations to determine the amount of water that can be approved to ensure the consumptive use is not increased by the change (*Id.*) As indicated, irrigators return water to the Aquifer every time they pump through return flows and infiltration. In fact, this concept is so axiomatic that it is embedded in regulation. K.A.R. 5-5-9(a)(1) defines the consumptive use for irrigation. For example, in Harvey County it is 86.6 percent and in Sedgwick County it is 85 percent. That means, that in both situations, close to one-sixth of all water diverted returns to the Aquifer through infiltration. Yet, the irrigators do not obtain special privileges for this fact or get a credit for water not pumped. Likewise, the City should not be allowed to expand its consumptive use.

IX. Accounting Methodology

In discussing the difference between the existing ASR recharge credit ASR accounting method and the proposed AMC accounting method, the Intervenor highlight Mr. Letourneau's testimony that "[i]n 2015 the variance is almost 1,000 feet between the current physical recharge and the proposed accounting methods." (Intervenor's Findings, p. 27, fact 112.) Although Mr. Letourneau did say feet (or the transcript is in error), of course, this reference should be to acre feet. Indeed, the Intervenor highlight the fact that Mr. Letourneau recommended that further refining of the accounting method should occur. (*Id.*) This point cannot be lost and again the Proposal is not in a suitable condition for approval.

X. Safe Yield

The Intervenor point out that "none" of the existing 30 permits of the City "meet safe yield." (Intervenor's Brief, p. 37, fact 137.) As an extension of that point, *not one* of the 30 additional permits the City filed, and withdrew, met safe yield either. (District Exhibit 41.) Also, on the point of safe yield, the Intervenor slightly mischaracterize Mr. Boese's testimony

by indicating that he testified that if average water use, rather than authorized quantity and recharge rate, was used for a “sustainability assessment and safe yield analysis... more permits [would be approved] across the basin storage area. (*Id.* at p. 73, fact 38.) Although a subtle point, Mr. Boese was actually referring to the entire Aquifer. Due to the extreme over-appropriation of the Aquifer in the basin storage area, the approval of new permits would be unlikely even if average water use was used rather than authorized quantity for safe yield calculations.

XI. Well Spacing

The Intervenors argue some excellent points on well spacing. However, the Intervenors inadvertently left the underlined portion out of the following phrase in the City’s October 10, 2008 letter to the District requesting spacing waivers for certain ASR Phase II recharge credit withdrawal permits: “whereas without the exemption on well spacing, the extensive number of existing domestic wells and non-domestic wells will make it impossible for the City to install an adequate number of recharge wells in the project area, the City requests that ASR wells be determined to be exempt from well spacing requirements.” (*Compare* Intervenor’s Findings, p. 43, fact 182 *with* District Exhibit 53.) This underlined phrase is particularly important. Without the spacing waivers, the City could not install enough recharge and recovery wells and it illuminates the City’s motivation for seeking waivers from the well spacing as further hinging on its goal to have the flexibility to expand recharge wells at any time. Indeed, the City now seeks to capitalize on these waivers, and will refile permits, and expand the number of recharge wells in the BSA. Again, these waivers were granted with the understanding that the City would pursue artificial recharge and the proposed wells would be used for both actual physical artificial recharge, through injection of source water into the Aquifer, and for subsequent recovery of the

injected water. (District's Findings, pp. 36-38.) As argued previously, because AMCs have nothing to do with artificial recharge, the spacing waivers are now obsolete.

XII. Expanding the Basin Storage Area Requires a Change Application

The Intervenors also provide a wonderful analysis of how the City is seeking to expand the place of use by lowering the minimum index level. (*See* Intervenors' Brief, p. 76, facts 49-52.) As indicated previously, the District agrees with this argument. Since the place of use for the artificial recharge authorized by Water Permit No. 46,627 is the basin storage area, lowering the minimum index level will obviously expand that area. (*See* Water Permit No. 46,627.) Thus, the City's attempt to expand the place of use necessitates the filing of a change application for permit number 46,627. This argument fits within the District's detailed position in this regard and further indicates the flaws with the procedure the City has followed in advancing the Proposal.

XIII. Contingency

Although a minor point in the grand scheme of the Hearing, the City fails to justify its proposed contingencies. The City writes, "Because of the imprecision associated with interpolation, the calculated lower index levels are imperfect and could be off plus or minus two feet." (City's Findings, p. 5, fact 31; *see also* p. 30, fact 5.) If the variance is only plus or minus two feet, it is hard to understand how a contingency of at least 10 feet is warranted.

XIV. 1998 Levels

The Intervenors contend the City still has not supported why it based its modeling around the 1998 levels. In fact, the only argument advanced by the City is that the 1998 levels are the most beneficial for recharge. (City's Brief, p. 17, fact 19.) However, the City never established a comparison to other years to establish why 1998 is optimal. It would be interesting to know if

2006 levels, for instance, when the City's proposed AMC most closely mirrored actual physical recharge accounting, would be comparatively good for recharge. Further data on this subject by the City is warranted and critical to a full analysis of the City's Proposal. It would also be interesting to hear the City's experts testify as to how this optimal condition was determined.

XV. Cap on Credits

Both the Intervenors and the District contend that the City has never supported how it selected the cap on credits. The City argues it will use AMCs once every 100 years. (City's Findings, p. 22, fact 64.) Pursuant to its own modeling, it will only need about 51,000 acre feet of credits during the time of a drought. (City's Exhibit 1.) Thus, a cap of 51,000—or even 60,000, seems far more reasonable. Pursuing any larger cap would potentially support an insidious intent. However, the District agrees that some cap on credits is better than none at all.

XVI. Standing

Both the Intervenors and the District agree that the City lacks standing. However, DWR essentially counters the District's standing argument by arguing *Clawson* is inapplicable, a new application or change application is not needed, by contending that the City is taking concrete steps to modify its water rights, and there is nothing speculative about the Proposal because it was worked on by a variety of credentialed professionals. (DWR's Brief, p. 74.) The District simply asks the Hearing Officer to review its well-documented Brief that is meticulously supported by the record and by legal analysis. These arguments by DWR are all adequately countered and don't merit further discussion here.

XVII. The *Williams* Case

DWR and the City launch into an identical analysis of the *Williams* case. (*See, e.g.*, DWR's Brief, pp. 69-70.) The key distinction of the *Williams* case is that Mr. Williams didn't

even have a water right that was infringed. *Williams v. City of Wichita*, 190 Kan. 317, 318, 374 P.2d 578 (1962). He was merely arguing that he had a right to water underneath his land. *See id.* The case refers to “unused water” with the key phrase being “unused.” At the time *Williams* was decided, little water was subject to appropriation rights. The situation is quite different at this juncture. Here, the argument is that water rights are being infringed where the “rights” to water are already allocated to other users. The *Williams* arguments by DWR and the City are easily factually distinguishable.

XVIII. The *Clawson* Case

The District agrees with the arguments of the Intervenors on *Clawson*. Both the City and DWR attempt to limit *Clawson* to its narrow facts to avoid its applicability. While it is true that *Clawson* involved unilateral actions by the Chief Engineer that were not initiated by the permit holder, the principles in *Clawson* are still highly relevant. The City contends that it “is not seeking to reargue the facts on which the original permit was based, but is seeking to have the chief engineer take into account entirely new circumstances....” (*Id.* p. 11, fact 14.) The District maintains that the City’s Proposal alters the very heart of the “original permit,” as substantiated by this Response and other filings. The City agrees that *Clawson* stands for the proposition that the chief engineer does not have “carte blanche authority to alter water appropriations.” (*Id.* at p. 11, fact 12 (*quoting Clawson*).) However, the court in *Clawson* takes the concept a step further, “[W]e also reject the notion that the chief engineer retains jurisdiction to modify an order during the water rights perfection period.” *Clawson v. State*, 49 Kan. App. 2d 789, 802 (2013). This statement is particularly relevant because DWR has attempted to distinguish the applicability of many regulations due to the City’s water rights not being perfected. However, not only is DWR’s assertion not supported, but *Clawson* makes it clear that the chief engineer can’t now

modify the City's permits without the protocols identified by the District being followed. And, just as DWR couldn't retain jurisdiction to reduce Clawson's authorized quantity, DWR does not have jurisdiction here to expand the City's consumptive use. (*See id.* at 804.) When a water right application is granted, it impacts many area users. Thus, *Clawson* does not preclude the Intervenor nor the District from complaining that the City's modifications will be detrimental to the Aquifer. *See Hawley v. Kan. Dep't of Agric.*, 281 Kan. 603, 604, 132 P.3d 870 (2006) (involving abandonment proceeding initiated, in part, by the complaints of neighboring landowners who had standing to pursue action by DWR).

XIX. Attacks on Romero Modeling

Both the Intervenor and the District relied heavily on the modeling of Dave Romero. The City does not refute that Romero's modeling showed that there will be impairment to other users and detrimental impacts to MDS and water quality caused by the City pumping recharge credits to the proposed Minimum Index Level. (City's Findings, p. 37, Conclusion 53; p. 40, Conclusion 74; p. 41, Conclusion 41.) Only the District modeled the potential impacts caused by AMCs and lowering the water table. The City and DWR did not model these concepts. The City does not refute that the Romero modeling indicates that the Proposal will result in 43,800 acre-feet of river depletion caused by the city pumping down the Aquifer to the proposed Minimum Index Levels. (City's Findings, p. 37, Conclusion 53).

The City claims that Romero did not demonstrate how the 43,800 acre-foot river depletion equated to a 10 cfs reduction in river flow and this is an imputed value. (City Findings, p. 37, Conclusion 55; p. 38, Conclusion 58.) Romero's report and testimony clearly show how the 43,800 acre-foot depletion causes a 10 cfs reduction in river flow by year 8 of the drought and that the 10 cfs reduction was a modeled result and not merely an imputed value. (*See*

District Exhibit 68, Figure 4, and District Brief, pp. 40-41). The City further complains that Mr. Romero did not demonstrate why the 10 cfs river flow reduction was divided in half—5 cfs reduction to the Little Arkansas River flow and 5 cfs reduction to the Arkansas River Flow. (City’s Brief, p. 38, Conclusion 58.) Mr. Romero explained in his expert report that he chose to split the river flow reduction between the rivers due to their hydrologic connection to the Aquifer and due to the City’s wells being located in between the two rivers. (District Exhibit 68). The City had ample opportunity to flesh this out during re-direct of Mr. Romero, but chose not to. Additionally, the City could have and should have done its own modeling to determine impacts to river flow.

The City states that Mr. Romero did not explain the river depletion impacts in drought years 5-8. (City’s Findings, p. 37, Conclusion 56). Romero’s expert report, especially Figure 4, clearly shows how the river depletion grows over time due to excessive groundwater pumping when the City withdraws recharge credits and the depletion of aquifer storage. (District Exhibit 68.) This was also discussed in length during Mr. Romero’s testimony. (See District’s Findings, pp. 40-41). The City tries to minimize the detrimental impacts to the streamflow by nit-picking Mr. Romero’s modeling and claims that the 10 cfs total river depletion (5 cfs Little Arkansas River and 5 cfs Arkansas River) only occurs in parts of 3 years during the drought. (City’s Findings, p. 38, Conclusion 59.) However, as adequately demonstrated in Romero’s expert report, river flow depletion starts occurring in year one and grows through time. (District Exhibit 68.) Instead of pursuing rabbit holes with Mr. Romero’s modeling, the real question is: why didn’t the City or DWR model these impacts?!?

XX. Modified MYFAs Could Satisfy the City’s Goals Without Violating the Takings Clause

Both the Intervenor and the District have repeatedly argued the applicability of the Takings clause to the City's Proposal. However, the Intervenor's Findings inspired an expansion on this concept. As argued previously, AMCs require the conversion of native water in the Aquifer to support the withdrawals of these credits. This affords a real property right to the City. Modified MYFAs, on the other hand, would leave an opportunity for the City to accomplish its goals without converting the water already dedicated to other users. If a 10-year MYFA is developed, the City can operate under a term permit and no new property right (water right) is established. In fact, K.A.R. 5-9-1d expressly states that no water can be perfected pursuant to a term permit. Consequently, while the District is adamantly opposed to the concept of AMCs and lowering the Minimum Index Levels due to the harm both will cause to the Aquifer and other users, the District supports the City and DWR seeking a modification of the MYFA concept to support the City's demands during a drought.

In contrast, DWR has contended that the District has inaccurately identified other options available during times of drought. For example, DWR now argues that MYFAs are an inappropriate tool for a municipality because they are only five years in duration. (*See* DWR's Brief, pg. 55; DWR's Findings, pg. 12.) Certainly, Mr. Boese in his testimony accounted for this and argued that the laws governing MYFAs should be amended to accommodate a 10-year duration. His calculations supported that the City's native water rights, enrolled in a 10-year MYFA, could support its drought needs. And despite DWR's arguments to the contrary (*see* DWR's Findings, p. 1), the Bentley Reserve and the E&S wellfields offer alternative sources of water that would be available during at least parts of an extended drought. These points were wholeheartedly ignored by DWR.

XXI. Exacerbating Future Impacts

The Intervenors and the District agree that if AMCs are approved, there is no question the City will be able to accumulate credits much faster in the future. It writes, “The rate of accrual of all recharge credits could not exceed the constructed physical diversion capacity of the ASR system including direct surface water diversions and future bank storage wells.” (City’s Findings, p. 2, fact 5.) The City contemplates future bank storage wells. This will allow it to accumulate credits much faster. Also, if the City can accumulate credits merely by shipping water off to the City and not hassling with injecting water in the Aquifer, it will be able to accelerate its recovery.

The City admits that it contemplates faster accumulation of credits in the future. The City elucidates: “The intent of the Proposal is that the adjusted lower index levels for Phase II would also apply to any additional Phase II infrastructure and to any infrastructure added to the index cells with Phase II infrastructure in later phases.” (City’s Findings, p. 33, fact 22.) The AMC concept, if approved, would also likely apply to any future ASR permits. The City filed additional permit application and later withdrew them. The City could easily refile those applications in the future if this Proposal is approved. Likewise, the City testified that it was attempting to pursue Phase III. (City’s Findings, pp. 20-21.) Thus, to the extent there are modeled harms now with lowering the minimum index level and AMCs—and there are many—these detrimental impacts will be accelerated in the future.

RESPECTFULLY SUBMITTED:

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Management District Number 2

CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian and David J. Stucky, do hereby certify that a true and correct copy of the above was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; (_x_) email; and/or (___) hand delivery on the 4th day of October, 2021, to:

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and the original sent by (___) mail, (___) fax, (_x_) email, and/or (___) electronically filed to/with:

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