

ADRIAN & PANKRATZ, P.A.
Attorneys at Law
Old Mill Plaza, Suite 400
301 N Main
Newton, KS 67114
Phone: (316) 283-8746
Fax: (316) 283-8787

IN THE DISTRICT COURT OF HARVEY COUNTY, KANSAS
NINTH JUDICIAL DISTRICT

EQUUS BEDS GROUNDWATER
MANAGEMENT DISTRICT NUMBER 2,

Plaintiff

Case No.

vs.

EARL D. LEWIS JR., P.E., THE CHIEF
ENGINEER OF THE STATE OF KANSAS,
DEPARTMENT OF AGRICULTURE,
DIVISION OF WATER RESOURCES, in his
official capacity

Defendant

Pursuant to K.S.A. Chapter 77-601 et. seq.

PETITION FOR JUDICIAL REVIEW

COMES NOW Equus Beds Groundwater Management District Number 2 (hereinafter “the District” or “GMD2”), pursuant to K.S.A. 77-614(c) and other authorities, by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., and David Stucky, with its Petition for Judicial Review of the June 21, 2022, Order Regarding the City of Wichita’s Proposed Modification of the Aquifer Storage and Recovery Project Phase II Water Permit Appropriation Permits (“Order”), as follows:

Opening Comments

1. It is a solemn day in the history of Kansas water law that the Equus Beds Groundwater Management District No. 2 must file this Petition for Judicial Review. The City of Wichita (“City”), and perhaps the Division of Water Resources (“DWR”) of the Kansas Department of Agriculture (“KDA”), will undoubtedly detonate a smokescreen and accuse the District of being

unnecessarily litigious in pursuing this course of action. However, the reality is just the contrary. The District was *forced* to engage in over two weeks of a hearing merely because the City submitted a Proposal requesting modifications to the City’s Aquifer Storage and Recovery (“ASR”) Phase II project and existing water permits that was detrimental to the Equus Beds Aquifer (“Aquifer”) on many levels, and the DWR wholeheartedly embraced the Proposal without affording it proper consideration or analysis. The District never wanted the burden of leading the charge to assume the level of review that the DWR neglected to perform. However, for the betterment of the vital groundwater resource and the many constituents that rely on it, the District had no choice but to pursue its arguments through a hearing—arguments that should have clearly carried the day with the Agency early on in the proceedings. Thus, the District’s goal in filing this Petition for Judicial Review is not to be litigious. But, instead, the District wishes to resolve this matter once and for all, and preclude countless days of additional hearing and painstaking review if the City attempts to just file a similar proposal in the future.

2. Undoubtedly, if the Proposal is dismissed only on procedural grounds and none of these other factual and legal considerations are resolved, the City will simply file a new application and ignite similar proceedings in the future, whether merely months or years from now. Only time would tell if the District could invest the time and resources to engage in similar actions to protect the Aquifer at that juncture. The District chooses not to leave this problem to be solved by a later generation. Thus, it is with a heavy heart that the District must pursue this Petition for Judicial Review, as a last resort, to protect the Aquifer now, along with its many users.

The Parties

3. The Plaintiff, the Equus Beds Groundwater Management District No. 2, 313 Spruce Street, Halstead, Kansas 67056; copy to attorneys: 301 N. Main, Suite 400, Newton, Kansas 67224; tom@aplawpa.com; stucky.dave@gmail.com.
4. The Defendant, Earl D. Lewis Jr., P.E. is the Chief Engineer of the Division of Water Resources of the Kansas Department of Agriculture. He may be served at his official office located at 1320 Research Park Drive, Manhattan, Kansas 66502-5000.
5. Other parties to the administrative proceeding included:
 - a. The City of Wichita, Department of Public Works & Utilities, 455 North Main Street, Wichita, KS 67202; attorney: bmcleod@wichita.gov.
 - b. The Kansas Department of Agriculture, Division of Water Resources, 1320 Research Park Drive, Manhattan, Kansas 66502-5000; attorney: stephanie.kramer@ks.gov
 - c. Richard Basore, Josh Carmichael, Judy Carmichael, Bill Carp, Carol Denno, Steve Jacob, Terry Jacob, Michael J. McGinn, Bradley Ott, Tracy Pribbenow and David Wendling (Intervenors), 1010 Chestnut Street, Halstead, KS 67056; attorney: twendling@mac.com.
6. The Agency officer designated to receive service of the petition for judicial review on behalf of KDA is: Kenneth B. Titus, Chief Legal Counsel, Kansas Department of Agriculture, 1320 Research Park Drive, Manhattan, Kansas 66502.

The Procedural Posture and the City's Proposal

7. On March 12, 2018, The City of Wichita filed with the Chief Engineer, DWR, the City's ASR Permit Modification Proposal - Revised Minimum Index Levels & Aquifer Maintenance Credits ("Proposal").

8. On July 23, 2018, David Barfield, the prior Chief Engineer, DWR, issued a Pre-Hearing Conference Order which established the purpose of the Hearing and designated the following parties to the Hearing: the City, DWR, and GMD2.
9. On October 1, 2018, at the request of the City, the Chief Engineer dismissed ASR Phase II pending new appropriation applications, File Nos. 48704 through 48733.
10. On October 26, 2018, David Barfield, Chief Engineer, DWR, issued an Order designating the Intervenors as a party to the Hearing.
11. On March 11, 2019, GMD2 filed its Motion to Dismiss and Motion for Summary Judgment and Brief in Support.
12. On March 19, 2019, David Barfield, Chief Engineer, DWR, issued an Order delegating Constance C. Owen to serve as the Hearing Officer in the hearing matter and temporarily postponing the hearing.
13. On May 28, 2019, a hearing was conducted for the purpose of hearing oral arguments regarding various pending motions, including GMD's Motion to Dismiss and Motion for Summary Judgment.
14. On July 24, 2019, the Hearing Officer, Constance C. Owen, issued an Order regarding the motions subject to the May 28, 2019, hearing. The Motion for Summary Judgment was denied and the Motion to Dismiss was not resolved and was taken under advisement by the Hearing Officer until the conclusion of the hearing.
15. On December 11, 2019, the evidentiary hearing ("Hearing") commenced and continued for a total of 15 days in 2019, 2020, and 2021, with the City resting its case in chief on February 11, 2020.

16. On February 11, 2020, the GMD2 requested a directed verdict and renewed its Motion to Dismiss. The presiding officer denied GMD2's Motion for Directed Verdict and advised the GMD2's Motion to Dismiss remained pending.
17. On February 19, 2021, closing arguments were heard.
18. On July 30, 2021, all parties submitted to the Hearing Officer their proposed findings and conclusions of law, and post-hearing briefs.
19. On October 4, 2021, the GMD2, the City, and the DWR submitted responses to the proposed findings and conclusions.
20. On January 14, 2022, the Hearing Officer submitted to the Chief Engineer her recommendation of denial of the Proposal and based it on detailed factual and legal considerations, and thus made a substantive decision on the merits of the Proposal and all the evidence presented at the Hearing.
21. On February 11, 2022, all parties submitted to the Chief Engineer their comments on the Hearing Officer's Recommendations.
22. On June 21, 2022, Earl D. Lewis, Chief Engineer, DWR, issued an Order denying the City's Proposal ("Order") and ostensibly based the decision on merely procedural grounds due to the fact the City's Proposal was not properly submitted and that the proposed modifications should have been submitted as new applications pursuant to K.S.A. 82a-711, although, as noted below, the Chief Engineer spiraled into a discussion of other limited factual considerations. A copy of this Order is attached as Exhibit A.
23. On July 6, 2022, GMD2 filed with DWR/KDA a Motion for Reconsideration/Clarification, for a Ruling on the Substantive Issues, and for Attorney/Expert Witness Fees.

24. On July 21, 2022, GMD2 filed with KDA/DWR to withdraw its July 6, 2022, Motion for Reconsideration/Clarification, for a Ruling on the Substantive Issues, and for Attorney/Expert Witness Fees, except that GMD2 is incorporating its arguments in favor of attorney/expert fees before this Court and also asking this Court to force a ruling on the substantive issues. However, the effect of this Motion is that all administrative remedies have been exhausted and no jurisdiction currently exists at an agency level and this matter is ripe for judicial review.

Condensed Statement of Relevant Facts

25. This is intended as only a cursory summary of the relevant facts. The parties presented thousands of pages of exhibits and the Hearing lasted for over two weeks. Therefore, for a detailed summary of the evidence substantiated at the Hearing, the Court can consult the District's Findings of Fact and Conclusions of Law.

26. Many years ago, the City accumulated 40,000-acre feet of native groundwater rights ("Native Rights") to be withdrawn by 55 wells authorized by Vested Water Right, File No. HV-006, Water Right, File No. 388 and Water Right, File No. 1006. The general area of these wells is oftentimes referenced as the City's wellfield.

27. Prior to the mid-1990's, the City historically pumped nearly the entire quantity of groundwater authorized by the City's Native Rights, thus depleting the Equus Beds Aquifer (the "Aquifer") in the vicinity of the City's wellfield.

28. With the help of the District, the City pursued means to become a better steward of the Aquifer and entered into the Aquifer Storage and Recovery ("ASR") Phase I Project, which allowed for physical artificial recharging of the Aquifer. ASR Phase I was intended, in part, to create a hydraulic barrier to slow the migration of a chloride plume that exists near Burrton, Kansas and preserve the water quality in the Aquifer.

29. The City and the District entered into a ASR Phase I Memorandum of Understanding (“MOU”) that contained many requirements including, but not limited to, the protection of domestic wells’ water quality and a remedy if the water quality is impacted by the ASR Phase I operations.

30. ASR Phase I, as approved by DWR, also imposed various permit conditions including, but not limited to, defining the horizontal and vertical boundaries of the ASR basin storage area, water quality and water-level monitoring, physical recharge credit accounting, establishing the Minimum Index Levels per Index Cell, prohibition of withdrawing recharge credits below the Minimum Index Levels, and prohibition of passive recharge credits

31. At the time, the City and the DWR opined that it would be in the public interest not to allow for the withdrawal of credits below the 1993 groundwater levels (“Current Minimum Index Level”).

32. Currently, with the adoption of ASR Phase II, the City can accumulate recharge credits by treating and physically injecting surface water into the Aquifer.

33. In more detail, the City takes water from the Little Arkansas River during high flows, treats it, injects it into the Aquifer, stores it in the basin storage area, determines losses, and then can later withdraw those recharge credits by pumping groundwater from the Aquifer to the City for municipal purposes. Under this approach, a recharge credit is established only when source water (treated surface water) is actually physically injected into the Aquifer.

34. As with ASR Phase I, a MOU was entered into between the City and the District and the Phase II MOU also imposed crucial guidelines on the City and the GMD2 including, but not limited to, the City’s commitment to a remedy for domestic well owners if the ASR Phase II project degrades the water quality to below drinking water quality at the domestic well; the

City's commitment to a remedy for domestic well owners within 660 feet of an ASR Phase II recharge and recovery well if operation of the ASR well impairs the domestic well; and a commitment by GMD2 to recommend spacing waivers for ASR recharge and recovery wells that do not meet spacing requirements to existing wells. The MOU was also predicated on physical artificial recharging of the Aquifer by the City and the City not withdrawing recharge credits below the Current Minimum Index Level.

35. The City also sought spacing waivers based on the conditions promised in the MOU and, in turn, received recommendations from the GMD2 Board of Directors to DWR that the spacing waivers be granted.

36. ASR Phase II, as approved by DWR, also imposed permit conditions on the City including, but not limited to, the following: description of the horizontal and vertical boundaries of the ASR basin storage area, water quality and water-level monitoring, physical recharge credit accounting, describing the Minimum Index Levels per Index Cell, prohibition of withdrawing recharge credits below the Minimum Index Levels, and prohibition of passive recharge credits.

37. The City's new Proposal, in short, seeks to accomplish two things: 1) obtain a newly-conceived type of "recharge credit" known as Aquifer Maintenance Credits ("AMCs") based on groundwater left in storage in the Aquifer during times when the Aquifer is at or near capacity and the City thus pumps treated surface water directly from the Little Arkansas River to the City for municipal use, and 2) to lower the minimum index levels under which the City can withdraw recharge credits. *See City's Proposal.*

38. As indicated, the City originally filed 30 Phase II water appropriation new applications when it filed its Proposal and also requested the proposed modifications be made to the City's 30 existing ASR Phase II water permits. The 30 new applications were subsequently withdrawn by

the City and dismissed by the DWR prior to the Hearing, and therefore were not subject to the Hearing.

39. A major genesis for the City's Proposal was due to drought planning as the City's population is projected to grow in the future. The City also touted its Proposal as designed to keep the Aquifer full so the City would not have to first pump down the Aquifer to make room for physical injection of surface water to accumulate recharge credits.

40. Months or even years before the Proposal was filed, the City began discussing the concept of AMCs and lowering the minimum index levels with the DWR and, originally, the District. Unfortunately, the District was excluded from discussions leading up to the filing of the City's Proposal due to expressing legitimate concerns with the inherent concepts. Probably all of these proceedings could have been avoided, or significantly limited, had the DWR and the City simply listened to the voice of the District before the Proposal was actually filed.

41. As referenced in the Proposal, the City performed some drought modeling and some modeling designed to demonstrate the hydrologic effects of the Proposal.

42. As shown in the Proposal and as universally agreed to by the parties, with AMCs, *surface* water is sent directly to the City from the Little Arkansas River for municipal consumption and then the City is seeking to later withdraw *groundwater* from the Aquifer even though no source water is placed in the Aquifer by the City.

43. The above approach is directly contrary to the ASR regulations.

44. The parties conceded that with AMCs no physical artificial recharge would occur in the Aquifer when an AMC is accumulated.

45. Consequently, with AMCs, in contrast to physical recharge credits, the City can double its consumptive use made of the water (highly simplified—pump one gallon of surface water

from the Little Arkansas River for municipal use in the City and then later withdraw another gallon of groundwater from the Aquifer and also use it for municipal consumption).

46. Neither the City nor the DWR could logically explain how a recharge credit would be created or perfected through the AMC approach.

47. Lane Letourneau, the sole witness for the DWR testified that if AMCs were found not to be a recharge credit, then AMCs don't exist.

48. The City also proposed to put a cap of 120,000 acre feet on the accumulation of recharge credits. Indeed, this was one of the few concepts the District agreed with, but demonstrated that the record only supported a 50,000-acre foot cap based on the City's own drought modeling.

49. The City also sought to lower the Current Minimum Index Level anywhere from 9 to 23 feet to create a deeper threshold under which recharge credits can be withdrawn. Of course, lowering the Current Minimum Index Level would further deplete the Aquifer under any stretch of the imagination.

50. No evidence supported how lowering the Current Minimum Index Level would benefit the Aquifer or any party other than the City, except the City contended it could wait longer in a drought to withdraw recharge credits. However, the City neglected to make this a permit condition or even explain how gutting the Aquifer even further during a prolonged drought would somehow be beneficial to the Aquifer.

51. Even the City attempted to distinguish the elements of its Proposal and argued that all the harms identified by the District applied to lowering the minimum index level and not AMCs.

52. As part of its Proposal, the City sought to implement a simplified accounting system, which included many inherent problems that were identified during the Hearing. For example, the City sought the measurement of Aquifer groundwater levels in January to determine when

AMCs could be accumulated (instead of requiring physical recharge). This would not account for a lowered water table during hot summer months and peak pumping periods (when physical injection is appropriate). The City could also not properly demonstrate how it determined the metrics for initial and gradational losses regarding accumulation and maintaining AMCs.

53. The City has also taken steps to pursue ASR Phase III, which would allow the City to expand its capacity to accumulate AMCs in the future—i.e. more bank storage wells, and compound the harms identified by the District.

54. The District’s experts, and the testimony of the witnesses for the City and the DWR, overwhelmingly supported the fact that the City made many errors in its modeling and failed to account for crucial variables. The City also failed to explain many of the starting points used for projections (i.e. 1998 groundwater levels or Cheney at 110—or 100 if the error was corrected—percent full). Concerns were also identified regarding the nature of the actual modeling approach (MODFLOW) used.

55. However, this paled in comparison to the fact that the City neglected to model the impacts to critical components, including impacts to other groundwater users, water quality, and minimum desirable streamflow.

56. Even more shockingly, the agency that was supposed to function as a gatekeeper to protect the Aquifer in this situation, the DWR, failed to perform any modeling of the City’s Proposal at all. Instead, the DWR employees just performed a cursory review of the City’s Proposal and decided it seemed “reasonable.”

57. The District and the Intervenors, on the other hand, produced experts that performed detailed modeling that demonstrated the detriments to minimum desirable streamflow and water quality if the City’s Proposal is adopted. The impacts of withdrawing AMCs, coupled with

lowering the Current Minimum Index Level, could cause area rivers to dry up and could allow for the spread of the Burrton Chloride plume and the leaching of arsenic, among other concerns identified by these highly credentialed experts.

58. The District also proved that the City's Proposal would cause impairment based on both a regional lowering of the water table and due to the fact that individual wells would dry up.

59. The parties in the hearing all acknowledged the benefit of safe yield and recognized that the City's well field is a heavily over-appropriated area. In short, safe yield is a calculation of the reasonable water appropriation that can exist in a given area without resulting in unduly depleting the Aquifer (over-appropriation).

60. The District also proved that the City's Proposal would adversely impact the safe yield of the Aquifer and not meet spacing requirements. The District supported the fact that new spacing waivers would be required if the City's Proposal is pursued.

61. To further demonstrate impairment, the District engaged in a detailed analysis of practical saturated thickness. Practical saturated thickness considers the lithologic data for a well to determine the porosity to actually obtain water. For instance, no water will come from a heavy clay layer, but a sand layer will produce water. At the Hearing, the District analyzed actual live well data to prove that there was actually less water available in the Aquifer than projected by the City through its merely theoretical modeling. And the discrepancies were certainly *not* insignificant in nature. In many areas, the City overstated the available water by as much as 100 feet. In the conclusion of his testimony, Mr. Letourneau, the sole witness for the DWR, expressed grave concern regarding these findings.

62. Further, the Intervenors testified in detail how the City's Proposal would undermine the value of their land and result in the taking of water that did not belong to the City. The

Intervenors further indicated that they bought their land as an investment and did not give the City permission to undermine this value.

63. The District also produced detailed expert testimony that supported the illegality of AMCs, as provided below. These experts included the former Chief Engineer of the DWR, David Pope, and Tim Boese, the Manager of the District, and the only witness at the hearing that was involved since the inception of ASR Phase I.

64. These highly credentialed experts also testified that AMCs are passive recharge credits. In short, a passive recharge credit is water left in storage that the City could have otherwise pumped. Passive recharge credits were prohibited in ASR Phase I and II and the DWR testified that it was still opposed to passive recharge credits.

65. Again, the City's approach to attempt to obtain credits for not pumping its Native Water Rights is a textbook example of passive recharge credits. The City's entire Proposal is predicated on obtaining benefits (credits) from water left in storage.

66. The City's Proposal also included a variety of permit conditions that could be adopted by the Chief Engineer. However, the District further established during the Hearing that the permit conditions were not stringent enough.

67. Regardless, the District overwhelmingly demonstrated that the City's Proposal cannot and should not be adopted for a vast multitude of reasons.

Incorporation by Reference

68. The District is asking to incorporate the following documents by reference into this Petition for Judicial Review:

- a. March 12, 2018 City of Wichita's ASR Permit Modification Proposal - Revised Minimum Index Levels & Aquifer Maintenance Credits;

- b. July 23, 2018, Pre-Hearing Conference Order;
- c. March 11, 2019, GMD2 Motion to Dismiss;
- d. March 11, 2019, GMD2 Motion for Summary Judgment and Brief in Support;
- e. May 1, 2019, Pre-Hearing Order;
- f. July 24, 2019, Order on Prehearing Motions;
- g. July 30, 2021, GMD2 Proposed Findings, Conclusions and Brief;
- h. January 14, 2022, Recommendations on the City of Wichita’s Proposed Modifications of the Aquifer Storage and Recovery Project Phase II Water Appropriation Permits;
- i. Various responses filed by the District to the Other Parties’ Findings of Fact and Conclusions of Law;
- j. February 11, 2022, GMD2’s Comments to Recommendations on the City of Wichita’s Proposed Modification of the Aquifer Storage and Recovery Project Phase II Water Appropriation Permits;
- k. June 21, 2022, Order Regarding the City of Wichita’s Proposed Modification of the Aquifer Storage and Recovery Project Phase II Water Permit Appropriation Permits; and
- l. July 6, 2022, GMD2 Motion for Reconsideration/Clarification.

Scope of Review and Relief Authorized

69. The Kansas Judicial Review Act (“KJRA”) affords courts a broad scope of review of agency actions and, in turn, an expansive list of authorized remedies. *See* K.S.A. 77-601, *et seq.* Judicial review is appropriate under the following list of broad-stroke justifications:

The court shall grant relief only if it determines any one or more of the following:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;
- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
- (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
- (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
- (8) the agency action is otherwise unreasonable, arbitrary or capricious.

K.S.A. 77-621(c) (emphasis added). Many of these reasons for judicial review will be applied and discussed below. However, it suffices to say that there are many areas that allow for this Court's province to further decide the issues or remand the matter for further findings by the Agency. Likewise, the list of remedies that can be invoked upon judicial review is extensive:

- (a) The court may award damages or compensation only to the extent expressly authorized by another provision of law.
- (b) The court may grant other appropriate relief, whether mandatory, injunctive or declaratory; preliminary or final; temporary or permanent; equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment or take any other action that is authorized and appropriate.
- (c) The court may also grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld, but the court may award attorney's fees or witness fees only to the extent expressly authorized by other law.
- (d) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

K.S.A. 77-622 (emphasis added). As indicated, the powers of this Court are very broad including the ability to force the Agency, through a declaratory action, to make factual determinations or decide legal issues.

The review sought in this Petition is unique in the fact that the Agency actually dismissed the City's Proposal. However, the Chief Engineer appeared to only base this decision on procedural grounds. This Final Order thus undermined the entire purpose for the Hearing. The Agency now cannot just hide behind one procedural argument, when proper review was ignored in the first place by the DWR, and the overwhelming evidence and law supports the illegality and problematic nature of the City's Proposal. If a new application is filed in the future by the City, even if some lipstick is put on the proposal, it will still be illegal and harmful for the Aquifer. The same conclusion should be reached but it will only be after countless additional resources are exhausted. Thus, the Agency should have been charged with making the right decision on the merits and the Court must require this action to occur now to protect this resource for future generations.

Background on Kansas Water Law and the Prior Appropriation Act

70. Kansas has adopted a detailed statutory system for the creation of water rights, the Kansas Water Appropriation Act. Water rights are real property. K.S.A. 82a-701(g).

71. The Chief Engineer has a statutory duty to enforce and administer the laws of Kansas pertaining to beneficial use of water and to control, conserve, regulate, allot, and aid in the distribution of the water resources of the state for the benefit and for the beneficial uses of all its inhabitants in accordance with the rights of priority of appropriation. K.S.A. 82a-706.

72. The Chief Engineer cannot alter Kansas public policy as this is the function of the legislature. Thus, the Chief Engineer must enforce the laws as they exist, and not endorse new, unsubstantiated concepts that are contrary to current water law principles.

73. The Kansas Water Appropriation Act embodies the prior appropriation doctrine when there is insufficient water available for all appropriators. *See, e.g.*, K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-742; 82a-745; 82a-1020; 82a-1028(n) and (o); 82a-1029; 82a-1039. In short, prior appropriation allocates water based on “first in time, first in right.”

74. The 1972 Groundwater Management District Act confers broad powers to local groundwater management districts to manage groundwater on a local level so long as the groundwater management districts act in concert with the Kansas Water Appropriation Act. *See, e.g.*, K.S.A. 82a-1020, 82a-1028(n) and (o), 82a-1029, and 82a-1039.

75. The Chief Engineer also does not have the authority to unilaterally alter a water right. *Clawson v. DWR*, 49 Kan.App.2d 789, syl. 15, 801, 315 P.3d 896 (2013).

76. The predictability afforded by these statutes have been entrenched in Kansas water law for generations. This stability, in turn, is relied upon by landowners, water right holders, and the public alike. *Id.* at 798-99. As it pertains to the Aquifer and this case, the Chief Engineer thus has a duty to enforce the laws identified by the District and thus protect the Aquifer.

The Agency Failed to Properly Make Proper Factual Determinations

77. In this case, the Chief Engineer wholly failed to make proper factual determinations to substantiate the Order. The Hearing Officer, on the other hand, provided a very detailed factual analysis and findings that should have been adopted by the Chief Engineer.

78. The Chief Engineer was required to make these factual determinations. As stated in the KJRA: “A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency’s discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness.” K.S.A. 77-526 (emphasis added).

79. Further, to the extent the Chief Engineer did delve into a factual discussion, the Chief Engineer mischaracterized the findings in the record. Thus, the Chief Engineer made incorrect findings to ostensibly justify the ruling.

80. For example, the Chief Engineer mischaracterized the Hearing Officer’s conclusion that lowering the minimum index levels would allow the City to exceed their authorized quantity allowed by the current ASR Phase II water permits. What the Hearing Officer explained is that lowering the minimum index levels would grant access to more of the Aquifer and allow the City to physically pump more groundwater than the City currently can withdraw. The Hearing Officer did not say or imply that the City could exceed the currently authorized quantity by lowering the minimum index levels.

81. Likewise, as noted by the Hearing Officer, AMCs would allow the City to accumulate more recharge credits than they can currently, or at least at a faster rate. Whereas traditional ASR credits require physical injection of water, AMCs can be accumulated simply by sending surface water to the City for municipal purposes. The Chief Engineer mischaracterized this to imply that the Hearing Officer stated that AMCs would allow the City to exceed their currently authorized recharge credit withdrawal quantity. AMCs would allow for more recharge credits, which in turn would allow the City to physically pump more recharge credits.

82. Thus, the Chief Engineer did not just stop the analysis with procedural concerns regarding the failure of the City to file a new application. Instead, the Chief Engineer dove into a critique of several findings of the Hearing Officer. Certainly, this expands the rationale for the Chief Engineer's ultimate conclusions and opens the door for necessary, but accurate factual findings that were supported by the record, as explained above.

The Agency Acted Beyond Its Jurisdiction in Forcing a Hearing

83. As noted, the District formally raised the fact that the City's Proposal required a new application as early as 2019 (and informally much earlier). Yet these arguments fell on deaf ears. Rather, the DWR vigorously argued against this notion and advocated for a formal hearing. The Chief Engineer at the time, and the Hearing Officer, further endorsed this sentiment. Thus, this entire Hearing could have been avoided. However, since it occurred, the below findings need to be made to avoid further exposing the Agency's major oversight and in turn making the Hearing a colossal waste of time and expense for all parties and taxpayers.

The Agency Has Not Decided Issues Requiring Resolution

a. Prior Orders Required Certain Findings to Be Made

84. Prehearing Orders in the case detailed the affirmative findings that the Chief Engineer was required to make after the Hearing. These orders included the Order to Modify Hearing and Schedule issued on September 27, 2018, the Pre-Hearing Conference Order dated July 23, 2018, and the Prehearing Order dated May 1, 2019. (*See Various Hearing Orders.*)

85. The May 1, 2019, Prehearing Order states:

[T]he 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.

See May 1, 2019 Prehearing Order.

86. As outlined in the Hearing, K.S.A. 82a-708(b) details that the applicant must demonstrate to the Chief Engineer that the change is reasonable, will not impair existing rights, and relates to the same local source of supply. (*See* K.S.A. 82a-708b.)

87. K.S.A. 82a-711 is the statute regarding the Chief Engineer's review of a new application. In part, as testified to by Mr. Boese, it states that the new application cannot impair an existing water right and cannot prejudicially or unreasonably affect the public interest. It further states that in determining whether the proposed use will prejudicially and unreasonably affect the public interest, the Chief Engineer will take into consideration, in part, established minimum streamflow requirements, the area, safe yield, and recharge rate of the water supply, and the priority of existing water rights. It further states that impairment shall include the unreasonable raising or lowering of the static water level and the unreasonable deterioration of the water quality at the existing water user's point of diversion. *See* K.S.A. 82a-711.

88. Notwithstanding the statements made in the Prehearing Orders, throughout the Hearing the DWR attorneys argued that the City did not have to prove the elements established above. It was only during closing arguments that the DWR attorney completely reversed course on this position. This frankly was not surprising considering the DWR attorneys also argued against the need for a new application to be filed (and then later signed off on the Final Order of the Chief Engineer dismissing for this exact reason).

89. Again, it was very lucky for all users of the Aquifer that the District stepped into fill the shoes of the DWR to protect against the approval of a harmful Proposal. Now that the Hearing occurred, the Chief Engineer was required to make all the findings identified above. Indeed, if

these findings are made, as explained and enumerated below, the record will overwhelmingly support the District's position.

b. Errors in Proposal

90. The District uncovered numerous errors with the City's Proposal. Although dismissing for procedural reasons may provide the City an opportunity to correct these countless mistakes in the future when it files a new application, merely correcting the errors will not change the inherent flaws with the City's Proposal. These errors, as explained in detail in the District's Findings of Fact and Conclusions of Law, undermined the City's ability to meet its burden of proof. However, regardless of the existence of these numerous blunders, the City's Proposal should not be approved for all the reasons articulated below.

c. Failure of City to Model Critical Components

91. The City failed to model many critical components including impacts to minimum desirable streamflow (sometimes referred to as "MDS"), water quality, or the forms of impairment identified by the District. Thus, the District and the Intervenors provided the only viable testimony on these subjects and Court can comfortably make rulings on these critical components.

d. The City's Proposal Was Clearly Contrary to the Public Interest

92. The Chief Engineer failed to make specific findings that the City's Proposal was not in the public interest. The Kansas Water Appropriation Act does not provide a succinct definition of "public interest." However, the Kansas Supreme Court has helped to define the broad scope of the "public interest where no apparent definition exists." *Harris Enterprises, Inc. v. Moore*, 241 Kan. 59, 66, 734 P.2d 1083 (1987). The Court has indicated that a public interest must "be a matter which affects a right or expectancy of the community at large and must derive meaning

within the legislative purpose embodied in the statute.” *Id. Wheatland Elec. Coop., Inc. v. Polansky*, 46 Kan. App. 2d 746, 754, 265 P.3d 1194 (2011) further supports a liberal standard in demonstrating impact to the public interest when the court indicated that “public interest could be hindered by the increased drain on a shared water resource” and that the “chief engineer [should] consider these real-world concerns.”

93. The Kansas legislature has adopted a statute that outlines the playbook the Chief Engineer must follow when considering the public interest. K.S.A. 2012 Supp. 82a-711(b), states:

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

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

Id. Each of these factors will be discussed below.

i. Water Quality

94. The District presented extensive testimony that the City’s Proposal would undermine water quality and the Chief Engineer should have acknowledged this fact. While the City’s witnesses acknowledged that significant Aquifer drawdowns could accelerate the movement of the Burrton Chloride Plume by as much as 40 percent, the District and Intervenor’s experts provided the only testimony on water quality and testified regarding the adverse impacts the City’s Proposal would have on water quality. These findings were made by the Hearing Officer and must be adopted by the Chief Engineer.

ii. Minimum Desirable Streamflow

95. As required by the Prehearing Orders, the next factor the Chief Engineer was required to make affirmative findings on was minimum desirable streamflow (“MDS”). *See e.g.*, K.S.A. 82a-703a, 703b, and 703c. The District produced extensive modeling and testimony from its experts indicating that the City’s attempts to establish a New Minimum Index Level and withdraw physical recharge credits and/or AMCs would have dire consequences for MDS. For example, Dave Romero, one of the most credentialed experts in the Hearing,¹ indicated that the City’s pumping in the simulated 1 percent drought depleted the Little Arkansas River and Arkansas River (“Rivers”) by a combined 30,100 acre-feet; pumping recharge credits to the New Minimum Index Levels caused an additional 33,600 acre-feet depletion in the Rivers compared to pumping to the current Minimum Index Levels (43,800 acre-feet versus 10,200 acre-feet), and caused a streamflow reduction of about 10 cubic feet per second in the Rivers; River flow depletion would last for years after the drought pumping ceased, and MDS would be met less often on the Little Arkansas River. These findings should have been made by the Chief Engineer.

iii. Impairment and Overall Health of the Aquifer

96. The Chief Engineer next should have made findings regarding impairment. K.S.A. 82a-711(c) clarifies that “impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user’s point of diversion beyond a reasonable economic limit.” The Kansas Court of Appeals very recently twice addressed the definition of impairment in the companion cases of *Garetson Brothers v. American Warrior, Inc.*, 51 Kan.

¹The other most credentialed experts were also produced by the District.

App. 2d 370, 347 P.3d 687 (2015); *Garetson Bros. v. Am. Warrior, Inc.*, 56 Kan App. 2d 623, 435 P.3d 1153 (Ct. App. Jan. 11, 2019). In those cases, the court adopted a very broad definition of the word “impairment” as it relates to water rights. *Id.* at 649. Two panels of the court held that an aggrieved party need only show that the offending party’s approach “diminishes, weakens, or injures” the aggrieved party’s rights. *Id.* Thus, this standard is now entrenched law.

97. The District presented ample evidence that the City’s Proposal would cause impairment. The District presented extensive testimony and exhibits reflecting that there would be a regional lowering of the water table if the City’s Proposal was adopted. The District further provided expert testimony from Dave Romero that individual wells would be depleted when the City withdrew its credits or if the minimum index level was lowered. These findings need to be made by the Chief Engineer to avoid a similar hearing in the future.

iv. Safe Yield

98. The District further proved that safe yield was applicable to the City’s Proposal as an AMC is not created as part of an aquifer *storage* and recovery project. Thus, the Chief Engineer should have made findings that the City’s Proposal would undermine safe yield. K.A.R. 5-3-9(b) states that “Unless otherwise provided by regulation, it shall be considered to be in the public interest that only the safe yield of any sources of water supply... shall be appropriated.” K.A.R. 5-22-7(a) provides, subject to certain exceptions, “The sum of prior appropriations shall not exceed the allowable safe-yield amount for that area of consideration.” While K.A.R. 5-22-7(b)(7) does exempt an application for an aquifer storage and recovery well from having to meet the safe yield regulation K.A.R. 5-22-7(a), an application for withdrawal of an AMC would not meet this exemption, as no source water is being physically injected and stored for later recovery.

99. The District provided extensive evidence that the City's Proposal would undermine safe yield. In fact, the District proved how the City would be withdrawing groundwater that is already dedicated to prior water rights in areas that are overappropriated by as much as fourfold. The Chief Engineer was required to protect the public interest and make findings to this effect.

v. Spacing

100. The District further proved that the City's Proposal would not meet well spacing requirements dictated by K.A.R. 5-22-2(a). The District proved that any initial spacing waivers obtained by the City are now wholly invalid as they were conditioned on minimum index levels remaining at the current established levels and utilizing artificial recharge. The Chief Engineer should have made this affirmative finding.

The City's Proposal Is Unconstitutional on Its Face

101. For the reasons articulated in its Findings of Fact and Conclusions of Law, the District maintains that AMCs would be an unconstitutional Taking of water. The Takings Clause of the Fifth Amendment of the United States Constitution ensures that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amends. V, XIV. The Kansas Supreme Court and Kansas statutory authority has afforded broad deference to this federal protection. *See* K.S.A. 26-513(a); *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 558, 215 P.3d 561 (2009). AMCs allow the City to obtain fictional credits to pump native groundwater that is dedicated to other users. The Intervenors testified in the hearing regarding how this would cost them millions of dollars in the diminution in value of their land and undermine investment-based expectations. The City's Proposal would further break contractual obligations if the City were allowed to lower the minimum index level. The City's Proposal

constitutes a blatant Taking and is unconstitutional on its face. This is another easy finding that must be made by the Court to avoid this charade from happening again in the future.

The Agency Failed to Follow Proper Procedure

102. The Agency failed to follow proper procedure on numerous levels. For example, early references in the record indicated that the Chief Engineer’s decision after the Hearing would be deemed an initial order, rather than a final order. The Chief Engineer’s characterization of the decision as a Final Order consequently stripped the District of its ability to seek review with the Secretary of Agriculture.

103. As indicated elsewhere in this document, the DWR’s counsel further attempted to buck the prehearing Orders which required an analysis under K.S.A. 82a-708b.

The Agency Failed to Properly Apply the Law and Erroneously Decided the Law

a. AMCs Violate the Prior Appropriation Act

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

105. Fundamental to this Act is the concept of prior appropriation or “first in time, first in right.” Attempted modifications of a water right that encroach on the rights of senior users must

be denied. *Wheatland*, 46 Kan. App. 2d at 754 (“*The chief engineer must deny any change application that will materially injure senior water-rights holders*, K.A.R. 5-5-8(a), and the chief engineer is allowed to place the terms, conditions, and limitations on the application that he or she deems necessary to protect the public interest.”) (emphasis added).

106. The District proved that the City’s Proposal flies in the face of the Kansas Water Appropriation Act. Through AMCs, the City will accumulate recharge credits, to later divert native groundwater, while never injecting any source water into the Aquifer. This native groundwater the City diverts may be subject to the priority of established senior or vested rights of other users. This stands the concept of prior appropriation and “first in time, first in right” on its head. Moreover, Kansas has adopted a statutory system to recognize new water rights through a sophisticated permitting process. As indicated, the City is attempting to circumvent this entire process. Thus, the very essence of the City’s Proposal drains the lifeblood out of years of established Kansas water law. Thus, the Court should make findings to this effect.

b. AMCs Are Fictitious and Prohibited by Current Law

107. All witnesses in the hearing agreed that AMCs are not defined by Kansas statutes or regulations. Thus, it was well established that AMCs are merely a fictitious concept conjured by the City. After extensive research, the District is not aware of any precedent for AMCs in any other jurisdiction—which makes sense as the concept is flawed on so many levels and violates universal tenants of water law.

108. Moreover, the Chief Engineer should have precluded the City from filing another similar, dangerous Proposal in the future by simply ruling now that AMCs are illegal. Since the Agency failed to properly act in this regard, the District is asking the Court to use its declaratory powers

to make that ruling now. Mr. Pope and Mr. Boese provided a masterful analysis of why AMCs are contrary to current statutes and regulations.

109. K.A.R. 5-12-1(a) reads: “An operator may store water in an aquifer storage and recovery system under a permit to appropriate water for artificial recharge if the water appropriated is source water.” “Source Water,” as defined by K.A.R. 5-1-1(yyy), “means water used for artificial recharge that meets the following conditions: (1) is available for appropriation for beneficial use; (2) is above-base flow stage in the stream; (3) is not needed to satisfy minimum desirable streamflow requirements; and (4) will not degrade the ambient groundwater quality in the basin storage area.” As supported by the testimony of the DWR and the District, the proposed accumulation of AMC’s does not meet the definition of “Source Water” found in K.A.R. 5-1-1(yyy), as the source water from the Little Arkansas River is not being used for artificial recharge when AMCs are accumulated, as it is instead being used directly for municipal use. Additionally, the definition of source water does not include an offset for water not pumped from the Aquifer, as proposed by the City with its Proposal.

110. “Artificial Recharge” as defined by K.A.R. 5-22-1(f) and K.A.R. 5-1-1(g) “means the use of source water to artificially replenish the water supply of the aquifer.” Again, as supported by the testimony of Mr. Letourneau and other parties, the proposed accumulation of AMCs does not meet the definition of “Artificial Recharge,” as the source water from the Little Arkansas River is not being used to artificially replenish the water supply of the Aquifer, but is instead being diverted directly to the City. “Aquifer storage” as defined by K.A.R. 5-22-1(c) and K.A.R. 5-1-1(e) “means the act of storing water in the unsaturated portion of an aquifer by artificial recharge for subsequent diversion and beneficial use.” The proposed accumulation of AMCs does not meet the definition of “Aquifer Storage” because AMCs, by definition, are accumulated when

the Aquifer is fully saturated, as again admitted to by Mr. Letourneau. “Aquifer storage and recovery system,” as defined by K.A.R. 5-22-1(d) and K.A.R. 5-1-1(f), “means a physical infrastructure that meets the following conditions: (1) Is constructed and operated for artificial recharge, storage, and recovery of source water; and (2) Consists of apparatus for diversion, treatment, recharge, storage, extraction, and distribution.”

111. It was uncontroverted during the Hearing that with the accumulation of AMCs no artificial recharge or storage of source water will occur. “‘Recharge credit’ means the quantity of water that is stored in the basin storage area and that is available for subsequent appropriation for beneficial use by the operator of the aquifer storage and recovery system.” K.A.R. §§ 5-1-1(mmm), K.A.R. 5-22-1(ee). As universally acknowledged during the Hearing, there is no water stored through the accumulation of AMCs. Mr. Letourneau and Mr. Pope both acknowledged that, as a consequence, there is no water placed in the Aquifer and available for *subsequent* recovery.

112. Further, K.A.R. 5-22-1(f) and K.A.R. 5-1-1(g) both refer to artificially replenishing an aquifer. Further, the entire set of regulations deal with “aquifer storage and recovery.” *See, e.g.*, K.A.R. 5-12-1 *et seq.* A regulation can be construed by looking at titles and plain language. Indeed, there would be no reason to even refer to the term “aquifer” in the regulations if there was no need to actually store water in an aquifer. These regulations further specify that an accounting method must be used to quantify the water injected into the aquifer. K.A.R. 5-12-2 defines the accounting of water in the context of water “entering and leaving the basin storage area.” Mr. Letourneau indicated that, with the accounting of AMCs, there is no metering of water, and the accounting is only theoretical.

113. Additionally, K.A.R. 5-12-2 requires the accounting to include the amount of “artificial recharge.” K.A.R. 5-1-1(k) and K.A.R. 5-22-1(l) indicate that a “basin storage area” means “the portion of the aquifer used for aquifer storage...” Again, this further clarifies that the source water must actually be put in the aquifer to accumulate recharge credits that can be later withdrawn from the aquifer. The regulations are also predicated on the use of “source water” per K.A.R. 5-1-1(g) and K.A.R. 5-22-1(f). The definition of source water found in K.A.R. 5-1-1(yyy) further contemplates that the water will be stored in the aquifer, because a condition is that the injected source water “will not degrade the ambient groundwater quality of the basin storage area.” Again, there would be no mandate regarding the quality of water in the aquifer if it wasn’t contemplated that the water was actually entering into the aquifer.

114. K.A.R. 5-1-1(e) and K.A.R. 5-22-1(c) also refers to “artificial recharge” and the plain language indicates that an aquifer will be recharged. The ordinary meaning of “recharge” refers to the “act of recharging” or “restoring.” *Webster’s Dictionary*. In this case, both Mr. Pope and Mr. Letourneau acknowledged that the City is attempting to capitalize on water that naturally entered the Aquifer. Mr. Pope also provided a detailed construction of the word “store,” after it was brought up by Mr. Oleen, one of the original attorneys for the DWR, and conclusively demonstrated that, by any interpretation of the definition, no storage of water will occur under the City’s Proposal. Thus, as indicated above, it is abundantly clear that AMCs are contrary to current statutes and regulations and the Agency should have made this finding.

115. A determination must be made that to constitute artificial storage and recovery, physical injection of source water must be placed in an aquifer. Indeed, the Chief Engineer reinforced this in the June 21, 2022 Order, during the discussion of lowering the minimum index levels, when he stated: “If the minimum index levels are lowered, the City is still only entitled to the

credits earned from injected water.” Order, p. 15. Regardless of whether the City attempts to conjure up a new name for AMCs in the future, a clear ruling must be made at this juncture that the overall concept is illegal.

c. The Agency Improperly Argued that AMCs Are a Functional Equivalent

116. Perhaps one of the more laughable notions articulated during the Hearing was that AMCs are the functional equivalent of physical recharge credits. Even just a common sense understanding of the City’s Proposal allows for the dismissal of this argument. However, a detailed review of the record buries this notion into utter obscurity. As noted above, the Chief Engineer should have simply determined that AMCs are prohibited by Kansas law.

d. AMCs Seek a New Form of Consumptive Use, an Undefined Source of Supply, and Improperly Expand Consumptive Use

117. A myriad of other reasons supported the fact that AMCs are barred by Kansas statutes and regulations. For instance, AMCs seek a brand new, fictional form of consumptive use. In Kansas, beneficial water uses include, but are not limited to, domestic, municipal, irrigation, industrial, recreational, and artificial recharge. K.S.A. § 82a-707(b). Any beneficial use not authorized by this statute is prohibited in Kansas. *See id; Wheatland*, 46 Kan. App. 2d at 748. Obviously, AMCs do not fall into any of these categories, including artificial recharge since no source water is being recharged, and this is yet another easy determination that should have been made by the Agency.

118. Another bedrock principle of Kansas water law is that once a permit is granted, no changes may be made to it that would expand the quantity of water diverted or the quantity of water consumed. “The extent of consumptive use shall not be increased substantially after a vested right has been determined or the time allowed in which to perfect the water right has expired, including any authorized extension of time to perfect the water right.” *See K.A.R. 5-5-*

3. Kansas courts have likewise found that you can't expand the consumptive use of a water right. *See Wheatland*, 46 Kan. App. 2d at 754-55. The United States Supreme Court has further substantiated this position and it is a universal principle of water law. *Montana v. Wyoming*, 563 U.S. 368, 379, 131 S. Ct. 1765 (2011). The City's Proposal attempts to accomplish exactly what is prohibited by water law 101: expand the consumptive use by diverting surface water directly to the City, while simultaneously obtaining AMCs to later divert additional groundwater from the Aquifer. Mr. Letourneau testified that the City was essentially attempting to double its consumptive use. Such an approach shocks the conscience of years of established water law holding that one cannot expand the beneficial use of a water right after it is initially approved. This is another easy affirmative finding that needs to be made by the Agency to avoid this costly litigation in the future (assuming that the DWR again affords the City carte blanche authority to pursue its Proposal and the District must again assume the role of the agency charged with protecting the Aquifer). The Chief Engineer should have made an affirmative finding in this regard.

119. Further, since AMCs are clearly not "groundwater recharge credits accumulated in the Equus Beds Aquifer," AMCs are an undefined, different source of supply that has no definition in the Kansas Water Appropriation Act statutes and regulations—unlike "groundwater," "surface water," and "recharge credits," which are all defined in K.A.R. 5-1-1. There is no support for a source of supply based on existing, native water "left in storage." Again, the Chief Engineer should have made this finding to preclude the City from simply filing a similar, illegal Proposal in the future.

e. Dropping the Minimum Index Level Is Illegal

120. The City is precluded from dropping to a New Minimum Index Level from a legal perspective. Doing so would be a violation of the ASR Phase II MOU with the District, ignore the conditions and circumstances in which spacing waivers were granted, and invalidate prior commitments made to landowners. Additionally, this would undermine the original permits granted to the City because it would be an illegal retroactive change to a water right. Again, the Chief Engineer should have made this affirmative finding.

The Agency Action Was Arbitrary and Capricious

121. For all the reasons articulated above, the Agency action was arbitrary and capricious. As the record reflects, the DWR has advanced spurious arguments throughout these proceedings. Parallel universes emerged, and any position advanced by the District was quickly opposed by the DWR and the City. The DWR opposed the District at every turn in the case. Fortunately, in a 187-page ruling, an impartial, and highly credential Hearing Officer found in the District's favor on almost every issue and argument. As mentioned earlier, the DWR even repeatedly contended that a change application or a new application was unnecessary. Now, the Chief Engineer has ruled in part on that exact issue, which could have avoided all parties countless time and money had the Agency not staked out such a contrary posture to the District's contentions early on in the proceedings. The Chief Engineer's Order—is even signed, in part, by a DWR attorney that advanced a conflicting position on this exact issue during the Hearing process.

122. If adopted, the City's Proposal would afford preferential treatment to the City at the expense of all other constituents of the Aquifer. Mr. Pajor (a City expert) testified that if other users can demonstrate that they are obtaining water from sources other than the Aquifer and thus

leave water in the Aquifer, the argument for additional credits is “parallel” to that of the City. However, as identified by David Pope, this would open the floodgates to other users—including other municipalities, irrigators, and industrial users alike—to bank fictional credits in the Aquifer that would allow for the entire supply in the Aquifer to be depleted if all “cashed” in at the same time if used in conjunction with native water rights and physical recharge credits. Thus, this would be very dangerous precedent that this Court cannot allow.

123. Certainly, the District can elaborate on all the manners in which the Agency acted arbitrary and capricious. However, no judge wishes for this Petition for Judicial Review to turn into a lengthy novel.

The Agency Forced the District to Incur Extensive Attorney and Expert Witness Fees and Expenses

124. If a ruling is not properly made on all the factual and legal issues, the District maintains this is fodder for attorney and expert witness fees. The District formally raised the argument that a new application needed to be filed well in advance of the Hearing and very early in the proceedings. Yet, this contention was vigorously opposed by the Agency at the time. Thus, a Hearing was forced. The DWR could have simply acknowledged that a new application was required and the proceedings could have been left for another day. Instead, the District was obligated to have the Hearing and incur substantial attorney fees and expert fees.

125. The District desperately wanted the matter to go away when it filed its Motion to Dismiss. It wanted to avoid a Hearing. Consequently, the Agency has now waived the “luxury” of simply leaving these matters to be decided in the future.

126. The District even asked for a directed verdict after the City presented its case in chief at the Hearing and again renewed its Motion to Dismiss. This request was denied. Thus, yet another chance was afforded to avoid additional time and money. Either the findings above need

to be made to avoid duplicative time and cost in the future, or attorney fees and expert witness fees must be awarded.

127. Finally, although the District withdrew its Motion for Reconsideration due to the fact that both the City and the DWR are adamant that all administrative remedies have been exhausted, the District is reincorporating all its arguments for attorney and expert witness fees identified in that motion. Again, the private attorney general theory fits perfectly in this case. This was a blatant situation where the governing Agency acted in an arbitrary and capricious manner and worked lockstep with the City to push through a harmful Proposal. The DWR and the City staked out an approach contrary to even the most basic tenants of water law. Thus, the District was forced to assume the role of the Agency, and protect the Aquifer, and enforce Kansas water law. Thus, attorney and expert witness fees should be awarded in this situation.

128. Alternatively, as an absolute last resort to ruling on the merits or awarding expert/witness fees, the Court can enter an interlocutory order to preserve the record in the event the City is merely allowed to pursue a similar proposal in the future. *See* K.S.A. 77-622(d).

129. The District reserves the right to brief the matter of attorney and expert witness fees through an additional pleading.

Relief Requested

130. For all the reasons articulated above, the District respectfully requests that the Court enter a declaratory judgment determining that:

- a. that the Chief Engineer should not have merely ruled on one procedural matter—while ignoring the breadth of the record—and should have adopted detailed findings of fact and conclusions of law;

- b. the City failed to meet its burden of proof in demonstrating that AMCs and lowering the Minimum Index Level are in the public interest;
- c. that AMCs (or any similar concept that proposes recharge credits can be accumulated without physical injection of source water into the aquifer) and lowering the Minimum Index Level are illegal for a multitude of reasons;
- d. that the City's Proposal violates the Kansas and United States Constitutions; and
- e. that upon making proper factual findings, the Chief Engineer must apply the requisite statutes and regulations.

131. Alternatively, the District is asking for attorney and expert witness fees and costs.

132. As a minimum level of relief afforded, the District asks that the Court use its interlocutory powers to preserve the record for later use in the event the City simply pursues a similar proposal in the future.

133. The District further requests that the Court enter such other relief as the Court, in its discretion, deems appropriate, just, and equitable.

RESPECTFULLY SUBMITTED:

/s/ Thomas A. Adrian
Thomas A. Adrian, SC #06976
tom@aplawpa.com
ADRIAN & PANKRATZ, P.A.
David J. Stucky, SC #23698
stucky.dave@gmail.com
Attorneys for Equus Beds Groundwater
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, **CERTIFIED MAIL, RETURN RECEIPT REQUESTED**; () fax; () email; and/or () hand delivery on the 21st day of July, 2022, to:

Earl D. Lewis Jr., P.E., Chief Engineer
Division of Water Resources
Kansas Dept. of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502

City of Wichita
Brian McLeod
Department of Public Works & Utilities
455 North Main Street
Wichita, Kansas 67202

Division of Water Resources
Stephanie Kramer
Kansas Dept. of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502

Richard Basore, Josh Carmichael, Judy Carmichael, Bill Carp, Carol Denno, Steve Jacob, Terry Jacob, Michael J. McGinn, Bradley Ott, Tracy Pribbenow and David Wendling
Tessa Wendling
1010 Chestnut Street
Halstead, Kansas 67056

Kenneth B. Titus, Chief Legal Counsel
Division of Water Resources
Kansas Dept. of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502

With a copy by U.S. Mail to the following:

Derek Schmidt
Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

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

Harvey County District Court, Ninth Judicial District
Newton, Kansas

/s/ Thomas A. Adrian
Thomas A. Adrian, SC #06976
tom@aplawpa.com
ADRIAN & PANKRATZ, P.A.
David J. Stucky, SC #23698
stucky.dave@gmail.com
Attorneys for Equus Beds Groundwater
Management District Number 2