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CLERK OF THE HASKELL COUNTY DISTRICT COURT
CASE NUMBER: 2012-CV-000009

Court: Haskell County District Court

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Case Title: Garetson Brothers vs. Kelly Unruh, etal.

Type: Permanent Injunction Decision

SO ORDERED.

/s/ Honorable Linda P. Gilmore, District Court Judge

IN THE DISTRICT COURT OF HASKELL COUNTY, KANSAS

GARETSON BROTHERS and, FORELAND REAL ESTATE, LLC PLAINTIFFS	)	
V.	)	12-CV-9
AMERICAN WARRIOR, INC., Successor in interest to KELLY AND DIANA UNRUH; and RICK KOEHN, DEFENDANTS	)	

PERMANENT INJUNCTION DECISION

This matter comes on for hearing on October 17, 2016. The Plaintiffs Garetson Brothers and Foreland Real Estate, LLC (Garetson), appear by and through Lynn D. Preheim and Frank Basgall of Stinson Leonard Street, LLP of Wichita, Kansas. Defendant American Warrior, Inc. (AWI), appears by and through Gerald A. Schultz and Zachary D. Schultz of Schultz Law Office, P.A. Defendant Rick Koehn (Koehn), appears in person and by and through counsel, Nathanial C. Foreman and Lane L. Frymire of Yoxall, Antrim, Foreman & Frymire, LLP.

I. CASE HISTORY AND PROCEDURAL BACKGROUND

On March 14, 2005, Garetson filed a complaint with Kansas Department of Agriculture's Division of Water Resources (DWR) alleging two neighboring junior water rights, Nos. 10,467 and 25,275, had impaired their senior vested water right, HS 003. (Pl. Exh. 103, Final DWR Report, p. 1) These three water rights, HS 003, 10,467 and 25,275 are used for crop irrigation and all are located in Groundwater Management District 3 in Southwest Kansas, overlying the Ogallala Aquifer. HS 003 became a vested water right in 1950 and is permitted to pump 240 acre feet at a rate of 600 gallons per minute. (Trial Transcript, 10/17/16, p. 140, ln. 2-7).

Garetson subsequently withdrew their complaint in 2007. However, DWR continued to investigate, monitor and record data from the wells at issue and three other neighboring wells from 2005 to present. In 2005, DWR installed water level monitoring equipment which over time allowed DWR to determine the degree of well-to-well interference between HS 003 and the nearest five water rights: 10,035, 10,467; 11,750; 19,032 and 25,275.

On May 1, 2012, seven years after Garetson filed their initial complaint with DWR, Garetson filed this law suit alleging impairment of senior water right HS 003 by water rights Nos. 10, 467 and 25, 275 owned by Kelly and Diana Unruh. The Unruhs filed an answer on June 11, 2012, in which they admitted to owning the two junior water rights, but denied the allegations of impairment. For whatever reasons, in his answer, Unruh misrepresented facts to the court and plaintiff when he stated he owned water rights that he had already sold to AWI on May 30, 2012. *See Answer and Plaintiff Exh.205, 206.* This misrepresentation of ownership in the Answer was not cured for over a year after the filing of the lawsuit. *See Amended Petition*, August 5, 2013. AWI was aware of the pending water right dispute when it purchased the property. (Trial Transcript, 10/17/16, p. 151, ln. 8-20).

On November 29, 2012, in a phone conference with District Judge Bradley Ambrosier, the Garetsons and Unruhs announced to the court they agreed to the appointment of DWR as a fact finder in the case. The court appointed DWR as the agreed upon fact finder, directed DWR to submit a report to the court and set the case for review in March of 2013. At some point, District Judge Ambrosier conflicted off the case when he became aware a former client, Cecil. O'Brate, owner and officer of AWI, was somehow involved. District Judge Clinton B. Peterson heard the motion for temporary injunction on May 20, 2013. *(See also Pl. Exh. 203, 207)* During the hearing, it was disclosed to Judge Peterson that Unruhs sold the property and

junior water rights to AWI on May 30, 2012, which was before the Unruhs had filed their answer in this case.

First Temporary Injunction- May 2013

DWR filed its preliminary fact finder report ("First Report) on April 1, 2013. (P. Exh. 101) DWR's first report was entered into evidence without objection. Garetson's motion for temporary injunction was granted. The district court ordered "the defendants (Unruh), their successors, their tenets [sic], and their agents...to refrain from pumping Well 10,467 and Well 25,257." The district court joined Cecil O'Brate, as owner and C.E.O. of AWI, as a defendant. A motion to establish bond was filed by the Unruhs on June 3, 2013.

District Judge Linda P. Gilmore was subsequently assigned to the case. On July 11, 2013, numerous procedural motions were set for hearing. The Unruh's requested a continuance on their motion for bond. On August 5, 2013, Garetson filed an amended petition naming AWI and Koehn, the tenant farming on AWI's land, as defendants. Cecil O'Brate was dismissed as an individual defendant and Unruhs were no longer a named defendant. On October 14, 2013, Garetson transferred its senior water right to Foreland Real Estate, LLC (FRE), who joined the lawsuit as a named plaintiff.

The court heard numerous motions November 3, 2013, and vacated the 2013 temporary injunction because the tenant Koehn had not received notice of the proceeding which ultimately shut the water supply off to his crop. Because the temporary injunction was vacated, the court saw no need to set a bond. The district court also appointed and directed DWR to "continue to investigate and report upon any or all of the physical facts concerning the water rights referenced in this case" pursuant to the procedure set forth in K.S.A. 82a-725. Specifically, the order provided:

> "The report shall set forth findings of fact in regard to the degree HS-003 is being impaired by water rights 10,467 and 25, 257. The report shall set forth the opinions of DWR regarding whether any such impairment...[is] a substantial impairment to HS-003. If DWR concludes substantial impairment to HS-003 exists, DWR shall advise as to recommended remedies to curtail the substantial impairment to HS-003 and explain why these remedies are recommended." *See* Pl. Exh. 104, P. 6.

Second Temporary Injunction- 2014

DWR filed a second report on March 27, 2014. The parties received a copy of the report from DWR and were allowed to file objections with DWR and exceptions with the district court as set forth by K.S.A. 82a-725. DWR reviewed the submitted objections and made appropriate changes to the report it felt necessary from those objections. (Trial Transcript, 10/17/16, p. 75, ln. 6-15)

Garetson's second motion for temporary injunction was heard on April 30, 2014. On May 5, 2014, the court issued a temporary injunction, set a bond and ordered AWI and its tenant to curtail use of water right 10,467 and 25,257.

Interlocutory Appeal

An interlocutory appeal was filed concerning whether the district court abused its discretion in issuing a temporary injunction and to address evidentiary matters. The appellate court held that using the ordinary definition of impair, the legislature intended that the holder of a senior water right may seek injunctive relief to protect against a diversion of water by a holder of a junior water right when that diversion diminishes, weakens, or injures the prior right. The court declined AWI's invitation to add the "beyond a reasonable economic limit" language and stated the legislature did not give the word "impair" a special definition in the statute. *Garetson Bros. v. Am. Warrior, Inc*., 51 Kan. App. 2d 370, 389, 347 P.3d 687, 698 (2015), review denied (Jan. 25, 2016)).

II. STATEMENTS OF FACTS

1. Garetson is the owner of File No. HS 003, a vested water right authorized to pump water at a quantity of 240 acre-feet at a rate of 600 gallons per minute. (Trial Transcript, 10/17/16, p. 133, 1n. 24-p.134, ln. 6, p. 140, ln. 2-7))

2. HS 003 is operating at a point of diversion approved by DWR, being used in an appropriate place of use and in compliance with its permit. (Trial Transcript, 10/17/16, p.140, ln. 8-15)

3. Neither a permit to appropriate water nor a certificate of appropriation guarantees that water will always be available to any permit holder. (Pl. Ex. 103, Final DWR Report, p. iii).

4. All water rights issued by DWR are subject to all vested rights and prior appropriations at the time they are issued. (Trial Transcript, 10/17/16, p. 148, ln. 8-15).

5. No one in Kansas owns the water. Water permit holders simply have the right to use water. (Tr. Transcript, 10-17-16, p. 95, ln. 6-12).

6. Water Right File Nos. 10, 467 ad 25, 275 are referred to together as AWI's water rights. Water Right File Nos. 10, 035; 11, 750 and 19,032 are other neighboring water rights. The following six water files HS 003, 10,467 and 25,275, 10,035; 11,750 and 19,032 are referred to together as the neighborhood. (Pl. Exh. 103, Final DWR Report, p. iii)

7. Water right No. 8157 is not part of the neighborhood because it is not in the same compartment as the neighborhood, there are no significant drawdowns observed which show No. 8157 affects HS 003 and 8157 does not impair HS 003. (Pl. Exh. 103, Final DWR Report, p. iii, p. 8; Transcript 10/19/16, p. 116, ln 3-12).

8. No. 8157 is authorized to use water from two wells: one which is the same well

authorized under HS 003, and another well about one mile south. (Pl. Ex. 103, Final DWR Report, p. iii).

9. No. 8157 and HS 003 are separately metered and owned by separate entities. (Trial Transcript, 10/19/16, p. 152).

10. The rate of water extraction from the aquifer greatly exceeds the rate of recharge to the aquifer. The aquifer has declined about six feet on average each year in this area for the last five years. (Pl. Exh. 103, Final DWR report, p. ii, p. 4)

11. The groundwater system in the area recharges somewhere in the range of 0.1 inch to 1.0 inch per year. (Pl. Exh. 103, Final DWR Report, p. ii and p. 3) The water replenishing the area of concern is less than 100 acre-feet per year compared with pumping that has been between 1,200 and 1,500 acre-feet per year in recent history for the six water rights studied in the DWR report. (Pl. Exh. 103, Final DWR Report, p. ii, p. 2-3) The imbalance between the rate of recharge with the rate of pumping has let to substantial declines in groundwater levels over the decades, reducing well yields. (Pl . Exh. 103, Final DWR Report, p. ii and 7)

12. Scientists with Kansas Groundwater Services (KGS) have found that, if recent practices continue, well operators in the area are facing the imminent end of the productive life of the isolated compartment of aquifer that they share. (Pl. Exh. 103, Final DWR Report, p. ii, p. 4).

13. In November 2013, DWR's step draw down test found a maximum sustained pumping rate of 404 gallons per minute ("gpm") for HS 003. While HS 003 is authorized at the rate of 600 gpm, DWR does not believe 600 gpm can be sustained in the current hydrologic setting. (Pl. Exh. 103, Final DWR Report, p. iii-iv, p. 7-8)

14. Due to pre-irrigation season and early irrigation season pumping, HS 003 was not able to pump after July 1, 2013, despite the injunction placed on AWI's water rights in late May of 2013. (Pl. Exh. 103, Final DWR Report, p. iv, p. 6).

15. Even when No. 25, 275 did not operate in 2013 and No. 10,467 did not operate after May 26, 2013, other neighboring water rights also caused significant, and at times impairing, levels of drawdown at No. HS 003. (Pl. Exh. 103, Final DWR Report, p.iii, p.5)

16. Although the area has been severely dewatered, DWR finds that with careful regulation of use, there may be sufficient remaining water supply to fulfill No. HS 003's water right and to provide a limited supply to one other neighborhood water right. (Pl. Exh. 103, Final DWR Report, p. ii, p.11, p.16)

17. DWR found that File No. HS 003 is being impaired when the operations of any of the other Neighborhood wells, including AWI's Water Rights, the Other Neighboring Water Rights, or any combination thereof prevents File No. HS 003 from pumping 240 acre-feet at 404 gpm during the irrigation season. (Pl. Exh. 103, Final DWR Report, p. 8)

18. DWR utilized the Theis equation to analyze and simulate the drawdown at HS 003 caused by pumping at the other neighborhood water rights. (Pl. Ex. 103, Final DWR Report, p. 6-7) Drawdowns, meter readings, pumping rates, and pumping time data gathered at each of the neighborhood water rights during the first 80 days of the irrigation season in 2013 were analyzed and AQTESOLV software utilized. (Pl. Ex. 103, Final DW Report, p. 6-12) DWR concluded by May 26, 2013 water right numbers HS 003; 10,467; 25,275; 10, 035; 11, 750 and 19,032 (the "Neighborhood") pumped about 430 acre feet and HS 003 could not pump more than about 300 gpm. (Pl. Ex. 103, Final DWR Report, p. 6)

19. Because AWI's Water Rights are closer than water right numbers 10,035; 11,750; and 19,032 ("Other Neighboring Water Rights"), the pumping from AWI's Water Rights is more immediate on HS 003. (Pl. Ex. 103, Final DWR Report, p. iv)

20. When all Neighborhood Water Rights are operating, AWI's Water Rights account for about half of the impact at HS 003. (Pl. Ex. 103, Final DWR Report, p. iv)

21. AWI's water right 10,467 exerts a 16% impact on HS 003. (Pl. Exh. 103, Final DWR Report, A-6 attachment)

22. AWI's Water Right 25, 275 exerts a 7% impact on HS 003. (DWR final Report, A-6 attachment).

23. Since AWI's wells were shut off, Garetsons have been able to pump HS 003 longer and pump a higher quantity of water. (Trial Transcript, 10/17/16, p. 148, ln. 8-15)

24. AWI's water rights could not operate without impairing HS 003. (Pl. Ex. 103, Final DWR Report, p.14)

25. DWR concluded that HS 003 has been substantially impaired by operation of the AWI's Water Rights and the Other Neighboring Water Rights. (Pl. Exh. 103, Final DWR Report, p. iv, p. 16)

26. HS 003 can be satisfied if the other wells in the neighborhood are not operating. (Trial Transcript, 10/17/16, p. 37, ln. 1-6; Ex. 103, Final DWR Report, p. ii, p. 15)

27. If none of the Neighborhood Water Rights pumped beginning in 2018, HS 003 could likely continue to pump 404 gpm for 240 acre-feet per year until 2028. (Pl. Ex. 103, Final DWR Report, p.15).

28. HS 003 is worse and weakened when AWI's water rights are operating. (Trial Transcript, 10/17/16, p. 36-37, ln. 1-6; Pl. Ex. 103, p. 3; Transcript, 10/19/16, p. 165, ln. 1-8)

29. The continued operation of AWI's water rights would lessen, diminish and weaken HS 003. (Trial Transcript, 10/17/16, p. 39, ln. 9-12; Trial Transcript, 10/19/16, p. 165, ln. 1-8.)

30. Dr. Rainwater opined that the DWR final report is not scientifically reliable for numerous reasons. (Trial Transcript, 10-19-16, p. 58, ln. 18-20; p. 62, ln. 22- p. 64, ln. 12, p. 75, ln 14-p. 76, ln. 3, Def. Exh. 308, Dr. Rainwater Memorandum)

31. Dr. Rainwater did not challenge the factual and statistical.data, but disagreed with the interpretation of that data. (Trial transcript, 10/19/16, p. 117, ln. 15-20). Dr. Rainwater accepted DWR drawdown tests at their face value. (Trial Transcript, 10/19/16, p. 116, ln. 1-25)

32. Dr. Rainwater noted the observed draw down at HS 003 also included both draw down in the aquifer as well as energy losses within HS 003 well itself. Dr. Rainwater concluded HS 003's sizable draw down is due to its' own construction and aquifer limitations. (Def. Exh. 308, Dr. Rainwater Memorandum, p. 2)

33. DWR employee, John Munson, testified the formulas utilized do assume everything is absolutely the same and agrees this is not possible in the "real world." Munson testified DWR's findings are as accurate as they can be given the fact that no model is perfect. (Trial Transcript, 10-19-16, p. 65, 11-26, p. 66, ln 1-6, p. 67, ln 1-12)

34. DWR never did a physical inspection of the HS-003 well to ensure it was working properly. (Trial Transcript, 10-17-16, p. 41, ln 9, p. 43, ln. 9).

35. Dr. Rainwater could not provide any computations to determine amount of impairment by the alleged improper well construction. (Trial Transcript, 10/19/16, p. 164, ln. 12)

36. The well bowls were previously replaced. (Trial Transcript, 10-18-16, p. 35, ln. 5-7) The screening used in the well has the most open area to allow water to pass through. (Trial Transcript, 10-18-16, p. 29, ln. 1-25)

37. Dr. Rainwater does not suggest an alternate equation for use by DWR and does not state in his report how this should have been done. (Trial Transcript, 10/19/16, p. 126, ln. 1-25). Dr. Rainwater recognized that every well causes draw down and some of its own impairment.

38. DWR proposed two remedies to cure impairment of HS 003. One remedy is to rotate which of the other water rights in the neighborhood is allowed to operate based on seniority and distance from File No. HS 003. The second remedy is protect and prolong File No HS 003's water right by curtailing all of the other water rights in the neighborhood. (Pl. Exh. 103, Final DWR Report, p. 17)

III. LEGAL ANALYSIS

A. Doctrine of Unclean Hands

In the pretrial order, the doctrine of unclean hands was raised as an issue of law. The clean hands doctrine is based upon the maxim of equity that he who comes into equity must come with clean hands. It provides, in substance, that no person can obtain affirmative relief in equity with respect to a transaction in which he has, himself, been guilty of inequitable conduct. The clean hands maxim is not a binding rule, but is to be applied in the sound discretion of the court. *Green v. Higgins*, 217 Kan. 217, 218, 535 P.2d 446, 447, 1975 Kan. LEXIS 427, (Kan. 1975) The doctrine of "clean hands" is applied sparingly and only to "willful conduct which is fraudulent, illegal or unconscionable" that "shock[s] the moral sensibilities of the judge." *Green v. Higgins*, 217 Kan. 217, 221, 535 P.2d 446 (1975); *In re Plaschka, 2010 Kan. App. Unpub.*

LEXIS 611, 237 P.3d 1272 (Kan. Ct. App. 2010)

The clean hands doctrine does not bar the plaintiff from obtaining an equitable injunction against the defendant for impairment of their senior water right. The court does not find the conduct of plaintiff was willful conduct that is fraudulent, illegal or unconscionable, nor does it shock the moral sensibilities of the court. The doctrine of clean hands does not bar Plaintiff from the relief sought.

B. Requirements for permanent injunction

K.S.A. 82a-716 provides an appropriator shall have the right to injunctive relief to protect his or her prior right of beneficial use as against use by an appropriator with a later priority of right. The statute clearly provides authority for plaintiffs to request an injunction to protect their first in time water right. Thus, impairment of a first in time water right is an act for which an injunction remedy exists under the KWAA. A holder of a senior water right may seek injunctive relief to protect against diversion of water by a holder of a junior water right when that diversion diminishes, weakens, or injures the prior right. *Garetson Bros. v. Am. Warrior, Inc*., 51 Kan. App. 2d 370, 389, 347 P.3d 687 (2014), review denied (Jan. 25, 2016).

The standard for a permanent injunction is essentially the same as the standard for a preliminary injunction, except that the plaintiff must actually succeed on the merits. *Steffes v. City of Lawrence*, 284 Kan. 380, 381, 160 P.3d 843, 846, 2007 Kan. LEXIS 367 (Kan. 2007); *Tyler v. Kansas Lottery*, 14 F. Supp. 2d 1220, 1223 (D. Kan. 1998); *Amoco Production Co., v. Village of Gambell, Alaska*, 480 U.S. 531, 546, n. 12, 94 L. Ed 2d 542, 107 S. Ct. 1396(1987)(citing *University of Texas v. Camenisch*, 451 U.S. 390, 392, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981).

At trial, the burden of proof in an injunction action is upon the movant. *Unified School District v. McKinney*, 236 Kan. 224, 227 (1984). In defining this burden, it has been generally held that the movant must establish a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought. *General Bldg. Contrs., L.L.C. v. Bd of Shawnee County Comm'rs*, 275 Kan. 525 (2003); *Wichita Wire, Inc. v. Lenox Manuf.,* 11 Kan App. 2 459; 726 P.2d 287; 1986 Kan. App. LEXIS 1439 (1986).

Before granting an injunction, the trial court must find the movant has satisfied five prerequisites: (1) the movant prevails on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; (4) a showing the injunction, if issued, would not be adverse to the public interest; (5) an action at law will not provide an adequate remedy. *Wichita Wire Inc. v. Lenox Manuf.*, 11 Kan. App. 2d 459, 726 P.2d 287; 1986 Kan. App. LEXIS 1439 (1986); *Steffes v. Lawrence*, 284 Kan. 380 (2007)(citing *Board of Leavenworth County Comm'rs v. Whitson*, 281 Kan. At 683)

1. ***Success on the merits***

Based on the evidence presented and the statements of facts, the Court finds that plaintiff has met their burden of proof and plaintiff's senior water right HS 003 has been impaired by defendants' junior water rights, 10,467 and 25,275. Using the ordinary definition of impair, the legislature intended that the holder of a senior water right may seek injunctive relief to protect against a diversion of water by a holder of a junior water right when that diversion diminishes, weakens, or injures the prior right. The court of appeals declined AWI's invitation to add the words "beyond a reasonable economic limit" and noted the legislature did not give the word

"impair" a special definition in the statute. *Garetson Bros. v. Am. Warrior, Inc*., 51 Kan. App. 2d 370, 389, 347 P.3d 687, 698 (2015), review denied (Jan. 25, 2016)).

Defendants argue HS 003 and No. 8157 are combined and thus HS 003 is not impaired. While Garetson used their landlord's water No. 8,157 to meet their crop needs, Garetson did so only after their landlord's crops were fully watered to place her in the best position. To maintain their relationship with their landlord, they cannot abuse the water usage or risk the loss of their landlord's good will. If Plaintiff utilized their landlord's water right no. 8157 to water everything on Section 36, their landlord could terminate their landlord-tenant relationship with Garetsons at any time. While Garetsons have been fortunate enough their landlord has allowed them to utilize water right no. 8157 in the past, this simply means the landlord has enough and is willing to share. The court continues to disregard the speculation or possibility that plaintiff could use their landlord's water at no. 8157 in the future if an injunction did not issue and focuses on water right HS 003 and whether it is impaired by AWI's rights.

While Dr. Rainwater's academic credentials are noteworthy, his testimony and opinions lacked the seasoning of someone with real life experience who is actively engaged in the field. The court was not persuaded the water well utilized by HS 003 was improperly constructed or a poor well site. The court found Danny Dunham to be a credible witness when he discussed drilling multiple dry holes, replacing the well bowls, and the type of screening used in the well. The court also noted Dr. Rainwater accepted DWR draw down tests at their face value, accepted DWRs factual and statistical data, agreed AWI's water rights communicated with HS 003 and agreed when AWI's rights are in use they affect the ability to use HS 003. After weighing the testimony and credibility of all the witnesses and the evidence presented, the court finds plaintiff

succeeds on the merits of their claim, which is, their senior water right HS 003 is being impaired by an appropriator with a later priority of right. *See Court's Statement of Facts.*

2. ***Showing that the movant will suffer irreparable injury unless the injunction issues.***

Defendants state granting an injunction would not prevent the irreparable injury to HS 003 because plaintiff will still not have enough water due to the draw down caused by the other water rights in the neighborhood. Therefore, Defendants argue because HS 003 will be impaired anyway, AWI's impairment is not irreparable and the cessation of pumping from AWI's water rights will not provide a remedy that will allow Plaintiffs to realize the authorized rate and quantity of HS 003. Defendants may be correct that plaintiffs' will not be able to realize the authorized rate and quantity of HS 003 even with the shut down of AWI's water rights. However, the irreparable harm to plaintiff still exists in that their first in time water right is being depleted year after year as a result of ongoing impairment from AWI's less senior water rights. The court rejects the premise that a junior water right should be allowed to continue to impair a senior water right because other junior water rights in the neighborhood are also impairing a senior water right. The injury resulting from AWI's impairment is still irreparable even if others are contributing to that impairment. Plaintiffs remedy is to address alleged impairment of other junior rights in the neighborhood in a separate action.

The aquifer is dropping and recharge is slow. Every year the aquifer in this area drops an average of six feet. Recharge to the groundwater system in the area is estimated in the range of .1 inch to 1.0 inch per year. Plaintiff can not protect its vested first in time water right without enjoining the defendants junior water rights. HS 003 water right is irreparably harmed by the rapid loss caused by the over watering in the aquifer for its' crops for this and future

growing seasons. Without a permanent injunction, the increasing decline in the water table and loss of time to utilize a first in time water right is unretrievable. To protect the plaintiffs' water right at HS 003, pumping by Defendant's water right no. 10,467 and no. 25,275 must be curtailed. The court finds plaintiff will suffer irreparable injury unless an injunction issues.

3. ***Threatened injury to Plaintiffs outweighs whatever alleged damage the proposed injunction may cause Defendants.***

The threatened injury to plaintiffs outweighs the alleged damage to the defendants as the plaintiffs' first in time water right continues to be depleted at a rate that would take years to recharge. The first in time water right status tips the scale in plaintiffs' favor. Defendants' rights are not entitled to protection to the detriment of plaintiffs' vested right. It is not equitable to allow defendants with a junior water right to successfully grow their crop, while plaintiff, with a first in time water right, is left with insufficient water. The injury to plaintiffs' first in time water right is not theoretical. DWRs two reports are consistent that HS 003 water right is being impaired, the aquifer is dropping six feet a year, the well used by HS 003 shut off in 2013 and HS 003 has been used for a longer period of time at a higher quantity since AWI's rights were shut off. For each subsequent year since AWI's rights were curtailed, HS 003 has been able to pump water from its' well at a higher quantity for a longer period of time. AWI purchased its water rights with knowledge those rights were junior to HS 003 and there was pending litigation regarding impairment of HS 003.

4. ***Injunction not adverse to the public interest.***

The court finds that public interest lies with enforcement of the Act and protection of senior water rights that are first in time and first in right. An injunction to protect Plaintiffs'

vested water right would not be adverse to the public interest. The DWR report and projections are bleak as it is apparent the water is being depleted at a rate which can not be recharged. As the race to the bottom of the aquifer takes place, the only certainty in the system is to honor the system of first in time, first in right.

The knowledge that first in time water rights will have precedent fosters certainty and allows remedies that hopefully will slow down the depletion of the aquifer. Land sales could be made with the knowledge that prior in time water rights will be upheld over less senior water rights which provides some certainty and stability in land prices.

5. ***An action at law will not provide an adequate remedy.***

An action at law does not provide an adequate remedy because once Plaintiffs' first in time water right is not recognized and the water stops pumping, their land values will decrease as their first in time water right is meaningless. Furthermore, no court can adequately compensate for the ongoing loss of water suffered by the plaintiffs. Without an injunction curtailing water usage by a junior right who is impairing a senior right, the senior water holder in placed in the position of having to return year after year to incur expense to pursue an injunction.

The act complained of is continuous and the impairment is of such a character plaintiffs' cannot be compensated by any ordinary standard of value or damages. For this reason an action at law will not provide an adequate remedy. *See Tharp v. Sieverling*, 128 Kan. 235 (1929)*; F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 233-234, 630 P.2d 1164, 1172, 1981 Kan. LEXIS 262 (Kan. 1981).

IV. REMEDIES:

Plaintiffs have met their burden of proof and established the necessary elements to show they are entitled to an injunction. The Plaintiffs are granted a permanent injunction and Defendants' shall not utilize junior rights no. 10,467 and no. 25,275 through the present place of use due to impairment of HS 003.

The court notes in DWR's proposed remedies, the only other suggested alternate remedy to total curtailment is to allow only one other of the five neighboring water rights to operate yearly, possibly on a rotating basis. DWR suggests the one neighboring well allowed to operate be determined based on the basis of seniority or distance from File No. HS 003. The court notes the next water right with senior priority in the neighboring group of wells is 10,035, which also happens to be the furthest distance from HS 003. (Pl. Exh. 103, Final DWR Report, p. 14, table) Based upon this alternate proposed DWR remedy, AWI's water right 10,467 and 25,275 are neither the next priority right or the farthest water right from HS-003.

This court does not wish to draft an order that would micro manage future use of no. 10,467 and no. 25,275. At an unknown future time AWI's rights may no longer impair HS 003. Should this unlikely event occur, the court trusts a procedure exists to address this situation in the KWAA.

V. SHOULD DAMAGES BE AWARDED FOR THE 2013 BOND

a) Whether the injunction was wrongfully issued.

Where a restraining order or temporary injunction is wrongfully issued, all expenses incurred therein, which are recoverable on the bond then given, may be recovered whether the

determination that the order was wrongfully issued is in the final trial of the case or on a separate hearing pursuant to an application to set aside or vacate the order. *Alder and Ludwig, v. City of Florence, Kansas*, 194 Kan. 104, 397 P.2d 375; 1964 Kan. LEXIS 457 (1964); *Messmer v. Kansas Wheat Growers Ass'n* , 129 Kan. 220, 282 Pac. 728 (1929); *Harlow v. Mason,* 98 Kan. 353, 157 Pac. 1175 (1916). It is quite uniformly held that expenses and attorney's fees may be recovered on the dissolution or vacation of a restraining order or temporary injunction when the same was wrongfully obtained. *See Messmer v. Kansas Wheat Growers Ass'n*., *supra*.

In *Hayworth,* the injunction was dissolved because of the unanimous jury verdict rejecting plaintiffs' claim and accepting defendant's claim, and awarding him damages. In light of the jury's verdict, plaintiffs' procurement of the temporary injunction prohibiting the sale of the cattle was wrongful. *Hayworth v. Schoonover*, 2000 Kan. App. Unpub. LEXIS 1084 (2000). *See also Newbern v. Service Pipe Line and Mining Co.*, 126 Kan. 76, 79, 267 Pac. 29 (1928) (the trial resulted in a judgment to the effect that the restraining order ought not to have been granted.") *See also DeWerff v. Schartz,* , 12 Kan. App. 2d 553,560 (1988) (final order which ordered defendants to control pumping of water under certain conditions was indicative that restraining order prohibiting *all* pumping was wrongfully issued).

In *Krause*, the city obtained a temporary injunction prohibiting Krauss from interfering with the installation of a pipe in the city's easement across his land. The case was tried and the court took the matter under advisement. Nearly two years later, the court determined the case was moot, dismissed the case, and dissolved the injunction. The Supreme Court rejected Krauss' argument the dismissal was a judicial determination that the injunction was wrongfully issued. *See City of Wichita v. Krause*, 190 Kan. 635 (1963).

The 2013 temporary injunction was issued in May of 2013. The 2013 injunction was set aside in November of 2013 because there was no reasonable notice to the party to be enjoined [tenant Koehn] and no opportunity to be heard. The court recognizes the injunction was not vacated based upon the merits of the evidence presented, but rather failure to provide notice. Regardless, the court finds the injunction was wrongfully issued in that it wrongfully enjoined Koehn, as a tenant. Koehn obeyed the injunction and suffered loss as a result.

b) Who was bound by the 2013 injunction.

Generally all defendants who have been enjoined by an order wrongfully obtained, and have obeyed the injunction, and who in consequence of the allowance of the injunction and their obedience thereto, have suffered loss, can claim and recover damages on a bond given for their protection. On the other hand, one not a party to the suit, or who is not a necessary or proper party, is not, in general, entitled to damages. Only persons, who are fairly within the covenant of an injunction bond can sue thereon. *Alder and Ludwig v. City of Florence*, 194 Kan. 104, 397 P.2d 375; 1964 Kan. LEXIS 457 (1964); *Kennedy v. Liggett*, 132 Kan. 413, 295 Pac. 675 (1931).

The *Alder* court noted bond is designed to secure to the party injured the damages he might sustain if it finally be decided that the injunction ought not to have been granted. In *Alder*, the Utilities Service Company, not being a party to the injunction action and not having been restrained or enjoined by the action of the court, was beyond the protection afforded in the bond to the party injured. In *Alder*, the City was the only party protected by the bond. Recovery was limited to the specific provisions of the bond, the conditions imposed therein, and the provision of the statute pursuant to which the bond was given. *Id.*

The 2013 injunction enjoined Kelly Unruh and Diana Unruh, and "their successors, their

tenets [sic] and their agents from pumping water from the wells associated with water rights nos. 10,467 and 25,275. Koehn was clearly bound by the 2013 injunction based on the language used by the court and he followed the injunction.

c) ***Whether damages should be awarded for the wrongful issuance of the 2013 injunction where a bond was never set.***

K.S.A. 60-903 (f) provides "the court may issue a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully restrained.

K.S.A. 60-905 (b) provides that no temporary injunction shall operate unless the party obtaining the same shall give an undertaking with one or more sufficient sureties in an amount fixed and approved by the judge of the court, securing to the party injured the damages such injured party may sustain including attorney fees if it be finally determined that the injunction should not have been granted." K.S.A. 60-905(b). *See Idbeis vs. Wichita Surgical Specialists*, 185 Kan. 485, 173 P.3d 642 (2007); *Omni Outdoor v. City of Topeka*, 241 Kan. 132, 734 P.2d 1133, 1987 Kan. Lexis 300 (1987).

In the *DeWerff* case, two defendants pumped water from their property which would travel towards the plaintiffs' property. Plaintiffs filed their petition and procured a restraining order without filing a bond which enjoined defendants from pumping water. *DeWerff v. Schartz*, 12 Kan. App. 2d 553, 751 P.2d 1047 (1988). After trial, the court ordered a permanent injunction which allowed defendants to pump water under certain conditions and awarded damages to defendants. The Plaintiffs argued defendants must prove the order was procured with malice to obtain a damages award.

Kansas recognizes the rule that malice is required to maintain an action for wrongful procurement of a restraining order issued without a bond. But, when a bond is posted, malice is not required. *See Hayworth v. Schoonover,* 2000 Kan. App. Unpub. LEXIS 1084 (2000), citing *DeWarff v. Schartz*, 12 Kan. App. 2d at 558-59; *Alder v. City of Florence*, 194 Kan. 104, 110, 397 P.2d 375 (1964), citing *Jacobs v. Greening*, 109 Kan. 674, 676, 202 Pac. 72 (1921) ("Stated in other words, it has been held that no action for the wrongful procurement of a restraining order and/or temporary injunction (other than upon a bond) is maintainable without a showing of malice"). The malice requirement applies to both restraining orders and temporary orders issued without a bond. To establish malice, it must be shown that the restraining order was obtained for any improper or wrongful motive. *See Nelson v. Miller*, 227 Kan. 271, 278, 607 P.2d 438 (1980).

The *DeWarff* court stated:

> Although we may question the results in Alder and Jacobs, the rule in those cases has not been modified. We are bound by it. We nevertheless must wonder how many trial judges realize when issuing restraining orders without bonds that they are denying the restrained party the opportunity to recover damages unless that party proves malice. *DeWerff v. Schartz*, 12 Kan. App. 2d 553, 558-559, 751 P.2d 1047, 1051, 1988 Kan. App. LEXIS 130, *12-14 (Kan. Ct. App. 1988).

The 2013 temporary injunction hearing was held on May 20, 2013. Thereafter, Unruhs filed a motion for bond on June 3, 2013. The motion was set for hearing on July 11, 2013 when Unruhs requested a continuance. (Transcript, July 11, 2013, p. 8). Unruhs were subsequently removed from the case in August through the filing of an Amended Petition because Unruhs did not own the land in question. Subsequently, after AWI "officially" joined the case, they filed a motion to establish bond on September 9, 2013, along with motion to vacate the temporary

injunction. Multiple motions were heard on November 5, 2013 and a decision to vacate the injunction was filed November 26, 2013. In the midst of multiple changes of counsel, the dismissal of the 2013 injunction and addition of multiple parties and three different judges, a bond ultimately was never set in regard to the 2013 injunction. *See Case History and Background*. Since no bond was set, a party must prove malice to recover damages.

The court has reviewed case law concerning malice. *See Nelson v. Miller*, 227 Kan. 271, 278, 607 P.2d 438 (1980). This court can not find from the evidence presented that Plaintiffs initiated this lawsuit for any reason other than securing the proper adjudication of the claim. Nor does the court find the plaintiff started proceedings because of hostility or ill will or to solely deprive the defendants of the beneficial use of their property. Finally, the court does not find the claim was brought to force a settlement with no relation to the claim. The request for damages is denied.

Linda P. Gilmore
District Judge

CERTIFICATE OF SERVICE:

I hereby certify that on this 1st day of February, 2017, a true and correct copy of the above order was e-filed with the court with corresponding e-filed copies to:

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Linda Gilmore

Linda Gilmore, District Judge