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**STATE OF KANSAS, BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE**

**In the Matter of the City of Wichita’s)
Phase II Aquifer Storage and Recovery Project) Case No. 18 Water 14014
In Harvey and Sedgwick Counties, Kansas.)**

Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.

**EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NUMBER 2 RESPONSE
TO KANSAS DEPARTMENT OF AGRICULTURE, DIVISION OF WATER
RESOURCES BRIEF**

COMES NOW Equus Beds Groundwater Management District Number 2 (hereinafter “the District”), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., and David Stucky, with its Response to the Kansas Department of Agriculture, Division of Water Resources’ (“DWR”) Brief, and in support of its position, as follows:

I. General Observations on DWR’s Approach

In the space allowed, the District will methodically attempt to address each of the accusations and positions asserted by DWR through its Finding of Facts (“DWR’s Findings”) and its Brief in Support of Proposed Findings of Fact and Conclusions of Law (“DWR’s Brief”). However, before delving into the specifics of each of DWR’s claims, some overarching observations are warranted. DWR blotted much ink laboring to make numerous pointed barbs regarding the lack of merit of the District’s position.¹ Incredibly, although its sole witness expressed the need to address many of the alarm bells rung by the District, DWR largely failed to

¹Accusing the District of making “erroneous factual assumptions,” applying the statutes and regulations in an “erroneous fashion,” “dragging the proceedings off course with myriad arguments (many of them very off base),” to name just a few of the attacks. See *e.g.*, DWR’s Brief, pg. 16.

clarify any of those identified concerns in its Brief. Despite Mr. Letourneau frequently asserting that items “should be looked into,” DWR has instead obfuscated the issues raised by the District and undermined them as immaterial. Most of these efforts by DWR can be easily disposed of with little substantive analysis, as numerous logical chasms exist between the supporting “facts” and the conclusions reached by DWR.

Further, it merits noting that many of the positions and arguments asserted by DWR constitute new testimony, and the vast majority of the most pointed conclusions lack any citations whatsoever. Moreover, the “supporting” citations incorporated by DWR are oftentimes generalized references to a statute or regulation, the Proposal, an Order, or a general document that has little to do with the heart of the underlying proposition. DWR also makes numerous cursory conclusions without explanation for how the proposition is supported—i.e. the Proposal will be “universally beneficial,” the Aquifer will be “mostly full,” that “some degree of error” in modeling is understandable. (*See, e.g.*, DWR’s Brief, p. 24.) In contrast, the District stands by the citations utilized in its Findings of Fact and Conclusions of Law (“District’s Conclusions”) as the District has tediously cited to the record in a manner that overwhelmingly directly supports its contentions. In fact, the District has supported most of its facts with citations to testimony of the City’s own witnesses or that of DWR’s sole witness. Thus, the District asks that the Hearing Officer peel away the generalized attacks against the District’s position to expose the naked truth that the District’s arguments were actually very well supported during the Hearing, while most of DWR’s contentions remain unsubstantiated. All definitions and capitalized terms will be the same as those established in the District’s Conclusions. Furthermore, although it is tempting to utilize the same approach as DWR and cram numerous additional points into footnotes to circumvent the page limitations, the District will abide by the rules traditionally governing brief

writing. *See, e.g.*, the Kansas Supreme Court the Kansas Court Rules Annotated, Rule 6.07(a)(2) available at <https://www.kscourts.org/KSCourts/media/KsCourts/Rules/Website-Rulebook.pdf> (proscribing that “[f]ootnotes should be avoided” unless “absolutely necessary”).

II. General Background, Factual Inaccuracies, and Common Ground

a. General Factual Inaccuracies

Numerous factual inaccuracies exist in DWR’s Brief and Findings. For example, DWR repeatedly indicates that the City can currently withdraw recharge credits via the existing Phase II withdrawal water permits at a rate of 19,000 acre feet per year. (*See, e.g.*, DWR’s Brief, p. 23.) This statement is verifiably wrong. The correct number should be 18,000 acre feet. (Testimony of Boese, R. Vol. VIII, p. 2266, l. 5- p. 2267, l. 20.)

b. Historic Drops in Water Table

DWR also repeatedly credits the City with primarily restoring water levels in the Aquifer through good management. (*See* DWR’s Brief, p. 17.) This ignores all the testimony indicating how other users have likewise contributed to the recovery, as well as natural recharge during wet years. (District’s Findings p. 23, Finding 104, *citing* Testimony of Pajor, R. Vol. 1, p. 151, ll. 4-12.) Even if this statement was true, as a corollary, it establishes that the City’s prior pumping of their native water rights fully or near fully was poor management by the City and was the driving force to depletions in the Aquifer in the first place. DWR, without any evidence, indicates that the Project has somehow raised the water table. (DWR’s Brief, p. 18.) If this new testimony had been raised at the Hearing, the District could have dispatched with it, as it was shown during the Hearing that the City had only artificially recharged (injected into the aquifer) less than 10,000 acre-feet into the Basin Storage Area from 2006 through 2016, which would not have appreciably raised the water table level. However, as new testimony that should be

disregarded anyway, it will be ignored. Moreover, DWR, in attempting to ostensibly discredit another argument of the District, later argues that the Aquifer quickly naturally recharges. (DWR's Brief, p. 23 ("This is the reason DWR is not concerned by the District's and the Intervenor's nit-picking of the City's modeling—even if the Aquifer's actual level following a drought is slightly lower than what the City's modeling shows it will be, the Aquifer would still be mostly full, *and would likely refill quickly due to its high rate of natural recharge.*" (emphasis added).) This belies the notion that the City has been the main contributor to the Aquifer's successful current levels.

c. Common Ground

In a Hearing that has become unnecessarily contentious, where certain parties have made scathing personal attacks, it merits noting that there are many points made by DWR that the District agrees with. The District agrees that lowering the minimum index levels and AMCs are independent of each other and "both aspects of the Proposal could be approved, either aspect could be approved and the other rejected, or both could be rejected." (DWR's Brief, p. 13.) Further, DWR now agrees that with AMCs no artificial recharge will occur in the Aquifer. (*See Id* at, pp. 31-32.) DWR also agrees with the District that passive recharge credits should not be allowed, and former Chief Engineer Barfield agreed. (*Id* at pp. 7, 57.)

III. The City's Drought Planning

Without explanation, DWR dismisses the District's concerns with the drought modeling performed by the City. However, little space will be devoted to this topic as the other concerns in this Brief dwarf the objections to the drought modeling. However, just a few aspects merit discussion. First, neither the City nor DWR has addressed how it is able to circumvent a regulation that only allows for water need projections made 20 years into the future. (*See K.A.R.*

5-22-14(f)). Instead, again without any support and in contravention of established law, both DWR and the City maintain that 40-year projections are permissible. Further, the District, through cross examination and through its own expert testimony, supported the speculative nature of this modeling. (*See* District’s Brief, p. 26, finding 118.) For example, given the overappropriated nature of the Aquifer, nobody could explain the justification for allocating this scarce resource in planning for a 1 percent drought instead of a 2 percent drought. (District Brief, p. 8.)

IV. The City’s MODFLOW Modeling

DWR fails to address most of the holes identified by the District in the City’s MODFLOW modeling. Instead, DWR has asserted that “any argument predicated upon a dewatering of the Aquifer under the Proposal or a nuanced inadequacy in the City’s modeling” is “fundamentally flawed. (*See* DWR’s Brief, p. 23.) Again, this assertion lacks any citation. However, it also appears to acknowledge that the District in fact established a “nuanced inadequacy in the City’s modeling.” The District maintains its position on the numerous “nuanced inadequacies” with the City’s modeling, as established in the District’s Conclusions, and maintains that these should still be addressed by the City. Indeed, DWR’s sole witness, Mr. Letourneau, testified that these errors should be addressed. (*See* District Brief, p. 54.) Further, the City failed to even model critical aspects necessary for a determination of the adequacy of the City’s Proposal, as established by the various Hearing orders. (*See* District Brief, pp. 70-71.) For example, the City failed to even model potential impairment to senior water users, impacts to water quality at all, or consider the impacts the Proposal (both withdrawal of AMCs and lowering the Minimum Index Levels) would have on minimum desirable streamflow. (*See id.*)

It is amazing that none of these points were addressed and DWR has simply chosen to hide behind a curtain of obscurity.

V. Impacts to Water Table

DWR has spent countless pages attempting to defend the position that the City's Proposal will not adversely impact the water table and many of these contentions will be integrated into the District's response to the Intervenor's Findings. Most alarmingly, DWR bases all of its arguments and assumptions on the periods of time AMCs are accumulated, and vastly ignores when AMCs are withdrawn. The *only* argument DWR raises is that the City's modeling establishes that at the end of an 8-year drought, the "Aquifer will remain 80 percent full on average." (DWR's Brief, p. 23.) In fact, DWR even contends that if the City's modeling is truly flawed and the Aquifer will only remain 65 to 70 percent full, it is still a "good" proposal. (*Id* at p. 52.) It is hard to even know where to begin to counter this position. First, it is hard to imagine a metric that indicates that an overall depletion of the Aquifer by 20 percent—let alone 30 to 35 percent—is somehow "good" for the Aquifer. It is hard to understand how DWR can actually maintain a straight face while arguing later that no impairment will occur. Instead, DWR advances a brand new standard for arguing that the Proposal is appropriate: the Aquifer will remain "mostly full." (*Id* at p. 23.) By way of example only, if during the time of a drought, five large users/municipalities deplete an Aquifer by 20 percent, the entire resource will be depleted. By DWR's own admission, the City's Proposal will reduce the average level of the entire Aquifer a minimum of 12 feet during withdrawals. (*Id* at p. 12.) Second, this percentage applies across the entire "Aquifer." (*See id.*) This ignores the pronounced effects of drawdowns in the heart of the basin storage area or in specified cones of depression near City wells, and the depletion may be much greater than 30 to 35 percent in those areas. Further, DWR ignores the

acute impacts at the site of individual wells. Third, the touted 80 percent metric assumes that the level of the Aquifer will start at the 1998 water-level. (*Id.* at, p. 24.) Again, understanding that 2 and 5 percent droughts are likely through the remaining years, this is an erroneous assumption. Thus, the possibility of the Aquifer remaining that full, is completely flawed in scope.

Finally, as indicated, DWR argues repeatedly that considerable drawdowns are appropriate because the Aquifer quickly naturally recharges. As a corollary, apparently the City's Proposal is merely a way that it can harness rainfall by pumping out of the river during high flows, and accumulating AMCs after the Aquifer has already naturally recharged. Consequently, it is no wonder the City is pushing to get this Proposal approved.

VI. Impairment Investigations

Some of the most curious statements raised by DWR surround the protocol of impairment determinations and investigations. First, DWR argues that the concept of impairment should not be applied in these proceedings because impairment should be addressed after the fact. (DWR's Brief, pp. 40-43.) Second, DWR contends that even if impairment should be considered up front, the District failed to establish that it would occur. (*Id.*) Each argument can be easily dispatched.

Clearly, by all accounts (other than DWR), impairment was proper fodder for the Hearing. For example, in his initial Hearing Order, Chief Engineer Barfield indicated that impairment must be considered and that the proposed changes can not cause impairment. (*See* July 23, 2018 Pre-Hearing Conference Order.) Subsequent Hearing Orders also stated this. DWR now apparently wishes to discredit its former Chief Engineer and the Hearing Officer on this point. Amazingly, DWR further contradicts itself by writing that a primary purpose of the Hearing was "to safeguard the rights of other area water right owners"—a textbook definition of

precluding impairment. (DWR’s Brief, p. 13). DWR also states that “DWR does not ever deny any kind of application or proposal because of a potential for impairment that is as speculative and unlikely as the one that the District and the Intervenors have raised here.” (*Id* at page 40). This statement has so much wrong with it that is hard to figure out which part to refute first. First, it was not the District’s (or Intervenor’s) burden to show that the Proposal would cause impairment. Pursuant to multiple hearing orders and K.S.A. 82a-708b, it was the City’s burden to demonstrate that the Proposal would *not* cause impairment. Second, DWR certainly does deny applications based on possible impairment. (*See, e.g.*, Letter from DWR, dated February 2, 2021 regarding a change application filed on Water Right No. 15424 being denied due to impairment concerns and the applicant failing to demonstrate impairment would not be caused by the change).² The District can undoubtedly provide additional examples, if needed.

DWR’s “opinion” that impairment won’t occur with the City’s Proposal is also baffling. It contends that the potential for impairment is speculative. (DWR’s Brief, pp. 38-39.) Yet, in practically the same breath, DWR admits that certain domestic wells will be impaired. (*Id.*) Moreover, DWR provided no evidence, modeling, or testimony on impairment. The only witness to provide detailed analysis on the subject, Dave Romero, indicated that numerous forms of impairment will occur and that wells will be impaired inside and *outside* of the 660-foot domestic well spacing requirement. (District Brief, pp. 33-34).

VII. Saturated Thickness

Another separate, but related topic to impairment and overall impacts to the water table, is saturated thickness. The District devoted a considerable amount of time fleshing these arguments out during the Hearing. Here, DWR again attempts to provide new analysis and

²The District recognizes this is new evidence but it is only in response to a surprising new allegation of DWR. Consequently, both this letter and DWR’s shocking contention can be ignored.

testimony unsubstantiated by the record. For example, without any citation, DWR argues the Proposal “shouldn’t be denied for this reason.” (DWR’s Findings, p. 17, fact 8.) In an arduous struggle to support this proposition, DWR compares the Aquifer to the Ogallala Aquifer, where considerable groundwater declines have occurred and managing levels of significant depletion is commonplace. (DWR’s Brief, p. 52.) Consequently, DWR writes: “A proposal that leaves the Aquifer 65 or 70 percent full following a one-percent drought is still very much a reasonable proposal.” (*Id.*) Again, DWR finds this reasonable because its “an area that sees much better natural recharge.” (*Id.*) Again, this argument is not supported with any citation to the record, and apparently bolstered by a brand new “exhibit,” as cited in footnote 218. (*Id.*)

Again, this argument is without merit. It is completely predicated on an unrealistic assumption that the Aquifer will head into a 1 percent drought virtually full. The reality of this best-case scenario occurring is simply highly unlikely, if not virtually impossible. Perhaps DWR is expecting this pre-withdrawal health of the Aquifer to be a necessary permit condition before AMCs can be withdrawn? Since these arguments on saturated thickness weren’t made during the hearing, it is hard to fully understand the logic at this late juncture.

Also, the other arguments make little sense either. It is hard to understand how such considerable depletions and leaving the Aquifer “mostly full” is now somehow acceptable to DWR, especially when the City will not inject or replace the AMC water that is withdrawn. Moreover, the comparison to the Ogallala Aquifer—a completely unrelated and different water system—is also astonishing. It is like saying that considerable depletions in Kansas are appropriate because California has much worse water problems. It is the District’s position that the Equus Beds Aquifer is a unique resource that should be carefully managed on its own merit and for its own sustainability. Perhaps DWR’s one-size-fits-all approach exemplifies why local

groundwater management districts are instead best charged with employing practices carefully tailored to the aquifer underlying the unique respective region governed.

In addition to its new arguments on saturated thickness that are easily addressed, DWR attempts to discredit the District by saying that the District has never been concerned with saturated thickness in the past. This argument is verifiably wrong. It is also a brand-new argument raised for the first time in DWR's Brief. Had it been raised during the Hearing, the District could have amply buried the notion. Although it is an irrelevant argument and should be given no consideration since no testimony supported it, the District will quickly respond with just a few examples of how saturated thickness has been addressed by the District previously. However, several hours of testimony could have been devoted to this topic during the Hearing if the District knew DWR would raise this as a serious attack. For example, the District has employed a regulation to create an enhanced well spacing area. *See* K.A.R. 5-22-2d. The entire genesis of this regulation is to address an area with a limited saturated thickness and to protect senior water users from impairment. *See id.* Moreover, as established, the whole reason the District supported the 1993 levels previously was to protect saturated thickness and protect the public interest. No more precious space in this Response will be devoted defending this notion.

Finally, notably, DWR ignores all arguments the District made on practical saturated thickness. Its sole witness, Mr. Letourneau, said this was a concern and should be investigated. (District Brief, pp. 49-51.) It makes sense that this was ignored because it is an inconvenient argument for an agency pushing hard to get a Proposal approved. The District asks that the Hearing Officer give actual deference to the arguments made by the District on this subject since they were well-reasoned and supported by the record. The City's Proposal, simply put, results in disturbing saturated thickness and practical saturated thickness concerns.

VIII. Safe Yield

DWR, unconvincingly, attempts to argue that safe yield does not apply to the AMC Proposal. The main arguments appear to be 1) a rewording of the contention the Proposal is not a change or new application, 2) that AMCs constitute aquifer storage and recovery, and 3) that “the Proposal will leave the Aquifer approximately 80 percent full... and all of the city’s wells will be governed by their authorized rates and annual quantities.” (DWR’s Brief, pp. 50-51.) All of these arguments have been addressed by the District. The District has established how this Proposal changes the analysis from when these permits were originally exempted from safe yield—i.e. no water added to the supply in the Aquifer, no storage occurring due to the City’s actions, lowering the minimum index level is a fundamental change, etc.

However, the biggest red herring is DWR’s continued 80 percent argument and the notion that the authorized rates and annual quantities will not change. Foremost, it has been established that the authorized rates and annual quantities listed in the permit are wholly irrelevant to determining the impacts that AMCs will have on the water supply or the harm to the Aquifer of lowering the minimum index levels. Moreover, DWR concedes that with the City’s Proposal, at a minimum, depletions of 20 percent might occur during a drought. These depletions would result from water (AMCs) withdrawn by the City that it did not add to the Aquifer—accumulated as a reward for taking water from the Little Arkansas River *after* the Aquifer has recovered from natural recharge or because the City has taken water from Cheney Reservoir instead of first pumping its native water rights in the Aquifer.

In another section of DWR’s Brief, it admits that depletions will occur and that this is not a reason to deny the City’s Proposal because all water rights would accordingly be denied. (DWR’s Brief, pp. 21, 36.) This argument hammers home the District’s point in favor of safe

yield applying. It is true that water rights will likely deplete a given quantity of water, but only to the extent the granting of the permit will not over-appropriate the supply. DWR admits that the City's Proposal will deplete the Aquifer. However, this argument somehow ignores the entire concept of safe yield. The established fact is that the Proposal changes the calculus from when *artificial* recharge credits were exempted from safe yield in the past. For all the reasons established in the District's Findings, safe yield must apply to the City's Proposal and it should clearly be denied for this reason.

IX. Expanding Consumptive Use

DWR's Brief responds to the District's contention that the City will increase its consumptive use. DWR raises the new contention, without any analysis or citation, that "[t]he City is permitted to increase its consumptive use under its existing Project water rights." (DWR's Findings, p. 16, fact 1.) Thus, DWR reasons, "The fact that the Proposal may result in the City increasing the consumptive use of some Project water rights is not fatal to the Proposal." (*Id.*) Thus, as a threshold matter, apparently to save face, DWR is finally acknowledging that the City's project could increase the consumptive use. (*See id.*)

DWR next recognizes K.A.R. 5-5-3 as prohibiting an increase in a water right's consumptive use. (DWR's Findings, p. 10, l. 2.) However, it contends this regulation only applies to vested or perfected water rights. (*Id.*) However, a review of any multitude of DWR files would demonstrate that it has consistently not allowed the expansion of the consumptive use of a water permit during the perfection period. For example, DWR regulation K.A.R. 5-5-10 restricts the amount of acres that can be added to the place of use of an irrigation water right to prevent an increase in the consumptive use. DWR applies this regulation to not only vested and certified water rights, but also to water permits that are still in the perfection period and therefore

not yet certified. If this new argument had been raised prior to or during the Hearing, an open records request could quickly have countered this contention.

Despite the previous contentions, DWR shuffles full circle and states “the City would not be entitled to any more water under the Proposal than it already is.” (DWR’s Brief, p. 21.) Although DWR does not cite any testimony for this contention or explain how this is the case, the District reiterates all its prior arguments about how the City will double its consumptive use of water. The District supported this contention through actual analysis and testimony on the record. DWR also again contends that the City would be limited by “annual authorized quantities and rates” for its recharge and recovery wells and the “limit on the withdrawal of recharge credits will remain the same.” (*Id.* at p. 26.) This is merely a subterfuge by DWR. As supported in the Hearing, the City will be able to accumulate recharge credits much faster with AMCs in its toolkit. (*See, e.g.* District’s Brief, pp. 52-53.) Further, the City applied for a host of new recharge credits withdrawal permits and then withdrew them. (*See* City’s Exhibit 1, Proposal.) The City has indicated that it plans to refile those permits and seek future bank storage wells. (District’s Brief, p. 20.) Further, lowering of the Minimum Index Levels allows the City access to groundwater that they do not have under the current 1993 water levels restrictions. Consequently, these existing “limitations” are irrelevant to an analysis of the City’s Proposal.

DWR’s next contention is perhaps the most fatal to its logic. It writes: “[T]he City would not use any water for artificial recharge under the Proposal. This is really a minimal difference, as *artificial recharge is not a consumptive use.*” (DWR’s Brief, p. 33 (emphasis added.)) Although this is a brand new contention again, and this could be argued in many ways, this contention seals the District’s argument. Using this logic, with AMCs the City would obtain a

consumptive use for pumping out of the river and another consumptive use for pumping out of the Aquifer. In contrast, with an artificial recharge credit, there would be no consumptive use when the water is pumped out of the Aquifer in the future because the City injected it, as the only consumptive use would be when the water is first diverted from the river at the surface water intake. DWR couldn't have better articulated how AMCs double the consumptive use.

Finally, again without any citation or analysis, DWR provides a cursory contradiction of its previous point: "The Proposal would not allow the City to magically have more water for consumptive municipal use than it had before. The City would simply be using more surface water and less native Equus Beds groundwater." (*Id.*) Although it is impossible to understand the reasoning or justification for this proposition, the District can only assume that DWR is again forgetting that AMCs will eventually be withdrawn from the Aquifer. Again, if anything, DWR's contentions only further solidify the District's arguments that the City's Proposal will expand the consumptive use made of water.

X. AMCs are a New Type of Beneficial Use

The District maintains its well-supported argument that AMCs are not defined by statute or regulation, distinguishable from artificial recharge credits, and thus are a new type of beneficial use. Apparently understanding that it is impossible to explain how AMCs constitute artificial recharge credits, DWR has now argued that the Aquifer Storage and Recovery Regulations are largely inapplicable. (DWR's Brief, pp. 74-77.) Instead, DWR now provides new testimony that AMCs are apparently a form of a municipal use. (*Id.* at pp. 31-32.) At initial blush this first-time testimony should be ignored. Further, DWR provides no explanation for how an AMC somehow falls under the definition of municipal use. However, the District actually does not have a problem with DWR attempting this new testimony as it supports what

the District has been saying from the commencement of the proceedings: AMCs are not a type of artificial recharge credit and don't fit anywhere within the types of blessed beneficial uses.

DWR's new testimony actually supports the illusory nature of an AMC and helps establish its fictional existence.

XI. Minimum Desirable Streamflow

DWR also argues that minimum desirable streamflow ("MDS") will not be impacted by the City's Proposal. (DWR's Brief, p. 47.) Again, DWR offers no citation for this contention as this was never substantiated during the Hearing. Despite DWR's attempt to craft new testimony in its Brief, the only witnesses that testified during the Hearing on the subject contended that MDS will be adversely impacted by the City's Proposal. (District's Brief, pp. 40-41.) This is the only testimony that should be considered and it is certainly the only conclusion in this regard supported by modeling and actual research.

Another argument that DWR breathes life into for the first time is the notion that MDS won't be impacted because diversions from the Little Arkansas River must cease if MDS falls below a certain level. (DWR' Brief, p. 49.) This argument has nothing to do with the District's arguments whatsoever. The District's concerns centered on when AMCs would be withdrawn and the effect of lowering the minimum index level. Under what circumstances Little Arkansas River water can be withdrawn is obviously wholly irrelevant to any concept discussed in the hearing on MDS. DWR certainly could offer no modeling or testimony on this subject at the Hearing because cross-examination would have immediately rendered the position obsolete.

Next, DWR argues for the first time in its Brief that there is no evidence of an interconnection between groundwater and surface water within the Aquifer area such to an extent the groundwater pumping can impact streamflow. (DWR's Finding, p. 12, fact 9; DWR's Brief,

p. 48.) Like other new arguments lacking support in the record, this one is equally stunning. First, the detailed modeling offered by the District's experts demonstrated this connection and the impact the City's Proposal will have on MDS. Had DWR attempted to discredit such an axiomatic concept during the Hearing, the District could have responded with extensive testimony and evidence supporting the connection. However, because the District is confident this new testimony will not be afforded any deference, the District will not provide a new academic analysis at this juncture. However, it merits noting a few aspects that were mentioned during the Hearing to dispatch with this surprising contention. First, bank storage wells rely on the hydrologic connection between river water and groundwater. (See ASR Phase I Initial Order and associated ASR Phase I Water Permits.) Also, the District has put into place river nodes on the Little Arkansas River to account for the groundwater/surface water interaction and quantify the amount of groundwater lost to the river for safe yield calculations (*See* K.A.R. 5-22-7). Additionally, as a further recognized demonstration of the interconnection between the Aquifer and the Little Arkansas River, the District's well spacing regulation K.A.R. 5-22-2 requires non-domestic wells to be located a distance (at least 1,320 feet) from the Little Arkansas River so as to not impact stream flow.

Finally, DWR argues that if MDS is impacted for more than 7 consecutive days, pumping can be shut down. (DWR's Brief, p. 47.) This "administration of water rights... continu[es] only as long as is necessary to restore MDS." (*Id.*) We know that if the minimum index level is lowered and AMCs are withdrawn, MDS will be adversely impacted for far longer than 7 days. (District's Brief, pp. 40-41; District Exhibit 68.) Thus, although AMCs and lowering the Minimum Index Levels should under no conditions be approved, if they were somehow approved, the District supports permit conditions that the withdrawal of AMCs must cease if

MDS is impacted for more than 7 days, and that withdrawal of any recharge credits (physical recharge credits or AMCs) must also cease if groundwater levels are below the current Minimum Index Levels (1993 levels) and MDS is impacted for more than 7 days. DWR's logic in this regard will ensure that AMCs, which should never be accumulated in the first place, won't be withdrawn during a time of a drought and negatively impact MDS and that the current minimum index levels won't be lowered.

XII. Water Quality

DWR argues that the City's Proposal will "improve water quality." (DWR Brief, p. 24.) Once again, the only citation to this new contention, found in footnote 110, is the City's Exhibit 1, and a reference to Attachment H regarding the migration of the chloride plume. (*Id.*) However, it remains uncontested that the only party that *modeled* water quality and demonstrated how the Proposal would undermine water quality is the District. (District's Brief, p. 32; District Exhibit 68.) Merely indicating that the chloride plume can migrate when the water table drops is far from a modeled application of the City's Proposal to water quality. The District's/Intervenor's evidence in this regard remains the only substantiated or credible evidence. A cursory statement by DWR that water quality will be improved cannot salvage the City's or DWR's failure to model this concept. It merits pointing out again that it is the City's, and not the District's, burden of proof on this point.

XIII. Special Attention to Pronounced Dangers of Lowering the Minimum Index Level

Perhaps the most harmful aspect of the City's Proposal is lowering the minimum index level. DWR even writes, "Former Chief Engineer David Pope found when he approved Phase I of the Project that the public interest would be protected if recharge credits were not withdrawn

when water levels were below the established minimum index level.” (DWR’s Brief, p. 5, FN 23.) This aspect of the Proposal certainly must be denied.

XIV. A Change Application or New Permit is Required

DWR further disagrees that a new permit or change application is needed for the City’s Proposal. They contend it is not a “true” change application despite the District’s argument that there are two points of diversion. (DWR’s Findings, p. 14, fact 4; DWR’s Brief, p. 34.) Little explanation is offered for this distinction other than the contention that the City is “already authorized to operate both its surface water intake on the Little Arkansas River and its recharge and recovery wells in the Equus Beds Wellfield.” (DWR’s Brief, p. 35.) Consequently, DWR acknowledges, “It is true that the City would utilize two sources of water and two points of diversion under the Proposal.” (*Id.*) The mere fact that the City can already pump from the Aquifer does not guarantee it the right to increase its pumping from the Aquifer. No irrigator with a water right would ever argue that since it already has a right to irrigate from the Aquifer, it can double its consumption of that groundwater in the future. The City will also undoubtedly use this Proposal as a vehicle to expand its consumption from the Aquifer in the future: the City indicated that it plans to apply for new permits, much in the same way the City had filed 30 additional Phase II application before withdrawing them and that the City has already planned for Phase III of the ASR Project (District’s Brief, pp. 20-21.)

Moreover, this distinction ignores the fact that AMCs are not artificial recharge and the “authorization” the City already has to divert water out of the Aquifer through the Project is limited to artificial recharge credits. As indicated, DWR argues that AMCs are not artificial recharge and artificial recharge is not a form of consumptive use. (DWR Brief, p. 33.) Thus, the contrapositive must also be true: AMCs are a form of consumptive use. Consequently, the City

is obtaining a diversion for one form of consumptive use out of the river and *another* diversion for an additional form of consumptive use out of the Aquifer in the form of AMCs. Likewise, DWR argues that withdrawing AMCs from the Aquifer is a municipal beneficial use of water. Consequently, DWR has trapped itself with its own circular arguments: either AMCs require a change in the point of diversion (a change application) or seek a brand new consumptive use of water (a new application). Either way, the City's failure to pursue a new or change application is fatal to its Proposal.

The District's refutes DWR's new claim that K.S.A 82a-711 does not apply to the City's Proposal. This contention is also addressed in the District's Response to the Intervenor's Findings. Clearly, it is impossible to review a change pursuant to K.S.A. 82a-708b without relying on the standards that must be met as described in K.S.A. 82a-711. By DWR's logic, K.S.A. 82a-711 should not be taken into consideration when reviewing a change filed pursuant to K.S.A. 82a-708b. However, the DWR Program Manager and the KDA Chief Counsel both disagree with this notion, as demonstrated by the attached letter, dated April 17, 2020, from Lane Letourneau, and the attached letter, dated October 12, 2020, from Kenneth B. Titus.³ These letters are regarding a change application unrelated to the City's Proposal, in which both letters describe how the change application filed on Water Permit No. 48676 (and therefore also Water Right No. 40518) does not comply with K.A.R. 82a-708b *and* K.S.A. 82a-711. In fact, the April 17, 2020 letter contains the following statement "Further, K.S.A. 82a-708b requires that the same standards used in approving new applications also be applied to change applications, and pursuant to K.S.A. 82a-711, the (change) Application appears to violate K.S.A. 82a-711(b)(2), (4), and (5)." Although Water Permit No. 48676 is not related to Phase II, interestingly it is

³Again, this is brand new evidence carefully measured to respond to brand new "ambush" arguments by DWR.

located just south of the basin storage area. The reasons for denial of the change application, as stated in the referenced letters, are based on DWR's determination that the change application does not comply with K.S.A. 82a-708b and K.S.A. 82a-711, despite the application complying with all applicable regulations. Coincidentally, the reasons stated for denial are some of the same reasons the District has demonstrated that the Proposal must be denied: safe yield, impairment, water quality impacts, and different source of water. Clearly, this dispatches DWR's argument that K.S.A. 82a-711 does not apply to the Proposal, unless DWR has chosen to not apply these standards uniformly to all changes.

XV. An AMC Is Nothing More than a Prohibited Passive Recharge Credit

DWR disagrees that AMCs constitute passive recharge credits. In fact, once again, without any citation, it writes that AMCS are "demonstrably not passive." (DWR's Findings, p. 13, fact 14.) The rudimentary distinctions made by DWR, however, are paper thin: 1) that the source of the water is Little Arkansas River water and 2) that the water is passed through the ASR facility. (DWR's Brief, pp. 59-60.) The argument regarding the source of the water is impossible to understand. It is incredible that DWR is even arguing that Little Arkansas River water is somehow exempted as a source of water that qualifies for passive recharge credits. If this were true, there are many irrigators that have surface irrigation rights to this water. This would open the floodgates to irrigators and other users to earn credits for pumping out of the Little Arkansas River in lieu of the Aquifer.

The second distinction focuses on the infrastructure. DWR distinguishes Cheney, El Dorado Reservoir, and the Arkansas River as not being "connected to the City's Project treatment plant by any physical infrastructure." (*Id.* at p. 60.) But the City's witnesses testified that these sources of water could conceivably be connected to the Project infrastructure. (*See*

Testimony of Henry.) Thus, making this distinction would also open a Pandora's Box and the City could accumulate extensive passive recharge credits simply by connecting to the Project infrastructure. This nonsensical logic certainly doesn't sell under any stretch of the imagination.

DWR also attempts to bolster its argument by excoriating the District's reliance on the definition of passive recharge credits established in the Phase I Order. First, DWR argues for the very first time that David Pope did not attempt to define passive recharge credits, but merely intended to identify an example, as evidenced by the use of an "i.e." (DWR's Brief, pp. 58-59.) This is brand new testimony that is obviously not supported by the record. However, the phraseology used is obviously very broad in referring to "water which the City could have legally pumped, but did not pump." (Phase I Order, p. 2, para. 10.) A plain reading of the language clearly identifies this isn't just a specific example—like pumping from Cheney Reservoir—but a broad definition. Further, while Mr. Pope offers the only sensible definition, DWR fails to offer an alternative explanation for what constitutes a passive recharge credit. Regardless, a few pages later DWR contradicts itself by maintaining there is "no legally binding *definition*" of passive recharge credits. (DWR's Brief, p. 58 (emphasis added).) This statement assumes that passive recharge credits were in fact defined, but that definition is not binding. DWR offers no explanation for how it can pick and choose which parts of the prior Phase I and II Orders are not binding. DWR does concede that former Chief Engineer Pope is the only one to have elaborated on the concept of passive recharge credits in an Order. (DWR's Finding, p. 11.) However, Mr. Barfield also prohibited passive recharge credits in the Phase II Order.

However, there is no need to speculate as to whether David Pope believed that AMCs were passive recharge credits. Mr. Pope testified in the Hearing, and in his expert report, that AMCs were nothing more than passive recharge credits. (District Exhibit 2.) Yet, without

authority, DWR testifies in its Brief that Mr. Pope never could have envisioned AMCs when he created his definition of passive recharge credits. (DWR's Brief, p. 59.) DWR knew that it would be futile to make this argument during the Hearing when Mr. Pope could crucify such as notion. Thus, it waited to raise this argument for the first time in its Brief. This attempt should thus be a complete nonstarter.

XVI. Permit Conditions

Since the Intervenors address permit conditions extensively, these points raised by DWR will be included in the Response to the Intervenor's Findings, and are incorporated herein.

XVII. The Clawson Case Controls

Since the City and DWR mirrored each other's arguments with respect to *Clawson*, this will be addressed in the response to the Intervenors Brief and are incorporated here.

XVIII. The Concept of a Functional Equivalent

DWR attempts to again revert back to the fictional concept of a functional equivalent. Again, this argument is supported solely by the fact that David Barfield attached this label. This should be offered little probative value since Mr. Barfield didn't even testify, and his contention was never subject to cross-examination. Indeed, the District would have welcomed that opportunity. DWR does argue that through AMCs and physical recharge credits the same amount of water will be withdrawn. (DWR's Brief, p. 29.) This argument has already been discredited as AMCs leave the City's native water rights intact and don't inject any water into the Aquifer. Also, there is no definition or allowance of a functional equivalent standard in Kansas Water Appropriation Act laws or regulations.

XIX. The KWAA

DWR makes a scant attempt to refute the District’s arguments concerning the KWAA. However, DWR argues that it applies the “prior appropriation doctrine only when (sic) *water supply is insufficient... or when an impairment is occurring.*” (DWR’s Finding, p. 14, fact 16 (emphasis added).) This directly supports the District’s argument: the District has shown that the water supply is over-appropriated and the City’s new Proposal violates safe yield—AMCs will appropriate water dedicated to more senior users that the City never placed in the Aquifer in the first place. Further, DWR admits that the City’s ASR rights are junior to these users. (DWR’s Brief, p. 71 (Noting, “It is true that the City would, at least at times, be exercising junior water rights under the Proposal.”)). The District incorporates all of its prior arguments and has made a clear showing that the KWAA will be violated by the City’s Proposal.

XX. Standing

DWR’s points on standing are addressed in the Response to the Intervenors’ Findings.

XXI. Role of GMD

With little analysis or explanation, DWR contends that it is not the District’s role to help manage the Aquifer as it relates to an Aquifer Storage and Recovery Project. By bootstrapping language out of K.S.A. 82a-1020 (i.e. “insofar as it does not conflict with the basic laws...”), DWR essentially argues that K.S.A. 82a-706 preempts a groundwater management district’s ability to manage an aquifer (arguing that the Chief Engineer “shall enforce and administer... laws... pertaining to the beneficial use of water and shall control, conserve, regulate, allot, and aid in the distribution”). (DWR’s Brief, pp. 20-21.) This construction of the statute actually supports the District’s argument. Furthermore, DWR conveniently chose to ignore the rest of K.S.A. 82a-1020 that states in part: “It is hereby recognized that a need exists for the creation of special districts for the proper management of the groundwater resources of the state...,” and

“[i]t is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas.” (K.S.A. 82a-1020.)

The simple fact is, management of the Equus Beds Aquifer is clearly the role of the District, and not DWR’s role. DWR’s role is to issue and administer water rights. In fact, the concept of aquifer management does not appear anywhere in the KWAA or associated laws and regulations. The District’s approved Management Program states that the goal of the District is to manage the aquifer on a safe yield principle to prevent groundwater mining and also protect water quality, which is exactly why the District opposes the City’s Proposal. DWR contends that the Aquifer at 80 percent full (or even 65-70 percent full) after the City pumps recharge credits is acceptable. The District disagrees based on the stated goal of the District Management Program. DWR has no authority to determine what level of fullness the aquifer should be at; it is clearly the District’s role. Likewise, the District is responsible for reviewing ASR annual accounting reports related to physical recharge. (See K.A.R 5-12-2.) This establishes the District’s clear role in managing the ASR Project. DWR even contradicts its own argument that the District doesn’t have authority when it writes, “K.A.R. 5-12-4 pertains to a groundwater management district’s authority to recommend rules and regulations related to aquifer storage and recovery monitoring and accounting requirements.” (DWR’s Findings, p. 15, fact d.2.)

XXII. Application of Regulations

DWR does spend some time addressing the application of the regulations. It makes the self-defeating argument that “the Proposal does not constitute an application to appropriate water.” (DWR’s Findings, p. 14, fact 1.) Consequently, “Most of [the regulations that govern aquifer storage and recovery projects] are not directly applicable to the Proposal.” (*Id.*)

However, DWR apparently must have not read the multiple hearing orders that all required the proposed changes to “meet the requirements set forth for Aquifer Storage and recovery Projects in K.A.R. 5-12-1, *et al...*” (*See, e.g.*, Prehearing Order dated May 1, 2019). Additionally, it is truly amazing that DWR is sincerely arguing that the City is not seeking additional water.

Likewise, if the aquifer storage and recovery regulations don’t apply in most respects, DWR can’t pick and choose the limited scenarios under which they do apply, in a piecemeal fashion, to benefit its argument. If they don’t apply, then the City can’t meet safe yield either, along with all the other ways the District has argued the City has violated the regulations. However, DWR puts the metaphorical nail in the coffin and contends that, with respect to aquifer storage and recovery, “no rules and regulations are at issue here.” (DWR’s Findings, p. 15, fact 3.) DWR’s argument in this respect is fatal to the approval of the Proposal.

DWR introduces a bunch of new arguments and testimony with respect to the concept of storage. (*See, e.g.*, DWR’s Findings, p. 15, fact 2.) Just as when DWR attempted to introduce a definition of storage during the Hearing (that wasn’t disclosed previously) as an exhibit that turned out to be beneficial to the District’s arguments, this new testimony likewise bolsters the District’s position in this regard. DWR points out that the regulation on annual accounting, K.A.R. 5-12-2(b), refers to “water balance.” (*Id.* at p. 16, fact e.3.) DWR indicates that “water balance” means “the method of determining the amount of water in storage in a basin storage area by accounting for *inflow to*, and outflow from, and changes in storage in that basin storage area.” (*Id.* (quoting K.A.R-5-1-1(0000) (emphasis added). The District expresses its gratitude to DWR for highlighting this definition because it further substantiates the District’s argument that storage requires inflows into the basin storage area. Again, this argument, now inadvertently

made by DWR, further supports that an AMC can not generate storage because no inflows into the Aquifer occur. Again, AMCs are not artificial recharge.

Further, with respect to the term “artificial recharge” DWR advocates for eliminating the concept of “artificial” completely out of the blessed definitions. To support this argument, it contends that storage can occur through natural means such as the “trunks of trees and the leaves of plants store food and volcanic craters store magma.” (DWR’s Brief, p. 29.) This construction of the word storage completely solidifies the District’s arguments as to the impacts to the Aquifer. Just as when trees are cut down in a forest or when oil is pumped from the ground and these resources are irreplaceable, the City is appropriating water that exists in the Aquifer solely because of natural means that will vanish once the City withdraws AMCs. Similar to the environmental and societal impacts of withdrawing too many fossil fuels, the City’s attitude of entitlement to this precious natural resource in the Aquifer is unsustainable. This new testimony provides wonderful support for the District’s contentions in this case and the District is thus very comfortable with the Hearing Officer allowing it. DWR takes the argument further and admits that AMCs will rely on appropriating native water that the City did not artificially store in the Aquifer. DWR indicates, “all water present in any aquifer pre-development came to be stored there through natural means, just as the water that the City could withdraw based on its accumulation of AMCs under the Proposal came to be in the BSA as a result of natural recharge.” (*Id.*) DWR’s new arguments provide an excellent public policy justification for why all the ASR regulations require actual physical *artificial* recharge. DWR should not be allowed to rewrite the regulations in its Brief and the current construction of the regulations make perfect sense: a credit system is only sustainable if water is added to the supply through artificial means. The City further acknowledges this position by noting that with physical recharge credits “the

water the City withdraws as a result of its accumulation of recharge credits... is not native Equus Beds groundwater.” (DWR’s Brief, p. 5.) In other words, as a corollary, this distinction is important because AMCs will clearly appropriate native Equus Beds groundwater.

DWR goes so far as to complain that the District’s construction of the word “store” “would force the City to jump through extra hoops.” (DWR’s Brief, p. 30.) Just because compliance with the law may result in an inconvenient reality, that does not provide grounds to ignore the law. Further, in the same sentence DWR again argues that the District’s interpretation of the word store will result in a “detriment to the Aquifer and all area water users.” (*Id.*) Once again, this proposition has no citation to the record, is not supported by further analysis, and ignores the modeled impacts demonstrating the harms occurring when AMCs are withdrawn.

Further, no water can be stored through the use of AMCs because AMCs are a completely fictional concept. You can’t store something that doesn’t even legally exist. DWR makes no other attempts to distinguish all of the District’s detailed statutory and regulatory analysis that was testified to by former Chief Engineer Pope and Mr. Boese. DWR has likely chosen not to counter these points because it failed to produce any analysis during the Hearing, and no credible counterarguments exist. The District incorporates all of its prior analysis in this regard and believes it provides ample reason for this Hearing Officer to deny the City’s Proposal with respect to AMCs. Regardless, DWR contradicts any arguments it previously made, indicating that artificial recharge is not required, when it writes, “DWR’s aquifer storage and recovery regulations *require* a water user who develops an aquifer storage and recovery system to obtain multiple permits to operate the system—at least one permit authorizing the diversion of surface water and at least one additional permit authorizing the subsequent withdrawal of *injected* water from the aquifer.” (DWR’s Brief, pp. 3-4 (emphasis added).)

XXIII. Takings Clause

DWR spends an extensive portion of its Brief attempting to refute the Takings Clause analysis of the District and the Intervenors. Fortunately, the arguments can all quickly be refuted. The first argument raised by DWR is that a Takings Clause claim is precluded because an impairment investigation is the sole remedy. (DWR's Brief, p. 62.) If DWR could produce a shred of caselaw or legal support for this proposition, the District would afford it some serious consideration. The two contentions are mutually exclusive, and one does not preclude the other. It is like arguing in remedies that one doesn't have a right to assert damages because the right to specific performance also exists. Or that if a municipality seeks condemnation on a section of river, no just compensation need be awarded so long as an impairment investigation can later occur. The District does not believe it is worth devoting any of the remaining room in this Brief to address such a spurious argument.

Next, DWR addresses the contractual argument made by the District. It argues that the language in the Phase II MOU guaranteeing that "Project recharge and recovery wells can only be pumped if water levels in the aquifer are higher than the historic low level," is ambiguous. (DWR's Brief, p. 65.) The District grants that the phrase "lowest index level" may not be abundantly clear and better language could have been integrated. However, the District believes that, when construed in harmony with the rest of the Order, it is obvious that this phrase is referring to the historic 1993 levels. The use of the word "historic" is a dead giveaway. Further, despite the language DWR would graft into the language, there is no reference to "index" or "well." (*See id.*) It refers to a singular "level." This could only mean the historic 1993 level. This commitment indicates that impairment may be "expected" if this standard is violated. Fortunately, regardless, the contractual argument by the District was not limited to this one

phrase in the Phase II MOU. For example, the District bolstered this argument by letters that the City sent out to water users and to the District, an analysis of the various Orders, and other documents.

DWR next attempts to provide an environmental impacts analysis. The only salient point appears to be that the City's Proposal will only impact the top 20 percent of the Aquifer and any contention "predicated upon a dewatering of the Aquifer" is unfounded. (DWR's Brief, p. 66.) Once again, there is absolutely no analysis or testimony offered to support this conclusion and it is hard to believe that anyone would afford it serious consideration. DWR also contends that former Chief Engineer Pope did not intend to indicate in prior documents that the public interest would be protected if the 1993 level was maintained. (DWR's Brief, pp. 66-67.) Fortunately, once again this new argument is quickly dispatched of because Mr. Pope testified that he believed the public interest was protected if the minimum index level was not dropped further. (See, e.g., Testimony of Pope, R. Vol. X, p. 2720, ll. 2-10; Pope Expert Report.) This indicates his prior intent. DWR may wish to conveniently ignore this testimony to contrive a new argument in its Brief. However, the sole credible testimony on this subject—by former Chief Engineer Pope himself—obviously resolves this dispute.

XXIV. Usufruct Argument

Separate from the Takings Clause analysis, DWR provides a supplementary argument that water rights are usufructs. (DWR's Findings, p. 14, fact 15; DWR's Brief, p. 64.) The District never argued that a given water user had a personal property right to a designated gallon of water. The argument has always been that the City could not have a real or personal property right to water, through a fictional recharge credit, that was already fully dedicated to other users through water *rights*. Water rights are real property rights. Infringing on those rights constitutes

a Taking. DWR contends, “Accordingly, water in state in the Aquifer does not ‘belong’ to anyone and is rightfully used by the water right owner who lawfully removes it from the ground.” (DWR’s Brief, p. 63.) It thus appears that DWR is now also contending that even recharge credits are no longer personal property of the City. Even more contradictory, DWR writes, “The City would not pump native Equus Beds water in the form of AMCs under the Proposal—it would pump only from the BSA and only water that could have originated as Little Arkansas River surface water.” (DWR’s Brief, p. 64.) There are countless problems with this statement—principally that it has been established that the City will be appropriating native groundwater since it is not contributing to the water supply. However, on point to this section, despite its usufruct argument, DWR now appears to be contending that the City has a super priority or special property right to water within the BSA under the Proposal—even though it previously argued in its Brief that AMCs are a form of municipal use. If it is true that AMCs are a municipal use and the usufruct statements are true, then the City cannot have a special priority to any water. DWR and the City launch into an identical analysis of the *Williams* case. (*See, e.g.*, DWR’s Brief, pp. 69-70.) Since the arguments by the City and DWR are identical, this is addressed in response to the Intervenors’ Brief.)

XXV. Conclusion

For all the above reasons, the District respectfully asks that the City’s Proposal be denied as the DWR has wholly failed to help make the case for the City.

RESPECTFULLY SUBMITTED:

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Management District Number 2

CERTIFICATE OF FILING AND SERVICE

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

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