



### *Intervenors support the Recommendations*

The Intervenors support the Hearing Officer's recommended order and many of the conclusions of law laid out effectively in the Recommendations and ask the Chief Engineer to adopt the Recommended Order denying the City's Proposal. The Recommendations accurately conclude:

1. Consumptive use relates to the authorized annual quantity established in a permit and it would be a violation of the prior appropriation doctrine to increase that amount. A new application is required pursuant to K.S.A. 82a-711. (Recommendations, p. 125-126, 130.)
2. The Proposal involves three sources of water: Little Arkansas surface water, Equus Beds groundwater and groundwater recharge credits. Expanding the Basin Storage Area changes the source of supply for the City's existing permits and cannot be changed without a new application. (Recommendations, p. 131.)
3. The Proposal would allow the City to pump more Equus Beds groundwater than it is allowed under existing permits. Due to the over-appropriated status this would violate the prior appropriation doctrine. (Recommendations, p. 135.)
4. The Proposal should be dismissed. (Recommendations, p. 139.)
5. New consent agreements and spacing waivers should be obtained prior to lowering the minimum index levels. (Recommendations, p. 142.)
6. The Hearing Officer's conclusion that in an ASR project, aquifer recharge does not occur without both physical injection and storage of water. Aquifer Maintenance Credits only offer "theoretical" recharge and therefore would be passive recharge credits which are expressly prohibited. (Recommendations, p. 148.)

7. The City failed to satisfy its burden to demonstrate the proposed modifications are reasonable, will not cause impairment and related to the same local source of supply. The City failed to contemplate the eventual recovery or withdrawal of recharge credits from the aquifer, precluding the City from demonstrating the proposed modifications are reasonable. The City failed to satisfy its burden by neglecting to consider the impacts to Minimum Desirable Streamflow, safe yield, senior or domestic water rights or the public interest. Focusing only on the accumulation of credits while ignoring the eventual withdrawal of such credits, (potentially to a lowered minimum index level) is inconsistent with Kansas water statutes which require the Chief Engineer to conserve and regulate the distribution of water resources in accordance with the rights of prior appropriation. K.S.A. 82a-706.

#### ***Hearing Officer's Further Discussion and Conclusions***

The Intervenors appreciate the additional effort by the Hearing Officer to continue the analysis beyond the Motion to Dismiss. Having heard all of the evidence, testimony and public comment the Hearing Officer is well positioned to also make a recommendation regarding the Proposal.

The Recommendations reflects a solid understanding and appreciation of the difference between the singular, carefully selected, remote, extreme drought scenario reflected in the Proposal and the entirety of what the City was seeking permission to do. The Hearing Officer demonstrated the ability to see past the illusion of withdrawing groundwater from the aquifer in the form of AMCs or lowering the aquifer below existing minimum index levels only during times of extreme drought in the limited quantities presented and saw the full potential of groundwater that could be withdrawn if the Proposal is approved. The Recommendations

accurately reflect an understanding of the Proposal and its alleged benefits only being achieved should the City elect to engage in the specific behavior of leaving water, both groundwater and recharge credits, in the aquifer until times of extreme drought. The City and Division relied heavily on a representation that 99% of the time the City would not be using the credits; focusing solely on the accumulation of credits without adequate regard for the eventual withdrawal of the credits.

The Hearing Officer, in her analysis and ultimate Recommendation, understood the failure to contemplate the eventual withdrawal of credits as an absolute obstacle to meeting the burden of proof required. The Proposal's alleged benefits are not ensured in any way by approving the proposed modifications. The proposed modifications would permit the City to appropriate groundwater far in excess of what is presented in the Proposal without any protections for the aquifer such as prioritizing surface water usage from Cheney or the City's other water resources, maintaining and enacting a Drought Response Plan in a manner no less conservative than presented, only using proposed AMCs during times of extreme drought, etc. The Hearing Officer accurately understood the narrowly tailored, and potentially misleading nature of the specific scenario the entire Proposal is based upon. The alleged benefits of the Proposal are based on the City electing not to do what they are already permitted to do; however, it does not actually prevent or restrict the City from engaging in such potentially harmful, yet lawful behavior. If approved, the proposed modifications give the City complete discretion to manage the Equus Beds Well Field Area as they desire with the full knowledge that selling Equus Beds water to others is a profitable business endeavor, especially during times of extreme drought. The Recommended Order appropriately prevents further subjecting the health and conservation of the Equus Beds Aquifer to the City's discretion. Given the City's repeated

threats to pump a hole in the aquifer the Intervenors hope the Chief Engineer will adopt the Recommended Order and prevent the health of the Equus Beds from being at the whim of the City's discretion.

The Hearing Officer, in acknowledging the Proposal is not limited to only accumulating recharge credits, appropriately recognized the proposed modifications allow an increase in consumptive use. The City and Division relied heavily on the authorized quantity of existing permits remaining the same. The Hearing Officer recognized that expanding the BSA also expands the source of supply. Similarly creating new credits for leaving water in the aquifer changes the source of supply from recharged water to native groundwater already fully appropriated to other water users. The Intervenors agree with the Hearing Officer's conclusion the Proposal would result in an increase in consumptive use and should be denied due to both not following the statutory process and also the over-appropriated status of the aquifer in the Equus Beds Well Field area.

The Intervenors are grateful for the Hearing Officer's concern over the numerous errors and inconsistencies raised during the hearing process. It is gravely concerning the Division described these errors as "nit-picking" by the District and Intervenors rather than sharing a desire to make decisions based upon accurate data, modeling and analysis. The Intervenors fully support the Hearing Officer's finding that these errors should be addressed and represent a need for further study.

***Past decades of denied applications cannot be ignored.***

A significant area of concern and frustration for the Intervenors, and as expressed in the public comments, is the issue of available water and safe yield of the Equus Bed Well Field area.

New appropriations in the area have been denied and discouraged for decades due to safe yield. Based on the Hearing Officer's recommendation to deny the Proposal this aspect of the Proposal did not require significant attention in the Recommendations. Repeated claims by the City and the Division regarding the "fullness" of the aquifer, average saturated thickness, or 89% full across the entire basin storage area ignore the safe yield of the aquifer, and misrepresent the individual impacts by looking at an area far larger than where the diversions are taking place. Fullness and remaining saturated thickness are also relative to a point in time condition impacted by numerous factors including, ignoring the long-term sustainability of the aquifer.

The missed opportunities of local water users and denied applicants to put the allegedly available water to beneficial use over the past few decades is significant. The potential economic impact the additional water could have had on local communities should not be ignored in now determining the aquifer can safely yield additional water or allow further appropriation while disregarding safe yield. Principles of fairness and reason require addressing this past wrong before allowing new appropriations or expansion of consumptive use. The Hearing Officer, after carefully considering all of the evidence and testimony concluded the proposed modifications result in both a new appropriation and increase in consumptive use. We ask the Chief Engineer to reject the use of aquifer fullness in making decisions; however, if the Chief Engineer chooses to go down this path there needs to be a fair process to address the decades of denied applicants and those told not to bother because water is not available.

***The Proposed Modifications would establish dangerous precedent.***

The Hearing Officer understands the dangerous precedent that would be established if our laws and regulations are interpreted or changed to allocate future credit to water users leaving water in the ground or failing to appropriate their full appropriated quantity. AMCs are nothing

more than a credit for water not pumped, the mere coincidence that the City also has an ASR program does not change this simple fact and does not justify granting the City credit for water not pumped without similarly offering credits to all water users for water not pumped. It is also short-sighted to assume the City will remain the only operator of an ASR program. If the Chief Engineer decides to expand the meaning of Artificial Recharge to include water not pumped, the exemption of ASR from safe yield must be revisited.

Fullness or average saturated thickness of the aquifer are inappropriate standards for approving water permit applications and would also create a dangerous precedent across the state. The Intervenors ask the Chief Engineer to clearly reject aquifer fullness as the basis for approving new appropriations or allowing a water user to increase the consumptive use. Safe yield is the far better standard and should not be replaced by claiming the entire aquifer overall will remain full. There is a clear need for a more detailed and localized analysis and Safe Yield requirements should not be disregarded.

***Preventing an unconstitutional taking is reasonable and in the public interest***

The Intervenors appreciate the Hearing Officer's analysis of whether mere approval of the Proposal constitutes an unconstitutional taking and appreciate the lack of precedent or guidance on the point of proactively preventing regulatory action that will result in an unconstitutional taking. The Intervenors believe both the inverse condemnation and takings analysis are relevant to determining whether the Proposal is reasonable and serves the public interest. The Intervenors understand the Hearing Officer may not be in the position, and precedent may not support declaring a preemptive taking; however, the ultimate constitutional issues are some of many factors to be considered in evaluating the reasonableness and public interest of the proposed modifications.

### ***Drought Planning***

The Hearing Officer expressed appreciation for the City's efforts to prepare for an extreme drought; while also acknowledging the Proposal is not the City's exclusive option should such a need arise. Many people, including the Intervenors, do not have a guaranteed source of water during times of extreme drought. The Intervenors support further discussion to plan for an extreme drought that contemplates the needs of all water users across the state.

### ***Need for Permit Conditions***

The Intervenors recognize the Chief Engineer may elect not to follow the Hearing Officer's well-reasoned and well-articulated Recommendations. The Division has made it abundantly clear through this process that the Proposal has the full support of the Division. In the event the Chief Engineer is of the same belief, even after reviewing the Recommendations, we urge the Chief Engineer to follow the appropriate statutory procedures consistent with Rules and Regulations of the Kansas Water Appropriation Act. There remain numerous issues to be addressed beyond a simple approval, including appropriate permit conditions to protect the public interest and address the likely impairment that would occur.

### ***Conclusion***

The Intervenors have the utmost respect for the Recommendations submitted by the Hearing Officer and appreciate the respect shown by the Hearing Officer to all parties and the public during this lengthy and difficult public hearing on such an important matter while also dealing with the challenges of the Covid pandemic.

The Intervenors ask the Chief Engineer to please adopt the Recommendations.

Respectfully submitted,

*/s/ Tessa M. Wendling*

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## CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that she transmitted the above and foregoing Intervenor's Comments to the Hearing Officer's Recommendations on the City of Wichita's Proposed Modification of the Aquifer Storage and Recovery Project Phase II Water Appropriation Permits by electronic mail on this 11<sup>th</sup> day of February, 2022, for filing, to [ronda.hutton@ks.gov](mailto:ronda.hutton@ks.gov) and served the same upon counsel for the other parties herein by electronic mail, this 11<sup>th</sup> day of February, 2022 addressed to:

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