

**THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS**

Before Commissioners:                      Shari Feist Albrecht, Chair  
   Jay Scott Emler  
   Dwight D. Keen

In the Matter of a General Investigation to                      )  
Examine the Legal Issues Pertaining to the                      )                      Docket No. 18-CONS-3224-CINV  
Notice Requirements for Applications, Filed                      )  
Between October 2008 and the Present,                      )                      CONSERVATION DIVISION  
Seeking Underground Injection of Salt Water                      )  
Pursuant to K.A.R. 82-3-402.                      )

**ORDER ON SIERRA CLUB, ET AL's PETITION TO INTERVENE AND ON MOTION  
TO FILE OUT OF TIME, *INSTANTER***

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

**Background**

1.            On November 21, 2017, the Commission opened a general investigation to examine the legal issues pertaining to the notice requirements for applications, filed between October 2008 and the present, seeking underground injection of salt water pursuant to K.A.R. 82-3-402.<sup>1</sup>

2.            On March 27, 2018, the Commission issued an *Order Clarifying Deadlines*, giving affected operators and interested parties who have been granted intervention until April 23, 2018, to file responsive legal briefs.<sup>2</sup> Members of the general public were also given until April 23, 2018, to submit public comments.<sup>3</sup>

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<sup>1</sup> *Order Opening General Investigation*, Ordering Clause A (Nov. 21, 2017).

<sup>2</sup> *Order Clarifying Deadlines*, Ordering Clause A (Mar. 27, 2018).

<sup>3</sup> *Id.*

3. On April 23, 2018, the Sierra Club, Douglas County, Kansas, Kathy Dowell, Tracy Brock, Larry Howard, Amy Adamson and Sarah Uher (Petitioners) filed a Petition for Intervention or Alternatively, Petition for Designation as Interested Parties and Petitioners' Merits Brief (Petition).

4. On April 23, 2018, the Petitioners filed a Motion to File Out of Time, *Instantly*, Petition for Intervention or Alternatively, Petition for Designation as Interested Parties (Motion). The Petitioners requested "that their Petition for Intervention or alternatively, Petition for Designation as Interested Parties and Merits Brief be accepted for filing *instantly*, if such is determined out of time."<sup>4</sup>

5. On May 7, 2018, Jonathan A. Schlatter, on behalf of the entities collectively designated "Operators," filed a Response in Opposition to the Petition of Sierra Club, et al., for Intervention (Response).<sup>5</sup>

6. On May 17, 2018, the Petitioners filed a Reply to Opposition to Petition for Intervention (Reply).

### **Discussion**

7. The Petitioners argued that their interests justify participation in this docket.<sup>6</sup> The Sierra Club described its organizational objectives.<sup>7</sup> According to the Petitioners, the basis for their claim to have a legal interest in this proceeding is their alleged "organizational standing" to

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<sup>4</sup> Motion, ¶ 4.

<sup>5</sup> Response in Opposition to the Petition of Sierra Club, et al., for Intervention, p. 1 (May 7, 2018).

<sup>6</sup> Petition, p. 3.

<sup>7</sup> Petition, ¶ 5.

participate.<sup>8</sup> In other words, the Petitioners believe that because Tracy Brock, Sarah Uher and Larry Howard are members of the Sierra Club and allegedly have individual standing to participate, then by virtue of their Sierra Club membership, the Sierra Club has organizational standing as well.<sup>9</sup>

8. The Petitioners asserted that the Sierra Club's advocacy on oil and gas related matters renders its participation "germane to Sierra Club's interests it seeks to protect and advance as an organization. Neither the claim asserted nor the relief requested requires the participation of individual Sierra Club members."<sup>10</sup> However, the Petitioners asserted that individual Petitioners Kathy Dowell, Larry Howard, Amy Adamson, Tracy Brock, and Sarah Uher have standing because they all have "water wells upon which [they] rel[y]" on their properties within 22 miles or less of an underground injection well "identified by Staff as having a defective published notice."<sup>11</sup>

9. The Petitioners asserted that Douglas County, Kansas, has standing because "Douglas County has a statutory duty to protect and promote the health and welfare of its residents which must include protection of water resources on which Douglas County residents rely."<sup>12</sup> The Petitioners claimed that the notice requirements under K.S.A. 55-151(c) provide "an independent basis to maintain standing in a case that deals with sufficiency of a statutorily required notice to Douglas County."<sup>13</sup> The Petitioners also argued that Douglas County has standing in this

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<sup>8</sup> Petition, ¶ 7.

<sup>9</sup> Petition, ¶ 7.

<sup>10</sup> Petition, ¶ 7.

<sup>11</sup> See Petition, ¶¶ 13-17.

<sup>12</sup> Petition, ¶ 8.

<sup>13</sup> Petition, ¶ 9.

proceeding by virtue of its protestant status in Docket Nos. 18-CONS-3195-CUIC and 18-CONS-3196-CUIC, which concern underground injection well Applications for wells in Douglas County.<sup>14</sup> Finally, the Petitioners claimed that “Douglas County . . . has standing because it is an association that has as its purposes the duties under K.S.A. 19-212 protection of county interests and Petitioners Larry Howard . . . and Amy Adamson . . . are Douglas County residents with individual standing.”<sup>15</sup>

10. The Operators’ Response alleged that “the Sierra Club parties offer a scattering of undeveloped and inapplicable legal statements and wholly unfounded legal conclusions” which “fall well short of showing” an entitlement to intervention.<sup>16</sup> The Operators rebutted the claims that, (1) Sierra Club’s organizational objective creates standing; (2) ownership of land “in distant proximity – as distant as 22 miles – to an already permitted injection well . . . creates standing;” and (3) “the existence of injection wells within [Douglas County’s] political boundaries creates standing.”<sup>17</sup> The Operators acknowledged that the Commission may grant discretionary intervention to the Petitioners, but claimed that “[t]he Sierra Club Parties’ offer no serious reason as to why justice would be served by allowing them to participate in this docket.”<sup>18</sup> The Operators alleged that the Sierra Club Parties’ requested remedy in this proceeding, namely, “the revocation of UIC permits affecting 2,111 injection wells,” demonstrates that the Sierra Club Parties will

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<sup>14</sup> Petition, ¶¶ 10-11.

<sup>15</sup> Petition, ¶ 12.

<sup>16</sup> Response, p. 3.

<sup>17</sup> Response, p. 3.

<sup>18</sup> Response, p. 4.

impair the orderly and prompt conduct of this proceeding.<sup>19</sup> The Operators also alleged that Douglas County erroneously believes it has parallel regulatory jurisdiction over injection wells.<sup>20</sup>

11. The Petitioners' Reply to the Operators' Response again addressed the issue of standing,<sup>21</sup> argued that the Petitioners are "Interested Parties" under the *Order Opening General Investigation*,<sup>22</sup> and stated that the Petitioners intervention will advance the Commission's goal of obtaining broad input on the legal questions raised by this investigation.<sup>23</sup> Specifically, the Petitioners argued that, "allowing this docket to be substantially the province of the regulated community is contrary to the objective of having broad input on the legalities related to the subject notices."<sup>24</sup> Petitioners further averred that their exclusion from this proceeding "would cause the docket to be an echo chamber where operators can be expected to minimize procedural due process at the expense of these Petitioners and the public, generally."<sup>25</sup>

### **Legal Standards**

12. The Commission shall grant intervention if the petition: (1) is submitted in writing; (2) states facts demonstrating the petitioner's legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and (3) the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.<sup>26</sup> The Commission

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<sup>19</sup> Response, p. 4.

<sup>20</sup> Response, p. 5.

<sup>21</sup> Reply, ¶¶ 2-6.

<sup>22</sup> Reply, ¶¶ 5-7.

<sup>23</sup> Reply, ¶¶ 8-11.

<sup>24</sup> Reply, ¶ 8.

<sup>25</sup> Reply, ¶ 10.

<sup>26</sup> K.S.A. 77-521(a); K.A.R. 82-1-225(a).

has discretion to grant intervention at any time where intervention is in the interests of justice and will not impair the orderly and prompt conduct of proceedings.<sup>27</sup> At any time during a proceeding, the Commission may impose limitations on an intervenor's participation, which may include limiting an intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition, limiting intervenor discovery, cross-examination and other procedures, and requiring intervenors to consolidate their participation in the proceedings.<sup>28</sup>

### **Findings and Conclusions**

13. The Commission finds that Petitioners submitted their intervention Petition in writing and properly served it, pursuant to K.S.A. 77-521(a)(1).

14. Concerning K.S.A. 77-521(a)(2), the Commission finds that Petitioners have not stated facts demonstrating their legal rights, duties, privileges, immunities or other legal interests may be substantially affected by this proceeding. Simply noting that certain persons have water wells on their property in varying proximities to wells that were approved on defective notices<sup>29</sup> does not automatically support the conclusion that such persons' legal rights and interests may be substantially affected by this proceeding. The Petitioners have provided no analysis that makes even a prima facie case that such persons' legal interests may be affected by the Commission's determination in this proceeding.

15. Given that such persons have shown no legal interest in this case, their membership in the Sierra Club provides no ground for the Sierra Club's intervention.<sup>30</sup> The Sierra Club's appeal

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<sup>27</sup> K.S.A. 77-521(b); K.A.R. 82-1-225(b).

<sup>28</sup> K.S.A. 77-521(c); K.A.R. 82-1-225(c).

<sup>29</sup> See Petition, ¶¶ 13-17.

<sup>30</sup> See Petition, ¶ 7.

to the three part standing test under Kansas case law<sup>31</sup> is mistaken because the different test provided under K.S.A. 77-521(a) is the applicable test for interventions, and the Sierra Club has not met that test.

16. The Commission finds that Douglas County's alleged authority to protect county property and promote the health and welfare of its residents<sup>32</sup> does not lead to the conclusion that Douglas County's legal interests in fulfilling those duties may be substantially affected by a proceeding on the legalities of proper notice for underground injection wells, over which Douglas County has no jurisdiction.<sup>33</sup> Moreover, absent some legal analysis, it does not follow from the Commission's duty to make available to the clerk of any county in which a well will be drilled information related to the intent to drill for such well<sup>34</sup> that Douglas County's legal rights and interests will be substantially affected by this proceeding on publication notice. The same is true with respect to Douglas County's participation in Docket Nos. 18-CONS-3195-CUIC and 18-CONS-3196-CUIC.<sup>35</sup> The Petitioners' conclusions on these points amount to unsubstantiated statements. In addition, the three part standing test mentioned in the previous paragraph is no more applicable for Douglas County's intervention request than it is for the Sierra Club.

17. Although the Petitioners do not meet the statutory requirements for mandatory intervention, the Commission has discretion to grant intervention upon a determination that the Petitioners' intervention is in the interests of justice and will not impair the orderly and prompt

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<sup>31</sup> See e.g. *Families Against Corp. Takeover v. Mitchell*, 268 Kan. 803, 811 (2000).

<sup>32</sup> See Petition, ¶ 8.

<sup>33</sup> See K.S.A. 74-623(a).

<sup>34</sup> See K.S.A. 55-151(c).

<sup>35</sup> See Petition, ¶¶ 10-11.



conduct of the proceedings.<sup>36</sup> The Commission agrees with the Petitioners that it is logical and just to grant their intervention,<sup>37</sup> particularly in light of the Commission's desire to have broad input and the fact that apart from the Petitioners' intervention and input, the docket would be largely "an echo chamber."<sup>38</sup> Moreover, given that discovery has not been a part of this proceeding and a hearing appears unlikely, the Commission finds that the Petitioners' intervention will not impair the orderly and prompt conduct of this proceeding. Thus, the Commission in its discretion grants the Petitioners full intervention pursuant to K.S.A. 77-521(b) and K.A.R. 82-1-225(b).<sup>39</sup>

18. The Commission finds the Petitioners' request for intervention was not filed out-of-time, and thus, their Motion to File Out of Time, *Instante*, is moot.

19. The Petitioners will be added to the mailing list. Service of electronic notices, pleadings, testimony, orders, communications, and other documents should be directed to the following:

Robert V. Eye  
Robert V. Eye Law Office, L.L.C.  
4840 Bob Billings Pky, Suite 1010  
Lawrence, Kansas 66049  
785.234.4040 Phone  
785.749.1202 Fax  
bob@kauffmaneye.com

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<sup>36</sup> See K.S.A. 77-521(b).

<sup>37</sup> See Petition, ¶¶ 8, 11.

<sup>38</sup> Petition, ¶¶ 8, 10.

<sup>39</sup> The Commission also grants the Petitioners' request to take administrative notice of Douglas County's Letter of Objection in Docket Nos. 18-CONS-3195-CUIC and 18-CONS-3196-CUIC.



**THEREFORE, THE COMMISSION ORDERS:**

A. Sierra Club; Douglas County, Kansas; Kathy Dowell; Tracy Brock; Larry Howard; Amy Adamson and Sarah Uher (Petitioners) are granted intervention.

B. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).<sup>40</sup>

C. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it deems necessary.

**BY THE COMMISSION IT IS SO ORDERED.**

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 06/14/2018



Lynn M. Retz  
Secretary to the Commission

MJD

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<sup>40</sup> K.S.A. 55-162; K.S.A. 55-606; K.S.A. 55-707; K.S.A. 77-503(c); K.S.A. 77-531(b).

## CERTIFICATE OF SERVICE

18-CONS-3224-CINV

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of electronic service on 06/14/2018.

KEITH A. BROCK, ATTORNEY  
ANDERSON & BYRD, L.L.P.  
216 S HICKORY  
PO BOX 17  
OTTAWA, KS 66067  
Fax: 785-242-1279  
kbrock@andersonbyrd.com

DAVID E. PIERCE  
DAVID E. PIERCE  
4133 NW Brickyard Road  
Topeka, KS 66618  
david.pierce@washburn.edu

JOSEPH SCHREMMER, ATTORNEY  
DEPEW GILLEN RATHBUN & MCINTERR. LC  
8301 EAST 21ST ST. NORTH, SUITE 450  
WICHITA, KS 67206-2936  
joe@depewgillen.com

CHARLES C STEINCAMP  
DEPEW GILLEN RATHBUN & MCINTERR. LC  
8301 EAST 21ST ST. NORTH, SUITE 450  
WICHITA, KS 67206-2936  
Fax: 316-265-3819  
chris@depewgillen.com

KARL N. HESSE  
FOULSTON SIEFKIN LLP  
1551 N. Waterfront Parkway  
Suite 100  
Wichita, KS 67206  
khesse@foulston.com

ROBERT J. McFADDEN, ATTORNEY  
FOULSTON SIEFKIN LLP  
1551 N. Waterfront Parkway  
Suite 100  
Wichita, KS 67206  
rmcfadden@foulston.com

JOHN T. BIRD  
GLASSMAN BIRD POWELL, LLP  
200 W. 13th Street  
PO Box 727  
Hays, KS 67601  
jtbird@haysamerica.com

KARL F. HIRSCH  
Hirsch, Heath & White, PLLC  
901 CEDAR LAKE BLVD  
OKLAHOMA CITY, OK 73114-7813  
khirsch@hhwlawfirm.com

MICHAEL DUENES, ASSISTANT GENERAL COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD RD  
TOPEKA, KS 66604  
Fax: 785-271-3354  
m.duenes@kcc.ks.gov

JONATHAN R. MYERS, LITIGATION COUNSEL  
KANSAS CORPORATION COMMISSION  
Conservation Division  
266 N. Main St. Ste. 220  
WICHITA, KS 67202-1513  
Fax: 316-337-6211  
j.myers@kcc.ks.gov

## CERTIFICATE OF SERVICE

18-CONS-3224-CINV

ROBERT V. EYE, ATTORNEY AT LAW  
KAUFFMAN & EYE  
4840 Bob Billings Pkwy, Ste. 1010  
Lawrence, KS 66049-3862  
Fax: 785-749-1202  
bob@kauffmaneye.com

LANE PALMATEER, ATTORNEY  
LANE R. PALMATEER  
801 E. Douglas Ave., 2nd Flr.  
Wichita, KS 67202  
lrpalmateer@gmail.com

JEFF KENNEDY  
MARTIN, PRINGLE, OLIVER, WALLACE & BAUER, LLP  
100 N. Broadway  
Suite 500  
Wichita, KS 67202  
Fax: 913-491-3341  
jkennedy@martinpringle.com

STANFORD J. SMITH, JR., ATTORNEY  
MARTIN, PRINGLE, OLIVER, WALLACE & BAUER, LLP  
100 N BROADWAY STE 500  
WICHITA, KS 67202  
Fax: 316-265-2955  
sjsmith@martinpringle.com

KAREN K. MCILVAIN  
MCILVAIN LAW OFFICE, LLC  
PO Box 703  
Madison, KS 66860  
mcilvainlaw@gmail.com

JONATHAN A. SCHLATTER, ATTORNEY  
MORRIS LAING EVANS BROCK & KENNEDY CHTD  
300 N MEAD STE 200  
WICHITA, KS 67202-2745  
Fax: 316-262-6226  
jschlatter@morrislaing.com

DAVID BENGSTON  
STINSON LEONARD STREET LLP  
STINSON LEONARD STREET LLP  
1625 N. Waterfront Parkway, Ste 300  
Wichita, KS 67206  
david.bengston@stinson.com

AMY FELLOWS CLINE, ATTORNEY  
TRIPLETT, WOOLF & GARRETSON, LLC  
2959 N ROCK RD STE 300  
WICHITA, KS 67226  
Fax: 316-630-8101  
amycline@twgfirm.com

TIMOTHY E. MCKEE, ATTORNEY  
TRIPLETT, WOOLF & GARRETSON, LLC  
2959 N ROCK RD STE 300  
WICHITA, KS 67226  
Fax: 316-630-8101  
temckee@twgfirm.com

KENNETH L. COLE  
WOELK & COLE  
PO Box 431  
Russell, KS 67665  
woelkandcole@hotmail.com

/s/ DeeAnn Shupe  
DeeAnn Shupe

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