

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

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

In the Matter of the Application of Midstates
Energy Operating, LLC to Authorize Injection of
Saltwater into the Squirrel Formation at the
Thrasher Wells #I-5, #I-4, and #I-3, and to
Increase the Injection Pressure on All Wells
Encompassed by Permit E-31965, Located in
Section 25, Township 13 South, Range 20 East,
Douglas County, Kansas

Docket No. 19-CONS-3173-CUIC

Conservation Division

License No.: 35503

RESPONSE TO MOTION TO DISMISS PROTESTS

Protestant Judith L. Wells asserts standing in the matter of the Midstates Application to add injection permits and pressure to the Thrasher lease in Douglas County and the “cure” of the revoked permit for Thrasher #I-5 that was illegally reinstated on Docket No. 18-CONS-3196-CUIC.

1. Judith L. Wells’ pre-filed testimony asserts that the conservation division has failed to collect adequate information regarding the potential contamination from the additional injection wells and increased injection pressure. Judith L. Wells’ objection and request for hearing received November 13, 2018 in Wichita asserts additional failures by the conservation division to enforce statutes and their own regulations to protect the usable water of the state from actual or potential pollution from any well, as required by K.S.A. 55-152(a). Judith L. Wells has prima facie standing to participate in the evidentiary hearing.

2. In Board of Sumner County v. Bremby, Supreme Court of Kansas case 96,658, 286 Kan. 745 (Kan. 2008), the court inferred from arguments by petitioner Tri-County that the failure of the KDHE to collect adequate information regarding potential contamination to approve the landfill permit, and Tri-County concerns that “if it leaks, causing contamination

to the soil, groundwater and surface water” met the standard of imminent injury. Section 763.

In *Board of Sumner County v. Bremby*, the court found that the Board of Sumner County also had standing on the basis of their claim that the proposed permit

“...could contaminate the water of the Chikaskia River, which provides a water source for some residents of Sumner County, if the site fails to meet certain regulatory and environmental standards. It appears from the face of the petition that these individuals represented by the Board would have standing to challenge the agency’s decision under the traditional injury test. Such a challenge is consistent with the Board’s charge to protect the residents of Sumner County and the challenge to the KDHE’s issuance of the permit does not require the participation of the individual residents. Based on the allegations of the petition, we conclude that the Board has standing to bring suit under the traditional association standing test.” Section 764

3. *Board of Sumner County v. Bremby* recognizes that associations and individuals have the right to challenge agency decisions granting permits that could cause contamination to soil, groundwater and surface water when agencies fail to collect adequate information regarding potential contamination.

4. *Labette Medical Center v. KDHE*, No. 116,416 decided by the Kansas Court of Appeals (2017) cited *Bremby*, 286 Kan. at 751 as the correct standard the district court should have used in its consideration of the motion to dismiss *Labette* on the basis of standing.

“Additionally, we must bear in mind that this case comes before us after the district court granted {a defendant’s} motion to dismiss. The district court’s ruling was made before commencement of discovery. Under these circumstances, we accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom. If those facts and inferences demonstrate that the appellants have standing to sue, the decision of the district court must be reversed.”

Labette also cites *Aeroflex Wichita Inc. v. Filardo*, 294 Kan 258 259, 275 P.3d 869 (2012) as the correct legal standard to apply to a standing determination at the motion to dismiss stage after discovery but prior to an evidentiary hearing. *Aeroflex* argued that it only needed to present a prima facie case and the district court should have considered the record in the light most favorable to it when ruling on the motion to dismiss. The Kansas Supreme Court ruled against the preponderance of evidence standard put forth by the appellee, *Tel-Instrument Electronic Corp.* and ruled

“Hence, we reject TIC’s arguments and conclude that, even though there was discovery

when a defendant's ...motion to dismiss for lack of personal jurisdiction is decided before trial on the basis of the pleadings, affidavits, and other written materials, and without an evidentiary hearing, any factual disputes must be resolved in the plaintiff's favor and the prima facie showing of jurisdiction." 294 Kan. at 267-70

5. Midstates' motion to dismiss protestants on the basis of standing is before the evidentiary hearing. Protestants have prima facie showing of personal jurisdiction before evidentiary hearings in precedents established by the Kansas Supreme Court. In filings on this docket and on Docket No. 18-CONS-3196-CUIC, Judith L. Wells has repeatedly expressed concerns with protection of the usable water of the state from actual or potential pollution from any well in its construction, operation, and abandonment, as required by K.S.A. 55-152(a).

6. K.S.A. 55-152(a) is the basis for commission regulations to protect groundwater and surface water. "The commission shall adopt such rules and regulations necessary for the implementation of this act including provisions for the construction, operation, and abandonment of any well and the protection of the usable water of this state from any actual or potential pollution from any well." Quasi-legislative agency standards for quasi-judicial application requiring actual and significant harm for public input into saltwater injection well permit applications fail to address the concerns that the Kansas Supreme Court accepted in Sumner County v. Bremby that potential contamination of soil, groundwater, and surface water is not addressed when a state agency fails to collect and analyze all pertinent information.

7. To reiterate information Judith L. Wells presented on Docket No. 18-CONS-3196-CUIC, including the hearing on June 26, 2018, K.S.A. 55-152(a) requires regulations to protect the usable water of this state from actual or potential pollution and does not require standing to require the commission to protect the water of the state from actual or potential pollution by following its own regulations. K.S.A. 55-152(a) requires regulations to protect the usable water of the state in the operation and abandonment of any well, but materials the oil and gas conservation division review consider construction only and fail on operation and

abandonment considerations. The conservation division has no studies on prolonged injections into small areas. The conservation division has no studies of formations to determine the allowable injection pressures that are safe to prevent fracturing by the formations injected into to prevent escape of injected saltwater into the fresh water of the state. The Wichita office policy seems to be to accept whatever injection rate and pressure the operator requests to effectively water flood, with no consideration on cumulative pressure on the formation to prevent fracturing and seepage into groundwater.

8. Judith L. Wells filed a formal complaint regarding the 243 wells Butler Petroleum abandoned in 2017 within three miles of the Thrasher lease. Docket No. 19-CONS-3204-CMSC was opened December 6, 2018 with no action other than the complaint itself online. Nearly 100 of these abandoned Douglas County wells are injection wells, but the Wichita office has taken no action to put these wells on the Abandoned Wells reports for 2018 or 2019 or to inspect or remediate issues with leaking wells and tank batteries.

9. Judith L. Wells drinks water from a water well on Section 25 within 1/2 mile of the abandoned Willoughby lease on Section 25, with three abandoned saltwater injection wells. With the exception of 5 houses immediately adjacent to the Thasher lease, no piped water is available on Section 25 and well water is the sole source of onsite drinking water.

10. The Douglas County map Judith L. Wells presented at the June 26, 2018 hearing was not accepted into evidence, but drainage leaves Section 36 (Hadl lease), is piped under County Road 458/1000, circles the Thrasher lease on the southwest quarter, and drains in part in a creek to the south of the Bondurants and west under 1057/1900 Road to join Spring Creek to drain into the Wakarusa. Another flow drains due north into the northwest quarter of Section 25, through a large pipe under 1057/1900 west to join Spring Creek and flows into the Wakarusa. The Wakarusa flows into the Kansas River, which flows into the Missouri River on its way to the Gulf of Mexico. Protestant Judith L. Wells drinks water furnished by Water District #1 in Johnson County which draws its water from the Kansas and Missouri

pumping stations.

11. K.S.A. 82a-702 Dedication of use of water. “All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.” K.S.A. 82a-703 states “Except as provided in K.S.A. 82-703a and subject to vested rights, all waters within the state may be appropriated for beneficial use as herein provided.” K.S.A. 82-703a requires minimum stream flows to be met before water can be appropriated for specific use permits. Water is plentiful in Douglas County, and no appropriations or vested rights are in force in northeast Douglas county. Ground and surface water belongs to the people of the state that is not subject to vested rights and permitted appropriations .

12. K.S.A. 55-152(a) authorizes regulations to protect the water of the state from actual or potential pollution from any oil or gas well. The public interest is served by regulations to protect the water of the state from any actual or potential pollution. Chapter 82a Waters and Watercourses requires conformity with the public interest to the end that the highest public benefit and maximum economical development may result from the use of such water, Articles 711, 712, and 733, which adds wording that plans and practices “will assure public benefit and promote public interest.”

13. K.S.A. 82a-929 State Responsibility for Water reads “The state of Kansas hereby recognizes its responsibility and jurisdiction to protect, conserve, and control all waters affecting the people of the state....” K.S.A. 82a-901 through K.S.A 82a-945 is known as the State Water Resources Planning Act. K.S.A. 82a-947. The State Water Resources Planning Act has responsibility and jurisdiction to protect, conserve and control all waters affecting the people of the state. No standards are set here to require people who want to protect the water of the state from pollution to establish actual and direct harm because the goal of statutes to protect all waters affecting the people of the state. K.S.A. 82a-943 Liberal Construction of Act reads “This act shall be construed liberally to effectuate the purposes hereof.”

14. K.S.A. 82a-901a Legislative Declaration reads “The people of the state can best achieve the proper utilization and control of the water resources of the state through comprehensive planning which coordinates and provides guidance for the management, conservation and development of the state’s water resources.” K.S.A. 82a-905 requires public hearings for the state water plan and to hear “protests or petitions of all interested persons”. K.S.A. 82a-907 lists required considerations of public health, aquatic and animal life and the general welfare of the people in formulation of the state water plan. K.S.A. 82a-927 states long-range goals and objectives of the state of Kansas for management and development of the waters of the state, including sufficient supplies of water for beneficial purposes; protection and the improvement of the water supplies of the state; the sound management, both public and private, of the surface and groundwater supplies of the state; and the prevention of pollution of the water supplies of the state.

15. K.S.A. 82a-928 reads “The policies of the state of Kansas that are deemed desirable for the achievement of the long-range goals and objectives as set forth in K.S.A. 82a-927 {enumerated in 14. above}and that shall serve as guidelines for PUBLIC CORPORATIONS AND ALL AGENCIES OF THE STATE {capitalization added} relative to their responsibilities with respect to the water resources of the state.....” include (j) the maintenance of the surface waters of the state and (k) the protection of the groundwaters of the state. K.S.A. 82a-924, in addition to K.S.A. 82a-943, requires that the state water plan act “shall be construed liberally to effectuate the purposes hereof, and the enumeration of specific powers in this act shall not operate to restrict the meaning of any general grant of power in this act or to exclude other powers comprehended in such a general grant.”

16. From the concise direction of K.S.A. 55-152(a) requiring the “commission shall adopt such rules and regulations necessary for the implementation this act including provisions for the construction, operation and abandonment of any well and the protection of the usable water of this state from any actual or potential pollution from any well” to the voluminous

directions provided in the Waters and Waterways chapter K.S.A. 82a cited above plus K.S.A. 82a-1202 ff licensing water well contractors and K.S.A. 82a-2001 ff classifying stream segments to include sustainability analyses for recreational use, the legislature has demonstrated clear and unwavering directions for protect the water of the state from actual or potential pollution. K.S.A. 82a-1020 established ground water districts “for the prevention of economic deterioration for associated endeavors”. K.S.A. 55-153 establishes the make up of the Gas and Oil Advisory Committee to include a representative of the state’s groundwater districts selected by the presidents of those districts.

17. Other statutes in Chapter 55 on oil and gas require protection of the water of the state from actual or potential pollution. K.S.A. 55-156 requires protection of usable ground water or surface water from pollution and from loss through downward drainage by plugging the well prior to abandoning any well, with a required severity level 10, nonperson felony, for failure to comply with this rule. K.S.A. 55-161 requires commission investigation of abandoned wells and based on actual or potential pollution problems to select abandoned wells to be drilled out to test the integrity of the plugs. K.S.A. 55-178 allows any person to file a complaint in writing (see Docket No. 19-CONS-3204-CMSC filed December 6, 2018 and not acted on by the commission as required by 55-179) with reason to believe that any well which has been abandoned is causing or is likely to cause pollution of any usable water strata or supply by reason of the fact that the well was not plugged. K.S.A. 55-194(a) requires reports on the 109 contamination sites identified in K.S.A. 55-191 as of 1996. K.S.A 55-194(b) requires an annual report of abandoned wells and their well sites with a multiyear pan for dealing with unplugged abandoned wells that categorizes wells according to the risk posed to public health and the environment.

18. K.S.A. 74-623 granted the state corporation commission the exclusive jurisdiction and authority to regulate oil and gas activities. The state corporation jurisdiction includes prevention and cleanup of pollution of the soils and waters of the state from oil and gas

related activities.

19. K.S.A. 82a-728(a) excludes the production and return of salt water in connection with the operation of oil and gas wells in accordance with K.S.A. 55-901 from laws against appropriation of water without a permit. No statute relating to Waters and Waterways grants special authority to the state corporation commission to exercise authority over surface or ground waters of the state. No authority relating to Waters and Waterways requires demonstration of direct and substantial harm by any person in the mandate that all water within the state of Kansas is dedicated to the use of the people of the state, K.S.A. 82a-702. Chapter 82a Waters and Waterways stipulates public interest, and public benefit and public input into the various components of the chapter. Authority in K.S.A. 74-623 grants the state corporation jurisdiction to regulate oil and gas activities, not create authority over waters and waterways. Authority in K.S.A. 55-152(a) requires the state commission to adopt rules and regulations to protect the usable water of the state from any actual or potential pollution from any well. K.S.A. 55-152(a) does not grant authority to apportion or grant vested water rights to any entity. The usable water of the state belongs to the people of the state unless water rights are vested or apportioned under statutes in K.S.A. 82a Waters and Waterways. By these standards, all water in the state is dedicated to the people of the state, so no one could be required to prove direct and substantial harm. If the usable water of the state is dedicated to the people of the state, then all people of the state have the right to question state commission saltwater injection permits that fail to collect all information required in their own regulations and legislative statutes to make a determination that approval of each saltwater injection well permit in isolation and in total injection in a field will achieve the requirement in K.S.A. 55-152(a) to regulate construction, operation, and abandonment to prevent actual or potential pollution from any well.

20. K.A.R. 82-3-135(b) requires a claim of actual property rights for groundwater and surface water that is dedicated to all people of the state unless it has been vested or

apportioned according to statutes in K.S.A. 82a Waters and Waterways. Rules for correlative rights likely do require specific claims of direct and substantial interest, but water pollution, actual or potential, does not. K.A.R. 82-3-135(b) also claims to establish property rights standards of direct and substantial interest for “waste” of oil and gas, but K.S.A. 55-605 is a statute specifically requiring that the state commission conduct a hearing on a claim by “any person” upon “any question” relating to the enforcement of K.S.A. 55-604 to make and enforce rules, regulations and orders for the prevention of waste.

21. Judith L. Wells filed for judicial review of K.A.R. 82-3-135(b) to determine its support by statutes on January 23, 2019 in Shawnee District Court, 2019CV40.

Respectfully submitted on March 18, 2019

/s/

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CERTIFICATE OF SERVICE
19-CONS-3173-CUIC

I certify that I emailed a true copy of my response to motion to dismiss to the following parties on March 18, 2019.

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