

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of TDR)
Construction, Inc. for a permit to authorize the)
enhanced recovery of saltwater into the) Docket No. 20-CONS-3079-CUIC
Moldenhauer #30 and Moldenhauer #45 wells,)
located in Franklin County, Kansas.)

MOTION TO DISMISS PROTESTS

COMES NOW the Applicant, TDR Construction Inc., by and through its attorney Keith A. Brock, Anderson & Byrd, LLP, and respectfully moves the Kansas Corporation Commission (the "Commission") for an Order Dismissing All Protests filed herein. In support of its Motion, Applicant states:

I. GENERAL REQUIREMENTS FOR VALID PROTESTS

1. K.A.R. 82-3-135b provides that "protest[s] **SHALL** include a clear and concise statement of the *direct* and *substantial* interest of the protestor in the proceeding, including specific allegations as to the manner in which the grant of the application will cause waste, violate correlative rights, or pollute the water resources of the state of Kansas." (emphasis added).

2. K.A.R. 82-3-135b clearly sets forth several mandatory components that all protest **MUST** contain in order to be valid and to secure consideration before the Commission. Such mandatory components are as follows:

- i. Include a clear and concise statement of the DIRECT and SUBSTANTIAL interest of the protestor in the proceeding; AND
- ii. Include SPECIFIC allegations as to the MANNER IN WHICH the APPLICATION will,
 - a. cause waste;
 - b. violate correlative rights; or
 - c. pollute water resources;

3. Moreover, in *Cross Bar Energy, LLC*, Docket No. 18-CONS-3689-CUIC the Commission recently issued a Final Precedential Order holding,

3. The Commission orders that, to be considered valid, all protests filed in accordance with K.A.R. 82-3-135a and K.A.R. 82-3-135b must meet the "direct and substantial interest" requirement by demonstrating that each individual protestant has "standing" under Kansas' traditional two-part test for standing. This means each protestant must demonstrate that, "[1] he or she suffered a cognizable injury and [2] that there is a causal connection between the injury and the challenged conduct." The Commission orders that this interpretation of K.A.R. 82-3-135a and K.A.R. 82-3-135b shall have precedential effect pursuant to K.S.A. 77-415(b)(2)(A).

The Commission further ruled that, "[t]he Commission's interpretation of K.A.R. 82-3-135a and K.A.R. 82-3-135b explained in paragraph three (3) above is adopted as precedential pursuant to K.S.A. 77-415(b)(2)(A)."

II. MOTION TO DISMISS ALL PROTESTS

4. The interest asserted by the Protesters in this Docket is neither direct nor substantial.

5. The Protest filed by Scott Yeargain and Polly Shteamer alleges the following three potential 'interests' entitling them to file protests in this Docket:

- i) the protesters float the Marais des Cygnes river in their canoes;
- ii) the protesters own a rental property that was leased IN THE PAST to tenants who had child that attended a school which currently obtains water from RWD 6; and
- iii) the protesters' FRIENDS drink rural water #6 water.

6. Attached hereto as Exhibit 1 is a map which highlights in blue the rough path of Wolf Creek from the vicinity of the subject lease to its confluence with the Marais des Cygnes River. Even if some water injected into the wells which are the subject of this Docket were released through some unforeseen event, such water would have to travel roughly ½ of a mile over land to reach Wolf Creek,

from there it would have to follow the meandering path of Wolf Creek for more than twelve miles, past the confluence with Spring Creek, past the confluence with Walnut Creek, past the confluence with Tauy Creek, and then flow down Ottawa Creek before it could have any possibility of reaching the Marais des Cygnes River. The likelihood of any water which is injected into the wells which are the subject of this Docket having any real possibility of reaching the Marais des Cygnes River is extremely remote and quite probably even impossible. Moreover, even if some trace of the water which is injected into the wells which are the subject of this Docket were to reach the Marais des Cygnes River such water would be diluted by its long journey down Wolf Creek and then down the Marais des Cygnes River to such a degree that it would be all but impossible to for the subject wells to impair RWD 6's ability to source its water from the Marais des Cygnes River.

7. Protesters will undoubtedly argue that if any water which is injected into the subject wells were to reach the Marais des Cygnes River, such water would make its journey at least in part through underground formations. This allegation is equally implausible as there are quite literally hundreds of existing injection and production wells located between the wells which are the subject of this Application and the Marais des Cygnes River. The removal and reinjection of fluid through these existing wells would preclude any possibility that water injected into the subject wells could reach the Marais des Cygnes River in concentrations that would impair RWD 6's ability to source its water from such river.

8. “Mere allegations of possible future injury do not meet the requirements of standing and instead, any threatened injury must be certainly impending. [citation omitted] Additionally, it is a well-recognized rule that [individuals] must assert his [or her] own legal rights and interests, and

. . . an injury must be more than a generalized grievance common to all members of the public.” [citation omitted]. See Written Findings and Recommendations issued by the Commission in *Cross Bar Energy, LLC*, Docket No. 18-CONS-3689-CUIC, ¶ 30.

9. Applicant is mindful that, “At the pre-evidentiary stage of a proceeding, a party need only demonstrate a prima facie case for standing. In other words, the Commission must determine if the facts alleged in the protest, and inferences to be made therefrom, demonstrate standing.” *Id.* at ¶ 31. However, the facts alleged in the Protest filed in this Docket certainly do not pertain to a harm that is “certainly impending” as is required to vest the Protesters with standing in this Docket. Instead the Protests in this Docket complain of an alleged injury that has no reasonable chance of ever occurring.

10. Moreover, if the Marais des Cygnes River were to become contaminated by some unforeseen occurrence it would be RWD 6 which would be directly impacted by such event as they would be forced to procure water from an alternate source. Thus, in the Protesters factual scenario RWD 6 is the only party which has a DIRECT interest in its water source. The interests of any customer of such water district would be indirect, therefore a customer of such water district would not have a “direct and substantial interest” as required by K.A.R. 82-3-135b. (Although it should be noted that Protesters are not even customers of the allegedly affected water district).

11. Moreover, even if it were assumed *arguendo* that Protesters did have a "direct and substantial interest" in this Docket, the Protests do not include specific allegations as to the manner in which the application will, pollute water resources. K.A.R. 82-3-135b requires a valid protest to contain "specific allegations as to the manner in which the application **will**," pollute water resources. (emphasis added). Simply arguing that the Marais des Cygnes River is down drainage from the subject

wells is not sufficient to demonstrate the “manner in which the application will” pollute water resources, i.e the Protests to not state the manner in which such water will allegedly make its twelve mile journey to the Marais des Cygnes River and arrive there in concentrations that would impair RWD 6's ability to source its water from such river or impair Protesters ability to float such river in their canoes.

12. More importantly however, pointing at wells on a 1920's map does not lead to the inference (and certainly does not constitute specific allegations) that such wells pose any current risk if the application filed in this Docket is granted. None of the Protests filed in this Docket indicate what the current status of the wells shown on the 1920's map are, whether they are plugged, what formation they are bottomed into, what formations are open in those well bores or whether such well bores are close enough in proximity that the subject well could communicate with them. Similarly, none of the Protests filed in this Docket state with specificity as required by K.A.R. 82-3-135b exactly how Protesters contend that water will travel into Applicant's injection wells, through the producing formation for a distance vaguely described by Protesters as “in proximity”, past the areas of low pressure created by nearby producing wells, up a well shown on Protesters's map, across dry ground for some unspecified distance, down Wolf Creek for more than twelve miles and into the Marais des Cygnes River undetected in quantities sufficient to compromise the water which is provided by RWD 6 when it leaves their treatment facility.

13. The Protests filed herein clearly do not meet the requirements of K.A.R. 82-3-135b or the guidelines set by the Commission in its Precedential Order in the Crossbar Energy Docket, and therefore such Protests are not valid and must be dismissed.

14. Moreover, Protesters admit that they are not even customers of the rural water district which will allegedly be affected. Thus, Protesters' relationship to this Docket can hardly be argued to be a "direct and substantial interest" as mandated by K.A.R. 82-3-135b. Protesters Scott Yeargain and Polly Shteamer allege that they own a rental property, and that PAST tenants of such property have sent their children to school, and that said school utilizes rural water and that said rural water is supplied by a rural water district which sources its water from the Marais des Cygnes river. This relationship is neither direct nor substantial. First, if the Marais des Cygnes River were contaminated by some event it would be RWD 6 which would incur the responsibility of obtaining an alternate water source. Neither Protesters Scott Yeargain and Polly Shteamer, nor their tenant are customers of RWD 6 that is alleged to be endangered and therefore they have no legitimate interest in this Docket. Any pollution risk would fall to RWD 6 and not to said Protesters. Protesters Scott Yeargain and Polly Shteamers' relationship to RWD 6 as a landlord of a PAST tenant who had a child which was sent to a school which currently obtains water from a potentially affected rural water district is far too removed and speculative to rise to the "direct and substantial interest" requirement mandated by K.A.R. 82-3-135b. The interest held by Protesters Scott Yeargain and Polly Shteamer and even by their PAST tenant and their FRIENDS would be at most an **INDirect** and tangential interest in the this Docket. The indirect and remote interest which Protesters Scott Yeargain and Polly Shteamer claim to have in the this Docket is simply insufficient to meet the "direct and substantial interest" requirement of K.A.R. 82-3-135b.

15. In *Kansas-Nebraska Natural Gas Co. v. State Corp. Commission*, 205 Kan. 838, 846 (1970) the Kansas Supreme Court distinguishes a "direct and substantial interest" as used in the Kansas judicial review statute from an indirect and remote interest. Furthermore, Black's Law

Dictionary defines a "direct interest" as "[a] certain, absolute interest." The remote and speculative interest alleged by Protesters Scott Yeargain and Polly Shteamer certainly does not fall within this definition.

WHEREFORE, Applicant moves the Commission for an order dismissing all protests filed in this Docket and further for an order directing Commission Staff to process the application filed herein administratively without a hearing thereon.

/s/ Keith A. Brock
Keith A. Brock, #24130
ANDERSON & BYRD, LLP
216 S. Hickory ~ P.O. Box 17
Ottawa, Kansas 66067
(785) 242-1234, telephone
(785) 242-1279, facsimile
kbrock@andersonbyrd.com
Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was sent via U. S. Mail, postage prepaid, hand-delivery, or electronically, this 27th day of September, 2019, addressed to:

Kelcey Marsh
k.marsh@kcc.ks.gov

Polly Shteamer
pshteamer@gmail.com

Jonathan Myers
j.myers@kcc.ks.gov

Scott Yeargain
j201942@yahoo.com

Robert Vincent
r.vincent@kcc.ks.gov

Lesli Baker
lesli@dbdoil.com



[Keith A. Brock](#)