

**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 Vulcan) Docket No: 19-CONS-3206-CUIC
Resources, LLC to Authorize Injection of)
Saltwater into the Squirrel formation at the) CONSERVATION DIVISION
Hatch #I-1 well, located in Section 2,)
Township 22 South, Range 13 East, Coffey) License No: 35601
County, Kansas.)

ORDER ON MOTION TO DISMISS

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 the following:

I. Background

1. On November 30, 2018, Vulcan Resources, LLC (Operator) filed an Application requesting permission to authorize injection of saltwater into the Squirrel formation at the Hatch #I-1 well located in Coffey County, Kansas.¹

2. On December 13, 2018, Susan Royd-Sykes (Protestor) filed a letter protesting the Application.² On December 18, 2018, Ms. Royd-Sykes requested a hearing.³

3. On January 8, 2019, the Commission issued an order scheduling a January 24, 2019, prehearing conference.⁴ On January 24, 2019, all parties attended the prehearing conference.

¹ Application (Nov. 30, 2018).

² Letter of Protest (Dec. 13, 2018).

³ Letter Requesting Hearing (Dec. 18, 2018).

⁴ *Order Designating Prehearing Officer and Setting Prehearing Conference* (Jan. 8, 2019).

4. On January 18, 2019, Protestor filed a *Motion to Compel Discovery Request*, and on January 23, 2019, Protestor filed a *Motion to Reschedule Jan. 24 Prehearing Conference*. Both motions are still pending before the Commission.

5. On January 24, 2019, Operator filed a *Motion to Dismiss Protest*, to which Protestor responded on January 30, 2019.

II. Legal Standards

6. Under K.A.R. 82-3-135b(a), a protest may be filed by any person having a valid interest in an application. Among other things, the protest must “include a clear and concise statement of the direct and substantial interest of the protester 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.”⁵

7. To meet the direct and substantial interest requirement, each protestant must demonstrate standing under Kansas’ traditional two-part test.⁶ In other words, each protestant must demonstrate that [1] a cognizable injury and [2] that there is a causal connection between the injury and the challenged conduct.⁷ A cognizable injury is established by showing that an individual personally suffers some actual or threatened injury as a result of the challenged conduct, and the injury must be particularized, *i.e.*, it must affect the plaintiff in a personal and individual way.⁸ Mere allegations of possible future injury do not meet the requirements of standing.⁹ Any threatened injury must be certainly impending.¹⁰ Also, an individual 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.¹¹

⁵ K.A.R. 82-3-135b(a).

⁶ Docket No. 17-CONS-3689-CUIC, *Final Precedential Order*, ¶ 3 (Apr. 5, 2018).

⁷ See *id.*

⁸ Docket No. 17-CONS-3689-CUIC, *Written Findings and Recommendations*, ¶ 29 (Mar. 29, 2018), incorporated by reference into the *Final Precedential Order*, ¶ 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

8. At the pre-evidentiary stage of a proceeding, a party need only demonstrate a prima facie case for standing, meaning the Commission must determine if the facts alleged in the protest, and inferences to be made therefrom, demonstrate standing.¹² However, once an evidentiary hearing has taken place, the burden increases to a preponderance of the evidence.¹³

III. Findings of Fact

Direct and Substantial Interest, Certainly Impending Threatened Injury

9. The Commission finds that Protestor has failed to demonstrate the first prong of the two-part standing test to meet the direct and substantial interest requirement of K.A.R. 82-3-135b(a). Under the first prong, the Protestor must show a cognizable injury. It may be a threatened injury, as alleged here, but such threatened injury must be certainly impending. Mere allegations of possible future injury do not meet the requirements of standing.

10. Protestor's protest makes the following allegations:¹⁴

- a. that her water is sourced from the City of Burlington;
- b. that Burlington's water plant is sourced on the Neosho River;
- c. that the Hatch #I-1 well site is less than 10 miles from her home;
- d. that the Hatch #I-1 is higher than surrounding creeks that feed into the Neosho River;
and
- e. that any brine or leak spillage from the Hatch #I-1 or associated tank battery that results in pollution to the Neosho or its tributaries would violate her personal right to clean and safe drinking water.

¹² *Id.* at ¶ 30.

¹³ *Id.*

¹⁴ These allegations are found in various locations within Protestor's two-page, single-spaced, paragraphs-unnumbered Letter of Protest, which does not comply with K.A.R. 82-3-219.

11. The Commission finds the above and the protest as a whole to be, at best, a mere allegation of possible future injury. Of note, there is neither an allegation that the Hatch #I-1 or its tank battery may spill, nor an allegation that such a spill may pollute the Neosho or its tributaries. Instead, there is simply an allegation that if a spill from the Hatch #I-1 polluted the Neosho, then Protestor's rights would be violated. An allegation of a violation of personal rights certainly describes an injury. But even making every possible inference *based upon the facts alleged*, it is not clear Protestor has even alleged a *threatened* injury, much less a certainly impending one.

12. Applicant's *Motion to Dismiss*, at Paragraph 6, briefly discusses the location of Burlington's water plant before arguing that Protestor's future threatened injury is not only speculative and conjectural, but physically impossible.¹⁵ The location of the water plant, however, is not in evidence. At the pre-evidentiary stage of a proceeding, the *merits* of an allegation of certainly-impending threatened injury are probably immaterial.

13. Protestor complains that Applicant's *Motion to Dismiss* misstates her argument regarding confluences of tributaries of the Neosho River.¹⁶ For the reasons described above, the Commission finds resolution of such complaint immaterial to the question of whether an allegation of certainly-impending threatened injury has been made. Protestor's *Response* also makes various factual allegations about the location of other wells, fencing and cattle, total square mileage of surface water in Coffee County, and Kansas Open Records Act requests.¹⁷ These allegations were not part of Protestor's protest, and thus are irrelevant to the question of whether the *protest* included an allegation of certainly-impending threatened injury.

¹⁵ Motion to Dismiss, ¶ 6.

¹⁶ Response to Applicant's Motion to Dismiss, Page 2.

¹⁷ *Id.*, Pages 4-6.

Direct and Substantial Interest, Generalized Grievance

14. The Commission declines to find that Protestor lacks standing because she only alleged a generalized grievance. Applicant's *Motion to Dismiss* accurately cites, and even italicizes for emphasis, the applicable rule that in order to have standing, a protestor must allege an injury that is more than a generalized grievance.¹⁸ In its *Motion to Dismiss*, however, Applicant merely makes the assertion, without any analysis, that alleged pollution of the raw water resource is no more than a generalized grievance.¹⁹

15. Without Applicant further developing its position and explaining how the rule pertains to this case, the Commission is unwilling to dismiss on these grounds.

Specific Allegations, Pollution of Water Resources

16. The Commission finds Protestor has failed to make the specific allegations required under K.A.R. 82-3-135b(a). Protestor does not make any claim of waste or violation of correlative rights in her protest, nor does she argue such in her response to the *Motion to Dismiss*.²⁰ Instead, Protestor relies solely upon pollution of water resources as her grounds for protest.²¹ Accordingly, the protest must include specific allegations as to the manner in which the grant of the application will pollute the water resources of the state of Kansas.

17. The Commission notes that Applicant's *Motion to Dismiss* does not argue that Protestor failed to include appropriate specific allegations. The Commission is not generally inclined to dismiss a protest on grounds not raised. In this case, however, the Commission finds it impossible to conclude, as it does above, that Protestor failed to allege a certainly-impending threatened injury, without it also logically following that Protestor failed to include sufficient specific allegations.

¹⁸ *Id.* at ¶ 3.

¹⁹ *Id.* at ¶ 6.

²⁰ See Protestant's Response to Applicant's Motion to Dismiss, Page 2 ("Protestant chose to address the issue of pollution . . .").

²¹ See, e.g., "As a 5th generation, life-long resident of Kansas, I have inherent rights to and guarantees of clean drinking water . . ." (Letter of Protest).

18. As discussed above, Protestor neither makes an allegation that the Hatch #I-1 or its tank battery may spill, nor an allegation that such a spill may pollute the Neosho or its tributaries. Without such allegations, it is impossible to find Protestor has alleged a manner in which granting of the application will pollute the water resources of the state of Kansas.

IV. Conclusions

19. Protestor should be dismissed from these proceedings for failure to demonstrate the first prong of the two-part standing test to meet the direct and substantial interest requirement of K.A.R. 82-3-135b(a). Specifically, Protestor failed to allege a certainly-impending threatened injury.

20. Protestor should be dismissed from these proceedings for failure to provide specific allegations as to the manner in which granting the Application will cause waste, violate correlative rights, or pollute the water resources of the state of Kansas as required under K.A.R. 82-3-135b(a).

21. Since Protestor should be dismissed from these proceedings, her *Motion to Reschedule Jan. 24 Prehearing Conference*, which at any rate was held with all parties in attendance, and her *Motion to Compel Discovery*, should be denied as moot.

THEREFORE, THE COMMISSION ORDERS:

A. The Operator's *Motion to Dismiss Protest* is granted. Staff shall process the Operator's Application accordingly.

B. Protestor's motions to reschedule the prehearing conference and to compel discovery are denied as moot.

C. 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).²²

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

²² 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).

BY THE COMMISSION IT IS SO ORDERED.

Keen, Chair; Albrecht, Commissioner; Emler, Commissioner

Dated: 02/28/2019



Lynn M. Retz
Secretary to the Commission

Date Mailed: 03/01/2019

JRM

CERTIFICATE OF SERVICE

19-CONS-3206-CUIC

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of
02/28/2019
first class mail and electronic service on _____.

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