IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KIMBERLY JUNKER, CANDICE BRANDAU LARSON, and KATHY CARTER, Petitioners, vs. IOWA DEPARTMENT OF NATURAL RESOURCES, Respondent.	NO. CVCV066246 **RESPONDENT'S REPLY TO RESISTANCE TO MOTION TO DISMISS**

Respondent Iowa Department of Natural Resources ("IDNR"), pursuant to Iowa Rule of Civil Procedure 1.431(5), hereby submits this Reply to Petitioners' Resistance to Motion to Dismiss. In support, IDNR states as follows:

PETITIONERS' AFFIDAVITS ARE OUTSIDE THE PLEADINGS AND SHOULD NOT BE CONSIDERED WHEN RULING ON RESPONDENT'S MOTION TO DISMISS

Petitioners' resistance brief recites the standards for motions to dismiss in original actions; however, this is not an original action. (Petitioners' Resistance p. 1). Although the rules of civil procedure apply to judicial review actions, this is not the case where they conflict with relevant provisions of Iowa Code chapter 17A. *Second Inj. Fund of Iowa v. Klebs*, 539 N.W.2d 178, 180 (Iowa 1995). For example, notice pleading is not applicable in judicial review proceedings since the pleading requirements of section 17A.19(4) are much more stringent than those required in an original action under Iowa Rule Civ. P. 1.403(1). *Kohorst v. Iowa State Com. Comm'n*, 348 N.W.2d 619, 621 (Iowa 1984). Thus, the notice-pleading standards cited in Petitioners' resistance are inapplicable in this action.

"A motion to dismiss tests the legal sufficiency of a plaintiff's petition." *Schaffer v. Frank*

Moyer Constr., Inc., 563 N.W.2d 605, 607 (Iowa 1997). Therefore, a motion to dismiss must be on legal grounds. *Robbins v. Heritage Acres*, 578 N.W.2d 262, 264 (Iowa. Ct. App. 1998). "[A] motion to dismiss can neither rely on facts not alleged in the petition (except those of which judicial notice may be taken) nor be aided by an evidentiary hearing." *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001). The two exhibits attached to Respondent's Motion to Dismiss are self-authenticating public documents of which the Court may take judicial notice. Iowa R. Evid. 5.902(5)-(6) (Official publications and Newspapers and periodicals); Iowa R. of Evid. 5.201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . [c]an be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). The information contained in Respondent's Exhibit 1 is corroborated in Petitioners' Petition, and the newspaper notice in Exhibit 2 is adopted as fact in Petitioners' resistance to the motion. Thus, Respondent requests the Court take judicial notice of these two exhibits.

Petitioners recite the following from the Iowa Supreme Court in their resistance brief:

> A court must decide the merits of a motion to dismiss based on the facts alleged in the petition, not the facts alleged by the moving party or facts that may be developed in an evidentiary hearing. *Berger v. Gen. United Grp., Inc.*, 268 N.W.2d 630, 634 (Iowa 1978); *Riediger v. Marrland Dev. Corp.*, 253 N.W.2d 915, 916–17 (Iowa 1977).

(Pet. Resistance p. 1). The attachment of affidavits from each of the Petitioners to the resistance brief are outside the bounds of consideration on a motion to dismiss. Each affidavit contains self-serving testimony articulating reasons why each Petitioner failed to exhaust the administrative remedies available to them. The Court may not take judicial notice of Petitioners' self-serving statements contained in the affidavits, and these affidavits are the exact kind of testimony that would be "developed in an evidentiary hearing," and may not be considered at the motion to dismiss stage. *Id.*

NO LEGAL EXCEPTION EXCUSES PETITINERS FROM EXHAUSTING THEIR ADMINISTRATIVE REMEDIES BEFORE SEEKING JUDICIAL REVIEW

The Iowa Supreme Court has held petitioners on judicial review may be excused from exhausting administrative remedies under the following circumstances:

1) when an agency action is in violation of the rulemaking procedures set forth under the APA;

2) when an adequate administrative remedy does not exist for the claimed wrong, or stated otherwise, plaintiff will suffer "irreparable injury of substantial dimension" if not allowed access to district court prior to exhausting all administrative remedies; or

3) when the applicable statute does not expressly or implicitly require that all adequate administrative remedies be exhausted prior to bringing an action in district court....

IES Util. Inc. v. Iowa Dep't of Revenue & Fin., 545 N.W.2d 536, 539 (Iowa 1996) (citations omitted). Petitioners argue the last two exceptions excuse their failure to exhaust the administrative remedies available to them; however, neither exception grants them relief.

A. Petitioners Must First Bring Their "Good Cause" Argument for Failure to Exhaust Administrative Remedies to the Agency Before Seeking Judicial Review.

Petitioners claim to have good cause to show an adequate administrative remedy does not exist for them because they did not receive actual notice of the IDNR recommendation to issue the permit. (Pet. Resistance at 2-4). The IDNR's public notice in the New Hampton Tribune, however, not only satisfied the IDNR's notice requirements, but the Petitioners still have an administrative remedy available they have not exhausted.

"Any affected person" must challenge a water use permit being issued by the IDNR by bringing a contested case within 30 days of the issuance. Iowa Code § 455B.278(2). The IDNR is not required to give actual notice of the permit to any affected person, only to give public notice of a decision to issue a permit "in a manner designed to inform persons who may be adversely affected by the permitted project or activity." *Id.* § 455B.278(1). Furthermore, the IDNR rule

implementing this provision provides this notice "may be published in a newspaper circulated in the locality of the proposed water source, or the department may use other methods of publishing the notice to ensure adequate notice to the affected public." 567 IAC 50.7(3)(a).

Petitioners' Petition states "[a] permit to withdraw up to 55.9 million gallons of water per year from the groundwater (Devonian Limestone) in Chickasaw County, Iowa, was issued to Lawler SCS Capture LLC, on May 29, 2023." (Petition ¶ 2). As New Hampton is the county seat of Chickasaw County, publishing the notice to issue the permit in the New Hampton Tribune is likely the best local source to inform people who may be adversely affected by the permit, and it is undisputedly a "newspaper circulated in the locality of the proposed water source." Petitioners argue, however, this public notice was not good enough, and the IDNR was required to "ensure that any person, such as the Petitioners herein, be given notice that they will see or hear of the IDNR's decision to issue a permit." (Pet. Resistance p. 2). This, however, is not the notice standard articulated in either statute or rule, and the IDNR notice in the New Hampton Tribune complied with the IDNR's requirement to give public notice.

In any event, even if the Court were to find the IDNR did not give sufficient public notice, or that Petitioners failed to receive actual notice, an adequate administrative remedy is still available to Petitioners once they received actual notice of the permit. Any person aggrieved by the issuance of a water use permit and fails to appeal the permit within 30 days may still appeal the permit if "the appellant shows good cause for failure to receive actual notice and file within the allowed time." 567 IAC 50.9. Rather than seeking judicial review before this Court, Petitioners were first required to make the "good cause" arguments currently proffered in their resistance brief before the EPC in a contested case action. This adequate administrative remedy is

still available to Petitioners. Therefore, Petitioners prematurely sought judicial review in this Court.

Petitioners Petition should be dismissed to allow them to exhaust the available administrative remedies before the EPC. Dismissal on this ground is consistent with the following discussion of the reasons for the "exhaustion doctrine" by the Iowa Supreme Court:

> The exhaustion requirement is both an expression of administrative autonomy and a rule of sound judicial administration. The agency is created as a separate entity, vested with its own powers and duties. The agency should be free, even when it errs, to work out its own problems. The courts should not interfere with the job given to it until it has completed its work. Premature interruption of the administrative process is no more justified than premature interruption of the trial process by interlocutory appeals. The agency, as the tribunal of first instance, should be permitted to develop the factual background upon which decisions should be based. Like the trial court, the agency should be given the first chance to exercise discretion and apply its expertness. In addition, judicial efficiency requires the courts to stay their hand while the party may still vindicate his rights in the administrative process. If he is required to pursue further agency remedies, the courts may never have to intervene.

City of Des Moines v. Des Moines Police Bargaining Unit Ass'n, 360 N.W.2d 729, 732 (Iowa 1985) (quoting B. Schwartz, *Administrative Law* § 172, at 498 (1976)).

B. The Iowa Code and IDNR Rules Expressly and Implicitly Require that Petitioners Exhaust Their Administrative Remedies Prior to Bringing an Action in District Court.

Petitioners resist Respondent's Motion to Dismiss by asserting no statute or rule required they exhaust any administrative remedy before seeking judicial review in this Court. (Pet. Resistance pp. 4-6). "Any affected person" is expressly required by statute to challenge a water use permit by bringing a contested case before the EPC. Iowa Code § 455B.278(2). Petitioners assert in their resistance brief they are "adversely affected" by the water use permit issued by the IDNR. (Pet. Resistance p. 5). The Court need not look any further to conclude Petitioners' Petition for judicial review must be dismissed because they failed to exhaust this administrative remedy.

The IDNR rule implementing this code section states that any person "aggrieved" by the initial decision may administratively appeal the water use permit. 567 IAC 50.9. Petitioners admit the statute requires "any affected person" to administratively appeal a permit decision; however, they argue the IDNR rule using the word "aggrieved" negates the statutory exhaustion requirement by replacing the word "affected" with the word "aggrieved." (Pet. Resistance p.5). Using semantical gymnastics, Petitioners claim they cannot be aggrieved by the water use permit, only adversely affected, and therefore were not required to initiate a contested case, but could appeal their claims directly to district court. (*Id.* pp. 5-6).

First, by requesting the Court overrule the explicit exhaustion requirement in the implementing statute because the language in the IDNR rule does not use the exact term as the statute is beyond this Court's authority. If the IDNR rule violates its empowering statute as Petitioners suggest, this is *ultra vires* and would invalidate the provisions of the rule, not the statute. *Haesemeyer v. Mosher*, 308 N.W.2d 35, 37 (Iowa 1981) ("To be valid, a rule adopted by an agency must be within the scope of powers delegated to it by statute."). Rather than use statutory construction to create a conflict between an administrative rule and a statute, agency rules must be construed together with the governing statute to harmonize them, using common sense and sound reason. *Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52, 56 (Iowa 1983). Thus, the IDNR rule must be read to require any "affected" person to exhaust their administrative remedies consistent with the mandate in the statute. Furthermore, it is clearly implicit in both statute and rule that no judicial review action may be filed in district court by any person, aggrieved or adversely affected, without first exhausting the available administrative remedies.

Second, Petitioners use a misleading reference to Merriam-Webster's Collegiate Dictionary (10th Ed.) to claim they cannot be "aggrieved" by the water use permit by implying the

only applicable definition of that term is for a person "suffering a denial of a legal right," and they could not fit that definition because they have no legal right to a water use permit. (Pet. Resistance p. 5). Actually, in addition to the single definition cited by Petitioners, the Merriam-Webster Dictionary includes multiple definitions for "aggrieved," including the following: (1) "troubled or distressed in spirit"; (2) "showing or expressing grief, injury, or offense"; and (3) "having interests adversely affected." *See Merriam-Webster.com dictionary*. Retrieved November 3, 2023, from https://www.merriam-webster.com/dictionary/aggrieved. All three of those dictionary definitions accurately describe the Petitioners in this action. ((*See* Petition ¶ 3) ("The Petitioners are concerned that the permit issued to Lawler SCS Capture LLC will adversely impact the sources of their drinking water.")) "Absent a statutory definition or an established meaning in the law, we give words used by the legislature their ordinary and common meaning by considering, among other things, the context in which they are used." *State v. Tarbox*, 739 N.W.2d 850, 853 (Iowa 2007). The terms "aggrieved" and "adversely affected" are not defined in Iowa Code chapters 17A or 455B; however, the common and ordinary meanings of both terms as used in both chapters give Petitioners standing to challenge the water use permit, and require they first exhaust their administrative remedies before invoking the jurisdiction of this Court.

CONCLUSION

Petitioners' Petition demonstrates they have standing to challenge the water use permit issued to Lawler SCS because they are adversely affected and aggrieved by the action. Petitioners, however, did not administratively appeal the water use permit as explicitly required by both statute and rule. IDNR rules provide them administrative relief under the circumstances if they can demonstrate "good cause" for this failure to appeal. Petitioners have not exhausted this available administrative remedy, and prematurely brought this judicial review action in district court.

Accordingly, this Court may not exercise jurisdiction in this matter until Petitioners exhaust all available administrative remedies. This judicial review action should be dismissed in its entirety.

Respectfully submitted,

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