

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

KICKAPOO TRIBE OF INDIANS OF THE )  
KICKAPOO RESERVATION IN KANSAS )  
(also known as the KICKAPOO TRIBE IN KANSAS), )  
 )  
Plaintiff, )  
 )  
vs. ) Case No. 06-2248-CM-DJW  
 )  
ARLEN LANCASTER, in his official capacity as Chief, )  
NATURAL RESOURCES CONSERVATION SERVICE, )  
UNITED STATES DEPARTMENT OF AGRICULTURE, )  
*et al.*, )  
 )  
Defendants. )  
\_\_\_\_\_ )

**MEMORANDUM IN SUPPORT OF THE MOTION TO  
DISMISS THE INDIVIDUAL BOARD MEMBERS OF  
THE NEMAHA BROWN WATERSHED JOINT DISTRICT NO. 7**

**Table of Contents**

|  |    |
|--|----|
| <b>Nature of the Case</b> .....  | 3  |
| <b>Statement of Facts</b> .....  | 5  |
| <b>Question Presented</b> .....  | 8  |
| <b>Argument and Authorities</b> .....  | 8  |
| <b>I. The Legislative Immunity doctrine bars claims against part-time local-government citizen-legislators like the individual members of the Watershed District’s Board of Directors.</b> ..... | 9  |
| <b>II. Legislative Immunity applies when local-government citizen-legislators perform state-delegated legislative functions.</b> .....   | 10 |
| <b>III. Legislative Immunity applies when citizen-legislators perform functions that are within the sphere of legitimate legislative activity.</b> .....   | 12 |
| <b>IV. The governmental function at issue, and not the motives of individual Board members, controls the application of Legislative Immunity.</b> .....  | 13 |
| <b>V. Legislative Immunity applies to local government officials’ “failure to act.”</b> .....  | 17 |
| <b>Conclusion</b> .....  | 17 |

## Cases

|   |               |
|---|---------------|
| <i>Abraham v. Pekarski</i> , 728 F.2d 167 (3d Cir. 1984) .....  | 10            |
| <i>Bogan v. Scott-Harris</i> , 523 U.S. 44 (1998).....  | <i>passim</i> |
| <i>Concerned Citizens United, Inc. v. Power &amp; Light Co., Inc.</i> , 215 Kan. 218, 523 P.2d 755 (1974)<br>.....  | 10            |
| <i>Fry v. Bd. of Cnty. Cmm'rs of Cnty. of Baca</i> , 7 F.3d 936, 942 (10th Cir. 1993) .....   | 12, 14, 15    |
| <i>Fry v. Bd. of Cnty. Cmm'rs of Cnty. of Baca</i> , 837 F. Supp. 330 (D. Colo. 1991) <i>aff'd</i> , 7 F.3d 936<br>(10th Cir. 1993) (citing <i>Abraham v. Pekarski</i> , 728 F.2d 167, 174 (3d Cir. 1984))..... | 10            |
| <i>Kamplain v. Curry Cnty. Bd. of Cmm'rs</i> , 159 F.3d 1248 (10th Cir. 1998).....  | 9, 12         |
| <i>Krantz v. City of Hutchinson</i> , 165 Kan. 449, 196 P.2d 227 (1948).....  | 11            |
| <i>Lake Country Estates, Inc. v. Tahoe Regional Planning Agency</i> , 440 U.S. 391 (1979).....  | 9             |
| <i>Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte Cnty./Kan. City</i> , 272 Kan. 1239, 38<br>P.3d 723 (2002) .....  | 11            |
| <i>Russell v. Town of Buena Vista, Colo.</i> , 2011 WL 288453 (D. Colo. 2011).....  | 10            |
| <i>Sable v. Myers</i> , 563 F.3d 1120 (10th Cir. 2009) .....  | <i>passim</i> |
| <i>State ex rel. Ferguson v. City of Wichita</i> , 188 Kan. 1, 360 P.2d 186 (1961) .....  | 11            |
| <i>Tenny v. Brandhove</i> , 341 U.S. 367 (1951).....  | 9, 16         |
| <i>Urban Renewal Agency of Kansas City v. Decker</i> , 197 Kan. 157, 415 P.2d 373 (1966).....   | 10            |
| <i>Winters v. U.S.</i> , 207 U.S. 564 (1908).....   | 3             |
| <i>Young Partners, LLC v. Board of Education</i> , 284 Kan. 397, 160 P.3d 830 (2007) .....  | 10, 11        |

### **Nature of the Case**

The Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas filed its Complaint (Dkt. No. 1) on June 14, 2006, and on December 23, 2011, the Tribe filed its First Amended Complaint (Doc. 154). The Tribe now asserts two principal claims against various federal and Kansas state parties.

First, the Tribe seeks recognition of a federally reserved water right as provided in *Winters v. U.S.*, 207 U.S. 564 (1908). That portion of the case has been stayed. (Dkt. No. 151, ¶ 4.)

Second, it seeks enforcement of an alleged promise by the Nemaha Brown Watershed Joint District No. 7 to exercise its power of eminent domain on behalf of the Tribe to acquire approximately 1,200 acres of land, both on and off of the Tribe's Reservation, for a multi-purpose reservoir generally referred to as the Plum Creek Reservoir as described in the 1994 Watershed Plan and Environmental Impact Statement.<sup>1</sup>

The Watershed District denies that the 1994 Watershed Plan is a binding contract and denies that it obligates the Watershed District to acquire property for the Plum Creek project or for the Tribe.

The defendants, Dexter Davis, Wayne Heiniger, Glenn Hennigan, Leo Wessel, Rodney Lierz, Jim Renyer, Roger Ploeger, David Zeit, and Rodney Heinen, are current or former elected members of the Watershed District's Board of Directors who have each been sued in both their official capacity and as individuals.

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<sup>1</sup> The 1994 Watershed Plan is Exhibit A to Steve Cadue's Declaration attached to the Tribe's Memorandum in Support of its First Motion for Partial Summary Judgment (Dkt. No. 43).

Essentially, the Tribe seeks declaratory and monetary relief, asserting that the Board members have unlawfully refused to cast votes in favor of the Watershed District's alleged obligation to condemn land for the Tribe. The relevant claims against the individual Board members are:

- That the Board members are in breach of some contractual obligation to vote in favor of the exercise of the Watershed District's eminent domain authority on behalf of the Tribe. (First Am. Compl., Dkt. No. 154, Prayer for Relief, #4.)
- That the Board members are acting *ultra vires* by refusing to fulfill their alleged obligation under State and Federal law by indefinitely tabling and refusing to vote in favor of the Watershed District's alleged obligation to exercise the Watershed District's eminent domain authority on behalf of the Tribe. (First Am. Compl., Dkt. No. 154, Prayer for Relief, #5.)
- That the Board members have refused to perform their "express obligations" under the Watershed Plan "in a timely and responsible fashion." (Dkt. No. 154, First Am. Compl., Prayer for Relief, #6.)

The basis for the Tribe's assertion that the individual Board members have an "express obligation" is unclear.<sup>2</sup> The only "obligation" the Tribe has put at issue is the Watershed District's purported obligation to condemn. There is no allegation that the individual Board members themselves possess the power of eminent domain or that the 1994 Watershed Plan imposes any direct obligations on any of them.

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<sup>2</sup> The 1994 Watershed Plan was signed by the Watershed District on May 12, 1994. Gale E. Miller, then President of the Watershed District, and V. Dean Wenger, then Secretary, signed the document on behalf of the Watershed District. None of the current members of the Watershed District Board signed or are otherwise mentioned in the document.

Local-government officials are absolutely immune from civil liability stemming from state-delegated legislative functions. Assuming, *arguendo*, that the 1994 Watershed Plan establishes some obligation on the part of the Watershed District to exercise its power of eminent domain for the Tribe, the individual members of the Watershed District's Board of Directors are immune from liability and should be dismissed.

### **Statement of Facts**

For purposes of this Motion to Dismiss only, the following facts are assumed be true:

1. The Watershed District was formed pursuant to the Kansas Watershed District Act, K.S.A. 24-1201, *et seq.* (First Am. Compl., Dkt. No. 154, ¶¶ 9 and 27.)
2. The Watershed District is a special district established under the laws of the State of Kansas for specified statutory purposes. (First Am. Compl., Dkt. No. 154, ¶ 27.)
3. Under Kansas law, the Watershed District has taxing, regulatory, and eminent domain authority and may use those powers to enter into contracts to improve, maintain, and operate works of improvement. K.S.A 24-1209. (First Am. Compl., Dkt. No. 154, ¶ 27.)
4. All of the powers granted to Kansas Watershed Districts are to be exercised by elected members of a Board of Directors composed of any odd number of such District's qualified voters. K.S.A. 24-1210.
5. Watershed District Board members are elected at annual Watershed District meetings. K.S.A. 24-1211.
6. On May 12, 1994, the Chairman of the Tribe and the President of the Watershed District signed the 1994 Watershed Plan. (First Am. Compl., Dkt. No. 154, ¶ 3.)
7. The 1994 Watershed Plan was approved by Congress in 1998. (First Am. Compl., Dkt. No. 154, ¶ 127.)

8. In the 1994 Watershed Plan, the Tribe, the Watershed District, and other State and Federal entities made commitments and agreed to perform specific functions that would lead to the construction of the Plum Creek Reservoir. (First Am. Compl., Dkt. No. 154, ¶ 127.)

9. The 1994 Watershed Plan, and the respective duties and responsibilities of each party provided therein, are clear and unambiguous. *Id.*

10. It has been the intention of all parties to the 1994 Watershed Plan since its inception to fulfill all terms and conditions of the Plan. (First Am. Compl., Dkt. No. 154, ¶ 128.)

11. The Watershed District made an express commitment to condemn the fee lands within the Plum Creek project boundaries if the Tribe's efforts to purchase such property fail, as they have so far. (First Am. Compl., Dkt. No. 154, ¶ 82.)

12. The 1994 Watershed Plan did not give the Watershed District an option to vote to reject the 1994 Watershed Plan or its obligations under it. (First Am. Compl., Dkt. No. 154, ¶ 128.)

13. The U.S. Department of Agriculture's Natural Resources Conservation Service and the Kansas State Conservation Commission have expended substantial financial resources within the upper Delaware River watershed since the execution of the 1994 Watershed Plan, building water impoundments and other water storage facilities and land treatment measures. (First Am. Compl., Dkt. No. 154, ¶ 129.)

14. As a direct consequence, the Watershed District and its Board members have received and will continue to receive all the benefits of the 1994 Watershed Plan. *Id.*

15. To date, the Tribe has performed all of its obligations under the 1994 Watershed Plan. (First Am. Compl., Dkt. No. 154, ¶ 130.)

16. Private landowners within the Plum Creek Project, with one exception, have refused the Tribe's offers to purchase or exchange property, thus necessitating the exercise of eminent domain authority by the Watershed District. *Id.*

17. Since January of 2004, the officers and members of the Board have indefinitely tabled the decision to condemn or not condemn the property that is necessary to construct the Plum Creek Reservoir. (First Am. Compl., Dkt. No. 154, ¶ 131.)

18. On July 24, 2003, the Watershed District held a special meeting to discuss the use of its eminent domain authority on behalf of the Tribe. (First Am. Compl., Dkt. No. 154, ¶ 78; NBJWD00822, July 24, 2003.)

19. At that 2003 meeting, the Board members passed a resolution to not proceed with condemnation and to revisit the issue once the Tribe made an effort to acquire the necessary lands by negotiating with local landowners. (First Am. Compl., Dkt. No. 154, ¶ 78.)

20. The motion was unanimously approved by the Watershed District Board. (First Am. Compl., Dkt. No. 154, ¶ 78.)

21. In January of 2004, several public information sessions and presentations were provided by the Tribe to answer the public's questions and hear their concerns regarding the Plum Creek Project. (First Am. Compl., Dkt. No. 154, ¶ 79.)

22. In January of 2004, the Watershed District met and indefinitely tabled a resolution to "proceed with condemnation at this time." (First Am. Compl., Dkt. No. 154, ¶ 80.)

23. This decision to not proceed with the Watershed District's obligations, and other specific conduct undertaken by the Board and its members, breaches the 1994 Watershed Plan and is *ultra vires* of the Board's obligations under Federal and State law. (First Am. Compl., Dkt. No. 154, ¶ 131.)

24. Pursuant to the express terms of the 1994 Watershed Plan all parties thereto expressly agreed to assume responsibility for all increased costs associated with the implementation of the 1994 Watershed Plan resulting from the failure to perform obligations and commitments in a timely fashion.<sup>3</sup> (First Am. Compl., Dkt. No. 154, ¶ 135.)

25. Under these express terms, the Watershed District and the Board members have, by virtue of their refusal to perform express obligations under the 1994 Watershed Plan in a timely and responsible fashion, directly caused the costs to the Tribe associated with the various phases of the completion of the projects under the 1994 Watershed Plan to increase substantially. (First Am. Compl., Dkt. No. 154, ¶ 136.)

### **Question Presented**

Are the elected members of the Watershed District's Board of Directors absolutely immune from civil liability when carrying out state-delegated legislative functions?

### **Argument and Authorities**

The individual members of the Watershed District's Board of Directors are entitled to legislative immunity and legislative immunity is absolute. Because the power of eminent domain is quintessentially governmental in nature, reserved only to a sovereign, the decision to exercise or refrain from exercising that power is a purely legislative act. The Watershed District Board members' decision not to exercise the Watershed District's condemnation power for the Tribe was made solely in furtherance of their positions as duly elected members of the Board of Directors of the Watershed District and was consistent with the purposes of Watershed Districts as legislatively defined by the State of Kansas. As such, the Board members are entitled to

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<sup>3</sup> As stated in a previous footnote, the individual members of the Watershed District's Board of Directors did not sign the 1994 Watershed Plan and have assumed no personal obligations in that document.



absolute legislative immunity. The Court should dismiss the Tribe's claims against the individual Board members.

**I. The Legislative Immunity doctrine bars claims against part-time local-government citizen-legislators like the individual members of the Watershed District's Board of Directors.**

The concept of legislative immunity is “well established in [the Tenth] circuit” and “is not limited to members of Congress and state legislators, but extends to local-government legislators.” *Kamplain v. Curry Cnty. Bd. of Cmm'rs*, 159 F.3d 1248, 1250 (10th Cir. 1998). The Tenth Circuit has taken an expansive view of legislative immunity, and the Supreme Court has cautioned, “that judges should not lightly conclude that a legislative body has exceeded legislative power.” *Sable v. Myers*, 563 F.3d 1120, 1124 (10th Cir. 2009) (citing *Tenny v. Brandhove*, 341 U.S. 367, 378 (1951)).

The public policy behind the doctrine of legislative immunity is well settled and was clearly expressed by the Supreme Court in *Bogan v. Scott Harris*, 523 U.S. 44, 52 (1998): “Regardless of the level of government, the exercise of legislative discretion should not be inhibited by . . . the fear of personal liability. Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace.” (Internal citations omitted.)

“Moreover, certain deterrents to legislative abuse may be greater at the local level than at other levels of government. Municipalities . . . can be held liable for constitutional violations, whereas States and the Federal Government are protected by sovereign immunity.” *Bogan*, 523 U.S. at 53 (citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n.26 (1979)).

Finally, “the ultimate check on legislative abuse – the electoral process – applies with equal force at the local level, where legislators are often more closely responsible to the electorate.” *Bogan*, 523 U.S. at 53.

## **II. Legislative Immunity applies when local-government citizen-legislators perform state-delegated legislative functions.**

Local-government officials are entitled to absolute legislative immunity when they perform legislative functions. With respect to local-government entities, “[t]he question of whether a governing body’s action is legislative . . . is an issue of state law.” *Fry v. Bd. of Cnty. Cmm’rs of Cnty. of Baca*, 837 F. Supp. 330, 335 (D. Colo. 1991), *aff’d*, 7 F.3d 936 (10th Cir. 1993) (citing *Abraham v. Pekarski*, 728 F.2d 167, 174 (3d Cir. 1984) (“It is only with respect to the legislative powers *delegated to them by the state legislatures* that the members of governing boards of municipal corporations enjoy legislative immunity”) (emphasis added)). “Therefore, the first inquiry must be whether local officials claiming immunity were performing delegated legislative functions.” *Russell v. Town of Buena Vista, Colo.*, 2011 WL 288453, at \*5 (D. Colo. 2011).

“The power of eminent domain is an inherent power which is vested exclusively in the sovereign – the State of Kansas. Implicit in, and as an integral part of, that power is the authority in the sovereign, acting through the legislature, to delegate the power of eminent domain.” *Concerned Citizens United, Inc. v. Power & Light Co., Inc.*, 215 Kan. 218, 226, 523 P.2d 755, 762 (1974). *Young Partners, LLC v. Bd. of Educ.*, 284 Kan. 397, 404, 160 P.3d 830, 837 (2007). The legislature has the power, within constitutional limits, to delegate eminent domain power to any public authority. *Urban Renewal Agency of Kan. City v. Decker*, 197 Kan. 157, 162, 415 P.2d 373, 376 (1966).

In *Young Partners, supra*, the Court said that:

the power of eminent domain is an inherent power which is vested exclusively in the sovereign – the State of Kansas. We have explained that implicit in, and as an integral part of, that power is the authority in the sovereign, acting through the legislature, to delegate the power of eminent domain. Such power may be delegated by the legislature to any public authority to be exercised as directed. The power of eminent domain can only be exercised by virtue of a legislative enactment. The right to appropriate private property to public use lies dormant in the state until legislative action is had, pointing out the occasions, modes, conditions and agencies for its appropriation.

284 Kan. at 404–05, 160 P.3d at 837–38 (internal quotes and citations omitted).

Kansas courts have long held that the exercise of eminent domain is a “typical governmental function[] of a municipality.” *Krantz v. City of Hutchinson*, 165 Kan. 449, 454, 196 P.2d 227, 231 (1948). “[T]he power of eminent domain may be exercised only on the occasion and in the mode and manner prescribed by the legislature.” *Nat’l Compressed Steel Corp. v. Unified Gov’t of Wyandotte Cnty./Kan. City*, 272 Kan. 1239, 1255, 38 P.3d 723, 735 (2002). And “[s]tatutes conferring and circumscribing the power of eminent domain must be strictly construed.” *Id.* at 1255.

*State ex rel. Ferguson v. City of Wichita*, 188 Kan. 1, 7–8, 360 P.2d 186, 191 (1961) involved the validity of a contract that provided that the City of Wichita was to be furnished a municipal water supply from a reservoir to be constructed by the United States. In *dicta*, the Court stated: “The underlying historical rule is that eminent domain is one of the attributes of sovereignty and that such power must and may be exercised only by the sovereign for its sole benefit.”

The Kansas legislature has expressly delegated the power of eminent domain to the Watershed District. K.S.A. 24-1209 (stating that Watershed Districts have the power “[t]o acquire land and interests in land by . . . eminent domain”). The decision to exercise or refrain

from exercising the Watershed District's power of eminent domain for the Tribe is clearly a legislative activity.

**III. Legislative Immunity applies when citizen-legislators perform functions that are within the sphere of legitimate legislative activity.**

“Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity.” *Sable v. Myers*, 563 F.3d 1120, 1123 (10th Cir. 2009) (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)). An action is legitimate legislative activity when the “legislative process was at work” and when the officials’ action was related to the business before the legislative body. *Kamplain v. Curry Cnty. Bd. of Cmm’rs*, 159 F.3d 1248, 1251 (10th Cir. 1998) (citing *Powell v. McCormack*, 395 U.S. 486, 502 (1969)).

Many factors are used to determine whether an act is legislative, including: (1) whether voting was present; (2) whether integral steps in the legislative process were present, such as introducing a budget or signing a law; (3) whether the decision was a discretionary, policymaking decision; and (4) whether the act took place “in a field where legislators traditionally have power to act.” *Bogan*, 523 U.S. at 55–56.

In addition, in *Fry v. Bd. of Cnty. Cmm’rs of Cnty. of Baca*, the Tenth Circuit discussed additional indicia of the legislative process. For example, the legislative process is “at work” if the issue was of wide public interest and debate and the legislative decision was made following an open public meeting in which all parties were heard. 7 F.3d 936, 942 (10th Cir. 1993).

Here, the Tribe alleges that the Board members improperly voted against condemnation and further breached the Watershed District's obligations by “indefinitely” tabling the question of whether to undertake condemnation proceedings for the Tribe. However, the Board members’ decision bears all of the hallmarks of an act within the sphere of legitimate legislative activity.

On July 24, 2003, the Watershed District held a special meeting to discuss the use of its eminent domain authority on behalf of the Tribe. Tribal representatives were present at that meeting, presented their case, and requested that the Board members vote to exercise eminent domain authority for the Tribe. The Board members, in their discretion, unanimously rejected – by vote – the Tribe’s request.

The First Amended Complaint also alleges that in January 2004, the Tribe held several public information sessions and the Tribe sought to answer the public’s questions and concerns regarding the condemnation issue. Finally, the Tribe alleges that at another meeting in January 2004, the Board members decided to indefinitely table the issue of whether to proceed with condemnation.

At these meetings, voting on whether to condemn for the Tribe was precisely the business before the Watershed District. The eminent domain issue was a matter of broad public concern, as is evident from both the July 2003 and the January 2004 meetings and public information sessions, and the Tribe had numerous opportunities to plead its case.

The power of eminent domain is expressly delegated to the Watershed District and the Board members’ decision to exercise – or refrain from exercising – that power is quintessentially legislative and clearly within the “sphere of legitimate legislative activity,” thus insulating the individual Board members from liability. *Sable*, 563 F.3d at 1126.

**IV. The governmental function at issue, and not the motives of individual Board members, controls the application of Legislative Immunity.**

Legislators are “absolutely immune from suit for their legislative activities.” *Bogan*, 523 U.S. at 53. *See also State v. Neufeld*, 260 Kan. 930, 943, 926 P.2d 1325, 1335 (1996) (“[L]egislators are absolutely protected from the burden of defending lawsuits if the conduct upon which the suit is based falls within ‘the sphere of legitimate legislative activity.’” (quoting

*Stephan v. Kan. House of Representatives*, 236 Kan. 45, 57, 687 P.2d 622, 632 (1992)). This immunity provides that “whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use.” *Bogan*, 523 U.S. at 53 (internal quotations and citation omitted).

“Because legislative immunity is absolute, any individual motive which may have guided a[n official] is irrelevant.” *Fry v. Bd. of Cnty. Cmm’rs of Cnty. of Baca*, 7 F.3d at 942. Reversing a District Court decision, the Tenth Circuit noted that state law “authorizes municipalities to exercise the power of eminent domain to obtain land for public works,” and held that a city council’s decision to exercise its eminent domain authority was protected by legislative immunity notwithstanding evidence that officials may have had an improper motive. *Sable*, 563 F.3d at 1126.

In that case, a landowner alleged that city council members had commenced condemnation proceedings in retaliation for the landowner’s previous quiet title action. *Id.* at 1121–22. The District Court denied the officials’ summary judgment motion in which the city asserted that the officials were entitled to legislative immunity. *Id.* at 1123. The Tenth Circuit reversed, holding that the city council members’ decision to condemn the land was protected by legislative immunity. *Id.* at 1127.

In *Sable*, the city council sought to expand a public-works facility and needed to acquire a strip of the plaintiff’s land to do so. *Id.* at 1123. The plaintiff refused to give up the land and sued the city to quiet title. *Id.* The city then proceeded to condemn the plaintiff’s entire parcel – not just the initial strip – declaring that it needed the land. *Id.* The plaintiff claimed that the city council members were not entitled to immunity because they were retaliating against the

landowner by condemning more land than they really needed. *Id.* The plaintiff pointed to city council meeting transcripts where, after learning that the city could condemn the land if it chose to, an official exclaimed “[i]t’s good to be King.” *Id.*

Notwithstanding the allegations of improper motive, the Tenth Circuit reversed, holding that the city council members were immune and granted summary judgment for the city, noting that officials should not have to “divert their time, energy, and attention from their legislative tasks to defend litigation.” *Id.* at 1123–24 (quoting *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 733 (1967)). “Given this purpose, whether there is immunity must ‘turn on the nature of the act, rather than on the motive or intent of the official performing it.’” *Id.* at 1124 (quoting *Bogan*, 523 U.S. at 54).

This is consistent with other binding precedent, which states that once legislative immunity is found to apply, “any individual motive . . . is irrelevant.” *Fry v. Bd. of Cnty. Cmm’rs of Cnty. of Baca*,. See also *Bogan*, 523 U.S. at 54 (The court of appeals “erroneously relied on [the officials’] subjective intent in resolving the logically prior question of whether their acts were legislative.”).

There are several sound policy reasons for this doctrine. To begin with, “almost every plaintiff will perceive the [officials’] conduct as a particular act directed at violating the plaintiff’s rights.” *Sable*, 563 F.3d at 1126. This is a particularly important point for local municipal entities such as the Watershed District because “charges of improper motive are likely easier to bring at the local-government level.” *Id.* at 1127.

Moreover, “the honor and fortune that come from service in local government are slight enough that many capable candidates for municipal office would surely forego the rewards of

such service if faced with the possibility of being sued for every decision taken without public consensus.” *Id.*

Finally, as stated by the Supreme Court, “[t]he privilege would be of little value if [officials] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader or . . . a jury’s speculation as to motives.” *Tenny v. Brandhove*, 341 U.S. 367, 377 (1951).

Here, the Tribe alleges that the Board members are contractually obligated to exercise the legislative discretion delegated to them by the Legislature to cast votes in favor of exercising the Watershed District’s eminent domain authority on behalf of the Tribe and that the Board members engaged in “behind the scenes activity” to the detriment of the Tribe. (First Am. Compl., Dkt. No. 154, ¶ 109.) The Tribe also alleges that the conduct of the Board members was “*ultra vires* their obligations under federal and state law.” (First Am. Compl., Dkt. No. 154, ¶ 131.)

Though the Board members deny these allegations, whether they are true is immaterial for purposes of legislative immunity. Legislative immunity turns on the nature of the act – the exercise of the Watershed District’s eminent domain authority – not on the motive or intent behind the Board members’ decision-making process.

Kansas law authorizes the Watershed District to exercise the power of eminent domain in certain circumstances. K.S.A. 24-1209, 24-1201a. The Tribe seeks to compel the Watershed District to exercise this discretionary legislative power for the Tribe and the Board members, in their discretion, have so far chosen not to do so. The Board members’ decisions were undoubtedly an exercise of discretion regarding a matter of public policy and they should



therefore be immune from liability for that decision. The individual Board members are entitled to legislative immunity and should be dismissed.

**V. Legislative Immunity applies to local government officials’ “failure to act.”**

In *Sable*, the plaintiff also sought relief against some of the defendants for their failure to act – specifically for not halting the condemnation proceedings. *Sable*, 563 F.3d at 1126 n.2. The court rejected the plaintiff’s claim, stating that, like an official’s decision to vote against a proposal, a decision to *refuse to act altogether* is protected by legislative immunity as long as the action at issue was a legislative function. The court explained that “[i]t would be strange public policy indeed to inform legislators that they are immune from liability if they decide to take action but not immune if they decide that action would be contrary to the public interest.” *Id.*

The Tribe is alleging that the Watershed District breached an alleged obligation by both voting against exercising its eminent domain authority and by later refusing to act altogether on that same “obligation.” The Board members’ decision to vote against condemnation and their subsequent refusal to act on the Tribe’s request that the Watershed District use its power of eminent domain was legislative in nature and fully within the Board members’ discretion. *Sable* is directly applicable here, and as in *Sable*, this Court should hold that legislative immunity applies and dismiss the individual Board members.

**Conclusion**

Local elected officials who, as here, serve the public on a part-time basis are entitled to immunity for discretionary decision making, particularly for decisions that involve the exercise of purely governmental powers delegated to them by the Kansas Legislature. The individual Board member’s decisions to cast their votes in favor of motions to refrain from exercising the

Watershed District's power of eminent domain are completely within the sphere of legitimate legislative activity that entitles them to absolute immunity. Dismissing the elected members of the Watershed District's Board of Directors does not adversely affect the Tribe's claim that the Watershed District, as an entity, is somehow obligated to exercise its condemnation authority to acquire land for the Plum Creek project.

Respectfully submitted,

s/David M. Traster

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#### **CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of February, 2012, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system that will send notice of electronic filing to the following:

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