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STATE OF KANSAS
BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE

In the Matter of the City of Wichita's	)	
Phase II Aquifer Storage and Recovery Project	)	**Case No. 18 Water 14014**
In Harvey and Sedgwick Counties, Kansas.	)	

Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.

MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF THE CITY

COMES NOW the Equus Beds Groundwater Management District Number 2 (hereinafter "the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., Leland Rolfs of Leland Rolfs Consulting, and David Stucky, with its Motion in Limine to Exclude Expert Testimony of the City. In support of said Motion, Movant states as follows:

I. Background

1. The City of Wichita (hereinafter "the City") submitted "expert" "reports" on February 15, 2019.
2. On March 12, 2018, the City submitted to the Chief Engineer of the Division of Water Resources a proposal titled "ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits" (hereinafter "the Proposal").
3. The City has developed a modified USGS Equus Beds Groundwater Flow Model (hereinafter "the Model").

4. The City's expert reports merely contain bullet points that reference different sections of the Model or different provisions in the Proposal.
5. The bullet points used by the City's experts are redundant and duplicated among multiple experts.

II. Analysis

a. Standard

In this hearing, the parties have mainly been complying with the rules of civil procedure. Thus, such an analysis is appropriate on this issue. A trial court/hearing officer has immense discretion to exclude expert testimony. "The qualification of experts and the admissibility of their testimony are discretionary matters for the trial court." *Warren v. Heartland Automotive Services, Inc.*, 36 Kan. App. 2d 758, 760 (2006). In this situation, the Chief Engineer, as the hearing officer,[1] is the "functional equivalent" of a trial court and thus has immense discretion to exclude expert testimony.

b. K.S.A. 60-226

K.S.A. 60-226 requires a party to serve an expert disclosure on the other party and then file the disclosure with the court/hearing officer. In relevant portion, K.S.A. 60-226 states as follows:

> (6) Disclosure of expert testimony. (A) Required disclosures. A party must disclose to other parties the identity of any witness it may use at trial to present expert testimony. The disclosure must state:
>
> (i) The subject matter on which the expert is expected to testify; and
>
> (ii) the substance of the facts and opinions to which the expert is expected to testify.
>
> (B) Witness who is retained or specially employed. Unless otherwise stipulated or ordered by the court, if the witness is retained or specially employed to provide expert testimony in the case, or is one whose duties as the party's employee regularly involve giving expert testimony, the disclosure under subsection (b)(6)(A) must also state a summary of the grounds for each opinion.

[1]Although it is recognized that the statutes in the Code of Civil Procedure refer to a trial court, for the purposes of this motion, the term hearing officer will be used interchangeably.

(C) Time to disclose expert testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or court order, the disclosures must be made:

(i) At least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under subsection (b)(6)(B), within 30 days after the other party's disclosure.

(D) Supplementing the disclosure. The parties must supplement these disclosures when required under subsection (e).

(E) Form of disclosures. Unless otherwise ordered by the court, all disclosures under this subsection must be:

(i) In writing, signed and served; and

(ii) filed with the court in accordance with subsection (d) of K.S.A. 60-205, and amendments thereto.

Where one fails to comply with the disclosure requirements of K.S.A. 60-226(b)(6), the expert testimony should be excluded. *Warren*, 36 Kan. App. 2d at 760-761.

In the case at hand, the City's experts failed to explain the grounds for each opinion. Rather, there are just bullet point references to broad topics. This does not satisfy the disclosure requirements of K.S.A. 60-226.

c. K.S.A. 60-456

In the 2014 legislative session, K.S.A. 60-456(b) was revised to comport with the federal standards regarding the admissibility of expert witnesses. In relevant portion, K.S.A. 60-456 reads as follows:

(a) If the witness is not testifying as an expert, the testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds: (1) Are rationally based on the perception of the witness; (2) are helpful to a clearer understanding of the testimony of the witness; and (3) are not based on scientific, technical or other specialized knowledge within the scope of subsection (b).

(b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case.

Subsection (b) now mirrors Federal Rule of Evidence 702. When Kansas evidentiary rules are patterned after federal law, Kansas courts look to federal cases to interpret the rules. *See, e.g., State v. Prine*, 297 Kan. 460, 478 (2013); *Beck-Wenzel v. Williams*, 279 Kan. 346, 349 (2005).

Consequently, Kansas has now essentially adopted the "*Daubert* Trilogy" regarding the admissibility of expert testimony. *See Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert,* the U. S. Supreme Court held that Federal Rule 702 (which is virtually identical to the new Kansas Rule) and other rules "assign to the trial judge the 'gatekeeping function' of ensuring that an expert's testimony both rests on a *reliable* foundation and is *relevant* to the task at hand." *Daubert,* 509 U.S. at 597 (emphasis added). The focus on a *Daubert* inquiry is on the underlying assumptions, principles, and methodology of an expert and not on the conclusions generated.

Numerous factors can be considered for the purposes of this analysis. Although far from an exhaustive list, some of the factors relevant to this case are as follows: 1) whether the opinions have been generated from research independent of the litigation or whether the opinions have been developed expressly for the purposes of testifying, 2) whether the expert has extrapolated from an accepted premise to an unfounded conclusion, 3) whether obvious alternative explanations have been accounted for, and 4) whether the expert is subjecting the opinion to the same standard as the expert's regular professional work outside of paid litigation consulting. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals. Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994); *Sheehan v. Daily Racing Form. Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). The proponent of expert testimony

has the burden of establishing that the potential admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

d. The City has Not Adequately Qualified Its Experts

The City has not demonstrated adequate credentials for each of its experts. Moreover, the City has not demonstrated how the credentials of each expert translated into reaching the opinions rendered. A proper *voir dire* of each expert is appropriate at the hearing, at the very least.

e. The City's Expert Opinions Are Neither Helpful nor Reliable and Do Not Meet the Standard of K.S.A. 60-456

Even if the City's "expert" witnesses had adequate credentials, any proposed testimony still does not meet the reliability and helpfulness standards of *Daubert*. The City's experts have not explained their opinions nor how they reached their opinions. Merely referencing the City's Model or the City's Proposal does not satisfy the standard of *Daubert*. Each expert must explain his or her rationale in reaching the stated conclusions. This did not occur. Further, the opinions need to be identified. The City's expert reports merely reference portions of the Proposal or Model that each expert is familiar with. This simply does not qualify to meet the *Daubert* standard. Thus, the testimony of the City's experts must be excluded.

f. The City's Expert Reports Should Be Stricken as Cumulative

Assuming for argument purposes only that the City's expert testimony could be found to be relevant and reliable, the City's expert testimony should be excluded as cumulative. "[A] trial court has the right to reject relevant testimony where the evidence is cumulative of fact established or where the probative value of the relevant evidence is outweighed by the risk of placing undue emphasis on some phase of the lawsuit with possible prejudice resulting." *Simon v. Simon*, 260 Kan. 731,741, 924 P.2d 1255 (1996), *citing Belts v. General Motors Corp.* 236 Kan. 108, 114-15, 689 P.2d 795 (1984). In this situation, the City's expert reports are mere regurgitations of the same

bullet points extrapolated to each expert. It is wholly unclear what the basis for each expert's opinions are. Moreover, the City's expert reports do not even spell out actual conclusions. Thus, the reports should be stricken.

III. Conclusion

For all the numerous reasons articulated above, Movant respectfully asks that the Chief Engineer grant its Motion in Limine excluding the expert testimony advanced by the City, and for such other relief as the Chief Engineer deems just and equitable.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian and David J. Stucky, do hereby certify that a true and correct copy of the above was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; (_x__) email; and/or (___) hand delivery on the 11th day of March, 2019, to:

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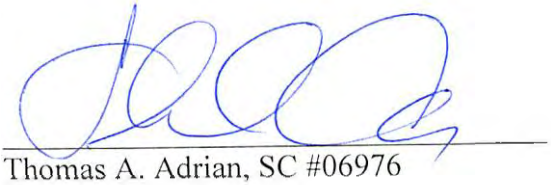

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