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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)
IN HARVEY AND SEDGWICK COUNTIES, KANSAS.) Case No. 18-Water-14014
Pursuant to K.S.A. § 82a-1901 and K.A.R. § 5-14-3a

DISTRICT'S REPLY AND CLARIFICATIONS TO VARIOUS RESPONSES OF DWR AND THE CITY TO THE DISTRICT'S MOTIONS

COMES NOW the Equus Beds Groundwater Management District Number 2 ("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 Reply and Clarifications to Various Responses of DWR and the City to the District's Motions. In support of this Reply, the District states the following:

I. Background

1. The City and DWR filed various Responses to the District's Motions. Most of these Responses were filed right on the eve of the original deadline. Although most of the Responses do not merit additional discussion and the District can simply stand behind its original Motions, a few clarifications are warranted through this Reply. These Responses filed by the City and DWR, and now addressed by the District, include, but are not limited to:
    a. City of Wichita's Response to Remaining Motions of Equus Beds Groundwater Management District No. 2 and Intervenors,

b. City of Wichita's Response to Equus Beds Groundwater Management District No. 2's Motion to Dismiss,

c. City of Wichita's Further Response to Summary Judgment Motion of Equus Beds Groundwater Management District No. 2, and

d. DWR's Consolidated Response in Opposition to GMD2's and Intervenor's Motion to Dismiss and Motion for Summary Judgment.

2. The District has now had the opportunity to fully digest these additional Responses. The District now makes the below additional Reply and Clarifications.

3. Incredibly, NONE of the Responses filed by the City or DWR cite any law to support the naked attacks on the District's Motions. The District stands by the detailed legal analysis presented in its original Motions. No legal analysis has been presented by either the City or DWR to counter the District's contention that the City's approach is not supported by current regulations or statutes.

II. There Is No Legal Framework for the City's Position

4. DWR best encapsulates the position of both the City and DWR in its Response when it argues that "relaxed rules of civil procedure and evidence" apply and that everyone should be given an "opportunity to be heard and present evidence" in "an open, formal-phase (sic) hearing." DWR concludes that these proceedings should not be decided on "procedural technicalities." Both the DWR and the City confound the gravity of the District's Motions. If what the City is attempting to do is illegal, pounds of legal process and days of an evidentiary hearing are not going to cure and resurrect the City's position. If something is illegal, neither a court nor a hearing officer can promulgate a different outcome. That is a legislative function.

5. The District is not simply arguing that the City was untimely or basing its position in some hyper-technical portion of the Rules of Civil Procedure. Rather, the District is merely pointing out that the fundamental basis for the City's position is not supported by *any* law. To the contrary, Kansas statutes and regulations elucidate the fatal nature of the City's approach. Both a court and a hearing officer must act as a gatekeeper to ensure that a hearing or trial is not unduly pursued when no lawful rudder guides the ship. DWR argues that members of the public would be "jilted" if there wasn't an opportunity for a hearing. The greater travesty is if the members of the public are deceived into participating in a multi-day hearing that is not guided by *any* law supporting the City's position. Thus, the dispositive motions of the District are properly dealt with now and decided in the District's favor.
6. Even though neither the City nor DWR cite any constitutional provisions, regulations, statutes, case law, treatises, or other legal authority to weaken the District's arguments, the City makes several cursory statements of law—without any authority—that merit some further clarification.

III. *Clawson* Governs this Matter

7. First, the City attempts to distinguish the *Clawson* case and limit it to narrow facts by arguing that only the impacted water right holder can invoke the rules in *Clawson*. This is simply a gross misstatement of the legal analysis in that case. It is true that the appellants in *Clawson* were the permit holders. However, a careful reading of *Clawson* makes it clear that it still stands for the proposition that the Chief Engineer does not have the authority to retain jurisdiction to retroactively modify a permit or water right. Period.

8. Even a quick read of *Clawson* makes it clear that the City's distinction is not supported by the legal analysis advanced by the court. The case has broad-sweeping import as the court indicated that the Chief Engineer cannot retain jurisdiction to modify a final agency action. The court writes, "In sum, the KWAA does not authorize the chief engineer to reevaluate and reconsider an approval once a permit has been issued." *Clawson v. State*, 49 Kan. App. 2d 789, 807, 315 P.3d 896 (2013). Instead, both the permit holder and the surrounding water users have expectations that this cannot occur without proper applications being filed to change or modify the water right.
9. Moreover, even despite the City's spurious distinction, the District, by virtue of various Memorandums of Understanding, was made a *party* to the City's Proposal. Consequently, the District certainly has standing to invoke the black letter law afforded by *Clawson*. The District's original arguments made in the Motions pursuant to this case remain intact and dispositive.

IV. The Takings Clause Clearly Applies

10. The City again cites no law to counter the various Takings Clause arguments presented. As this Hearing Officer knows, Takings Clause arguments are grounded in the Constitution of the United States. Of course, there cannot be any higher level of authority to support the District's position. The City does not reject the notion that a Taking will occur.
11. Rather, the City simply posits that any aggrieved party can pursue an impairment argument. It is perplexing how the impairment process can satisfy the constitutional requirement for "just compensation" as a threshold to the taking even occurring. The City's position would be the same as saying that a municipality can condemn someone's

property and the property owner's subsequent remedy is to complain if and when the use of the property is actually obstructed. Certainly, this Hearing Officer understands that such a position is contrary to hundreds of years of established jurisprudence in this area. The City wishes to stand the Takings Clause—and the Constitutional protections afforded by it—on its head.

V. All Expert Testimony Proposed by the District Is Admissible

12. The District maintains its detailed response to the City's Motion in Limine. The District also joins in the analysis that many of the gatekeeper rules in expert testimony are rooted in not prejudicing a jury. All the rationale for excluding this testimony is rooted in the distinction between a jury function and a court function. *See, e.g., Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988). The Hearing Officer in this case, having a thorough understanding of Kansas law, can determine what testimony the Hearing Officer wishes to adopt. The City's arguments attempt to insult the intelligence of this very legally qualified Hearing Officer.
13. Additionally, both the City and the Chief Engineer have previously rendered opinions on the legality of the City's actions. Certainly, as indicated before, expert testimony can be used to clarify the foundational or background facts. The current Chief Engineer's original conclusions were misguided on the legality of this action and this never should have moved forward. This effectively "opened the door" to the District's rebuttal to utilize experts with credentials similar to the Chief Engineer, to counter this foundational opinion originally offered by the Chief Engineer.
14. Multiple cases have also held that testimony on law can be utilized to help understand background facts and the development of the applicable legal principles. *See, e.g.,*

Anderson v. Suiters, 499 F.32d 1128 (10th Cir. 2007). That is what both David Pope and Tim Boese are doing in this case. Both of them were involved in the nature of this ASR Project since its inception and have a superior understanding of the development of the legal principles involved—over that of any other expert.

15. Further, as indicated before, merely applying the law to the facts, and vice versa, does not render expert testimony inadmissible. As the Tenth Circuit wrote, "We do not exclude all testimony regarding legal issues. We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Specht*, 853 F.2d at 809. Courts have consistently allowed experts to apply the facts to the law in situations very similar to this. *See, e.g., United States v. Buchanan*, 787 F.2d 477, 483 (10th Cir. 1986) (allowing an expert to apply the law to determine if a certain weapon had to be registered with the Bureau of Alcohol, Tobacco, and Firearms); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 552 (5th Cir. 1981), modified on other grounds, 459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983) (attorney expert in securities law allowed to testify that a statement in a prospectus was standard language for the issuance of a new security); *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (trial court erred in refusing to let experts on income tax law testify regarding whether failure to report funds received for sale of blood plasma constituted income tax evasion). In this case, for example, the experts have simply analyzed the City's AMC Proposal and opined that diverting surface water directly to the City and asking for groundwater credits is a fundamental difference and outside of the rules that govern the matter. Both David Pope

and Tim Boese have spent most of their careers applying these rules to the facts before them.

16. There is certainly no argument that any of the District's experts are anything other than highly qualified. The credentials of the District's experts are unparalleled in this matter.

VI. The District has Presented a Valid Argument Regarding Standing

17. The City's meanspirited attack on the District's understanding of standing seems to merit little response. The District outlined the applicable rules governing standing and indicated how they apply in this case. One of the arguments the District raised with respect to standing is that the City cannot bring this Proposal before the Hearing Officer because no new or change application was filed. Certainly, if someone went directly to court to attempt to change a zoning without first filing a zoning application with the local governing body, the court would dismiss the case for lack of standing. The same is true in this case.

VII. Procedural Due Process

18. The District acknowledges that the new Hearing Officer has given care to afford due process to all involved. Thus, admittedly, these arguments are largely moot.

VIII. The District's Arguments Are Timely

19. Finally, although the City does not advance any legal authority to support its Proposal, interestingly, the only law that the City does cite in its Responses is K.S.A. 60-256, where the City argues that the District's motions are somehow untimely. Although the City's arguments to support this position are bewildering, certainly the City's position is moot based on the new schedule established by the new Hearing Officer.

IX. The City Mischaracterizes the Facts of this Case

20. With the razor-thin attacks on the District's legal analysis dispelled with, the District will now turn to further clarifying and substantiating its assertion of the facts. Again, the District maintains that the City has simply focused on muddling the facts as the sole grounds of attacking the District's Motions. Thus, the following responses and clarifications are warranted:

    a. **Impairment.** The District's position is based on the fact that the City does not address the impairment to other water users that could occur with the proposed lowering of the minimum index levels and when the City pumps AMCs during a time of drought. The City acknowledges that the only way it addresses "impairment" in its proposal is by the bare posturing that its Proposal is beneficial because it focuses on "maintaining the maximum quantity of water possible in aquifer storage within the Equus Beds Well Field." However, the City admits that its Proposal does not address whether impairment would occur during aquifer drawdowns in a time of drought. Instead, the City contends it addressed impairment in this situation through its answer to the District's interrogatories. A review of those answers does not illuminate how the City addressed that fundamental concern. Rather, the City wrote: "It can be *estimated* that *impairment* is unlikely in non-drought conditions, with normal recharge and pumping." This statement affords little comfort. Of course impairment is less likely to occur in "non-drought conditions." But since impairment is "unlikely" at best during non-drought conditions, it is troubling to speculate what impairment could look like during an actual drought condition. The City also stated in their

answer to the District Interrogatories that "Impairment was not indicated during the modeled 1% drought with increased pumping associated with recovery of credits, as there were no observed instances where wells were shut down due to low water levels." However, the City did not model the impacts to other groundwater users if the aquifer was lowered to the City's proposed minimum index levels and also did not appear to evaluate if the non-city well yields were reduced (impaired), just rather if the wells could still pump. The City also apparently did not model the impact to domestic wells. However, the District's expert, Balleau Groundwater, Inc., presented a drought model that showed domestic wells were impaired during a 1% drought.

b. **Minimum Desirable Streamflow.** The District's position is based on the fact that the City does not take into account the impact to minimum desirable streamflow that could occur with the proposed lowering of the minimum index levels and when the City pumps AMC groundwater during a time of drought. Again, the City confounds the District's position and the facts by stating that "The Proposal also points out the capacity to maintain aquifer levels as full as possible during normal periods provides multiple local and regional water quality benefits by limiting migration of the Burrton chloride plume, limiting natural chloride intrusion from the Arkansas River, and through the enhancement of baseflow to creeks, streams and rivers." The City provided no information or data that demonstrates the impact on streamflow in the Little Arkansas and Arkansas River caused by lowering of the minimum index levels and pumping of AMC groundwater during drought times. Instead, the City has curiously focused on

conditions during non-drought times when the aquifer is at a fuller level. The District's expert Balleau Groundwater, Inc., did show that lowering of the groundwater levels to the proposed minimum index levels negatively impacted streamflow.

c. **Water Quality.** The District's position is based on the fact that the City does not address the impact to water quality that could occur with the proposed lowering of the minimum index levels and when the City pumps AMC groundwater during drought times. Again, the City focused on non-drought conditions and provided little or no information or data that shows what the impact on water quality, especially salinity migration from the Burrton Chloride plume and the Arkansas River, would be caused by lowering of the minimum index levels and pumping of AMC groundwater during drought times. The District's expert Balleau Groundwater, Inc., concluded that "If the City diverts groundwater resulting in lowering water levels to the proposed minimum index level, there is increased potential to induce migration of chloride form the areas of Burrton and the Arkansas River."

d. **Unreasonable raising or lowering of the static water level.** The District's position is based on the fact that the City's Proposal does not address the unreasonable raising or lowering of the static water level caused by the proposed lowering of the minimum index levels and when the City pumps AMCs groundwater during a time of drought. Again, the City focuses on non-drought conditions and touts the benefits of the City not purposely lowering the static water level to facilitate physical artificial recharge. While there may be some

benefits to the City not being poor stewards of the resource by purposely and intentionally lowering the groundwater level for the purpose of physically artificially recharging the aquifer to accumulate recharge credits, there is no guarantee that allowing AMCs will result in higher groundwater levels during non-drought conditions. Furthermore, the City has not shown that lowering of the minimum index levels will not result in an unreasonable lowering of the static water level. In fact, the Chief Engineer concluded in the August 8, 2005, ASR Initial Order (incorporated as conditions in the ASR Phase I and Phase II Orders) that the public interest was protected if the recharge credits could not be withdrawn when the water level was below the current minimum index levels. Moreover, the pumping of groundwater under the authority of accumulated AMCs will result in the unreasonable lowering of the static level, as the groundwater pumped is native to the aquifer and is already dedicated to other water rights owners that have a priority to divert the groundwater. The aquifer in the vicinity of the Wichita Well Field is well documented as being over-appropriated and under the AMC Proposal the City would not be adding to the groundwater supply by physically recharging treated surface water from the Little Arkansas River to accumulate AMCs, but would then be able to pump additional groundwater when needed. This is clearly not in compliance with the District's Safe Yield Regulation K.A.R. 5-22-7.

e. **Passive Recharge Credits**. The District's position is that AMCs are passive recharge credits and therefore expressly prohibited. The City's and DWR's contention is that AMCs are not passive recharge credits and are merely another

type of recharge credit that can be established under the current regulations and that AMCs are a "functional equivalent" to physical recharge credits. Clearly, AMCs are not allowed by current statutes and regulations, as the definitions and regulations pertaining to aquifer storage and recovery are predicated on physical artificial recharge of an aquifer. Additionally, no definition even exits for AMCs. Although also no definition exists for "passive recharge credits", the Chief Engineer in the August 8, 2005 ASR Phase I Initial Order provided insight into what was meant by "passive recharge" and "passive recharge credits". Clearly, these terms and subsequent conditions prohibiting passive recharge credits were meant to mean that the City could not receive recharge credits for groundwater not pumped under the City's existing groundwater rights. The City is proposing to receive AMCs by offsetting pumping of the City's existing groundwater water rights in the Equus Beds Aquifer with surface water diverted from the Little Arkansas River, treated, and sent to the City for municipal use. The City acknowledges this on page 1-2 of the Proposal when the City states: "The water left in storage as a result of utilizing Little Arkansas River flows rather than groundwater from the EBWF would be considered as an ASR Aquifer Maintenance Credit (AMC) with similar characteristics to the current ASR recharge credits." Clearly, AMCs are passive recharge credits and expressly prohibited by the ASR Phase I and Phase II Orders of the Chief Engineer.

f. With the above in mind, there is no issue of material fact precluding summary judgment. Additionally, the extraneous arguments that the City raises do not defeat the fundamental issues raised in the Summary Judgment Motion.

X. Conclusion

21. For the above reasons, the District asks that the Hearing Officer consider this additional Reply and grant all motions filed by the District.

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 3rd day of May, 2019, to:

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