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

CITY OF WICHITA'S RESPONSE TO
CLARIFICATIONS ON MOTIONS TO COMPEL

Prior to examining the details of the various, "clarified" discovery complaints advanced by Equus Beds Groundwater Management District No. 2 ("GMD2"), the City would like to highlight a few of the basic principles relating to the purposes and conduct of discovery.

Kansas courts have noted that the purpose of the discovery rules is to educate the parties in advance of trial of the real value of the claims and defenses, to expedite litigation, to safeguard against surprise, to prevent delay, to simplify and narrow the issues, and to expedite and facilitate both preparation and trial. *Unified School District No. 232, Johnson County, v. CWD Investments, LLC*, 288 Kan. 536, 566, 205 P.3d 1245 (2009).

K.S.A. 60-226(b) contains provisions on the scope and the limits of discovery, in most relevant part, as follows: "Parties may obtain discovery regarding any nonprivileged matter that is *relevant to any party's claim or defense* and *proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, *the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit* (italic emphasis added).

By the letter of the statute, it is clear that discovery requests and discovery motions that impose burdens with no corresponding benefits are not within the scope of legitimate discovery. During the

hearing on GMD2's motion, its counsel admitted GMD2 knows the facts germane to its positions in the case. This was essentially also an admission that it does not need further discovery as sought by its motions, and that the motions have been presented for an improper purpose, to impose unwarranted burdens and needlessly increase the cost of litigation. Notably, GMD2's "Clarifications on Motions to Compel" was submitted without any K.S.A. 60-211 or K.S.A. 60-226(f) signature or certification.

Turning to GMD2's "clarified" complaints, its unsigned pleading begins with the statement, "In the first set of Interrogatories and Request for Admissions sent to the City, the City simply objected to virtually every question contending that the questions were not capable of comprehension." This is simply untrue. The City's actual responses, submitted by GMD2 with its unsigned pleading, show that the City in fact answered all of the Interrogatories in GMD2's first set of interrogatories, and the answers, though some were made subject to stated objections, provided substantial responsive information. Also, the text of the City's various objections to those interrogatories belies GMD2's claim that the City objected to all the interrogatories on the basis that "the questions were not capable of comprehension." A number of the interrogatories were in fact answered without objection, and none of the objections stated by the City were based on the questions being incapable of comprehension.

Likewise, the City's responses to GMD2's first admission requests reflect that the City answered requests 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 22, 23, 24 and 26 *without any objections whatsoever*. As to each, the City also included an explanation of its answer because such was requested in one of GMD2's interrogatories. The remaining requests, 8, 12, 13, 16, 17, 18, 19, 20, 21 and 25, were answered subject to stated objections, and each answer was again also followed by an informative and substantive explanation of the answer. Further, with the exception of request 17, the City's objections to these requests were not made on the basis that

"the questions were not capable of comprehension." The very documents filed by GMD2 with its unsigned pleading show that its claims about the City's initial responses are not supported by fact. The degree to which GMD2's false statements conflict with the facts shown by the documents suggests that the falsehoods are intentional and born of some considerable malice.

At this juncture, it also bears mention that GMD2, in its own discovery responses, made extensive objections and generally provided less substantive responses than the City provided in answering GMD2's discovery requests (See Exhibits B, C and D to the City's Response to the Motion to Compel).

Moving past GMD2's initial complaint (which is essentially just inaccurate statements concerning the City's responses and objections), GMD2's next complaint relates to the City's response to a request in GMD2's second request for admissions, which asked about whether water would be physically injected into the aquifer "when an AMC is accumulated." GMD2 labors under a misperception as to when and how credits are "accumulated," and this error infected a number of the requests in its second request for admissions by wrapping into each of them an assumption that was not factually valid. Specifically, GMD2's requests appear to be assuming that credits (whether physical recharge credits or AMCs) are "accumulated" at the time of the pumping activity that eventually contributes to creating the credits. However, this is incorrect.

As the City pointed out in its responses and objections, the accounting process by which credits are "accumulated" is performed on an annual basis, and there is no proposal to change this in the accounting method for AMCs. This is discussed in the City's Proposal, which states:

> Recharge credits would be accrued annually and cumulative up to a maximum total for the BSA of 120,000 AF. A recharge credit storage cap of 120,000 AF is approximately equal to the volume of groundwater required to fill the aquifer between the 1993 water levels (when the ILWSP was implemented and development of the City's ASR program

> began) and pre-development aquifer conditions (Attachment H [to the Proposal]). An annual accounting report will continue to be generated and submitted to DWR for review and approval, with a corresponding review and commentary from GMD2, as required by K.A.R. 5-12-2 and 5-22-10 (Proposal, p. 4-8).

Until a given calendar year closes, and the wellfield activity for that year can be evaluated in the accounting process, the City does not get credits related to that year's activity. In fact, historically there has been additional lag time while GMD2 and the Chief Engineer review the accounting data. To illustrate this more concretely, the City has copied and submitted (as Exhibit 1 hereto) the Chief Engineer's correspondence and Order of April 11, 2019, which sets forth available recharge credits as of the end of 2016. Basically, two years and four months *after* the end of 2016, the City "accumulated" the credits arising from its 2016 activity in the wellfield. Until that time (i.e., the date of the Chief Engineer's April 11, 2019 Order), the net increase in credits based on the accounting for calendar year 2016 was not recognized and those credits had not been "accumulated" and could not have been withdrawn by the City.

This extensive time gap between wellfield operations and the resulting "accumulation" of credits is why it is impossible for the City to tell whether it will or will not be physically injecting water into the aquifer "when an AMC is accumulated." The City is capable of knowing what it is doing in the wellfield today, but is not capable (nor is anybody capable) of knowing what will be happening in the wellfield two years and four months from the end of the current year. Maybe the City will be physically injecting water into the aquifer. Maybe it will be drawing credits. Maybe it will be using water directly from the river. Maybe life on Earth will have been wiped out by a meteor. In all likelihood, what is happening in the wellfield at the time credits are "accumulated" will vary from year to year. In any event, what is or is not happening in the wellfield at the time credits are eventually "accumulated" has no possible bearing on any of the substantive issues in this case.

The City pointed this out to GMD2 very specifically, and in no uncertain terms. In summarizing the City's objection, GMD2 omits the actual language of the objection, which forthrightly told the district exactly what the problem was, as follows:

> Counsel objects to the request as ambiguous and irrelevant due to its use of the phrase "when an AMC is accumulated," as the accounting process is annual, covers activity for an entire year, and may or may not be conducted (and it is immaterial whether it is being conducted) in any year at a time when treated water is being injected into the Aquifer.

Ironically, GMD2's own, unsigned pleading also acknowledges that the City nevertheless proceeded to answer GMD2's defectively-phrased request, subject to the stated objection. In fact, the City's answer (quoted in GMD2's unsigned pleading) also specifically pointed out that "During any given year, the City may conduct activity giving rise to both types of credits and during any given year, the City may or may not be physically injecting water in the Aquifer at the time accumulation of credits is calculated and reported."

The City's answers and objections pinpointed for GMD2 exactly what was wrong with its formulation of the defectively-phrased requests. As shown by GMD2's December 17, 2018 file stamp on the document, GMD2 had the City's answers and objections in its possession that day. Also as of that day, under the Chief Engineer's November 19, 2018 Scheduling Order, discovery had not closed, but was open until January 7, 2019. Further, the deadline for depositions in the case was still open and was ultimately extended to March 8, 2019. In the space of a few minutes, GMD2 could have prepared and served revised requests which eliminated the problem caused by its mistaken assumption as to the accumulation of credits. It also could have noticed a K.S.A. 60-230(b)(6) deposition, requiring the City to designate a witness to be examined on the subject of AMCs and AMC accounting, which would have afforded interactive opportunities to reform questions until rational and relevant responses were possible. Or, it could, of course, just have acknowledged that the City had already provided

complete information on the basis of AMCs and AMC accounting in the City's proposal[1]

GMD2 did none of these things. Neither did it make any attempt to confer with the City to resolve any problem it had with the City's objections to the defectively-worded references to activity "when an AMC is accumulated." Not a letter. Not an email. Not a telephone call. Nothing. Instead, GMD2 essentially refused to consider the glaring issue identified in the City's objections, and decided to take umbrage at the implication that the issue might have resulted from GMD2's failure to understand the accounting process or the time at which credits are "accumulated." Blinded by a fog of its own egotism and distemper, and in a monumental display of hubris, GMD2 deliberately ignored the City's objections, unilaterally determined that there were no problems with its defectively-worded requests, let the periods for written discovery and deposition expire with no attempt to repair the problems, and subsequently filed its motion to compel.

Both in its motion, and in its current, unsigned pleading, GMD2 fails to disclose to the Hearing Officer the fact that it never made any attempt to confer with the City concerning any of the City's answers or objections to the second set of interrogatories or second request for admissions. That failure is highly significant, because it is clear from the text of K.S.A. 60-237(a)(1) that such an attempt is a mandatory prerequisite of a motion to compel. Having decided, on its own, to ignore that requirement, GMD2 is precluded from maintaining a challenge to any of those answers and objections (including the ones seeking information on wellfield activity "when an AMC is accumulated").

[1]For example, the Proposal itself, at page 1-2, recognizes that the genesis of AMCs lies not in treated water physically injected in the Aquifer, but "the water left in storage as a result of utilizing Little Arkansas River flows rather than groundwater from the EBWF."

In any event, GMD2's wooden refusal to recognize the defective formulation of its questions about "accumulation" of credits is pure, blind obstinacy, and the questions, as phrased, are insane.

For its next complaint, GMD2 takes issue with the City having pointed out GMD2's failure to define "source water" in several of the requests. Notably, GMD2 does not explain how this detracts from the City's substantive *answers* to the requests (which requests were also generally defective due to GMD2's "accumulation" *faux pas*). Apparently, GMD2 is just complaining for the sake of complaining. In any event, GMD2 does not claim that it included a definition of "source water" in the lengthy definitions section of its request (it did not) nor does it claim that it referenced any regulatory definition or even that it generally suggested undefined terms should be construed based on regulatory definitions (it did not). Also, it is interesting that in GMD2's own responses, it pointed out that it could not understand "existing water permits" or the City's "rights" to annually withdraw up to 40,000 acre feet from the aquifer, because those terms were undefined (See Exhibit B to the City's Response to Motion to Compel, GMD2's objections to requests 1 and 5). In fact, when served with discovery requests on essentially the same forms it had sent to the City, GMD2 objected to a number of requests that were substantially identical to those it had served on the City (See Exhibits B, C and D to the City's Response to Motion to Compel).

Moreover, like the complaint concerning the City's objections to the defective "accumulation" references, this complaint about the City's observations on undefined terms is foreclosed by K.S.A. 60-237(a)(1), due to GMD2's failure to make any attempt to confer with the City concerning it.

The last complaint in Part I of GMD2's unsigned "Clarifications on Motions to Compel" concerns the City's response to a request about "safe yield." GMD2 refers to this as "Request 15," and apparently means request 15 in its second set of requests for admissions. It is possible that the City's counsel misunderstood the intent of the request, which refers to "applications requesting withdrawal of AMCs" (as to which, the City knows of none, given that AMCs do not yet exist). Also, the City has hardly "evaded" stating its position on issues of "safe yield," as requests 22, 23 and 24 of GMD2's first requests for admissions covered this issue, and were answered without objection. If request 15 of GMD2's second request for admissions was trying to re-ask one of those with the addition of the bizarre "when an AMC is accumulated" formulation, it was additionally objectionable as pointless, redundant and cumulative. In any event, this complaint is also foreclosed by K.S.A. 60-237(a)(1), due to GMD2's failure to make any attempt to confer with the City concerning it.

Accordingly, to summarize the dispositive points relating to Part I of GMD2's unsigned pleading: 1) the complaints about the City's responses to the first interrogatories and requests for admissions are entirely based on extensive misstatements of fact; 2) the several complaints about the City's responses to the second interrogatories and requests for admissions are substantively meritless; and 3) the complaints about the City's responses to the second interrogatories and requests for admissions cannot be maintained because GMD2 failed to comply with K.S.A. 60-237(a)(1) as to any of them.

Turning to Part II of GMD2's unsigned pleading, relating to the City's document log, the City has noted that one document, described as "Brian McLeod email of 9/18/2018 to David Barfield, Kenneth Titus, Tom Adrian, dave@aplawpa.com" (which was the cover email for the submission of the City's Preliminary Expert Disclosures) was incorrectly flagged as

"privileged." It was not privileged, given that it went out to counsel for GMD2 at the same time it was sent to the Chief Engineer (the hearing officer at that time). Per the direction of the current Hearing Officer, it has been included in the documents sent for *in camera* review. However, GMD2 obviously already has the document. The conduct of litigating an obvious logging error related to a document that is actually in GMD2's possession is again indicative of GMD2's tactical use of pointless, collateral discovery litigation to impose burdens and increase costs. (It is particularly incongruous that GMD2 has asked the Hearing Officer to oversee all of this collateral discovery litigation while simultaneously arguing that the case cannot be before the agency and that the Hearing Officer has no jurisdiction).

Beyond the simple point that GMD2 already has the email that was sent with the Preliminary Expert Disclosures, it is also significant that, as a mere procedural disclosure in accordance with the (then-existing) case schedule, the document lacks relevance to any of the substantive issues in the case anyway. As to the remaining documents referenced in Part II of GMD2's unsigned pleading, many of them are similarly irrelevant because they are simply internal communications of the City's litigation team relating to such matters as scheduling, status notes, gathering and organizing material for discovery responses, and other logistical aspects of managing the litigation. These should not be subject to disclosure, because they have no bearing on the substantive issues and because GMD2 is not entitled to invade the internal communications of the City's litigation team, including communications with IT consultants assisting search processes and engineering staff/consultants assisting the City's legal staff with technical issues.

GMD2's discussion of work product focuses very narrowly on one variant of attorney work product, asserting that every document not produced at the specific direction of the City's

counsel is discoverable. This is wrong. K.S.A. 60-226(b)(4) notes that work product protection today extends to documents and tangible things that are prepared in anticipation of litigation or for trial *by or for* another *party* or its *representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent*. Furthermore, communications with the City's experts and outside consultants also enjoy the protections provided by K.S.A. 60-226(b)(5), and GMD2 is not entitled to insert itself in the loop of their communications with the City.

The City again notes that GMD2, in its own discovery responses, responded to a request for production seeking expert communications with a general, global assertion of privilege, not bothering to identify or describe any of the documents as to which this sweeping claim was made (GMD2's response to the City's production request 13, Exhibit D to the City's Response to Motion to Compel). Moreover, in its Answers to Interrogatories, specifically, the City's Interrogatory No. 5, seeking a specification and log of documents withheld under claim of privilege or for any other reason, GMD2 responded, "this interrogatory answer will be addressed at a later time, through answers to the City's Request for Production of Documents, *with a privilege log* and any other supplemental response" (Exhibit C to the City's Response to Motion to Compel, italic emphasis added). Timothy D. Boese, as Manager for GMD2, subscribed the interrogatory responses under oath. Accordingly, it is clear that GMD2's assertion of blanket privilege without a specification of items withheld is a knowing, intentional and deliberate disregard of its discovery obligations in this case. As a party in such a posture, GMD2 should not be heard to nit-pick the privilege logs of the parties that actually furnished privilege logs.

In addition, the character and form of GMD2's unsigned pleading should preclude it from continuing with its challenge to the City's privilege log at this point. Beyond the fact that the document is replete with false statements and pointlessly seeks information GMD2 has

admitted it already has, the document is unsigned. The absence of signature seems likely to be due to the inherent difficulty of making the certification required by K.S.A. 60-226(f)(1) in this instance, given that the certification would not be accurate for multiple reasons pointed out above. However, GMD2 should not be permitted to continue if its counsel will not take professional responsibility for its unsigned pleading. K.S.A. 60-226(f)(2) provides:

> *Failure to sign.* Other parties have no duty to act on an unsigned disclosure, request, response or objection until it is signed, *and the court must strike it* unless a signature is promptly supplied after the omission is called to the attorney's or party's attention (italic emphasis added).

The documents designated by GMD2 have been sent to the Hearing Officer in digital form on compact disc. The City remains of the view that GMD2 is not entitled to any supplemental responses or additional disclosures for the reasons stated herein. A court [and by extension, a hearing officer] has the authority to focus discovery, prevent abusive discovery, and to insure confidentiality when necessary. *See, Purdum v. Purdum*, 48 Kan. App. 2d 938, 989, 301 P.3d 718 (2013). In the present case, an appropriate disposition of GMD2's discovery motions would be to deny them in their entirety.

Respectfully submitted,

Office of the City Attorney
of the City of Wichita, Kansas

By /s/ Brian K. McLeod
Brian K. McLeod, SC # 14026

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he transmitted the above and foregoing Response and its accompanying Exhibit 1 by electronic mail on this 13th day of June 2019, for filing, to ConnieOwen@everestkc.net, Chris.Beightel@ks.gov, David.Barfield@ks.gov and Kenneth.Titus@ks.gov and served the same upon counsel for the other parties herein by electronic mail addressed to:

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