

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

**DWR's RESPONSE IN OPPOSITION TO
GMD2's CLARIFICATIONS ON MOTIONS TO COMPEL**

COMES NOW DWR, by and through counsel, Aaron B. Oleen, and responds to Section III of GMD2's "Clarifications on Motions to Compel" document e-mailed to the parties on June 7, 2019, regarding DWR's document production to GMD2 in this matter and GMD2's pending Motion to Compel to DWR. For clarity, the table (containing excerpts from DWR's 12-28-18 revised privilege log) from Section III of GMD2's document is reproduced below, with the addition of a column on the right containing DWR's particular response to each contested DWR privilege-log item.

In general, DWR believes that all communications and documents discussed below were properly redacted or withheld as privileged or protected. Should the Presiding Officer disagree as to any communication or document and order its production in whole or in part, DWR reiterates its opposition to awarding GMD2 any attorney's fees or other sanctions. As previously explained more fully in DWR's Response in Opposition to GMD2's Motion to Compel to DWR, neither DWR's actions nor GMD2's inactions concerning discovery warrant any such award.

DWR Privilege Log No.	Description	DWR Privilege Claim	GMD2 Reason for Production	DWR Response
1, 8, 11, 34, 39	6-27-2018 Email Communications (re AO legal input/advice re C.E.'s draft presentation-summary of Wichita's ASR Phase II modification requests)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	This is communication between one party (DWR) and the Chief Engineer / Hearing Officer. Unclear when the Chief Engineer became Hearing Officer. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the then Hearing Officer in this case instead of maintaining an independent agency role. No indication of what litigation is anticipated.	These e-mails concern internal legal advice/revisions to the draft DWR summary document that ultimately was distributed at the 6-28-19 public informational meeting in Halstead. The e-mails occurred before the 7-19-18 pre-hearing conference, which is when DWR deems the C.E.'s role as Presiding Officer to have begun. Accordingly, these e-mails are properly protected by the attorney-client privilege. GMD2 isn't entitled to see internal legal discussions about draft documents.
13 through 30, 46	3-4-2016 through 5-18-2016 Email Communications (re AO legal input/advice re draft Order Approving Available Recharge Credits as of 2014)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2016 unless the City's Proposal submitted in March 2018, was already being considered by DWR. Further, these were routine business decisions which are generally not subject to insulating with an attorney/client privilege. Merely adding an attorney to a communication (such as a business record) otherwise not subject to a privilege cannot automatically protect it from discovery. Certainly, with respect to work product doctrine, proximity in time to litigation is an important factor and the litigation must be anticipated. It is impossible in this situation.	These e-mails are irrelevant to this matter because they pertain to legal advice/revisions concerning the routine, yearly approval of available recharge credits regarding Wichita's ASR project (here, the approval of such credits as of 2014). Such credits are not at issue in this matter, but regardless, GMD2 isn't entitled to see internal legal discussions about draft documents. These e-mails are properly protected by the attorney-client privilege.

36, 57	4-18-2018 (No. 36) and 4-17-2018 (No. 57) Email Communications (discussion of KT's legal input/advice re why C.E. not delegating presiding-officer hearing)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	This is communication between one party (DWR) and the Chief Engineer / Hearing Officer. Unclear when the Chief Engineer became Hearing Officer. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the then Hearing Officer in this case instead of maintaining an independent agency role. No indication of what litigation is anticipated. Further, if the Hearing Officer and DWR were "independent," then such communications would waive any attorney/client privilege.	These e-mails concern legal opinions/advice from KDA chief counsel to the C.E., regarding the issue of delegating the hearing in this matter. These e-mails are clearly protected by the attorney-client privilege. Moreover, these e-mails occurred long before formal proceedings in this matter began, and thus the inclusion of DWR staff on these communications at that time was not improper.
37	7-16-2018 Email Communication (KT legal advice re separation of C.E./Presiding Officer group and DWR group, for purposes of the Wichita ASR Phase II modification-request hearing matter)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	This is communication between one party (DWR) and the Chief Engineer / Hearing Officer. Unclear when the Chief Engineer became Hearing Officer. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the then Hearing Officer in this case instead of maintaining an independent agency role. The District needs this document to determine how DWR and the CE planned to be separate. No indication of what litigation is anticipated. Further, if the Hearing Officer and DWR were "independent," then such communications would waive any attorney/client privilege. Certainly, the Hearing Officer couldn't be involved in preparing litigation, even if it was anticipated at that point.	This e-mail concerns legal advice from KDA chief counsel to DWR officials before the 7-19-18 pre-hearing conference, which is when DWR deems the C.E.'s role as Presiding Officer to have begun. DWR objects to disclosing this e-mail on principle/the law, not because of its particular content. This e-mail is properly protected by the attorney-client privilege. Moreover, GMD2 has no pending motion questioning the independence of the C.E. as to this matter. That issue has been resolved, by GMD2's admission, with the delegation of the hearing in this matter to current Presiding Officer Owen. GMD2's continued insistence to see this e-mail amounts to an improper fishing expedition.

38	7-18-2018 Email Communication (re ABO legal advice re DWR group's testimony at Wichita ASR Phase II modification-request hearing)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	Since DWR didn't submit any expert reports, the District needs information as to what level DWR has reviewed the City's Proposal. This document may assist in that. No indication of what litigation is anticipated.	This e-mail concerns legal advice regarding DWR's preparation and strategy for the hearing in this matter and thus is clearly protected by the attorney-client privilege. GMD2 is not entitled to invade that privilege merely because this e-mail "may" assist GMD2, and especially where GMD2 obtained/had the opportunity to obtain their allegedly needed information during their deposition of Lane Letourneau on behalf of DWR.
44	12-18-2017 Email Communication (discussion of KT's legal input/advice re why C.E. not delegating presiding-officer hearing authority)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2017 unless the City's Proposal submitted in March 2018, was already being considered by DWR. Further, if the Hearing Officer and DWR were "independent," then such communications would waive any attorney/client privilege. Certainly, the Hearing Officer couldn't be involved in preparing litigation, even if it was anticipated at that point.	This e-mail concerns legal opinions/advice from KDA chief counsel to the C.E., regarding the issue of delegating the hearing in this matter. This e-mail is clearly protected by the attorney-client privilege. Moreover, this e-mail occurred long before formal proceedings in this matter began, and thus the inclusion of DWR staff on this communication at that time was not improper.
47	10-1-2015 Email Communication (re RL legal advice re whether public hearing required concerning ASR Phase II)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2015 unless the City's Proposal submitted in March, 2018, was already being considered by DWR	Like with other DWR privilege log items, GMD2 overly focuses on DWR's asserted work product protection and fails to consider/address DWR's asserted attorney-client privilege. That privilege is most applicable here and trumps GMD2's desire to see this communication.

54	7-16-2018 Email Communication (KT legal advice re separation of C.E./Presiding Officer group and DWR group, for purposes of the Wichita ASR Phase II modification-request hearing matter)	K.S.A. 60-426: Attorney client privilege;	This is communication between one party (DWR) and the Chief Engineer / Hearing Officer. Unclear when the Chief Engineer became Hearing Officer. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the then Hearing Officer in this case instead of maintaining an independent agency role. The District needs this document to determine how DWR and the CE planned to be separate. No indication of what litigation is anticipated. Further, if the Hearing Officer and DWR were "independent," then such communications would waive any attorney/client privilege. Certainly, the Hearing Officer couldn't be involved in preparing litigation, even if it was anticipated at that point.	This e-mail concerns legal advice from KDA chief counsel to DWR officials before the 7-19-18 pre-hearing conference, which is when DWR deems the C.E.'s role as Presiding Officer to have begun. DWR objects to disclosing this e-mail on principle/the law, not because of its particular content. This e-mail is properly protected by the attorney-client privilege. Moreover, GMD2 has no pending motion questioning the independence of the C.E. as to this matter. That issue has been resolved, by GMD2's admission, with the delegation of the hearing in this matter to current Presiding Officer Owen. GMD2's continued insistence to see this e-mail amounts to an improper fishing expedition.
60	11-05-2004 Internal Memo (LR legal analysis re certain change apps & proposed new app from Wichita, pertaining to Wichita ASR)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2004. This document may provide insight into the details and rationale for certain ASR permit conditions. Certainly, with respect to work product doctrine, proximity in time to litigation is an important factor and the litigation must be anticipated. It is impossible in this situation.	Again, GMD2 conveniently ignores DWR's asserted attorney-client privilege associated with this item, which privilege is most applicable here. Current GMD2 consultant Lee Rolfs does not own the privileges and protections associated with his communications and work product from back when he worked for DWR. DWR owns those, and DWR properly chooses to assert them here.

61	10-11-2004 through 10-12-2004 email communications (LR legal input/advice re draft pre-hearing order in Wichita ASR matter)	K.S.A. 60-426: Attorney client privilege	This document may provide insight into the details and rationale for certain ASR permit conditions. Further, these were routine business decisions which are generally not subject to insulating with an attorney/client privilege. Merely adding an attorney to a communication (such as a business record) otherwise not subject to a privilege cannot automatically protect it from discovery.	These e-mails concern legal advice/revisions regarding a draft pre-hearing order by Lee Rolfs back in 2004. These e-mails are likely irrelevant to the instant matter, but regardless, GMD2 isn't entitled to see internal legal discussions about draft documents. (Ironically, in the subject line Mr. Rolfs had even written "PRIVILEGED—ATTORNEY WORK PRODUCT". Perhaps GMD2 should confer with their consultant Mr. Rolfs before disputing privilege-log items.) These e-mails are properly protected by the attorney-client privilege.
62	10-8-2004 email communication and draft memo (JB's draft memo & identified issues to LR re certain apps filed by Wichita for the ASR project)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2004. This document may provide insight into the details and rationale for certain ASR permit conditions. Further, these were routine business decisions which are generally not subject to insulating with an attorney/client privilege. Merely adding an attorney to a communication (such as a business record) otherwise not subject to a privilege cannot automatically protect it from discovery. Certainly, with respect to work product doctrine, proximity in time to litigation is an important factor and the litigation must be anticipated. It is impossible in this situation.	This e-mail includes a draft memo about which former DWR employee Jim Bagley specifically was asking then-DWR attorney Lee Rolfs for legal advice. Current GMD2 consultant Lee Rolfs does not own the privileges and protections associated with communications related to when he worked for DWR. DWR owns those, and DWR properly chooses to assert them here. These items are clearly protected by the attorney-client privilege.

64	6-23-2005 email communications (re propriety of adding certain findings to an ASR order)	K.S.A. 60-426: Attorney client privilege	This document may provide insight into the details and rationale for certain ASR permit conditions. Merely adding an attorney to a communication (such as a business record) otherwise not subject to a privilege cannot automatically protect it from discovery.	These e-mails concern solicited legal advice regarding the proposed findings/contents of a contemplated ASR order. These e-mails are likely irrelevant to the instant matter, but regardless, GMD2 isn't entitled to see internal legal discussions about draft documents. These e-mails are properly protected by the attorney-client privilege.
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WHEREFORE, DWR requests that GMD2's Motion to Compel to DWR, as clarified by GMD2's "Clarifications on Motions to Compel" document, be denied; that no related attorney's fees or other sanctions be awarded to GMD2; and for such other and further relief as the Presiding Officer deems just and equitable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

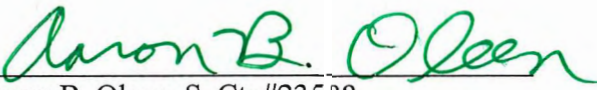
I certify that on this 20th day of June, 2019, the above *DWR's Response in Opposition to GMD2's Clarifications on Motions to Compel* was electronically filed with the Presiding Officer for this matter and that copies were sent via e-mail to the following:

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