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.

ORDER ON PREHEARING MOTIONS

This case arises from the City of Wichita's Aquifer Storage and Recovery (ASR) Permit Modification Proposal regarding Phase II of the ASR project (the "proposal"). The City submitted the proposal to the Division of Water Resources, Kansas Department of Agriculture (DWR) on March 12, 2018. The Chief Engineer of DWR delegated the authority to preside over this matter to this presiding officer on March 19, 2019.

On May 28, 2019, oral argument was held on all pending prehearing motions at the Harvey County Courthouse in Newton, Kansas. Arguments commenced at 10:04 a.m. The parties in attendance and participating were: the City of Wichita (the City), represented by Brian K. McLeod; Equus Beds Groundwater Management District No. 2 (GMD2), represented by Thomas A. Adrian, David J. Stucky, and Leland Rolfs; the Kansas Department of Agriculture's Division of Water Resources (DWR), represented by Aaron Oleen and Stephanie Murray; and the Intervenors, represented by Tessa M. Wendling.

As noted in the Prehearing Order issued on May 1, 2019, eight motions remained pending at the time the Chief Engineer delegated authority to this presiding officer. In order to make the most effective use of time, the motions were addressed in order of the parties' priorities and expectations for the time needed to address each. This order will address each motion in similar sequence. The motions are as follows:

1. GMD2's Motion for Summary Judgment;
2. GMD2's Motion to Dismiss;
3. GMD2's Motion to Compel to the Division of Water Resources;
4. GMD2's Motion to Compel to the City of Wichita;
5. City's Prehearing Motion in Limine to Exclude "Expert Reports" of Carl E. Nuzman, Tim Boese, and David Pope;
6. GMD2's Motion in Limine to Exclude Expert Testimony of the City;
7. GMD2's Motion in Limine and Motion to Bar Agency Recommendations;
8. Intervenors' Motion in Support of Equus Beds Groundwater Management District No. 2's Motion to Ensure Impartiality of Chief Engineer, Motion in Limine to Exclude Expert

Testimony of City, Motion in Limine to Exclude Expert Testimony of DWR or Recommendations, Motion to Dismiss and Motion for Summary Judgment.

Preliminary Directive re Professionalism and Civility

The parties are reminded that professional and civil communications are expected and required at all times during the course of these proceedings, whether in person or in writing. This presiding officer will not tolerate derogatory characterizations between the parties, such as "mean-spirited," "egotism and distemper", "blind obstinacy", "considerable malice" and "persnickety". There will be no tolerance of sarcasm, such as "maybe life on Earth will be wiped out by a meteor" or hyperbolic language, such as labeling another's party's argument "insane" or a "monumental display of hubris". More than one party has engaged in this behavior. Further use of such unprofessional and uncivil language may result in the related content, whether oral or written, being stricken from the record.

Standards applicable to all the motions addressed herein

This proceeding arises under the Kansas Water Appropriation Act (KWAA), K.S.A. 82a-701, *et seq.;* the administrative regulations administering the KWAA, K.A.R. 5-1-1, *et seq.*; the Groundwater Management District Act (GMDA), K.S.A. 82a-1020 through 82a-1042; and the regulations administering the GMDA relative to Equus Beds Groundwater Management District No. 2, K.A.R. 5-22-1, *et seq.*

"Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.' *Pork Motel, Corp. v. Kansas Dept. of Health & Environment,* 234 Kan. 374, 378, 673 P.2d 1126 (1983)". *American Trust Administrators, Inc. v. Kansas Insurance Dept.*, 273 Kan. 694, 698, 44 P.3d 1253 (2002).

Properly promulgated administrative regulations have the force and effect of law. *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 168, 239 P.3d 51 (2010). Agencies generally may not disregard their own rules and regulations. *Schmidt v. Kansas Bd. of Technical Professions*, 271 Kan. 206, 221, 21 P.3d 542 (2001).

At times, the parties cite to the Kansas Administrative Procedure Act (KAPA), K.S.A. 44-501, *et seq.* Although there is useful guidance in KAPA, that statutory scheme does not strictly apply here. KAPA only applies "to the extent that other statutes expressly provide that the provisions of this act govern proceedings under those statutes." K.S.A. 77-503(a). The

KWAA does not adopt KAPA for purposes of this case. A provision of KWAA, K.S.A 82a-1901, adopts KAPA for very specific circumstances, none of which apply here. K.S.A. 82a-1901 states that KAPA will govern hearings requested *after* the Chief Engineer has issued an order pursuant to one of four identified statutes: K.S.A. 82a-708b (applications to change existing water appropriations), K.S.A. 82a-711 (applications for new water appropriations), K.S.A. 737 (civil enforcement against various violations), and K.S.A. 82a-770 (suspension of water rights) and when the Chief Engineer has failed to act pursuant to K.S.A. 82a-714 (certification of water rights). K.S.A. 82a-1901(a). This statute also states that KAPA applies to requests for review of twelve specified categories of orders after they are issued by the Chief Engineer, allowing for review of these orders by the Secretary of Agriculture. K.S.A. 82a-1901(c). Finally, K.S.A. 82a-1901 states that any final order of the Department of Agriculture issued upon review pursuant to K.S.A. 82a-1901 shall not be subject to reconsideration pursuant to the KAPA provision K.S.A. 77-529. K.S.A. 82a-1901(d). In the case at hand, there has been no order of the Chief Engineer under any of the four identified statutes, nor has there been a claim of failure to properly certify a water right, nor has there been a request for review of any order of the Chief Engineer. Therefore, pursuant to K.S.A. 77-503(a), these proceedings are not governed by KAPA.

(Note: some of the pleadings submitted in this case address more than one motion. In the interest of creating a comprehensive and understandable record, all pleadings addressing a given motion will be listed with that motion; some pleadings may be listed numerous times so as to clearly show the arguments presented for each motion.)

1. GMD2's Motion for Summary Judgment

The following pleadings related to this issue were filed by the parties, as indicated below.

1. On March 11, 2019, GMD2 filed its Motion for Summary Judgment.

2. On March 11, 2019, the Intervenors filed their Motion in Support of Equus Beds Groundwater Management District, No. 2's Motion to Ensure Impartiality of Chief Engineer, Motion in Limine to Exlcude (sic) Expert Testimony of City, Motion in Limine to Exclude Expert Testimony of DWR or Recommendations, Motion to Dismiss and Motion for Summary Judgment.

3. On March 18, 2019, the City filed the City of Wichita's Response to Remaining Motions of Equus Beds Groundwater Management District No. 2 and Interveners (sic).

4. On March 18, 2019, DWR filed its Consolidated Response in Opposition to GMD2's and Intervenors' Motion to Dismiss and Motion for Summary Judgment.

5. On April 1, 2019, the City filed its Further Response to Summary Judgment Motion of Equus Beds Groundwater Management District No. 2.

6. On May 3, 2019, GMD2 filed the District's Reply and Clarifications to Various Responses of DWR and the City to the District's Motions.

Counsel for all four parties presented oral argument on this motion at the hearing. As will be evident from the oral argument transcript, the parties generally addressed the Motion for Summary Judgment and the Motion to Dismiss somewhat simultaneously due to some overlap in GMD2's arguments for those two motions. However, because the standards differ regarding the resolution of those two motions, they will be resolved separately. The Motion for Summary Judgment will be addressed first.

Legal Standards for Summary Judgment

Division of Water Resources regulation K.A.R. 5-14-3a governs the procedures for this administrative hearing. See K.A.R. 5-14-3(e)(1). As with most administrative hearings, the procedural rules that apply to civil litigation are relaxed. The applicable regulations state that the presiding officer "shall not be bound by the technical rules of evidence" and "shall give the parties a reasonable opportunity to be heard and to present evidence." K.A.R. 5-14-3a(q)(1),(2). "[T]he general rule for administrative proceedings is that the rules for the admission of evidence aren't as strict as those used in court proceedings...". *Woessner v. Labor Max Staffing*, 56 Kan. App. 2d 780, 780, 437 P.3d 992 (2019).

However, the parties are entitled to the opportunity to file pleadings, objections, and motions, and may, at the presiding officer's discretion, be given the opportunity to file briefs, proposed findings of fact and conclusions of law and proposed orders. K.A.R. 5-14-3a(i). In submitting pleadings, objections and motions, parties may use civil procedure statutes for guidance, even if those statutes are not controlling in these circumstances.

In civil litigation, a summary judgment motion must establish that "the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." K.S.A. 60-256(c)(2). If such a motion is properly made and supported, the opposing party "may not rely merely on allegations or denials in its own pleading; rather, its response must ... set out specific facts showing a genuine issue for trial," also based on documentation. K.S.A. 6-256(e)(2) . Although the presiding officer is not required to strictly apply the rules of civil procedure, it is appropriate to apply these fundamental criteria to the summary judgment motion at hand.

Discussion and Conclusions

The pleadings of all parties filed in regards to this motion, and the oral arguments presented by all counsel, have been carefully reviewed and considered. It is noted that the Intervenors support the Motion for Summary Judgment. It is also noted that DWR opposes the

motion, but raised a different basis for that position at oral argument than had been expressed in its written response. In its Consolidated Response in Opposition to GMD2's and Intervenors' Motion to Dismiss and Motion for Summary Judgment, DWR argued in favor of denying the motions so that the administrative hearing can be held, giving all parties a reasonable opportunity to be heard and to present evidence. DWR also asserted that the public is entitled to public proceedings after a full evidentiary disclosure, the denial of which would damage DWR's credibility. However, at oral argument, DWR contended that this presiding officer lacks the authority to rule on these motions because the record contains indications that the Chief Engineer was previously unconvinced of the arguments raised in the Motion for Summary Judgment and Motion to Dismiss, and that the presiding officer's authority only extends to conducting a fact-finding evidentiary hearing. Because DWR challenges the presiding officer's authority to rule on this motion (and the Motion to Dismiss), this issue will be addressed first.

DWR's new position is not persuasive for the following reasons. The Chief Engineer's Notice of Delegation and Temporary Postponement uses broad language in stating that he, "pursuant to K.A.R. 5-14-3a", delegates to the undersigned "the authority to serve as presiding officer in this matter." That regulation lists a wide spectrum of actions and proceedings incumbent on a presiding officer, including the mandates that "each party shall have the opportunity to file pleadings, objections and motions", and that, at the presiding officer's discretion, the parties may file "briefs, proposed findings of fact and conclusions of law, and proposed orders." K.A.R. 5-14-3a(i). The delegation of authority contained no language inconsistent with this regulation. Moreover, at the time the Chief Engineer issued the delegation of authority (March 19, 2019), numerous motions had already been filed and remained pending, including the eight motions argued in person on May 28, 2019. There is no evidence that the Chief Engineer intended to leave any of those motions unresolved. To the contrary, the motions each affect numerous aspects as to how the proceedings will be conducted and, therefore, the authority to rule on all of the pending motions is a natural and necessary component of the presiding officer's duties under K.A.R. 5-14-3a.

Turning to the Motion for Summary Judgment, the first question is whether the motion adequately establishes uncontroverted facts that are material to the case. GMD2's motion sets forth eleven facts it asserts are uncontroverted. These eleven items all pertain to the title and contents of the City of Wichita's "ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits," which seeks to alter certain aspects of Phase II of the City's aquifer storage and recovery project as approved by the Chief Engineer of DWR. The City has responded that only two of those eleven assertions are uncontroverted (one of those agreed-upon items is the title); the City takes issue with the accuracy or truth of the other nine assertions, at least in part. Simply because the parties disagree as to what the facts are is not sufficient to determine whether there are genuine issues of any material fact; the movant bears the burden of specifically establishing that there is no genuine issue of material fact. The City

then bears the burden of specifically establishing otherwise. If there are material facts in genuine dispute, the motion must be denied and there is no need to address questions of law.

The Motion for Summary Judgment fails in that there are material facts cited, but their status as uncontroverted is not clearly established. GMD2 alleges the content of the City's proposal is, in effect, a request for a change in one or more water rights that would require a properly submitted application for change pursuant to K.S.A. 82a-708b. To resolve this allegation requires a thorough review of the content of the City's proposal, an extensive highly technical document that may be the subject of expert testimony at the hearing. It is premature to grant summary judgment absent an adequate review of the proposal and the benefit of explanatory testimony at the hearing.

In the third stated "unconverted fact", GMD2 states that the City's proposal requested that the City be authorized to accumulate Aquifer Maintenance Credits (AMCs), which the district states are "a new type of 'recharge' credit". In support, the district cites the proposal generally, without a specific citation to where this statement can be corroborated and without attachments for that purpose. In its response, the City indicates that the proposal does request that the City be allowed to accumulate AMCs, but that this would be a "' new type of recharge credit', as alleged, but only in the sense of being established via an alternative procedure." In support, the City cites a ten-page section in its proposal, without a specific cite to where this distinction is discussed and without any attachment provided. It seems these two parties have differing definitions of what a "new type of recharge credit" means. The citations given by the parties are not specific enough to resolve where the disagreement begins and ends.

In addition, in its "uncontroverted facts" numbered seven through ten, the district alleges the City's proposal does not address water quality, impairment, impact on minimum desirable streamflow and the unreasonable raising or lowering of the static water level. The City responds with references to certain provisions in its proposal that it contends do address these matters. It appears there is at least reference in the proposal to the topics listed. Thus, these alleged facts are not uncontroverted and the matter is not appropriate for summary judgment.

The Motion for Summary Judgment is denied.

2. GMD2's Motion to Dismiss

The following pleadings related to this issue were filed by the parties:

1. On March 11, 2019, GMD2 filed its Motion to Dismiss.
2. On March 11, 2019, the Intervenors filed their Motion in Support of Equus Beds Groundwater Management District, No. 2's Motion to Ensure Impartiality of Chief Engineer,

Motion in Limine to Exlcude (sic) Expert Testimony of City, Motion in Limine to Exclude Expert Testimony of DWR or Recommendations, Motion to Dismiss and Motion for Summary Judgment.

3. On March 18, 2019, the City filed the City of Wichita's Response to Equus Beds Groundwater Management District No. 2's Motion to Dismiss.

4. On March 18, 2019, DWR filed its Consolidated Response in Opposition to GMD2's and Intervenors' Motion to Dismiss and Motion for Summary Judgment.

5. On May 3, 2019, GMD2 filed the District's Reply and Clarifications to Various Responses of DWR and the City to the District's Motions.

As set forth above in the section addressing the Motion for Summary Judgment, the record and related legal standards validate the undersigned presiding officer's authority to evaluate and resolve this motion.

Counsel for all four parties presented oral argument on this motion at the hearing. As mentioned above, at oral argument the parties generally addressed the Motion for Summary Judgment and the Motion to Dismiss somewhat simultaneously due to some overlap in GMD2's arguments for those two motions. However, because the standards differ regarding the resolution of those two motions, they will be resolved separately; the Motion for Summary Judgment was addressed above. The Motion to Dismiss not be resolved at this time; it will be taken under advisement until after the evidentiary hearing.

3. GMD2's Motion to Compel to the Division of Water Resources

The following pleadings related to this issue were filed by the parties, as indicated below.

1. On March 11, 2019, GMD2 filed its Motion to Compel to the Division of Water Resources.

2. On March 18, 2019, DWR filed DWR's Response in Opposition to GMD2's Motion to Compel to the Division of Water Resources.

3. On March 18, 2019, the City filed the City of Wichita's Response to Remaining Motions of Equus Beds Groundwater Management District No. 2 and Interveners (sic) (City simply "joins in DWR's response to GMD2's Motion to Compel directed at DWR".).

4. On May 28, 2019, at the hearing for oral arguments, DWR submitted to the presiding officer the DWR Privilege Log (rev. 12/28/18) and documents listed therein (both unreadacted and redacted versions).

5. On June 7, 2019, GMD2 submitted its Clarification on Motions to Compel, with attachments.

6. On June 20, 2019, DWR submitted DWR's Response in Opposition to GMD2's Clarifications on Motions to Compel.

Standards for Motions to Compel

As stated above, the rules of evidence and civil procedure are relaxed in administrative agency contexts, although the rules of civil procedure may provide guidance. Even in civil litigation, where the strict rules governing motions to compel apply, "the trial court is vested with large amounts of discretion in its direction of pretrial discovery. It is vested with considerable discretion in the enforcement of its previously issued discovery orders and in the assessment of sanctions against noncomplying parties." *Vickers v. Kansas City*, 216 Kan. 84, 90, 531 P.2d 113 (1975). Therefore, the presiding officer in an administrative matter would have similarly broad discretion regarding motions to compel.

Some of the arguments in the motions to compel challenge assertions of attorney-client privilege and work product privilege. The same DWR regulation that states the presiding officer shall not be bound by the technical rules of evidence also requires the presiding officer to give effect to the privileges listed in K.S.A. 60-426 through 436, which include the attorney-client privilege and the work-product protection. K.A.R. 5-14-3a(q)(3). An agency must follow its own rules and regulations. *Schmidt v. Kansas Bd. of Technical Professions*, 271 Kan. 206, 221, 21 P.3d 542 (2001).

K.S.A. 60-426(a) states that communications between an attorney and such attorney's client in the course of that relationship and in professional confidence, are privileged.

"Work product protection" is defined as "the protection that applicable law provides for tangible material, or its equivalent, prepared in anticipation of litigation or for trial." K.S.A. 60-426a(f)(2). Pursuant to K.S.A. 60-226(b)(4), "Ordinarily, a party may not discover 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."

GMD2 explains its concerns as arising from the potentially conflicting roles of the Chief Engineer in this situation. The Chief Engineer holds the broad statutory authority to "enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate" the use of waters of the state. K.S.A. 82a-706. The initial authority to approve or change the ASR Project's Phase II rests with the Chief Engineer. However, the Chief Engineer also is authorized, and in some cases, required, to conduct a public evidentiary hearing in order to reach decisions. K.A.R. 5-12-3. Thus, the Chief Engineer may ultimately preside over the public hearing, a role requiring objectivity and a prohibition on ex parte communications with the parties (the applicant, DWR and others). K.A.R. 5-14-3a(j).

Thus, there is a period of time in which the Chief Engineer may, in the ordinary course of his or her duties, be appropriately communicating with DWR staff and legal counsel and others outside the agency (ex., the applicant, interested parties) about a pending matter that could ultimately be resolved through a public hearing. However, if the Chief Engineer takes on the role of being that presiding officer, that new role imposes duties of impartiality and transparency. In the new role as presiding officer, the Chief Engineer is now prohibited from the kinds of communications he or she likely has already had, even with his or her own staff and staff's legal counsel. In addition, the Chief Engineer is now duty-bound to evaluate all evidence with impartiality, even though he or she may have already begun to form opinions about the matter at hand.

This scenario would never be acceptable for a district court judge; even the appearance of conflicts of interest would preclude the dual administrative and adjudicatory roles. However, in the context of this administrative agency, whose division head has overlapping duties defined by statute, the duality can occur. The problem can be avoided by the Chief Engineer delegating the role of presiding officer to another individual pursuant to K.A.R. 5-14-3a(4)(b), as he did in this case. However, in this case, the Chief Engineer acted as presiding officer for many months before making such a delegation, and reserved the authority to make the final decision after receiving recommendations from the current presiding officer, both actions being authorized by regulation. K.A.R. 5-14-3a(b).

Two regulations offers guidance on this potential for conflicting roles and how to preserve the integrity of the presiding officer, one is procedural the other substantive. The procedural regulation states, "After the presiding officer has issued a notice of hearing and before an order is issued, no party or its attorneys shall discuss the merits of the proceedings with the presiding officer or with any other person named in the prehearing order as assisting the presiding officer in the hearing, unless all parties have the opportunity to participate." K.A.R. 5-14-3a(j). K.A.R. 5-14-3a also governs the procedural requirements for prehearings and discovery in similar fashion to those of the full hearing, and seems to contemplate the notice of hearing issuing prior to a prehearing conference. Thus, it is reasonable to conclude that the regulation would prohibit ex parte communications after a notice of *pre*hearing conference and before an order is issued. In this case, the first notice of prehearing conference was issued on July 2, 2018. DWR asserts the Chief Engineer's role as hearing officer began on the date of the first prehearing conference, July 19, 2018, but the regulation indicates that shift in roles is deemed to have occurred 17 days earlier, when the notice for that conference was issued.

Despite this apparently clear line of demarcation, the substantive regulation states, ""Any party may petition for disqualification of a presiding officer upon discovering facts establishing grounds for disqualification because of bias, prejudice or interest." K.A.R. 5-14-3a(j)(4). Thus, the procedural date for when ex parte communications became prohibited, in this case July 2,

2018, does not necessarily excuse the Chief Engineer from disqualification for bias, prejudice or interest evidenced prior to that date.

At oral arguments, GMD2 asserted concern because, "prior to becoming the hearing officer, the chief engineer had publicly touted this AMC proposal, had indeed even submitted letters trying to argue that the proposal of the City was legal, and so we were just merely interested in what level of involvement the chief engineer had in analyzing this proposal, in considering the technical aspects, and what private conversations between the chief engineer and the City might have occurred and what the substance of those communications were." (Trans. p.74-75.) GMD2 further argues that either the Chief Engineer can have no involvement in the outcome of this matter or, if the Chief Engineer has a role, that GMD2 is "entitled to full discovery." (Trans. p.75.)

The authority delegated by the Chief Engineer to the current presiding officer is to serve as presiding officer and make written recommendations to the Chief Engineer. See K.A.R. 5-14-3a(s). Thus, the Chief Engineer will ultimately decide the outcome of this matter and this presiding officer has no authority to decide otherwise. As such, GMD2's alternative request for disclosure will be addressed.

Discussion and Conclusions

GMD2's Motion to Compel directed at DWR requested complete answers to a number of interrogatory questions, a list of certain kinds of communications and sharing of a number of items listed in DWR's privilege log. The motion also made the broad request that DWR provide unredacted versions of communications between DWR and the Chief Engineer which were identified in DWR's privilege log, but redacted based on claims of work product and/or attorney-client privilege protections. GMD2's motion also requested that DWR enumerate all ex parte communications that DWR or the City has had with the Chief Engineer regarding the subject matter of this hearing. At the hearing, counsel for the district stated that DWR had largely addressed most of the concerns raised in the written motion, with the only remaining requests being those related to the items listed in DWR's privilege log regarding communications between DWR or the City and the Chief Engineer. (Trans. p. 74.) At the hearing, GMD2 did not clarify whether it is still seeking attorney fees, as requested in its written motion.

At the hearing, DWR responded that it has, indeed, worked with GMD2 to address and resolve many of the concerns raised in the original motion. (Trans. p. 79.) DWR stated that it has already provided GMD2 with a complete list of any communications that the Chief Engineer or DWR has had with the City regarding this proposal. (Trans. p. 79.) GMD2 agreed. (Trans. p. 84) DWR reasserted the protections of work product and attorney-client privileges and suggested an in camera review by the presiding officer (Trans. p.79-80.).

At the hearing, DWR provided the presiding officer with a copy of the items in its privilege log, in their original and redacted versions. GMD2 was given a deadline by which to specifically identify which items listed in DWR's privilege log it wanted to be reviewed in camera and the reasons for those requests, which GMD2 timely did. DWR was given an opportunity to submit a response, which it did.

The resolution of this motion, then, comes down to determining whether the items specified by GMD2 qualify for protection from disclosure as either attorney-client privilege or attorney work product, as individually claimed. GMD2 identified 30 items from DWR's privilege log that it wants to see in unredacted form. For three of these, DWR's log claims attorney-client privilege. For the other 27, DWR's log claims both attorney-client privilege and work product protection. In its Response in Opposition to GMD2's Clarifications on Motions to Compel, DWR added more detailed explanations of the bases for its asserted privileges and protections.

The three items for which DWR cites only attorney-client privilege (not work product protection) are items 54, 61, and 64. To reiterate, K.S.A. 60-426(a) states that communications between an attorney and such attorney's client in the course of that relationship and in professional confidence, are privileged. These items all involve internal discussions between DWR staff and their attorney as to internal drafts of documents in the ordinary course of their professional duties, with no outside parties having access to the discussions. The presiding officer finds these items are covered by the attorney-client privilege and need not be disclosed.

The remaining 27 items are all claimed by DWR to be protected as attorney-client communications and work product. Items numbered 1, 8, 11, 34 and 39 are listed together because the numbers refer to the same email entries dated June 27, 2018. As described by DWR's log, these are emails "re AO [Aaron Oleen, counsel for DWR] legal advice re CE's [Chief Engineer's] draft presentation-summary of Wichita's ASR Phase II modification request". GMD2 is concerned that it reveals prohibited communications between the Chief Engineer and DWR after the Chief Engineer became presiding officer. As noted above, the regulations indicate that the Chief Engineer's role shifted to that of presiding officer on July 2, 2018, after the date of this email. These items, internal communications about the drafting of the public presentation summary of the ASR modification request between the Chief Engineer and his legal counsel, copied to no one outside the agency, are covered by the attorney-client privilege. As such, it is not necessary to determine whether it is covered by the work product protection.

Items 13 through 30 are email communications between DWR staff and legal counsel regarding the drafting of the Order Approving Available Recharge Credits as of 2016. Their dates range from March 4, 2016, through May 18, 2016. DWR asserts these items are covered by attorney-client privilege and work product protection. As they are internal discussions

between staff and legal counsel about drafting an order, and not copied to anyone outside the agency, they are entitled to attorney-client privilege and need not be disclosed. As such, it is not necessary to determine whether they are covered by the work product protection.

Item 46 are emails dated May 10, 2016, containing internal communications between the Chief Engineer, DWR staff and their attorney regarding the drafting of yearly approvals of Wichita's ASR recharge credits; they are copied to no one outside the agency. They are covered by the attorney-client privilege. As such, it is not necessary to determine whether this item is covered by the work product protection.

Item 36 and Item 57 are identical. Each is an email dated April 17, 2018, containing legal advice from DWR legal counsel to the Chief Engineer regarding the issue of delegating the hearing in this matter. No one outside the agency is copied on this email. It is covered by the attorney-client privilege. As such, it is not necessary to determine whether it is covered by the work product protection.

Item 37 is an email dated July 16, 2018, containing legal advice regarding the issue of separating the Chief Engineer/Presiding Officer group and DWR group due to the Chief Engineer's role as presiding officer. DWR asserts that this took place before the July 19, 2018, prehearing conference, when DWR believes the Chief Engineer began his role as presiding officer. However, the regulations indicate that communications with the presiding officer not shared by all parties would have been prohibited on July 2, 2018. By the time this email was sent, the Chief Engineer had shifted to the role of presiding officer. Therefore the inclusion of DWR staff, a party to the proceedings, as recipients rendered it non-confidential, thereby disqualifying it from attorney-client privilege.

DWR also claims this email (Item 37) is protected as attorney work product, defined as documents prepared in anticipation of litigation or for trial by or for a party. K.S.A. 60–226(b)(4). "The work-product rule is not an absolute privilege but rather a limitation on discovery." *Wichita Eagle & Beacon Publishing Co. v. Simmons,* 274 Kan. 194, 218, 50 P.3d 66 (2002). Even if this email was prepared with the intent of having been in preparation for litigation, the Chief Engineer bore the duties of the presiding officer at that point and was prohibited from participating in preparation for litigation with a party. Thus, it is not entitled to work product protection. Item 37 must be disclosed by DWR.

Item 38 is an email dated July 18, 2018 regarding legal advice from Aaron Oleen to the DWR group regarding testimony at an ASR modification request hearing. No one outside the DWR group is copied on this email. It is covered by the attorney-client privilege. As such, it is not necessary to determine whether it is covered by the work product protection.

Item 44 is an email dated December 18, 2017, containing legal advice to the Chief Engineer regarding the issue of delegating the hearing. It is not copied to anyone outside the agency; it is dated well before the July 2, 2018 prohibition on ex parte communications with a party. It is covered by the attorney-client privilege. As such, it is not necessary to determine whether it is covered by the work product protection.

Item 47 is a set of two emails dated October 1, 2015, containing legal advice regarding the issue of whether a public hearing is required for the ASR Phase II. It is not copied to anyone outside the agency. It is covered by the attorney-client privilege. As such, it is not necessary to determine whether it is covered by the work product protection.

Item 54 is an email dated July 16, 2018, containing legal advice from Kenneth Titus, Chief Counsel for the Department of Agriculture, regarding separation of the Chief Engineer/Presiding Officer group and the DWR group. It is not copied to anyone outside the Chief Engineer/Presiding Officer group. It is covered by the attorney-client privilege. As such, it is not necessary to determine whether it is covered by the work product protection.

Item 60 is an internal DWR memo dated November 5, 2004, from DWR legal counsel to DWR staff regarding certain change applications and new applications related to the Wichita ASR. It is not copied to anyone outside the agency. It is covered by the attorney-client privilege. As such, it is not necessary to determine whether it is covered by the work product protection.

Item 61 is a thread of emails dated October 11, 2004, and an email dated October 8, 2004, including a draft memo sent by DWR employee to DWR legal counsel for legal advice. Item 62 is the same as the October 8, 2004, email with draft memo included in Item 61. The emails concern certain applications filed by the City of Wichita for the ASR project. These items are not copied to anyone outside the agency. Items 61 and 62 are covered by the attorney-client privilege. As such, it is not necessary to determine whether they are covered by the work product protection.

Item 64 is a set of two emails dated June 23, 2005, containing commentary about the addition of certain findings to an ASR order. Although the emails are not from a DWR attorney, they are copied to a DWR attorney and appear to be part of a larger discussion between the attorney and staff. They are not copied to anyone outside the agency. Item 64 is covered by the attorney-client privilege. As such, it is not necessary to determine whether it is covered by the work product protection.

The deadline for DWR to disclose the items indicated is set forth at the end of this order. GMD2's request for attorney fees is denied.

4. GMD2's Motion to Compel to the City of Wichita

The following pleadings related to this issue were filed by the parties, as indicated below.

1. On March 11, 2019, GMD2 filed its Motion to Compel to the City of Wichita.

2. On March 12, 2019, the City filed the City of Wichita's Response to Equus Beds Groundwater Management No.2's Motion to Compel to the City.

3. On June 7, 2019, GMD2 submitted its Clarification on Motions to Compel.

4. On June 13, 2019, the City submitted the City's Response to Clarifications on Motion to Compel.

5. On June 19, 2019, the presiding officer received in the mail the City's CD containing the designated emails and attachments for in camera review.

Standards for Motions to Compel

The applicable standards are presented above, relative to GMD2's Motion to Compel to DWR.

Discussion and Conclusions

At the hearing held on May 28, 2019, GMD2 was directed to identify the individual items for which it sought an in camera review. In its Clarification on Motions to Compel, the district specifically identified three items from the district's Second Set of Requests for Admissions, items 1, 2, and 15. Although the district also challenges the overall sufficiency of the City's responses to requests for admission and answers to interrogatory questions, the district did not identify any other specific items. The discovery documents are extensive and the presiding officer declines to explore every item within them, limiting review to the items identified. At the hearing, the presiding officer directed the City to submit to the presiding officer an unredacted and redacted version of each item subsequently identified by GMD2 for in camera review. The electronic files the City submitted all appear to be unredacted.

Item 1 in GMD2's Second Set of Requests for Admissions is as follows: "Admit or deny that no water will actually physically be injected into the Aquifer when an AMC is accumulated (as opposed to a Physical Recharge Credit)." The City objected,

> "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 is immaterial to this matter whether it is being conducted) in any year at a time when treated water is being injected unto the Aquifer."

The City denied the request to admit, stating (subject to and without waiving the foregoing objection):

> "The AMC proposal describes the interactive accumulation of physical recharge credits and AMC recharge credits. The City will continue to conduct physical recharge operations based on the condition and capacity of the aquifer to accept physical recharge. 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 into the Aquifer at a time accumulation of credits is calculated and reported."

The City explains that its responses are justified because the question appears to hinge on the time in which AMC credits would be documented and reported as having accumulated. In other words, the City perceives the question as asking if "no water will actually physically be injected into the Aquifer" at the time of reporting AMC credits, which occurs annually. The City reads this request as asking what the pumping operations will be at annual points in time, which the City cannot reasonably predict. However, given the primary issues in this case, it is reasonable to interpret the request as having a very different meaning.

A key point of the City's proposal involves the accumulation of a new kind of aquifer credit, one which appears to be different from the currently authorized recharge credits. The currently authorized recharge credits arise from the physical injection of water into the aquifer, while the new kind of credits (AMCs) may not. This distinction is highly relevant. It is apparent, given the importance of the distinction, that this point is the focus of the request, not the point in time at which the AMC would be calculated and reported. Therefore, the objection to Item 1 is overruled; the City must respond accordingly.

Item 2 in GMD2's Second Set of Requests for Admissions is as follows: "Admit or deny that no source water will enter into the Aquifer through gravity flow when an AMC is accumulated (as opposed to a Physical Recharge Credit)." The City objected,

> "Counsel objects to the Request as ambiguous and irrelevant due to its use of the term 'source water' and the phrase "when an AMC is accumulated," as the accounting process is annual, covers conditions and activity for an entire year, and may or may not be conducted
> (and it is immaterial to this matter whether it is being conducted) in any year at a time when "source water" (whatever that is) is entering the Aquifer through gravity flow."

The City denied the request to admit, stating (subject to and without waiving the foregoing objection):

"The AMC proposal describes the interactive accumulation of physical recharge

credits and AMC recharge credits. The City will continue to conduct physical recharge operations based on the condition and capacity of the aquifer to accept physical recharge. During any given year, the City may conduct activity giving rise to both types of credits and during any given year, 'source water' (whatever that is) may or may not be entering the Aquifer through gravity flow at the time accumulation of credits is calculated and reported."

As with Request No. 1, above, the City explains that its responses are justified because the question appears to hinge on the time in which AMC credits would be documented and reported as having accumulated. As analyzed above, this view is contrary to the reasonable interpretation of the question as addressing the specifics of physical water diversion contemplated by the proposal, rather than the point in time the AMCs would be calculated and reported. In addition, "source water" is defined in DWR regulation and is a necessary element for the approval of any Aquifer Storage and Recovery project. K.A.R. 5-1-1(yyy); K.A.R. 5-12-1(a). Thus, the request is not irrelevant nor ambiguous; the objection is overruled. The City is ordered to answer accordingly.

Item 15 in GMD2's Second Set of Requests for Admissions is as follows: "Admit or deny that the City's appropriation applications requesting withdrawal of AMCs are subject to the District's Safe Yield Regulation K.A.R. 5-22-7 when an AMC is accumulated (as opposed to a Physical Recharge Credit)." The City objected,

"Counsel objects to the request on the basis that it appears to speak to applications that have been withdrawn, and is therefore irrelevant and not reasonably calculated to lead to discovery of admissible evidence."

The record indicates that the City had previously filed applications with DWR for new permits to divert water, but the City later withdrew those applications. The presiding officer agrees that the matter of the withdrawn applications is not relevant. The City's objection is sustained.

In its Clarifications on Motion to Compel, GMD2 specified 52 items in the City's privilege log which its seeks to have disclosed. In its responsive pleading, the City admitted that one document listed in the log is not entitled to a protective privilege; this item is identified as "Brian McLeod email of 9/18/2018 to David Barfield, Kenneth Titus, Tom Adrian, dave@aplawpa.com". The City must disclose this item, if it has not done so already.

The City asserts that nine items in the log are protected solely by attorney-client privilege. Item 8 is an email from Cherwell to Joseph Pajor dated September 4, 2018. There is

no attorney included in the communication, thus the attorney-client privilege does not apply. The City must disclose this item.

Items 9, 10, and 11 are emails from Joseph Pajor to Scott Macey dated September 6, 2018. There is no attorney included in the communication and, therefore, the attorney-client privilege does not apply. The City must disclose these items.

Item 15 is an email from Joseph Pajor dated September 10, 2018. Although it is copied to the City's attorney, one of the direct recipients is Brian Meier, who appears to be an employee of Burns and McDonald, an private company independent of the City. Thus, the communication was not confidential and is not entitled to attorney-client privilege. The City must disclose item 15.

Item 16 is an email from Joseph Pajor, also dated September 10, 2018. There does not appear to be an attorney included in this communication. Also, it is also directed to Brian Meier as was Item 15. Accordingly, this item is not entitled to attorney-client privilege and must be disclosed.

Item 25 is an email from Brian McLeod dated September 18, 2018. It is directed to the David Barfield (the Chief Engineer), Kenneth Titus (DOA attorney) and Tom Adrian (GMD2 attorney). It is not confidential, not entitled to attorney-client privilege and must be disclosed.

Item 29 is an email from Joseph Pajor dated September 26, 2018. There does not appear to be an attorney included in this communication. Also, it is directed to Brian Meier, rendering it non-confidential and not entitled to attorney-client privilege. It must be disclosed.

Item 37 is an email from Joseph Pajor dated October 1, 2018. There does not appear to be an attorney included in this communication. Also, it is directed to Brian Meier, rendering it non-confidential and not entitled to attorney-client privilege. It must be disclosed.

There are three items for which the City claims attorney-client privilege and work product protection, Items 1a, 1b and 36. Item 1a is an email from Scott Macey dated August 31, 2018. It is copied to the City's attorney and is not directed to anyone outside the City's employ. It is entitled to attorney-client privilege. As such, it is not necessary to determine if it qualifies for work product protection.

Item 1b is an email from Scott Macey to Joseph Pajor dated August 31, 2018. There is no attorney included in the communication. Therefore, it is not entitled to attorney-client privilege. The email is not directed to, or copied to, an attorney, nor is an attorney apparently

involved in any way. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

Item 36 is an email from Scott Macey dated September 28, 2018. It is directed to Lane Letourneau, Aaron Oleen, Alan King and Brian McLeod. Because it is directed to staff and counsel for another party in this case, it is not confidential and not entitled to attorney-client privilege. This same reason precludes it from being considered work product; materials shared with a potentially opposing party cannot reasonably be withheld from subsequently sharing with the same party based on claims that they were prepared in anticipation of litigation. The City must disclose Item 36.

The City has asserted work product protection as the reason for nondisclosure of 41 items. Item 2 is an email from Scott Macey dated August 31, 2018. Item 3 is an email from Scott Macey dated September 4, 2018. Item 4 is an email from Luca DeAngelis dated September 4, 2018, in response to Item 3. These three items involve contacts with a potential expert witness and are entitled to work product protection.

Item 5 is an email thread regarding on-call task orders. The email is not directed to, or copied to, an attorney, nor is an attorney apparently involved in any way. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

Item 6 is a multipage email dated August 31, 2018, from Scott Macey to Scott Macey, regarding ASR Events Calendar. It appears to be a series of calendar entries spanning several years (2013 to 2018), prepared in the ordinary course of business. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

Item 7 appears to be the same as Item 1b. The analysis for Item 1b applies here, also.

Item 12 is an email thread regarding on-call task orders. The email is not directed to, or copied to, an attorney, nor is an attorney apparently involved in any way. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

Item 13 is an email from Scott Macey dated September 6, 2018 to Joseph Pajor. There is no attorney included in the communication. The content is merely a link to a separate document or file. There is no explanation from the City as to what this document or file is, therefore, it is impossible to determine if work product protection applies. The attorney work product doctrine does not offer a per se exemption for all records prepared by or for an attorney. *Wichita Eagle &*

Beacon Publishing Co. v. Simmons, 274 Kan. at 218. Here, it cannot be determined if the material(s) were even prepared "by or for an attorney", if it/they were prepared in anticipation of litigation, or what the content of these material(s) is. "Privileges in the law are not favored because they operate to deny the factfinder access to relevant information." *Adams v. St. Francis Regional Med. Center*, 264 Kan. 144, Syl. P.3, 955 P.2d 1169 (1998). Therefore, it cannot be concluded that these material(s) cited by the link are entitled to work product protection. The City must disclose them.

Item 14 is an email from Scott Macey dated September 7, 2018, to Daniel Clement regarding the ASR Proposed Minimum Index Levels. It does not, in and of itself, contain enough content to determine whether it was created by or for an attorney in anticipation of litigation. The email thread contains an earlier message from 2017, well before the City submitted its proposal to DWR. This part did not include an attorney in the communication, thus it apparently was not created by an attorney, and there is not enough information to determine if it was created for an attorney in anticipation of litigation. For the reasons cited here and above regarding Item 13, this material must be disclosed.

Item 17 is an email from Daniel Clement dated September 10, 2018, to Daniel Clement regarding ASR drought modeling supplemental figures. Item 18 is an email from Scott Macey dated September 10, 2018, on the same topic. Item 21 is an email from Scott Macey dated September 11, 2018, also on the same topic. Because they appear to have been created by or for an attorney in anticipation of litigation, these items are entitled to work product protection. These need not be disclosed.

Item 19 and 20 are emails from Brian Meier dated September 11, 2018, to Joseph Pajor that include material that appears to qualify for work product protection. Because they appear to have been created by or for an attorney in anticipation of litigation, these items are entitled to work product protection. These need not be disclosed.

Item 22 appeared, at first, not to exist. However, GMD2 has explained that their listing contained a typographical error in that the date of the two sought-after emails from Brian Meier to Joseph Pajor was September 11, 2018, not September 12, 2018. The presiding officer subsequently required counsel for the City provide it for the presiding officer's in camera review; the City submitted one of the two emails to the presiding officer and replied that the other was already in the set previously provided. Both items contain more than one email message in a thread. The shorter of the two items is contained within the longer item. The portion of both items that is an email from Joseph Pajor to Brian McLeod dated Tuesday, September 11, 2018, at 8:56 a.m. qualifies as work product and is, therefore, privileged. The remaining portions are not entitled to privilege and must be disclosed; they are an email from Brian Meier to Joseph Pajor dated September 11, 2018 at 10:24 a.m., an email from Brian Meier to Joseph Pajor dated

September 11, 2018 at 1:19 p.m., and an email from Joseph Pajor to Brian Meier dated September 11, 2018 at 12:37 p.m.

Item 23 is an email thread regarding on-call task orders. The email is not directed to, or copied to, an attorney, nor is an attorney apparently involved in any way. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

Item 24 is an email thread regarding on-call task orders. The email is not directed to, or copied to, an attorney, nor is an attorney apparently involved in any way. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

Item 26 is an email from Scott Macey dated September 18, 2018. It has scant content, making it impossible to determine whether it was prepared by or for an attorney in anticipation of litigation. The thread contains material previously directed to another party, thereby waiving any confidentiality. This item does not qualify for work product protection and must be disclosed.

Item 27 is a multipage email dated September 19, 2018, from Scott Macey to Joseph Pajor, regarding "Events Calendar to Crosscheck". It appears to be a series of calendar entries spanning several years (2013 to 2018), prepared in the ordinary course of business. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed. (See Item 6.)

Item 28 is an email from Scott Macey to himself dated September 20, 2018 regarding DWR meeting minutes revisions. There is not enough content to determine whether it was prepared by or for an attorney in anticipation of litigation. This item does not qualify for work product protection and must be disclosed.

Item 30 is an email from Paul McCormick dated September 27, 2018 regarding commentary on model changes. The content does not constitute work product material; indeed it contains material described as previously presented to DWR, thereby waiving any confidentiality. This item must be disclosed.

Item 31 is the same email as Item 30, with additional items in the thread, including direct communication with one of the parties, waiving any potential confidentiality. As with Item 30, Item 31 is not entitled to work product protection and must be disclosed.

Item 32a is an email from Paul McCormick dated September 28, 2018. It does not evidence material created by or for an attorney in anticipation of litigation, and it contains the same material as in Item 31 of direct communication with one of the parties. For the same reason as above, this item must be disclosed.

Item 32b is an email from Paul McCormick dated September 28, 2018, indicating communication of draft documents, seeking input from staff and legal counsel. It is entitled to work product protection and need not be disclosed.

Item 33 is an email from Don Henry dated September 28, 2018. It also indicates communication of draft documents, seeking input from staff and legal counsel. It is entitled to work product protection and need not be disclosed.

Item 34 is an email from Scott Macey, containing Item 33. For the same reasoning applied to Item 33, Item 34 need not be disclosed.

Item 35 is an email from Scott Macey to Lane Letourneau dated September 28, 2018, regarding a GMD2 letter request. It is a clear communication directly to another party, thereby waiving any claim of confidentiality or of having been created in preparation for litigation. It must be disclosed.

Item 36 is an email from Scott Macey dated September 28, 2018, to Lane Letourneau and Aaron Oleen and others regarding ASR groundwater modeling data submittal. It is a clear communication directly to another party, thereby waiving any claim of confidentiality or of having been created in preparation for litigation. It must be disclosed.

Item 38 is an email from Scott Macey dated September 28, 2018, to Lane Letourneau regarding a letter to GMD2 on ASR rule, moving forward. It is a clear communication directly to another party, thereby waiving any claim of confidentiality or of having been created in preparation for litigation. It must be disclosed.

Item 39 is a multipage email dated October 19, 2018, from Scott Macey to Scott Macey, regarding GMD2 Events Calendar. It appears to be a series of calendar entries spanning several years (2015 to 2017), prepared in the ordinary course of business. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed. (See Items 6 and 27.)

Item 40 is a multipage email dated October 19, 2018, from Scott Macey to Scott Macey, regarding DWR Meeting Calendar. It appears to be a series of calendar entries spanning several years (2013 to 2018), prepared in the ordinary course of business. It does not indicate that it was

prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed. (See Item 6, 27 and 39.)

Item 41, 42, 43, 44 and 45 are emails from Scott Macey dated October 24, 2018, regarding ASR website updating. All of this material appears to have been created in the ordinary course of business, not by or for an attorney in anticipation of litigation. They are not entitled to work product protection and must be disclosed.

Item 46 is an email from Ben Nelson dated October 24, 2018 regarding 1% drought. This material appears to have been created in the ordinary course of business, not by or for an attorney in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

Item 47 is an email thread regarding on-call task orders. The email is not directed to, or copied to, an attorney, nor is an attorney apparently involved in any way. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

Items 48a and 48b are emails from Scott Macey dated October 25, 2018, to Jennifer Hart regarding files and the City's ASR website. As with Items 42 through 45, all of this material appears to have been created in the ordinary course of business, not by or for an attorney in anticipation of litigation. They are not entitled to work product protection and must be disclosed.

Items 49a is an email thread regarding on-call task orders. The first email appearing in the thread is dated October 25, 2018, from Scott Macey to Michael Jacobs. This one email appears to contain material "prepared by or for a party's representative, including not only lawyers, but . . others," in anticipation of litigation. See *Wichita Eagle & Beacon Publishing Co. v. Simmons*, 274 Kan. 194, 218, 50 P.3d 66 (2002). This one email qualifies for work product protection and need not be disclosed. However, the other emails in the thread are not entitled to work product protection. They are not directed to, or copied to, an attorney, nor is an attorney apparently involved in any way. They do not indicate that they were prepared under an attorney's supervision in anticipation of litigation. They must be disclosed.

Item 49b is an email thread regarding on-call task orders. The email is not directed to, or copied to, an attorney, nor is an attorney apparently involved in any way. It does not indicate that it was prepared under an attorney's supervision in anticipation of litigation. It is not entitled to work product protection and must be disclosed.

All items designated in this order for disclosure from the City must be disclosed to all parties and the presiding officer by the deadline set forth at the end of this order.

GMD2's request for attorney fees is denied.

5. City of Wichita's Prehearing Motion in Limine to Exclude "Expert Reports" of Carl E. Nuzman, Tim Boese, and David Pope

The following pleadings related to this issue were filed by the parties, as indicated below.

1. On March 11, 2019, the City filed the City of Wichita's Prehearing Motion in Limine to Exclude "Expert Reports" of Carl E. Nuzman, Tim Boese, and David Pope.

2. On March 18, 2019, GMD2 filed its Response to Motion in Limine to Exclude Expert Testimony.

3. On May 3, 2019, Intervenors filed Intervenors' Response to Motion in Limine to Exclude Expert Testimony.

4. On May 3, 2019, GMD2 filed the District's Reply and Clarifications to Various Responses of DWR and the City to the District's Motions.

Standards for Admissibility of Expert Reports/Testimony

As noted above, the formal rules of evidence do not apply in administrative proceedings such as these. *Woessner v. Labor Max Staffing*, 56 Kan. App.2d 780, 791, 437 P.3d 992 (2019); K.A.R. 5-14-3a(q)(1). The admissibility of evidence is "more liberal" in administrative matters. *Id.*, citing *Gasswint v. Superior Industries Int'l-Kansas, Inc.*, 39 Kan. App.2d 553, 560, 185 P.3d 284 (2008).

Even in a trial court setting where the rules of evidence strictly apply, "'The qualification of an expert witness as well as the admissibility of expert testimony are matters within the broad discretion of the trial court. . . .The trial court's determination will not be overturned absent an abuse of such discretion..'" *Dieker v. Case Corp.*, 276 Kan. 141, 154, 73 P.3d 133 (2003), citing *Olathe Mfg., Inc. v. Browning Mfg.*, 259 Kan. 762, 915 P.2d 86 (1996). "'Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.'" *Id.*, citing *City of Wichita, Kansas v. Eisenring*, 269 Kan. 767, 776, 7 P.3d 1248 (2000). Because the rules of evidence are more relaxed in the administrative context, an administrative hearing officer is afforded at least the same level of discretion.

The Kansas Supreme Court adopted the standard for admissibility of expert testimony articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and codified this standard at K.S.A. 60-456(b). See *Matter of Cone*, 309 Kan. 321, 435 P.3d 45 (2019). That statute, K.S.A. 60-456(b), states:

"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."

The Kansas Supreme Court noted that, under *Daubert*, "the trial court's overarching inquiry should be the scientific validity, evidentiary relevance and reliability" of the expert testimony in determining admissibility. *Matter of Cone*, 309 Kan. at 327.

In addition, K.S.A. 60-456(d) provides, "Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact."

Discussion and Conclusions

In its motion, the City asserts that in each of the reports filed by Carl E. Nuzman, Tim Boese and David Pope, "the author opines on the meaning and application of statutes and regulations," and therefore these reports are inadmissible.

In reviewing the three named experts' extensive qualifications, professional experience and training, it is clear that their respective testimonies regarding the scientific and technical aspects of the City's ASR proposal are properly admissible under K.S.A. 60-456(b). Indeed, the City does not challenge their admissibility on these grounds. The City contends none of these expert witnesses may be allowed to submit testimony containing opinions on matters of law, specifically the statutes and regulations governing water appropriations and ASR projects. The City asserts such testimony is never admissible, citing *Glassman v. Costello*, 267 Kan. 509, 986 P.2d 1050 (1999). The *Glassman* court clarified that the threshold question is whether the proceedings are before a jury or not. "[W]e point out that it is undisputed that '[w]here trials are by jury, it is the sole province of the court to decide questions of law as distinguished from questions of fact.' *Hunter v. Brand,* 186 Kan. 415, 419, 350 P.2d 805 (1960)." *Glassman*, 267 Kan. at 528. The court further stated:

"In 31A Am.Jur.2d, Expert and Opinion Evidence § 136, pp. 143–44, it is stated: 'While witnesses may be permitted, in a proper case, to give an opinion on the ultimate *fact* involved in the case, there is a strong consensus among jurisdictions, amounting to a general rule, that witnesses may not give an opinion on a question of domestic law or on matters which involve questions of law. The fundamental problem with testimony

containing a legal conclusion is that conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury amounts to a usurpation of the court's responsibility to determine the applicable law and to instruct the jury as to that law.'" *Id.*

The *Glassman* court reiterated, "It invades the authority of the court to allow an individual to present testimony to a jury as to what a change in the law was intended to accomplish." *Id.*, at 528.

Accordingly, the Kansas Court of Appeals has found that "the mere fact that the ultimate question at issue is a legal one for the court to determine does not make potential testimony on the subject inadmissible." *Wilson v. State*, 51 Kan. App.2d 1, 24, 340 P.23d 1213 (2014)(*rev. denied* April 29, 2015). "Accordingly, when expert testimony may be helpful to the court in understanding the background facts of the case or determining the ultimate legal issue, the testimony is admissible." *Id.*

In the case at hand, the issues do require the application of statutes and regulations, some of which address technical matters of water management and hydrologic principles, topics with which the three experts have thorough knowledge and respected experience. In addition, the decades-long careers of Mr. Boese and Mr. Pope required them to apply the water statutes and regulations to countless fact patterns as part of their daily duties in managing the resource. Their testimony is relevant and helpful to the presiding officer. There is no jury and the testimony will not invade the province of the presiding officer. The presiding officer is a lawyer with over 30 years of experience; none of the expert witnesses at issue are attorneys. There is no danger of the presiding officer being misled on legal matters by these expert witnesses. Moreover, it is important to note that expert witnesses' testimony on matters of law is not determinative. *Wilson*, 51 Kan. App.2d at 25. As the *Wilson* court summarized, "the district court is free to admit expert testimony regarding [legal issues], but that court --and any appellate court on review--must make its own independent conclusions." *Id.*

Because the expert testimony challenged here is found to be admissible, it "is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact." K.S.A. 60-456(d).

The City's motion to exclude the expert reports of Mr. Nuzman, Mr. Boese and Mr. Pope is denied.

6. GMD2's Motion in Limine to Exclude Expert Testimony of the City

The following pleadings related to this issue were filed by the parties, as indicated below.

1. On March 11, 2019, GMD2 filed its Motion in Limine to Exclude Expert Testimony of the City.

2. On March 11, 2019, Intervenors filed their Motion in Support of Equus Beds Groundwater Management District No. 2's Motion to Ensure Impartiality of Chief Engineer, Motion in Limine to Exclude Expert testimony of City, Motion in Limine to Exclude Expert Testimony of DWR or Recommendations, Motion to Dismiss and Motion for Summary Judgment.

3. On March 18, 2019, the City filed the City of Wichita's Response to Equus Beds Groundwater Management District No. 2's Motion in Limine to Exclude Expert Testimony of the City.

Standards for Admissibility of Expert Reports/Testimony

The applicable standards for admissibility are set forth in the discussion of the City of Wichita's Prehearing Motion in Limine to Exclude "Expert Reports" of Carl E. Nuzman, Tim Boese, and David Pope, above.

Discussion and Conclusions

The district contends the expert reports submitted by the City should be excluded because their content is deficient. The district further argues the City's experts should not be allowed to testify because the allegedly deficient material fails to qualify them as experts and fails to qualify their testimony as helpful or relevant, and that the expert reports should be stricken as cumulative.

Primarily, the district argues that the City's expert reports fail to contain necessary conclusions or opinions or the analyses used in reaching said conclusions or opinions. GMD2 characterizes the City's expert reports as containing mere "bullet point references to broad topics."

Looking to civil procedure for guidance, but mindful that the statutes do not govern these proceedings, expert reports must state "the subject matter on which the expert is expected to testify" and "the substance of the facts and opinions to which the expert is expected to testify". K.S.A. 60-226(b)(6)(A). Further, "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." K.S.A. 60-226(b)(6)(B).

If a party learns that such expert disclosure is incomplete or incorrect, it must supplement the disclosure with any expert testimony to be made at least 30 days before trial, unless otherwise ordered. K.S.A. 60-226(e). Supplementation is intended for changes due to newly discovered evidence or material inadvertently left out, not for the initial disclosure of an opinion on the central issue of the lawsuit." *Walder v. Board of Com'rs of Jackson County*, 44 Kan. App.2d 284, 287, 236 P.3d 525 (2010)(*rev. denied* Sept. 23, 2011). The main purpose for complete disclosure is to avoid unfair surprise to other parties. See *Walder*, p.288.

Although this matter is not bound by the rules of evidence, the applicable regulations allowing all parties "reasonable opportunity to be heard" also require "the opportunity to present evidence and argument, conduct cross-examination, and submit rebuttal evidence". K.A.R. 5-14-3a(m). Likewise, the regulations address discovery and the filings of pleadings, motions and objections. K.A.R. 5-14-3a(h),(i). These provisions clearly contemplate the sharing of evidence prior to the hearing and the opportunity for parties to address each other's submissions. The principle of avoiding unfair surprise would apply here, as it does in civil litigation.

Here, each of the City's expert reports lists the general topics for which the expert was consulted, the grounds for each expert's knowledge, and the factual and/or scientific bases for each expert's opinions. Each report also includes descriptions of documents prepared by, or under the supervision, of each expert, and documents reviewed by or relied upon by each expert, and certain correspondence. It is noted that some of these documents described by the City are not accessible to the presiding officer, were not submitted as attachments, and therefore are incapable of review. Each report also includes a statement about the expert's relationship to the City and a reference to his or her qualifications as listed elsewhere. Finally, each expert report concludes with this statement, " "[Name of expert]'s factual observations and opinions are as presented above in this Expert Report, ASR Permit Modification Proposal, cover letter and supporting appendices."

However, there appears to be no identification in the referenced reports, ASR proposal, its attachments, or cover letter specifying any individual expert's observations and opinions. The reports are replete with factual information on which the experts have relied, but the reports do not identify the respective observations, opinions or conclusions of any given expert. The blanket reference at the close of each report is not a sufficient substitute; the documents referenced, at least those accessible to the presiding officer, do not attribute conclusions or opinions to individual experts. This lack of disclosure could result in unfair surprise to other parties. Therefore, the City must supplement each of its expert reports to provide the opinions and/or conclusions reached by each expert and a summary of the grounds for each.

The district's argument that the City's experts should not be allowed to testify because the allegedly deficient material fails to qualify them as experts and fails to qualify their testimony as

helpful or relevant, is moot, contingent on the City providing the supplementation described herein.

GMD2 further argues that the expert reports should be stricken as cumulative because the reports contain the same bullet points modified for each expert. Assuming the City provides the supplementation described above, the supplemented reports should provide adequate specificity and distinction. However, the City is cautioned against the use of cumulative testimony, both in expert reports and at the hearing. "'Cumulative evidence is evidence of the same kind to the same point, and whether it is cumulative is to be determined from its kind and character, rather than its effect.' A district court may in the exercise of discretion refuse to admit cumulative evidence." *State v. Dupree*, 304 Kan. 43, 64, 371 P.3d 862 (2016). See *Simon v. Simon*, 260, Kan. 731, 741, 924 P.2d 1255 (1996)["'a trial court has a right to reject relevant testimony where the evidence is cumulative of facts 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.' (Citation omitted.)"].

GMD2's motion to exclude the City's expert reports is denied, contingent upon the City providing the supplementation described herein. The City shall provide such supplementation no later than the deadline set forth at the end of this order.

7. GMD2's Motion in Limine and Motion to Bar Agency Recommendations

The following pleadings related to this issue were filed by the parties, as indicated below.

1. On March 11, 2019, GMD2 filed its Motion in Limine and Motion to Bar Agency Recommendations.

2. On March 11, 2019, the Intervenors filed their Motion in Support of Equus Beds Groundwater Management District No. 2's Motion to Ensure Impartiality of Chief Engineer, Motion in Limine to Exclude Expert Testimony of City, Motion in Limine to Exclude Expert Testimony of DWR or Recommendations, Motion to Dismiss and Motion for Summary Judgment.

3. On March 18, 2019, DWR filed DWR's Response in Opposition to GMD2's and Intervenors' Motion in Limine and Motion to Bar Agency Recommendations

4. On March 18, 2019, the City filed the City Of Wichita's Response to Remaining Motions of Equus Beds Groundwater Management District No. 2 and Interveners (sic).

5. On May 3, 2019, GMD2 filed the District's Reply and Clarifications to Various Responses of DWR and the City to the District's Motions.

Standards for Standards for Admissibility of Expert Reports/Testimony

The applicable standards are set forth above, in relation to other parties' motions to exclude expert reports and/or testimony. Additional standards specific to DWR per regulation are as follows:

DWR shall be allowed to be a party to a formal hearing. K.A.R. 5-14-3a(a)(1).

"Each party shall have the opportunity to file pleadings, objections or motions. At the presiding officer's discretion, any party may be given an opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed orders." K.A.R. 5-14-3a(i).

"The presiding officer shall not be required to consider any written filing that has not been filed on or before the deadline or that is not served on all parties." K.A.R. 5-14-3a(i)(3).

"Each party shall have a reasonable opportunity to be heard. Each party shall be given the opportunity to present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as may be restricted by a prehearing order or limited grant of intervention." K.A.R. 5-14-3a(m).

"(2) If the DWR does not offer opinion testimony concerning whether and how the application complies or does not comply with the applicable regulations, its participation in the hearing shall be limited as follows:

(A) The DWR shall make a proffer of the records of the agency pertaining to the pending matter and may offer the testimony of fact witnesses to lay foundation for the proffer. These witnesses may be cross-examined, but cross-examination shall be limited to the scope of the direct questioning.

(B) If any member of the DWR's staff is called as a witness for or is cross-examined by another party, the DWR shall be allowed to conduct cross-examination of the witnesses offered by that party.

(3) The applicant shall be heard after the DWR's proffer, unless the presiding officer determines that another order of presentation will facilitate the conduct of the hearing.

(4) If the DWR offers opinion testimony concerning whether and how the application complies or does not comply with the applicable regulations, the DWR shall be heard after the applicant and the DWR may participate in the hearing to the same extent as the applicant, unless the presiding officer determines that a different order of presentation will facilitate the conduct of the hearing. K.A.R. 5-14-3a(n).

Discussion and Conclusions

GMD2 and the Intervenors contend that DWR should be precluded from offering any expert reports or expert testimony because DWR did not designate any expert witnesses or submit any expert reports by the given deadline, and has not submitted either to date. In addition, GMD2 and the Intervenors argue that DWR should be precluded from offering any

recommendations as to whether the City's proposal should be approved or not, as a consequence of not being able to present any expert testimony.

According to the record, the Chief Engineer, while in the role of presiding officer, issued an order dated December 21, 2018 that required the parties to submit expert reports by February 15, 2019. Another order issued by the Chief Engineer in the role of presiding officer dated February 15, 2019, extended that deadline to February 18, 2019. DWR has not filed any expert reports, a fact which no party challenges.

The regulations specifically state that DWR shall be a party and, as such, DWR should be subject to the same benefits and obligations as all other parties. K.A.R. 5-14-3a(a)(1). The benefits include a reasonable opportunity to be heard, a mandated opportunity to file pleadings, objections or motions, a possibility of filing briefs, proposed findings of fact and conclusions of law, and proposed orders, and a mandated opportunity for direct examination and cross-examination of witnesses. K.A.R. 5-14-3a(m),(i),(l). However, the obligations include meeting deadlines set by the presiding officer for written filings, with the penalty that the presiding officer need not consider any written filing that has not been filed on or before the deadline. K.A.R. 5-14-3a(i)(2)(3).

No party objects to members of DWR staff testifying as fact witnesses, which could encompass explanations of how DWR employees have carried out their duties in the past. The objections arise over DWR employees testifying about how they would carry out their duties in the present case. If such objections are sustained, DWR would be precluded from offering "opinion testimony concerning whether and how the application complies or does not comply with the applicable regulations". K.A.R. 5-14-3a(n).

The governing regulations do not resolve the question. Although K.A.R. 5-14-3a(i)(3) states that untimely written filings may be excluded, it does not state that such failure means the related expert may not testify at the hearing. In addition, the regulations allow for circumstances in which DWR does, and does not, offer "opinion testimony concerning whether and how the application complies or does not comply with the applicable regulations", and prescribes rules for each circumstance, but it does not give guidance on when such testimony may be given or excluded. K.A.R. 5-14-3a(n).

This is an unfortunate situation because DWR staff is in a unique position to provide testimony helpful to the hearing officer based on staff's knowledge and experience. The most fundamental purposes of expert testimony are that it encompass matters beyond the common knowledge and skill of the ordinary person and it must be helpful to the trier of fact. *McConwell v. FMG of Kansas City, Inc.*, 18 Kan.App.2d 839, 847, 861 P.2d 830 (1994)(*rev. denied* Feb. 2, 1994); *Mooney v. City of Overland Park*, 283 Kan. 617, 622, 153 P.3d 1252 (2007). The

testimony of DWR staff can be expected to meet both of these criteria. GMD2 and the Intervenors further challenge expert testimony by DWR staff for failure to meet the *Daubert* standards, as codified in K.S.A. 6-456(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."

Citing the deposition of DWR Appropriation Program Manager Lane Letourneau, the district asserts that DWR has not performed any independent research on the City's groundwater flow model; DWR has not gathered any data as it relates to the model; DWR has not performed any independent modeling; DWR has not performed any independent research or technical analysis regarding the impact of the City's proposal on the aquifer. Accordingly, GMD2 contends DWR staff fail to meet the necessary criteria for admissibility of expert testimony. In addition, GMD2 points out that, without having applied reliable principles and methods to the facts of this case, and only having opined that the City's proposal is "reasonable", DWR staff would only be testifying as to the credibility of other expert witnesses, a situation which our courts have disallowed. *State v. Albright*, 283 Kan. 418, 430, 153 P.3d 497 (2007).

GMD2 also contends DWR has not identified the credentials of any potential expert witness, except Lane Letourneau, and therefore it is not possible to determine whether their potential witnesses qualify as experts. DWR counters that it is entitled to be a party under K.A.R. 5-14-3a, that the rules of evidence are relaxed in administrative settings, that the other parties have learned through written discovery who DWR's witnesses may be and that all testifying DWR employees should be deemed experts by virtue of their jobs, at least to the extent of each employee's job duties. (DWR further argues that its employees may testify as experts due to the Chief Engineer being the presiding officer; as this is no longer true, those particular arguments are unpersuasive.)

The presiding officer is cognizant of the regulatory mandate that all parties be given reasonable opportunity to be heard and the relaxed evidentiary context, as well as the guidance in the regulations for orderly and fair proceedings. K.A.R. 5-14-3a(m)(a)(i). In addition, as the parties agree in their pleadings, the presiding officer has wide discretion regarding whether to exclude or admit expert testimony. See *Warren v. Heartland Automotive Services, Inc.*, 36 Kan. App.2d 758, 760, 144 P.3d 73 (2006). In this case, it would seem to be patently unfair to, on the one hand, allow the City the opportunity to cure defects in its expert reports by supplementing its expert reports, while, on the other hand, foreclosing any opportunity for DWR to cure its defect

in failing to submit expert reports. More importantly, the presiding officer bears the overriding responsibility of ensuring a complete record for entities and courts who may subsequently review the decision in this case. Therefore, DWR will be allowed to submit expert reports that comply with the same requirements as discussed elsewhere in this order. If DWR fails to do so by the deadline given herein, such reports will not be accepted and said experts will not be allowed to testify at the hearing beyond fact testimony.

Finally, in the interest of avoiding unfair surprise to any party, the following shall apply to all parties. Any expert testimony offered at the hearing by any party that exceeds the content of said expert's written report may, in the presiding officer's discretion, be allowed but shall not be considered in determining the outcome of this case. This approach also helps ensure a complete record for appeal and may help preemptively address anticipated disagreements among counsel during the hearing. Counsel will remain free to lodge objections for the record.

It is noted that the district acknowledges the credentials of Lane Letourneau have been established in the record and that DWR's Pre-Hearing Brief and Written Testimony contains testimony of Mr. Letourneau. Therefore, DWR need not submit a separate expert report by Mr. Letourneau by the given deadline in order for Mr. Letourneau to submit expert testimony at the hearing within the scope of his written testimony. In addition, it is noted that the deposition of Mr. Letourneau is also part of the record of this case. Therefore, Mr. Letourneau's expert testimony at the hearing, within the scope of his written testimony, does not present unfair surprise.

The need for a complete record and the need to avoid unfair surprise require an opportunity to submit all new (DWR) and supplemented (City) expert reports. However, this presiding officer is loathe to further delay the hearing in this case. Therefore, in order for DWR to present DWR employees (other than Lane Letourneau) as expert witnesses at the hearing, it must submit adequate written expert reports no later than the deadline set forth at the end of this order, the same deadline for the City to submit its expert report supplements.

8. Intervenors' Motion in Support of Equus Beds Groundwater Management District No. 2's Motion to Ensure Impartiality of Chief Engineer, Motion in Limine to Exclude Expert Testimony of City, Motion in Limine to Exclude Expert Testimony of DWR or Recommendations, Motion to Dismiss and Motion for Summary Judgment

This motion is essentially what its title indicates: it contains statements in support of the identified motions filed by GMD2. The Motion to Ensure Impartiality of Chief Engineer has been withdrawn by GMD2 as moot, to which the Intervenors agreed. This motion does not raise new arguments; the matters it addresses have been resolved, above.

ORDER

1. GMD2's Motion for Summary Judgment is denied.

2. GMD2's Motion to Dismiss is taken under advisement.

3. GMD2's Motion to Compel to DWR is granted only as to the items specified, which DWR must provide no later than 12:00pm on August 2, 2019. As to the other items specified, the motion is denied.

4. GMD2's Motion to Compel to the City is granted only as to the answers and items specified, which the City must provide no later than 12:00pm on August 2, 2019. As to the other answer and items specified, the motion is denied.

5. The City's Prehearing Motion to Exclude "Expert Reports" of Carl Nuzman, David Pope and Tim Boese is denied.

6. GMD2's Motion to Exclude Expert Testimony of the City is denied contingent on the City supplementing its expert reports no later than 12:00p.m. on August 23, 2019.

7. GMD2's Motion to Bar DWR Agency Recommendations is denied contingent on DWR submitting expert reports for any expert it wishes to question at the hearing, other than Lane Letourneau, no later than 12:00pm on August 23, 2019. If it so wishes, DWR may submit an expert report from Lane Letourneau in accordance with the requirements for any other expert as described herein, but it need not do so in order for Mr. Letourneau to provide expert testimony within the scope of his written testimony and deposition.

IT IS SO ORDERED, THIS 24th DAY OF JULY, 2019.

Constance C. Owen
Presiding Officer

CERTIFICATE OF SERVICE

On this 24th day of July, 2019, I hereby certify that the original of the foregoing Order on Prehearing Motions was sent by electronic mail to the following:

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Constance C. Owen
Presiding Officer