

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

In the Matter of the City of Wichita's)
Phase II Aquifer Storage and recovery Project) **Case No. 18 WATER 14014**
In Harvey and Sedgwick Counties, Kansas)
_____)
Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a

**CITY OF WICHITA'S RESPONSE TO
EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NO. 2'S
MOTION FOR RECONSIDERATION AND FOR LEAVE TO HAVE ADDITIONAL
MOTIONS CONSIDERED OUT OF TIME**

The City of Wichita, Kansas (the "City") respectfully requests the Hearing Officer to overrule the Motion filed by the Equus Beds Groundwater Management District No. 2 (the "District"). As correctly noted in the Order addressing the untimely motion for summary judgment, the information which the District identifies as new for purposes of that motion was not new. It was ascertainable from the City's Proposal from the beginning. The excerpts provided in support of the City's amended expert reports also were not new information, but were excerpts of documents provided to the District in discovery many months ago. Further, the District's delay, from August 23, 2019 to October 10, 2019, in seeking to pursue additional motions or depositions relating to expert reports, leaves the case in a posture where conducting such activity now would either cause additional delays or disrupt the parties' preparation for the scheduled hearing. By way of more detailed response to the Motion, the City offers the following additional points:

1. The City timely responded to the Order to furnish supplemental discovery responses by August 2, 2019. The supplemental responses to Requests for Admission did not provide any information that had not been ascertainable from the City's original Proposal. The supplemental production was also largely redundant, and chiefly provided some immaterial, internal City communications, linked to substantive information that had already been provided in the City's original responses. If it was not immediately apparent to the District that the

supplemental production was largely redundant, this fact could have been determined in a matter of minutes by automated comparison with the prior responses, as both the original and supplemental disclosures were provided in digital form.

2. The only materials from the City's supplemental responses which were cited in support of the District's revised motion were the City's supplemental responses to Requests 1 and 2 of the District's Second Requests for Admission (See, Memorandum in Support of Revised Motion for Summary Judgment, ¶¶ 4 – 8). The District claimed it was prejudiced in filing its original motion "by not having the benefit of the City properly answering its discovery requests" (Revised Motion for Summary Judgment, p. 2). However, the information in the City's supplemental responses had been provided in the City's Proposal, which disclosed from its inception that AMCs would be based on "the water left in storage as a result of utilizing Little Arkansas River flows rather than water from the EBWF" (Proposal, Page 1-2). The District could have cited this information in its original Motion for Summary Judgment, but did not do so. This was not attributable to any action by the City, in discovery or otherwise.

3. The claim of prejudice in the revised motion did not mention any issues as to the City's supplemental expert disclosures (Revised Motion for Summary Judgment, p. 2). The District had received these supplemental disclosures on August 23, 2019, more than a month prior to filing its Revised Motion for Summary Judgment on September 25, 2019, and weeks prior to the telephone status conference on September 18, 2019. The District also did not mention any issues with the supplemental expert disclosures during the September 18, 2019 telephone status conference.

4. In referring to the City's amended expert disclosures as "over 800 pages," the District is obviously counting the excerpts of supporting documents referenced in the disclosures. However, as is indicated in the amended disclosures, these excerpts are of documents previously provided as part of the City's original Production Responses (most can be found among the City's designated Exhibits). They are not new information, but were excerpted and attached to more immediately associate the referenced documents with the expert disclosures

to which they pertain. Many of these documents were also referenced in the City's original expert disclosures, and although the Hearing Officer did not have access to the referenced documents at the time those disclosures were submitted, the District did. The District could not have read many pages of the excerpts attached to the amended expert disclosures without realizing they were all material it had previously seen. In fact, the descriptions of the excerpts within the body of each amended disclosure fairly signaled that this was the case. The ostensible need to re-read all of these materials for more than a month is not an adequate explanation for the timing of the District's motions.

5. The City believes the amended disclosures and supporting excerpts fairly meet the Hearing Officer's direction to supplement the reports to provide the opinions and conclusions reached by each expert and a summary of the grounds for each. (Some reports were not supplemented in order to reduce the number of witnesses, in keeping with the Hearing Officer's caution against cumulative testimony).

6. If the District believed it needed yet additional detail, it could have pursued depositions of some or all of the City's witnesses. Indeed, the District's ostensible desire to take depositions of the City's experts after receipt of the supplemental disclosures, but well in advance of the hearing, was a material part of the District's August 6, 2019 motion to continue the hearing setting. As of the present date, more than two months after its receipt of the City's supplemental expert disclosures, the District has not contacted the City to identify or schedule any witness for deposition. The District admits in its Motion (Paragraph 39) that it deliberately opted to file its Revised Motion for Summary Judgment instead of noticing depositions. Then, in the same paragraph, the District asks for leave to take unspecified depositions hereafter, if its motions are not allowed. At this point, it would seem preferable for the parties to focus on hearing preparation, rather than reopening discovery for eleventh-hour depositions.

7. The City again calls attention to the point that, from the beginning of the effort to bring this case to a hearing, the case schedule has always contemplated a post-hearing period of approximately thirty days for submission of additional, written testimony, post-hearing

comments and briefs (See, July 23, 2018 Pre-Hearing Conference Order, Paragraph 9). This is inconsistent with the District's attempt to cut off or limit technical evidence in the case that identifies errors in its expert reports. It also negates any realistic prospect that the District might suffer prejudice as a result of any evidence presented at hearing, because the District will have opportunities for rebuttal both in its own case-in-chief and during the post-hearing period for submission of additional written evidence. For these same reasons, the City does not object to the District's request to file "rebuttal expert reports." Otherwise, however, the case should proceed to hearing as scheduled, without any further procedural wrangling over pre-hearing motions.

CONCLUSION

The legal authorities cited in the District's Motion correctly recognize that the rulings on the questions raised by the Motion are within the discretion of the Hearing Officer. However, the District's claims to have presented compelling grounds for its Motion are in error. The District's failure to raise these issues during the September 18, 2019 status conference has not been adequately explained, and the District's delays in seeking depositions, as well its submission of untimely motions, have not been adequately explained by its claims of new information.

WHEREFORE, the City requests that the District's Motion be denied.

Respectfully submitted,

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

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

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he transmitted the above and foregoing Response to the Motion for Reconsideration by electronic mail on this 29th day of October, 2019, for filing, to ConnieOwen@everestkc.net, Chris.Beightel@ks.gov, David.Barfield@ks.gov and Kenneth.Titus@ks.gov and served the same upon counsel for the other parties herein by electronic mail addressed to:

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