

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.

**DWR's CONSOLIDATED RESPONSE IN OPPOSITION TO
GMD2's AND INTERVENORS' MOTION FOR RECONSIDERATION AND FOR
LEAVE TO HAVE ADDITIONAL MOTIONS CONSIDERED OUT OF TIME**

DWR opposes GMD2's motion for reconsideration of the Presiding Officer's October 9, 2019 order declining to consider GMD2's revised summary-judgment motion, and also opposes GMD2's related and combined motion for leave to have additional motions considered out of time (collectively, the "Motion"), to which Motion Intervenors have joined.

1. GMD2 apparently has never agreed with the Chief Engineer's legal conclusions, summarized in his letters of September 18, 2017 and June 1, 2018, that Wichita's Proposal fits within the existing statutory and regulatory framework. *See* such letters of the Chief Engineer attached hereto as **Exhibits A and B**, respectively. Accordingly, GMD2 has spent much of the last two years attempting to contest Wichita's Proposal on procedural/technical/legal grounds, rather than attempting to meaningfully address its merits.

2. If GMD2 and Intervenors wish to put all their eggs in one procedural/technical/legal basket, then that is their prerogative. It is unfortunate, however, because it is within the Chief Engineer's discretion to consider the merits of Wichita's Proposal (as with any water-right owner's proposal, generally). If and when any final agency action is taken with respect to Wichita's Proposal, then GMD2 and Intervenors can attempt to make their legal arguments before a district

judge in an action under the Kansas Judicial Review Act.

3. GMD2's and Intervenors' reluctance to address the merits is also unfortunate because obtaining input on the merits is partly why the Chief Engineer decided to hold a public hearing on Wichita's Proposal in the first place—even though no law requires that such a hearing be held. The Chief Engineer stated that there “may well be additional terms and conditions that will improve the accounting of AMCs” and that is why he was committed to holding a “public hearing prior to a final consideration of Wichita's proposed project.” Letter dated June 1, 2018, attached hereto as **Exhibit B**.

4. The Chief Engineer was committed to holding a public hearing on the merits of Wichita's Proposal, and this commitment was expressly continued notwithstanding the subsequent delegation of these proceedings to the Presiding Officer: in his March 19, 2019 *Notice of Delegation and Temporary Postponement*, the Chief Engineer “delegated the authority to conduct a hearing among the formal parties and to provide written recommendations to the Chief Engineer based on the record after such hearings are complete.” (emphases added). A hearing on the merits has always been intended to be held, and it should be held.

5. Finally, as stated in DWR's previous consolidated response in opposition to GMD2's and Intervenors' first summary-judgment motion and motion to dismiss, the public has been noticed and re-noticed of a formal public hearing on the merits of this matter multiple times. Most recently, the Presiding Officer issued her *Notice of Hearing* on October 8, 2019, and DWR understands that the Presiding Officer has taken steps to have a similar notice published in various publications. The public—not all of whom agrees with the opposition of GMD2 and Intervenors—is entitled to the public hearing to which it has been repeatedly promised.

6. These proceedings should be allowed to conclude in the full and normal course as contemplated when they began. The Motion should be denied. And because the parties have had ample opportunity to conduct depositions (GMD2 deposed Lane Letourneau on behalf of DWR, in fact), GMD2's alternative request to conduct additional depositions at this late stage should be denied as well.

WHEREFORE, DWR requests that GMD2's Motion be denied; and for such other and further relief as the Presiding Officer deems just and equitable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 30th day of October, 2019, the above *DWR's Consolidated Response in Opposition to GMD2's and Intervenors' Motion for Reconsideration and for Leave to Have Additional Motions Considered Out of Time* was electronically filed with the Presiding Officer for this matter and that copies were sent via e-mail to the following:

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