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
THE DISTRICT'S MOTION FOR RECONSIDERATION AND FEES

In response to the novel motion submitted by Equus Beds Groundwater Management District No. 2 ("the District"), the City of Wichita, Kansas ("the City") respectfully offers the following reasons why the motion should be denied.

I. The Agency Order of June 21, 2022 is a Final Order not Subject to Reconsideration

The Chief Engineer's Order of June 21, 2022 states that it is a Final Order (June 21, 2022 Order, pp. 2, 13, 17). It denies the City's proposal, with the result that the proceedings at the agency level are clearly over (June 21, 2022 Order, p. 17). It also expressly states that it is not subject to review by the Secretary of Agriculture pursuant to K.S.A. 82a-1901 because the City's proposal for Aquifer Maintenance Credits ("AMCs") and revised lower index levels was not submitted pursuant to K.S.A. 82a-708b or 82a-711 (June 21, 2022 Order, p. 2).

II. Making Substantive Findings to Limit Future Applications Would Be Improper

The Chief Engineer's Order of June 21, 2022 (apart from any proceedings on judicial review) concludes proceedings before the agency by denying the City's proposal as improperly submitted (June 21, 2022 Order, pp. 16-17). By the terms of the Order, to bring a proposal for AMCs or revised lower index levels before the agency for further proceedings, the City would be required to file a new permit application, pursuant to K.S.A. 82a-711 (June 21, 2022 Order, pp.

15-17). Such new permit applications would effectively commence a new case, and the Chief Engineer has also indicated that such new applications would likely need to contain information and analyses beyond that submitted in support of the City's proposal in the present case (June 21, 2022 Order, p. 16).

Because the Chief Engineer denied the City's proposal on the threshold issue that it was improperly submitted, the Chief Engineer found it unnecessary to make substantive findings on the other evidence and issues (June 21, 2022 Order, p. 13). This was, in fact, also the primary recommendation of the Hearing Officer, who expressly recommended that the proposal be dismissed "without consideration on the merits" and addressed her further recommendations only as matters to be considered in the event the Chief Engineer declined to adopt her recommendation to dismiss the City's proposal as improperly submitted (January 14, 2022 Recommendations, pp. 4, 139-140). In its comments on the Hearing Officer's Recommendations, the District did not take any issue with this whatsoever (District's February 11, 2022 Comments to Recommendations, pp. 1-21). To the contrary, the District stated that the Hearing Officer's Recommendations were "masterfully written, carefully reasoned and accurately weaves the facts into the relevant law" (District's February 11, 2022 Comments to Recommendations, p. 1). The District further asserted that "deference should obviously be afforded to the Hearing Officer" Id.

It follows that the District's instant motion, seeking to press beyond the result recommended by the Hearing Officer (and adopted by the Chief Engineer in accordance with the District's own written positions), is an effort to untimely assert new positions contrary to the District's own prior arguments. The motion should properly be rejected for that reason alone, but there are additional reasons why it is without merit.

Most significantly, the notion of pressing on to make unnecessary substantive findings

in an attempt to limit a possible future application is doubly infirm. In the present case, the District's strategy was to extensively attack the original proposal, even to the point of counting typographical errors, and to obstruct the City from presenting additional evidence to the greatest degree possible, with recurrent objections and multiple motions to limit witness testimony. In a future case, based on an application as yet undeveloped, and for which the Chief Engineer has indicated an expectation that different and additional evidence and analysis will be expected, there is no rational or legal basis for limiting the City to the record that was developed in the current proceedings. Moreover, to insist on making unnecessary findings on such a record would be pointless, because the doctrine of *stare decisis* is inapplicable to administrative tribunals, and hence, proceedings and determinations in one administrative hearing do not apply in subsequent hearings. *See, In re. Appeal of K-Mart Corp.*, 238 Kan. 393, 397, 710 P.2d 1304 (1985).

The District's alternative argument, asserting that such steps are necessary as a matter of fairness, to redress burdens it was allegedly "forced to" assume, is factually unsupported. Neither the agency nor the City "forced" the District to do anything. Rather, the reality is that District was improperly committed to expending vast sums of public money in a case wherein it had no economic interest, and on tactics and strategy that afforded it no benefits, while concurrently furthering the financial interests of conflicted actors who directed those tactics and strategy.

The District itself, owning no potentially impacted water rights, could not have been adversely affected by anything in the City's proposal. It was not required by any provision of law to contest the City's proposal, or to hire numerous attorneys to conduct litigious discovery disputes, motion practice or hearing preparation. It was not required to put on witnesses or participate in the hearing at all. As a matter of its own, internal, tactical decisions, the District chose to do all these things. Instead of relying on its Motion to Dismiss (which the Chief Engineer ultimately granted), the

District went on to burn through appreciable sums of public money (at least $406,076.00, it appears to now be claiming) to litigate everything it could find to litigate, perhaps extending even to its current motion. Nobody "forced" the District to do these things, and it seems rather the case that they were done improperly and in the face of the Kansas Local Government Ethics Law.

District board members Michael McGinn and Robert Seiler were included among the movants in Intervenors' October 15, 2018 Motion to Intervene. The Motion recited that the movants named therein were landowners and that the City's proposal, if approved, would impair or impede their ability to protect their respective property interests (Motion to Intervene, ¶ 7). It also stated that the movants' water rights would be substantially affected by the Proposal (Motion to Intervene, ¶ 9). Mr. McGinn signed the Motion as holder of permit # 32875, and a joint owner of Permits # 32790, #49102 and #29488 (Motion to Intervene, p. 11-12). Mr. Seiler signed it as owner of permits #37612 and #22902 (Motion to Intervene, p. 18). In their subsequent, November 3, 2018 Motion to Withdraw as A Party, Michael McGinn and Robert Seiler, who had entered the case on October 26, 2018, disclosed that they were members of the District board, and sought leave to withdraw from the case in an effort to mitigate aspects of the associated conflict of interest (Motion to Withdraw as a Party, ¶¶ 1-3).

Although their own pleadings disclosed that they had personal economic interests in contesting the City's proposal, the conflicted board members remained on the District board, and, both before and after their brief role as formal Intervenors, appear to have participated in executive sessions and in the direction of the District's litigation decisions and budget decisions related to its involvement in the case. While the District could gain no financial benefit from its participation in the litigation (admitted in its present Motion, ¶ 42), the conflicted board members potentially benefited from use of the District's public funds for the costs of litigation in which they had substantial personal interests.

In the case of *Dowling Realty v. City of Shawnee*, 32 Kan. App. 2d 536, 542-543 (2004), a planning commissioner named Tubbesing, who left the bench and spoke in favor of a proposal in which he had a substantial interest, was held to have "acted upon" the matter for purposes of K.S.A. 75-4305, even though he did not participate in the vote. The court held that although the planning commission's decision was objectively reasonable, the commissioner had violated K.S.A. 75-4305. In its disposition, the court stated:

> We remand the case to the trial court with directions to send it back to the Commission to redo the entire process since it was tainted from the very beginning. All future proceedings must be conducted without Tubbesing as long as he remains on the Commission. *Dowling Realty v. City of Shawnee*, 32 Kan. App. 2d 536, at 546.

The implications of this ruling for the present case is that all of the District's actions and decisions in relation to this case, including expenditures for experts and counsel, and directions as to substantive arguments to pursue, may be similarly tainted by conflict. Not only was the District not "forced" to take these actions, it should have positively refrained from taking any of them.

Having acted improperly in the waste of public funds with no prospect of gaining any benefit actually accruing to the District is no basis for the District to claim that the agency must proceed to make unnecessary findings or try to limit future applications to the record made in this case. To the extent the District has suffered a financial detriment in its litigious conduct in this matter, that detriment is due to its own deliberate choices, which appear to have been tainted by conflict and fiduciary misconduct. To the extent the District seeks redress, it should perhaps consult with the Kansas Attorney General to determine what course may be available to recover its $406,076.00 from its conflicted board members and other fiduciaries who directly benefited from the expenditures.

III. The Agency Should Not Pay the District's Attorney Fees

The District's instant motion does not disclose from whom it seeks attorney fees, but the basis of its argument suggests it is looking to the agency to reimburse the claimed $406,076.00. Certainly the City cannot be said to have "vexatiously" brought or defended

anything, where the City simply followed procedures as directed by the agency, only to find after several years and substantial costs of its own that the Chief Engineer ultimately concluded "it is logical" for a different procedure to apply (June 21, 2022 Order, p. 16). Of course, the City did not have reason to anticipate that change of position on the part of the agency, and if there is an aggrieved party in this chain of events, that party would be the City. Accordingly, there is no case for any fee claim as against the City under any of the authorities cited by the District.

The City is also of the view that the agency should not pay the District's fees. The District has not even provided the barest substantiation for the claimed fees, including counsel's contract with the District or a sworn statement detailing the sums charged and the services performed. Further, as noted in the preceding portion of this response, any expenditures by the District resulted from the District's own conflict-tainted decisions to insert itself in the agency process and then pursue unnecessarily litigious tactics throughout. There is no reason at law or policy for the Department of Agriculture to even consider reimbursing costs voluntarily incurred by the District through such questionable internal practices.

WHEREFORE, THE CITY PRAYS 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
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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he transmitted the above and foregoing Response by electronic mail on this 7th day of July 2022, for filing, to ronda.hutton@ks.gov and served the same upon counsel for the other parties herein by electronic mail addressed to:

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