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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.

MOTION FOR RECONSIDERATION/CLARIFICATION, FOR A RULING ON THE SUBSTANTIVE ISSUES, AND FOR ATTORNEY/EXPERT WITNESS FEES

COMES NOW Equus Beds Groundwater Management District Number 2 (hereinafter "the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., and David Stucky, with its Motion for Reconsideration/Clarification, for a Ruling on the Substantive Issues, and for Attorney/Expert Witness Fees, as follows:

I. Background

1. This is a matter regarding a critical decision regarding the welfare of the Equus Beds Aquifer ("the Aquifer").
2. On March 12, 2018, the City of Wichita ("the City") filed its "ASR Permit Modification Proposal, Revised Minimum Index Levels & Aquifer Maintenance Credits" with the Chief Engineer, of the Division of Water Resources ("the DWR").
3. In short, through the Aquifer Maintenance Credits (AMCs) Proposal, in the event the Aquifer is too full for proper artificial recharge via physical injection of source water (treated Little Arkansas River surface water), the City wishes to obtain a recharge credit without physically injecting source water into the Aquifer. In turn, the City can pump treated source water from the Little Arkansas River directly to the City for municipal use

and then pump corresponding groundwater out of the Aquifer at a later date based on this new type of recharge credit. The City wishes to also lower the minimum index levels, which will allow it to capture recharge credits from the Aquifer even when it is more depleted than currently allowed pursuant to the existing minimum index levels.

4. On March 11, 2019, the District filed a formal Motion to Dismiss. In that Motion, among many substantive arguments, the District contended that the City's Proposal required a new application or a change application pursuant to the Kansas Water Appropriation Act K.S.A. 82a-701 *et seq*. The District also filed a Motion for Summary Judgment raising other arguments that should have allowed for the resolution of the case prior to a formal hearing.
5. The Chief Engineer of the Division of Water Resources was the official hearing officer at the time of the filing of the Motions.
6. The District had informally raised the need for a new or change application months or even years before the formal Motion to Dismiss was filed. The City, the Chief Engineer, and the DWR all ignored this argument.
7. In fact, as the formal record reflects, the DWR, through its various iterations of legal counsel, vigorously argued that a change application or a new application was unnecessary in this situation. The City agreed with that assertion.
8. Likewise, the Chief Engineer failed to rule on that issue, which forced the District to have a formal hearing on all the substantive issues.
9. On March 19, 2019, the Chief Engineer designated Constance M. Owen to serve as the Hearing Officer.

10. The parties then engaged in approximately 13 days of the hearing. For the most part, the parties were liberally encouraged to present all applicable evidence.
11. The City called in and presented a host of expert witnesses to testify on the Proposal.
12. Likewise, the District also called a number of expert witnesses, with two of the expert witnesses for the District flying in from out of state.
13. The DWR only presented one expert witness but had a full opportunity to present other evidence and call other witnesses.
14. The Intervenors likewise called a variety of additional witnesses.
15. Thousands of pages of exhibits were presented, and detailed expert reports were filed.
16. Consequently, it is certainly true that vast resources and expenses were invested in the formal hearing.
17. In fact, as the record reflected, many of the substantive arguments raised by the District were brought to the City's and the DWR's attention months or years before the hearing.
18. Upon the conclusion of the formal hearing, on January 14, 2022, Ms. Owen issued a 187-page ruling deciding almost all substantive issues in the District's favor.
19. Ms. Owen undoubtedly spent hundreds of hours sifting through the evidence and through the testimony. The District agrees with Ms. Owen ruling in almost all material respects, as indicated in its post-decision filings.
20. On June 21, 2022, the Chief Engineer issued a ruling affirming the Hearing Officer's ultimate conclusion that the City's Proposal should not be approved. However, the actual basis for that decision is perhaps somewhat unclear.
21. It appears that the Chief Engineer may be primarily ruling on the fact that the City failed to file new applications.

22. However, if that was the sole basis for the opinion, the Order would have likely only been a few pages. Instead, the Order is 18 pages long and the Chief Engineer delves into a number of substantive issues. The Chief Engineer labors to disagree with the Hearing Officer on many of those substantive matters. Thus, the Chief Engineer's ruling sets the appropriate stage for the Secretary of Agriculture to clarify the decision on those substantive issues.
23. Curiously, the Chief Engineer sent a cover letter that observes that the proceeding has cost "more than a million dollars over four years." The letter further states, "That figure is even more alarming considering the final decision was based not on the modeling or technical merits of an application, but on the procedure for making the request."
24. The District fully agrees with this assessment and wishes that its Motion to Dismiss, which raised the procedural defects with the City's Proposal several years earlier, had been ruled on and a hearing could have been avoided. However, the Motion was vehemently opposed by the DWR and the City, and was not ruled on by the Chief Engineer or Hearing Officer at the time, which forced the formal hearing. The District afforded the DWR, the City, and the Chief Engineer the opportunity to avoid the "time and money" of a hearing by raising that argument early in the proceeding. The District would have been satisfied with that basic threshold decision early in the proceedings. However, the DWR's vigorous opposition to that position (along with the City), as documented throughout the record, and the corresponding lack of an early ruling on the matter, left the District with no choice but to engage in a formal hearing.

II. Whether the Chief Engineer's Decision Is a Final Order

25. It is entirely unclear whether the Chief Engineer's Order is indeed a final order. On pages 2 and 17 of the Order, the Chief Engineer appears to declare the Order final.

26. However, this is in stark contrast to the prior record.

27. In the companion matter of ASR Phase I, the August 2, 2005 Approval Order was deemed an *Initial* Order. Likewise, the September 18, 2009 ASR Phase II Approval Order was also styled as an Initial Order.

28. The initial Pre-Hearing Conference Order, dated July 23, 2018, states that the proposed permit modifications must meet the requirements set forth in KSA 82a-708b (change application law). Subsequent hearing orders also stated this. In contrast, the Chief Engineer appears to base the decision that the Order in this case is a final order due to the notion that this matter was not pursued pursuant to K.S.A. 82a-708b or 82a-711.

29. On page 182 of her ruling, the Hearing Officer states, "The Chief Engineer shall issue the *Initial Order* in this matter after reviewing any timely submitted comments." *Id*. (emphasis added).

30. Further, the initial Pre-hearing Conference Order, dated July 23, 2018, and other hearing orders, states that the hearing is being conducted pursuant to the hearing procedure regulation, K.A.R. 5-14-3a. The parties were notified that the hearing procedures outlined in K.A.R. 5-14-3a were being applied to the ASR hearing. K.A.R. 5-14-3a(s)(5) states that the Order shall state that it is subject to review by the Secretary of Agriculture pursuant to K.S.A. 82a-1901.

31. Thus, pursuant to K.S.A. 82a-1901, the parties should have had 30 days to request any type of review with the Secretary of Agriculture. However, in an abundance of caution,

even though it contradicts the prior record and Kansas statutes and regulations, the District is treating this as a final order and pursuing this motion within the requisite 15 days before the Secretary of Agriculture.

III. Ruling on Substantive Issues

32. The District agrees with the Chief Engineer that the formal hearing has resulted in the District and the Intervenors wasting needless time and money. The District believes firmly that its motions, filed months before the formal hearing, should have resolved the need for a hearing. As indicated, the District contended that a new application or a change application was required. Additionally, as explained in detail in the District's prior motions, the District demonstrated that the City's Proposal was contrary to current statutes and regulations and, in fact, prohibited by current law. Again, these obvious arguments should have resolved the matter well before need for the time and expense of a hearing.
33. Nonetheless, the District was forced to engage in a formal hearing process. All parties presented a considerable amount of testimony and evidence.
34. The District has raised a number of arguments as outlined in its prior motions, briefs, and Findings of Fact and Conclusions of Law. The District requests that the Secretary carefully read these filings by the District and incorporate them into this Motion.
35. Consequently, since the parties have now had a full hearing, the District is asking the Secretary to rule on all the substantive issues.
36. If this matter can simply be pursued again with a new application or change application, the 13 days of trial will have been a colossal waste of time and taxpayer money, and in vain. The parties will be forced to engage in the entire process again.

37. Again, this is wholly unnecessary. There is no need for the metaphorical can to be kicked to a later day. There is a detailed record allowing for resolution of all the substantive arguments at this juncture.

38. At a threshold level, the District asks for the Secretary to determine whether AMCs are allowed by current statutes and regulations, whether AMCs violate the Kansas Water Appropriation Act, and whether AMCs constitute passive recharge credits. The District further believes that there is overwhelming evidence that AMCs will not benefit the health of the Aquifer. Likewise, the District believes there was not *one shred* of evidence that lowering the minimum index level will somehow benefit the Aquifer, but will actually impair senior water users, and detrimentally impact water quality and minimum desirable streamflow. In fact, if the Secretary reads the City's last filing (i.e. City's Comments on the Hearing Officer's Recommendations, dated February 11, 2022, pp. 39-40), it seems as if the City almost concedes that point. Thus, the District is asking the Secretary to rule on these substantive and overarching matters.

39. A ruling on all these arguments will undoubtedly be in the best interest of tax payers and all the constituents of the Aquifer alike.

IV. Preservation of Record

40. Alternatively, in the event the City is allowed to simply refile an application in the future, to save all parties considerable time, money, and resources, the District respectfully asks that the record from this hearing be preserved for a later, ostensibly identical proceeding. Consequently, the District requests that this record be preserved and be automatically considered in the future.

V. Attorney Fees

41. Finally, in the event the above positions are deemed meritless, the District has no choice but to seek attorney fees. Even absent a clear statutory basis, attorney fees may be awarded when "reasonably necessary for the administration of justice." *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 419-20, 197 P.3d 370 (2008) (*quoting Wilson v. American Fidelity Ins. Co.*, 229 Kan. 416, 421, 625 P.2d 1117 (1981)). These principles are applicable in an agency proceeding and attorney fees may be awarded under the appropriate circumstances. *See Pener v. King*, 305 Kan. 1199, 1210, 391 P.3d 27 (2017). Specifically, attorney fees can be awarded "when the losing party brought or defended the action in bad faith or vexatiously." *Miller v. Cudahy Co.*, 656 F. Supp. 316, 336-37 (D. Kan. 1987).
42. The "private attorney general" theory "supports awarding the prevailing parties such costs when they brought the action to benefit the public at large and without any large financial incentive of their own." *Id*. (applying Kansas law). Indeed, in this case, the District certainly did not pursue this matter for financial gain. In fact, quite to the contrary. Rather, the private attorney general theory is fully applicable because the District pursued a meritorious position that should have been advanced by the DWR early on in these proceedings. The District fully sought its position to benefit the health of the Aquifer and all the various users.
43. In the event the Secretary chooses not to rule on the substantive issues, the District respectfully requests that the Secretary award the District attorney fees and expert witness fees in the amount of $406,076.00.

44. Again, had the Chief Engineer originally identified that a new application or a change application was required, most of the attorney fees and *all* the expert witness fees for the District could have been avoided.
45. The DWR and the City aggressively opposed the District's Motion in this regard.
46. These actions forced the District to have the formal hearing.
47. Likewise, as supported by the record, many of the arguments raised at the hearing were informally brought up by Mr. Boese to the City and to the DWR years before the formal hearing occurred. These concerns—which were identified as having legitimacy by Mr. Letourneau (with the DWR) during the hearing and by the Hearing Officer—were all previously ignored by the City and the DWR. For instance, even obvious errors in the Proposal were not corrected, even though Mr. Boese identified them early on in his discussions with the City.
48. Thus, the District agrees with this Chief Engineer's assessment that undue time and money could have been avoided had the City and the DWR cooperated with the District in addressing the substantive issues. Instead, the DWR and the City chose to become adversarial to the District and exclude the District from the table in discussing the Proposal. Again, this was very well documented in the record during the Hearing and is demonstrated in the District's Findings of Fact and Conclusions of Law.
49. Additionally, if the City is merely allowed to file a new application or a change application in the months or years ahead, this matter will again likely go through the entire process again. Awarding attorney fees now will thus allow the District to have the funds to again crusade on behalf of the Aquifer and its users in the future if the substantive issues are not ruled on at this juncture.

WHEREFORE, for all the reasons articulated above, the District respectfully requests that the Secretary of Agriculture make a ruling on the substantive issues raised at or prior to the formal hearing or, alternatively, if a subsequent new application is allowed, for a preservation of the existing record for later use, or alternatively further, for attorney fees exhausted in being forced to pursue this entire matter for the welfare of the Aquifer.

RESPECTFULLY SUBMITTED:

/s/ Thomas A. Adrian
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CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian and David J. Stucky, do hereby certify that a true and correct copy of the above was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; **(_x__) email**; and/or (___) hand delivery on the 6th day of July, 2022, to:

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and the original sent by (___) mail, (___) fax, **(_x__) email**, and/or (____) electronically filed to/with:

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