

**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 FURTHER RESPONSE TO SUMMARY JUDGMENT MOTION
OF EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NO. 2**

In light of the postponement of the hearing originally set for March 26-27, 2019, the City of Wichita, Kansas (the “City”) submits the following additional response to the Motion for Summary Judgment submitted by Equus Beds Groundwater Management District No. 2 (“GMD2”).

RESPONSE TO STATEMENT OF FACTS

1. Uncontroverted (Proposal, Title Page).
2. Uncontroverted (Proposal, p. 2-25, Table 2-11).
3. It is uncontroverted that the proposal requested the City be allowed to accumulate Aquifer Maintenance Credits (“AMCs”), but the City posits that such would be a “new type of recharge credit” only in the sense of being established via an alternative procedure. (Proposal, pp. 3-1 through 3-10).
4. Uncontroverted in part. It is actually the accounting method for establishing AMCs (rather than the AMCs themselves) that might allow the accumulation of credits under the circumstances described, but such accumulation would be additionally dependent upon the availability of source water for this purpose, because the availability of water in the Little Arkansas River for diversion would remain identical to that established by the base flow and seasonal limits developed as part of the ASR Phase 1 and Phase 2 permitting process. (Proposal, p. 3-5).

5. The reference to the City taking certain actions “without having ever actually physically recharging the aquifer with source treated water from the Little Arkansas River” is controverted because the City has in fact physically recharged the aquifer with such water over a period of years (See, e.g., Section 2.5 of each of the Wichita ASR Annual Accounting Reports 2013-2016). In fact, the ground water level recoveries in the Equus Beds Well Field that now limit physical recharge capacity are the direct result of the City’s Integrated Local Water Supply Plan and ASR Project (Proposal, p. 3-2). GMD2’s statement that the City is “requesting authority to withdraw the AMCs at any time in the future” is controverted to the extent that such a request is not present in the City’s proposal (Proposal). To the extent the proposal also does not contain a time restriction (Proposal), the Division of Water Resources (“DWR”) has nevertheless made it clear that if the City wishes at any point to withdraw more recharge credits than the current recharge-credit withdrawal limitation of 19,000 AF, any such additional withdrawals would first have to be applied for and approved by DWR, which approvals would be subject to such conditions as the Chief Engineer might impose (DWR’s Amended and Supplemental Response to Interrogatory No. 16 of GMD2’s Second Set of Interrogatories).
6. As phrased, the allegation is partly controverted. It is uncontroverted that under the current recharge-credit withdrawal limitation, the City could withdraw up to 19,000 AF annually, subject to meeting the other conditions and limitations in Finding 11.G. of the Findings and Order for the City of Wichita’s Aquifer Storage and Recovery project – Phase II, as the same might be modified if the City’s Proposal is approved. This would require that sufficient credits be available for withdrawal and that water levels not be below specified lower index levels (Finding 11.G. of the Findings and Order for the City of Wichita’s Aquifer Storage and Recovery project – Phase II). Notably, subject to the Finding 11.G. conditions, the City would be

allowed to withdraw 19,000 AF annually under the existing permit. However, even in the event of a modeled 1% (i.e., eight-year) drought, assuming 2060 projected demands, the City would only anticipate withdrawing the full 19,000 AF in credits in one year of the drought (Proposal, p. 2-5, Table 2-3).

7. GMD2's assertion that the Proposal does not address water quality is controverted. Water quality is discussed as a reason specific sources were not considered "firm" water sources for modeling (Proposal, p. 2-3), and as a benefit of the water recoveries achieved by the City's outcome-based management of water resources (Proposal, p. 3-1). The Proposal notes that, "The implementation of ASR was envisioned and constructed to improve groundwater levels, sustain water quality, and to meet the future projected daily demands of the City," and further, "The focus of the ASR program on drought mitigation allows for the same water quantity and water quality benefits as originally envisioned and results in utilization of ASR recharge credits less frequently" (Proposal, p. 3-2). The Proposal also specifically points out that the capacity to maintain aquifer levels as full as possible during normal periods provides multiple local and regional water quality benefits by limiting migration of the Burrton chloride plume, limiting natural chloride intrusion from the Arkansas River, and through the enhancement of baseflow to creeks, streams and rivers. (Proposal, p. 3-10). Water quality benefits of AMCs are also discussed in Table 3-1 of the Proposal (Proposal, p. 3-11).
8. GMD2's assertion that the Proposal does not consider impairment is controverted. The Proposal indicates that it will have an impact contrary to impairment, in that it will facilitate management of regional groundwater levels at near full conditions, resulting in improved groundwater quality and resource availability for all users (Proposal, Table 3-1), and similarly, the ability to develop and recover AMCs will result in an aquifer management strategy focused on maintaining the maximum quantity of water possible in aquifer storage within the Equus Beds Well Field

(Proposal, p. 3-10). Further, the City has provided additional analyses outside of the Proposal document, including the following information referenced in its response to Interrogatory No. 12 of GMD2's Second Set of Interrogatories:

Use of recharge credits or AMC's during drought has been modeled, and review of modeled performance of non-City wells in the vicinity of the Wichita wellfield was undertaken during modeling. Water levels at such wells were evaluated to verify that the wells continued to pump even during periods of modeled low water levels. Impairment was not indicated during the modeled 1% drought with increased pumping associated with recovery of credits, as there were no observed instances where wells were shut down due to low water levels. It can be estimated that impairment is unlikely in non-drought conditions, with normal recharge and pumping.

The referenced modeling data was provided in the City's production responses. The City additionally noted, as part of its response to Interrogatory No. 13 of GMD2's Second set of Interrogatories:

Recovery of recharge credits or AMC's will be as a result of the City's long-term effort to inject water to keep the aquifer full, or as results of the City's efforts to accommodate conditions that prevent recharge of water pumped from the river. Recovery of this water during times of need and in a judicious manner is a reasonable accommodation. It is part of the City's Proposal that portions of the Equus Beds aquifer protected via its Phase 1 facilities will remain subject to the unchanged water level restrictions. The City will continue its efforts to slow the advance of the Burrton chloride plume, and has not requested any changes to the water levels in this area. These reasonable protections are a part of our proposal. It is further anticipated that the City will continue its ASR project in the future, and that lowering of the aquifer in the vicinity of the City's central wellfield during drought will allow subsequent injection of water that has been treated to meet drinking-water quality standards.

9. GMD2's assertion that the Proposal does not take into account the impact on minimum desirable streamflow is controverted. The Proposal specifically recognizes that the availability of water in the Little Arkansas River for diversion would remain identical to that established by the base flow and seasonal limits developed as part of the ASR Phase 1 and Phase 2 permitting process. (Proposal, p.

3-5). The Proposal also points out that the capacity to maintain aquifer levels as full as possible during normal periods provides multiple local and regional water quality benefits by limiting migration of the Burrton chloride plume, limiting natural chloride intrusion from the Arkansas River, and through the enhancement of baseflow to creeks, streams and rivers. (Proposal, p. 3-10). Outside the Proposal document, analyses of the relationship between aquifer levels and streamflows are presented in the 2008 Equus Beds Storage Deficit Relationships document produced to GMD2 in discovery and in the 2009 Environmental Impact Statement and 2009 ASR EIS Appendices produced to Interveners in discovery.

10. GMD2's assertion that the Proposal does not address unreasonable raising or lowering of the static water level is controverted. Section 3.0 of the Proposal states: "Under existing ASR permit conditions, the City can enhance the physical recharge capacity of the ASR program by making a shift to utilization of more groundwater from the EBWF. Rather than lowering groundwater levels in the EBWF to create physical recharge capacity and storage for the ASR system, an alternative recharge credit development strategy during full aquifer conditions is being proposed for consideration." Section 3.1 of the proposal points out, "The groundwater level recoveries within the EBWF area are a direct result of the implementation of the ILWSP and the City's ASR program. The results of responsible resource management and conservation by the City have promoted a historic period of groundwater level recoveries to the benefit of the City of Wichita and other groundwater users." Section 3.2 of the Proposal includes the statements that, "The implementation of ASR was envisioned and constructed to improve groundwater

levels, sustain water quality, and to meet the future projected daily demands of the City,” and, “The focus of the ASR program on drought mitigation allows for the same water quantity and water quality benefits as originally envisioned and results in utilization of ASR recharge credits less frequently.” Section 3.3 of the Proposal notes, In-lieu of implementing a pumping strategy to increase the storage capacity within the EBWF, the quantity of water diverted from the Little Arkansas River that cannot be physically recharged through the ASR system could be sent to the City’s main water treatment plant to directly meet City water demands. The capture and use of transient surface water in the Little Arkansas River directly offsets groundwater that would have been pumped to meet daily demand and to create physical ASR recharge capacity.” Section 3.4 of the Proposal (“Permit Conditions”) includes the statement, “The estimated aquifer storage volume in the CWSA during initial implementation of the ILWSP by the City and during the conceptual development of the ASR program is estimated at 120,000 AF (see Attachment H, page 13) therefore the combined total quantity of AMCs and physical recharge credits cannot exceed 120,000 AF. The proposed 120,000 AF limit on the combined total quantity of AMCs and physical recharge credits represents an estimated 11.7% of total available aquifer storage within the CWSA.” Section 3.6 of the proposal includes the statements that, “The ability to develop and recover AMCs results in an aquifer management strategy focused on maintaining the maximum quantity of water possible in aquifer storage within the EBWF,” and, “The capacity to maintain aquifer levels as full as possible during normal periods provides multiple local and regional water quality benefits by limiting migration of

the Burrton chloride plume, limiting natural chloride intrusion from the Arkansas River, and through enhancement of base flow to creeks, streams, and rivers.” Table 3.1 in the Proposal includes the statement that, “Regional groundwater levels can be managed at near full conditions, improved groundwater quality and resource availability for all users.” Further, outside the Proposal document, the reasonableness of impacts on water levels was addressed in the City’s Answers to Interrogatories 12 and 13 in GMD2’s Second Set of Interrogatories to the City.

11. GMD2’s assertion that “DWR has indicated it will determine the circumstances under which AMCs can be withdrawn at a later time” is controverted in part. Although not keyed to specific content in the record, the assertion appears to be based on a misreading of DWR’s initial response to Interrogatory 16 in GMD2’s Second Interrogatories to DWR, which was later clarified by a supplemental response in which DWR indicated that if the City wishes at any point to withdraw more recharge credits than the current recharge-credit withdrawal limitation of 19,000 AF, any such additional withdrawals would first have to be applied for and approved by DWR, which approvals would be subject to such conditions as the Chief Engineer might impose (DWR’s Amended and Supplemental Response to Interrogatory No. 16 of GMD2’s Second Set of Interrogatories). Hence, the statement referred to pertained only to DWR’s determination on any future request of the City to withdraw credits in excess of the current, 19,000 AF annual limit.

Analysis

Initially, GMD2’s Motion is subject to denial because a substantial portion of its assertions (many of which make only vague and general references to the alleged supporting

material) are controverted.

In addition, GMD2's discussion of the theory behind physical recharge credits (pages 12-13 of its Memorandum) strongly supports the City's request to adjust existing lower index levels so that the City, during a prolonged drought event, can withdraw water that it previously recharged into the aquifer. The recognition that the injected water should be treated as the City's personal property and remain subject to the City's use and control is inconsistent with index levels that effectively give the control of that water to other users a few years into a major drought event.

With respect to the AMCs, GMD2 does not dispute that the City could exercise its native rights to pump up to 40,000 AF from the aquifer each year. The City clearly could then obtain physical recharge credits by taking source water from the Little Arkansas River and treating and injecting it to recharge the aquifer, as is recognized by GMD2's own discussion of physical recharge credits. Indeed, if the City's proposal for AMCs is not approved, pumping down the aquifer and subsequently recharging it will be the only way the City can accumulate the recharge credits it needs for drought resilience planning.

The AMC mechanism would simply allow the City to skip the interim pumping step, with resulting benefits to all users of the aquifer. First, relieved of the necessity to pump down the aquifer to create recharge capacity, the City could use its ASR facilities to regularly maintain the aquifer at near-full levels. Second, the quality of the water in the aquifer will be better if consistently maintained at higher levels than it will be if the City is having to turn over up to 40,000 AF a year by pumping and recharge. In each scenario, the City's treatment and use of the source water from the Little Arkansas River is the reason for the presence in the aquifer of the water that would be subject to the credits. Whether or not the City is deemed to be physically

“putting” the water in storage, the effect on the quantity of water available in the aquifer is the same. Use of AMCs, as opposed to turning water over to accumulate physical recharge credits, simply represents better management of the aquifer. GMD2’s arguments against the credits (e.g., trying to characterize AMCs as a “use” or “source” of water) are convoluted elevations of form over substance.

GMD2’s argument about the *Clawson* case (on page 20 of its Memorandum) is completely misguided, as it is based on GMD2’s erroneous reading of DWR’s interrogatory answer which actually pertained to determinations of any future City applications to withdraw credits beyond the existing 19,000 AF annual limit.

GMD2’s argument as to “passive recharge credits” (pages 20-22 of its Memorandum) misses a critical distinction between AMCs and the credits formerly rejected as “passive recharge credits.” That distinction is that the AMCs would be directly based on the treatment and use of the very source water from the Little Arkansas River that would be available and could be used to physically recharge the aquifer (for physical recharge credits) if the aquifer had available recharge capacity. David Pope’s “expert report” opining that AMCs are the same as the “passive recharge credits” he did not approve when he was Chief Engineer is entitled to no weight. A former Chief Engineer’s interpretation is not binding on successors in the office, and “opinion testimony” is generally inadmissible as to interpretation or application of laws and regulations (as discussed in the City’s separate Motion in Limine).

Finally, although GMD2’s conclusion claims entitlement to summary judgment on all of the issues bearing on the proposed AMCs and the proposed adjustments to the 1993 index levels, the Memorandum is lacking much substantive discussion of the proposed index levels. Its discussion of injected water as the City’s property actually supports the requested adjustment, as

that analysis leads to the conclusion that the City, not other users of the aquifer, should be able to use the City's water during a prolonged drought.

WHEREFORE, GMD2's Motion for Summary Judgment should 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 1st day of April, 2019, for filing, to David.Barfield@ks.gov, Connieowen@everestkc.net, Kenneth.Titus@ks.gov and Chris.Beightel@ks.gov and served the same upon counsel for the other parties herein by electronic mail, addressed to:

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