

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.

STATUS CONFERENCE ORDER

Comes now, Constance C. Owen, Presiding Officer, who hereby documents the following matters addressed during a status conference conducted by telephone on August 6, 2019, regarding the City of Wichita's proposed modifications to Phase II of its Aquifer Storage Project ("Project").

1. The status conference call was presided over by the Presiding Officer. Representatives and counsel from the following parties were present: Brian McLeod, Scott Macey, Joseph Pajor and Don Henry for the City of Wichita ("City"), Tom Adrian, Lee Rolfs, David Stucky and Tim Boese for the Equus Beds Groundwater Management District No. 2 ("GMD2"), Aaron Oleen and Stephanie Murray for the Division of Water Resources, Kansas Department of Agriculture ("DWR"), and Tessa Wendling for the Intervenors.

2. On July 24, 2019, the Presiding Officer issued the Order on Prehearing Motions, which included directives regarding the partial granting of motions to compel and the contingent denial of motions to exclude expert reports and/or expert witnesses.

3. On July 26, 2019, DWR submitted "DWR's Notice of Compliance with Order on Prehearing Motions", with the required document attached, per the Order on Prehearing Motions.

4. On August 1, 2019, the City submitted the "City of Wichita's Supplemental Responses to Requests 1 and 2 of Equus Beds Groundwater Management District No. 2's Second Requests for Admission", per the Order on Prehearing Motions.

5. On August 2, 2019, the City submitted an email with a dropbox link for accessing items identified from its privilege log which had been ordered to be disclosed by the Order on Prehearing Motions.

6. On August 2, 2019, the City submitted the City's Motion to Modify Order on Prehearing Motions.

7. On August 6, 2019, the Intervenors submitted Intervenors' Motion for Continuance.

8. On August 6, 2019, GMD2 submitted its Response to City's Motion to Modify Order on Prehearing Motions and District's Motion for Continuance of Hearing.

Discussion and Orders

City's Motion to Modify Order on Prehearing Motions

The City sought relief from having to comply with the order to disclose Item 13 as listed on its privilege log, an email from Scott Macey to Joseph Pajor dated September 6, 2018, containing as its only content a link to a separate document or file. The City's motion stated that this link was to "a temporary directory, set up to share machine-generated search results from multiple Outlook accounts, so that the City's counsel and litigation team could review them for relevance, redundancy and privilege." The City stated it would need to recreate the directory, as it no longer existed. In the alternative, the City requested permission to disclose contents of the directory (once it was recreated) minus items already held not subject to disclosure, items logged by the City as privileged but not challenged, items in the machine-generated results that were not relevant to this case, and redundant copies of email chains with multiple recipients.

The district argued that it could not determine the importance of the contents of the directory without seeing the contents. DWR and Intervenors declined to offer opinion or argument.

Discussion between the City and the district led to further explanation by the City that recreating this directory would only yield items already disclosed or listed in the privilege log. Upon assurances from counsel for the City that this would, in fact, be the outcome, the Presiding Officer ruled that the directory need not be recreated, and that Item 13 need not be disclosed. The district did not object. The City's Motion to Modify is granted; Item 13 need not be disclosed.

Motions for Continuance of Hearing

The Intervenors and GMD2 requested a continuance of the hearing dates for at least 2 months or 90 days, respectively. (The parties and the Presiding Officer had previously set aside September 23 to 26, 2019 for the hearing, but no public notice had yet been issued.) They both cited the Order on Prehearing Motions, which sets a deadline of August 23, 2019, for DWR to submit expert reports for any expert it wishes to question at the hearing (other than Lane Letourneau); the same deadline applies for the City to supplement its expert reports, as detailed in the Order on Prehearing Motions. The Intervenors and the district contend that this deadline is only 30 days prior to the hearing, which would potentially prevent them from having adequate time to evaluate the new information, share it with their respective experts for comment, and otherwise prepare for the hearing.

DWR stated that it was not yet sure if it would submit additional expert reports, but it wished to reserve the right to do so by the stated deadline. The City stated it would be supplementing its expert reports, as required, by the stated deadline.

The City argued that additional time would not be needed if the parties had the opportunity to submit written responses within 30 days after the close of the hearing. GMD2 replied that such an opportunity would not be an equivalent substitute for the chance to cross-examine witnesses at the hearing. DWR declined to offer an opinion on this issue.

The Presiding Officer found the Intervenors' and GMD2's arguments persuasive. The Motion for Continuance is granted, with the caution that additional continuances will not be granted absent extreme circumstances. The Presiding Officer will promptly initiate communications between all parties to secure a new date for the hearing, preferably in November or December of 2019.

Additional Relief Sought per GMD2's Response to City's Motion to Modify Order on Prehearing Motions and District's Motion for Continuance of Hearing

At oral arguments on the prehearing motions held on May 28, 2019 (regarding the district's Motion to Compel directed to the City), the district was given the opportunity to specifically identify items in the City's privilege log and the City's answers to requests for admission and interrogatories for in camera review by the Presiding Officer. The district subsequently identified specific items in the privilege log, which the Presiding Officer evaluated in the Order on Prehearing Motions. The district generally described flaws in the City's answers to requests for admission and interrogatories, but only listed 3 specific examples, which the Presiding Officer evaluated in the Order on Prehearing Motions.

In its motion filed August 6, 2019, and during the status conference, the district explained that it had not understood the directive to specifically identify the City's answers to requests for admission and interrogatories, that it did not intend to limit the Presiding Officer's review to the three examples given, and that it found many of the City's answers defective. Consequently, the district requested an opportunity to now provide a specific list of more of the City's answers for the Presiding Officer to review for adequacy. The Intervenors declined to comment on the issue. DWR and the City stated that they understood the instructions at oral arguments to require GMD2 to list all specific items it wished to be reviewed.

The Presiding Officer acknowledged that, in its written submission, the district did cite the three allegedly defective answers to requests for admission as examples of more comprehensive problems. However, without the district identifying more individual answers for review, the Presiding Officer would have had to review for adequacy every answer the City provided in the two sets of requests for admission and the two sets of interrogatories, including answers that may have been acceptable to the district. It is not incumbent on the Presiding Officer to take on such a task, nor is it the Presiding Officer's role.

The Presiding Officer believes the district makes its request in good faith. Nonetheless, the request to now identify additional items for review is denied.

Clarity re Communication Recipients

The parties discussed the need to clarify which individuals should be included as recipients of email messages relative to this case. GMD2 requested that Allison Graber and Tim Boese be included in all email communications, in addition to Tom Adrian, David Stucky and Lee Rolfs. The City stated that all messages can be sent to Brian McLeod. DWR requested that all messages be sent to Aaron Oleen and Stephanie Murray. The recipient for the Intervenors will be Tessa Wendling.

THEREFORE, having considered all matters raised at the status conference, the Presiding Officer orders the following:

1. The City's Motion to Modify is granted; Item 13 need not be disclosed.
2. The Intervenors' and GMD2's Motions for Continuance are granted; the Presiding Officer will set the new hearing date as soon as possible after consultation with counsel.

3. The portion of GMD2's Response to City's Motion to Modify Order on Prehearing Motions and District's Motion for Continuance of Hearing in which the district requests the opportunity to specify additional answers provided by the City in response to requests for admissions and interrogatories, and have those answers reviewed for adequacy, is denied.

IT IS SO ORDERED, THIS 9th DAY OF AUGUST 2019.


Constance C. Owen
Presiding Officer

CERTIFICATE OF SERVICE

On this 9th day of August 2019, I hereby certify that the original of the foregoing Status Conference Order was sent by electronic mail to the following:

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Constance C. Owen
Presiding Officer