

**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  
EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NO. 2'S  
RENEWED MOTION IN LIMINE**

The City of Wichita, Kansas (the "City") respectfully requests the Hearing Officer to overrule the Motion filed by the Equus Beds Groundwater Management District No. 2 (the "District"). Generally, the District's Motion is founded on hypertechnical nitpicking, contrived claims of unfair surprise, and erroneous assertions that the City's supplemented reports did not adequately meet the direction given by the Hearing Officer. By way of more detailed response to the Motion, the City offers the following additional points:

1. Preliminarily, the City again notes the District's continuing resort to double standards. For example, the District complains that the City's reports do not disclose the details of "who gathered the data in the attachments and whether the individual experts actually helped make calculations involving that data" (Renewed Motion, p. 2, ¶ 8). The District's own reports do not provide this level of detail. Some do not even disclose factual bases for sweeping conclusions. For example, the Boese Report states, "Most certainly, MDS would be negatively impacted by the Proposal and this should be further evaluated" (p. 5), and, "Certainly, the lowering of the minimum index levels and allowing the City to pump the aquifer below the current minimum index levels will increase the hydraulic gradient and increase the migration of the salt contamination" (pp. 5-6). There is no identification of supporting facts or data. The report is unsupported by modeling or calculations, as are the Austin George Report, the Carl Nuzman Report and many of the statements in the David Pope Report. The rules cannot be

different for different parties, and the District should not be allowed to assert requirements against the City that its own reports patently fail to meet. The conduct is inequitable, undermines basic due process, and offends the common principle that a litigant is estopped from taking inconsistent positions in litigation.

2. The District's new complaint as to signatures (raised for the first time in its Renewed Motion) is another example. Either the signature requirements of K.S.A. 60-226 apply to this case, or they do not. By previous proceedings on the District's unsigned Clarification on Motions to Compel, it appears to have been operationally established that they do not. Beyond that, the signature requirement of K.S.A. 60-226(f) applies to 60-226(b)(6) disclosures, not to individual "reports" served as part of the content of the disclosure. It is clear from the text of K.S.A. 60-226(f) that where it applies, it calls for signature by an attorney of record. The District does not appear to have provided any K.S.A. 60-226(b)(6) disclosure so signed. Accordingly, if the signature requirement of K.S.A. 60-226 is invoked to strike expert disclosures and bar witnesses, the District's disclosures and witnesses are equally subject. Notably, the District does not explain how it is in any way prejudiced in relation to this issue.

3. In the "Analysis" portion of its Renewed Motion (beginning on p. 4) the District continues to mix and match formal evidentiary standards with standards for adequacy of K.S.A. 60-226(b)(6) disclosures. The purpose of K.S.A. 60-226(b)(6) disclosures is not to enable collateral *Daubert* challenges nor to establish full evidentiary foundations for everything the expert might say at hearing. The purpose of K.S.A. 60-226(b)(6) disclosures is to provide information as to the subject matter a given witness will address and the substance of the facts and opinions to which that witness will testify as an expert, so that parties can determine what depositions to take and prepare for the presentations at hearing. In keeping with this, the Hearing Officer directed the City, in its supplemental reports, to provide the opinions and/or conclusions reached by each expert and a summary of the grounds for each (July 24, 2019 Order on Pre-Hearing Motions, p. 27). The City respectfully submits that it has done so, notwithstanding the District's continuing complaints.

4. The District's Renewed Motion is a vague and generalized attack, lacking particularized or in-depth analysis of any of the supplemental expert reports. As with prior Motions, the District throws in an out-of-context "example" of a single line from a single expert report, coupled with a paragraph of conclusory assertions, not supported by any citation to facts of record. There is essentially no supporting detail, although the District states it "would be happy to provide an exhaustive list of the deficiencies if requested by the Hearing Officer" (Renewed Motion, p. 3, ¶ 9). As movant, the District had the obligation to support its Motion. Merely suggesting that it "would be happy" to do so "if requested by the Hearing Officer" is not a viable substitute, but amounts to an express acknowledgement that the Motion is unsupported.

5. In any event, the City believes that its supplemental reports meet the direction given by the Hearing Officer, that all of the supplemental reports are adequate to prevent unfair surprise to the other parties, and that the District has failed to reasonably attempt to show otherwise. The City offers further support for its position in the following discussion.

A. John Winchester Report.

As an introduction to conventions and features in this PDF report, please note that the matters designated by bullet points in subparagraph c) of the expert report indicate subject matter the expert will address, while main opinions and conclusions to which the expert will testify are indicated by underlining. These are followed in some instances by references to fuller discussion of the matters identified, as set out in the Proposal, and/or references to attached documents showing supporting methodology and sources of data relied upon. The presence of the topics and statements in the expert report constitutes the identification of the topics as the subject matter to which the expert will speak and the identification of the opinions the expert will give. (This is true for all the challenged reports). The supporting documents attached to the expert report are readily accessible for reference using the PDF Bookmark feature (i.e., Bookmarked Attachments A, B-1, B-2,

B-3, C-1, C-2, D, E-1, E-2, E-3 and F). In B-2, internal references are also bookmarked for convenience. The text of the expert report is also bookmarked, to facilitate quick transitions back and forth between the report and referenced supporting documents. Further, the report and all bookmarked attachments are electronically searchable using the PDF search function (so, for example, a reader desiring to trace through all direct references to a 1% drought could enter the search term “1%” and quickly find and review all 36 references to that term).<sup>1</sup>

Subparagraph c) of the report refers to the observations and opinions of Mr. Winchester as presented in the Proposal and summarized in the report. The reference to Proposal Section 2.1 recognizes that, from the time the Proposal was submitted, the content of Section 2.1 of the Proposal (pp. 2-1 to 2-2) summarized work by and in consultation with Mr. Winchester (and his consulting company, High Country Hydrology) to identify the characteristics, including severity and duration, of a drought with a 1% exceedance (“the 1% Drought”). The text of the referenced Proposal Section 2.1 reflects that the Palmer Drought Severity Index was used as a mechanism to identify the 1% Drought. The section also provides general background as to the Palmer Drought Severity Index, including the observation that the index is used by the National Oceanic and Atmospheric Administration (NOAA), the United States Department of Agriculture (USDA), the United States Drought Monitor (USDM), and other agencies to classify relative drought conditions. (Proposal, pp. 2-1 to 2-2). For more complete background on the Palmer

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<sup>1</sup> The District’s complaint that “The reports do include additional attachments, but these additional documents are not clearly labeled for easy reference” (Renewed Motion, p. 2, ¶ 7) suggests that the District missed or does not understand how to use the PDF Bookmarks.

Drought Severity Index, the 1965 research paper that developed the index was also attached to the Proposal as Attachment B. (PDF Bookmark A to the expert report).

During review of hydrologic data, High Country Hydrology found that estimates of the Palmer Drought Severity Index (PDSI) generated from tree ring chronology could be used to review historic droughts of record for their intensity and duration (Proposal, Section 2.1, p. 2-2., also explained in detail in the Technical Memorandum by Mr. Winchester which was included as Attachment C to the Proposal, and PDF Bookmark B-3 to the expert report). As noted in the Technical Memorandum (p.1), The data relied upon was a subset of approximately 1,000 years of summer Palmer Drought Severity Index data developed by Dr. Edward Cook of the Lamont Doherty Earth Observatory of Columbia University. Specifically (and to reduce bias toward drought arising from use of data based on less than 15 tree ring sites), Mr. Winchester limited the data relied upon to that for the period 1640-2003, for which data was available from 15 or more tree ring sites (Technical Memorandum, p. 5). Mr. Winchester's Technical Memorandum is essentially a seven-page, narrative expert report in which Mr. Winchester explains his methodology, supporting data and conclusions on the identification, duration and severity of the 1% Drought step-by-step. The 1999 and 2007 Cook articles referenced in the Technical Memorandum were not attached to the Proposal, but are included for reference at PDF Bookmarks B-1 and B-2 to the expert report.

High Country Hydrology calculated that a 1% Drought can be approximated by the drought of 1933-1940 (See Proposal, p. 2-2, Table 2-2, at PDF Bookmark D, which is based on Table 1 in the Technical Memorandum, at p. 6). The Layzell report (PDF

Bookmarked as C-1) is cited in the expert report for the point that 1930s and 1950s magnitude droughts are not unusual, and the specific supporting reference can be found at p. 16 of that report. The Woodhouse & Overpeck report is PDF Bookmarked as C-2, and the specific statement cited from it can be found at page 2710 of that report.

Mr. Winchester provided guidance on the use of the MODSIM-DSS tool utilized as described in Section 2.3 of the Proposal, relating to modeling integrated water resources management during a 1% Drought. The full discussion from Section 2.3 of the Proposal is excerpted and PDF Bookmarked as E-3. Supporting excerpts from documents discussing the RESNET Model are PDF Bookmarked as E-1. Supporting excerpts from documents showing High Country Hydrology's conversion and use of the model are PDF Bookmarked as E-2.

The computer screen capture PDF Bookmarked as F shows Figure 1 from the Proposal, which helps illustrate how the model represents the resources and environmental effects.

Most of the information referenced in the expert report, including the discussion, tables and figures from the Proposal, the 1965 Palmer Drought Severity Index Research Paper No. 45, Mr. Winchester's Technical Memorandum and the supporting Cook articles referenced therein were accessible to the District from the day the Proposal was submitted. The remaining information was furnished to the District in discovery. The District has had all of it for more than a year. The expert report is a roadmap that ties it

all together. It fairly discloses the subject matter to which Mr. Winchester will speak, the opinions he will offer, and the facts, methodology and data underlying those opinions.

B. Daniel Clement Report.

This report is similar to the John Winchester report in its organization and conventions. Topics, opinions, and the support for the opinions are covered in subparagraph c). Again, both the expert report and supporting documents are PDF bookmarked, allowing the reader to move back and forth between the statements in the report and the bookmarked supporting documents. Again, the entire body of information (report and bookmarked attachments) is also searchable via the PDF search function. Where limited information is drawn from a voluminous document, the PDF search feature can be used to quickly locate the specific supporting reference(s) within the bookmarked document. Like the John Winchester report, this report is a roadmap that ties together the subject matter to which Mr. Clement will speak, his opinions, and the facts, methodology and data underlying them.

One of the key issues addressed by Mr. Clement is the use of surrogate 2011 and 2012 drought data, repeating four times, to simulate a 1930s drought of eight years duration. The problem encountered and addressed here was that the availability of detailed hydrologic data for the 1933 to 1940 period was found to be limited for the groundwater model area in both density and completeness for evapotranspiration, stream flows and precipitation (Proposal, pp. 2-7 to 2-8). The excerpt from the Proposal (PDF Bookmarked as A-1) shows how Palmer Drought Severity Index comparisons were used to identify

comparatively recent years comparable to 1930s drought years, which could be used to develop more complete hydrologic data sets for a 1% Drought simulation.

The report addresses other important matters as well, and going through the report in the same fashion as with the Winchester report will demonstrate that it appropriately identifies the subject matter Mr. Clement will address, the opinions he will give as to that subject matter, and the facts, data and analysis supporting those opinions.

With respect to one aspect of the supplemental expert report, the City notes that the District has generally objected to all statements critiquing errors and misstatements in other parties' expert reports. Mr. Clement's report contains such a narrative critique of defects and misstatements by Carl E. Nuzman, PDF Bookmarked as Attachment S.<sup>2</sup> The District contends that rebuttal testimony on these points should be barred as "untimely" because the narrative was not served within thirty days of the prior disclosure to which it was addressed (Renewed Motion, p. 5).

As to this argument, the City first notes that every expert disclosure submitted by the District and Interveners attacks the Proposal, prepared under the charge of, and signed by, Mr. Paul McCormick, but not one of them was filed within 30 days (or even 330 days) of the Proposal, which was the "prior disclosure" to which they were addressed. Further, as the City has previously mentioned, from the beginning of the effort to bring this case to a hearing, the case schedule has always contemplated a post-hearing period of approximately thirty days for submission of additional written testimony, post-hearing

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<sup>2</sup> The specific incorrect statements Mr. Clement noted within the Nuzman report were injected by Mr. Nuzman without identification of supporting facts, and consequently, they are another example of the District's own expert disclosures failing to meet the very standards it asserts against the City.



comments, and briefs (See, July 23, 2018 Pre-Hearing Conference Order, Paragraph 9).

This 30-day period for post-hearing submission of additional written testimony is inconsistent with the District's attempt to import rebuttal deadlines (never identified in any prehearing conferences) to cut off or limit technical evidence that identifies factual errors, inconsistent reasoning, or misleading statements in its expert reports. To the extent the District indicates that its objection can be satisfied by allowing it to serve rebuttal expert reports (Renewed Motion, p. 5) the City does not object to that request.

The City respectfully submits that the expert disclosures made for the testimony of Mr. Clement are amply sufficient, and it is not reasonably possible for the District to be unfairly surprised by anything to which he will testify.

#### C. Scott Macey Report

This report is similar in its organization and conventions to the reports referenced above. Topics, opinions, and the support for the opinions are covered in subparagraph c). Again, both the expert report and supporting documents are PDF bookmarked, allowing the reader to move back and forth between the report and bookmarked supporting documents. Again, the entire body of information is also searchable via the PDF search function. Where limited information is drawn from a voluminous document, the PDF search feature can be used to quickly locate the specific supporting reference(s) within the bookmarked document. Like the reports discussed above, this report is a roadmap that ties together the subject matter to which Mr. Macey will speak, his opinions, and the facts, methodology and data underlying them.

Among the significant matters Mr. Macey will address are the City's projected future

water demands, the impact of conservation efforts on these demands, the impact of the 1% Drought on Cheney Reservoir (the City's main water resource apart from the Equus Beds Aquifer), impacts of drought response measures, and adjustments to the MODSIM-DSS Model to address the interrelated effects of such factors and the integrated management of water resources during a 1% Drought. Going through the report in the same fashion as suggested above with respect to the reports previously discussed will demonstrate that it appropriately identifies the subject matter Mr. Macey will address, the opinions he will give as to that subject matter, and the facts, data and analysis supporting those opinions.

D. Luca DeAngelis Report.

This report is similar in its organization and conventions to the reports referenced above. Topics, opinions, and the support for the opinions are covered in subparagraph c). Again, both the expert report and supporting documents are PDF bookmarked, allowing the reader to move back and forth between the report and the bookmarked supporting documents. Again, the entire body of information is also searchable via the PDF search function. Where limited information is drawn from a voluminous document, the PDF search feature can be used to quickly locate the specific supporting reference(s) within the bookmarked document. Like the reports discussed above, this report is a roadmap that ties together the subject matter to which Mr. DeAngelis will speak, his opinions, and the facts, methodology and data underlying them.

Among the significant matters Mr. DeAngelis will address are the modeling of groundwater and stream flows for purposes of the 1% Drought simulation, as well as the

location of stream gauges and sources of aquifer recharge, calculation of evaporation and transpiration, and the development of the proposed minimum index levels. Going through the report in the same fashion as suggested above with respect to the reports previously discussed will demonstrate that it appropriately identifies the subject matter Mr. DeAngelis will address, the opinions he will give as to that subject matter, and the facts, data and analysis supporting those opinions.

As with the Daniel Clement Report, the Luca DeAngelis Report contains a critique or rebuttal to which the District has generally objected, and it is PDF Bookmarked as Attachment G to the report. This critique addresses erroneous statements and conclusions in the Masih Akhbari report, and should not be excluded for the same reasons as stated above with respect to Daniel Clement's critique of the Carl E. Nuzman report.<sup>3</sup>

#### E. Paul McCormick Report

This report is similar to the reports already mentioned in its organization and conventions. Topics, opinions, and the support for the opinions is covered in subparagraph c). Again, both the expert report and supporting documents are PDF bookmarked, allowing the reader to move back and forth between the report and bookmarked supporting documents. Again, the entire body of information is also searchable via the PDF search function. Where limited information is drawn from a voluminous document, the PDF search feature can be used to quickly locate the specific supporting reference(s) within the bookmarked document. As with the reports previously

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<sup>3</sup> Mr. DeAngelis points out that some of the conclusions stated in the Masih Akhbari report are based on factual errors, while other conclusions are undermined by the sources and analyses in the Masih Akhbari report itself. So, again, the Masih Akhbari report failed to meet the very standards for expert disclosures that the District asserts against the City.

discussed, this report is a roadmap that ties together the subject matter which Mr. McCormick will address, his opinions, and the facts, methodology and data underlying them.

One additional consideration pertinent to Mr. McCormick's expert disclosure is that the Proposal itself was essentially a 55-page expert narrative compiled under the charge of, and signed by, Mr. McCormick (See, Proposal, third page, "Index and Certification"). The body of the Proposal set forth in detail the methodology and supporting data sources from which the City had developed the characteristics of a 1% drought, illustrated the impact of such a drought on the City's integrated management of its water resources in the Equus Beds Aquifer and Cheney Reservoir, demonstrated the inability of the City to recover credits from many of the Basin Storage Area index cells during a 1% drought (due to the limitations posed by 1993 minimum water levels), and illustrated and quantified impacts if the 1993 minimum water levels were lowered (Proposal, pp. 1-3 to 2-25 and Figure 11). The Proposal also explained the derivation of the proposed Aquifer Maintenance Credits and related accounting method. At times when the aquifer is too full for physical recharge, the proposed AMC accounting procedures would allow the City, by diverting treated river water to its distribution system, to obtain credits functionally equivalent to the physical recharge credits it could obtain by withdrawing water under its 40,000 acre feet base rights and then physically recharging the aquifer with the treated river water (Proposal, pp. 3-1 to 4-8). The District obviously had access to this entire body of information from the day the Proposal was submitted, and now has Mr. McCormick's supplemental expert report as well, and cannot plausibly claim to be surprised by any aspect of Mr. McCormick's testimony.

With respect to one aspect of the supplemental expert report, the City notes that Mr. McCormick's report contains a narrative critique of the reports submitted by George A. Austin and by Dave M. Romero, PDF Bookmarked as Attachment N to the expert report. This critique should not be excluded for the same reasons as stated above with respect to the Daniel Clement critique of the Carl E. Nuzman report and the Luca DeAngelis critique of the Masih Akhbari report.<sup>4</sup>

F. The Joe Pajor and Don Henry Reports.

Each of these reports is similar to the reports already mentioned in its organization and conventions. Topics, opinions, and the support for the opinions is covered in subparagraph c) of each report. Again, each of the expert reports and supporting documents are PDF bookmarked, allowing the reader to move back and forth between the report and bookmarked supporting documents. Again, the entire body of information for each report is also searchable via the PDF search function. Where limited information is drawn from a voluminous document, the PDF search feature can be used to quickly locate the specific supporting reference(s) within the bookmarked document. As with the reports previously discussed, each of these reports is a roadmap tying together the subject matter that the witness will address, his opinions, and the facts and analyses supporting those opinions.

Going through these reports in the same fashion as suggested above with respect to the reports previously discussed will demonstrate that each of them appropriately identifies

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<sup>4</sup> The critique of the George Austin report notes factual errors and internal contradictions such that it shows the Austin report fails to meet the very standards for expert disclosures that the District asserts against the City. The critique of the Dave Romero report notes that all modeling data relied on for that report has been withheld from the City, rendering testing or verification impossible. As a consequence, the Romero report also fails to meet expert disclosure standards.

the subject matter the witness will address, the opinions he will give as to that subject matter, and the facts, data and analysis supporting those opinions.

6. The City respectfully submits that the supplemental disclosures it has provided are extensive, and more than adequate to meet requirements of K.S.A. 60-226(b)(6) and prevent unfair surprise. Recognizing that the District would likely be dissatisfied with any possible disclosures, no matter what they contained, the City has supplemented the reports in keeping with the directions of the Hearing Officer, to provide the opinions and/or conclusions reached by each expert and the summary of the grounds for each. If the District believed it needed yet additional detail, it could have pursued depositions of some or all of the City's witnesses. Indeed, the District's ostensible desire to take depositions of the City's experts after receipt of the supplemental disclosures, but well in advance of the hearing, was a material part of the District's August 6, 2019 motion to continue the hearing setting. However, the District never contacted the City to identify or schedule any City witness for deposition.

#### CONCLUSION

The City prepared its supplemental expert disclosures to provide the level of information directed by the Hearing Officer. The supplemental reports provide far more information than the District's disclosures, which generally do not meet the standards articulated by the Hearing Officer. To the extent the District claims to need a further level of detail, it had ample opportunity to set depositions, but made no attempt to do so, even after obtaining an extension of case deadlines ostensibly for such purposes. The District's Motion consists chiefly of conclusory generalizations, is nearly bereft of analysis as to the details of any of the challenged reports, and vaguely alleges "deficiencies" which it did not specify, leaving the Motion unsupported (Motion, p. 3, ¶ 9).

WHEREFORE, the City requests that the District's Motion (and any supporting or parallel position of Interveners) be overruled.

Respectfully submitted,

Office of the City Attorney  
of the City of Wichita, Kansas

By /s/ Brian K. McLeod  
Brian K. McLeod, SC # 14026

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he transmitted the above and foregoing Response to the Renewed Motion in Limine by electronic mail on this 15th day of November, 2019, for filing, to [ConnieOwen@everestkc.net](mailto:ConnieOwen@everestkc.net), [Chris.Beightel@ks.gov](mailto:Chris.Beightel@ks.gov), [David.Barfield@ks.gov](mailto:David.Barfield@ks.gov) and [Kenneth.Titus@ks.gov](mailto:Kenneth.Titus@ks.gov) and served the same upon counsel for the other parties herein by electronic mail addressed to:

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