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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. )**

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**Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.**

**EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NUMBER 2  
COMMENTS TO RECOMMENDATIONS ON THE CITY OF WICHITA’S PROPOSED  
MODIFICATION OF THE AQUIFER STORAGE AND RECOVERY PROJECT PHASE  
II WATER APPROPRIATION PERMITS**

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 Comments to Recommendations on the City of Wichita’s Proposed Modification of the Aquifer Storage and Recovery Project Phase II Water Appropriation Permits (“Order”), as follows:

**I. Introduction**

Overall, the Order is masterfully written, carefully reasoned, and accurately weaves the facts into the relevant law. Indeed, deference should obviously be afforded to the Hearing Officer for the significant investment made into ensuring all witnesses and parties were heard during the Hearing, and for the tedious amount of time she spent reviewing and discerning testimony and exhibits. Consequently, a lengthy brief is not needed. Likewise, the District trusts that, per K.A.R 5-14-3a(s)(3), no party will be allowed to raise new arguments or evidence in these responses. While the City of Wichita (“City”) and the Division of Water Resources (“DWR”) may choose to fill up numerous pages with their comments and may even raise a few

valid distinctions, no amount of wordsmithing can clothe the naked truth: the City's Proposal should be denied for a myriad of reasons. That said, the District will provide brief comments regarding the Order and will make a handful of clarifications.

As a prerequisite, however, previously demonstrated throughout the Hearing, there were several Hearing Officer Orders issued which described what requirements the City's Proposal must meet. For example, the May 1, 2019, Prehearing Order states:

The City shall bear the burden of proof, proving by a preponderance of the evidence that the proposed changes to the project should be approved. K.A.R. 5-14-3a(n)(1). The proposed changes must meet the requirements set forth for Aquifer Storage and Recovery projects in K.A.R. 5-12-1, et al. and the requirements set forth in K.S.A. 82a-708b, including that the proposed changes are reasonable and will not cause impairment and that the proposed changes relate to the same local source of supply. Whether or not a change is reasonable should consider the effect upon the public interest.

(*See id.*) As shown convincingly in the Order, and as discussed below, the City failed to meet any of these requirements.

## **II. Comments and Clarifications Regarding Facts**

The recitation of facts is very thorough and, overwhelmingly, accurate. However, just a few points of clarification are warranted.

1. There is a slight misstatement on page 38 of the Order through fact 24(f) and fact 25. There were seven new ASR recharge and recovery permits approved on September 28, 2010. Six were for ASR Phase II and one was for ASR Phase I. This created the confusion with the City's witnesses regarding the 19,000 (including Phase I and Phase II permits) v. 18,000 acre feet (solely authorized for ASR Phase II recharge credit withdrawal). Regardless, Mr. Boese corrected the City's mischaracterizations through his testimony. (Testimony of Boese, R. Vol. VIII, pp. 2265-67.)

2. On page 31 of the Order, fact 12, the Order correctly recites and cites information found in the USGS report (District Ex. 46 - USGS SIR 2013-5042, p. 1.) regarding the ASR Phase I construction and that the ASR project was to “store and later recover groundwater....” This statement could be misinterpreted that groundwater would be stored and later recovered by the City. Obviously, this statement meant that source water (Little Arkansas River surface water) would be stored in the Equus Beds Aquifer (“Aquifer”). Indeed, pages 6 and 9 of the USGS report clearly describe that the source water for artificial recharge of the Aquifer is excess flows of the Little Arkansas River.
3. On page 40 of the Order, fact 29, the Order inadvertently states that a domestic well owner may consent to locating a proposed point of diversion within *1,320* feet of the domestic well. The correct well spacing should have been *660* feet, not *1,320* feet.
4. On page 52, fact 96, the Order states that the list of proposed permit conditions, if the Proposal was approved, “does not include a restriction that the City only earn AMC credits during a time of drought.” While this statement is correct, a review of the citation (City Ex. 1, p. 306; Testimony of Boese, Tr. pp. 2177-2178), and additional testimony by DWR (testimony of Letourneau, Tr. pp.1515-1517), indicates that the Order should have stated that the proposed conditions do not include a restriction that the City only *withdraw* AMC credits during a time of drought.

### **III. Comments and Clarifications Regarding Arguments**

#### **a. Expansion of Consumptive Use**

The Order correctly contends that the City's Proposal expands the consumptive use. Indeed, if the City is able to accumulate fictitious recharge credits through the AMC Proposal, the City would accumulate recharge credits faster without injecting source water into the Aquifer. Moreover, if the City is allowed to use treated surface water from the Little Arkansas River for municipal use by directly pumping it to the City (as opposed to physically injecting it into the Aquifer), while at the same time accumulating AMCs for the same quantity of source water being sent to the City, this is a classic "two-for-one," whereas the City is getting two beneficial uses for the same gallon of water, and therefore undoubtedly increasing the consumptive use. Additionally, if the City's Proposal to lower the minimum index levels is approved, the City could then pump more recharge credits, and therefore more groundwater, than currently allowed. Both parts of the Proposal (AMCs and lowering the minimum index level) will consequently break down any barriers to the City seeking additional ASR recharge and recovery permits in the future, which will *further* expand the consumptive use of groundwater made by the City—with a linear correlation to increased harms to the Aquifer.

#### **b. Need for New Application**

The Order accurately recites that a new application(s) is required for the City to proceed with its Proposal. (Order, pp. 123-24.) The obvious rationale is explained in great detail in the Order and in the various briefings from the District. Among many reasons, the City's Proposal constitutes a significant expansion of the City's ability to accumulate and withdraw recharge credits and thus groundwater, and requests fundamental changes in both how recharge credits are accumulated and when they can be withdrawn. Thus, although as argued by the District,

semblances of the City’s Proposal might be addressable through an application for a change in use—i.e. a change in the use made of water through AMCs or a change in the place of use if the City were only allowed to lower the minimum index level and expand the basin storage area—the need for a new application eclipses what could be corrected with a change application because of this expanded appropriation of water. Mr. Romero even modeled and opined through his expert testimony that lowering the minimum index level will constitute a new diversion of groundwater. (*Id.* at p. 128.) Indeed, lowering the minimum index level does not automatically allow the City to divert more water; however, it allows the City to further deplete the Aquifer by opening an additional source of supply that was previously closed off. This additional access to pumping recharge credits can and will (as modeled by Mr. Romero) expand the actual consumptive use made of water. For a multitude of reasons, the City must apply for a new application to appropriate groundwater.

**c. Water Left in the Aquifer**

The District just wants to make a minor clarification regarding the groundwater left in the Aquifer when an AMC is accumulated so this point is not misconstrued by the City or by the DWR. A few places in the Order somewhat imply that the groundwater left in the Aquifer by the City is water the City previously injected through artificial recharge. (*See, e.g.*, Order, pp. 44, 127, 161.) Although some of the groundwater left in the Aquifer could indeed be injected water, the bulk of the water that the City wants to benefit from leaving in the Aquifer is native groundwater that previously existed in the Aquifer from natural recharge—the latter serving as the foundation for the majority of the harms embedded in the Proposal. The Order does not contend that the injected water left in storage is mutually exclusive of the City’s ability *simultaneously* to leave native groundwater in the Aquifer. In fact, the entire rest of the Order is

predicated on the City's contention that it is also leaving native groundwater in the Aquifer. For example, the Order contemplates that the City's Proposal could harm senior water right holders. (Order, pp. 157-160.) Obviously, the City would not harm senior water rights if it wasn't seeking to obtain benefits from appropriating and using native groundwater—through the accumulation and withdrawal of AMCs—that previously existed in the Aquifer from natural recharge that was already allocated to other users, and further exacerbated by lowering the minimum index levels. Thus, the Hearing Officer obviously got this point correct through additional analysis.

The Order further explains, “Under the AMC concept, the source of water *for direct municipal use* (without storage) is the Little Arkansas River.” (Order, p. 131 (emphasis added).) This is exactly correct. By extension, the source of water to accumulate AMCs is groundwater left in the Aquifer by the City not pumping native groundwater. (*See id.*) AMCs are merely a re-appropriation of groundwater left in the Aquifer, which is clearly barred by Kansas law. This point is the cornerstone for many of the other rulings in the Order and is well established by the Order.

#### **d. *Clawson* Clarifications**

As indicated, the District agrees with the Order in almost all material respects. Perhaps the main section in the Order that the District somewhat respectfully disagrees with is the characterization of and application of the *Clawson* case. The District says this in a cautionary fashion and fully appreciates the Hearing Officer's desire to limit *Clawson* to its narrow facts, and the District likewise acknowledges that *Clawson* is not abundantly clear in its scope.

In turn, just a few points of clarification are warranted. The Hearing Officer writes, “Therefore, it appears that the KWAA does sufficiently grant the Chief Engineer the authority to

retain jurisdiction to modify permit conditions in order to protect the public interest.” (Order, p. 134.) To the extent it is implied otherwise, the District is not arguing that the Chief Engineer cannot later take steps for the public good. Rather, the District’s contention has always been that, even if sought by the applicant, the Chief Engineer cannot unilaterally take steps that significantly *harm* the public interest at the expense of other constituents of the Aquifer. In another part of the Order, the issue is properly framed: “However, the question at hand is whether the Chief Engineer can make changes requested by the permit holder, that would benefit the permit holder and possibly harm the public interest.” (*Id.* at p. 133.) The District agrees with the Hearing Officer, in applying *Clawson*, and subject to the caveat below, that “[t]he City is not facing a situation in which the Chief Engineer has unilaterally limited the City’s permits against its wishes.” (*Id.*)

The Hearing Officer also distinguishes the Proposal from the facts of *Clawson* because “this situation does not involve a prior evaluation of the impact of the Proposal on the public interest” and “the potential impacts on the public interest from significant changes in the operations of the ASR project are still being evaluated as part of this hearing process.” (*Id.* at 134.) Per this logic, the District agrees with the Hearing Officer that the Proposal may not have been ripe for dismissal per *Clawson* on this nuanced point when the Motion to Dismiss was first filed. However, with the facts established through the Hearing process, this argument is ripe for review: the Order is replete with explanation of how the District and the Intervenors demonstrated that the Proposal will harm the public interest. Thus, *Clawson* can now be used as a sword to further chop down the City’s Proposal.

Again, the District fully understands attempts to limit *Clawson* to its narrow facts. However, the *Clawson* Court writes, “In sum, the KWAA does not authorize the chief engineer

to reevaluate and reconsider an approval once a permit has been issued.” 49 Kan. App. 2d at 807. Although perhaps dicta, the District believes that this language also precludes the Chief Engineer from taking steps to retroactively modify a permit in a fashion that undermines the public interest while only benefiting the applicant of a water right.

Also, and this is a minor and subtle point, but *Clawson* also applies because the DWR contended that it would retain jurisdiction to add permit conditions at a later time. Mr. Letourneau testified to numerous permit conditions that should later be considered and potentially adopted. For example, he said that more analysis was required regarding when AMCs could be withdrawn to protect other users of the Aquifer. (Testimony of Letourneau, R. Vol. VII, p. 1704, ll. 11-18; p. 1705, ll. 11-20.) Retaining this type of jurisdiction—at the potential expense of the applicant—is precisely what *Clawson* ostensibly prevents.

**e. Violation of KWAA**

There is no question that the Proposal violates the concept of first in time, first in right. The Order adjudicates properly that the Kansas Water Appropriation Act (“KWAA”) is violated. With the accumulation of AMCs and the lowering of the minimum index levels, the Proposal allows for the City to appropriate and withdraw water dedicated to senior water right users. As noted in the Order and shown during the Hearing by the District and others (*see e.g.* Testimony of Boese, Tr. p. 2222-2223; District Ex. 59; District Ex. 41), the Aquifer in the area of the City’s well field is grossly over-appropriated and no new water appropriations (except domestic, temporary permits, and small use permits) have been approved in that area since the District’s safe yield regulation went into effect in approximately 1980. Clearly then, allowing native groundwater to be re-appropriated as a recharge credit and later withdrawn, merely because it was not diverted by the City pursuant to its water rights, unequivocally violates the prior

appropriation doctrine, as does allowing the City to withdraw groundwater at lower aquifer levels by lowering the minimum index levels. Both of these proposals undoubtedly infringe on senior water rights.

**f. Takings Clause**

The District still believes that the City’s Proposal constitutes a taking since, among other reasons, it will interfere with the value of other water rights and, in turn, water rights constitute real property rights. However, given that there are so many other valid reasons to reject the City’s Proposal, the District fully understands why the Hearing Officer would “decline” to heap this on as a reason to dismiss the City’s Proposal on its face. (Order, p. 138.) The Order is correct that nothing in Kansas law addresses this unique set of arguments. The District also appreciates the rationale that establishing “just compensation due... is beyond the scope of this proceeding.” (*Id.*) Likewise, the District understands that raising these arguments now *may* amount to “a preventative ‘takings’ analysis.” (*Id.* at 137.) If the Proposal is granted, however, it will inevitably preserve a meritorious takings clause claim—or numerous such actions—for a later day.

**g. Standing**

The Order rejects the District’s arguments regarding standing. (Order, pp. 138-39.) Again, this is not a material point in the grand ocean of arguments against the Proposal. However, the District desires to briefly clarify its position as it still believes it is valid. In short, if it is assumed that the City should have filed a new application—as properly ruled by the Hearing Officer—and the City failed to do so, there is no valid proposal before the DWR for consideration. Thus, for this and other reasons, the City lacks any standing to pursue its position

at this juncture and the DWR lacks jurisdiction to consider the Proposal. However, again, this point is not critical to the outcome of these proceedings in any fashion.

#### **h. Spacing Waivers and Consents**

The District wholeheartedly supports the ruling that new spacing waivers are required, and the City must try to obtain new consents from well owners. (Order, p. 142.) Any contrary position would completely undermine the validity of procedural and regulatory processes long entrenched in Kansas water law. Moreover, it would shatter the trust of area well owners by turning a blind eye to the promises made to them many years ago when spacing waivers were first granted in the ASR process.

#### **i. Passive Recharge Credits**

Yet another part of the Order that is perfectly crafted is the discussion on passive recharge credits. As the Hearing Officer determined—and this is the blatantly obvious answer—AMCs are nothing more than odious passive recharge credits. (Order, p. 144.) As identified in the Order, any attempt by the City or the DWR to torture out a distinction with AMCs that the water is Little Arkansas River water that passes through the ASR treatment facility, fails to pass even the most basic of smell tests. It is very clear that the City is attempting to obtain credits for native groundwater left in the Aquifer, while simultaneously consuming the water pumped from the river for municipal use. As testified to by Mr. Pope, this stabs at the very heart of what was contemplated as passive recharge credits when the Phase I Order was adopted.

#### **j. Statutory Construction Arguments**

Perhaps one of the strongest parts of the Order—and this is saying an awful lot given how well the Order is written—is the section on statutory construction. The Hearing Officer properly

identifies that AMCs are not identified in statutes or regulations. Embodied in this concept is the District's contention that there is no basis for this source of supply.

The Hearing Officer summarizes how the Proposal flunks a statutory/regulatory construction analysis. (Order, pp. 145-147.) The Order adroitly applies the facts of the Proposal to the current laws in Kansas. The District will not recite the numerous arguments in these brief comments. However, at its core, the City's Proposal does not embody an aquifer *storage and recovery* project. Rather, it qualifies as neither. No water is stored, and thus there is nothing to recover. Instead, through AMC accumulation, the City just wants to later divert native groundwater appropriated to other users.

#### **k. MDS and Safe Yield**

The Order also skillfully recites the arguments on MDS and safe yield, two separate but equally important concerns. (Order, pp. 152-156.) It blasts the City for ignoring these critical concepts and highlights how the District demonstrated that the City's Proposal fails to meet either component. Again, these concepts are discussed in great detail in the District's prior briefings and in the Order, and will not be further recited here. No further discussion is required as these are obvious points and there is simply nothing the City or the DWR can do to salvage these arguments at this late juncture.

#### **l. The Public Interest**

##### **i. Impact on Senior Water Users**

The Order also properly analyzes how the City's Proposal will undermine the rights of senior water right holders. (Order, pp. 157-58.) This point also does not require further analysis and is already discussed in great detail in the Order and in these comments.

## ii. Impairment

The Hearing Officer does an excellent job of summarizing the arguments on impairment in her ruling. (Order, pp. 158-68.) There are many relevant points on this topic that have been highlighted in great detail previously by the District and through the Order, and thus only a few of the high points are discussed here. The Order destroys the DWR's contention that impairment can and should *only* be considered after the fact, and not when a water right is granted. (Order, pp. 158-159.) The *Clawson* Court also rejected the DWR's surprising contention in this regard:

Kan. Stat. Ann. § 82a-711(b) (Supp. 2012) specifically requires the chief engineer to consider senior water rights and the public interest prior to granting a water right. In fact, once the chief engineer finds that a proposed use neither impairs a use under an existing water right nor prejudicially and unreasonably affects the public interest, the chief engineer shall approve all applications for such use made in good faith.

*Id.* at 49 Kan. App. 2d at 806. The Order accurately recites how the City and the DWR failed to address impairment *at all* through any form of substantive analysis. Yet, on the other hand, the District and the Intervenors demonstrated through expert testimony that *various* forms of impairment will in fact occur. For example, Mr. Romero's modeling showing depletion of river levels, in conjunction with impairment, is analyzed in detail in the Order. (Order, p. 164.)

The Order also accurately incorporates the District's contentions regarding practical saturated thickness—an exposed flank that Mr. Letourneau found “concern[ing]” but that was never later resurrected by the City or the DWR in rebuttal. (*See* Testimony of Letourneau, R. Vol. VI, p. 1585, l. 5 – 1586, l. 15; p. 1590, ll. 3-12; p. 1604, ll. 3-16 (lamenting that considering the practical saturated thickness, particularly in light of dropping the minimum index levels, could result in numerous impairment complaints and may not be in the public interest.) The Order concludes that there will be both a regional lowering of the water table and impairment to individual wells if the Proposal is adopted. The Order also rejects the City's calloused, sole

response to impairment: that the City could just help drill new wells when the inevitable impairment occurs. Thus, as summarized in the Order, it is very clear that the City's Proposal will result in numerous forms of impairment and, again, it is impossible for either the City or DWR to somehow untimely introduce new evidence or analysis to attempt to rescue a completely untenable point.

### **iii. Streamflow**

The Order also rightfully crucifies the City for its failure to address impacts to streamflow, in conjunction with the discussion on MDS. To the contrary, the Order summarizes how the District's and the Intervenor's experts demonstrated that adverse impacts to streamflow will occur. Again, there is nothing either the DWR or the City can do to breathe life into this concept at this stage in the proceedings.

### **iv. Water Quality**

The Order also rightfully excoriates the City for failing to consider water quality in its modeling. (Order, pp. 170-74.) The Order accurately identifies how the District and the Intervenor proved that the Proposal will negatively impact water quality. The Hearing Officer also wasn't fooled into believing that the City could remedy the impacts to deteriorating water quality merely by helping install water purification systems for homeowners. This is yet another obvious reason to reject the City's Proposal and, once again, this point cannot be resuscitated either at this stage in the proceedings.

### **m. Functional Equivalent**

The Order aptly rejects the DWR's tenuous contention that AMCs are somehow the "functional equivalent" of physical recharge credits. (Order, pp. 174-75.) As pointed out by the Hearing Officer, the functional equivalent concept is not embodied in Kansas water law.

Moreover, the argument flies in the face of the entire regulatory scheme since “AMCs would award credits for future pumping without any accompanying storage of source water.” (*Id.*)

**n. Accounting Methodology**

The Order also properly identifies the vast discrepancies uncovered by the District with the City’s new accounting methodology. (Order, pp. 176-77.) As identified by the Hearing Officer, the City’s own experts admitted to the lack of validity or reliability with this portion of the Proposal. As a side note, the Order seems to imply that AMCs could be accumulated regardless of the height of the water table. While the City’s Proposal did contain a proposed annual “ASR Operations Plan” that would be used to determine if the City could accumulate AMCs, or had to physically inject treated surface water into the Aquifer in order to accumulate recharge credits, the groundwater levels, as measured in January of each year, were only *one* variable to be considered. (City Ex. 1). Using only January water levels would not represent the City’s ability to conduct physical recharge during the entire year, especially during summer months when increased pumping by all users lowers the water table. Additionally, the proposed operation plan included many other variables to determine physical recharge capacity including, but not limited to, the City’s wellfield infrastructure and the recharge wells’ ability to actually recharge water. (City Ex. 1, pp. 3-6 – 3-10).

**o. City’s Modeling Errors**

The Order also accurately summarizes the numerous errors with the City’s modeling and the corresponding recitation of these errors in the Proposal. (Order, pp. 177-80.) The mistakes are extensive and there is no need to outline them again here. However, as the Order concludes, “These contradictory statements raise serious concerns. All of these errors, discrepancies and

inconsistencies undermine the credibility of the model, and, by extension, the Proposal.” (*Id.* at p. 180.)

**p. MYFAs and Other Alternatives**

The District wholeheartedly agrees with the Hearing Officer that the mere fact that the City could pursue other alternatives—such as multi-year flex accounts—is completely irrelevant to an analysis of rejecting AMCs and the lowering of the minimum index level. (Order, pp. 180-81.) The District only raised this argument in response to numerous innuendos by the City that the City did not have a choice other than to pursue the Proposal to meet its water needs. The District agrees that regardless of whether the City has other options at its disposal, the City’s Proposal is illegal and harmful on its face.

**q. GMD Role**

The District slightly disputes the Orders characterization of the District’s position with respect to the role of a groundwater management district. (Order, p. 181.) As pointed out, the Order concedes that the District should have been allowed to first conduct a safe yield analysis or make a recommendation on the well spacing waivers. Again, it is the District’s function to engage in management of the Equus Beds Aquifer. The Chief Engineer and the DWR may have final authority on many issues, but initial management authority is conferred with the District. Additionally, because the Proposal was being considered in the context of being a pseudo change application, the District should have first been allowed to review the Proposal and make a formal recommendation to the Chief Engineer, as is required of all new and change application filed in the District pursuant to K.A.R. 5-22-12. Thus, the District maintains that the City failed to exhaust administrative remedies because the Proposal was not first brought before the District for review and recommendation. The need to exhaust administrative remedies is firmly

embedded as a prerequisite to agency authority in Kansas law. *See* K.S.A. 77-501 *et seq.* The District still firmly believes that this is another sound reason that the Chief Engineer can now reject the City's Proposal.

**r. Permit Conditions**

For all the reasons addressed in the Order, the District can't imagine that the Chief Engineer will give any serious consideration to approving the Proposal. Thus, the District will decline to discuss permit conditions. However, in the rare event this Proposal is allowed to proceed, the District asks to preserve its ability to elaborate on permit conditions. However, simply put, a complete avalanche of permit conditions cannot somehow shield or ameliorate the indefensible nature of the City's Proposal.

**s. Additional Points**

Although in its 184 pages, the Order thoroughly encapsulates all the crucial arguments, the District will touch on just a few additional concepts in these final comments. This is only intended as a cursory list as many other points were raised during the Hearing or in the District's prior briefings. Of particular interest is the 120,000 acre-foot cap on credits requested by the City. Per *Clawson*, the Chief Engineer always has authority to subsequently restrict a permit if requested by the applicant. In this case, no cap on recharge credits currently exists and it is theoretically possible for the City to bank enough credits that it could cannibalize the Aquifer through its subsequent withdrawals of those credits. All parties agreed that no cap on credits currently exists. And all parties agreed that a cap on credits is appropriate. Mr. Letourneau said that the cap on credits should be looked into, and something less than a 120,000 acre-foot cap should be implemented. (Testimony of Letourneau, R. Vol. VII, p. 1698, ll. 13-23.) Even the City's analysis highlighted that a more appropriate cap on credits—something less than 120,000

acre feet—could and should be imposed. (*See, e.g.,* City Ex. 1.) For these reasons, the District respectfully asks that the Chief Engineer cap the City’s existing physical recharge credits at 60,000-acre feet, which exceeds what the City would need during a 1 percent drought event per its own modeling. (City Ex. 1.) This will prevent the City from accumulating unlimited credits that could be suddenly withdrawn in an unsustainable fashion and, in turn, cripple the viability of the Aquifer.

Aside from what is already well documented in the Order, the Hearing exposed numerous other problems with the City’s modeling. For example, as noted previously, the City never refuted the contention that it is detrimental to only measure water levels in January because it expands the City’s capacity to accumulate AMCs rather than requiring the City to physically inject treated surface water into the Aquifer. The City also failed to employ any type of statistical analysis regarding the time periods during which the City believed the Aquifer would actually be benefitted by water left in in the Aquifer while AMCs are accumulated. It was the District’s contention that these would be isolated periods significantly eclipsed by the City’s ability to severely harm the Aquifer through later withdrawals. Again, this analysis was never established by the City. The City also failed to identify how waiting until the end of a prolonged drought to withdraw credits, when the Aquifer is already depleted, would somehow be more beneficial to other users. Simply put, since AMC credits would be accumulated in an illusory fashion, there would be no convenient time to withdraw them, and the impacts to the Aquifer could be catastrophic at any point in time. Further, based on K.A.R. section 5-22-14(f), the City was precluded from projecting water demands into 2060. Mr. Letourneau testified to this fact and such a deviation would require a waiver recommendation from the District Board. (Testimony of Letourneau, R. Vol. V, pp. 1,363-68.) Many similar points could be raised, but

there is no need to expound on these other concerns in these comments as there are virtually infinite other reasons identified in the Order to deny the Proposal. Another point that should *never* be discounted is the extensive list of lingering errors, omissions, and items in the Proposal and the modeling that Mr. Letourneau said that the City and the DWR should address, and yet the City declined to subsequently remedy through additional analysis or testimony. (*See* District’s Findings of Fact and Conclusions of Law (providing an extension summary of concerns Mr. Letourneau had with the City’s Proposal).)

Also not fully addressed in the Order is the contention by both the City and the DWR that AMCs could be created by merely changing the accounting. The cites to the record for these arguments are well detailed in the District’s prior Findings of Fact and Conclusions of Law. However, in short, Mr. Pajor testified that AMCs were a mere relabeling of the water and Mr. Letourneau contended that AMCs were simply a change in accounting. (Testimony of Pajor, R. Vol. II, p. 326, ll. 16-22; Testimony of Letourneau, R. Vol. VII, p. 1629, ll. 7-11.) It makes perfect sense that the Order did not pay any lip service to these absurd contentions. It is obvious that you can’t simply will something into existence, or make the illegal legal, simply by an astute change in accounting or by adopting new crafty terminology.

Perhaps the most important point that may not have been fully illuminated by the Order is the parade of potential future harms. To the extent there are harms with the Proposal—and these are too numerous to count—the City could compound these dangers by applying for additional ASR permits in the future. Indeed, right before the Hearing, ostensibly to preserve its argument that it wasn’t seeking an additional authorized quantity through the Proposal, the City dismissed 30 new ASR Phase II recharge and recovery applications that it had filed. If the Proposal is adopted, one can make no mistake that these applications, and perhaps many more, will be

immediately filed. Further, if the City is afforded preferential treatment in this case, it could open the floodgates to other municipalities pursuing AMCs in the future. Likewise, other users (such as irrigators that have been excellent stewards of the Aquifer in the past by not using their full annual authorized quantities of groundwater) may collectively band together to also obtain passive recharge credits for water they could have “legally pumped but chose not to,” per the textbook definition of this term. Frankly, paving the way for a series of such passive recharge requests or, even worse, a class action lawsuit, is unlikely a public relations battle that the DWR wants to face. This slippery slope of future harm’s is a Pandora’s Box that the Chief Engineer should decline to open.

#### **IV. Conclusion**

The District is very grateful that the Hearing Officer exercised the due diligence necessary to reach the correct, albeit obvious, outcome in this Hearing. The reasons for denying the City’s Proposal are seemingly endless, and only some main points will be identified in this brief conclusion. While not a creature of any current statute or regulation, AMCs constitute prohibited passive recharge credits, with no iota of functional equivalence to physical recharge credits. Indeed, AMCs result in no injection of source water into the Aquifer and defy the necessary regulatory elements of a storage and recovery system. Moreover, the City’s Proposal is an unconscionable mockery of the KWAA. Further, the City failed to follow the proper statutory and procedural requirements by not filing a new application(s), and instead merely sought harmful, unilateral modifications to its existing permits. Had the City properly filed a new application, the District could have fulfilled its gatekeeper role by preliminarily identifying the alarming impacts to safe yield and water quality inherent in the City’s Proposal and, likewise, the violations of spacing requirements.

The City's Proposal also doubles the City's consumptive use of water by seeking to divert water directly from the Little Arkansas River for direct, municipal consumption while simultaneously achieving fictitious credits to withdraw future groundwater from the Aquifer, which is further amplified if the minimum index levels are lowered. Finally, all modeling deficiencies and errors aside, the City simply failed to meet its burden of proof with respect to the elements it was required to establish at the Hearing in critical regards including, but not limited to, impairment, water quality, minimum desirable streamflow, and that the proposed changes will not unreasonably and prejudicially affect the public interest. Consequently, for all the reasons articulated in the Order, these brief comments, and in the extensive Record, the District prays that the Chief Engineer will likewise deny the City's Proposal in its entirety, except for imposing a reasonable cap on the accumulation of physical recharge credits by the City. Such a result is consistent with deeply-entrenched Kansas water laws, ensures the future health of the Aquifer, and promotes sound public policy.

RESPECTFULLY SUBMITTED:

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Management District Number 2

## 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 11th day of February, 2022, to:

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