

September 10, 2018

David Barfield
Chief Engineer
Division of Water Resources
1320 Research Park Drive
Manhattan, Kansas 66502

Re: Administrative Hearing re City of Wichita
ASR Permit Condition Modifications

Dear Mr. Barfield:

In response to a letter dated September 6, 2018, from Mr. Aaron B. Oleen, Kansas Department of Agriculture (KDA) Staff Attorney for the Division of Water Resources (DWR), in the matter of the notification to nearby well owners of pending City of Wichita (City) application nos. 48704 through 48733, the Equus Beds Groundwater Management District No. 2 (District) offers the following information and refutation of certain information provided in the letter.

The District disagrees that “standard protocol” was followed by DWR regarding notification by letter to only those nearby well owners within 1,000 feet of the wells proposed by application nos. 48704 through 48733. While the District agrees it is the practice of DWR to allow a public notice to be published in the area newspaper by the applicant in lieu of providing the names and addresses of nearby well owners within ½ mile, this is rarely done and only upon the request of the applicant due to a large number of wells within ½ mile. In these cases, DWR would mail notification letters to those nearby owners with wells within 1,000 feet, and allow the public notice to serve as notification to other well owners within ½ mile. There is no known statute or regulation that allows this practice, but DWR has been following this practice for years, but only in the cases that the applicant so requests and there are a large number of wells within ½ mile.

Regarding application nos. 48704 through 48733, the circumstances do not exist that would allow a public notice in lieu of direct notification to nearby well owners within ½ mile. A review of the applications shows that 22 of the 30 applications each have less than 10 wells not owned by the City within ½ mile, and only three applications have more than 20 wells within ½ mile. This certainly does not rise to the level that notification by letter to nearby well owners within ½ mile of each application is too burdensome, and therefore publishing a public notice is appropriate. Furthermore, it does not appear that the City made a request to DWR that a public notice be published in lieu of direct notification by letter to nearby well owners within ½ mile; indeed the City provided with each application a map and list identifying all wells and the well owners’ names and addresses within ½ mile of each proposed well location. Therefore, it is obvious that the City fully expected that DWR would notify all well owners within ½ mile of

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each application. Additionally, please note that if DWR is relying on the nearby well owners information submitted with applications, the applications were submitted over five years ago and therefore the names and addresses of nearby well owners should be verified, as most certainly some of the ownerships of the nearby wells have changed.

As far as Mr. Oleen's claim that K.S.A. 82a-1906 was not in effect at the time that DWR received the applications and is therefore not relevant, the District disagrees with this assessment. The plain language of the statute states that notification to owners with a point of diversion within ½ mile shall be notified "...of a water right pending request or application..." The law does not state that the notification requirement is for a request or application submitted to DWR on or after the effective date of K.S.A. 82a-1906, rather that the application or request is "pending", which the City's application nos. 48704 through 48733 are indeed still pending. Additionally, the City has proposed significant modifications to the applications' proposed conditions of approval, most notably the lowering of the minimum Index water levels and the establishment of Aquifer Maintenance Credits. The City's proposed modifications were submitted to DWR on or after March 12, 2018, well after the effective date of K.S.A. 82a-1906. Additionally, the City is requesting the same modifications to the existing Aquifer Storage and Recovery (ASR) water permits, and therefore notification to nearby well owners within ½ of the existing ASR permits could also fall under the requirements of K.S.A-1906 as a "water right pending request." Thus, we do not believe that this is a retroactive application of the statute.

Notwithstanding the District's argument that the City's pending ASR applications, and quite possibly the existing ASR water permits, are subject to notification to nearby well owners within ½ mile pursuant to K.S.A. 82a-1906, the District argues that standard protocol has not been followed regarding notification to nearby well owners. The District Manager, who has been employed by the District for over 26 years and therefore has extensive experience and knowledge in assisting applicants with completing new and change water permit applications and reviewing such applications, advises that the City's pending applications do not rise to the level of needing a public notice in lieu of direct notification by letter to nearby well owners within ½ mile, and that this is not "standard protocol" as opined by Mr. Oleen. The District strongly suggests that the Chief Engineer seek the expertise of DWR employees who have experience in processing and reviewing applications for information in this matter.

Finally, regarding the public notices that were published in The Wichita Eagle and The Harvey County Independent newspapers in January, 2016, the District also argues, in addition to publishing of a public notice not being "standard protocol" for applications such as applications nos. 48704 through 48733, the public notices are also defective. First, the public notices were published in January 2016, which is over 2½ years ago. Second, the City has proposed significant changes to the applications' conditions of approval, which were not submitted to DWR until over two years after the public notices were published, and therefore no information was provided in the public notices or the applications regarding the proposed modifications.

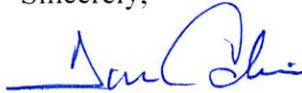
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This occurred because the City proposed ASR permit modification proposal was not available for inspection when the public notices were published. Third, the public notices were not published following DWR standard procedure in which DWR requires the public notice to be published for three consecutive weeks; the public notices appear to only have been published once in each newspaper.

The District respectfully requests that DWR properly notify by letter all owners with wells within ½ mile of each well proposed by Application Nos. 48704 through 48733, so that the District can review the applications and provide recommendation pursuant to the District's Application Processing Requirements and Procedures Regulation K.A.R. 5-22-12 et seq., and also respond, as determined possible, to the City of Wichita's First Set of Interrogatories. The District staff would be glad to assist DWR in this task. The District also requests that DWR review and determine if notification pursuant to K.S.A. 82a-1906 should be provided to nearby well owners of the existing ASR permits in which the City has requested significant modifications to the permit conditions. It is the District's opinion that the City's request to modify the existing ASR permit conditions falls under the requirements of K.S.A-1906 as a "water right pending request."

Please contact me with any questions or concerns.

Sincerely,



Thomas A. Adrian
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Attorney

TAA:djs