

**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)
In Harvey and Sedgwick Counties, Kansas.)**

Case No. 18 WATER 14014

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

**DWR's RESPONSE IN OPPOSITION TO GMD2'S AND INTERVENORS'
MOTION IN LIMINE AND MOTION TO BAR AGENCY RECOMMENDATIONS**

COMES NOW the Kansas Department of Agriculture, Division of Water Resources ("DWR"), by and through counsel, Aaron B. Oleen, and hereby opposes the motions of GMD2 and Intervenors (via their motion in support of GMD2's motions) to exclude DWR's expert testimony and agency recommendations at the formal phase of the hearing for this matter (the "Motions"). The Motions seek to stifle opinions that GMD2 and Intervenors apparently fear may differ from their own, with the absurd intended result of preventing DWR officials from doing their normal jobs and meaningfully considering and commenting on the proposal at issue.

I. BACKGROUND AND APPLICABLE LAW

1. On or about July 23, 2018, the Presiding Officer issued his *Pre-Hearing Conference Order for the Consideration of Proposed Modifications to the Phase II of the City of Wichita's Aquifer Storage and Recovery Project* (the "Pre-Hearing Conference Order"). Paragraph 3 of such order provides (emphasis added) that:

The hearing, in so far as is reasonable and at the discretion of the Chief Engineer, shall be conducted pursuant to K.A.R. 5-14-3a. The rules of evidence will not be strictly adhered to in the formal phase of the hearing. However, all cross-examinations conducted should have some reasonable relationship to the testimony provided, and the privileges listed in K.S.A. 60-426 through 60-436, and any other privileges recognized by law shall be given effect, in so far as the Chief Engineer determines such application is reasonable. **All rules and procedures shall be applied by the Chief Engineer to provide all parties to this action a reasonable opportunity to be heard and present evidence.**

2. The Presiding Officer's later *Order to Modify Hearing and Schedule*, issued on September 27, 2018 (the "Order to Modify"), addresses any procedural changes to this matter resulting from Wichita withdrawing its applications that originally had accompanied Wichita's proposal at issue. Such order generally reiterates the procedures governing this matter and provides that "All other matters set forth in the Pre-Hearing Conference Order shall remain in effect insofar as they do not conflict with this and subsequent orders."

3. K.A.R. 5-14-3a(a)(1) provides that DWR shall be allowed to be a party to a formal hearing before the Chief Engineer.

4. K.A.R. 5-14-3a(q) provides that during the hearing, the "presiding officer shall not be bound by the technical rules of evidence."

II. ARGUMENT

5. Numerous pages in the Motions are devoted to legal arguments and citations to the civil procedure and evidence rules found in Chapter 60 of the Kansas Statutes Annotated. While all this might be relevant and appropriate in a civil matter in district court, it is not so in this particular matter. The Pre-Hearing Conference Order makes clear that the incorporated procedural provisions of K.A.R. 5-14-3a govern this administrative matter. DWR, therefore, is entitled to

participate as a formal party, and the Kansas Rules of Evidence should be relaxed in favor of DWR's right to a reasonable opportunity to be heard and present evidence.

6. The fact that DWR did not submit an official designation of experts is irrelevant in this administrative matter. The other formal parties learned through written discovery what witnesses DWR may call to testify in this matter. By virtue of their very agency jobs, all testifying DWR employees should be deemed experts for purposes of this agency administrative matter, to the extent of each employee's job duties. And the other formal parties in this matter already know the subject matter on which DWR expert witnesses may testify, because that subject matter at issue is identified in the Order to Modify and includes whether Wichita's "proposed changes are reasonable and will not cause impairment and [whether] the proposed changes relate to the same local source of supply. Whether or not a change is reasonable should consider the affect [sic] upon the public interest."


7. Similarly, whether testifying DWR witnesses meet some inapplicable codified evidence standard should have no effect on DWR's ability to fully participate here and provide expert testimony and recommendations to the Presiding Officer. Because the Presiding Officer is the Chief Engineer of DWR, he is perfectly knowledgeable about the various expertise or credentials that each testifying DWR employee possesses. Moreover, just because DWR officials may not have performed certain actions desired by GMD2 and Intervenors, does not mean that such actions were warranted in the first place, or that DWR officials cannot give expert testimony and recommendations that may be useful to the Presiding Officer. The Chief Engineer is accustomed to receiving input from DWR staff, and here the Presiding Officer can give appropriate weight to any DWR expert opinion or recommendation. The other formal parties, of course, can

attempt to challenge or discredit such testimony through cross-examination or their own testimony.

8. It would be an absurd outcome here if DWR employees were prevented from performing some of the very duties for which they have been hired, which include considering requests from water applicants or existing owners and giving corresponding opinions and recommendations to the Chief Engineer for his own consideration and ultimate decision. If DWR is not meaningfully allowed to participate as a formal party in this matter, then DWR should be withdrawn as a formal party and either (a) allowed to submit DWR's expert opinions and recommendations into the record along with other general public comments, or (b) allowed to join the Presiding Officer as his direct advisor in this matter, without the heretofore-honored separation of camps and avoidance of *ex parte* communications. Completely barring DWR's meaningful input in this matter, as GMD2 and Intervenors apparently would have it, would go against the purpose of this hearing process and cannot be a reasonable option.

WHEREFORE, DWR requests that the aforementioned Motions of GMD2 and Intervenors be denied; and for such other and further relief as the Presiding Officer deems just and equitable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 18th day of March, 2019, the above *DWR's Response in Opposition to GMD2's and Intervenors' Motion in Limine and Motion to Bar Agency Recommendations* was electronically filed with the Presiding Officer for this matter and that copies were sent via e-mail to the following:

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