

STATE OF KANSAS  
BEFORE THE DIVISION OF WATER RESOURCES  
KANSAS DEPARTMENT OF AGRICULTURE

<b>In the Matter of the City of Wichita's</b>	)	
<b>Phase II Aquifer Storage and Recovery Project</b>	)	<b>Case No. 18 WATER 14014</b>
<b>In Harvey and Sedgwick Counties, Kansas.</b>	)	
<hr style="width:50%; margin-left:0;"/>		

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

**DWR'S RESPONSE TO GMD2'S AND INTERVENORS'  
MOTIONS TO ENSURE IMPARTIALITY OF HEARING OFFICER**

COMES NOW the Kansas Department of Agriculture, Division of Water Resources ("DWR"), by and through counsel, Aaron B. Oleen, and hereby states the following in response to GMD2's Motion to Ensure Impartiality of Hearing Officer, which Intervenor have joined (the "Motions"). In summary, DWR does not oppose such measures or determinations of impartiality, if any, that the Presiding Officer may deem appropriate. DWR, however, is confident that the Presiding Officer has been and can continue to be impartial in this matter, and thus DWR does not believe that any such measures or determinations are necessary.

1. Since even before Wichita submitted its official proposal at issue in this matter, to wit: Wichita's *ASR Permit Modification Proposal: Revised Minimum Index Levels & Aquifer Maintenance Credits*, dated March 12, 2018 (the "Proposal"), both the Presiding Officer/Chief Engineer and DWR have been committed to transparency and the importance of the public process in considering and making decisions about the Proposal. The Presiding Officer has held public outreach events, taken public comments at an informal-phase hearing, and, since the very outset of this process, has been committed to holding a full formal-phase evidentiary hearing where testimony and evidence can be presented. At no point in the foregoing has the Presiding Officer ever given an indication, either in writing or orally (to DWR's knowledge), that he has prejudged

whether any aspect of the Proposal ultimately should be approved. To the contrary, as GMD2 and Intervenors know, all of the Presiding Officer's comments about the matter have been riddled with qualifications about the need to make a decision only after a complete and open public process. (See, e.g., Chief Engineer's June 1, 2018, letter to GMD2's Board of Directors, attached as Ex. B to the Motions.)

2. For example, nothing in the Presiding Officer's June 1, 2018 letter (written as the Chief Engineer) indicates that he has unequivocally made a decision regarding the "functional equivalent" concept or any other aspect of the Proposal. GMD2 has simply cherry-picked language from that letter that suits them and ignored the surrounding language that provides context. The Presiding Officer stated in the letter (emphasis added) that, "as proposed, AMCs appear to be the functional equivalent of existing recharge credits and [appear to] serve the public interest . . . ." The letter contains numerous instances of other similarly qualifying language that, contrary to GMD2's assertions, show that the Presiding Officer has not decided whether to approve any aspect of the Proposal. His mind is certainly not "irrevocably closed" on the matter, as referenced in the Motions.

3. Indeed, the case GMD2 cites in support of its contention that a hearing officer must not have an "irrevocably closed mind," *McPherson Landfill, Inc. v. Board of County Commissioners of Shawnee County*, actually supports a finding that the Presiding Officer here has not exhibited disqualifying bias, prejudice, or prejudgment. *McPherson* cites *Farmland Industries, Inc. v. State Corporation Commission of Kansas*, where the Kansas Court of Appeals denied a claim of prejudgment against the Commission. See *Farmland Industries, Inc. v. State Corp. Com'n of Kansas*, 943 P.2d 470 (Kan. Ct. App. 1997). In *Farmland*, the court reasoned that a pre-hearing order issued by the Commission was not evidence of prejudgment because the Commission had

not given final approval of the agreement at issue and had explained that the order was necessary to ensure a fair and efficient hearing process. *Id.* at 485. The Commission also subsequently clarified that it would decide the ultimate reasonableness of the agreement after hearing all the evidence in the matter. *Id.* Here, the actions that the Presiding Officer has taken are almost exactly in line with the actions taken by the Commission in *Farmland*. As explained above, every statement that the Presiding Officer has made regarding the Proposal has been tempered by statements indicating that he has not reached a final decision and that he is committed to the public process and to hearing all evidence and considering all viewpoints.

4. DWR does not believe that the Presiding Officer's involvement in the initial stages of reviewing the Proposal, including his conclusion that the proposal was "reasonable" enough to warrant the time and effort associated with further, official consideration, constitutes bias. Such involvement was undertaken within the scope of his statutory authority and job duties as Chief Engineer. K.A.R. 5-14-3a clearly contemplates the Chief Engineer acting as the presiding officer in administrative proceedings such as this. The Chief Engineer is also authorized by statute to undertake his day-to-day job duties, which would normally include assessing and forming opinions as to requests like the Proposal. GMD2 and Intervenors have not presented sufficient evidence to indicate that it would be improper for the Presiding Officer to exercise the dual-role here that the statutes authorize.

5. Bias or prejudice may only be properly invoked to disqualify a hearing officer in extreme circumstances, and then generally because the hearing officer has an opinion regarding, or an interest in, the matter to be decided that is personal in some way. *See State v. Schaeffer*, 286 P.3d 889, 892 (Kan. 2012). This standard has been applied to administrative matters as well as district court proceedings. *See, e.g., KS Assoc. of Pub. Employees vs. Dept. of Admin. and Dept.*

*of Social & Rehab. Servs.*, 1994 WL 16780065, at \*1 (KS Pub. Relations Bd. Feb. 16, 1994). As explained above, the Presiding Officer has never suggested that he has such personal opinions or interests; rather, he has always reiterated that he will make final decisions based on evidence contained in the record.

6. Finally, to DWR's knowledge, the Presiding Officer has not had any improper communications with Wichita or DWR regarding this matter. Before formal proceedings began, the Presiding Officer communicated directly with Wichita—and directly with GMD2—in the context of his statutory duties as Chief Engineer. Those communications were disclosed and produced by DWR in discovery in this matter. The Presiding Officer's communications cited in DWR's revised privilege log either concerned the then-Chief Engineer's involvement in the initial stages of this process, which does not impact his ability to serve as hearing officer as explained above, or the then-Chief Engineer's communications with his attorney, KDA's chief counsel. As explained in a previous response, DWR is open to *in camera* review of these communications by the Presiding Officer, but DWR itself is not in a position to waive the Presiding Officer's/Chief Engineer's attorney-client privilege.

7. Since formal proceedings were initiated, the DWR team has respected a separation between it and the Presiding Officer and his advisors. GMD2's suggestions to the contrary are based on mischaracterizations of Lane Letourneau's deposition testimony, in a way that suits GMD2. Mr. Letourneau never indicated at his deposition that he or any member of DWR's team had conferred or intended to confer with the Presiding Officer regarding hearing strategy or opinions in this matter. In fact, Mr. Letourneau reiterated at his deposition that no one from DWR's team has spoken with the Presiding Officer regarding the substantive issues in this matter "since all this started." (Letourneau Dep. 80:1–9, March 8, 2019, the full transcript of which is

attached hereto as **Exhibit A.**) Of course, because members of the DWR team nevertheless remain under the direction of and responsible to the Chief Engineer concerning matters other than these proceedings (of which there are many), DWR employees much communicate with the Chief Engineer regarding their schedules and whereabouts. (*See* Letourneau Aff. attached hereto as **Exhibit B.**)

8. Ultimately, DWR does not oppose such measures or determinations of impartiality, if any, that the Presiding Officer may deem appropriate. But DWR does think it important to clarify GMD2's and Intervenors' erroneous arguments and mischaracterizations. DWR does not believe that the Presiding Officer's actions in this matter have warranted the Motions now before him.

WHEREFORE, DWR requests that the Presiding Officer consider the Motions in light of DWR's response herein and make such ruling as the Presiding Officer deems appropriate; 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 18<sup>th</sup> day of March 2019, the above *DWR's Response to GMD2's and Intervenors' Motions to Ensure Impartiality of Hearing Officer* 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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### **Intervenors**

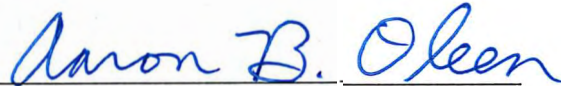
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