

**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
MOTION TO DISMISS**

The City of Wichita, Kansas (the "City") submits the following as a written response to the recent Motion to Dismiss submitted by Equus Beds Groundwater Management District No. 2 ("GMD2") herein:

1. GMD2 mischaracterizes in significant respects the MOUs referenced in its Motion. As to these documents (both of which are available on the ASR website):
 - a. In the MOU for Phase I of the ASR project, there was no agreement to specific, permanent lower index levels, but item 12 (page 4 of 4) simply agreed that the GMD2 recommendations on the project would be modified to include the changes to "Exhibit A" to the MOU.
 - b. In the said "Exhibit A," lower index levels, where addressed (i.e., for applications 45567, 45568 and 45576) were simply recommended to be established in compliance with K.A.R. 5-1-1(oo) and K.A.R. 5-12-1(b)(2). Nothing in the City's current proposal is contrary to that, and the proposed changes in index levels would be allowed within current K.A.R. 5-1-1(uu).
 - c. Also, item 10 in the MOU recognized that even firm commitments made in the document were subject to state law, regulations and orders of DWR.
 - d. In the MOU for Phase II of the ASR Project (as to which, GMD2 cites Item A.6.), there was also no agreement to permanently establish specific lower

index levels. The language cited by GMD2 in Item A.6. simply acknowledged the then-existing lower index levels, stating, “Because the project recharge and recovery wells can only be pumped if water levels in the aquifer are higher than the historic low level, no impairment is expected.”

- e. The language in Item A.6. did not say impairment *would be* expected if the index levels were lowered. Also, the statement was specifically addressed to impacts on drawdown of domestic wells within 660 feet of an ASR recharge and recovery well, and provided as a contingent safeguard that the city would take appropriate steps to restore productivity of an impacted domestic well to the same rate and quality as before.
 - f. As with the previous MOU, Item B.2. in the MOU for phase II of the ASR Project recognized that even firm commitments set forth in the MOU remained subject to state law and regulations and the orders of DWR.
 - g. Finally, as to the MOU for Phase II of the ASR Project, Item B.5., on the signature page, recited, “At intervals of no more than five (5) years, the City and GMD2 will jointly assess the need to continue any or all the provisions of this MOU.” Such a reassessment has not been shown to have occurred, suggesting that GMD2 has effectively abandoned the notion of continuing provisions under the document.
 - h. It follows that the MOUs and GMD2’s attempted out-of-context construction of an isolated item from one of them, do not support the Motion to Dismiss.
2. GMD2 cites K.S.A. 82a-708(b) as providing the “sole legal authority” for changes to an existing right. However, GMD2 provides no citation to any case holding that this statute is exclusive, and, later in its own Motion, acknowledges that changes can in fact be made to existing rights without a change application, via a Finding

and Order of the Chief Engineer.

3. GMD2 also cites the *Clawson* case, which involved an attempt to modify a final order without the right-holder's consent. GMD2 has cited no authority that *Clawson* prevents changes to existing rights when sought by the right-holder (and again, its admission that such changes can be made via a Finding and Order of the Chief Engineer contradicts this argument).
4. GMD2 argues that the change would be an "unauthorized taking," but this is complete nonsense given that statutory provisions against impairment of senior rights-holders would remain in place. To the extent that any such rights-holders believed their rights were being impaired by reduction of the water levels in the aquifer, K.A.R. 5-4-1a provides a specific procedure to address such issues. Accordingly, GMD2's ostensible "due process" issues are also baseless, and its further complaint about the alleged "lightning speed" of this hearing process (still not concluded, *a year after* submission of the proposal) is absurd.
5. GMD2's "standing" argument reflects that GMD2 does not know what standing is, nor the rules for how to determine it.

WHEREFORE, GMD2's Motion in Dismiss should be denied.

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 GMD2's Motion to Dismiss by electronic mail on this 18th day of March, 2019, for filing, to David.Barfield@ks.gov and Kenneth.Titus@ks.gov and served the same upon counsel for the other parties herein by electronic mail, addressed to:

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