

In The Matter Of:

In the Matter of the City of Wichita's Phase II Aquifer

Oral Arguments

May 28, 2019

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1 STATE OF KANSAS
2 BEFORE THE DIVISION OF WATER RESOURCES
3 KANSAS DEPARTMENT OF AGRICULTURE

4 In the Matter of the City)
5 of Wichita's Phase II) Case No.
6 Aquifer Storage and) 18 WATER 14014
7 Recovery Project in Harvey)
8 and Sedgwick Counties,)
9 Kansas,)
10 Pursuant to K.S.A. 82a-1901
11 and K.A.R. 5-14-3a

12 This matter came on for hearing before
13 Constance C. Owen, Presiding Officer, at the
14 Harvey County Courthouse, Newton, Harvey County,
15 Kansas, on the 28th day of May, 2019.

16 A P P E A R A N C E S

17 City of Wichita, Department of Public
18 Works and Utilities, appears by their attorney,
19 Brian K. McLeod, Deputy City Attorney, 435 North
20 Main, 13th Floor, Wichita, Kansas 67202. Also
21 present was Don Henry.

22 Equus Beds Groundwater Management District
23 No. 2 appears by their attorneys, Thomas A. Adrian
24 and David J. Stucky, Adrian & Pankratz, 301 North
25 Main, Suite 400, Newton, Kansas 67114. Also
present were Leland Rolfs and Tim Boese.

Division of Water Resources appears by

1 **PRESIDING OFFICER:** Right now we are
2 opening the hearing. It is 10:04 a.m. on
3 Tuesday, May 28th, 2019. The matter before
4 us is captioned State of Kansas, Before the
5 Division of Water Resources, Kansas
6 Department of Agriculture, In the Matter of
7 the City of Wichita's Phase II Aquifer
8 Storage and Recovery Project in Harvey and
9 Sedgwick Counties, Kansas, Case Number 18
10 WATER 14014. We are at the Harvey County
11 Courthouse in Newton, Kansas.

12 And at this point, we will go around and
13 state appearances, please. Let's start
14 with you, Tom.

15 **MR. ADRIAN:** Okay. I'm Tom Adrian
16 of Adrian & Pankratz, Newton, and we
17 represent the Equus Beds Groundwater
18 Management District No. 2.

19 **MR. ROLFS:** Leland Rolfs from Leland
20 Rolfs Consulting, representing Equus Beds
21 Groundwater Management District No. 2.

22 **MR. BOESE:** Do you want me to go
23 ahead and --

24 **MR. ADRIAN:** Go ahead.

25 **MR. BOESE:** Tim Boese, manager of

1 A P P E A R A N C E S (Cont.)

2 their attorneys, Aaron B. Oleen and Stephanie
3 Murray, Kansas Department of Agriculture, 1320
4 Research Park Drive, Manhattan Kansas 66502.

5 Intervenor appear by their attorney,
6 Tessa M. Wendling, 1010 Chestnut Street, Halstead,
7 Kansas 67056.

1 the Equus Beds Groundwater Management
2 District in Halstead.

3 **MR. STUCKY:** And I'm David J.
4 Stucky, also with the Equus Beds Aquifer as
5 counsel.

6 **MS. WENDLING:** I'm Tessa Wendling
7 with Wendling Law representing the
8 Intervenor.

9 **MR. OLEEN:** Aaron Oleen, staff
10 attorney with the Kansas Department of
11 Agriculture.

12 **MS. MURRAY:** Stephanie Murray, staff
13 attorney with the Kansas Department of
14 Agriculture.

15 **MR. HENRY:** Don Henry, assistant
16 director of public works and utilities,
17 City of Wichita.

18 **MR. MCLEOD:** Brian McLeod, a deputy
19 city attorney for the City of Wichita.

20 **PRESIDING OFFICER:** Okay. Thank
21 you. And the subject matter of today's
22 hearing, rather extensive, we had eight
23 motions that were noticed to be the subject
24 of oral argument today. And I will list
25 those for the record and then let's discuss

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1 the priorities for our time because if we
2 take a break for lunch, we have seven hours
3 roughly. And as I gauge these, if everyone
4 gets 15 minutes per motion, we will be here
5 till 6:00 o'clock so we -- perhaps we want
6 to prioritize our time a little bit.
7 So the motions to be argued are GMD2's
8 motion to compel directed at the Division
9 of Water Resources; GMD2's motion to compel
10 directed to the City of Wichita; the City's
11 prehearing motion in limine to exclude,
12 quote, expert reports, quote, of Carl E.
13 Nuzman, Tim Boese, and David Pope; GMD2's
14 motion in limine and motion to bar agency
15 recommendations; GMD2's motion in limine to
16 exclude expert testimony of the City;
17 GMD2's motion for summary judgment; GMD2's
18 motion to dismiss; and the Intervenor's
19 motion in support of Equus Beds Groundwater
20 Management District No. 2's motion to
21 insure impartiality of chief engineer,
22 motion in limine to exclude expert
23 testimony of the City, motion in limine to
24 exclude expert testimony of DWR or
25 recommendations, motion to dismiss and

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1 motion for summary judgment.
2 So, Counsel, those of you who have
3 submitted these motions, and everybody, if
4 I'm correct, everybody but DWR has been in
5 initial movement. What are your priorities
6 for your time, or shall we limit beginning
7 with 12 minutes per person per motion?
8 GMD, do you have an opinion about
9 your -- the time you would like to focus on
10 today?
11 **MR. STUCKY:** I think -- I guess I'll
12 speak for us. We're prepared to just go
13 through each of our motions in order, and I
14 think that'll be an efficient use of time.
15 We're prepared, if it's useful to you, to
16 go first and just go through all the
17 motions as we see it and try and allocate
18 our time in a respectful manner and then
19 give others an equal amount of time this
20 morning to also respond and address the
21 motions. So that's -- that's what we think
22 would be most efficient so ...
23 **PRESIDING OFFICER:** I would prefer
24 to take motion by motion.
25 **MR. STUCKY:** Okay.

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1 **PRESIDING OFFICER:** And, for
2 example, we start with one of your motions
3 to exclude, to stay on track and give
4 everyone fair time, that would give you
5 maybe 12 minutes per motion. Does that
6 sound reasonable to you?
7 **MR. STUCKY:** I think we'll focus our
8 time on a couple of the motions, the
9 majority of our time on the motion for
10 summary judgment and the motion to dismiss,
11 and then I think some time on the motions
12 in limine and then a lesser amount of time
13 on the remaining motions. So I think
14 that's how we'd like to allocate our time,
15 if that's appropriate.
16 **PRESIDING OFFICER:** Okay. City, how
17 would you like to prioritize your time?
18 **MR. MCLEOD:** I don't think the City
19 greatly cares, we would have been happy
20 having the motions resolved on the papers
21 so --
22 **PRESIDING OFFICER:** Uh-huh.
23 **MR. MCLEOD:** -- whatever limits the
24 hearing officer chooses to set, we, I
25 think, will easily be able to abide.

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1 **PRESIDING OFFICER:** Okay.
2 Intervenor, do you --
3 **MS. WENDLING:** I would agree that
4 the motion for summary judgment and motion
5 to dismiss deserve the most attention.
6 **PRESIDING OFFICER:** Okay. DWR?
7 **MR. OLEEN:** DWR doesn't really have
8 an opinion, whatever the hearing officer
9 would prefer. I don't anticipate that DWR
10 will need 12 minutes to respond to each of
11 the motions --
12 **PRESIDING OFFICER:** Okay.
13 **MR. OLEEN:** -- directed against DWR.
14 **PRESIDING OFFICER:** Okay. Well, in
15 light of this, then maybe we should defer
16 back to the presentation that the District
17 was anticipating to begin with and -- and
18 let you present yours. It doesn't sound
19 like there will be extensive response. So
20 it might be more efficient for you to
21 proceed that way.
22 **MR. OLEEN:** I'm sorry, Officer Owen,
23 I would conceptually, because we have so
24 many motions, I would prefer to have
25 everybody talk about one motion before we

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1 move on to the next because --
 2 **PRESIDING OFFICER:** Okay.
 3 **MR. OLEEN:** -- I may forget about
 4 what points they made in motion one versus
 5 motion seven or eight as far as responding.
 6 But it's not a big deal.
 7 **PRESIDING OFFICER:** Okay. Well,
 8 fair enough, that was what I was thinking
 9 anyway. So shifting gears again, we'll go
 10 back to what I want to do.
 11 So you want to spend the bulk of your
 12 time with your motion to dismiss and your
 13 motion for summary judgment; is that right?
 14 **MR. STUCKY:** Yes.
 15 **PRESIDING OFFICER:** Okay. Well,
 16 then let's start with your motion to
 17 dismiss.
 18 **MR. ADRIAN:** I was about to say Your
 19 Honor, but it's ...
 20 **PRESIDING OFFICER:** Madam Hearing
 21 Officer maybe.
 22 **MR. ADRIAN:** Okay. What we're going
 23 to do in consideration of the motion for
 24 summary judgment and motion to dismiss is
 25 I'm going to make some opening remarks on

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1 behalf of the District showing how we got
 2 where we are, and then Dave Stucky will be
 3 arguing the more technical approach to
 4 that.
 5 As I said earlier, I'm Tom Adrian, and
 6 I've been legal counsel for the Equus Beds
 7 District No. 2 actually since its inception
 8 in roughly 1975. I actually grew up in the
 9 Equus Beds, my father was a farmer there,
 10 and I still own the land that -- where I
 11 grew up; it is irrigated by Equus Beds
 12 water and fed our cattle and other
 13 livestock with Equus Beds water, and this
 14 is -- this whole thing is very dear to my
 15 heart.
 16 The motions we've filed are extremely
 17 important to us, they go along with the
 18 legislative declaration that was set out
 19 when the Equus Beds -- when districts such
 20 as the Equus Beds were formed, and that
 21 became actually law in K.S.A. 82a-1020.
 22 And that declaration was that in effect the
 23 governing of the -- withdrawal of water
 24 from the Equus Beds was to be controlled
 25 by, as much as possible, local input. And

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1 the Equus Beds District was formed, as I
 2 said, in 1975, and it has been working in
 3 that direction ever since.
 4 The statement of purpose on this is
 5 that -- of my presentation is to give you
 6 some background really into the original
 7 what are called ASR, or the Aquifer Storage
 8 and Recovery Project. The original hope of
 9 that project, which began quite a few years
 10 ago, was to inject water in various forms
 11 into the aquifer to prevent the movement of
 12 a salt plume that resulted from oil and gas
 13 exploration around the City of Burrton,
 14 Kansas. The hope was that by building some
 15 head pressure of inputting water in that it
 16 would stop the movement, the southeastern
 17 movement of that salt plume because it was
 18 threatening all the wells in its path,
 19 which would also include the wells -- I
 20 think there are 56 wells of the City of
 21 Wichita, and so they had a definite
 22 interest in trying to prevent the movement
 23 of that salt plume.
 24 In that project, when we were discussing
 25 that, and if you examine the voluminous

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1 records you've already seen, the MOUs that
 2 came out of that discussion, as we were
 3 discussing that, the City's proposal back
 4 then was that they should receive credits
 5 for injecting the water; in other words,
 6 the credit would allow them to withdraw
 7 water over their current allocation, which
 8 is 40,000 acre-feet a year. And by
 9 injecting water, by doing this preventative
 10 motion, they would gain that credit. And
 11 that's -- obviously seemed reasonable and
 12 it was agreed to.
 13 One of the theories that they advanced
 14 back then was that if they ceased or
 15 restricted the use of the aquifer that they
 16 should get credit for that, in other words
 17 nonuse should cause them to get additional
 18 credit to withdraw the water under the
 19 theory that nonuse was actually increasing
 20 the water in the aquifer. And the term
 21 that got applied to that was passive
 22 recharge. The idea of passive recharge was
 23 resoundingly rejected by the District and
 24 also by the DWR, and so passive recharge
 25 never became the law.

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1 Recently, Joe Pajor, who is an employee
2 of the City of Wichita and a member of the
3 board of directors of the Equus Beds
4 Groundwater Management District, advised
5 the rest of the board that until this
6 current project becomes the rule, in other
7 words until they can get credit for
8 injecting -- for cleaning water out of
9 the -- the Little Ark River and sending it
10 directly to the City as opposed to
11 injecting it into the aquifer, until that
12 becomes the case, they are going to start
13 increasing their pumping out of the Equus
14 Beds Aquifer.
15 You know, obviously they said that the
16 aquifer -- or the ASR, that project now has
17 new purpose. Original purpose was to stop
18 the movement of the salt plume and other
19 things; now he said that the purpose of the
20 Aquifer Storage and Recovery Project is to
21 cover their needs in the case of a drought.
22 And they had calculated that they need more
23 water than what they have allocated to
24 them. They also calculated that they could
25 not build sufficient credits under the

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1 current system.
2 That application, as the record will
3 show, was filed back in March of 2018, and
4 both the City and the chief engineer were
5 ready to go to hearing in August, and we
6 were not. And we've had a difficult year
7 trying to gain adequate time to prepare and
8 get expert witnesses, and that has taken
9 quite a bit of time. During that time, the
10 City was quite critical of us for being
11 obstructionist and for trying to prepare
12 our case.
13 Motion for summary judgment and the
14 motions to dismiss really are saying there
15 is no law to authorize them to do what
16 they're asking to do. Really, that -- that
17 jumps over the idea of whether it's a good
18 idea or not a good idea, but the law simply
19 isn't there. In fact, it's specifically
20 not there because it directs, as they will
21 tell you, it directs that they get credit
22 for injecting water in the aquifer.
23 By granting this motion to dismiss, what
24 would happen is that they would be forced
25 to take the action they should have taken

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1 in the first place, which is to ask for a
2 change in the law and/or the regulations
3 that would permit them to do that. And
4 that's a much more extensive process than
5 simply filing a request with the chief
6 engineer.
7 That action -- that action, then, puts
8 into play whether it is -- whether the
9 people that are responsible for changing
10 the law feel it is a good idea for the
11 aquifer to be treated in that way. In
12 other words, what they're asking for is
13 credit for not injecting water in the
14 aquifer but simply moving it to Wichita
15 directly, which sounds very much like and
16 similar to passive recharge, which
17 previously has been rejected.
18 And now I'm going to turn over to Dave
19 simply to argue the more technical aspects
20 of those motions.
21 **MR. STUCKY:** Well, good morning, I'm
22 Dave Stucky, and I'm going to go over our
23 motions in a little more detail. And
24 certainly I don't want to insult Madam
25 Hearing Officer here, I know that you've

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1 read all the motions, but I would still
2 like to give some of the high points. And
3 I promise that I'll be respectful with the
4 time this morning. I actually just
5 recently had knee surgery, so my desire to
6 stand for an extended period of time is not
7 great. So with that in mind, I'm going to
8 go over some of the facts that we're using
9 in our motion for summary judgment.
10 As Tom mentioned, at issue is what is
11 called the ASR Permit Modification Proposal
12 Revised Minimum Index Levels & Aquifer
13 Maintenance Credits, and that's a proposal
14 that was submitted by the City on March 12,
15 2018. It allows for the accumulation of
16 aquifer maintenance credits where when the
17 Equus Beds Aquifer has limited recharge
18 capacity as determined by the City, surface
19 water can be diverted from the Little
20 Arkansas River, treated, and pumped
21 directly to the City. For each gallon of
22 surface water that is pumped directly to
23 the City, the City will also get a
24 correlating credit for another gallon, less
25 5 percent, of groundwater that can later be

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1 withdrawn from the aquifer. Without filing
 2 any new water permit applications, the
 3 water can be pumped from the aquifer
 4 virtually anytime, even during a time of
 5 extreme drought. And this is limited by a
 6 19,000 acre-feet annually.
 7 The City's proposal will also lower the
 8 previously agreed upon minimum index
 9 levels. So currently there's a minimum
 10 index level that defines at what -- when
 11 the City can withdraw below a certain
 12 amount, and that minimum index level
 13 they're proposing to reduce per their
 14 proposal. And although it's not central to
 15 our motion, impairment, minimum desirable
 16 streamflow, and water quality are either
 17 not addressed or merely paid lip service at
 18 best in the City's proposal. And, in fact,
 19 in reading the City's proposal again last
 20 night, basically those three elements are
 21 given essentially a sentence of attention
 22 in the proposal, which I have right before
 23 me right now. So -- so basically given
 24 very little attention in the proposal.
 25 DWR has indicated the circumstances by

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1 approvals that were granted, the difference
 2 was that the City was injecting water into
 3 the aquifer, and after the water was
 4 injected into the aquifer, then there was a
 5 credit received for that water injected.
 6 So for every gallon put in the aquifer, the
 7 City could take an equal gallon back out at
 8 a later time. So this is in stark contrast
 9 to what they did before.
 10 And as what -- and in addition to what
 11 Tom mentioned, that old proposal, if you
 12 will, I'll call it the old proposal for our
 13 purposes today, was consistent with current
 14 ASR regulations, which we'll talk about
 15 here in a moment, the ASR permit approvals
 16 and the conditions that were imposed by
 17 those permits, and two memorandums of
 18 understanding that were entered into
 19 between the City and the District. And
 20 it's our position that these regulations,
 21 approvals, and memorandums of understanding
 22 have created a number of expectations for
 23 all constituents of the District, and
 24 that's why we think that this is very vital
 25 that these motions be heard and addressed.

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1 which the water, the AMC is to be -- later
 2 to be withdrawn from the aquifer, what
 3 conditions can be imposed on those
 4 retroactively, and DWR has said that they
 5 can attach conditions retroactively through
 6 their answers to our discovery requests.
 7 So those basic facts, again, these
 8 aren't rocket science kind of facts, these
 9 aren't facts that are really subject to any
 10 kind of contro -- any kind of controverting
 11 by either the City or DWR, they're very
 12 straightforward facts that are included in
 13 the proposal, that are admitted to in
 14 responses to discovery, so a very, very
 15 basic concept is what we're relying on for
 16 the purposes of our motion, the very basic
 17 conceptual idea that the water will be
 18 diverted from the Little Ark River, pumped
 19 directly to the City, and the City will get
 20 a correlating credit for that water that is
 21 diverted to the City in the form of an
 22 aquifer maintenance credit.
 23 Now, just to distinguish, and I think
 24 Tom already made this clear, but in the
 25 prior ASR proposals and subsequent

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1 Additionally, one other uncontroverted
 2 fact, and I'm just reading directly from
 3 prior permits at issue of the City, in
 4 those prior permits, they say verbatim, and
 5 I'm going to quote, that the applicant
 6 shall not be deemed to have acquired a
 7 water appropriation for groundwater from
 8 the Equus Beds Aquifer except for recovery
 9 of water recharged pursuant to the approved
 10 Aquifer Storage and Recovery. So in other
 11 words, with respect to the prior permits,
 12 the City doesn't get any kind of -- any
 13 kind of credit or they don't get any kind
 14 of water appropriation except for any water
 15 that they physically inject into the
 16 aquifer, and that's specifically the black
 17 letter language of the prior permits.
 18 So those are the basic facts we're going
 19 to rely on for the purpose of our motion
 20 for summary judgment, and I don't believe
 21 that any of those facts can be -- have been
 22 controverted and can be controverted by
 23 either the City or the Division of Water
 24 Resources.
 25 So with that in mind, I'd like to move

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1 on to our arguments and just try and
2 highlight what we see as the critical
3 points for each of our arguments. Now,
4 obviously, I understand that Madam Hearing
5 Officer is familiar with the Kansas Water
6 Appropriation Act, and so I won't delve
7 into that in great detail, but just for the
8 purposes of the record and -- I'm going to
9 highlight just a few points with respect to
10 the Kansas Water Appropriation Act.
11 Now, of course, we know that in Kansas,
12 the bible of water law is the Kansas Water
13 Appropriation Act, and that governs a lot
14 of -- almost everything that we do with
15 respect to water in this state. And
16 pursuant to the Kansas Water Appropriation
17 Act, basically every element -- there is
18 basic elements of every water right. Of
19 course, there's a point of diversion, a
20 quantity, a rate, a beneficial use.
21 At the most fundamental level, there is
22 basic attributes of every water right.
23 And, in fact, the Kansas Water
24 Appropriation Act, while it designates
25 these potential beneficial uses, it states

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1 that each water right can only have one
2 beneficial use for the water. In addition,
3 K.S.A. 82a-711a requires consideration of
4 water quality, safe yield, impairment, and
5 other factors whenever the Division of
6 Water Resource considers any type of
7 proposal such as the one before you today.
8 We have also outlined all the
9 regulations that create the definitions and
10 the further regulatory framework for what
11 we're operating under in our motion. So
12 with that in mind, our first point has to
13 do with the fundamentally illegal nature of
14 the City's, quote, unquote, right in this
15 particular case.
16 First of all, it's our position that the
17 City is allowed to have two beneficial
18 uses, both municipal use when they pump a
19 gallon of water from the Little Ark River
20 directly to the City, and second of all,
21 they get an aquifer maintenance credit that
22 they can later withdraw this water at a
23 later time from the aquifer. So our
24 position is that they're getting a two for
25 one. For every gallon they send to the

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1 City, they also get a correlating gallon
2 that they can later withdraw out of the
3 aquifer.
4 And it's our position that doing this
5 expands the consumptive use of the existing
6 ASR permits, and so it's our position that
7 this is fundamentally in violation of the
8 Kansas Water Appropriation Act. And our
9 analogy that we would use with respect to
10 this double credit that the City is getting
11 would be an insurance analogy. Now,
12 obviously I understand you've practiced law
13 a long time and all of us, including
14 myself, have probably been on some sort of
15 personal injury case at some point in our
16 career, and as we know, if you have a
17 client that's injured in a car wreck,
18 perhaps their car is damaged, perhaps they
19 sustained injuries, their insurance company
20 is going to pay them for their medical
21 bills and pay them for the damage to their
22 car.
23 Well, later, that client may sue the
24 defendant that injured them in the
25 automobile accident, and when that

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1 defendant's insurance company pays, the --
2 your client's insurance company will
3 subrogate, or ask dollar for dollar back
4 every penny that they paid initially to
5 your client. And the whole idea under the
6 law is that you can't have a double
7 recovery; you can't get payment from your
8 own insurance company and also a payment
9 from the defendant's insurance company.
10 The law forbids a double recovery.
11 And that's exactly what the City is
12 trying to do in this case. The City is
13 trying to violate the classic English
14 proverb because the City wants to have its
15 cake and eat it too. That's exactly what
16 they're trying to do in this case, and at a
17 very fundamental level, we're asking that
18 you deny the City's proposal for that
19 reason alone.
20 Additionally, what we have highlighted
21 in our motion has to do with the safe yield
22 analysis. And, again, this is just black
23 letter law in Kansas that we're relying on
24 which is K.A.R. 5-3-9b, which states that
25 unless otherwise provided by regulation, it

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1 shall be considered to be in the public
 2 interest that only the safe yield of any
 3 sources of water supply shall be
 4 appropriated.
 5 Now K.A.R. 5-22-7a does provide certain
 6 exceptions, and we do admit that the
 7 aquifer storage and recovery well is exempt
 8 pursuant to those exceptions but only to
 9 the extent that the permits are adopted
 10 consistent with the ASR regulations that
 11 were approved at the time that the
 12 memorandums of understanding in this case
 13 were entered into. And it's our position
 14 that AMCs do not add to the groundwater
 15 supply, so therefore they do not fit within
 16 that exemption to safe yield.
 17 And just as a basic fact, again, that
 18 nobody is going to deny, it's as simple as
 19 the sky being blue, this is an area that's
 20 over-appropriated. No new water permits
 21 can be granted in this particular area
 22 because all the water is currently
 23 allocated, and since all the water is
 24 allocated, safe yield principles should
 25 apply. And so in other words, no new water

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1 can be diverted, and the City's proposal
 2 should be subject to safe yield; and once
 3 again, that dovetails into our argument
 4 that you can't pump a gallon of water to
 5 the City and also get another gallon of
 6 credit from the Equus Beds Aquifer at a
 7 later time.
 8 Our next point is that the regulatory
 9 framework does not exist to support the
 10 City's proposal, and we detail this in our
 11 motion. And, again, I'm not going to bore
 12 you with any kind of Latin maxims or
 13 anything with respect to statutory
 14 construction in this case that we learn in
 15 our first year of law school. However, I
 16 will just highlight some basic statutory
 17 construction issues, again, that a first
 18 year law student would be able to identify
 19 by looking at these regulations.
 20 The regulations that we're operating
 21 under are called Aquifer Storage and
 22 Recovery. And when I was explaining this
 23 concept to my 4th grade son last night,
 24 certainly he understood what the concept of
 25 storage is and later recovery. An example

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1 is there's a lot of farmers here in this
 2 room, and, indeed, I help on our family
 3 farm, and as I explained it to my son, the
 4 idea is if you put grain in a grain bin,
 5 that's storage; and if you want to take the
 6 grain out at a later time, that's recovery.
 7 You're not storing grain in a grain bin if
 8 you're sending the grain directly to the
 9 elevator, that's the difference in this
 10 particular case and a concept that even a
 11 4th grader can easily understand based on
 12 the title of the statute.
 13 But certainly we don't have to rely on
 14 the title of these regulations to support
 15 our position in this case. First of all,
 16 this is not source water because the
 17 definition says that source water shall be
 18 water used for artificial recharge that
 19 satisfies a variety of conditions. And
 20 it's not artificial recharge because the
 21 source water must first be placed in the
 22 aquifer, and that's very clear in the
 23 definitions. The definition of aquifer
 24 storage specifies that you must store the
 25 water subject to the artificial recharge

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1 for subsequent use. Subsequent use. And
 2 so the definition of aquifer storage very
 3 clearly supports our position. That what
 4 the City was previously doing was
 5 appropriate, this new proposal does not fit
 6 within any regulations.
 7 The definition of recharge credit has to
 8 do with water being stored in the aquifer,
 9 if you read that definition. The
 10 definition of accounting talks about taking
 11 into account the water entering and leaving
 12 the aquifer. Now, the City may tell you
 13 that their accounting proposal as included
 14 in the proposal they have submitted is
 15 quite complicated and it's much different
 16 than what I'm trying to argue to you today,
 17 but at its most basic level, their old
 18 accounting system accounted for water that
 19 went directly into the aquifer and taken
 20 out at a later time. And that's what's
 21 contemplated by the regulations in this
 22 particular case.
 23 There is also a concern identified in
 24 those regulations for water quality in the
 25 basin storage area, and if you look at how

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1 that's defined, it's talking about the
2 concern for the water -- quality of the
3 water injected, placed into the aquifer,
4 and that's what's contemplated by those
5 statutes. In other words, the water should
6 be treated before it's put in the aquifer.
7 It has nothing to do with trying to stop a
8 migration of a chloride plume or anything
9 of that nature as far as what's actually
10 contemplated in this particular set of
11 regulations.
12 And as I mentioned, the word subsequent
13 is used, and we're just asking that you --
14 from a statutory construction standpoint,
15 we're asking that you give the word
16 subsequent its plain and ordinary meaning.
17 And in that definition, it talks about
18 water being stored for subsequent
19 withdrawal. Now, of course, if the water
20 isn't stored, there's nothing there
21 available for subsequent withdrawal, and
22 so, therefore, that word would have no
23 effect if we were to adopt the City's
24 proposal.
25 Additionally, those regulations talk

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1 about putting water in an unsaturated
2 portion of the aquifer, and that's a
3 significant term, put the water in an
4 unsaturated portion of the aquifer. In
5 other words, if there's availability in the
6 aquifer, the water can be put in the
7 aquifer, but what the City, on the other
8 hand, is proposing to do is put the water
9 in a saturated portion of the aquifer. A
10 saturated portion of the aquifer. In other
11 words, when the water -- or when the
12 aquifer is full or nearly full or fully
13 saturated, the City wants to pump the water
14 directly to the City and still get credit.
15 This is in direct contravention of the
16 language used in these regulations that has
17 to do with putting the water in an
18 unsaturated portion.
19 So, indeed, you'll find a more detailed
20 statutory construction in our motion, those
21 are just some of the high points, but it's
22 our position that not only does the City's
23 proposal not fall within the ambit of
24 current Kansas law, but Kansas law as it
25 currently exists directly forbids what the

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1 City is attempting to do. And we think
2 that if you study those regulations -- and,
3 again, as Tom mentioned, you know, there's
4 been some discussion by the Division of
5 Water Resources or the City that what we're
6 trying to do here is something
7 hyper-technical under the rules of civil
8 procedure. And we're not trying to argue
9 process, we're not trying to argue how many
10 days you have to respond to motion for
11 summary judgment or any of the rules of
12 civil procedure. What we simply did was
13 use this motion for summary judgment as a
14 vehicle to point out that what the City is
15 trying to do is illegal. It was illegal
16 when they filed it, and it's illegal here
17 today.
18 We also mentioned the Clawson case in
19 our motion for summary judgment, I'm going
20 to discuss that when I talk about our
21 motion to dismiss. But, finally, as I wrap
22 up our discussion of our motion for summary
23 judgment, I just want to touch on the
24 concept of passive recharge credits.
25 And, again, just for me to help

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1 understand this case, analogies have been
2 quite helpful as I understand and try and
3 grasp the complexity of the issues that are
4 dealt with here today. And so Tom did an
5 excellent job just a moment ago of
6 outlining what this concept of passive
7 recharge credits was. In other words, what
8 happened was the City was saying that, you
9 know, we could pump from the aquifer or we
10 could pump from Cheney Reservoir, and so
11 you should give us credit for being a good
12 steward and pumping from Cheney Reservoir
13 instead of the aquifer, give us a credit
14 for that, allow us to later withdraw water
15 from the aquifer for pumping from Cheney
16 Reservoir instead of the aquifer.
17 And this was brought up at a board
18 meeting, and Tom mentioned he recalls when
19 that occurred, and specifically what was
20 decided in those memorandums of
21 understanding that were adopted and signed
22 off on by the City and the District was
23 that passive recharge credits shouldn't --
24 will not be allowed. And that was what
25 came out of that. And so through both the

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1 ASR phase I and the ASR phase II, orders of
 2 the chief engineer in both of those orders,
 3 it was specified that passive recharge
 4 credits would never be allowed.
 5 You know, and we have the chief engineer
 6 filed a legal memorandum in this case that
 7 said that these aquifer maintenance credits
 8 are a functional equivalent of the ASR
 9 project, some sort of functional
 10 equivalent, and what I would submit to you
 11 here today, and I think for the arguments
 12 we have highlighted, it's the functional
 13 opposite of the ASR project, the AMCs are
 14 the functional opposite of the ASR project.
 15 And what AMCs are the functional equivalent
 16 of is a passive recharge credit. Because
 17 instead of pumping water from Cheney
 18 Reservoir, the City is simply trying to
 19 pump water from the Little Arkansas River.
 20 Now, they're using a different source,
 21 but their whole idea is the same as what
 22 was expressly forbidden a few years ago,
 23 which is that you can't get a credit for
 24 pumping water directly to the City from
 25 Cheney Reservoir or the Little Arkansas

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1 River, you can't get credit for that in the
 2 form of a later credit from the aquifer,
 3 that's a passive recharge credit. And so
 4 what we're saying the City is attempting to
 5 do is a functional equivalent of a passive
 6 recharge credit and should be denied for
 7 that reason as well.
 8 So I think that sums up our points in
 9 our motion for summary judgment, and I'd
 10 like to reserve the majority of the
 11 remainder of our time for the District's
 12 motion to dismiss.
 13 **PRESIDING OFFICER:** Okay, thank you.
 14 **MR. OLEEN:** I'm sorry, Officer Owen,
 15 if I may, just a -- in DWR's opinion, the
 16 arguments involved with the motion to
 17 dismiss are very similar conceptually to
 18 those for the motion for summary judgment.
 19 DWR would be okay with the District
 20 immediately discussing the motion to
 21 dismiss arguments along with summary
 22 judgment arguments but that's just --
 23 **PRESIDING OFFICER:** Any objection
 24 from the City?
 25 **MR. MCLEOD:** I think they just did

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1 that anyway so I have no objection.
 2 **PRESIDING OFFICER:** Proceed, please.
 3 **MR. STUCKY:** All right. We'll
 4 proceed on to our motion to dismiss, and
 5 I've highlighted what we think are the
 6 facts germane to our motion for summary
 7 judgment. There's just a couple additional
 8 points that are -- that are key to our
 9 motion to dismiss.
 10 And point number one is that the
 11 proposal, if approved as proposed, would
 12 allow the City to withdraw its aquifer
 13 maintenance credits without filing any new
 14 or change applications as required by the
 15 Kansas Water Appropriation Act, so there's
 16 no new application or no change application
 17 that will be filed by the City, that's
 18 point number one. And point number two is
 19 that the proposal would allow the City to
 20 lower the minimum index levels. And we
 21 talked about that before, but I just want
 22 to highlight it again.
 23 So that turns us to our argument, and,
 24 again, I won't duplicate any of our
 25 arguments, I'm just going to highlight the

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1 additional points that we raised in our
 2 motion to dismiss.
 3 Now, our first point was that a change
 4 application should have been filed by the
 5 City in this particular case, and, again,
 6 that's black letter law in K.S.A. 82a-708b.
 7 What that statute says is that there's
 8 three attributes of a water right that can
 9 be changed, the point of diversion, the
 10 place of use, and the use made of the
 11 water. And it's our position that the
 12 permits that the City had were water
 13 rights, and if the City wished to change
 14 them, there's an application process that
 15 needs to be followed. There's specific
 16 forms the Division of Water Resources has
 17 and an application process that needs to be
 18 followed for those water rights to be
 19 changed.
 20 By trying to change how the recharge
 21 credits are accumulated, which is what the
 22 City is trying to do, they should have
 23 filed -- that's a fundamental change to
 24 those permits, and, therefore, they should
 25 have followed the process to seek a change

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1 application or -- or indeed seek a new
2 permit.
3 And we have -- we have highlighted the
4 Clawson case, and I just want to discuss
5 the Clawson case briefly as it relates to
6 our motion. Now, in the Clawson case, what
7 happened was Mary Clawson filed for ten
8 permits, and she was granted these ten
9 permits. But when the Division of Water
10 Resources granted those ten permits, they
11 imposed some conditions on those permits.
12 And they imposed the condition of a
13 monitoring well and monitoring requirements
14 for these permits, but also they put a
15 clawback provision on those permits that
16 said that if we don't like what we see with
17 this monitoring well, we can scale back
18 your water right in the future. Well, in
19 the future, that's exactly what the
20 Division of Water Resources tried to do,
21 they tried to exercise this clawback
22 provision and modify the water rights of
23 Ms. Clawson. And Ms. Clawson said, not so
24 fast.
25 This went to the court of appeals, and

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1 the court of appeals agreed with
2 Ms. Clawson. And what came out of that
3 case, first of all, quoting from that case,
4 it's stated, the Kansas Water Appropriation
5 Act does not give the chief engineer carte
6 blanche authority to alter water
7 appropriations. It stated that it
8 identified only a handful of reasons the
9 chief engineer can alter a permit or water
10 right, and those included abandonment or
11 some sort of ability to suspend a water
12 right. There are only very limited
13 situations this case identified under which
14 DWR can further alter a permit absent a
15 change application being filed.
16 And to sum up the case, just the black
17 letter law of this case, and I'm going to
18 quote again because it's important, the
19 case -- the Court wrote, in sum, the Kansas
20 Water Appropriation Act does not authorize
21 the chief engineer to reevaluate and
22 reconsider an approval once a permit has
23 been issued, end quote. And so what our
24 position is is that this case can't be
25 limited to its narrow facts.

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1 And we understand that the City is going
2 to argue that it's a different kind of
3 circumstance because they're asking to
4 change their own water right. But if you
5 read this case, it's not limited to its
6 narrow facts. This case basically stands
7 for the proposition that if the Division of
8 Water Resources grants a permit, they can't
9 keep in place some sort of clawback
10 provision and later change that permit
11 because there's a whole application process
12 that allows for a permit to be changed and
13 you have to follow that.
14 And so the Clawson case falls directly
15 in to what we're trying to argue in this
16 particular case. The City has these ASR
17 permits, and they're asking that those ASR
18 permits be changed to allow for this
19 aquifer maintenance credit proposal, and
20 they're asking that this be done without
21 any kind of new change application being
22 filed, and what we're saying is under the
23 Clawson case, you can't do that. The
24 Division of Water Resources can't claw back
25 and change those prior permits that were

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1 granted without the proper application
2 process being followed.
3 And indeed I just want to also mention
4 that the District is a party to the
5 memorandums of understanding, and so really
6 we also, it's our position that these
7 permits shouldn't be changed over the
8 objection of the District because of our
9 valuable role as a party to these
10 memorandums of understanding that were the
11 bedrock for these permits being granted.
12 And so -- so as I mentioned, the reason
13 for Clawson is it creates expectations for
14 all water right users, all constituents in
15 an area of a water right that once the
16 Division of Water Resource grants a water
17 right, they're not going to just be able to
18 modify it willy-nilly in the future without
19 this change application process being
20 followed.
21 So the next point that we highlight in
22 our motion has to do with the Takings
23 Clause, and this is just very
24 straightforward, again, basic law school,
25 the Takings Clause of the Fifth Amendment

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1 of the United States Constitution ensures
 2 that, quote, private property shall not be
 3 taken for public use without just
 4 compensation, end quote. And we cite law
 5 in our motion that states that for purposes
 6 of the Takings Clause, we can talk about a
 7 real property right or it can also be a
 8 contractual right, which is also partially
 9 what's at issue here today, especially as
 10 it relates to the District.
 11 Now, the City's proposal allows for the
 12 taking of water never physically injected
 13 into the aquifer and owned by the City. So
 14 in other words, the City can divert this
 15 water directly to the City and then they
 16 can take this water out of the aquifer from
 17 other water right users in this aquifer,
 18 and that's a taking of property; and that's
 19 our position, very straightforward taking
 20 of property.
 21 And if you read -- and also it's our
 22 position that the City's proposal violates
 23 the memorandums of understanding that were
 24 entered into. And it's our position that
 25 that created a contractual right and a

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1 contractual expectation of the District and
 2 the constituents of the District. And so
 3 by violating those memorandums of
 4 understanding, by taking the water from the
 5 aquifer, that's in stark violation of the
 6 Takings Clause, and the City needs to give
 7 compensation as a result of what they're
 8 attempting to do.
 9 Now, if you read the City's response,
 10 their only response to our Takings Clause
 11 argument is that there's a mechanism to
 12 address this, and their solution is that
 13 there's an impairment mechanism, you can
 14 address this in the future. And so their
 15 idea is that it's okay to take someone's
 16 property now because down the road we can
 17 address it through these impairment
 18 mechanisms down the road, we can try and
 19 decide down the road whether there's
 20 impairment, and that will somehow remedy a
 21 Takings Clause argument. And as you know,
 22 that certainly has no bearing and doesn't
 23 offer a solution for a Takings Clause
 24 argument. You have to give the
 25 compensation up front or the proposal is

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1 fatal.
 2 So that moves us to -- you know, we
 3 mentioned some other fundamental violations
 4 of the Kansas Water Appropriation Act, it's
 5 just our position in our motion to dismiss
 6 that the City's concept stands the idea of
 7 the Water Appropriation Act on its head.
 8 The Water Appropriation Act in Kansas is --
 9 the foundation or the bedrock of the entire
 10 act is the idea of first in time, first in
 11 right, the first to apply for a permit is
 12 the first to get the rights. And that's
 13 the whole idea of our Kansas Water
 14 Appropriation Act.
 15 And so what we have here is a situation
 16 where the City is going to divert water
 17 directly to the City, and then because they
 18 diverted some water to the City, they're
 19 going to have this passive recharge credit
 20 where they can then withdraw water from the
 21 aquifer at a later time whenever they
 22 choose even though they didn't put any
 23 water in the aquifer. And that is in stark
 24 violation of the Kansas Water Appropriation
 25 Act. It could be interfering with the

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1 rights of more senior users in the aquifer,
 2 and that's -- violates the Kansas Water
 3 Appropriation Act at its very core and is
 4 yet another reason why as of today you
 5 should deny the City's request.
 6 So our final arguments that we raise in
 7 our motion to dismiss have to do with
 8 standing and due process, and I just want
 9 to touch on that just a little bit. With
 10 respect to our argument on standing, it's
 11 our position that several things should
 12 have happened here. First of all, the City
 13 should have filed some change applications,
 14 they should have done that, number one, and
 15 number two, the City, after they filed
 16 those change applications, they should have
 17 brought this application before the
 18 Groundwater Management District, that's our
 19 position, and we should have had an
 20 opportunity as a Groundwater Management
 21 District, as a board, and many of our board
 22 members are here today, they should have
 23 had an opportunity to first hear this
 24 proposal and make a decision or
 25 recommendation on this proposal. And, of

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1 course, that didn't occur.
2 And so because -- and, finally, for our
3 standing argument, what the City is trying
4 to do is illegal per Kansas law. And so
5 you can't pursue something that is illegal,
6 and it's speculative at best, as we've
7 highlighted, and so for all those reasons,
8 there's no standing for the City to be
9 moving forward.
10 And I would just submit, again, I think
11 analogies are helpful, I would submit the
12 analogy of a zoning situation. If you're
13 trying to change -- if a property owner is
14 trying to change their zoning, they can't
15 just file directly in district court to
16 change their zoning. You have to first
17 file an application to change your zoning,
18 and then you have to go before the board of
19 planning and zoning. And then if you don't
20 like the decision of the board of planning
21 and zoning, then you can go before the --
22 the city council or county commission,
23 whatever your governing body is. And if
24 you still don't like that decision, then
25 you can go to district court. As an

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1 analogy -- pursuant to that analogy, what's
2 happened here by the City not filing an
3 application, going directly to hearing,
4 this -- that's like going directly to
5 district court in a zoning case, and so
6 therefore there's no standing.
7 And so I just -- I just want to mention
8 that we, and Tom mentioned this already,
9 that we believe that the Groundwater
10 Management Act has significance, that this
11 should have been heard by the District
12 prior to coming to our hearing here today.
13 And so it's also our position that the City
14 has failed to exhaust administrative
15 remedies, that by going directly to a
16 hearing before the Division of Water
17 Resources, without filing an application
18 and without going before the District, they
19 failed to exhaust administrative remedies,
20 and that's yet another fatal reason why
21 their proposal should be dismissed.
22 And as far as due process, now we
23 mentioned in our due process arguments that
24 we were concerned about the timing. That
25 really is not as much of an issue anymore

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1 now that Madam Hearing Officer has taken
2 over as the hearing officer and given us
3 what we think is a very respectful schedule
4 with respect to this hearing. But what I
5 would mention with respect to procedural
6 due process is the whole idea that the
7 District's due process rights and the
8 rights of all its constituents have been
9 violated in the sense that we have an
10 illegal proposal that's been filed that
11 should have gone before the District first,
12 and without us having an opportunity to
13 have first heard this proposal, these
14 procedural due process rights of the
15 District and its constituents have been
16 violated.
17 So with that in mind, as I sum up both
18 our motion for summary judgment and our
19 motion to dismiss, we think that we've
20 identified not one but dozens of reasons
21 why what the City is trying to do is
22 illegal and this shouldn't proceed to any
23 kind of further hearing.
24 **PRESIDING OFFICER:** Thank you.
25 Would the City of Wichita like to respond?

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1 **MR. MCLEOD:** Well, sure. Brian
2 McLeod for the City of Wichita. I will
3 start with also a little bit of background
4 on the ASR project, the problems that led
5 to and -- which the City is attempting to
6 address via this proposal.
7 The comment was made in the District's
8 opening that under the current system the
9 City could not accumulate sufficient
10 credits for -- to address its drought
11 resiliency concerns. That is not strictly
12 accurate. What is accurate is with the
13 aquifer saturated because of the success of
14 the City's ASR program and the City's
15 careful management and forbearance in use
16 of its native rights in the aquifer, there
17 is no place to put source water from the
18 river now when it is treated because the
19 aquifer is full. So to accumulate credits
20 to address its drought resiliency concerns,
21 the City would therefore need to exercise
22 its native rights to pump down the aquifer
23 to create capacity for recharge from the
24 source water in the river.
25 And it's -- it's reminiscent of 9th

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1 grade algebra, when you know that the end
 2 result is going to be credits for the City,
 3 why require all those interim steps? Why
 4 not cut to the chase and leave the aquifer
 5 topped off and not require the City to go
 6 in, pump water out, pump new water in, turn
 7 the aquifer over in the process, leave the
 8 aquifer most of the time lower than it
 9 could be under the City's proposal.
 10 So the notion of the City's proposal is
 11 you're getting to a point that is
 12 functionally the same as if the City went
 13 through all these steps, you end up with an
 14 aquifer that is -- that is full more of the
 15 time, you avoid the necessity to turn water
 16 by pumping out and pumping in, and let
 17 things -- let things naturally settle out
 18 in the aquifer so you have better water
 19 quality than if the City has to pump out
 20 and treat water and pump in.
 21 The notion that ASR was -- was always
 22 simply to create a barrier to movement of
 23 the salt plume by Burrton, I think that is
 24 inaccurate. That is a nice collateral
 25 benefit, but the purpose of the ASR project

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1 situation where the City is -- is taking
 2 that water that it could have put in the
 3 aquifer if there were space for recharge
 4 and basically skipping a step in the
 5 process the City would otherwise have to do
 6 to generate actual physical recharge
 7 credits.
 8 I think we know on the salt plume issues
 9 and from the studies that have been done
 10 that the salt plume moves very slowly.
 11 I'll come back to that, I want to address
 12 the 1993 water levels which are the other
 13 main component of the City's proposal.
 14 Those 1993 water levels, they're not
 15 greatly scientific, not a great deal of
 16 anything went into setting those as a
 17 parameter initially of the permits, they
 18 were the historic low watermark of the
 19 aquifer. So it was a cheap, easy way to be
 20 able to say to people, well, if you didn't
 21 have problems in 1993, you won't have
 22 problems if the water levels are reduced to
 23 the 1993 levels. There wasn't really
 24 any study saying that anyone would suffer
 25 significant impairments if the water levels

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1 has always been to recharge the aquifer.
 2 It's been very successful in that regard
 3 which is why the aquifer is saturated
 4 today.
 5 The statement that passive recharge
 6 credits were resoundingly rejected by the
 7 District and DWR, check the documents on
 8 this, if you will, but my recollection from
 9 the documents that I have seen is somewhat
 10 different, I don't believe that the MOUs
 11 contain an agreement rejecting passive
 12 recharge credits. My recollection is the
 13 District did not take a position on passive
 14 recharge credits; and at DWR, the former
 15 chief engineer did ultimately reject the
 16 concept but he also considered the concept
 17 seriously for a time.
 18 The difference between that old concept
 19 of passive recharge credit and what the
 20 City is proposing here is that the
 21 conditions on the City's diversion and
 22 treatment and use of the source water from
 23 the river would be an additional parameter.
 24 So this is not a situation where the City
 25 is simply not using the aquifer. It's a

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1 went lower than the 1993 levels, and the
 2 City believes the aquifer would be left
 3 approximately 80 percent saturated with the
 4 new lower index levels that it has
 5 proposed.
 6 Now, the purpose of those low -- those
 7 lower index levels is also tied to the
 8 City's drought resiliency concerns.
 9 Currently, the City knows by our experience
 10 in the recent drought several years ago
 11 that a few years into a significant drought
 12 event, the water levels will come very
 13 close to the 1993 water levels because of
 14 the irrigation uses of the aquifer by other
 15 parties. So at the front end of a drought
 16 event, the City before it knows how
 17 prolonged or significant that drought event
 18 will be has to decide in the early years of
 19 the drought whether to take its accumulated
 20 credits or risk losing them when the
 21 aquifer levels drop below the 1993 index
 22 levels.
 23 Modifying the levels would simply allow
 24 the City to wait until we were further into
 25 a drought. If we're talking a 100-year

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1 drought, it might be a drought of seven
2 years' duration. If we're talking, you
3 know, a lesser drought, a two- or
4 three-year drought and the City were able
5 to wait that long and not lose its credits,
6 we could get through the drought and never
7 have to draw accumulated credits, and that
8 also would further keeping a fuller aquifer
9 level and put off the City's need to decide
10 on whether to draw credits to the time when
11 it would be clear that we were in a
12 prolonged 100-year drought event.
13 So both of the components of the City's
14 proposal would tend to leave a fuller
15 aquifer most of the time, better water
16 quality most of the time, and the District
17 has honed in on the -- on the
18 once-in-100-year event, saying, well, you
19 know, what if, you know, we get to this
20 100-year drought and this all happens, the
21 City has to -- has to withdraw these
22 accumulated credits, and there are all this
23 potential parade of horrors? Well, the
24 aquifer's still going to be 80 percent
25 saturated, and even if some people have

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1 difficulty with domestic wells, if those
2 wells are extended to fully penetrate the
3 aquifer, there should not be impairment
4 there, I think that's intuitive.
5 The notion procedurally that we can't
6 get there from here, that's really kind of
7 the District's argument in its motion to
8 dismiss and its summary judgment motion,
9 the main argument. The idea, as I
10 understand it, being that you can't have --
11 you can't have modifications to permits
12 without a change application, yet in their
13 own motion to dismiss, the District
14 recognizes that there are a range of
15 matters where that's just done typically.
16 So as a bright-line rule, that rule is not
17 there.
18 And then the other notion that they
19 bring is the notion that even if the City
20 were to file a change application, this is
21 not a change that can be addressed because
22 the statutes don't specify that you can
23 make these kind of modifications in a
24 change application, so that literally you
25 can't get there from here.

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1 Now, this in conjunction with the
2 discussion of the long pendency of the
3 case, all the litigiousness and the
4 discovery things that have passed and will
5 be before you again later today, this
6 issue, if the District believed it, this
7 issue could have been raised at the very
8 first teleconference, the very first;
9 that's actually where it belonged, where it
10 should have been discussed if they thought
11 that it was true. It doesn't depend on
12 anything that they have learned in
13 discovery. I mean, it's always been known
14 that the City had not filed a change
15 application, it's always been known what
16 the changes were that the City was seeking,
17 so this could have been raised as a
18 threshold argument and it -- I mean, it is,
19 I think, an argument before you now that
20 it's an argument of first impression.
21 The City's view of it is that to the
22 extent we know that things are routinely
23 done without change applications, this mode
24 of proceeding by DWR made sense to us.
25 It's not a -- it's not a question of

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1 standing, the Cochran case addresses
2 standing and clearly we have it. It is a
3 procedural quagmire type argument, and it
4 does need to be addressed; and if the
5 District is right concerning that argument,
6 then the Hearing Officer and the Division
7 have no jurisdiction over any of their
8 collateral motions, discovery issues,
9 et cetera.
10 The taking issue, I would point out,
11 directly conflicts with what Mr. Adrian
12 said in his opening that the District's
13 position was that this all should be done
14 via legislative process. Well, if it's a
15 constitutional taking, I don't see that
16 working either. Those two -- those two
17 positions are incompatible, and consistency
18 has really not been the District's strong
19 suit in the history of the case.
20 The idea that there is a taking here, I
21 think does not fit well with -- with the
22 working of the Western Rights Model of
23 water rights in general. Conflicting water
24 rights are addressed all the time, the
25 impairment mechanisms and administration of

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1 rights, and part of that is because the
 2 right to divert is not ownership of the
 3 water. Nobody owns that water, certainly
 4 not the District, and so there is not a
 5 taking issue unless there is impairment of
 6 somebody's own water right to divert.
 7 I think it is -- it is a factual issue
 8 whether that will be showable by the
 9 District or not, and the City's view is
 10 with the aquifer still 80 percent saturated
 11 even at the lower levels, there will not be
 12 impairment because people will be able to
 13 extend their wells if their wells are
 14 impacted.
 15 And it also makes really very little
 16 sense to address the proposal based on a
 17 100-year event when 99 percent of the time
 18 it's going to be to the clear advantage of
 19 everybody; it makes no sense to concentrate
 20 on this fictionalized parade of horrors
 21 that the District believes could happen in
 22 the 100-year drought.
 23 And beyond those things, I don't really
 24 have further comments responsive to their
 25 motion.

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1 **PRESIDING OFFICER:** Thank you.
 2 Would the Intervenor like to -- excuse me,
 3 would the Intervenor like to respond?
 4 **MS. WENDLING:** Yes. Most of the
 5 Intervenor comments are trying not to
 6 repeat what the District has already said.
 7 We do support every -- all the grounds that
 8 the District has advanced for the motion
 9 for summary judgment and motion to dismiss.
 10 I would like to spend a little time
 11 focusing on the Takings Clause. As they
 12 have said, the Fifth Amendment ensures that
 13 private property shall not be taken for
 14 public use without just compensation. The
 15 City obviously disagrees that there would
 16 be a taking in the event that this proposal
 17 is approved.
 18 The City chooses to ignore the
 19 implications of utilizing the credits they
 20 seek to accumulate. Their -- their
 21 proposal focuses only on accumulating
 22 credits and completely ignores what happens
 23 when those credits are used, which is an
 24 irresponsible way of looking at it. This
 25 parade of horrors is an important thing

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1 to consider because we do need to know what
 2 will happen if these credits are used or if
 3 the index levels are lowered to the point
 4 that the City has proposed. To say that we
 5 should not consider this 1 percent event is
 6 interesting for the City to say since it
 7 forms the entire basis of the proposal. If
 8 we were not contemplating this 1 percent --
 9 or 100-year drought, there would be no need
 10 or justification for the proposal in the
 11 first place.
 12 The City's proposed modifications in
 13 both aspects, both the AMCs and lowering
 14 the index levels, both individually can
 15 result in taking. The AMCs, excuse me,
 16 recharacterize the native water that
 17 resides in the basin storage areas as an
 18 AMC so that water that is currently
 19 appropriated to others, as this is a fully
 20 appropriated area, that water is
 21 recharacterized or converted into an AMC
 22 with exclusive rights to the City of
 23 Wichita; however, that water has already
 24 been appropriated and rights to other
 25 people. This recharacterization of the

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1 water is an invasion of water rights
 2 belonging and appropriated to other people.
 3 Similarly, the lower minimum index
 4 levels expand the basin storage area, which
 5 other people have described as a box. By
 6 making this box larger, it similarly
 7 displaces the water, that native water gets
 8 appropriated to other individuals, making
 9 it more difficult, if not impossible, for
 10 those groundwater users to access and use
 11 the water that they've been appropriated a
 12 right to. So when individuals who have a
 13 right to water are no longer able to access
 14 that water, we would likely end up in an
 15 impairment situation.
 16 This interference with their ability to
 17 access the water rights is a physical
 18 invasion. In Frick versus City of Salina,
 19 the Kansas Supreme Court found that a
 20 regulatory action is a per se taking when
 21 the government requires a landowner to
 22 suffer a permanent physical invasion, and
 23 this is exactly what the City is proposing.
 24 Many of my other points the District has
 25 already covered in detail, and we agree

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1 with those points. It is important to
2 understand the impact of the fully
3 appropriated aquifer, that what being
4 sought by the City is a new appropriation,
5 as pointed out, without an application.
6 Any further appropriation in excess of safe
7 yield is a clear violation of the
8 fundamentals of the Kansas Water
9 Appropriation Act and is a fundamental flaw
10 in the City's proposal.
11 I think it's worth identifying further
12 that the -- the water rights being sought
13 by the City of Wichita or the proposal is
14 for an entirely speculative need. K.S.A.
15 82a-707e says appropriation rights in
16 excess of the reasonable needs of
17 appropriators shall not be allowed. So I
18 have not found anywhere that drought
19 mitigation is identified as a beneficial
20 use, and so the 120,000 acre-feet the City
21 is seeking in AMCs is a speculative need
22 far in excess of anything reasonably needed
23 by the City, especially as they have
24 suggested that we should ignore the
25 possibility of the 100-year drought. Thank

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1 you.
2 **PRESIDING OFFICER:** Oh, thank you.
3 And DWR, your response.
4 **MR. OLEEN:** Aaron Oleen for the
5 Kansas Department of Agriculture, Division
6 of Water Resources. Madam Presiding
7 Officer, please don't let the simplicity
8 and the brevity of which I'm about to speak
9 distract you from its truth. Everything
10 that the District and the Intervenors, all
11 their legal arguments that they've raised,
12 while they might be appropriate to a
13 district court in a KJRA action, if and
14 when agency action is taken, it is not
15 appropriate now in this administrative
16 proceeding. All their legal arguments have
17 essentially already been considered by the
18 chief engineer, and the chief engineer took
19 a different interpretation of the law.
20 I want to direct your attention to two
21 letters which maybe you've already seen,
22 they are posted on DWR's website for this
23 matter. One is a letter from the chief
24 engineer to the City of Wichita dated
25 September 18, 2017, it was cc'd to the

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1 District; the other letter is dated
2 June 1st, 2018, and it was sent directly
3 from the chief engineer to the District. I
4 have copies here if you would like.
5 In these documents, in these letters,
6 before we got to this formal stage, the
7 chief engineer addressed the District's
8 legal arguments. They wanted -- they
9 raised most, if not all, of these legal
10 arguments already, and the chief engineer
11 said, no, I'm sorry, I take a different
12 interpretation of the law than you, I have
13 consulted with my chief counsel, we think
14 that this concept, this proposal that
15 Wichita proposes is allowed under the law,
16 largely because the chief engineer views
17 this not as making material changes to
18 existing water rights but more of a change
19 in the accounting system to how aquifer
20 recharge credits are accumulated.
21 I understand that the District doesn't
22 like that legal interpretation, and so
23 they've trotted out before you a slew of
24 all their legal arguments. They have those
25 ready for a district court case, so good

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1 for them, but it's not within your
2 jurisdiction, in DWR's understanding, to
3 take a contrary position on these legal
4 arguments and what the chief engineer has
5 already decided.
6 You were delegated authority by the
7 chief engineer to, quote, conduct a hearing
8 among the formal parties and provide
9 written recommendations to the chief
10 engineer based on the record after such
11 hearings are complete. I don't believe
12 that it was the chief engineer's intent to
13 give you authority to take a contrary legal
14 interpretation than the one he's already
15 taken.
16 He's made his interpretation of the law,
17 and the District, perhaps this is part of
18 their strategy to try to preserve these
19 arguments for a future lawsuit under the
20 KJRA, that's fine, I understand that, but
21 the chief engineer as the head of an
22 agency, he can hold a hearing on issues
23 that he wants to consider. And the
24 District is trying to prevent the chief
25 engineer from holding a hearing about an

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1 issue that he wants to consider, and I
 2 don't think they can do that. If and when
 3 agency action is actually taken, if it
 4 rises to the level of changing property
 5 rights, then they can file their action
 6 under the Kansas Judicial Review Act. But
 7 it's not appropriate here.
 8 In -- in these letters that the chief
 9 engineer provided to the District, the
 10 chief engineer gave his opinion about why
 11 he does not think that change applications
 12 are necessary in order to consider the
 13 proposal that Wichita is asking for; it's
 14 because the chief engineer deems them,
 15 again, as I said, to be more akin to
 16 accounting procedures.
 17 The -- the chief engineer addressed
 18 his belief that the proposal that Wichita
 19 is suggesting does not involve passive
 20 recharge credits. The chief engineer
 21 addressed -- or stated his opinion that
 22 he's decided not to seek independent legal
 23 review of the matter as they wanted because
 24 the chief engineer already considered these
 25 legal issues in conjunction with the chief

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1 counsel for DWR.
 2 So I think that these esteemed gentlemen
 3 over here, you know, I understand the
 4 arguments, the legal arguments they're
 5 trying to make, but it's not appropriate at
 6 this stage, it's not appropriate to stop
 7 the public hearing that the chief engineer
 8 wants to have. Those types of legal
 9 arguments can be made to a district court.
 10 What the chief engineer wants, as I
 11 understand it, is input on the proposal
 12 itself, assuming that it's legal under the
 13 law, as the chief engineer has determined,
 14 the chief engineer wants to know what sort
 15 of conditions would need to be imposed,
 16 along with recognition of this proposal in
 17 order to ensure important issues such as
 18 water quality are covered or potential
 19 impairment are uncovered.
 20 The chief engineer wants the District to
 21 weigh in on those material aspects, and the
 22 District has avoided doing that, perhaps
 23 because they're concerned about waiving
 24 their legal arguments. In my personal
 25 opinion, they should note their legal

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1 arguments, they can make them again if they
 2 get to that point, but then be part of the
 3 process because otherwise they're putting
 4 all their eggs in one basket; and if
 5 they're wrong on the legal -- on their
 6 legal arguments, then they would not have
 7 been part of advising the chief engineer,
 8 or rather yourself now, on what sort of
 9 conditions would need to be imposed in
 10 order to make this work.
 11 Again, I have copies of these documents
 12 here if you'd like, they're part of the
 13 record, but these two letters, if you will
 14 read them, you'll see that the chief
 15 engineer has already addressed these
 16 concepts.
 17 **PRESIDING OFFICER:** Okay. I do
 18 believe those are part of the record and
 19 everyone has access to them, so I don't
 20 think we need to introduce them separately
 21 today. But thank you.
 22 **MR. OLEEN:** Thank you.
 23 **MR. STUCKY:** Madam Hearing Officer,
 24 can I just give a few comments of response,
 25 I promise it'll be just three minutes or

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1 less?
 2 **PRESIDING OFFICER:** Three minutes is
 3 fine, thank you.
 4 **MR. STUCKY:** Okay. I'll be very
 5 brief in my comments. Just to point out up
 6 front, one, I did misspeak briefly as
 7 Mr. McLeod mentioned, it was a slip, the
 8 permits are what mentioned the passive
 9 recharge credits shouldn't be allowed. The
 10 idea of passive recharge credits were not
 11 ultimately mentioned in the memorandums of
 12 understanding, I just want to make that
 13 record clear, that's the one aspect on
 14 which we believe we misspoke. But that
 15 said, every other thing that we said, we
 16 believe is true.
 17 I also want to clarify, I think, some
 18 misstatements that were made by the City.
 19 The ASR project has not caused water levels
 20 to increase. We believe that the modeling
 21 shows that that's due to rain and reduced
 22 pumping.
 23 The City talked about the aquifer being
 24 at 80 percent full. At the new minimum
 25 index levels, we believe this is a fallacy,

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1 so that's just an average that in times of
2 extreme drought that certainly would not be
3 the case and is not supported by their
4 model. Again, not dispositive to the
5 motions here today but we just wanted to
6 mention.
7 And also the City mentioned you can make
8 some changes to -- to permits and -- before
9 the chief engineer, but the law says they
10 can't be fundamental changes to the
11 permits. You can make de minimis changes,
12 and we highlight that in our motion, you
13 can't make fundamental changes to permits,
14 and that's what we're talking about.
15 And so -- and something else the City
16 said is that, you know, this is unfair,
17 we're hearing the District's arguments for
18 the first time, and I was going to respond
19 to that but I think that's in stark
20 juxtaposition to what Mr. Oleen said just a
21 moment ago which was the City brought up
22 all these legal -- or the District brought
23 up all these legal arguments a long time
24 ago, and the chief engineer sent a short
25 one- or two-page letter that said we're

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1 denying those legal arguments. That's what
2 the record supports, that's what the record
3 shows. This was brought up in board
4 meetings a long time ago, we advanced our
5 legal position and said that we didn't
6 believe what the City was trying to do was
7 legal, and that's when the chief engineer
8 sent that letter. So I think that bats
9 down really quickly what the City was
10 arguing.
11 So with that in mind, with those
12 clarifications in mind, I just want to make
13 it very, very clear that what we're saying
14 has not been controverted by any law by
15 either the District -- by either the City
16 or the Division of Water Resources, they
17 haven't cited any law that has supported
18 their proposal and said -- shown why what
19 they're trying to do is legal. That's
20 something that's missing from all the
21 briefs, all the argument submitted by the
22 Division of Water Resources and by the
23 City.
24 And I'll sum up what Mr. Oleen said in
25 just -- very briefly. What he's saying is

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1 that the chief engineer, number one,
2 decided that what the City is trying to do
3 is legal so that's the law now, that's
4 point number one; and point number two is
5 we're in an administrative procedure and
6 this is -- our arguments should all be
7 reserved for district court. I just want
8 to quote very briefly to you from the
9 Kansas Administrative Procedures Act, and,
10 again, this is just basic law in Kansas,
11 but it says in K.S.A. 77-519, the presiding
12 officer, which is now you, at appropriate
13 stages of the proceedings shall give all
14 parties full opportunity to file pleadings,
15 objections, and motions, including but not
16 limited to motions to dismiss and motions
17 for summary judgment, end quote, from the
18 Kansas Administrative Procedures Act.
19 So what we're doing is directly in line
20 with the Kansas Administrative Procedures
21 Act, and it's our position that there's a
22 new sheriff in town, there's a new hearing
23 officer that's presiding over these
24 hearings, so it doesn't matter if the
25 chief engineer, through some short

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1 one-and-a-half-page letter, said that what
2 the City is trying to do is legal, that
3 doesn't make it right, that doesn't make
4 what the -- make it the law just because
5 the prior hearing officer said that in a
6 letter that was sent before he even became
7 the hearing officer, which was part of the
8 reason for our motion for impartiality,
9 which, of course, is not at issue anymore.
10 So it's our position that that's all
11 irrelevant, that you have the full rights
12 under the Kansas Administrative Procedures
13 Act to adjudicate our motions, to decide
14 that what the City is attempting to do is
15 illegal, and it's irrelevant what a prior
16 hearing officer said in that regard.
17 **PRESIDING OFFICER:** Thank you.
18 Okay. It is now 11:30, why don't we take
19 about a ten-minute break, and then we'll
20 resume with remaining motions. Thank you,
21 off the record.
22 (Thereupon, a recess was taken;
23 whereupon, the following was had.)
24 **PRESIDING OFFICER:** Let's go back on
25 the record. Okay. We're now back on the

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1 record, it's 11:45, and it appears that for
 2 the most part the remaining motions sort of
 3 fall into two categories, motions to compel
 4 and motions to exclude.
 5 And let's start with the motions to
 6 compel, which as I understand it there are
 7 two of those, both filed by the District.
 8 So let's start with the motion to compel
 9 directed at DWR. And then we'll just march
 10 through the motions after that one. So,
 11 GMD, if you would like to proceed with
 12 that.
 13 **MR. STUCKY:** Thank you. Well, Madam
 14 Hearing Officer, just in the interest of
 15 time, and we're optimistic that we can get
 16 this moved along and hopefully finish up
 17 this hearing by 12:30 as we go right
 18 through, we're willing on these particular
 19 motions to basically just stand on the face
 20 of the motions. As this matter has gone on
 21 and on, we've decided that there's other
 22 matters that are more vital to our time and
 23 more vital to our resources, and so as it
 24 exists here today, we've argued in length
 25 what we see as the most vital of our

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1 motions.
 2 But the motion to compel with respect
 3 to DWR is fairly simple and fairly
 4 straightforward. The whole idea was that
 5 originally there was a number of documents
 6 that weren't furnished to us, and really
 7 Mr. Oleen did a good job of communicating
 8 with the District and a really good job of
 9 trying to coordinate with the District to
 10 try and ensure that a lot of those
 11 complaints were purged. And so really a
 12 lot of the original issues with -- that we
 13 had in our original motion to compel with
 14 respect to DWR admittedly have been
 15 resolved.
 16 And so I guess what's remaining really
 17 is we had asked to get a -- get more
 18 information on communications that occurred
 19 between the chief engineer and various
 20 parties in this case. And as you heard
 21 from Mr. Oleen that prior to becoming the
 22 hearing officer, the chief engineer had
 23 publicly touted this AMC proposal, had
 24 indeed even submitted letters trying to
 25 argue that the proposal of the City was

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1 legal, and so we were just merely
 2 interested in what level of involvement the
 3 chief engineer had in analyzing this
 4 proposal, in considering the technical
 5 aspects, and what private conversations
 6 between the chief engineer and the City
 7 might have occurred and what the substance
 8 of those communications were. And so
 9 really what -- what's left with respect to
 10 our motion to compel against the Division
 11 of Water Resources is just that simplistic
 12 point.
 13 What we're saying is either the chief
 14 engineer can have no involvement in this
 15 hearing any further, that any kind of
 16 recommendations made by the chief engineer
 17 as far as what's legal and not legal has no
 18 bearing and there can be no recommendations
 19 by the chief engineer, either that occur or
 20 if the chief engineer is going to have some
 21 sort of involvement in this hearing process
 22 in a different role other than hearing
 23 officer, then we're entitled to full
 24 discovery. We're entitled to be able to
 25 find out what those communications are,

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1 what the chief engineer has said, what the
 2 chief engineer has analyzed. And so that's
 3 our position with respect to the motion to
 4 compel, quite simply put at this point.
 5 With respect to our motion to compel
 6 against -- against the City, we included
 7 with our motion to compel against the City
 8 a golden rule letter, and, of course, as
 9 you're familiar with the rules of civil
 10 procedure we tried to follow those. We
 11 first sent a letter to the City addressing
 12 what our complaints were, and we didn't
 13 feel that those issues were resolved so we
 14 filed a motion to compel. And so our
 15 concerns are outlined in that golden rule
 16 letter.
 17 And some of the issues had to do with
 18 the documents we got, they were sent to us
 19 in what we con -- we did not consider an
 20 organized fashion, and it appeared to us
 21 that there were documents missing. But
 22 really at the core of our motion to compel,
 23 just to sum it up in a few sentences, is
 24 the whole idea that when we sent out our
 25 interrogatories and our requests for

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1 admission, the City found, in our view, as
2 Tom mentioned, a lot of really creative
3 ways to skirt answering our questions.
4 And, you know, Tom and Lee have been
5 attorneys for a long time, and I bet they
6 would be willing to stand up and tell you
7 that they've never seen, or rarely seen
8 more creative wordsmithing by a party to
9 try and avoid answering a question. And
10 that was basically what our position was.
11 For example, we would ask a very
12 straightforward question like is water
13 being directly diverted to the City, and we
14 would get some long objection as far as why
15 they couldn't answer that question. So if
16 we had asked if the sky was blue, we would
17 get an objection because we hadn't
18 specified if we were talking about the sky
19 for Planet Earth or Planet Mars. So those
20 are the kinds of objections we got, and so
21 it's laid out in our motion to compel, and
22 we're simply asking that the City properly
23 answer our interrogatories and our
24 motions -- and our requests for admissions.
25 But really at this point, I think we

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1 know what the facts are, and I think we
2 know what the germane facts are as it
3 relates to our motions here today. And
4 those are straightforward enough that we
5 still feel that the hearing officer can
6 resolve those issues in our -- in our
7 favor, that Madam Hearing Officer can
8 resolve those in our favor. But, yes, we
9 are asking that those motions to compel be
10 addressed as they're filed and be granted.
11 So ...
12 **PRESIDING OFFICER:** Okay. DWR,
13 would you like to respond to the motion
14 directed towards you?
15 **MR. OLEEN:** Again, Aaron Oleen with
16 the Kansas Department of Agriculture. It
17 sounds to me, then, from Mr. Stucky that
18 the real lingering issue that the District
19 has is assurance that they have a list of
20 identified communications that DWR, the
21 chief engineer had with Wichita, if I
22 understand Mr. Stucky correctly. And we
23 did provide that as part of answering the
24 District's written discovery, we provided a
25 list, it's referred to in our response to

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1 this motion to compel. I believe it was
2 maybe even attached as an exhibit. So I
3 don't know what else to say other than DWR
4 is not aware, to my knowledge, of any other
5 ex parte communications that the chief
6 engineer or DWR had with Wichita. So
7 that's all I can say about that.
8 We did work -- work through a good chunk
9 of our discovery disputes after the
10 District's first golden rule letter was
11 sent to DWR, we had a conference call,
12 engaged in some more discovery, we produced
13 some documents that DWR thought likely were
14 still privileged or protected but we
15 produced them anyways.
16 You know, I'm aware of the fact that
17 anytime you assert a protection or a
18 privilege, the other side can interpret
19 that as meaning that you have something
20 that you really don't want them to see or
21 that's helpful to their case. I really
22 don't think that's the case now, but we --
23 we still have documents which we're still
24 asserting our privilege are protected. I
25 don't personally think that they are some

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1 sort of silver bullet, but I'm not going
2 to -- I'm not going to waive
3 attorney-client privilege and other
4 protections just to aussage the District's
5 fears.
6 I think that just because the chief
7 engineer at one point changed from being
8 the head of DWR to now being the ultimate
9 arbiter of this administrative proceeding,
10 I don't think that negates the privileged
11 nature of communications that he had with
12 his chief counsel at the time. And so, you
13 know, if the District still feels like
14 certain identified documents on our revised
15 privilege log, if they truly have questions
16 as to the propriety of asserting privileges
17 or protections with respect to those items,
18 then we have them and you can conduct an
19 in camera review as you deem appropriate,
20 but I believe that DWR has -- has gone out
21 of their way and been reasonable in trying
22 to provide responsive documents to the
23 District.
24 The District, they waited two months to
25 file their motion to compel from the time

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1 that DWR filed our response to their golden
 2 rule letter. I don't know about you, but
 3 that leads me to think they don't have any
 4 issues. And I repeatedly told them, let me
 5 know if you have issues. Two months, more
 6 than two months passed, don't hear anything
 7 until the deadline to file pretrial
 8 motions, then we get what I hope is largely
 9 a stock motion to compel because I think
 10 the -- the gall in requesting attorney's
 11 fees when you've waited more than two
 12 months to ask for documents, I don't think
 13 that needs to be -- I think that's evident.
 14 But I think that we have largely addressed
 15 the issues. Again, I stand ready to let
 16 you review documents in camera if you deem
 17 it appropriate.
 18 **PRESIDING OFFICER:** Thank you. And
 19 would the City like to respond to the
 20 motion to compel directed towards the City?
 21 **MR. MCLEOD:** Sure. And I'll just do
 22 that from here. The City, I think you will
 23 see when you look at the discovery requests
 24 and the answers on the written discovery,
 25 answered the discovery requests as they

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1 were written and ordered. It's not a
 2 litigant's job to rewrite the opposing
 3 party's discovery requests to try to make
 4 them say what you think the party may be on
 5 after.
 6 I believe also that -- that we've always
 7 known that the answers to all those
 8 questions were in the proposal, and I think
 9 you've seen from the papers that the
 10 District has filed and heard the admission
 11 that Mr. Stucky made during his
 12 presentation on his motion that they know
 13 the information, they don't really need
 14 those written discovery requests answered
 15 any differently than they were, and the
 16 point of the motion just looks vexatious.
 17 The discovery requests themselves were
 18 significantly vexatious, and when similarly
 19 worded discovery requests were served by
 20 the City on the District, they objected to
 21 all of them. Where the City had supplied
 22 the District with a detailed index of
 23 matters withheld for work product and
 24 attorney-client reasons, the District
 25 generally asserted stuff in this category

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1 as work product or attorney-client, didn't
 2 give us specifics.
 3 The so-called golden rule letter, this
 4 letter was sent to the City and DWR on a
 5 government holiday when our offices were
 6 closed, with a deadline that would pass,
 7 that holiday weekend, before our offices
 8 reopened. That deadline was never
 9 revisited with the City by counsel. Again,
 10 it was difficult to take that as anything
 11 but another vexatious attempt to be
 12 litigious on matters that the District
 13 really didn't need to fill out their
 14 positions in the case.
 15 Nevertheless, in response to all that at
 16 the time, we did offer to send the chief
 17 engineer for an in camera inspection all of
 18 the documents that were listed by the City
 19 as withheld, to permit an in camera
 20 inspection, to supplement the City's
 21 answers as the chief engineer might find
 22 necessary if he did.
 23 The chief engineer did not direct the
 24 City to do anything, wisely, I believe,
 25 because wisely, I believe, he saw the

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1 District's discovery gamesmanship for what
 2 it was. There is no point in requiring or
 3 compelling pointless discovery just to
 4 impose burdens, and you shouldn't. Just
 5 say no as to these motions to compel and
 6 overrule them, please.
 7 **PRESIDING OFFICER:** Mr. Stucky, I
 8 have a question. It sounds as though you
 9 are reducing your motion at this point,
 10 paring it down because you were talking
 11 about what's left of the motion as to DWR?
 12 **MR. STUCKY:** Correct.
 13 **PRESIDING OFFICER:** Mr. Oleen
 14 testified that he provided you a list of
 15 communications?
 16 **MR. STUCKY:** (Nods head.)
 17 **PRESIDING OFFICER:** Are you
 18 asserting that some items on that list
 19 should have been provided to you but were
 20 not?
 21 **MR. STUCKY:** Correct. So our
 22 position is that when you're asking for
 23 documents, you can provide a list all day
 24 of what those documents are, but if you
 25 don't receive the documents and you don't

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1 get any kind of information on the -- any
2 kind of information or a summary of those
3 documents, it's absolutely worthless. And
4 so that's our position that, yes, we were
5 given a list of the documents that exist,
6 but we were told that the documents were
7 subject to work product or attorney-client
8 privilege.
9 And as we advanced with the law we
10 cite in our motion, our position is
11 straightforward that you can't go from
12 having these privileged communications on
13 one hand, then go to being a hearing
14 officer and publicly tout a particular
15 proposal and have those work product and
16 attorney-client privileges remain. You
17 can't be involved in working something up
18 in anticipation of litigation while at the
19 same time serving as a hearing officer.
20 So at the point that you serve as a
21 hearing officer, any kind of work product
22 or attorney-client privileges in that
23 regard are waived at that point. That's
24 our position. So, yes, we're asking that
25 we be made aware of what the substance of

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1 those documents were, not just what
2 documents existed but the substance of
3 those documents. That's our position.
4 And we also would support, at the very
5 least, an in camera review of some of those
6 documents to help understand if there are
7 documents that we should be aware of to
8 help understand what analysis the chief
9 engineer did in this particular case. And
10 so that's -- that's our position, we're
11 asking for the substance of those documents
12 and we think that those privileges that are
13 cited were waived, and that's our position.
14 **PRESIDING OFFICER:** Are you
15 requesting an in camera review of the
16 documents?
17 **MR. STUCKY:** Yes, we are.
18 **PRESIDING OFFICER:** Do you have
19 specific items on that list that you would
20 like to be the subject of an in camera
21 review or everything on the list?
22 **MR. STUCKY:** If we may in that
23 regard, Madam Hearing Officer, if -- if it
24 would be appropriate, and, again, we don't
25 want to cause busywork for anybody, we're

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1 not going to try and cause busywork for the
2 City or Division of Water Resources. We --
3 our position is that that's never been our
4 attempt. And with respect to what the City
5 said by the -- their position that we sent
6 our golden rule letter during a holiday, of
7 course they could have purged our concerns
8 at any time.
9 So in that regard, if it's appropriate,
10 if you see it appropriate, if we could
11 have, you know, maybe a week to try and
12 outline what we see as the critical
13 documents, because as I'm standing here
14 today, I would be prepared to just say we
15 want an in camera review of all the
16 documents but we would like -- I think it
17 would be appropriate and fair to you for us
18 to get an opportunity to try and further
19 narrow that down and specify exactly which
20 documents they are just for clarification.
21 So with your permission, we'd like a little
22 time to respond, and we can send that as an
23 e-mail to everybody involved. So ...
24 **PRESIDING OFFICER:** Okay.
25 Mr. Oleen, you offered an in camera review,

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1 I assume you are willing to participate in
2 what Mr. Stucky's describing?
3 **MR. OLEEN:** Yes, Your Honor.
4 **PRESIDING OFFICER:** Okay.
5 **MR. OLEEN:** And logistically if it
6 would be appropriate, it sounds like
7 Mr. Stucky is proposing that he send you a
8 list later of specific items for which he
9 wants your in camera determination. I have
10 a binder now of everything that we produced
11 in its redacted form, also in its
12 un-redacted form. I propose that I just
13 hand you a copy of that binder now, then
14 when Mr. Stucky sends you the list of the
15 items that he specifically wants reviewed,
16 you can look at those specific items in the
17 binder.
18 **PRESIDING OFFICER:** That sounds very
19 efficient, thank you. So you asked for one
20 week to identify the documents, would that
21 be -- you want to just -- next Tuesday, I
22 don't know what the date of that is. Can
23 someone pull that up for me, what day is
24 that exactly, a week from today? Is that
25 the 4th, June 4? Thank you. Excuse me

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1 while I make a few notes.
 2 Okay. And, Mr. Stucky, as regards the
 3 City -- oh, pardon me, Mr. Adrian.
 4 **MR. ADRIAN:** Madam Hearing Officer,
 5 could we request till the end of next week?
 6 **PRESIDING OFFICER:** I think that's
 7 fine.
 8 **MR. ADRIAN:** Yeah, I think that --
 9 **PRESIDING OFFICER:** Would that make
 10 it the 7th? What date is that then?
 11 **MR. ADRIAN:** I think it's the 7th,
 12 yes.
 13 **PRESIDING OFFICER:** No, that would
 14 be fine, we'll move that to June 7, then.
 15 And, Mr. Stucky -- oh, pardon me,
 16 Mr. Oleen.
 17 **MR. OLEEN:** Sorry. If I may, I
 18 guess, you know, obviously providing you
 19 with a copy of these documents, your in
 20 camera review, I think, assumes that you
 21 would first find as the District argues
 22 that the mere fact that the chief engineer
 23 has changed roles causes him to lose his
 24 protections. Just to be clear, DWR, we
 25 don't believe that because you become a

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1 hearing officer, now you have to disclose
 2 all communications with your attorney, for
 3 example, about issues that arose before you
 4 became the hearing officer.
 5 **PRESIDING OFFICER:** Okay, thank you.
 6 Okay. And, Mr. Stucky, as to the City, do
 7 I understand that you have the same concern
 8 with them about releasing items that
 9 they've determined were privileged that had
 10 to do with potential communications with
 11 the chief engineer?
 12 **MR. STUCKY:** Yes, the answer to that
 13 question is yes, in addition to not
 14 answering our interrogatories or requests
 15 for admissions, so yes.
 16 **PRESIDING OFFICER:** Well, taking
 17 things one thing at a time, the -- I know
 18 that the City at one time offered an
 19 in camera review; is that right,
 20 Mr. McLeod?
 21 **MR. MCLEOD:** We did and I will also
 22 add that on the lengthy privilege log I do
 23 not believe a single document withheld by
 24 the City had anything to do with any
 25 contacts with the chief engineer. I

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1 believe the City has furnished every single
 2 document that is responsive to that general
 3 document description and that counsel's
 4 statement is in error when he says that
 5 they're waiting for something on that from
 6 us.
 7 **PRESIDING OFFICER:** Okay. So,
 8 Mr. Stucky, do you believe that there are
 9 items on the City's privilege log
 10 pertaining to alleged communications
 11 between the City and the chief engineer?
 12 **MR. STUCKY:** That I don't recall.
 13 What I was saying is that there's documents
 14 that the City has stated were privileged
 15 that we do not believe were privileged, but
 16 I can't specifically recall at this exact
 17 moment whether or not they were
 18 communications directly with the chief
 19 engineer, that may be true, but there were
 20 documents that were identified as
 21 privileged where we don't think the
 22 privilege stands, and -- and we identified
 23 what we think those are.
 24 **PRESIDING OFFICER:** You identified
 25 the individual documents?

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1 **MR. STUCKY:** Not -- not in our
 2 motion. I think through e-mails and
 3 through our golden rule letter, but I guess
 4 we'd ask for the same opportunity. This in
 5 camera review concept has been given, we'd
 6 ask that we have until June 7th to outline
 7 and identify the specific documents that we
 8 think should be reviewed or -- in an in
 9 camera review. So we'd ask for that same
 10 opportunity as it relates to the City. And
 11 then I can answer your question in greater
 12 detail at that point.
 13 **PRESIDING OFFICER:** And, Mr. McLeod,
 14 would you have any objection to that
 15 process?
 16 **MR. MCLEOD:** I will say just this,
 17 Your Honor, I do because of the -- of the
 18 absence of parity in the discovery conduct
 19 in this case, at least we furnished a
 20 privilege log, as did DWR; whereas, in
 21 responding to discovery requests addressed
 22 to them, the District just made general
 23 assertions of attorney-client privilege and
 24 work product. I don't believe that they
 25 even specifically identified the things

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1 they were withholding.
2 **MR. STUCKY:** I'm going to object
3 just for the record as far as the relevance
4 of this discussion and these comments.
5 These aren't motions that are before Madam
6 Hearing Officer here today, and so they're
7 not fodder for any consideration or fodder
8 for any comments by Mr. McLeod. So I just
9 want to make an objection as to relevance
10 with respect to those comments.
11 **MR. MCLEOD:** We didn't file a motion
12 to compel, Your Honor, but that doesn't
13 mean that there should be an enforced
14 non-parity of discovery and a party
15 bringing motions to compel that has
16 disregarded its own obligations. For that
17 reason, I am somewhat chapped by the
18 request and regard it as being just a
19 continuation of the gamesmanship. But as
20 far as the in camera review, whatever you
21 would like for in camera review purposes,
22 we will send. I just, I comment as to the
23 absence of parity in the discovery
24 processes so enforced.
25 **PRESIDING OFFICER:** Okay. Well, it

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1 seems reasonable to me that the District
2 have until June 7 to identify any documents
3 the City has identified as privileged that
4 the District has reason to believe are not.
5 And I assume Mr. McLeod does not have a
6 copy of all of those documents with him as
7 Mr. Oleen does, so at that point, then,
8 there would be communication through me to
9 Mr. McLeod to see copies of the items that
10 you identify. And I will take a few notes,
11 bear with me.
12 And, Mr. Stucky, I'm assuming that the
13 items that you identify you will also
14 identify why you have chosen each of them?
15 **MR. STUCKY:** Yes, Your Honor.
16 **PRESIDING OFFICER:** Thank you.
17 Mr. Oleen.
18 **MR. OLEEN:** Officer Owen, I would
19 like to explain to you how our binder
20 works. In my opinion, it's not something
21 that needs to be on the record; in my
22 opinion, it's something that could be
23 explained to you, with the District's
24 counsel, afterwards; but I just wanted to
25 have that opportunity so you're not

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1 confused by how things are organized.
2 **PRESIDING OFFICER:** Okay. So we'll
3 do some logistics later.
4 Mr. Stucky, finishing up your concerns
5 with the City's answers to interrogatories,
6 what specifically are you asking me to do?
7 **MR. STUCKY:** Direct the City to
8 answer our questions and not hide behind
9 objections as to the wording. And I think
10 by that same deadline, and it's frankly
11 more work for the District and more work
12 for legal counsel for the District and so I
13 hesitate to offer this, but I think it's
14 appropriate here, by that June 7th date,
15 let us outline what we think were the most
16 egregious examples of where the City simply
17 ignored our question or tried to somehow
18 find a reason not to answer our question
19 based on some technicality on one of the
20 words used as far as the wordsmithing goes.
21 So we'd ask that we be given until
22 June 7th, and we'll outline what we see as
23 the key ones that we feel should -- you
24 should direct the City to answer and why,
25 we'll explain that as well by the June 7th

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1 date. And then you can make a decision
2 on whether or not you -- you want to direct
3 the City to answer them. So that's what
4 I'd propose.
5 **PRESIDING OFFICER:** So let me think
6 about that. Response from the City?
7 **MR. MCLEOD:** I think that Mr. Stucky
8 already admitted during his initial
9 presentation that they have the information
10 that they need, so this is a pointless
11 exercise, the City answered their
12 questions, they didn't like the answers.
13 **PRESIDING OFFICER:** Now, Mr. Stucky,
14 the subset of questions which you're
15 offering to provide me comes from the most
16 recent set of interrogatories; is that
17 correct?
18 **MR. STUCKY:** Yes, and requests for
19 admission.
20 **PRESIDING OFFICER:** And requests for
21 admission, because I believe there have
22 been more than one set of those that have
23 been propounded.
24 **MR. STUCKY:** Correct, we tried to
25 pay very, very -- instead of initially

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1 filing -- we filed a set of interrogatories
 2 and requests for admissions initially, and
 3 instead of filing a motion to compel and go
 4 through that process, what we simply
 5 decided to do is file a second set of
 6 interrogatories and requests for admissions
 7 where we tried very, very hard to try and
 8 clarify our questions and I guess close any
 9 kind of loopholes that the City was
 10 complaining about in our language. And so,
 11 yes, it'll be the second set that we sent
 12 out.
 13 **PRESIDING OFFICER:** Okay. So I
 14 would expect -- I'll set the same deadline
 15 of June 7 for the District to provide those
 16 questions to me with an explanation of why
 17 you believe the existing answers are
 18 deficient, okay? I would like you to
 19 provide the same thing to the City so that
 20 they have an opportunity to respond on the
 21 same day. I mean, you don't have to
 22 respond the same day; I would like to give
 23 you a week to respond to that, so that
 24 would be by June 14.
 25 Okay. Any reason why we do not move on

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1 response is relatively straightforward. As
 2 we point out in our response, the Kansas
 3 Administrative Procedure Act again governs,
 4 and so as a hearing officer, you have
 5 greater flexibility to allow this type of
 6 testimony than it would be if we were
 7 before a jury. So that's -- that's point
 8 number one, quite straightforward in that
 9 regard.
 10 So what the City is trying to do is
 11 they're trying to exclude some highly
 12 qualified experts in the form of David Pope
 13 and Tim Boese. And the City does cite,
 14 which what I will tell you is a relatively
 15 general rule, that experts generally can't
 16 testify strictly on issues of law.
 17 Now, the reason why our experts can
 18 testify in this case, in addition to what I
 19 just raised about the Administrative
 20 Procedures Act, is the fact that an expert
 21 can testify on mixed questions of law and
 22 fact. And so in other words, if a
 23 discussion of the law is necessary to help
 24 explain what the fact is or how the fact
 25 applies, an expert can discuss the --

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1 to motions to exclude? No? Okay. The
 2 City has filed a motion to exclude the
 3 expert reports, within quotes, of Carl
 4 Nuzman, Tim Boese, and David Pope. Would
 5 the City care to present that?
 6 **MR. MCLEOD:** Very briefly, Your
 7 Honor. It's quite simple really, there are
 8 matters that should be arguments of
 9 counsel, other matters that are fact that
 10 should be testimony by witnesses. It is, I
 11 believe, recognized as a near universal
 12 rule that you don't put experts on the
 13 stand to testify to courts or hearing
 14 officers about what the law is. These
 15 three expert reports are replete with legal
 16 conclusions of the witnesses who are
 17 non-attorneys telling the hearing officer
 18 their views of what is legal and illegal.
 19 I can't imagine how that could be helpful,
 20 and generally courts and agencies don't
 21 permit that, and that's the basis of the
 22 City's motion.
 23 **PRESIDING OFFICER:** Thank you.
 24 District's response to that?
 25 **MR. STUCKY:** Thank you. Our

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1 discuss the law. And that's one general
 2 exception, and that's black letter law that
 3 we cite in our response.
 4 And also we cite law that says that
 5 experts can testify on the law if it's
 6 helpful, and we highlight why it's helpful
 7 in this particular case. And the reason
 8 for that is that agency heads do comment on
 9 the law every day in their jobs. And
 10 agencies are responsible for promulgating
 11 the laws, and as you know, it's a
 12 long-standing rule in law in the United
 13 States that agencies are afforded deference
 14 as far as their recommendations go with
 15 respect to the law.
 16 And so because of that, what we have
 17 here is two -- either a former agency head
 18 or a current head of an agency that wants
 19 to discuss the facts as it relates to the
 20 law. And so we think that they should be
 21 given some sort of special deference based
 22 on those reasons that we cite pursuant to
 23 the fact that they were or are current
 24 agency heads, and we cite law that supports
 25 our argument in that regard.

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1 Now, both David Pope and Tim Boese are
2 both highly credentialed individuals, and
3 they both helped develop the regulations
4 that are at issue in this particular case,
5 they both helped develop the current ASR
6 permit conditions, they both helped develop
7 the memorandums of understanding that are
8 at issue. And, in fact, David Pope, of
9 course, is retired as the head of the
10 Division of Water Resources, but both of
11 them, and Tim Boese currently, interpreted
12 the law every day in their jobs and tried
13 to explain what was within the parameters
14 of the law as it related to the facts
15 before them. So that's something that
16 they're charged with doing every day and
17 that's the very nature of their job, the
18 fundamental nature of their job as agency
19 heads, and so that's why they should be
20 given special deference in this case.
21 And Tim Boese has been involved in this
22 ASR project since day one, and, you know,
23 he's been with the District since the early
24 1990s, and so he is intimately acquainted.
25 And I think -- I would -- I would be

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1 surprised if anyone in this room would be
2 willing to stand up and say that they've
3 had more involvement in this whole project
4 since its inception than Tim Boese has. I
5 mean, that would really surprise me.
6 And, of course, everyone knows David
7 Pope and his storied career as an engineer
8 at various different jobs before he became
9 the chief engineer of the Division of Water
10 Resources; obviously his reputation speaks
11 for itself with his storied career.
12 And so we're just asking that two of the
13 most highly qualified individuals that
14 interpret facts and help to define what
15 fits in the parameters of the law be
16 allowed to testify. And I think that they
17 are two of the most highly qualified
18 individuals, and I would submit that two of
19 the other most highly qualified individuals
20 to speak on the law are Lee Rolfs and Tom
21 Adrian. And they're also in this room, of
22 course, but we're asking that they be
23 allowed to testify, we think it is helpful
24 and reliable. They're experts here at
25 applying the facts to the law.

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1 And part of the concerns that were
2 identified by the City have to do with
3 what's prejudicial to a jury. Of course,
4 you're an accomplished legal scholar
5 yourself as the hearing officer, so you can
6 decide what's helpful. If you want to
7 disregard something that Tim Boese says or
8 something that David Pope says, you're free
9 to do that, and so there -- we don't need
10 to have a gatekeeper function and decide
11 what's going to be prejudicial to a jury
12 because we're not talking about a jury
13 trial here.
14 Additionally, and this is quite
15 significant, the Division of Water
16 Resources opened the door to both Tim Boese
17 and David Pope testifying on these issues.
18 And Mr. Oleen highlighted the fact that --
19 that the current chief engineer submitted
20 letters, that Mr. Barfield submitted
21 letters saying that what the City is trying
22 to do is indeed legal. Well, we cited law
23 in our motion that says that this opens the
24 door for us to now be able to rebut that
25 position and argue this through our

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1 experts, that essentially the Division of
2 Water Resources has opened the door to this
3 testimony.
4 Additionally, we cite law that says that
5 testimony on the law can be used to help
6 understand background facts, and, again,
7 our experts helped to develop these laws,
8 they understand the legislative history,
9 and that's exactly the kind of fodder that
10 should be allowed in this kind of
11 testimony. We cited some similar
12 situations, some analogous cases, some case
13 law that supports our position, for
14 example, an attorney testifying on what
15 constitutes tax evasion under the law, that
16 was allowed; or an example of an attorney
17 testifying on whether or not a certain
18 prospectus fit within the ambit of
19 securities law, that's allowed because it
20 was helpful, it was a highly specific area
21 of law and it was allowed. And so for all
22 those reasons, we think it's certainly
23 allowable in this particular case.
24 **PRESIDING OFFICER:** Thank you.
25 Would the Intervenors care to respond

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1 regarding this motion?
 2 **MS. WENDLING:** Yes, thank you. The
 3 Intervenor, again, largely rely on the
 4 great work done by the District and that
 5 our arguments are very similar in that both
 6 the prehearing conference orders and KAPA
 7 allow flexibility to the hearing --
 8 presiding officer, hearing officer to not
 9 be bound by the technical rules of evidence
 10 and allow experts to testify on questions
 11 of law if that is found to be helpful.
 12 The Kansas Supreme Court has found that
 13 witnesses routinely testify as to factual
 14 matters that juries are to determine, and
 15 that allows embracing the ultimate
 16 decisions to be decided, and that's in
 17 State versus Ingham.
 18 Here, while Mr. Nuzman does have one
 19 comment regarding the law, the bulk of his
 20 testimony is relying on his specialty
 21 expertise in this area, specifically with
 22 mod flow; a review of his expert report is
 23 very focused on that technical analysis,
 24 and that is why we seek to have him
 25 testify. I personally have found his

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1 expert report to be very helpful as someone
 2 new to the area of water law, and it is
 3 completely within the hearing officer's
 4 discretion if you do find such testimony to
 5 be helpful to admit that testimony.
 6 As the District has already said, the
 7 City relies on Glassman versus Costello,
 8 which is differentiated from this case in
 9 that you're discussing the prejudicial
 10 value of that testimony in front of the
 11 jury rather than a hearing officer such as
 12 yourself.
 13 **PRESIDING OFFICER:** And, excuse me,
 14 whose testimony were you referring to
 15 regarding mod flow?
 16 **MS. WENDLING:** Carl Nuzman.
 17 **PRESIDING OFFICER:** Nuzman.
 18 **MS. WENDLING:** Oh, sorry.
 19 **PRESIDING OFFICER:** Go ahead.
 20 **MS. WENDLING:** Yes, Carl Nuzman is
 21 the Intervenor expert that has been
 22 objected to. So we find that Mr. Nuzman is
 23 sharing well-informed and reliable
 24 information that will be helpful and should
 25 be allowed and ask that you deny the City's

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1 motion to exclude his expert testimony.
 2 **PRESIDING OFFICER:** Thank you. Did
 3 the Division want to respond to that
 4 motion?
 5 **MR. OLEEN:** Real briefly, Your
 6 Honor. Generally, DWR is in favor of more
 7 testimony, more disclosure, we believe
 8 that's part of the purpose of the
 9 evidentiary hearing that we want to have is
 10 to hear different points of view on the
 11 City's proposal.
 12 Because you have already been presented
 13 with these legal interpretations via the
 14 District's and the Intervenor's vehicles of
 15 a summary judgment motion and a motion to
 16 dismiss, I do not think it would be
 17 appropriate if and when we get to a hearing
 18 when they bring out these witnesses to
 19 repeat those same legal arguments to you,
 20 again, legal arguments, district court
 21 action under KJRA. But to the extent that
 22 anybody else wants to have meaningful input
 23 on the material aspects of the City's
 24 proposal, it doesn't amount to the legality
 25 of whether it can exist or not, I don't

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1 think those legal arguments are appropriate
 2 in the administrative hearing.
 3 **PRESIDING OFFICER:** Thank you. Next
 4 we come to the District's motion in limine
 5 to bar agency recommendations, would you
 6 like to present that now?
 7 **MR. STUCKY:** Yeah, just very briefly
 8 I'll sum up our position. What our
 9 position is in that regard is that pursuant
 10 to the Kansas Administrative Procedure Act
 11 every hearing officer can set different
 12 rules, and I could quote the Administrative
 13 Procedures Act, can also determine to what
 14 extent the administrative procedures should
 15 follow the rules of evidence or should
 16 follow the rules of civil procedure, every
 17 hearing officer has latitude in that
 18 regard.
 19 And what our position is is that the
 20 Division of Water -- that there was an
 21 expert deadline set in this particular
 22 case, the Division of Water Resources chose
 23 not to file any kind of expert report, not
 24 advance any kind of -- chose to say that we
 25 don't have any expert testimony, we don't

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1 have anyone that will testify as an expert
2 in this case, so the Division of Water
3 Resources made that decision, and, in fact,
4 Mr. Oleen, I think, even sent an e-mail
5 saying that we're -- that we're not going
6 to submit any expert report, so that was a
7 conscious decision made by the Division of
8 Water Resources.
9 And we took a deposition in this case of
10 one of the employees of the Division of
11 Water Resources, and it's our position that
12 the Division of Water Resources hasn't
13 conducted any independent technical
14 evaluation of either the City's proposal or
15 the City's model, that there's been no
16 detailed independent analysis or -- or
17 examination of this modeling or the
18 proposal, that basically the City talked
19 through their proposal with the Division of
20 Water Resources and the Division of Water
21 Resources more or less said that sounds
22 good.
23 And so our position is that deadlines
24 are set for a reason, and if you fail to
25 abide by a deadline, it should have some

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1 meaning if they're set. And so as a
2 result, it's our position that the Division
3 of Water Resources can't offer testimony or
4 opinions or recommendations as to the
5 validity of the City's proposal at this
6 juncture or that would render those
7 deadlines meaningless. And, indeed, we
8 also argue that because they didn't conduct
9 an independent analysis of the City's
10 proposal or model that under the Daubert
11 test of excluding expert witnesses they
12 also don't have the ability to testify in
13 that regard.
14 So it's fine if the Division of Water
15 Resources wants to comment on the
16 background of this case or give some
17 observations on -- on some of the facts,
18 but they can't make recommendations or
19 cross into the territory of rendering
20 opinions at this hearing. That's our
21 position on that issue.
22 **PRESIDING OFFICER:** Thank you. And
23 the Division, your reply?
24 **MR. OLEEN:** Madam Presiding Officer,
25 I have to point out the fact that it's

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1 glaring to me when -- when the District is
2 defending a motion in limine from the City,
3 they say, Madam Officer, we don't need to
4 follow technical rules under civil
5 procedure, you have broader discretion
6 under KAPA and under the reg 5-14-3a here
7 today, but then when they're trying to
8 argue for their motion in limine against
9 DWR, now they're citing 60-226, they're
10 citing 60-426, they're all about
11 hyper-technical rules of civil procedure.
12 To me that's talking out of both sides of
13 their mouth a little bit.
14 But ultimately, look, you do, as
15 presiding officer, have the discretion to
16 be more liberal with what are otherwise
17 technical rules of evidence and
18 admissibility under civil procedure. In
19 fact, the regulation that we're also
20 following in addition to KAPA, 5-14-3a, it
21 provides that DWR is a formal party to
22 these proceedings, as DWR should be because
23 that's why the citizens of the State pay
24 DWR officials. Part of their job is to
25 consider requests from applicants and make

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1 decisions or give opinions about that, and
2 the absurdity that would result if there's
3 an issue about water rights that DWR is
4 prevented from commenting on makes no sense
5 to me.
6 And I know that Mr. Stucky said that in
7 an e-mail I said that DWR would not be
8 rendering any expert opinions, I went back
9 and tried to find this supposed e-mail. I
10 did find an e-mail where I said that DWR
11 does not intend to submit any expert
12 reports, and we did not submit a technical
13 expert report by the deadline. I didn't
14 deem that to be applicable to DWR by virtue
15 of the fact that we're DWR officials and
16 this is part of our job.
17 To the extent that I was wrong, I don't
18 believe there is -- there is any credible
19 harm to the District because they have
20 learned through discovery what DWR's
21 position is, and by the deadline all
22 parties in this case had filed prehearing
23 briefs, back before this matter was
24 delegated to you. And so DWR filed what I
25 believe was entitled DWR's Prehearing Brief

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1 and Written Testimony, and a DWR official
 2 signed that document. And so to the extent
 3 that the District -- I don't think --
 4 bottom line, they can't claim that they
 5 don't know what DWR's official opinions are
 6 going to be.
 7 And I think we again have to remember
 8 what the District doesn't like to hear
 9 versus what they hear. Just because they
 10 don't like an opinion or an action that DWR
 11 took doesn't mean that that can't be DWR's
 12 opinion. They're trying to exclude
 13 opinions that they disagree with or
 14 opinions that in their belief are not
 15 sufficiently based on adequate independent
 16 investigation they said. But that's not
 17 for them to decide. I believe that's for
 18 you to decide.
 19 Actually, it's -- more importantly, it's
 20 for the ultimate arbiter, the chief
 21 engineer to decide, he knows what his
 22 staff -- he knows their qualifications, he
 23 knows if some DWR official is going to get
 24 on the stand at the public hearing and make
 25 comments about this or that, he's going to

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1 know because he oversees these people, he's
 2 going to know if they're stepping out of
 3 their bounds of knowledge.
 4 In summary, I just think it would be an
 5 absurd result to not let DWR have any input
 6 in this matter, especially when the
 7 regulation 5-14-3a says DWR is a formal
 8 party, when you have discretion to be
 9 lenient on the technical rules of evidence,
 10 and when they have received DWR's official
 11 opinions through discovery and our
 12 prehearing brief and DWR written testimony.
 13 **PRESIDING OFFICER:** Okay. Question.
 14 There seem to be a distinction between fact
 15 testimony and recommendations, and correct
 16 me if I'm wrong, but it seemed to be that
 17 the District was fine with DWR employees
 18 testifying perhaps what happened, who had
 19 it, what they did, you know, that's the
 20 kind of thing I'm -- is that right,
 21 Mr. Stucky?
 22 **MR. STUCKY:** That is correct.
 23 **PRESIDING OFFICER:** That their
 24 concern is recommendations on the outcome
 25 of approving the proposal or not, so is

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1 what I hear you saying that DWR intends to
 2 submit recommendations on the ultimate
 3 decision of approval or not?
 4 **MR. OLEEN:** On some issues, yes. It
 5 may not be -- it may not be a green light
 6 or red light, but it may be -- and it will
 7 be an official recommendation as to certain
 8 sub-issues. And -- and that is evidenced
 9 in the prehearing brief that was filed.
 10 Part -- part of it is that DWR views this
 11 as a fact-finding process still --
 12 **PRESIDING OFFICER:** Uh-huh.
 13 **MR. OLEEN:** -- views this hearing
 14 that we want to hold as potentially
 15 receiving new information. The District
 16 wants to treat this as everybody's coming
 17 to the battle knowing the positions that
 18 they're going to take. And while we think
 19 we know a lot of the positions, DWR may
 20 hear something from some member of the
 21 public or even the District that causes DWR
 22 to have a different opinion about this or
 23 that issue or this or that recommendation.
 24 And so that's why in DWR's prehearing
 25 brief and written testimony we say, you

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1 know, these are our initial opinions based
 2 on what DWR has done so far, but we reserve
 3 the right and expect to provide follow-up
 4 comment, recommendations to the presiding
 5 officer if DWR learns of information
 6 through the course of this hearing that we
 7 didn't know about.
 8 **PRESIDING OFFICER:** Okay. Thank
 9 you.
 10 **MR. STUCKY:** Can I, while you're
 11 writing, just a very, very brief response?
 12 A lot of our concerns here that we've cited
 13 have to do with what's fair notice, what
 14 allows us a proper opportunity to prepare?
 15 And some of our original due process
 16 considerations had to do with the fact that
 17 the City, with lots of independent
 18 consultants and a very experienced
 19 engineering firm, worked on this proposal
 20 for four years, and then suddenly it falls
 21 in our lap and we're here at a hearing and
 22 we're trying to prepare.
 23 And the same is true with deadlines in
 24 this case. The whole idea of these
 25 deadlines and indeed the whole reason the

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1 new rules of civil procedure were passed,
2 and Tom can talk about this, was to avoid
3 surprise, to avoid these -- these surprises
4 occurring at an actual hearing or trial.
5 And so if the Division of Water
6 Resources has recommendations or has
7 positions they're going to make, we want to
8 know what those are so we can adequately
9 prepare for this hearing. And I'm looking
10 at the brief that was submitted by the
11 Division of Water Resources, and it's
12 really not abundantly clear to me what
13 actual recommendations they're going to
14 make with respect to that proposal in
15 scanning over that brief again. So that's
16 our position.
17 **PRESIDING OFFICER:** Does the City
18 have a response to this motion?
19 **MR. MCLEOD:** We do. I harken back
20 to the -- to the discussion on the prior
21 motion about courting some deference to the
22 opinions of technically expert staff, and
23 although the Kansas courts have actually
24 some years ago rejected that doctrine for
25 judicial review, what's known as operative

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1 construction, in this instance it makes
2 total sense that the DWR staff be able to
3 make technical recommendations after the
4 hearing record has been put before them and
5 they're able to look at that whole body of
6 information and assess it using their
7 technical training and expertise.
8 That, to me, is fundamentally different
9 than the issue of whether they testify and
10 provide expert opinions in the hearing
11 itself. It's simply DWR staff doing their
12 job. And for a litigant to file a motion
13 saying prevent these folks from giving
14 recommendations when they have seen the
15 material in the hearing record strikes me
16 as not entirely rational. It is their job,
17 it's what they are tasked to do, and they
18 should be able to do it.
19 And there is a period set in the former
20 scheduling orders, at least, following the
21 hearing, public hearing procedure where the
22 record would still be open for written
23 submissions from essentially anyone and
24 everyone. So if there is something in the
25 staff recommendations that the District

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1 feels it needs to respond to, I believe
2 they would be able to respond to it during
3 that written comment period.
4 **PRESIDING OFFICER:** Do the
5 Intervenors have a response?
6 **MS. WENDLING:** No, we do not.
7 **PRESIDING OFFICER:** Okay. And now
8 we move to the District's motion in limine
9 to exclude expert testimony of the City.
10 **MR. STUCKY:** And just to clarify
11 something I said, there are five conditions
12 the Division of Water Resources asks to
13 impose on the City's request if it's
14 approved, and I guess we're fine with the
15 Division of Water Resources recommending
16 those five conditions. If that's the whole
17 basis of their recommendations, those seem
18 appropriate.
19 But finally moving to our final issue at
20 hand today, which is the District's motion
21 in limine, I'm going to, I think, defer my
22 time here to the Intervenors on this, the
23 Intervenors also briefed this issue.
24 But just in 30 seconds or less, our
25 position is that under the Daubert standard

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1 of expert testimony, the experts of the
2 City don't explain their rationale or
3 conclusions, they just give us some bullet
4 points, and so it's really hard for us to
5 determine exactly how they arrived at their
6 conclusions. And for that reason, we find
7 that it's not helpful or reliable.
8 So our position is that, you know, in
9 distinguishing the motions, the motion in
10 limine of the City just seeks to exclude
11 the testimony of our experts in general
12 because -- and try and bar us from
13 testifying because we gave too detailed of
14 an analysis, too detailed of an opinion.
15 They're trying to basically stop us because
16 our experts wanted to give too detailed of
17 an analysis as to the ins and outs of the
18 City's proposal.
19 Our position with respect to the City
20 and the Division of Water Resources is that
21 we should have been given more information
22 to help us prepare for this hearing, and
23 that's the distinction in a nutshell
24 between the two sets of motions here.
25 **PRESIDING OFFICER:** The City like to

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1 respond?
 2 **MR. MCLEOD:** Surely. First, the
 3 notion that the City objected to the legal
 4 opinion giving -- of the District's experts
 5 as being too detailed, that was not it at
 6 all. They're testifying to law, and that's
 7 the basis of the City's objection there.
 8 As far as the City expert reports, there
 9 was no particular detail set forth in the
 10 prehearing order for expert reports or what
 11 to do with them. The City had, of course,
 12 submitted its proposal, which is
 13 extraordinarily lengthy and detailed. The
 14 format of the City's expert disclosures
 15 basically was to show which of the
 16 witnesses would testify to which of the
 17 elements of the proposal and some of the
 18 City's written discovery responses as well
 19 and was designed to make those disclosures
 20 so that the District could make an informed
 21 decision whether or not to depose
 22 particular witnesses.
 23 So those documents are not really
 24 designed to be exhibits, to be in and of
 25 themselves helpful to the hearing process

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1 but to give the District a notion of the
 2 substance to which those witnesses would
 3 testify so that they could make a decision
 4 whether or not to take depositions of any
 5 of them.
 6 **PRESIDING OFFICER:** Do the
 7 Intervenors have a response to this?
 8 **MS. WENDLING:** Yes. Intervenors
 9 find that the City experts, based on
 10 information in the expert reports, do not
 11 meet the standards of being helpful and
 12 reliable. The information provided fails
 13 to explain how such opinions were reached
 14 and merely direct you back to the proposal,
 15 similar to many of the comments made by the
 16 City throughout this process. This falls
 17 short of achieving the Daubert standard as
 18 discussed by the District because it does
 19 not explain the rationale of reaching
 20 conclusions. They are merely conclusions
 21 or actually bullet points from the
 22 proposal.
 23 Examples such as if the propose -- the
 24 model identifies a shortfall of 43,850
 25 acre-feet, what is their rationale or

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1 conclusion that they need 120,000
 2 acre-feet? Similarly, when the model
 3 documents say a grid with smaller cells is
 4 necessary to reach the detailed analysis of
 5 impairment, the City concludes no
 6 impairment will happen. So there are
 7 significant gaps that -- and that lack of
 8 detail, relying exclusively on the
 9 proposal, does not yield helpful or
 10 reliable expert witness. As the City has
 11 said in their responses, they haven't
 12 contemplated the withdrawal of the AMC
 13 credits; therefore, how can they testify as
 14 an expert to the impact of such credits?
 15 We find essentially that the City expert
 16 reports are mere bullet points repeating
 17 the proposal without grounds or any
 18 explanation for those opinions and
 19 therefore are unhelpful, and we ask that
 20 they be excluded.
 21 **PRESIDING OFFICER:** Thank you. Does
 22 the Division have a response to this
 23 motion?
 24 **MR. OLEEN:** No, Madam Officer.
 25 **PRESIDING OFFICER:** Okay.

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1 **MR. OLEEN:** I should say other than
 2 just again, DWR is in favor of more
 3 information as a result of this hearing
 4 process because, again, DWR views this as
 5 still part of an ongoing fact-finding
 6 process.
 7 **PRESIDING OFFICER:** I have a couple
 8 of questions, and these can be answered by
 9 any of you that know. To my knowledge, the
 10 only deposition that has been taken in this
 11 case was Lane Letourneau; is that correct?
 12 **MR. MCLEOD:** Yes.
 13 **MR. STUCKY:** Yes.
 14 **PRESIDING OFFICER:** Okay, thank you.
 15 And the experts that are indicated in these
 16 various filings, disclosures, reports, will
 17 they be personally testifying at the
 18 hearing barring some unforeseen casualty?
 19 **MR. MCLEOD:** Yes.
 20 **PRESIDING OFFICER:** You anticipate
 21 the City's experts being present?
 22 **MR. MCLEOD:** Some of them may not be
 23 present, but if they aren't, their -- their
 24 expert report is not going to be offered in
 25 lieu of what they would testify to if

1 present.

2 **PRESIDING OFFICER:** And DWR, same?

3 **MR. OLEEN:** Yes. At this time, Lane
4 Letourneau, whose deposition was taken and
5 who also signed DWR's prehearing brief and
6 written testimony, it's anticipated he will
7 testify.

8 **PRESIDING OFFICER:** And the
9 District?

10 **MR. STUCKY:** Yes, all the experts
11 that we've identified will speak at the
12 hearing.

13 **PRESIDING OFFICER:** And Intervenors?

14 **MS. WENDLING:** We are not certain
15 whether Mr. Nuzman will be available on the
16 dates and have not concluded whether or not
17 to have him testify.

18 **PRESIDING OFFICER:** And then the
19 final motion was to Intervenors' motion in
20 support, and it seems to me that you've
21 presented --

22 **MS. WENDLING:** I believe everything
23 has been presented and I have nothing
24 further.

25 **PRESIDING OFFICER:** Thank you. So

1 now going to still be with the chief

2 engineer if he's not going to be advising
3 you? I think that's what you intend but it
4 can get confusing.

5 **PRESIDING OFFICER:** Well, I'm not
6 sure that's what I was trying to say. I
7 really wasn't speaking to that. And I'll
8 reiterate that on the record because

9 earlier I mentioned it off the record that
10 when I was designated hearing officer,
11 presiding officer for this case, my
12 delegation of authority included the

13 ability to access communications with
14 Mr. Beightel for technical assistance, this
15 is a highly technical case.

16 And I have since concluded that I would
17 feel more comfortable and secure my
18 impartiality more -- more strongly if I do
19 not rely on Mr. Beightel's advice.

20 However, I do not see a problem
21 communicating with him or with the chief

22 engineer's office if I need to access, you
23 know, plans, logistics, those type of
24 things, which the rest of you were probably
25 privy to anyway.

1 it would appear to me that we've addressed
2 all eight of the motions, is there anything
3 anyone would like to add, have I missed
4 something, is there anything we need to
5 further address before we conclude this
6 hearing? Mr. Oleen.

7 **MR. OLEEN:** I should have brought
8 this up, I think, back when we were talking
9 about Chris Beightel and his role.

10 **PRESIDING OFFICER:** Uh-huh.

11 **MR. OLEEN:** I guess I would just
12 like some clarification whenever it's
13 ultimately obtained, whether from you or
14 the chief engineer, if Mr. Beightel, if
15 he's not going to be advising the presiding
16 officer as a technical adviser, if he's now
17 going to be advising the chief engineer
18 when the chief engineer considers your
19 recommendation?

20 So, you know, DWR has been respecting a
21 wall from the moment that the chief
22 engineer became the presiding officer, and
23 we have been treating Mr. Beightel as in
24 the chief engineer's camp, and I just -- I
25 think I want some clarification that he's

1 So my concern only addressed the fact
2 that I do not want to have communications
3 with someone who appears to be a potential
4 witness, has been involved in some of the
5 communications between the parties, and I'm
6 just trying to keep it very clean from my

7 side. So his involvement from DWR's view
8 is within DWR's decision to make. If there
9 is a wall between the chief engineer and

10 his staff, if there's a wall between
11 various attorneys into what they can
12 discuss, as there should be, that is up for
13 DWR to decide how that should go.

14 **MR. OLEEN:** Okay. DWR did not
15 identify Mr. Beightel as a witness on our
16 witness and exhibit list. I'm not saying
17 that assuages your concerns in not
18 consulting with him but --

19 **PRESIDING OFFICER:** And I don't know
20 where I saw that, and I -- maybe I was --
21 you know, maybe that's something that I
22 sort of put together in my head that wasn't
23 actually there, but -- but be that as it
24 may, I would just simply feel more
25 comfortable remaining completely removed

1 from anyone at DWR regarding the merits of
 2 the outcome of this particular case. And
 3 that that's what I was addressing because
 4 it's in the record that I had access to
 5 him, and I just wanted everyone involved to
 6 know that I don't intend to seek his advice
 7 or counsel or technical input on my role.
 8 Does that help you?
 9 **MR. OLEEN:** I think so. Previously
 10 before you became involved, we were told
 11 that the chief engineer -- that
 12 Mr. Beightel was going to be in the chief
 13 engineer's camp. And --
 14 **PRESIDING OFFICER:** Uh-huh.
 15 **MR. OLEEN:** -- and DWR will continue
 16 to assume that's the case unless the chief
 17 engineer tells us otherwise, which I don't
 18 anticipate that he will. I just --
 19 **PRESIDING OFFICER:** I'm not
 20 suggesting that you change that.
 21 **MR. OLEEN:** Okay. I'll leave that
 22 alone.
 23 **PRESIDING OFFICER:** I'm leaving that
 24 up to you.
 25 **MR. OLEEN:** Okay.

1 C E R T I F I C A T E
 2 OF KANSAS)
 3 ICK COUNTY) ss:
 4 I, Nancy L. Rambo, a Certified Shorthand
 5 ter, within and for the State of Kansas, do
 6 y certify that the foregoing is a true and
 7 ct transcript of the proceedings had at the
 8 and place hereinbefore set forth.
 9 I further certify that I am not a relative
 10 ployee or attorney or counsel of any of the
 11 es, nor am I a relative or employee of such
 12 ney or counsel, nor am I financially
 13 ested in the action.
 14 WITNESS my hand and official seal at
 15 ta, Sedgwick County, Kansas, this 10th day of
 16 2019.

17
 18
 19 NANCY L. RAMBO, R.P.R., C.S.R.
 20 Registered Professional Reporter
 21 Certified Shorthand Reporter
 22
 23
 24
 25

1 **PRESIDING OFFICER:** But thank you
 2 for clarifying that.
 3 Anything else from anyone? Okay. As I
 4 mentioned before, I'll be communicating
 5 with you about rescheduling our oral -- our
 6 conference call.
 7 Right now, it is basically 1:00 o'clock
 8 and this hearing is concluded. Thank you
 9 all. Off the record.

10 * * * * *

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