

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 125,469

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS,
Appellant,

v.

EARL LEWIS, P.E., In His Official Capacity as
Chief Engineer Division of Water Resources, Kansas Department of Agriculture,
Appellee,

v.

THE CITY OF HAYS, KANSAS,
and
THE CITY OF RUSSELL, KANSAS,
Appellees.

ORDER

In this appeal under the Kansas Judicial Review Act, K.S.A. 77-601 et seq., Appellant, the Water Protection Association of Central Kansas (Water PACK), a nonprofit organization, challenges the Chief Engineer of the Division of Water Resources' Master Order. That order approved a change of water rights usage from irrigation to municipal for the Cities of Hays and Russell on the R9 Ranch in Edwards County under the Kansas Water Appropriation Act, K.S.A. 82a-701 et seq. Water PACK petitioned the District Court of Edwards County to review the Division's approval, claiming the change adversely affects it and/or its members. See K.A.R. 5-5-8(a) ("Each application for a change in the place of use or the use made of water which will materially injure or adversely affect water rights or permits to appropriate water with priorities senior to the date the application for change is filed shall not be approved by the chief engineer."). The Chief Engineer and the Cities denied Water PACK's factual basis

for claiming any adverse effect and raised as an affirmative defense Water PACK's general lack of standing to press its KJRA case.

In its decision on the merits, the district court did not resolve Water PACK's standing to press the broader questions it advanced. Instead, the court focused more narrowly only on Water PACK's standing, and case or controversy concerns, relating to specific TYRA limitations in the Master Order, which the Cities consented to, that Water Pack claims are invalid. On that issue, the district court found Water PACK "has established its standing or that of its members for a causal connection to potential injury under the TYRA limitation or the mechanics of a public hearing contemplated for modification of the TYRA limitation." The Cities did not cross-appeal that ruling.

After Water PACK lost in the district court on the merits, it docketed this appeal with the Court of Appeals. We transferred the case to this court on the Cities' motion under K.S.A. 20-3017 and Supreme Court Rule 8.02 (2023 Kan. S. Ct. R. at 54). Now in their brief to this court, the Cities revisit their broader attack against Water PACK's standing to oppose the Master Order under the KJRA. They contend Water PACK fails to show any of its members suffered a cognizable injury or that they "'have been threatened with an impending, probable injury . . . or threatened injury.'" See *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013) (recognizing that to satisfy the first prong of the three-prong test for establishing associational standing, "the association must show that it or one of its members has suffered actual or threatened injury—*i.e.*, the association or one of its members must have suffered cognizable injury or have been threatened with an impending, probable injury and the injury or threatened injury must be caused by the complained-of act or omission."). If the Cities are right, we lack subject matter jurisdiction over this appeal.

This court usually resolves challenges to an appellant's standing as a question of law based on a well-developed record on appeal. See, e.g., *Baker v. Hayden*, 313 Kan. 667, 673, 490 P.3d 1164 (2021) (recognizing "an appellate court can generally determine

the issue, especially when the issue arises during an appeal related to a motion to dismiss, because it presents a question of law. See *Gannon*, 298 Kan. at 1122-23 [discussing burden at various stages of proceeding]; *Sierra Club v. Moser*, 298 Kan. 22, 29, 310 P.3d 360 [2013] [stating that standing presents question of law]). And here, Water PACK bears the burden of proving its standing in the face of the Cities' argument. See *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014) (once standing is questioned, party asserting claim bears burden of establishing standing requirements).

But we do not have a well-developed record relating to Water PACK's basis for bringing its KJRA claims. Water PACK apparently recognizes this and now moves to supplement the record on appeal with "sworn direct testimony" of an expert witness before it files a reply brief. The Chief Engineer and the Cities oppose this motion to supplement the record on various grounds. They also argue the proposed supplemental record would not resolve the standing question even if the court grants the motion to supplement.

This court believes it cannot resolve the motion or the broader question of Water PACK's standing on the record as it presently exists. For example, the Cities should be allowed the opportunity to contest or rebut the testimony in the proposed supplement, and a fact-finder must determine its weight and credibility. These evidence-testing and fact-finding functions lie uniquely within the province of the district court. *State v. Hooks*, 312 Kan. 604, 607, 478 P.3d 773 (2021).

Accordingly, the court orders as follows:

- The court stays briefing until further order of the court.
- The court will not set this case on its September docket.
- The court remands this case to the district court for further proceedings on Water PACK's motion to supplement the record and the Cities' broader challenge to

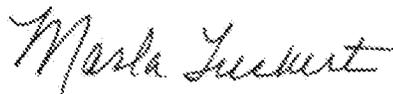
Water PACK's standing. On remand, in addition to considering Water PACK's proposed supplementation of the record, the district court must make specific findings of fact and conclusions of law resolving Water PACK's ¶¶ 4, 5, and ¶ 7 of its Petition for Judicial Review filed in the district court, as well as the affirmative defense of lack of standing raised by the Chief Engineer and the Cities in their respective responses to that petition. See *Sierra Club*, 298 Kan. 22 (statutory and traditional standing; association's standing).

The court retains jurisdiction over this appeal while it is on remand and issues the following additional directions.

- Water PACK must file with this court a report on the status of the remand proceedings in district court no later than 30 days from the date of this order, and every 30 days thereafter until the district court issues its final judgment on remand.
- Water PACK's final status report must be filed no later than 14 days after the district court's entry of its final judgment on remand and must include that final judgment as an attachment.
- Any party who files a notice of appeal from the district court's remand decision must cause a copy of that notice to be filed in this court no later than 7 days after its filing in the district court.
- Any supplemental appeal must be docketed in the above-captioned case in compliance with Supreme Court Rule 2.04 (2023 Kan. S. Ct. R. at 15).

Dated this 20th day of June 2023.

FOR THE COURT



MARLA LUCKERT
Chief Justice