

2. The Intervenors filed an entry of appearance on October 15, 2018.
3. The District filed a motion to dismiss on March 11, 2019.
4. On March 11, 2019, the Intervenors filed a Motion in Support of the Equus Beds Groundwater Management District, No. 2's Motion to Dismiss and Motion for Summary Judgment to join in the District's Motion and incorporate the points raised by the District.
5. On May 28, 2019 a hearing was held on the motion to dismiss with testimony by all parties.
6. More than three years later, on June 21, 2022, the Chief Engineer issued the Order Regarding the City of Wichita's Proposed Modification of the Aquifer Storage and Recovery Project Phase II Water Appropriation Permits (the "Order") concluding "...the proposed modifications should have been submitted as new applications pursuant to K.S.A. 82a-711." (June 21, 2022 Order p. 16.).
7. On July 6, 2022, the District filed a Motion for Reconsideration/Clarification, For a Ruling on the Substantive Issues, and for Attorney/Expert Witness Fees.

DISCUSSION

1. ***Should the Order Regarding the City of Wichita's Proposed Modification of the Aquifer Storage and Recovery Project Phase II Water Appropriation Permits issued on June 21, 2022 be subject to Administrative Review?***
8. The Order declares "the portion of the City of Wichita's proposal that was reviewed by the presiding officer was not submitted pursuant to 82a-708b or 82a-711, and therefore is not subject to review by the Secretary of Agriculture pursuant to K.S.A. 82a-1901. (June 21, 2022 Order p. 2). It is unclear what "portion" of the proposal the Order is referring to.

9. The delegation to the presiding officer by the Chief Engineer makes no mention of a “portion” of the proposal. Instead, the Notice of Delegation delegated the matter to the presiding officer and the proceedings. (Notice of Delegation March 19, 2019.) The Notice of Delegation also provided “it is the purpose of these hearings to determine if and under what circumstances such modifications to the existing ASR project should be made.” (Notice of Delegation March 19, 2019 and Recommendation p. 11).
10. K.S.A. 82a-1901 provides different time periods for orders of the chief engineer in sections (a) – (c). Section (d) of the statute clearly states “Any final order of the department of agriculture issued pursuant to this section shall not be subject to reconsideration”. K.S.A. 82a-1901(d). The Order in question was issued by the Chief Engineer of the Division of Water Resources, not by the Kansas Department of Agriculture, and does not appear to be issued pursuant to K.S.A. 82a-1901 if the proposal was not pursuant any of the statutes specifically referenced in K.S.A.82a-1901. Therefore, K.S.A. 82a-1901 does not explicitly bar the parties from seeking administrative review.
11. The Division of Water Resources (the “Division”) consistently and repeatedly said the decision would be subject to review by the Secretary of Agriculture. In a May 9, 2018 letter to the City and GMD2, Chief Engineer Barfield made the following statements:
12. “Regarding this entire process, it is important to note that there is no application to approve new infrastructure nor any applications which create new authority to divert water. Since neither of these elements exist, the requirement to hold a public hearing has not been triggered.”

13. “Therefore, I believe that it is in the best interest of the public and for transparency that a formal hearing be held.”
14. “This means that any decision I make will be based on the evidence contained in the hearing record, which will include the GMD’s testimony and recommendations provided at the hearing.”
15. The outlined process clearly states “potential review of record and decision by the Secretary of Agriculture,” and “potential review of record and decision by district court” as the final steps in the process outlined by Chief Engineer Barfield. (DWR Letter on Process May 9, 2018.)
16. The KDA-DWR Summary distributed at the public meeting on June 28, 2018 and the public hearing December 11, 2018 states: “A decision will be made based on the record established at the hearing. It will be subject to administrative and judicial review.” (DWR Halstead Public Information Meeting Summary and DWR December 2018 Public Hearing Handout p. 2.)
17. The July 23, 2018 Pre-hearing Conference Order clearly states the hearing will be conducted pursuant to K.S.A. 82a-1901 and K.A.R 5-14-3a. The Pre-hearing Conference Order goes on to say “the proposed modifications must meet the requirements set forth in K.S.A. 82a-708b.” (Pre-Hearing Conference Order July 23, 2018 p. 2.)
18. After delegation to the presiding officer hearing orders continued to be issued pursuant to K.A.R. 5-14-3a. (Prehearing Status Conference Order October 2, 2019; Notice of Hearing dated October 8, 2019).
19. K.A.R 5-14-3a(s)(5) provides “The order shall state that it is subject to review by the secretary of agriculture pursuant to K.S.A. 82a-1901, and amendments thereto.”

20. In July 2019, the Order on Prehearing Motions stated: “This proceeding arises under the Kansas Water Appropriation Act (KWAA), K.S.A. 82a-701, *et seq.*; the administrative regulations administering the KWAA, K.A.R. 5-1-1, *et seq.*; the Groundwater Management District Act (GMDA), K.S.A. 82a-1020 through 82a-1042; and the regulations administering the GMDA relative to Equus Beds Groundwater Management District No. 2, K.A.R. 5-22-1, *et seq.* (Order on Prehearing Motions, p. 2. July 24, 2019.)
21. The Chief Engineer’s June 21, 2022 Order does not reference any statute or regulation precluding or limiting state agency review.
22. No notice was provided to the parties of a conversion to another type of state agency proceeding as allowed by K.S.A. 77-506 which provides the conversion may be effected only upon notice to all parties.
23. The Division allowed and argued in favor of a full hearing on the merits after the issue of City’s failure to comply with statutory prerequisites of the Kansas Water Appropriation Act was raised. The parties should be afforded the remedies available for a full hearing and not deprived of such remedies following years of reliance on prior and repeated representations.
24. The potential justification or benefit to removing a clearly articulated administrative procedure is unclear, especially in light of the time, effort and cost expended on this process and the additional cost, time and effort that would be required by the parties for judicial review or, as indicated in the June 21, 2022 Order, a repeat hearing after the City prepares the requisite application.

II. A full hearing was held at the insistence of the Division of Water Resources in opposition to the District’s timely filed motion to dismiss.

25. In May 2019 the District testified “point number one is that the proposal, if approved as proposed, would allow the City to withdraw its aquifer maintenance credits without filing any new or change applications as required by the Kansas Water Appropriation Act.... A change application should have been filed by the City in this particular case, and, again, that’s black letter law in K.S.A. 82a-708b...There’s specific forms the Division of Water Resources has and an application process that needs to be followed for those water rights to be changed.” (Oral Argument Transcript, May 28, 2019, pp. 35-36.)
26. The City testified in response “...it’s always been known that the City had not filed a change application, it’s always been known what the changes were that the City was seeking so this could have been raised as a threshold argument...The City’s view of it is that to the extent we know that things are routinely done without change applications, this mode of proceeding by DWR made sense to us...It is a procedural quagmire type of argument, and it does need to be addressed; and if the District is right concerning that argument, then the Hearing Officer and the Division have no jurisdiction over any of their collateral motions, discovery issues, et cetera. (Oral Argument Transcript, May 28, 2019, pp. 55-56.)
27. The Division offered the following testimony regarding the motion to dismiss “Everything that the District and Intervenors, all their legal arguments that they’ve raised, while they might be appropriate to a district court in a KJRA action, if and when agency action is taken, is not appropriate now in this administrative proceeding. All their legal arguments have essentially already been considered by the chief engineer, and the chief engineer took a different interpretation of the law.” (*Id.* p. 62.)

28. The Division went on to say the Chief Engineer did not give the hearing officer “authority to take a contrary legal interpretation” to those the Chief Engineer had already taken. “The Chief Engineer as the head of an agency, he can hold a hearing on issues that he wants to consider. And the District is trying to prevent the Chief Engineer from holding a hearing about an issue that he wants to consider...If and when agency action is actually taken, if it rises to the level of changing property rights, then they can file their action under the Kansas Judicial Review Act. But it’s not appropriate here.” (*Id.* p. 64-65.)
29. Further the Division testified “...the Chief Engineer gave his opinion about why he does not think that change applications are necessary in order to consider the proposal that Wichita is asking for; it’s because the Chief Engineer deems them...to be more akin to accounting procedures.”
30. Finally, the Division concluded “The Chief Engineer addressed – or stated his opinion that he’s decided not to seek independent legal review of the matter as they wanted because the Chief Engineer already considered these legal issues in conjunction with the chief counsel for DWR...It’s not appropriate to stop the public hearing that the Chief Engineer wants to have.” (*Id.* p. 65-66.)
31. The July 24, 2019 Order on Prehearing Motions stated “the Motion to Dismiss will not be resolved at this time; it will be taken under advisement until after the evidentiary hearing.”
32. The Intervenors felt powerless in the face of the Division’s testimony and the Division being both a party and the ultimate decision maker. Even with the appointment of a Hearing Officer, the Chief Engineer retained authority for the eventual order. The

precedent established in *Cochran v. Kansas Dept. of Agriculture* (291 Kan. 898 (Kan. 2011) 249 P.3d 434) where the Division fought to the Kansas Supreme Court in order to prevent impacted water right holders from addressing concerns of potential impairment left the Intervenors with the belief they had no other option other than to continue with the hearing requested by the Chief Engineer. *Cochran* similarly involved City of Wichita permits to appropriate water issued by the Chief Engineer. The Cochrans, as owners of prior water appropriation rights were concerned about the impact the new rights appropriated to the City of Wichita would have on their prior appropriation rights. After the Division made the new appropriation to the City of Wichita, the Cochrans requested a hearing regarding the permits. (*Id.* at 900.) This request was denied by the Chief Engineer and Secretary of Agriculture. (*Id.* at 901.) The District Court in Sedgwick county found the Cochran's had standing to seek review of the Chief Engineer's order. Both the City and DWR argued against the Cochran's having standing to seek judicial review. (*Id.* at 905.) On appeal, the Kansas Supreme Court upheld the district court ruling finding the Cochran's had standing to seek judicial review. To the Intervenors, Cochran demonstrated the Division's appetite to fight those who might oppose additional appropriations involving the City of Wichita. If the Division was willing to go to the Kansas Supreme Court to avoid impacted water right holders availing themselves upon judicial review, participating in the full hearing was the only option for the Intervenors to protect the groundwater they depend on. This belief was affirmed by the Division testifying that "the bulk of the testimony elicited by both the District and Intervenors has really keyed on things that are not truly relevant and have simply obscured and unnecessarily complicated those key facts." (Hearing Transcript Vol. XV p. 3582.)

33. Again, on February 11, 2020 after the City had finished presenting their case in chief the District renewed the Motion to Dismiss. (Hearing Transcript Vol. V. p. 1228.) The City and Division again both opposed the motion. The Division testified against the District's Motion to Dismiss stating "I disagree with counsel for GMD's assertion that the City needed to prove some of those things that counsel claims need to be proven. But even if he is true, there's witnesses of the DWR that haven't gone yet that may address some of those items. Even if those items are not addressed, I think under the spirit of this type of administrative proceeding, again, as stated in my opposition to GMD2's previous motion for summary judgment and motion to dismiss, that it's not appropriate to end these proceedings in that procedural way. (*Id.* pp. 1228-1229.) The District's Motion to Dismiss remained pending and the parties moved forward with and additional ten days of testimony: February 12, 2020, March 2 – 6, 2020, February 3-5, 2021 and February 19, 2021.

III. Groundwater Management District 2 acted consistently with its purpose to properly manage the groundwater resources.

34. K.S.A. 82a-1020 is the Legislative declaration for Groundwater Management Districts and states: "It is hereby recognized that a need exists for the creation of special districts for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; for the prevention of economic deterioration; for associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets. It is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with respect to the

use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas. It is, therefore, declared that in the public interest it is necessary and advisable to permit the establishment of groundwater management districts.”

35. The Groundwater Management District Act does not instruct GMDs to manage groundwater resources only for their economic benefit. Proper management of groundwater absolutely requires the District to voice opposition to proposed changes believed to harm the groundwater resource. Any implication that the District acted improperly in advocating for the proper management of the aquifer in a manner consistent with the basic laws and policies of the state is unwarranted.
36. The District’s advocacy to properly manage the Equus Beds was necessary and appropriate. The District, well in advance of the hearing, advocated that the enumerated standards for approval in K.S.A. 82a-711 be given proper consideration. K.S.A. 82a-711 places maximum economic development from the use of water only after considering potential impairment and public interest. The Presiding Officer concluded in her recommendation that “the Proposal does not contain adequate analysis, or in most instances, any analysis, to demonstrate the requisite criteria listed under K.S.A. 82a-711, to prove the Proposal will not harm the public interest and will not impair an existing right to the use of water.” (January 14, 2022 Recommendation p. 174.). It is frightening to consider what might have happened had the District not incurred the burden and expense of advocating for proper management.

IV. Conclusion

37. It is an odd position to seek Administrative Review of an outcome the Intervenors requested and advocated for in 2019. The significant effort, expense and emotional strain

endured by the parties over the three years between oral argument on the motion to dismiss and the Chief Engineer dismissing the matter on the initial argument made in support of the motion to dismiss is not what anyone should accept. It is an indication of errors, flawed process, inadequate regulations or potentially worse. We recognize there may be no adequate remedy for what has happened; however, the Intervenors seek review by the Secretary of Agriculture in hopes further review of these unfortunate events and outcome will at a minimum help to prevent similar situations in the future and preferably result in an order consistent with the carefully reasoned recommendations issued by the Hearing Officer.

38. The Intervenors are troubled by the process that led to significant time, energy and cost without the proper procedures being followed and particular questions as to what authority the matter was pursuant to. Based on the confusing procedural nature of this proceeding it is difficult to understand what interest is served by eliminating the less expensive remedy of Administrative Review in favor of Judicial Review.
39. The proceeding sets a frightening precedent allowing a state agency to spend years on a proceeding and public hearing allegedly pursuant to one statute only to declare the matter not submitted pursuant to that statute without any notice to the parties of such change. If not submitted pursuant to the originally communicated statutes, the Order fails to clarify what statute, if any, authorized the proceeding. The Secretary of Agriculture should do whatever is possible and permissible to prevent such a use of resources in the future.
40. Finally, the Order contains multiple pages of additional facts and discussion unrelated to the conclusion that the City's proposal was not properly submitted. To avoid further confusion this surplus language should be stricken from the order.

WHEREFORE the Intervenors respectfully support the District's Motion for Reconsideration/Clarification, For a Ruling on the Substantive Issues, and for Attorney/Expert Witness Fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 12th day of July, 2022, I hereby certify that the original of the foregoing INTERVENORS RESPONSE IN SUPPORT OF EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT, NO. 2'S MOTION FOR RECONSIDERATION/ CLARIFICATION, FOR A RULING ON THE SUBSTANTITVE ISSUES, AND FOR ATTORNEY/EXPERT WITNESS FEES was sent by electronic mail to the following:

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