

**IN THE TWENTY-FOURTH JUDICIAL DISTRICT
DISTRICT COURT OF EDWARDS COUNTY, KANSAS**

WATER PROTECTION ASSN. OF
CENTRAL KANSAS,

Plaintiff,

V.

DAVID BARFIELD, P.E., IN HIS
OFFICIAL CAPACITY AS CHIEF
ENGINEER, DIVISION OF WATER
RESOURCES, KANSAS DEPARTMENT
OF AGRICULTURE,

Defendant.

Case No. 2019-CV-000005

Pursuant to K.S.A. Chapter 77

DEFENDANT CHIEF ENGINEER'S ANSWER

COMES NOW, David W. Barfield, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture (the "Chief Engineer"), by and through counsel, Aaron B. Oleen, and pursuant to K.S.A. 77-614(d), submits Defendant Chief Engineer's Answer (the "Answer") to the Petition for Judicial Review (the "Petition") filed in this matter by plaintiff Water Protection Assn. of Central Kansas ("Plaintiff").

The numbered responses below correspond to the numbered paragraphs of the Petition. The Chief Engineer denies each and every allegation in the Petition that is not specifically admitted herein.

ANSWER

Responses to Petition's Section Titled "Jurisdiction and Venue"

1. The Chief Engineer admits the allegations in Paragraph 1.
2. The Chief Engineer admits the allegations in Paragraph 2.
3. The Chief Engineer is without sufficient information either to admit or deny the allegations in Paragraph 3, and thus the Chief Engineer denies the same.
4. The Chief Engineer is without sufficient information either to admit or deny the allegations in Paragraph 4, and thus the Chief Engineer denies the same.
5. The Chief Engineer admits that Plaintiff requested that the Secretary of Agriculture administratively review the Master Order. The Chief Engineer is without sufficient information either to admit or deny the composition of Plaintiff or the purposes for which Plaintiff was organized, and therefore denies such related allegations. The Chief Engineer denies the remaining allegations in Paragraph 5.
6. The Chief Engineer admits that the Master Order involves change applications submitted by the City of Hays and the City of Russell seeking to change, among other things, the place of use and the type of use of water currently authorized for irrigation use at the R9 Ranch in Edwards County, Kansas. The Chief Engineer denies the remaining allegations in Paragraph 6.
7. The Chief Engineer is without sufficient information either to admit or deny the allegations in Paragraph 7 of the Petition, and thus the Chief Engineer denies the same.
8. The allegations in Paragraph 8 amount to legal assertions to which a response is not required, and thus the Chief Engineer denies the same.

9. The Chief Engineer admits that Dr. Andy Keller and some of Plaintiff's alleged members participated in the proceedings that led to the Master Order and that the participation of such persons is specifically referenced in the Master Order. The Chief Engineer is without sufficient information either to admit or deny the remaining allegations in Paragraph 9, and thus the Chief Engineer denies the same.

10. The Chief Engineer admits that the Cities, officials with DWR's Stafford and Stockton Field Offices, GMD5, GMD5's consultant BGW, some members of the general public in Edwards County, Kansas, and some of Plaintiff's alleged members were involved in the Master Order proceedings. The Chief Engineer is without sufficient information either to admit or deny the remaining allegations in Paragraph 10, and thus the Chief Engineer denies the same.

11. The Chief Engineer admits the allegations in Paragraph 11.

Responses to Petition's Section Titled "Summary of Applicable Kansas Water Law"

12. The pleading language quoted in Paragraph 12 amounts to legal assertions, to which a response is not required. Furthermore, the document from which the language is quoted, assuming that the quotation and context is accurate, speaks for itself. Accordingly, the Chief Engineer denies the allegations in this Paragraph.

13. The allegations in Paragraph 13 amount to legal assertions to which a response is not required, and thus the Chief Engineer denies the same.

14. The allegations in Paragraph 14 amount to legal assertions to which a response is not required. Furthermore, the quoted legal authority, assuming that the quotation and context is accurate, speaks for itself. Accordingly, the Chief Engineer denies the allegations in this Paragraph.

15. The allegations in Paragraph 15 amount to legal assertions to which a response is not required. Furthermore, The Kansas Court of Appeals opinion language quoted in Paragraph 15, assuming that the quotation and context is accurate, speaks for itself. Accordingly, the Chief Engineer denies the allegations in this Paragraph.

16. The allegations in Paragraph 16 amount to legal assertions to which a response is not required. Furthermore, the quoted legal authority, assuming that the quotation and context is accurate, speaks for itself. Accordingly, the Chief Engineer denies the allegations in this Paragraph.

17. The allegations in Paragraph 17 amount to legal assertions to which a response is not required. Furthermore, the quoted legal authority, assuming that the quotation and context is accurate, speaks for itself. Accordingly, the Chief Engineer denies the allegations in this Paragraph.

18. The allegations in Paragraph 18 amount to legal assertions to which a response is not required. Furthermore, the quoted legal authority, assuming that the quotation and context is accurate, speaks for itself. Accordingly, the Chief Engineer denies the allegations in this Paragraph.

19. The allegations in Paragraph 19 amount to legal assertions to which a response is not required, and thus the Chief Engineer denies the same.

The Chief Engineer specifically denies that Plaintiff accurately cites or interprets all applicable laws and denies that the Kansas Water Appropriation Act (the “KWAA”) prohibits or does not provide for contingent or conditioned approvals of original applications or change applications. The Chief Engineer points out that K.S.A. § 82a-708b (called the “Change Order

Statute” in the Petition) of the KWAA provides that the Chief Engineer “shall approve or reject the application for change in accordance with the provisions and procedures prescribed for processing original applications for permission to appropriate water.” Among other authorities, such “provisions and procedures” include K.S.A. § 82a-711, which authorizes the Chief Engineer to approve an application “within reasonable limitations”, and K.S.A. § 82a-712, which authorizes the Chief Engineer to “approve an application upon such terms, conditions, and limitations as he or she shall deem necessary for the protection of the public interest.”

Responses to Petition’s Section Titled “Defects in the Master Order and Its Proceedings”

20. The allegations in Paragraph 20 amount to legal assertions to which a response is not required. Furthermore, the terms of the Master Order and the quoted legal authority (assuming that the quotation and context is accurate) speak for themselves. Nevertheless, the Chief Engineer admits that the approvals in the Master Order are contingent and conditioned upon certain factors stated therein, including the issuance of a subsequent transfer order under the Water Transfer Act. The Chief Engineer denies the remaining allegations in Paragraph 20.

The Chief Engineer specifically denies that Plaintiff accurately cites or interprets all applicable laws and denies that the Kansas Water Appropriation Act (the “KWAA”) prohibits or does not provide for contingent or conditioned approvals of original applications or change applications. The Chief Engineer points out that K.S.A. § 82a-708b (called the “Change Order Statute” in the Petition) of the KWAA provides that the Chief Engineer “shall approve or reject the application for change in accordance with the provisions and procedures prescribed for processing original applications for permission to appropriate water.” Among other authorities, such “provisions and procedures” include K.S.A. § 82a-711, which authorizes the Chief Engineer

to approve an application “within reasonable limitations”, and K.S.A. § 82a-712, which authorizes the Chief Engineer to “approve an application upon such terms, conditions, and limitations as he or she shall deem necessary for the protection of the public interest.”

21. The allegations in Paragraph 21 amount to legal assertions to which a response is not required. Nevertheless, the Chief Engineer admits that the KWAA authorizes the Chief Engineer to promulgate rules, regulations, and standards to effectuate the purposes of K.S.A. § 82a-708b (called the “Change Order Statute” in the Petition), but the Chief Engineer denies that the Kansas Administrative Procedure Act, found at K.S.A. §§ 77-501 through 77-566, purports to authorize such action, or that the Chief Engineer has purported to take or should take such action thereunder. The Chief Engineer denies the remaining allegations of Paragraph 21.

22. The terms of the Master Order speak for themselves. Nevertheless, the Chief Engineer admits that the Master Order specifically references K.A.R. § 5-5-8 (called the “No Injury Regulation” in the Petition) only once in paragraph 13, but the Chief Engineer denies the remaining allegations in Paragraph 22.

23. The terms of the Master Order speak for themselves. Nevertheless, the Chief Engineer admits that he found in the Master Order that the requested changes by the City of Hays and the City of Russell “will not impair existing rights”, but the Chief Engineer denies the remaining allegations in Paragraph 23. The Chief Engineer specifically denies that sufficient “contrary evidence” regarding impairment was presented in the Master Order proceedings.

24. The reports referenced in Paragraph 24 speak for themselves. Accordingly, the Chief Engineer denies the allegations in this Paragraph. The Chief Engineer specifically denies that either report shows that “pumping 4,800 acre-feet per year from the R9 Ranch will weaken,

make worse, lessen in power, diminish, relax, or otherwise affect in an injurious manner wells adjacent to the R9 Ranch.”

25. The Chief Engineer denies the allegations in Paragraph 25.

26. The Chief Engineer denies the allegations in Paragraph 26.

27. The Chief Engineer denies the allegations in Paragraph 27.

28. The terms of the Master Order speak for themselves. The Chief Engineer otherwise denies the allegations in Paragraph 28.

29. The terms of the Master Order speak for themselves. Nevertheless, the Chief Engineer admits that the Master Order contains the quoted language, but the Chief Engineer denies the characterization of such quotation.

30. The Chief Engineer denies the allegations in Paragraph 30.

Responses to Petition’s Section Titled “Prior Agency Proceedings”

31. The Chief Engineer admits the allegations in Paragraph 31.

32. The terms of the Master Order speak for themselves. Nevertheless, the Chief Engineer admits the allegations in Paragraph 32.

33. The Chief Engineer admits the allegations in Paragraph 33.

34. The referenced documents speak for themselves. Nevertheless, the Chief Engineer admits the allegations in Paragraph 34.

AFFIRMATIVE DEFENSES

35. The Petition fails to state a claim on which relief can be granted.

36. Plaintiff lacks standing.

37. With respect to the proceedings and issuance of the Master Order and its incorporated Change Approvals, the Chief Engineer:

- a. acted within the jurisdiction conferred by applicable law;
- b. correctly interpreted and applied applicable law;
- c. engaged in lawful procedure and followed prescribed procedure;
- d. took action based on determinations of fact, made or implied by the Chief Engineer, that are supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole;
- e. adequately and properly considered all submitted evidence, whether in favor or in opposition to the requested changes by the City of Hays and the City of Russell, which evidence in the record is sufficient to support the conclusions of the Chief Engineer in the Master Order and its incorporated Change Approvals; and
- f. did not engage in unreasonable, arbitrary, or capricious agency action.

38. The Chief Engineer reserves the right to raise any additional defenses and affirmative defenses which may become apparent during this action.

WHEREFORE, the Chief Engineer respectfully requests that the Court deny any and all relief requested or sought by Plaintiff; and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

KENNETH B. TITUS
CHIEF COUNSEL

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CERTIFICATE OF SERVICE

I certify that on the 28th day of June, 2019, the above *Defendant Chief Engineer's Answer* was electronically filed with the District Court Clerk using the Court's electronic filing system, which will send a notice of electronic filing to registered participants:

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