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CLERK OF THE EDWARDS COUNTY DISTRICT COURT
CASE NUMBER: 2019-CV-000005

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,

V.

THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS,

Intervenors.

Case No. 2019-CV-000005

Pursuant to K.S.A. Chapter 77

CHIEF ENGINEER'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY

Defendant David W. Barfield, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture (the "Chief Engineer"), opposes Plaintiff's Motion for Discovery. Although Kansas commentators and courts have suggested that limited discovery may be available in a Kansas Judicial Review Act ("KJRA") action, Plaintiff has failed to establish appropriate factual justification for its discovery request and Plaintiff's request exceeds the particular scope of

review and relief that is actually supported in the Petition. Accordingly, Plaintiff's Motion should be denied without oral argument.

Current Kansas Court of Appeals judge, Judge Steve Leben, wrote about the propriety of discovery in KJRA actions in 1995, before his appointment to the bench; this was perhaps the first (and perhaps still the most extensive) Kansas commentary on the subject. *See* Steve Leben, *Challenging and Defending Agency Actions in Kansas,* 64 J.K.B.A. 23 (June/July 1995). Judge Leben convincingly articulated multiple reasons why, generally, "discovery is inconsistent with the statutory framework and should not be available in KJRA appeals." *Id.* at 31. The sole exception that Judge Leben advocated was that "[l]imited discovery should be allowed when the applicable KJRA provision allows consideration of some new issues on review," e.g., when additional evidence to the agency record is appropriate under K.S.A. 77-619(a). *Id.*

KJRA provision K.S.A. 77-619(a) does not directly address discovery but provides what evidence a court may receive in addition to that already contained in the agency record for judicial review. Additional evidence may only be received into the agency record if such evidence "relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues" regarding one of two general types: (1) improprieties regarding the constitution or motive of those taking the agency action, or (2) "unlawfulness of procedure or of decision-making process." K.S.A. 77-619(a).

Plaintiff brings its Motion under K.S.A. 77-619(a) and evidently hopes to discover the latter type of potential additional evidence, regarding "unlawfulness of procedure or decision-making process". *See* Plf.'s Mot. at 1; Plf.'s Memo. at 4–5; K.S.A. 77-619(a)(2). Plaintiff's Petition does seek relief for what Plaintiff labels the Chief Engineer's alleged unlawful procedure

or failure to follow prescribed procedure, *see* Plf.'s Pet. at 11, and thus at least initially, additional evidence regarding such "unlawfulness" might seem to be within the scope of review identified and requested by Plaintiff in this case. Plaintiff apparently thinks that this is the end of the inquiry and thus that Plaintiff's requested discovery is sufficiently warranted and should be allowed. But Plaintiff should have to establish more before this Court even considers the rare prospect of allowing any limited discovery in this KJRA case.

In the KJRA case of *Bd. of County Comm'rs v. Kansas Racing & Gaming Comm'n*, the Kansas Supreme Court upheld a district court's refusal to allow traditional discovery because the plaintiffs "failed to invoke the statutory means of obtaining judicial relief that could have given the district court statutory authority to allow discovery and receive evidence outside the agency record." 393 P.3d 601, 617 (Kan. 2017). In other words, the plaintiffs' requested discovery of additional evidence under K.S.A. 77-619(a) exceeded the particular scope of review and relief that the plaintiffs sought in their petition under K.S.A. 77-621(c). *Id.* at 616. Thus the Kansas Supreme Court established that a district court has discretion to deny a KJRA plaintiff's discovery request that falls outside the scope of the petition, but the Kansas Supreme Court never reached the issue of whether or to what extent such a plaintiff is required to demonstrate a sufficient factual basis to warrant any discovery. *See id.* at 616–17 (noting multiple possible rationales for the district court's ruling). But the district court had suggested that such a demonstration of sufficient factual basis also should be required, and such a requirement would indeed make sense in KJRA actions.

The district court in *Bd. of County Comm'rs*, in denying the plaintiffs' request for discovery, had noted the following and described a discovery motion that sounds remarkably similar to Plaintiff's Motion before this Court:

> Under the KJRA, this Court reviews challenged agency action much like an appellate court and is generally restricted to the agency record. While discovery may be available in judicial review proceedings under appropriate circumstances, the Court cannot authorize discovery whenever a plaintiff makes unsupported allegations under K.S.A. 77–619(a) and expresses the mere belief that something is out there to be found through discovery. Because Kansas law presumes the regularity of agency proceedings and actions absent evidence to the contrary, the Court believes that the requested discovery should be permitted only upon a prima facie showing of wrongful conduct supported by something of evidentiary value. However, Plaintiffs' motion rests on unsupported allegations and Plaintiffs have made no prima facie showing of wrongful conduct based on affidavits, appropriate verified statements or anything else of evidentiary value.

393 P.3d at 613 (quoting a portion of the district court's ruling that was upheld on other grounds) (emphasis added).

Here, Plaintiff has not identified either the form(s) or exact content of its so-called "limited" discovery for which Plaintiff seeks authorization, nor has Plaintiff provided anything of evidentiary value to suggest that any admissible evidence of "unlawfulness of procedure or of decision-making process" under K.S.A. 77-619(a)(2) even exists to support the claimed related allegations in Plaintiff's Petition. Thus Plaintiff has failed to make a prima facie showing that any such admissible evidence exists or that any particular evidence, if it does exist, would be admissible. In effect, Plaintiff's Motion stands on "unsupported allegations under K.S.A. 77-619(a) and expresses the mere belief that something is out there to be found through discovery." *Bd. of County Comm'rs*, 393 P.3d at 613 (quoting a portion of the district court's ruling that was upheld on other grounds).

In other words, Plaintiff wishes to go on the proverbial "fishing expedition" that is even less appropriate in KJRA actions than in civil actions under Chapter 60. In KJRA actions, the disputed agency action is known and the universe of documents that the agency considered and upon which the action was based is provided to the parties in advance, in the form of the filed

agency record—which, in this case, is comprised of over 3,500 documents. Generally, everything in the filed agency record should be sufficient for a plaintiff to make its KJRA case, and the agency's decision will either stand or fall on the basis of the documents in the agency record. Where, as here, a KJRA plaintiff alleges in its petition unlawful procedure or decision-making under K.S.A. 77-621(c)(5), then if the plaintiff believes that additional evidence as to such "unlawfulness" exists or is likely to exist and would be admissible, then the plaintiff should be required to establish appropriate factual justification before any limited discovery on the issue. Otherwise, every KJRA plaintiff could include bare "unlawful procedure" claims under K.S.A. 77-621(c)(5) in the petition, later file an unsupported motion to engage in discovery under the related additional-evidence provision of K.S.A. 77-619(a)(2), and then delay the proceedings for days (such as the 120 requested here by Plaintiff) while the plaintiff engages in costly, time-consuming, and perhaps pointless discovery.

Furthermore, it is important to note that Plaintiff confuses allegedly unlawful procedures and process, which might warrant limited discovery and the admission of additional evidence under K.S.A. 77-619(a)(2), with allegedly erroneous factual findings or legal conclusions, which are properly resolvable by the Court on the existing record and as matters of law. The various complaints that Plaintiff makes in paragraphs 20–30 of its Petition are really about the factual determinations that the Chief Engineer made based on evidence in the agency record, or about the way that the Chief Engineer interpreted and applied applicable law. *See, e.g.*, Plf.'s Pet. ¶ 20 (claiming that applicable law does not provide for contingent approvals); Plf.'s Pet. ¶ 24 (claiming that the Chief Engineer misinterpreted a report). Plaintiff should not be allowed to justify discovery based on K.S.A. 77-619(a)(2), merely via the "unlawful procedure" labeling that

Plaintiff ascribes to its allegations in the Petition. When that incorrect labeling is peeled off, Plaintiff's requested discovery of additional "unlawful procedure" evidence under K.S.A. 77-619(a) exceeds the particular scope of review and relief that is actually supported in the Petition under K.S.A. 77-621(c). Accordingly, the holding in *Bd. of County Comm'rs* supports this Court's denial of Plaintiff's Motion. *See* 393 P.3d at 616–17.

Plaintiff's unsupported request to seek additional "unlawful procedure" evidence via unspecified discovery, coupled with Plaintiff's Petition claims (mis)characterized as concerning "unlawful procedure", should not be deemed enough to warrant an exception to the rule that discovery is inappropriate in KJRA actions. Plaintiff has not told the Court exactly what form(s) of discovery Plaintiff believes is justified nor has Plaintiff provided proposed specific deponents or proposed specific written discovery questions, to enable the Court to conclude that limited discovery is justified as to any particular allegation in Plaintiff's Petition that might properly warrant additional admissible evidence. In the absence of such information and the absence of a prima facie showing that any discovery will or is likely to be reasonably calculated to lead to the discovery of additional admissible evidence under K.S.A. 77-619(a), Plaintiff's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above *Chief Engineer's Response in Opposition to Plaintiff's Motion for Discovery* was electronically filed with the District Court Clerk using the Court's electronic filing system, which will cause service to be made on the following other counsel of record by the transmission of a notice of electronic filing on the date reflected on the electronic file stamp hereto:

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