

**THE STATE OF KANSAS  
TWENTY-FOURTH JUDICIAL DISTRICT  
SERVING  
EDWARDS, HODGEMAN, LANE, NESS, PAWNEE, AND RUSH COUNTIES**

**IN THE  
DISTRICT COURT OF EDWARDS COUNTY, KANSAS**

WATER PROTECTION ASSN. OF  
CENTRAL KANSAS

*Plaintiffs,*

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

**Motion for Discovery**

The plaintiff (“Water PACK”) moves this Court to admit additional evidence through discovery to be taken in this matter under Section 77-619(a) of the Kansas Judicial Review Act for the reasons identified in the attached memorandum. Water PACK also asks the Court for oral argument on the question of discovery to the extent that question is disputed by the defendant and the intervenors.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion for Discovery was electronically served on counsel of record in this matter on the date that of entry in the corresponding electronic docket and filed in original form with the Clerk of the District Court.

By: /s/ Micah Schwalb

Micah Schwalb, #26501

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**Memorandum in Support of Motion for Discovery**

Plaintiff Water Protection Assn. of Central Kansas (“Water PACK”) submits this memorandum in support of its motion for discovery. Undersigned counsel hereby certifies that he conferred with counsel to the defendant (“Barfield”) and counsel to the intervenors (the “Cities”) regarding discovery in this matter on or about August 5, 2019. Based upon those conversations, and in order to clarify application of pertinent sections of the Kansas Judicial Review Act

(“KJRA”) and of the Kansas Code of Civil Procedure to this matter, Water PACK submits this memorandum in support of its motion.

#### ARGUMENT AND AUTHORITIES

The KJRA, as the statutory basis for review of Kansas agency decisions by Kansas trial courts, derives from the Uniform Model State Administrative Procedure Act (“MSAPA”). *Lindenman v. Umscheid*, 255 Kan. 610, 681 (Kan. 1994); *see also Hale v. Substance Abuse Ctr. E., Inc.*, 19 Kan. App. 2d 569, 571 (1994). Modeled after sections of the 1981 MSAPA, KJRA § 77-621(c)(5) provides for relief from agency action upon a determination that “the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure[.]” *See Ann Pecora, The Model State Administrative Procedure Act: Planned Restraint on the Consolidation of Power by Executive Branches of State Governments*, 32 VILLANOVA L. REV. 451, 464 (1987) (referencing section 15(g) of the 1981 MSAPA). Section 77-619(a) in turn provides that:

The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding...unlawfulness of procedure or of decision-making process.

*See also Doe v. Kansas Dept. of Human Resources*, 277 Kan. 795, 812-14 (2004). Reflecting upon the “striking resemblance” between Section 77-621(c)(5) and 619(a), the Supreme Court in *Bd. of County Com’rs v. Kansas Racing & Gam. Commission* held that district courts may admit additional evidence in KJRA cases, including evidence obtained in discovery, so long as such evidence concerns (among other matters) the unlawfulness of procedures or of the decision-making process used by the agency. 393 P.3d 601, 617 (Kan. 2017). The Supreme Court has also determined that discovery remains available in KJRA proceedings based on the inherent powers of district courts and the statutory grant of authority set forth in the KJRA. *Id.* at 617; *see also*

*Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 97 (2005). (the “Code of Civil Procedure may be used by the district court to supplement the KJRA if the provision is a logical necessity that is not addressed within the KJRA.”)

Judge Leben, writing before *Kansas Racing & Gam. Commission* and his appointment to the Kansas Court of Appeals, explained in 1995 that KJRA “discovery is allowed as long as the evidence Petitioners seek appears to be ‘reasonably calculated to lead to the discovery of admissible evidence’ relating ‘to the validity of the agency action at the time it was taken and...needed to decide disputed issues regarding...unlawfulness of procedure or of decision-making process.’” Steve Leben, *Challenging and Defending Agency Actions in Kansas*, 64 J.K.B.A. 23, 39 (June/July, 1995) (quoting *City of Kansas v. Hayden*, Case No. 89-CV-206, Memorandum Decision and Order at 5-6 (Dec. 15, 1989)); KSA § 77-619(a); KSA § 60-226(b). Comments to sections of the 1981 MSAPA<sup>1</sup> corresponding to KJRA § 77-619(a) buttress Judge Leben’s analysis as follows:

Subsection (a) permits the court to receive evidence, subject to a number of conditions. First, the evidence must relate to the validity of the agency action at the time it was taken; in this context, the term “validity” is intended to encompass the provisions of Section [77-621] on scope of review. Thus, evidence may be received only if it is likely to contribute to the court's determination of the validity of agency action under one or more of the standards set forth in [77-621]; see Section [77-619(a)]. Second, paragraphs (a)(1) and (2) identify some specific issues that may be addressed, if necessary, by new evidence.

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<sup>1</sup> Absent definitive answers in the legislative history pertaining to the adoption of a model, act, the Court may consult the official comments of the relevant model act. See *Bruch v. Kan. Dep’t of Rev.*, 282 Kan. 764, 778 (2006); *Citizens’ Util. Ratepayer Bd. v. State Corp. Comm’n of State of Kan.*, 24 Kan. App. 2d 63, 69, 941 P.2d 424, 428–29 (1997) (comments to corresponding provisions in the Model Act are “instructive”).

See MSAPA § 5-114. Precedents from other jurisdictions adopting § 5-114 (or predecessor provisions) likewise echo Judge Leben and the Supreme Court in *Kansas Racing & Gam. Commission*.

In Nevada, where the state administrative procedure act permits admission of evidence germane to procedural irregularities, their Supreme Court noted that it was within the discretion of the trial court to receive relevant evidence to supplement the agency record. *Minton v. Bd. of Med. Exam'rs*, 110 Nev. 1060, 1082, 881 P.2d 1339, 1354 (1994) (disapproved of on other grounds by *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 327 P.3d 487 (2014); see also NRS 233B.135. Similarly, in *Nightlife Partners, Ltd. v. City of Beverly Hills*, the California Court of Appeals refused to limit review of an agency decision to the administrative record because the bare record would not disclose the factors considered in the reviewing official's construction of the evidence, and required the administrative officials participating in the decision to explain their actions through independent testimony. 133 Cal. Rptr. 2d 234, 241 (2003). Finally, the Washington Court of Appeals held that when a "petition seeking review of agency action includes allegations of procedural irregularities, a violation of the appearance of fairness doctrine, or raises a constitutional question, it may be necessary for the trial court to consider facts outside the record certified to it in order to resolve those issues." *City of Federal Way v. King County*, 62 Wash. App. 530, 534 n.2 (1991). As in *Minton*, *Nightlife Partners*, and *City of Federal Way*, Chief Engineer's conduct in this matter raises concerns regarding unlawful procedures employed by an agency subject to judicial review under statutes adapted from MSAPA.

The petition in this matter focuses squarely upon the unlawfulness of procedure and of the decision-making process surrounding Chief Engineer Barfield's "contingent" approval of the

change applications submitted by the Cities, as well as other irregularities in the record. Indeed, in both the petition for judicial review and in the earlier petition for administrative review submitted to the Secretary of Agriculture, Water PACK repeatedly identified unlawful procedures employed by Chief Engineer Barfield in connection with the referenced change orders, including the following: (a) conditioning approval of the change orders in a manner not contemplated in KSA § 82a-708b and K.A.R. 5-5-1; (b) approving change applications shown by the Cities to cause impairment of existing water rights in violation of K.A.R. 5-5-8 and K.A.R. 5-5-9(c) (the latter, the 1994 version); and (c) ignoring conflicts between Farm Service Agency data and satellite imagery showing that the change applications, if approved, would impair existing water rights and increase consumptive use at the R9 Ranch in violation of K.A.R. 5-5-3. Water PACK thus seeks the Court's leave to conduct discovery intended to identify evidence outside the administrative record demonstrating that Chief Engineer Barfield, relying upon information in part supplied by the Cities, engaged in an unlawful actions in connection with approving the change orders referenced in the Petition.

#### CONCLUSION

Pursuant to the KJRA, as well as KSA §§ 60-226 - 60-236 (inclusive), Water PACK requests an order authorizing 120 days' of discovery limited to matters concerned with the validity or lawfulness of actions taken by Chief Engineer Barfield in connection with approval of the change orders referenced in the Petition, as alleged in paragraphs 20-30 of the Petition.

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PREPARED AND FILED BY

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I certify that a true and correct copy of this Memorandum in Support of Motion for Discovery was (a) electronically served on counsel of record in this matter on the date that the same was entered in the electronic docket for the same; and (b) filed in its original form with the Clerk of the District Court.

By: /s/ Micah Schwalb

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