

**IN THE 24TH 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.*

Pursuant to K.S.A. Chapter 77

**PETITION FOR JUDICIAL REVIEW**

COMES NOW, Plaintiff Water Protection Assn. of Central Kansas (“Water PACK”) and petitions this Court for judicial review of the Master Order Contingently Approving Change Applications Regarding R9 Water Rights dated March 27, 2019 (the “Master Order”) attached as Exhibit A. Unless otherwise noted below, capitalized terms used in this Petition have the meanings set forth in paragraphs 1-29 of the Master Order.

**Jurisdiction and Venue**

1. The Kansas Judicial Review Act (“KJRA”) provides that a district court shall conduct judicial review of agency actions, absent circumstances inapplicable here. *See* K.S.A. § 77-609(a).

2. Venue is proper in Edwards County because the Master Order is a final order effective in Edwards County. K.S.A. § 77-609(b).

## Overview

3. Water PACK is a Kansas not-for-profit corporation registered at 306-A N. Main Street, Saint John, Kansas 67576.

4. The articles of incorporation of Water PACK identify the following purpose: “Any and all business connected with the use and conservation of water in the State of Kansas.”

5. Water PACK’s membership is comprised of agricultural producers and businesses, and was organized to promote, foster, and encourage the beneficial, economical, and sustainable use of quality water. Water PACK, as an organization comprised of land owners, water rights owners, and the general public, is adversely affected and aggrieved by the Master Order and, having exhausted all administrative remedies, is entitled to seek judicial review of the Master Order.

6. The Master Order involves change applications submitted by the City of Hays and the City of Russell seeking to change the place and type of use of water currently diverted for irrigation use at the R9 Ranch in Edwards County, Kansas. (Master Order at ¶ 17-18).

7. Water PACK members own agricultural land adjacent to the R9 Ranch, as well as appropriation rights that permit diversion of groundwater for irrigation adjacent to the R9 Ranch. (See Master Order at p. 41-42).

8. K.S.A. § 77-614 states that a petition for review under the KJRA must identify the persons or parties in any adjudicative proceedings that led to agency action.

9. Water PACK, Water PACK’s consultant Dr. Andy Keller, and Water PACK members participated in the proceedings that led to the Master Order and are specifically referenced therein. (See, e.g., Master Order at ¶¶ 29, 59, 60-63, 79, 131, 160-161).

10. Other persons involved in the Master Order proceedings include the Cities, DWR’s Stafford and Stockton Field Offices, GMD5, and GMD5’s consultant, and the general public in Edwards County, Kansas, including the constituent members of Water PACK. (See Master Order at p. 53).

11. The Defendant, David W. Barfield, P.E. (the “Chief Engineer”), is the Chief Engineer of the Division of Water Resources (“DWR”) of the Kansas Department of Agriculture (“KDA”). He may be served at 1320 Research Park Drive, Manhattan, Riley County, Kansas 66502.

### **Summary of Applicable Kansas Water Law**

12. The following is taken from the Second Amended Petition for Judicial Review submitted by counsel to the Cities in *Friesen v. Barfield*, 2018-CV-000010 (Gove County District Court, Kansas, Nov. 19, 2018):

82. The Chief Engineer is required to enforce and administer the laws of this state pertaining to the beneficial use of water and to control, conserve, regulate, allot, and aid in the distribution of the water resources of the state for the benefit and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation. K.S.A. 82a-706.

...

85. Kansas public policy, unchanged since 1945, mandates the use of the prior appropriation doctrine when there is insufficient water available for all appropriators.

86. The prior appropriation doctrine permeates the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*, and is fundamental Kansas public policy that is binding on all water users and government agencies, including the Chief Engineer and GMD4. *See, e.g.*, K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-742; 82a-745; 82a-1020; 82a-1028(n) and (o); 82a-1029; 82a-1039; and the April 13, 2018, Order, pp. 4- 5,

¶ 4.

...

88. The importance of stability in property law has been recognized by our Courts. “The need of stability in the water laws of Kansas cannot be overstressed.” *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 232, 630 P.2d 1164 (1981) (quoting *Williams v. The City of Wichita*, 190 Kan. 317 at 319, 374 P.2d 578 (1962)).

89. Quoting from *Stone*, 230 Kan. at 233, 630 P.2d 1164, the Clawson Court went on to say:

The doctrine has provided stability for landowners, water right holders, and the public. The importance of stability in property law has been recognized by our Supreme Court: “In a well-ordered society it is important that people know what their legal rights are, not only under constitutions and legislative enactments, but also as defined by judicial precedent, and having conducted their affairs in reliance thereon, ought not to have their rights swept away by judicial decree. And this is especially so where rights of property are involved.... And it should be left to the legislature to make any change in the law, except perhaps in a most unusual exigency.” *Stone* 230 Kan. at 233, 630 P.2d 1164 (quoting *Freeman v. Stewart*, 2 Utah 2d 319, 322, 273 P.2d 174 [1954]).

*Clawson*, 49 Kan. App. 2d at 799.

...

101. Each Permit,<sup>1</sup> when issued, is an administrative Order, *Clawson*, supra, 49 Kan.App.2d at 801, and the time to challenge those Orders has long since passed.

102. Water rights are real property. K.S.A. 82a-701(g). While the Legislature can always amend or repeal its own laws it cannot unring a bell. “The past cannot be recalled by the most absolute power.” *United States v. Winstar*, 518 U.S. 839, 873 (1996) (quoting *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810)).

13. A selection of other DWR statutes and regulations germane to the issues identified in this Petition, attached hereto as Exhibit B, includes the following:

- a. K.S.A. § 82a-708a (governing original applications)
  - i. K.A.R. 5-3-5 (governing original applications)
- b. K.S.A. § 82a-708b (the “Change Order Statute”)
  - i. K.S.A. § 82a-708b (a)(2) (the “No Injury Rule”)

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<sup>1</sup> This term refers to water appropriation permits.

- c. K.A.R. 5-5-1, *et seq.* (the “Change Order Regulations”)
  - i. K.A.R. 5-5-8 (the “No Injury Regulation”)
  - ii. K.A.R. 5-5-9 (1994) (the “Consumptive Use Regulations”)
- d. K.S.A. § 82a-1501 *et seq.* (the “Water Transfer Act”)
  - i. K.A.R. 5-50-1, *et seq.* (the “Water Transfer Regulations”)

14. The Change Order Statute permits a change in the point of diversion or type of use of water rights upon satisfaction of certain conditions, including compliance with the No Injury Rule, which requires a demonstration to the Chief Engineer that “any proposed change is reasonable and will not impair existing rights[.]” (Emphasis supplied).

15. In *Garetson Bros. v. Am. Warrior Inc.*, construing § 82a-717a of the Kansas Water Appropriation Act, the Kansas Court of Appeals defined the term “impair” to mean “to weaken, to make worse, to lessen in power, diminish, or relax or otherwise affect in an injurious manner.” 347 P.3d 687, 698 (Kan. App. 2015).

16. Referencing the No Injury Rule, the No Injury Regulation promulgated prior to *Garetson Bros.* states that “[e]ach 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.” (Emphasis supplied).

17. Also referencing the No Injury Rule, the Consumptive Use Regulations prohibit approval of any change application that causes “the net consumptive use from the local source of water supply to be greater than the net consumptive use from the same local source of water supply by the original irrigation use” based on criteria and calculations set forth therein. Consumptive Use Regulations at (a). The criteria used to calculate net consumptive use include “the maximum

acreage legally irrigated in any one calendar year during the perfection period.” *Id.* at (a)(2)(A) and (B). If the generalized calculation methods set forth in K.A.R. 5-5-9(a) yield a number “which appears to be unrealistic and could result in impairment of other water rights,” the Chief Engineer must undertake a site-specific net consumptive use analysis to determine the quantity of water which was actually beneficially consumed under the water right. *Id.* at (c).<sup>2</sup>

18. Upon satisfaction of the No Injury Rule and other conditions in the Change Order Statute, 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.” Change Order Statute, *supra*.

19. Under the Kansas Water Appropriation Act, K.S.A. § 82a-706a, statutes and regulations for processing original applications to appropriate water or changes in water rights allow the Chief Engineer to impose conditions on applications to appropriate or change water appropriations, but do not provide for contingent approval of an original application or a change application. *Compare* the Change Order Statute, *with* K.S.A. § 82a-708a, K.A.R. 5-3-5, *and* the Change Order Regulations.

### **Defects in the Master Order and Its Proceedings**

20. Though the Master Order purports to condition effectiveness of the Change Approvals upon issuance of a subsequent Transfer Order to be issued under the Water Transfer Act and the Water Transfer Regulations (Master Order at ¶ 46), the Change Order Statute and the Change Order Regulations do not provide for contingent approvals. Further, the Water Transfer Act by its own terms does not purport to amend the Kansas Water Appropriation Act and indeed

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<sup>2</sup> See also K.A.R. 5-5-8(c) (defining “consumptive use”).

does not “exempt the applicant from first complying with the provisions of...the Kansas water appropriation act[.]” *See* K.S.A. § 82a-1507(b).

21. The Kansas Administrative Procedure Act (“KAPA”) and the Kansas Water Appropriation Act permit the Chief Engineer and DWR to promulgate rules, regulations, and standards to effectuate the purposes of the Change Order Statute. *Compare* K.S.A. § 77-421 with K.S.A. § 82a-706a. The Chief Engineer has not promulgated changes to the Change Order Regulations in compliance with KAPA that provide for contingent approval of a change application.

22. The Master Order explicitly references the No Injury Regulation only once in paragraph 13, but includes no specific findings with respect to material injury or adverse effects on those holding water rights with priorities junior to the R9 Water Rights but senior to the June 26, 2016 dates of the Change Applications. *See Wheatland Elec. Coop., Inc. v. Polansky*, 46 Kan. App. 2d 746, 757-58 (2011).

23. The Master Order notes that the Change Applications may not be approved if they will cause the extent of consumptive use associated with the R9 Water Rights to increase substantially (*See, e.g.*, Master Order ¶¶ 35-37), and finds that the conversion of the use of the R9 Water Rights from irrigation to municipal uses “will not impair existing rights” despite contrary evidence. (*See id.* at ¶ 70; *see also Id.* ¶ 88, 92).

24. A 2018 report commissioned by the Cities and attached hereto as Exhibit C (the “BMcD Report”) modeling impact of the Change Applications (if approved) shows the effect of pumping an average of 4,800 acre-feet per year for municipal use in the manner contemplated by the Master Order relative to historic irrigation uses at the R9 Ranch. (*Compare* BMcD Report at

Scenarios 2 and 4 *with* Scenarios 1 and 3). Negative contours in Figure 6<sup>3</sup> and Figure 9 of the BMcD Report show 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.<sup>4</sup> What's more, the model referenced in the BMcD Report holds constant the aquifer recharge from precipitation regardless of the land use (irrigated or dry land), while recharge from the Arkansas River (called stream leakage in the modeling report) assumes river flow in the first 16 years of the modeling, dominating the short-term modeling results and influencing long-term results.. (BMcD Report at Table 2, Scenarios 3, 4, and 5).<sup>5</sup> A 1994 report prepared by a prior consultant to the Cities, by contrast, concluded that the R9 Ranch could support removal of 5500 acre-feet per year with recharge from the Arkansas River, but that the area could only naturally support the removal of between 3200 and 3800 acre-feet of water depending upon average recharge of between one or two inches.<sup>6</sup>

25. When applying the Consumptive Use Regulations in the Master Order, notwithstanding the No Injury Rule and the No Injury Regulation, the Chief Engineer ignores the effects of conversions of the R9 Water Rights from irrigation to dryland/grassland proposed by the Cities, as well the effect of assuming aquifer recharge from stream leakage in the face of declining Arkansas River flows. (*See* Master Order at ¶ 80, 151, 157). As noted in hydrologic model relied upon by the Cities and the Chief Engineer,<sup>7</sup> the non-irrigated crops and natural vegetation planned

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<sup>3</sup> BMcD Report, fig. 6 (showing hydraulic boundary effect resulting from assumed flow in the Arkansas River.).

<sup>4</sup> *See* BMcD Report at Tables 1, 2, and 3 (average maximum pumping of 4,800 AFY is approximately the same as assumed average annual recharge).

<sup>5</sup> BMcD Report, all tables, footnotes (explaining that negative values show flows out of the R9 Ranch; 2nd. footnote for Tables 2 and 3 states that the assumed flow in the Arkansas River after year 16 is zero).

<sup>6</sup> *See* [Exhibit D](#).

<sup>7</sup> *See* BALLEAU GROUNDWATER, INC., HYDROLOGIC MODEL OF [GMD5], at 57 (June 2010) (“Irrigation return flow (deep percolation) adds soil moisture above the water table that enhances recharge from precipitation events.”), available at [http://archive.gmd5.org/District\\_Model/GMD5\\_Model\\_Final\\_Report.pdf](http://archive.gmd5.org/District_Model/GMD5_Model_Final_Report.pdf); *Id.* at 20 (“Potential recharge tends to be larger for cropland than for natural vegetation[.]”).



for the R9 Ranch consume more precipitation than irrigated crops historically grown at the R9 Ranch, while 4,800 acre-feet of water planned for municipal use will not be used to irrigate the R9 Ranch, thus lowering return flows and impairing adjacent water users more extensively than in the manner depicted by the BMcD Report;<sup>8</sup> similarly, one should not assume aquifer recharge from stream leakage in the face of nonexistent river flows.<sup>9</sup> Taken together, such factors show that the approval of change in use will yield a net consumptive use in excess of the original irrigation use.

26. The Chief Engineer did not validate DWR's records with respect to consumptive use at the R9 Ranch during the year of perfection, despite evidence suggesting flaws in such records. Richard Wenstrom, P.E., noted the following in his petition seeking administrative review of the Master Order, which was incorporated by reference in the petition submitted to the KDA Secretary seeking review of the Master Order pursuant to K.S.A § 77-527 and attached hereto as Exhibit E (the "Review Request"):

If they had gained access to FSA records they would have found an entirely different cropping pattern. A few local producers and citizens contacted the tenants that were in place during the year of record, and these two tenants agreed to go to the FSA-USDA in Edwards County to see what the reported cropping for that year actually was. The former tenants obtained the cropping data, and graciously agreed to give us access to the data. What we learned is that, instead of the 2,901 acres of alfalfa and 2,247 acres of corn reported by the Chief Engineer, the FSA records show: 2,387 acres alfalfa, 488 acres corn, 176 acres milo, 1,670 acres wheat, 293 acres of circles not farmed or crop destroyed. This also explains why the satellite photos of the R9 Ranch for the year of record generated for Water PACK by Dr. Andy Keller, Keller-Bliesner Engineering, show so many circles that were obviously not corn or alfalfa .... some actually look like they were not even farmed, but now we know that was wheat stubble.

27. The foregoing errors resulted in a calculated authorized annual quantity of water under the Consumptive Use Regulations "which appears to be unrealistic and could result in

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<sup>8</sup> See BMcD Report at Figure 7 (aqua-colored showing the annual recharge used in the modeling, which is the same for irrigation and dryland (municipal) scenarios.)

<sup>9</sup> See Exhibit D.

impairment of other water rights,” yet the Master Order does not undertake a site-specific net consumptive use analysis in the manner required by those same Consumptive Use Regulations or as suggested by GMD5. (Consumptive Use Regulations at (c)).

28. In response, the Master Order references submissions by the Cities regarding interpretations that would be “unfair” to them, as well as a supposed lack of evidence regarding impairment of water rights only senior to the R9 Water Rights, to find that a contingently authorized transfer of a maximum of 6,756.8 acre-feet of water will not “impair existing rights.” (Master Order ¶¶ 83, 85). The No Injury Rule does not however reference “fairness”, and both the No Injury Regulations and the Consumptive Use Regulations require safeguarding return flows for users with water rights senior to the filing date of the Change Applications.

29. The Master Order instead asserts the following: “While the Cities’ modeling of their proposed operations shows that area water levels will continue to decline at varying but reasonable rates as noted above, like their neighbors who are also depleting the local aquifer, the Cities are entitled to make reasonable beneficial use of their R9 Water Rights.” (See Master Order at ¶ 162).

30. The Master Order thus ignores or discounts evidence, analysis, or recommendations submitted by KBE on behalf of Water PACK, GMD5, BGW on behalf of GMD5, or Water PACK’s members regarding defects in the Limitations, the TYRA Limitation, and in the Master Order’s overall analysis. (See Master Order at ¶¶ 61-63, 68, 80-85).

### **Prior Agency Proceedings**

31. The Chief Engineer executed the Master Order and the Change Approvals on March 27, 2019. (Master Order at pp. 52, 84-238). A KDA staff member notarized the Chief

Engineer's signatures to the Master Order on March 27, 2019 and mailed the same to the parties referenced in the certificates of service on March 28, 2019. (Master Order at pp. 53, 84-238).

32. The Master Order states that, "This Master Order and its incorporated Change Approvals will become final orders, without further notice, unless a petition for administrative review by the Secretary pursuant to K.S.A. 82a-708b, K.S.A. 2016 Supp. 82a-1901, and K.S.A. 77-527 is filed within 15 days after the date of service shown on the Certificate of Service." (Master Order at ¶ 257).

33. Between April 4, 2019 and April 9, 2019, Water PACK and certain of its members timely petitioned the KDA Secretary to review the Master Order pursuant to K.S.A § 77-527.

34. Between April 24, 2019 and April 29, 2019, the Secretary declined the Review Request and other petitions submitted by Water PACK members. The order declining the Water PACK Review Request is attached hereto as Exhibit F (the "Declination").

### **Relief Requested**

The Plaintiff asks the Court to aside or modify the Master Order based upon the reasons set forth herein, as well as in the Review Request. The Plaintiff further requests that the Court enter declaratory judgment interpreting the Kansas Water Appropriation Act, in particular the Change Order Statute and the Change Order Regulations, as well as the Water Transfer Act and the Water Transfer Regulations, holding:

- a. the Chief Engineer acted beyond the jurisdiction conferred by any provision of law;
- b. the Chief Engineer erroneously interpreted and applied the law;
- c. the Chief Engineer engaged in an unlawful procedure or failed to follow prescribed procedure;

- d. the Master Order and the Change Approvals are based on determinations of fact, made or implied by the Chief Engineer, that are not supported to the appropriate standard of proof by evidence that was substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the Court in accordance with the KJRA;
- e. that the Chief Engineer and DWR failed to adequately consider, or to consider at all, evidence contrary to, contradicting, and detracting from their own findings and rulings set forth in the Master Order; and that, in light of contradicting evidence, the findings and rulings in the Master Order have been so undermined by such evidence that the evidence in the record is insufficient to support the conclusions of the Chief Engineer and the DWR;
- f. the Master Order and the Change Approvals are otherwise unreasonable, arbitrary, or capricious;<sup>10</sup> and
- g. for such other relief as the Court, in its discretion, deems appropriate, just, and equitable.

K.S.A. § 77-622.

Respectfully submitted,

/s/Micah Schwalb

Micah Schwalb, Esq., KS Bar 26501

Roebaugh Schwalb

4450 Arapahoe Ave.

Boulder, CO 80303

[micah.schwalb@roebaughschwalb.com](mailto:micah.schwalb@roebaughschwalb.com)

720-773-0970 (business)

*Counsel to Water PACK*

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<sup>10</sup> See K.S.A. § 77-621(c)(2), (4), (5), (7), and (8).

## CERTIFICATE OF SERVICE

I hereby certify that, on the date that this original PETITION FOR JUDICIAL REVIEW was electronically filed with the clerk of the above-referenced district court, the same was mailed by U.S. certified mail to:

David W. Barfield, Chief Engineer  
Division of Water Resources  
Kansas Dept. of Agriculture  
1320 Research Drive  
Manhattan, KS 66502  
david.barfield@ks.gov

Kenneth B. Titus, Chief Counsel  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502  
kenneth.titus@ks.gov

Jeff Lanterman, Water Commissioner  
DWR Stafford Field Office  
300 S Main St.  
Stafford, KS 67578  
jeff.lanterman@ks.gov

Kelly Stewart, Water Commissioner  
DWR Stockton Field Office  
820 S. Walnut St.  
Stockton, KS 67669  
Kelly.Stewart@ks.gov

Toby Dougherty, City Manager  
CITY OF HAYS  
City Hall, 16th & Main  
P.O. Box 490  
Hays, KS 67601  
tdougherty@haysusa.com

Jon Quinday, City Manager  
CITY OF RUSSELL  
133 W. 8th Street  
P.O. Box 112  
Russell, KS 67665  
quinday@russellcity.org

Orrin Feril, District Manager  
GMD5  
125 S Main St.  
Stafford, KS 67578  
oferil@gmd5.org

With copies to counsel for the Cities identified in the certificate of service of the Master Order

By: /s/ Micah Schwalb  
Micah Schwalb, #26501