

KANSAS DEPARTMENT OF AGRICULTURE
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**IN THE TWENTY-THIRD JUDICIAL DISTRICT
DISTRICT COURT OF GOVE COUNTY, KANSAS**

JON and ANN FRIESEN; FRIESEN FARMS,
LLC, et. al.,

Plaintiffs,

vs.

DAVID BARFIELD, P.E., THE CHIEF
ENGINEER OF THE STATE OF KANSAS,
DEPARTMENT OF AGRICULTURE,
DIVISION OF WATER RESOURCES, in his
official capacity,

Defendant.

Case No. 2018-CV-000010

Pursuant to K.S.A. Chapter 77

DEFENDANT CHIEF ENGINEER'S MOTION TO DISMISS

COMES NOW, Defendant David Barfield, P.E., Chief Engineer, Division of Water Resources, Kansas Department of Agriculture ("Chief Engineer"), by and through counsel, Kenneth B. Titus, and pursuant to K.S.A. 60-212(b), K.S.A. 77-607, and Supreme Court Rule 133, moves the Court for an order to dismiss the Petition for Judicial Review ("Petition"), filed by Jon and Ann Friesen, Friesen Farms, LLC, *et al.* ("Plaintiffs").

The Chief Engineer offers the following in support of the motion to dismiss:

1. Pursuant to K.S.A. 77-606, the Kansas Judicial Review Act ("KJRA"), K.S.A. 77-601, *et seq.*, is the "exclusive means of judicial review of agency action."
2. The Chief Engineer and/or the Division of Water Resources, Kansas Department of Agriculture is an "agency" as that term is defined by K.S.A. 77-602.
3. In order to establish a Local Enhanced Management Area ("LEMA"), K.S.A. 82a-1041 requires the issuance of several initial orders, including an Order of Decision, *see* K.S.A.

- 82a-1041(d), and then following the conclusion of the evidentiary public hearing process, a final order designating the LEMA known as the Order of Designation, *see* K.S.A. 82a-1041(e).
4. Pursuant to K.S.A. 82a-1041(d), the Chief Engineer issued an Order of Decision on February 23, 2018, corrected on February 26, 2018, which order rejected the proposed LEMA management plan and returning it to the Northwest Kansas Groundwater Management District No. 4 (“GMD4”) for further consideration. *Plaintiffs’ Petition*, p. 11, ¶ 55; and *Plaintiffs’ Exhibit B*.
 5. Following the Order of Decision, the elected GMD4 Board of Directors amended the proposed LEMA management plan and resubmitted it to the Chief Engineer for his consideration. *Defendant’s Exhibit 1* (attached).
 6. The proposed amendments were accepted by order of the Chief Engineer on March 8, 2018. *Defendant’s Exhibit 2* (attached).
 7. The Chief Engineer then issued an Order of Designation on April 13, 2018, pursuant to K.S.A. 82a-1041(e), which order formally adopted the LEMA management plan and designated the boundaries of the proposed LEMA. *Plaintiffs’ Exhibit C*, p. 5, ¶ 1; *Defendant’s Exhibit 3* (attached).
 8. Plaintiffs’ Petition requests review of the Order of Decision issued by the Chief Engineer pursuant to K.S.A. 82a-1041(d) on February 23, 2018 and corrected on February 26, 2018. *Plaintiffs’ Petition*, p. 11, ¶ 55.
 9. Plaintiffs did not request review by the Secretary of Agriculture of the Order of Decision. *Plaintiffs’ Exhibit C*.

Lack of Standing to Challenge Nonfinal Agency Action

10. K.S.A. 77-607(a) provides for “judicial review of final agency action.”
11. Final agency action is “the whole or part of any agency action other than nonfinal agency action,” whereas nonfinal agency action is “the whole or part of an agency determination, investigation, proceeding, hearing, conference or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural or intermediate with regard to subsequent agency action of that agency or another agency.” K.S.A. 77-607(b)(1) and (2).
12. Plaintiffs do not request judicial review of final agency action. The Order of Decision challenged by Plaintiffs is nonfinal agency action because subsequent action of the Chief

Engineer and GMD4 was intended and did in fact occur. The Order of Decision did not establish or alter any legal rights or obligations itself and was only one of several steps necessary in establishing this LEMA. The Order of Decision merely ordered that the proposed LEMA management plan, as submitted, could not be approved and thus it was returned to GMD4 for further consideration and potential amendment, with GMD4 ordered to approve or reject the Chief Engineer's proposed modifications within 90 days. *See* K.S.A. 82a-1041(d)(4); and *Plaintiffs' Exhibit B*, p. 27.

13. "An order cannot be final if the matter is still under 'active consideration' by the tribunal." *Sprint Commc'ns Co., L.P. v. Corp. Comm'n*, 45 Kan. App. 2d 460, 464-65, 249 P.3d 1210 (2011). The Order of Decision ordered GMD4 to consider the Chief Engineer's proposed modifications to the LEMA management plan and approve or reject them within 90 days. Thus, the matter was still under active consideration since formal action was required by GMD4 to amend the proposed LEMA management plan and then resubmit the amended plan to the Chief Engineer, and then the Chief Engineer had to consider those amendments and, if accepted, determine the final boundaries and corrective controls of the LEMA based on evidence in the record and the amended management plan. *See* K.S.A. 82a-1041(d), (e), and (f).
14. Pursuant to K.S.A. 82a-1041(e) and (h), the Chief Engineer did issue a subsequent order ultimately accepting the LEMA management plan as modified by GMD4, and then the Chief Engineer issued an Order of Designation, which serves as the final order fully implementing the LEMA and creating enforceable legal obligations. *See Defendant's Exhibits 2 and 3*.
15. In contrast, the Order of Decision that Plaintiffs now challenge before this Court did not and could not alter any existing rights or obligations because additional consideration of evidence was required by both an additional governmental entity (i.e., GMD4) and the Chief Engineer prior to the issuance (if ever) of a subsequent final order. The Order of Decision, therefore, is nonfinal agency action.
16. Although the KJRA does provide for interlocutory review of nonfinal agency action in limited circumstances pursuant to K.S.A. 77-608, by its very nature, interlocutory review of a nonfinal agency action is not available at the conclusion of administrative proceedings that include final agency action that is fully reviewable, as in the present case. Had Plaintiffs wished to properly seek interlocutory review of the Order of Decision under the KJRA, they should have done so before the Order of Designation was issued.

17. The Order of Decision fits squarely within the definition of nonfinal agency action under the KJRA because subsequent action was required by K.S.A. 82a-1041 and by the order as it was written and issued, and such subsequent action did in fact occur. Only the Order of Designation amounts to final agency action because it establishes legal rights and obligations. This premise is illustrated by the enacting statute in that K.S.A. 82a-1041(h) and (i) provide extensive protections from enacted LEMA management plans upon appeal of an Order of Designation but no protections during an appeal of an Order of Decision.
18. Plaintiffs, therefore, have failed to properly request review of final agency action and this Petition should be dismissed for lack of subject matter jurisdiction.

Failure to Exhaust Administrative Remedies

19. Even assuming that the Order of Decision amounted to final agency action, Plaintiffs failed to exhaust administrative remedies for the review of the Order of Decision.
20. Except for certain exceptions that do not apply in this case, K.S.A. 77-612 allows one to file a petition for judicial review “only after exhausting all administrative remedies available within the agency whose action is being challenged[.]”
21. Plaintiffs are entitled to and did in fact seek administrative review by the Secretary of Agriculture. *See* K.S.A. 82a-1901(c); and *Plaintiffs’ Exhibit C*. However, Plaintiffs did not seek the Secretary’s administrative review of the Order of Decision that Plaintiffs now ask this Court to review. Accordingly, this Petition should be dismissed for lack of subject matter jurisdiction.

Failure to Timely Request Judicial Review

22. Furthermore, even again assuming that the Order of Decision amounted to final agency action, Plaintiffs also failed to timely file their petition for judicial review.
23. “Judicial review is initiated by filing a petition for judicial review in the appropriate court[.]” K.S.A. 77-610.
24. Pursuant to K.S.A. 77-613(b), a petition for judicial review of a final order shall be filed within 30 days after service of the order if reconsideration has not been requested and is not a prerequisite for seeking judicial review. An additional three days is added to prescribed petition period when service of final agency action is done by mail. K.S.A. 77-613(e).

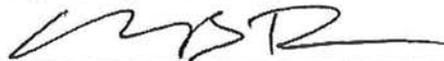
25. Assuming the Order of Decision amounted to final agency action, Plaintiffs were required to file this petition for judicial review on or before March 28, 2018. Even assuming that the corrected Order of Decision issued on February 26, 2018, was deemed to contain more than a clerical correction and thus began the running of Plaintiffs' filing deadline, the latest possible date to file their petition for review was April 2, 2018. The Plaintiffs thus filed their petition late, on June 13, 2018, well beyond any deadline for review of the Order of Decision.
26. The Kansas Supreme Court has held that the time for taking an administrative appeal, as prescribed by statute, is jurisdictional and that delay beyond the statutory time is fatal. *Vaughn v. Martell*, 226 Kan. 658, 661 (1979). Thus, as a result of Plaintiffs' untimely filing, assuming that the Order of Decision amounted to final agency action, this matter should be dismissed for lack of subject matter jurisdiction.

Conclusion

27. Plaintiffs lack standing under the KJRA because they are requesting an improper review of nonfinal agency action, i.e., the Order of Decision. Even assuming that such order amounts to final agency action, however, then Plaintiffs have failed to exhaust all administrative remedies available for the Order of Decision and also have untimely filed their request for judicial review.

WHEREFORE, the Chief Engineer prays that the court deny any and all relief sought by Plaintiffs, and dismiss their Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 12th of July, 2018, the above *Defendant Chief Engineer's Motion to Dismiss* 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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