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

JON and ANN FRIESEN; FRIESEN FARMS, LLC;)
DOYLE SADDLER; 1885 ENTERPRISES, LLC; JUSTIN)
SLOAN; TOM SLOAN; BERT STRAMEL; STRAMEL)
FARMS, INC.; FRED ALBERS; MARVIN ALBERS; FRANK)
BOUITS; DENISE J. BURROWS, TRUSTEE OF THE)
CHARLES SCHROEDER FAMILY TRUST; GARY E.)
COOPER; ELFRIEDE U. COOPER; GARY E. COOPER,)
TRUSTEE OF THE GARY E. COOPER AND MARY)
PAWLUS TRUSTS; COOPER GRAIN, INC.; CAMERON)
EPARD; F. DOYLE FAIR, TRUSTEE OF THE A.L.) Case No. 2018-CV-000010
ABERCROMBIE MARITAL TRUST; LOIS L. FERGUSON;)
BRYAN FRAHM; MEADOW LAKE FARMS, INC.; LON)
FRAHM; FRAHM FARMLAND, INC.; LON FRAHM,)
TRUSTEE OF THE PEGGY FRAHM EVANS TRUST;)
SHEILA FRAHM; JAMES FRITZ; VINCENT V. GLAD and)
TENLEY S. GLAD, doing business as GLAD FARMS; PAT J.)
HAFFNER; WILBURN HOLLOWAY; DAVID HOUSTON;)
DOUGLAS IRVIN; IRVIN FARMS, INC.; SHARON K.)
MANN; JOHN P. McKENNA; BRENT MERANDA;)
BERWYN PETERSEN; S.Q.I. FARMS, INC.; PAUL STEELE;)
RICHARD A. STEFAN; JOSEPH G. WALDMAN; DENNIS)
WALKER; WALKER TESTING CO., INC.; KEVIN W.)
WARK; WARK PROPERTIES, LLC; PRAIRIE DOG)
PROPERTIES, LLC; KEVIN W. WARK, TRUSTEE OF THE)
BERRIE FAMILY TRUST; KEVIN W. WARK, TRUSTEE OF)
THE FLIPSE LIVING TRUST; DARREL E. WARK; DANIEL)
WAYAND; WENDY WEISHAAR; and DONALD RALL;)
)
)
Plaintiffs,)

vs.

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

PURSUANT TO K.S.A. CHAPTER 77

RESPONSE TO THE CHIEF ENGINEER’S MOTION TO DISMISS

Plaintiffs seek review of the Chief Engineer’s April 13, 2018, Order establishing a Local Enhanced Management Area (“LEMA”) within the Northwest Kansas Groundwater Management District No. 4 (“GMD”). While the Petition for Judicial review mistakenly refers to previous, non-final Orders issued on February 23, 2018, and February 26, 2018, the Petition, read as a whole and in conjunction with the exhibits, makes it clear that review of the later April 13, 2018, Order is requested.

To the extent that the Court finds that information required by K.S.A. 77-614(b) is missing, subsection (c) makes it clear that the Court retains jurisdiction and leave to supplement the Petition is to be freely given.

Statement of Facts

1. After hearings held in late 2017, on February 23, 2018, the Chief Engineer issued an Order sending a Local Enhanced Management Area (“LEMA”) plan proposed by the Northwest Kansas Groundwater Management District No. 4 (“GMD”) pursuant

to K.S.A. 82a-1041, back to the GMD with suggested revisions. That Order was amended on February 26, 2018.¹

2. Plaintiffs did not request that the Secretary of Agriculture review the February 23, 2018, and February 26, 2018, Orders because they were not final Orders.² Instead, Plaintiffs waited until the Chief Engineer issued his April 13, 2018, Order that established the LEMA to request administrative review.

3. The GMD revised the LEMA Plan as the Chief Engineer suggested and on March 8, 2018, the Chief Engineer accepted the GMD's revised LEMA Plan.

4. On April 13, 2018, the Chief Engineer issued an Order adopting the GMD's revised LEMA Plan.

5. On Sunday, April 29, 2018, the Plaintiffs served a Petition pursuant to K.S.A. 82a-1901 requesting that the Secretary of Agriculture review the Chief Engineer's April 13, 2018, Order. A copy of the Petition for Administrative Review, specifically requesting review of the April 13, 2018, Order, was attached to the Petition for Judicial Review as Exhibit C.

6. The Petition for Administrative Review requested that the Secretary of Agriculture review the Chief Engineer's April 13, 2018, Order that established the

¹ See the Petition for Judicial Review, Exhibits A and B.

² Motion to Dismiss, ¶ 9.

LEMA.³ The Petition for Administrative Review mentions the April 13, 2018, Order numerous times.⁴

7. On May 18, 2018, the Secretary of Agriculture issued an Order denying review of the Chief Engineer's April 13, 2018, Order. A copy of the Secretary's May 18, 2018, Order was attached to the Petition for Judicial Review as Exhibit E.

8. On June 13, 2018, Plaintiffs filed the Petition for Judicial Review pursuant to Kansas Statutes Annotated Chapter 77, referring to the February 23 and 26 Orders sending the proposed LEMA back to the GMD rather than the April 13, 2018, Order that actually established the LEMA.

9. Even though the Petition for Judicial review refers to the earlier Orders, it specifically mentions the "recently created Local Enhanced Management District ("LEMA")."⁵

10. The Petition for Judicial review specifically states that the "Plaintiffs seek judicial review of the Chief Engineer's . . . orders establishing a LEMA in GMD4 for the reasons set out in the Petition for Administrative Review."⁶ The only Order

³ Ex. C., Page 1. *See also* p. 4. ("There are numerous problems with the LEMA statute, the procedure that resulted in the April 13, 2018, Order, and with the Order itself.")

⁴ *See*, p. 5 ¶¶ 1, 3, and 4; p. 6, ¶¶ 7 and 8; p. 7, ¶¶ 11 and 12; p. 11, ¶ 28; p. 12, ¶¶ 31 and 32; p. 13, ¶ 34; p. 15, ¶¶ 45 and 47; and p. 16, ¶ 49.

⁵ Petition, ¶ 53.

⁶ Petition, ¶ 55.

“establishing” a LEMA is the Chief Engineer’s April 13, 2018, Order; the February Orders do not.

11. Even though the Petition for Judicial Review references the incorrect Orders, by attaching the April 29, 2018, Petition for Administrative Review of the Chief Engineer’s April 13, 2018, Order it clearly identifies “the agency action at issue”⁷ and provides more than a “brief description of the agency action.”⁸

12. In fact, the first paragraph of Exhibit C specifically requests that the Secretary review that Order:

COME NOW, the Petitioners, by and through their attorney, David M. Traster, Foulston Siefkin, Wichita, Kansas, and pursuant K.S.A. 2016 Supp. 82a-1901 and K.S.A. 77-501, et seq., request that the Secretary of Agriculture conduct *administrative review of the Chief Engineer’s April 13, 2018, Order that establishes a Local Enhanced Management Area (“LEMA”) within the boundaries of the Northwest Kansas Groundwater Management District No. 4 (“GMD4,” the “GMD,” or the “District”).*⁹

13. Moreover, the Secretary’s May 18, 2018, Order, specifically acknowledges the request for review of the April 13, 2018, Order by the Secretary of Agriculture:

That on April 13, 2018, the Chief Engineer issued an Order of Designation Regarding the Groundwater Management District No. 4 District Wide Local Enhanced Management Plan (“Order of Designation”) which approved the modified proposed management plan.

That on April 29 2018, David M. Traster, attorney for Petitioners (“Petitioners”), filed a Petition for Review by the Secretary of Agriculture

⁷ See K.S.A. 77-614(b)(3).

⁸ *Id.*

⁹ Emphasis added.

(“Petition for Review”) requesting review of the Order of Designation.¹⁰

14. The Petition for Judicial Review states that the “Plaintiffs seek judicial review of the Chief Engineer’s February 23, 2018, and February 26, 2018, Orders establishing a LEMA in GMD4 *for the reasons set out in the Petition for Administrative Review*. The February 23, 2018 Order, the February 26, 2018 Order, and the Petition for Administrative Review are attached as Exhibits A, B, and C.”¹¹

15. The Petition for Judicial Review goes on to explain that, pursuant to K.S.A. 77-527, Plaintiffs filed a Petition for Administrative Review on April 29, 2018, and that the Secretary of Agriculture declined review of the Chief Engineer’s Orders on May 18, 2018. The Order declining review is attached to the Petition for Judicial review as Ex. E.

16. The record reflects that the agency lawyer who signed and filed the Chief Engineer’s Motion to Dismiss was involved in the LEMA proceeding from the outset and at every stage of the proceeding.¹²

¹⁰ Petition Exhibit E, p. 2,

¹¹ Petition, ¶ 55.

¹² Mr. Titus prepared the Certificate of Agency Record; was copied on the June 27, 2017 letter from the Chief Engineer to Mr. Luhman, the GMD4 Manager (KDA 000134-35); appeared for the Chief Engineer at the hearing held on November 14, 2017 (KDA 000411); received various pleadings (KDA 000291, 307, 310, 336, 354, 367, 381, 403, 407, 1208, 2384, 2433, 2605, 2609, 2624, 2707, 2721, 2731, 2736, and 2834); prepared multiple decision documents (KDA 000360, 385, 395, 2331, 2464, 2547-48, 2656, 2688, 2788-89, and 2837); and is the agency officer designated to receive service of petitions for judicial review (2605, 2730, and 2838).

Argument and Authorities

The Petition complies with the requirements of the Kansas Judicial Review Act and requests review of the Chief Engineer’s April 13, 2018, Order designating a LEMA within GMD4.

The Kansas Judicial Review Act (“KJRA”), permits judicial review of agency actions.¹³ A Petition for Judicial Review must be filed with the clerk of the court¹⁴ within 30 days after final agency action.¹⁵

A petition for judicial review must, among other things, identify “*the agency action at issue*,” together with a duplicate copy, summary *or brief description of the agency action.*”¹⁶

The statute goes on to state that the failure to include some of the required information does not deprive the Court of jurisdiction and directs the Court to “freely” permit Plaintiffs to supplement omitted information.

Failure to include some of the information listed in subsection (b) in the initial petition does not deprive the reviewing court of jurisdiction over the appeal. Leave to supplement the petition with omitted information required by subsection (b) shall be freely given when justice so requires.¹⁷

This Petition for Judicial Review was filed after exhausting administrative remedies and within the time limits to seek review of the Chief Engineer’s April 13,

¹³ K.S.A. 77-601, *et seq.*

¹⁴ K.S.A. 77-614(a)

¹⁵ K.S.A. 77-613(d).

¹⁶ K.S.A. 77-614(b)(3) (emphasis added).

¹⁷ K.S.A. 77-614(c).

2018, Order and significantly after it would have been possible to seek judicial review of the February Orders, assuming that judicial review of those Orders was even possible.

The requirement that a Petition for Judicial Review strictly comply with the KJRA is focused on providing the agency and the Court with notice of the issues to be addressed. Reading the Petition as a whole, it was and is evident that the Plaintiffs seek review of April 13, 2018, Order in spite of the fact that the wrong Orders were referred to in the Petition.

In *Swank v. Kansas Dept. of Revenue*,¹⁸ after an administrative hearing, the Department of Revenue suspended Swank's driver's license for driving under the influence of alcohol.

Swank filed a petition for judicial review that did not explicitly state that the arresting officer lacked "reasonable grounds to believe that Swank was operating a vehicle while under the influence." Instead, she asserted that the arresting officer did not see her drive and because Swank's post-driving alcohol consumption could have impacted her blood alcohol breath test, there was no evidence that she was under the influence of alcohol while she operated the vehicle.

The District Court held a de novo trial and reversed the Agency's decision. The Court of Appeals reversed the District Court and the Supreme Court granted review.

¹⁸ 294 Kan. 871, 281 P.3d 135 (2012).

The Agency argued for the first time in the Supreme Court that Swank failed to plead the issue of reasonable grounds thus depriving the Court of subject matter jurisdiction. Noting the requirement that Petitions for Judicial review must strictly comply with the KJRA pleading requirements, the Supreme Court held that it had subject matter jurisdiction because Swank’s Petition did not force the agency to guess at the specifics undergirding it. “She explicitly alleged specific reasons for relief under K.S.A. 77–614(b)(6).”¹⁹

The Court went on to explain that the requirement for “strict compliance” is to provide “fair notice” so that opposing parties and the Court have notice of the issues to be addressed.

Our conclusion that the district court had subject matter jurisdiction in this case also is consistent with the *fair notice* purpose of the strict compliance pleading requirement discussed in *Bruch* and *Kingsley*. See *Kingsley*, 288 Kan. at 406, 204 P.3d 562 (petition for judicial review strictly complies with K.S.A. 77–614[b] when reasons for relief set forth in it give court, agency notice of issues to be raised); *Bruch*, 282 Kan. at 779, 148 P.3d 538 (aims of K.S.A. 77–614[b] to assist people in filing appeals from administrative actions, to facilitate judicial task by serving notice upon opposing parties, reviewing court of issues to be addressed, relevant facts).²⁰

The Court went on to emphasize that the Petition provided adequate notice and allowed for “comprehension of the nature of Swank’s claims “ in part because the

¹⁹ 294 Kan. at 877.

²⁰ 294 Kan. at 877-78 (emphasis added).

Agency's lawyer had participated in the administrative hearing and was therefore aware of Swank's position.²¹ Moreover, it was plain that the District Court understood the nature of Swank's allegations.

The record before us demonstrates adequate notice to and comprehension of the nature of Swank's claims on the part of the agency and the district court judge. The Department of Revenue's counsel had participated in the administrative hearing in which the presiding officer noted Swank's unsuccessful motion to dismiss for lack of Morrison's "reason to believe," as well as Morrison's failure to inquire about post-driving consumption. As to Judge Creitz, given the wording of his ultimate spoken and written rulings, it is plain that he understood the import of the petition's allegations, including Swank's challenge to Morrison's "reasonable grounds" in the absence of any inquiry about post-driving alcohol consumption.²²

The *Swank* Court did not address the Kansas Legislature's 2009 amendment of K.S.A. 77-614 adding section (c),²³ presumably because the Agency did not raise the jurisdiction issue until the case reached the Supreme Court.

That is not the case here. While the Court requires "strict compliance" with the pleading requirements, the Legislature specifically permits supplementation of a Petition for Judicial Review.

(c) Failure to include some of the information listed in subsection (b) in the initial petition does not deprive the reviewing court of jurisdiction over

²¹ See Statement of Facts, ¶ 16.

²² *Id.*

²³ L. 2009, Ch. 109, Sec. 26.

the appeal. Leave to supplement the petition with omitted information required by subsection (b) shall be freely given when justice so requires.²⁴

While this is a Chapter 77 action, the Chief Engineer's Motion to Dismiss was filed pursuant to the Code of Civil procedure, the KJRA, and Supreme Court Rule 133.²⁵ The KJRA does not mention amendments of pleadings but the Code of Civil procedure allows amendment within 21 days after service of a K.S.A. 60-212(b) Motion to Dismiss.²⁶ An amended Petition is being filed simultaneously with this Response to the Motion to Dismiss.

The Chief Engineer seeks dismissal of the case and denial of "any and all relief" because the Petition references earlier, non-final Orders. The Chief Engineer's Motion fails to address the Plaintiff's request for judicial review of the Chief Engineer's failure to adopt rules and regulations as required by K.S.A. 82a-1041. The case should not be dismissed for any reason or even if the Court finds that the Chief Engineer's Motion to Dismiss has merit.

²⁴ The 2009 Legislature amended other provisions of the KJRA to ameliorate the harsh treatment of persons seeking judicial review of Agency actions. *See, e.g.*, K.S.A. 77-603(d) (permitting the court to relieve a petitioner of the requirement to exhaust administrative remedies to avoid irreparable harm); K.S.A. 77-617(d) (expanding the scope of issues that can be raised to include issues "first reasonably knowable to the person"); and K.S.A. 77 621(d) (expanding the definition of "in light of the record as a whole."

²⁵ Opening paragraph of the Chief Engineer's Motion to Dismiss.

²⁶ K.S.A. 60-215(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 19th day of July, 2018, I certify that the above and foregoing Response to Chief Engineer's Motion to Dismiss was electronically filed with the clerk of the court using the eFlex system and served on counsel of record via same and by email as follows:

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