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

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**IN THE 24TH JUDICIAL DISTRICT**
**DISTRICT COURT OF EDWARDS COUNTY, KANSAS**

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| WATER PROTECTION ASS'N OF CENTRAL KANSAS,<br>*Plaintiff,*<br>*v.*<br><br>DAVID BARFIELD, P.E., IN HIS OFFICIAL CAPACITY AS CHIEF ENGINEER, DIVISION OF WATER RESOURCES, KANSAS DEPARTMENT OF AGRICULTURE,<br>*Defendant.*<br>*v.*<br><br>THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS,<br>*Intervenors.* | Case No. 2019-CV-000005 |

Pursuant to K.S.A. Chapter 77

**ANSWER**

COME NOW the Intervenors, the Cities of Hays, Kansas and Russell, Kansas ("Cities"), and deny each and every allegation of the Petition that is not specifically admitted.

1. The allegations in Paragraph 1 of the Petition are admitted.

2. The allegations in Paragraph 2 of the Petition are admitted.

3. The allegations in Paragraph 3 of the Petition are admitted.

4. The allegations in Paragraph 4 of the Petition are admitted.

5. The Cities are without information about the specific membership or the purposes of the Water PACK organization other than as set out in the Articles of Incorporation and therefore deny those allegations in Paragraph 5 of the Petition. Further answering, the Cities deny that Water PACK's members include all of the general public and that the organization itself is aggrieved. The Cities admit that Water PACK requested that the Secretary of Agriculture review the Master Order. The Cities further deny that Water PACK is adversely affected and aggrieved by the Master Order and that the organization is entitled to seek judicial review of the Master Order.

6. The Cities deny that water is currently being diverted for irrigation use on the R9 Ranch in Edwards County, Kansas, but admits the balance of Paragraph 6 of the Petition. Further answering, the Change Applications sought to change the place and type of use as well as the points of diversion for each of the R9 Water Rights.

7. The Cities are without sufficient information to admit or deny the allegations contained in Paragraph 7 of the Petition and therefore deny the same. Further answering, the Cities lack information relating to the current land-ownership status of present Water PACK members, the location or type of land allegedly owned by such members, or the existence, ownership, or present status of water rights appurtenant to land that Plaintiff may be referring to in Paragraph 7 and therefore deny the same. Further answering, the allegation that Water PACK members own land "adjacent" to the R9 Ranch is a legal term of art for the Court's determination and no answer to that allegation is required herein. To the extent that an answer is required, the same is denied. The Cities are further without information about whether all the owners of all land with appurtenant water rights nearby the R9 Ranch are members of Water PACK and

specifically deny the implication that all Water PACK members own land and water right "adjacent" to the R9 Ranch.

8. The allegations in Paragraph 8 of the Petition are admitted.

9. The Cities admit that Water PACK's consultant submitted reports, Water PACK submitted letters, and that some Water PACK members participated below. The Cities are without information about whether all persons who submitted comments are Water PACK members and therefore deny the remaining allegations of Paragraph 9 of the Petition.

10. The Cities admit that the Cities, DWR's Stafford and Stockton Field Offices, GMD5, GMD5's consultant, and some members of the general public participated in the proceedings before the Chief Engineer. The Cities are without information regarding the residence of all members of the general public who participated. Further answering, the Cities are without information regarding Water PACK's membership but are aware that some Water PACK members did not participate in the proceedings before the Chief Engineer and therefore deny the allegation that Water PACK's entire membership participated in the proceedings below.

11. The allegations in Paragraph 11 of the Petition are admitted.

**The Cities' Response to the Summary of Applicable Kansas Water Law**

12. The language included in the block-quote in Paragraph 12 of the Petition appears to have been copied-and-pasted in part from the petition for judicial review filed in the *Friesen v. Barfield* case, but state that such language speaks for itself and that the cherry-picked provisions included by Water PACK in Paragraph 12 may or may not have bearing on the present case. Further responding, the allegations in the quoted language are conclusions of law, not statements of fact, and no response is therefore required. The Cities admit that the water rights they own on the R9 Ranch are protected by Kansas law and that Water PACK is seeking to undercut the stability provided by that law by pursuing the present action.

13. The allegations in Paragraph 13 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. The Cities deny that the monikers Water PACK uses to characterize the listed statutes and regulations are accurate and specifically assert that Water PACK has

mischaracterized K.S.A. 82a-708b(a)(2) as a "No Injury Rule" and K.A.R. 5-5-8 as a "No Injury Regulation."

14. The allegations in Paragraph 14 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. Further answering, the citied statutes speak for themselves. The Cities deny that K.S.A. 82a-708b(a)(2) is properly characterized as a "No Injury Rule." The Cities admit that K.S.A. 82a-708a permits changes to the point of diversion and type of use as well as changes in place of use but deny the incorrect implication that the statute allows changes in the point of diversion or type of use but not both.

15. The allegations in Paragraph 15 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. Further answering, the *Garetson* decision speaks for itself. To the extent that Paragraph 15 contains factual allegations, they are denied.

16. The allegations in Paragraph 16 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. Further answering, K.A.R. 5-5-8 speaks for itself. To the extent that Paragraph 16 contains factual allegations, they are denied.

17. The allegations in Paragraph 17 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. Further answering, K.A.R. 5-5-9 (1994), the text of which is attached hereto, speaks for itself. To the extent that Paragraph 17 contains factual allegations, they are denied.

18. The allegations in Paragraph 18 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. Further answering, K.S.A. 82a-708b speaks for itself. To the extent that Paragraph 18 contains factual allegations, they are denied.

19. The allegations in Paragraph 19 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. Further answering, the cited statutes and regulations speak for themselves. The Cities specifically deny the assertions that the cited statutes include all of the authority granted to the Chief Engineer and that contingent approval of a Change Application is prohibited. To the extent that Paragraph 19 contains factual allegations, they are denied.

**The Cities' Response to the Alleged Defects in the Master Order and Its Proceedings.**

20. The allegations in Paragraph 20 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. The Cities admit that the Master Order conditions the effectiveness of the Change Approvals upon issuance of a subsequent Transfer Order. Further answering, the statutes referenced in Paragraph 20 speak for themselves. The Cities deny that the Water Appropriation Act prohibits contingent approval of Change Applications. Further answering, the Cities state the Chief Engineer's Water Transfer Regulations specifically contemplate "contingently approved" Change Applications (K.A.R. 5-50-2(x)(2)(A)-(C)) and that the Master Order includes other conditions.

21. The allegations in Paragraph 21 of the Petition are conclusions of law, not statements of fact, and no response is therefore required. Further answering, the statutes and regulations referenced in Paragraph 21 speak for themselves. The Cities deny that K.S.A. 77-421 is part of the Kansas Administrative Procedure Act, that KAPA has anything to do with promulgating

administrative regulations, and that KAPA or any other Kansas statute requires such changes especially since the Chief Engineer's Water Transfer Regulations specifically contemplate "contingently approved" Change Applications in the water transfer context. K.A.R. 5-50-2(x)(2)(A)-(C).

22. The Cities admit that there is only one reference to K.A.R. 5-5-8 in the Master Order but deny the remaining allegations in Paragraph 22 of the Petition. The Master Order speaks for itself. The Cities specifically deny Water PACK's incorrect allegation that the Master Order does not include specific findings about "material injury or adverse effects" on other water rights. In fact, the Master Order includes numerous specific findings that approval of the Change Applications will not result in material injury or adverse effects on other water rights, including, without limitation:

> 66. The Chief Engineer carefully considered the public input received that was germane to the Chief Engineer's decisions regarding the Change Applications, specifically the decisions required by K.S.A. 82a-708b, i.e., whether the applicant has demonstrated that any proposed change is reasonable, will not impair existing rights, and relates to the same local source of supply as that to which the water right relates.

70. After careful review of the documents and information referenced herein, the Chief Engineer finds that conversion of the R9 Water Rights from irrigation to municipal use under the terms and conditions set out in this Master Order is reasonable, will not impair existing rights, and relates to the same local source of supply as that to which the R9 Water Rights relate. *See* K.S.A. 82a-708b(a). Accordingly, the conversion of the R9 Water Rights from irrigation to municipal use should be contingently approved on the terms and conditions set out in this Master Order.

86. The Chief Engineer finds that the consumptive use determined by DWR was done in conformity with applicable DWR regulations. DWR properly applied K.A.R. 5-5-9(b) (1994 version) at the request of the applicant Cities to consider the use of alternate crops such as alfalfa. Furthermore, no compelling evidence has been offered to substantiate concerns of impairment and therefore K.A.R. 5-5-9(c) (1994 version) is not applicable in this instance.

88. Considering the reduced pumping rates, the distances between the Cities' wells and the wells of nearby water rights, the groundwater modeling results provided by the Cities, and the TYRA Limitation on diversions from the R9 Water Rights, the Chief Engineer finds, pursuant to K.S.A. 82a-708b(a)(2), that for each of the wells for which the Cities have applied to change from irrigation use to municipal use as requested in the Change Applications and explained herein, the Cities have demonstrated in each case that the proposed quantities for municipal use as requested in the Change Applications and explained herein are reasonable and will not impair existing rights.

189. The Chief Engineer finds that this contingent change in places of use is reasonable, will not impair existing rights, and relates to the same local source of supply as that to which the R9 Water Rights relate. *See* K.S.A. 82a-708b(a).

> 212. The Chief Engineer finds that the requested changes in points of diversion are reasonable, will not impair existing rights, and relate to the same local source of supply as that to which the R9 Water Rights relate. *See* K.S.A. 82a-708b(a).

Further answering, each of the Change Approvals, which are incorporated in the Master Order (Master Order, ¶ 5), include the Chief Engineer's finding that "the changes requested in the Change Application are reasonable and will not impair existing rights, that such changes relate to the same local source of supply, and that the Change Application should be and is hereby approved pursuant to K.S.A. 82a-708b and as provided herein."

23. The Master Order speaks for itself. The Cities admit that conversion of the R9 Water Rights from irrigation to municipal uses "will not impair existing rights." The Cities deny Water PACK's incorrect allegation that "contrary evidence" exists that amounts to a determination of fact, made or implied by the agency, that is supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, especially when the Court cannot reweigh the evidence or engage in *de novo* review. K.S.A. 77-621(c).

24. The 2018 Burns and McDonnell modeling report and the conclusory statements in Mr. Vincent's 1994 report speak for themselves. The Cities deny that the Burns and McDonnell Report shows 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 and that Burns and McDonnell's methods were inappropriate or invalid.

25. The Cities deny the allegations in Paragraph 25 of the Petition.

26. The Cities deny the allegations in Paragraph 26 of the Petition. Further answering, the cited FSA records were not provided to the Chief Engineer or the Secretary of Agriculture, are not part of the Agency Record, and are not within the narrow grounds upon which additional evidence may be offered under K.S.A. 77-619. Judicial review of disputed facts must be confined to the agency record "as supplemented by additional evidence taken pursuant to this act." K.S.A. 77-618. The Court can only receive supplemental evidence if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding improper constitution as a decision-making

body, improper motive or grounds for disqualification, or unlawfulness of procedure or of decision-making process. K.S.A. 77-619.

The Cities further deny the existence of any "contrary evidence" that amounts to a determination of fact, made or implied by the agency, that is supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, especially when the Court cannot reweigh the evidence or engage in de novo review. K.S.A. 77-621(c).

27. The Cities deny the allegations of Paragraph 27 of the Petition. The Chief Engineer properly applied K.A.R. 5-5-9(b) (1994 version), consumptive use was determined in conformity with applicable DWR regulations, and K.A.R. 5-5-9(c) (1994 version) was not applicable because there was no compelling evidence to substantiate impairment concerns.

28. The Cities admit that Water PACK's interpretation of the relevant statutes and regulations would be "unfair" to the Cities and that the authorized transfer of up to 6,756.8 acre-feet of water will not "impair existing rights." The remaining allegations of Paragraph 28 of the Petition are denied.

29. The Master Order speaks for itself.

30. The Cities deny the allegations in Paragraph 30 of the Petition. The Master Order carefully, thoughtfully, and specifically addresses all of the evidence, analysis, and recommendations submitted.

**Prior Agency Proceedings**

31. The Cities admit the allegations in Paragraph 31 of the Petition.

32. The Cities admit the allegations in Paragraph 32 of the Petition.

33. The Cities admit the allegations in Paragraph 33 of the Petition.

34. The Cities admit the allegations in Paragraph 34 of the Petition.

**Affirmative Defenses**

35. The Petition fails to state a claim on which relief can be granted.

36. The Plaintiff lacks standing.

37. The Chief Engineer acted within the jurisdiction conferred upon him in the Water Appropriation Act, the Water Transfer Act, and the regulations adopted under the authority granted by those statutes.

38. The Chief Engineer accurately interpreted and applied the law, including K.S.A. 82a-708b.

39. The Chief Engineer engaged in lawful procedures and followed all prescribed procedure. The Petition fails to allege any facts to support its assertion that the Chief Engineer engaged in an unlawful procedure. The administrative proceeding that resulted in the Master Order began on June 25, 2015, when the Cities filed the original Change Applications. The Agency Record shows that Water PACK was fully informed that the proceeding had commenced early in the proceeding. Water PACK could have intervened in the Agency proceeding but declined to do so until three years later at the June 2018 public hearing.

40. The Master Order and the Change Approvals are based on determinations of fact, made or implied by the Chief Engineer, that are fully supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole. The Master Order demonstrates that the Chief Engineer gave full and careful consideration to all of the evidence, whether for or against the findings set out in the Draft Master Order dated April 4, 2018.[1]

[1] https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/r9ranchmasterorder_20180504.pdf?sfvrsn=c6a881c1_0

WHEREFORE, the Cities respectfully request that the Court dismiss Water PACK's Petition for Judicial Review, for its costs, and for such other relief as the Court in its discretion deems just and equitable.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 9th day of July, 2019, I presented the foregoing to the Clerk of the Court for filing and uploading to the Kansas Courts e-Filing system that will send notice of electronic filing to the following:

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**K.A.R. 5-5-9 (1994 version)**

**K.A.R. 5-5-9. Criteria for the approval of an application for a change in the use made of water from irrigation to any other type of beneficial use of water.**

(a) The approval of a change in the use made of water from irrigation to any other type of beneficial use shall not be approved if it will cause 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 the following criteria:

(1) The maximum annual quantity of water to be allowed by the change approval shall be the net irrigation requirement (NIR) for the 50% chance rainfall for the county of origin, as set forth in K.A.R. 5-5-12, multiplied by the maximum acreage legally irrigated under the authority of the water right in any one calendar year during the perfection period. For vested rights, the acreage used shall be the maximum acreage irrigated prior to June 28, 1945; or

(2) if the applicant establishes to the satisfaction of the chief engineer the need for more flexibility in the authorized annual quantity, the application may be approved subject to the following limits.

(A) The maximum annual quantity of water to be allowed by the change approval shall be the NIR for the 80% chance rainfall for the county of origin, as set forth in K.A.R. 5-5-12, multiplied by the maximum acreage legally irrigated in any one calendar year during the perfection period. For vested rights the acreage used shall be the maximum acreage irrigated prior to June 28, 1945.

(B) The new type of beneficial use shall be further limited by a five year fixed allocation of water in which the NIR for a 50% chance rainfall for the county of origin, as set forth in K.A.R. 5-5-12, is multiplied by five times the maximum acreage lawfully irrigated in any one calendar year during the perfection period. For vested

rights, the acreage used shall be the maximum acreage irrigated prior to June 28, 1945.

(C) An application for a term permit which will circumvent the five year allocation of water limit shall not be approved by the chief engineer.

(3) In determining whether the net consumptive use of water will be increased by the proposed change in the use made of water, the applicant shall be given credit by the chief engineer for any return flows from the proposed type of beneficial use which will return to the same local source of supply as the return flows from the originally authorized type of beneficial use as substantiated by the applicant to the satisfaction of the chief engineer by an engineering report or similar type of hydrologic analysis.

(4) The authorized quantity to be changed to the new type of beneficial use shall never exceed the maximum annual quantity authorized by the water right.

(5) If a water right which overlaps the authorized place of use of one or more other water rights, either in whole or in part, is being changed to a different type of beneficial use, the total net consumptive use of all water rights after the change is approved shall not exceed the total net consumptive use of all of the rights before the change is approved.

(6) The approval for a change in the use made of water shall also be limited by that quantity reasonable for the use proposed by the change in the use made of water.

(b) Upon request of the applicant, the historic net consumptive use actually made during the perfection period, or prior to June 28, 1945 in the case of vested rights, under the water right proposed to be changed shall be considered by the chief engineer, but the burden shall be on the owner to document that historic net consumptive use with an engineering study, or an equivalent documentation and analysis, and demonstrate to the satisfaction of the chief engineer that the analysis submitted by the applicant is a more accurate estimate of the historic net

consumptive use than the net consumptive use calculated using the methodology set forth in paragraph (a)(1).

(c) If the methods set forth in subsection (a) produce an authorized annual quantity of water which appears to be unrealistic and could result in impairment of other water rights, the chief engineer shall make a site-specific net consumptive use analysis to determine the quantity of water which was actually beneficially consumed under the water right. The quantity approved shall be limited to the quantity determined to be reasonable by the chief engineer's analysis. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 1993 Supp. 82a-708b; effective Nov. 28, 1994.)