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CASE NUMBER: 2019-CV-000005

THE STATE OF KANSAS
TWENTY-FOURTH JUDICIAL DISTRICT
IN THE
DISTRICT COURT OF EDWARDS COUNTY, KANSAS

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS

Plaintiff,

vs.

CHRIS BEIGHTEL, P.E., THE CHIEF ENGINEER OF THE STATE OF KANSAS, DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, IN HIS OFFICIAL CAPACITY

Defendant,

vs.

THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS

Intervenors

CASE NO. 2019-CV-000005

Pursuant to K.S.A. Chapter 77

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

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SUMMARY OF ARGUMENT

The predecessor to the Defendant (in his official capacity, the "Chief Engineer") allowed the Intervenors (together, the "Cities") to pirate the proscribed process for water change approvals. In particular, the Chief Engineer improperly:

a. Negotiated the terms of final orders in the absence of authority to do so and failed to post negotiated draft orders on the Division of Water Resources ("DWR") website;

b. Included contingencies within the change approvals;

c. Caused DWR to satisfy evidentiary burdens expressly placed upon the Cities;

d. Ignored contrary and critical evidence submitted by the Cities, the Plaintiff ("Water PACK"), and Big Bend Groundwater Management District No. 5 ("GMD5");

e. Required the Cities to perform an analysis required of the Chief Engineer and DWR, applying standards lacking the force of law; and

f. Imposed a unique and previously unseen condition upon the change approvals intended to sidestep the express holding of the Court of Appeals in *Clawson v. Kan. Dep't of Agriculture*, 315 P.3d 896 (Kan. App. 2013).

Any one of the foregoing defects render the order invalid. This court should therefore:

- set aside or enjoin the Master Order, together with the approvals referenced therein;
- to the extent that the Court deems the contingencies in the Master Order improper, order the Chief Engineer to reject the Cities' change applications;
- order any other appropriate relief.

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STANDARDS OF REVIEW

Section 82a-724 of the Kansas Water Appropriation Act (the "KWAA") subjects change applications adjudicated by the Chief Engineer to review under the Kansas Judicial Review Act (the "KJRA").[1] The party seeking relief from invalid agency action bears the burden of proving that invalidity.[2] In assessing validity, a reviewing court must apply tests described in K.S.A. 77-621(c) to the actions of the agency, as of the time the actions occurred.[3] If a court deems such tests satisfied, after standards specifically applicable to each test described in 77-621(c), it may award relief set forth in K.S.A. 77-622.[4]

This case asks whether tests two, four, five, seven, and eight of K.S.A. 77-621(c) apply to the Master Order Contingently Approving Change Applications Regarding R9 Water Rights dated March 27, 2019 (together with change approvals referenced therein, the "Master Order"). Simplified, those KJRA tests render invalid an action that entails:

Standard Two: Exceeding Agency Authority or Jurisdiction;

Standard Four: Improper Interpretation or Application of the Law;

Standard Five: Products of Procedural Irregularity;

Standard Seven: A Lack of Support of Substantial Evidence in Light of the Whole Record; or

Standard Eight: An Otherwise Unreasonable, Arbitrary, or Capricious Action.[5]

Claims relating to authority, legal interpretation or application, and unlawful procedure require *de novo*

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[1] *See* Clawson v. Kan. Dep't of Agriculture, 315 P.3d 896, 902 (Kan. App. 2013) (internal citations omitted).

[2] *Clawson*, 315 P.3d at 902 (internal citations omitted); KSA § 77-621(a)(1).

[3] *Id.* at 77-621(a)(2).

[4] *See* Michael S. Obermeier, *The Kansas Judicial Review Act: A Road Map*, J. KAN. B. A., May 2017, at 31 (citing KSA 77-622).

[5] *See* Steve Leben, *Challenging and Defending Agency Actions in Kansas*, J. KAN. B. A., July 1995, at 22 (citing a prior version of K.S.A. 77-621(c)); *see also* KSA 77-622 (noting that the court must account for harmless error); Farmland Indus., Inc. v. State Corp. Comm'n of State of Kan., 25 Kan. App. 2d 849, 852, 971 P.2d 1213, 1217 (1999) ("If the agency error did not prejudice the parties, the agency's action must be affirmed.").

review as questions of law, subject to the Court receiving evidence outside of the agency record in the case of procedural irregularities.[6] With regard to erroneous legal interpretations or applications of law construed under 77-621(c)(4), any historic deference to an agency's interpretation of its enabling statute has been consigned to the jurisprudential dust bin, as the Kansas Supreme Court has deemed the doctrine of operative construction to be "abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal."[7] The seventh and eighth tests each involve standards described as follows:

> A challenge under [the Unreasonable, Arbitrary and Capricious test] attacks the quality of the agency's reasoning. [Citations omitted.] Although review must give proper deference to the agency, its conclusion may be set aside—even if supported by substantial evidence—if based on faulty reasoning. A challenge under [the Substantial Evidence test] attacks the quality of the agency's fact-finding, and the agency's conclusion may be set aside if it is based on factual findings that are not supported by substantial evidence.[8]

For purposes of the Substantial Evidence test, "in light of the record as a whole" means that the adequacy of the evidence in the record to support a given fact finding must be judged in light of all relevant evidence in the record, including any determinations of veracity by the presiding officer, but the court may not reweigh the evidence or engage in *de novo* review.[9] In addition, a reviewing court must assess evidence that detracts from an agency's factual findings when assessing whether evidence was (in fact) substantial; that is, the reviewing court "must determine *whether the evidence supporting the*

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[6] *Id.*; Friedman v. Kan. State Bd. of Healing Arts, 296 Kan. 636, 620 (2013) (regarding de novo review to determine if an agency's action exceeded its authority); *see Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362 (2015) (regarding *de novo* review to determine if the agency erroneously interpreted or applied the law); Sheldon v. Kan. Pub. Employees Ret. Sys., 40 Kan. App. 2d 75, 81 (2008); *see* also K.S.A. § 77-619(a) (regarding evidence outside the administrative record); Katz v. Kan. Dept. of Rev., 45 Kan. App. 2d 877, 886 (2011) (regarding improper interpretation or application of the law).

[7] Douglas v. Ad Astra Info. Sys., LLC, 296 Kan. 552, 559, 293 P.3d 723 (2013); *see also* May v. Cline, 304 Kan. 671, 675, 372 P.3d 1242 (2016); Villa v. Kansas Health Policy Auth., 296 Kan. 315, 323, 291 P.3d 1056 (2013); Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs., 290 Kan. 446, 457, 228 P.3d 403 (2010) (an agency's statutory interpretation "is not afforded any significant deference on judicial review.").

[8] In re Protests of Oakhill Land Co., 46 Kan. App. 2d 1105, 1115, 269 P.3d 876 (2012).

[9] Leben, *supra*, 64 J.K.B.A. at 27 ("The plain language of the KJRA, like the federal APA, calls for the substantial evidence test to be applied to the whole record, not just the portion supporting the agency finding.").

agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusion." [10] Further, a reviewing court owes no deference to the agency's credibility determinations (if any) if the agency decision rests upon submitted materials and the agency did not view or cross-examine the individuals submitting those materials in person.[11] Taken together, this means that a reviewing court, focusing on the agency record and additional evidence admitted pursuant to the KJRA, will (1) review evidence both supporting and contradicting the agency's findings; (2) examine the presiding officer's credibility determinations; and (3) review the agency's explanation as to why the evidence supports its findings.[12]

With regard to the Unreasonable, Arbitrary, or Capricious test, "[a]n administrative action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate."[13] If the agency's determinations are clearly overcome by substantial contrary evidence, thus rendering the decision so wide of the mark as described, the reviewing court may reverse the agency's actions. [14]

Whether an agency action is arbitrary and capricious in turn "relates to whether a particular action should have been taken or is justified, such as the reasonableness of an agency's exercise of discretion in reaching a determination or whether the agency's action is without foundation in fact."[15]

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[10] Herrera-Gallegos v. H & H Delivery Serv., Inc., 42 Kan. App. 2d 360, 361-63 (2009) (emphasis added).

[11] Hudson v. Bd. of Directors of the Kansas Pub. Employees Ret. Sys., 388 P.3d 597, 603 (Kan. App. 2016) ("Without live testimony, the Board was not in a position to observe the demeanor of the doctors or assess their credibility."). In such a scenario, it is proper for the district court to view credibility determinations of the agency with skepticism because there is no support for those determinations in the record. *Id.* at 604-05.

[12] Williams v. Petromark Drilling, LLC, 299 Kan. 792, 795, 326 P.3d 1057 (2014).

[13] *Katz*, 45 Kan. App. 2d 877 (2011).

[14] *See* Denning v. Johnson Cty., Sheriff's Civil Serv. Bd., 46 Kan. App. 2d 688, 701, 266 P.3d 557, 568 (2011), *aff'd sub nom.,* Denning v. Johnson Cty., 299 Kan. 1070, 329 P.3d 440 (2014); Williams v. Petromark Drilling, LLC, 299 Kan. 792, 795 (2014); In re Protests of Oakhill Land Co., 46 Kan. App. 2d 1105, 1115, 269 P.3d 876 (2012);.

[15] Katz v. Kan. Dept. of Rev., 45 Kan. App. 2d 877, 888 (2011).

> Essentially, the test under K.S.A. 77–621(c)(8) determines the reasonableness of the agency's exercise of discretion in reaching its decision based upon the agency's factual findings and the applicable law. Useful factors that may be considered include whether: (1) the agency relied on factors that the legislature had not intended it to consider; (2) the agency entirely failed to consider an important aspect of the problem; (3) the agency's explanation of its action runs counter to the evidence before it; and (4) whether the agency's explanation is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[16]

As between an agency action lacking substantial evidence under test seven or an action that is unreasonable, arbitrary, or capricious under test eight, failure to consider uncontested evidence is deemed to be unreasonable, arbitrary, and capricious under K.S.A. 77-621(c)(8), but not as a failure of substantial evidence under 77-621(c)(7).[17]

BACKGROUND AND PROCEDURAL HISTORY

This controversy involves the R9 Ranch, an agricultural beachhead outside Kinsley.[18] Various owners of the R9 Ranch, formerly known as the Circle K Ranch, struggled to grow crops in the sandy soils of the ranch, which sits along the perpetually dry Arkansas River.[19]

> A study of the R9 Ranch soil types using the Edwards County Soil Survey Maps (USDA/Soil Conservation Service, now NRCS) yields the following information: Approximately 17 % of the R9 Ranch has a Tivoli Fine Sand Soil Type. **The manual states that this soil type is not suitable for irrigation due to its extreme permeability.** About 67 % of the R9 Ranch is Pratt-Tivoli Loamy Fine Sand soil type. The USDA manual states that this soil has "**extremely low water holding capacity, rapid permeability, and subject to blowing**". Taken together, 84% of the R9 Ranch has extremely low water holding capacity.[20]

In the 1980s, DWR engaged professional engineers to conduct site-specific surveys of the R9 Ranch

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[16] Wheatland Elec. Co-op., Inc. v. Polansky, 46 Kan. App. 2d 746, 757–58, 265 P.3d 1194 (2011) (internal citations omitted; emphasis supplied).

[17] *See Hudson*, 388 P.3d at 605.

[18] *See* Kansas Historical Society, *Interview with Jacob Roenbaugh*, p. 2 (Nov. 9, 2009) ("Interviewer: What's the soil like up there? Jake: Sandy, I'm a sand rat."), *available at* https://www.kansasmemory.org/item/227287.

[19] A.R. 38.

[20] A.R. 784 (emphasis supplied).

to evaluate perfection of permits to appropriate water.[21] Those engineers prepared field inspections reports (each, an "FIR") that ultimately led DWR to permit the diversion of 7,647 acre-feet per year ("AF") of water for irrigation use.[22] However, irrigation diversions often exceeded 8,000 AF.[23]

Today, the R9 Ranch covers approximately 6,900 contiguous and sandy acres about five miles southwest of Kinsley, where prior owners irrigated between 5,111 and 5,147 acres of farmland.[24] The City of Hays purchased the R9 Ranch in 1995 and the City of Russell acquired an 18 percent interest in the R9 Ranch in 1996.[25] The Cities last used the R9 Ranch for crop production in 2017.[26] As of 2018, the Cities had made good on 75% of their effort to convert the entirety of the R9 Ranch from irrigated crops to native grasses.[27]

On June 29, 2015, the Cities submitted initial applications under the Kansas Water Appropriation Act (the "KWAA") that proposed to pipe all 7,625AF appropriated at the R9 Ranch to Hays and Russell.[28] A parallel water transfer act ("WTA") application filed six months later represents the second WTA application in Kansas history and the first under current WTA requirements.[29] The Cities twice amended the KWAA applications in 2016 and on March 24, 2019.[30]

In connection with their KWAA change applications, the Cities sought to limit procedural

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[21] *See* Deposition of Chief Engineer David Barfield, p. 144, attached as Appendix B ("I actually first came to know him, he had a firm called Pumping Plant Testing that we used to do field inspections of water rights under a program that I managed on behalf of the division, so I got acquainted with him back in 1985, I believe.") [*hereinafter*, Barfield Deposition].

[22] *See, e.g.*, A.R. 2209 (representative FIR); A.R. 39.

[23] Presentation in Greensburg, Kansas, by Chief Engineer David Barfield, June 21, 2018, at A.R. 852 (see inline comment).

[24] R9 Ranch Consumptive Use Analysis prepared for Water PACK by Keller-Bliesner Engineering, LLC, last updated Nov. 12, 2017, at A.R. 968.

[25] A.R. at 810.

[26] Transcript of Presentation by Hays City Manager Toby Dougherty, June 21, 2018, A.R. at 804.

[27] *Id.*

[28] Cover Letter from Foulston Siefkin LLP to DWR Regarding Change Applications, A.R. 1542-1587.

[29] Presentation by Chief Engineer David Barfield, June 21, 2018, at A.R. 828.

[30] *See* A.R. at 993, 1316.

risks posed by the holding in *Wheatland Electric Co-Op, Inc. v. Polansky,* seeking to negotiate an order with the Chief Engineer regarding conditions that would limit the effectiveness of their change applications. The Chief Engineer, accepting their request, noted several unique items in the proceedings that included the following:

- Tying effectiveness to conclusion of the WTA proceeding;
- Deferred identification of final well locations;
- Approval of total maximum quantities, but actual demand based on population; and
- A sustainable yield limitation.[31]

To support the request to change all 7,647 AF, the Cities supplied FIRs and litigation exhibits from a 1982 case involving prior owners of the property,[32] attaching 1984 and 1985 Farm Service Agency ("FSA") cropping records to only two of the original change applications initially submitted in 2015,[33] contending that the former name for the ranch (the "Lucerne Ranch"), the FIRs, and litigation exhibits proved that alfalfa predominated the crop mix during the period of perfection for the individual water rights.[34] An example change application from the Cities thus read as follows:

> The FIR states that alfalfa and wheat were grown on this circle during the year of record…Since alfalfa was grown on the authorized place of use during the perfection period it is reasonable to use the [Net Irrigation Requirement] for alfalfa, which yields a total quantity of 203.77 acre-feet consumed."[35]

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[31] Presentation by Chief Engineer David Barfield in Greensburg, Kansas, June 21, 2018, at A.R. 853.

[32] *See* Letter from Pamela Meadows, American Ag. Industries Inc., to Slentz-McCallaster, Inc. dated Mar. 25, 1982, at A.R. 1911-1916.

[33] *Compare* Report of Acreage (1985), A.R. 2265-2269; Report of Acreage (1984), A.R. 2545-2547; *with* Cities Motion to Intervene, ¶ 26 ("[T]he 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[.]").

[34] David Barfield, *Overview of Draft, Proposed Approval Documents* (June 21, 2019), at A.R. 840-41 ("Cities demonstrated that many of the circles irrigated alfalfa"); Cover Letter from Foulston Siefkin LLP to DWR Regarding Change Applications at A.R. 1567-68; *see, e.g.,* File No. 21,730 (Circle 1) Application at A.R. 1736, 1739-40.

[35] *See, e.g.*, A.R. 1048.

Standards applied in this case show that alfalfa consumes more water than corn.[36]

Notwithstanding data relied upon in the Master Order, FSA records and satellite imagery submitted to the Chief Engineer by the Plaintiff ("Water PACK") showed that prior owners of the R9 Ranch grew just 2,387 acres of alfalfa, 488 acres of corn, 176 acres of milo, 1,670 acres of wheat, and left fallow or destroyed crops on the remaining 293 acres during the perfection period used by DWR.[37] Such data reflected farming conditions on the ground, as well as the pumping in excess of 8,000AF required to maintain saturation of the soils at the R9 Ranch:

> With declining pumping rates in shallow aquifer areas during the summer months, this is hardly a place to be growing economical alfalfa or corn. Local area irrigators know this, and verify the low levels of production from either crop. Alfalfa is recognized as a "cover crop" in that only one or 2 cuttings of alfalfa are possible unless there is abnormally high rainfall.[38]

Parties with water rights adjacent to the R9 Ranch thus voiced repeated objections to the Cities' request to divert such a large amount of water, as well as to the records relied upon by the Cities.[39] Ignoring these data, as well as materials in the administrative record relating to the proposed change of use, the Master Order relied upon calculations prepared by DWR that do not square with the maximum acreage grown at the R9 Ranch during the period of perfection, nor the actual conditions on the ground.[40] To be sure, the Chief Engineer did not wholly accept the amounts initially proposed

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[36] *See* A.R. 38 ("The NIR for corn for 50% chance rainfall for Edwards County is 13 inches for corn, and 20.9 inches for alfalfa, as specified and used by the Chief Engineer. The NIR for milo and wheat for 50 % chance rainfall for Edwards County is 11 inches and 8.7 inches, respectively.").

[37] A.R. 967-968; A.R. 942-943.

[38] A.R. 784.

[39] *See, e.g.,* Letter from Leroy Wetzel at A.R. 26 (noting his B.S. in Mechanical Engineering, that he farms immediately West of the R9 Ranch, and that his personal observation that "to pump 48,000 acre feet of water in 10 years off the property would actually amount to an increase in the consumptive use out of an already over appropriated aquifer."); Letter from Richard Wenstrom, P.E., at A.R. 36 ("There will be no more deep percolation to the aquifer as there was under irrigated crops, since Hays/Russell will pump water from the aquifer and transfer 100% of this water out of our basin and to another part of Kansas. If that quantity is too high, eventually impairments will occur with nearby farms like ours.").

[40] Master Order at ¶ 63, A.R. 7; Master Order at Appendix B, A.R. at 113-117 (omitting references to maximum acreage grown during the year of perfection, fallowed fields, wheat or milo shown in FSA records submitted by the Cities).

by the Cities, but instead engaged in prolonged negotiations with the Cities that involved multiple amendments to the Cities' applications, the imposition of select limitations on the change approvals, and an agreement upon the definition of "sustainability".[41]

The Chief Engineer also required the use of a hydrological model (the "R9 Ranch Model") prepared by consultants to the Cities ("BMcD") to assess the "sustainability" of the proposed change based upon input from the Chief Engineer and DWR personnel.[42] The Cities thus prepared and later changed the R9 Ranch Model based on an existing hydrological model (the "GMD5 Model") of Big Bend Groundwater Management District No. 5 ("GMD5") described in a 2010 report by Balleau Groundwater Inc. ("Balleau").[43] Based upon output from the R9 Ranch Model, the Chief Engineer included a Ten Year Rolling Aggregate ("TYRA") Limitation on the Cities' change applications that caps average annual withdrawals at 4,800AF over a ten-year period.[44]

In parallel to the foregoing efforts, the Chief Engineer and the Cities also negotiated and reached an agreement regarding the terms of the Master Order prior to publication of an initial draft of the Master Order.[45] Indeed, the City of Hays even provided an initial draft of the Master Order to DWR on December 4, 2016, and spent years exchanging drafts with DWR counsel that never appeared on the DWR website except in the form of an initial draft and the final Master Order.[46] Describing the public version of the draft Master Order in one of their amended change applications,

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[41] See, e.g., Letter from GMD5 to DWR, Aug. 28, 2018, at. A.R. 378 ("Neither the District office nor legal representation was consulted during the drafting and negotiations leading to the draft master order."); A.R. 919 ("for purposes of this project, we have -- we have come to an agreement on what [sustainability] means.").

[42] A.R. 345-376; Master Order at A.R. 67 (noting that water withdrawals would be limited by a ten-year limitation driven by results from the R9 Ranch Model).

[43] Master Order at A.R. 67.

[44] Master Order at ¶ 24, A.R. 63.

[45] A.R. at 1320.

[46] *See* A.R. at 396.

the Cities stated the following:

> The Cities understand the Initial Order is subject to review by the GMD and others and cannot be finalized until after that review. The Cities submit these amendments to their original Change Application but the amendments are contingent upon the entry of an Initial Order and a Final Order with terms that are acceptable to the Cities.[47]

What's more, in a letter accompanying the Master Order, the Chief Engineer noted the following: "A unique condition of these documents is that they do not become effective until the occurrence of certain events, as explained in the Master Order."[48]

On May 4, 2018, the Chief Engineer submitted the public draft of the Master Order to GMD5 with exhibits and posted the public draft of the Master Order on the DWR website.[49] On June 21, 2018, the Cities and the Chief Engineer convened a public meeting at the Twilight Theater in Greensburg.[50] At that meeting, various Water PACK members expressed incredulity at the process surrounding development of the draft Master Order, noting a lack of time required for proper rebuttal of the consumptive use analysis and modeling results referenced in the Draft Master Order,[51] and that the Chief Engineer had already made up his mind.[52]

Thereafter, various members of the public, including Water PACK members and their representatives, submitted comments to the Chief Engineer detailing extensive concerns with the draft Master Order, as well as the process surrounding its negotiation.[53] Dr. Andrew Keller also updated

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[47] A.R. at 1320.

[48] A.R. 56.

[49] *See, generally,* Barfield Deposition.

[50] *See, generally,* A.R. 793-958 ("Three weeks is not a lot of time for a big issue like that for us to convince you of that.").

[51] A.R. at 909 ("We are in this public forum, but before they advertised in this public forum in Kiowa County that should have been done in Edwards County, for one thing, I thought it was to get our opinions or, you know, concerns about it. I'm getting the feeling that you've already made up your mind. Is this true or false?").

[52] A.R. at 919.

[53] A.R. 674-792.

and worked with Balleau to refine an analysis of the R9 Ranch Model presented at the June 21 Greensburg Meeting. Throughout the summer and fall of 2018, DWR, the Cities, and GMD5 continued to exchange documents and comments regarding the draft Master Order, while the Cities' modeling consultants refined the R9 Ranch Model and a related report. Importantly, notwithstanding the Cities' stated intention to convert the R9 Ranch from cropland to grassland and continuing lack of water in the Arkansas River, the final R9 Ranch Model report and R9 Ranch Model submitted to DWR on September 24, 2018 expressly ignored the extraordinary impact of cropland-to-grassland conversion and lacking river flows, along with several other issues.[54]

The Cities submitted their second amended applications on a Tuesday, March 24, 2019.[55] DWR then documented a staff review of the R9 Ranch Model report that Thursday, March 26, and the Chief Engineer issued the Master Order three days later on Friday, March 27, 2019.[56]

RULES OF CONSTRUCTION

It is a well-established rule of law that Kansas administrative agencies have no common-law powers.[57] Any authority claimed by an agency must instead be conferred in the authorizing statutes either expressly or by clear implication from express powers granted.[58] Issues regarding an agency's authority or jurisdiction, as in civil matters, may be raised at any stage of a proceeding.[59] Whether an

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[54] Letter from BMcD to Hays Regarding R9 Ranch Modeling Results, Revision 2, dated September 24, 2018, at 1, A.R. 345 ("Please note that the revised groundwater model report does not address the 'alternative' approaches to groundwater modeling offered by BGW or Keller-Bliesner Engineering, which were discussed in BMcD's September 13, 2018 letter to Mr. Dougherty and forwarded to the Chief Engineer.").

[55] A.R. 993.

[56] *See* A.R. 58, 306.

[57] *Clawson*, 315 P.3d at 905.

[58] *Id.* (citing *Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs.*, 290 Kan. 446, 455, 228 P.3d 403 (2010)).

[59] *See* Zinke & Trumbo, Ltd. v. Kansas Corporation Commission, 242 Kan. 470, 490 (1988); *see also* Cities' Motion to Intervene, p. 2 (Rhodenbaugh v. Kansas Employment Sec. Bd. of Review, 52 Kan. App. 2d 621, 372 P.3d 1252, 1254 (2016) ("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."))

agency has exceeded its statutory authority requires interpretation of the statutes enabling that agency.[60] When analyzing the meaning of statutes:

> [T]he most fundamental rule of statutory construction is that the intent of the legislature governs if that can be ascertained. We presume that the Legislature "expressed its intent through the language of the statutory scheme, and when a statue is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language." Moreover, when interpreting the plain language of a statute, we must refrain from reading language into the statute that is not readily found therein.[61]

If a statute is determined to be ambiguous, only then may a court may a court seek to determine legislative intent, "properly look to the purpose to be accomplished, and the necessity and effect of the statute,"[62] and "if possible...reconcile different provisions [of the same act] so as to make them consistent, harmonious, and sensible."[63]

Otherwise, a court must look to the plain meaning of the words as the Legislature wrote them. Such "[s]tatutory words are presumed to have been and should be treated as consciously chosen and, with understanding of the ordinary and common meaning, intentionally used with the legislature having meant what it said.[64] And "[i]t is the function of the courts, not of administrative agencies, to determine whether an agency has acted within the scope of its authority."[65] If a "reviewing court finds that the administrative body's interpretation is erroneous as a matter of law, the court should take corrective steps."[66] Where a statute is clear and unambiguous, a reviewing court or other authority

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[60] *Clawson*, 315 P.3d at 903 (internal citations and quotation marks omitted).

[61] Schneider v. City of Lawrence*,* 2019 WL 494486, 3 (Kan. 2019).

[62] State v. Keely, 236 Kan. 555, 559, 694 P.2d 422 (1985).

[63] *Id.*

[64] Kansas Ass'n of Public Employees v. Public Employee Relations Bd., 13 Kan.App.2d 657, 661–62, 778 P.2d 377 (1989).

[65] Vann v. Employment Sec. Bd. of Review, 12 Kan. App. 2d 778, 780, 756 P.2d 1107, 1109 (1988) (internal citation omitted).

[66] State, Dep't of Soc. & Rehab. Servs. v. Pub. Employee Relations Bd. of Kansas Dep't of Human Res., 249 Kan. 163, 166, 815 P.2d 66, 69 (1991).

should not read a statute "to add something not readily found in it."[67] Courts must correct erroneous interpretations by an administrative agency.[68]

In the case of water administration in particular, "[t]he Legislature has learned from past policy decisions and has responded by providing specific statutory methods to protect the right to access water and apply it to beneficial use."[69] In addition:

> As a general principle of administrative law, agency decisions must be based on known rules and standards applicable under the facts presented. The requirement for filing and publishing rules and regulations is primarily one of dissemination of information. Members of the public, and others affected thereby, should not be subjected to agency rules and regulations whose existence is known only by agency personnel. When an administrative agency arbitrarily applies a rule that is not embodied in the statutes or published as a rule or regulation, a respondent to an agency action is deprived of fair notice and due process.[70]

The Chief Engineer may therefore only apply statutes, rules, and regulations adopted in accordance with such methods.[71] Standards, statements of policy, or general orders of general application, when employed by the Chief Engineer or by groundwater management districts, are void and of no further effect in the absence of a proper rulemaking.[72] To assure that an agency has engaged in lawful procedures and followed prescribed procedures, the agency must render a written decision that is concise and contains a specific statement of relevant law and basic facts that support the decision.[73]

With regard to the statutes and regulations in this matter, the Court of Appeals in *Wheatland*

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[67] Bergstrom v. Spears Manufacturing Co., 289 Kan. 605, Syl. ¶ 1 (2009).

[68] Citizens' Utility Ratepayer Bd. v. State Corp. Comm'n of State of Kan., 264 Kan. 363, 411 (1998); Radke Oil Co., Inc. v. Kan. Dep't of Health & Env't, 936 P.2d 286, 288 (1997).

[69] Defendant Chief Engineer's Response Memorandum to Petitioners' Memorandum in Support of Petition for Judicial Review, in *Friesen v. Barfield*, Gove County Case No. 2018-CV-10, at p. 44 (Mar. 22, 2019), *available at* https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/response-memorandum-to-friesen-030519-final_78327.pdf.

[70] *Schneider v. Kan. Sec. Comm'r*, 397 P.3d 1227, 1240 (Kan. App. 2017) (internal citations and quotations omitted).

[71] K.S.A. 82a-1903(a)(2).

[72] K.S.A. 82a-1903(b)(2), (c).

[73] *Farmland Industries, Inc. v. State Corp. Com'n of State of Kan.*, 25 Kan.App.2d 849, 852, 971 P.2d 1213, 1217 (1999) (citing Test Four).

Elec. Co-Op., Inc. v. Polansky specifically held that K.A.R. 5-5-8 follows the statutory authority of K.S.A. 82a-708b when applied to an application to change a water right from an irrigation use to another beneficial use, later directing DWR to apply K.A.R. 5-5-9 to change applications submitted by Wheatland Electric Co-Op Inc. on remand.[74]

ARGUMENTS AND AUTHORITIES

Kansas water law statutes and regulations recognize that water is a common resource with competing uses and competing users.[75] To facilitate distribution of water, Kansas follows the Western water law rule of prior appropriation, [76] allocating water based upon the rule of capture and the type of beneficial use, among other factors.[77]

> 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."[78]

Importantly, because water rights divert water from a shared resource, the owner of a water right may only change an existing appropriated water right if the change is reasonable and does not materially impair or injure other existing water rights with priority dates senior to the date of the change application.[79]

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[74] 265 P.3d at 1201.

[75] *See* F. Arthur Stone & Sons v. Gibson, 230 Kan. 224, 230 (1981) (citing K.S.A. 82a-702, 82a-707(c)).

[76] Wheatland Elec. Co-Op, Inc. v. Polansky, 265 P.3d 1194, 1201 (Kan. App. 2011) (citing K.S.A. 82a-707(c)).

[77] *Clawson*, 315 P.3d at 904.

[78] *Id.*

[79] *See* Att'y Gen. Op. No. 95-92; *see also Wheatland Elec. Co-Op, Inc.*, 265 P.3d at 1202 (citing with approval Att'y Gen. Op. No. 95-92 as persuasive authority); *Clawson* 315 P.3d at 908 (referencing application of Att'y Gen. Op. No. 95-92 in *Wheatland Elec. Co-Op, Inc.*).

At a high level, change applications require two clear and distinct steps intended to assure a stable water supply. First, through its change application, an applicant bears the burden of proving that its proposed change is reasonable and will not materially affect other water rights. [80] Once the complete application is filed and the applicant's burden satisfied, the Chief Engineer must then either reject or approve the application in a final order subject to KJRA review.[81] In assessing the application, however, the Chief Engineer must apply principles used when processing original applications to appropriate water.

> The statute requires that **approval or rejection** of an application for change be made using the same criteria prescribed for processing original applications to appropriate water. Accordingly, the chief engineer must determine 1) whether a proposed use impairs a use under an **existing** water right, and 2) **whether a proposed use prejudicially and unreasonably affects the public interest, taking into consideration, for example, whether the proposed use will raise or lower the static water level, K.S.A. 1994 Supp. 82a-711**.
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> […]
>
> Thus, the application of statutory criteria determines whether any proposed change will be approved by the chief engineer. Accordingly, whether the proposed change will or will not injure or adversely affect water rights is a determination of fact that is made by the chief engineer at the time of application for change.[82]

As such, only after the applicant has met its burden and the Chief Engineer has assessed the change for injury to other users and reasonability may the Chief Engineer act upon the submission.

Statutes and regulations bearing upon this case include but are not limited to the following:

- K.S.A. 82a-708a (governing original applications)
    - K.A.R. 5-3-5 (governing original applications)
- K.S.A. 82a-711 (governing permits to appropriate water)

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[80] Att'y Gen. Op. No. 95-92 (emphasis supplied).

[81] *See Clawson*, 315 P.3d at 905.

[82] Att'y Gen. Op. No. 95-92 (emphasis supplied).

- K.S.A. 82a-708b (the "Change Order Statute")
- K.A.R. 5-5-1, et seq. (the "Change Order Regulations")
    - K.A.R. 5-5-8 (the "Base Change Criteria")
    - K.A.R. 5-5-9 (1994) (the "Irrigation Change Criteria")[83]

Notably, the WTA expressly provides that its provisions do not excuse applicants from "first complying with" the KWAA.[84] Here, the Master Order fails to comply with the law.

I. ALLOWING THE CITIES TO DRAFT AND NEGOTIATE THE MASTER ORDER WAS UNLAWFUL

As noted above, the Chief Engineer permitted the Cities to submit various drafts of an initial version of the Master Order, engaged in two years of protracted negotiation with the Cities regarding those documents, and did not reveal the true extent of the collaborative drafting until this controversy arose.[85] With the drafting process obscured from the public in violation of legislative dictates, the provisions of the Master Order bent in favor of the applicant and away from safeguarding the water rights of other users. Indeed, counsel for the City of Hays and counsel to the Chief Engineer exchanged so many drafts in connection with their negotiations that the burden of finding and reproducing them all served as a basis for their objections to including such documents in the administrative record at an earlier stage of this proceeding.[86]

In a letter dated February 19, 2018, the Chief Engineer alluded to negotiations with the Cities

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[83] Unless otherwise noted in the Memorandum, all references to K.A.R. 5-5-9(a) made herein refer to the 1994 version of that regulation.

[84] K.S.A. 82a-1507(b) ("This act shall not be construed as to exempt the applicant from first complying with the provisions of…the Kansas water appropriation act or the state water plan storage act, whichever is applicable.").

[85] A.R. at 394; *Acting Chief Engineer's Response to Plaintiff's Motion to Correct and Supplement the Administrative Record*, p. 9-10, Mar. 20, 2020 (acknowledging a years-long process by which drafts and correspondence were prepared by or exchange with the Cities prior to public dissemination of the various drafts of the Master Order).

[86] Parenthetically, we note that transcripts from prior hearings in this matter have been ordered but were not available prior to the required date of filing of this memorandum.

and indicated that their discussions would "culminate in DWR completing a draft master order and draft individual approvals for the proposed changes[.]"[87] A May 4, 2018 letter similarly described draft change approvals as "the result of the Cities working with DWR to come up with potential workable documents acceptable to the Chief Engineer and the Cities[.]"[88] In point of fact, however, the Chief Engineer had accepted an unique and (according to the Chief Engineer) unprecedented offer from counsel for the City of Hays to provide initial drafts of both the Master Order and the change approvals incorporated therein, an offer he accepted in an effort to economize state resources.[89] Permitting the Cities to draft the Master Order is not, however, contemplated in the KWAA, nor in the Chief Engineer's rules for handling change applications. What's more, the various drafts of the Master Order arguably qualified as amendments to the Cities' change applications under the plain language of K.S.A. 82a-708b and K.S.A. 82a-1906(a), as the latter expressly refers to amendments to applications made under K.S.A. 82a-708b.

The Change Order Statute does not contemplate the Chief Engineer providing feedback to an applicant regarding a change application, let alone delegating the drafting of an order to an applicant in a proceeding that necessarily affects the rights of others.[90] Sections of the Groundwater Management District Act do provide for such a give-and-take, but only in the context of the establishment of local enhanced management areas, which require a public hearing.[91] Likewise, the DWR regulations for enforcement proceedings contemplate a level of back and forth through informal settlements, while the statute governing the establishment of water conservation areas

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[87] A.R. at 635.

[88] A.R. at 394

[89] *See* Barfield Deposition, p. 100.

[90] *Cf.* Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, at 5 (C.R.S. No. R41546, Mar. 27, 2017) (describing Federal statutory authority for negotiated rulemakings).

[91] K.S.A. 82a-1041(d).

provides for entry into (and presumably the negotiation of) consent agreements, but only subject to public notice requirements.[92] The Change Order Statute and Change Order Regulations, by contrast, contain no similar language.

As a consequence, the Chief Engineer exceeded the jurisdiction conferred by any provision of law by permitting the Cities to draft and comment on the Master Order, while engaging in an unlawful procedure that hid the drafting process from the public. Through this process, the Chief Engineer and the Cities unlawfully altered other appropriations in the area, and effectively re-wrote the rules for change application processing without a rulemaking.[93]

It is telling that every single draft Master Order referenced in this Memorandum was framed as an approval that presupposed the outcome.[94] Admittedly , the Master Order presents unique issues raised for the first time in connection with this proceeding. But the Chief Engineer must stay withing the guardrails defined by the legislature, guardrails that yielded regulations for change application submissions that require all change applications to be submitted in a form prescribed by the Chief Engineer, only to be considered a "complete application" upon satisfaction of certain conditions.[95] Those regulations were vetted and published in the manner set forth in K.S.A. 77-421, which requires every state agency to properly file every rule and regulation of general application for notice and

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[92] *Compare* K.S.A. 82a-745 *with* K.A.R. 5-14-6.

[93] K.S.A. 77-622(c)(2), (5).

[94] *Compare* A.R. 453 *with* Initial Order Approving Applications To Change Points Of Diversion, Places Of Use, And Use Made Of The Captioned Water Appropriation Rights at p. 8, Appendix A ("The Chief Engineer and DWR staff considered the applicable requirements set out in K.A.R. 5-5-1 – K.A.R. 5-5-16 and in K.A.R. 5-25-1 – K.A.R. 5-25-20, **including especially the requirements in K.A.R. 5-5-9.**").

[95] K.S.A. 82a-708b(a); K.A.R. 5-5-1(a) ("An application for approval to change the place of use, the point of diversion, the use made of water, or combinations thereof, filed pursuant to K.S.A. 82a-708b and amendments thereto, shall be made on a form prescribed by the chief engineer and shall include whatever information is required by the chief engineer to properly understand the proposed change in the place of use, the point of diversion, the use made of water, or any combination of these."); K.A.R. 5-5-2a (describing the contents of a "complete application" for change to a water right).

comment, as well as any revocation or amendment of such rules.[96] Such requirements go to the very heart of procedural protections considered by a reviewing court under K.S.A. 77-621(c)(5), as the established requirements for a change application (or any change to it) serve to ensure a level playing field for those that hold water rights.[97] In the absence of adherence to standard processes, the Chief Engineer could simply change the requirements for any application administered by his office without the knowledge of the public. Kansas water law does not, however, "give the chief engineer carte blanche authority to alter water appropriations."[98]

If asked, the Chief Engineer may grant a waiver or an exemption from DWR regulations.[99] But such an exemption or waiver depends upon a showing that it "will not prejudicially nor unreasonably affect the public interest and that it will not impair an existing water right." Further, such waivers and exemptions would not limit the clear legislative command requiring all change applications (or any amendments thereto) to be posted on the DWR website.[100] The administrative record however shows no reference to a waiver or an exemption requested by the Cities with regard to K.A.R. 5-5-2a.

By failing to post the various drafts on the DWR website in compliance with such procedural protections, the Chief Engineer relied upon novel standards unknown to the public and allowed the Cities to direct the outcome of the effort. [101] Moreover, by permitting the Cities to actually draft the terms of the Master Order behind closed doors and failing to cause the various drafts to be posted on the DWR website, the Chief Engineer altered the rights of other users without notifying them of what

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[96] *See* Att'y General Op. 89-134 at 4, http://ksag.washburnlaw.edu/opinions/1989/1989-134.pdf.

[97] *Id.* (citing K.S.A. 77-415).

[98] *Clawson*, 315 P.3d at 909.

[99] K.S.A. 82a-1904, K.A.R. 5-5-2a, K.A.R. 5-10-4.

[100] K.S.A. 82a-1906(a).

[101] K.A.R. 5-5-1(a), K.S.A. 82a-1906(a).

was happening, undermining both the plain meaning and intent of K.S.A. 82-708b and K.S.A. 82a-1906(a). When asked why the Cities drafted the Master Order, the Chief Engineer said this:

> This is a pretty unique set of circumstances and the city needed some unique things. It's preparing the way for a water transfer process later on where the city has a burden so, you know, they wanted to help sort of shape the document in terms of what -- what they needed to meet their client's needs and all the processes that they would have to go through. So some very unique circumstances.[102]

When asked about the document exchanges at his deposition, the Chief Engineer replied by stating that they "took full control of the drafting of the document somewhere in the summer of 2017, well before even the proposed draft master order."[103] It should be noted, however, that after publication of the draft Master Order before the meeting in Greensburg, counsel for the City of Hays continued to review and provide input on subsequent drafts.[104] Permitting the applicant to influence the outcome in this manner exceeded the authority of the agency, violated procedural protections afforded to other water users under the KWAA, and was illegal.

This unprecedented drafting process exceeded the authority of the agency, relaxed rules applicable to other applicants, yielded an order that violated Legislative dictates, and otherwise misapplied and misinterpreted the laws applicable to the applications. What's more, the decision to obscure the order drafting process violated agency procedures, presupposed the outcome, exceeded the authority of the office, and was taken without regard to the benefit or harm to the community at large.

II. THE CONTINGENCIES IN THE MASTER ORDER ARE INVALID

One product of the unlawful drafting effort described above is the invalid contingencies in the Master Order requested by the Cities in their effort to reduce risks associated with the holding in

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[102] Barfield Deposition, at 102.

[103] *Id.*

[104] *Id.* ("But Mr. Traster did have an opportunity to review what we were doing and had input into it.").

Wheatland Elec. Co-Op, Inc. v. Polansky.[105] Referencing *Wheatland*, the Cities noted the following:

> If an order approving these change applications becomes effective as soon as an order approving the transfer is final but Hays determines that it cannot proceed with the project, the value of the Ranch would diminish substantially. In that case, the water rights could not be used for irrigation and there would be no way to get the water from the Ranch to Hays and Russell for municipal use. The water rights would be lost and the value of the Ranch would diminish from irrigated cropland to sand hills. That result would be a patently unfair result to the Cities and their citizens.[106]

Notwithstanding the Cities' concerns, neither the Change Order Statute, the Change Order Regulations, nor the WTA confer the authority to the Chief Engineer to subject change approvals to contingencies.[107] Instead, the KWAA obligates the Chief Engineer to approve or reject an application—nothing more, and nothing less.

To assure an agency engages in lawful procedures and follows prescribed procedures, that agency must render a written decision that is concise and contains a specific statement of relevant law and basic facts that support the decision.[108] With regard to the contingencies, the Master Order relies solely upon WTA regulations and not the KWAA.

> **Pursuant to K.A.R. 5-50-2(x) and K.A.R. 5-50-7**, the terms and conditions of this Master Order (including its incorporated Change Approvals) remain contingent and conditioned upon, and will not become effective unless and until, such time as when both of the following may have occurred:
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> > a. the transfer panel issues a Transfer Order approving a transfer of water pursuant to the Kansas Water Transfer Act, K.S.A. 82a-1501, et seq., and the Transfer Order becomes a final, non-appealable order under the KAPA and the KJRA; and
> >
> > b. DWR receives written notice from Hays that Hays has entered into

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[105] *See* Master Order at ¶ 4, A.R. 61 ("'Change Applications' means the applications that the Cities originally submitted to the Chief Engineer on June 26, 2015, as later amended by various amendments, which applications request contingent approval to change the use made of the water, the places of use, and the points of diversion under the R9 Water Rights."); Cover Letter from Foulston Siefkin LLP to DWR Regarding Change Applications dated June 25, 2015, at A.R. 1545.

[106] *Id.*

[107] *See* K.S.A. 77-621(c)(2).

[108] *Farmland Industries, Inc. v. State Corp. Com'n of State of Kan.*, 25 Kan.App.2d 849, 852, 971 P.2d 1213, 1217 (1999) (citing Test Four).

> a written construction contract to drill one or more of the 14 proposed municipal wells (excluding test drilling) for the Project, which notice, along with a copy of the contract, Hays must provide to DWR within thirty (30) business days after the contract is fully executed.[109]

The WTA however includes a clause which states that applicants must first comply with the provisions of the KWAA, of which the Change Order Statute (but not the WTA) is a part.[110] Had the Legislature wished to tie the WTA to the Change Order Statute in the manner desired by the Cities or as set forth in K.A.R. 5-50-2(x), they would have omitted language requiring all applicants to first comply with the KWAA. But, as noted previously by this Court, the separate statutory authority of the WTA "is not directly relevant to the issues under review in this proceeding."[111]

Thus removed from the WTA, the KWAA did not condone contingencies of the sort embedded in the Master Order.[112] Rather, the KWAA and DWR regulations specifically require (through the word "shall") one of two things: approval or denial of a change application.[113] Approval of a change application is thus an all-or-nothing proposition, subject to reasonable restrictions placed on an approval, if any.

By tying effectiveness of the change orders to subsequent decisions of the WTA transfer panel or even a notice from the City of Hays, the Master Order impermissibly subdelegated the authority of the Chief Engineer to another agency—namely, the three-official WTA panel that acts by majority

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[109] Master Order ¶ 253, at A.R. 107 (emphasis to WTA enabling regulations supplied).

[110] K.S.A. 82a-1507(b) ("This act shall not be construed as to exempt the applicant from first complying with the provisions of…the Kansas water appropriation act[.]").

[111] *Order Granting Defendant's Motions and Granting Plaintiff's Motion in Part* at ¶ 3(g).

[112] *Compare* K.S.A. § 82a-708b(a) *with* K.A.R. 5-5-1 *et seq. and* K.A.R. 5-50-2(x)(2).

[113] K.S.A. 82a-708b(a) (the owner shall "(1) Apply in writing to the chief engineer for approval of any proposed change; (2) demonstrate to the chief engineer that any proposed change is reasonable and will not impair existing rights; (3) demonstrate to the chief engineer that any proposed change relates to the same local source of supply as that to which the water right relates; and (4) receive the approval of the chief engineer with respect to any proposed change. 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.").

vote.[114] Ordinarily, legislators intentionally assign administrative jurisdiction to make certain decisions.[115] Absent an express grant of authority to subdelegate jurisdiction in the WTA, we find no indication that the Chief Engineer could lawfully transfer authority over the waters of Kansas to another agency, nor permit the applicant to have the final say.

Such agency actions, especially when viewed in light of the negotiations and procedural defects described above, exceeded authorities granted by the Legislature, misinterpreted or misapplied the law, thus rendering the Master Order the product of an invalid procedure, as well as unreasonable, arbitrary, and capricious.

III. THE MASTER ORDER IMPROPERLY APPROVED CHANGE APPLICATIONS IN VIOLATION OF DWR REGULATIONS

The Master Order rests in part upon a net consumptive use analysis that, according to the Cities, suggested that "[t]here is no evidence that the proposed changes would impair water rights that are senior to the water rights on the R9 Ranch[.]"[116] Yet that net consumptive use analysis, performed by DWR and relied upon by the Chief Engineer in the Master Order, satisfies every test for invalidity at issue in this matter. To understand why, however, requires a review of applicable KWAA statutes and DWR regulations.

The Change Order Statute places the express burden upon the applicant to apply in writing for approval of a requested change, meet certain burdens, and receive an approval.[117] The Chief Engineer must in turn either approve or reject the application within 150 days or a complete application according to the "provisions and procedures prescribed for processing original

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[114] *See* K.S.A. 82a-1504(b); *see also* Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279 (2017).

[115] King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

[116] A.R. 8.

[117] KSA 82a-708(a)(2) (emphasis supplied).

applications for permission to appropriate water."[118] Such provisions and procedures require, among other things, whether a proposed use will prejudicially and unreasonably affect the public interest, the latter assessed after considering (among other matters) the following criteria: (1) the area, safe yield and recharge rate of the appropriate water supply; (2) the priority of existing claims of all persons to use the water of the appropriate water supply; (3) the amount of each claim to use water from the appropriate water supply; and (4) all other matters pertaining to such question.[119]

K.A.R. 5-5-8(a), by explicit reference to K.S.A. 82a-706a and K.S.A. 82a-708b as its enabling authorities, frames the approval standard in both disjunctive and forward-looking terms relative to existing water rights.

> Each 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.[120]

K.A.R. 5-5-3 in turn requires that "[t]the extent of consumptive use shall not be increased substantially after a vested right has been determined or the time allowed in which to perfect the water right has expired, including any authorized extension of time to perfect the water right."

The court in *Wheatland* held that such "consumptive use regulations follow the [KWAA]'s statutory authority."[121] And in doing so, the Court of Appeals highlighted the following portion of a 1995 opinion from the Attorney General:

> If approval of a change application would substantially increase the gross pumpage under that water right by allowing the right to be pumped to its maximum quantity every year... the consumptive use would also increase and nearby well owners who depend on that same source of water supply would be injured by the change

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[118] *Id.; see also* K.A.R. 5-5-2a (regarding required contents of complete application).

[119] *See* K.S.A. 82a-711(b)(2)-(5).

[120] (Emphasis supplied).

[121] *Wheatland Elec. Co-Op, Inc.*, 265 P.3d at 1201.

approval.[122]

Relying on the Attorney General's opinion, the court in *Wheatland* held that K.A.R. 5-5-8 the Base Change Criteria were "valid and that the chief engineer may limit consumptive use in connection with approval of a change of use application."[123] But because the Chief Engineer in *Wheatland* had not undertaken the analysis required under K.A.R. 5-5-9, the Court of Appeals remanded the case back to the district court to apply that regulation.

The Master Order references the Base Change Criteria referenced in *Wheatland Electric* just once, instead focusing largely on the Irrigation Change Criteria.[124] Not surprisingly, given the provenance of the initial draft of the Master Order, only two of the options available under the Irrigation Change Criteria are referenced in the Master Order.[125] The first option employed in the Master Order, K.A.R. 5-5-9(a)(1)-(3) permits the calculation of net consumptive use using net irrigation requirements ("NIR") for corn, as adjusted for 50% chance rainfall by county, to determine the maximum quantity of water that can be changed under each water right, subject to accounting for the maximum amount of acreage farmed during the perfection period, overlapping water rights, post-change recharge, and other reasonable limits. Importantly, if the simpler corn-based method produces an unrealistic number and could result in the impairment of other existing water rights, K.A.R. 5-5-9(c) requires the Chief Engineer to conduct a site-specific survey "in accordance with the provisions and procedures prescribed for processing original applications for permission to appropriate water."[126]

The second option employed in the Master Order, K.A.R. 5-5-9(b), contemplates a historic

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[122] *Wheatland Elec. Co-Op, Inc.*, 265 P.3d at 1202.

[123] *Id.*

[124] *See* Master Order at ¶ 13, A.R. 61.

[125] Master Order at ¶ 74, A.R. 72 (noting that the NIR for corn in Edwards County is 13" and the NIR for alfalfa is 20.9) without reference to the source of such numbers).

[126] *See* K.A.R. 5-5-9(c); K.S.A. 82a-708b(a).

look-back. Through an engineering study performed to the satisfaction of the Chief Engineer, an applicant bearing the burden of proof may ask to demonstrate that its analysis of historic consumptive use "is a more accurate estimate" than the corn-based method under K.A.R. 5-5-9(a).[127] Yet under either the corn-based method or the actual use method, echoing the definition of "consumptive use" in 5-5-8, the Master Order notes the following under K.A.R. 5-5-9(a):

> Approval of a change from irrigation to another type of beneficial use is not permitted if the change will cause the net consumptive use from the local source of water supply to be greater than the net consumptive use from the local source of water supply by the original irrigation use.[128]

That is, both the Base Change Criteria and the Irrigation Change Criteria consider effects of an approved change on the local water supply, asking whether the proposed use will "materially" injure or change the net consumptive use and thereby alter the state of affairs for others dependent on the same water supply.

The Chief Engineer testified, however, that DWR has never considered the post-change impact of a water right on junior users, stating that "the senior can interfere with the junior's use as a general matter."[129] We also note that, with few exceptions, the records relied upon by DWR for their net consumptive use review assumed a perfection year of 1984 or 1985, relied upon one of those years of perfection to determine maximum acreage legally irrigated to establish the maximum amount that the Cities could transfer under the Master Order, and did not account for the definition of consumptive use in 5-5-8(c).[130] The Master Order cannot stand as written—it suffers from too many defects.

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[127] *See also* K.A.R. 5-5-2a(d) ("If any questions have been raised concerning whether approval of the application could cause impairment of senior water rights or prejudicially and unreasonably affect the public interest, the applicant shall submit sufficient information to resolve those questions.").

[128] Master Order at ¶ 37, A.R. 64.

[129] Barfield Deposition, p. 51.

[130] *See* DWR Perfection/Base Acre Reviews and Summary Table, July 14, 2015 through Aug. 27, 2015, A.R. at 3650-3681.

A. THE MASTER ORDER IGNORES & OVERLOOKED CRITICAL INFORMATION IN THE RECORD

The Chief Engineer failed to consider four key factual items in the record; namely, that (1) information predating 1984, to the extent relied upon to determine maximum acreage under K.A.R. 5-5-9(a), was demonstrably unreliable; (2) FSA records provided by both the applicant and by Water PACK showed different crops planted in the period of perfection than those indicated by DWR in the net consumptive use analysis attached to the Master Order; (3) satellite data from 1984 and 1985 corroborated the FSA records, not those of DWR; (4) post-change conditions planned for the R9 Ranch, when coupled with incorrect cropping data employed by DWR and data from the GMD5 Model, yielded a number that was both unrealistic and likely to result in an impairment of other water rights in light of historic uses at the R9 Ranch. What's more, the Chief Engineer did not review contrary data submitted within the record that undermined the conclusions reached by DWR in their consumptive use analysis, and in fact did not review the analysis for propriety.[131]

With regard to documents submitted by the Cities, to the extent that DWR personnel relied upon data predating 1984 or 1985, such personnel ignored the following statement referenced in the FIRs attached to the Cities' applications:

> This development [the R9 Ranch] has had several owners since its inception in 1975, with owners from Europe & around the U.S. at various times, a state of confusion has existed in the crop production report. All of the water use or equipment records have been either destroyed or lost, and the systems and pump plant components have been intermittent over the years.
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> Since late 1983, Connecticut General has made a diligent effort to keep crop records. Therefore, it would seem reasonably to use the years since 1983 in choosing a year of record.[132]

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[131] Barfield Deposition, p. 46 (Referring to A.R. 967-968, "Again, I don't know to what extent staff reviewed this table."); 95.

[132] *See, e.g.,* A.R. 1616, 1633, 1640, 1648, 1655, 1754.

FSA cropping records submitted by the Cities in connection with their first applications corroborated defects in the record, yet those FSA records were neither considered nor mentioned in the context of the net consumptive use analysis performed by DWR for 1984 and 1985 maximum acreage calculations, notwithstanding repeated references in the record to the import of that data.[133] What's more, despite the FSA records and satellite photography confirming what was actually grown at the R9 Ranch between 1984 and 1985, satellite photography that clearly undermined the DWR net consumptive use analysis, the Chief Engineer concluded that "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."[134]

The Master Order however did not reference the definition of "consumptive use" set forth in K.A.R. 5-5-8(c), which expressly requires consideration of material changes due to alterations in deep percolation, return flows to the source of water supply, and surface runoff. Indeed, the net consumptive use analysis included in the Master Order also ignored clear data in the GMD Model showing different recharge rates based on cropland-to-grassland conversions, as well as differences in recharge rates in western Edwards County relative to Edwards County as a whole, issues expressly contemplated in K.A.R. 5-5-8.[135] Finally, the Master Order also ignored the conclusions of GMD5 in relation to the consumptive use analysis, and did not reference a letter from a prior consultant to the City Hays that described issues apparent at the R9 Ranch in 1994.[136] As such, and given that neither

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[133] Report of Acreage (1985), A.R. 2265-2269; Report of Acreage (1984), A.R. 2545-2547.

[134] A.R. 74.

[135] *Compare* A.R. 3403 (map of recharge rates from GMD5 Model, showing Kinsley within recharge Zone 9) *with* A.R. 3402 (showing higher recharge after 1970 for Zone 9, after cropland conversions); *see* Barfield Deposition, p. 65 (noting that the R9 Ranch Model does not account for materials submitted by Dr. Keller appearing at A.R. 959).

[136] A.R. 781 ("The area can naturally support the removal of between 3200 and 3800 acre feet of water per year, and the actual amount would depend upon whether the average recharge to the area is one or two inches; When potable water quality is considered, this amount could be reduced to approximately 1400 acre feet[.]").

the Master Order nor the DWR consumptive use analysis referenced therein accounted for FSA records, satellite data, defects in R9 Ranch records, or such key considerations in the GMD5 Model, any resulting calculation of the maximum amount that the Cities could move from the R9 Ranch does not hold up to scrutiny. [137]

When viewed in light of the record as a whole, in particular the wholesale failure to account for K.A.R. 5-5-8, "the agency's explanation of its action runs counter to the evidence before it."[138] Such failures render the Master Order unreasonable, arbitrary, and capricious, lacking in substantial evidence, based upon an improper interpretation of the law, and the product of an unlawful procedure.

B. DWR IMPROPERLY SATISFIED A BURDEN OF PROOF PLACED ON THE APPLICANT

The Master Order depends upon the DWR analysis and concludes that the bulk of the R9 Ranch water rights were used to irrigate alfalfa and corn.[139] Indeed, once the maximum acreage was determined, regardless of whether 5-5-9(a) or 5-5-9(b) applied, DWR ran "appropriate consumptive-use mathematics calculations" by reference to the Kansas Irrigation Guide and Planners Handbook to determine the NIR for alfalfa or corn, presumably in reflection of language set forth in K.A.R. 5-5-9(a)(3) that contemplates the Chief Engineer giving the applicant credit for returns flows relative to consumptive use.[140] But it was DWR that performed the calculations ultimately referenced in the

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[137] *See, e.g.,* A.R. 3657 (noting a perfection year of 1977 but no crops grown that year); A.R. 3660 (noting milo grown in 1984); A.R. 3661 (using both 1985 and 1991, the latter outside the perfection period); A.R. 3667 (noting use of the year 1984, a period outside the perfection period).

[138] *Wheatland Elec. Co-op.*, 46 Kan. App. at 757–58.

[139] Master Order ¶ 63, at A.R. 70 ("DWR's use of alternative crops is based on K.A.R. 5-5-9(b) (1994 version)"); Master Order ¶ 86, at A.R. 74 ("The Chief Engineer finds that the consumptive use determined by DWR was done in conformity with applicable DWR regulations."); Deposition of C.E. Barfield at 96, attached as Appendix B (noting that a DWR employee "did the determination of acres, appropriated cropping, and then applied the rule."); Acting Chief Engineer's Response to Plaintiff's Motion to Correct and Supplement the Administrative Record at p. 6 (describing the steps taken by DWR).

[140] A.R. 3741; *see also* Barfield Deposition, p. 37 ("Did the cities provide any additional information on this? A: I'm not recalling it.").

Master Order and not the Cities.[141]

The Cities instead simply requested an amount in excess of the total amount of water appropriated under their water rights upon submission of their change applications without consideration of consumptive use in the manner required by K.A.R. 5-5-8, amended their request downward to 6,756.3AF based upon intervening discussions with DWR and the Chief Engineer, and then left the Chief Engineer to rely upon an analysis performed by DWR in the final amendment to their applications filed just days before the Chief Engineer issued the Master Order.[142]

The simple fact that the Cities first requested to change amounts in excess of those appropriated under the R9 Ranch water rights should have ended the inquiry and triggered a site-specific analysis.[143] In the absence of the Cities amending their submission, or the Chief Engineer carrying out the required site-specific analysis, the Chief Engineer was not empowered to approve their change applications in the manner required by both the Base Change Criteria and the Irrigation Change Criteria, especially in light of language set forth in K.A.R. 5-5-2a(d) that required the Cities (not DWR) to submit sufficient documentation to resolve any questions raised concerning whether approval of their application would cause impairment of senior water rights or would prejudicially affect the public interest. Approval of the Master Order thus exceeded the Chief Engineer's statutory authority, deviated from required procedures, misinterpreted and misapplied the law, was not supported to the appropriate standard of evidence, and otherwise yielded an unreasonable, arbitrary, and capricious agency action.

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[141] Master Order at ¶ 86, A.R. 74.

[142] *See* Letter from C.E. Barfield to City of Hays Counsel, Jan. 21, 2016, at A.R. 671 ("The principal item for discussion will be your request for many of the referenced water rights to convert to municipal use more than the water right' s authorized quantity."); *See* Letter from Pamela Meadows, American Ag. Industries Inc., to Slentz-McCallaster, Inc. dated Mar. 25, 1982, at A.R. 1911-1916; Report of Acreage (1985), A.R. 2265-2269; Report of Acreage (1984), A.R. 2545-2547.

[143] *Id.*

C. THE APPLICANT COULD NOT MEET THE BURDEN OF PROOF UNDER K.A.R. 5-5-9(A), SO THE APPLICATIONS WERE IMPROPERLY APPROVED

Even if the Cities had performed the required analysis, they could not have satisfied the dictates of K.A.R. 5-5-8 described in *Wheatland*, the considerations described in K.A.R. 5-5-9(a), or the standard of proof required under K.S.A. 82a-708b.[144] Again, the statute governing change applications expressly requires the applicant to prove their proposed change is both reasonable and will not lead to impairment. K.A.R. 5-5-9(a)(1) first provides Edwards County applicants with a relatively simple standard for this calculation, as it considers the net irrigation requirements ("NIR") for corn under a 50% chance of rainfall to determine the maximum amount of irrigation water that may be changed to a different beneficial use, relative to the maximum acreage legally irrigated during the year of perfection. As such, K.A.R. 5-5-9(a)(1) does not examine what an irrigator actually grew during the year of perfection, nor the effects of the proposed change, and instead asks whether calculations made under (a)(1) indicate that consumptive use "will be increased by the proposed change in the use made of the water."[145] What's more, by using a county-wide figure, the Irrigation Change Criteria does not account for soil conditions in a particular location, unlike the September 22, 2017 version of K.A.R. 5-5-9(c), which provides that "If the water right is within a groundwater management district and the district has additional site-specific data available, the data may be submitted to the chief engineer for consideration."

For the Cities, the corn-based calculation should have shown the following:

1.09 feet
x 5,147.70 acres
5,610.993 AF

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[144] *See Clawson*, 315 P.3d at 905-06, discussed *infra* in Section V. We also note that the Chief Engineer did not act upon the initial or the first amended change applications within the period required by the Change Order Statute.

[145] (Emphasis supplied).

In the calculation set forth above, 1.09 feet (or 13 inches) is the NIR for Edwards County set forth in DWR regulations,[146] 5,147.7 is the aggregate maximum acreage legally irrigated under the R9 Ranch water rights in any calendar year during the year of perfection,[147] and 5,610.993AF is the maximum transfer amount determined under net consumptive use calculations required under 5-5-9(a)(1) without accounting for the impact of K.A.R. 5-5-8.

The math under the corn method thus shows that the 6,756.3AF maximum annual diversion set forth in the Master Order exceeds 5,610.993AF of annual net consumptive use by 1,145.307AF, thus triggering provisions in the Base Change Criteria and the Irrigation Change Criteria that prevent approval of a change application that increases net consumptive use with materially adverse effects on other existing water rights.

Given such the vast difference between the maximum amount ultimately approved under the Master Order, Water PACK, its members, and members of the public raised questions early and often regarding the impact of the change applications on existing water rights, which should have caused the Cities to submit application information sufficient to resolve those questions in compliance with DWR regulations.[148] The Cities had the burden to do so. The Cities however submitted no such documentation, and instead referenced the analysis performed by DWR in their final amended applications.[149] As such, even in the absence of the Cities meeting their burden, the Chief Engineer improperly approved the Master Order in violation of K.A.R. 5-5-9(a) and K.S.A. 82a-709b, while failing to require the "no injury" proof required of an applicant under in K.A.R. 5-5-2a(d), as well as K.A.R. 5-5-8.

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[146] *Compare* K.A.R. 5-5-1(a)(1) *with* K.A.R. 5-5-12.

[147] R9 Ranch Consumptive Use Analysis prepared for Water PACK by Keller-Bliesner Engineering, LLC, last updated Nov. 12, 2017, at A.R. 968.

[148] *See* K.A.R. 5-5-2a(d).

[149] *See id.*

What's more, the 6,756.3AF consumptive use requested by the Cities exceeded the consumptive use calculated under the simpler corn method, demonstrating the exact unrealistic result expected under K.A.R. 5-5-9(c). If the simpler corn-based method yields "an authorized annual quantity of water which appears to be unrealistic and could result in impairment of other water rights," then the Chief Engineer was required to conduct a site-specific net consumptive use analysis to determine the quantity of water that was actually beneficially consumed under the water right.[150] Here, however, the Master Order overlooked the 1,145.307AF increase in net consumptive use in violation of K.A.R. 5-5-9(a), as well as any consideration of why the soil types and Arkansas River flows required pumping in excess of appropriated amounts at the R9 Ranch, thus avoiding the site-specific survey required under K.A.R. 5-5-9(c) or the factors considered under K.A.R. 5-5-8.

D. THE APPLICANT COULD NOT MEET THE BURDEN OF PROOF UNDER K.A.R. 5-5-9(B)

K.A.R. 5-5-9(b) provides an alternative approach, and references "the historic net consumptive use actually made during the perfection period[,]" as well as whether such historical calculations produce a better result than calculations made under 5-5-9(a)(1). Because the Cities' submissions indicated that the R9 Ranch had irrigated some alfalfa during the year of perfection, DWR used a 20.9 inch NIR for those acres based upon data for Edwards County set forth in Table 2.2 of the 1977 Kansas Irrigation Guide and Irrigation Planners Handbook, as well as based on in-person consultation with Dr. Danny Rogers of Kansas State University.[151] But even after shifting the 2,901 alfalfa acres identified by DWR away from corn, and assuming the 1977 Kansas Irrigation Guide

[150] K.A.R. 5-5-9(c).

[151] Master Order at ¶ 74, A.R. at 72.

provided a valid result,[152] one still sees an increase in net acre-feet of consumptive use relative to the maximum amount set forth in the Master Order:

5-5-9(a)(1) Method:	1.09 feet x 2,246.7 corn acres = 2,448.903 acre-feet
5-5-9(b) Method:	1.14833 feet x 2,901 alfalfa acres = 3,331.305 acre-feet
Total:	**5,780.208 acre-feet**

Once again, the 5,780.208AF derived above did not correlate with the 6,756.8AF arrived at in the Master Order, a discrepancy that is not resolved based upon the tabular data provided by DWR.[153] In addition, given that the Cities initially sought to move 7,647AF from local water supply, the ultimate quantity arrived at in the Master Order exceeded the 5,780.208AF calculated under 5-5-9(b) by almost 2,000AF, and significantly differed from the averaged 4,800AF withdrawals under the TYRA Limitation (discussed below).[154] Under any reasonable reading of K.A.R. 5-5-9(a) or K.A.R. 5-5-9(b), and once again ignoring K.A.R. 5-5-8, the Cities did not meet the evidentiary burden imposed upon them by the plain language of K.S.A. 82a-708b or the Change Order Regulations. On the contrary, in agreeing upon a maximum amount of 6,756.8AF under the Master Order in the face of such calculations, both the Cities and the Chief Engineer impliedly admitted that the proposed change in use (even without accounting for the planned grassland conversion under 5-5-8) would materially injure surrounding water rights. As it stands, however, the Master Order does not show the calculations that arrived at the 6,756.80 amount.[155] What's more, by failing to explain and show the factual basis for the maximum quantity arrived at in the Master Order, the agency did not render a

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[152] Use of the Kansas Irrigation Handbook by DWR in connection with 5-5-9(b), as relied upon by the agency in connection with its decision, arguably involved application of a standard not properly submitted for rulemaking in compliance with K.S.A. 82a-1903(a)(2). *See also* K.S.A. 77-620(a).

[153] *See* A.R. 976 (omitting the maximum acreage legally irrigated during the perfection period).

[154] See Barfield Deposition, p. 80 ("We've said it's a significant difference.").

[155] *Cf.* A.R. 967-68 (comparing calculations and cropping patterns).

written decision that contained a specific statement of basic facts that supported the number arrived upon.[156] What's more, the failure to conduct a site-specific survey based upon such differences strains credulity beyond the point of reasonable debate, thus rendering the conclusions in the Master Order unreasonable, arbitrary, and capricious, as well as lacking in substantial evidence in light of the record as a whole."

E. THE MASTER ORDER IMPROPERLY IGNORED K.A.R. 5-5-8

None of the analysis described above considered the impact of cropland-to-grassland conversion on consumptive use.[157] One must calculate net consumptive use using "the maximum acreage legally irrigated under the authority of the water right in any one calendar year during the perfection period."[158] In determining whether net consumptive use will increase, the Chief Engineer must give the owner credit for any return flows expected from the proposed change under 5-5-9(a), as substantiated by the applicant through an engineering report or similar type of hydrologic analysis.[159] By the same token, under K.A.R. 5-5-8(c), the Master Order should have (but did not) consider changes to return flows, deep percolation, or surface water runoff referenced therein.

When pressed, the Chief Engineer acknowledged that they had not considered the post-change dynamics at the R9 Ranch, stating, "[w]ell, we do not consider the post-change use, if that's what you're asking."[160] Indeed, when pressed on the matter, the Chief Engineer stated, "[y]eah. We never have."[161] In light of the plain language of the KWAA and DWR regulations, the Chief Engineer necessarily exceeded his authority, erroneously interpreted or applied the law, engaged in an unlawful

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[156] *Farmland Industries, Inc. v. State Corp. Com'n of State of Kan.*, 971 P.2d 1213, 1217 (1999) (citing K.S.A. 77-621(c)(4)).

[157] *See* John C. Peck, *Assessing the Quality of a Water Right,* 70 J. KAN. B.A. 26, 35(2001).

[158] (Emphasis supplied).

[159] K.A.R. 5-5-9(a)(3).

[160] C.E. Deposition at p. 50.

[161] *Id.*

procedure, and failed to follow prescribed procedures when approving the change applications without any regard to K.A.R. 5-5-8.[162] In short, the Master Order entirely failed to consider a critical component of the issue at hand.

F. PRIOR DEFECTS UNDER K.A.R. 5-5-8 AND K.A.R. 5-5-9 NECESSARILY INFECTED USE OF THE R9 RANCH MODEL

While the KWAA empowers the Chief Engineer to issue and apply rules, regulations, and standards necessary for "the achievement of the purposes" of the KWAA, [163] the Chief Engineer is expressly prohibited from using general standards or policies not subjected to required rulemaking. Such standards, policies, and orders of general application with the effect of law are "void and of no further effect" until adopted in accordance with applicable KAPA provisions.[164] As such, use of the Kansas Irrigation Guide to calculate NIR for alfalfa was void.[165]

Similarly, the practice of not considering post-change conversions in the context of changes to irrigation rights, let alone making specific findings with regard to the effects upon those rights, necessarily led the Cities to apply such standards to the assessment of "sustainability" contemplated in connection with the TYRA Limitation. The required analysis, described repeatedly by Dr. Keller and by Water PACK, required an assessment of future return flows and deep percolation based upon the proposed use in the manner contemplated by K.A.R. 5-5-8 (and by extension, K.A.R. 5-5-3). To assess return flows, runoff, and deep percolation necessarily required regard for soil types, future uses, and the state of the Arkansas River. In the absence of considering K.A.R. 5-5-8, the Master Order unlawfully served to approve the change applications, erroneously interpreted or applied the law, engaged in an unlawful procedure and failed to follow required procedure, was based on a

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[162] K.S.A. 77-621(c)(2), (c)(4), and (c)(5).

[163] K.S.A. 82a-706a.

[164] K.S.A. 82a-1903(a)(2).

[165] *See* A.R. 3727, 3444.

determination of fact that was not supported to the appropriate standard of evidence, and was otherwise unreasonable, arbitrary, and capricious.

IV. THE MASTER ORDER IMPROPERLY APPLIED UNAPPROVED STANDARDS IN CONNECTION WITH A HYDROLOGICAL MODEL

In connection with the R9 Ranch Model., the Chief Engineer required the Cities to reconfigure the GMD5 Model and perform model runs based upon unpublished standards, including but not limited to the development of a 51-year time horizon that simply repeated a 17-year data set that did not include the period of perfection, even though such data was available to the Cities.[166] Such adjustments amounted to standards of general application that were not subjected to required notice and comment proceedings, yielding a flawed analysis that (like the DWR consumptive use analysis) did not account for the cropland-to-grassland conversion contemplated by the change applications.[167] What's more, even when configured in an unregulated manner,[168] the R9 Ranch Model still showed that existing water rights surrounding the R9 Ranch would be impacted by the proposed change applications.[169]

K.S.A. 82a-1903 only permits the Chief Engineer to enforce rules and regulations enacted in accordance with K.S.A. 77-420, specifically stating that standards, policies, and orders of general application with the effect of law are "void and of no further effect" until adopted in accordance with applicable KAPA provisions.[170] The reconfiguration and use of the GMD5 Model by the Cities, as

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[166] A.R. 716; Barfield Deposition, p.71 ("We had a number of discussions with respect to what model run should be done as part of the overall evaluation, including the drought scenario.").

[167] Letter from Chief Engineer dated February 19, 2018, at A.R. 635 ("As part of our evaluation of the Cities' change applications, I have required the Cities to complete a modeling analysis to support their change applications by demonstrating that the proposed quantities for municipal use are reasonable over the long-term. I have also required the Cities to complete a modeling assessment of the impacts of the proposed changes on the area.").

[168] Barfield Deposition, p. 89-93.

[169] A.R. 368, 371 (showing expected declines in groundwater levels based upon a 51-year horizon that assumes continuation of cropping patterns upon approval of the Master Order).

[170] K.S.A. 82a-1903(a)(2).

applied to both the R9 Ranch and adjacent lands as a requirement and condition of the Master Order, thus exceeded the statutory authority of the Chief Engineer, as well as the required procedures for handling change applications.

This is so because the Chief Engineer caused the Cities' experts to apply unpublished standards and rules of general application to the GMD5 Model to determine the effect of proposed changes. KAPA defines a rule or regulation in terms of "a standard, requirement or other policy of general application that has the force and effect of law…issued or adopted by a state agency to implement or interpret legislation."[171] In language echoed by limitations imposed upon the Chief Engineer, KAPA indicates that "any standard, requirement or other policy of general application may be given binding legal effect only if it has complied with the requirements of the rules and regulations filing act."[172]

The Chief Engineer never subjected the rubrics applied within the R9 Ranch Model to the required notice and comment proceedings. Instead, he required the Cities' consultants to use the R9 Ranch Model (as derived from the GMD5 Model) to analyze whether the Master Order would be "sustainable," a standard agreed upon by the Cities and the Chief Engineer in connection with negotiation of the Master Order. "If a state agency fails to submit a policy that by content and effect is a regulation to the notice and publication requirements of [KAPA], the policy is void."[173]

The reconfiguration of the GMD5 Model in this manner falls squarely within the concerns expressed by the Court of Appeals and by the Supreme Court in *Bruns*.[174] In *Bruns*, the Board of Technical Professions (BTP) applied an unpublished internal policy to deny license reciprocity to professional engineers licensed in other states, relying solely upon that internal policy to do so. In

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[171] *Taylor v. Dept. of Health and Env.*, 305 P.3d 729, 734 (Kan. App 2013) (citing K.S.A. 77-415(c)(4)).

[172] *Compare* K.S.A. 82a-1903(a)(2) *with* K.S.A. 77-415(b)(1).

[173] *Bruns v. Kansas State Bd. of Technical Professions*, 19 Kan. App.2d 83 (1993), *aff'd* 255 Kan. 728 (1994).

[174] *Id.*

response, both the Court of Appeals and the Supreme Court reasoned that K.S.A. 77-415(4) characterizes a rule or regulation as one issued to "interpret legislation enforced or administered by a state agency."[175] Both the Supreme Court and the Court of Appeals also found it significant that the BTP relied upon the written internal policy for enforcement and interpretation of its enabling statute.[176] Here, like the BTP in *Bruns*, the Chief Engineer caused the Cities to employ unpublished standards for configuration of the GMD5 Model unscrutinized by those within the ambit of the Master Order.[177]

V. THE TYRA LIMITATION IS INVALID AS WRITTEN AND AS APPLIED

As the name suggests, the Ten-Year Rolling Aggregate Limitation purports to allow the Chief Engineer to set an aggregate limit of 48,000AF on withdrawals from the R9 Ranch, at an average of 4,800AF per year. As written, this TYRA Limitation is invalid because it permits the Chief Engineer to maintain jurisdiction over the change approvals, altering the TYRA Limitation after the effectiveness of the change approvals (if any) in violation of *Clawson* and K.A.R. 5-5-9(a)(6).[178]

In *Clawson*, the Chief Engineer sought to maintain jurisdiction over an approved appropriation permit so that he could change approved rates and quantities of water at a later time.[179] Clawson and amici argued successfully that such retention of jurisdiction would subvert the rights of the permit-holder created upon approval of the appropriation permit, effectuating a later change in water rights well after the time to seek KJRA review had past.[180]

Holding for Clawson, the Court of Appeals noted that, unlike other administrative statutes

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[175] *Id.* at 87.

[176] *Id.* at 87-88.

[177] Barfield Deposition, p. 92-93.

[178] *Clawson*, 315 P.3d at 905; K.A.R. 5-5-9(a)(6).

[179] *See id.*

[180] *Id.* 905-06.

permitting retention of jurisdiction, K.S.A.2012 Supp. 82a-711(b) "specifically requires the chief engineer to consider senior water rights and the public interest *prior* to granting a water right."[181] Ruling in favor of Clawson, the Court of Appeals held as follows:

> In sum, the KWAA does not authorize the chief engineer to reevaluate and reconsider an approval once a permit has been issued. Clawson would have to invest significant amounts of money to reperfect the existing water rights. If the chief engineer could reduce the rate of diversion and the quantity of the water rights authorized to be perfected, the permit would be meaningless. We affirm the district court's rejection of the chief engineer's retention of jurisdiction.[182]

Similar concerns apply in the case of the TYRA Limitation, which purports to allow the Chief Engineer to adjust and reevaluate the change applications well after the time for KJRA review of a final order has passed. What's more, given that the Change Order Statute expressly references considerations applicable in connection with permits to appropriate water, the *Clawson* standard should apply with equal force to consideration of impacts upon water rights with dates of priority senior to those of a change application. As noted by the Court of Appeals in *Clawson*, as between both the right subject to a change application and other existing rights, the KWAA "does not authorize the chief engineer to reevaluate and reconsider an approval" once a change approval has been issued.[183]

We also note that the TYRA Limitation, if later revisited, violates procedural protections afforded to water users surrounding the R9 Ranch. Suppose that in ten years the Chief Engineer decides to revisit the TYRA Limitation in a way that harms other users.[184] Assuming the law remains unchanged, any other user of water in the vicinity of the R9 Ranch impaired by relaxation of the TYRA Limitation would find themselves required to exhaust their administrative remedies before seeking

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[181] *Id.* at 908 (emphasis in original).

[182] *Clawson*, 315 P.3d at 909.

[183] *Id.* at 900.

[184] Master Order at ¶ 227, 229.

judicial review.[185] The Master Order, however, states that the TYRA Limitation does not benefit or create rights for any third party, thus cutting off administrative avenues of relief that the Legislature (in response to *Clawson*) required of third parties prior to seeking judicial review.[186]

If the TYRA Limitation as written is allowed to stand, without the ability to participate in any subsequent review of that TYRA Limitation, the Chief Engineer has effectively cut off the ability of third parties to prevent impairment of their water rights if TYRA Limitation changes. What's more, in practical effect, the TYRA Limitation undermines the very requirement at issue here, e.g., those that require an applicant seeking a change order to first apply in the proscribed form. As such, the Chief Engineer has thus exceeded his statutory authority, erroneously interpreted and misapplied the law, engaged in an unlawful procedure or failed to follow prescribed procedure, and otherwise acted in an unreasonable, arbitrary, and capricious manner in a fashion that harms or ignores other users in the vicinity of the R9 Ranch.

CONCLUSION

The following appears in a 2001 article published in the Journal of the Kansas Bar Association regarding the purchase and change of water under Kansas statutes:

> A "rule of thumb" in Western water law is that only the amount of water consumed can be changed to a different place of use. For example, a buyer of a right with 100 units being totally consumed (no return flow to the stream) in a factory could change the entire 100 units to another place of use, because there would be no harm to anyone downstream. A buyer of a water right with 100 units used for water power (0% consumption because all water returns to the stream after running through the turbines) could not change any part of the water right to another location. A buyer of an irrigation right for 100 units that consumes 40 units and returns 60 units could change only 40 units to another location. Kansas law follows this rule of thumb in several complex regulations.[187]

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[185] *See* K.S.A. 82a-716; 82a-717a.

[186] *See id.*

[187] Peck, supra note 157, at 35.

In light of the foregoing, Water PACK respectfully asks this Court to:

a. set aside or enjoin the Master Order and the change approvals;

b. to the extent that the Court deems the contingencies in the Master Order invalid, order the Chief Engineer to reject the Cities' change applications;

c. take any other action deemed authorized and appropriate under K.S.A. 77-622.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Plaintiff's Memorandum in Support of Petition for Judicial Review* 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