BEFORE THE KANSAS DEPARTMENT OF AGRICULTURE
1320 Research Park Drive
Manhattan, Kansas 66502

In the Matter of City of Hays' and the City of Russell's Applications for Approval for Change in Place of Use, Point of Diversion, and Use Made of Water Under Existing Water Rights	FILE NOS. 21,729-D1; 21,729-D2; 21,730; 21,731; 21,732-D1; 21,732-D2; 21,733; 21,734; 21,841; 21,842; 22,325; 22,326; 22,327; 22,329; 22,330; 22,331; 22,332; 22,333; 22,334; 22,335; 22,338; 22,339; 22,340; 22,341; 22,342; 22,343; 22,345; 22,346; 27,760; 29,816; 30,083; and 30,084.

Pursuant to K.S.A. chs. 82a and 77

PETITION FOR REVIEW OF CHANGE APPROVALS

Water PACK asks the Secretary of Agriculture to review the Change Approvals set forth in Exhibits 1-32 of the Master Order issued March 27, 2019 ("Master Order") in the above-captioned proceeding(s).[1] The Secretary may review the Change Approvals pursuant to K.S.A. §§ 77-527, 82a-708b, and 82a-1901 (2016).

BASIS FOR PETITION

Both K.S.A. § 82a-708b (the "Change Order Statute") and enabling regulations set forth in K.A.R. 5-5-1, *et seq.* (the "Change Order Regulations") prohibit unreasonable changes and impairments of existing water rights in connection with a change approval, while omitting reference to contingencies of the kind included in the Master Order. Instead, the Change Order Statute, the Change Order Regulations, and the Kansas Water Transfer Act envision a thumbs up or thumbs down act of *pollice verso* on the part of the Chief Engineer, while the Change Order Statute and Change Order Regulations require due regard for future impacts on water rights holders that will be affected by the Change Approvals, regardless of seniority.

The Change Approvals May Not Include Contingencies

As written and as applied, the contingencies embedded in the Change Approvals exceed the jurisdiction of the Chief Engineer and run counter to the express provisions of the Change Order Statute and the Change Order Regulations. *See* Hoesli v. Triplett, Inc., 303 Kan. 358, 362, 361 P.3d 504 (2015); Friedman v. Kansas State Bd. of Healing Arts, 296 Kan. 636, 640, 294 P.3d 287 (2013). The Change Order Statute specifies that once an applicant satisfies certain conditions, only then can the Chief Engineer "approve or reject the application for change in accordance with the provisions and procedures prescribed for processing original applications for permission to appropriate water." And while the administrative regulations for the Kansas Water Transfer Act contemplate submission of "contingently approved documents" like the Change Applications, neither the Change Order Statute nor K.A.R. 5-5-1 *et seq.* contemplate contingent approvals of the kind embodied in the Master Order. *Compare* K.S.A. § 82a-708b(a) *with* K.A.R. 5-5-1 *et seq. and*

[1] Except where otherwise noted in this petition, capitalized terms have the meanings set forth in the Master Order.

K.A.R. 5-50-2(x)(2). Approval of a change application is instead an all-or-nothing proposition, subject to conditions of approval DWR may include in connection with the Water Transfer Act.

The Change Approvals are Unreasonable

Neighboring Colorado already suffers from the "buy and dry" phenomenon,[2] yet the Master Order expressly contemplates that the intended use of the R9 Ranch water will "cause the water levels of the R9 Ranch to continue to decline"[.] Master Order at ¶ 137. The Change Approvals thus conflict with Kansas laws and policies intended to promote the economic vitality of Kansas, deviate from principles set forth in the Kansas Water Plan, and yield an unrealistic analysis of how withdrawals will impact local water users. Such agency actions are unreasonable, because they are taken without due regard to the benefit or harm to all interested parties, because DWR fails to consider important aspects of the problems presented, and because DWR's explanation of those problems runs counter to the evidence before it and its own regulations.

For example, by virtue of specific local conditions, and as noted in prior submissions to DWR, there is zero return flow when pumped water is transferred out of the Mid-Arkansas Subbasin in southwest Edwards County. [3] *See* K.A.R. 5-5-8(c)(2). Water PACK's prior comments submitted July 16, 2018 further state that:

7. Water PACK believes strongly in the lack of recharge available from the base flow of the Arkansas River from the Dodge City area downstream to the R9 Ranch. The Mid-Arkansas Sub-Basin, in which the R9 Ranch is located, has the weakest base flow in the SW corner of the Sub-Basin, and is unlikely to improve over time. This is due to the absence of flow in the Arkansas River in this reach of the river, plus the heavy pumping from irrigators just a few miles west in GMD # 3, who are allowed to pump up to 24 inches of water each year.

8. It is likely that in the near future irrigators in this area around and adjacent to the R9 Ranch will need to create solutions, such as WCA's or similar programs, to address a declining water table, which they will almost certainly continue to experience in the alluvial and surrounding area aquifers. A good question is whether the cities of Hays/Russell will participate in these programs, or will they be allowed to continue to draw down the water table in the area (especially if allowed to pump the quantities given in the Master Order). Their legal representatives at the June 21 meeting in Greensburg alluded to the thought that their client cities would be exempt from these types of programs!

9. In 2003, the Division of Water Resources determined that the Mid-Ark Sub-Basin was in overdraft by irrigation pumping by some 41,000 Acre-Feet per year, with the SW area of the Sub-Basin being the prime area where this is occurring. Subsequent analysis by Dr. Andy Keller, Keller-Bliesner Engineering, on behalf of

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[2] *See, e.g.*, EDF, ALTERNATIVE WATER TRANSFERS IN COLORADO 8 (2016), https://www.edf.org/sites/default/files/alternative-water-transfers-colorado.pdf.

[3] See Petition for Review Submitted Concurrently by Jane Wenstrom, noting that transfers from the R9 Ranch will ensure that local users will rely entirely upon high-precipitation events for recharge of the aquifer.

Water PACK, determined the overdraft to be closer to 10,000 Acre-Feet per year. He also confirmed the SW area as the area where this is predominant. Whichever number you prefer, this is a good snapshot of what was happening in the early 2000's. Water PACK's analysis of the static water levels in the area of the R9 Ranch from state & GMD data give strong evidence that this lowering of the water tables is continuing to occur, and Dr. Keller's updated analysis indicates that the decline is accelerating.

10. Years of experience by agricultural irrigators in the area of the R9 Ranch provide insight into what it is like to irrigate the sandy soil types with shallow aquifer depths and declining pumping rates during the irrigation season. 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. 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. Yet this is the basis for the Division of Water Resources determination that alfalfa and corn were able to consumptively use 88% of applied irrigation water during the irrigation season within the perfection period of 1984 and 1985! And this leads to the overstatement of water that could be converted from agricultural to municipal use in the Master Order.

As written, the Master Order thus yields unrealistic numbers by overlooking evidence submitted by Water PACK and other participants in this proceeding. K.A.R. 5-5-9(c) (1994) version). Such data shows that the net consumptive use, calculated relative to the maximum acreage legally irrigated under the authority of the water rights during the perfection period (1984), was far less than the net consumptive use calculated by DWR. *See* K.A.R. 5-5-9(a)(1) (1994 version).

Water PACK therefore urges the Secretary to review whether the Change Approvals will cause groundwater levels in the area to decline or decline excessively; cause the rate of withdrawal of groundwater within the area in question to equal or exceed the rate of recharge in such area; or cause preventable waste of water to occur within the area in question. *See* K.S.A. §§ 82a-1036, 82a-1041. Water PACK also asks the Secretary to examine cropping data for the R9 Ranch from the year of record, satellite photography matching the cropping data reported by KBE, and NRCS studies of the unique soil conditions at the R9 Ranch.[4] What's more, given continuing concerns

[4] See Petition for Administrative Review of Master Order Submitted by Richard J. Wenstrom, P.E., which is incorporated by this reference.

regarding the long-term sustainability of the Arkansas River Basin,[5] policies set forth in the Groundwater Management District Act (as amended), and data supplied by interested parties, Water PACK believes that is unreasonable to authorize transfer of the quantities contemplated in the Change Approvals in the absence of a site-specific survey, as well as further consideration of projected impacts posited by KBE. *See* K.A.R. 5-5-9(c) (1994 version).

The Master Order Improperly Concludes the Change Approvals Will Not Impair Existing Rights in Spite of BMcD's Evidence to the Contrary, and Relies on Unrealistic Numbers

The Master Order concludes that the Change Approvals "will not impair existing rights"[.] Master Order at ¶ 70. This finding appears to be based upon statements made by the Cities in a September 18 letter suggesting that "[t]here is no evidence that the proposed changes would impar water rights that are **senior** to the water rights on the R9 Ranch[.]" Master Order at ¶ 85 (emphasis supplied). The Change Order Statute, however, encompasses *all* users in the context of its impairment analysis. Specifically, the statute states that "an applicant must demonstrate that the change is reasonable, that it will not **impair existing rights**, and that water will be diverted from the same local source of supply." Master Order at ¶ 34 (emphasis supplied). Likewise, the Change Order Regulations do not distinguish between impairment of senior or junior users, and instead require DWR to determine whether authorized annual quantities calculated under K.A.R. 5-5-9 (a) (1994 version) yield numbers that appear to be "unrealistic" and "could result in impairment of **other water rights**." K.A.R. 5-5-9(c) (1994 version) (emphasis supplied).

However, data submitted by BMcD clearly shows that pumping by the Cities will impair both junior and senior water rights immediately adjacent to the R9 Ranch.[6] Given that Kansas law defines impairment in terms of whether a diversion "diminishes, weakens, or injures" another water right, and in light of concerns regarding the consumptive use analysis detailed above, Water PACK urges the Secretary to consider whether findings in the Master Order properly address and consider the impacts of the Change Approvals on both junior and senior water rights. *See* Garetson Bros. v. Am. Warrior, Inc., 347 P.3d 687, 699 (Kan. App. 2015).

CONCLUSION

The express language of the Change Order Statute and the Change Order Regulations provide the Chief Engineer with a binary choice: e.g., whether to approve or reject a change application. Had the Kansas legislature wished to provide for contingent approvals in the statute, or consideration of only senior water users in connection with impairments caused by a change application, the legislature could have done so. Further, it is unrealistic for DWR to disregard data suggesting that the post-change use of water at the R9 Ranch will increase consumptive use in violation of K.A.R. 5-5-3 and impair junior users. *See* Master Order at ¶ 86. We therefore request your review.

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[5] KANSAS DEPARTMENT OF AGRICULTURE, UPPER ARKANSAS RIVER CONSERVATION RESERVE ENHANCEMENT PROGRAM PERFORMANCE REPORT 1 (Oct. 1, 2014-Sept. 30, 2015).

[6] Letter from BMcD to Toby Dougherty, City Manager, City of Hays, R9 Ranch Modeling Result, at page 24, fig. 9 (Feb. 13, 2018), *available at* https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/r9-ranch-modeling-report_feb-13-2018.pdf?sfvrsn=9dd680c1_4.

Respectfully submitted,

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