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FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
316-267-6371

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

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

Pursuant to K.S.A. Chapter 77

THE CITY OF HAYS' RESPONSE TO MOTIONS TO CORRECT AND SUPPLEMENT THE ADMINISTRATIVE RECORD

The Agency Record complies with all Kansas Judicial Review Act requirements. In his recent deposition, the former Chief Engineer testified that all of the documents that he considered are already included in the Agency Record. There are no omissions

that will impede the Court's review of the Master Order. Water PACK's references to the Federal Administrative Procedures Act are a smoke screen raised in an attempt divert attention from the plain text of the KJRA.

Water PACK fashions its recent motion as one to supplement or correct the administrative record. In reality, this is Water PACK's ***second*** attempt to obtain discovery. The Court has already indulged Water PACK with an opportunity to depose the Chief Engineer, and during that deposition, the former Chief Engineer confirmed that he did not rely on any of the documents that Water PACK now asks the Court to order the Kansas Department of Agriculture, Division of Water Resources ("DWR") to add to the Agency Record. Because those documents are, by definition, ***not*** part of the "agency record" under K.S.A. 77-620(a), the KJRA does not permit their consideration in this proceeding.

DWR, not Water PACK, knows which documents it "used as a basis for its action" and which documents it did not. There could be relevant documents that the Agency did not use for one reason or another. [1]And there could even be relevant documents that it could or should have used but did not. But Water PACK has not and

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[1] *See* the comment to § 5-115 of the 1981 Model APA: "This section deals with the agency record for judicial review, ***which is related but not necessarily identical to the record of agency proceedings*** that is prepared and maintained by the agency." Model State Administrative Procedure Act § 5-115 cmt. (1981).

cannot sustain the burden to show that there are other relevant documents that DWR did, in fact, rely on to support the Master Order.

Moreover, Water PACK provided its specific comments and concerns after DWR published the draft Master Order. A spirited debate ensued among the Cities, the Big Bend Groundwater Management District No. 5's consultant, and Water PACK's consultant.[2] The former Chief Engineer addressed each of Water PACK's concerns in the Master Order issued on March 27, 2019.[3] Water PACK's disagreement with the Master Order is not grounds for relief under K.S.A. 77-621(c).

Granting Water PACK's motion would, in essence, reward Water PACK, for its failure to timely intervene below. This Court should not permit it.

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[2] *See generally, e.g.*, A.R. 783–85 (July 10, 2018 Water PACK comments on the draft Master Order); A.R. 777 (July 25, 2018 additional Water PACK comments on draft Master Order); A.R. 903–36 (transcript of question and answer portion of June 21, 2018 public meeting); A.R. 937–58 (transcript of public information portion of June 21, 2018 public meeting); A.R. 880–902 (June 21, 2018 PowerPoint prepared by Water PACK's consultant); A.R. 852–61 (June 21, 2018 PowerPoint by the Cities' consultant); A.R. A.R. 704–36 (August 8, 2018 PowerPoint of GMD5's consultant); A.R. 756–68 (August 6, 2018 responsive comments from the Cities' consultant).

[3] *See* the comparison of the Draft Master Order and the Final Master Order attached to the Intervenors' Brief in Response to Water PACK's Motion for Supplemental Discovery, Ex. 9 (Dec. 6, 2019). For example, as shown by the "tracked changes" in Exhibit 9, the former Chief Engineer provided a detailed discussion of Water PACK's concerns on PDF pp. 118–121; 123–125; and 135–145.

I. There is no legal basis to grant Water PACK's motion.

Water PACK begins its argument with a false predicate:

> Where the agency submits an incomplete agency record, the KJRA permits a plaintiff to move to correct or supplement the agency record in a manner not dissimilar to that available under the Federal Administrative Procedure Act.[4]

First, the record in this case is complete. But even if it was not, Water PACK's assertion has no legal basis.

A. The fact that the KJRA scope-of-review section, K.S.A. 77-621, is similar to the federal scope-of-review provision does not mean that K.S.A. 77-619 and 77-620 are "modeled upon the Federal APA" as Water PACK asks the Court to believe.[5]

Water PACK asks the Court to compare K.S.A. 77-620(f), the provision that allows the Court to "require or permit subsequent corrections or additions to the record" with two Kansas cases[6] and a comment in the 2005 draft of the Revised Model

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[4] Water PACK's Mot., at 8.

[5] Water PACK cites a comment from the 2005 Model APA stating that subsections (a) to (c) of the scope-of-review section of the 2005 Model APA are taken from the 1961 and 1981 Model APAs and are "substantially similar to the general scope of review provisions of the Federal APA, 5 U.S.C. SECTION 706." Water PACK's Mot., at 8. However, K.S.A. 77-619, and 77-620, the provisions dealing with the permissible content of the "agency record" are based on §§ 5-114 and 5-115 of the 1981 Uniform Model State Administrative Procedure Act. They have no counterparts in the Federal APA.

[6] The pinpoint citations simply acknowledge that KJRA is modeled or patterned after, but does not adopt, the 1981 Uniform Model State Administrative Procedure Act.

"The KJRA is modeled after Article 5 of the 1981 version of the Model State Administrative Procedure Act. ***The legislature, however, did not adopt the Model Act***." *Lindenman v. Umscheid*, 255 Kan. 610, 618, 875 P.2d 964, 971 (1994) (citations omitted) (emphasis added).

State Administrative Procedures Act ("2005 Model APA").[7] Water PACK asserts that a 2005 comment notes that "sections of the Model State Administrative Procedure Act are modeled upon the Federal APA."[8] But that comment is about the scope-of-review section of the 2005 Model APA that is somewhat similar to portions of K.S.A. 77-621(a) and (c).[9] The comment is not about a counterpart to K.S.A. 77-620 because the 2005 Model APA does not have a counterpart to that section.

Moreover, the Leben article[10] mistakenly states that the 1981 Model APA[11] was adopted "verbatim" in Kansas—it was not.[12] One of the variations from § 5-116 of the 1981 Model APA is in K.S.A. 77-621(c)(7), where the Legislature substituted "when viewed in light of the **record as a whole**," for "when viewed in light of the **whole**

"This court's research has revealed that the KAJR was apparently patterned after the Model State Administrative Procedure Act (1981)." *Hale v. Substance Abuse Ctr. E., Inc.*, 19 Kan. App. 2d 569, 571, 873 P.2d 932, 934 (1994).

[7] DRAFT *Revised Model State Administrative Procedures Act*, by the National Conference of Commissioners on Uniform State Laws, October 2005 Meeting Draft, ("DRAFT 2005 Model APA"), p. 67, accessed on March 19, 2020, and available at: https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f218bdf4-c162-279e-1960-0f2d297d41f4&forceDialog=0.

[8] Water PACK's Mot., at 8.

[9] DRAFT 2005 Model APA, *supra.*

[10] Steve Leben, *Challenging and Defending Agency Actions in Kansas*, 64 J. Kan. B. Ass'n 22, 28 (July 1995),

[11] Uniform Law Commissioners' Model State Administrative Procedure Act (1981), accessed on March 20, 2020, and available at: https://www.japc.state.fl.us/Documents/Publications/USAPA/MSAPA1981.pdf.

[12] *See* footnote 8, *supr*a.

record before the court." While this may seem like a distinction without a difference, the Legislature must have had something in mind or it would not have made this change. It was most likely thinking the same thing in 2009 when it added subsection (d) to, among other things, make it clear that the "record as a whole," is the record, "compiled pursuant to K.S.A. 77-620."[13]

The Kansas Legislature has made it clear that "[j]udicial review of disputed issues of fact shall be confined to the agency record."[14] And, the "agency record for judicial review of the agency action" consists of the documents that, (1) express the agency action under review, (2) were considered, and (3) form the basis for agency action, in this case, the Master Order.[15]

B. Federal case law interpreting the undefined "whole record" term in the Federal APA in not persuasive authority for interpreting the Kansas definition of "the record as a whole."

It is more important to point out that the Federal APA does not define the term "whole record." Instead, the content of the "whole record" is left to federal agencies and the courts. Water PACK's attempt to convince the Court that K.S.A. 77-620 is in any way similar to the Federal APA is without foundation; there is no connection between 5 U.S.C. § 706 and K.S.A. 77-619 and 77-620.

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[13] K.S.A. 77-621(d) added in 2009. L. 2009, Ch. 109, § 28.

[14] K.S.A. 77-618.

[15] K.S.A. 77-620(a).

The Federal APA requires federal courts to conduct judicial review of agency action based on the undefined "whole record."[16] The KJRA provides a specific three-part definition of "the record as a whole" in K.S.A. 77-620(a).[17] The KJRA was enacted in 1984[18] and K.S.A. 77-621 was amended in 2009[19] further distancing "the record as a whole" from the undefined federal "whole record."

Water PACK selectively quotes *Bar MK Ranches v. Yuetter* from the Tenth Circuit, but that case fails to support Water PACK's argument. The *Bar MK* Court states that the record should ***not*** be supplemented with "post hoc rationalizations for [the agency's] decision."[20] The case continues: "[T]he designation of the Administrative Record, like any established administrative procedure, is ***entitled to a presumption of administrative regularity***."[21] "The court assumes the agency properly designated the Administrative Record ***absent clear evidence to the contrary***."[22]

Ultimately, the Tenth Circuit ruled that the plaintiffs "failed to carry their burden of clearly establishing that the Administrative Record was improperly designated" even though the plaintiffs did show that certain documents included in the administrative

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[16] 5 U.S.C. § 706.

[17] *See* the previous Section.

[18] L. 1984, Ch. 338.

[19] L. 2009, Ch. 109, § 28.

[20] 994 F.2d 735, 739–40 (10th Cir. 1993).

[21] *Id.* at 740 (citation omitted) (emphasis added).

[22] *Id.* (citation omitted) (emphasis added).

record "were not included in the agency appeal record."[23] The Tenth Circuit's ruling turned on the lack of prejudice suffered by plaintiffs: "Plaintiffs have alleged that the Forest Service submitted documents to the district court as post hoc rationalizations for the decision. However, Plaintiffs fail to show how these alleged post hoc rationalizations prejudice them."[24]

Water PACK asks the Court to add documents to the Agency Record, presumably so that it can formulate impermissible post hoc rationalizations. But Water PACK does not allege that it is prejudiced by their exclusion. Nor could it.

Even if the Federal Act was could be used as a rough guide, federal courts have not devised a uniform definition of "whole record." Federal courts are split on almost every Federal APA issue. This is reflected in the broad disparity with which the Federal APA has been treated by interpreting courts in which "petitioners may take advantage of any of the myriad circuit splits and hazy standards" within the Federal APA.[25]

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[23] *Bar MK Ranches*, 994 F.2d at 740. *See also*, footnote 1, *supra.*

[24] *Id.*

[25] *See, e.g.*, Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 Kan. L. Rev. 1, 67 (2018). *See also id.* at 37 ("There is a circuit split over whether deliberative process materials belong in the APA record and must be logged as privileged. . . . Courts are also split on whether a privilege log is required."; *id.* at 43 ("The landscape of completion and supplementation, as practiced, is unkempt terrain. Courts disagree as to which exceptions exist, how to prove them, and how to classify them. Moreover, some disagreements are not just among circuits, but also intra-circuit."); *id.* at 55 ("Many courts are split as to whether APA complaints are subject to motions to dismiss on pleading and merits grounds."); *id.* at 67 n. 379 ("However, there appears to be an intra-circuit split in the D.C. Circuit regarding the lawfulness of

Gavoor and Platt conclude their Kansas Law Review article on the proper content of the administrative record under the Federal APA with a comment that is instructive here:

> What goes into the administrative record reviewed by a court in an APA action is a deceptively simple inquiry: what materials did the agency consider in making the decision being challenged? This topic has gone largely unexplored in literature, as courts—pressed by zealous advocates who chafe at the proper restrictions in APA practice not found in other civil actions—create a myriad of exceptions that seem reasonable. However, the APA's text, history, structure, and purpose carefully delineate the scope of the record, no matter how reasonable it may seem to allow the government or a petitioner to slip a few documents into the record for judicial consideration.
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> Although the APA's record rule has been in the U.S. Code for over seventy years, . . . lower courts remain split in their approaches, contributing to uncertainty for massive bureaucracies seeking to implement best practices at minimum costs to the taxpayer."). [26]

C. Kansas case law cuts against Water PACK's motion to add documents to the Agency Record.

Water PACK's argument that documents should be added to the record because the Federal APA somehow applies to this Kansas administrative proceeding is also undercut by the first case Water PACK cites. Immediately after the sentence in *Lindenman v. Unscheid* cited by Water PACK stating that the KJRA was modeled after

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remand without vacatur."); *id.* at 76 ("Lower courts are imprecise about the record rule and allow various exceptions that might not rise to the level of a circuit split.").

[26] *Id*. at 80.

the 1981 Model APA, the Court goes on to state that "[t]he legislature, however, did not adopt the Model Act."[27]

The Kansas Supreme Court has recently noted that the general admonition that discovery is unavailable in a KJRA action is no idle threat. In *In re Application of Fleet for Relief from a Tax Grievance in Shawnee County*, the Court applied K.S.A. 77-619(a) and 77-618 to affirm that "judicial review of disputed facts is limited to the agency record unless an exception applies."[28] In that case, the discovery issue was not appealed, so the Court made no formal ruling. Nevertheless, it took the unusual step of raising the issue *sua sponte*: "we feel obligated to note that we find no statutory authority allowing the addition of new evidence under these circumstances."[29] The Court went on to note that the District Court's decision to receive supplemental documents into the agency record was erroneous because neither of the "two limited exceptions for when new evidence can be added to the agency record" set out in K.S.A. 77-619(a) applied.[30] So while it is true that "[t]he decision to receive additional evidence on review of agency action is within the sound discretion of the district court," the Supreme Court has made it clear that one of the K.S.A. 77-619(a) exceptions must apply.[31]

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[27] 255 Kan. 610, 618 (1994).

[28] 293 Kan. 768, 786 (2012).

[29] *Id.*

[30] 293 Kan. 768, 786 (2012).

[31] *See id*; *Cherokee Cty. v. Kan. Gaming Comm'n*, 306 Kan. at 317–18 (citations omitted).

The Supreme Court addressed the issue more recently in *Board of Cty. Comm'rs of Cty. of Cherokee v. Kan. Racing & Gaming Comm'n*, noting that the extent to which supplementing the record is available in a KJRA proceeding "has been largely unlitigated."[32] Nevertheless, the Court noted: "Typically, the question of when a district court may receive additional evidence arises when a party wishes to supplement the agency record with evidence the party already possesses."[33] To do so, the appellant must "demonstrate a sufficient factual basis to warrant traditional means of discovery."[34]

Moreover, Kansas "courts review an agency's factual findings to ensure substantial evidence supports them 'in light of the record as a whole.'"[35] Based on that agency record, courts must "determine whether the evidence supporting the agency's factual findings is substantial when considered in light of all the evidence."[36] More specifically, "[s]ubstantial evidence is such evidence as a reasonable person might accept as being sufficient to support a conclusion."[37]

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[32] 306 Kan. 298, 317–18 (2017).
[33] *Id.* at 319.
[34] *Id.*
[35] *Clawson v. State Dep't of Ag., Div. of Water Resources*, 49 Kan. App. 2d 789, 797 (2013).
[36] *Id.*
[37] *Id.* (citing *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 362–63 (2009)).

There is no viable evidence that DWR did not properly designate the Agency Record. And this Court has no duty to comb through the record; rather, the evidence in the Agency Record "cited by any party" must merely be "substantial" and "supported to the appropriate standard of proof."[38]

Water PACK emphasizes that evaluating the "record as a whole" requires evaluating evidence in the record "that both supports and detracts from an agency's finding."[39] This is a true statement, but it does not advance Water PACK's argument. If DWR's Master Order is not supported by substantial evidence, the appropriate remedy is remand ***not*** engaging in a protracted fishing expedition to add materials that Water PACK would have had access to if it had intervened and now seeks hoping that it will be able to formulate ad hoc arguments to attack the Master Order.[40]

Instead, the salient question for ***this*** motion is whether the documents Water PACK seeks to add to the record were both considered by the Chief Engineer before issuing the Master order and used as a basis for the Master Order but not included in the Agency Record filed with the Court. None of the documents that Water PACK seeks meet that test. Moreover the content and conclusions set out in the Master Order are

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[38] K.S.A. 77-621(c)(7) and (d).

[39] Water PACK Mot., at 6.

[40] K.S.A. 77-619(b).

supported by documents in the Agency Record, as they must be,[41] that "a reasonable person might accept as being sufficient to support a conclusion."[42]

Finally, none of the documents Water PACK seeks to add to the Agency Record in this case would assist the Court in deciding whether the Master Order is lawful or supported by substantial evidence. As stated above, Water PACK had ample opportunity to express its concerns and did express them.[43] The former Chief Engineer addressed each of Water PACK's issues in the final Master Order.[44] Water PACK's Motion is tantamount to a second Motion for discovery, but it has failed to provide any factual basis justifying its request. In reality Water PACK's motion is an attempt to take advantage of its failure to intervene and/or object to proceedings below. Water PACK's motion should be denied.

Kansas caselaw, statutory law, regulatory law, and public policy all run counter to Water PACK's arguments, and this Court should not buy them.

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[41] *See* K.S.A. 77-618 stating that judicial review is limited to the Agency Record.

[42] *Clawson*, 49 Kan. App. 2d at 979.

[43] *See* footnote 2, *supra.*

[44] *See* footnote 3, *supra*.

II. None of the categories of documents contained in Water PACK's motion should be added to the Agency Record.

Judicial review of disputed issues of fact are confined to the Agency Record, which is limited to the Master Order and the documents that the Agency says it considered before it acted and that it used as a basis for its action.[45]

The former Chief Engineer testified in his deposition that he was not aware of any documents that he considered or used as a basis for his decision to issue the Master Order that are not already in the record.[46]

Nevertheless, Water PACK asks the Court to add five categories of documents to the Agency Record: (1) publicly available website information; (2) two letters to Water PACK board members sent by the former Chief Engineer prior to issuance of the Master Order; (3) all draft versions and correspondence between counsel for the Cities and DWR relating to drafting and negotiating the terms of the Master Order; (4) more than 13 million pages of undecipherable binary and programming code; and (5) a pleading filed in a separate administrative proceeding that has not yet commenced.

Some of these documents are already in Water PACK's possession (the deposition exhibits, the model files, and the transfer application). Others are not (the drafts of the Master Order and related correspondence). But none of them were relevant

[45] K.S.A. 77-620(a).

[46] Chief Engineer Dep., 152:11–22.

to the Chief Engineer's formulation of the findings and conclusions in the Master Order and none of them can move the needle in this proceeding.

A. Drafts and correspondence relating to the Master Order

Water PACK argues that all drafts of the Master Order, and all correspondence relating to those drafts, should be added to the record. Water PACK could have intervened in the proceeding but chose not to. Had Water PACK participated, the dynamics of the negotiation would have been different. It chose not to participate and the documents that were generated during those discussions are confidential settlement negotiations. Under Kansas law, all orders of the Chief Engineer "shall be subject to review in accordance with the provisions of the Kansas administrative procedure act" ("KAPA"), K.S.A. 77-501, *et seq.*[47] KAPA, in turn, provides that "informal settlements" between private parties and DWR are perfectly appropriate. K.S.A. 77-505 states that nothing in KAPA prevents parties from "settling a matter at any time." And DWR's regulations state that "informal settlement" is available to the parties to an agency action "at any time during the proceedings."[48] It is well established in Kansas that offers

[47] The pre-2017 version of K.S.A. 82a-1901(a) applies to this proceeding, but the present version also provides that orders by the former Chief Engineer shall be made "in accordance with the provisions of [KAPA]."

[48] K.A.R. 5-14-6.

to compromise and the like are confidential,[49] and Water PACK provides no justification for why this important rule should be discarded in this case.

Moreover, to the extent that any of the provisions in any draft document were considered and used, they are fully incorporated in the Master Order as issued. Conversely, to the extent that the content of any draft document did not make it into the final version, it may have been "considered" but was not "used as a basis" for the Agency's action. Thus, under K.S.A. 77-620(a), those documents are not properly included in the Agency Record.

As discussed in Section III, *infra*, DWR and the Cities negotiated the terms of the Master Order over a period of several years. Gathering all of the drafts, correspondence, and email messages would require a monumental effort by DWR staff and counsel and would require extensive cooperation by the counsel for both Cities. Any meaningful review of these documents by Water PACK would likely require an extended period of time. Granting Water PACK's Motion would likely result in unnecessarily delay of the resolution of this matter.

B. Model input files

Water PACK asks the Court to add to the record the "model input files" that the Cities' consultant, Burns & McDonnell, used to draft the first and the amended groundwater model reports.

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[49] *See* K.S.A. 60-452; K.S.A. 60-452a.

They do not belong in the record because the former Chief Engineer relied on the reports, not the model files themselves. The model files were initially created by GMD5's consultant.[50] Burns & McDonnell obtained the files from DWR through an Open Records Act request.[51] Burns & McDonnell prepared the draft Model Report that was vetted by DWR.[52] The model input files were provided to GMD5 and Water PACK prior to the Greensburg meeting.[53] Burns & McDonnell submitted the final report on which the former Chief Engineer relied.[54] After the Greensburg meeting, GMD5's consultant pointed out a minor error that was corrected by Burns & McDonnell, and a revised report was submitted.[55] Burns & McDonnell corrected the error but did not provide its revised model files to DWR.

Granting Water PACK's request would be an exercise in futility. Water PACK does not explain how the model files would be helpful to the Court's consideration of this matter. As noted in Hays' response to Water PACK's supplemental brief on its first motion for discovery, none of the model files are in plain English; only someone

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[50] A.R. 348.

[51] A.R. 348.

[52] A.R. 345–346.

[53] A.R. 635.

[54] A.R. 345–46.

[55] A.R. 345–46.

knowledgeable in water modeling could make heads or tails of them.[56] Reviewing the model files also requires appropriate software and computer systems to load, store, and compile the various iterations of the model, which are generally in binary and Base32 notation format, and are understandable only by a computer. The model files are huge, equivalent to more than 13 million printed pages. Adding many gigabytes of gibberish into the Agency Record would serve no legitimate purpose.

Both the original and the amended groundwater model reports were used by the former Chief Engineer in drafting the Master Order, and both of those documents are currently included in the Agency Record. But the former Chief Engineer confirmed in his deposition that he never used the model input files to arrive at his conclusions. In his deposition, the Chief engineer was asked about the model input files, and he testified that they are essentially computer code (which was provided to Water PACK):

> Right. So there's—that thumb drive had everything that somebody who had MODFLOW, a modeler who has MODFLOW, needs to replicate the runs that the cities did to support the application. So, you know, there's a set of data files and they include—they include data files, they include configuration files that specify what model runs and what boundary conditions, everything it takes to take MODFLOW and produce the model runs, that's what's on that USB drive that I caused to be delivered to GMD 5 and Water Pack.[57]

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[56] The Cities' Response to Water PACK's Motion for Discovery, at 24–30, and Exhibit 5 thereto (Dec. 6, 2019).

[57] Chief Engineer Dep., 91:10–21.

The former Chief Engineer continued to explain that the amended model report incorporated corrections of "some minor errors in the model" "that actually benefitted the cities. It actually made their case a little stronger."[58] Nevertheless, the Cities elected to leave their water use conclusions alone, further supporting their conservative approach to protect the long-term, sustainable use of the R9 Ranch water.

C. Consumptive use analysis

Water PACK complains that the "initial" consumptive use analysis performed by DWR staff is not included in the record. First, the Cities' "consumptive use analysis" referenced at A.R. 671 is already included in the record,[59] as is DWR's "initial review."[60] Any other documents Water PACK may be seeking to uncover are properly excluded from the Agency Record because they do not fall within K.S.A. 77-620(a)'s definition. The former Chief Engineer confirmed this in his deposition when he testified that he did not rely on any such documents (which, it turns out, do not appear to exist) in crafting the Master Order.

> Q. [by Water Pack] But that specific initial [consumptive] analysis, is that in the administrative record to your knowledge?
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> **A. Which? The one the applicant provided?**

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[58] *Id.* at 92:3–10.

[59] *See* A.R. 1567–68 (The Cities' cover letter to the change applications, describing consumptive use); *see also, e.g.*, A.R. 1018, 1020–21 (water right No. 21,729); A.R. 1736, 1739–40 (water right No. 21,730); A.R. 1057, 1059–60 (water right No. 21,731); A.R. 1072, 1074–75 (water right No. 21,732); *etc.*

[60] A.R. 3650–81; A.R. 3741; A.R. 3648; A.R. 113–17.

Q. The initial -- correct.

A. Well, if it's part of the applications, which I think it was, it is.

Q. Your internal review though?

A. Oh, I'm sorry. Our internal review of what they provided.

Q. Initially?

A. Not to my knowledge.

Q. Okay. Did you rely on that while processing the applications?

A. I don't think we did. Again, I think we did the determination of acres, appropriated cropping, and then applied the rule.[61]

D. Deposition exhibits

Finally, both DWR and Water PACK ask the Court to include deposition exhibits in the record. While the Cities do not have strenuous objections to inclusion of the deposition exhibits, they are not properly added to the Agency Record because there is no indication that the former Chief Engineer relied on, or even considered, them to reach the conclusions contained in the Master Order.

The transfer application is also irrelevant to whether the Master Order approving the Cities' change applications is based on substantial evidence. As with the other categories of documents that Water PACK seeks to inject into this proceeding, the reasons given for adding them to the Agency Record do not meet the requirements under K.S.A. 77-620(a).

[61] Barfield Depo., p. 95, l. 20 – p. 96, l. 11.

III. Everything Water PACK seeks to add to the record is a result of its failure to intervene below. It would be grossly unfair and result in extreme prejudice to the Cities to grant Water PACK's motion.

Fairness, judicial economy, party resources, and public policy all weigh heavily against Water PACK's current motion. Water PACK was given early notice of the Cities' change applications and the related administrative proceeding, yet Water PACK made no effort to formally join that proceeding.[62]

Had Water PACK intervened in the proceedings below, it would have been included as a party in the correspondence, negotiations, and meetings. Now, Water PACK seeks to put toothpaste back into the tube by forcing DWR and the Cities to provide Water PACK with documents that it would have had if it had participanted in the administrative proceeding. The Cities and DWR should not be punished because Water PACK chose not to participate.

In fact, it is apparent that Water PACK chose a clandestine approach. It retained a consultant who prepared and presented to Water PACK, in private, a November 24, 2016, report that is critical of DWR's well-known and well-understood application of K.A.R. 5-5-9 (1994 version), the regulation that governs changing irrigation water rights to other uses.[63] DWR and the Cities negotiated the terms of the Master Order unaware

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[62] A.R. 669; Hays' Response to Water PACK's First Mot. for Disc., at ¶¶ 9–19 (Sept. 19, 2019).

[63] Hays' Response to Water PACK's First Mot. for Disc., at ¶¶ 13–14 (Sept. 19, 2019).

of the Report until July of 2018[64] after held the public meeting in Greensburg. While Water PACK elected not to participate in the detailed negotiations, it was obviously preparing to challenge the Master Order. If Water PACK is motivated by the concerns it raised during and after the Greensburg meeting, it would have provided the information it withheld for earlier consideration by the former Chief Engineer and the Cities.

If the Cities had known that Water PACK was lying in wait to make this after-the-fact effort to delay the Court's review of the Master Order by asking the Court to add drafts, settlement negotiations, correspondence, etc., to the Agency Record, the Cities would have approached its dealings with DWR (and Water PACK) much differently. As it is, Water PACK is attempting to take unfair advantage of their strategic decision to ***not*** intervene, otherwise known as "sandbagging." This Court should not allow it.

Conclusion

After its first motion for discovery, the Court granted Water PACK an opportunity to take the Chief Engineer's deposition for very narrow purposes. In so doing, the Court noted that "the limited extent of Plaintiff's participation in the administrative proceedings that produced the Master Order was Plaintiff's choice."[65]

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[64] A.R. 754.

[65] Order, at 3 (Oct. 13, 2019).

Following the Court's ruling, Water PACK took the Chief Engineer's deposition and made its record. The Chief Engineer's testimony did not substantiate any of Water PACK's allegations. That should be the end of the line.

Respectfully submitted,
FOULSTON SIEFKIN LLP
David M. Traster, #11062
1551 N. Waterfront Parkway, Ste. #100
Wichita, KS 67206-4466
Tel (Direct): (316) 291-9725
Fax (Direct): (866) 347-3138
Email: dtraster@foulston.com

~and~

Daniel J. Buller, #25002
9225 Indian Creek Parkway, Ste. #600
Overland Park, KS 66210-2000
Tel (Direct): (913) 253-2179
Fax (Direct): (866) 347-9613
Email: dbuller@foulston.com

~and~

John T. Bird, #08419
Todd D. Powell, #18723
200 W. Thirteenth St.
Hays, Kansas 67601-0727
Tel (Direct) (785) 625-6919

By: *<u>/s/ David M. Traster</u>*
David M. Traster, #11062
Attorneys for the City of Hays, Kansas

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March 2020, I presented the foregoing to the Clerk of the Court for filing and uploading to the Kansas Courts e-Filing system that will send notice of electronic filing to the following:

Micah Schwalb
micah.schwalb@roenbaughschwalb.com
ROENBAUGH SCHWALB
4450 Arapahoe Avenue
Boulder, CO 80303
Attorneys for Plaintiff

Kenneth B. Titus, Chief Counsel
Kenneth.titus@ks.gov
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502
~and~
Aaron B. Oleen, Staff Attorney
aaron.oleen@ks.gov
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502

Attorneys for Defendant

Kenneth L. Cole
cole_ken@hotmail.com
WOELK & COLE
4 S. Kansas St.
P.O. Box 431
Russell, Kansas 67665-0431
Attorneys for the City of Russell, Kansas

/s/David M. Traster
David M. Traster, #11062