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

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

WATER PROTECTION ASSN. OF CENTRAL KANSAS,

Plaintiff,

V.

DAVID BARFIELD, P.E., IN HIS OFFICIAL CAPACITY AS 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

CHIEF ENGINEER'S RESPONSE IN OPPOSITION TO PLAINTIFF'S SUPPLEMENTAL BRIEF TO MOTION FOR DISCOVERY

Defendant Chief Engineer continues to oppose Plaintiff's Motion for Discovery, notwithstanding the additional explanation that Plaintiff has provided in its Supplemental Brief (Plaintiff's "Supplementation"). With respect, the Supplementation fails to contain additional, sufficient justification for Plaintiff's claim that limited discovery is appropriate based on the so-labeled "unlawful procedure" allegations in Plaintiff's Petition. Plaintiff's discovery motion should be denied, with no more chances for supplementation or Petition amendments.

I. Plaintiff's allegations of omissions from the Agency Record are insufficient evidence of "unlawful procedure", for purposes of Plaintiff's pending discovery motion.

In its Supplementation, Plaintiff does not request limited discovery in the form of any written questions or document requests, but only requests permission to conduct certain depositions.[1] Plaintiff also does not move for the admission into the filed Agency Record, under K.S.A. 77-619 regarding additional evidence, of any relevant documents Plaintiff believes or knows to exist and that are not already in the Agency Record. Accordingly, the Chief Engineer does not understand the point of paragraphs 12 and 13 in the Background Section of the Supplementation, in which Plaintiff alleges that the Agency Record omits certain documents, records, or information. These allegations are red herrings that have no bearing on Plaintiff's pending discovery motion.

It is important to note that K.S.A. 77-620 generally provides what constitutes an agency record on KJRA review, to wit: "any agency documents expressing the agency action" (here, the Master Order at issue), "other documents identified by the agency" as having been considered and relied on for its agency action (here, the documents other than the Master Order that the Chief Engineer included in the Agency Record), and "any other material required by law[.]" Thus Plaintiff does not get to decide what documents the Chief Engineer considered and relied on in issuing the Master Order and thus should be included in the Agency Record—the Chief Engineer decides that.

[1] This fact appears to confirm Intervenors' understanding (disputed by Plaintiff) that, at the initial discovery-motion hearing on October 17, 2019, Plaintiff had only expressly requested, and the Court had said that it only might allow, limited discovery in the form of depositions. *See* the parties' proposed Order e-mailed to the Court by Plaintiff's counsel on November 7, 2019.

Plaintiff's alleged omissions to the Agency Record could only be relevant now, for purposes of the pending discovery motion, to the extent they indicated that the Chief Engineer had improperly omitted items from the Agency Record as part of "unlawfulness of procedure or of decision-making process." *See* K.S.A. 77-619(a)(2). But to this day, nowhere has Plaintiff ever clearly explained to the other parties or the Court what items Plaintiff claims it attempted to have the Chief Engineer consider before issuing the Master Order, but which items the Chief Engineer did not consider and did not include in the Agency Record. The Chief Engineer posits that this ambiguity is Plaintiff's strength and strategy here, because if Plaintiff would clearly identify any such alleged items then the Chief Engineer could explain why they were properly not considered and not included as part of the Agency Record (e.g., because Plaintiff never actually presented such items to the Chief Engineer).

Plaintiff should have to show more before any alleged omissions from the Agency Record could justify engaging in limited discovery based on "unlawful procedure". Plaintiff's claims of omissions from the Agency Record are insufficient evidence of "unlawful procedure", for purposes of the pending discovery motion.[2]

[2] This is not to say that the Chief Engineer would necessarily oppose a later motion to add certain items to the filed Agency Record, within reason, under K.S.A. 77-619 or otherwise. In processing and discussing the Intervenors' change applications and in drafting and issuing the Master Order, the Chief Engineer created and received many documents. But mere relation to this matter does not equal consideration and reliance, and so pursuant to K.S.A. 77-620(a), the Chief Engineer included in the filed Agency Record such documents that he considered and relied on in issuing the Master Order. If other parties want certain more minor, tangentially relevant documents to be added to the Agency Record for purposes of their arguments and the Court's reference, then the Chief Engineer may not object, assuming the request is reasonable. But the current omission of such documents does not justify any limited discovery.

II. Plaintiff's various citations to federal acts, federal cases, and model-act comments are insufficient legal support for the expansive interpretation of "unlawful procedure" under the KJRA that Plaintiff would have this Court adopt, in order to justify limited discovery.

In Section A of the Supplementation, Plaintiff effectively admits why federal analogies cannot be drawn to support Plaintiff's expansive interpretation of "unlawful procedure" under the KJRA. As Plaintiff apparently acknowledges, before allowing extra-record evidence (and, presumably, limited discovery therefor) many federal authorities first require "a strong showing of bad faith or improper behavior"—something that Plaintiff has never expressly alleged or shown the Chief Engineer to have engaged in regarding the Master Order.

Plaintiff goes on to claim, however, that the KJRA does not require any showing of bad faith in conjunction with a request for limited discovery or extra-record evidence based on "unlawful procedure". *See* Pl.'s Supplementation at 10. In doing so, Plaintiff cites a model-act comment which discusses an agency's failure to timely act as an example of an agency's failure to follow prescribed procedure. *See id.* But this comment citation supports the Chief Engineer's argument more than Plaintiff's. If anything, the comment indicates that "unlawful procedure", as the concept was contemplated in the 1981 Model State Administrative Procedure Act and as the term is used in the KJRA, is intended to cover such commonly understood rules of administration such as timing, sequence, form, inclusion, etc., not disagreements over the ultimate factual findings and legal interpretations and conclusions that go to the merits of an issue. In any event, Plaintiff has not provided sufficient legal authorities that support Plaintiff's expansive interpretation of "unlawful procedure" to justify Plaintiff's request for limited discovery.

III. Plaintiff still mischaracterizes disputes over factual findings and legal interpretations and conclusions as examples of "unlawful procedure" that could justify limited discovery. And Plaintiff still provides nothing of evidentiary value.

Plaintiff still attempts to label as "unlawful procedure" what is really Plaintiff's disagreement with the Chief Engineer's factual findings and legal interpretations and conclusions. Plaintiff still claims that the Chief Engineer "violated procedures" by, e.g., making certain findings in the Master Order that the changes approved therein were reasonable and will not impair existing water rights, and by making the Master Order contingent upon and conditioned on certain things. *See* Pl.'s Supplementation at 11. Importantly, Plaintiff has recourse to challenge the Chief Engineer's factual findings under K.S.A. 77-621(c)(7) (agency action based on insufficiently supported determinations of fact) and to challenge the Chief Engineer's legal interpretations and conclusions under K.S.A. 77-621(c)(4) (agency erroneously interpreted or applied the law). Plaintiff already has all the information it needs to make those types of challenges—limited discovery is neither needed nor appropriate.

Additionally, Plaintiff's bulleted list of "issues with the decision-making process" at page 12 of the Supplementation amounts to mere unsupported speculation of wrongdoing that should be insufficient to justify any limited discovery. As the Chief Engineer has previously argued, the district court in *Bd. of County Comm'rs vs. Kansas Racing & Gaming Comm'n* wisely opined that a request for discovery in a KJRA action requires a "prima facie showing of wrongful conduct supported by something of evidentiary value." 393 P.3d 601, 613 (Kan. 2017) (quoting a portion of the district court's ruling); *see generally* Chief Eng'r's Resp. in Opp. to Pl.'s Mot. for Discovery, at 3–4. Plaintiff's bulleted list of accusations remains just that and does not amount to anything of evidentiary value.

Finally, the Chief Engineer reminds the Court of the important overall timeline and context to Plaintiff's request for limited discovery:

- Plaintiff was given notice of KDA-DWR's discussions with Intervenors about their change applications (which were eventually contingently approved by the Master Order), as early as early 2016. [*See, e.g.*, A.R. 665, Chief Eng'r's letter to Hays' attorneys dated April 6, 2016 (copied to Plaintiff and noting that KDA-DWR "would like to continue the dialog with the City so that KDA-DWR will have the best information available with which to process and consider the City's Change Applications.").]

- Plaintiff never requested to be directly involved in the discussions between KDA-DWR and Intervenors, but KDA-DWR nevertheless periodically informed Plaintiff (and others) of key developments, including the drafting of a draft proposed master order. [*See generally* A.R. 394, Chief Eng'r's letter to GMD5 dated May 4, 2018 (copied to Plaintiff).]

- On June 21, 2018, Plaintiff and its consultant (but not Plaintiff's current, or any, counsel) publicly participated in the informational Public Meeting and provided comments and analyses then, and subsequently in writing, regarding Intervenors' change applications and the draft proposed master order. [A.R. 68, Master Order, at ¶ 61.]

- The Chief Engineer properly considered such information and on March 28, 2019, he issued the Master Order, to which Plaintiff (and now including Plaintiff's current counsel) takes certain exceptions.

It is evident from the nature of Plaintiff's motion and arguments, coupled with this background context, that Plaintiff's request for limited discovery based on claims of "unlawful procedure" or "unlawful decision-making process" is a veiled attempt to allow Plaintiff, now with the representation of current counsel, to reopen and reargue issues that were properly considered and then decided by the Chief Engineer in ways that Plaintiff dislikes. Such issues should not be reopened and reargued via any time-consuming and costly depositions or other limited discovery—the related decisions only need to be confirmed or invalidated by this Court after briefing on the merits.

Plaintiff's Supplementation fails to provide the justification that Plaintiff's discovery motion lacked. The Chief Engineer's opposition to Plaintiff's original discovery motion remains valid. Plaintiff's discovery motion should be entirely denied with no further supplementations or Petition amendments. The validity of the Master Order is ready to be decided on its merits, by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above *Chief Engineer's Response in Opposition to Plaintiff's Supplemental Brief to Motion for Discovery* was electronically filed with the District Court Clerk using the Court's electronic filing system, which will cause service to be made on the following other counsel of record by the transmission of a notice of electronic filing on the date reflected on the electronic file stamp hereto:

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