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

THE STATE OF KANSAS
TWENTY-FOURTH JUDICIAL DISTRICT
SERVING
EDWARDS, HODGEMAN, LANE, NESS, PAWNEE, AND RUSH COUNTIES

IN THE
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

SUPPLEMENTAL BRIEF

In keeping with a draft agreed-upon order submitted to the Court by the parties on November 7, 2019 in relation to the motion for discovery filed August 27, 2019 (the "Discovery Motion") by the Plaintiff ("Water PACK"), the Plaintiff hereby supplements the Discovery Motion with this Supplemental Brief.[1] Water PACK again asks the Court to order the Defendant (the

[1] Given that the Agency Record is subject to further supplement, that the Court has not yet issued a case management order in this matter, and that the court only received the agreed-upon draft order (the "Draft Order") the day prior to this Supplemental Brief, the undersigned notes that this Supplemental Brief may prematurely require Water PACK to make arguments regarding the merits of allegations in its Petition or in the Discovery Motion without orders in place regarding the same. Water PACK therefore requests it be permitted to amend this Supplemental Brief and its Petition as additional materials are made available in the Agency Record to the extent that the same bear upon the merits of its claims against the Agency, as well as once the Draft Order is issued as modified by the Court.

"Agency") and the Intervenors (the "Cities" and each, a "City") to produce the discovery specifically referenced below.

BACKGROUND

1. An employee of the Agency certified that a "true and correct copy of the agency record" was submitted in this matter in the Certificate of Agency Record filed in the docket on July 18, 2019.

2. The Agency Record indicates that the City of Hays purchased approximately 6,800 acres of farmland now known as the R9 Ranch in Edwards County, Kansas in 1994 or 1995. [*Compare* A.R. 852 *with* A.R. 1577]. The City of Russell later purchased an 18% interest in the R9 Ranch from the City of Hays. [A.R. 802].

3. The Cities filed their initial change applications for the R9 Ranch water rights on or about June 26, 2016. [A.R. 1588]

4. The Cities filed amended change applications for the R9 Ranch water rights in November of 2016. [A.R. 1316]

5. On May 4, 2018, the Chief Engineer released a draft proposed master order in relation to the change applications (the "Draft Master Order") that assumed approval of the Cities' amended change applications and the lawfulness thereof. [A.R. 396]

6. The Cities again sought to amend their change applications for the R9 Ranch water rights on March 24, 2019. [A.R. 633-34; 993]

7. During a public meeting held on June 21, 2018, held prior to approval and publication of the final Master Order, presentations made by the Chief Engineer indicated that:

   a. The Draft Master Order "conforms with all statutes and regulations." [A.R. 852 (see embedded comment in PDF), 854]

b. the Master Order would be contingently approved. [A.R. 835]

8. In February of 2019, the Hays Mayor, Hays City Manager, the Russell City Manager, and other representatives of the Cities began to meet with members of the Kansas legislature and the Kansas governor's office. Becky Kiser, *R9 Ranch Final Master Order Promised by March 1, Cities Talk to Governor*, HAYS POST (Feb. 20, 2019).[2] The stated intention of such meetings was to increase pressure on the Agency to issue the final Master Order. *Id.*

9. The Agency issued the Master Order on March 28, 2019. [A.R. 56]

10. Water PACK filed a Petition for Review of Change Approvals with the Kansas Secretary of Agriculture (the "Administrative Petition") on April 9, 2019. [A.R. 5]

11. The Secretary of Agriculture declined the Administrative Petition on April 29, 2019. [A.R. 1]

12. The Agency Record on its face omits the following documents or information specifically referenced therein:

a. The Hydrologic Model (the "Model") of Big Bend Groundwater Management District No. 5 ("GMD5"), prepared by Balleau Ground Water Inc.;

b. Modifications to the Model and Model runs performed by BMcD, the Cities' consultant [A.R. 667 (noting that the Cities' consultant was "enhancing" the Model)];

c. Modifications or Model runs performed by Agency personnel upon direction of the Chief Engineer. [A.R. 306]

d. Copies of the various drafts of the proposed Master Order exchanged by the Agency and the Cities. [*See* A.R. 389 ("As you know, this matter is unique in that DWR

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[2] https://www.hayspost.com/2019/02/20/%F0%9F%8E%A5-r9-ranch-final-master-order-promised-by-march-1-cities-talk-to-governor/

has worked with the Cities to be more efficient in the long-run and come up with a potential final product, i.e., the draft proposed master order."); Statement of Counsel to the Cities during Telephone Conference Call held among counsel to the parties on Tuesday, November 5, 2019 ("I drafted the thing and I hate Times New Roman.")].

13. The Agency Record also omits any records or documents from the following meetings or referenced correspondence:

    a. July of 2014. [A.R. 1568 (noting meeting with Brent Turney of the Agency and discussions regarding crops grown at the R9 Ranch during the perfection period)];

    b. March 24, 2016. [A.R. 665-668 (noting meetings between the Cities' representatives and unnamed personnel from the Agency)];

    c. May 20, 2016; August 10, 2016; August 17, 2016; September 15, 2016; October 6, 2016; December 12, 2016; January 10, 2017; February 15, 2017; June 27, 2017; and October 24, 2017. [A.R. 676-677 (noting "numerous face-to-face meetings" between Burns & McDonnell ("BMcD") and Agency staff regarding the model used by the Agency in the Master Order)];

    d. May 3, 2018. [A.R. 677 (describing email from counsel to the Cities)];

    e. July or August of 2018. [A.R. 750 (noting "a recent telephone conversation" between the Agency and representatives from the City of Hays)]

ARGUMENT AND AUTHORITIES

The Cities and the Court have asked Water PACK to identify the unlawful procedures and decision-making processes meriting introductions of extra-record evidence. In their response to the Discovery Motion, the Cities seek to narrow the inquiry to what they characterize as substantive

questions of law or fact. *See* Cities' Resp, at 7-8. One cannot however divorce Water PACK's effort to adduce additional evidence from the procedures set forth in the Kansas Judicial Review Act ("KJRA") which, like the Kansas Administrative Procedure Act ("KAPA"), by its own terms "creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes." K.S.A. § 77-603(b) (emphasis supplied).

In other words, the unlawful procedures and decision-making processes complained of by Water PACK arise under the KJRA and the statutes applicable to the Master Order. Those procedures include those required of the Agency in K.S.A. § 77-621(c)(2), (4), (7), and (8), as well as the procedures incorporated in K.S.A. § 77-621(c)(5) that appear in the following items identified in paragraph 13 of the Petition:

a) K.S.A. § 82a-708b (the "Change Order Statute")
    i) K.S.A. § 82a-708b (a)(2) (the "No Injury Rule")
b) K.A.R. 5-5-1, *et seq.* (the "Change Order Regulations")
    i) K.A.R. 5-5-8 (the "No Injury Regulation")
    ii) K.A.R. 5-5-9 (1994) (the "Consumptive Use Regulations")
c) K.S.A. § 82a-1501 *et seq.* (the "Water Transfer Act")
    i) K.A.R. 5-50-1, *et seq.* (the "Water Transfer Regulations")

That is, the foregoing referenced sections of the KJRA and the procedural mechanisms identified in the Change Order Statute are the precise unlawful procedures complained of in the Petition and in the Discovery Motion that merit introduction of additional evidence.

The parties of course debated the scope of "procedure" K.S.A. § 77-621(c)(5) and 77-619(a)(2) during the hearing on the Discovery Motion held October 17, 2019. A procedure by definition involves "a specific method or course of action" while a process entails the "proceedings

in any action[.]" BLACK'S LAW DICTIONARY 1241, 1242 (8th Ed.). The KJRA identifies specific procedures the Agency must abide by, authorizing the Court to grant relief on grounds that include engagement in such unlawful procedures, including those imposed by other statutes like the Change Order Statute. *Compare* K.S.A. § 77-603(b) *with* K.S.A. 77-621(c)(5). The Change Order Statute and the Change Order Regulation likewise identify specific procedures the Agency must follow when handling change applications, such that one may not decouple the Change Order Statute or its enabling regulations from the KJRA when considering unlawfulness of procedure.

Under the Change Order Statute, for example, the Chief Engineer must "approve or reject the application for change in accordance with the provisions and procedures prescribed for processing original applications for permission to appropriate water." (Emphasis supplied) The No Injury Regulation, derived from the No Injury Rule, in turn states that "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." (Emphasis supplied) But neither the No Injury Rule nor the No Injury Regulation include language that confers jurisdiction upon the Agency to condition approval of a change application in the manner asserted in the Master Order. The procedural defect Water PACK complained of with respect to the contingency in the Master Order, for example, thus involves failure to engage in a rulemaking that would permit the inclusion of such a contingency.[3] The KJRA in turn required the Chief Engineer, when handling the Master Order, to act within his jurisdiction,[4] to engage in lawful procedure and follow prescribed

[3] After all, as in *Clawson v. Kan. Dep't of Ag.*, "'any authority claimed by an agency or board must be conferred in the authorizing statutes either expressly or by clear implication from the express powers granted.'" 315 P.3d 896, 909 (2013) (*citing Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs.*, 290 Kan. 446, 455, 228 P.3d 403 (2010)).
[4] K.S.A. § 77-621(c)(2)

procedure,[5] to support the Master Order with determinations of fact supported by appropriate standards of proof viewed in light of the record as a whole,[6] and to otherwise act reasonably and not in an arbitrary and capricious manner.[7]

A. THE KJRA, DERIVED FROM THE FEDERAL APA, PERMITS THE INTRODUCTION OF EXTRA-RECORD EVIDENCE WITH REGARD TO THE VALIDITY OF THE AGENCY ACTION IN LIGHT OF UNLAWFUL PROCEDURES OR PROCESS

Examining the meaning of the word "procedure" in the context of the KJRA necessarily requires inquiry into the extra-record evidence that may be permitted upon failure to follow such procedures. Again, the extra record evidence rule assists the Court in efforts to assess the validity of an agency action in terms of unlawful procedures or decision-making processes. K.S.A. §§ 77-619(a), 77-620(c)(5). Specifically, the Court "may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding…unlawfulness of procedure or of decision-making process." K.S.A. §§ 77-619(a); Discovery Motion at 3 (citing Comments to sections of the 1981 Model State Administrative Procedure Act corresponding to KJRA § 77-619(a). As written, the extra-record evidence rule thus complements limitations on the scope of review set forth in the KJRA that derive from Federal Administrative Procedure Act ("APA"). *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REVISED MODEL STATE ADMINISTRATIVE PROCEDURES ACT 67 (October 2005 Meeting Draft) (noting that corresponding

[5] 77-621(c)(5)
[6] 77-621(c)(7)
[7] 77-621(c)(8)

sections of the Model State APA are substantially similar to Section 706 of the APA);[8] *Lindenman v. Umscheid*, 255 Kan. 610, 681 (1994) (noting that the KJRA derives from the Model State APA).[9]

Like the KJRA, the Federal APA frames introduction of extra-record evidence in terms of unlawful process or procedure outlined as grounds for relief in the Federal APA and in agency statutes. Federal courts, within narrow exceptions, permit extra-record evidence to overcome judicial challenges presented by limited agency materials, as "it is often difficult to determine whether the agency has considered 'all relevant factors' unless the court 'looks outside the record to determine what matters the agency should have considered but did not.'" Travis O. Brandon, *Reforming the Extra-Record Evidence Rule in Arbitrary and Capricious Review of Informal Agency Actions*, 21 LEWIS & CLARK L. REV. 981, 989 (2017) (citing *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (D.C. Cir. 1980)); *see also* K.S.A. § 77-621 (c)(8)(permitting relief if the Court determines that "the agency action is otherwise unreasonable, arbitrary or capricious."). However, under Section 706 of the Federal APA and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977), "a 'strong showing of bad faith or improper behavior' is necessary to venture beyond the agency's 'administrative findings' and inquire into 'the mental processes of administrative decisionmakers.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2579 (2019) (THOMAS, J., concurring in part and dissenting in part). In the Ninth Circuit, federal district court judges thus admit extra-record evidence:

> (1) if admission is necessary to determine "whether the agency has considered all relevant factors and has explained its decision,"

[8] https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f218bdf4-c162-279e-1960-0f2d297d41f4&forceDialog=0.

[9] Absent definitive answers in the legislative history pertaining to the adoption of a model act, the Court may consult the official comments of the relevant model act. *See Bruch v. Kan. Dep't of Rev.*, 282 Kan. 764, 778 (2006); *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n of State of Kan.*, 24 Kan. App. 2d 63, 69, (1997) (comments to corresponding provisions in the Model Act are "instructive").

(2) if "the agency has relied on documents not in the record,"

(3) "when supplementing the record is necessary to explain technical terms or complex subject matter," or

(4) "when plaintiffs make a showing of agency bad faith."

Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005); *see also* Brandon, *supra*, at 991 (noting eight general exceptions to the record review rule; internal quotation and citation omitted)[10]. That is, courts may require officials participating in a decision to give testimony explaining their action upon "a strong showing of bad faith or improper behavior[,]" especially in instances where the bare record does not permit the court to determine whether an official acted within the scope of their authority or otherwise in a manner justifiable under applicable standards. *Overton Park,* 401 U.S. at 420;[11] *Dep't of Commerce*, 139 S. Ct. at 2564 (noting that the district court authorized expert discovery and depositions of certain Department of Justice and Commerce Department officials).

In addition, admission of extra-record evidence occurs more frequently in complex environmental actions than in reviews of other types of agency decisions. *National Audubon Society v. Hoffman*, 132 F.3d 7, 15 (1997).

> This occurs because NEPA imposes a duty on federal agencies to compile a comprehensive analysis of the potential environmental impacts of its proposed action, and review of whether the agency's analysis has satisfied this duty often requires a court to look at evidence outside the administrative record. To limit the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA. The omission of technical scientific information is often not obvious from the record itself, and a court may therefore need a plaintiff's

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[10] "(1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage."

[11] The decision to go beyond the record is usually "based on a combination of circumstances that [when] taken together, [are] most exceptional." *New York v. Dep't of Commerce*, 345 F.Supp.3d 444, 453 (S.D.N.Y. 2018).

> aid in calling such omissions to its attention. Thus, we have held that the consideration of extra-record evidence may be appropriate in the NEPA context to enable a reviewing court to determine that the information available to the decisionmaker included a complete discussion of environmental effects and alternatives.

Id. at 14-15; *see also Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1240 (10th Cir. 1979); CONGRESS OF THE UNITED STATES OFFICE OF TECHNOLOGY DEVELOPMENT, USE OF MODELS FOR WATER RESOURCES MANAGEMENT, PLANNING, AND POLICY 61 (1982) (noting the challenges associated with the use of models by federal and state regulators).[12]

The KJRA however focuses on the validity of an agency's action in terms of "procedure" and "process", but does not (based upon our research) require a showing of bad faith in connection with such unlawful procedures or decision-making processes. The drafters of the 1981 Model State Administrative Procedure Act, which forms the basis of the KJRA, described unlawful procedure by way of example:

> One example of an agency's failure to follow prescribed procedure, under paragraph (c)(5), is the agency's failure to act within the prescribed time upon a matter submitted to the agency. Relief in such cases is available under Section 5-117(b) and (c).

Comment to Model State Administrative Proc. Act 1981 § 5-116; *compare* Sections 117(b) and (c) of the 1981 MSAPA *with* K.S.A. § 77-622(b) and (c). Other jurisdictions adopting the Model State Administrative Procedure Act, which the KJRA is based upon, have thus allowed additional evidence where either: (a) the bare record would not disclose the factors considered in the reviewing official's construction of the evidence, *Nightlife Partners, Ltd. v. City of Beverly Hills*, 133 Cal. Rptr. 2d 234, 241 (2003); or (b) the "petition seeking review of the agency action includes allegations of procedural irregularities." *City of Federal Way v. King County*, 62 Wash. App. 530, 534 n.2 (1991).

[12] https://ota.fas.org/reports/8233.pdf.

B. THE MASTER ORDER IS INVALID BECAUSE THE AGENCY ENGAGED IN UNLAWFUL PROCEDURES AND DECISION-MAKING PROCESS

As shown by the Agency Record produced to date, the Agency blew past specific procedures laid out in the Kansas Water Appropriation Act and enabling regulations like a careless driver ignoring a stop sign, with the Cities riding shotgun and providing encouragement along the way. Those procedural stop signs included the specific methods or forms of approval required under the Change Order Statute and the Change Order Regulations referenced above, the lack of a rulemaking permitting inclusion of a contingency in the Master Oder, as well as the procedural safeguards embedded in Section 77-619(c) of the KJRA. Taken together, Water PACK thus characterized the unlawful procedures employed by the Agency as follows:

> "[T]he 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."

[A.R. 05] That is, the Agency violated procedures set forth its own enabling statute and regulations by (a) including a contingency in the Master Order in the absence of a statute, enabling regulations, or a rulemaking permitting such a contingency; and (b) approving the Master Order in violation of approval procedures set forth in the No Injury Regulation, which are entitled "Standards for approval of an application for a change in the place of use and a change in the use made of water[;]" K.A.R. 5-5-8. Finally, within the context of the KJRA, the Agency also failed to properly consider evidence introduced by Water PACK in the administrative proceedings below. *See, e.g.,* K.S.A. § 77-621 (c)(7).

With regard to issues with the decision-making process, the Agency Record submitted to date also presents a panoply of problems not evident prior to the filing of the Petition. In particular, the

Background set forth above shows in clear terms the following:

- The initial composition of the Draft Master Order by counsel to the Cities and subsequent collaborative drafting of the Master Order by the Cities and Agency in the absence of a regulation or statute permitting the same. [Background at ¶ 5 and ¶ 12(d)]
- Publication of the draft Master Order with the predetermined conclusion that the Master Order conformed to all statutes and regulations and would be contingently approved prior to holding the public meeting referenced in the Agency Record. [Background at ¶ 10]
- Approval of the Master Order in response to political pressure from members of the Kansas legislature and the Kansas Governor's Office. [Background ¶ 8] [13]
- Holding a public meeting regarding the Draft Master Order to solicit comments on the same when the Agency had already determined key issues pertinent to its handling of the Cities' change applications. [Background at ¶ 7]
- Use of the BMcD-modified Model in the Master Order without undertaking a formal rulemaking that would permit use of the BMcD-modified Model as a regulation generally applicable to change applications within GMD5. *See Taylor v. Dep't of Health & Environment*, 305 P.3d 729, 737 (Kan. App. 2013).

Notwithstanding the assertions of the Agency and the Cities to the contrary, the statutes and regulations applicable to the Master Order on their face require adherence to procedural requirements imposed upon the Agency by the Kansas legislature and the Agency's own regulations. Further, use of the BMcD-modified Model in the adjudication amounted to the

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[13] *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1030 (1972). (McKinnon, J., concurring in part and dissenting in part); *see Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966);

application of generally-applicable rules to a change order adjudication without undertaking a formal rulemaking permitting the same. The Agency as such did not comply with those procedures while using unlawful decision-making processes, and so the Court should permit the introduction of extra-record evidence relating to the same.

CONCLUSION

In light of the foregoing, Water PACK proposes that the Court permit depositions of the following individuals, as well as the introduction of expert reports or testimony pertaining to their testimony and to the BMcD-modified Model:

The Chief Engineer

1. Matters upon Which Examination Would be Conducted
    a. Impairment of water rights with points of diversion adjacent to the R9 Ranch and senior to the date of the Cities' change applications to the extent discussed with the Cities or their representatives;
    b. Use of the Model and Model runs, as modified by BMcD and Agency personnel;
    c. The conclusions reached in the public meeting and in the Draft Master Order prior to the issuance of the final Master Order; and
    d. Oral and written communications between or among the Agency, the Cities, members of the Kansas legislature, and personnel from the Kansas governor's office relating to the initial Draft Master Order, as presented at the public meeting referenced in the Agency Record.
2. Unlawful Procedures or Decision-Making Processes
    a. Approval of change applications in violation of KSA 77-621(c)(5) and the

No Injury Regulation;

b. Reliance upon the BMcD-modified Model in the absence of a rulemaking permitting application of the same to the Cities' change applications and to the surrounding existing water rights in violation of KAPA;

c. Concluding that the Draft Master Order complied with applicable laws and regulations prior to issuance of the Master Order;

d. Permitting the Cities to prepare the initial draft of the Draft Master Order;

e. Failure to support the Master Order with determinations of fact as to impairment of surrounding water users in violation of K.S.A. 77-621(c)(7), the Change Order Statute, and the No Injury Rule; and

f. Issuing the Master Order in response to improper political pressure.

Corporate Representative of BMcD

1. Matters upon Which Examination Would be Conducted

   a. Impairment of water rights with points of diversion adjacent to the R9 Ranch and senior to the date of the Cities' change applications, as modeled by BMcD;

   b. Use of and modifications made to the Model and the Model runs, as modified by BMcD and Agency personnel, to issue the Master Order; and

   c. Oral and written communications between or among the Agency, the Cities, and BMcD in relation to BMcD-modified Model runs performed by the Agency and BMcD on behalf of the Cities.

2. Unlawful Procedures or Decision-Making Processes

   a. Use of the Model, as modified by BMcD, in the absence of a KAPA-

compliant rulemaking permitting the same in an adjudication;

b. Failure to support the Master Order with determinations of fact as to impairment of surrounding water users in violation of K.S.A. 77-621(c)(7), the Change Order Statute and the No Injury Rule; and

c. Permitting the Cities to draft the initial Draft Master Order.

Brent Turney and Sam Perkins

1. Matters Upon Which Examination Would be Conducted

   a. Impairment of water rights with points of diversion adjacent to the R9 Ranch and senior to the date of the Cities' change applications, as modeled by BMcD;

   b. Oral and written communications between or among the Agency, the Cities, members of the Kansas legislature, and personnel from the Kansas governor's office relating to the initial Draft Master Order, as presented at the Agency's public meeting in Greensburg; and

   c. Use of the Model and Model runs, as modified by BMcD and Agency personnel, adjudicating the Cities' change applications;

2. Unlawful Procedures or Decision-Making Processes

   a. Use of the Model, as modified by BMcD, in the absence of a rulemaking permitting the same in an adjudication;

   b. Failure to support the Master Order with determinations of fact as to impairment of surrounding water users in violation of K.S.A. 77-621(c)(7), the Change Order Statute and the No Injury Rule; and

   c. Permitting the Cities to collaboratively draft both the draft Master Order

and the final Master Order.

Water PACK also requests leave to add other deponents as may be needed upon further supplements to the Agency Record contemplated by the Agency or the Cities, together with oral argument regarding the same.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Supplemental Brief 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