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

Court: Edwards County District Court

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Case Title: Water Protection Assn of Central Kansas vs. David W Barfield, in his Official Capacity PE, et al.

Type: Memorandum Decision and Order

SO ORDERED.

/s/ Honorable Bruce Gatterman, Chief District Judge

THE STATE OF KANSAS
Twenty-fourth Judicial District
Serving
Edwards, Hodgeman, Lane, Ness, Pawnee & Rush Counties

IN THE DISTRICT COURT OF EDWARDS COUNTY, KANSAS

Water Protection Association of Central Kansas, Plaintiff,	)	
v.	)	
Earl Lewis, P.E., in his Official Capacity as Chief Engineer, Division of Water Resources, Kansas Department of Agriculture, Defendant.	)	Case No. 2019-CV-000005
v.	)	
The City of Hays, Kansas and the City of Russell, Kansas, Intervenors.	)	

MEMORANDUM DECISION AND ORDER

NOW on this date as reflected upon the electronic filestamp hereon, the above matter comes on before the Court for decision, in chambers. The Plaintiff, Water Protection Association of Central Kansas (Water PACK), appears by Micah Schwalb, Roenbaugh Schwalb, Attorneys at Law of Boulder, Colorado; and by Aaron Kite, Attorney at Law of Dodge City, Kansas. Earl Lewis, P.E., Chief Engineer, Division of Water Resources, Kansas Department of Agriculture, appears by Kenneth B. Titus, Chief Counsel, Kansas Department of Agriculture, of Manhattan, Kansas. Intervenor, the City

of Hays, initially appeared by John T. Bird and Todd D. Powell of Glassman, Bird & Powell, LLP of Hays, Kansas, and now appears by Donald F. Hoffman of Dreiling, Bieker & Hoffman of Hays, Kansas. Intervenor, the City of Russell, appears by Kenneth L. Cole of Woelk & Cole of Russell, Kansas. Both intervenors are also represented by David M. Traster and Daniel J. Buller of Foulston Siefkin, LLP of Wichita and Overland Park, respectively.

The Court has reviewed the substantial agency record in this action, the Plaintiff's Petition for Judicial Review filed May 29, 2019, Water PACK's Memorandum in Support of Petition for Judicial Review filed June 1, 2020, the Response of Defendant Acting Chief Engineer to the Water PACK Memorandum filed July 16, 2020, the Response of the Intervenor Cities in Opposition to the Water PACK Memorandum and Petition for Judicial Review filed July 16, 2020, and the Reply Brief of Water PACK filed August 24, 2020. Oral Argument was held to the Court on January 8, 2021, and all issues were taken under advisement.

From the Court's review and in consideration of the pleadings, agency record, memorandum, and oral arguments, the Court identifies legal issues, statements of fact, conclusions of law, and issues its legal holding.

Issues:

1. Was the process for drafting and negotiating the Master Order unlawful?
2. Do the contingencies contained within the Master Order invalidate the Order as a matter of law?
3. Were the change applications approved in the Master Order in violation of Division of Water Resources (DWR) regulations?
4. Did the Master Order improperly apply unapproved standards and rules of general application to the Big Bend Groundwater Management District No. 5 (GMD 5) Model?
5. Is the Ten Year Rolling Average (TYRA) limitation invalid as written and as applied?

Statement of Facts:

The Cities of Hays and Russell have struggled with inadequate water supplies over the course of many years. In 1995, the Cities purchased the R9 Ranch located five miles southwest of Kinsley, in Edwards County, Kansas, consisting of approximately 6,900 contiguous acres. Of this acreage, prior owners irrigated about 5,100 acres of farm land. The initial purchase was by the City of Hays, and the City of Russell later acquired an 18% interest in the R9 Ranch.

The Cities purchased the R9 Ranch and its 32 water rights as a long-term water source for the Cities. On June 29, 2015, the Cities submitted their initial applications for conversion of the irrigation rights on the R9 Ranch to municipal rights to DWR pursuant to the Kansas Water Appropriation Act, K.S.A. 82a701 et. seq. (KWAA). Due to the nature of the proposed diversion, the Cities were also subject to compliance with the statutory requirements set out in the Kansas Water Transfer Act (KWTA), K.S.A. 82a1501 et. seq.

The change order applications consist of thousands of pages. David Barfield, the prior Chief Engineer of DWR, testified the change applications as submitted represented the most extensive and complex applications of his entire career. The Cities twice amended their change order applications in 2016, and on March 24, 2019. The Chief Engineer issued the Master Order three (3) days following the second amended application on March 27, 2019.

Other facts contained within the record, as relevant, will be referenced in this Memorandum Decision and Order.

Standard of Review:

Petitions for judicial review in Kansas are governed by the Kansas Judicial Review Act codified in K.S.A. 77-601, *et. seq*. The KJRA applied to all agencies and all proceedings for judicial review and civil enforcement of agency actions not specifically exempted by statute. K.S.A. 77-603(a). A Court has jurisdiction to review an agency's

final order when the party who filed the petition meets the requirements for timeliness, standing, and has exhausted their available administrative remedies. K.S.A. 77-611(a), 612(c).

The Scope of Review in a KJRA case is limited to eight enumerated determinations the Court can make for which relief can be granted. K.S.A. 77-621(c). Specifically:

> (c) The Court shall grant relief only if it determines any one or more of the following:
>
> (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
> (2) The agency has acted beyond the jurisdiction conferred by any provision of law;
> (3) The agency has not decided an issue requiring resolution;
> (4) The agency has erroneously interpreted or applied the law;
> (5) The agency has engaged in an unlawful procedure or has failed to follow prescribe procedure;
> (6) The persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
> (7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the Court under this act; or
> (8) The agency action is otherwise unreasonable, arbitrary or capricious.

Water PACK argues the applicable sections of K.S.A. 77-621(c) as relating to the invalidity of the agency action in this case are subsections (2), (4), (5), (7), and/or (8). Water PACK, as the party asserting error by the Chief Engineer of the Division of Water

Resources, has the burden of proving one or more of these grounds for relief to apply. If Water PACK establishes that errors occurred under K.S.A. 77-621(e) "due account shall be taken by the Court of the rule of harmless error."

The claims of Water PACK under K.S.A. 77-621(c)(2),(4) and (5) are each subject to *de novo* review by the District Court, and are primarily thought of as questions of law.

A challenge under K.S.A. 77-621(c)(7) 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. *In Re Protests of Oakhill Land Co. 46 Kan. App 2d 1105, 1115 (2012).* The reviewing Court must consider all of the evidence, including evidence that detracts from an agency's factual findings in order to assess whether the evidence is substantial enough to support those findings. *Herrera-Gallegos v. H&H Delivery Serv., Inc., 42 Kan. App 2d 360 (2009).*

The last standard of review under K.S.A. 77-621(c)8 challenges the quality of the agency's reasoning. *Oakhill Land Co at 1115.* Essentially, this section 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. Factors that may be considered include whether an agency relied upon factors that the legislature did not intend for it to consider; the agency entirely failed to consider an important aspect of the problem; the agency's explanation of its action runs counter to the evidence before it; and the agency's explanation is so implausible that it cannot be explained by a

difference in view or a product of agency expertise. *Wheatland Elec. Co-op., Inc., v. Polansky, 46 Kan. App. 2d 746, 757-58, (2011).*

Examination of Issues:

1. *Drafting of Master Order*.

From its review of the Agency Record, Water PACK maintains the Chief Engineer permitted the Cities to submit multiple drafts of an initial version of the Master Order, and remained in protracted negotiations with the Chief Engineer for a period of two (2) years. Water PACK maintains that the true extent of the cooperative drafting was not disclosed until this controversy arose, representing a drafting process which was obscured from the public view in violation of law and resulting in a Master Order being in favor of the Cities and away from safeguarding the water rights of other users.

In discovery, the Chief Engineer acknowledged accepting a unique and unprecedented offer from counsel for the City of Hays to provide initial drafts of the Master Order and change approvals. Water PACK maintains that delegating the Cities to draft the Master Order is not contemplated in the KWAA, nor in the rules of the Chief Engineer for processing change applications, nor does the change order statute contemplate the Chief Engineer providing feedback to an applicant regarding a change application. In addition, Water PACK maintains that submission of multiple drafts of the Master Order arguably qualified as amendments to the change application of the Cities under K.S.A. 82a-708b and 82a-1906a.

As a consequence of these factual circumstances, Water PACK argues the Chief Engineer exceeded the jurisdiction conferred upon him by law thereby denying procedural protections to other parties holding water rights. By permitting the Cities to draft the terms of the Master Order in private and failing to post the various drafts on the DWR website, due process rights of other users were violated by failing to provide notification.

The Chief Engineer, according to Water PACK, justified his decision in testifying that the change order application was a unique set of circumstances in that it was preparing the way for a water transfer process later on, creating a need for the City to help shape the document in terms of what they believed would be needed in the water transfer process. Water PACK maintains that these unprecedented decisions exceeded the authority of the agency and violated the due process rights of other users.

The Chief Engineer and the Cities each argue that Water PACK fails to provide a citation to any statute or regulation in support of its argument prohibiting the Chief Engineer from engaging in a back-and-forth dialog or negotiation with a change order applicant.

Initially, Water PACK argues the change application statute of K.S.A. 82a-708b and accompanying regulations make no express authorization to support the conduct of the Chief Engineer. In response, the Chief maintains the regulations adopted to implement 82a-708b do in fact contemplate the ability of the Chief Engineer to confer

with change order applicants, to-wit: K.A.R. 5-5-1 providing that a change application shall include information as required by the Chief Engineer to properly understand the proposed change, which by implication contemplates an exchange of information for proper understanding of the change applications. Coupled with this understanding is the Chief Engineer's testimony that he could not think of a more extensive or complex set of change applications filed during his tenure.

Both the Chief and the Cities in their briefing cite *Sierra Club v. Moser, 298 Kan. 22 (2013), appeal after remand 305 Kan. 1090 (2017)* in support of an argument that Kansas caselaw provides and acknowledges that a dialog may lawfully take the form of an applicant providing proposed language for consideration by an agency in the adoption of an issued order.

The Chief Engineer testified that the initial proposed draft Master Order he received from the City of Hays was just a starting point and a framework for discussion, and that thereafter, DWR took control of drafting the proposed Master Order. In the briefing of the Cities, examples of deposition testimony of the Chief Engineer are included to demonstrate instances where language, information, and requirements were added or removed by the Chief Engineer from the Master Order as a result of public hearing and comments which differed from the draft language proposed by the Cities; the significant extent of the Chief Engineer's ultimate changes from prior draft language

proposed by the Cities; and the rejection of many of the Cities' positions, including especially the Cities' objections to the TYRA limitation.

Finally, the Chief Engineer points to the common practice of DWR in allowing the Chief Engineer to confer with an applicant as a part of the course of processing and reviewing an application. This pattern of conduct has been particularly true with applications involving unique or complex circumstances. The Chief Engineer specified as much at the informational meeting of June 21, 2018, held in Greensburg, Kansas, in describing the general process for reviewing application as sometimes allowing for a back and forth with the applicants to make sure the change is going to meet the needs of the applicant in spurring the change and in conforming with the rules of DWR.

The Chief and Cities next address the argument of Water PACK that the drafts of the issued Master Order qualified as amendments to the Cities' change applications and DWR was thus required to post all such drafts upon its official website as a part of the Cities' complete applications under K.S.A. 82a-1906. By failing to do so, Water PACK alleges the Chief engaged in unlawful procedure, which altered the rights of other water users without notification. Both Defendants take issue with Water PACK's construction of 82a-1906(a) noting that the phrase "and amendments thereto" is not an express reference to a change application amendment, but instead is a reference to any subsequent amendments to the cited statutory provisions. In addition, the Cities argue K.S.A. 82a-1096(a) does not apply to these specific change applications, because the

statute only became effective on July 1, 2016, which post-dated the change order applications by over one year.

The change application regulation at K.A.R. 5-5-2a(a) defines a complete application as one that "completely and accurately meets all the requirements specified in this regulation". There is no reference in the definition or suggestion that a draft comprises the applicant's change order request. The Chief maintains the obvious purpose of K.S.A. 82a-1906(a) is to alert nearby water owners of actual changes that are proposed so that owners can respond when they know exactly how they might be impacted. In any event, ultimately the proposed Master Order was provided to GMD 5 and Water PACK, and was also posted on DWR's official website.

The Defendants take issue with Water PACK's claim of decisions hidden during the drafting process or made "behind closed doors". In their respective briefing, both Defendants cite various notifications and information provided to the public and to Water PACK throughout the process, commencing with a public meeting on February 15, 2016 at Water PACK's annual meeting, and subsequent correspondence forwarded to Water PACK through May of 2018. At no time did Water PACK respond to any of these events or communications either by asking to participate in or objecting to the pending change applications.

2. *Contingencies in the Master Order*.

Water PACK asserts that the Master Order must be set aside because K.S.A. 82a-708b does not give the Chief Engineer the legal authority to include contingencies in the Master Order. Similarly, Water PACK maintains that neither the Change Order Regulations, nor the Water Transfer Act (WTA) confer authority upon the Chief Engineer to subject change application approvals to contingencies. More specifically, in its briefing, Water PACK claims the Chief Engineer is obligated to approve or reject an application – nothing more or less. By providing contingencies in the Master Order, the Plaintiff alleges the Chief Engineer acted beyond jurisdiction conferred by law, that the agency erroneously interpreted or applied the law, or that the agency action is otherwise unreasonable, arbitrary, or capricious under K.S.A. 77-621(c)(2)(4) and (8), respectively.

Secondly, Water PACK argues that the Master Order, at paragraph 253, states that the contingencies are pursuant to Water Transfer Act regulations, and by so ordering, the Chief Engineer impermissibly and unlawfully delegated his authority for change order applications to a WTA hearing panel in violation of K.S.A. 77-621(c)(4) and (5). In support of this argument, Water PACK claims the Master Order, in providing for contingencies, relied solely upon Water Transfer Act regulations (K.A.R. 5-50-2(x) and K.A.R. 5-50-7), even though a change applicant under K.S.A. 82a-1507(b) is required to first comply with the provisions of the KWAA change order statute.

Water PACK states that in their respective briefing, both the Cities and the Chief Engineer reference the WTA to rationalize the contingency in the Master Order. Water PACK further contends that the Master Order indicates it is a final order, and that the provisions of K.S.A. 77-530(b) do not permit the Chief Engineer to specify a later effective date for the Master Order.

Finally, in response to the argument of the Cities and Chief Engineer, that K.S.A. 82a-708b(a) allows for the Chief Engineer to impose conditions upon an approval, Water PACK argues KWAA makes no mention of conditioning the effectiveness of a change approval on a future event citing *Wheatland* and *Clawson v. State of Kansas Dept. of Agriculture, Division of Water Resources, 49 Kan. App. 2d 789 (2013)*. Water PACK states that each affirm the Chief Engineer's authority to impose conditions comes from K.S.A. 82a-711(b) which focuses on the broader water supply and not the effectiveness of the application itself. *Clawson at 806*.

The contingencies in question are found in the Master Order in that the change applications were approved "contingent upon" the occurrence of two (2) future events: (1 a final order approving the "water transfer" under the WTA and (2 Hays entering into a construction contract to drill municipal wells for the actual project. (Master Order P. 253). The Cities argue that the contingencies were practical and absolutely required given issues involving financing, construction, engineering, legal, and other considerations necessary for a water transfer project of this scope.

In response to Water PACK, the Chief Engineer and Cities cite from K.S.A. 82a-708b(a) (the change order statute), in part, "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." Each also notes the provisions of the statute governing original appropriation applications at K.S.A. 82a-712 specifying that the Chief Engineer may approve an application for a smaller amount of water than requested and may approve an application upon such terms, conditions, and limitations as he or she shall deem necessary for the protection of the public interest. In addition, the change order application regulation at K.A.R. 5-5-8(b) likewise provides that each approval of a change application is conditioned by the terms, conditions, and limitations the Chief Engineer deems necessary to protect the public interests. Under authority of these statutes and the change order regulations, the Chief Engineer and Cities maintain the Chief Engineer has the express authority under KWAA to condition change application approval orders on events, including the occurrence or non-occurrence of items in the future if deemed necessary to protect the public interest.

The Cities maintain in their briefing that *Clawson* and *Wheatland* provide authority for the Chief Engineer to impose terms, conditions, and limitations on new permits, as well as change applications.

While acknowledging the WTA is a collateral proceeding to this action, the Chief Engineer notes that WTA regulations at K.A.R. 5-50-2 anticipate presentation of contingently approved documents in submitting a complete water transfer application. The WTA regulations, according to the Chief Engineer, recognize that the underlying change order application approval is not immediately effective until determination of the outcome of the WTA proceedings.

The Cities provide a detailed discussion of the plain language interpretation of the term "condition" and "contingency" as being synonymous with each other. This interpretation is not controverted by Water PACK.

Addressing the second part of the Water PACK contingency argument, as to an impermissible delegation of the Chief Engineer's authority to the Water Transfer Hearing Panel, the Chief Engineer first relies upon its principal argument stated above that contingencies or conditions are authorized by the statutory citations in the Water Appropriation Act, and the change order regulations. Both the Chief Engineer and the Cities argue the sole statutory basis and authority for the Master Order is found in K.S.A. 82a-708b. While paragraph 253 of the Master Order includes a citation to K.A.R. 5-50-2x and K.A.R. 5-50-7, which are WTA regulations, the language is prefaced by noting that the Cities filed change applications in anticipation of a water transfer under K.S.A. 82a-1501 et. seq. Both responding parties note that while the contingencies expressed in paragraph 253 of the Master Order are pursuant to WTA regulations, they are not

authorized by those regulations because the only statutory authority for authorization is found in K.S.A. 82a-708b.

3. *Master Order Approval of Change Applications and DWR Regulations*.

Water PACK notes K.S.A. 82a-708b(a) requires an applicant to apply in writing for approval of a requested change of place of use and to satisfy a specified burden in order to receive an approval of the change. Approval of a change order is undertaken on the same provisions and procedures prescribed for processing an original application for permission to appropriate water. That process, described in K.S.A. 82a-711, determines whether a proposed use will prejudicially and unreasonably affect the public interest by consideration of specified factors, including the area, safe yield and recharge rate of the appropriate water supply; the priority of existing claims of all persons to use the water; the amount of each claim to use water from the appropriate water supply; and all other matters pertaining to such question. K.S.A. 82a-711(b)(2-5).

Water PACK also maintains K.A.R. 5-5-8(a) frames the change application approval in both disjunctive and forward-looking terms relative to existing water rights, emphasizing the regulation as:

> Each application for a change in the place of use or the use made of water which <u>will</u> materially injure <u>or</u> adversely affect water rights or permits to appropriate water <u>with priorities senior to the date the application for change is filed shall not be approved by the Chief Engineer.</u>

Water PACK argues that the Master Order in this case considers the base change criteria of K.A.R. 5-5-8 only on a limited basis, and instead focuses largely on Irrigation Change Criteria, and even then only two (2) of the options available under that criteria, namely calculation of net consumptive use using Net Irrigation Requirements (NIR) for corn as adjusted for 50% chance rainfall by county under 5-5-9(a)(1-3), and secondly, under K.A.R. 5-5-9(b), a historic look back by analysis of historic consumptive use as a more accurate estimate than the corn-based method. Both options require consideration of the effects of an approved change on the local water supply as to whether the proposed use will cause the net consumptive use to be greater than under the original irrigation use.

Specifically, Water PACK alleges the Chief Engineer failed to consider four (4) key factual items in the record, namely, information predating 1984 in determining maximum acreage was demonstrably unreliable in consideration of the Field Inspection Reports (FIRs) attached to the City's applications; FSA records provided to the Chief Engineer by the Cities and by Water PACK establish different crops were planted in the period of perfection other than those indicated by DWR in its net consumptive use analysis; satellite data from 1984-1985 as corroborated by FSA records; and post-change conditions planned for the R9 Ranch on conversion from crop land to grass land yielded an unrealistic number likely to result in impairment of other water users.

Water PACK submits the consumptive use calculation for the R9 Ranch should completely ignore alfalfa based upon the FSA cropping records and satellite information showing what was actually grown at the R9 Ranch between 1984 and 1985. This cropping information undermines the DWR net consumptive use analysis despite the fact that the Chief Engineer found no compelling evidence offered to substantiate concerns of impairment.

In opposition to the finding of the Chief Engineer, Water PACK maintains the net consumptive use analysis in the Master Order ignored clear data in the GMD 5 model showing different recharge rates based on crop land to grass land conversions, as well as differences in recharge rates from western Edwards County relative to Edwards County as a whole, together with other issues contemplated in K.A.R. 5-5-8.

For these reasons, Water PACK states the Chief Engineer was obligated to consider post-change conditions, which would likely result in impairment to other area water rights in the light of the historic uses at the R9 Ranch. In determining whether net consumptive use will increase, the Chief Engineer must give the applicant credit for any return flows expected from the proposed change under K.A.R. 5-5-9(a). The Chief Engineer acknowledged that he had not considered post-change dynamics at the R9 Ranch, stating in his deposition that the agency historically had never done so.

Water PACK states the failure of the Chief Engineer to consider post-change dynamics, when reviewing the record as a whole, results in an agency calculation of the

maximum amount the Cities could appropriate from the R9 Ranch, which runs counter to the evidence before it, thus rendering the Master Order unreasonable, arbitrary, capricious, and lacking in substantial evidence under K.S.A. 77-621(c)(8).

In addition, Water PACK argues that DWR improperly satisfied a burden of proof placed upon the Cities in performing calculations to determine consumptive use. Water PACK maintains that the initial submission by the Cities requested change amounts in excess of those appropriated under the R9 Ranch water rights which should have triggered a site-specific analysis under K.A.R. 5-5-9(c)(1994 version). Water PACK avers the Chief Engineer was without authority to approve change applications without submission of sufficient documentation by the Cities, not DWR, to resolve questions concerning whether approval of the application would cause impairment of senior water rights, or adversely affect the public interest, resulting in a Master Order that deviated from required procedures, misinterpreted and misapplied the law, and was not supported to the appropriate standard of evidence, therefore representing an unreasonable, arbitrary, and capricious agency action, under K.S.A. 77-621(c)(2)(4)(5)(7) and (8).

Water PACK then maintains that even if the Cities had performed the required analysis instead of DWR, they would have been unable to prove the proposed change was reasonable and would not lead to impairment. Water PACK sets forth the corn-based calculation under 5-5-9(a) and concludes that the 6,756.3 acre feet maximum

annual diversion under the Master Order exceeded annual net consumptive use by over 1,100 acre feet on an annual basis, which increased net consumptive use with materially adverse effects on other existing water rights. Even under the alternative approach for historic net consumptive use actually made during the perfection period under K.A.R. 5-5-9(b), using an NIR for alfalfa, the result for net consumptive use calculates approximately 1,000 acre feet in excess per year than that provided under the Master Order, according to Water PACK calculations.

Water PACK argues that the unsupported maximum amount of diversion in the Master Order, together with a failure to conduct a site-specific survey renders 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.

Finally, Water PACK notes the Chief Engineer is empowered to issue and apply rules, regulations, and standards, but is expressly prohibited from using general standards not subjected to required rule making. Water PACK argues that use of the Kansas Irrigation Guide to calculate NIR for alfalfa was void, resulting in an erroneous interpretation, engagement in an unlawful procedure, and failure to follow required procedures, and was otherwise unreasonable, arbitrary, and capricious.

The Chief Engineer and the Cities dispute the assertion of Water PACK of a failure by the Chief Engineer to consider four (4) key factual items.

First, the Chief maintains that DWR personnel did not ignore information referenced in the FIRs attached to the Cities' application relating to loss or destruction of water use records predating 1984.

The record shows Richard J. Wenstrom, P.E., specified in a note that the owner had done a better job of keeping track of water use since late 1983. Wenstrom did note that choosing a year of record was extremely important to the irrigator because the perfected quantity in a Certificate of Appropriation would be limited to the maximum annual quantity of water actually applied to beneficial use in any one calendar year. In their submission, the Cities used the acres irrigated as stated in each FIR to calculate consumptive use relying upon Wenstrom's approval of the FIRs and the fact that he is a licensed professional engineer as to a consideration that the acres actually irrigated were accurate. The Defendants argue the lack of water use records did not have a bearing upon Wenstrom's ability to determine the number of acres actually irrigated, and acres irrigated during any one calendar year is the information needed for the calculation of consumptive use under the default approach for corn.

The record reflects that the year of record for calculating the perfection acres for 25 of the 30 water rights on the R9 Ranch is 1984 or later, only five (5) of the original water rights had a perfection period ending before 1984, and three (3) of those used the default NIR for corn and two (2) used the alternative method for alfalfa. This means that

DWR applied the NIR for alfalfa to approximately 3% of the total acreage of the R9 Ranch with water rights with years of record before 1984.

Second, according to the Chief, the record does not contain information submitted by Water PACK to the Chief Engineer with contradictory FSA records concerning crops actually grown during the perfection periods. The only information submitted on behalf of Water PACK was a compiled table purporting to reflect FSA data for crops grown, but copies of the actual records were never submitted to the Chief Engineer. More importantly, according to the Chief, the compiled table information of FSA crop data only included the years 1984 and 1985 even though the consumptive use regulation for actual historic crops grown under K.A.R. 5-5-9(b) considers crops grown "during the perfection period" of a water right. The Chief maintains the limited in scope compiled FSA data submitted by Water PACK failed to address the entirety of the perfection period, and the Chief, while giving appropriate weight and credit to the data submitted by Water PACK for FSA data did not believe that the same was more reliable than information contained within the files of DWR and as supplemented by the Cities.

The Chief argues the same problem exists with the satellite data submitted by Water PACK from 1984 and 1985. The FIR submitted by the Cities compiled by Wenstrom indicated alfalfa was grown on the subject real estate, which then led to the Cities' submission as the crop of record for calculating consumptive use. The satellite data was of limited scope and Defendants maintain it did not address the entirety of the

perfection period, and that the first-hand observation of crops actually grown during the perfection period is better evidence than speculating upon Water PACK satellite photos from 1984 and 1985. The Cities further maintain additional evidence exists in the record supporting the use of alfalfa for calculating consumptive use including water use reports, letters regarding alfalfa grown, and FSA reports showing alfalfa was grown during the perfection period.

As to the fourth factor argued by Water PACK, the Chief Engineer first maintains Water PACK failed to present any evidence of impairment of any nearby water rights.

The Chief Engineer stated in his deposition that post-change dynamics are not normally considered. Admittedly, the change of beneficial use of water cannot increase consumptive use; however, the Chief maintains that historically return flows occurred on the R9 water ranch when groundwater was pumped and applied to land and crops and the amount of water not absorbed by crops returned to the aquifer.

Under the Administrative Regulations, consumptive use is the gross diversion of water from the source minus waste and return flows to the source. Water PACK argues that converting the R9 Ranch to native grass land will increase consumptive use compared to the current irrigated crop land. The Chief Engineer maintains return flows only occur when the source water is applied to the place of use. In this instance, groundwater will be withdrawn, but will not be applied to the current place of use, and the regulations require that the current amount of water which makes up return flows

be left in the ground. By use of this calculation, native grass will have no impact on the consumption of the source water. This factor is why the Chief Engineer did not consider post-change dynamics.

The Cities further point to K.A.R. 5-5-9(a) which requires the Chief Engineer to compare the net consumptive use after the change to water consumed in the past under the original irrigation right. The Cities argued there are no Kansas cases that support Water PACK's claim of calculation of consumptive use upon reversion of the R9 Ranch to native grass.

The Chief Engineer denies that DWR improperly satisfied a burden of proof placed upon the Cities. The Chief Engineer notes that neither K.A.R. 5-5-8 nor K.A.R. 5-5-9 prohibit assistance to an applicant, and that K.S.A. 74-501 specifically authorizes the Chief Engineer to seek expert assistance. The Chief argues that Water PACK fails to cite any contrary authority and in any event, the actions of the Chief do not rise to the level of being unreasonable, arbitrary, or capricious.

The Chief Engineer consulted outside experts as to the issue of reasonableness of the consumptive use analysis calculation, and requested additional information from the Cities in order to ascertain the public interest would not be harmed. Defendants maintain the agency record clearly shows a detailed review of the consumptive use calculations was independently conducted by DWR. According to the Chief Engineer, all

actions were directly authorized and part of the normal application process available to all water right applicants.

The Cities also addressed Water PACK's claim of the invalidity of the Master Order by virtue of the fact that DWR performed the final consumptive use calculations, which according to Water PACK, relieved the Cities of the burden of proof. The Cities first note the record reflects a detailed consumptive use analysis for each water right was attached to each change application based upon the Cities' interpretation of the actual quantity of water certified, crops grown during the perfection period, and application of the corn and historic use calculations of alfalfa. The fact that DWR applied consumptive use calculations resulting in a smaller quantity of water available for change of use in the amount of 6,756.8 acre feet per calendar year did not relieve the Cities of its burden of proof. The fact that the Cities ultimately agreed with the DWR consumptive use calculation did not invalidate the process.

In response to the Water PACK claim that the Chief failed to follow K.A.R. 5-5-9, the Defendants note Water PACK's miscalculation of necessary conversions for the consumptive use for corn and alfalfa. This math error was not disputed by Water PACK in its response brief or at oral argument. Defendants maintain by use of their calculations and in consideration of K.A.R. 5-5-9(a)(4)(1994 version) to cap the quantity of the change of use by the authorized quantity of the existing water right, the calculations performed are in accordance with regulatory requirements.

The Chief further responds to the Water PACK claim of miscalculation of certified acres by noting that Plaintiff relies solely upon the calculations provided in the Keller-Bliesner consumptive use report. That report determined maximum acreage based upon aerial photography from years 1984 or 1985 instead of actual numbers of acres watered during the perfection period. Use of this limited calculation impermissibly reduced actual acres that were certified during the perfection period.

Water PACK has also presented the theory that if consumptive use is greater than the method allowed by using the 50% NIR for corn calculation, such number is unrealistic and results in impairment. In response, the Chief identifies K.A.R. 5-5-9(b), which allows for alternate methods for determining consumptive use, which in this case involved calculations for alfalfa acres grown on the R9 Ranch during the perfection period.

The Cities confirm K.A.R. 5-5-9(a)(1994) provides the default consumptive use calculation when changing irrigation rights to another use. The formula multiplies the maximum acreage legally irrigated in any one calendar year during the perfection period by the NIR for corn under a 50% chance rainfall for the county. The corn calculation looks back in time to acres irrigated during the perfection period, and the default method applies regardless of the crop or crops actually grown during the perfection period. The regulation is not limited to acreage grown during the year of

perfection, but instead is based upon acres irrigated during any calendar year during the perfection period.

K.A.R. 5-5-9(b) provides an alternative method to calculate net consumptive use by looking at historic net consumptive use actually made during the perfection period. The alternative method is used if historic figures would be more accurate than the default criteria. This calculation also looks back in time, and in this case, examined alfalfa grown on the R9 Ranch during the perfection period, which has a greater 50% NIR than does corn. The regulation is not limited to acreage grown during the year of perfection, but instead is based upon acres irrigated during any calendar year during the perfection period.

The Cities note that the site-specific net consumptive use analysis under K.A.R. 5-5-9(c) which Water PACK argues was triggered by the initial consumptive use analysis submitted by the Cities is only applicable if the calculation under the default subsection of K.A.R. 5-5-9(a) and the historical analysis under K.A.R. 5-5-9(b) are unrealistic, and could result in impairment of other water rights. After reviewing the consumptive use analysis for the change applications using actual historical crops grown, the Chief Engineer concluded the Cities were entitled to change up to 6,756.8 acre feet of water per year from irrigation to municipal use. In making this determination, the Chief Engineer specifically found that the "site-specific" approach under subsection (c) was inapplicable. (Master Order P. 86).

The Chief acknowledges K.S.A. 82a-1903 requires adoption of rules and regulations containing all standards, policies, and general orders in accordance with the Rules and Regulations Filing Act, K.S.A. 77-415 et. seq. The Chief denies that the Kansas Irrigation Guide which was used for calculation of consumptive use using the NIR for alfalfa is required to be adopted as a rule and regulation in that the Chief has not attempted to enforce an unwritten standard as law in a generally applicable way, Defendant Chief Engineer argues the Kansas Irrigation Guide is a natural extension of existing statute and regulations in that it allows for a technical calculation for NIR for alfalfa, and is only applicable in specific instances. The Cities join this argument maintaining the Chief Engineer is only required to submit proposed rules and regulations "of general application and have the affect of law". In contrast, the NIR for corn is generally applicable to all change applications and has been adopted by regulation. The Chief Engineer argues it is impracticable to expect adoption of every single calculation that might ever be used into a rule and regulation. The Defendants also note that Water PACK does not argue that the NIR for alfalfa used by the Master Order was inaccurate, but only that it is subject to the rule-making requirement of K.S.A. 82a-1903(a).

4. *Chief Engineer Applying Unapproved Standards – The GMD 5 Model*.

Water PACK maintains that the Chief Engineer required the Cities to reconfigure the GMD 5 Model and perform model runs based upon unpublished standards

including development of a 51 year time horizon repeating 17 year data, which did not include the period of perfection. According to Water PACK, these adjustments amounted to implementation of standards of general application not subjected to required notice and comment proceedings yielding a flawed analysis.

More specifically, Water PACK maintains that the Chief Engineer required the Cities' experts to apply unpublished standards and rules of general application to the GMD 5 model to determine the effect of the proposed change application. A standard requirement or other policy of general application may only be given binding effect if it fully complies with the requirement of the Rules and Regulations Filing Act under K.S.A. 77-415 et. seq. In the present case, Water PACK maintains the Chief Engineer failed to subject the rubrics applied within the R9 Ranch model to the required notice and comment proceedings, and that the process is therefore void.

Water PACK references K.S.A. 82a-1903 as permitting the Chief Engineer to enforce rules and regulations enacted in accordance with K.S.A. 77-420, but that policy or orders of general application not so enacted are void. As authority, Water PACK cites the case of *Bruns v. Kansas State Bd. of Technical Professions, 19 Kan. App. 2d 83 (1993) affirmed 255 Kan. 728 (1994).* In the *Bruns* case, the Appellate Courts found it significant that the Board of Technical Professions relied upon the written internal policy for enforcement and interpretation of an enabling statute.

The Chief Engineer maintains Water PACK misunderstands the use and purpose of the GMD 5 model, which according to the Defendants was a tool available to all parties for consideration of the impact of the change applications of the Cities. As a tool, the model is simply a method to consider impact of a change order, but does not set any standards to be met by an applicant for the change application. The Chief notes that use of the model is not required for any change application.

By analogy, the Chief Engineer compares the generally applicable requirements of the 50% NIR corn, which is adopted in a rule and regulation, to the GMD 5 model, which is a particularized tool relating only to a described portion of the State of Kansas. Defendants argue that the fact the GMD 5 model existed, and was used to consider the impact of the change applications, did not make the model generally applicable to all change applications, nor did it set any required legal standard as both the Cities and Water PACK could have presented information from any model they chose to develop.

While noting the technical and complex nature of water rights, the Chief Engineer cites *Southwestern Bell Tel. Co. v. State Corporation Commission, 192 Kan. 39 (1963), syl. 3* which is cited in *Kansas Gas & Electric Co. v. Kansas Corporation Commission, 239 Kan. 483 (1986) at 496*, stating "A public utility has no vested right in any one particular formula or method, and the State Corporation Commission is not bound to use any particular formula or combination of formulae in valuing a public utility's property for rate-making purposes. The State Corporation Commission should receive and consider

all evidence which has a relevant bearing on reasonable value and then determine what formula, or combination of formulae, it believes should be used under the facts and circumstances of the case to arrive at a reasonable value of the property for rate-making purposes."

The Chief Engineer noted in his deposition that DWR does not have an approved list of tools concerning particular groundwater models that must be utilized. The Chief requested the Cities to perform modeling work using the GMD 5 model through an exercise of the Chief Engineer's discretion to consider appropriate methodology in determination of the hydrological question presented by the change applications.

Water PACK maintains that even under the GMD 5 Model, existing water rights surrounding the R9 Ranch are impacted by the proposed change applications. The Chief Engineer responds that this claim does not provide any basis for invalidating the issued Master Order in that the model demonstrates the long-term effects of proposed pumping for municipal use by the Cities, as constrained by the TYRA limitation imposed by the Chief Engineer. The limitation suggests decreases in water levels around the R9 Ranch boundary by between 0.3 feet or up to 0.8 feet, which were determined by the Chief Engineer to represent reasonable rates of decline in line with the status quo. This information resulted in the ultimate determination by the Chief Engineer that the Cities proposed quantities for municipal use were reasonable and would not impair existing rights.

5. *The TYRA Limitation*.

Water PACK notes that the TYRA purports to allow the Chief Engineer to set an aggregate limit of 48,000 acre feet on withdrawals from the R9 Ranch at an average of 4,800 acre feet per year. Water PACK maintains the TYRA limitation is invalid because it permits the Chief Engineer to maintain jurisdiction over the change approvals through altering the TYRA limitation after the effectiveness of the change approvals. Specifically, Water PACK argues this ability violates K.A.R. 5-5-9(a)6 and the *Clawson* case.

In *Clawson*, the Chief Engineer sought to retain jurisdiction over an approved appropriation permit for purposes of changing approval rates and quantities at a later time. In *Clawson*, the Court of Appeals held that the KWAA does not authorize the Chief Engineer to reevaluate and reconsider an approval once a permit has been issued. To allow the Chief Engineer to reduce the rate of diversion and quantity of water rights would make a water appropriation permit meaningless. Water PACK argues that by applying *Clawson* to the current TYRA limitation, which would allow the Chief Engineer to adjust and reevaluate change applications well after the time for judicial review of a final Order would subvert and impact water rights with dates of priority senior to those of a change application. In making that argument, Water PACK notes that the change order statute expressly references considerations which are applicable in connection with initial permits to appropriate water making the *Clawson* ruling applicable to the TYRA limitation.

Potential for future modification of the TYRA limitation would further violate procedural due process rights afforded to water users surrounding the R9 Ranch. The TYRA limitation according to the Master Order does not benefit or create rights for any third party, thus those other users of water in the vicinity would have no ability to seek judicial review and effectively would have no ability to pursue prevention of impairment of their water rights through a change of the TYRA limitation.

Water PACK maintains that by enactment of the TYRA limitation, the Chief Engineer has exceeded his statutory authority, has erroneously interpreted and misapplied the law, has engaged in an unlawful procedure or failed to follow prescribed procedures, resulting in an unreasonable, arbitrary and capricious act harming other users in the vicinity of the R9 Ranch.

In response, the Chief Engineer notes "limitations" as one of several types of qualifying order provisions that the KWAA authorizes the Chief Engineer to impose if necessary for the public interest when approving a new water appropriation application or a change application.

The definitional portion of the Master Order provides the following:

> "Limitation" means a term or condition imposed by the Chief Engineer on a water right pursuant to K.S.A. 82a-707(3), K.S.A. 82a-708b, K.A.R. 5-5-8, and/or K.A.R. 5-5-9 (1994 version) that, depending on the particular circumstances, limits the authorized rate(s) of diversion and/or the authorized annual quantity(ies) of water when a junior water right(s) is combined with a senior water right(s), to a rate of diversion or annual quantity of water that is less than the sum of the combined water rights' individual authorized rates of diversion or annual quantities of water.

> Depending on the particular circumstances, Limitations might be added, removed, or modified in an approval of an application to change the characteristics of a water right. Limitations are binding conditions unless and until they are removed or modified in a subsequent final order issued by the Chief Engineer. Specific Limitations are further defined herein (see Reasonable-Needs Limitations and the TYRA Limitation).
>
> (Master Order P. 13).

The Cities and the Chief Engineer both note the provisions of K.S.A. 82a-708b and K.S.A. 82a-712, which together, authorize the Chief Engineer to approve change applications for a smaller amount of water than requested and upon such terms, conditions, and limitations as he or she shall deem necessary for protection of the public interest.

The "limitation" limits the authorized rate of diversion upon concerns of reasonableness. While the TYRA limitation in this action is more unique than most imposed limiting conditions, the Chief maintains it is a limiting condition authorized by the KWAA. The "Reasonable Need Limitation" within the issued Master Order imposes additional limiting conditions which are based on the Cities' respective populations and reasonable amounts of municipal water use. That limiting consideration examines each Cities' total available municipal water from all sources, and provides limitation to an amount that represents the total reasonable municipal needs of each City. (Master Order P. 171-183 inclusive, and P. 231-238 inclusive).

Within the issued Master Order, the Chief Engineer acknowledges the extraordinary limiting condition of the TYRA, stating ". . . DWR does not routinely

impose limitations of the type or magnitude of the TYRA limitation on orders approving change applications.". (Master Order P. 129). Both Defendants note the Cities initially objected to the TYRA limitation as being unfair treatment, but eventually the City acquiesced partly in recognition of the benefit of operating the R9 Ranch water rights over the long-term in a sustainable manner.

The Chief Engineer found that imposing the TYRA limitation was necessary to ensure that the proposed change in use would be reasonable and result in better sustainability within the long-term yield of the R9 Ranch without unreasonable affects to the area. (Master Order P. 94). Imposition of the limiting condition of the TYRA was determined by the Chief Engineer for the protection of the public interest, but did not impose the TYRA limitation out of any concern for direct, well-to-well impairment under the KWAA. The TYRA limitation itself was based in primary part upon the use of the GMD 5 model which the Chief Engineer found to be reasonably reliable.

The Cities maintain that Water PACK has no standing to challenge the TYRA limitation itself, first because the Cities have consented to the TYRA limitation, and secondly because no case or controversy exists between Water PACK and the Cities relating to the quantity of the Cities' vested water rights.

Within the Master Order, the Chief Engineer found that notwithstanding the determination of the reliability of the Cities' modeling results, a possibility existed that ". . . additional data collection, further refinement, and/or calibration of the existing GMD 5

model . . . or the creation of an entirely new model, could result in changes to the conclusions that form the primary basis for the TYRA limitation, in which case it may be appropriate to increase the TYRA limitation.". (Master Order P. 169). This finding is the primary basis of the claim of Water PACK of the invalidity of the TYRA limitation by permitting the Chief Engineer to maintain jurisdiction over the change approvals through the potential for future alternation of the TYRA limitation after the change approvals have been determined.

Both Defendants maintain that the *Clawson* ruling is inapplicable to the facts of this case. The *Clawson* case involved an approval by the Chief Engineer for new appropriations of water and the provision at issue purported to give the Chief Engineer unlimited power over perfected water rights by retaining jurisdiction to make reasonable reductions in the approved rate of diversion and changes in other terms, conditions, and limitations as may be deemed to be in the public interest. The Court of Appeals affirmed the District Court which found the Chief Engineer could not retain jurisdiction over new appropriation permits on the basis that the KWAA, nor any other statute conferred continuing jurisdiction upon the Chief Engineer to reconsider an approval once a permit was issued.

According to the Cities, the TYRA limitation is unlike the provision in *Clawson* in three (3) key respects: first, because the limitation allows only an increase; second, because the changes can only be made at the request of the owner; and third, because

of the procedural and substantive safe guards in place prior to any change to the TYRA limitation. The Chief also points out that the TYRA limitation was established only with the prior acquiescence of the Cities. The Defendants maintain there is no statutory restriction on future adjustments to limitations of this type, and the Master Order specifically states that all limitations (presumably including the reasonable-needs limitation and the TYRA limitation) are binding conditions that cannot be removed or modified absent a subsequent final order by the Chief Engineer. Before a subsequent order can be entered, a public hearing is required.

The Chief Engineer further responds to the Water PACK claim that the potential to ease the TYRA restrictions in the future violates procedural protections afforded to water users surrounding the R9 Ranch. The Chief Engineer argues that the Master Order does afford procedural protections to the public regarding any future consideration of easing the TYRA limitation restrictions, by providing that the Chief Engineer shall hold a public hearing or hearings on the specific question of whether the City has sufficiently demonstrated that the science underlying the public interest reasons for imposing the TYRA limitation has changed in a way that warrants easing the TYRA limitation. (Master Order P. 230).

Any member of the public, including Water PACK, may participate in the future public hearing if legal requirements for standing are met. With respect to standing, the Chief Engineer points to the following:

> The TYRA limitation is imposed for the exclusive benefit of the public as a whole and not for the benefit of any other water right, person, or entity. Because the TYRA limitation is not for the benefit of any other water right, person, or entity, it does not confer any benefits or create any rights in any third party. This language recognizes that members of the public are not prevented from participating in a public hearing, but sets forth limitation upon the grounds under which participation could occur, and the arguments that could be advanced. By preventing individual third party water right owners to rely upon the TYRA limitation, and preventing opposition upon its restrictions on individual grounds based on something less than a direct impairment claim, the Chief Engineer maintains that this does not represent an unfair restriction, given the extraordinary benefit to Water PACK and other third party water right owners from the establishment of the TYRA limitation. (Master Order P. 227).

Conclusions of Law and Holding:

1. *The Drafting Process*.

Water PACK identifies three (3) separate determinations under K.S.A. 77-621(c) by which the Court can grant relief as to the drafting process itself and the participation of the Cities. Water PACK maintains relief is appropriate under (2) the agency has acted beyond the jurisdiction confirmed by any provision of law; and (4) the agency has erroneously interpreted or applied the law. With respect to the Water PACK claim as to the failures of the Chief Engineer to post online drafts of the change orders, Water PACK maintains the Chief Engineer, under (5), engaged in an unlawful procedure, or failed to follow prescribed procedure by altering the rights of other water users without notice and opportunity to be heard. The scope of review for these claims is *de novo*.

The Chief Engineer accepted a unique proposal from counsel for the City of Hays to provide initial drafts of both the Master Order and the change approvals incorporated to the order. In his deposition, the Chief Engineer acknowledged that this is the first time an applicant had offered to draft such a document.

Water PACK maintains there is no express or implied statutory authority nor regulatory authority, which contemplates the ability of the Chief Engineer to allow the Cities to prepare the initial draft of the Master Order and to subsequently continually comment on later drafts of the Order. The Cities responded that from their review of the Kansas Water Appropriation Act, the Water Transfer Act, Kansas Administrative Procedures, and Kansas Judicial Review Act, no language has been found that would expressly prohibit the Chief Engineer from relying upon information from the Cities to provide drafts and comments on the Master Order.

The Chief Engineer points to statutory and regulatory language, which would impliedly authorize the course of conduct pursued by the Chief Engineer, as well as caselaw and past practice.

K.S.A. 82a-708b is the change order statute. Change application regulations adopted to implement this statute at K.A.R. 5-5-1 clearly contemplate an exchange of information between the Chief Engineer and change order applicants by providing that a change application "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." Given the extensive and complex set of change applications in this action, common sense contemplates an exchange of information between the applicants and the Chief Engineer.

All parties discuss in detail the case of *Sierra Club v. Moser (Sierra Club (I), 298 Kan. 22 (2013), appeal after Remand 305 Kan. 1090 (2017).*

Water PACK concludes that *Sierra Club I* is clearly distinguishable from the facts of this case in that the cited case involved an entirely different statutory scheme, different regulations, different procedural posture, and different prayers for relief. Specifically, Water PACK maintains *Sierra Club I* did not involve the substantive or procedural provisions of the KWAA, nor did it involve the submission of two (2) incomplete sets of thirty-two (32) change order applications in advance of a third and final set of applications, ultimately approved by the Chief Engineer, without notice.

Sierra Club I parallels this action more closely than Water PACK argues. It involved a case where KDHE had issued draft permits, held public hearings, and accepted public comments on the underlying proposed permit. *Sierra Club* included a factual situation where the applicant had provided KDHE with proposed responses to public comments, which were ultimately included virtually verbatim in the KDHE permit. In *Sierra Club I*, the Plaintiff sought relief by suggesting KDHE had failed to perform its role as a "decision-making body", and had prejudged the outcome of the permitting process. The Kansas Supreme Court disagreed with the Plaintiff. While acknowledging

that it would have been improper for KDHE to prejudge the outcome of the permitting process, the Court noted nothing inherently wrong with an agency adopting proposed language within its issued order, so long as the proposed language is individually considered.

The facts in the instant case are similar in that the Chief Engineer acknowledged receipt of the initial proposed draft Master Order from the City of Hays, but testified the draft was a starting point and a framework for discussion. The Chief Engineer further testified that DWR "took control" of the drafting approximately ten (10) months before the Master Order. This testimony is uncontroverted in the record. An example of the independent drafting process is the Chief Engineer's requirement for the TYRA limitation due to the unique nature of the change approvals, which was initially opposed by the Cities, but was ultimately conceded.

Additionally, examination of the issued Master Order confirms the testimony of the Chief Engineer. Clearly, language and information was both added and removed from the proposed Master Order as a result of public hearing, public comments, and the Chief Engineer's fact finding; all of which differed from the initial draft language proposed by the Cities. In comparing the draft language of the initial order to the final Master Order, the Chief Engineer clearly individually considered independent facts and public comments, and ultimately performed his role as an independent decision-making

body. Water PACK had the full ability to comment upon the issues presented and to advocate on its own behalf as to issues presented within the Master Order.

While the underlying statutory and regulatory issues in *Sierra Club I* differ from those in this case, the holding as a matter of law does not: adoption of proposed language in an issued Order is permissible so long as the proposed language has been individually considered through public comments and investigation, and that the Order ultimately entered by the agency is in proper recognition of its duties and discretion.

Water PACK cites no caselaw nor statutory authority for its argument of express prohibition of negotiation and participation in drafting by the Cities. The record establishes that the Chief Engineer properly recognized his duties in consideration of the change applications and development of the Master Order, and that he fully considered public comments, including those of Water PACK in finalizing the Master Order. Water PACK fails in its burden of proof to establish the agency acting beyond its jurisdiction, or engaging in an unlawful procedure in the drafting process, and the Water PACK claim for relief on this issue is denied.

An additional issue exists with the drafting of the Master Order in that Water PACK maintains the Chief Engineer engaged in an unlawful procedure by failing to post all drafts of the Master Order exchanged by DWR and the Cities on the official website of the Division of Water Resources. Water PACK has two (2) separate claims in that respect, first, under K.S.A. 82a-1906(a), the drafts of the Master Order qualify as

"amendments" to the change application of the Cities and were required to be posted, and second, the failure of the Chief Engineer to post the amendments altered the rights of other water users, without notice.

K.S.A. 82a-1906(a) states as follows:

> "The division of water resources of the Kansas department of agriculture shall post all complete applications and all orders issued by the division pursuant to K.S.A. 82a-706b, 82a-708a, and 82a-708b, and amendments thereto, and K.S.A. 82a-745, and amendments thereto, on its official website."

The phrase "and amendments thereto" is not an express reference to change-application amendments, but instead to any subsequent amendments to the cited statutory provisions, and Water PACK fails to meet its burden to establish otherwise.

A complete application under the change application regulation K.A.R. 5-5-2a(a) is defined as one which "completely and accurately meets all of the requirements specified in this regulation". There is no reference in the regulation or K.S.A. 82a-1906(a) of the posting of a draft. The purpose of K.S.A. 82a-1906(a) is to alert affected water owners of the actual change that are proposed in order to provide an opportunity for response. In this case, only the proposed Master Order became an official amendment to the Cities' change applications. The Chief Engineer wrote a letter to GMD 5 with copy to Water PACK which explained that the Cities effectively were requesting water right changes in accordance with the terms of the proposed Master Order by correspondence

dated May 4, 2018. At that point, the proposed Master Order was also posted on DWR's official website.

In the response brief of the Chief Engineer at page 18, efforts of the Chief Engineer communicating with the public and Water PACK are detailed and the Chief Engineer maintains that Water PACK at no time responded to any of the communications until after the Master Order was issued officially approving the Cities' change applications. Water PACK fails in its burden of proof to establish unlawful procedures by the Chief Engineer under K.S.A. 82a708, K.S.A. 82a-1906(a), or any other related actions under the drafting process.

2. *Contingencies and Conditions in the Issued Master Order*.

Water PACK asserts neither the change order statute, the change order regulations, nor the WTA confer authority upon the Chief Engineer to subject change approvals to contingencies. By including contingencies, according to Water PACK, the Chief Engineer acted beyond jurisdiction conferred by law and erroneously interpreted or applied the law, both of which are subject to *de novo* review. Water PACK further alleges that the agency action was unreasonable, arbitrary, or capricious.
the law, or that the agency action is otherwise unreasonable, arbitrary or capricious.

Determination of Water PACK's claim starts with an examination of K.S.A. 82a-708b(a). The complete sentence concerning the authority of the Chief Engineer to approve or reject the application reads "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." K.S.A. 82a-711 and K.S.A. 82a-712 govern original applications for permission to appropriate water. The latter statute specifically authorizes the Chief Engineer to "approve an application upon such terms, conditions, and limitation as he or she shall deem necessary for the protection of the public interest."

Consistent with the underlying statutes, administrative regulation K.A.R. 5-5-8(b) provides that approval of change applications are to be conditioned by the Chief Engineer upon such terms, conditions, and limitations as he or she may deem necessary to protect the public interest. This regulation and the statutory framework were approved in *Wheatland at 752-755.*

In the Master Order, the Chief Engineer included terms, conditions, and limitations in the form of a contingent approval of the change of use applications of the Cities from irrigation use to municipal use. The contingency allows the water rights to remain available for irrigation use until the "effective date" of the Master Order, which depends upon two (2) future events, i.e., the contingencies, namely, issuance of a final order approving a water transfer, and receipt of written notice by DWR that the Cities have entered into a construction contract to drill one or more municipal wells for the water transfer project. (Master Order paragraph 253). In the absence of the contingencies, the irrigation water rights of the Cities remain unchanged.

Water PACK does not dispute the plain language interpretation by the Cities of the terms "condition" and "contingency" as synonymous, but instead maintains that the Chief Engineer is required only to approve or reject an application.

Interpretation of a statute is a question of law. Our Appellate Courts have noted on many occasions that the legislature is presumed to have expressed its intent through the language of the statutory scheme it enacts. If a statute is plain and unambiguous, the Court must give effect to the intention of the Legislature as expressed. *In the Matter of Marriage of Killman, 264 Kan. 33 42-43 (1998)*. When reviewing the statutes for change of use and for original applications to appropriate water, the Chief Engineer clearly has the right to impose terms, conditions, limitations, and/or contingencies upon applications for change of use of water.

Article 50 of the Kansas Department of Agriculture Division of Water Resources regulations govern water transfers. K.A.R. 5-50-2 specifies requirements for a water transfer application including (x) a copy of contingently approved documents including an application for change of place of use, type of use, or point of diversion. K.A.R. 5-50-7 specifies a water transfer application should not be considered complete until the application for a change of point of diversion, place of use, or use made of water filed pursuant to the Kansas Water Appropriation Act has been approved contingent upon receipt of a permit to transfer water. Both of these regulations are referenced in paragraph 253 of the Master Order, where the Chief Engineer specified that the terms

and conditions of the Master Order remain contingent and conditioned upon the issuance of a Transfer Order from the transfer panel approving a transfer of water, and receipt by DWR of written notification from the Cities of the entry into a written construction contract to drill one or more of the proposed municipal wells. Water PACK therefore argues the water transfer regulations are the sole basis expressed for the contingency in violation of the KWAA.

Water PACK points to no statutory or regulatory authority requiring the Chief Engineer to recite authority for each provision or paragraph in the Master Order. The Chief Engineer does in fact describe the general applicable law for change order applications, including the provisions of K.S.A. 82a-712 and 82a-708b as previously discussed in this opinion. (Master Order P. 30-42 inclusive). Error, if any, by the Chief Engineer's failure to again recite the provisions of K.S.A. 82a-708b and K.S.A. 82a-712 in paragraph 253 of the Master Order did not prejudice Water PACK, and is harmless.

On this issue, Water PACK has failed in its burden of proof to establish that the Chief Engineer acted without legal authority by including contingencies in the Master Order; that the Chief Engineer acted beyond the jurisdiction conferred by any provision of law, nor that the Chief Engineer erroneously interpreted or applied the law.

The remaining claim about contingencies raised by Water PACK is that the agency action is otherwise unreasonable, arbitrary or capricious under K.S.A. 77-621(c)8.

In *Wheatland,* the test under K.S.A. 77-621(c)8 determines the reasonableness of the agency's exercise of discretion in reaching a decision based upon the agency's factual findings and the applicable law. Useful factors for consideration include (1) the agency relief upon 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. *Wheatland 757*.

In this action, the Chief Engineer set forth contingencies within the Master Order under authority of K.S.A. 82a-712 and K.A.R. 5-5-8(b). The Chief Engineer fully considered the nature of the change request and the importance of a contingent order to protect the applicants and the public interests. Without contingencies in the change approvals, the Cities would experience a substantial reduction in the quantity and value of its underlying water rights without any assurance of the ultimate approval under the Water Transfer Act.

Water PACK has not met its burden of proof to show that the Chief Engineer considered factors outside the statutory framework, that he failed to consider an important aspect of the problem, that his explanation of actions runs counter to the evidence, or that the determination in the Master Order is so implausible that it cannot

be the reasonable application of agency expertise. Water PACK's argument under K.S.A. 77-621(c)8 fails.

3. *Master Order Approval of Change Applications and Applicable Regulations*.

Water PACK seeks relief under K.S.A. 77-621(c)(2), (4), and (5), claiming that the applicable statutes and regulations did not authorize the Chief Engineer to perform the consumption use analysis, for the R9 water rights. Water PACK also alleges a lack of evidence in the record or a failure of the Chief Engineer to properly consider all evidence as required by K.S.A. 77-621(c)(7). Finally, Water PACK also sets forth a claim under K.S.A. 77-621(c)8 arguing that the agency action is otherwise unreasonable, arbitrary or capricious.

K.A.R 5-5-9(a)(1994) states that the approval for a change in the use made of water from irrigation to any other type of beneficial use shall not be approved if the change causes the net consumptive use from the local source of water supply to be greater than the net consumptive use from that same supply under the original irrigation used upon criteria described thereafter.

Consumptive use is defined in K.A.R. 5-5-8(c) as:

> (c) as used in K.A.R. 5-5-3 "consumptive use" means gross diversions minus: (1 Waste of water, as defined in K.A.R 5-1-1(cc); and (2 return flows to the source of water supply: (A) through surface water run off which is not waste; and (B) by deep percolation.

In determining consumptive use, Water PACK argues the Chief Engineer erred by failing to consider four (4) key factual items within the record, including the reliability of information predating 1984, FSA records showing different crops planted in the period of perfection than those indicated by DWR, satellite data from 1984 and 1985, and post change conditions planned for the R9 Ranch. Collectively, this failure, when coupled with inaccurate cropping data employed by DWR and information from the GMD 5 model, yielded a consumption use analysis which was unrealistic and likely to result in impairment of other water rights. According to Water PACK, the Chief Engineer only considered base change criteria under K.A.R. 5-5-8 on a limited basis and instead focused largely on two (2) aspects of irrigation change criteria, namely calculation of net consumptive use under net irrigation requirements (NIR) for corn, and a historic look back at consumptive use when it provided a more accurate estimate than the corn-based method.

Under either method of determination of consumptive use, Water PACK maintains the Chief Engineer failed the requirements of K.A.R. 5-5-9(a) to make an accurate determination of net consumptive use of the water right change by neglecting to consider the impact of post-change conditions from irrigated cropland to non-irrigated native grass, triggering the need for a site-specific net consumptive use analysis under K.A.R. 5-5-9(c)(1994 version).

As expressed previously, under K.S.A. 77-621(c), the burden of proving the invalidity of the agency action and resulting Master Order is upon Water PACK. The alleged failure of the Chief Engineer's failure to consider key factual items and the Defendant's response was set forth in detail previously in this opinion, and each are separately considered here.

Fact 1: Reliability of information predating 1984.

Richard Wenstrom, P.E., as a part of FIRs submitted in the late 1980's, noted that water use and equipment records for the R9 Ranch had largely been destroyed or lost predating 1984. There is no serious dispute that post 1984 records are more accurate for the R9 Ranch, but as noted by the Chief Engineer, water use reports pre-1984 did exist, and to the extent available, were used for determination of maximum legally irrigated acres during the perfection period.

Ultimately, the Chief Engineer relied upon the FIRs for each of the thirty (30) water rights as attached to the change applications. The FIRs set forth the rate of diversion for each well and a determination of the maximum number of acres legally irrigated in any one calendar year during the period of perfection.

Fact 2: FSA records showing different crops planted and grown during the period of perfection than those indicated by DWR.

This claim of error relates to the use of alfalfa for the consumptive use analysis for a portion of the water use rights instead of the default application of corn.

DWR maintains that Water PACK failed to submit copies of actual FSA records to support the compiled FSA crop data of its expert, which related to calendar years 1984 and 1985. There is no record to establish that the Chief Engineer failed to consider the limited FSA data submitted by Water PACK's expert, however, the key determination under K.A.R. 5-5-9(b) is in submission of data regarding actual historic crops grown during the perfection period of a water right.

Even if the Plaintiff's FSA information was completely accurate, it does not address the entirety of the perfection period, and does not overcome the determination of the Chief Engineer at paragraph 76 of the Master Order stating "A review of the information in DWR files as supplemented by information provided by the Cities shows that the R9 Ranch was principally an alfalfa operation during the perfection periods for the R9 water rights." Accordingly, the Chief Engineer then used the historic use calculation of the NIR for alfalfa on those R9 Ranch irrigation circles shown in Appendix B: Table 1 attached to the Master Order.

Fact 3: Satellite data from 1984 and 1985.

Water Pack maintains the satellite data it submitted from 1984 and 1985 should have been considered by the Chief Engineer in determination of the crop of record and in the consumptive use analysis. This information, much like the FSA records submitted by Plaintiff's expert, was of limited scope and did not address the entirety of the perfection period. There is no showing that the Chief Engineer failed to consider the

satellite data, but from the record determined that the information within the DWR files as supplemented by the Cities supported use of the historic net consumptive use analysis under K.A.R. 5-5-9(b).

Fact 4: Post Change Conditions Planned for the R9 Ranch.

The Chief Engineer is required by regulation to examine whether a change from irrigation use to another type of beneficial use will cause net consumptive use from the local source of supply to be greater than the net consumptive use from the local source of supply under the original irrigation use. Water PACK maintains the Chief Engineer failed this test in neglecting to consider the impact of post-change conditions. Water PACK argues the language of K.A.R. 5-5-9(a) requires a forward look as to net consumptive use in that a change in use is not to be approved if the change "will" cause the net consumptive use following the change to be greater than the net consumptive use prior to the change.

Water PACK asks the Court to adopt the opinion of the water consulting firm Keller-Bliesner Engineering, LLC, (hereinafter KBE) who was hired by Water PACK to study issues relating to the change applications. KBE opined that more rainfall is consumed by dryland/natural grasslands than irrigated land and the effective rainfall used in the net consumptive irrigation use calculation should be equivalent to the consumptive use under dryland conditions, premised on the fact that the R9 Ranch will be returned to natural grasslands following approval of the change of use.

In the present case Under K.A.R. 5-5-9 (1994), in determining net consumptive use, the maximum annual quantity of water allowed under the change approval was determined by the NIR requirements of subsection (a) or (b). This calculation results in a determination of the net consumptive use as applied to either corn or alfalfa during the perfection period, and by definition, looks back in time to see the net amount of water consumed during the perfection period.

In justifying the decision of the Chief Engineer, his briefing explains why the NIR requirements of K.A.R. 5-5-9(a) and (b)(1994) were used to the exclusion of K.A.R. 5-5-9(c)(1994) and without consideration of post-change conditions. Page 39 of the Chief's brief first explains the definition of consumptive use under K.A.R. 5-5-8(c) and the historic use at the R9 Ranch where return flows occurred when groundwater was pumped from the current place of use for application to crops. Historically, whatever water was not absorbed by the crops "returns" to the aquifer. Important to the change to municipal use request is that return flows only occur when the source water is applied to the place of use. In this case, groundwater will be withdrawn, but will not be applied to the current place of use and regulations then require that the current amount of water, which makes up return flows, be left in the ground. The Chief Engineer maintains that since the "source" of the water will not be reapplied to the current place of use, conversion to native grass will have no impact on the consumption of the source water, and that source is required to be left at the source.

The Master Order further explains why the Chief Engineer discounted the KBE analysis and its calculation of consumptive use. (Master Order P. 83-85). The Chief also takes note of the argument of the Cities in citing language from K.A.R. 5-5-9(a)(1994) requiring net consumptive use based upon the original irrigation use made of water.

The Chief Engineer found no compelling evidence was offered of any evidence of impairment, nor was evidence presented establishing that nearby water right's ability to operate would be harmed by the consumptive use calculation. (Master Order P. 86). The Chief Engineer found that approval of the change applications permitting diversion of a total of up to 6,756.8 acre-feet of water per calendar year from all of the R9 water rights combined, subject to the terms of the TYRA limitation, would not cause the net consumptive use from the local source of water supply for the new municipal use to exceed the net consumptive use from that same local source of supply by the original irrigation use. (Master Order P. 89 and P. 95).

Water PACK has failed to meet its burden of proof under K.S.A. 77-621(c) as to its claim of the failure of the Chief Engineer to consider key factual items.

Water PACK additionally maintains that DWR improperly satisfied the Cities' burden of proof by performing the consumptive use calculations.

The record shows the Cities submitted a consumptive use analysis for each water right in the respective change applications. The analysis was based upon the Cities' interpretation of actual quantity of water certified, crops grown during the perfection

period, and application of K.A.R. 5-5-9(a) and (b) (1994). The calculation of the Cities requested a change order of 7,625.5 acre feet to municipal use. DWR reviewed the Cities' consumptive use analysis and conducted its own review. The Chief Engineer consulted with outside experts as to the reasonableness of consumptive use numbers and also requested additional information from the Cities in accordance with its duty to determine no harm to the public interest through the change.

The record reflects that the Chief Engineer rejected the Cities' initial application based upon the detailed review of the consumptive use calculation conducted by DWR, which included supplemented information from the Cities. Water PACK cites no authority to prohibit the consumptive use analysis by DWR, nor cooperation between the Cities and the agency.

The record and the Master Order reflect that the Chief Engineer reviewed and considered the analysis submitted by Water PACK and its consultant, KBE; the analysis of Burns & McDonnell (BMcD), the Cities' expert; the analysis of Balleau Groundwater, Inc. (BGW), modeling consultants hired by GMD 5; and the analysis of DWR. The Chief Engineer received written and verbal public comments and recommendations from the informational public meeting of June 21, 2018, and a full discussion occurred following the public meeting involving the Chief Engineer, DWR, Water PACK and its members, Water PACK's consultant, GMD 5, GMD 5's consultant, the Cities' consultants, and the Cities' attorney. The Chief Engineer considered all of this information in arriving at the

determination that the change of use would not cause the net consumptive use from the local source of the water supply for the new municipal use to exceed the net consumptive use from the same local source of water supply by the original irrigation use.

Neither K.A.R. 5-5-8 or K.A.R. 5-5-9 prohibit assistance to an applicant, and K.S.A. 74-501 specifically authorizes the Chief Engineer to seek expert assistance. Water PACK provides no evidence that DWR or the Chief Engineer violated any regulation, or exceeded any statutory authorization in the process of determination consumptive use numbers.

Water PACK also argues the original consumptive use analysis of the Cities, as submitted with the change order applications, specified an unrealistic number for purposes of a change order, which could have resulted in impairment of other existing water rights, thereby triggering the requirement under K.A.R. 5-5-9(c)(1994) for a site-specific survey. As the record reflects, through the use of the corn-based method and the historic alternative use method, the consumptive use analysis of DWR resulted in a substantially lesser-consumptive use calculation. The site-specific analysis first requires a finding that the quantity of water requested is unrealistic and could result in impairment of other water rights. Water PACK has failed to point to any specific indication of impairment in the record. In fact, the Master Order specifically details

considerations by the Chief Engineer under K.S.A. 82a-708b as to whether the proposed change is reasonable and whether the same would impair existing rights.

The Master Order also notes the supplemental recommendation of GMD 5 to determine a new consumptive use based on site-specific data and the site-specific analysis conducted by KBE for Water PACK, noting that the KBE estimate under a site-specific average reflected corn and alfalfa values close to those used by DWR.

The Chief Engineer ultimately found the consumptive use analysis determined by DWR was done in conformity with applicable regulations and that no compelling evidence had been offered to substantiate concerns of impairment. The Chief Engineer determined under these findings that a site-specific analysis under K.A.R. 5-5-9(c)(1994 version) was not applicable. (Master Order P. 86).

Finally, Water PACK maintains the Master Order should be invalidated because the Chief Engineer calculated consumptive use for a portion of the R9 Ranch water rights using the NIR for alfalfa based upon the Kansas Irrigation Guide. Water PACK maintains that by doing so, the Chief Engineer relied upon a rule and regulation which had not been adopted under the Rules and Regulations Filing Act, K.S.A. 77-415 et. seq.

The Chief Engineer has adopted generally applicable rules for change applications and for calculation of net consumptive use at K.A.R. 5-5-8 and 5-5-9. The NIR for corn has been determined by the Chief Engineer to be generally applicable to change applications and that standard has been adopted in regulation. Any calculation

for historic net consumptive use depends upon the documentation and analysis provided to the satisfaction of the Chief Engineer. The NIR for alfalfa used within the Master Order pursuant to the Kansas Irrigation Guide is a policy and calculation specific to the circumstances of the Cities' change order and is not a general order with wide spread general application. The calculation in this case was only applied after the historical use of alfalfa acreage was documented to the satisfaction of the Chief Engineer. The Chief Engineer's use of the Kansas Irrigation Guide to calculate the NIR for alfalfa did not require submission under the Rules and Regulations Filing Act of K.S.A. 77-415 et. seq., as this calculation is not generally applicable to change of use applications.

Water PACK argues that the change in use will materially impair or injure other existing water rights, but Water PACK does not assert that any specific water right or well will be impaired. Attorney General Opinion No. 95-92 states in part "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." The Chief Engineer found that granting change applications would not cause unreasonable declines and that the Cities were entitled to make reasonable beneficial use of the R9 Ranch water rights even though water levels will continue to decline in the area and noting that neighboring landowners are also continuing to deplete the aquifer. The Chief Engineer also determined a site-specific consumptive use analysis was not

required because no compelling evidence had been offered to substantiate concerns of impairment. (Master Order Paragraph 86).

In summary, Water PACK has failed to meet its burden of proof to establish invalidity of the action of the Chief Engineer in undertaking the determination and analysis of consumptive use. Specifically, Water PACK has not established that the Chief Engineer during this process acted beyond jurisdiction conferred upon the agency by law; has failed to establish that the agency erroneously interpreted or applied the existing law and regulations; and failed to establish the agency engaged in an unlawful procedure or failed to follow a prescribed procedure. Water PACK also fails its burden of proof under K.SA. 77-621(c)(7) and (8) in that the agency action in determining net consumptive use was based upon a determination of fact supported by substantial and contemporaneous evidence from the record as a whole. There is no evidence to support that the agency action in determining consumptive use was unreasonable, arbitrary, or capricious.

4. *Use of the GMD 5 Model*.

Water Pack contentions as to the GMD 5 Model are discussed. Water PACK first maintains the GMD 5 Model constituted current rules and regulations employed by the Chief Engineer, of general application with the effect of law, and therefore subject to the requirements of K.S.A. 82a-1903(a) as cited previously in this opinion. Secondly, Water PACK alleges that even if the GMD 5 Model is appropriate for consideration, the model

itself establishes that existing water rights surrounding the R9 Ranch are impacted by the proposed change applications. Third, Water PACK claims the final edition of the GMD 5 Model used by the Chief Engineer was applied to the R9 Ranch in the Master Order without a public hearing in that the Chief Engineer reviewed the final document in reliance upon the evaluation of the DWR staff and within days of receiving the final analysis approved the Cities' applications.

Water PACK argues use of the GMD 5 Model exceeded the authority of the Chief Engineer, employed improper procedure by disregarding the harm to all involved, and was unreasonable, arbitrary, and capricious under K.S.A. 77-621(c)(2)(5) and (8). The standard of review for the first two claims is *de novo*. The third Water PACK claim challenges the quality of the agency's reasoning.

Water PACK's initial argument is that the Master Order should be invalidated because the long-term pumping scenarios used by the Cities model report used three (3) repeating 17 year cycles in development of the long-term model. The long-term model was run with proposed municipal wells pumping 4,800 acre feet per year, and the Cities experts opined that based upon the model results, 4,800 acre feet per year is a reasonable value for long term maximum average yield of the R9 Ranch which in turn would not result in detrimental effects to the aquifer under the R9 Ranch and surrounding area (A.R. 650-651).

Water PACK maintains use of the groundwater model report and the 17 year periods violated K.S.A. 82a-1903 in that the development of a 51 year time horizon in conjunction with the GMD 5 Model were unpublished standards applied as rules of general application. Water PACK notes that the Chief Engineer at no point subjected the R9 Ranch model to required notice and comment proceedings under the Rules and Regulations Filing Act, K.S.A. 77-415 et. seq. As authority for its position, Water PACK has cited the *Bruns* case referenced previously in this opinion.

The Chief Engineer testified during his deposition that DWR does not employ a specific list of tools, nor require any particular groundwater model to be utilized in the analysis of change applications. Water PACK points to no specific statute or regulation which requires a model to be formally adopted in a rule and regulation prior to use. From a practical standpoint, to impose that requirement to an identification of an exclusive list of hydrological models would unreasonably intrude upon the discretion of the Chief Engineer to use appropriate methodology to determine complex hydrological questions, and such a regulation could not encompass all potential circumstances.

Nor does the *Bruns* case provide support to the Water PACK position. *Bruns* is factually distinguishable in that it involved an internal policy of the Kansas State Board of Technical Professions, which applied to all persons applying for a professional engineering license by reciprocity or comity. The Appellate Court found the internal

policy as applied to be broad enough to satisfy the requirement of "general application under K.S.A. 77-615".

The GMD 5 Model is not general application of legal standard, but is one method to consider impact of a proposed change order. The Chief Engineer did eventually direct the use of the GMD 5 model, but the Cities or Water PACK, in the interim, could have employed information from any hydrological model they chose to develop.

Both the Chief Engineer and the Cities point to Supreme Court decisions specifying that in cases involving complex orders or problems, agencies are allowed wide discretion and are not bound by any one formula or method. The key requirement is that the agency receives and considers all evidence submitted to it which has a relevant bearing on the issue in question, and then employs the formula or remedy determined, in this case by the Chief Engineer, to be used under the specific facts and circumstances of the case.

The Master Order sets forth and establishes the consideration of evidence by the Chief Engineer from all relevant sources and the reasons for his determination in granting the change order.

Water PACK fails to establish that the GMD 5 hydrological model was a standard or general order having the effect of law.

Reviewing the second contention of Water PACK, the revised modeling report of BMcD of September 24, 2018, describes the effects of pumping 4,800 acre feet per year

from the R9 Ranch upon the aquifer and surrounding users over the modeled periods. The modeled long-term effects, constrained by the TYRA limitation, reflect a decrease in water levels around the R9 Ranch boundary during the model period of 51 years. These water level declines were characterized by the Chief Engineer in his deposition as "very small" and he confirmed within the Master Order that the water level declines under the TYRA limitation were reasonable rates of decline in line with the status quo and existing declines to which other aquifer water users are contributing. (Master Order P.162). Water PACK does not assert any specific water right or well that will be impaired by the changes approved in the Master Order.

The fact that water rights from the R9 Ranch and surrounding areas might be impacted by proposed change applications does not meet Water PACK's burden of proof to establish impairment.

In its reply brief, Water PACK alleged the Chief Engineer received amended application by the Cities on a Sunday, and approved change use applications the following Thursday. This process avoided the protections required by KWAA for submission of public comment, failed to comply with K.S.A. 82a-1906(a), and deprived interested parties a meaningful opportunity to participate in the final decision. Due to the lack of notice, Water PACK challenges the validity of the Master Order.

In the Master Order, the Chief Engineer describes the review of the change applications, the BMcD modeling report and related files, the draft Master Order, the

public meeting and comments, and the approved change and beneficial use. (Master Order P. 55-70 inclusive).

The Master Order confirms that DWR provided the change applications, the BMcD modeling report and related modeling files, a proposed draft of the Master Order, and the change approvals to GMD 5 for its review as required by K.A.R. 5-25-1 through K.A.R. 5-25-21, also making the same documents available to the public on DWR's website.

An informational public meeting was held on June 21, 2018, to explain the issues considered with respect to the change applications, to take and answer questions, and to receive comments from the public. This portion of the meeting was transcribed and reflects a detailed, respectful, and informative process and exchange (A.R. 903-957). The proposed timeline for consideration of the change applications of Hays-Russell was presented at the meeting (A.R. 835). Furthermore, an overview of the Draft, Proposed Approval Documents was provided at the informational meeting (A.R. 836-847). The Chief Engineer extended the public comment process and timeline and accepted public comments through the month of September, 2018, which specifically included the opportunity for the experts of the Cities, DWR, and Water PACK to review and comment on one another's work.

GMD 5 provided written recommendations on August 29, 2018, and supplemented those recommendations on September 14, 2018. Included was the

review of BGW, modeling consultants for GMD 5, in response to the expert report of KBE, the expert for Water PACK, and to the Cities' groundwater modeling report.

Dr. Andrew Keller of KBE provided comments and analysis at the public meeting of June 21, 2018, and supplemented those comments later in writing. The Keller analysis at the public meeting included a site-specific net consumptive use determination pursuant to K.A.R. 5-5-9(c) (1994 version). This analysis included the Keller opinion and finding that more rainfall is consumed by natural grasslands than irrigated cropland arriving at a net consumptive use computation of 3,790 acre feet per year as a maximum value (A.R. 876). In its subsequent filing, KBE also provided a review of the BMcD modeling report under date of August 21, 2018.

To assist with his review and consideration of the identified issues and the public comments, the Chief Engineer directed DWR staff to analyze local data and model outputs for purposes of providing an independent review and assessment of modeled water levels on the R9 Ranch.

The GMD 5 recommendations of August 29, 2018, included in part that the TYRA limitation should be a lower figure of 40,000 acre feet; certain modeling issues should be corrected; that the TYRA limitation should be subject to future change either greater or lesser, and that a hearing should be required before any change should be made and other recommendations. In a supplemental recommendation of September 14, 2018,

GMD recommended determination of a new consumptive use for the change applications based on site-specific data under K.A.R. 5-5-9(c).

K.S.A. 82a-1906(b) requires DWR to post all complete change of use applications and orders issued by the Division on its official website, and in conjunction with the groundwater management district provide notification to all water right owners with a point of diversion within half a mile of a pending water right request or application.

The record reflects that on June 26, 2015, the Cities submitted their original change applications, which applications were complete, subject to later amendment. Ultimately, the change applications were amended in final form to conform with the Master Order. The draft of the proposed Master Order had been shared with GMD 5, a copy and explanation had been provided at the public meeting, and an extended period of comment was provided thereafter. The change applications, modeling reports, and the proposed draft of the master order and the change approvals were all submitted to GMD 5 for its review. The fact that the Master Order was finalized and published shortly after the final amendment of the change applications did not prejudice any party given the prior opportunity extended to participate and comment.

In summary, Water PACK fails to meet its burden of proof to establish that the GMD 5 hydrological model was a standard or general order having the effect of law, and use of the model did not exceed the authority of the Chief Engineer, nor did employment of the model represent an improper procedure disregarding harm to all

involved. The Master Order describes in detail the process used by the Chief Engineer in consideration of expert opinions, public comments, and required analysis. While the various studies, opinions, and modeling are each subject to separate interpretation, it cannot be said that the Chief Engineer's explanation for his decision in granting the change applications runs counter to the evidence presented, nor that his determination is so implausible that it cannot be a reasonable application of agency expertise. (*Wheatland* at 757). The evidence to support the determinations of fact of the Chief Engineer is substantial when viewed in the light of the record as a whole. Water PACK fails to establish that the agency action was unreasonable, arbitrary, or capricious.

5. *Validity of Ten-Year Rolling Average (TYRA).*

Water PACK raises two (2) primary arguments as to the validity of the TYRA limitation. First, Water PACK maintains the TYRA limitation is unlawful because it allows the Chief Engineer to retain jurisdiction over the approvals of the change applications by his ability to alter the TYRA limitation after the effective date of the change approvals. Water PACK argues the TYRA limitation violates K.A.R. 5-5-9(a)6, and is in contravention of the rule set forth in the *Clawson* case. However, Water PACK never develops its argument relating to a violation of K.A.R. 5-5-9(a)(6), and fails in its burden of proof as to that contention.

Secondly, Water PACK argues the potential for future modification of the TYRA limitation violates procedural due process rights afforded to water users surrounding

the R9 Ranch, due to the language of the TYRA limitation, which specifies the limitation does not benefit or create rights for any third-party user. This restriction prevents any surrounding water user from seeking judicial review of any future modification of the TYRA limitation. According to Water PACK, the net effect is that surrounding water users would have no ability to pursue prevention of the impairment of their water rights caused by a future change of the TYRA limitation.

With respect to the TYRA limitation as written, under K.S.A. 77-621(c), Water PACK states that the Chief Engineer has exceeded his statutory authority under (c)(2); has erroneously interpreted and misapplied the law under (c)(4); has engaged in unlawful procedure or failed to follow prescribed procedure under (c)(5); and that the agency action is otherwise unreasonable, arbitrary, or capricious under (c)(8).

Water PACK has also referenced a collateral issue of the invalidity of the TYRA limitation due to its development by use of the GMD Model to establish the limits of the TYRA. The validity of the GMD Model has been previously addressed and determined adverse to Water PACK and the collateral issue is also similarly denied.

In briefing, the Cities have argued waiver and lack of standing for Water PACK to lodge an objection to the TYRA limitation. Water PACK successfully responds to both of these arguments at pages 24-25 of its reply brief. Water PACK did not waive its right to object to the procedural aspects of the TYRA hearing process for any future requested modification. Similarly, Water PACK has established its standing or that of its members

for a causal connection to potential injury under the TYRA limitation or the mechanics of a public hearing contemplated for modification of the TYRA limitation. The Cities' claim of lack of standing and waiver are denied.

Water PACK argues the rule expressed in *Clawson* is applicable to the TYRA limitation. In *Clawson*, the Appellate Court held that DWR did not have jurisdiction to alter a water right once the applicable action had been taken by the Chief Engineer. Water PACK acknowledges the Chief Engineer retains jurisdiction to enforce its orders, and that it has the statutory power to prevent impairment. However, Water PACK maintains the Chief Engineer's attempt to retain jurisdiction must fail because it represents an attempt to modify a final order.

Water PACK's second issue is presented under the theory that the process for modification provides an insufficient safeguard against future injuries to water right holders within the R9 Ranch area. Any modification of the TYRA limitation according to the Master Order first requires a public hearing or hearings. (Master Order P. 230).

When the request for modification is filed by the Cities, in writing, they must provide notice to DWR and GMD 5. (Master Order P. 229). Water PACK notes there is no reference within the Master Order to any form of notice to adjacent water users similar to that which would be required under K.S.A. 82a-1906, nor does the Master Order specify the authority of the Chief Engineer to govern and hold the public hearing. The Master Order purports to prevent any ability of surrounding water users to seek

review of a determination made at the public hearing absent proof of impairment. Water PACK states it is unclear from the Master Order if the public hearing would require a new and complete change application on behalf of the Cities.

Finally, Water PACK notes the following from *Ft. Hays St. Univ. v. Ft. Hays St. Univ. Chapter, 290 Kan. 446 (2010) at 455,* "It is a well-established rule of law that Kansas administrative agencies have no common law powers 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.", as cited in *Clawson 315 P. 3d at 905.*

The Chief Engineer found, under authority of K.S.A. 82a-706 and 82a-708b, together with the unique aspects of the change applications, the TYRA limitation was required. (Master Order P. 94-96). Within the Master Order, the Chief Engineer states the TYRA limitation will ensure that the proposed change in use would be reasonable and would result in better sustainability within the long-term yield of the R9 Ranch, without unreasonable effects to the area. The TYRA limiting condition was imposed by the Chief Engineer for the protection of the public interest, but not out of any concern for direct, well-to-well impairment under the KWAA. The limitation itself was based in primary part upon the use of the GMD 5 model (Master Order P. 96), which the Chief Engineer found to be reasonably reliable, while also noting the Chief Engineer's

understanding that groundwater modeling is not a perfect science. (Master Order P. 136).

Both Defendants maintain the *Clawson* ruling is inapplicable to the facts of this case. The *Clawson* case involved an approval by the Chief Engineer for new appropriations of water and the provision at issue purported to give the Chief Engineer unlimited power over perfected water rights by retaining jurisdiction to make reasonable reductions in the approved rate of diversion, and changes to other terms, conditions, and limitations as might be deemed to be in the public interest. The Appellate Court in affirming the District Court found the Chief Engineer could not retain jurisdiction over new appropriation permits on the basis that the KWAA, nor any other statute conferred continuing jurisdiction upon the Chief Engineer to reconsider an approval once a permit was issued. *Clawson*, according to the Defendants, is distinguished in that it involved permits to appropriate water which had not yet been perfected instead of change application approvals.

The Chief Engineer further responds to the Water PACK claim that the potential to ease the TYRA restrictions in the future violates procedural protections afforded to the Water users surrounding the R9 Ranch. Specifically, the Chief Engineer maintains that the Master Order does in fact afford procedural protections to the public concerning any future consideration of the easing of the TYRA limitation restrictions. The Chief Engineer is required to hold a public hearing or hearings on the specific

question of whether the City has demonstrated sufficient proof for increase in the quantity of water to be diverted under the TYRA limitation. (Master Order P. 230). The Cities must request the modification in writing, with notice to both DWR and GMD 5 and demonstrate to the Chief Engineer's reasonable satisfaction that the request is based upon a new estimate from a groundwater model, which estimate and model are supported by data and methods comparable or superior to the modeling method used for the estimate in the Master Order and which data provides a new estimate of the yield that is larger than estimated in the GMD Model approved by the Chief Engineer in the present Master Order. (Master Order P. 229).

The *Wheatland* case confirms the Chief Engineer has the authority to act upon a change application by using the same provisions applicable to applications for a new permit. Under K.S.A. 82a-712, the Chief Engineer is authorized to approve an application for a smaller amount of water than requested and "upon such terms, conditions, and limitations as he or she shall deem necessary for the protection of the public interest.". In briefing, the Chief Engineer explains that DWR policy and regulations typically distinguish "limitations" from "terms and conditions" in that a "limitation" is a particular type of condition, which limits the authorized rate of diversion or authorized annual quantity of water when a junior water right and senior water right are combined, to a quantity that is less than the sum of the combined water rights.

The TYRA limitation is unique in that DWR proffers it would not routinely impose limitations of the type or magnitude of the TYRA, but the Chief Engineer found that imposing the TYRA limitation was necessary to ensure that the Cities' proposed changes would be reasonable and result in better sustainability within the long-term yield of the R9 Ranch (defined as the quantity of water that can be taken from the aquifer underlying the R9 Ranch over the long term without unreasonably affecting the area) with the intent of constraining the Cities' long-term use to that amount. (Master Order P. 94 and P. 159).

As a matter of law, the TYRA limitation itself is clearly within the statutory authority of the Chief Engineer under K.S.A. 82a-712, and evidence within the record substantiates the reasons for the TYRA limitation, including data from the GMD 5 model.

The Cities and the Chief Engineer successfully distinguish the jurisdictional ruling in *Clawson* from the facts of these change applications. The District Court and the Kansas Appellate Court in *Clawson* held the Chief Engineer did not have the statutory power to retain jurisdiction to limit or reduce water rights on a date subsequent to issuance of an appropriation permit. In the present case, the Master Order imposes conditions and limitations upon change application approvals, and the limitations imposed as a part of the change applications are not after the fact restrictions harming a water right owner. In addition, as pointed out by the Chief and the Cities, the TYRA limitation in this case is further distinguished from *Clawson* in that the limitation only

allows a potential increase in diversion; the changes to the TYRA limitation can only be made at the owner's request; and third, efforts were made to place procedural safeguards in place prior to any change. No future change in the TYRA limitation would alter the quantity of individual water rights actually approved, and under those conditions, there are no statutory restrictions upon the potential for future adjustments to the TYRA limitation.

Water PACK fails in its burden of proof to establish that by enactment of the TYRA limitation, the Chief Engineer exceeded his statutory authority, or erroneously interpreted and misapplied the law, or engaged in an unlawful procedure or failed to follow prescribed procedures, or that the agency action in establishing the TYRA limitation was otherwise unreasonable, arbitrary or capricious.

In consideration of the Water PACK due process argument, the Master Order confirms the total quantity of water that may be diverted for municipal use from the combined R9 water rights may not exceed 48,000 acre feet of water during any, each, and every ten (10) consecutive calendar years. (Master Order P. 226). The Master Order explains that the TYRA limitation is imposed for the exclusive benefit of the public as a whole and not for the benefit of any other water right person or entity, thereby failing to confer any benefit or create any rights in any third party. (Master Order P. 227).

The Chief Engineer within the Master Order explains the process for consideration of a written request of the City to increase the quantity of water to be

diverted under the TYRA limitation. (Master Order P. 229). Finally, the Chief Engineer specifies that prior to the determination of whether to approve the requested increase of the TYRA limitation, a public hearing or hearings are to be held on the specific question of whether the City has demonstrated the advisability of an increase in the TYRA limitation to "the Chief Engineer's reasonable satisfaction." (Master Order P. 230).

The Master Order contains no other specification as to the process and requirements of a "public hearing". During oral argument, counsel for the Chief Engineer stated that the public hearing procedure would clearly be under DWR regulation K.A.R. 5-14-3a, which according to counsel sets out the procedure to be followed for a public hearing. The Master Order requires notice of the public hearing to be provided to both DWR and GMD 5.

Examination of the specific regulation identifies parties and entities allowed to be parties to a formal hearing before the Chief Engineer, including DWR, the person or persons to whom the order will be directed, the applicant to change the place of use, the owners of the proposed place of use, and "any other person who has filed a timely petition for intervention in accordance with K.A.R. 5-14-3(e)". But K.A.R. 5-14-3(3) specifies only the parties named in the notice of hearing or otherwise designated by the Chief Engineer may participate in the hearing. This regulation essentially mirrors the language of the Master Order (P. 227). Presumably, GMD 5 would be authorized to participate if it filed a timely petition for intervention.

The Cities argue the TYRA limitation only affects the Cities and questions standing of other water rights or water users. Admittedly, the approval of the change applications and the associated approved diversion of 6,756.8-acre feet of water for municipal use per calendar year arrived at through the consumptive use analysis are determinations, subject only to this appeal, affecting the Cities.

But the TYRA limitation expressed within the Master Order presents a different issue. The Master Order specifies a finding of the Chief Engineer in consideration of the unique aspects of the change in use project that long-term withdrawals for municipal use under the Master Order are consistent with the quantity of water that reasonably can be diverted from the water resources on the R9 Ranch wellfield "over the long term without unreasonable effects to the area." The Chief Engineer required the Cities to develop modeling work to establish the basis of the TYRA limitation and to assess the impact of the pumping of the R9 water rights "on the surrounding area". (Master Order P. 96). In his further discussion of the TYRA limitation within the Master Order, the Chief Engineer noted that the GMD 5 model with modeling analysis by the Cities' expert, BMcD, provided an operation "constrained by such long-term yield sufficiently demonstrates that the Cities' proposed operations will not increase the rate of water level decline from the status quo and therefore will not unreasonably interfere with neighboring water rights." (Master Order P. 163).

A "Water Right" (as referenced in Master Order P. 163) is defined at K.S.A. 82a-701(g) as " . . . any vested right or appropriation right under which a person may lawfully divert and use water. It is a real property right appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal, or by inheritance."

While failing to identify the statutory or regulatory authority for a public hearing in the Master Order, the Chief Engineer apparently proposes to limit the public hearing to DWR, GMD 5, and the Cities, in the absence of a showing of direct impairment. There is no reference in any of the cited provisions in the prior paragraphs of this opinion to the term "impairment". This exclusion in participation does not coincide with a stated purpose of the TYRA limitation. The definitional portion of the Master Order defines "limitation" as providing, in part, "limitations are binding conditions unless and until they are removed or modified in a subsequent final order issued by the Chief Engineer." (Master Order P. 13). A final order encompasses something more than a generic reference to a quasi public hearing limiting participation and excluding area water users from a future application or determination without notice and opportunity to be heard.

The failure of the Master Order to consider the rights of area water users and/or water right holders to receive notice and opportunity to be heard at any public hearing concerning a proposed modification of the TYRA limitation deprives those water right

holders of due process of law and Water PACK has met its burden of proof to establish the invalidity of this portion of the agency action specifically under K.S.A. 77-621(c)(2) and (4).

Pursuant to K.S.A. 77-622(b), this Court grants appropriate relief, both equitable and legal. The Court orders the following in modification and set aside of agency action:

A. The language in the Master Order in paragraph 165, 227, and any similar language in any other paragraph of the Master Order is modified to read:

The TYRA limitation is imposed for the benefit of the public, but not to the exclusion or benefit of any other water right, person, or entity.

B. Paragraph 230 of the Master Order, and any similar paragraph within the Master Order is modified to state:

"Prior to deciding whether to approve any such requested increase of the TYRA limitation, the Chief Engineer shall hold a public hearing or hearings on the specific question of whether the City has demonstrated the above requirements to the Chief Engineer's reasonable satisfaction. Prior to conducting any public hearing, notification and publication shall be provided in the same manner required by K.S.A. 82a-1906. In accordance with the notification statute, those water right users will have the right to appear and be heard, including the right to present evidence of either direct impairment, or in challenge to any new groundwater model or modeling analysis, including presentation of expert evidence in opposition to the extent relevant to the issue of the proposed modification of the TYRA limitation and the affect of sustainable yield upon the surrounding area and water right holders."

C. Applicable language in the Master Order shall be modified to reflect the relief ordered in this Memorandum Decision and Order.

Concluding Summary:

All findings of fact and conclusions of law insofar as they may be combined as overlapping issues of fact and law, are included in and made a part of this Court's conclusions of law and judgment.

In review of the agency action, the Court has complied with the provisions of K.S.A. 77-601 et. seq. and with the rule expressed in numerous Appellate decisions including *Lockett v. University of Kansas, 33 Kan. App. 2d 931 (2005)* in that the Court may not substitute its judgment for that of the administrative agency and instead has considered, as a matter of law, whether the administrative agency acted fraudulently, arbitrarily, or capriciously; the agency's administrative order is supported by substantial evidence; and the agency's action was within the scope of its authority.

Water PACK has met its burden of proof under K.S.A. 77-621(c)(2) and (4) to establish the invalidity of the portion of the Master Order describing the rights of area water users and water right holders, and their respective ability to participate in any public hearing for modification of the TYRA limitation. Judgment upon that contention is granted in favor of Water PACK and in accordance with the findings of this Court under K.S.A. 77-622.

Water PACK has failed to meet its burden of proof under K.S.A. 77-621(c) to establish the invalidity of agency action in all other respects and its Petition for Judicial Review on those issues is denied.

The Court has considered all of the arguments presented by all parties herein, and to the extent not specifically addressed within this opinion, the same are denied without further comment beyond the findings, conclusions, and judgment of this Court.

This Memorandum Decision and Order shall be considered to be the judgment of the Court, and no further Journal Entry of Judgment is required. Counsel of record will receive a copy of this opinion through eFlex.

Order is effective as of the date and time on the signature page attached by the Court.