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IN THE TWENTIETH JUDICIAL DISTRICT
DISTRICT COURT OF STAFFORD COUNTY, KANSAS

ALAN B. CRANE, LEAH R. CHADD, and HELEN CARR WEWERS, Plaintiffs, vs. DAVID BARFIELD, P.E., THE CHIEF ENGINEER OF THE KANSAS DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, in his official capacity, Defendant.	Case No. 2018-CV-000006

Pursuant to K.S.A. Chapter 77

DEFENDANT CHIEF ENGINEER'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

COMES NOW, Defendant David Barfield, P.E., Chief Engineer, Division of Water Resources, Kansas Department of Agriculture ("Chief Engineer"), by and through counsel, Kenneth B. Titus, and pursuant to K.S.A. 60-212(b) and Supreme Court Rule 133, moves the Court for an order to dismiss the Petition for Judicial Review ("Petition"), filed by Alan B. Crane, Leah R. Chadd, and Helen Carr Wewers ("Plaintiffs"). An order to dismiss is proper because Plaintiffs have failed to state a claim for which relief can be granted and Plaintiffs lack standing under both the common law and the Kansas Judicial Review Act ("KJRA"). The Chief

Engineer files herein his Memorandum in Support Thereof which more fully explains why he is entitled to an order of dismissal.

WHEREFORE, the Chief Engineer requests an order to dismiss Plaintiffs' Petition.

MEMORANDUM IN SUPPORT

Although this Petition was filed pursuant to the KJRA, K.S.A. 77-601 *et seq.*, the Kansas Rules of Civil Procedure may be used to supplement the provisions of the KJRA. The "rules of civil procedure can supplement the [KJRA] where necessary to fill in the gaps, but the Code of Civil Procedure cannot alter or override express provisions of the KJRA." *White v. Kansas Dept. of Revenue*, 38 Kan.App.2d 11, 18; 163 P.3d 320. *See also*, *Pieren-Abbot v. Kansas Dept. of Revenue*, 279 Kan. 83, 97; 106 P.3d 492; *Rodenbaugh v. Kansas Employment Sec. Bd. of Review*, 52 Kan.App.2d 621, 628; 372 P.3d 1252; and *Seaman Unified School Dist. No. 345 v. Kansas Com'n on Human Rights*, 26 Kan.App.2d 521, 524; 990 P.2d 155 (motion for summary judgment applicable to KJRA). The rules of civil procedure have been applied in numerous types of KJRA cases, and since the KJRA does not provide for a specific dismissal procedure, this motion to dismiss, pursuant to K.S.A. 60-212(b), is proper.

I. Nature of the Case

The 2012 Kansas Legislature enacted K.S.A 82a-1041 to enable local enhanced management areas ("LEMA"). The LEMA statute includes language stating that the Chief Engineer "shall adopt rules and regulations to effectuate and administer the provisions of this section." The statutory language and context provide no guidance, direction, or mandate as to the specific content of any potential rules and regulations. As of the date this memorandum was

filed, the Chief Engineer has not promulgated any rules and regulations under the authority of K.S.A. 82a-1041.

Also, as of the date this memorandum was filed, the Board of Directors of Big Bend Groundwater Management District No. 5 ("GMD5") has not approved any potential management plan (a management plan is the basis of a LEMA and is the initial document that contains the necessary corrective controls, boundaries, and other elements needed to establish and enforce a LEMA), nor has GMD5 submitted any such plan to the Chief Engineer for initial approval and initiation of LEMA proceedings as contemplated in K.S.A. 82a-1041(a). GMD5 is currently developing a potential management plan and has made at least one public presentation. However, there is no certainty that any of the elements considered up to this point and presented to the public will be included in any management plan submitted to the Chief Engineer, if any plan is ever submitted.

While GMD5 is considering a potential management plan, the Chief Engineer has not enforced any agency policy related to K.S.A. 82-1041 against the Plaintiffs or any person located within GMD5. It is also impossible to know what persons may ultimately be affected by a potential LEMA because the boundaries and corrective controls contained in any management plan may be altered or rejected outright during the LEMA proceedings.

II. Plaintiffs Fail to State a Claim

Pursuant to K.S.A. 60-212(b)(6), Plaintiffs fail to state a claim upon which relief can be granted. Most importantly, Plaintiffs have not brought forth any claim of injury or damages based on the action or inaction of the Chief Engineer. Despite no evidence of harm, the Plaintiffs request that the Court effectively order the Chief Engineer to adopt rules and regulations. What relief this action could provide is unclear because in paragraph 37 of the Petition, Plaintiffs state

that any rules and regulations adopted by the Chief Engineer would fail to provide them adequate relief. Plaintiffs also propose the Court declare that certain legal assertions must be applied to any potential rules and regulations, although Plaintiffs fail to provide any support for what those rules and regulations should contain or how it would provide them relief from action taken by the Chief Engineer. It is difficult to apply prescribed standards of law to unknown circumstances.

The text of K.S.A 82a-1041 does not provide any material for Plaintiffs to strengthen their claims. Plaintiffs cannot say exactly what the Chief Engineer has failed to adopt, and in the absence of any legislative requirements, there is no relief the Court could order to alleviate their hypothetical concerns. Further, in the absence of affirmative action by the Chief Engineer and the absence of any claim of injury or damages, Plaintiffs cannot even claim that the Chief Engineer has caused them harm or enforced a policy against them that should have been adopted as a rule and regulation. Therefore, in the absence of any action by the Chief Engineer and the complete lack of injury or damages suffered by Plaintiffs, this matter should be dismissed.

Courts may review a motion to dismiss for failure to state a claim by accepting all facts alleged by the plaintiff as true, along with any inferences that may be drawn, to determine if upon plaintiff's theory, or upon on any other possible theory, the facts state any claim for which relief can be granted. *Cohen v. Battaglia*, 296 Kan. 542, 545-546; 293 P.3d 752. This task is somewhat complicated in the present case because Plaintiffs mix legal assertions and opinions into their alleged facts, but even when accepting all these statements as true, such facts and opinions do not provide a claim for which the Court can grant relief. There are no allegations or statements concerning what any rules and regulations should contain. There is no allegation or statement that provides any guidance as to what sort of relief could be granted because there is no allegation of an injury or of any damages. There are no allegations that the Chief Engineer has

taken any action against Plaintiffs or enforced any policy related to K.S.A. 82-1041 against them. Absent a specific legislative requirement to regulate a specific part of the LEMA process, it is unclear how relief could be afforded to the Plaintiffs.

III. Plaintiffs Lack Standing

A. Common Law Standing

Pursuant to K.S.A. 60-212(b)(1) this Court lacks subject matter jurisdiction because Plaintiffs lack constitutional standing. Plaintiffs have filed this action under the authority of the KJRA, but they are not relieved from meeting the common law standing requirements that apply to all cases in Kansas. In *Sierra Club v. Moser*, the Sierra Club sought to establish standing under the KJRA to challenge a permit issued by a state agency. 298 Kan. 22; 310 P.3d 360. Although the Sierra Club met the statutory requirements for standing under the applicable act concerning air quality, they still had to establish common law standing to sustain an action under the KJRA. "In order to have standing to file an action in a Kansas court, Sierra Club must demonstrate that it also meets common-law or traditional standing requirements...." *Id.* at 32-33. *See also, Cochran v. State, Depart. Of Agr., Div. of Water Resources*, 291 Kan. 898, 908-909; 249 P.3d 434 ("It is important to emphasize that in addition to the statutory qualifications conferring standing, a party seeking judicial review...must demonstrate he or she also meets the traditional requirements for standing.").

In *Cochran*, a water well owner was concerned that their well would be impaired by a new application approved by the Division of Water Resources ("DWR"), however, under DWR's interpretation of the Kansas Water Appropriation Act, the owners were not entitled to administrative review because the approved application did not involve them as a party. *Id.*, pp. 900-901. However, in determining that the owners could establish standing under the KJRA, the

Cochran Court also recognized that to demonstrate standing for judicial review, "a person must demonstrate that he or she suffered cognizable injury and that there is a causal connection between the injury and the challenged conduct." *Id.* at 908. No causal connection has been presented by the Plaintiffs.

The Kansas Constitution requires that an actual case or controversy be presented, and not just a request for an advisory opinion. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897-898. (Challenge to a statutory provision requiring the Attorney General to file a case on behalf of the state to determine the constitutionality of a new statute without an underlying case or injury.) The question presented must be justiciable, and as a "part of the Kansas case-or-controversy requirement, courts require [that]: (a) parties must have standing; (b) issues cannot be moot; (c) issues must be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) issues cannot present a political question." *Id.* at 896. While there are less rigorous requirements for declaratory judgment cases, an actual case or controversy is still required. *Id.* at 897.

Plaintiffs have failed to present a case or controversy. First, no injury or damage has been alleged by Plaintiffs due to the inaction of the Chief Engineer in not promulgating rules and regulations. Second, there is complete uncertainty as to whether a LEMA hearing will ever take place within GMD5. There is also uncertainty about what any proposed management plan might contain or where it might apply. Even if the lack of a finalized management plan could be overcome, a LEMA may falter at several points during the process. A LEMA management plan may change throughout the hearing process or be rejected by either the Chief Engineer or, if any changes are proposed upon the original plan, it may also be rejected by GMD5. There is no

current harm alleged and there is no imminent harm because of the uncertainty regarding the establishment of a LEMA and the uncertainty of what any management plan might contain.

It is also important to note, that besides the uncertainty of any specific harm occurring, there are protections for water right owners built into K.S.A. 82a-1041. A management plan may only be adopted after at least two public hearings are held. The order implementing a LEMA must be based on the evidence presented at public hearing and this decision is subject to full administrative and judicial reviews. Not only is there no present harm claimed by Plaintiffs, but any threat of potential or imminent harm is decreased because of the protections the legislature sets forth to govern the LEMA process.

Further, since no harm has occurred to Plaintiffs, and it is uncertain whether any harm will ever occur, this issue is not ripe. The "doctrine of ripeness is 'designed to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.* at 892. "Stated yet another way, the doctrine prevents courts from being 'asked to decide ill-defined controversies over constitutional issues'...or a case which is of 'a hypothetical or abstract character.'" *Id.* Plaintiffs ask the Court to order that un-adopted and undefined rules and regulations be promulgated so that an undescribed and unknown harm might potentially be avoided. It is even uncertain if any proposed management plan would include Plaintiffs' property, in which case, the unknown regulations may never actually be applied to Plaintiffs. The issue raised by Plaintiffs, and the remedy sought, appear to be exactly the type of ill-defined, hypothetical, abstract, advisory, and nebulous issue that the Kansas Constitution has placed outside the jurisdiction of Kansas courts.

B. KJRA Standing

In order to establish KJRA standing pursuant to K.S.A. 77-611 a person must be subject to an agency action. Pursuant to K.S.A. 77-606, the KJRA is the "exclusive means of judicial review of agency action." The Chief Engineer is a state "agency" as the term is defined by K.S.A. 77-602(a) and (k). "Agency action" is defined by K.S.A. 77-602(b) as the following three things: (1) the "whole or part of a rule and regulation or an order," (2) the "failure to issue a rule and regulation or an order," or (3) an "agency's performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise." The Chief Engineer's failure to adopt rules and regulations pursuant to K.S.A. 82-1041(k) is not agency action for purposes of the KJRA, and therefore Plaintiffs do not have standing under the KJRA.

In examining agency action pursuant to K.S.A. 77-602(b), the first criterion is easily dismissed as no rules and regulations have been promulgated and no order issued to Plaintiffs pursuant to K.S.A. 82a-1041. Second, the Chief Engineer has not attempted to enforce any unwritten policy upon Plaintiffs. The "failure to issue a rule and regulation" has typically been deemed tantamount to "agency action" only where the agency enforces a policy as if it had the effect of law although the policy was not properly adopted as a rule and regulation. (Presumably because a plaintiff must have suffered some injury or damage because of the government's actions.) Here, no affirmative action has been taken by the Chief Engineer. In *Hallmark Cards, Inc. v. Kansas Dept. of Commerce And Housing*, 32 Kan.App.2d 715; 88 P.3d 250, the Kansas Court of Appeals examined an agency's application of an unwritten policy against an applicant of a grant program. Upon examination of the record, the court found that the agency's "internal standards for determining statutory eligibility for [a grant program's] certification were not reasonably objective, ascertainable standards, nor were they consistently and uniformly applied

since program inception...." *Id.* at 728. In the present case, however, the Chief Engineer has not made any decision, let alone taken any action, with respect to Plaintiffs, and thus there is no agency action to which to apply a standard and no agency record to review.

Plaintiffs make no claim that the Chief Engineer has an unwritten or unknown agency policy that has been applied against them. In *Hallmark*, the court stated that absent rulemaking, "it is critical that informal standards are a natural interpretation of the statute, are applied with consistency, and do not reflect a change in policy of general application. [citation omitted.] An agency must always proceed by rulemaking if it seeks to change the law and establish rules of widespread application." *Id.* at 725. There is no evidence or allegation that the Chief Engineer attempted to change the interpretation of K.S.A. 82a-1041. In other LEMA proceedings, K.S.A. 82a-1041's requirements for notice have been followed, public hearings have been held, and all evidence has been considered based on the statutory requirements and then set forth in orders subject to administrative and judicial review. In these previous LEMA proceedings and in the present case, the Chief Engineer has not created any standards absent those set forth in the statute, and no action has been, or will imminently be, applied to Plaintiffs. Therefore, there is no application of unwritten or unknown agency policy against Plaintiffs.

Third, the Chief Engineer does not possess a mandatory duty to adopt rules and regulations pursuant to K.S.A. 82a-1041. The statute uses the word "shall," but it provides no guidance as to what specifics should be addressed by any potential rules and regulations. The LEMA statute is comprehensive and already provides for due process protections, as well as meticulously detailing the corrective controls that can be adopted and the process for adopting and changing a management plan. In cases such as this, courts have found that the word "shall" is interpreted to mean the prescribed action is a directive, and not a mandatory section of the

statute. For example, in *State v. Raschke*, 289 Kan. 911; 219 P.3d 481, the Supreme Court of Kansas considered whether the minimum fines set by the legislature for a crime were mandatory. Included in this case is a thorough discussion of Kansas case law where "shall" has been interpreted to be either directory or mandatory. *Id.*, pp. 914-922. The court summarized the case history and set forth the following criteria: "(1) legislative context and history; (2) substantive effect on a party's rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provision...." *Id.* at 922. The legislature did not provide any guidance as to what the proposed rules and regulations should contain. However, the legislature did provide explicit details on the procedures to be followed in a LEMA proceeding, including the criteria necessary to establish a LEMA, public notice provisions, the requirement of written orders, and a fully developed review process. This attention to detail indicates that the legislature explicitly put their substantive concerns into the statute, and that anything left to rules and regulations merely regards form and not substance. The LEMA statute provides no consequences if the Chief Engineer has not adopted rules and regulations. Considering the statute as a whole, it appears that the requirement to adopt rules and regulations pursuant to K.S.A. 82a-1041 was merely a directory, not a mandatory, part of the statute, and thus the Chief Engineer has not failed to perform a duty to Plaintiffs.

The KJRA also requires that a person be "subject to that rule" in order to have standing on the basis of a challenged rule and regulation. K.S.A. 77-611(c). In the present case there is no standard or policy that has been applied as a rule and regulation to Plaintiffs and there are no LEMA proceedings currently initiated within GMD5. Plaintiffs are not currently regulated in any way (pursuant to K.S.A. 82a-1041) by the Chief Engineer. Further, it is possible that the Chief

Engineer could adopt rules and regulations regarding a LEMA that are not applicable to Plaintiffs. For example, potential rules and regulations could deal with how a groundwater management district presents a management plan, or rules and regulations could adopt specific requirements for LEMAs based on geographic location that do not affect GMD5.

IV. Conclusion

Pursuant to K.S.A. 77-607 and 77-611, a person must be subject to an agency action and have proper standing to bring an action under the KJRA. As shown above, no agency action subject to judicial review has occurred. Further, Plaintiffs' challenge is against the failure to adopt a rule and regulation, but Plaintiffs have not been made subject to any to any policy or action. Even if such a hypothetical rule or regulation were adopted, it may not regard a topic that makes Plaintiffs subject to the rule or regulation. Plaintiffs have failed to establish that an agency action has occurred and have further failed to establish standing as required by the KJRA.

In the present case, Plaintiffs have presented no harm that is connected to the Chief Engineer's decision to not yet adopt rules and regulations. Plaintiffs have not suffered any actual harm as a result of the Chief Engineer's actions pursuant to K.S.A. 82a-1041 and hence there is no court action that could provide them relief. There is no management plan submitted yet for the Chief Engineer's review, there is nothing that indicates that any LEMA rules and regulations would harm (or help) Plaintiffs in any way, and it is possible that any future LEMA might not include Plaintiffs' property, or ultimately, no LEMA may be adopted, meaning there is no case or controversy presented to the court.

WHEREFORE, the Chief Engineer prays that the Court deny any and all relief sought by Plaintiffs and dismiss their Petition.

NOTICE OF HEARING

You are hereby notified that **Defendant Chief Engineer's Motion to Dismiss** filed in the above matter will be heard in the Stafford County District Court, before the Honorable Scott McPherson, District Court Judge, on **Wednesday, May 16, 2018 at 2:00 p.m.** or as soon thereafter as the same may be heard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 3rd day of May, 2018, I certify the above *Motion to Dismiss and Memorandum in Support Thereof* was electronically filed with the Clerk of the Court and to all other parties listed by depositing the same in the United States mail, first class postage prepaid and properly addressed to:

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