

BEFORE THE KANSAS DEPARTMENT OF AGRICULTURE

In the Matter of the City of Wichita’s)
Phase II Aquifer Storage and Recovery Project in) Case No. 18 WATER 14014
Harvey and Sedgwick Counties, Kansas.)
_____)

Pursuant to K.S.A. 82a-1901, K.S.A. 77-501, and K.A.R. 5-14-3a.

**RESPONSE TO EQUUS BED GROUNDWATER MANAGEMENT DISTRICT NO. 2’S
MOTION FOR RECONSIDERATION**

COMES NOW, Earl D. Lewis, P.E., Chief Engineer of the Division of Water Resources, Kansas Department of Agriculture (“Chief Engineer”) who, in response to the Motion for Reconsideration/Clarification, for a Ruling on the Substantive Issues, and for Attorney/Expert Witness Fees (“Motion for Reconsideration”) filed by the Equus Beds Groundwater Management District No. 2 (“GMD No. 2”) on July 6, 2022, now provides additional information to the Secretary of Agriculture (“Secretary”) regarding the Secretary’s jurisdiction to consider the Motion for Reconsideration.

I. Brief Facts

1. On June 21, 2022, the Chief Engineer issued a final order (“Final Order”) denying the City of Wichita’s (“Wichita”) request to modify its Aquifer Storage and Recovery Phase II Project Appropriation Permits (“ASR”).
2. Based upon all evidence in the record, Wichita’s request was denied because it failed to properly submit a new application for the proposal pursuant to K.S.A. 82a-711.¹
3. The Final Order states that since the proposal was not submitted pursuant to any statutory authority subject to review by the Secretary, the order was deemed final, and was subject to review pursuant to the Kansas Judicial Review Act, 77-601 *et seq.*²
4. Proper notice regarding how to request judicial review of the Final Order within 30 days was provided to all parties.³

¹ Final Order, pp. 13-17.

² *Id.* at 2.

³ *Id.* at 17-18.

5. On July 6, 2022, GMD No. 2 filed the Motion for Reconsideration, citing K.S.A. 82a-1901 and K.A.R. 5-14-3a(s)(5), which references K.S.A. 82a-1901, as authority for filing the motion.⁴

II. Discussion

A. Does the Secretary Have Jurisdiction to Review the Final Order?

The Kansas Water Appropriation Act is somewhat unique in Kansas law in that it grants a non-agency head specific statutory authority that is not delegated from an agency head. K.S.A. 82a-706 provides that:

The chief engineer shall enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation.

Other than a few references to financial or administrative duties related to day-to-day management of the Kansas Department of Agriculture and the Division of Water Resources, the KWAA does not provide the Secretary with any direct statutory authority regarding administration of the KWAA itself or review of orders issued pursuant to the Chief Engineer's explicitly granted authority.⁵

Therefore, in order to establish the Secretary's jurisdiction to review orders issued by the Chief Engineer, we must look outside the KWAA. Such jurisdiction is granted in limited circumstances pursuant to K.S.A. 82a-1901, which provides that orders issued by the Chief Engineer under the following statutes are subject to review by the Secretary: K.S.A. 42-703, 42-722, 42-722a, 82a-708b, 82a-711, 82a-718, 82a-737, 82a-770, 82a-1038, 82a-1041, and 82a-714. There is no evidence in the record, nor application on file, that suggests Wichita's proposal was submitted pursuant to any of the statutes listed in K.S.A. 82a-1901. Therefore, the Secretary does not have jurisdiction to review the Final Order based on K.S.A. 82a-1901.

The reference to K.A.R. 5-14-3a also fails to establish that the Secretary has jurisdiction. The procedures contained in K.A.R. 5-14-3a do not automatically apply to all hearings

⁴ Motion for Reconsideration, pp. 5-6.

⁵ See e.g., K.S.A. 82a-706e (establishment of field offices), K.S.A. 82a-736 (payment of expenses), and K.S.A. 82a-737 (unused definition of Secretary).

conducted by the Chief Engineer, but the regulation does allow the Chief Engineer to apply such procedures upon proper notice. In this case, the procedures in K.A.R. 5-14-3a were adopted in the initial Pre-Hearing Order, issued July 23, 2018, “in so far as is reasonable and at the discretion of the Chief Engineer...”⁶ There is no record that this guideline was modified or rescinded during the hearing. However, K.A.R. 5-14-3a(s)(5) simply states that an order issued by the Chief Engineer pursuant to that regulation is to state that it is subject to review by the Secretary pursuant to K.S.A. 82a-1901. As explained above, K.S.A. 82a-1901 does not grant the Secretary jurisdiction to review the Final Order. Because no statutory authority establishes the Secretary’s jurisdiction, the Chief Engineer cannot use his own regulation to impermissibly delegate the authority that the Kansas Legislature specifically granted to him to administer the KWAA. K.A.R. 5-14-3a does not give the Secretary jurisdiction to review the Final Order.

B. Does any Authority Exist to Allow a Motion for Reconsideration?

GMD No. 2 filed the Motion for Reconsideration without citing any valid authority to file such a motion. In the absence of any citation to proper authority, the Chief Engineer can only speculate that the motion was filed pursuant to the Kansas Administrative Procedure Act (“KAPA”), K.S.A. 77-501, *et seq.*, specifically K.S.A. 77-529. However, KAPA alone does not provide the Secretary jurisdiction to consider a motion for reconsideration in this case, as KAPA “only applies to the extent that other statutes expressly provide that the provisions of this act govern proceedings under those statutes.”⁷ There is no mention of KAPA in the KWAA. It is mentioned in K.S.A. 82a-1901, but that statute only makes KAPA applicable to proceedings regarding the other specific statutes referenced within K.S.A. 82a-1901, not to all proceedings conducted under the KWAA.

Even if K.S.A. 82a-1901 could somehow be found to grant jurisdiction, section (d) of that statute explicitly states that orders issued thereunder “shall not be subject to reconsideration pursuant to K.S.A. 77-529....” GMD No. 2 is apparently unclear regarding the proper procedure for their request, as they seem to confuse review by an agency head with a motion for reconsideration. It is not proper to request reconsideration prior to review by an agency head. Under KAPA, these are distinct steps in the review process and both review by the Secretary and

⁶ Pre-Hearing Conference Order at 2.

⁷ K.S.A. 77-503.

reconsideration are mentioned separately in K.S.A. 82a-1901.⁸ Regardless of the lack of clarity in the request, there is no statutory jurisdiction for review or reconsideration by the Secretary under either K.S.A. 82a-1901 or K.S.A. 77-529. Even if there was a plausible way to justify a request for reconsideration, the Secretary would still lack jurisdiction because there has been no review by the agency head.

III. Conclusion

GMD No. 2 has failed to cite any applicable authority that would grant the Secretary jurisdiction to review the Final Order issued by the Chief Engineer. The only place in statute that provides the Secretary any authority to review orders of the Chief Engineer is found at K.S.A. 82a-1901. K.S.A. 82a-1901 provides an exclusive list of statutes under which orders are issued and may be reviewed by the Secretary. It is an uncontroverted fact that Wichita's proposal was not filed under any statutory authority listed in K.S.A. 82a-1901. Accordingly, review by the Secretary here would constitute an improper exercise of the statutory authority vested solely in the Chief Engineer. Further, GMD No. 2 cannot graft additional avenues for appeal on top of those provided by the Kansas Legislature, as KAPA only applies where explicitly stated in statute, and no statute establishes KAPA's application to this type of order.

WHEREFORE, the Chief Engineer hereby requests that the Secretary decline to reconsider the Final Order due to lack of jurisdiction.

RESPECTFULLY SUBMITTED,

/s/ Kenneth B. Titus
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⁸ See e.g., K.S.A. 77-527 compared to K.S.A. 77-529.

CERTIFICATE OF SERVICE

On this 12th day of July 2022, I hereby certify that the original of the foregoing
“**RESPONSE TO EQUUS BED GROUNDWATER MANAGEMENT DISTRICT NO. 2’S
MOTION FOR RECONSIDERATION**” was sent by electronic mail to the following:

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