

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS

IN THE MATTER OF)
THE APPLICATION OF THE CITIES OF)
HAYS, KANSAS AND RUSSELL, KANSAS)
FOR APPROVAL TO TRANSFER WATER) OAH NO. 23AG0003 AG
FROM EDWARDS COUNTY, KANSAS)
PURSUANT TO THE KANSAS WATER)
TRANSFER ACT.)

Pursuant to K.S.A. Chapter 77.

**CITIES’ RESPONSE TO WATER PACK’S MOTION TO STRIKE REBUTTAL
TESTIMONY OF DAVID BARFIELD, P.E.**

Water PACK’S Motion to Exclude the testimony of David Barfield should be denied. Mr. Barfield is a former Chief Engineer of the Division of Water Resources (“DWR”) who has provided pre-filed rebuttal testimony to Water PACK’s expert, Steve Larson. Water PACK is mistaken on the law and presents a twisted factual basis for its Motion, which should be denied.

I. Water PACK’s attempt to strike Mr. Barfield is an obvious and desperate attempt to exclude testimony that is fatal to Larson’s groundwater model report.

According to the Kansas Supreme Court, the “*requirements for qualification as an expert witness are minimal*”; generally, nothing more is required to qualify an expert than evidence that the person has been educated in a particular trade, science, or profession.” *State v. Claerhout*, 310 Kan. 924, 934 (2019) (citation omitted). “Rejection of expert testimony is the exception rather than the rule.” *Smart v. BNSF Ry. Co.*, 52 Kan. App .2d 486, 496 (2016) (internal quotes and citation omitted).

And, contrary to Water PACK’s mistaken argument, under Kansas law, “[t]here is no rule requiring that the expert have a special knowledge of every aspect of his field.” *Borth v. Borth*, 221 Kan. 494, 498–99 (1977) (citation omitted). Rather, “[t]he test of competency of an expert witness is whether he discloses sufficient knowledge of the subject of inquiry to entitle his opinion to go to the [fact finder], and the question of the degree of his knowledge goes more to the weight

of his testimony than to admissibility.” *Slough*, 8 Kan. App. 2d at 109 (quoting *Ziegler v. Crofoot*, 213 Kan. 480, Syl. ¶ 4 (1973), *overruled on other grounds by Lollis v. Superior Sales Co. Inc.*, 224 Kan. 251 (1978)).

Under K.S.A. 60-456(b), a witness is qualified to serve as an expert so long as he has “knowledge, skill, experience, training or education” on the matter to which he testifies. K.S.A. 60-456(b); *Slough v. J. I. Case Co.*, 8 Kan. App. 2d 104, 108 (1982). “The qualifications of an expert witness and the admissibility of his testimony are within the sound discretion of the trial judge.” *U.S.D. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 363 (1981) (citing *Plains Transp. of Kan., Inc. v. King*, 224 Kan. 17, 21 (1978)).

Here, Mr. Barfield’s pre-filed rebuttal testimony and report make clear that his opinions are solidly within his qualifications. His prior experience as Chief Engineer of DWR brings irreplaceable—and irrefutable—expertise, experience, and professional knowledge. It is not possible to credibly question his qualifications, particularly in light of the fact that Mr. Barfield’s rebuttal testimony exposed numerous glaring defects, unfounded assumptions, and simple errors in Larson’s opinions and methodology.

Water PACK attempts to distract attention from the problems with their own expert by twisting facts about Mr. Barfield’s qualifications and his prior deposition testimony when he stated: “I’m not an expert at developing groundwater models. I consider myself more an expert in the application of groundwater modeling to our resource problems.” (Water PACK’s Br. at 3–4.) Water PACK’s argument is a blatant red herring. Mr. Barfield is not a groundwater modeler, he has never claimed to be a groundwater modeler, and he was not asked to perform groundwater modeling in this case.

Mr. Barfield was asked to *apply* Mr. Larson’s groundwater modeling work to a resource problem—i.e., the conversion of the R9 Ranch from irrigation to municipal use and estimate the impacts of those changes over time. To see this, all one needs to do is review Mr. Barfield’s summary of his scope of work on PDF pg. 11 of his expert testimony: “My work consisted of a careful review of Mr. Larson’s report, as well as a review of pertinent portions of BGW’s GMD 5 Model Report and its attachments as they relate to Mr. Larson’s opinions.” (Rebuttal Test. of Barfield, PDF pg. 11 (Rpt. pg. 2).)

Water PACK attempts to distort Mr. Barfield’s testimony and opinions into something they are not. He did not create, modify, or run a groundwater model for purposes of this matter. He is simply interpreting and evaluating Mr. Larson’s groundwater modeling report to provide helpful information to the Presiding Officer.

Mr. Barfield’s credentials are impeccable. He is a licensed professional engineer with a Master’s Degree in Water Resources Engineering from KU. His education “includes training in the engineering property of soils and graduate level work in groundwater modeling.” (Barfield Rebuttal, at PDF pg. 12 (Rpt. pg. 3).) This ends the matter. The Kansas Supreme Court has held that “nothing more is required to qualify an expert than evidence that the person has been educated in a particular trade, science, or profession.” *State v. Claerhout*, 310 Kan. 924, 934 (2019) (citation omitted). But Mr. Barfield’s report goes on to provide an extensive discussion about his experience working on and evaluating groundwater models—precisely what he has done in this case. (Barfield Rebuttal, at PDF pgs. 12–13 (Rpt. pgs. 3–4). *See also id.* at PDF pgs. 25–32 (CV of D. Barfield).)

It is difficult to grasp the purpose behind Water PACK's baseless Motion—beyond consuming time and effort of counsel for the Cities on the literal eve of the hearing, and creating a distraction.

II. Mr. Barfield Bases His Testimony on the Same Facts and Data as Intervenors' Expert.

It is entirely unclear what data Water PACK takes issue with from Mr. Barfield's testimony. Mr. Barfield simply provided a critique of their own expert's report. Mr. Barfield's testimony only speaks to infirmities in Mr. Larson's methodology and in his numerous unfounded assumptions. That's it. As a result, Intervenors' second basis for striking Mr. Barfield attacks an issue that simply does not exist—he did not rely on the data their argument complains of. Of course, if counsel for Water PACK wishes to cross-examine Mr. Barfield on this issue, they are the hearing officer will, no doubt, give them ample opportunity to do so.

III. K.S.A. 77-514 Has No Bearing on Mr. Barfield's Suitability as an Expert.

Without doubt Mr. Barfield is exceptionally well qualified and would be allowed to testify at a jury trial under even the strictest application of our rules of evidence. His prior role as Chief Engineer of DWR, and his participation in the prior Change Application proceeding is not a basis to disqualify him. Not even close. In addition, it is important to note that Mr. Barfield's testimony will primarily involve a critique of Mr. Larson's expert report. As he states in his pre-filed testimony, "I've been asked to review and provide an evaluation of Mr. Larson's expert report as further supplemented by his direct testimony for this proceeding." (Intervenors' Trial Br. 4, ¶¶ 8–10.) Again, there is no doubt that Mr. Barfield is qualified for that particular task.

Water PACK's conspiracy theory about Mr. Barfield has no merit, but any criticism of him, or bias underlying his opinions based upon his former service as Chief Engineer, goes to the weight of his testimony and not its admissibility. Again, counsel for Water PACK is free to cross-examine Mr. Barfield about his role as Chief Engineer. And the Presiding Officer is free to, and

should consider his response when evaluating and weighing Mr. Barfield's opinions. But nothing about his prior role as Chief Engineer should *disqualify* him as an expert in the case.

Neither is Mr. Barfield's email, which Intervenors attached to their Trial Brief but fail to quote, evidence of anything, and certainly not his qualifications as an expert witness. In that email, addressed to lawyers, educational institutions, governmental entities, and engineering firms, Mr. Barfield states that he is seeking to inform/educate others on water resource issues. (Ex. 1, Intervenor's Trial Brief). In fact, he included Richard Wenstrom—one of the nearest irrigators to the Ranch and a principal advocate for their not-in-my-backyard effort to stymie the Cities' water transfer. In that email, Mr. Barfield said nothing that could be construed as an improper "solicitation": "My principal means of doing this is the KWRC Newsletter (one – two emails per week)." *Id.* He then invites the recipients to sign up for that newsletter on his website's homepage. *Id.* That's it. There is nothing unusual, inappropriate, or nefarious about it. It certainly has nothing to do with his testimony in this matter. And characterizing it as some kind of targeted "solicitation" is improper.

Likewise, Water PACK's furtive references to the law (one statute and one case) as a basis for precluding Mr. Barfield's testimony falls far short of the mark. K.S.A. 77-514 has nothing to do with Mr. Barfield's services as an expert witness:

Except as otherwise provided by law, in any proceeding under this act, a person shall not be eligible to act as presiding officer, and shall not provide **confidential** legal or technical advice to a presiding officer in the proceeding, if that person: (1) Has served in an investigatory or prosecutorial capacity in the proceeding or a proceeding arising out of the same event or transaction

K.S.A. 77-514(h) (emphasis added). Obviously, Mr. Barfield is not providing confidential advice of any kind to the Presiding Officer. He has been retained as an expert witness to provide a critique of one of Intervenors' expert witnesses in open court on the record. Mr. Barfield has no untoward relationship or unfair influence with the Presiding Officer, the Transfer Panel, or any of the Parties

in this matter that would bend or warp the outcome of this matter. He simply provided an expert report critiquing the evaluation of Water PACK's effort. The Presiding Officer is perfectly capable of receiving Mr. Barfield's testimony impartially and assigning it whatever weight he deems appropriate. Nothing about this violates K.S.A. 77-514.

Additionally, the single case Intervenor's cite for limiting Mr. Barfield's testimony actually undermines their position. *Pork Motel, Corp. v. Kansas Department of Health and Environment*, 234 Kan. 374 (1983), involves the propriety of a *current* KDHE employee serving as a hearing officer for an administrative hearing. There, Pork Motel argued that the KDHE employee's service as hearing officer denied it procedural and substantive due process. *Pork Motel*, 234 Kan. at 383. The Court found that the employee's service as hearing officer did not violate Pork Motel's due process rights and that, at the hearing, he acted more as a technical advisor to the other hearing officer than anything else. *Id.* at 384. Therefore, not only was the service of a current KDHE employee as a hearing officer appropriate under KAPA, his service as a direct technical advisor to the other hearing officer was also appropriate. Mr. Barfield's role in this hearing is nowhere near as involved as the KDHE employee in *Pork Motel*. Mr. Barfield is retired from his role at DWR, is one party's expert witness, is subject to the other parties' cross-examination, and his testimony will receive whatever weight the Presiding Officer decides to give it.

In summary, Intervenor's provide no basis for disqualifying Mr. Barfield as an expert witness under K.S.A. 77-514 or on any other grounds. Water PACK's motion to strike Mr. Barfield should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Response to Water Pack’s Motion to Strike Rebuttal Testimony Of David Barfield, P.E served this 18th day of July, 2023, by uploading it to OAH Case Nos. 23AG0003 and by electronic mail to the following:

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