

WOELK & COLE  
P.O. Box 431  
Russell, KS 67665  
(785) 483-3711  
Fax 785-483-2983  
[woelkandcole@hotmail.com](mailto:woelkandcole@hotmail.com)

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

IN THE 24TH JUDICIAL DISTRICT  
DISTRICT COURT OF EDWARDS COUNTY, KANSAS

WATER PROTECTION ASSN. OF CENTRAL KANSAS, V. DAVID BARFIELD, P.E., IN HIS OFFICIAL CAPACITY AS CHIEF ENGINEER, DIVISION OF WATER RESOURCES, KANSAS DEPARTMENT OF AGRICULTURE, V. THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS, Pursuant to K.S.A. Chapter 77	CASE NO.	PLAINTIFF, 2019-CV-000005  DEFENDANT,  INTERVENORS,
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CITY OF RUSSELL'S SUPPLEMENTAL BRIEF ON PLAINTIFF'S REQUEST FOR DISCOVERY

At the hearing held October 17, 2019 the Plaintiff (hereinafter "Water PACK") was directed to provide the Court with the specific persons it wished to depose, identify the subject matters for each person to be deposed, and how the expected testimony would provide evidence needed to decide the disputed issue regarding whether the agency action consisted of "unlawfulness of procedure or of decision making process."

Water PACK has filed its supplemental brief much of which relates to arguments unrelated to the Court's inquiry as to whether discovery should be allowed and if so the scope of the same. The City of Hays has filed, or will file, a comprehensive response to all of Water PACK's contentions so those will not be repeated in this brief.

Water PACK, at Page 11 of its brief, identifies what appears to be the specific contentions of "unlawfulness of procedure or of decision-making process" that would permit the Court to receive additional evidence under K.S.A. 77-619(a)(2).

In sum, those contentions appear to be the following:

1. The Chief Engineer included a contingency in the Master Order in the absence of a statute, enabling regulation, or rule making permitting such contingency.

2. The Master Order violates the provisions of K.A.R. 5-5-8 entitled “Standards for approval of an application for a change in the place of use and change in the use made of water.”

3. The agency failed to properly consider evidence introduced by Water PACK in the administrative proceeding.

Again, Water PACK confuses unlawful procedures or decision-making process with differences of opinion in findings of fact or legal conclusions.

The Master Order and its incorporated Change Approvals are contingent upon the occurrence of various events highly summarized as 1) a final order entered by the water transfer hearing panel approving the Cities’ separate transfer application, and 2) the City of Hays contracting for the drilling of wells to complete the project on or before December 31, 2029, or any extension of the same granted by the Chief Engineer for good cause.

The issue of whether the contingency in the Master Order is lawful or not is an issue of law rather than fact. Discovery on this subject matter should not be permitted.

Water PACK’s second issue is whether the Master Order violates the provisions of K.A.R. 5-5-8 which Water PACK incorrectly characterizes as the “No Injury Regulation”. The existing administrative record on this matter is complete and exhaustive. The search for evidence on this issue to prove “unlawfulness of procedure or of decision-making process” would serve no purpose other than delay and generate unnecessary expense.

Water PACK’s final issue raised is that the agency failed to consider evidence introduced by Water PACK in the administrative proceeding. Water PACK does not detail what evidence it submitted in the administrative proceeding that was not properly considered by the agency. As detailed more fully in the administrative record and the City of Hays brief under the Statement of Facts, Water PACK had full opportunity to participate in the administrative proceeding. For some reason, unknown to the undersigned, it chose not to intervene in the proceeding and participate more directly in the matter. That said, given the

agency record on direct communications between the agency and Water PACK, the agency's public hearing on the matter and acceptance of public comments and submissions, the agency's record of public disclosures on the development of the Master Order, and the opportunity for Water PACK's full participation in the agency process that resulted in the Master Order it is too late for Water PACK now to contend that its "evidence" was not properly considered. Properly characterized Water PACK's contention is not that the agency failed to properly consider the evidence it introduced, but that the agency reached certain factual conclusions, fully supported by the evidentiary record, that does not correspond with Water PACK's desired result. The motion to permit discovery on this issue should be denied.

The City of Russell respectfully requests that the Water PACK's motion for discovery be denied.

RESPECTFULLY SUBMITTED:



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Kenneth L. Cole

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CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Supplemental Brief on Plaintiff's Request for Discovery was filed with the Electronic Filing System which will send a Notice of Electronic Filing to the following case participants who are registered Filing Users:

Micah Schwalb  
ROENBAUGH SCHWALB  
4450 Arapahoe Avenue  
Boulder, CO 80303  
*Attorneys for Plaintiff*

Kenneth B. Titus  
Aaron B. Oleen  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, KS 66502  
*Attorneys for the Chief Engineer*

David M. Traster  
FOULSTON SIEFKIN LLP  
1551 N. Waterfront Parkway, Ste. # 100  
Wichita, KS 67206-4466

Daniel J. Buller  
FOULSTON SIEFKIN LLP  
9225 Indian Creek Parkway, Ste. # 600  
Overland Park, KS 66210-2000

John T. Bird  
Todd D. Powell  
GLASSMAN BIRD AND POWELL  
200 W. Thirteenth St.  
Hays, KS 67601-0727  
*Attorneys for the City of Hays, Kansas*

/s/ Kenneth L. Cole

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