

ELECTRONICALLY FILED
2020 Apr 27 AM 11:58
CLERK OF THE EDWARDS COUNTY DISTRICT COURT
CASE NUMBER: 2019-CV-000005



Court: Edwards County District Court
Case Number: 2019-CV-000005
Case Title: Water Protection Assn of Central Kansas vs. David W Barfield, in his Official Capacity PE, et al.
Type: ORDER GRANTING DEFENDANT'S MOTIONS AND GRANTING PLAINTIFF'S MOTION IN PART

SO ORDERED.

A handwritten signature in black ink, appearing to be "B. Gatterman", written in a cursive style.

/s/ Honorable Bruce Gatterman, Chief District Judge

**THE STATE OF KANSAS
TWENTY-FOURTH JUDICIAL DISTRICT
SERVING
EDWARDS, HODGEMAN, LANE, NESS, PAWNEE, AND RUSH COUNTIES**

**IN THE
DISTRICT COURT OF EDWARDS COUNTY, KANSAS**

WATER PROTECTION ASSOCIATION
OF CENTRAL KANSAS

Plaintiff,

V.

CHRIS BEIGHTEL, P.E., IN HIS OFFICIAL
CAPACITY AS ACTING CHIEF
ENGINEER, DIVISION OF WATER
RESOURCES, KANSAS DEPARTMENT
OF AGRICULTURE

Defendant,

V.

THE CITY OF HAYS, KANSAS AND
THE CITY OF RUSSELL, KANSAS

Intervenors

CASE NO. 2019-CV-000005

Pursuant to K.S.A. Chapter 77

**ORDER GRANTING DEFENDANT'S MOTIONS AND GRANTING PLAINTIFF'S
MOTION IN PART**

Pursuant to the Court's Agreed Order Extending Deadline to Respond & Continuing Related Motions Hearing dated March 9, 2020, the following motions came before Chief Judge Bruce Gatterman for an April 6, 2020 hearing held via teleconference:

- The Defendant's Motion to Submit Additional Evidence Under K.S.A. 77-619 ("Defendant's 619 Motion");

- The Defendant’s Motion to Correct Agency Record Under K.S.A. 77-620(f) (“Defendant’s 620(f) Motion”); and
- The Plaintiff’s Motion to Correct and Supplement the Administrative Record (“Plaintiff’s Motion”).

The Defendant and the City of Hays filed Responses to the Plaintiff’s Motion.

The Plaintiff appeared by its counsel, Micah Schwalb of Roenbaugh Schwalb and Aaron Kite of the Kite Law Firm. The Defendant appeared by his attorney, Aaron B. Oleen, Staff Attorney for the Kansas Department of Agriculture. The Intervenor, the City of Hays, appeared by its attorneys David M. Traster and Daniel J. Buller of Foulston Siefkin LLP, its attorney John Bird of Glassman Bird Powell LLP, and its City Manager, Toby Dougherty. The Intervenor, the City of Russell, appeared by its attorney, Kenneth L. Cole of Woelk & Cole, and its City Manager, Jon Quinday. There were no other appearances.

Having considered the Motions, the Responses, and statements of counsel, the Court ruled and ordered as follows:

1. Defendant’s 619 Motion was **GRANTED** with respect to Exhibits 11 and 13 to the deposition (“Deposition”) of the former Chief Engineer for the State of Kansas held on January 28, 2020, which items the Court receives under K.S.A. 77-619(a) as evidence that may be relevant to the Plaintiff’s claims. Exhibits 11 and 13 are not included in the agency record pursuant to K.S.A. 77-620(a).
2. Defendant’s 620(f) Motion was **GRANTED** with respect to that certain spreadsheet-document’s second page that was earlier inadvertently omitted from the agency record that the Defendant transmitted to the Court. Under K.S.A. 77-620(f), the Court permits the Defendant to correct the agency record by including that page.

3. With respect to specific items described in Plaintiff's Motion and requested by the Plaintiff under K.S.A. 77-620(f), the Court ruled as follows:
 - a. **DENIED** as to Deposition Exhibits 1, 11, and 13, based upon the lack of nexus between such Exhibits and the agency proceedings, as indicated by the Deposition. As ordered above, however, the Court grants Defendant's 619 Motion and receives Deposition Exhibits 11 and 13 under K.S.A. 77-619(a), as evidence that may be relevant to the Plaintiff's claims.
 - b. **WITHDRAWN** as to the Plaintiff's requests regarding the Intervenors' consumptive use analysis and the assessment thereof performed by the Defendant's staff and any materials that the Defendant had received from Dr. Danny Rogers of KSU. The Plaintiff withdrew such requests during the April 6, 2020 hearing.
 - c. **DENIED** as to the input package files for the three-dimensional groundwater flow model provided to the Plaintiff and to GMD5 by the former Chief Engineer on or about March 9, 2018, because the Deposition indicated that the former Chief Engineer relied upon the report derived from such electronic files and not the electronic files themselves, nor would such electronic files be easily reviewable by the Court.
 - d. **DENIED** as to the input package files for the three-dimensional groundwater flow model used by Burns & McDonnell in connection with their revised modeling report dated September 24, 2018, because the Deposition indicated that the former Chief Engineer relied upon the report derived from such electronic files, and not the electronic files themselves, nor would such electronic files be easily reviewable by the Court.
 - e. **DENIED** as to the input package files to the three-dimensional groundwater flow

model used by the Defendant's staff during a review thereof encapsulated in a report dated March 26, 2019, because the Deposition indicated that the former Chief Engineer relied upon the report derived from such electronic files, and not the electronic files themselves, nor would such electronic files be easily reviewable by the Court.

f. **DENIED IN PART AND GRANTED IN PART** as to the drafts of the Master Order prepared by or exchanged with Intervenor the Cities and any related correspondence:

i. The Court partially denied this request in Plaintiff's Motion because the Deposition indicated that the former Chief Engineer did not rely on such drafts of the Master Order or any related correspondence, within the meaning of K.S.A. 77-620(a), in preparing and issuing the Master Order or the draft proposed Master Order. Rather, the former Chief Engineer merely considered certain phraseology suggested by such drafts, as a drafting starting point. Such drafts and related correspondence are properly not included in the filed agency record under K.S.A. 77-620(a).

ii. The Court partially granted this request in that the Court agreed to receive and ordered the submission, under K.S.A. 77-619(a), of only the initial draft of the Master Order prepared by counsel to the City of Hays and provided to the Defendant (the "Hays Draft"), in light of how the Hays Draft may relate to the Plaintiff's "unlawful procedure or failure to follow prescribed procedure" claim referenced in the Petition. The Court will only receive the Hays Draft and only under K.S.A. 77-619(a).

g. **DENIED** as to the Cities' application to transfer water from the R9 Ranch originally filed on January 6, 2016, as amended, because such application is governed by a separate statutory authority; namely, K.S.A. 82a-1501, *et seq.* and is not directly

relevant to the issues under review in this proceeding.

4. The Defendant has both corrected the agency record by including the aforementioned spreadsheet-document's back page, and the Defendant has submitted the Hays Draft to the Court, as of April 16, 2020.
5. Pursuant to the Court's January 13, 2020, Order, the Plaintiff's Memorandum in Support of its Petition for Review must be filed no later than June 1, 2020.

SO ORDERED, as of the date of the electronic signature of the Chief Judge appended to this Order by the Kansas Courts eFiling system.

[Counsel signatures follow]

APPROVED:

ROENBAUGH SCHWALB

Micah Schwalb
micah@rslfirm.com
4450 Arapahoe Avenue
Boulder, CO 80303
720-773-0970

~and~

KITE LAW FIRM

Aaron L. Kite
aaron@kitelawfirm.com
808 McArtor Road
P.O. Box 22
Dodge City, KS 67801
620-255-2673

By: /s/Micah Schwalb

Micah Schwalb, #26501

Attorneys for Plaintiff

ACTING CHIEF ENGINEER

CHRIS BEIGHTEL, P.E.

Kenneth B. Titus
Kenneth.titus@ks.gov

~and~

Aaron B. Oleen
aaron.oleen@ks.gov
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502
785-564-6738

By: /s/Aaron B. Oleen

Aaron B. Oleen, #23588

Attorneys for Defendant

FOULSTON SIEFKIN LLP

David M. Traster
dtraster@foulston.com
1551 N. Waterfront Parkway, Ste. #100
Wichita, KS 67206-4466
316-291-9725

~and~

Daniel J. Buller

dbuller@foulston.com
9225 Indian Creek Parkway, Ste. #600
Overland Park, KS 66210-2000
913-253-2179

~and~

GLASSMAN BIRD AND POWELL

John T. Bird
Todd D. Powell
200 W. Thirteenth St.
Hays, Kansas 67601-0727
785-625-6919

By: /s/ David M. Traster

David M. Traster, #11062

Attorneys for the City of Hays, Kansas

WOELK & COLE

Kenneth L. Cole
cole_ken@hotmail.com
4 S. Kansas St.
P.O. Box 431
Russell, Kansas 67665-0431
785-483-3711

By: /s/Kenneth L. Cole

Kenneth L. Cole, #11003

Attorney for the City of Russell, Kansas
