

ELECTRONICALLY FILED
2020 Jan 13 AM 9:38
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
Type: Order

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

FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
316-267-6371

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

WATER PROTECTION ASS'N OF
CENTRAL KANSAS,

Plaintiff,

v.

DAVID BARFIELD, P.E., IN HIS
OFFICIAL CAPACITY AS 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

Now on this 20th day of December, 2019, the above-captioned matter comes before the Court for a continued hearing on and determination of Plaintiff's Motion for Discovery, as to the remaining issue of depositions.

Plaintiff, Water PACK, appears by its attorney, Micah Schwalb of Roenbaugh Schwalb, Attorneys at Law of Boulder, Colorado. Defendant, Chief Engineer Barfield, appears by his attorney, Aaron B. Oleen, Staff Attorney for the Kansas Department of Agriculture of Manhattan, Kansas. Intervenor, the City of Hays, Kansas, appears by its attorneys, David M. Traster and Daniel J. Buller of Foulston Siefkin LLP, and the Hays City Manager, Toby Dougherty. Intervenor, the City of Russell, Kansas, appears by its attorney, Kenneth L. Cole of Woelk & Cole, and the Russell City Manager, Jon Quinday. There are no other appearances.

After an initial hearing on Plaintiff's Motion on October 17, 2019, the Court issued an Order on December 16, 2019, denying Plaintiff's Motion except as to the issue of depositions: the Court took under advisement the issue of Plaintiff's request to take certain depositions and ordered Plaintiff to supplement its Motion with additional information explaining the desired deposition topics and the justification therefor. Plaintiff filed its Supplemental Brief and Defendant and Intervenors filed Responses.

After hearing the arguments and statements of counsel at the continued hearing on December 20, 2019, regarding Plaintiff's Motion, the Court orders as follows regarding the remaining issue of depositions:

1. No Kansas appellate court has held that traditional discovery is unavailable as a matter of law in KJRA proceedings, and the general rules of discovery are liberal and permit discovery leading to admissible evidence. The sum of Plaintiff's allegations concerning the Chief Engineer amounts to a prima facie showing of "unlawful procedure" that could justify the admission of additional evidence into the Agency Record as filed. However, the limited extent of Plaintiff's participation in the administrative proceedings that produced the Master Order was Plaintiff's choice. Accordingly, the Court will permit Plaintiff to take the oral deposition of the Chief Engineer only, and the deposition will be limited as provided herein.

2. The Chief Engineer's oral deposition must take place during January of 2020, and is to be concluded in eight hours on a single day, in Manhattan, Kansas, or such other location as the Chief Engineer may reasonably choose.

3. Examination of the Chief Engineer is limited to the following topics as they specifically relate to the Plaintiff's allegations that the Chief Engineer engaged in unlawful procedures or decision-making processes, which topics generally follow certain of Plaintiff's requested deposition topics of the Chief Engineer.

A. Information made available to the Chief Engineer regarding impairment of water rights with points of diversion adjacent to the R9 Ranch and senior to the date of the Cities' change applications, to the extent discussed with the Cities or their representatives;

B. The Chief Engineer's use of the Model and Model runs, as modified by Burns and McDonnell and Agency personnel;

C. Any of the Chief Engineer's conclusions reached at the public meeting of June 21, 2018, and in the May 4, 2018, Draft Master Order, prior to the issuance of the final Master Order;

D. To the knowledge of the Chief Engineer, oral and written communications between or among the Agency, the Cities, members of the Kansas Legislature, and personnel from the Kansas governor's office relating to the Draft Master Order;

E. The Chief Engineer's conclusions that the Draft Master Order complied with applicable laws and regulations, prior to issuance of the Master Order;

F. The Chief Engineer's decision to permit the Cities to prepare the initial draft of the Draft Master Order;

G. Whether the Chief Engineer supported the Master Order with determinations of fact regarding impairment of surrounding water users; and

H. Whether the Chief Engineer issued the Master Order in response to improper political pressure.

4. No deposition questioning of the Chief Engineer beyond the specific topics listed above is permitted. No other individuals or corporate representatives will be deposed.

5. Motions to add documents to the Agency Record, whether as a result of the Chief Engineer's deposition or otherwise, must be filed no later than February 21, 2020. Responses are due no later than March 6, 2020. No replies are permitted.

6. Motions to add documents to the Agency Record, if any, will be heard by conference call on March 16, 2020, at 2:00 p.m. unless, after review of any Motions to add documents to the Agency Record, the Court decides that in-person oral argument would be preferable. Call in number: 888-301-0487; participant code: 861-8816.

7. Plaintiff's Memorandum in Support of its Petition for Review must be filed on or before April 6, 2020, unless a Motion to add documents to the Agency Record is filed. In that case, Plaintiff's Memorandum must be filed within 45 days after the Court rules on the Motion.

8. Defendant's and Intervenors' Memorandums are due within 45 days after the filing deadline for Plaintiff's Memorandum.

9. Plaintiff will have 30 days after the filing deadline for Intervenors'

Memorandums, to file a Reply.

This Order is effective as of the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

APPROVED:

Micah Schwalb
ROENBAUGH SCHWALB
4450 Arapahoe Avenue
Boulder, CO 80303
720-773-0970
micah.schwalb@roenbaugh

By: /s/Micah Schwalb
Micah Schwalb, #26501
Attorneys for Plaintiff

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

By: /s/Aaron B. Oleen
Aaron B. Oleen, #23588
Attorney for the Chief Engineer

David M. Traster
FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Ste. #100
Wichita, KS 67206-4466
316-291-9725
866-347-3138 (fax)
dtraster@foulston.com

By: /s/David M. Traster
David M. Traster, #11062
Attorneys for the City of Hays, Kansas

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

By: /s/Kenneth L. Cole
Kenneth L. Cole, #11003
Attorneys for the City of Russell, Kansas