In The Matter Of:

Hays, Kansas & Russell, KS v

Edwards County, Kansas & Kansas Water Transfer Act

Formal Hearing

Vol. 1

July 19, 2023

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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 FROM EDWARDS COUNTY, KANSAS PURSUANT TO THE KANSAS WATER TRANSFER ACT
OAH No. 23AG0003 AG

FORMAL HEARING

VOLUME I

This matter came on for Formal Hearing before Matthew A. Spurgin, Presiding Officer, at Hyatt Regency Wichita, Riverview Ballroom, 400 West Waterman, Wichita, Sedgwick County, Kansas, commencing at 10:10 a.m. on the 19th day of July, 2023.

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A P P E A R A N C E S

City of Hays, Kansas appears by its attorneys, David M. Traster, Foulston Siefkin LLP, 1551 North Waterfront Parkway, Suite 100, Wichita, Kansas 67206; Daniel J. Buller, Foulston Siefkin LLP, 7500 College Boulevard, Suite 1400, Overland Park, Kansas 66210; and Donald F. Hoffman and Melvin J. Sauer, Jr., Dreiling, Bieker & Hoffman LLP, 111 West 13th Street, Hays, Kansas 67601. Also present were Toby Dougherty and Jami Buck.

City of Russell, Kansas appears by its attorney, Kenneth L. Cole, P.O. Box 431, Russell, Kansas 67665. Also present was Jon Quinday.

Water PACK and Edwards County appear by their attorneys, Charles D. Lee and Myndee M. Lee, Lee Schwalb LLC, 7381 West 133rd Street - Second Floor, Overland Park, Kansas 66213.

Division of Water Resources appears by their attorney, Kate Langworthy, Kansas Department of Agriculture, 1320 Research Park Drive, Manhattan, Kansas 66502. Also present was Lane Letourneau.

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PRESIDING OFFICER: We're now on the record, this is the hearing in the matter of the application of Hays, Kansas and Russell, Kansas, their application to transfer water, and this was Office of Administrative Hearing Case Number 23AG0003 AG. Today's date is July 19, 2023, it's now 10:11 a.m., my name is Matthew Spurgin, I'm the administrative law judge who is presiding over this case.

Would the parties please state their appearances for the record, and if you could make sure anything that might be an unusual spelling is spelled out correctly so our court reporter can get that.

MR. TRASTER: Thank you, Your Honor. My name is David Traster from Foulston Siefkin representing the City of Hays; Daniel Buller is with me. Mel Sauer is here and Don Hoffman are also attorneys representing the City of Hays. Also represented by the city manager, Toby Dougherty, and the mayor, Mr. Musil, M-U-S-I-L, is present today. There are other representatives from the City of Hays

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in the room as well.

Your Honor, I would point out that I am connected to Zoom, but I'm not seeing anything. I haven't had -- I don't have the volume up so -- I just wanted to see, make sure that it was going, and I'm just noting that I don't have the video, which is fine, I ...

PRESIDING OFFICER: All right. Looks like more people have joined the waiting room. I am going to just disable the waiting room so everybody -- we'll just disable the waiting room so everybody's automatically admitted in, and then they don't have to worry about waiting to be admitted and I don't have to keep a close eye on that.

MR. TRASTER: I'm going to leave the meeting, I just wanted to make sure that it was up and running. Thank you.

MR. COLE: Yes, the applicant City of Russell appears with the city manager, Jon Quinday, and counsel Ken Cole.

MR. LEE: Your Honor, Water PACK and Edwards County, Kansas appear through

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Charles Lee and Myndee Lee of Lee Schwalb, Schwalb may be a little hard, S-C-H-W-A-L-B, attorneys of record.

MS. LANGWORTHY: Kansas Department of Agriculture Division of Water Resources appears by counsel Kate Langworthy and also represented by Lane Letourneau; last name may be difficult, L-E-T-O-U-R-N-E-A-U.

PRESIDING OFFICER: Okay. Make sure I get the microphone back on here.

All right. Thank you, everybody. Now, this hearing is to address the application pursuant to the Water Transfer Act. Thank you, everybody, for working with us so far to get to this point. This is really kind of a first of its kind, so we're learning as we go, as we move through this process.

We had a few filings that came in yesterday just as I was getting ready to leave Topeka to drive down here. Some things that were filed by Department of Health and Environment and the Water Office indicated that they wanted to be included on the notice list as commenting agencies. I do have an order that will be coming out

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on that, but with traveling and getting things sent back remote to my legal assistant, those have not gotten uploaded to that E-file system yet. But anything that's filed in this matter, let's go ahead and get them included on here.

The way the statute's worded, it says notice will be sent out to appropriate commenting agencies, including but not limited to a list of agencies. There's no way to know until someone has told us that they want to be one of those agencies how we can serve any notice on there. But now that we have that notice, let's make sure that anything is sent out there.

That order will be coming out either today or tomorrow, whenever my assistant is able to get that uploaded on there. So just if anything does need to get filed, just make sure those parties are included on the service list.

All right. So I guess kind of some preliminary things. We'll go through with the witnesses. Those who've had the prefiled testimony when they are called up

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to the witness stand, your witness has that prefiled testimony, just kind of ask that witness if that's the same -- once they're sworn in, ask them if they filed that prefiled testimony, if that's the same testimony that they would offer if they were asked those same questions today.

Presumably they will say, yes, it is, or if there's some corrections, they transposed numbers, anything like that, then their testimony on the witness stand they can make those corrections. But, otherwise, they can say that will be the testimony that they would offer, then you can offer that, and we can just go ahead and admit that and they can be ready for cross-examination, kind of speed things along a little bit so we hopefully are not here a month from now still conducting this hearing.

If you have questions, just ask as we go along, we'll try to work out things as best we can. Are there any questions the parties have or any concerns about witnesses? I don't know that I caught

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anything in the filings about any issues with witness availability.

MR. TRASTER: Your Honor, there are just a couple matters, David Traster for City of Hays. The --

PRESIDING OFFICER: Mr. Traster, would you just push the button on there so it lights up on your microphone? I just want to make sure so that Zoom picks that up as well so anybody can --

MR. TRASTER: It is lit up.

PRESIDING OFFICER: Okay.

MR. TRASTER: I guess I -- David Traster for the City of Hays. I -- most of the prefiled testimony has a brief summary of the content of the testimony. Do you want the witness -- do you want us to ask the witness for a brief summary, or is the written testimony -- written summary and the report adequate?

PRESIDING OFFICER: Why don't we do this. If you have a witness that says, I provided testimony on X, Y, and Z and that's included in my report here, in my testimony that was filed with the report as

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an attachment, just like a 50,000-foot view of what it is; and that way if we have anybody observing the hearing, they kind of get a little bit of an idea this person knows about geology, this person knows about engineering, economics, whatever it may be.

MR. TRASTER: So a brief summary of the topic without going into the details of the subject matter itself?

PRESIDING OFFICER: Uh-huh. And then those filings are available, they can be accessed if anybody really wants to go through and look at that. For most people, unless they're subject matter experts, a lot of that may be, you know, a foreign language.

MR. TRASTER: Sure.

PRESIDING OFFICER: But at least that way, at least what is put out there for anybody who may be observing, they know at least up front before someone starts their cross-examination that John Doe is the witness here, is an engineer and studies hydrology and whatever it may be.

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MR. TRASTER: Sure, we can do that. The other thing I wanted to -- there are a couple of matters I wanted to address with you.

PRESIDING OFFICER: Sure.

MR. TRASTER: So there are two applicants here, the City of Hays and the City of Russell, and we felt that it would be most efficient and most understandable if we would combine the presentation, in other words instead of Hays putting on its entire case and then Russell putting on its entire case, if we could -- because they are interrelated, if we could present them sort of together.

The plan at this point is to call Mr. Dougherty and then maybe another witness but then Mr. -- Mr. Quinday, and that way I think the whole -- I think it'll -- the evidence will flow in better. But they are separate parties with separate counsel, and we just -- is that all right with you if we combine the presentation?

PRESIDING OFFICER: I don't have any objection to that, is there any objection

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from any other parties or ...
MR. LEE: Your Honor, we would only say I'm not sure that the parties -- those parties are precisely aligned, but we can probably sort through that during the process of the hearing.
PRESIDING OFFICER: I think I'll allow that, Mr. Traster. Just the one thing that I want to be cautious with is we're not having attorneys tag team witnesses. So if you're -- if you're cross-examining a witness as counsel for Hays, you're doing that, you and Mr. Buller are not tag teaming on that. You can ask those questions and then we can allow Russell's counsel to also question that witness. But since we have that distinction there --
MR. TRASTER: I understand.
PRESIDING OFFICER: -- not the two of you at the table kind of tag teaming.
MR. TRASTER: There are four lawyers here for Hays, they don't all get to ask every witness the same questions?
PRESIDING OFFICER: Yes.

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MR. TRASTER: Okay. All right.
PRESIDING OFFICER: All right.
MR. TRASTER: Understood. And that's -- that's the plan, that was always the plan.
So the other question in our mind, you set some deadlines for submission of expert reports and then you set some dead -- and some deadlines for rebuttal reports, and we have both. Not all of the expert reports have rebuttal reports, but several of them do. Those -- how do you want us to proceed, do you want us in our case in chief to address the expert witness -- the expert testimony and the rebuttal, respond to the rebuttal in our case in chief, or are we supposed to wait until our actual rebuttal case to -- to delve into rebuttal? I'm guessing the former, but I wanted to --
PRESIDING OFFICER: I think if we do it all at once, and then that way if you have John Doe as your witness come up who had that prefiled testimony and then Water PACK's expert had something else and so then John Doe's rebuttal testimony, you

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know, my methodology is the correct one because they didn't consider these factors --
MR. TRASTER: Sure.
PRESIDING OFFICER: -- something like that. And it would be the same for your witnesses, Mr. Lee, my methodology, whatever it may be, so just address that all, and then we don't have witnesses coming back up and down, and I think that might cause more confusion if witnesses are being recalled more than necessary.
MR. TRASTER: Well, and there could be some recall if -- if we call a witness and the rebuttal testimony -- there could be some need to recall witnesses, but I think this approach would minimize that, if we can. Otherwise, we'll be calling --
PRESIDING OFFICER: Yeah, we can't predict everything that's going to happen, but we'll just try to avoid as much of that extra confusion as possible so we can try to make this run as smoothly as possible.
MR. TRASTER: The other question I have, I've handled a number of

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administrative hearings before the Office of Administrative Hearings over the years, but I've never been before you. And normally the witness -- the exhibits are admitted the front end and objections go to weight, not admissibility, and I don't know how you want us to proceed with admission of documents. Do you want us to lay foundation for every document, and if that is going to be the case, we'll be here a long time? And a lot of the documents we have, we've presented turn out not to be relevant, very relevant, but I -- that, again, goes really to weight, not admissibility. So I'm just wondering how you want us to -- do we need to offer every -- every exhibit, and if we don't offer it, it's not admitted? How do you anticipate --
PRESIDING OFFICER: For this hearing, because of the nature of it, it -- this is different than those hearings that I may do that are going to be a two-hour hearing or even a one-day hearing. A good number of the hearings that we do at the

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Office of Administrative Hearings, at least one of the parties is a pro se party.

Everybody's represented here. I think what might be the best way is if you've got a list of the exhibits, if you want to offer them, offer them, and then if there is no objections we'll admit those. If there are objections or somebody, you know, wants to have foundation laid, those can be addressed as necessary then. Does that make sense?

MR. TRASTER: It does and I -- I don't mean to be flip about this at all, but, I mean, we have, like, 2800 exhibits.

PRESIDING OFFICER: I understand.

MR. TRASTER: And I -- some of them may need foundation, but we would -- many of them are duplicative, unfortunately, but we would just like to have them admitted for purposes of -- so that they can be examined or -- or witnesses can be examined about them, understanding that they go -- that all of them, they go to the weight, not admissibility.

I don't know that there are any that

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are, you know -- well, but given -- given the way that the KAPA, the Kansas Administrative Procedures Act is drafted, you know, the rules of evidence aren't strictly applied and hearsay is admissible and all -- everybody's entitled to put on their evidence, and I'm just suggesting that they -- that it be attached en masse, but we can do it -- we can do it a different way if you would prefer.

PRESIDING OFFICER: Okay. I guess for the exhibits that you have, then, you can propose those, if you want to offer those, we'll see if there's objections, and if there is not objections, that might save a lot of time even discussing this right now.

MR. TRASTER: Sure.

PRESIDING OFFICER: In the same way that any of the other parties may have as well.

MR. LEE: Your Honor, if I may?

PRESIDING OFFICER: Go ahead, Mr. Lee.

MR. LEE: I would -- I would suggest

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protocol where the exhibits that Mr. Traster is referring to are contingently admitted and that to the extent they are used actually during the hearing there's an opportunity to object on whatever basis would be appropriate.

2800 exhibits, obviously that's unwieldy, but at the same time, without knowing precisely what's going to be used, if we were to take the approach they're admitted unless we object during the course of examination of a witness who is referring to or relying upon an exhibit, that seems to us to maybe meet the issue of trying to be expeditious about this but also without surrendering concerns one might have about a particular exhibit.

MR. TRASTER: That sounds like a really good idea, they're contingently admitted, they're in the record, and then if there are objections, we will -- we'll address them at the time.

PRESIDING OFFICER: And all other parties, is that acceptable to everybody else?

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MS. LANGWORTHY: No objection, Your Honor.

MR. COLE: Yes.

PRESIDING OFFICER: Okay. So we'll do that, exhibits will all be contingently admitted. And if there is an objection raised, that objection will be addressed. I am probably going to, I'll just let everybody know, I'll probably error on the side of letting something in and putting it more toward the weight of everything else.

As we already brought up from what you said, Mr. Traster, rules of evidence are greatly relaxed for administrative proceedings. My biggest concern, though, is going to be relevancy. On the one hand, I do hate to kind of provisionally admit 2800 exhibits and kind of cloud the record with things there, even if they are duplicative, but to make things a little more expeditious with time, that seems like the best way to go.

My biggest concern again will be the relevancy. I don't care if something happened in California unless somebody can

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somehow tie some -- something that happened in some case there, some evidence from some water being used there to how it's applied here because otherwise that probably is not relevant, if that makes sense to everybody. So --

MR. TRASTER: Thank you, Your Honor, that's very helpful. My -- I guess my concern is that we don't want to have to go through all 2800 of them. Some of them are, you know, ancillary, supportive, historical, but they may be part of the story in the proceedings.

Finally, I think -- well, I won't say finally because I -- one of the things I wanted to let you know is that some of our witnesses are going to be fact and expert witnesses. We intend to call, for instance, Mr. McCormick as a fact witness, and so we will be scrupulous as we can about making sure that there is a bright line, a clear distinction between the testimony that he gives as a fact witness versus delving into his -- the testimony that he might give as a -- as an expert.

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And so I just want to advise the Court that that's our plan. And I think Mr. McCormick is a key witness in that regard, there may be one or two others, and we will make it clear at the beginning we'll probably call him as a fact witness first, then offer his expert testimony, if that's acceptable to Your Honor.

PRESIDING OFFICER: I think that sounds acceptable. Any objections?

MR. LEE: Your Honor, only to the extent, I guess this is preemptive, but only to the extent fact witnesses aren't in a position to provide opinions and so that's different. So if it's outside what's in his expert report, we would have concerns about that if it's -- if it's couched in the form of opinion.

MR. TRASTER: And we -- that -- we understand that and we'll try to avoid it; but we also understand that anybody can object, and we'll deal with it at the time. But we will prep our witnesses about opinions and we'll go from there.

PRESIDING OFFICER: All right. Are

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there any other questions or preliminary matters that the parties would like to address?

MR. TRASTER: Probably so but I think that's the list of things that I wanted to cover. Thank you, Your Honor, I appreciate your indulgence while we work through these preliminary matters.

MR. LEE: Your Honor, thank you. Just three quick preliminary matters. One is we would propose and request that the parties advise each other of who is going to testify the following day by the end of the day just for purposes of preparation. So I presume that's not an issue?

MR. TRASTER: To the extent that we know, I have no objection at all, yeah.

MR. COLE: No objection.

MR. LEE: Okay. Secondly, it has come to case that Mr. Harvey, who is one of the authors of the Harvey Economics expert report is not going to be available to testify, but his coauthor Susan Walker will be available. She coauthored the report, she coauthored the testimony, and she

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will -- she will adopt the report and adopt the testimony, stand for cross-examination based on what has been presented to the tribunal. So just for purposes of advance notice.

And third, we are assuming that we won't be in a position to get to our witnesses until next week, and that is the schedule that we have advised them. If that seems incorrect, then we would need to do something else.

MR. TRASTER: I would imagine that we'll take the rest of this week at least and probably most of next but -- but depends on a lot of things, like how much cross-examination.

MR. LEE: Well, Mr. Traster, I'm not verbose as you know, but I'm -- I'm assuming certain things.

MR. TRASTER: Well, we are all assuming those things.

MR. LEE: Okay, thank you.

MR. TRASTER: I guess there is one other preliminary matter, and that is I -- I've been sitting to make these comments,

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Mr. Lee has been standing; and I've been sitting 'cause I thought I needed to be close to the mic and because I have some back problems, do you -- how do you --

MR. LEE: That's -- that's just force of habit for me.

PRESIDING OFFICER: You can do whatever is comfortable for either of you, I'm not going to be picky about that. I will just ask when you are questioning a witness and we have the witness come up here to sit next to the court reporter, go ahead and step up to the podium there so that we make sure that the witness can hear you clearly and the microphone picks you up clearly as well.

MR. TRASTER: I just want to make sure there's no disrespect if I don't stand up.

PRESIDING OFFICER: You're fine.

MR. BULLER: Your Honor, this is -- this is not tag teaming, I -- but with respect to the substitution of Mr. Harvey by Ms. Walker, we were confused about the nature of Water PACK's rebuttal reports

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because they were -- Ms. Walker and Mr. Harvey's reports were copied and pasted and -- other than the qualifications.

And so, you know, under Kansas law that's duplicative, you have one expert that says if you don't have two experts that say the same thing, and, you know, I can have a case on that, but to the extent that Ms. Walker is presenting rebuttal testimony that is exactly like Mr. Harvey's rebuttal testimony, I presume Mr. Walker's -- or, I'm sorry, Mr. Harvey's rebuttal testimony won't be admitted into the record as evidence. And, you know, I don't think they have to withdraw it, but -- but -- but, you know, having both of them is just cumulative. And so I would suggest that one -- I assume Mr. Harvey's rebuttal would be withdrawn or stricken as the case may be.

MR. LEE: Your Honor --

PRESIDING OFFICER: Response?

MR. LEE: -- if I may address Mr. Buller's comment. We are not suggesting that Ms. Walker is going to say

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something different than what Mr. Harvey said. What we're simply saying, she's going to testify to the same thing, same facts and not go beyond what has been provided to -- to the Cities' counsel and to the tribunal.

MR. BULLER: Then I guess Mr. Harvey's rebuttal report should be withdrawn, I mean, they're the same report, they're literally copied and pasted.

PRESIDING OFFICER: Okay. It's been filed, it'll be part of the file, but when -- when she appears to testify, her rebuttal testimony would be what she would be adopting as her testimony as if she were giving it today, so that's what would be, then, provided and entered into the record as her testimony as if she were giving it today.

MR. BULLER: And -- and because we're just learning about this, the question I have is any objections relating to Mr. Harvey's direct testimony would apply with equal force to Ms. Walker -- Ms. Walker's adoption of that testimony.

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The problem is their qualifications aren't identical, but I guess they're both economists. I guess the question I'm having and I'm struggling, you know, to say it succinctly is any objections that we would otherwise have to Mr. Harvey's direct testimony would apply with equal force to Ms. Walker in adopting that testimony.

MR. LEE: And we entirely agree with that, Your Honor.

MR. BULLER: Okay.

PRESIDING OFFICER: All right. Any other preliminary questions or ...

MS. LANGWORTHY: Your Honor, with respect to KDHE's motion to leave the record open for opportunity to comment for 30 days, we were wondering if it would be possible to extend that to 45 to allow the commenting agencies, particularly the Kansas Water Office -- Mr. Unruh indicated that their regular meeting is August 23rd, and so a 30-day opening may not leave enough time for them to meet and then act or compile a comment to submit for the record, but just wanted to submit that for

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your consideration.
PRESIDING OFFICER: Okay.
MS. LANGWORTHY: Or, excuse me, Kansas Water Authority, I apologize.
PRESIDING OFFICER: I'll take that under advisement. We'll see where things play out --
MS. LANGWORTHY: Excellent.
PRESIDING OFFICER: -- with everything here.
MS. LANGWORTHY: Understood.
PRESIDING OFFICER: Excuse me. We just have to figure out how we're going to work around all the statutory deadlines for getting an order out and everything. And I am speculating that the parties are going to want to submit potentially either, however you want to phrase it, like either post-hearing brief or proposed findings and conclusions, however we want to phrase that, I'm speculating the parties are going to want to do something like that, so we'll have to figure out time frames for everything there involved. We got a couple weeks to do that here, so we'll get that

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all figured out here before the end of our formal hearing.
And I guess I did want to note that I don't see anybody here for GMD5. Has anybody heard anything from GMD5?
MR. TRASTER: We have not, Your Honor.
PRESIDING OFFICER: Okay. So as far as for next week, we had left a hearing date or, what, Wednesday as potentially no hearing on Wednesday because their counsel was potentially going to be in another hearing that was already set somewhere, Douglas County or Johnson County, or something.
MR. TRASTER: Right.
PRESIDING OFFICER: So I just wanted to see what the status was of that since they are not here today for this. So we'll see if we hear anything more from GMD5 by the end of the week here so we can figure out what we're doing for next week. We have the room here booked for all of next week, we'll kind of see where things go with -- with everything, if we're going to

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be in here on Wednesday or not next week.
MR. TRASTER: I have not had a chance to see the submission -- I have not seen the request from KDHE for an extra 30 or 45 days before. As you pointed out, they came in -- those pleadings came in late yesterday when we were working on some other things. I don't have any particular objection to some time, but I do want to go on the record as saying that the City of Hays, at least, is very anxious to have -- to get to the end of this and to get the next statutory time limit running. And there is a 120-day window for the -- for the hearing, and we want to move expeditiously to the end of it. But I am -- I understood your position that you want to discuss that as we go along, and I'm absolutely open to that, I just want to be clear that we're going to -- we would like to move this forward.
PRESIDING OFFICER: I don't think there's any intent to drag this out longer than necessary. There is a lot involved for everybody here, time, expense,

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everything, so the faster we can wrap things up, the better, but we also don't want to rush through things and not do a sufficient job or have sufficient record for the matter.
MR. TRASTER: And I'm not trying to cut anybody off by any means.
PRESIDING OFFICER: All right. So are there any other preliminary matters?
MS. LEE: Sorry.
PRESIDING OFFICER: Ms. Lee?
MS. LEE: This is very technical. Is this connected to that -- to that projector, do you know, this HGMI cord?
PRESIDING OFFICER: I --
MS. LEE: I don't know which --
PRESIDING OFFICER: I think it might be.
MS. LEE: Does anybody know the screen --
PRESIDING OFFICER: Okay. We can go off the record here for a moment.
(Discussion held off the record.)
PRESIDING OFFICER: We can go back on the record then. Didn't want to put our

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court reporter in a position of having to dictate a whole bunch of irrelevant information while we were trying to figure out the technical information there.

MR. TRASTER: I can't hear you, Your Honor.

PRESIDING OFFICER: Didn't want to put our court reporter in that position of having to try to dictate everything while they were trying to get the technical aspects worked out there. So -- so if there's no more preliminary matters, then, would the parties like to give some opening statements?

MR. TRASTER: There's one more.

PRESIDING OFFICER: One more?

MR. TRASTER: Yep. If you guys are arguing this --

MR. BULLER: I believe Water PACK filed a motion relating to Mr. Barfield.

MR. LEE: We did.

MR. BULLER: It's your motion.

MR. LEE: We did, Your Honor, and sounds like you may have seen that or at least have seen it come in.

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PRESIDING OFFICER: I saw it last night and have not been able to go through that and your response to it fully yet, so we'll take that up at a future point here before we would get to that point of testimony.

MR. LEE: Sure.

MR. TRASTER: That's fine. It matters in terms of our preparation of witnesses and the order of witnesses, so it doesn't need to be today but we do need to know whether Mr. Barfield is going to be able to testify, sooner rather than later, but we don't have to take it up now.

PRESIDING OFFICER: Okay.

MR. LEE: That's fine, Your Honor.

PRESIDING OFFICER: Anything else, Mr. Buller?

MR. BULLER: That's it.

PRESIDING OFFICER: Okay.

MR. BULLER: Thank you.

PRESIDING OFFICER: I guess either Mr. Buller or Mr. Traster, would you like to make an opening statement?

MR. TRASTER: So is the mic on? I guess it is.

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Your Honor, may it please the Court, my name is David Traster, I'm a lawyer from Foulston Siefkin, I represent the City of Hays, and we, Hays -- the Cities of Hays and Russell, as you know, have filed an application to transfer some water from Edwards County to Hays and Russell and -- along with our co-applicant.

The statute is really very clear, the principal issue in this case is about benefits to the State versus the benefits to the State of denying the transfer. And this is, in fact, not about benefits to Hays and Russell as entities, and if that's the case, it's certainly not about any alleged harm to any of the intervenors or to Edwards County.

The application should be approved because we will show that the benefits to the State for approving the transfer far outweigh the benefits to the State for not approving it. Water PACK's arguments about what the Cities need or don't need are not relevant.

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The Water Transfer Act -- the Water Appropriations Act, excuse me, indicates or says that appropriation rights in excess of reasonable needs are not permitted, and those reasonable-needs limitations are not established by the Water Transfer Act but by the Water Appropriation Act. The Water Transfer Act doesn't mention the applicant's needs.

The Cities are requesting an order approving the transfer of their well-established water appropriation rights in which the Cities have a property interest and which they are entitled to exercise. The -- Hays and Russell are in desperate need of water, but the quantity -- and the quantity to which they are entitled has already been resolved.

They're asking for permission to transfer 6756.8 acre-feet per year for municipal use in Hays and Russell, voluntarily limited to 4800 acre-feet per year on average, from the R9 Ranch in Edwards County, which they own. It's a parcel of irrigated property, farmland that

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is contiguous, that the purchase -- the Cities purchased in 1995 specifically for the purpose of developing it as a municipal water supply.

It's an ideal water source, it has very sandy soils that allow rain -- the rainfall to soak in, there's no discernible runoff, and there are between 45 and 145 feet of saturated thickness on the ranch, averaging about 100 feet of saturated thickness. There are literally hundreds of years of water available for the City of Hays and for the irrigators who oppose this.

The Cities purchased this -- this property on the open market, they own the water rights, and they are entitled to exercise them, just like the irrigators are entitled to exercise theirs.

The evidence is going to show that the State will reap significant benefits by addressing the Cities' needs, dire need for water. Their existing sources are dependent on surface flow in the Smoky Hill River and Big Creek. Those sources are very dependent on rainfall to the west.

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When there is adequate rainfall over a period of years, they can exercise their rights and -- and meet their current needs, but those needs are growing and, in fact -- the fact that they are limited during times of drought has created an impression that they are -- they don't have any water and, in fact, a true perception. Right now, those -- those sources are -- are running dry.

I would direct Your Honor to the screen, I think Jami's going to put up a image of the area, the Hays Smoky Hill wellfield during October of 2012, it's Exhibit 800; and the next photo is Exhibit 802, which is a -- a photo of the Smoky Hill River near Russell's Pfeifer wellfield downstream from the Hays wellfield during that same drought. You can see that there is no surface -- there was no surface flow in that -- in that very significant drought. There are -- fortunately, in 2014 it began to rain -- well, yeah, and -- but drought is an existential problem for these two cities.

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But the evidence is also going to show that there -- that those -- these droughts are not -- are sort of the least of the problem. Dr. Anthony Layzell is a paleo-scientist with Kansas Geological Survey. He is going to testify about -- that historically over the last thousand years, there have been numerous droughts spanning much longer than the two- or three-year droughts that we are -- have been experiencing in recent decades. There -- there have been droughts that have lasted 50 years and even one that has lasted 100 years.

We'll call Dr. Jeff -- Jeffrey Basara, who's a climatologist. He will testify that based on the global warming and issues that have been modeled worldwide that the prospects of a 10-year drought have increased by 35 to 60 percent. He will testify that the odds of a 26 -- of a 20-year drought happening in the next 50 years have increased by 60 to 85 percent. So these are not speculative issues; there isn't any doubt that we have

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had droughts and we will continue to have droughts.

But you don't have to look to the past, the ancient past or to the future to know that drought is a problem. I'm going to show you Exhibit 2679, which is a graphic showing the droughts -- the droughts from 2010 to 2000 -- to current, and you can see that there are several very significant droughts.

And, Jami, if you'd scroll down to the last page of that, this is -- these are the most severe, exceptional droughts over the last 100 or so years. And you can see that we had the drought in the '50s, which is a significant -- one of the most significant droughts, it was bad, and in the '30s it was bad. The droughts since haven't been quite as significant, but all the evidence suggests that we're going to be facing those same kinds of historic droughts in the future.

As I said at the outset, this proceeding is about the impacts of approving or denying the transfer to the State as a

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whole. It's -- it is to the State's significant benefit to have a reliable -- for the Cities to have a reliable drought-resistant water supply that will allow them to grow. They're doing well now, but they really need the ability to weather these droughts.

The evidence will show that approval will have a overwhelmingly positive benefit for the State of Kansas. The construction project alone will have a $167 million impact, with 752 full-time jobs and tax revenue of up to $4.4 million.

Conversely, Kansas will suffer extraordinary economic harm if the transfer is denied. Dr. Stephen Hamilton estimates that the -- that just during one year of a -- one of these 10-year droughts, the loss based on water shortages in Hays and Russell will amount to $251 million to the State and $17 million in lost tax revenue.

In contrast, Water PACK opposes the transfer to benefit a few irrigators at the expense of more than 26,000 residents in Hays and Russell. They focus entirely on

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their local harm. They don't mount any evidence -- haven't mounted any evidence that focuses on the statewide impacts; it -- it is completely focused on a few people near the -- near the ranch.

And it's very important to point out as well that the irrigation wells on the ranch have been plugged since 2017; therefore, any economic loss to the community by converting from irrigation to natural grass has already occurred. It's interesting to note that their -- their economist, I guess it's going to be a different one, but their economist doesn't give any credit to the State or suggest there's going to be any benefit to the State from a $100 million construction project, even though it will clearly have significant benefits.

There -- even if there is -- and he assumes that there are no qualified construction companies that can do this job, which is not the case, and, therefore, the funds will flow out of the State. Without even -- and even if that's the case, there will be Kansas employers,

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workers, businesses, restaurants, gas stations who will all receive some benefit, even if it is an out-of-state contractor. That evidence is just not there.

It's also interesting, and I don't know now given the change in the -- in the expert witness here, but the report indicates -- has opinions about climatology, it has opinions about paleo-science, it has opinions about hydrology, it has opinions about engineering, and it has opinions about city planning, and those opinions, they're not -- there's no foundation for the idea that their -- that their witness will be -- is an expert in either -- any of those disciplines. The overwhelming evidence will show that the benefits to the State far outweigh the benefits of denying -- to the State of denying the transfer. It's not even close.

Water PACK goes on to make a fairly ridiculous claim about devastating impairment. This isn't the proper forum for administration of impairment

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complaints. Moreover, that -- those questions have already been litigated, and Water PACK has lost. The chief engineer is the ultimate authority on impairment, and the former chief engineer has issued an order with explicit findings that the transfer will not impair Water PACK's members' rights.

And they lost for a good reason. Water PACK's version of impairment has no basis in Kansas law. We -- Kansas law is specific, stating that reasonable lowering of the water table is permitted. The portion of the High Plains aquifer underlying the ranch is not like the Ogallala to the west that's experiencing significant declines with no recharge. This area does recharge. And the evidence will show that there is about - well, I already said that - 45 feet of saturated thickness near the river, 145 feet on the east side of the ranch.

The GMD model, groundwater model shows that with all of the other irrigation wells pumping, the neighbors using the amounts

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they've used historically, and with the Cities of Hays and Russell reducing their irrigation rights from over 7700 acre-feet per year to just 4800 acre-feet per year will reduce the decline on the ranch versus resuming irrigation, and that's to the benefit of the neighbors.

Their expert is going to testify that there are up to 713 wells that will be impacted by this transfer, most -- many of them are just by less than an inch. And only one well will decline between 2.6 and 2.8 feet at -- and will decline more than the GMD model shows if you believe his testimony, which we think is -- should not be believed for a number of reasons; that the -- his report shows that it's an additional 2.6 to 2.8 feet of additional decline after 51 years of continuous pumping at 4800 acre-feet per year over what -- what our -- what our original model showed.

Dr. -- we intend to call David Barfield, the former chief engineer, who is an expert on -- he's not a modeler, but he is a -- he

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is well versed in reading and reviewing models, and he will testify that those -- the conclusions of their expert are fundamentally flawed, there's no legitimate basis -- well, strike that.

I'm going to go into a little more detail. As I said earlier, a water right will only impair another water right if there's an unreasonable lowering of the static water level beyond reasonable economic limit, K.S.A. 82a-11 -- excuse me, 82a-711, parentheses c -- K.S.A. 82a-711(c).

The next statute, the next provision, 82a-711a, with no parentheses, goes farther. It states that every water appropriation right owned by Hays and Russell and every appropriation right owned by a Water PACK member includes an express condition that allows for the reasonable lowering of the static water level. It specifically allows new permits that may cause or will cause the level to be lowered at the point of diversion of a senior water right.

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There's no evidence in the record to indicate that any Water PACK member will not be able to continue to exercise their rights. There's enough water for everybody, the sky is not falling. But that's not good enough for Water PACK. They want to stop the Cities from exercising their rights. Their alleged material lowering or deleterious effect is nothing more than the little shepherd boy crying wolf.

But that's not the end of the impairment story. Kansas law applies the western water law doctrine of priority, first in time is first in right, K.S.A. 82a-707. The date of priority and not the kind of use determines whether -- how to allocate water when there is insufficient supply, which there is not, there's plenty for everyone. There are numerous other statutes that deal with this, that say the same thing. Kansas law is clear, first in time is first in right, and this is not complicated or arcane; it's the same rule we all learned in grade school in the lunch

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line, no cuts.

Water PACK members know the rule, Water PACK lawyers know the rule, in fact their trial brief doesn't just cite but quotes a Tenth Circuit opinion that says that the Division of Water Resources must always protect senior water rights above junior water rights.

I would direct you to the screen to show you a spreadsheet showing -- and, Jami, if you could zoom in. There you go. I have -- this spreadsheet shows the -- the water -- the water appropriation rights in priority order with the Hays and Russell water rights on the R9 Ranch in red.

It shows all of the senior -- the rights that are junior to Hays and Russell, and as you can see, there are 13 water rights that are junior to the bulk of the Hays and Russell water rights. There are a few of Hays and Russell water rights that are smattered in with the bunch, but there are 23 water rights that are junior to every single water right on the ranch. If pumping 4800 acre-feet of water impairs

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any -- impairs anyone, it's mostly Water PACK members because there are only three of those water rights who are owned by non-Water PACK members.

In their brief, they raised this Anti-Speculation Doctrine, it doesn't help, it doesn't apply, and I'm not going to go into it at this time but it doesn't help them either.

Hays and Russell meet all of the other requirements of the Transfer Act. We will show that both Hays and Russell have adopted conservation plans that have been in effect for many years. They have resulted in the lowest gallons per person per day in the state. Water PACK is essentially seeking to punish the Cities for having conserved water and -- which is a violation of Kansas law and something that Water PACK members would never stand for.

Both Hays and Russell have implemented great structures that encourage the efficient use of water. In fact, rates are -- rise astronomically for large users

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during severe droughts. I would tell you that there are several -- that there are several residential water bills in the City of Hays over $1,000 for a month's use for residential use, and at least one in Russell, and all in an effort to curtail significant outdoor water use.

There are no detrimental environmental impacts. The ranch has been converted to native grass, it will increase habitat, especially for the lesser prairie chicken, it will reduce erosion, and the year-around vegetative cover will help with water loss, reduce water consumption, and improve air, soil, and water quality.

There are significant public health and welfare benefits to assuring Hays and -- that Hays and Russell have adequate supplies. In fact, one of our witnesses will testify that he -- that during severe drought, especially in the '11 and '12 time frame, there were times when he wondered whether he was going to get up in the morning and be able to turn on the spigot and have water come out.

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Because of their location in the state, they've spent decades searching for other sources that are feasible drought resistant. They've looked at Kanopolis Lake, Waconda Lake, Cedar Bluff, Wilson and Fossil Lake. None of those sources are workable.

They've looked at -- they've tried -- talked about trying to draw more water from the Smoky Hill and Big Creek, which is where they already draw their sources, and there's no more reliable water in that area. They've looked in the Middle Arkansas River, the Pawnee River, the Solomon River, the Saline River. They've looked for groundwater in the Dakota aquifer and the Ogallala aquifer. And I will pause to say that in 1992 the City of Hays did drill several water wells in the Dakota, but they are only -- they're only capable of producing about 120 acre-feet a year.

They've even looked at several outside-the-box solutions. The Pikitanoi project that was sponsored by the Kickapoo

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Indian Tribe in northeast Kansas was -- was discussed as an alternative, and that didn't work out. They looked at water rights as far away as west of Garden City, there's a large contiguous body of land, irrigated land that they could have purchased, but it's a long -- a lot longer, a lot farther away, and there are other problems.

The ranch is the only economically feasible, drought-resistant water supply that the Cities can have. Appropriate measures have been taken to address water quality. Locally, Hays uses contam -- diverts water and runs it through a stripper, an air stripper to remediate historical contamination from dry cleaners.

I could go into some detail about the design. This is a standard -- this isn't a complicated, rocket science type project. We're not trying to build a nuclear power plant, we're not trying to build a skyscraper here. This is a pipeline project. There will be some disruption during -- during construction but -- and as

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I've discussed, the changes are not going to cause impairment. In fact -- and that's the only thing that could be an impact, but I've already said that we're reducing our -- the quantity from 7700 acre-feet for irrigation to 4800 acre-feet per year on average, but it will also reduce the rate of withdraw.

The water rights on the ranch currently authorize about 40,000 gallons per minute of diversion. The Master Order limits the Cities to 14 wells, with a maximum of 13,950 gallons per minute. The evidence will show that the plan is to divert those to -- to pump those wells on a rotating basis at just 350 gallons per minute, about 12 percent of what -- of the irrigation rate. So even apart from the reduced quantity, the rate will reduce -- be reduced further as well.

I would also point out that this -- that the plan is not to drill all 14 wells and divert 4800 acre-feet right off the bat. The plan is to do this in two phases, with seven wells to start, so it's likely that

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only about half of the water will be diverted from the ranch in the early years. The GMD admits that the transfer complies with all of its regulations, and there's no evidence that -- that this is going to violate the GMD management program.

In conclusion, Your Honor, the Cities have spent literally decades struggling with inadequate, drought-susceptible water supplies. For years, they've had to live under the stigma that they lack real reliable water supplies, and that's because they do.

Their growth has been stunted, they've lost business opportunities, they can't even take a long shower, water their lawns in many cases, or wash their cars. During the drought, they have legitimate fears about not being able to utilize water for basic purposes.

They don't have -- in Hays and Russell, you don't have -- they don't have to live the way the rest of us do, and they've been living that way for decades. They finally have a chance to right the ship. They've

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invested enormously in this project and now are faced with challenges with unsupported claims by people who want to deny Hays and Russell their lawfully purchased water rights, will continue to exercise their own.

The benefits to the State of approving this transfer are so much greater than denying it that the opponents haven't even tried to focus on statewide benefits; they're focused on local impacts only. It's time to give the citizens of Hays and Russell what they're entitled to, we would respectfully request that you recommend that the panel approve the transfer as requested. Thank you, Your Honor.

MR. COLE: Ken Cole appearing for the City of Russell. First, I'd like to thank the hearing officer and then ultimately the panel for considering our application, acting upon the application; this has been a long process, a process that started actually years and years before the application was filed.

Mr. Traster has done a good job

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summarizing the scope and the purpose of this hearing so I won't repeat that. I do want to briefly summarize some of the evidence that'll be presented and -- and bring a focus on the City of Russell.

The City of Russell was incorporated in 1872. It's in western Kansas, a small town in western Kansas. But unlike most small towns or towns in western Kansas, and most towns in Kansas, it was not built next to a river, which is a little ironic in where we're meeting here today and we can see a large river flowing past this hearing place.

This is -- Russell was a railroad town, it's why it was built where it is. The rivers we rely upon, the closest river we rely upon is 7 miles to the south. Our existing sources, as Mr. Traster has indicated, are quite similar to the City of Hays, it's Big Creek and Smoky Hill River. Smoky Hill River is groundwater production, Big Creek is surface water production. Both of those are susceptible to droughts, both of those are at various points

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stressed by both the use and in some cases contaminants that can come down the river. Neither are reliable.

The evidence has shown that the City of Russell has for 60, 70 years explored and looked for another viable, reasonable, affordable water source. We've -- the engineering reports on file will list those various studies, they'll list those various options, they'll list options that were explored, all of which were discarded.

Years ago, the Cities looked south to the ranch in Edwards County, a ranch that was available to the public at large, a ranch that they purchased on the open market, who may finally provide that water security that everyone looks for and certainly needs to move forward. After exploring all other options, the R9 is our option.

The opposition and some of the reports that are filed suggest that our communities and perhaps many communities in western Kansas are really just at a standstill, perhaps declining, perhaps it's only a

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matter of time. The evidence will show that's not the case. The evidence will show that Russell is a vibrant community, it is a community that people are moving to, it is a community that has economic prospects at its doorstep, but it is a community that is limited. And it's limited by its available, reliable water source. You give us that vehicle and the State will recognize a tremendous amount of value. Thank you.

MS. LANGWORTHY: Your Honor, I was notified that the feed was lost for the Zoom.

MS. LEE: Yeah.

PRESIDING OFFICER: And I'm trying to get it restored here.

MS. LANGWORTHY: Okay. I hope that the buttons we pushed over there didn't cause that but ...

(Discussion held off the record.)

PRESIDING OFFICER: Should be back up now. All right. Mr. Lee.

MR. LEE: Your Honor, may it please the tribunal, Charles Lee of Lee Schwalb,

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LLC for Water PACK and Edwards County. Our perspective, as you recognize, is different from the Cities, but it's different for reasons other than has been characterized in the sense that this is not a situation where Water PACK and its many members or the County are taking a not in your backyard approach. What they are doing is trying to address in a constructive way a issue that is of existential concern for members and existential concern, frankly, for Kansas and throughout the midwestern states.

There's really, as -- as Your Honor will see, I think there's five facts, five issues, concepts that preclude approval of the request as is. The first of those is that the Cities need much less water than they have sought in their application. We'll talk about that a little bit more as -- as we go on, but that simply is not -- is not disputable. They will say that, they will acknowledge that.

The second issue is the Cities' application does not provide an analysis of

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future water needs. Mr. Traster is incorrect in saying that needs is not a component of a water transfer, and we will show the Court why that is, in fact, incorrect.

Third issue is that the Cities' population growth estimates are materially inaccurate to the tune of at least twice, and that information comes from the expert for the Cities. We, in fact, will provide that same information from our experts, but in this case this is from the Cities.

The fourth of these is that the transfer volume will, in fact, materially lower the water table. To the extent that's true, which we think is demonstrable, that equates to impairment, and I don't think there would be an argument from the other side about that. The question becomes is it more than reasonable lowering of the table, and Mr. Larson, our distinguished expert, will address that issue.

And the last of these -- or the next of those issues is that the -- that the Anti-Speculation Doctrine is, in fact, a

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part of Kansas law. We have cited in our trial brief Mr. Griggs' comment to that effect, it is -- you can see in looking at the Water Transfer Act, and particularly the implementing regulations, that the principles of the Anti-Speculation Doctrine that have been adopted in most western states that share water law concepts with Kansas that it is, in fact, a vibrant -- vibrant sort of issue and applicable and helpful here.

So the -- the issue of the first of these, the Cities does not -- do not need the water that they have requested. They don't know how much they need because they have not undertaken a water needs analysis. We had the opportunity to take Mr. Dougherty's deposition, who is the city manager for the City of Hays, and he acknowledged, in fact, that there was no such -- no such study undertaken.

And that is, in fact, a requirement. The regulations and specifically Kansas Administration -- Administrative Regulation 5-50-2 has -- one of the required

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components of the application requires that there be -- that the projected water needs of the applicant be demonstrated and the basis for those projections, so that clearly is contemplated as part of -- as part of the act. And also related to that is a similar requirement for a projected per capita per day usage for public water supply users. So that is part of the act, how much do they need, and that is a -- is a fundamentally important issue in this proceeding.

As I indicated, Mr. Dougherty, who is the city manager and who's well versed with this act and has lived it for a period of time, was asked about a water needs study, and his response to that in his deposition was, off the top of my head, I can't tell you specific reports that have addressed water needs. And it's not there, it's not in the application either.

This issue of how much is needed obviously is difficult for the Cities to know if they don't have a water needs study, but what they -- what is clear is

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that they need less than they are seeking. The application, and this is just taken from the application itself, seeks 6,756.8 acre-feet of water per year. Mr. Traster has alluded to the TYRA limitation of 4800, which is what the chief engineer imposed on the Cities, but that is, in fact, the application.

Contrast that with the combined present usage for the City of Hays and City of Russell in 2020, that was 2766 feet, so you're talking about the percentage, that's something between twice and three times more than they used in 2020. Henry Schwaller was - Schwaller perhaps, I may be mispronouncing his name - acknowledged this issue. This is the April 12th edition of the -- 2019 of Hutchinson News, and they're quoting Mr. Schwaller at a meeting where he says, and I'm quoting, we certainly don't need the entire water right, Schwaller said, but we've been working with other communities in the area.

Well, those other communities, Your Honor, are not part of this application and

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cannot be considered even if there was a contract in place, which is an issue addressed by the Anti-Speculation Doctrine as well. The argument goes on to say that the R9 more than doubles the water capacity that Hays and Russell have currently. So this is directly relevant to how much you need. They say they don't need this much, and, of course, as to the previous slide they don't know exactly how much they do need.

This is acknowledged, again, Mr. Dougherty's deposition, he is presented with a quote from the former mayor that I read to him which is, quote, we certainly don't need the entire water right now that we can take from the ranch, end quote, and my question to him -- to him was, do you agree with that statement, and his answer is I do.

Harvey Economics, who is our expert on this subject, states, and Your Honor will hear this, that Net future water needs for the Cities will be much less than the Cities have indicated in their KWTA, Water

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Transfer Act, application and supporting information, and there will -- there is a good deal of support for that statement by Harvey Economics.

I mentioned the Cities' population growth estimates, that is part of the Water Transfer Act requirements is to look at what future population will be, and it's not -- it's not curious as to why that is, because that has to do with the calculation of what future water needs will be and the -- in this case, the application states, and I'm quoting from that, population projections for 2026 and 2036 are based on 2 percent annual population growth, 2 percent as approved by the chief engineer.

But, in fact, this is Ms. Haase, who is their population growth expert, and this is her direct testimony, I conclude within a reasonable degree of professional certainty that an estimated growth rate of 1 percent annually over the next 10 to 20 years is likely for the City of Hays. We will see why even that number is suspect, but she

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herself, without any further prompting from anybody else, has cut in half the population growth estimate that the City used as part of its application.

Harvey Economics, which, of course, is our expert, and I'm quoting from this, that projections developed for Ellis and Russell Counties show a projected population growth rate for Ellis County of .34 percent per year through 2045 and a growth rate of 0. -- or .06 percent per year for Russell County.

Now, it is true that Ellis County is not coextensive with Hays nor is Russell County coextensive with -- with Ellis County, Ellis County and Russell -- and Hays are not the same thing; however, they are certainly the dominant communities in those cities.

This issue that -- of whether there will be a material deleterious effect on the R9 area and specifically Water PACK members, that's addressed in the Larson analysis, and what he says is that The inclusion of a reduction in groundwater recharge in the

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potential future scenarios of municipal pumping significantly increases the impacts to groundwater levels by five times. Increasing the impact by five times, we would suspect that most folks would say that that is something beyond reasonable and certainly is -- certainly is material.

He also says that The failure of Burns & McDonnell to consider the reduction in groundwater recharge, which is an important issue that Your Honor will hear about in this case, understates the potential future negative impacts to groundwater levels that would occur when municipal pumping replaces irrigation pumping on the R9 Ranchlands. Basically, what Your Honor will hear is that there should have been, and you'll hear this not just from Water PACK but also from GMD5, that the -- that the change that is mentioned by Mr. Larson here has a municipal -- has an effect that should have been taken into account and thus the groundwater recharge predictions that the Cities would like to rely on are flawed.

The Anti-Speculation Doctrine is

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important throughout the West, it is -- we quoted and cited the Pagosa cases in our trial brief, and if one looks at what are really the fundamental constituent elements of the Anti-Speculation Doctrine, one will see that that ties into what the Water Transfer Act is borrowing.

The first of those elements that needs to be answered is what is a reasonable water supply planning period? That issue here is basically 51 years. It can be argued that that is too long.

But then the second of those elements is what is the substantiated population or what are the substantiated population projections based on normal rate of growth for that period? That simply goes back and is directly incorporated into regulations that say you need to provide us, you applicant need to provide us with what the projected population will be.

And third, what amount of available unappropriated water is reasonably necessary to serve reasonably anticipated needs above its current water supply?

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Well, we don't have that in the application, and the Anti-Speculation Doctrine will say that we should, and the -- and the -- Your Honor will hear what the current water supply is, including what the current water supply is under decadal drought situations, and that will be, I think, information that -- that you will find important.

The last of these issues, we have concerns about where the analytical support for the Cities' efforts is coming. That first box there is a -- is a -- is taken from a memorandum that the City of Hays put together, and I suspect it's hard for you to see, but it talks about what will be paid to Burns & McDonnell if this project proceeds, and it's roughly -- the combination of those two figures is roughly $8 million.

The second of those boxes is a -- the header from an email from Mr. Barfield reaching out to various folks after he retired and went into a private practice and saying would you like to be on my -- on

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my mailing list. And the two highlighted names there are David Traster and Toby Dougherty.

We talk about that, of course, in our motion to strike Mr. Barfield, and which I realize you have not had an opportunity to see, but it strikes us as untoward. And maybe that's just us and you can tell us, I guess, at the end of the day, but that is a concern we have.

So, you know, what -- what Mr. Traster's argument suggests to me is that the Water Transfer Act can be consigned to the dustbin. He acts as if it doesn't have any real meaning in terms of the -- its provisions and says that the only issue is is there benefit to the State or is there not benefit to the State or at least how is that weighed? But that is a -- is a misinterpretation. There wouldn't be any reason for the Water Transfer Act if that were the case.

There -- there is a process as you would know about change of use and the Cities went through that. In other words, they --

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they prosecuted a change of use proceeding to change the R9 Ranch from irrigation to municipal. If all these factors that are in the regulatory scheme and that are in the Anti-Speculation Doctrine weren't important as part of this, then the -- the Transfer Act becomes superfluous.

This issue, and I want to be clear that neither we nor our -- our clients are unsympathetic to the -- the water situation in Hays. We think it will be demonstrated that it is perhaps less dire than -- than may be intimated here, but nonetheless there is, without question, a water issue. But in talking about -- and I'm roughly paraphrasing Mr. Traster, in talking about the issue of the City of Hays, citizens not having to live unlike other citizens in the State, it's hard to see how that changes.

We'll -- you'll see in the testimony that Mr. Dougherty, in his deposition, said those conservation measures are not going to change, we are going to keep them in place and the citizens of Hays are used to that and they will live with that. And so

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to say that somehow this is -- this is a solution to greener grass, based at least on what Mr. Dougherty has testified about, would be incorrect.

The Cities, Your Honor, importantly don't need the water but -- in the volumes that they're talking about, but it is -- it is vitally important, I think, for us all to recognize that the Water Transfer Act is not a zero sum game. The -- it specifically allows for a transfer of less water than the applicant has sought, and if one looks at what are the -- are the -- the important issues here of how much water does the City need, what is going to be the effect of the volume of water that they are seeking on the aquifer, then one is left in a situation that there is a solution to this, and it is a reasonable transfer and not the transfer that they're seeking and do not need.

We would ask one of two things, either that the transfer be rejected or that it be modified to allow for transfer of a volume of water more commensurate with what the

Cities' demonstrated needs are, and that also would ameliorate what we consider to be the effect on the aquifer in and around the R9 Ranch. Thank you.

PRESIDING OFFICER: All right. Ms. Langworthy, anything you want -- is there anything you wanted to present, Ms. Langworthy?

MS. LANGWORTHY: No, Your Honor.

PRESIDING OFFICER: All right. So we're at about 11:50 now, I'm going to propose that we just go ahead and take a recess until 1:00 o'clock and then come back and we'll let the Cities start presenting their witnesses at 1:00. Does that sound acceptable to everybody?

MR. TRASTER: That would be fine, Your Honor, thank you.

MR. LEE: Yes, Your Honor.

PRESIDING OFFICER: All right. We are in recess, go off the record, and we'll resume at 1:00 o'clock.

(Thereupon, a lunch recess was taken; whereupon the following was had.)

PRESIDING OFFICER: All right. It is after 1:00 now, so I think we can -- I think we've got everybody back so we can go ahead and go back on the record and resume the hearing.

We got our opening statements from everybody, so, Mr. Traster, would you like to start with witnesses?

MR. TRASTER: Yes, call Toby Dougherty, please.

PRESIDING OFFICER: Mr. Dougherty, your testimony will be under oath subject to the perjury laws of the State of Kansas. Would you please raise your right hand.

TOBY DOUGHERTY,
having first duly sworn or affirmed, was examined and testified as follows:

PRESIDING OFFICER: You may proceed, Mr. Traster.

MR. TRASTER: Thank you, Your Honor.

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DIRECT EXAMINATION

BY MR. TRASTER:

Q So, Mr. Dougherty, state your name, please.
A Toby Dougherty.
Q And your business address?
A 1507 Main, Hays, Kansas 67601.
Q And is that the business address of the City of Hays?
A It is.
Q What -- what's your current position with the City?
A I'm the city manager.
Q And how long have you been employed in that position?
A Since 2007.
Q And before that, what were your -- what were you -- how were you employed?
A I was the assistant city manager from 2005 to 2007.
Q And before that?
A Before that, I was the city administrator in Gallatin, Missouri.
Q And how long were you in that position?
A A little over two years.
Q Is that something you were trained for education

wise?
A Yes, I have a degree in -- from -- sorry, I have a degree from the University of Kansas, yes.
Q And what's the specialty or --
A In political science with a minor in public administration.
Q And in your -- what are your duties in your current employment as the city manager?
A I manage the affairs of the city of Kansas, all administrative affairs of the city of Kansas.
Q City of Hays?
A I'm sorry, City of Hays.
Q And how many employees do you -- do you supervise, either directly or indirectly?
A Approximately 190 full-time employees currently.
Q And the -- how many direct reports do you have, if you know?
A Approximately 13 direct reports.
Q Okay. And is one of those direct reports responsible for the operation of the -- of the water system?
A Yes, that would be Jeff Crispin, the water resources director.
Q So tell us a little bit about the city, you gave us its mailing address, what's its population?

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A **Approximately 22,000, I believe the 2020 census had us at 21, 8 something. Yes.**
Q Is it growing, is the city growing?
A **We are growing, we are one of the few cities in western Kansas that are growing.**
Q And I -- I guess it's a city of the second class; is that correct?
A **That's correct.**
Q What's the difference -- what is -- is there something special about that?
A **Classifications of cities are defined by the Kansas statutes, and right now we are a city of the second class. Hays has a population to qualify for a city of the first class, but for logistical reasons in the past, they haven't.**
Q So, I mean, is this -- this doesn't mean you're a second class city, it just means that that's your classification?
A **Kansas has four classifications of cities.**
Q And they're based on population and other factors, it isn't a grading system?
A **Correct.**
Q You didn't get a B in -- on city government, this is just a designation; is that correct?
A **Correct.**

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Q So do you operate a water supply system?
A **We do.**
Q Well, tell us -- tell us a little bit about Hays, I mean, just set the stage here for us.
A **Hays is the regional economic hub of northwest Kansas. We are home to Fort Hays State University, the largest employer in Hays is the Hays Medical Center. We are a regional shopping and medical services hub. We have a disproportionate amount of retail services, which is reflected in our retail pull factor, which is the amount of people from outside the city that shop inside of the city, and we have -- have had significant growth in that category and expect future growth in that retail category.**
Q When you say disproportionate, what do you mean disproportionate, meaning --
A **Meaning we are typically in the top five in Kansas cities in retail pull factors.**
Q Sometimes disproportionate has a negative connotation, you don't mean it in that context here?
A **No, we mean in a good way.**
Q And so what you're saying is, and correct me if I'm wrong, but you have exceptional or high -- highly rated trade pull factor?
A **Correct.**
Q Is that a fair way -- I'm not trying to put words in your mouth but I'm -- so I'll direct your attention to the screen, can you identify that document?
A **That is a map showing the annual precipitation across Kansas.**
Q Okay. And it's an exhibit -- for the record Exhibit 1665. How is this -- what is the relevance of this -- of this document to -- to our inquiry today?
A **So Kansas has a wide variation of rainfall from a little over 15 inches in the far southwest part of the state to 46 inches in the far southeast part of the state. Hays is in a band that typically receives 22 to 24 inches of rain per year and --**
Q If I -- so here's Russell and here's Ellis County.
Jami, I think that we're not seeing the whole thing. Okay. There we go.
So I've got my pointer on, I think, Ellis County; is that right?

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A **Correct.**
Q It's a little hard to read, so I -- I know where it is, I just -- and so this band, this orange, lighter orange band has an average annual precipitation of what?
A **Of 22 to 24 inches of rain per year.**
Q And the band to the east of that little darker orange, that's -- is that the band that Russell is in?
A **That's correct.**
Q And what's their average rainfall?
A **Between 24 and 26 inches of rain per year.**
Q I'm going to point here and just to the west of the Hays-Trego County line at that reservoir, is that -- do you recognize that?
A **That would be Cedar Bluff Reservoir.**
Q Okay. And it's in -- it's in a band that has a little less rainfall than falls in Hays or Russell, does it not?
A **The yellow band would be 20 to 22 inches of rain per year.**
Q Next I'd like to direct your attention to this -- this screen -- this - what am I going to call it - foam board, I guess, and can you describe what that document is?

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A This is a rendition of the Smoky Hill and Big Creek watersheds as they flow into Hays and then the Hays and Russell wellfields on the Smoky Hill River. The shadings in color are due to elevation changes.

Q And for the record, that is Exhibit 2822, and the -- it's specifically at Cities' page 103417. Let's go back to the screen for a moment and look at 2657. Can you tell us what's -- what's being shown here?

A This is a map of Kansas that has Ellis County, Russell County, the Cities of Hays and Russell, along with Edwards County and the R9 Ranch highlighted. It also shows the other population centers, I believe in excess of 5,000 in population, and it shows the location of the High Plains aquifer in a shaded area.

Q So the orange, light orange area is the High Plains aquifer?

A That's correct.

Q So there's a box on here labeled Edwards County and there's an outline in red, I think it's a little hard to see from here, but what's that red box or red highlighted area?

A That would be the boundary of the R9 Ranch that

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Hays and Russell own.

Q In Edwards County?

A In Edwards County.

Q And just for the record, it's more than 35 miles from Hays and Russell, is that not correct?

A Yes, it is approximately 77 miles from Hays; I'm not sure how far it is from Russell, probably close to the same.

Q So what's significant about showing the High Plains or the Ogallala aquifer on this map?

A The significance for me is that the High Plains aquifer does not provide a source and opportunity for a source of water for Hays and Russell because we do not overlie that aquifer.

Q So just looking at the map, is this the Smoky Hill River that I'm pointing to?

A It is.

Q And it looks like, for the record, that the Ogallala portion of the aquifer, there's Ogallala north of the -- of the Smoky Hill basin, there's Ogallala south of the Smoky Hill basin, but there's sort of a big blank spot there. Is that a fair characterization?

A Yes, it is.

Q All right. Let's go to the -- the next map, I

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think it's 20 -- 2658. Tell us about this map, Mr. Dougherty, please.

A This map shows the same population centers that was shown in the previous map, so communities with a population of more than 5,000. It also shows the same boundaries of Hays, Russell, the counties, and then Edwards County and the R9 Ranch. What it also shows is the major and minor alluvium through Kansas, so rivers and streams, as well as the reservoirs in Kansas.

Q And for the record, what do you mean by alluvium?

A Alluvium are the areas that are associated with, I guess for lack of a better word, the river bottoms or creek bottoms, the areas that would typically be saturated by flow in a particular creek or river.

Q So the -- as I -- as I understand it, the City of Hays has a wellfield, and we'll talk about this in more detail, but inside the City of Hays and then south on the Smoky Hill River; is that correct?

A Correct, we have a Big Creek wellfield that we refer to as our city wellfield, and then we have a wellfield on the Smoky Hill River 12 miles

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south of town that we refer to as the Smoky Hill wellfield.

Q Let's look back at this map over here on the foam board and can you kind of -- do you have a pointer with you?

A I do.

Q Can you show us Hays and Russell on that map? I can see it, I think, but ...

A So Hays is located here, Russell is located here.

Q All right. So -- and where would the Hays Smoky Hill wellfield be in -- on there?

A The Hays Smoky Hill wellfield is due south of town. It's on Highway 183, it straddles both sides of 183 for a couple miles on each side. And then Russell's wellfield in the Smoky Hill River is approximately here, it's just a few miles upstream of Hays' wellfield.

Q And it's near the -- near a small town there, isn't it?

A The town of Pfeifer.

Q And the Hays wellfield is near what town?

A The town of Schoenchen.

Q You're going to need to spell both of those names for the court reporter, she's already

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giving me the evil eye.
A P-F-I-E-F-E-R.
Q Maybe --
A Or is it E-I-F-E-R? Okay. P-F-E-I-F-E-R and Schoenchen is S-C-H-O-E-N-C-H-E-N.
Q She didn't give me an evil eye, she just knew that I was going to -- she was going to if I didn't say something.
So, Mr. Dougherty, what's the -- how has the Cedar Bluff Reservoir affected the flow in the Smoky Hill at this -- at the Hays wellfield?
A Cedar Bluff Reservoir effectively truncates any flow upstream of the dam and impounds that water behind the dam, and because there are not regular scheduled releases from Cedar Bluff Reservoir, most of the water that's impounded behind the reservoir evaporates or stays within the reservoir. So it's effectively cut off the flow 25 miles upstream from our wellfield.
Q So how is the Hays wellfield, I mean, it's dependent on flow in the river, is there -- is there regular flow in the river even though the Cedar Bluff cut it off?
A There's periodic flow in the river. There are times when the river runs dry and it's a -- it

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doesn't take a really lengthy dry spell in order to have the river dry up. But what it means for us is it -- essentially that we depend on rainfall in this area right here, and this is a different watershed, but in this area right here we depend on rainfall in order to benefit the Smoky Hill wellfield.
Q So rainfall falls directly in the river but then falls in places enough to run off into the river. Is that fair?
A Any -- any rainfall of significance will run off of -- in the watershed into the river. If it makes it to the wellfield, it will provide recharge because the Smoky aquifer is a -- it's a pretty narrow aquifer, but it's very coarse, gravelly aquifer, it makes a natural storage vessel; and it will soak up water fairly quickly, but it depends on water to fill up.
Q Okay. So let's look at a map 2659, please. What -- what is this map showing us?
A This is the same map before showing the cities of the -- over 5,000, the alluvials, the reservoirs, but it also has put the High Plains aquifer back on the visual.
Q So it -- it shows both the High Plains aquifer

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and the alluvial aquifer?
A Correct.
Q Is that what you're --
A Correct.
Q Okay. And so do you -- can you -- do you -- is there a distinction or a difference between the Ogallala aquifer and the High Plains aquifer in your mind?
A It's my understanding that the entire aquifer from South Dakota to Texas is the High Plains aquifer, but in Kansas, maybe outside of Kansas, but in Kansas, the portion to the west that is -- receives very little, if any, recharge is referred to as the Ogallala, and the portion that does receive recharge is referred to as the High Plains aquifer.
Q And so is the ranch, if you know, in -- in the High Plains or the Ogallala?
A The ranch is in the High Plains because it does receive regular recharge.
Q So looking at this map, this 2659, we talked a little earlier about the idea that there's no Ogallala in the Smoky Hill River basin and there's -- you're tapped into the -- the sources that are available, I mean, you've got two

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alluvium -- alluviums, you've got the -- looks like there's a Big Creek alluvium coming right through Hays and then some -- the alluvium from -- for the Smoky Hill, those are your sources?
A That's correct. We do have a Dakota wellfield that is not an alluvium, it is a confined aquifer, a deep aquifer, but it provides minimal benefit. These are our main two sources of water.
Q So how much water does the Dakota produce?
A On an average annual basis, I believe our last ten years, about 130 acre-feet. I think for planning purposes, probably 120 is a safe guess.
Q But don't you have a lot more water rights on -- than 120 or 30 in that aquifer?
A I believe we perfected 700 acre-feet of water rights, but those water rights aren't sustainable because of the nature of the aquifer's decline and the drawdown. And the water is brackish at best, and the more water that's pulled out of the Dakota at a higher rate, the worse the water gets. So I have seen studies of possibly up to 40 percent or more loss due to brine if you -- if you get really

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deep into the Dakota aquifer.
Q So just from a practical standpoint, and I know you're not a geologist or a hydrologist, but from a management standpoint, you're sticking with about 120 to 30, maybe a little more from time to time, from the Dakota wells. Is that a fair characterization?
A Yes.
Q What are the Cities actually requesting?
A The Cities are requesting the approval to transfer 6,756 acre-feet of water from the R9 Ranch to the Cities of Hays and Russell, and that amount is to be limited by the ten-year rolling average limitation, which is 48,000 acre-feet on a ten-year rolling average.
Q 48,000 or 4800?
A 48,000 in total in a ten-year rolling -- in a ten-year period is the way the Master Order is structured.
Q So over any ten-year period, you can't take more than 48,000, but every time -- every year, that ten-year time frame skips ahead one; is that fair?
A Correct, the way the Master Order is structured, our consumptive use number for the water rights

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on the R9 is 6,756 acre-feet of water, so that's our cap; that is the number we could utilize up to under the Master Order. But because of the ten-year rolling average, that factors into that 48,000 acre-feet on a ten-year rolling average, so in subsequent years we would have to use less water if we did use our full allotment.
Q So you -- you can use -- the practical limit is 4800 acre-feet per year, you can -- you can exceed it but you pay a price for that in later years. Is that fair?
A Yes, yes, we have the right to use, under the Master Order, the 6,756-acre water, but for practical reference we refer to the annual sustainable water rights as 4,800 acre-feet.
Q Okay. And how did that come to pass, that limitation?
A During the change application process, the city engineer asked, actually demanded that we agree to utilize the property sustainably.
Q So the city -- the city engineer did?
A No, I'm sorry, the chief engineer for the Division of Water Resources demanded during the negotiations that the Cities agree to a sustainable yield commitment on the property.

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And we pushed back on that during the change application process. We felt like the chief engineer didn't have the right to impose that process on us.
There's -- there's actually a letter that our neighbor, Richard Wenstrom, wrote. The GMD was considering a LEMA, a Local Enhancement Management Area, a couple years ago, and so there were a lot of submissions and comments in that LEMA process. And our neighbor, Richard Wenstrom, wrote a letter to the GMD that stated any attempt to reduce water rights by regulation is an uncompensated taking and should be defended in a court of law, and we agree with that.
And so we pushed back pretty heavily on the idea of committing to something that is not required by regulation. After significant discussions with DWR, after discussion with the attorneys, after discussions with the governing bodies, we determined that we have no will or desire to use the property unsustainably, and so we agreed for sake of the Master Order to reduce our water rights on the R9 property in excess of the consumptive use number by approximately

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28 percent, and that's where the ten-year rolling average came from.
Q So how did -- where did the 4800 acre-feet come from?
A During the change application process, we contracted with Burns & McDonnell to perform a modeling of the property to determine the sustainable yield number. We obtained the Groundwater Management District Number 5's water model from the State after an open records request, Burns & Mac then utilized that model in order to determine the number, the -- Burns & Mac's results were reviewed, I'm not sure if peer reviewed is a proper term, but they were reviewed by the DWR staff as part of this, and in the end DWR concurred that 4800 acre-feet on an annual basis, or the ten-year rolling average, was the sustainable number for the property.
Q What do you mean by sustainable?
A According to Burns & Mac's report, after they ran the model, the -- the property was essentially no better or worse off after 51 years of use than it was at the time when the model started, when the modeling period started.

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Q So how much water does Hays need?
A We need 4,800 acre-feet on an annual basis, or 48,000 acre-feet on a ten-year rolling average.
Q But you don't need 6756?
A That was -- that was implied in my 48,000 acre-feet answer, but to correct, we need 6,756 acre-feet of water or 48,000 acre-feet on a ten-year rolling average as per the Master Order.
Q So you were here for the -- the opening statements, you heard the opening statements --
A Yes.
Q -- did you not? And you heard that the lawyer for Water PACK indicated that you testified that you didn't have any studies to show what your need was. You heard that -- you heard what he said about what you testified to, did you not?
A I did.
Q Was his characterization of your testimony in your deposition accurate?
A No.
Q Why?
A So the -- the way my testimony in the deposition was mischaracterized is twofold, and it would be helpful to read the exchange in the deposition

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testimony.
Q I can give you the text, if you'd like to have it.
A No, no, that's fine, I'm just saying if one wanted to --
MR. LEE: Your Honor, may I approach the witness?
MR. TRASTER: That's fine with me but --
A I don't need to see it. I don't need to see it.
MR. TRASTER: Thank you, appreciate it.
PRESIDING OFFICER: You can ask him about it when you cross-examine him.
MR. LEE: That's fine. Trying to be helpful.
A So in preparation for my deposition, I did not review any documents. In preparation for my deposition, I met with my attorneys, and I was advised to tell the truth; and I was advised if I don't know the answer to something, state as such.
So during the deposition, I was asked several lines of questions about studies that state that Hays needs more water in a very

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specific manner, and I tried to inform the opponent's counsel that it was implied decades before I came to Hays that we needed more water. The -- the need for water was established well before I got to Hays and that our existing sources were inadequate now, and so I was less concerned about future need than about current need.
So the attorney kept pressing the item and appeared to me to be asking for a report that said something very specific about needing more water. So I indicated to the attorney that I would have to check the record, but I am aware of reports that showed that we have population growth scenarios and those population growth scenarios result in us exceeding our different yield estimates at different times, but I would have to reflect the records. And in the end, the attorney kept asking, and so I finally had to answer that I can't recall the specific study you're looking for because that was the truthful answer at the time.
BY MR. TRASTER:
Q So when you read what he put on the screen, was that an accurate statement of what you said in

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that moment during your deposition?
A I did say I don't recall at that moment.
Q Okay. Have you -- do you think that it's a fair way to characterize your testimony in the context of the further discussion that you don't know and there aren't any studies that deal with need?
A I -- I do think it's a mischaracterization, and I would like to go back and restate that the need for an additional water source was established decades before I came to Hays. They knew back in the '90s their sources weren't sustainable long-term and -- and couldn't sustain the population they had during droughts.
So it's -- it's a little bit like if you're very poor, you don't need a study to tell you you're poor and you need more money. You know you're poor and you need more money. So most of our studies are written presuming we need more water. They talk about the search for additional water and -- and what waters could be available, and they talk about safe yield and sustainable yield of our current sources. And they talk about growth projections. But there's a lot of presumption in those studies that we

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need an additional water source; otherwise, why would we be looking for water sources?

Q Okay. So let's just step back from studies and the deposition and all that. You said Hays needs water. And so without, you know, any of that, just why does Hays need water?

A We need water because our existing sources are inadequate during times of drought. When it rains and the Big Creek alluvial is receiving water and the Smoky Hill alluvial is receiving water, then we can produce our water rights. Possibly. We -- we haven't used our water rights amount for a long time, but the water sources are very productive when there's water there. The problem is they dry up very quickly and --

Q Does one of them dry up more quickly than the other?

A The Smoky Hill wellfield dries up faster than the Big Creek wellfield. The Big Creek wellfield is also -- it's slower to dry up, but it's also slower to recharge. The Smoky is quicker to dry out, it is quicker to recharge.

So one of the expert reports we presented was -- showed the viability of our sources, the

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production viability of our sources during times of drought, and what you see is during a decadal drought such as the 1930s drought, our sources produced only 840 acre-feet of water. We consume 2,000 acre-feet of water a year. To cut that less than half is a humanitarian disaster for Hays, Kansas. In a multidecadal drought, our sources, which are part of the historical record, our sources produce less than 500 acre-feet of water. That's beyond a humanitarian disaster. So we have an existing need right now for an additional source of water.

Q So the Water PACK's expert says that, okay, assuming you need water, the quantity should be -- you should subtract your existing sources, the quantity available from your existing sources from -- from your need. From a public policy standpoint, political science standpoint, what -- is that a valid analysis?

A It's -- no, it's not a valid analysis and it's completely unreasonable. If our existing sources are not valid during times of drought, why would we count them for future planning which includes droughts?

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Q So your sources, your existing sources are vulnerable to drought, are they vulnerable to other -- other issues?

A I -- they could be vulnerable to contamination. That would be the main thing would be contamination.

Q So --

A We don't have a surface water intake so I'm not worried about an algae bloom.

Q I don't want to get out ahead of Russell here, but isn't Russell already having some problems with an algae bloom of some kind?

A Russell has a surface water right on Big Creek, and, yes, that right, I believe, is limited right now due to an algae bloom.

Q So they're vulnerable from drought and there are other things that could happen. You're dealing with -- you've got -- your Big Creek wells have some contamination with dry cleaner solvents as I understand it; is that correct?

A Yes, there is a plume of underground water within the City that is -- contains, I think it's just dry cleaning chemicals but it could be more. And then we have a -- a couple wells that we refer to as remediation wells, those wells

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collect the contaminated water to try to stop the spread of the plume and send it to an air stripper which removes the chemicals and then that goes back into our raw water collection system.

Q Okay. I think we're going to get into that a little bit later but -- so during opening statements, Mr. -- counsel for Water PACK put a statement up there by a former mayor, Henry Schwaller, were you -- do you recall seeing that on the screen?

A I do.

Q And it was a quote from a newspaper article, right?

A Yes, I believe it was.

Q And in your deposition, you -- you agreed with the statement that Mr. Schwaller made but it wasn't completely -- the quote wasn't -- wasn't -- the quote of the newspaper wasn't complete, was it?

A It was not.

Q How do you know what he actually said?

A I was at the meeting, I was at the Ellis County commission meeting when the statement was made, but I've also watched the YouTube video of the

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meeting.
Q So you're not basing it on your memory, you're basing it on watching the vi -- or what are you basing it on, the video?
A I'm basing it on the YouTube video --
Q Okay.
A -- 'cause that's the most recollection of the meeting.
Q So is it fair to say that Mr. Schwaller was accurately quoted, but -- but there was -- it was truncated with Mr. Schwaller said or something to that effect?
A Correct. The -- the statement Mr. Schwaller made was truncated in the newspaper version. The statement Mr. Schwaller made was, we certainly don't need the entire water right now.
Q Is that true?
A It's true. The newspaper printed it as, we certainly don't need the entire water.
Q Okay. So when we talk about what -- what the City of Hays needs, you're telling us that you don't need it now, but you do need it, so when do you need it?
A I don't know when we're going to need it. We -- we know we need a certain amount right now to

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make our existing sources adequate -- or combined with our existing sources to make sure that we can make it through a drought. Now, not knowing the possible severity of future droughts, I don't know when that's going to happen or how much I would need during a drought that our existing sources would be short. I'm also not sure how we're going to grow in the future, and so I can't determine that.
What I do know is this is a very expensive project. We are going to be borrowing monies likely up to 30 years to pay back on this. We need to know as communities of Hays and Russell, we need to know that water is going to be there for future generations. Hays and Russell can't afford to invest that amount of money in something that may or may not be there. And -- and so that's why we need the assurance of the 6,756 acre-feet of water, limit to the ten-year rolling average so the ranch is there for future generations to use if they grow into the full usage of it.
Q So are you -- are you asking for water that -- for new appropriations, new water rights?
A No, these are existing water rights, they were

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perfected and purchased on the open market in an arm's length transaction.
Q So the -- the -- what I saw on the screen was that the Anti-Speculation Doctrine is about unappropriated water, that you can't get unappropriated water. Is this -- are you asking for a transfer of unappropriated water?
A We are not.
Q So -- and in your -- in your deposition, you said that you didn't recall any studies about need?
A Yes.
Q And -- and there were other studies that dealt with a lot of other things but you didn't recall studies about need. Do you -- have you been able to review the records since your deposition?
A I have.
Q Have you been able to identify any specific studies that are about need?
A I have.
Q And if I was to put Exhibit 1-192 on the screen, please. And scroll to page 7. The internet is wonderful but it's a little slow. So --
A What's the title?

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Q Black & Veatch Water Supply Study Summary Memo.
A Oh, that'd be the 1977 Black & Veatch water supply study memo.
Q Right, right.
A I might --
Q We'll move on to -- and come back to that. How about Exhibit 338, Jami? For the record, Jami Buck is a legal assistant and she's helping us today and she can work magic.
Can you identify this document?
A This is a memo from Joe Aistrup, he was with the Docking Institute at Fort Hays State University, and he wrote a memo to David Pope, who was the chief engineer at the time, that discusses Hays' need for water in order to support future population growth, but the memo also mentions that the lack of available water has had a detrimental effect on our past population growth.
Q Jami, could you take us to page 18151, please.
Mr. Dougherty, on the -- do you see this graph on the screen?
A I do.
Q We haven't talked about this yet, but we're going to talk about what happened in 1990, '91

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later on, but can you just briefly tell us what happened in 1990, '91, '92 time frame?

MR. LEE: Your Honor, let me interpose an objection that Black & Veatch is not scheduled to appear, to my knowledge, and this is clearly hearsay.

MR. TRASTER: Yeah, it's clearly hearsay, hearsay is admissible in an administrative proceeding so ...

PRESIDING OFFICER: I have down this as page 18151, is it still part of Exhibit 338?

MR. TRASTER: It's part of 338, and it's 18151 is the page number.

PRESIDING OFFICER: Okay. I will overrule the objection, you can go to the exhibit.

MR. TRASTER: Thank you very much.

BY MR. TRASTER:

Q So what happened in the '90, '91, '92 time frame?

A The City of Hays experienced a very severe but very short duration drought in 1991. And --

Q So if we look over here at these maps or this Exhibit 2679, the first page and -- and then the

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last page, you see some drought -- they indicate some droughts. Is that the time frame we're talking about?

A Correct. So the top visual here shows all of the stages of the Palmer Drought Index Rating, and the 1991 drought would be right here. This just shows exceptional drought in the past 100 years, and the 1991 drought would be right there. So as you can see, it was -- it was an exceptional drought, but it was very short lived. And what happened is is the City's wellfields were unable to meet demands, and that was the precipitating event that led to a lot of the issues that we're going to talk about.

Q And we are going to go into that. So in any event, what -- what is this -- there's -- the chart number 1 in Exhibit 338 on the page we referred to earlier, 18151, what is it showing?

A It shows population growth and -- shows actual growth and a trend line. And the point Dr. Aistrup was making in the report is that we had good population growth, at times really good population growth when we had the thought that we had adequate water supplies, but then the '91 drought changed that and that our growth has

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been stunted since that point.

Q So --

A And, therefore, Dr. Aistrup determined that we -- we need water in order to make sure we have adequate growth.

Q So this graph shows population -- actual population from roughly 1950 to 2000, and I'm just reading it, and then the trend line, so what's the significance of the population that's above the trend line and population that's below the trend line?

A Above the trend line means that we were growing in excess of the trend, of our past trends. Below the trend line means you're growing in percentages below the past trends.

Q And can you prove absolutely that that was the only cause was a lack of water?

A I cannot.

Q But is there -- is this an indication that -- that lack of water may have affected your growth?

A It is.

Q So let's go to -- turns out that it's not Exhibit 1-192, it's Exhibit 192, and that should have seven pages and be from Black & Veatch and

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if you'll go to the seventh page. And blow up the second paragraph, please. So what -- what is it about this that's interesting or --

A I think you have to scroll down, if I recall. Water requirements.

Q Why don't you scroll up because I think maybe cut off the top. Nope, nope.

We can move on if you prefer.

A Let's move on, I -- I reviewed that one, but I think it's on another page.

Q So what -- what do you think -- well, I don't want to ask you to speculate. Let's look at Exhibit 127, no hyphen.

MR. TRASTER: Your Honor, would it be okay if I took my jacket off?

PRESIDING OFFICER: Go ahead.

BY MR. TRASTER:

Q Page 4, please.

A I think we may have some old exhibit numbers on some of those.

Q 'Cause this isn't what you want?

A This isn't what I -- I wrote down.

Q We'll come back to that.

A I -- I think the exhibit numbers need to get confirmed. Can we come back to this?

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Q We can.
A Okay.
Q We can.
A I think the exhibit numbers in those reports need to get confirmed.
Q Okay. If that's the worst mistake we make today, it'll be just fine.
So I -- I know this exhibit number is right, can you put up 255, please. And scroll down to page 17104. I'm looking for the Big Creek map. There you go.
Okay. Mr. Dougherty, this -- this is a map -- well, tell us what this map is, please.
A This map shows the location of the city wells in the Big Creek wellfield as well as the raw water distribution -- or, sorry, raw water collection lines.
Q So --
A And it also shows private water rights, privately held water rights.
Q So the wells that are red dots and with the red labels are the City Big Creek wells, is that -- is that what -- is that right?
A Yes.
Q And it's a little hard to read, but I think it's

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17204?
What's the page number, Jami?
MS. BUCK: 17104.
BY MR. TRASTER:
Q 17104 for the record. So these wells are in the Big Creek alluvium. Is that fair?
A That's correct.
Q And tell us a little bit about that, I mean, you said that the watershed -- or the alluvium in -- for the Smoky is narrow. Is it also narrow at Big Creek?
A No. The Smoky alluvium is -- in the vicinity of our wellfield is very narrow, very porous, it -- it absorbs water very quickly, it -- it depletes very quickly. The Big Creek is more of a broad aquifer, and it takes in water more slowly but it also depletes more slowly.
Q So these wells -- what's the YE2 at the top?
A Those are just different names for wells, those are Yuasa Exide as opposed to City, and it's just -- the City had bought water rights from Yuasa Exide several decades ago and so titled them as such.
Q So the -- up at the northwest corner is the Yuasa wells, and then there's some wells on the

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other side of the transmission line, and is it fair to say that the transmission line then follows or drops down to the south and then back to the east? Is that -- am I getting that right?
A That's correct.
Q And along the way -- well, when it gets down to the south end of town, it picks up some other Big Creek wells?
A That's correct.
Q From there, it goes where, to the treatment plant, I guess?
A It -- it goes north adjacent to and parallel to Vine Street, U.S. 183, to the water treatment facility.
Q So north of that, then, are some wells, C20TA REM and C20 REM, what -- what's that?
A Those are the remediation wells that I discussed earlier that are remediating the polluted groundwater.
Q So there's a plume of polluted groundwater in -- near those wells?
A Yes.
Q And those -- that groundwater is extracted from those wells, do you just put it right into your

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system?
A No, it's -- it's extracted from the wells, and it goes to a -- an apparatus called a packed tower or an air stripper. It's -- was financed by KDHE in order to remediate the -- the contaminated groundwater. So it is treated, the contaminants are removed via that process. The water that comes out of the air stripper is water that's safe for us to then put into our raw water collection that we then treat and it goes into our distribution system.
Q So there's some other wells in the middle here, and I'm going to call them C30EM at the northwest and C29EM, what does EM stand for, if you know?
A Those are emergency wells, and those are wells that they are very low in potential quantity, they may not be in very good locations. I don't know if in the historical past they've ever been used for production wells. If -- if -- if they were, it was before advance treatment methods. What they are is emergency wells, and if -- if there was ever a time of emergency, water could be piped directly into the system.
Q So what are the green triangles, if you know?

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A The green triangles are monitoring wells.
Q So what do you use those for?
A To help determine the relative health of the aquifer.
Q So this document is the -- is the aquifer -- what do you call this document, I mean, we haven't talked about it?
A It's part of a document called the Aquifer Health Index.
Q And that's something you use to assess the health of the aquifer?
A Right.
Q There'll be more about that later but -- so let's go to the next page, can you tell us what this is depicting?
A This depicts our Smoky Hill River wellfield, the orange line through the middle of it is U.S. 183, and the City of Schoenchen is immediately to the west of that line to the left; and then as you can see, our wellfield straddles both sides of U.S. 183 in the Smoky Hill River valley.
Q And so these pentagons, I guess, are -- are all city municipal wells; is that correct?
A Yes, and -- and then there's some monitoring

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wells interspersed. Or, I'm sorry, I think the gaging stations are identified with the triangles.
Q The legend says that there are some Smoky monitoring wells in the small dot, I think I see one here at the far end just below well 19. I think there's one at the far end near well --
A And there's three in the middle. There's two more to the right of 183 and one to the left.
Q Okay. So at the far right is near well S23M. I'm not seeing -- okay.
A It's by S14.
Q All right. And those -- are those wells used for the Aquifer Health Index as well?
A They are.
Q So earlier you testified that these are your two major sources and -- and -- but then there's the Dakota. You also told us that releases from Cedar Bluff are -- it truncates the basin and cuts off flow from the west. Do you recall that testimony?
A That's correct.
Q So what -- let's look at Exhibit 1-6 -- excuse me, 1-162. So what is this document?
A I believe this is a letter from the city

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attorney, John Bird, at the time in 2003 to Governor Sebelius regarding the potential impairment of the City's Smoky Hill wellfield water rights.
Q Did John characterize that as potential impairment?
A No.
Q He said it was impairment, didn't he?
A Correct.
Q And there are other documents, but what -- what was the net result of this letter, if you -- if you recall?
A The net result of this letter was the creation of a document called the Cedar Bluff Operations Agreement and then a memorandum of understanding with the State of Kansas. The Cedar Bluff Operations Agreement put in place metrics for the City's ability to ask for releases from water rights in Cedar Bluff Reservoir if certain factors were met that -- that allowed us to release water. And then the memorandum of understanding, the State indicated that they would work with us on a few different things, including the Smoky Hill expansion.
Q Okay, thank you.

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MR. TRASTER: Your Honor, what's -- what's your plan or schedule, do you want to take a break every hour, every hour and a half, every two hours, it's up to you but --
PRESIDING OFFICER: We can play it by ear as we go through this proceeding. If there's a need for a break, we can take a break; otherwise, we can kind of wait till we're between witnesses.
MR. TRASTER: Okay. Well, I don't think -- I think Mr. Dougherty's going to be on the stand the rest of the afternoon.
PRESIDING OFFICER: Okay.
MR. TRASTER: So I could use a break, if we could take five minutes or maybe ten?
PRESIDING OFFICER: Okay. Let's just go ahead and take a ten -- well, let's take 13 minutes, we'll come back at 2:15.
MR. TRASTER: That would be wonderful, thank you, Your Honor.
PRESIDING OFFICER: Take a short recess and come back then.
(Thereupon, a recess was taken;

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whereupon, the following was had.)
PRESIDING OFFICER: I'm showing 2:15 so we can go ahead and go back on the record. And you may resume, Mr. Traster.
BY MR. TRASTER:
Q Mr. Dougherty, I remind you you're still under oath.
A Yes, I agree.
Q So we were talking about the Cedar Bluff Operations Agreement, and that provides for releases or not releases from Cedar Bluff to -- what's it -- generally, what's it do?
A The operations agreement put in place a series of criteria that if certain metrics are reached within our wellfield, it gives the City of Hays the ability to ask the Kansas Water Office for a release of water from Cedar Bluff from the artificial recharge pool, which is a layer within the reservoir.
Q And so that's just automatic that you call them up and they release the water?
A I -- I don't believe it's automatic, it's spelled out in the agreement. We have asked for releases in the past based off of the -- off of the metrics in the agreement and those releases

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have happened, but it's not a -- we don't pick up the phone and the release starts the next day.
Q Sure, but is there always water available to release?
A It's not assured. So the reservoir accounting is -- is kind of like a layer cake, and people own different layers within the -- the reservoir; Russell owns a layer, they have a water right in -- in the reservoir, and the recharge pool is a layer within that reservoir. And so water does have to be available in that pool, and there has been times in the past where water is not available in that pool.
Q How much -- what is your water right, how much water are you entitled to take from the Smoky Hill River well -- wellfield total, if you know?
A Our total water right, I believe it's 2285 acre-feet of water, but it's limited by the IGUCA to either 2,000 or 2200 acre-feet of water.
Q So if I were to tell you that it's 20 -- you have a water right for 2800 acre-feet but you could only take 2285.83 acre-feet from the -- because of the IGUCA, would you argue with me?

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A No.
Q What's an IGUCA?
A An IGUCA is an Intensive Groundwater Use Control Area, and Hays' water supplies are actually under two separate IGUCAs, one on the Smoky Hill wellfield and then one in the Hays area that covers the Big Creek wellfield.
Q So the Smoky wellfield, do you know why -- can you give us some background? That was before your time, was it not?
A It was.
Q I mean, so we'll just let the documents speak for -- for the -- the orders are part of the record, they're in the record and available, and we'll let that -- let that go for now.
So you talked about, then, the Big Creek wells, and we showed you the map so we could see kind of where they are, and those are in the Aquifer Health Index, Exhibit 255, and you've also talked about the Big Creek -- you talked about Big Creek and Smoky Hill, but earlier you said there are some Dakota wells. Let's look at map Exhibit 2661. Mr. Dougherty, you have seen this map before, can you tell us what it is depicting?

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A This map shows the locations of Hays and Russell, along with the City's Big Creek wellfield located in blue, the Schoenchen wellfield located in yellow, Russell's Pfeifer wellfield located in red, and then the Dakota wells are depicted in green southwest of the city.
Q These green wells here are the Dakota wells that the City of Hays owns?
A That's correct.
Q And there are, like, six of them?
A Six of them.
Q And -- but you can only take 120 acre-feet?
A That's our functional limitation is 120 acre-feet.
Q So is there a pipeline that comes from the Dakota wells into town?
A There is.
Q And is that -- where does the pipeline terminate?
A I believe it joins one of our raw water collection lines around U.S. 183.
Q And -- and then the water goes into the treatment plant?
A Yes.

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Q Is there some sort of a -- and I'm not asking you about the specifics, but do you have to blend that water or treat that water or do something to make it usable?
A Well, the -- the water is treated like all of our water. We have a municipal softening facility, and so we use lime softening to treat our water and then we sand filter or chlorinate it and distribute it. So the -- the Dakota water is blended with existing waters. One of the reasons why, when you get above 120 acre-feet, it gets a little difficult for us to use that is because the water is -- is so poor, so brackish, and very high in salts that it makes it difficult to blend, it requires advance treatment.
When the Cities opened up that wellfield -- and they opened it up in a reactionary basis in 1992 as a result of the 1991 drought, and they actually set up temporary reverse osmosis facilities in the country and then they leased -- I believe on a temporary or term permit, they leased some oil field disposal wells in order to dispose of the brine. All that was done on a term permit basis.

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Q So is the -- is this limitation of 120 feet just -- you can bump the hell out of it if you wanted to but you can't use it?
A We have water rights of up to 700 acre-feet. That number is not sustainable because the wells are in a very small geographic area. The Dakota aquifer receives almost no recharge and so the -- the yield requirements for spacing are very large, I believe it's -- if you were to develop new water rights in the Dakota, I believe it's a 4-mile spacing between wells. And so that's to prevent competition with other wells. So we could possibly, like, back in the '90s produce more than 120 acre-feet if we had some advanced treatment, but what we're going to do is deplete the source very quickly, so that's not a sustainable usage of it.
Q Well, when you were testifying about the treatment, I thought, well, that -- is that the limit, you just can't use it 'cause you haven't invested in treatment, but it sounds to me like it might be -- I don't know which end is the limitation, is the limitation in the wellfield or is the limitation in the treatment?
A It's both.

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Q Okay. I would also -- so I want to take a look at the legend here a minute. Scroll up a little. So just for the record, the Pfeifer wellfield is shown here, and it shows a surface water intake as well as the City of Russell wells in the river alluvium. And I also, for the record, point out that Russell has a surface water right in the -- in Big Creek. I'm not trying to testify for them but I am testifying, I just want -- for the purposes of the accuracy of this exhibit, I just want to point out that the well -- that the Big Creek surface water rights are not shown and they should have been. My fault.
All right. Do you know when those wells were drilled?
A 1992.
Q And we'll talk about it -- well, why? What happened in 1992?
A The wells were drilled as a result of the 1991 drought.
Q So we've -- you've talked a little bit about that but let's talk about it more. The 1991 -- the -- when were the Smoky Hill -- when was the -- were these Smoky Hill wells drilled, if

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you know?
A I believe in the '50s; what year, I don't know but I believe in the '50s.
Q So they're fairly -- fairly senior water rights in that area?
A Very much so.
Q Are they senior to Cedar Bluff?
A Yes.
Q What happened in 1991?
A In 1991, the City experienced a extreme but -- a brief in time but a very extreme drought that exploited the vulnerability of the City's sources, mainly the Smoky Hill wellfield. So the -- there were several wells in the Smoky Hill wellfield that were pulling air, and the City was not able to meet its daily demands for usage and so had to enact some pretty draconian responses in order to get usage under control to account for the situation.
Q Jami, would you pull up the 2679 on the screen, please. Sorry for the late notice here. Okay, very good, thank you.
Now, what I'd like for you to do is zoom in on that 1990, '91 time frame so we can kind of see how that was. So it looks like that -- so

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the yellow is abnormally dry but not -- they don't call it drought. But -- so here's -- you see '85, it's -- there's a period where it's wet but then right before '90, you got a pretty significant drought, and then '91, it isn't even as significant but you just -- you just came out of one. Is that a fair characterization of that exhibit?

A That's correct.

Q So they were able to -- if I'm understanding you correctly, they were able to divert water from the Smoky, you know, in -- in the late 1980s but by 1990, '91 they could not?

A That's correct, and it was a, again, it was a short duration in the '90s in the summer where all flow stopped in the river for a lengthy period of time and -- and the wells were unable to produce.

Q We'll get into this later, but while we've got this on the screen, there's another drought in 2011, '12, '13, right?

A That's correct.

Q And that -- I'm showing you, you know, it's after 2000 -- between 2010 and '15, is that the drought that we just referred to?

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A Yes.

Q And it -- unlike -- I mean, why -- unlike the 1991 drought where you had a pretty significant drought ahead of that, in 2012, '11, '12, '13, you didn't have a significant drought but it was dry. Is that a fair characterization of that?

A Yes.

Q And we'll come back to that but -- so as a result of the drought in '91, the City of Hays, this is before your time, but the City of Hays drilled these Dakota wells, right?

A That's correct.

Q Do they meet this 4-mile spacing requirement that you were talking about?

A They do not.

Q And what -- how did you get that done?

A I don't know. I believe it was because it was on an emergency term basis, but that would be speculation.

Q What else happened as a result of that drought?

A The 1991 drought was life changing in many ways for the City of Hays. First of all, it -- it set off a -- a frantic search for an additional water source that had been apparent but somewhat muted before that. The second thing it caused

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was the development of the Dakota wellfield. They weren't looking long-term Dakota, they were looking at we need water right now when that was developed. We implemented our conservation program at that time, and the conservation program that is still in existence today, that all started with the -- the drought of the '90s. The -- the water rate structures that we have in place today were all considered as a result of the 1990 drought.

Q Was -- you had an election, you voted in a sales tax at that time too, didn't you?

A I believe that was in 1992 is when the residents voted for a half cent -- they voted to impose on themselves a half cent sales tax allocated to water. Hays residents, when you read the record, they knew all along an additional source was going to be expensive. In 1991, the need for an additional source was amplified and, therefore, the governing body asked to be put on the ballot the sales tax question, and it was voted overwhelmingly and -- and we have been benefitting from the proceeds of that sales tax since.

Q So we've heard about how it's Burns & McDonnell

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and David Barfield who were selling the City of Hays the bill of goods here to line their own pockets and that's why Hays thinks it needs water, but how long has Hays worked with Burns & McDonnell?

A I think the first reference I see to Burns & McDonnell in the record is 2002.

Q Well, were they working for Hays in the same manner they are now in 1992?

A I don't believe so.

Q Do you have -- let's look at, I hope it's 332. And scroll down, I think there's a -- yeah, there's -- scroll down. There you go. There it is. Why don't you blow that up, Jami.

I don't know if you can see it from here, but I'll represent to you that this is Exhibit 332.

And I'd like to know the page number, I'm sorry, Jami, I asked you to blow it up before I got -- before I got that in the record. 18059, page 18059.

Now let's go look at the vote. So the official vote count on this half cent sales tax, if you can read it, is 3370 yes and 1140 no?

A That's correct.

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Q If I told you that's a 75/25 split, does that resonate with you?
A I would have to agree with that.
Q So the Hays -- the folks in Hays must have thought that water was needed or they wouldn't have voted 75 to 25 for a sales tax, would they?
A I think when your existing sources don't meet daily demands, it implies a sense of urgency that, yes, you need an additional water source.
Q Do you need a study to tell the Hays residents that they need water?
A Not when their existing sources couldn't meet daily demands.
Q So were there any other measures taken at that time that you -- if you recall, to either use, reuse, or conserve water?
A I mentioned the conservation efforts. So the City also started investing in effluent water usage, and so we use our treated effluent in order to irrigate -- currently, we irrigate ball fields, sports complex is irrigated with effluent water, Larks Park is irrigated with effluent water, the Fort Hays Municipal Golf Course is irrigated with effluent water. And depending on the year, we can -- we utilize

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35 percent of our total produced effluent to irrigate our parks and recreational facilities.
Q And when you say -- I pronounce it a little different, you're probably right and I'm probably wrong, but effluent water is from the Hays water -- wastewater treatment plant?
A It is, we -- we treat our -- our wastewater to standards that allows us to use it for irrigation.
Q Why don't you use it -- if you use some percent, why don't you use it all?
A So Hays is limited by its water rights. With the water right, you either have a consumptive or a nonconsumptive use, and if you don't have a consumptive use, you have a duty to put it back into the, either stream or whatever you pull it out of. And so we do not have consumptive use water rights on Big Creek. Whatever gets utilized in Big Creek has to be put in Big Creek because there are downstream users. And so we are limited to the Smoky and the Dakota wellfield.
So when you look at our effluent usage, we -- we know with our demands and -- and the potential for growth we have within the existing

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facilities -- Fort Hays also uses a little bit of the effluent water for -- they have a soccer and a track facility next to our sports complex. We don't want to get into a situation where we have obligations for grass that exceed the potential for our -- our consumptive use water rights.
Q So the wells in -- I want to see if I get this right. So the wells in Big Creek are -- you pump water out, you send it to the treatment plant, it goes out in some distri -- do you have a distribution system?
A Yes.
Q That distributes water through Hays?
A We are the sole water supplier for residents within the city limits.
Q And you have pipelines all over the city to supply those?
A Yes.
Q And so that water gets used by residents in their daily activities and then some of it goes back down the sewer, right?
A Yes.
Q Goes back to the sewer plant? So some of that is consumed, I mean, the water that people use

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on their lawns doesn't make it back to the wastewater treatment plant, does it?
A It does not.
Q But some of it does?
A Right.
Q And that's the amount that you can't use for other uses, you can't reuse that water?
A Right. I believe there is an implied consumption in municipal usage knowing that some of that water is going to be used for --
Q Sure.
A -- purposes that don't result in water going down the drain.
Q But you can -- but why can you then use the water -- you pump the water out of the Smoky Hill wellfield, it comes to town, it gets treated, it goes out to the customers, it comes -- and gets either consumed or sent back to the wastewater treatment plant, why is that -- why can you use that when you can't use the -- the Big Creek water?
A It's because of the nature of the water right itself. The water right we have is a consumptive use water right. So -- so once we pull the water out of the ground, we have -- we

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do not have an obligation to put it back in the source of supply we pulled it out of.

Q Okay. So that -- was this -- is this in the time frame when you started using -- we've talked about those remediation wells, did you start using that water at this time too or not?

A I believe that was in the mid '90s, I can't tell you the specific year, so I could be wrong, but I think it was early to mid '90s when the KDHE program to implement the remediation wells and then we started receiving the benefit of those remediation wells.

Q Something else happened that was significant in 1995 too, didn't it?

A 1995 is when Hays purchased the R9 Ranch in Edwards County.

Q And you weren't there at the time, were you?

A I was not.

Q Where did you grow up?

A I was actually raised in Lucas, Kansas.

Q How far away is that from Hays?

A It's about an hour.

Q So was Hays someplace you've been as -- as a youth and young adult, I mean ...

A Oh, yes.

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Q So you're familiar with the town?

A Yes.

Q You were familiar with the town before you became the assistant city manager. Is that fair?

A That's correct.

Q Tell us about the characteristics of the ranch, what is it about the ranch that makes it a source that you're interested in?

A Well, first and foremost, the Cities own the water rights, and -- and so when looking for an additional source, that's typically half of the battle is actually figuring out how to acquire water rights, so we own the water rights. Most importantly is the R9 Ranch is sustainable. It is a natural storage vessel for rain that falls on the property. The property is -- it's along the Arkansas River, it is very sandy soil. Water falls on the sand, it soaks in, and then it's there to use for future years.

So during the change application process, there was a public meeting in Greensburg, and Water PACK had hired an expert, Dr. Keller, I can't think of Dr. Keller's first name, but he talked about the porous, sandy soils on -- on

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the R9 Ranch. Richard Wenstrom, our neighbor, wrote a letter to Secretary Mike Beam as part of the change application process asking for judicial review. Richard's references in that letter to the R9 were --

Q Asking for judicial review of the?

A I'm sorry, asking for judicial review of the Master Order that was issued to Hays and Russell.

Q That had been issued --

A Yes.

Q -- that had been issued by the chief engineer to approve your change application?

A That's correct.

Q Thank you.

A Mr. Wenstrom referred to the ranch -- soils on the ranch as sandy soils, with low water-holding capacity and rapid permeability resulting in most of the water returning to the aquifer. In these proceedings, John Janssen, who is on the GMD5 board, submitted a letter to the hearing panel where he referred to the ranch as dune sand, with infiltration rates up to 5 inches per hour, actually he said in excess of 5 inches per hour. This is what makes the R9 a very suitable

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storage vessel for water and a long-term sustainable option for us.

Q So you bought this ranch in '95, but you sold some to -- to Russell, why'd you do that? Or why did they, you weren't there at the time, but why did they do that?

A I believe Russell had an immediate need for an additional source of water and Hays to Russell's proximity means they can thrive off of each other, what's good for Hays and Russell are good for the region, and so therefore the governing bodies agreed that Russell would buy an 18 percent interest in the property.

Q In my experience of neighboring cities, neighboring towns, you know, in Kansas at least, aren't always so friendly, what's the deal there?

A I -- I think maybe it's just because of the need, I mean, we have a common need of an additional water supply.

Q Why did -- why didn't Hays and Russell go ahead and develop the ranch in 1995?

A I believe it was for two reasons. One, they didn't have the money. I think they -- they probably had to look pretty hard to find the

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money to buy this property. The actual sales tax itself wasn't voted in until 1992. Even in 1995, that property to develop was extremely expensive and would far outpace their ability to pay for it without incurring significant debt.

But at that time, there were still a lot of perceived viable options on the table. And I say perceived because they turned out not to be viable options. But in -- in 1995 there were still options out there that I believe both communities viewed as viable, or potentially viable.

Q So did the -- and I think we can go into the details of this later, but has the City, generally speaking, the two cities, Hays and Russell, looked diligently for -- or looked -- I don't want to characterize it. I also think I really messed up earlier and mispronounced the name of the Arkansas River. I might have mispronounced it and said the Arkansas River, and if I did, I -- my deepest apologies to anybody that heard it.

And I forget where -- so other potentially viable sources, so, I mean, have you looked for other sources between -- between 19 -- you said

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earlier that one of the outcomes of the 1991 drought was a diligent search for new sources, and maybe I mischaracterized that but new sources, you were looking for new sources beginning in -- as a result of the '91 drought?

A That's correct, and the Cities have looked at many sources.

Q So there -- what else -- what -- my understanding --

Let's go back to Exhibit 255, Jami. You probably already closed it, but I want to take a look at the -- or -- well, let's look at the Hays -- the Smoky Hill wellfield, which is -- next page.

So earlier you testified that these 12 wells, I think, is this the original configuration of the wells?

A It is not. The wellfield was expanded in a project that took place in 2009.

Q As the result of some hearings in -- earlier, correct?

A As a result of a series of regulatory hearings in Hays held by the chief engineer, David Pope at the time, and I believe those were 2006, maybe 2005 and '6.

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Q And those -- that was, in essence, a series of applications to change the points of diversion for the wellfield wells; is that correct?

A That's correct.

Q And why was that done?

A The City expanded their wellfield at -- at recommendation of experts in the field as it was determined that the -- the way the wells were originally constructed and the proximity by which they were drilled was creating unnecessary competition amongst the wells and limiting the City's ability to utilize its full water rights. So the thought was if the wellfield was expanded, then they could get closer to utilizing their full water right and it might make the wellfield more viable during a time of drought.

Q So are you saying that sometimes these wells can be too close together?

A Yes.

Q I note that a couple of the wells over on the west end are still pretty close together. Is that an issue?

A I couldn't tell you.

Q All right. You're not a hydrologist?

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A I am not.

Q So was -- was part of the process or the reasoning for expanding the wellfield to just make the -- the storage area bigger?

A Yeah, so the City had a water right that they could -- even IGUCA limited right, Intensive Groundwater Use Control Area, and so -- but they felt like their right was limited because it was being pulled out of a very concentrated area, so, yes, by expanding the footprint of the wellfield, therefore, they could pull from a bigger area.

Q So that was 2009 that that job, that deal was -- that process was completed?

A That's correct.

Q So that solved all the problems, right?

A It did not.

Q It didn't? So what -- what happened? I mean, did it improve the situation?

A It did. In reviewing the record, there was a lot of faith placed in the potential benefit for the expansion of the Smoky Hill wellfield, but in practicality that didn't provide the benefit that everybody thought it would. So what happened was in 2000 -- beginning in '11, '12,

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and '13, we experienced a significant short duration drought that really exploited again, once again, the vulnerability of the Smoky Hill wellfield. The wellfield did perform better than it did in the '90s, so the -- the enlargement of the wellfield did make it a little less resistant to drought, but it also showed that the Smoky Hill wellfield is not a viable and sustainable source during times of prolonged droughts.

Q So how did you find that out?

A We found that out because we saw our water levels declining in the aquifer, the streamflow dried up and -- and then the water levels rapidly declined, and if it wasn't for a release from Cedar Bluff they might have dissipated beyond our usable levels.

Q So earlier you testified that this wellfield is dependent on flow in the river from the west. Is that a fair characterization?

A Yes.

Q During opening, my opening remarks, I had a couple of photographs put up on the screen, I believe one was from October of 2013. Do you recall that photo?

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A I do.

Q I believe it was 803 -- 801 or 80 -- 801, wasn't it? It doesn't matter, we've seen it, we know it's -- it showed the dry creek bed. So -- there we go, 800, Exhibit 800. Do you -- are you familiar with precisely -- or approximately where this photo was taken? If not, that's fine.

A I'm not, a lot of the channel looks the same down there.

Q Okay. So we talked earlier, and I showed you the drought -- or it was dry, not wet during the period in the couple years before 19 -- before 2011 and -- and '12 and '13. What was the consequence of that with respect to what happened during that drought?

A It was -- it helped exacerbate the problem of a rapid depletion of the aquifer. I think a good analogy is we are in an exceptional drought right now, but the Smoky Hill wellfield is still in relatively okay condition because we've had a lot of wet years.

Q So looking at -- back at 2679, it looks like there's an existing drought that's pretty significant right now, right?

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A Yes.

Q In fact, on the last page of 2669 where we're just showing the exceptional drought during the period 1910 to current, it -- it is -- you are in an exceptional drought?

A We are still currently in an exceptional drought.

Q But what -- I also note that there is -- before 2000 -- there was a drought, it looks like in what year, '16, '17, '18, but there's -- it's not abnormally dry prior to right now?

A No, those were very wet years.

Q So, again, will you just tell me what -- the consequence of that, I mean, comparing 2011, '12, '13 to current situation, I want to make sure I understand?

A So the comparison is right now we are in extreme drought, but when you look at the Smoky wellfield, it is in better condition than it would have been in 2012 in extreme drought. The Big Creek wellfield is actually starting to trend down right now because of the extreme drought.

But going into the 2011 drought, it had been dry and we had received either below or

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just right at normal rainfall for a few years, and so when that flash drought hit, it hit very hard and it took a -- a source that was somewhat stressed and it just depleted it very quickly. And so that's where we saw just rapid declines in the water levels.

Q So if I'm understanding this correctly, in 2009 you expanded the wellfield and at least some people thought it was going to be very helpful, but it was less helpful than expected?

A Yes.

Q What happened to Big Creek during that period, the Big Creek wells, were they still capable of producing?

A During the 2011 drought?

Q '11 to '13?

A Big Creek wells, they declined to a point that made us very nervous, the flow actually stopped in Big Creek, and -- and that was the first time in a lot of people's memory that flow had ever stopped in Big Creek. And -- and we started seeing some fairly rapid declines in Big Creek again in a manner that we hadn't seen in -- in -- since we started tracking well levels in Big Creek. So we were very concerned about --

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about the future viability of that.
Q What's the current state of Big Creek, is it flowing now?
A Yes. Flow has been reducing for about, I'm going to say two years, it's been steadily declining, but there is still a minimum -- a minor flow in Big Creek.
Q So let's look at 255, Exhibit 255. Yeah, there you go. Figure 3. And for the record, it's page 17106. 17106. So this document, figure 3, is from the Aquifer Health Index, and it shows 2010 to '15 Smoky Hill wellfield?
A It does, it does. I believe we have a paper exhibit too.
Q Okay. Is that easier to see?
A It -- it -- I'm not sure it's over here. I know I saw it earlier. Daniel has it.
Q So -- yeah, put it up. You can actually put it over -- yeah, there you go. Thank you, Daniel.
So we have figure 3 on an easel here, but we also have it on the screen so everybody can see. Can you tell us what -- what -- what's the significance -- let me back up. So the Aquifer Health Index was done in 2016, or something, right?

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A Right. So coming out of the -- actually at the -- at the outset of the 2013, '14 period, with that drought, we were very concerned about Big Creek aquifer, that we didn't have a good understanding of how Big Creek's aquifer responded to drought. So we had Big Creek studied a little bit closer. And then we were also surprised with how rapidly the Smoky Hill wellfield depleted, and so we also had the Smoky Hill aquifer studied in a little more detail.
We then had an Aquifer Health Index created that created an index for both aquifers because they are different and they respond differently to rainfall and -- and conditions that deplete them, they are completely different acting aquifers. So we had an Aquifer Health Index created for each wellfield that would show us the relative health of each aquifer. And so what this represents is the index for the Smoky wellfield for a period of time from 2010 through mid to late 2015.
Q But that predates the actual aquifer -- the Aquifer Health Index, as I understand it?
A What's that?
Q It pre -- this time period isn't --

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A No, this -- the data predates the creation of the Aquifer Health Index. We've been collecting data on both wellfields for decades as far as well levels and -- and monitoring well levels.
Q So the Aquifer Health Index takes data that you've been collecting and it gives you some sort of a reading on the health of the aquifer. Is that a fair way to say it?
A Yes.
Q And this is just looking back at putting -- plugging the data in?
A Correct.
Q Okay. So I'm going to assume, and correct me if I'm wrong, it looks like there's a column on the -- on the left of zero to 100, is that some sort of a score?
A It -- it's a relative health score. As in most scoring, zero is bad, 100 is good.
Q In 2010 -- October of 2010 through May -- April, May, June of 2011, it looks like the Aquifer Health Index ranged from 70 up to 90 roughly?
A Yes, and what that represents is a regular flow in the Smoky Hill River.
Q What happened, then, when it dropped off in 2000 -- the middle of 2011?

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A That's when it started getting dry, and so even though there is not a flow in the river, there's still subsurface moisture in the aquifer itself. So flow stopped in the river, meaning inflow stopped into the aquifer, and so that meant we started mining water out of the aquifer.
And then you can see it went down pretty quickly. With rainfalls, and I'm looking at the time frame, so a little bit of winter, so it could be snow melt as well, the aquifer maintained. Also in the wintertime, the trees and the vegetation along the river go dormant, so it's not pulling that aquifer out. But then as soon as the spring hit, you see the -- the water levels start going down again.
Q So it jumps up in April of 2012 a little bit from 60 to 65 or 60 -- a little higher, but then -- it bounces around, but then it starts to take a nosedive, doesn't it?
A That's when it got really bad. That's when we started hitting the meat of the drought, and -- and the sources just rapidly depleted. As I mentioned before, this is a very narrow channel, and so when you start pulling water out of it, it starts depleting very rapidly when there's no

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inflow.
Q So it looks like a miracle occurred here in April of -- of 2013, what happened?
A So that was actually in March of 2013. In December of 2012, we asked the Kansas Water Office for a release of water from Cedar Bluff, and I don't know the -- the amounts of what was released. But in March of 2012, there was a release of water for a specific period of time in order to get water down the channel to Hays' wellfield. And I know it took nine days or so for that water to -- we have a report that's filed as an exhibit, but I think it took about nine days for that water to actually reach our wellfield.
I can tell you they were releasing water at a pretty good clip from Cedar Bluff, I don't remember how many cubic foot a second, maybe 125 or 150, something like that, but the -- the current mayor and mayor at the time and I were down there in the wellfield and -- and you could stand 5 foot from that water in our wellfield and it would take five minutes to reach you because it was just soaking into the well so --
Q You could stand where?

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A You could stand in the river channel as the water was coming down, you could stand 5 foot away from the -- from the water's edge, I mean, the head of the water, and it would take it five minutes to get to you because it wasn't moving forward as much as it was moving laterally and down into the aquifer.
Q So it was soaking into the aquifer?
A Right. So the water took nine days to get to our wellfield. Our -- our water came from the joint use pool -- or from the artificial recharge pool that -- that I talked about earlier from Cedar Bluff. When the water reached our wellfield, Russell asked for release of their water from Cedar Bluff. They own water rights in Cedar Bluff. Their water rights made -- their water made it to our wellfield in a matter of a couple days and then on through our wellfield in order to make it to Pfeifer's wellfield, where I believe that's where it stopped and soaked in, and I don't think any of it went past Pfeifer's wellfield. So the -- the increase you see there, that is not due to rainfall, that is all due to that Cedar Bluff release.

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Q Let's go back to 800, if you still have it up. So looks like the river -- is this showing the river channel itself --
A Yes.
Q -- if you know? Now, you said you didn't know specifically where it was from?
A I don't know the location, but I can -- I can say that is the river channel.
Q And so it's dry --
A Yes.
Q -- right? You're -- you're saying that the water was flowing from the west and -- and flowing at the surface and soaking in, is the -- is the riverbed sandy?
A Yes.
Q Compare the river -- quality of the riverbed sand to the quality of the sand on the R9 Ranch, if you can?
A It's different but it's both -- they're both sand.
Q So they -- they sort of react the same way?
A Yes.
Q Water -- water falls on it, it soaks in?
A It soaks in, there's -- there's very little discernible runoff from the R9 Ranch. We don't

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have any creeks or waterways or anything that flows off of the ranch.
Q All right. So there was this release in 2013 -- there were two releases, the release from Fort Hays and then Russell asked for a release from its -- did they do that on purpose, wait to --
A Yes.
Q -- to get the aquifer full, if you will?
A Yes, they purposely waited because they knew that if -- if the aquifer wasn't saturated at least to our wellfield, then anything they release is going to get caught up in our wellfield and never make it to their Pfeifer wellfield. So from a strategic standpoint, it was -- it was a good use of the -- of waiting for their water right to be released.
Q So are you telling me that if Russell has this big water -- this water right in Cedar Bluff, if they want to release it, it's basically going to stop someplace before it gets to their wellfield? If you know?
A So the characteristics of the aquifer are if there is adequate saturation for water to make it to their wellfield, then they probably don't need the release. When conditions are as such

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that they do need the water, the aquifer is going to be depleted enough it's never going to make it there.

Q Let's go back to 255, please. So there was this release in March of 2013 where we've got this spike in the middle going up, and that doesn't look like it solved the problem?

A No, because it was dry. The -- the release saved us from -- from dropping into emergency status further. Now, I'm going to clarify for the record, we had a different classification of drought response before because we didn't have a very good understanding of the aquifer. So we were in warning but not emergency at the time. But after we developed what we thought was a better understanding of the aquifer, in retrospect, we should have been in an emergency but we hadn't declared an emergency yet.

Q What's the difference?

A What's that?

Q What's the difference, I mean, watch or warning or emergency, I mean, what --

A It's -- it's all part of our drought response plan. We have different reactionary measures as part of our drought response plan to water

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watch, water warning, water emergency.

Q And does that affect the rate?

A It --

Q The rate people pay?

A In water warning and water emergency, it does.

Q And I think we'll deal with that, but I just want to --

A Yes.

Q We won't go into that now but -- so it looks like there's a little blip here in maybe July of 2013, I mean, it all of a sudden goes up and then it drops off precipitously, what happened there?

A So that month there was 7 inches of total rainfall in July of -- of 2013. But it wasn't enough to break the drought or even create an appreciable flow in the Smoky Hill River, so conditions just kept -- went right back down. The aquifer was so depleted, whatever short-term flow was there was taken up, and then the wellfield level started going right back down towards emergency again. And then it started raining, and that's what the last blip you see is it started raining.

Q Let's not get there quite so fast. So if it

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rains on the -- right on the channel, water is going to soak in, but the channel is fairly narrow. What -- what happens if you have a big rain like this and it's all -- it's been dry, what happens -- how much runoff do you get?

A Well, if it's -- if it's a protracted drought and all watersheds that lead into the Smoky watershed are dry, then that's going to soak up a lot of that water before it even -- even reaches the wellfield. I believe it's behind figure 3.

Q So back to this -- I can't remember, it's figure 3 and it's Bates number 103417, 103417. If you have -- the flow in Big Creek and Smoky depend on rainfall in the basin is what you've testified to?

A Yes.

Q And if it's really dry and you get a big rain, some runs off but a lot of it soaks in?

A Right.

Q And so you'd have -- a big rain doesn't help -- one big rain doesn't help, it takes more than one. Is that fair?

A Correct, the ground has to reach a certain amount of saturation for water to run off.

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Q So then -- so you had a rain in July of '13 -- Let's go back to where we were. I appreciate that, Jami, but -- So you had a rain in July of '13, it helped -- the release helped, the release from Cedar Bluff helped?

A Yes.

Q And then the rain helped?

A Yes.

Q But it didn't solve the problem, you still have a decline in -- in flow in the Smoky from after that July rain to July of '14 or thereabouts, correct?

A Correct, there was still a drought in the Smoky Hill watershed, and so there was no discernible flow in the river so we were essentially mining the aquifer.

Q So it looks like to me the slope or the trend line from July of '12 to March of '13 was steeper than the trend line from July of '13 to '14, is that -- does that resonate with you, I mean --

A It does appear to be slightly shallower.

Q So it appears, then, that the rain or the release or both helped a little, but it didn't

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solve the problem?
A Right.
Q Is that a fair way to read that graph?
A It is, and there could have been some minor rain events that helped slow the decline.
Q This isn't a matter of it never rained, it just didn't rain enough. Is that fair?
A Yes.
Q So what happens then in July of 2014?
A That's when it started raining, and we received some very large rains with some significant runoff and -- and it started recharging the aquifer.
Q And so is that the -- it didn't return to the health of the aquifer from the early part of this graph in '10 and early 2011, but at least it was better. Is that fair?
A Right, not in this graph, if -- if you had the entire extrapolation of the Aquifer Health Index, you'll see it stabilized, it went down very briefly, which is what you see at the end of this visual, and then we entered a very wet period and it went back up to essentially as good as we could hope for conditions.
Q When -- when was the last time that -- you've

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got water rights for, like, in excess of 3600 acre-feet, don't you?
A Yes, 3675 acre-feet, I believe.
Q When was the last that you used -- that Hays used that much water, if you know?
A I believe it was 1983 was the last time we used that much water.
Q So right now you're using in the range of 2,000 acre-feet?
A That's correct.
Q And if -- if it's during a drought, your usage goes up, doesn't it?
A It goes up. We -- we do a good job of trying to get our residents to curtail their usage. The natural inclination of people during a drought is to use more water, especially for outdoor vegetation to try to keep it alive. We try to counteract those measures, so you will see some appreciable increases in usage during a drought but it's not -- it's not like you would see, say, in a place like Wichita where, you know, there's -- there's not the daily conservation measures that we have.
Q So in a wet year, how much water could you produce if you had to?

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A I think depending on the year, and I'm not saying we could do this year in, year out, but I think if -- if both aquifers were as full as they could get, we could possibly produce that 3600 acre-feet water right.
Q You don't because you -- if you produced it, what would happen the next year?
A Well, it's unsustainable. We -- we -- we can't -- we wouldn't want to create a situation where we're using 3600 acre-feet because we know we couldn't do that year in, year out, so it would be an unsustainable path forward.
Q Let's look at 2625. Oh, never mind, this is something -- we'll do that later.
Almost skipped a whole page, that would be bad. Earlier you said that there are two IGUCAs, one on the Smoky that reduced your water right from 2800 to 2285 and change, but you also said there was a Hays IGUCA. What -- what is that, tell me about that?
A So it's an -- also an Intensive Groundwater Use Control Area, and -- and I don't know the exact geometry of it, but it encompasses Hays and -- and Big Creek wellfield or water rights around Hays. I do not know off the top of my head if

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that IGUCA limited our Big Creek water rights.
I think it may have limited our total availability to utilize our water rights, but it also -- there's a lot of competing interests in the Big Creek wellfield. There are independently owned water rights that are separate from the City in Big Creek so those -- those water rights are covered by this IGUCA if the chief engineer wanted to impose restrictions. And then there are private wells in the area that aren't regulated typically by the -- by the State of Kansas.
And so one of the things we have done is the chief engineer has essentially delegated the authority during times of water warning or water emergency, within the Hays area, we can make private wells comply with our water conservation guidelines for outdoor watering and -- and -- and water wasting.
Q So when I was driving over here I noticed that somebody's sprinkler head sprayed water onto the street and there was this wet area on the street. Does that happen in Hays?
A It does, unfortunately, but we try to address it very quickly. The -- the City of Hays has a

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ordinance prohibiting the wasting of water, and so if you had a -- a misadjusted sprinkler head that was watering the street or if the lawn or vegetation you were watering was overly saturated and what you were putting down was running onto the street, you can actually receive a ticket for that. Now, we don't -- we don't write tickets first, we try to educate first and we warn, and then if necessary and if the behavior doesn't change, we write a ticket. But we are very proactive in trying to address situations like that.

Q So I personally have a nice green lawn and I water it and -- but do -- if I want one of those in Hays, how am I going to have a nice green, cool-season grass lawn, how does that -- what would I have to do?

A Well, it depends and -- and it really doesn't matter if you're on a private well or a public water supply. If you have an existing home, you have the right to put in cool-season grass and irrigate it. You are subject to, if it's potable water, of paying the bill which can be very pricey because of our conservation rates.

Q Like how pricey?

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A There are people that pay over $1,000 a month for their water bill because they choose to put some water down on their lawn in the summertime.

Q Every year?

A Yeah, for the most part.

Q I mean, don't the rates go up during a -- during a bad drought? I mean, is that -- or not?

A They go -- the conservation tier rates go up during times of water warning and water emergency. Normally, we have the base rate, we have the conservation rate, and then we have a conservation rate tier 2 which catches -- tier 1 and tier 2 catch the typical outdoor water use.

So back to your lawn question --

Q Well, I'm just curious about $1,000 water bill, I mean, is it two people?

A No, it's several people. I don't know the exact number but it's several.

Q I'm not asking for that. I certainly don't want you to give me their names, but there are several people who pay voluntarily over $1,000 a month to water their lawns. Is that what --

A Right.

Q -- you're telling me?

A Right.

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Q Okay. Sorry, go ahead.

A So back to your question about the lawn, if you were building a new house or a new business, we have adopted landscaping regulations that limit the amount of cool-season turf that can be put in, that limit the amount of overall irrigated area that's allowed on a property, and -- and -- and so you're not going to have a big lawn of cool-season grass.

We also have requirements in our landscaping regulations that prohibit spray irrigation, overhead spray irrigation within 5 foot of a hard surface; that way you avoid that misadjusted sprinkler that waters the streets. There's usually some sort of a rock or a mulch buffer around those areas or people put in subsurface irrigation in order to accomplish that. So you could have some cool-season grass in functional areas, but you're not going to have a vast yard of cool-season grass in Hays.

Q And really I think we're on a little bit of a tangent, a good one but still a tangent. I was asking about the terms of IGUCA, and basically it, if I heard you right, allows the City of Hays to regulate private wells, the private

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domestic wells in the same way it regulates water use from the Hays distribution system. Is that a fair way to say it?

A It is, in times of water -- water warning and water emergency, yes.

Q And so it's my understanding that you have to implement -- it's dele -- you said it was delegated to the City of Hays, the City of Hays -- okay, yeah, you're the one that enforces that, then?

A We are the one that enforces it. And I say -- I want to clarify my statement. We also have the ability to -- we have outdoor watering limitations, so between June 1st and September 30th, you can't use -- you can't water outdoor vegetation between noon and 7:00 p.m. because a lot of that water is going to evaporate before it actually reaches the root zone. The IGUCA allows us to implement that -- that for private wells too. So every year we request the chief engineer write a letter that requires those private well owners to comply with our ordinances, and then every year the chief engineer imposes that.

Q Jami, will you pull up Exhibit 1-100, 1, hyphen,

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100 and go to page 4737?
So I'll represent to you, Mr. Dougherty, that this is the order that the chief engineer issued to expand the -- the Hays wellfield in the Smoky, but I want you to look at paragraph 77, can you read it?
A Jami is going to have to zoom in. Oh, yes. The City believes that an actual shortage of water, as well as a perception of water shortage, has stymied economic development.
Q Does the City believe that?
A The City still believes that.
Q Based on what?
A Based on the fact that we have had an inadequate water supply for several decades now; based off the fact that we are essentially the only city, I would -- I would include Russell in this, but essentially the only city in Kansas that for 30 years has been acting like a city in the Desert Southwest with regard to our water conservation measures we're imposing on our residents; and -- and just the overall perception in Kansas that we have no water when we are trying to do the best we can to manage our existing sources and make them last as long

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as possible while we find -- while we search for an additional source.
Q So you got 3685 acre-feet of water that you could pump, but if you did, it would -- you'd pay the consequence the following year or two, and people know that, is that -- I mean, is that a common understanding as far as you -- do you talk to other city managers about -- about water use and conservation in Hays?
A Periodically I do, it's not uncommon -- I mean, we were the only city doing this for a lot of years, so whenever cities were looking to implement water conservation programs or dealing with water issues, sometimes I would get a phone call about why we were doing what we did and how we did it.
Q So does the City have a conservation plan that has been approved by the Kansas Water Office?
A We do.
Q And tell us -- we've talked some about conservation, you've told us about landscaping and watering and other things. Are there other -- is there -- are there other components of the conservation program in Hays that -- that need to be in the record?

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A So our conservation programs started in -- in 1991 during the drought, and they started with indoor water use, toilet replacement rebates, they started giving away showerheads, they started educating the schoolchildren as they were learning about the hydrological cycle. And they say they -- I say they, the city commissioners were doing this and -- and city staff that really weren't water education experts were doing this because -- because they had to.
Those programs -- and then the outdoor watering stuff, we talked about the prohibitions, the water wasting, that was all implemented in the '90s. The rate structure that we have that -- that penalizes excessive uses of water but provides the -- the lowest water rate for domestic use, that was all done in the '90s.
Q Let me stop you there and we're going to talk about rates later, but if I'm on a fixed income, am I going to get hit with a $1,000 water bill?
A Assuming you don't use it outdoors, you won't.
Q I mean, the rate, basic -- basic human needs aren't exorbitantly expensive in Russell -- or

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Hays, are they?
A No, the way our water rates are structured is your domestic needs are -- your domestic uses are typically at your lowest rate, and then outdoor uses are at your highest rate. So the -- the rates, all that was put into place. By the time I came along in 2005, all of that was well established. I remember one of the first things I worked on was creating the washing machine rebate program. High-efficiency washing machines were becoming very commonplace, and so we had a commissioner that wanted to put in a rebate program, and -- and I worked on that.
In 2011, we decided to take our conservation efforts to the next level, we revamped all of our programs to make sure that we were promoting the most efficient options out there. We hired a water conservation specialist, we were the first city in Kansas to do so. We adopted the green plumbing code, I believe we were the first city in Kansas to do so.
Q What's that?
A The green plumbing code, it's -- it's part of

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the building code, but it is a plumbing code that one facet of it makes sure that homes are designed for efficient water use, both indoor use and irrigation systems used outdoors.

Q So that, for instance, I mean, is that part of the reason you have -- can't have a sprinkler head close to a hard surface, or is that something --

A That's something different, that's part of our landscaping regulations. That was another thing that we did is we -- we kind of co-opted some landscape regulations from Salt Lake City area that had some water issues, and so we incorporated some of those measures to make sure that we weren't having people put in a lot of nonfunctional turf and then created a situation where they're going to be getting water waste tickets or high water bills, you know, just by the way the property was designed.

We -- we started -- we revamped the education program with the water conservation specialist, she's -- she's very good at that, and she just took that to the next level. She started working with the watershed protection specialist --

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Q Who is that?

A It's Holly Dickman.

Q Okay, thank you.

A Holly started working with a lady named Stacie Minson, who is the KSU watershed protection specialist. And so they both have limited budgets and limited resources, so they sort of combine their resources to teach people about water quantity and water quality because they are interrelated in a lot of facets, and so we feel like we are doing our -- doing the best to make sure that we stay at the forefront of water conservation techniques.

Q So you stated publicly and you stated several times -- well, you stated publicly that Hays plans to continue to conserve water, and you heard this morning that you don't need it because you're going to continue to conserve and so Hays residents can just keep doing what they're doing. Is that -- tell us about your -- what your plans are, are you just going to turn on the tap and say, you know, hey, use it all? Is that -- I mean, how -- I mean, I'm serious, I don't know how to -- how are you going to do this?

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A We have stated that we have no desire to walk away from our conservation programs, and -- and before I get into this, I want to draw a distinction between conservation and efficiency. Conservation just means using less of something. Efficiency means using less but getting a similar outcome, the same or a similar outcome. So --

Q And the same or similar, use less water to -- to achieve an outcome that the higher use -- I mean --

A Yes, yes. And it's not just water, electricity, you can be efficient with anything. So we talk about conservation because that's the vernacular everybody understands, but we focus a lot on efficiency measures. We want people to take showers, we just want people to use less water while they do that. We want people to be able to wash their cars and have nice landscaping and have sports fields to play on and do laundry and all that stuff, we just want them to do it in a more efficient manner. We have hotels, we want to make sure that they have the most efficient fixtures out there.

So we have stated publicly, we have no

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desire -- and -- and I speak for myself and from what I've heard the governing body say, we have no desire to walk away from our conservation programs. The reality is those conservation programs are largely voluntary, and so it is not speculation to say that if we are able to secure a long-term source of water, it's human nature for some people to relax, and there could be a natural relaxation of some of our residents.

Our residents are very proud of their conservation efforts, but they also know we have a very limited resource we are dealing with. So it is entirely possible that there could be a relaxation which could increase our gallon per capita per day even though we don't change anything in our program. The hardest thing about -- so you mentioned, you asked earlier about calls from other city managers, the most common question I get is how do you pay for something like this, how do you get it started?

We already got started. We've crossed the biggest hurdle, so we have no intention of walking away from it. But there are also other things that could affect the gallons per capita per day usage, if that's the metric we want to

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be held to. We could bring industry in that uses more water, but we avoid, like, everything right now that could use a little more water than we use, that could increase our gallon per capita per day that has nothing to do with our conservation program.

We are a retail hub on I-70. We have two travel plazas in the works right now that are going to add hotels and restaurants and -- and a truck stop, an auto travel plaza, and all of that could affect our commerce, but it could affect our gallons per capita per day usage and have nothing to do with conservation measures because --

Q Because when I come to town and take a shower, I stay in there for 10 minutes or 15 minutes; whereas, Hays residents don't take those longer showers. Is that -- I mean, I'm being facetious but --

A Well, more specifically when you come to Hays and take a shower, you're not a Hays resident, you don't count for that gallon per capita per day.

Q Okay.

A So if -- if we have 300 more people spending the

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night in Hays taking showers, we're going to make sure that's done in the most efficient way possible, using the most efficient toilets and showers possible. But that water usage could result in our gallons per capita per day increasing regardless of what we do. So --

Q Okay. Because I want to be clear about this because I think I misunderstood you. The water that I -- that is used by me and visitors in Hays who don't know about the conservation is water that counts against your gallons per capita per day, doesn't it?

A All water we use is -- counts against our gallons per capita per day.

Q Okay. I thought you said that it didn't count but it does. Okay, very good.

A It does. Okay. So, you know, yes, it is true that we are going to keep our conservation programs in place, but, again, they're largely voluntary and -- and incentive based. They're -- they're not sticks, with the exception of the water runoff and the water -- watering, which I don't know why we would ever change that, that just makes sense to, you know, not let people take potable water and run it

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into the streets. But yet we could see our gallons per capita per day go up, that's just a reality, so to be -- to be held to some unreasonable standard of gallons per capita per day in perpetuity, that's like stating you're poor and you don't spend any money so, therefore, you should just stay poor and not worry about spending any more money.

Q Well, I think you can keep your gallons per capita per day lower by just never -- by just dismissing this complaint and then -- then you'll keep your gallons per capita per day down, I mean, that's the logic here really, isn't it?

A Possibly, yes.

Q That's not what you want to do, is it?

A Hays and Russell want the ability to utilize water like every other city in the State of Kansas.

Q You've told me that conservation -- you've talked about efficiency versus conservation and that -- should other cities be following some of your examples?

A So there are a myriad of reasons why cities should invest in water efficiency and

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conservation measures. I served on a panel at the Governor's Water Conference with a council member, I believe he was from Gardner, and Gardner was looking at building a new water treatment facility, and they were doing that because of growth. So if they were to use water more efficiently, they could delay that cost of that water treatment facility.

Cities that are growing sometimes have to oversize water mains, and if you can use water more efficiently you can put some of that stuff off. All water has to be pulled from some source, treated, and distributed, which all costs money. It costs money to pull it out, it costs money to treat it, it costs money to store it and distribute it, and it costs personnel money. So the ways you can find efficiency measures to use less of that or have your residents use less, that's more input cost that can be passed on to your residents.

So there is always an incentive, regardless of your -- your source, to use water in a more efficient manner. As I said, when you don't have that constraint of source that's looming against you, sometimes it's very hard for cities

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to make that initial investment in conservation programs. And that's a lot of times the discussions I have with cities that don't have source issues but say, hey, our residents and our governing body wants to use water more efficiently, how do we start these programs, how do we get them in place, where do we find that money?

Q I have a lot of questions about your rate structure, but I think maybe it's time for a short break, if you don't mind, Your Honor?

PRESIDING OFFICER: Any objection from any other parties?

MR. LEE: No, Your Honor.

MS. LANGWORTHY: No, Your Honor.

PRESIDING OFFICER: All right. Well, we've got 3:40 now, why don't we just come back at 4:00 o'clock.

MR. TRASTER: That would be great, thank you, Your Honor.

PRESIDING OFFICER: So off the record on recess here until 4:00 o'clock.

(Thereupon, a recess was taken; whereupon, the following was had.)

PRESIDING OFFICER: About

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4:00 o'clock here so we'll go ahead and go back on the record. And, Mr. Traster, before you pick back up with Mr. Dougherty's questioning, can you give me an estimation as to how much more time you think you'll need to complete your examination?

MR. TRASTER: I'll do my best, Your Honor. I -- I would say I'm halfway through.

PRESIDING OFFICER: Okay.

MR. TRASTER: So, you know, I think it's going to make the rest of whatever time you want to take today, and then I don't know what time you want to stop, but it's going -- it's going to take about as much time as we've already spent. And I -- I've done some kind of skipping ahead, but -- so it -- but I also might have missed some things so I just -- I don't know.

PRESIDING OFFICER: Okay. I just wanted to get an idea.

MR. TRASTER: That's the best idea.

PRESIDING OFFICER: If you thought

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it's going to be, you know, maybe an hour and a half or so, at that point I would say, yeah, let's just keep going, that would be a good stopping place and then to break at that point. I don't know on the first day that I'm going to make everybody suffer by staying here till 10:00 o'clock at night if that's how long you think you're going to take with the witness. As we get later in the hearing, if we need to speed things along, make sure we get done, we may be staying here that late at night but --

MR. TRASTER: Yeah.

PRESIDING OFFICER: -- day one, I don't think I'm going to put anybody through that. I don't think anybody would like me if I made them all stay that late for the hearing.

MR. TRASTER: Sure.

PRESIDING OFFICER: So let's plan on going till 5:00, give or take when you think you're at a good stopping point --

MR. TRASTER: Sure.

PRESIDING OFFICER: -- for the day,

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you'll let me know and then we'll address what time we'll pick things up in the morning then to --

MR. TRASTER: Sure.

PRESIDING OFFICER: -- get going again.

MR. TRASTER: Your Honor, counsel asked for a list of the witnesses that we're going to plan for tomorrow, and so just the current plan is to finish up with Mr. Dougherty and then there's a witness, Doug Williams, he is one of the people who spoke at the public meeting, he's the -- he's the Grow Hays executive director, if you recall. From there, turn it over to ...

MR. COLE: Yeah, City of Russell will probably lead off with Jon Quinday, the city manager; Brad Wagner, who spoke briefly at the public comment hearing; and then I haven't decided yet but if I did, it would be Randy Baker so it would be those three witnesses.

MR. TRASTER: Would be the next ones in order?

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MR. COLE: Yeah.
MR. TRASTER: And maybe finish with all three tomorrow and -- is he as long-winded as Toby?
MR. COLE: You're plowing a lot of our field.
PRESIDING OFFICER: And I'm not trying to push you to say you have to do more witnesses than that tomorrow --
MR. TRASTER: No.
PRESIDING OFFICER: -- but if -- I don't know what to expect with the witnesses, if it's going to be, you know, your -- your questioning and then Mr. Lee, if he only has five minutes of questioning, and if Ms. Langworthy has nothing more to question of those witnesses.
MR. LEE: Do we get to vote on that?
MR. TRASTER: Because I -- I have a vote, I know exactly how many minutes I'd let him have.
PRESIDING OFFICER: Maybe -- maybe he needs more time than that, maybe we don't even get through those, but if we had to go, say, two more witnesses after that,

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who would be your next two after that?
MR. TRASTER: Well, definitely after Toby, it will be Doug Williams and we -- you know, I wasn't even thinking about cross but -- but it could take awhile. So, you know, I -- we may not get to all those, but that's just the order. Doug Williams is -- I don't think he's going to be -- he won't take a long time. I mean, really what we'll be talking about, I think, are -- he's your witness, how long is he going to take?
MR. BULLER: Yeah, I would be surprised if it was longer than 45 minutes. I don't anticipate lots of cross-examination with him, but, yeah, maybe an hour, 45 minutes. Maybe less than that.
PRESIDING OFFICER: Okay.
MR. TRASTER: Does that help?
PRESIDING OFFICER: Well, I guess for the order that you're looking at, we'll plan on just those five, but if we would go -- if those do run very quickly and we go on to the next witness, who would that

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next witness be? And then we'll look at things in the morning after we get, you know --
MR. TRASTER: Sure.
PRESIDING OFFICER: -- like lunch break time, and if we need to kind of say then that, well, we may look at having another witness, at least you have some time over a lunch break there to do some last-minute preparations if you may need to, Mr. Lee. I completely understand the need to anticipate who's coming up, I just -- I don't want to get to the point this early in this process where we're ending the hearing at 3:00 in the afternoon because we finished all the witnesses we planned for the day.
MR. TRASTER: I don't think that there's much risk of that. I think our next two witnesses are going to be Jeff -- huh.
A Crispin.
MR. TRASTER: Crispin. Jeff Crispin and Paul McCormick.
PRESIDING OFFICER: Okay.

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MR. TRASTER: And both of them -- I think Jeff is going to take a little while, you know, more than 45 minutes or an hour. He's the operator of the water system, and so he has some knowledge about, you know, current sources and how they're working, and I want to go into some depth with him on the Aquifer Health Index and that sort of thing. But it's covering some of the ground we've covered today a little bit.
Paul McCormick is the -- one of the witnesses that I want to call as a fact witness prior to his testimony as -- as a -- his expert witness testimony so he -- he could take awhile.
PRESIDING OFFICER: Okay. All right. That's fine and, you know, I'm not saying you have to get to them tomorrow, just --
MR. TRASTER: We're going to -- I think we're prepared and will be to -- oh, I'm sorry, I didn't realize you were --
PRESIDING OFFICER: That's all right.
MR. TRASTER: I think we're going to

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be prepared to plow on and one witness after another, there won't be -- unless there's a real -- something unanticipated happens, there won't be any, well, we're done for the day and we don't have our next witness available. I don't think that's going to happen.

PRESIDING OFFICER: I hope not, I just don't want to waste any time and at the end have everybody be rushed because whatever happens we just need to make sure that everyone's gotten through those witnesses and we have a sufficient record of everything.

MR. TRASTER: Okay.

PRESIDING OFFICER: All right. Go ahead and continue with your questioning of Mr. Dougherty, then.

BY MR. TRASTER:

Q Mr. Dougherty, I remind you again that you're still under oath.

A I acknowledge.

Q I forgot to tell her what I wanted next, I'm sorry.

So you testified that you have 3685

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acre-feet of water available in -- from your sources in Hays and Russell -- or in Hays, in Hays, but that you can't really utilize the full quantity that you have available even though you have the legal right to do that; is that correct?

A Correct.

Q So this idea -- and conservation is measured in gallons per capita per day, I mean, that's one of the measures or one of the indicators of how well people are conserving?

A It is a relative measure of how -- how water wise the City is.

Q So should that be -- should Hays' future water be capped at the gallons per capita per day that it has been operating at in the past because of its conservation efforts?

A Absolutely not. I think that would be a -- an unreasonable and an unfair restriction on future water uses. And I don't believe it's in accordance with Kansas water law. So I mentioned earlier a -- the Groundwater Management District Number 5 was considering a Local Enhanced Management Area, and Water PACK's president, Pat Janssen, wrote a letter of

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submission regarding that LEMA creation. And Mr. Janssen stated that if historical use is the basis for future allocations, you will be punishing landowners who choose to conserve. And I couldn't agree more with Pat on that. We have conserved because we have had to, we've had no other choice to, no other alternative, but to have that restriction held over us in perpetuity is completely unreasonable.

Q Are you aware of any rule or regulation that would require you to maintain that level of conservation?

A I am not.

Q Let's look at 2690. Well, we're talking about conservation and your conservation program, you mentioned education in the schools?

A Correct.

Q What -- what is -- what is 2690?

A This is an example of a poster -- so our water conservation specialist, Holly Dickman, every year her and Stacie Minson, the watershed protection specialist, they do a -- they conduct a water poster contest, and this is open to people of all ages from preschool to adult, and there's a theme. I believe this -- I can't tell

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you the year this is from, but the theme was every -- make every drop count.

And so these posters are submitted, they are graded, the city commissioners and some city staff get together and they judge these posters. And they -- they create different age classes and they create different awards for 2nd, 3rd place for each age class, and then the posters are actually -- and there's prizes given, there's a ceremony. Last year -- I believe this year's ceremony was at Sternberg Museum, there are prizes given out to the winners, and they're recognized at the ceremony.

And then each year the posters are displayed during a art walk, which is an event that takes place in downtown Hays, so they pick a local business and they display these posters downtown. So it's -- it's just a way of keeping the kids engaged in water conservation mostly. It's geared towards young kids, but it's open to different age divisions.

Q So this is 2690, is the first page and it's the 1st place poster for preschool and it -- it says, Turn off the water when you brush your teeth?

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A Right, and this is all about, you know, the teaching kids the value of water. And I know Holly's going to go to this in more detail when she's here, but there's a lot of activities geared toward the younger kids because if you instill that conservation ethic into those kids, then they're just going to naturally use water in a more efficient manner as they become adults.

And so that's one of the reasons why we go into the schools while the kids are learning about water during the hydrological cycle because it helps reinforce those -- those habits. It also helps condition the parents to make sure they're -- they're using water more efficiently.

Q So this exhibit is 16 pages long, and I don't want to go through them all because Holly may go into it, but, Jami, can you just go -- here's another one, this is the 1st place, the second page, kindergarten, it's O'Loughlin Elementary, Take five minutes in the shower. When you are brushing your teeth, don't let your water keep running, I guess, I can't read it, but don't waste water, use less water, make every drop

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count, is that -- so let's -- let's do one or two more. These are just creative posters that kids make?

A Right.

Q Thank you. Mr. Dougherty, we've talked a little bit about your water rate structure in -- in Hays, and in some cases you have people who are willingly paying $1,000, over $1,000, and that -- I mean, when you said that, it was over 1,000, I thought you were being -- when we first talked about it, I thought you were kidding, but literally you've got people who are paying bills, a month bill for $1,000 for water in Hays?

A Yes, residents, not businesses.

Q Talk about the structure, how does this work?

A Hays' rate structure is based off of -- so there was a base rate, a lot of cities have base rates, and there's an included amount in that base amount, I don't remember how many cubic feet, maybe 100 cubic feet is included in that base rate. And then beyond that base rate, there is a regular rate, and that rate is calculated by determining -- determining a customer's winter average.

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So December, January, February, those bills are averaged because that gives us an idea of what water is needed for domestic use or -- or non-outdoor use. You're typically not irrigating a bunch of stuff outdoors or filling a swimming pool, or something like that, in July -- or January, I mean.

So the base rate is calculated, and then when you get your -- your normal bill, the -- and I don't -- I don't know the ratios, but there is a certain amount of water that's charged at that base rate -- or the regular rate is charged at the -- up to the winter average. So if you use below and up to the winter average, you pay the regular water rate, which is the lowest water rate available.

Then there's a conservation tier 1 that kicks into place when you exceed that winter average, and that's paid at a higher rate. If you exceed the next step, and I couldn't tell you what that next step is, you get into conservation tier 2 where you pay, again, a higher rate. So what it does is it allows essentially people that want to use more water in the summertime for outdoor water uses to do

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that but they're paying at a higher rate. And then if they really want to get wild and use a lot of water, they get into that tier 2, meaning they're going to pay for it.

So water is a commodity, and it's very hard to tell people they can't use a commodity. So you put price controls in to try to -- try to, you know, create an equilibrium or a balance on usage and -- and incent without punishing the people that need that water for domestic use.

Q Okay. Moving on to the next subject, the -- I'm wondering if you'd talk about how the planning horizon, what is the -- there's been some discussion about the planning that -- that Hays' plan uses 2 percent population growth and -- and it -- and the plan horizon stops at 2041. Can you -- can you explain what's going on there?

A Well, so Hays has a lot of different planning horizons. We have a five-year capital improvement plan, we have a comprehensive plan that was passed in -- or adopted in 2011 that we thought might be a 10- or a 15-year planning horizon or it could be shorter, could be longer depending on how things go.

Q Is that related strictly to water?

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A No, that's to overall -- all growth. The planning horizon for this project is what we think is -- is the -- the usable life span of the project, and so we view this as a long-term water source. So our planning horizon -- it's also very expensive, so our planning horizon for this project is significantly longer than planning horizons, say, for our five-year capital improvement plan.

We recently invested 30 some million dollars in a new wastewater facility. We didn't do that on a five-year planning horizon; we knew that facility was going to last us for decades into the future without having to invest in significant improvement.

So the water system is the same way. We are spending most likely over $100 million on this, with 30-year financing, most likely, moving forward, and we would like to utilize the project after we pay it off for a few years. Our estimates are -- is that this project is going to provide a reliable source of water for a minimum of 50 years and -- and probably significantly longer than that. So that is our planning horizon for this -- this property and

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this project.

Q So in the course of working through this -- the Master Order and -- and the change application process, there was some discussion about -- I mean, as you know, the Kansas Water Appropriation Act says that water in excess of reasonable needs is not allowed, and that generally applies to new water rights, when you apply for a new water right, but it also applies when you want to change a right from one kind of use to another. You're aware of that?

A Yes, I am.

Q So you are planning, generally speaking, if I understand you correctly, for about 1 percent growth over the next how long?

A So for the foreseeable future, the mid range, the -- the 20 years, we would like to think that we could target a 1 percent growth rate. Could it be lower? Yes. Could it be higher? Yes. We feel that if we have an adequate supply of water that we can achieve growth rates that we haven't seen in the past. But the -- that's a different calculation than the reasonable-needs calculation that is part of the water appropriations and part of our -- our -- our

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Master Order here.

Reasonable needs is -- is a cap on usage, on -- on future usage, so it's a little bit like a savings account. Mid-range planning is kind of like a budget, you know, you budget your expenditures, you -- you expect to track your expenditures, but it's not the savings account, it's not -- reasonable needs is the cap on what we could grow into into the future, and when we went into the discussions with the Division of Water Resources, we made it very clear this is an extremely expensive project that is going to have to last us for 50 years plus, and we can't do this, it's not cost effective to do this if we know we can only utilize part of it for a 20-year period. We have to be able to look beyond and know we can grow into that. And so we were very up front with them that we wanted to have the ability to utilize this project for a myriad of growth factors into the future that we can't account for right now.

Q Do you -- do you plan to use every drop of that reasonable-need number, I mean, is that -- you're hoping to use all that?

A Well, we can't use that. Hays and Russell

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combined don't use that right now, but we don't know what's going to happen 30, 40 years into the future. The governing body adopted the joint interlocal agreement with Russell in 2014, we're not through the process yet. So procuring an additional source of water is not like going to the grocery store and getting a gallon of milk, it is a very lengthy process.

So the idea that we would get just enough, just enough and maybe you could go back and get more is absurd, knowing that you get just enough and then in two years we have to go through another 15-year process to get just enough more and then we automatically start the 15-year process again. So that's why the reasonable-need cap that we asked for was granted, knowing that this is a very expensive project and it needs to be there in the future.

Q So I'm going to put back that 2659, Exhibit 2659 which is, as a reminder for the record, the map showing the Ogallala in western Kansas, the High Plains in sort of central Kansas, Hays and Russell, Ellis and Russell Counties, the ranch, and it also shows population centers that are above 5,000, I think you testified?

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A It does.
Q What's unusual or different about Hays and Russell than the other population centers in Kansas that have more than 5,000 people?
A The lack of locally available water. So if you look at that map, when you get west of Hutchinson, the major population centers sit on top of the High Plains or the Ogallala aquifer, and when you get to the Hutchinson, Wichita, Salina, you have reached the part of the state that receives enough rainfall to where the creeks and the rivers and the streams flow year-around reliably, even through times of drought, so surface water is a viable alternative for those cities. You get far enough east you have a lot of reservoir storage that is reliably full that can be used for water projects as well. So it's not surprising.
Q Jami, would you put up 1665, please.
So this is a map that you testified to about first, and you were telling us -- I left my pointer. You were telling us about rainfall in these orange, light orange and dark orange regions in the state and then west, but is there a line or an amount of rainfall that you can --

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you said something about reliably -- rivers flow reliably. Is there some standard that you're aware of?
A It's my understanding in Kansas, at least, that the line that represents 30 inches of annual rainfall, which is the transition from the light green to the dark green, is where you can expect to see reliable year-around streamflow even during times of drought. Once -- the further west you get, the more uncertain that -- that source can be.
Q So Hays and Russell, for the record, are obviously far west of that 30-inch line?
A Yes. And for comparative purposes, Salina receives a little over 30 inches of rain a year and -- and we receive 22, 23.
Q Now, there are some reservoirs, there's not very many in southwest Kansas, but there are some reservoirs in northwest Kansas, I mean, is that -- why is it that there are so many more reservoirs in the eastern part of the state than north, if you know?
A There's more surface water runoff and therefore more potential to have reservoirs.
Q Jami, will you put up Exhibit Number 1-201?

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And this is a Water Supply Handbook prepared by the Institute for Water Resources at the Water Resources Support Center by the U.S. Army Corps of Engineers and let's go to page 107. Yeah, page 107, if you can skip to that. There's a passage here I want you to be aware of or tell us about. In this paragraph 2 at the first full paragraph on -- on page 6-9, and we'll get you the Bates number here in a moment. Well, the Bates number for this is 8085, 8085. Can you read that, that second paragraph, that paragraph 2?
A Could you zoom in, please. One more. These activities are based on estimates of future water requirements. The future may be measured in days, years, or decades. The construction of major water facilities are planned over many years to meet expected water demands extending many decades into the future. On the other hand, implementation of demanding management measures during drought conditions may focus on water needs only for the next several days, weeks, or months.
Q Can you pull up Exhibit 1-2, please. And go to paragraph 234. 234, this is on Bates page 150.

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So this is -- maybe it's the previous page, Jami.
MR. TRASTER: Your Honor, this is just the reasonable-need calculation, I don't think I have any questions about it, I apologize for taking the time.
BY MR. TRASTER:
Q Can you pull up 2659, please. I'm sorry, 2609, please.
This is -- can you just tell us what this document is?
A This is a work session memo from February of 2014 that accompanies the Hays City Commission's resolution of intent to develop the R9 Ranch, so this is the resolution they adopted that directed me to begin the regulatory process to develop the R9.
Q And who wrote this?
A I wrote the memo that accompanied the -- the resolution.
Q In the first paragraph, you talk about Hays has addressed water shortcoming with conservation programs and efficiency. Read on from there if you will, if you can. I can read it to you if you'd prefer. 'Cause it's a little bit fuzzy.

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A It says, while successful in the short term, the measures are not significant enough to ensure the current sources will be adequate for a 50-plus-year planning horizon. That's -- after years of studying potential sources, it has been determined that the R9 Ranch represents -- provides the most viable long-term option for the City of Hays and the surrounding area.
Q Is that accurate? That was written in 2014, does it remain accurate today?
A It does.
Q Can you pull up Exhibit 3-2, please, Jami. Can you identify this document?
A Is this the water transfer application?
Q It's the cover letter that was sent with the original change applications.
And, Jami, if you would, go to page 8498 -- I mean the Bates number 8498.
So, Mr. Dougherty, beginning on this page and continuing is a discussion about the necessity -- the heading, The necessity for an alternative approach to DWR's traditional reasonable-quantity analysis for municipal use. Have you -- do you recall reading that -- the section of that cover letter?

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A I do.
Q And is it basically the City's justification, explanation for the need to not just limit the analysis to a 20-year planning horizon?
A Yes, I believe we made that clear from the very start.
Q And the chief engineer eventually, I mean, not even -- well, the chief engineer agreed with this approach, correct?
A Correct.
Q So is it fair to say that the 2 percent growth -- the 2 percent projection of need, reasonable need is a -- an article of the Water Appropriation Act?
A It is.
Q And it doesn't really -- you're not -- that's not your planning horizon or your growth -- planned growth rate? It's a cap on what you -- the quantity that you can reasonably use, correct?
A It is, it is a cap that provides us an adequate horizon for growth, especially given the length it takes to procure an additional water source.
Q So when you -- I don't know how you're going to finance this, I mean, you have some money in the bank from your 2 percent -- your half cent sales tax?
A Correct.
Q But simple me, you got to go to the banker maybe, the government maybe, but you got to go to the bank to borrow the money to build this project, right?
A Correct.
Q And when you go to the bank to borrow the money and you tell them, well, we've only -- we need to build a project that's going to last us 50 years but we've only got a supply that's going to last 20, what's going to happen?
A I don't think we'll get financing. I assume that if we have a debt service horizon that exceeds our useful horizon, then we won't get -- we won't get financing.
Q Have you ever applied for state revolving loan -- state revolving loan fund from KDHE?
A For this project?
Q No, no, for anything?
A Yes, we actually received SRF funding or state revolving loan funding for our wastewater facility upgrade, rebuild that I mentioned earlier.

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Q When they were talking to you about lending you the money to build the wastewater, did they talk to you about -- or do the documents show that they wanted you to be able to show them that you had a rate structure that would allow them to -- to repay the loan?
A Yes.
Q And -- and did they make any requirements about the idea that you're going to have that rate structure in place as long as that loan is outstanding?
A That actually comes with any loan, but, yes, it comes with the bond too, you have a covenant that you are going to charge adequate rates to cover the debt service, plus operations.
Q There's been some discussion about that Water PACK seems to be very worried about the rates that Hays -- Hays residents are going to have to pay. Is that a worry that they should be -- something they should be concerned about, do you think?
A Unless they're ratepayers, I don't think it's really any of their concern. It's the residents of Hays and ultimately Russell that should be concerned about whether or not they want to pay

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a rate that covers any debt service.
Q And so -- but you've got this -- you've got some money in the bank and there are other ways to finance this outside of just raising rates, aren't there?
A It has never been our intent to finance this with an increase in rates. In fact, one of the reasons why the governing body decided in 2014 is because we had enough money in the bank and the expected project cost and financing options indicated that we could do this without raising rates. We have a significant amount of money in the bank as a result of the half cent sales tax. We have financing options from the state revolving loan fund and from another federal program called WIFIA, W-I-F-I-A. Both of those are 30-year financing vehicles. And so with the money we have in the bank, with the money we have coming in with the half cent sales tax, with the terms that those financing vehicles offer, it is still our intent to bring the project home without affecting rates.
Q So I made the -- in the opening I made the point that this isn't about impact in Hays and it isn't about the impact in Edwards County, it's

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about the statewide impact, so how does that -- I mean, what is the statewide impact, if you know, of approval of this -- of this application versus denial?
A The statewide impact of approval is maintaining the economic health of a $2 billion regional economy. Hays and Russell economies are growing, and we would like to continue growing. And every dollar of sales tax and income tax and commerce that's generated in the Cities of Hays and Russell benefits the State of Kansas. And our economists looked very -- in very much detail on the effects of droughts and the subtraction of those state revenues during droughts. And I think it's important -- it's not measurable because I don't know, but I think it's important --
Q It's not measurable, you can't measure it or it's not measurable?
A What I'm about to say is not measurable.
Q Okay.
A I think it's important to understand the potential value to the State that this water creates by allowing that $2 billion economy to grow in an unfettered manner, without the cloud

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of a lack of available water over our heads. That's something unmeasurable, and our economist did not measure that because he wasn't comfortable measuring something like that. But I think it's real and I think it's a benefit to the State of Kansas.
Q One moment, please. I have some other questions about this, but I -- I didn't write down the exhibit number so I can't pull it up so I think I'm going to come back to that in the morning if that's okay.
So what happens if the -- if -- to the state as a whole, in your view, if the water transfer is disapproved, is not approved?
A I think the State is going to be losing out on potential revenues in the future, I think the State is going to be realizing a loss of revenue during times of drought in Hays and Russell, and I think that could compound in the future if because of a lack of available water we see depopulation or the closure of major industries or even the shrinking in Hays of the university, the -- the Hays Medical Center, some of our retail, or some of the industrial productivity that Russell has.

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Q So as a result of this -- the memo we just saw, there were change applications filed with the Division of Water Resources, correct?
A Correct.
MR. TRASTER: And for the record, those exhibits, those applications are Exhibits 1-5 through 1-36, and the Bates numbers are 432 through 2459. 432 through 2459. Your Honor, we have prepared a spreadsheet that has some -- has a list of all the water right files and the starting page for each of the -- of the change applications and some of the critical documents or the critical pages that may be helpful to you, but I haven't -- it's not marked as an exhibit, and I think what I'm going to do is share it with counsel and ask if they have any objections to producing it to you. I probably should have done that before I asked -- told you about it because if they do object, maybe -- anyway, but -- but in each case the original change application, the amended change application, and the second amended change application have bookmarks

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in the bookmark sections where you can jump to page 1 of each one of those change applications.

BY MR. TRASTER:

Q So -- I see why I'm confused here. We don't need to go into the details, but just generally speaking, what -- you filed the change applications, according to that letter that I showed you earlier, on June 26th, 19 -- 2015, then what happened?

A Then we had a series of meetings with DWR staff to discuss the potential terms of the Master Order, to discuss the sustainability requirement the chief engineer wanted to impose on us. I do recall at the very first meeting that we converge -- convened with DWR staff that there were, I believe, two members from Water PACK that attended that meeting.

And I remember having a conversation with you and the chief engineer at the time, and -- and it was determined that this is a public process and we're not hiding anything, and they actually sat in on the first meeting. But I don't recall anybody ever coming to another meeting.

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So we went through a process to discuss the -- the ten-year rolling average limitation, we discussed the modeling, we discussed all other facets of reasonable-needs limitation for a series of years that led to the issuance of the draft Master Order, I believe, in 2018.

Q Jami, can you pull up that June -- June 25th, 2015 cover letter, if you can. I believe it's Exhibit 1-2, I think. Oh, yeah, it's 3-2, right, right. So scroll down to the signature block and -- actually not the signature block but who got copies of the letter. There you go.

So this letter was sent to a number of people, including Lynn Preheim, the GMD5 attorney, and Orrin Feril, the GMD5 manager; is that correct?

A That's correct.

Q So they knew about this from the beginning?

A That's correct.

Q So -- okay. So we had some meetings, the Master Order was issued on June 27th, 2019, and what did it do?

A The Master Order governs the conversions of the water rights on the R9 Ranch from irrigation to municipal, it determined the points of diversion, it determined the rates of diversion, it determined the place of use, it determined the -- the reasonable needs, that calculation was included, the ten-year rolling average calculation was included. And I know there's a lot of things I'm missing because it was a very comprehensive order.

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Q That's fine, I mean, we can look at the document, tell what it does so --

A It also had a provision that the actual changes from irrigation to municipal use didn't kick in until we signed the contract to drill the first production well.

Q So it's also not effective until -- unless and until the transfer is approved, correct?

A Correct. And we viewed it as a two -- as one process with two parts, knowing that we had to go through the change application process and the transfer process in order to be fully successful.

Q The two parts being change application and then this proceeding?

A Yes.

Q Why was the ranch selected over other sources?

A Early on, I mentioned that the ranch has very sandy soils and that it's a natural storage vessel and that we own the water rights. That's what makes it the most viable, sustainable, long-term source.

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Q What's the water quality like?

A The water quality is variable on the ranch. We have pockets of really good water, and we have pockets of water that are higher in sulfates and total dissolved solids. Nitrates were an issue when we were farming and when there was farming operations in the ranch, but those are lessening.

But overall, the quality of the ranch water is -- is decent, it's good. We can blend a significant portion of the ranch water with existing sources. I know I've seen reports that talk about the blending of up to 5,000 acre-feet of ranch water, but those are old reports so I can't, you know, determine the viability of them.

Russell has a different treatment method than we do, so they can -- they have more advanced treatment than we do, so they could probably take more of the water unblended than we can. But that initial phase of the wellfield

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we can use entirely blended without any sort of advanced treatment.

Q When you say initial phase, what do you mean?

A Right now, the wellfield is conceptual in two or three phases, and that'll be determined during the actual planning process. As we mentioned before, this is a long-term water source. We have 14 well locations identified, municipal well locations, so during design those locations will be identified but not all those wells will be developed during construction because if we're not utilizing the full right right away we don't need the full infrastructure to use the right. So one of the things we will determine during the planning -- or the project design is whether to look at a two-phased approach or a -- or a three-phased approach.

Q I thought you told me that the well locations were all determined?

A The well locations -- let me clarify. The well areas for the locations are determined. So with each of the 14 municipal well sites there is, in the Master Order, there is a geometric shape associated with that well site. And that geometric shape was created because of

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constraints about not moving a water right more than 10 percent closer to a -- to a stream, which the Arkansas River is, and not getting within a half mile of a different source of supply or a different well. And so there were geometric shapes associated. So one of the things that's going to happen during design is we will do test drilling within those geometric shapes to find the best point of diversion, and that's where the municipal well will be put, and that will then become the point of diversion.

Q So you said something about half mile from other wells, Jami, can you pull up 1-1? So what -- what is this -- let's skip -- let's go to the second page, it may be a little easier to -- okay. Can you zoom in?

Okay. So in terms of well locations, can you describe where those 14 wells are or how they're placed?

A In this visual, the -- the municipal -- the future municipal wells are letters, the A, B, C, D, and so on. The blue dots represent the irrigation points of diversion that we -- we previously had on the property, and those have all been plugged and -- and -- and

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infrastructure removed. So those points of diversion were com -- combined into different municipal wells, and -- and in doing so there were certain things we had to avoid and certain requirements we had to adhere to, and so that's why when you look at the overall footprint of the ranch, it contracted for more the points of diversion were at versus where it was when it was an irrigated property.

Q So these sort of semicircles that are blocked out on the south --

A I can see them. They're neighboring wells.

Q Okay. They're --

A They're -- they're radiuses from neighboring wells. If you -- if you consider the point of diversion from a neighboring well and you shade a circle with the radius, that's what that represents is a part of that.

Q So the regulations don't let you -- you can't move more than a quarter of a mile closer to an existing well for fear of direct impairment, correct?

A That's correct.

Q What's the radius on these circles?

A I believe we went with a half mile.

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Q Why?

A Because we wanted to be respectful of our neighbors' water rights.

Q There has been some discussion with -- back to quality. I suppose that some day it might be needed -- you say you can blend the first part of it, but if you have to treat the water on the ranch with an RO, reverse osmosis treatment plant, that -- that produces a waste stream, doesn't it?

A It does.

Q So would you build an RO plant on the -- in Edwards County?

A We would not. And it's -- it's -- RO technology is becoming cheaper, but the advanced treatment required for this, it's not certain that it would be RO, it could be some other kind of advanced treatment. We're not dealing with salt on the ranch, which you typically use reverse osmosis for. We're dealing with total dissolved solids and -- and sulfides and -- or sulfates, one of the two, I'm not a chemist. So there are other treatments available.

Russell has an EDR facility, electrodialysis reversal, I believe, is what

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that stands for. But, yes, that does create -- both create a waste stream and you would have to dispose of that. And we wouldn't want to create finished water on the ranch and then have to dump it into our raw water collection system where it gets contaminated and then treated again, that wouldn't make financial sense.

Q Is there any scenario that you can think of that you would end up doing some sort of a treatment other -- okay, you're going to chlorinate the water on the ranch, but -- but is there any scenario under which the City of Hays or the City of Russell would decide they're going to build some sort of a water treatment plant that's going to generate a significant waste stream for disposal in Edwards County?

A Nothing that I could see or that I could foresee ever recommending. Right now, the place of use is Hays, Russell, and the R9. And the only reason it's the R9 is because we need to utilize some of that water for the process of actually producing water. Unless we were selling finished water on the property or to somewhere else where we'd have to go through a process, it does not make sense to do that. So it's very

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expensive to pump -- pump water and treat water, so you only want to do it once, you don't want to have to do it twice.

Q So if -- assume that you're going to build -- assume that you're going to build some sort of a treatment plant, wouldn't you think about considering treat -- the treatment of some of the water that you've already got? The existing sources are good but not perfect --

A Right, our existing sources have issues, and -- and I want to add one more thing to the -- to the possibility or the speculation that you could treat on site and move forward. Advanced treatment such as RO or something like that does create a waste stream. The worse the water is, the larger the waste stream. I mentioned the Dakota wellfield, you know, we could see losses in excess of 40 percent and getting higher depending on how -- how much bad water you take out.

Q From the Dakota?

A From the Dakota. That is not the water on the R9. There is not a huge waste stream with that, so you will see yields much higher as a part of your total water that you pump out. So, again,

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there's no compelling reason to ever treat and pump from there.

So back to your question, our existing sources are not great. We have a municipal softening facility because we have very hard water. It's good water but it's very hard. So we have to go through a lime softening process. The Dakota wells are not that great of water, and -- and, again, we, you know, we can blend a little bit but it's really not good water, so if we're investing in some sort of advanced treatment, it makes sense to do it at our existing facility, not somewhere else.

MR. TRASTER: Your Honor, I'm kind of at a good spot to break, but I could keep going.

PRESIDING OFFICER: Well, I guess we are at 5:00 o'clock and seems like that would probably be a good place to end it then as opposed to going on and putting you in a position where you're not at a good spot to break.

MR. TRASTER: Yeah. I mean, I can go on, I'd be happy to, I just -- you said something about a good spot so that's where

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I am.

PRESIDING OFFICER: If you're at a good spot, we'll go ahead and adjourn for the night. And then what time, 9:00 o'clock in the morning okay for everybody?

MR. TRASTER: Sounds good.

MR. LEE: It is for us, Your Honor.

PRESIDING OFFICER: All right. We'll reconvene at 9:00 a.m. and pick up the remainder of your questions of Mr. Dougherty at that point.

MR. TRASTER: Thank you so much.

PRESIDING OFFICER: All right. Thank you, everybody, we're adjourned for the day.

(Whereupon, the proceedings were adjourned at 5:03 p.m.)

C E R T I F I C A T E

STATE OF KANSAS)
) ss:
SEDGWICK COUNTY)

I, Nancy L. Rambo, a Certified Shorthand Reporter, within and for the State of Kansas, do hereby certify that the foregoing is a true and correct transcript of the proceedings had at the time and place hereinbefore set forth.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in the action.

WITNESS my hand and official seal at Wichita, Sedgwick County, Kansas, this 1st day of August, 2023.

NANCY L. RAMBO, R.P.R., C.S.R.
Registered Professional Reporter
Certified Shorthand Reporter

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