

**Before the Chief Engineer of the Kansas Department of Agriculture,
Division of Water Resources,
the Director of the Kansas Water Office, and
the Secretary of Health and Environment**

**In the matter of the application of the
Cities of Hays and Russell, Kansas for
approval to transfer water from
Edwards County pursuant to the Kansas
Water Transfer Act.**

Pursuant to K.S.A. 82a-1501, *et seq.*

**RESPONSE OF THE CITIES OF HAYS AND RUSSELL, KANSAS,
TO THE JOINT PETITION FOR INTERVENTION
FILED BY WATER PACK AND EDWARDS COUNTY**

COME NOW the Cities of Hays and Russell, Kansas (the “Cities”), by and through their undersigned counsel and deny each of the assertions set out in the Joint Petition for Intervention filed by Water PACK and Edwards County unless specifically admitted below. Further responding, the Cities state:

Introduction

1. Hays and Russell have long been at the forefront of water conservation in Kansas.¹ For decades the Cities have suffered from the lack of a reliable, drought-resistant water supply resulting in the adoption of extreme conservation measures—unheard of outside of the desert southwest—which led to some of the lowest per-capita water use by municipalities in the

¹ David Condos, *This City in Kansas Really Conserves Its Water, but that Still Might Not be Enough to Survive*, Kansas News Service and High Plains Public Radio, Oct. 11, 2022 (https://www.kcur.org/news/2022-10-11/this-city-in-kansas-really-conserves-its-water-but-that-still-might-not-be-enough-to-survive?utm_source=newsletter&utm_medium=email&utm_content=David%20Condos%20has%20this%20story&utm_campaign=Early%20Bird).

State. Both Cities have learned to squeeze every drop from their existing, very fragile, sources during normal times and especially during droughts. Over time, the Cities' residents have become accustomed to conservation as a lifestyle. But these efforts came at great cost—stunting population growth, dissuading corporate investment and strategic partnerships, and creating a general perception that the Cities lack an adequate water supply.

2. The Cities purchased the R9 Ranch, including its appurtenant water rights, in 1995 for the express purpose of solving their water-supply problems.

3. On June 26, 2015, after evaluating more than 25 distinct potential water supplies over the course of decades, the Cities concluded that the R9 Ranch was the only viable, drought-resistant source of water available to them. The Cities submitted change applications requesting DWR's approval to contingently change the R9 Ranch water rights from irrigation to municipal use in Hays and Russell in preparation for this transfer proceeding. On March 27, 2019, the former Chief Engineer issued a Master Order approving the Cities' applications.

4. Application of DWR regulations permitted diversion of up to 6,756.8 acre-feet per year for municipal use.² Underscoring the Cities' commitment to sustainable use of water from the R9 Ranch, the Cities agreed to limit their use to a ten-year rolling average of 4,800 acre-feet, a reduction of almost 2,000 acre-feet per year.³

5. Water PACK opposed the Cities' Change Applications and then the Chief Engineer's Master Order at the agency level, and subsequently challenged the Master Order before the Edwards County District Court pursuant to the Kansas Judicial Review Act. Water

² Master Order, ¶ 224.

³ *Id.* at ¶¶ 225–30.

PACK's efforts to challenge the Change Applications and the Master Order failed before the Chief Engineer, failed before the Secretary of Agriculture, and failed before the District Court. They continue to press their unsuccessful arguments before the Kansas Supreme Court in the change proceeding and now seek to raise their failed arguments again in this proceeding.

6. Likewise, Edwards County is, once again, opposing the Cities' efforts. That opposition started with a 1996 attempt to invoke the Kansas Supreme Court's original jurisdiction to issue Writs of Mandamus and Quo Warranto challenging the constitutionality of the Kansas Water Transfer Act. Kansas Appellate Case No. 96-77903-S. The County's lawsuit was summarily dismissed. *See also*, Ex. 1, Mike Berry, *Edwards County Ready to Fight Hays for Water*, Wichita Eagle, August 31, 1994, at 3D.

7. The Petitioners' longstanding efforts to impede the Cities' water transfer are not unusual. Opposition to proposed transfers is often based on the *incorrect* notion that water "belongs to" the inhabitants of an area where the resource is plentiful. John C. Peck, *Legal Constraints On Diverting Water From Eastern Kansas To Western Kansas*, 30 Kan L. Rev. 159, 171, 1981-1982.

8. As it did in the change proceeding (discussed below), Water PACK, and now Edwards County, focus their "policy" arguments almost exclusively on the laws of other states.⁴ But Kansas follows its own version of the prior appropriation doctrine and in this State, water rights are real property rights that belong to the owners of the authorized place of use—in this instance, the Cities. K.S.A. 82a-701(g) and K.S.A. 82a-708a(a).

⁴ See Paragraph 38 below responding to Joint Petition for Intervention, paragraph 5.

9. Water PACK asserts that it stands for protection of property rights while refusing to recognize the property rights of anyone other than its members. Water PACK ignores the fact that it is asking the Cities to abide by standards that its members would never tolerate. In fact, Water PACK has spent decades opposing any restrictions on the diversion of groundwater for irrigation use in spite of the fact that those diversions have impaired senior surface water rights in the Quivira National Wildlife Refuge.⁵ In that matter, Water PACK’s asserts that “reductions in allocations from current levels . . . should not be a consideration.”⁶

10. In light of Water PACK’s unequivocal “no reductions” approach in other matters, their resistance to the Cities’ Water Transfer appears hypocritical and is at least inconsistent.

11. The assertion that municipal use of water from the R9 Ranch would, in any way, cause direct impairment of any water right owned by any Water PACK member or would cause or contribute to regional impairment lacks credibility and rings hollow in light of the ongoing regional impairment caused by Water PACK members, including impairment of senior surface water rights.⁷ No Water PACK member has agreed, or would agree, to the restrictions they seek to impose on the Cities.

⁵ *Final Report of the Chief Engineer, Prepared pursuant to K.A.R. 5-4-1, Concerning a Claim of Water Right Impairment In the Matter of Water Right File No. 7,571 Owned and operated by U.S. Fish and Wildlife Service, July 15, 2016* (available at https://agriculture.ks.gov/docs/default-source/wms---impairment-reports/final-impairment-report-quivira-20160715.pdf?sfvrsn=ad2ab8c1_4)

⁶ *See, e.g., Ex. 2, Letter from Water PACK to DWR relating to the Quivira Impairment, arguing that “Water PACK does not agree that the upper Rattlesnake basin is a decline area” and that “[r]eductions in allocations from current levels . . . should not be a consideration.”* (available at https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/quivira_comments_20160517.pdf?sfvrsn=cd6dbbc1_12, at 3–4).

⁷ *See* footnotes 4 and 5.

12. According to WIMAS,⁸ 2021 diversions of water in Ellis and Russell Counties totaled 15,191 acre-feet or about 381 gallons⁹ per person per day combined across all types of use (irrigation, residential, commercial, industrial, municipal, etc.).

13. In 2021, Edwards County residents diverted 155,274 acre-feet of water, or 47,685 gallons of water *per person per day* when combined across all types of use.¹⁰

14. Edwards County has less than 10% as many people as Ellis and Russell Counties—about 2,907 residents—yet, due almost entirely to irrigation, consumes in excess of 10 times more water.¹¹ In fact, as shown in Figure 1, irrigation use in Edwards County has increased dramatically since the mid-1980s and remains at or near all-time highs.

⁸ “WIMAS is a web based application that allows users to query, analyze, and map Kansas water right data. Data is retrieved from the Kansas Department of Agriculture’s, Division of Water Resources Water Rights Information System.” Available at: <https://geohydro.kgs.ku.edu/geohydro/wimas/>.

⁹ An acre-foot of water is the volume it would take to cover one acre with a depth of one foot of water—about 325,851.4 gallons. See <https://www.merriam-webster.com/dictionary/acre-foot>. According to the U.S. Census Bureau, Ellis County’s 2020 population was 28,934 (<https://www.census.gov/quickfacts/fact/table/hayscitykansas,elliscountykansas/EDU685220>) and Russell County’s population was 6,691 (<https://www.census.gov/quickfacts/russellcountykansas>) for a total of 35,625 residents ($15,191 * 325,851.4 \div 35,625 \div 365 = 380.68$ gallons per person per day).

¹⁰ WIMAS, <https://geohydro.kgs.ku.edu/geohydro/wimas/> (Filter by County name and click the “Summarize Quantity” button in the top-right corner). Population figure from U.S. Census Bureau (<https://www.census.gov/quickfacts/edwardscountykansas>). ($155,274 * 325,851.4 \div 2,907 \div 365 = 47,68.86$ gallons per person per day).

¹¹ WIMAS, <https://geohydro.kgs.ku.edu/geohydro/wimas/> (Filter by County name, click the “Summarize Quantity” button in the top-right corner, and then click “Graph by Use Made of Water”).

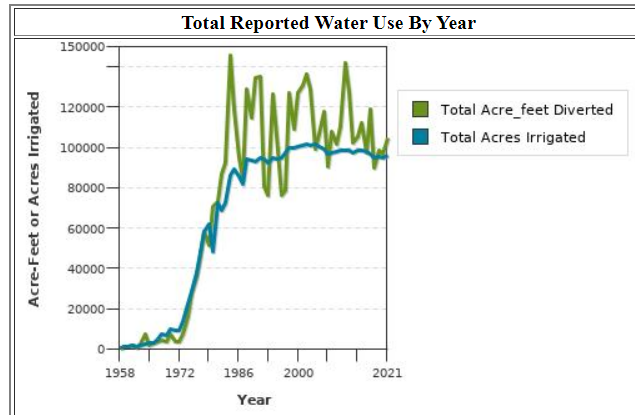


Figure 1 – Edwards County Irrigation Water Use per WIMAS

15. As alluded to in paragraph 7 of the Joint Petition for Intervention, Water PACK actively participated in the change proceeding and challenged the Chief Engineer’s Master Order before the agency and in its subsequent Petition for Judicial Review. In that change proceeding, Water PACK pressed numerous arguments and introduced substantial evidence asserting the same unfounded arguments asserted in the Joint Petition, including:

- a. that the water transfer will result in impairment;¹²
- b. that the Cities’ groundwater model report was inaccurate and misconfigured;¹³ and
- c. that the Chief Engineer and the Cities failed to account for the consumptive use by native grasses.¹⁴

16. The Chief Engineer considered and rejected these and other Water PACK arguments in the Master Order. Thereafter, Edwards County District Court Judge Gattermann made a careful evaluation of those arguments and the Chief Engineer’s exercise of his duty to

¹² Compare Joint Pet. ¶¶ 9 and 10.e with Ex. 3, Water PACK’s Memorandum in Support of Pet. for Judicial Review at 22, 24, 26 (claiming that the proposed changes were “likely to result in impairment of other water rights”), and with Ex. 4, Water PACK’s Reply Br. at 3–4, 12–14.

¹³ Compare Joint Pet. ¶ 9 with Ex. 3, at 9–10, 36–38, and with Ex. 4, at 20–23.

¹⁴ Compare Joint Pet. ¶ 9 with Ex. 3, at 26–35 (attached as Exhibit A) and with Ex. 4, at 14–19.

fully consider Water PACK's arguments. Judge Gattermann rejected each of Water PACK's arguments.¹⁵

17. Water PACK is attempting to litigate the same issues that it raised before the Chief Engineer, the Secretary of Agriculture, and the District Court and is continuing to assert in the Supreme Court. Water PACK was given a full and fair opportunity to litigate each of its concerns in the change application proceeding. The Chief Engineer gave careful consideration to each of Water PACK's concerns and supported his decision in a well-reasoned 53-page Master Order. That Order was carefully reviewed by District Court Judge, Bruce Gattermann, who again gave Water PACK's concerns careful consideration and supported his decision in another well-reasoned decision—82-pages in length.

18. Kansas law and fundamental fairness precludes imposing the burden of relitigating issues that have already been resolved in a parallel proceeding on the Presiding Officer, the Panel, the other Parties, and especially the Cities and DWR. Relitigation of the same issues violates long-standing public policies that preclude redundant litigation. Whether characterized as res judicata, collateral estoppel, law of the case, or in some other way, Water PACK is not entitled to a redetermination of its failed arguments in this transfer proceeding.

General responses to the Joint Petition for Intervention

19. Water PACK and Edwards County served their Joint Petition for Intervention by electronic mail on September 27, 2022.

¹⁵ Judge Gattermann made minor procedural changes to the process to increase the TYRA Limitation if the Cities ever request an increase.

20. The first meeting of the Water Transfer Hearing Panel was held on September 28, 2022.

21. At that meeting, the Panel elected to permit the Presiding Officer to decide whether to grant or deny Petitions for Intervention.

22. The Water Transfer Act, (“WTA”) K.S.A. 82a-1501, *et seq.*, states that intervention must be in accordance with the Kansas Administrative Procedure Act (“KAPA”), K.S.A. 77-501, *et seq.*, except all Petitions for Intervention must be submitted at least 60 days before commencement of the formal hearing. K.S.A. 82a-1506(c).

23. The KAPA intervention provision states that the Presiding Officer must grant a petition for intervention only when both of the following requirements are met:

a. The petition is submitted in writing and states *facts* demonstrating that the petitioner’s legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law, and

b. the Presiding Officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

K.S.A. 77-521(a)(2) and (3) (emphasis added).

24. Water PACK and Edwards County state that they are entitled to intervene pursuant to K.S.A. 77-521, the KAPA intervention provision, and K.S.A. 60-224(a), the intervention provision in the Code of Civil Procedure. Petition ¶ 12.

25. Neither Water PACK nor Edwards County asserts “an unconditional right to intervene by a statute.” K.S.A. 60-224(a)(1). Thus, in the district court, to intervene they would have to satisfy the requirements of K.S.A. 60-224(a)(2). However, as stated above, the WTA specifically states that intervention shall be in accordance with KAPA, which, as discussed below,

does not permit notice pleading. K.S.A. 82a-1503(c). Because Petitioners do not meet the requirements of K.S.A. 77-521(a)(2), their Joint Petition to Intervene must be denied.

26. To be entitled to intervene under KAPA, Edwards County must state “facts” that demonstrate that it has legally protected interests that may be substantially affected by the transfer. K.S.A. 77-521(a)(2). Similarly, Water PACK must state “facts” that demonstrate that its members have legally protected interests that may be substantially affected by the transfer.

27. KAPA “creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes.” K.S.A. 77-502(b). This language mirrors the KJRA provision, K.S.A. 77-603(b).

28. A KJRA petition must assert “facts to demonstrate that the petitioner is entitled to obtain judicial review.” K.S.A. 77-614(b)(5). In *Bruch v. Kansas Dept. of Revenue*, 282 Kan. 764, 772, 148 P.3d 538 (2006), *superseded by statute*, the Court held that K.S.A. 77-614(b) imposes specific pleading requirements in a KJRA Petition for Judicial Review that are jurisdictional and strict compliance is required. Failure to comply precludes a litigant’s right of appeal.

29. The 2009 Legislature added a provision to the KJRA stating that the failure to include some of the required information in the initial petition does not deprive the reviewing court of jurisdiction and leave to supplement the petition should be freely given. K.S.A. 77-614(c).

30. Like the KJRA’s pleading requirements, KAPA’s intervention provision requires that Petitions for Intervention provide “*facts* demonstrating that the petitioner’s legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the

proceeding.” K.S.A. 77-521(a)(2) (emphasis added). However, KAPA does not include the KJRA savings clause added in 2009.

31. Thus, it is not enough for the Petitioners to raise unsubstantiated or speculative concerns, such as, *e.g.*, apprehension based on a “not in my backyard” mindset.

32. Instead, Petitioners must come forward with concrete facts showing that Edwards County itself and Water PACK members have the requisite legally protected interests in the outcome of the transfer proceeding.

33. Moreover, the WTA states that “[a]ny person shall be permitted to appear and testify at any hearing under this act upon the terms and conditions determined by the presiding officer.” K.S.A. 82a-1503(c). Thus, even though Water PACK and Edwards County are not entitled to intervene and participate in the transfer proceeding as parties, they will still have the right to be heard.

The Cities’ response to Water PACK’s and Edwards County’s assertions.

34. The Cities admit ¶ 1 of the Joint Petition.

35. The Cities admit ¶ 2 of the Joint Petition.

36. The Cities admit ¶ 3 of the Joint Petition. Further responding, Edwards County asserts that it is body corporate and politic with a right to intervene to protect its own interests. It does not assert that it is intervening to protect the interests of others.

37. Responding to ¶ 4 of the Joint Petition, the Cities admit that Water PACK is a trade association with a principal mailing address at P.O. Box 1867, Great Bend, Kansas 67530.

Further responding, Water PACK asserts that it is a trade association whose members hold water rights, but Water PACK does not assert that it, as an entity, has any legally protected interests.

Further responding, the Cities deny that Water PACK members hold water rights “surrounding” the R9 Ranch. The Cities admit that there are Water PACK members who own land in the vicinity of the R9 Ranch. The Cities specifically deny that any Water PACK members have any factual basis for the assertion that they will be harmed, or even impacted, by the transfer.

38. The Cities deny the assertions in ¶ 5 of the Joint Petition. Petitioners’ opposition to the Cities’ lawful use of their vested property rights is not based on existing Kansas law. Petitioners’ opposition to the transfer is based on Nevada and Colorado law that is in direct conflict with DWR rules and regulations that have the force and effect of law. This is not the proper forum to challenge those regulations. There is no legal basis for the application of the law of other states which, if applied here, would result in harmful statewide impacts for the pretended benefit of a few members.

Further answering, and for the reasons set out below, the Cities deny that Water PACK members have any legal rights, duties, privileges, immunities, or other legal interests that will or can be substantially affected by this proceeding.

Further answering, Water PACK is precluded from relitigating the issues it has already pressed—and lost—in its challenge of the Chief Engineer’s Master Order contingently approving applications to change the R9 Ranch water rights , as set forth in more detail in paragraphs 5–6, and 15-18 above, and 40-42 and 45 below.

39. Responding to ¶ 6 of the Joint Petition, the Cities admit that in the 1970s, Mr. Wenstrom performed field inspections on the R9 Ranch water rights (not just the irrigation wells) under a contract with DWR. In the mid-1980s, DWR approved each of Mr. Wenstrom's reports. However, Water PACK has failed to state facts that show how Mr. Wenstrom's field inspection reports, that were approved and relied on by DWR, establish that he or any other Water PACK member's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the transfer proceeding.

Further responding, the Cities do not have information about Water PACK's membership; however, based on their current information and belief, the Cities admit that many Water PACK members operate farms in central Kansas. The Cities deny the remaining assertions in ¶ 6 of the Joint Petition because Water PACK has failed to state facts that identify the "other Water PACK members" referred to, the locations of the land farmed by those other members, whether such locations are irrigated cropland or dryland, what kind of crops, and the nature of the soil on the land farmed by the other members. Moreover, Water PACK asserts no facts to establish that these unnamed "other Water PACK members" have land, water rights, or any legal rights, duties, privileges, immunities, or other legal interests that may be substantially affected by this proceeding as is required by K.S.A. 77-521(a)(2).

40. Responding to ¶ 7 of the Joint Petition, the Cities are without information regarding any testimony that Water PACK representatives provided to the Kansas Legislature regarding the WTA and therefore deny that the assertions in paragraph 7 have any relevance to this proceeding.

The Cities further deny the implication that Water PACK alone financed the development of the GMD5 hydrological model prepared by Balleau Groundwater, Inc. On information and belief, the Cities assert that the majority of the funding was provided by GMD5.

Further responding, the Cities deny Water PACK's inaccurate and misleading assertions that the Cities' experts "modified" the Balleau Groundwater, Inc. model to support either the applications to change the R9 Ranch water rights from irrigation to municipal use or the transfer application. Water PACK is precluded from relitigating matters that were or could have been addressed in the Cities' change proceeding. Those assertions were reviewed by the Chief Engineer and Judge Gattermann in Case No. 2019-CV-000005, and are currently on appeal before the Kansas Supreme Court, Appellate Case No. 125469-S.

The Cities are without information regarding Water PACK's sponsorship of research or education on water use and therefore deny the same.

41. Responding to ¶ 8 of the Joint Petition, the Cities deny that Water PACK sought judicial review of the Cities' change applications, submitted March 25–26, 2019, or any other change applications. Instead, Water PACK sought judicial review of orders signed by the Chief Engineer on March 27, 2019.

Further answering, the Cities deny that the change applications submitted on March 25–26, 2019, were the only complete applications submitted to DWR. Moreover, the Cities assert that whether or not the change applications submitted on March 25–26, 2019, were the only complete applications submitted to DWR is not relevant in this transfer proceeding..

The Cities admit that Water PACK's appeal of the Edwards County District Court decision affirming the Chief Engineer's Master Order is pending before the Kansas Supreme Court.

Any purported legal rights, duties, privileges, immunities, or other legal interests of each and every Water PACK member that are connected in any way to this transfer proceeding were or could have been raised, adjudicated, and resolved against Water PACK in the Edwards County District Court and will be fully and finally resolved by the Kansas Supreme Court. To the extent that they were not raised in that proceeding, they were waived and Water PACK is precluded from attempting to re-litigate those issues in this proceeding. Paragraphs 15-18 are incorporated here by reference.

42. Responding to ¶ 9 of the Joint Petition, the Cities deny that the quantity of water the Cities seek to transfer from the R9 Ranch to the Cities will impair existing water rights for any reason. As stated in ¶ 14, above, Water PACK raised and fully litigated its allegations that the water transfer will result in impairment, that the Cities' groundwater model report was inaccurate and misconfigured, and that the Chief Engineer and the Cities failed to account for the consumptive use by native grasses. The District Court ruled against Water PACK on those assertions and relitigation of those issues in this proceeding is not permitted. Paragraphs 15-18 are incorporated here by reference.

Further answering, *White Pine County v. Wilson*, Seventh Judicial District Court of

Nevada, Case No. CV-1204049 (March 9, 2020) applies Nevada law,¹⁶ which is inapplicable here. Likewise, *American Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994) applies Colorado law and has no relevance to this proceed. Finally, there is nothing in cited pages of *Kansas v. Colorado*, 514 U.S. 673, 684-85 (1995) that supports Water PACK’s speculative claims.

Further answering, Petitioners’ opposition to the transfer is based on Nevada and Colorado law that is in direct conflict with DWR rules and regulations that have the force and effect of law. This is not the proper forum to challenge those regulations.

43. Responding to ¶ 10 of the Joint Petition, the Cities deny that any of the issues raised in ¶¶ 10.a–e establish the facts required to permit intervention by Water PACK or Edwards County. Further responding, the Cities state the following in response to paragraphs 10.a–e:

a. Water appropriation rights with a priority date on or before April 12, 1984, are not subject to minimum desirable streamflow requirements. K.S.A. 82a-70b(b). The most junior water right on the R9 Ranch, File 30,084, has a July 1, 1977 priority date. Thus, Water PACK’s assertions in paragraph 10.a. are irrelevant and contrary to the plain language of Kansas law. Flow in the Arkansas River has no effect on flow in the Walnut Creek Intensive Groundwater Use Control Area and none of the Cities’ proposed municipal wells will be in the Rattlesnake Creek Basin.

b. Water PACK and Edwards County have not, and cannot, identify any facts that show that there will be “deleterious impacts upon the economy and dependent government services in the County.” The R9 water rights have not been used for

¹⁶ Nevada law is at odds with K.S.A. 82a-711a stating in part that “nothing herein shall be construed to prevent the granting of permits to applicants later in time on the ground that the diversions under such proposed later appropriations may cause the water level to be raised or lowered at the point of diversion of a prior appropriator, so long as the rights of holders of existing water rights can be satisfied under such express conditions.” The cited case states at pp. 8-9 that it cannot be clearer that Nevada law prohibits depletion, citing NRS 533.370, *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 524, 245 P.3d 1145, 1147 (2010), *rehearing denied*, and *State Engineer v. Morris*, 107 Nev. 699, 819 P.2d 203 (1991).

irrigation in recent years, and the negligible impacts on the local economy, if any, have already occurred. Moreover, Petitioners admit that any supposed impacts are merely “potential” and lack any factual basis. Petitioners’ speculation does not satisfy their statutory obligation to provide “facts” that justify intervention under KAPA.

c. Water PACK and Edwards County have not, and cannot, identify any “facts” that identify any deleterious effects that might result from the facilities necessary to transfer water from the R9 Ranch to the Cities or other municipalities. Moreover, they admit that any supposed impacts are merely “potential.” Their speculation does not satisfy their statutory obligation to provide “facts” to support a KAPA Petition for Intervention, which must therefore be denied.

d. Water PACK and Edwards County have not, and cannot, identify any facts showing that there have been deviations, unjustifiable or otherwise, from the Cities’ conservation plans and practices. Unspecified allegations are not “facts” to support a KAPA Petition for Intervention.

Further responding, Water PACK and Edwards County have not, and cannot, identify any facts showing deviations from GMD5 Rules because the GMD5 Model was, in fact, used to evaluate the Cities’ proposed changes. Moreover, whether the R9 water rights should have been changed from irrigation to municipal use was fully litigated and resolved against Water PACK. That issue is beyond the scope of the transfer proceeding and Water PACK is precluded from relitigating those issues here.

Further responding, the Cities admit that the GMD5 Management Program discusses sustainable yield but deny that the transfer runs afoul of that objective or that the Management Program is binding on the Cities or the Panel. Specifically, GMD5 regulations define “sustainable yield” as “the long-term yield of the source of supply, including hydraulically connected surface water or groundwater, *allowing for the reasonable raising and lowering of the water table.*” K.A.R. 5-25-1(1) (emphasis added). In the change proceeding, the Chief Engineer determined that diversion of up to 6,756.8 acre-feet per year, limited to a ten-year rolling average of 4,800 acre-feet, is “sustainable” and the District Court has affirmed his finding. Water PACK was a party to that proceeding, had a full and fair opportunity to be heard, and is therefore precluded from relitigating any issues it did or could have raised in that proceeding.

Water PACK and Edwards County cite K.A.R. 5-25-4(c), which addresses change applications, but that regulation is not relevant to this proceeding.

Further responding, and assuming for the sake of argument only that Petitioners could establish “facts” to substantiate any of the issues or concerns set out ¶¶ 10.a–e, they fail to

provide “facts” to show how any of the legal rights, duties, privileges, immunities or other legal interests of the County or any Water PACK member may be substantially affected.

44. Responding to ¶ 11 of the Joint Petition, the Cities deny that approving a transfer of the total amount of water requested in the transfer application violates the WTA, the Kansas Groundwater Management Act (K.S.A. 82a-1020, *et seq.*), the Kansas Water Appropriation Act (K.S.A. 82a-1901, *et seq.*), or the Kansas Private Property Protection Act (K.S.A. 77-701, *et seq.*), or any of their enabling rules and regulations. Petitioners fail to state how any of the referenced statutes will be violated. Bare assertions are insufficient to meet the requirements for intervention under K.S.A. 77-521(a)(2). Instead, Water PACK and Edwards County must produce *facts* that establish that the transfer will actually violates these statutes.

Further responding, and assuming for the sake of argument only, that Petitioners could establish “facts” to substantiate violations of any of the listed statutes, they fail to provide “facts” to show how any of the legal rights, duties, privileges, immunities or other legal interests of the County or any Water PACK member may be substantially affected.

45. Responding to ¶ 12 of the Joint Petition, the Cities deny that Petitioners are entitled to intervene in this proceeding because they have failed to produce facts to establish that they have any legally protected interests that require intervention. Rather, their Petition appears to be Water PACK’s attempt to relitigate issues that it has already had a full and fair opportunity to present, which it lost. Water PACK is not allowed a second bite at the apple. Paragraphs 15-18 are incorporated here by reference..

Edwards County has not identified any water rights, land, or other interests that it asserts will be impacted by the transfer and has failed to meet the statutory mandate to come forward with facts to establish that the transfer will impact its water rights, land, or other interests.

Water PACK has failed to meet the statutory mandate to assert facts to establish that the transfer will impact the water rights, land, or other interests of its members.

Further answering, for the reasons set out in ¶¶ 24-25, the Cities deny that K.S.A. 60-224(a) is applicable to motions to intervene in a water transfer proceeding.

46. Responding to ¶ 13 of the Joint Petition, the Cities deny that the interests of justice favor allowing intervention and further deny that Water PACK has any interest in the orderly and prompt conduct of the proceeding.

Further answering, the Presiding Officer is authorized to impose conditions upon an intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time, including:

- a. Limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;
- b. limiting the intervener's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
- c. requiring two or more interveners to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.

K.S.A. 77-521(c)(1)–(3). If the Presiding Officer decides to permit intervention by Water PACK or Edwards County, the Cities respectfully request that their participation be limited to issues that were not raised and resolved in the change application proceeding.

Conclusion

The Joint Petition for Intervention filed by Water PACK and Edwards County should be denied because it is based on speculation and non-specific assertions that wholly fail to meet the statutory requirement to assert facts that establish that Edwards County and any Water PACK members have legal rights, duties, privileges, immunities, or other legal interests that may be substantially affected by the proceeding. To the extent that there were any legal rights, duties, privileges, immunities, or other legal interests that might have been affected by this transfer proceeding, they were resolved against Water PACK and cannot be relitigated in this proceeding. And Water PACK and Edwards County will not be prejudiced by denying their Joint Petition for Intervention as they will still have the right to “appear and testify” at the hearing pursuant to K.S.A. 82a-1503(c).

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Response of the Cities of Hays and Russell, Kansas was served this 27th day of October, 2022, by electronic mail to the following and will be filed with the Office of Administrative Hearings when e-filing becomes available:

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