

**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 PURSUANT TO THE KANSAS
WATER TRANSFER ACT

OAH Case No. 23AG0003 AG

**MOTION BY WATER PACK AND EDWARDS COUNTY, KANSAS FOR
LEAVE TO FILE FIRST AMENDED JOINT PETITION FOR INTERVENTION**

Water PACK and Edwards County, Kansas (Movants) hereby move this Court for leave to file the attached First Amended Joint Petition for Intervention. For the reasons set forth in the accompanying Memorandum, Movants respectfully request that this Court grant it leave to file the Amended Petition because it will elucidate the issues and will not result in prejudice to other parties.

Respectfully submitted.

LEE SCHWALB LLC

By/s/Charles D. Lee
Charles D. Lee, Esq., KS Bar 10277
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Myndee Lee, Esq. KS Bar No. 20365
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*Attorneys for Water PACK and Edwards
County, Kansas*

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2022, the foregoing was electronically served to all counsel of record by email as follows:

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ATTORNEYS FOR BIG BEND GROUNDWATER
MANAGEMENT DISTRICT NO. 5

KANSAS DEPARTMENT OF AGRICULTURE
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1320 Research Park Drive
Manhattan, KS 66502

ATTORNEY FOR THE KANSAS DEPARTMENT OF
AGRICULTURE

/s/ Charles D. Lee_____

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS**

THE APPLICATION OF THE CITIES OF
HAYS, KANSAS AND RUSSELL, KANSAS
FOR APPROVAL TO TRANSFER WATER
FROM EDWARDS COUNTY PURSUANT
TO THE KANSAS WATER TRANSFER
ACT

OAH Case No. 23AG0003 AG

Pursuant to K.S.A. 77-501, 82a-1501, 82a-1901, *et seq.*

FIRST AMENDED JOINT PETITION FOR INTERVENTION

Edwards County, Kansas (the **County**) and the Water Protection Association of Central Kansas (**Water PACK**), acting through their undersigned counsel, hereby petition the Presiding Officer to approve their intervention in this case pursuant to K.S.A. 77-521, K.S.A. 82a-1503, and Section 5 of the Standing Guidelines for Presiding Officers issued by the Director of the Office of Administrative Hearings (**OAH**), the latter to the extent applicable to this case. In support of this Petition, the County and Water PACK state the following:

1. At this stage of the proceeding, the Presiding Officer must accept the facts alleged in this Petition as true, along with any inferences that can be reasonably drawn therefrom. *Cf., Cochran v. State, Dep't of Agr., Div. of Water Res.*, 291 Kan. 898, 903, 249 P.3d 434, 440 (2011) (“The district court's ruling was made before commencement of discovery; therefore, this court should ‘accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom.’”).
2. The County is a body corporate and politic organized under K.S.A. 19-101 et.seq. The County’s office is located at 312 Massachusetts Ave # 1, Kinsley, KS 67547.
3. The County relies upon tax revenue to support local services, including the Edwards County

Hospital. *See* Edwards County, Kansas Financial Statement with Independent Auditor's Report Year Ended Dec. 31, 2021, p. 14-15, *available at* <https://admin.ks.gov/browse/files/f75832f006d64d05be6ba2a97dbf611b/download>.

4. David Getches, a departed expert on water law, noted the following:

The impacts of water exports are more palpable when the water being transferred is already being used in the area of origin. The seller of the water rights—such as a farmer selling irrigation rights—presumably will be paid the fair market value of the rights. Although the seller receiving compensation will not suffer hardship, third parties may suffer indirect but significant economic impacts. As the farming economy declines, so will the businesses that depend on selling tractors, seeds, and fertilizer and the banks that lend money. **All the businesses that depend on these businesses are, in turn, affected. With less business activity, local governments will collect less tax revenue, causing a decline in the ability of local governments and school districts to provide services to citizens. As community life declines the area will become less attractive to new businesses resulting in a downward spiral of economic effects.**

David Getches, *Interbasin Water Transfers in the Western United States: Issues and Lessons*, at 237 in WATER CONSERVATION, REUSE, AND RECYCLING (2005) (emphasis supplied).

5. The R9 Ranch sits south of Kinsley, along the Arkansas River in Big Bend Groundwater Management District No. 5 (**GMD5**), within the boundaries of the County.
6. The legal rights, duties, privileges, immunities, or other legal interests of the County and its residents are expected to be substantially affected by this proceeding.
7. Water PACK is a trade association whose members hold water rights surrounding the R9 Ranch. The principal mailing address for Water PACK is P.O. Box 1867, Great Bend, Kansas 67530.
8. Water PACK seeks to conserve and protect water as a crucial engine for the Kansas economy, balancing the public interest with private property rights. The legal rights, duties, privileges, immunities, or other legal interests of Water PACK and its members are expected to be

substantially affected by this proceeding.¹

9. Water PACK sought judicial review of the March 27, 2019 contingent approvals of the R9 Ranch change applications submitted by the Cities of Hays and Russell (the **Cities**) on March 25-26, 2019, as well as the corresponding actions of the prior Chief Engineer leading up to those contingent approvals in the form of the March 27, 2019 Master Order.
10. An appeal from the decision of the District Court in connection with judicial review of the Master Order remains pending before the Kansas Supreme Court as of the date of this First Amended Petition (the **Appeal**) under Appellate Case No. 125469-S.
11. Water PACK representatives testified before the Kansas Legislature to support enactment of the Water Transfer Act (**WTA**). Water PACK financed the development of the GMD5 hydrological model (the **GMD5 Model**) modified by the Cities' experts in support of the proposed water transfer (as modified, the **Hays Model**). Water PACK sponsors research and education on water use in Kansas.²
12. Richard Wenstrom P.E., performed initial field inspections on the irrigation wells drilled at the R9 Ranch. Other Water PACK members have decades of experience farming in the soils typical of the area. Richard and Jane Wenstrom hold irrigation rights surrounding the R9 Ranch, are Water PACK members, and participated in the change application proceedings that led to the Appeal.³ Richard Wenstrom is also a director and an officer of Water PACK.
13. Kent, Leroy, Pam, and Steve Wetzels hold irrigation rights surrounding the R9 Ranch. The Wetzels

¹ See related materials attached at [Schedule 8](#).

² See, e.g., Kansas Water Office, WaterPACK & ILS Farm (last visited Nov. 16, 2022), available at <https://kwo.ks.gov/projects/waterpack-and-ils-farm>; and Nathan P. Hendricks, et al., *The Value of Water in GMD5*, at 1 (Dec. 20, 2018) ("This research was supported by funding from Water PACK[.]", available at [2018-12-23 WaterPACK EconStudy.pdf \(gmd5.org\)](#)).

³ See excerpts from Record on Appeal attached as [Schedule 12](#).

are Water PACK members who participated in the change application proceedings that led to the Appeal.⁴ The Cities specifically identified the Wetzels as owning water rights near the R9 Ranch in their change applications.⁵

14. Public records, expert testimony, and a correctly configured GMD5 Model show that the quantity of water the Cities wish to move from the R9 Ranch will directly and indirectly impair water diverted from within the County by Water PACK's members, in part because the conversion of the R9 Ranch to native grasses will reduce aquifer recharge, accelerate depletion of the Arkansas River, and increase net consumptive use when compared with the prior use. K.S.A. 82a-1502(b) (generally proscribing approval, absent other enumerated conditions, of water transfer applications that would have the effect of impairing water reservation rights, vested rights, appropriation rights or prior applications for permits to appropriate water.); *see also White Pine County v. Wilson*, Seventh Judicial District Court of Nevada, Case No. CV-1204049 (March 9, 2020); *American Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994); *cf. Kansas v. Colorado*, 514 U.S. 673, 684-85 (1995).

15. The following significant echoed by the WTA militate against approval of the Cities' application as presented and provide a cogent rationale for granting this Petition:

- a. The importance of maintaining minimum desirable streamflow requirements within GMD5, the Walnut Creek Intensive Groundwater Use Control Area, and water supplies to the Rattlesnake Creek Basin;
- b. The potentially deleterious impacts upon the economy and dependent government services in the County, which uses property taxes to support local services, including but not limited to

⁴ See excerpts from Record on Appeal attached as [Schedule 13](#).

⁵ *Id.*

- the Edwards County Medical Center in Kinsley;
- c. The potentially deleterious effects resulting from the facilities necessary to transfer water from the R9 Ranch to the Cities, as well as other municipalities the Cities plan to the water supply;
 - d. Unjustifiable deviations from conservation plans and practices developed and maintained by the Kansas water office pursuant to K.S.A. 74-2608; and
 - e. Unjustifiable deviations from GMD5 Rules and the 2018 GMD5 Management Program, as the former requires the use of the GMD5 Model to evaluate changes, while the latter incorporates sustainable yield requirements that would be violated by the Cities' application as presented. GMD5 Management Plan at 13, 16; see also K.A.R. 5-25-4(c), K.S.A. 82a-1502(c)(1)-(9).
16. Approving a transfer for the total amount of water requested under the Application would violate 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.*), and the Kansas Private Property Protection Act (K.S.A. 77-701, *et seq.*), together with their enabling rules and regulations, as well as the duties of the Chief Engineer. K.S.A. 82a-706 (“The chief engineer shall enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation.”) (emphasis supplied).
17. Both Water PACK and the County are entitled to intervene in this proceeding both as a matter of right and as a matter of discretion. *Compare* K.S.A. 77-521(a) (“The presiding officer shall grant a petition...”) *with* K.S.A. 77-521(b) (“The presiding officer may grant a petition...”) (emphasis supplied); *see also* 2010 Revised Model State Administrative Procedure Act Comment, Section 409 cmt. (“Subsections (a) (1),(2) are adapted from Rule 24(a), intervention of right in the Federal Rules of Civil Procedure. Under subsection (a) a petition for intervention must be timely. Under

ordinary circumstances a timely petition would be filed far enough in advance of the contested case hearing so that the intervener would be able to prepare for that hearing, and the existing parties would have time to respond to the intervener's petition. Subsection (b) is a revised version of 1981 MSAPA Section 4-209(b). Subsection (b) is also based upon Rule 24(b), permissive intervention in the Federal Rules of Civil Procedure.”).

18. The interests of the County or Water PACK in this matter are not currently represented by the existing parties.
19. For the reasons enumerated above, the undersigned are entitled to intervene in this proceeding to represent their interests, whose interests include water rights and lands impacted by the Application, as well as the interests of Water PACK and its members. K.S.A. 77-521, 60-224(a).
20. As shown, the interests of justice favor allowing intervention and the orderly and prompt conduct of the proceedings will not be impaired.

LEE SCHWALB LLC

/s/ Micah Schwalb

Micah Schwalb, No. 26501

Charles D. Lee, No.10277

Myndee M. Lee, No. 20365

7381 W. 133rd St., Second Floor

Overland Park, KS 66213

EMAIL mschwalb@leelawlimited.com

VOICE 720.773.0970

Attorneys for Water PACK and Edwards County

Schedule 8

Water PACK Materials

176-024-8

Articles of Incorporation

D. _____

We, the undersigned, incorporators, hereby associate ourselves together to form and establish a corporation NOT for profit under the laws of the State of Kansas.

FIRST: The Name of the Corporation is Water Protection Assn. of Central Kansas 0 2 8

SECOND: The location of its registered office in Kansas is Box 338 (Number) 224 11-1-90
234 W Main (Street) Macksville (City) Stafford (County) 67557 (Zip Code)

and the resident agent in charge thereof at such address is Donald K. Peterson
10 TRANS. TOTAL 1 75.00

THIRD: This Corporation is organized NOT for profit and the nature of its business or purposes to be conducted or promoted is: Any and all business connected with the use and conservation of water in the State of Kansas.

FOURTH: This corporation shall not have authority to issue capital stock.

The total number of shares of this corporation is as follows:

_____ shares of _____ stock, class _____ par value of _____ dollars each
_____ shares of _____ stock, class _____ par value of _____ dollars each
_____ shares of _____ stock, class _____ without nominal or par value
_____ shares of _____ stock, class _____ without nominal or par value

Statement of all or any of the designations and the powers, preferences and rights and the qualifications, limitations or restrictions thereof, in respect to any class _____

Statement of Grant of Authority, as may be desired to be given to the Board of Directors, if given _____

FIFTH: The conditions of membership shall be fixed by the by-laws (or) the conditions of membership are: _____

SIXTH: The Name(s) and Mailing Address of each of the INCORPORATOR(S):

Kent Lamb	R.R. Box 69	Macksville, KS 67557
Roger Stotts	Rt. 1, Box 136C	Greensburg, KS 67054
Kent Moore	Rt. 1, Box 30	Iuka, KS 67066
Donald K. Peterson	Box 338	Macksville, KS 67557

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SEVENTH: The name and mailing address of each person, who is to serve as a director until the first annual meeting of the stockholders or until a successor is elected and qualified, is as follows:

Kent Lamb	R.R. Box 69	Macksville, KS 67557
Roger Stotts	Rt. 1, Box 136C	Greensburg, KS 67054
Kent Moore	Rt. 1, Box 30	Iuka, KS 67066
Donald K. Peterson	Box 338	Macksville, KS 67557

EIGHTH: The Term for which this Corporation is to exist is perpetual

In Testimony Whereof, We have hereunto subscribed our names this 29th day of

October, A. D. 19 90

Kent Lamb _____ Donald K. Peterson _____
Roger Stotts _____ _____
Kent Moore _____ _____

STATE OF KANSAS,

COUNTY OF STAFFORD } ss.

Personally appeared before me, a Notary Public in and for Stafford County, Kansas, the above-named Kent Lamb, Roger Stotts, Kent Moore, and Donald K. Peterson

who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal, this 29th day of

October, A. D. 1990

Michael C. Niederee

Notary Public.

My commission expires February 26, 1991



[SEAL]

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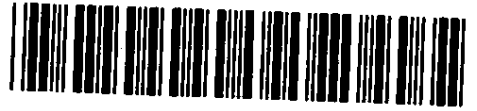
**KANSAS SECRETARY OF STATE
Business Entity Certificate
of Amendment**

Memorial Hall, 1st Floor
120 S.W. 10th Avenue
Topeka, KS 66612-1594

(785) 296-4564
kssos@sos.ks.gov
https://sos.kansas.gov

3258 01
053 059
\$20.00

FILED BY KS SOS
02-19-2020
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FILE#: 1760248



05552235

1. Business entity ID/file number:

Not Federal Employer ID Number (FEIN).

1760248

2. Name of business entity:

Must match name on record with Secretary of State.

Water Protection Assn. of Central Kansas

3a. Indicate the type of document to be amended:

- Kansas For-Profit Articles of Incorporation (fee \$35)
- Kansas Not-for-Profit Articles of Incorporation (fee \$20)
- Kansas Limited Liability Company Articles of Organization (fee \$35)
- Kansas Limited Partnership Certificate (fee \$35)
- Kansas Limited Liability Partnership Statement of Qualification (fee \$35)
- General Partnership Statement of Partnership Authority (fee \$35) (Skip to Question 4.)
- Foreign Entity Application for Registration (fee \$35 for-profit; \$20 not-for-profit)

3b. The document indicated above is amended as follows:

(If additional space is needed please provide an attachment.)

The name of the entity is changed to "Water Protection Association of Central Kansas" and the Articles of Incorporation are amended and restated in the form of the attachment.

4. For general partnerships only — Identify the statement to be amended and indicate the amendment to be made:

5. Effective date:

Upon filing with the
Kansas Secretary
of State

Future effective date:
(Cannot be later than 90 days after
the date this certificate is filed.)

Month

Day

Year

6. Signature(s): Sign in the appropriate section below according to the type of business entity for which the amendment is being filed.

For Kansas corporations, limited liability companies and limited liability partnerships, general partnerships, and all foreign covered entities:
(See below for required signature.)*

I declare under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct.

Signature

/s/ Kent Moore

Name of Signer (Printed or Typed)

Kent Moore, President

***Kansas entities:** Requires the signature of an authorized officer of a corporation, authorized person of a limited liability company or limited liability partnership, or a partner of a general partnership.

***Foreign covered entities:** Requires the signature of an officer, director, authorized person or partner with authority according to the organic documents of the entity in its home state.

For Kansas limited partnerships only:
(See below for required signature(s).)**

I declare under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct.

Signature of General Partner

Name of Signer (Printed or Typed)

Signature of new General Partner (if amendment adds a new general partner)

Name of Signer (Printed or Typed)

****Kansas limited partnerships:** Requires the signature of at least one general partner and by each other general partner who is designated in the certificate of amendment as a new general partner.

**1st AMENDED AND RESTATED
ARTICLES OF INCORPORATION OF
THE WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS**

- 1 NAME.** The name of this corporation is the Water Protection Association of Central Kansas (the **Association or Water PACK**).
- 2 DURATION.** The period of duration of the Association is perpetual.
- 3 PURPOSES.** The Association is organized for the purpose of promoting such common interests of its members as may qualify it as exempt from Federal income tax under Section 501(c)(6) of the Internal Revenue Code of 1986, or the corresponding provision of any subsequent Federal tax laws (together, the **Code**), all in accordance with the provisions of the Code, and within such limits:
 - 3.1** to promote, foster, and encourage the business conditions of its members in relation to their use and conservation of water within the State of Kansas, together with any and all matters relating thereto;
 - 3.2** to attempt to influence legislation germane to the common business interests of the Association's members;
 - 3.3** to initiate, sponsor, and promote research to determine the quality and quantity of water available for water use, the source of surface and ground water, the rate of withdrawal, replenishment, or recharge, source of pollution and all other factors pertaining to the available supply of water for appropriation;
 - 3.4** to sponsor the formulation of a general water policy which will be for the best interests and will promote the welfare of the majority of the members of the Association;
 - 3.5** to take such action as is deemed necessary or advisable to protect the rights and promote the welfare of the members of the Association in all matters which are of mutual interest and benefit to a majority of the members in connection with water use or loss of appropriations;
 - 3.6** to sponsor the study of legislation, tax matters, rules and regulations of any duly-constituted authority which may affect the land, equipment, power, rate of withdrawal, appropriation and quality of water resources of the members of the Association;
 - 3.7** to initiate, sponsor, and promote research to determine the most profitable crops which can be raised on irrigated land;
 - 3.8** to promote the general interest and activities of the members of the Association in the improvement of water use practices for their mutual benefit and welfare and for the development of the most profitable and permanent system of water use;
 - 3.9** to assist its members in obtaining the most satisfactory and economical fuel or electrical power at reasonable rates;
 - 3.10** to obtain and furnish such information and reports to the members of the Association as are deemed helpful or of value to them in connection with water use;

- 3.11 to take such steps as are proper and necessary in order to promote better relations and secure proper advantages from regulatory and other agencies, and by these means to attain wider recognition of the fact that the activities of its members are of primary importance to the domestic economy of the nation and of the State of Kansas;
 - 3.12 to work with allied groups, organizations, and governmental bodies regarding the interests of its members, together with any constituent bodies thereof;
 - 3.13 to take all other appropriate action in furtherance of such purposes; and
 - 3.14 consistent with the above, to exercise all powers available to nonprofit corporations incorporated pursuant to the laws of the State of Kansas.
- 4 STOCK. The Association shall not have authority to issue capital stock.

5 MANAGEMENT.

- 5.1 BYLAWS. Except as otherwise provided by law or these Articles, the internal affairs of the Association shall be regulated and determined as provided in its bylaws, as amended, restated, or amended and restated.
 - 5.2 MEMBERS. The Association shall have classes of members who shall have such rights, powers, and obligations as set forth in the bylaws. The liability of members to the Association for monetary damages or for breach of fiduciary duty shall be limited to the fullest extent permitted by law.
 - 5.3 DIRECTORS. The affairs of the Association shall be managed by a Board of Directors. The number of Directors, not less than three, and the manner of choosing Directors, shall be as set forth in the bylaws from time to time. The liability of Directors to the Association for monetary damages or for breach of fiduciary duty shall be limited to the fullest extent permitted by law.
 - 5.4 PROPERTY. The private property of the Officers and Directors of the Association shall not be subject to payment of corporate debts to any extent whatever.
- 6 RESTRICTIONS. At all times and under all circumstances, and notwithstanding merger, consolidation, reorganization, termination, dissolution, or winding up of the Association, voluntary or involuntary or by the operation of law, or upon amendment of these articles:
- 6.1 The Association has not and shall not have or exercise any power or authority either expressly, by interpretation, or by law, nor shall it directly or indirectly engage in any activity, that would prevent it from qualifying as an entity described in Section 501(c)(6) of the Code.
 - 6.2 No part of the net earnings of the Association has nor shall inure to the benefit of, or be distributable to, any private individual, including but not limited to its directors, officers, employees, independent contractors, or other persons; except that the Association shall be authorized and empowered to pay reasonable compensation for services rendered to the Association and to make payments and distributions to further the purposes in Section 3 above.
 - 6.3 The Association shall not participate or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.

- 6.4 The Association shall not carry on propaganda or otherwise attempt to influence legislation to an extent that would disqualify it under Section 501(c)(6).
- 6.5 Upon dissolution of the Association, all of its assets and property of every nature and description remaining after the payment of all liabilities and obligations of the Association (but not including assets held by the Association upon condition requiring return, transfer, or conveyance, which condition occurs from the dissolution) shall be paid over and transferred to one or more organizations which engage in activities substantially similar to those of the corporation and which are then qualified for exemption from Federal income taxes as organizations described in Sections 501(c)(3) or (c)(6) of the Code.
- 7 AMENDMENTS. These articles may be altered or amended by a vote of two-thirds (2/3) of the members present, voting, and entitled to vote at any annual meeting of the Association or at any special meeting called for such purpose.
- 8 ORIGINAL DATE OF INCORPORATION. The Association was originally incorporated on Nov. 1, 1990.
- 9 MANNER OF ADOPTION. These 1st amended and restated articles of incorporation were proposed by the directors and adopted by the members in accordance with the provisions of K.S.A. § 17-6605.

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Not For Profit Corporation Annual Report



1. Corporation Name: WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS
2. Business Entity ID No.: 1760248
3. Tax Closing Date: December 2021
4. State of Incorporation: KS
5. Official Mailing Address:
PO Box 1867 , Great Bend KS 67530
6. Location of Principal Office:
306-A N. Main Street , St. John KS 67576

Electronic File Stamp Information.

Filed

- Date:08/13/2022
- Time:
09:09:04 AM

7. Officers:

Tim George - Treasurer or equivalent (This officer is also a member of the governing body)
PO Box 1867 Great Bend, KS 67530

Patrick Janssen - President or equivalent (This officer is also a member of the governing body)
PO Box 207 Kinsley, KS 67547

Kasey Gamble - Secretary or equivalent (This officer is also a member of the governing body)
PO Box 1868 Great Bend, KS 67530

Richard Wenstrom - Vice President (This officer is also a member of the governing body)
PO Box 1867 Great Bend , KS 67530

8. Governing Body:

Clayton Wood - PO Box 1867 Great Bend, KS 67530

Kenneth Hammeke - 1016 W. 13th St Larned, KS 67550

Daniel Grizzell - 4111 Sandpiper Ln Great Bend, KS 67530

Richard Wenstrom - 2171 120th Ave Kinsley, KS 67547

Tim George - 1216 M5 Rd Larned, KS 67550

Bronson Smith - 158 NW 10th Ave Great Bend, KS 67530

Kasey Gamble - 16134 30th Ave Greensburg, KS 67054

Jon McClure - 544 SE 10th St Stafford, KS 67578

Brian Dunn - 774 NW 10th Ave St. John, KS 67576

Chad Fisher - 116 E 3rd Ave Saint John, KS 67576

Gary Hornbaker - 1488 NE 70th St Stafford, KS 67578
Patrick Janssen - PO Box 207 Kinsley, KS 67547
Kent Moore - 100498 NW 50th Ave. Iuka, KS 67066

9. Does this corporation/organization have the authority to issue stock? No

10. Total number of members: 220

11. Does this corporation hold more than 50% equity ownership in any other business entity that is on file with the Kansas Secretary of State? No

12. Does this corporation own or lease land in Kansas suitable for use in agriculture? No

"I declare under penalty of perjury pursuant to the laws of the state of Kansas that the foregoing is true and correct."

Executed on August 13, 2022

Signature of Authorized Signer: MB Schwalb

Title/Position of the signer: Attorney in Fact

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Schedule 12

Wenstrom Materials

2171 120th Avenue
Kinsley, Kansas 67547
April 5, 2019

RECEIVED
APR 10 2019
LEGAL SECTION
KS DEPT. OF AGRICULTURE

The Honorable Mike Beam
~~Acting~~ Secretary
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502

Dear Secretary Beam:

RE: Petition for Administrative Review of the Master Order Contingently Approving Change Applications Regarding R9 Water Rights, issued on March 27, 2019 by David W. Barfield, P.E., Chief Engineer, Division of Water Resources

My name is Richard Wenstrom, and I am the owner of an irrigated farm in Edwards County and have farmed in the area for over 40 years now. Part of our farm is adjacent to property owned by the cities of Hays and Russell known as the R9 Ranch (formerly Circle K Ranch). In addition, I am a licensed Professional Engineer in the state of Kansas, and Past President and a current Board member of the Water Protection Association of Central Kansas (Water PACK), a private group of irrigated producers who are organized to support irrigated agriculture.

The basis for my petition is to outline problems that I see with the determination of the consumptive use by the Chief Engineer under K.A.R. 5-5-9 (1994 version) and how it is used to determine the amount of water that can be changed from agricultural use to municipal use.

The Chief Engineer and the consultant for Hays/Russell are quick to point out that they did not do a site specific analysis of net consumptive use as outlined in K.A.R.5-5-9 6(c) because the reasons given in the statute were not met in their view. I would say that this is a precedent setting project involving many water rights that involves removing water from one part of the state with no subsequent return flows to the aquifer of supply, and exporting that water to another part of the state. The public interest is of paramount importance in this project due to the magnitude of the removal and the finality of the consequences of the decisions spelled out in the Master Order, not to mention the effect of this project on the irrigated producers and communities in the vicinity of the Ranch.

For example, the Chief Engineer and his staff failed to check the validity of the cropping records for the R9 Ranch for the year of record back in the mid 80's. If they had gained access to FSA records they would have found an entirely different cropping pattern. A few local producers and citizens contacted the tenants that were in place during the year of record, and these two tenants agreed to go to the FSA-USDA in Edwards County to see what the reported cropping for

that year actually was. The former tenants obtained the cropping data, and graciously agreed to give us access to the data. What we learned is that, instead of the 2,901 acres of alfalfa and 2,247 acres of corn reported by the Chief Engineer, the FSA records show: 2,387 acres alfalfa, 488 acres corn, 176 acres milo, 1,670 acres wheat, 293 acres of circles not farmed or crop destroyed. This also explains why the satellite photos of the R9 Ranch for the year of record generated for Water PACK by Dr. Andy Keller, Keller-Bliesner Engineering, show so many circles that were obviously not corn or alfalfa....some actually look like they were not even farmed, but now we know that was wheat stubble.

The NIR for corn for 50 % chance rainfall for Edwards County is 13 inches for corn, and 20.9 inches for alfalfa, as specified and used by the Chief Engineer. THE NIR for milo and wheat for 50 % chance rainfall for Edwards County is 11 inches and 8.7 inches, respectively. Obviously, if the cropping acres were accurately known, with wheat, milo, and empty circles replacing corn and alfalfa, the consumptive use on the R9 Ranch during the perfection period would have been much less as the NIR and acreage figures are adjusted lower. This would then have caused the amount of water that can be converted from agricultural to municipal would also have been correspondingly lower as well.

Consumptive use is supposed to be a measurement of the water that is actually consumed by the crop being irrigated or watered by precipitation as a fraction of the total water that is applied in either case. As irrigated producers, we have an obligation and a task of minimizing the amount of irrigation water that is not consumed by the crop, as this water is being pumped at cost and any water not consumed is wasted through deep percolation and/or evaporation. We live with this process every day of the growing season. It is no wonder, then, that when we observe a process set in place by the Chief Engineer that ignores what is happening to consumptive use at the actual irrigation site at the R9 Ranch (apparently allowable under K.A.R. 5-5-9 even though this consumptive use may seem unrealistic but does not impair other water users) we are dismayed considerably.

Here's why.....the R9 Ranch has many factors where it is well nigh impossible to optimize beneficial consumptive use on crops raised under irrigation. The best evidence for this is the history of unprofitable crop production at the R9 Ranch (formerly Circle K Ranch) back through its troubled history. As owners discovered this, they sold the ranch over and over again to try to recover their investment through land appreciation rather than through profitable farming. This is not to say that this ranch has not had good farmers.....there have been some excellent famers who have tried to make a profit on this operation. But Mother Nature is extremely cruel to those who try.

First of all, low water holding capacity soils on the ranch.....I personally used the USDA/SCS Soil Manual for Edwards County and offer these observations: 17 % of the R9 Ranch has a Tivoli fine sand soil type. This soil type is so coarse that it is labeled by the Manual as "not applicable to irrigation". How easy would it be to have positive consumptive use on this soil type? 67 % of the Ranch has a Pratt-Tivoli loamy fine sand soil type. The Manual says this soil has "extremely low water holding capacity, rapid permeability, and subject to blowing". What happens to

crops on these soils is that the irrigator keeps pumping and pumping, but most of the water returns to the aquifer through deep percolation without positive consumptive use. As the season progresses, this vicious cycle continues and the result is very poor yields for corn, and reduced cuttings in quantity and quality for alfalfa compared to normal soils that can hold more water. The Chief Engineer, given his decision on consumptive use allowing 6,767.8 Acre-Feet of consumptive use (out of 7,625.7 Acre feet of Ag water rights) has essentially said that 88.6 % of the water pumped on these soils during the perfection period was used consumptively by the crops. As a farmer and irrigation engineer, I cannot agree with this decision.

Further complicating this situation are the shallow wells on the R9 Ranch.....most are less than 100 feet deep, with 40-60 feet of saturated thickness. Under high pumping situations such as heat, wind and low humidity affecting Ranch crops, especially corn and alfalfa, the wells tend to dewater and provide only a portion of designed flow rates. This further complicates the irrigator's ability to provide enough irrigation water to meet evapotranspiration demands. This has always been a huge problem for operators of the R9 Ranch, or its predecessors. Sadly, even if the wells did not dewater, and pump normally, most of the water just returns to the aquifer as deep percolation because of the coarse gravelly soils, as stated above. This is also why local producers such as us are concerned about the amount of water that is allowed to be transferred in this water transfer matter. There will be no more deep percolation to the aquifer as there was under irrigated crops, since Hays/Russell will pump water from the aquifer and transfer 100 % of this water out of our basin and to another part of Kansas. If that quantity is too high, eventually impairments will occur with nearby farms like ours. This will not be good for Hays/Russell either.

Finally, some comments regarding the unique situation this matter presents to anyone who attempts to quantify consumptive use under K.A.R. 5-5-9 to determine the amount of water that can be changed to municipal use from agricultural use. In full disclosure, I discussed the following with Dr. Andy Keller, P.E., President, Keller-Bliesner Engineering. Dr. Keller is widely recognized as one of the foremost experts in Consumptive Use Concepts under Irrigation in the entire world, and a very able hydrologist. Water PACK has been extremely fortunate to be able to access his services as a consultant. He is very familiar with central Kansas, having worked here early in his career, and also has provided consulting service to Water PACK on two other occasions.

The Kansas Water Appropriation Rules and Regulations governing change in use of water from irrigation to other beneficial use are intended to ensure the change does not result in an increase in the net consumptive use from the water source:

"K.A.R. 5-5-9. Criteria for the approval of an application for a change in the use made of water from irrigation to any other type of beneficial use of water. (a) The approval of a change in the use made of water from irrigation to any other type of beneficial use shall not be approved if it will cause the net consumptive use from the local source of water supply to be greater than the net

consumptive use from the same local source of water supply by the original irrigation use..."

When formerly irrigated land is no longer irrigated, in time, as dryland vegetation becomes established, the consumed portion of precipitation falling on the land will become greater than under irrigated conditions. This is what will happen on the R9 Ranch when irrigation ceases. Accordingly, to ensure no net increase in consumptive use from the R9 Ranch post-transfer, the increased consumptive use of precipitation under dryland conditions should be accounted in determining the amount of water that can be transferred.

The Chief Engineer, in his Master Order, appears to not agree the consumed portion of precipitation on the R9 Ranch would increase under dryland conditions and, without substantiation, concludes (paragraph 89) "the diversion of a total of up to 6,756.8 acre-feet of water per calendar year from all of the R9 Water Rights combined, will not cause the net consumptive use from the local source of water supply for the new municipal use to exceed the net consumptive use from the same local source of water supply by the original irrigation use." The net consumptive use of 6,756.8 acre-feet per year found by the Chief Engineer is significantly greater than the 3,790 acre-feet per year calculated by Water PACK's consultant and, at a minimum, should trigger a site-specific net consumptive use analysis by the Chief Engineer per K.A.R. 5-5-9 (c) to ensure no increase in net consumptive use from the R9 Ranch as a result of the change from irrigation to municipal use.

Thank you very much for this opportunity to submit this Petition.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard J. Wenstrom". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Richard J. Wenstrom, P.E.

Schedule 13

Wetzel Materials

PUBLIC COMENTS

1 MR. BARFIELD: All right. So with that,
2 I guess we would like to take any other comments
3 that you have and want us to consider orally today
4 -- and we can have written comments later -- we
5 would like to make sure we capture them. So we
6 would ask -- we have a mic up here and we would
7 ask -- I didn't insist on it for the Q and A
8 because I could -- but we would like to capture
9 them. So if you could just sort of come forward
10 over here and just make your remarks. I might ask
11 a clarifying question or two, but we'll capture
12 them and call it a day. So if we could have you
13 come forward, please.

14 MR. WETZEL: We might ask what brought us
15 to this point? Why --

16 UNIDENTIFIED SPEAKER: I'm sorry, could
17 you state your -- just for the record --

18 MR. WETZEL: I'm Leroy Wetzel. I'm a
19 Water PACK member. I farm an irrigated farm just
20 to the west of R9 Ranch.

21 What has brought us to this point of
22 continuing declines even though the city of Hays
23 has decreased their pumping? And over the years,
24 I have been around a few of those, the water to
25 the west is less abundant, and Andy has -- Dr.



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KDA 000938

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PUBLIC COMENTS

1 of this area, that it is actually and in reality
2 sustainable, and not just sustainable on paper
3 with questionable figures.

4 Don't get me started. I could tell you more,
5 but I'm going to quit.

6 (Applause)

7 MR. BARFIELD: Other comments for us to
8 consider? Again, if you could state your name.

9 MS. WETZEL: My name is Pam Wetzel and
10 I'm on the west side of the river. And my concern
11 is the future generations. We -- we have many
12 generations in our family and we'd like to
13 continue our farm operation. In order to do that,
14 we rely on every drop of water from irrigation or
15 whatever to stay in our aquifer and not be moved.
16 And my biggest concern is how you got water moved
17 to Hays. We will never see a drop of that again
18 in our county once it's moved. And I really feel
19 that it's our livelihood and otherwise it's going
20 to continue to just deteriorate in our area, like
21 it is for the west. So thank you for your time.

22 (Applause)

23 MR. BARFIELD: Thank you. All right,
24 other comments? Come on forward.

25 MR. JANSSEN: I'm a little slow today.



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169

Exhibit L

1. Gregory C. & Lisa J.T. Ebert, P.O. Box 242, Kinsley, KS 67547
2. Kevin R. Schultz & Vera M. Rev Trust, 2048 280th Ave., Haviland, KS 67059
3. Gregory Ebert, P.O. Box 242, Kinsley, KS 67547
4. Monte L. & Douglas D. Hirsh, 103 Capital, Kinsley, KS 67547
5. Monte L. & Douglas D. Hirsh, 103 Capital, Kinsley, KS 67547
6. Tom Hammond, P.O. Box 3278, Viero Beach, FL 32964
7. Jennifer & Amy Mull, Attn: Glenn Mull, Pawnee Rock, KS 67567
8. Leroy A. & Steven D. Wetzel, 2167 20th Ave., Offerle, KS 67563
9. Randy A. & Tammie S. Schmidt, 905 Marsh Kinsley, KS 67547

EXHIBIT
L

**WATER RESOURCES
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JUN 29 2015

KSDEPT OF AGRICULTURE

SCANNED
KDA 001586

**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 PURSUANT TO THE KANSAS
WATER TRANSFER ACT

OAH Case No. 23AG0003 AG

**MEMORANDUM IN SUPPORT OF MOTION BY WATER PACK
AND EDWARDS COUNTY, KANSAS FOR LEAVE TO FILE
FIRST AMENDED JOINT PETITION FOR INTERVENTION**

The Water Protection Association of Central Kansas (Water PACK) and Edwards County, Kansas (County and, together, Movants) hereby respectfully submit this Memorandum in support of their Motion for Leave to File an Amended Joint Petition for Intervention.

A. PROCEDURAL POSTURE

Movants served their original Joint Petition for Intervention on September 27, 2022. The Cities of Hays and Russell, Kansas (Cities) served their response and objection on October 27, 2022. No other response or objection by interested parties has been received.

The Movants received the Prehearing Order and Notice of Prehearing Conference on November 8, 2022. That Order provided notice of a prehearing conference to commence February 15, 2023. To date no discovery has been commenced by any interested party.

B. ARGUMENT

Though arguable that ALJ Spurgin's Prehearing Order renders a motion for leave to amend gratuitous,¹ reference to the K.S.A. 60-215 Code of Civil Procedure analogue would suggest that the better practice is to seek leave of the tribunal.

¹ "Petitions to intervene on behalf of Edwards County and Big Bend Groundwater Management District No. 5 were submitted to the Water Transfer Panel before this matter was referred to OAH and before the Presiding Officer was appointed for this proceeding. The petitions were not submitted to the Presiding Officer in accordance with the Kansas Administrative Procedures Act and therefore, such petitions would need to be re-submitted pursuant to K.S.A. 77-521." *Prehearing Order at FN 6.*

1. NO INTERESTED PARTY WILL SUFFER UNDUE PREJUDICE

An amended petition for intervention will not, under the circumstances extant, cause any interested party to suffer undue prejudice. The Cities implicitly conceded that an amended petition will not delay or impede this proceeding by arguing before the Kansas Supreme Court that the Prehearing Order renders it necessary to file a new petition and that such a petition is not due until March 2023. This from Paragraphs 20 and 21 of their opposition to Water PACK's request for additional time to file their brief in the related appeal pending in the Kansas Supreme Court, Case No. 22-125469-A (copy attached at Tab 1):

20. Thus, even assuming the prehearing conference lasts only one day, Water PACK has at least until March 18, 2023, to file a Petition for Intervention, *see* K.S.A. 82a-1503(b).

21. Water PACK is under no time pressure to re-file its Petition for Intervention in the Water Transfer Proceeding and that is, therefore, not a justifiable basis for extending its deadlines in this case.

2. MOTIONS TO AMEND SHOULD BE LIBERALLY GRANTED

Assuming leave of the tribunal is necessary or desirable, K.S.A. 60-215 is the beacon and judicial interpretations of the statute are instructive. Kansas courts have a liberal policy of allowing amendments to a complaint. "As a general rule, however, amendments to pleadings are favored in law and shall be allowed liberally in the furtherance of justice to the end that every case may be presented on its real facts and determined on its merits. *Thurman v. Cundiff*, 2 Kan. App. 2d 406, 413, 580 P.2d 893, 900 (1978). Viewed through that prism, and given the early stage of this matter, it would be unusual to deny a request to amend.

3. ALLOWANCE OF THE REQUESTED AMENDMENTS WILL ELUCIDATE THE ISSUES TO THE BENEFIT OF THE TRIBUNAL AND THE INTERESTED PARTIES

Important to the threshold question of intervention, granting this motion allows Movants to (i) describe in further detail the expected effects of the contemplated water transfer on Edwards County government and the County's citizens, and (ii) marshal compelling historical and technical evidence in relation to the proposed water transfer.

C. CONCLUSION

Given the distant deadline noted by the Cities for Movants to file a petition to intervene, the Cities' recited expectation that a new petition would necessarily be filed, and the fact that this transfer proceeding is in its nascent stages with no discovery having been conducted, Movants' Motion for Leave to File First Amended Joint Petition for Intervention should be granted.

Respectfully submitted.

LEE SCHWALB LLC

By/s/Charles D. Lee

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2022, the foregoing was electronically served to all counsel of record by email as follows:

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ATTORNEY FOR THE KANSAS DEPARTMENT OF
AGRICULTURE

/s/ Charles D. Lee

TAB 1

IN THE SUPREME COURT OF THE STATE OF KANSAS

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS,)	
)	
Plaintiff/Appellant,)	
)	
v.)	Case No. 22-125469-A
)	
EARL LEWIS, P.E., THE CHIEF ENGINEER OF THE STATE OF KANSAS, DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, IN HIS OFFICIAL CAPACITY,)	
)	
Defendant/Appellee,)	
)	
v.)	
)	
THE CITY OF HAYS, KANSAS and THE CITY OF RUSSELL, KANSAS,)	
)	
Intervenors/Appellees.)	
)	

**RESPONSE TO APPELLANT’S THIRD MOTION
FOR ADDITIONAL TIME TO FILE OPENING BRIEF**

COME NOW the Cities of Hays and Russell, Kansas, (the “Cities”) and oppose Water PACK’s request for a 30-day extension of time within which to file its opening brief. The Cities respectfully request that the Court enter an Order requiring Water PACK to file its opening brief no later than November 30, 2022. The Cities also move for an Order providing that no further extensions be granted to Water PACK for its opening brief except on a showing of exceptional circumstances.

1. As stated in their Motion to Transfer, the Cities filed applications to change water appropriation rights owned by the Cities appurtenant to the R9 Ranch in Edwards County in June of 2015—more than seven years ago. Time is of the essence because under the best of circumstances, the Cities are several years away from being able to address their water-supply needs, and the current drought in northcentral Kansas continues to worsen.

2. Water PACK filed its Notice of Appeal on July 27, 2022.

3. The appeal was docketed on August 23, 2022.

4. On August 24, 2022, the Cities filed a Motion to Expedite the Briefing Schedule and a Motion to Transfer the appeal to the Supreme Court.

5. On August 29, 2022, Water PACK filed a Memorandum in Opposition to the Cities' Motion to Expedite the Briefing Schedule.

6. On September 1, 2022, the Court of Appeals denied the Cities' Motion to Expedite, pending a decision on the Motion to Transfer.

7. On September 26, 2022, this Court granted the Cities' Motion to Transfer.

8. On September 28, 2022, at 11:12 AM, and without first conferring with counsel for the Cities, Water PACK filed its first Motion for Additional Time to file its opening brief. Water PACK did not serve the Cities until after close of business on September 29, 2022. The Cities received notice of the Motion from the Court's e-filing

system at 8:43 AM on September 30, 2022, less than two hours before the Court granted the Motion.

9. Again without first conferring, Water PACK filed a Second Motion for Additional Time on October 19, 2022, which the Cities did not oppose and which the Court granted on October 24, 2022.

10. Water PACK's Third Motion for Additional Time to file its opening brief was filed on Friday, November 11, 2022, at 8:39 AM, and requests a 30-day extension to December 14, 2022. As with its prior two Motions, Water PACK did not confer with counsel. The Cities were first apprised of Water PACK's latest Motion at 10:14 AM on November 14, 2022, via the Court's e-filing system.

11. Water PACK's Third Motion for Additional Time asserts that Edwards County, Kansas, and Water PACK filed a Joint Petition for Intervention in the parallel Water Transfer proceeding that is now before the Office of Administrative Hearings.

12. Water PACK incorrectly asserts that the Joint Petition for Intervention is currently pending before the OAH Presiding Officer.

13. The Water Transfer Panel forwarded the Joint Petition for Intervention and other pleadings to the OAH and OAH Staff added those pleadings to its docket on October 27, 2022.

14. On November 8, 2022, the Presiding Officer issued a Prehearing Order and Notice of Prehearing Conference. In a footnote, the Presiding Officer stated:

Petitions to intervene on behalf of Edwards County and Big Bend Groundwater Management District No. 5 were submitted to the Water Transfer Panel before this matter was referred to OAH and before the Presiding Officer was appointed for this proceeding. The petitions were not submitted to the Presiding Officer in accordance with the Kansas Administrative Procedures Act and therefore, such petitions would need to be re-submitted pursuant to K.S.A. 77-521. This notice is provided to Edwards County and Big Bend Groundwater Management District No. 5 as a courtesy.

15. While Water PACK is not referred to in the footnote, the Certificate of Service shows that a courtesy copy of the Prehearing Order and Notice of Prehearing Conference was mailed to Water PACK counsel.

16. It therefore appears that the Joint Petition for Intervention filed by Water PACK and Edwards County is not currently pending before the Presiding Officer in the Water Transfer Proceeding.

17. In fact, based on the timelines set out in the Water Transfer Act, K.S.A. 82a-1501, *et seq.*, Water PACK has ample time to re-file a Petition to Intervene in that proceeding.

18. The Presiding Officer has scheduled the prehearing conference to begin on February 15, 2023, which, by statute, must conclude no more than 45 days after it commences. K.S.A. 82a-1503(b).

19. The statute goes on to provide that the formal hearing must commence 90–120 days after the conclusion of the prehearing conference, and that any person may file a petition for intervention “not later than 60 days before the formal hearing.” K.S.A. 82a-1503(c).

20. Thus, even assuming the prehearing conference lasts only one day, Water PACK has at least until March 18, 2023, to file a Petition for Intervention, *see* K.S.A. 82a-1503(b).

21. Water PACK is under no time pressure to re-file its Petition for Intervention in the Water Transfer Proceeding and that is, therefore, not a justifiable basis for extending its deadlines in this case.

WHEREFORE, the Cities respectfully request that the Court deny Water PACK’s Motion, set Water PACK’s filing deadline to November 30, 2022, order that no further extensions be permitted for Water PACK’s opening brief in this matter, and for such other relief the Court finds just and equitable.

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I hereby certify that I presented the foregoing to the Clerk of the Court for filing and uploading to the Kansas Courts e-Filing system that will send notice of electronic filing to counsel of record and courtesy copies will be sent to the following by electronic mail:

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Subject: OAH Case No. 23AG0003 AG
Date: Monday, December 5, 2022 3:06:56 PM
Attachments: [OAH Case 23AG0003 Reply to Cities Response to 1st Petition to Intervene.pdf](#)
[OAH Case 23AG0003 AG Joint Motion to File Amended Intervention Petition.pdf](#)

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To whomsoever it may concern:

This email concerns OAH Case No. 23AG0003 AG. Please forward the enclosed correspondence to ALJ/Presiding Officer Spurgin. My contact information is set forth below.

Be well,
-Micah

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