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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 PURSUANT TO THE KANSAS WATER TRANSFER ACT	OAH Case No. 23AG0003 AG

REPLY BY WATER PACK AND EDWARDS COUNTY, KANSAS TO RESPONSE BY CITIES OF HAYS AND RUSSELL, KANSAS TO PETITION FOR INTERVENTION

I. INTRODUCTION

The Cities of Hays and Russell (the Cities) in their response to the petition for intervention jointly filed by the Water Protection Association of Central Kansas (Water PACK) and Edwards County (the County) seek dismissal. But in positing, incorrectly, that the joint petition is jurisdictionally defective because of the purported failure to include "concrete facts showing that Edwards County itself and Water PACK members have the requisite legally protected interests in the outcome of the transfer proceeding,"[1] the Cities disregard the governing statute and rely inappropriately on *Bruch v. Kansas Dep't of Revenue*, 282 Kan. 764, 148 P.3d 538 (2006), ignoring our Supreme Court's more recent refinement of the jurisdictional template in *Kingsley v. Kansas Dept. of Revenue,* 288 Kan. 390, 396–408, 204 P.3d 562 (2009). The Cities also misapprehend distinctions between the Water Transfer Act (WTA) and the Kansas Water Appropriation Act (KWAA). Simply put, the WTA statutory scheme for considering proposed "buy and dry" proposals[2] is different from the standards applied to the Cities' change applications under the KWAA.

[1] Cities' Response at ¶ 32.

[2] Daniel Cusick, Kansas Town taps ranch water 70 miles away, ignites legal fight, https://www.eenews.net/articles/farm-vs-city-kansas-water-law-gets-a-major-stress-test.

A. K.S.A. 77-521 GOVERNS ADMINISTRATIVE INTERVENTION AND, TO THE EXTENT RELEVANT, THE REQUISITE FACTS UNDER K.S.A. 77-614(B) ARE MATERIALLY LESS COPIOUS THAN URGED BY THE CITIES

The Cities' response confuses standards for administrative intervention with standards for judicial review of an agency order. Whether the Court must grant the intervention request submitted by Water PACK and the County is not governed by Kansas Judicial Review Act (KJRA) standards. It is, instead, determinable by reference to the Kansas Administrative Procedure Act (KAPA). K.S.A. 82a-1503(c) (intervention "shall be in accordance with the Kansas administrative procedure act[.]"); *see* K.S.A. 77-501 (KAPA includes K.S.A. 77-501 through 77-566, not the KJRA). Under the KAPA, intervention must be permitted if:

> (2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interests <u>may be</u> substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and
>
> (3) 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) (emphasis supplied). An application for judicial review, by contrast, references K.S.A. 77-614(b) in a manner that renders the Cities' arguments entirely specious. "A ***petition for judicial review*** shall set forth. . . ." (Emphasis supplied).

To the extent the requirements of the KJRA should be considered, *Kingsley* and its progeny[3] stand for the proposition that the requisite facts required to imbue a tribunal with jurisdiction are simply those that demonstrate the petitioner has standing, has

3 *See e.g., Swank v. Kansas Dep't of Revenue*, 294 Kan. 871, 877, 281 P.3d 135, 139–40 (2012) ("We held that the petition had strictly complied with K.S.A. 77–614(b)(5)'s command to state facts supporting standing, exhaustion of administrative remedies, and timeliness, even though those concepts were not mentioned explicitly."); *Canas-Carrasco v. Kansas Dep't of Revenue*, 340 P.3d 1235 (Kan. Ct. App. 2014) ("Since Bruch, our Supreme Court has relaxed somewhat its specificity requirements regarding the pleading compliance standards of K.S.A.2013 Supp. 77–614(b). Yet, still, a petition must contain "sufficiently specific reasons for relief so that the court and agency can ascertain the issues that will be raised before the district court.").

exhausted administrative remedies (inapplicable here), and has sought relief on a timely basis.

> We conclude that under the plain language of the KJRA, a petition for judicial review must contain specific facts indicating that the plaintiff is "entitled to judicial review" as described by K.S.A. 77–607(a) or K.S.A. 77–608. In cases such as this one—which involves an appeal from a final agency action—the plain statutory language of the KJRA requires that a petitioner provide facts that demonstrate the petitioner has standing, has exhausted administrative remedies, and is filing a timely petition for judicial review.

Kingsley, 288 Kan. at 403 (emphasis supplied).

Even to the extent applicable, again a questionable proposition, the Cities misapprehend the meaning and import of the KJRA pleading requirements under K.S.A. 77-614(b). For pleading purposes, a statement of fact as a concept is more elastic and less rigidly construed than suggested by the Cities. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007).

> [W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely.

The Cities' proposed interpretation of the K.S.A. 77-614(b) is tantamount to revisiting "the dark ages of Code pleading."[4] Properly understood, the statute instead requires that a petition to intervene apprise the opposing party of the issues and is specific enough to inform the tribunal of the questions to be decided.

> Our conclusion that the district court had subject matter jurisdiction in this case also is consistent with the fair notice purpose of the strict compliance pleading requirement discussed in *Bruch* and *Kingsley*. *See Kingsley*, 288 Kan. at 406, 204 P.3d 562 (petition for judicial review strictly complies with

[4] Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions under the Federal Rules of Civil Procedure*, 67 N.C. L. Rev. 1023, at 1041 (1989).

> K.S.A. 77–614[b] when reasons for relief set forth in it give court, agency notice of issues to be raised).

S*wank*, 294 Kan. at 877–78.

B. INTERVENTION SHOULD BE LIBERALLY GRANTED AND THE CITIES HAVE NOT, AND CANNOT, DEMONSTRATE PREJUDICE

As a guiding precept, motions to intervene in administrative proceedings should be liberally granted.

> The district court found that because the KCC was vested with wide discretion in allowing parties to intervene, and because OXY alleged no prejudice as a result of this intervention, the decision should not be overturned on review. We agree.
>
> K.S.A. 77–521(b) allows the KCC discretion to grant a petition for intervention upon a determination that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings. While the evidence of record supporting the decision that intervention was in the best interests of justice is sparse, the intervention did not impair the orderly and prompt conduct of the proceedings.

Mobil Expl. & Producing U.S. Inc. v. State Corp. Comm'n of State of Kan., 258 Kan. 796, 846, 908 P.2d 1276, 1309 (1995); *see also*, *In the Matter of the Joint Application of Sprint Commc'ns Co., L.P., United Tel. Co. of Kansas, United Tel. Co. of E. Kansas, United Tel. Co. of S. Cent. Kansas, & United Tel. Co. of Se. Kansas for the Comm'n to Open A Generic Proceeding on Sw. Bell Tel. Co. S Rates for Interconnection, Unbundled Elements, Transp. & Termination, & Resale.,* No. 97-SCCC-149-GIT, 2000 WL 36566637 (Jan. 27, 2000); *cf. Smith v. Russell*, 274 Kan. 1076, 1083, 58 P.3d 698, 703 (2002). "It is well established under Kansas law that K.S.A. 60–224(a) is to be liberally construed to favor intervention."

To the same effect is the 1981 Model State Administrative Procedure Act (MSAPA) upon which K.S.A. 77-521 is modeled:

> In the interest of assuring greater participation and access to the adjudicative hearing process, the drafters of the 1981 Model Act included a detailed provision setting the guidelines for intervention. Under certain

> conditions that is, where the petitioner's legal interests will be substantially affected, the petition is timely filed and the interests of justice will not be impaired – the petition for intervention must be granted as a right.

Howard J. Swibel, *Meeting the Challenge: Adjudication Under the 1981 Model State Administrative Procedure Act,* 8 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 15 (1988) (emphasis supplied)[5]; *see also Bruch*, 148 P.3d 548 (noting that KAPA is patterned from the 1981 MSAPA and that comments to the MSAPA may be consulted to determine the intent behind corresponding KAPA provisions in the absence of applicable Kansas Legislative history).

Here the Cities have offered nothing more than procedural bromides to suggest that the intervention application runs afoul of inapplicable standards and have not made the case that they will be prejudiced or the proceeding impaired if the petition is granted.

C. THE OVERARCHING ISSUE OF ACCESS TO AND UTILIZATION OF WATER RESOURCES IS AN EXISTENTIAL CONCERN TO THE PETITIONERS

It is not hyperbolic to suggest that no issue is of greater economic and societal importance to Kansas agriculture than water. "Water is at the core of sustainable development and is critical for socio-economic development, energy and food production, healthy ecosystems and for human survival itself. Water is also at the heart of adaptation to climate change, serving as the crucial link between society and the environment." *United Nations, Global Issues, Water* https://www.un.org/en/global-issues/water (last accessed 11.22.2022).

> There is no single element more important than water. It binds us all. It's important to all life, not just the people, but the whole state. Everything living is dependent upon water, and if we don't have it in sufficient quantity and quality, the quality of life deteriorates. And I see problems with public water supplies every day. I see declining aquifers. I see drying up of the streams. It's continuing, and there doesn't seem to be the kind of leadership or emphasis on it that is needed for the better future of Kansas.

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[5] Available at https://digitalcommons.pepperdine.edu/naalj/vol8/iss1/2/.

Kansas Oral History Project, Interview of former Kansas Governor Mike Hayden by former KGS Director Rex Buchanan, p. 16 (Nov. 23, 2021), *available at* https://ksoralhistory.org/wp-content/uploads/Hayden-Mike-Oral-History-Project-Interview.pdf.

Due to the inversely proportional relationship between liberal allowance of intervention and the importance to the putative intervenor of the issue under consideration, intervention is a clearly favored process where essential rights are at stake. Stated otherwise, in respect to issues of fundamental importance to the applicant, a tribunal should be more inclined to grant intervention.

II. WATER PACK AND THE COUNTY HAVE STANDING UNDER THE STANDARDS URGED BY THE CITIES

If judicial standing is applicable here, and we do not concede that it is, "[u]nder Kansas law, in order to establish standing generally, a plaintiff must show that (1) he or she suffered a cognizable injury and (2) there is a causal connection between the injury and the challenged conduct. (Citations omitted). And in order to establish a cognizable injury, a party must show 'a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct.'" *Solomon v. State*, 303 Kan. 512, 521, 364 P.3d 536, 543 (2015).

Petitioners' standing is clearly established by reference to their revised Joint Petition for Intervention which incorporates these salient averments.

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 becomes 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).

[…]

6. The legal rights, duties, privileges, immunities, or other legal interests of the County 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 members are expected to be substantially affected by this proceeding.

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 Edwards County District Court in connection with judicial review of the Master Order remains pending before the Kansas Supreme Court as of the date of this Petition (the Appeal) under Appellate Case No. 125469-S.

Taking the foregoing statements as true,[6] it cannot be gainsaid that Water PACK members and the County are at risk of suffering "some actual or threatened injury as a result of the challenged conduct."

Under well-established precedent and the asserted facts, Water PACK may intervene administratively or sue on behalf of its members. "The United States Supreme Court has held that an association has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested require participation of individual members." *NEA-Coffeyville v. Unified Sch. Dist. No. 445, Coffeyville, Montgomery Cnty.*, 268 Kan. 384, 387, 996 P.2d 821, 824 (2000).

The County likewise must be permitted to intervene. It has long been a party to the R9 proceedings and thus has statutory standing under K.S.A. 77-611(b). *See Cities Response at* ¶ 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."). Further, the County has standing to protect its own interests and the public interest in light of the associated "economic, environmental, public health and welfare and other impacts of approving or denying the transfer of the water." K.S.A. 82a-1502(c)(3); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992); K.S.A. 82a-927(i) ("The long-range goals and objectives of the state of Kansas for management, conservation and development of the waters of the state, are

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[6] "[A]n appellate court must assume as true all well pleaded facts in plaintiff's petition, along with any inferences that can be reasonably drawn therefrom. *Roy v. Edmonds*, 45 Kan. App. 2d 1156, 1159, 261 P.3d 551, 554 (2011).

hereby declared to be… the protection of the public interest through the conservation of the water resources of the state in a technologically and economically feasible manner.")

In the paradigm urged by the Cities, in addition to common law standing, "[a] party seeking relief under the KJRA must have . . . statutory standing. *City of Derby, v. State ex rel. Jordan*, 2018 WL 3673253 (2018). To the extent the KJRA applies here, statutory standing is defined in K.S.A. 77-611 as follows:

> The following persons have standing to obtain judicial review of final or nonfinal agency action: (a) A person to whom the agency action is specifically directed; (b) a person who was a party to the agency proceedings that led to the agency action; (c) if the challenged agency action is a rule and regulation, a person subject to that rule; or (d) a person eligible for standing under another provision of law.

Water PACK arguably has KJRA standing under K.S.A. 77-611 (a) (b) and (d). As a party to prior agency proceedings related to this matter, it is indisputably imbued with standing under subpart (b). *Board of County Commissioners of Sumner County v. Bremby,* 2008, 189 P.3d 494, 286 Kan. 745 (Interested persons' submission of written comments during a public notice and comment period and all persons' comments made during a public hearing held by an agency both qualify as participation within the meaning of the Kansas Act for Judicial Review standing requirements). *See also, Sierra Club v. Moser*, 298 Kan. 22, 32, 310 P.3d 360, 369 (2013) (Sierra Club's participation in the agency proceedings entitled it to assert statutory standing under K.S.A. 77–611(b) of the KJRA and under K.S.A. 2012 Supp. 65–3008a(b) because the other components of the KAQA's standing requirements were also met).

III. WATER PACK AND THE COUNTY HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

The Cities do not claim in their response that Water PACK or the County have failed to exhaust administrative remedies. Though clearly not demonstrable in any event, this

issue is now waived. "The failure to exhaust administrative remedies is an affirmative defense, *Jones v. Bock,* 549 U.S. 199, 216, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007), so the defendants had to make a showing that Bloom had failed to exhaust administrative remedies." *Bloom v. FNU Arnold,* 284 P.3d 376 (2012).

IV. WATER PACK AND THE COUNTY TIMELY FILED THEIR PETITION TO INTERVENE

As with the question of exhaustion of administrative remedies, the timeliness of the petition to intervene was not addressed in the Cities' response and thus under familiar constructs is deemed waived. Moreover, K.S.A. 82a-1503 and K.S.A. 77-521 make clear the petition was filed within the statutory time frame.

> (c) Intervention in the hearing shall be in accordance with the Kansas administrative procedure act, except that any petition for intervention must be submitted and copies mailed to all parties not later than 60 days before the formal hearing. K.S.A. 82a-1503.
>
> (b) The presiding officer may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

K.S.A. 77-521.

V. CLAIM PRECLUSION DOES NOT APPLY

The Cities suggest that principles of clam preclusion should bar Water PACK's intervention. That interpretation of the doctrine is misguided. "Under Kansas law, claim preclusion consists of four elements: (1) same cause of action or claim, (2) same parties, (3) claims in the current case were or could have been raised in the prior action, and (4) final judgment on the merits of the prior action." *Herrington v. City of Wichita*, 500 P.3d 1168, 314 Kan. 447 (2021). Of the four elements, only the identity of the parties is constant here. This proceeding is different (1); the claims are different (3); and there is no final judgment on the merits (4). And importantly, KWAA statutes and regulations at issue in the Appeal differ substantially from the law and procedures required under the WTA, in

particular by virtue of the existence of the water transfer panel itself, the role of the presiding officer, and the showings required under the WTA.

VI. CONCLUSION

That the undersigned have articulated "sufficiently specific reasons for relief so that the court and agency can ascertain the issues that will be raised before the [tribunal]"[7] and thus have the right to intervene is not reasonably debatable. Ultimately, parties are entitled to be heard. "Litigants must have some effective means to vindicate injuries suffered to their rights without being shut out of court. See *Christopher v. Harbury*, 536 U.S. 403, 415, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002). In other words, individuals are entitled to their "day in court." *State v. Roat*, 311 Kan. 581, 591, 466 P.3d 439, 447 (2020).

To deny intervention here would be to abandon that salutary principle and amount to an exercise in the disfavored concept of summary disposition[8] and preemptive fact-finding. "The determination of a complaint's factual sufficiency rests largely on a district judge's discretion, which, if taken too far, allows judges to deny access to a merits adjudication whenever an equivocal set of facts can be interpreted as 'more likely' to reflect lawful conduct, a process that feels uncomfortably close to a weighing of the evidence." ARTHUR R. MILLER, *Pleading and Pretrial Motions—What Would Judge Clark Do?*, Litigation Review Conference, Duke Law School, at 14 (2010).

The Cities' construct regarding the applicability of the KJRA and the concomitant pleading and standing requirements is ultimately unpersuasive as borrowing from plainly

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[8] "It is rather elementary that summary disposition is not a favored way of deciding cases. It is an extreme remedy and should be used sparingly." *Nedley v. Consolidation Coal Co.*, 578 F. Supp. 1528, 1533 (N.D.W. Va. 1984).

inapposite statutory regimes and superimposing inapplicable impediments. But even if those tenuous requirements are deemed applicable, Water PACK and the County have conclusively demonstrated that they have standing and that any dormant objections to questions of administrative exhaustion and timeliness have not been raised and are thus waived. The revised petition to intervene should be granted.

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