BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS

IN THE MATTER OF

THE APPLICATION OF THE CITIES OF HAYS, KANSAS AND RUSSELL, KANSAS FOR APPROVAL TO TRANSFER WATER FROM EDWARDS COUNTY, KANSAS PURSUANT TO THE KANSAS WATER TRANSFER ACT.	)	**OAH NO. 23AG0003 AG**

Pursuant to K.S.A. Chapter 77.

THE CITIES' RESPONSE
TO WATER PACK'S AND EDWARDS COUNTY'S
MOTION FOR LEAVE TO FILE FIRST AMENDED
JOINT PETITION FOR INTERVENTION

COME NOW the Cities of Hays and Russell, Kansas (the "Cities"), by and through their undersigned counsel and provide this response to Water PACK's and Edwards County's Motion for Leave to File First Amended Joint Petition for Intervention.

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Statement of Facts.

1. The R9 Ranch covers about 6,900 contiguous acres of irrigated farmland in Edwards County south of Kinsley, a tiny fraction of the irrigation acres in Edwards County.[1]

2. The water rights appurtenant to the R9 Ranch authorize the diversion of almost 8,000 acre-feet of water per year for irrigation use.

3. The Cities purchased the R9 Ranch in 1995 to permanently resolve their decades-long struggle against crippling water shortages.

4. Between 1995 and 2015, the Cities explored numerous other water-supply options, principally because of local opposition to the proposed transfer that included a failed attempt by Edwards County in 1996 to invoke the Supreme Court's original jurisdiction to challenge the constitutionality of the Kansas Water Transfer Act.[2]

5. Edwards County's and Water PACK's ongoing attempts to stop the Cities' water transfer are not outside the norm. Opposition to proposed transfers is often based on the *incorrect* notion that water "belongs to" the inhabitants of areas where the resource is plentiful.

6. In fact, Kansas law is clear and unequivocal. All water belongs to the State until reduced to possession via a lawful "water right," which "is a real property right." A water right is "appurtenant to and severable from the land . . . in connection with which the water us used," and passes "as an appurtenance with a conveyance of the land."[3]

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[1] Statements of Fact, ¶¶ 1-13 are adapted from the Cities' Motion to Transfer the Water PACK appeal of the District Court approval of the Master Order to the Kansas Supreme Court. The Motion and Order granting it are attached as Ex. 1. Its exhibits are available and will be provided upon request.

[2] K.S.A. 82-1501, *et seq.*

[3] K.S.A. 82a-702, 82a-701(g), and 82a-708(a). The single exception to Kansas's prohibition on extracting water without a lawful water right is if done so for a domestic use. *See* K.S.A. 82a-728.

7. Both Cities presently draw water from the Smoky Hill and Big Creek alluviums. Flow in those streams is dependent on rainfall to the west in Wallace, Logan, Gove, and Trego Counties, all of which are suffering severe, extreme, or exceptional drought conditions.[4]

8. A speedy resolution of this case is of the utmost importance to the Cities and the State because it involves urgent public health and welfare needs.[5]

9. Both Hays' and Russell's water supplies are dramatically impacted by drought, even droughts of short duration. The Cities' ability to provide water to their residents quickly becomes critical even during very brief "flash" drought events. For example, in 2012, both the Smoky Hill River and Big Creek near the Cities went completely dry, and as recently as August 15, 2022, there was no flow in the Smoky Hill River at Russell's primary wellfield near Pfeifer.

10. This has led to austerity measures by the Cities unheard of outside the desert southwest. The Cities adopted water-conservation policies many years ago that go far beyond the norm for this part of the country. For example, both Cities:

- Restrict outdoor water use to specified hours and prohibit irrigation run-off;
- Prohibit or restrict washing vehicles and outdoor vegetation;
- Use effluent water to irrigate golf courses and other public areas;
- Have installed the latest water reuse technology in their recent water recreation facilities;
- Require all new construction to incorporate efficient plumbing fixtures limiting water consumption;
- Offer free low-flow showerheads and cash rebates to replace fixtures with high-efficiency alternatives; and
- Have rate ordinances that encourage water conservation.

[4] https://droughtmonitor.unl.edu/CurrentMap/StateDroughtMonitor.aspx?KS, accessed on December 22, 2022. The Cities are keenly aware that Edwards County is also suffering from an exceptional drought, though Edwards County residents are not dependent upon surface water flow as the Cities are.

[5] *See also* Ex. 2, October 20, 2022, letter to Acting Director Snell discussed in Section III. A.

11. The Cities pushed relentlessly for resolution of the change application proceeding but, in the meantime, construction costs have increased—steadily at first, and dramatically of late.

12. The pandemic had, and continues to have, a significant impact on labor and material costs and delivery schedules. In 2015, the cost to construct the first phase of the project, which does not include increased costs of financing, permitting, engineering design, or acquisition of easements and rights-of-way, was estimated to be $72.9 million. The current construction cost estimate is $106.6 million, a 46.29% increase.

13. By 2025, the project is estimated to cost rate payers in Hays and Russell $134.9 million, a 26.53% increase from the current estimate and an 85% increase from 2015. And, Beginning in 2025, construction costs are expected to increase by more than $10 million annually.

14. For these reasons, on June 26, 2015, the Cities filed applications seeking the Chief Engineer's[6] contingent approval to change water rights for irrigation use on the R9 Ranch to municipal use in Hays and Russell.

15. On March 27, 2019, the Chief Engineer issued the Master Order and approvals of each of the applications after, among other things,

- extensive and detailed negotiations with the Cities;
- publishing the change applications and related documents on its web site in early 2016;
- publishing the Cities' first Water Transfer Application and 182 Exhibits on its web site;
- corresponding with Water PACK;
- publishing a draft Master Order and approvals for public comment in early 2018;
- holding a public hearing; and
- reviewing and carefully considering comments from the public, from Water PACK, from Water PACK's retained expert, and others.[7]

[6] Unless otherwise stated or the context suggest otherwise, references to the Chief Engineer are to David Barfield, P.E., the former Chief Engineer of the Division of Water Resources.

[7] Master Order, pp. 8-14, ¶¶ 43-69.

16. The Master Order reduced the quantities authorized for irrigation use to 6,756.8 acre-feet, in compliance with DWR's "consumptive use" regulations.[8]

17. The Chief Engineer required the Cities to use the GMD5[9] computer groundwater model to determine the long-term yield of the R9 Ranch aquifer.[10]

18. The long-term water level changes calculated by the groundwater model support the conclusion that 4,800 acre-feet per year is a sustainable pumping rate for the R9 Ranch.[11]

19. Based on the results of the GMD5 Model, the Chief Engineer imposed an additional reduction in the quantity that can be diverted from the R9 Ranch water rights that is over and above the reductions required by the consumptive-use regulations.[12]

20. Thus, the Master Order permits the diversion of up to 6,756.8 acre-feet per year for municipal use, further limited to a Ten-Year Rolling Average ("TYRA") of 4,800 acre-feet per year—a reduction of almost 2,000 acre-feet per year (1,956.8 acre-feet).[13]

21. Water PACK defines the "amount of water that can be taken from the R9 Ranch on a sustainable basis, as 'the maximum amount of water that . . . ***does not contribute to present and future lowering of the water table*** in and around the R9 Ranch.'"[14]

22. However, GMD5 regulations define "sustainable yield" as "the long-term yield of the source of supply, including hydraulically connected surface water or groundwater, ***allowing***

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[8] K.A.R. 5-5-3, 5-5-8, and 5-5-9 (1994 versions).
[9] "GMD5" refers to the Big Bend Groundwater Management District, No. 5.
[10] Master Order, p. 25, ¶ 132.
[11] *Id.*, pp. 28-9, ¶ 146.
[12] *Id.*, p. 17, ¶ 87. *See* footnote 8.
[13] *Id.*, p. 44, ¶¶ 224-26.
[14] *Id.*, p. 33, ¶ 160 (emphasis added).

for the reasonable raising and ***lowering of the water table.***"[15] And K.S.A. 82a-711a makes all water appropriation rights subject to "reasonable raising or lowering of the static water level . . ."

23. Water PACK does not assert that it owns any water rights that will be impaired by approval of the Cities' transfer. Instead, Water PACK asserts that it is "a trade association whose members hold water rights surrounding the R9 Ranch." In fact, Water PACK members own water rights in the vicinity of but not "surrounding" the R9 Ranch.

24. There has never been an impairment complaint filed with DWR or a District Court pursuant to K.S.A. 82a-716 or 82a-717a or K.A.R. 5-4-1[16] or 5-4-1a[17] asserting that any of the R9 water rights have impaired or are impairing any other well or water right.

25. The Master Order prohibits the placement of any new or replacement municipal well within one-half mile of any existing irrigation well outside of the boundaries of the R9 Ranch.[18] Thus, no new or replacement municipal well may be located within 2,640 feet of the current authorized location of any Water PACK member's existing irrigation well.[19]

Argument and Authorities.

I. Access to a sustainable and drought-resistant source of water is of paramount concern to the City of Hays and the City of Russell.

Water PACK asserts that water is of "existential concern" to Kansas agriculture, but water is of "existential concern" to every sector of society. Groundwater is not more important to irrigated agriculture than it is to the Cities' and their residents, who must have an adequate water supply—even during a drought. And Kansas law does not prioritize agricultural use over other

[15] K.A.R. 5-25-1(l) (emphasis added.)
[16] K.A.R. 5-4-1, procedure used to distribute water when a prior right is being impaired directly.
[17] K.A.R. 5-4-1a, distribution of water when impairment is due to regional lowering of the water table.
[18] Master Order, pp. 41–42, ¶ 208.
[19] *Id*.

uses.[20] Moreover, the record clearly shows that the Cities have implemented draconian conservation measures, while irrigation use, especially in Edwards County, is at an all-time high—for which Water PACK's members bear some responsibility.

II. The KAPA intervention statute mirrors the KJRA pleading requirements.

K.S.A. 77-521 governs petitions to intervene in KAPA[21] proceedings. It states that the Presiding Officer must grant a petition for intervention if:

> (2) the petition 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
>
> (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.[22]

Likewise, the KJRA[23] requires that petitions for judicial review include *"**facts*** to demonstrate that the petitioner is entitled to obtain judicial review.*"*[24] Thus, to intervene in this case, Petitioners must allege ***facts*** showing that they have legal rights that may ***be substantially affected*** by the proceeding. Moreover, they must convince the Presiding Officer that their participation will not impair either the interests of justice or the orderly and prompt conduct of this proceeding.[25]

A. The KJRA pleading requirements are instructive for interpreting the KAPA intervention provision but are not controlling.

The cases interpreting the KJRA pleading requirements are instructive because K.S.A. 77-521(b)(2) requires that KAPA petitions to intervene state *"*facts demonstrating*"* the requisite

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[20] K.S.A. 82a-707(b).

[21] *"*KAPA*"* refers to the Kansas Administrative Procedure Act, K.S.A. 77-501, *et. seq*.

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

[23] *"*KJRA*"* refers to the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.*

[24] K.S.A. 77-614(b)(5) (emphasis added).

[25] K.S.A. 77-521(a)(3).

intervention requirements and K.S.A. 77-614(a)(5) requires "facts to demonstrate" that a petitioner is entitled to judicial review. In that respect, the two provisions are identical.

Petitioners base their arguments on a mischaracterization of the Cities' Response to their original Petition for Intervention—incorrectly stating that the Cities assert that a request to intervene in a KAPA proceeding is governed by KJRA pleading standards. In fact, the Cities state that this is a KAPA proceeding, citing K.S.A. 82a-1503,[26] and the Cities' Response cites K.S.A. 77-521 at least 8 times.[27] Rather than address the Cities' argument on its merits, Petitioners mischaracterize the Cities' position, chide the Cities for taking a position that they did not take, mischaracterize the KJRA pleading standards, and then argue that the mischaracterized standards apply to their First Amended Petition for Intervention.

Nevertheless, Petitioners correctly state that the Cities rely on *Bruch v. Kansas Dep't of Revenue,*[28] where the Court held:

> K.S.A. 77–614(b) provides specific pleading requirements for a petition for review from an administrative agency. Application of a strict compliance standard is in keeping with the overall intent of the Kansas Legislature in enacting the KJRA and results in apprising both the court and the agency of the positions raised. Compliance with the specific language of K.S.A. 77–614(b) meets the strict compliance requirement.[29]

Water PACK is also correct when it states that:

> *Kingsley* and its progeny 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 exhausted administrative remedies (inapplicable here), and has sought relief on a timely basis.[30]

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[26] Cities' Response, p. 8-9, ¶ 25.

[27] *Id*., p. 8, ¶¶ 23 & 24; p. 9, ¶¶ 25 & 26; p. 10, ¶ 30; p. 12, ¶ 39; p. 17, ¶ 44; & p. 18, ¶ 46.

[28] 282 Kan. 764, 148 P.3d 538 (2006), disapproved of on other grounds in *Sloop v. Kansas Dep't of Revenue,* 296 Kan. 13, 290 P.3d 555 (2012). In the previous memorandum, the Cities incorrectly stated that *Bruch* has been superseded by statute.

[29] 282 Kan. 764, Syl. 5.

[30] Petitioners Reply, pp. 2-3 (emphasis added).

In *Kingsley v. Kansas Dep't of Revenue,* the Court stated that *"*the petition must contain specific facts indicating that the person has standing.*"*[31]

And as stated in their Reply,[32] the Court in *Kingsley*[33] refined its holding in *Bruch*.[34] But that refinement did nothing to relax the requirement for strict compliance with the pleading requirements as Petitioners incorrectly assert. To the contrary, in *Kingsley*, the Court stated:

> Although we reiterate here, as we did in *Bruch,* that strict compliance with the KJRA*'*s pleading requirements is a jurisdictional prerequisite to a district court hearing the petition, we will not impose requirements additional to those specifically set forth in the statutory language.[35]
>
> Thus, a petition for judicial review from a final agency action must specifically demonstrate that a person is *"*entitled to judicial review*"* under the KJRA—that is, the petition must contain ***specific facts indicating that the person has standing*** to file the petition pursuant to K.S.A. 77–611.[36]

Both *Bruch* and *Kingsley* require Petitions for Judicial review to strictly comply with K.S.A. 77–614(b)(5), which required, and still requires, that petitions for judicial review set out specific facts.[37] All that the 2009 amendments to K.S.A. 77-614 did was permit courts to allow defective petitions to be amended to include the omitted information and abrogated *Kuenstler v. Kansas Dep't of Revenue,*[38] which held that a failure to comply with the strict pleading

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[31] 288 Kan. 390, 403, 204 P.3d 562, 573 (2009).

[32] Petitioners*'* Reply, p. 1.

[33] 288 Kan. 390, 204 P.3d 562 (2009).

[34] In *Kingsley,* the Court explained that *Bruch* has led lower courts to treat K.S.A. 77–614(b)(5) and (b)(6) as one pleading requirement. The Court stated that these requirements may be related but are not identical. 288 Kan. at 400. Subsection (b)(5) requires that pleadings include facts and (b)(6) requires the reasons relief should be granted.

[35] 288 Kan. at 404.

[36] *Id.* (emphasis added).

[37] The *Kingsley* decision was issued 4 months before the amendments to K.S.A. 77-614.

[38] 40 Kan. App. 2d 1036, Syl. ¶ 5, 197 P.3d 874 (2008).

requirements of K.S.A. 77–614(b) within the statutory time period cannot be cured with an amended petition.[39]

Citing *Bruch*, the *Kingsley* Court further explained that facts are required to support a Petition for Judicial Review to *"'*facilitate the judicial task*'*. . . [by giving notice to] opposing parties and the reviewing court by identifying issues to be addressed on appeal and the facts as to why the petition should be reviewed. *Bruch*, 282 Kan. at 779, 148 P.3d 538.*"*[40]

Thus, the Court in *Kingsley* emphasized the requirement that petitions for judicial review provide the Court and the parties with specific facts:

> We conclude that under the plain language of the KJRA, a petition for judicial review must contain ***specific facts*** . . . the plain statutory language of the KJRA requires that a petitioner ***provide facts*** . . .
>
> Kingsley argues . . . that the only fact that a plaintiff must plead . . . is that his or her license has actually been suspended. This argument is without merit.
>
> [T]he petition must contain ***specific facts*** . . .
>
> K.S.A. 77–614(b)(5) provides that petitions for judicial review under the KJRA must set forth *"**facts* to *demonstrate*** that the petitioner is entitled to obtain judicial review.*"* The statute does not require legal arguments or statutory citations, but ***facts***.[41]

Nor can it be said that *"Kingsley* and its progeny*"*[42] include either *Swank v. Kansas Dep't of Revenue*,[43] or *Canas-Carrasco v. Kansas Dep't of Revenue,*[44] in the way that Petitioners

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[39] K.S.A. 77-614(c).

[40] 288 Kan. 390, 399, 204 P.3d 562 (2009).

[41] 288 Kan. at 403–05 (emphasis added by the Court).

[42] Petitioners*'* Reply, p. 2, footnote 3.

[43] 294 Kan. 871, 876, 281 P.3d 135 (2012). The *Swank* Court distinguished *Bruch* on other grounds.

[44] 340 P.3d 1235 (Kan. Ct. App. 2014). In this unpublished opinion a Court of Appeals panel stated that *"*[s]ince *Bruch,* our Supreme Court has relaxed somewhat its specificity requirements regarding the pleading compliance standards of K.S.A.2013 Supp. 77–614(b).*"* That statement is questionable in light of *Via Christi Hosps. Wichita, Inc. v. Kan-Pak, LLC.* Nevertheless, the *Canas-Carrasco* panel went on to say, *"*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.*' Kingsley v. Kansas Dept. of Revenue,* 288 Kan. 390, 406, 204 P.3d 562 (2009).*"*

incorrectly assert. The Supreme Court cited *Bruch* and *Kingsley*[45] with approval in 2012 in *Swank v. Kansas Dep't of Revenue*[46] and in 2019 in *Via Christi Hosps. Wichita, Inc. v. Kan-Pak, LLC,*[47] (*"*Moreover, the compliance with these pleading requirements must be *'*strict.*'"*). In *Swank*, the Court said:

> 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 K.S.A. 77–614[b] when reasons for relief set forth in it give court, agency notice of issues to be raised); *Bruch*, 282 Kan. at 779, 148 P.3d 538 (aims of K.S.A. 77–614[b] . . . to facilitate judicial task by serving notice upon opposing parties, reviewing court of issues to be addressed, relevant facts).[48]

Thus, a petition for intervention in a KAPA proceeding must provide *"**facts*** demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding.*"*[49] Petitions to intervene must be granted if, and only if, a petitioner satisfies the K.S.A. 77-521(a)(2) standard with specific facts.

B. Kansas law does not declare that Petitions for Intervention in KAPA proceedings are to be "liberally granted."

There are no KAPA provisions that require liberal construction or substantial compliance with pleading requirements like those found in the Rules of Civil Procedure.[50] Nevertheless, Petitioners assert that intervention in KAPA proceedings should be liberally granted. The cases cited do not even hint at this supposed *"*guiding precept.*"*[51]

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[45] The Supreme Court has cited *Kingsley* with approval holding that a petition for judicial review must include the Petitioner's reasons for believing that relief should be granted in *Bd. of Cnty. Commissioners of Cnty. of Cherokee v. Kansas Racing & Gaming Comm'n,* 306 Kan. 298, 320, 393 P.3d 601 (2017) and *Rosendahl v. Kansas Dep't of Revenue*, 310 Kan. 474, 480, 447 P.3d 347 (2019).

[46] 294 Kan. 871, 877, 281 P.3d 135 (2012).

[47] 310 Kan. 883, 888, 451 P.3d 459 (2019).

[48] 294 Kan. at 877 (emphasis added).

[49] K.S.A. 77-521(a)(2) (emphasis added).

[50] *See e.g.,* K.S.A. 60-102 and K.S.A. 60-208(a).

[51] Petitioners' Reply, p. 4.

There is nothing in the text of *Mobil Expl. & Producing U.S. Inc. v. State Corp. Comm'n*[52] to support Petitioners' assertion. The Supreme Court simply affirmed the KCC's exercise of discretion to allow intervention without providing any "guiding precepts."[53]

K.S.A. 77-521 is never even mentioned in *In the Matter of the Joint Application of Sprint Commc'ns Co.*[54] In that proceeding, the KCC "observes that intervention, although liberally granted, should be supported by necessary legal argument."[55] The KCC's comment did not cite authority for its passing statement that intervention should be liberally granted and appears to have applied the Code of Civil Procedure's intervention provision which is inapplicable in a KAPA proceeding. *See* the discussion in the following Section. Moreover, a passing statement in an unpublished KCC opinion can hardly be said to lay down a "guiding precept" of Kansas law.

In *Smith v. Russell,*[56] the Court states that K.S.A. 60–224(a) is to be liberally construed to favor intervention.[57] But *Smith v. Russell* is a Chapter 60 case. *See* discussion in the next Section.

Finally, the 1981 Model State Administrative Procedure Act, upon which K.S.A. 77-521 is based,[58] does not say that intervention should be liberally granted. The citation to Howard J. Swibel's article[59] provided by Petitioners does not suggest otherwise and certainly does not support the assertion that intervention should be "liberally granted."

C. The intervention provision in the Code of Civil Procedure is wholly inapplicable in KAPA proceedings.

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[52] 258 Kan. 796, 846, 908 P.2d 1276, 1309 (1995).
[53] 258 Kan. at 845–47.
[54] 2000 WL 36566637 (Jan. 27, 2000).
[55] *Id.*, ¶ 6.
[56] 274 Kan. 1076, 58 P.3d 698 (2002).
[57] 274 Kan. 1076, Syl. ¶3.
[58] The only difference between 1981 Model Code, § 4-209 and K.S.A. 77-521(a) is an Oxford comma.
[59] 8 J. Nat'l Ass'n Admin. L. Judges 1, 15 (1988). The cited article states that intervention should be granted as of right "[u]nder certain conditions that is, where the petitioner's legal interests will be substantially affected." Reply, pp. 4-5.

This proceeding is governed by KAPA, which "creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes."[60] The Code of Civil Procedure specifically states that it only applies to other codes of procedure when they are silent on a particular procedure:

> When . . . the codes of procedure for any other court . . . or quasi-judicial body, ***fail to contain a specific provision on a particular procedure,*** then the provisions of this article ***may be adopted.***[61]

KAPA contains its own intervention provision so the intervention standards in the Code of Civil Procedure[62] and the KJRA pleading requirements[63] do not apply to intervention in this proceeding. References to the interpretation of the KJRA pleading requirements are merely instructive.

D. Water PACK and the County have not provided the Presiding Officer or the Cities with facts to support their Petition for Intervention.

As stated above, the KJRA provisions are not controlling but are instructive. In a KJRA case, a petitioner must cite to the administrative record or file declarations to establish the standing of a party seeking judicial review of agency action. *Sierra Club v. Moser*.[64] Whether that degree of support is required in a KAPA proceeding is an open question and is likely subject to the discretion of the Presiding Officer.[65]

There is an extensive administrative record in Water PACK's appeal of the Master Order. And, of course, its members are available to provide declarations if they are actually aware of facts

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[60] K.S.A. 77-503(b).
[61] K.S.A. 60-265(b) (emphasis added).
[62] K.S.A. 60-224.
[63] K.S.A. 77-614.
[64] 298 Kan. 22, 39–40, 310 P.3d 360, 373 (2013).
[65] *See, e.g., Mobil Expl. & Producing U.S. Inc. v. State Corp. Comm'n.*, 258 Kan. 796, 846, 908 P.2d 1276, 1309 (1995), discussed in Section II. B.

that support Water PACK's claims. If Water PACK can provide facts to support its claims, it should be required to do so. If it cannot, the Petition should be denied.

As stated above, the requirement to provide facts to support a petition for intervention is designed to ensure that the Presiding Officer and the parties are given notice of the issues to be addressed. The Cities have the burden to establish that the transfer application should be approved. A review of the WTA,[66] DWR's water transfer regulations, especially K.A.R. 5-50-2, and the Cities' First Amended Water Transfer Application shows that there are a multitude of issues that must be addressed during the formal hearing. The Cities need, and are entitled to, as much advance notice as possible of the claims and defenses that will be raised in opposition to the transfer. This is a complex proceeding and Water PACK should not be permitted to conceal its arguments and objections and the Cities should not be required to wait for discovery responses to adduce them.

Moreover, as discussed in the Statement of Facts, the Cities are in urgent need of an additional drought-proof water supply. Resolving this matter as quickly as possible is in the public interest.[67] Thus, the "interests of justice and the orderly and prompt conduct of the proceedings" justify requiring Petitioners to identify their specific issues, supported by statements of fact, before permitting them to intervene.

Finally, as discussed in greater detail in Section IV on standing, Petitioners assert a number of shared and generalized concerns that are not related to the specific "legal rights, duties, privileges, immunities or other legal interests" of the County or individual Water PACK members. To the extent that these general concerns are appropriate at all, they should be limited to the K.S.A. 82a-1503(d) portion of the hearing, which permits "any person" "to appear and testify at any

[66] The Water Transfer Act, K.S.A. 82a-1501, *et seq*.
[67] *See* Ex. 2, October 20, 2022, letter to Acting Director Snell discussed in Section III. A.

hearing under this act upon the terms and conditions determined by the presiding officer.*"* Water PACK need not be a *"*party,*"* as defined in K.S.A. 82a-1501(h), to address these general concerns.

If allowed to participate as parties, the Petitioners*'* presentation of evidence and cross-examination of witnesses should be limited to actual injuries to individual Water PACK members and to the County as an entity that are cognizable, particularized, and supported by cogent evidence—meaning the injuries must affect the Water PACK member in a personal and individual way; it cannot be the kind of *"*not in my backyard*"* pontifications that are the hallmark of the First Amended Petition for Intervention and of Water PACK*'*s arguments to date.

III. Intervention by Water PACK and the County will cause substantial prejudice to the Cities and the public interest.

A. The orderly and prompt conduct of this water transfer proceeding will be impaired by allowing Water PACK and the County to intervene.

Petitioners assert, without explanation, that their participation will not prejudice the Cities. In his October 20, 2022, letter to Acting Director Snell, the current Chief Engineer, Earl Lewis, P.E., emphasized the critical importance of concluding these proceedings in as timely fashion as possible. The Chief Engineer stated:

> It is the Panel*'*s hope that there is currently an administrative law judge on the Office of Administrative Hearings*'* . . . ***who has the workload capacity*** to conduct the water transfer hearing in a ***timely fashion and in accordance with the timelines and procedures set out in K.S.A. 82a-1503***. I would also note that . . . that any judicial review of the Panel*'*s final order is to have precedence in the district court, the Kansas Court of Appeals, and the Kansas Supreme Court (See K.S.A. 82a-1504; K.S.A. 82a-1505).
>
> Finally, ***the Panel wishes to emphasize the importance of concluding the water transfer hearing in as timely a fashion as possible.*** As these proceedings relate to the distribution of Kansas*'*s water supply, ***they concern matters of significant public interest***—the Water Protection Association of Central Kansas appealed DWR*'*s contingent approval of the Cities*'* change applications . . . to the Kansas Court of Appeals, and, on September 26, 2022, the Kansas Supreme Court granted a motion by the Cities to transfer the case to the Supreme Court ***due to the importance of its subject matter. Given that the Kansas Supreme Court found it appropriate to expedite the appeal regarding the Cities' change applications, the Panel believes it is prudent for the water transfer proceedings to similarly be***

> ***conducted expeditiously, in order to provide the parties with a certain resolution as soon as possible.***[68]

A copy of the City's Motion to Transfer to the Supreme Court is summarized in the Statement of Facts and attached and incorporated by reference. It explains the basis for the urgent need to resolve this matter expeditiously. The Cities have pushed relentlessly and have still been delayed at huge expense.

The WTA includes deadlines written into the law. *See* the attached schedule, Ex. 3, showing the statutory time limits going forward. The presiding officer may only extend a time limit with the written consent of all parties or for good cause shown.[69]

Based on recent experience and the delays in filing its opening brief in Water PACK's appeal, if Water PACK is permitted to intervene as a full party, delays can be expected unless strictly limited by the Presiding Officer.

The Clerk of the Appellate Courts docketed Water PACK's appeal on August 23, 2022.[70] The next day, the Cities filed motions for an expedited briefing schedule and to transfer the appeal to the Supreme Court.[71] On August 29th, Water PACK filed a response to the Motion to expedite stating, in part:

> [T]he facts militate against granting the relief sought by the Cities. The agency record is 3756 pages. The undersigned lead appellate counsel did not participate in the proceedings below. Those facts alone are compelling. ***Coupled with the Cities' nebulous rationale for acceleration ("an important public health and welfare issue that could turn critical),*** the Court is presented with an insufficient rationale justifying the extraordinary departure from the rules governing the appellate process that the Cities request.[72]

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[68] Ex. 2, October 20, 2022, letter to Acting Director Snell (emphasis added).

[69] K.S.A. 82a-1503(b). Note that the Panel must issue a final order 90 days after the Presiding Officer issues an initial order and that time limit can only be extended with the written consent of all parties or for good cause shown. K.S.A. 82a-1504(c).

[70] Ex. 4.

[71] Exs. 1 and 5.

[72] Ex. 6. (Emphasis supplied.)

On September 1st, the Court of Appeals denied the motion to expedite pending a decision on the motion to transfer.[73] On September 28th, Water PACK filed a motion for an extension to file its opening brief that was due on October 3, 2022.[74] The motion was granted making their brief due on October 24th.[75] On October 19th, Water PACK filed a second motion for an extension which was granted, extending the date to November 14th.[76] On November 11th, Water PACK filed a third motion for extension.[77] On November 21st, that motion was granted making the opening brief due on December 14, 2022. [78] The Order stated *"*The court will not consider further extensions absent exceptional circumstances. Workload alone is not an exceptional circumstance.*"*

The Petitioners state that no prejudice will result if they are permitted to intervene. But their pleadings in the Supreme Court suggest otherwise, referring to the Cities*'* factual statement that *"*an important public health and welfare issue that could turn critical*"* is nothing more than a *"*nebulous rationale for acceleration.*"*[79]

B. The interests of justice will be impaired by allowing Water PACK and the County to intervene.

As stated in the Cities*'* response to Water PACK*'*s and the County*'*s original Petition for Intervention, fundamental fairness precludes imposing the delays and the burdens that would be placed on the Presiding Officer, the Panel, and especially the Cities and DWR, if the Petitioners are permitted to relitigate issues that have already been resolved or are being resolved in a parallel proceeding. Water PACK attempts to cloak its objections to the transfer in slightly different terms

[73] Ex. 7.
[74] Ex. 8.
[75] Ex. 9.
[76] Exs. 10 and 11.
[77] Ex. 12.
[78] Ex. 13.
[79] Ex. 6.

than used in the judicial review proceeding but at bottom, Water PACK is motivated by its member's NIMBY attitudes and by unfounded fears about future impairment by someone other than another Water PACK member. This mindset is illustrated, in particular, in Paragraph 15 of First Amended Petition for Intervention where, as discussed in Section IV.B., *infra*, Petitioners throw mud against the wall in a desperate attempt to get something to stick.

Water PACK attempts to narrow the nature of the Cities' objection by limiting it to "claim preclusion." Relitigation of the same issues in multiple case violates long-standing public policies that preclude redundant litigation whether characterized as "claim preclusion," res judicata, collateral estoppel, law of the case, or in some other way. In addition to the well-founded principles underlying those doctrines, the Cities object to Petitioner's intervention on the grounds set out in K.S.A. 77-521(a)(3): Granting Water PACK and the County status as "parties" is not in the interests of justice or the orderly and prompt conduct of this proceeding, especially if that means treating the Cities' critical water needs as "nebulous" and pushing to rehash issues that are being simultaneously litigated in another forum.

IV. Petitioners must demonstrate that they each have standing as a prerequisite to being allowed to intervene.

In spite of Water PACK's unsupported statement about the generalized risk of injury to the entire ag industry if the water transfer is granted, there have been no allegations of direct impairment. Petitioners have provided no facts showing that any water right or any well will be directly impacted by the proposed transfer. In fact, as discussed below, the GMD5 Groundwater Model shows that the effect of the transfer will be sustainable over the long term. Because no Water PACK member has asserted a claim for direct impairment, and assuming for the sake of argument only, that the transfer will have much larger negative effects on the aquifer than shown by the GMD5 Model, those impacts comply with Kansas public policy because of the statutory

requirement that every water appropriation permit includes an "express condition" allowing a reasonable lowering of the static water level and for the reasonable decrease of the streamflow by other water rights in the region.[80]

A. As a trade association, Water PACK has no legal rights, duties, privileges, immunities or other legal interests that may be affected, substantially or not, by this proceeding.

Water PACK does not assert that it owns any water rights that will be impaired by approval of the Cities' transfer application. Water PACK is "a trade association whose members hold water rights surrounding the R9 Ranch."[81] Water PACK agrees that to have standing as a "trade association," it must provide the Presiding Officer with facts showing that Water PACK members have individual standing.[82]

> To meet the first prong [of the three-part test for association standing], the association must show that it or ***one of its members has suffered actual or threatened injury***; that means the association or one of its members must have suffered ***cognizable injury*** or have been threatened with ***an impending, probable injury*** and the injury or threatened injury must be caused by the complained-of act or omission.[83]

Standing requires that a Water PACK member has "suffered an injury in fact, or a concrete and particularized actual or imminent injury." *Kan. Bldg. Indus. Workers Comp. Fund v. State*.[84]

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[80] K.S.A. 82a-711 and 82a-711a.

[81] Undated Joint Petition For Intervention, electronically filed in OAH case #23AG0003 on October 27, 2022, ¶ 4. While the Cities admitted that there are Water PACK members who own land in the vicinity of the R9 Ranch, Response to ¶ 4 of the Joint Petition, those lands do not "surround" the R9 Ranch.

[82] Petitioners' Reply, p. 8, citing *NEA-Coffeyville v. Unified Sch. Dist. No. 445, Coffeyville, Montgomery Cnty.,* 268 Kan. 384, 387, 996 P.2d 821, 824 (2000).

[83] *Id.* (emphasis added.)

[84] 302 Kan. 656, 679, 359 P.3d 33, 49 (2015).

See also Bd. of Sumner Cnty. Comm'rs v. Bremby,[85] *Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc*.,[86] and *Sierra Club v. Moser*.[87] It is Black-Letter law that:

> In order to support an action, the interest of a party plaintiff must be a ***present, substantial interest*** as distinguished from a ***mere expectancy or future, contingent interest.*** A party must be able to demonstrate that he or she has some beneficial interest in the controversy that is ***concrete and actual, and not conjectural or hypothetical.*** Not only is standing confined to those whose interest in the controversy is direct, immediate, and substantial but also, a litigant must have a personal stake in the outcome.[88]
>
> Injuries that are ***shared and generalized***, such as the right to have the government act in accordance with the law, are not sufficient to support standing.[89]

Water PACK asserts that it has members who hold water rights *"*surrounding the R9 Ranch*"* and that approval of the application in this case will impair existing water rights.[90] It does not say which rights will be impaired and, more importantly, does not provide facts showing that water rights owned by any of its members will actually be impaired. And, to the extent that the future impairment Water PACK is concerned about is a regional lowering of the aquifer, its alleged *"*no injury*"* rule does not exist and is contrary to the plain language of K.S.A. 82a-711a, GMD5 regulations as addressed above, and pursuant to more than 75 years of Kansas law.[91]

Water PACK unsuccessfully raised the same issues it alludes to here in Edwards County District Court. The Agency Record in that case includes correspondence from individuals, at least some of whom are Water PACK members. None of the comments state that approval of the change applications, and by extension the transfer application, will result in direct impairment of an

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[85] 286 Kan. 745, 761, 189 P.3d 494 (2008).
[86] 292 Kan. 285, 324, 255 P.3d 1186, 1212 (2011).
[87] 298 Kan. 22, 33, 310 P.3d 360, 369 (2013).
[88] 59 Am. Jur. 2d PARTIES § 31 (emphasis added).
[89] *Id.* (emphasis added).
[90] Undated Joint Petition For Intervention, electronically filed in OAH case #23AG0003 on October 27, 2022, ¶¶ 4 and 9.
[91] K.S.A. 82a-711 and 82a-711a.

existing irrigation well. The Chief Engineer summarized the concerns raised in the public comments, stating that there was:

> concern that a transfer of 6,756.8 acre-feet causes, or might cause, declines that some people may consider excessive and that could lead to impairment complaints both for and against the Cities.[92]

The Chief Engineer addressed this concern in multiple locations in the Master Order:

> 66. The Chief Engineer carefully considered the public input received that was germane to the Chief Engineer's decisions regarding the Change Applications, specifically the decisions required by K.S.A. 82a-708b, i.e., whether the applicant has demonstrated that any proposed change is reasonable, will not impair existing rights, and relates to the same local source of supply as that to which the water right relates.[93]
>
> 70. After careful review of the documents and information referenced herein, the Chief Engineer finds that conversion of the R9 Water Rights from irrigation to municipal use under the terms and conditions set out in this Master Order is reasonable, will not impair existing rights, and relates to the same local source of supply as that to which the R9 Water Rights relate. *See* K.S.A. 82a-708b(a). Accordingly, the conversion of the R9 Water Rights from irrigation to municipal use should be contingently approved on the terms and conditions set out in this Master Order.[94]
>
> 86. Furthermore, no compelling evidence has been offered to substantiate concerns of impairment and therefore K.A.R. 5-5-9(c) (1994 version) is not applicable in this instance.[95]
>
> 88. Considering the reduced pumping rates, the distances between the Cities' wells and the wells of nearby water rights, the groundwater modeling results provided by the Cities, and the TYRA Limitation on diversions from the R9 Water Rights, the Chief Engineer finds, pursuant to K.S.A. 82a-708b(a)(2), that for each of the wells for which the Cities have applied to change from irrigation use to municipal use as requested in the Change Applications and explained herein, the Cities have demonstrated in each case that the proposed quantities for municipal use as requested in the Change Applications and explained herein are reasonable and will not impair existing rights.[96]
>
> 163. While there is a general concern about the rates of decline in the region, the Chief Engineer's decision must be based on the specific case of the R9 Ranch and

[92] Master Order, p. 12, ¶ 63.
[93] *Id.*, p. 13, ¶ 66.
[94] *Id.*, p. 14, ¶ 70.
[95] *Id.*, p. 17, ¶ 86.
[96] *Id.*, p. 18, ¶ 88.

> its immediate vicinity. The Chief Engineer finds that the modeling supports the Cities' determination of long-term yield of 48,000 acre-feet per every 10 years because the model reasonably represents the groundwater system of the R9 Ranch and immediate vicinity with its distribution and spacing of the wells for the R9 Water Rights and for other nearby water rights, the expected recharge, the northeasterly gradient of the groundwater table, the capture of flows from the southwest, and the lack of water rights to the northeast, all of which demonstrate that use on the R9 Ranch at this level will have limited negative effects on the nearest neighboring wells. Further, the Chief Engineer finds that the Cities' modeling of their operations constrained by such long-term yield sufficiently demonstrates that the Cities' proposed operations will not increase the rate of water level decline from the status quo and therefore will not unreasonably interfere with neighboring water rights.[97]
>
> 189. The Chief Engineer finds that this contingent change in places of use is reasonable, will not impair existing rights, and relates to the same local source of supply as that to which the R9 Water Rights relate. *See* K.S.A. 82a-708b(a).[98]
>
> 212. The Chief Engineer finds that the requested changes in points of diversion are reasonable, will not impair existing rights, and relate to the same local source of supply as that to which the R9 Water Rights relate. *See* K.S.A. 82a-708b(a).[99]

There are no facts set out in the First Amended Petition for Intervention that are contrary to the Chief Engineer's findings. Moreover, as stated above, shared and generalized injuries are not sufficient to support standing.[100] In *Sierra Club v. Moser,*[101] the Supreme Court stated:

> As the United States Supreme Court has recognized: "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' [by an agency action] within the meaning of the APA [see Administrative Procedure Act, 5 U.S.C. § 702 (2006)]." *Sierra Club*,[102] 405 U.S. at 739, 92 S.Ct. 1361; see *Summers v. Earth Island Institute,* 555 U.S. 488, 494, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (generalized harm to environment will not alone support standing). ***The injury must be particularized, meaning it must affect the plaintiff in a "personal and individual way."*** *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).[103]

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[97] *Id.*, p. 33, ¶ 163.
[98] *Id.*, p. 38, ¶ 189.
[99] *Id.*, p. 42, ¶ 212.
[100] 59 Am. Jur. 2d PARTIES § 31.
[101] 298 Kan. 22, 310 P.3d 360 (2013),
[102] *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).
[103] 298 Kan. at 35–36 (emphasis added).

B. Many, if not most of Water PACK's and the County's concerns are general, shared by others, and not related to the legal rights, duties, privileges, immunities, or other legal interests of any Water PACK member or the County.

In paragraph 15 of the proposed First Amended Joint Petition for Intervention, Petitioners raise a number of issues that are clearly outside of the scope of any perceived injury to any Water PACK member or any Edwards County citizen. Their concerns are those shared by other members of the public and are not a basis for being afforded party status in this proceeding.

Petitioners have provided no facts, have not asserted, and are unlikely to be able to show that any of the following issues will *"*substantially*"* affect any Water PACK member or the County in any particularized, personal, or individual way as required by K.S.A. 77-521(a)(2). Moreover, none of the concerns discussed in this Section comply with the standard enunciated by Petitioners, which requires that a pleading apprise the Presiding Officer and the Cities of the issues in a manner *"*specific enough to inform the tribunal of the questions to be decided.*"* [104]

1. Regional groundwater depletion is permitted by Kansas law.

Petitioners have provided no facts showing that any water right or any well will be directly impacted by the proposed transfer. In fact, the GMD Groundwater Model shows that the effect of the transfer will be sustainable. As discussed above, K.S.A. 82a-711a requires there to be an *"*express condition*"* in every water appropriation permit that permits a reasonable lowering of the static water level and for the reasonable decrease of the streamflow.

2. The R9 Ranch water rights are not subject to Minimum Desirable Streamflow requirements.

[104] Petitioners*'* Reply, p. 3.

Water PACK provides no facts to suggest that its members are injured by the State's compliance or non-compliance with minimum desirable streamflow requirements within GMD5 or the Walnut Creek Intensive Groundwater Use Control Area.

More importantly, as Water PACK is well aware from its involvement in the Change Proceeding, the most junior water right on the R9 Ranch, DWR File No. 30,084, has a priority date of July 1, 1977. Therefore, none of the R9 Ranch water rights are even subject to MDS limitations, which are only imposed on water rights with priority dates after April 12, 1984.[105] And, as provided by K.S.A. 82a-708b, the water rights on the R9 Ranch retain their priority when they are changed from irrigation to municipal use. Thus, even if a Water PACK member or the County is injured by non-compliance with an MDS requirement, there is no remedy enforceable against the Cities or the R9 Ranch water rights.

3. The Transfer will not affect the Rattlesnake Creek Basin

Likewise, it is not clear what Petitioners mean by "water supplies to the Rattlesnake Creek Basin" in which Water PACK members have an interest. Petitioners have not alleged any facts to suggest that the transfer will have any effect in the Rattlesnake Basin.

4. Deleterious impacts on local economies and dependent government services are outside the scope of the WTA.

Petitioners raise the specter that the transfer will have negative impacts on the economy. While the economic impact of the transfer is a potential issue in the water transfer proceeding, the focus is not on local economies. Instead, if the "economic . . . impacts of approving or denying the transfer"[106] is at issue, the analysis is "whether the benefits ***to the state*** for approving the transfer outweigh the benefits ***to the state*** for not approving the transfer."[107]

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[105] K.S.A. 82a-703b(a).
[106] K.S.A. 82a-1502(c)(3).
[107] K.S.A. 82a-1502(c) (emphasis added).

Moreover, the Cities have plugged all of the irrigation wells[108] and sold or scrapped all of the center pivot systems on the R9 Ranch, so any economic harm has already occurred. Water PACK has no right to tell the Cities what it can and cannot do with its property on the R9 Ranch.

Finally, the Edwards County valuation has steadily increased over the years, so it is unclear how the County would seek to show that the transfer has or will have a *"*substantial effect*"* on the local economy or dependent government services as required by K.S.A. 77-521(a)(2).

5. Petitioners will not be injured by the water transfer infrastructure

The Cities are unaware of any *"*potentially deleterious effects resulting from the facilities necessary to transfer water from the R9 Ranch to the Cities*"* nor have the Petitioners identified any. This is another generalized statement with no actual applicability to this matter.

6. There have been no deviations from conservation plans, GMD5 Rules, or the 2018 GMD5 Management Plan.

Petitioners have not, and cannot, substantiate deviations by either City, unjustifiable or otherwise, from conservation plans and practices developed and maintained by the Kansas Water Office, GMD5 Rules, or GMD5*'*s Management Plan.

At the Chief Engineer*'*s direction, the Cities obtained the GMD5 Model from DWR and used it to evaluate the proposed changes. The GMD5 Model demonstrates that the changes approved by the Chief Engineer in the Master Order comply with the sustainable yield requirements in K.A.R. 5-25-1 which defines 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.*"*

Conclusion

[108] All of the permitted irrigation wells on the R9 Ranch have been plugged or have been converted to domestic wells and used for occasional water level and water quality sampling.

Petitioners' Motion to Amend should be denied. Their purported right to participate as parties in this proceeding is based on a non-existing "liberally granted" standard; generalized, NIMBY-type arguments; misstatements of the plain text of statutory and regulatory mandates; mischaracterizations of the Cities' arguments; and absolutely no reference to actual facts demonstrating any impairment, substantial or otherwise, to any "legal rights, duties, privileges, immunities or other legal interests" of any person or entity. Petitioners have failed to show they are entitled to intervene as parties and their Motion to Amend should be denied.

If the Presiding Officer determines that the Petitioners, or either of them, should be allowed to intervene, the Cities respectfully request that their participation be limited to substantial impairment of specifically identified, particularized, personal, and individual "legal rights, duties, privileges, immunities or other legal interests" other than those raised in the change application proceeding. The Cities also respectfully request that any and all of their requests for extensions of time be granted only upon agreement of all parties and the Presiding Officer.

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 23rd day of December, 2022, by uploading it to OAH Case Nos. 23AG0003 and by electronic mail to the following:

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Court: Supreme Court

Case Number: 125469

Case Title: WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, APPELLANT,
V.
EARL LEWIS, P.E., IN HIS OFFICIAL CAPACITY AS CHIEF ENGINEER DIVISION OF WATER RESOURCES, KANSAS DEPARTMENT OF AGRICULTURE,
V.
THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS, APPELLEES.

Type: Motion to Transfer to Supreme Court by Aples Cities of Hays and Russell, Kansas

Considered by the Court and granted.

SO ORDERED.

/s/ Marla J. Luckert, Chief Justice

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF KANSAS

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, Plaintiff/Appellant, v. 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.	Case No. 125469-AS Dist. Ct. Case No. 19-CV-5

MOTION TO TRANSFER TO SUPREME COURT BY THE CITIES OF HAYS AND RUSSELL, KANSAS

Pursuant to K.S.A. 20-3017 and Supreme Court Rule 8.02, the City of Hays, Kansas, and the City of Russell, Kansas (the "Cities"), move for a transfer of this appeal from the Court of Appeals to the Supreme Court for final determination.

IN SUPPORT of this Motion, the Cities state as follows:

I. Nature of the case.

Petitioner, the Water Protection Association of Central Kansas ("Water PACK"), sought review in Edwards County District Court under the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.* ("KJRA"), of a "Master Order" issued by the Kansas Department

of Agriculture, Division of Water Resources ("DWR"). The Master Order approved 32 Applications seeking to change the characteristics of the Cities' water appropriation rights appurtenant to farmland in Edwards County, known as the "R9 Ranch," from irrigation use on the Ranch to municipal use in the Cities. In an 82-page ruling, Hon. Bruce Gatterman affirmed the Master Order on June 29, 2022, with modifications on a single issue from which the Cities do not appeal. (Ex. 1.) Water PACK has now appealed Judge Gatterman's ruling.

The R9 Ranch covers about 6,900 contiguous acres of irrigated farmland (yet accounts for only a tiny fraction of irrigation use in Edwards County). The water appropriation rights appurtenant to the R9 Ranch authorize the diversion of almost 8,000 acre-feet of water per year for irrigation use. The Cities purchased the R9 Ranch, including its appurtenant water rights, in 1995, intending to use the property to permanently resolve their decades-long struggle against crippling water shortages. (Ex. 1, PDF p. 4.).

Before the Cities can divert and transport water from the R9 Ranch to their residents, they must comply with two related, but separate, statutory requirements. The Kansas Water Transfer Act, K.S.A. 82a-1501, *et seq.*, requires approval of the "water transfer" by a Panel consisting of DWR's Chief Engineer, the Director of the Kansas Water Office, and the Secretary of Health and Environment or her designee. K.S.A. 82a-1501(a)(1), (d), (e) and (f) and K.S.A. 82a-1502(a)(1).

In order to submit a "complete" water transfer application, the Cities must first obtain "contingently approved" applications to change the characteristics of their R9

Ranch water rights. K.S.A. 82a-1501a(b)(1), K.A.R. 5-50-2(a)–(z), including (x)(2)(A)–(C), and K.A.R. 5-50-7(b)(1)–(3). The Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*, permits any owner of a water right to seek DWR approval to change the place of use, the point of diversion, or the authorized use of water without losing priority of right. K.S.A. 82a-708b. It is this "change" proceeding that is presently before the Court.

Between 1995 and 2015, the Cities explored numerous other water-supply options, principally because of local opposition to the R9 Ranch project, including a 1996 attempt by Edwards County to invoke the 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. 2, Mike Berry, *Edwards County Ready to Fight Hays for Water*, Wichita Eagle, August 31, 1994, at 3D.

On June 26, 2015, after determining that the R9 Ranch was the only viable source of municipal water available to them, the Cities submitted Change Applications requesting DWR's contingent approval to change the R9 Ranch water rights from irrigation to municipal use in Hays and Russell. In his ruling, Judge Gatterman stated that "David Barfield, the prior Chief Engineer of DWR, testified the change applications as submitted represented the most extensive and complex applications of his entire career." (Ex. 1, PDF p. 5. *See also* PDF pp. 10 and 41 noting the complexity of the Change Applications.)

The original Change Applications, two sets of amendments, and related documents are available at the following web site: https://agriculture.ks.gov/divisions-programs/dwr/water-appropriation/change-applications/hays-change-and-water-transfer.

On March 27, 2019, DWR issued the "Master Order" and 32 separate Orders approving the Change Applications. (The Master Order is attached as Exhibit 3; however, due to the large size of the entire Master Order, the orders approving each of the individual Change Applications, Exhibits 1–32, are not included in Ex. 3 but are available at DWR's website: https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/haysr9_master-order_final_complete.pdf?sfvrsn=7e168ac1_4.) The Master Order will permit the Cities to divert and transport up to 6,756.8 acre-feet of groundwater from the R9 Ranch per year but limits the Cities to a ten-year rolling average of 4,800 acre-feet per year. Ex. 3, ¶¶ 226 and 239. After the Secretary of Agriculture denied its request for review, Water PACK filed a Petition for Judicial Review in Edwards County District Court. (Ex. 4.)

Edwards County's 1996 attempt and Water PACK's current attempt to impede the Cities' water transfer, are not outside the norm. Opposition to proposed transfers is often based on the ***incorrect*** notion that water "belongs to" the inhabitants of areas 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. Kansas 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).

A speedy resolution of the present appeal is an important public health and welfare issue that could turn critical. As discussed in Section III below, Ellis and Russell Counties, and the counties to the west on which they rely for their current water supply, are in a drought that is crippling much of the Western United States. https://droughtmonitor.unl.edu/CurrentMap.aspx.

Because the Cities' current water supplies are highly vulnerable to drought, they have pressed to finalize the change proceeding so they may commence the water transfer proceeding. To that end, on January 8, 2016, while negotiations with DWR over the terms of the Change Applications had only just begun, the Cities filed an Application to Transfer Water from Edwards County, Kansas to the Cities of Hays and Russell, Kansas. And on May 20, 2019, the Cities filed the First Amended Transfer Application that consisted of 48 single-spaced pages, two Appendices covering 40 pages, and Exhibits 1–184 covering over 7,700 pages. The Transfer Application, the First Amended Transfer Application, and related documents are available at the following web site: https://agriculture.ks.gov/HaysRussellTransfer.

Following Judge Gatterman's June 29 Ruling in the Cities' and DWR's favor, Water PACK filed a Notice of Appeal in the district court on July 27, 2022, but has neither sought to stay the effectiveness of Judge Gatterman's ruling nor paid a supersedeas bond, which, in light of dramatically increasing project costs, would be substantial. *See* Section III. G.

It took seven years from the date of the original Change Applications to receive Judge Gatterman's final Decision. The Chief Engineer has informed the Cities that the

First Amended Transfer Application is now complete, and he intends to commence the water transfer proceeding notwithstanding this appeal. Nevertheless, resolving Water PACK's appeal is of utmost urgency for numerous reasons, the most important of which include the facts that Ellis and Russell Counties are, once again, in the midst of a drought, project costs are skyrocketing, and legal certainty is needed to obtain project financing.

II. The Kansas Supreme Court has jurisdiction to hear this appeal from the district court's final judgment.

The Supreme Court has jurisdiction to hear this appeal from an "order or judgment of a district court." K.S.A. 60-2101(b).

On June 29, 2022, the district court entered the Memorandum Decision and Order as its final judgment pursuant to K.S.A. 77-601, *et seq.*, including K.S.A. 77-622, affirming the Chief Engineer's Orders, with modifications on a single issue. (Ex. 1.) Water PACK filed a Notice of Appeal on July 27, 2022. (Ex. 4.)

Cases appealed to the Court of Appeals may be transferred to the Supreme Court upon the motion of any party. K.S.A. 60-2101(b) and K.S.A. 20-3017. Because their urgent need for a long-term drought-resistant water supply is of existential importance to the Cities and has consequential statewide impacts, the subject matter of this case is of significant public interest. K.S.A. 20-3016(a)(2). Water PACK seeks to overturn the district court's decision affirming the Cities' right to change their R9 Ranch water rights to municipal use. This case presents legal questions that have major public significance for the Cities with no countervailing harm to Water PACK or its members. K.S.A. 20-3016(a)(3).

III. This case involves matters of "significant public interest" and "major public significance."

This case directly relates to matters that the Legislature has directed the courts to address expeditiously. K.S.A. 82a-1505(b). Moreover, a speedy resolution of this case is of the utmost importance to the Cities and this State and merits transfer directly to the Kansas Supreme Court pursuant to K.S.A. 20-3016(a). It involves matters that relate to what may soon become urgent public health and welfare needs as well as the Cities' property rights which are central to the "public interest and welfare of this state."

A. Water Transfer cases are to be given precedence in the appellate courts.

This matter is directly related to the Cities' water transfer proceeding. The Master Order was issued pursuant to provisions of the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq*. However, contingently approved change applications are required for a "complete" water transfer application. K.A.R. 5-50-2(x) and K.A.R. 5-50-7. The Water Transfer Act, includes the following provision:

> The [KJRA] review proceedings shall have precedence in the district court. Appellate proceedings shall have precedence in the court of appeals and in the state supreme court under such terms and conditions as the supreme court may fix by rule.

K.S.A. 82a-1505(b).

The Legislature recognized the importance and significant public interest in cases involving all water transfers putting these cases on par with responses to certified questions from federal courts, K.S.A. 60-3204; judicial review of orders issued by the Secretary of Labor, K.S.A. 44-612; and appeals from orders denying that a plaintiff has

the power of eminent domain and that a taking is necessary to the plaintiff's lawful corporate purposes, K.S.A. 26-504.

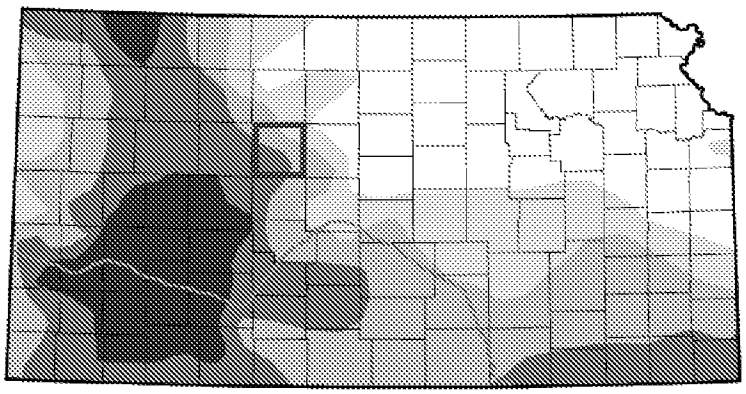
While this is technically judicial review of an order issued pursuant to the Water Appropriation Act, it is a necessary first step in a water transfer proceeding and is therefore the kind of case that the Legislature has said "shall have precedence in the court of appeals and in the state supreme court." K.S.A. 82a-1505(b). The present drought exacerbates that urgency.

B. Hays and Russell are uniquely impacted by drought.

On June 27, 2022, the Governor issued Executive Order #22-06 placing all 105 Kansas counties in drought watch, warning, or emergency status. She stated that abnormally dry or drought conditions are forecast to persist or get worse. https://www.kwo.ks.gov/admin-pages/news-content/2022/06/27/governor-declares-drought-emergency-warnings-and-watches-for-kansas-counties.

Ellis County is in "Drought Warning" status and Russell County is in a "Drought Watch." However, both communities draw water from the Smoky Hill and Big Creek alluviums. Flow in those streams is dependent on rainfall in counties to the west of Hays, including Wallace, Logan, Gove, and Trego Counties, which are all in "Drought Emergency" status. (*Id.*)

The U.S. Drought Monitor Map for Kanas released on August 16, 2022, shows that parts of Western Kansas, including Ellis County, are in Extreme Drought (bright red) and the portion of the State in Exceptional Drought (dark red) is increasing.



C. The Cities have suffered with inadequate water supplies for decades.

The City of Hays has struggled with water shortages for many years. (Ex. 1, PDF p. 4; Ex. 5., July 3, 1985 Hays IGUCA Order, Findings, ¶ 8.) The City diverts groundwater from municipal wells in the Smoky Hill River and Big Creek alluviums. (*Id.*, Findings ¶ 7.) The Big Creek wells are scattered across the City. (Ex. 6, Map of Big Creek Wells.) They draw water from the alluvium that is recharged by some infiltration but mainly from the flow in Big Creek, which, in turn, depends on rainfall to the west of Hays. (Ex. 7, Hays Russell Well location Map.) Recharge of the Hays and Russell well fields in the Smoky Hill alluvium relies on flow in the River which is negatively impacted by the Cedar Bluff Reservoir and substantial upstream irrigation. (*Id.*)

The Cities' ability to provide water to their residents quickly becomes a critical situation even during very brief "flash" droughts. For example, in 2012, both the Smoky Hill and Big Creek near the Cities went completely dry. (*See* Ex. 8, 2012 USGS photo of Big Creek near Hays; Ex. 9, USGS photo of Smoky Hill River near Schoenchen.) And on August 15, 2022, there was no flow in the Smoky Hill River at Pfeiffer. (Ex. 10.)

Over the years, numerous domestic wells have been drilled in the Big Creek alluvium, competing with the City of Hays' wells. (Ex. 5, Findings, ¶¶ 7, 13, 20, and 23; Ex. 6 Map of Big Creek Wells.) In February of 1985, the City of Hays requested that the Chief Engineer initiate proceedings to designate an Intensive Groundwater Use Control Area ("IGUCA") in the City of Hays and the surrounding area. (Ex. 5, Findings, ¶ 1. *See* K.S.A. 82a-1036, *et seq.*)

Hays City officials testified that the City of Hays has struggled to meet water demands during hot dry weather since 1975. (Ex. 5, Findings, ¶ 8.) The problem worsened after DWR reduced the quantity of water the City of Hays can divert from its Smoky Hill well field in the May 31, 1984, Lower Smoky Hill IGUCA, Ex. 11. (*Id.*) But the historical record shows the problem goes back much further. *See* https://municipalwaterleader.com/guaranteeing-the-water-supply-of-hays-kansas-through-conservation-reuse-and-new-supplies/

The Chief Engineer entered an Order establishing an IGUCA covering a total of 9.9 square miles including the City of Hays and the immediate area. (Ex. 5; Ex. 12, Map of Hays IGUCA.) The Order was amended on August 29, 1985, requiring all domestic wells within the area to be registered with DWR and allowed the Chief Engineer to restrict the use of groundwater for outdoor use when "high temperature, strong winds and solar radiation . . . results in . . . waste of water." (Ex. 13.) The Hays IGUCA Order was the first of its kind and remains one-of-a-kind in Kansas.

D. Despite extensive conservation measures, the Cities' existing water supplies are extremely vulnerable to drought.

Both Hays' and Russell's water supplies are dramatically impacted by drought, even droughts of short duration. This has led to unheard-of austerity measures by the Cities.

Both Cities adopted water-conservation policies many years ago that go far beyond the norm for this part of the country. For example, both Cities:

- Restrict outdoor water use and irrigation to specified hours and prohibit irrigation run-off;
- Prohibit or restrict washing vehicles and outdoor vegetation;
- Use effluent water to irrigate golf courses and other public areas;
- Have installed the latest water reuse technology in their recent water recreation facilities;
- Require all new construction to incorporate efficient plumbing fixtures limiting water consumption;
- Offer free low-flow showerheads and cash rebates to replace fixtures with high-efficiency alternatives;

(*See* Ex. 14, Declaration of Toby Dougherty, Hays City Manager, *and* Ex. 15, Declaration of Jon Quinday, Russell City Manager, for these and numerous other conservation measures implemented by both Cities.)

This has resulted in per-capita water use among the lowest in the State. For example, during 2013–2017, average water use in Hays was just 92 gallons per person per day. *See* Municipal Water Use 2017 at https://www.agriculture.ks.gov/divisions-programs/dwr/water-appropriation/water-use-reporting

Hays	Dodge City	Garden City	Liberal	Salina	Great Bend	Hutchinson
84	134	185	184	101	104	136
	160%	220%	219%	120%	124%	162%

Russell's per capita water use during this period was 135 gallons per person per day because of an ethanol plant and the nation's largest gluten plant, which accounts for 44% of total U.S. production.

These restrictions apply to residential, commercial, and, in many cases, industrial users of the Cities' water supplies. The Cities' economic development has been harmed by these austerity measures. For example, in times of drought, Hays imposes a moratorium on all new water meters, essentially freezing the City's residential, commercial, and industrial growth. (Ex. 14, Declaration of Toby Dougherty, Hays City Manager.) This is significant for Hays, a city with both low unemployment (<2%) ***and*** a housing shortfall. (*Id.*) Hays is a growing community, but its growth is being stunted by the absence of a reliable, drought-resistant water supply. (*Id.*)

Russell is just as vulnerable to drought—perhaps more so, because Russell's well field is farther downstream. (Ex. 15, Declaration of Jon Quinday, Russell City Manager. *See also* Ex. 10.)

For these reasons, resolving Water PACK's appeal, which is needed to finalize the water transfer, is of the utmost urgency for the Cities, their citizens, the mid-central Kansas region, and the State as a whole.

E. Previous delay in spite of the Cities' best efforts.

It has now been more than seven years since the Cities submitted the Change Applications. The Cities twice amended the Applications that, altogether, comprise more than 2,100 pages, leading to a complex Master Order changing the Cities' R9 Ranch water rights—which are lawfully purchased real property rights owned by the Cities. K.S.A. 82a-701(g) and K.S.A. 82a-708a(a).

The Change Applications were supported by a complex numerical groundwater model establishing that the diversion of 4,800 acre-feet per year from the R9 Ranch is sustainable over a 50+-year horizon. None of the Water PACK members/irrigators who are working so vigilantly to obstruct and delay the Cities' water transfer are —voluntarily or involuntarily—subject to similar limitations. Yet they seek to obstruct the Cities' property rights on terms to which they would never agree.

The Cities pushed hard for final approval of the Change Applications and, in spite of those efforts, had to wait nearly four years while DWR reviewed, and ultimately approved them. And it has now been more than seven years since they initiated the process. During that time, the Cities worked ahead, filing the Water Transfer Application and the First Amended Transfer Application. Multiple factors and circumstances have delayed the process. Some are the result of the complex and unique Change Applications. Others, like Water PACK's apparent efforts to slow judicial review, are based on unfounded fears. Seven years is long enough to wait for a matter that is of crucial importance to the Cities and their respective futures.

F. Concurrent consideration of the appeal and the water transfer is important because additional delay is built in.

The Water Transfer Act includes a series of time limits within which the proceeding must occur. K.S.A. 82a-1503(b), (c), and K.S.A. 82a-1504(b). As shown in the schedule attached as Ex. 16, the proceeding will take a minimum of 11 months and must be completed within 22 months unless extensions are granted for good cause shown or by agreement of all parties (the Cities will only agree to delay in the most compelling circumstances). *Id.*

Development of the R9 Ranch as a municipal water supply is planned to occur in phases. The first phase will involve installation of several new public water-supply wells and supporting infrastructure including well houses, a 480 Volt 3-phase power distribution system, access roads, a raw water collection system, a 1.0 million-gallon storage tank, a high-service pump station, a Supervisory Control and Data Acquisition (SCADA) system, and approximately 65 miles of 20-inch ductile iron or PVC pipe that will tie into the existing pipeline from the Hays Smoky Hill River well field near Schoenchen, Kansas. (Ex. 17, Declaration of Paul McCormick, P.E.) Nine miles of 18-inch pipeline from near Schoenchen to Russell's Pfeiffer well field will connect the City of Russell to the system. (Ex. 15.)

Assuming that the Panel approves the transfer, actual construction will begin as soon as the design of a collection and transmission system and related infrastructure is complete and the Cities obtain financing for the project. Thus, the sooner this appeal is resolved, the sooner the Cities can begin the next phase of the project.

G. Previous delay has already increased the cost of the project; further delay will be devastating

The Cities have pushed relentlessly for resolution of both proceedings since filing the original Change Applications in 2015. In the meantime, construction costs have increased steadily at first, and dramatically of late. The pandemic had, and continues to have a significant impact on labor and material costs and delivery schedules. In 2015, the cost to construct the first phase of the project, which does not include increased financing costs, permitting costs, engineering design, or acquisition of easements and rights-of-way, was estimated to be $72.9 million. (Ex. 17, Declaration of Paul McCormick, P.E.) The current construction cost estimate is $106.6 million, a 46.29% increase. (*Id.*) By 2025, the project is estimated to cost rate payers in Hays $134.9 million, a 26.53% increase from the current estimate and an 85% increase from 2015. (*Id.*) Beginning in 2025, construction costs are expected to increase by more than $10 million annually. (*Id.*)

IV. This case is the first of its kind in the State of Kansas and the Cities are in urgent need of prompt resolution of Water PACK's appeal.

The Water Transfer Act was first enacted in 1983 and amended in 1993. There has only been one other proceeding under the Act which took place before the 1993 amendments. *Water Dist. No. 1 v. Kan. Water Auth.*, 19 Kan. App. 2d 236, 866 P.2d 1076 (1994). No water-starved municipality has ever sought State approval of a water transfer of their lawfully owned water rights that were needed to meet their critical supply needs.

In the district court, Water PACK made numerous frivolous arguments. Judge Gatterman dutifully addressed each of Water PACK's challenges based on well-established Kansas law. Because of the Cities' urgent needs, they respectfully state that

they should not be forced to endure the delay inherent in the review of Judge Gattermann's order in the Court of Appeals, this Court's consideration of a Petition for Review, and then potentially in this Court. The Cities and their residents deserve what every other community in Kansas already has—a drought-resistant source of potable water.

V. Conclusion.

The Cities of Hays and Russell respectfully request that this appeal be transferred to the Supreme Court for final determination.

Respectfully submitted,

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Attorneys for City Russell, Kansas

CERTIFICATE OF SERVICE

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 the following:

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Attorney for Defendant/Appellee

/s/David M. Traster
David M. Traster, KS #11062

EXHIBIT INDEX

Ex. 1	2022-06-29 Memorandum Decision and Order
Ex. 2	1994-08-31 Mike Berry, *Edwards County Ready to Fight Hays for Water*, *Wichita Eagle*
Ex. 3	2019-03-27 Master Order
Ex. 4	2022-07-27 Water PACK Notice of Appeal
Ex. 5	1985-07-03 Hays IGUCA
Ex. 6	Hays Big Creek Wells
Ex. 7	Hays Russell Well Location Map
Ex. 8	2012 USGS Kansas Drought – Photo of Big Creek Near Hays During 2012 Drought
Ex. 9	2012 USGS Kansas Drought – Photo of Smoky Hill River Near Hays During 2012 Drought
Ex. 10	2022-08-15 Smoky Hill River at Pfeifer
Ex. 11	1984-05-31 Lower Smoky Hill IGUCA
Ex. 12	Map of Hays IGUCA
Ex. 13	1985-08-29 Amended Hays IGUCA
Ex. 14	Declaration of Toby Dougherty
Ex. 15	Declaration of Jon Quinday
Ex. 16	Water Transfer Act Statutory Schedule
Ex. 17	Declaration of Paul McCormick, P.E.

23AG0003 A6

1320 Research Park Drive
Manhattan, KS 66502
785-564-6700
www. agriculture.ks.gov

Kansas
Department of Agriculture

900 SW Jackson, Room 456
Topeka, KS 66612
785-296-3556

Mike Beam, Secretary

Laura Kelly, Governor

October 20, 2022

Loren Snell, Acting Director
Kansas Office of Administrative Hearings
1020 S. Kansas Avenue
Topeka, KS 66612-1327

Re: APPOINTMENT OF PRESIDING OFFICER FOR WATER TRANSFER HEARING

Dear Mr. Snell:

I am writing this letter on behalf of the Water Transfer Hearing Panel (Panel) to request that the Office of Administrative Hearings (OAH) appoint a presiding officer to conduct a hearing regarding a water transfer application filed by the Cities of Hays, Kansas and Russell, Kansas (Cities) in accordance with the Kansas Water Transfer Act, K.S.A. 82a-1501, et seq., and amendments thereto and rules and regulations adopted thereunder (the Act).

The Act is invoked when an applicant seeks to divert water in a quantity of 2,000 acre-feet or more per year and transport that water for beneficial use outside a 35-mile radius of its point of diversion (*See* K.S.A. 82a-1501). K.S.A. 82a-1501a(b) provides that the Panel, which is to consist of the Chief Engineer of the Kansas Department of Agriculture, Division of Water Resources (Chief Engineer), the Director of the Kansas Water Office, and the Director of the Kansas Department of Health and Environment's (KDHE) Division of Environment, as designated by the Secretary of KDHE, "shall request a presiding officer from the Office of Administrative Hearings to conduct a hearing in accordance with this Act when: (1) an application for a water transfer is complete…" K.S.A. 82a-1501a(c) requires that the hearing officer be an "independent *person knowledgeable in water law*, *water issues* and hearing procedures." (*emphasis added.)*

I would also note the existence of K.A.R. 5-50-8, which was never updated following revisions to the Act in 2004. This regulation conflicts with K.S.A. 82a-1501a because it directs the Panel to request nominations for a water transfer hearing officer from the water transfer applicant, entities in the area or basin where the potential point or points of diversion are located, and the Act's designated "commenting agencies." (*See* K.S.A. 82a-1501.) It is the opinion of the Panel that K.A.R. 5-50-8 has been implicitly revoked due to the 2004 amendments to K.S.A. 82a-1501a. To the extent K.A.R. 5-50-8 is not revoked by implication, it is my intention to waive that regulation as to the Cities' water transfer application pursuant to K.S.A. 82a-1904, which provides that the Chief Engineer may grant a waiver of any rule or regulation adopted by DWR for good cause shown and upon a determination that the waiver will not prejudicially or unreasonably affect the public interest and will not impair any existing water right. I believe the

EXHIBIT
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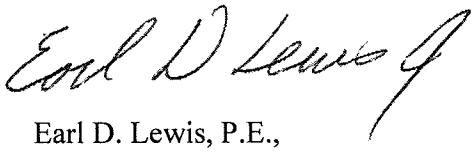
requirements of K.S.A. 82a-1904 are met in this case and that a waiver of K.A.R. 5-50-8 would be appropriate. The Panel has thus elected to move forward with requesting the appointment of a presiding officer from OAH under the authority of K.S.A. 82a-1501a(b), as the Cities' have submitted a complete water transfer application to DWR.

Therefore, the Panel is requesting that OAH appoint a presiding officer to conduct a hearing regarding the proposed water transfer in accordance with the Act. It is the Panel's hope that there is currently an administrative law judge on the Office of Administrative Hearings' staff who meets the relevant requirements of K.S.A. 82a-1501a and who has the workload capacity to conduct the water transfer hearing in a timely fashion and in accordance with the timelines and procedures set out in K.S.A. 82a-1503. I would also note that the Act provides that the Panel "shall review all initial orders of the presiding officer in accordance with the Kansas Administrative Procedure Act (KAPA)," acting as an agency head pursuant to KAPA when it does so, and that any judicial review of the Panel's final order is to have precedence in the district court, the Kansas Court of Appeals, and the Kansas Supreme Court (*See* K.S.A. 82a-1504; K.S.A. 82a-1505).

Finally, the Panel wishes to emphasize the importance of concluding the water transfer hearing in as timely a fashion as possible. As these proceedings relate to the distribution of Kansas's water supply, they concern matters of significant public interest—the Water Protection Association of Central Kansas appealed DWR's contingent approval of the Cities' change applications (filed as a prerequisite to the approval of their water transfer application) to the Kansas Court of Appeals, and, on September 26, 2022, the Kansas Supreme Court granted a motion by the Cities to transfer the case to the Supreme Court due to the importance of its subject matter. Given that the Kansas Supreme Court found it appropriate to expedite the appeal regarding the Cities' change applications, the Panel believes it is prudent for the water transfer proceedings to similarly be conducted expeditiously, in order to provide the parties with a certain resolution as soon as possible.

Accordingly, the Panel would greatly appreciate receiving a response to this letter or notice of the appointment of a presiding officer to conduct the water transfer hearing as soon as possible. Please also send a summary of the relevant qualifications of any hearing officer that OAH does appoint. Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,



Earl D. Lewis, P.E.,
Chief Engineer,
Kansas Department of Agriculture,
Division of Water Resources
785-564-6658
earl.lewis@ks.gov

Snell, Loren F. [OAH]

From: Lewis, Earl [KDA]
Sent: Friday, October 21, 2022 8:53 AM
To: Snell, Loren F. [OAH]
Cc: Kramer, Stephanie [KDA]
Subject: Request for Hearing Officer
Attachments: Letter to OAH re water transfer hearing presiding officer 10.10.22.pdf

Mr. Snell,

I chair the state's water transfer panel which was recently convened. On the panel's behalf, attached you will find a letter requesting the appointment of a hearing officer to conduct the hearing process as prescribed by statute. A hard copy of the letter will follow.

Please feel free to contact me if you have any questions about this matter. Thank you for you assistance.

Earl

Earl Lewis, PE | Chief Engineer
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Manhattan, Kansas 66502
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Statutory **maximums** are highlighted in yellow and **minimums** in orange. See K.S.A. 82a-1503(b) and (c), and K.S.A. 82a-1504(b).

The presiding officer and the hearing panel may extend the time limits "but only with the written consent of all parties or for good cause shown." K.S.A. 82a-1503(b) and K.S.A. 82a-1504(b).

	Minimum Days	Maximum Days	Minimum Dates	Maximum Dates
Prehearing Conference starts (not less than 90 and not more than 120 days after the required notice)	90	120	2/15/2023	2/15/2023
Prehearing Conference concludes (shall conclude not later than 45 days after commencement)	2	45	2/17/2023	4/1/2023
Motions to Intervene must be filed at least 60 days before Public Hearing commences	-60	-60	3/19/2023	5/31/2023
Public Hearing starts (not less than 90 and not more than 120 days after prehearing conference concludes)	90	120	5/18/2023	7/30/2023
Public hearing concludes (shall conclude not later than 120 days after commencement)	15	120	6/2/2023	11/27/2023
Hearing Officer's Initial Order	60	90	8/1/2023	2/25/2024
Transfer Panel's Final Order	60	90	9/30/2023	5/25/2024
Total Days after commencement of prehearing conference			227	465
Total Months after commencement of prehearing conference			7	15

EXHIBIT
3

Docketing Notice

Court of Appeals of Kansas

County: ED

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

CLERK DISTRICT COURT
EDWARDS COUNTY COURTHOUSE
PO BOX 232
KINSLEY, KS 67547

Appellate Case No. 22-125469-A
District Court Case No. 19CV5

WATER PROTECTION ASSOCIATION
OF CENTRAL KANSAS, APPELLANT,
V.
EARL LEWIS, P.E., IN HIS OFFICIAL
CAPACITY AS CHIEF ENGINEER
DIVISION OF WATER RESOURCES,
KANSAS DEPARTMENT OF AGRICULTURE,
V.
THE CITY OF HAYS, KANSAS AND
THE CITY OF RUSSELL, KANSAS, APPELLEES.

PLEASE BE ADVISED THAT THE FOLLOWING ACTIVITY HAS BEEN NOTED FOR THE CASE ABOVE:

NOTICE OF APPEAL FILED
Notice of Appeal (7/27/22) Water Protection Association of Central Kansas

Court: Court of Appeals of Kansas Case No.: 22-125469-A

Dist. Ct. Judge BRUCE T GATTERMAN
Date: August 23, 2022

Douglas T. Shima
Clerk of the Appellate Courts

EXHIBIT
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IN THE SUPREME COURT OF THE STATE OF KANSAS

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, Plaintiff/Appellant, v. 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.	Case No. 22-125469-A Dist. Ct. Case No. 19-CV-5

MOTION TO EXPEDITE THE BRIEFING SCHEDULE

Intervenors the City of Hays and Russell, Kansas (the "Cities") hereby move for an Order expediting the briefing schedule in this Appeal. In support of this Motion, the Cities incorporate their Motion to Transfer this Appeal to the Kansas Supreme Court as if set forth in full herein.

For the same reasons that Water PACK's appeal should be transferred, the briefing schedule should be expedited. In the event that the Supreme Court denies the Cities' Motion to Transfer, the Cities respectfully request that the Court of Appeals enter an Order expediting the briefing schedule.

EXHIBIT 5

Respectfully submitted,

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Attorneys for the City of Hays, Kansas

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CERTIFICATE OF SERVICE

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 the following:

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, Plaintiff/Appellant, v. 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.	Case No. 22-125469-A

PLAINTIFF'S/APPELLANT'S MEMORANDUM IN OPPOSITION TO INTERVENOR'S/APPELLEE'S MOTION TO EXPEDITE THE BRIEFING SCHEDULE

In their motion filed August 24, 2022, Intervenors/Appellees (the Cities) seek an order expediting the briefing schedule. The motion is offered as an adjunct to their motion to transfer this matter to the Kansas Supreme Court. For the reasons hereafter noted, the motion should be denied.

The briefing schedule is governed by Kan. Sup. Ct. R. 6.01. Relevant to the issue before the Court, the Rule provides as follows.

> (A) If a reporter's transcript was not ordered or if all transcripts ordered were filed with the clerk of the district court before docketing, an appellant must file a brief no later than 40 days after the date of docketing.

EXHIBIT
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> (B) If a transcript was ordered, but was not filed before docketing, an appellant must file a brief no later than 30 days after service of the certificate of filing of the transcript under Rule 3.03.

Kan. Sup. Ct. R. 6.01.

Whether the Court is imbued with authority to deviate from that rule is perhaps debatable. *Cf. Rock Chalk Hills, LLC v. Sweeney, 337 P.3d 72 (2014)* (explaining that the statute in question was a mandatory provision and that the trial court was without discretion to deviate from the statute's scheduling mandate).

But regardless of whether authority exists, the facts militate against granting the relief sought by the Cities. The agency record is 3756 pages. The undersigned lead appellate counsel did not participate in the proceedings below. Those facts alone are compelling. Coupled with the Cities' nebulous rationale for acceleration ("an important public health and welfare issue that *could*[1] turn critical), the Court is presented with an insufficient rationale justifying the extraordinary departure from the rules governing the appellate process that the Cities request.

WHEREFORE, premises considered, Plaintiff/Appellant respectfully requests that the Cities' motion to expedite the briefing schedule be denied.

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[1] *Motion to Transfer to Supreme Court by the Cities of Hays and Russell, Kansas* at 5 (Emphasis Supplied).

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Myndee M. Lee

Court: Court of Appeals

Case Number: 125469

Case Title: WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, APPELLANT,
V.
EARL LEWIS, P.E., IN HIS OFFICIAL CAPACITY AS CHIEF ENGINEER DIVISION OF WATER RESOURCES, KANSAS DEPARTMENT OF AGRICULTURE,
V.
THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS, APPELLEES.

Type: Motion to Expedite the Briefing Schedule by Aples, Cities of Hays and Russell,

Denied pending decision on transfer.

SO ORDERED.

/s/ Honorable Stephen D. Hill, Court of Appeals Judge

EXHIBIT 7

IN THE SUPREME COURT OF THE STATE OF KANSAS

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, Plaintiff/Appellants, v. 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/Appellee.	Case No. 22-125469-A

APPELLANT'S MOTION FOR ADDITIONAL TIME TO FILE OPENING BRIEF

Pursuant to Kan. Sup. Ct. R. 5.02, Appellant respectfully requests an additional 20 days to file its brief in this matter. In support of this Motion and as good cause for the requested relief Appellant states the following:

1. The present due date for the brief is October 3, 2022.
2. This is Appellant's first request for additional time.
3. The Table of Contents that was due September 6, 2022, was not filed until Thursday, September 15, 2022 at 4: 38 p.m.
4. The record on appeal was not received by Appellant until Monday, September 19, 2022, leaving only 15 days to prepare its brief.
5. The record on appeal is more than 4,800 pages long.

EXHIBIT 8

6. Appellants' lead appellate counsel did not participate in the proceedings below.

WHEREFORE, Appellant respectfully requests the Court provide an additional 20 days, up to and including October 24, 2022, for Appellant to file its opening brief.

Dated September 28, 2022
Overland Park, Kansas

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Court: Supreme Court

Case Number: 125469

Case Title: WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, APPELLANT,
V.
EARL LEWIS, P.E., IN HIS OFFICIAL CAPACITY AS CHIEF ENGINEER DIVISION OF WATER RESOURCES, KANSAS DEPARTMENT OF AGRICULTURE,
V.
THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS, APPELLEES.

Type: 1st Mot For EOT of Time to File Brief by Aplt, Water Protection Assoc of Cen KS

Motion Granted: Appellant's brief to be filed on or before 10/24/2022.

SO ORDERED.

/s/ Marla J. Luckert, Chief Justice

EXHIBIT 9

IN THE SUPREME COURT OF THE STATE OF KANSAS

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, Plaintiff/Appellants, v. 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/Appellee.	Case No. 22-125469-A

APPELLANT'S SECOND MOTION FOR ADDITIONAL TIME TO FILE OPENING BRIEF

Pursuant to Kan. Sup. Ct. R. 5.02, Appellant respectfully requests an additional 20 days to file its brief in this matter. In support of this Motion and as good cause for the requested relief Appellant states the following:

1. The present due date for the brief is October 24, 2022.
2. This is Appellant's second request for an extension. The first granted request was for an additional 20 days. This request seeks the same extension period.
3. Appellant's counsel is presently involved in federal and state cases that have, to an unexpected degree, regularly intruded on the briefing process.

WHEREFORE, Appellant respectfully requests the Court provide an additional 20 days, up to and including November 14, 2022, for Appellant to file its opening brief.

EXHIBIT 10

Dated October 19, 2022
Overland Park, Kansas

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Court: Supreme Court

Case Number: 125469

Case Title: WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, APPELLANT,
V.
EARL LEWIS, P.E., IN HIS OFFICIAL CAPACITY AS CHIEF ENGINEER DIVISION OF WATER RESOURCES, KANSAS DEPARTMENT OF AGRICULTURE,
V.
THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS, APPELLEES.

Type: 2nd Mot For EOT of Time to File Brief by Aplt, Water Protection Assoc of Cen KS

Motion Granted: Appellant's brief to be filed on or before 11/14/2022.

SO ORDERED.

/s/ Marla J. Luckert, Chief Justice

EXHIBIT 11

IN THE SUPREME COURT OF THE STATE OF KANSAS

WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, Plaintiff/Appellant, v. 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.	Case No. 22-125469-A

APPELLANT'S THIRD MOTION FOR ADDITIONAL TIME TO FILE OPENING BRIEF

Pursuant to Kan. Sup. Ct. R. 5.02, Plaintiff/Appellant (Water PACK) hereby requests an additional 30 days to file its opening brief in this matter. In support of this Motion, and as good cause for the requested relief, Water PACK states the following:

1. The present due date for Water PACK's opening brief is November 14, 2022.

2. This is Water PACK's third request for an extension. The first and second requests were for an additional 20 days. This request seeks an extension of thirty (30) days because of continued conflicts presented by litigation involving Appellant's counsel, as well as the pendency of Water PACK's petition to intervene in a parallel Water Transfer Act (WTA) proceeding involving the Appellees.

EXHIBIT
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3. Together with Edwards County, Water PACK filed a joint petition to intervene (Joint Petition) in the parallel WTA proceeding convened by the Defendant/Appellee (Chief Engineer) in response to an amended WTA application filed by the Intervenors/Appellees (Cities) under KSA 82a-1501, *et seq.*

4. The Joint Petition was forwarded to the Office of Administrative Hearings on or about October 27, 2022 by the WTA panel and remains pending before Administrative Law Judge Spurgin under OAH Case No. 23 AG 0003.

5. On or about October 28, 2022, the Cities lodged a response to the Joint Petition that requires the coordinated and timely reply of Water PACK and Edwards County.

6. As before, counsel to Water PACK remains involved in federal and state cases that continue to intrude upon the briefing process, as well as the parallel WTA proceeding.

7. Since November 1, Appellant's lead counsel has participated in three depositions. Each exceeded seven (7) hours in duration. Preparation for the depositions required twenty (20) hours of document review and analysis. A fourth deposition is scheduled for November 17 and is expected to exceed eight (8) hours in duration with concomitant preparation time.

WHEREFORE, Water PACK respectfully requests the Court provide an additional 30 days, up to and including December 14, 2022, for filing its opening brief.

Dated November 11, 2022
Overland Park, Kansas

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Counsel to Water PACK

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Third Motion for Additional Time to File Opening Brief was electronically served on counsel of record in this appeal on the date of entry in the electronic docket and filed in original form with the Clerk of the Appellate Courts.

/s/Myndee M. Lee
Myndee M. Lee

Court: Supreme Court

Case Number: 125469

Case Title: WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS, APPELLANT,
V.
EARL LEWIS, P.E., IN HIS OFFICIAL CAPACITY AS CHIEF ENGINEER DIVISION OF WATER RESOURCES, KANSAS DEPARTMENT OF AGRICULTURE,
V.
THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS, APPELLEES.

Type: 3rd Mot For EOT of Time to File Brief by Aplt, Water Protection Assoc of Cen KS

Granted. Appellant must file a brief by December 14, 2022. The court will not consider further extensions absent exceptional circumstances. Workload alone is not an exceptional circumstance.

SO ORDERED.

/s/ Marla J. Luckert, Chief Justice

EXHIBIT 13