

**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

PREHEARING ORDER
AND
NOTICE OF CONTINUED PREHEARING CONFERENCE

The above matter comes before the Presiding Officer/Administrative Law Judge (ALJ) following a prehearing conference held on March 3, 2023 by video conference. The undersigned ALJ presided over the prehearing conference. On behalf of the parties, intervenors, and commenting agencies, the following appearances were noted:

David Traster and Daniel Buller, counsel for the City of Hays, Kansas (Hays).
Melvin Sauer, assistant city attorney, Hays.
Kenneth Cole, counsel for the City of Russell, Kansas (Russell).
Charles Lee, counsel for intervenors, Water PACK and Edwards County.
Kate Langworthy, counsel for the Kansas Department of Agriculture/Division of Water Resources (KDA/DWR).
Christina Hansen, counsel for GMD5.

1. This proceeding is held pursuant to the authority of the Kansas Water Transfer Act (WTA), K.S.A. 82a-1501 *et seq.* The prehearing conference was initiated on February 15, 2023. The prehearing conference was continued to March 3, 2023.
2. The prehearing conference is continued again and shall resume on March 31, 2023 at 10:15 a.m. to finalize preliminary matters.¹
3. The parties have had the opportunity to weigh in on procedural issues for this matter and are hereby ordered to comply with the following procedures:
 - a. **MOTIONS/RESPONSES:** If any motion is filed by any party, any other party, including intervenors and commenting agencies, shall have 14 days from the date of service of such motion to file any response with the Office of Administrative Hearings (OAH). Any

¹ K.S.A. 82a-1503(b) provides that the prehearing conference shall conclude within 45 days of the date it commenced unless the parties consent to extending the deadline. The 45th day after the prehearing conference commenced on February 15, 2023 is Saturday April 1, 2023, and therefore the last day to conclude the prehearing conference, absent an extension, would roll to Monday, April 3, 2023.

further pleadings in reply shall be filed within seven (7) days of the date of service of the responsive pleading. Unless the motion has notified the ALJ that all parties, including intervenors and commenting agencies, has been contacted and does not object to the motion, the ALJ will wait until response/reply pleadings have been filed from all parties and commenting agencies, OR until the time to file such response or reply has expired.

- b. **EXPERT TESTIMONY:** The parties shall pre-file any testimony from individuals who will be providing testimony as experts. Pre-filed testimony should be drafted in a question-and-answer format with each line of the pre-filed testimony numbered. At the time of the hearing, the witness will be permitted to adopt his or her pre-filed testimony as the direct testimony the witness would offer at the hearing, and it can be admitted to the record before the witness is tendered for cross-examination.
 - c. **ORDER OF PRESENTATION:** Hays and Russell, as the applicants, will present their case first, followed by intervenors in the order they entered the case, and then any commenting agencies.
4. **PUBLIC COMMENT HEARING.** A public comment hearing will be held in Hays, Kansas. The WTA provides that the formal public hearing commence 90 to 120 days after the prehearing conference has concluded and that the formal public hearing is to be held in the basin of origin. The WTA further provides that the presiding officer may hold a public comment hearing in the proposed place of use. The WTA does not provide a timeframe for when the public comment hearing should be held. However, it is hereby determined that the public comment hearing should be held prior to the formal public hearing to allow the parties an opportunity to address any issues raised during the public comment hearings which they believe necessary to address on the record at the formal public hearing. Subject to facility scheduling, the parties tentatively agreed to a public comment hearing date of June 20, 2023. At that time the parties will each be permitted to provide a brief presentation to the public regarding the case and their positions in the case.
 5. **FORMAL PUBLIC HEARING:** The WTA requires the formal public hearing to be held in the basin of origin.² The formal public hearing in this matter will be held in Wichita, Kansas beginning July 19, 2023 and potentially continuing through August 2, 2023. No hearing will be held on July 26, 2023. The parties advised the ALJ they may have administrative staff available to assist in coordinating the booking of facilities and services for the hearing. Such staff shall contact OAH to coordinate any efforts with OAH administrative staff.
 6. When the prehearing conference resumes on March 31, 2023, deadlines will be set for the parties to pre-file the written testimony of any expert witnesses. Deadlines may also be set for expert witnesses to pre-file any supplemental/rebuttal testimony after initial pre-filed testimony has been filed.
 7. KDA/DWR is a commenting agency in this matter pursuant to K.S.A. 85a-1501(i).³ As noted in prior orders, GMD5 would be a commenting agency, but also submitted a motion to intervene and

² K.S.A. 82a-1503 provides the hearing is to be held in the basin of origin, but does not more narrowly specify what constitutes "basin." It is determined there is sufficient information to conclude the basin of origin for the water originating in Edwards County, Kansas can include Wichita, Kansas. Due factors including the availability of facilities and back-up facilities for the hearing location, the hearing will take place in Wichita.

³ Pursuant to K.S.A. 82a-1501(i) "Commenting agencies" would include groundwater management districts, and state agencies including the Kansas Department of Health and Environment, the Kansas Water Office, the Kansas Water Authority, the Kansas Department of Wildlife, Parks and Tourism, and the Kansas Department of Agriculture/Division

was granted intervention. Commenting agencies may submit expert testimony along with all other parties in this matter or present other testimony or evidence the commenting agency believes would be helpful in this case.

8. When the prehearing conference resumes on March 31, 2023, the parties should be prepared to address the following:
 - a. Final scheduling for the public comment hearing.
 - b. Details for the location for the hearing on the application.
 - c. Any accommodations anticipated for the hearing.
 - d. Notices for the public comment hearing.
 - e. Deadlines for expert witness disclosure and deadlines for pre-filed expert testimony.
 - f. Deadlines to pre-file any proposed exhibits.
 - g. Deadlines to disclose non-expert witnesses.
 - h. Any additional procedural concerns to be addressed.
9. Additionally, it is noted that prehearing conference commenced pursuant to K.S.A. 82a-1503(b) must conclude within 45 days. The WTA specifies that the formal public hearing must commence between 90 and 120 days after that prehearing conference has concluded. It is acknowledged that leading up to a trial or hearing it is possible that some issues may arise for one or more parties that may require clarification. Ex-parte communication between the ALJ and a party is not permitted. In other proceedings, if issues arise that require attention, one or more parties often request the ALJ convene a brief prehearing conference to address matters such as procedural concerns. As noted above, unless waived, this prehearing conference must conclude no later than April 3, 2023.
10. When the parties reconvene for the prehearing conference on March 31, 2023, the parties should be prepared to address whether there is any provision in the WTA that would prohibit any additional prehearing/preliminary conferences to be convened after the conclusion of the official prehearing conference, if needed, to address any procedural questions or issues that arise prior to the commencement of the formal public hearing.
11. This *Prehearing Order and Notice of Continued Prehearing Conference* constitutes notice of any dates or deadlines scheduled herein.
12. This order shall govern the proceedings until such time as any provisions of this order are replaced by a subsequent order.

Notice of Prehearing Conference

The prehearing conference started on February 15, 2023 has been continued and will resume on **March 31, 2023 at 10:15 a.m.** The prehearing conference will be held by zoom video conference. To participate in the prehearing conference, you may use Zoom software or go to www.zoomgov.com. Enter **Meeting ID: 161 258 5548** and **Passcode: 320581**.

If you attempt to join before the ALJ has opened the video conference link, you may be placed into a waiting room until the proceeding begins. If you have been waiting more than five (5) minutes before the

of Water Resources. As of the March 3, 2023 prehearing conference, only KDA/DWR and GMD5 had appeared for any proceeding in this matter. Should other entities qualifying as “commenting agencies” wish to receive notifications of any orders or filings in this matter they should submit an entry of appearance with OAH so they can be included on the service list for this case.

Presiding Officer begins the proceeding, you may be disconnected by the system. If this happens, please re-join immediately. If you are unable to connect to the prehearing conference, please contact OAH staff immediately at 785-296-2433.

This proceeding is held pursuant K.S.A. 82a-1501(a), K.S.A. 82a-1503(b), and K.S.A. 77-516.

The prehearing conference will be an opportunity for the parties to address any concerns with moving forward towards setting a hearing. The parties should be prepared to address date(s) and location for a public hearing, date(s) and locations for any public comment hearing (if deemed necessary), and any other matters deemed necessary to move forward with the proceeding.

This prehearing conference will be held regardless of any closing of State offices in Shawnee County, or any other part of the State.

If any accommodations are necessary, please contact OAH immediately, in writing.

IT IS SO ORDERED.



Matthew A. Spurgin
Administrative Law Judge/Presiding Officer
Office of Administrative Hearings

Certificate of Service

On March 8th, 2023, I certify that a copy of the foregoing was placed in the United States first class mail, postage prepaid, addressed to:

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and I further certify that I caused a copy of the foregoing to be served electronically through OAH's e-filing system to:

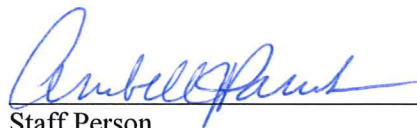
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