

**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
PROCEDURAL SCHEDULE**

The above matter comes before the Presiding Officer/Administrative Law Judge (ALJ) following a prehearing conference held on March 31, 2023 by video conference.¹ 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.
Christina Hansen, counsel for GMD5.
Kate Langworthy, counsel for the Kansas Department of Agriculture/Division of Water Resources (KDA/DWR).

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 31, 2023.
2. The parties addressed remaining procedural issues to proceed to the formal public hearing in the above captioned matter. The parties agreed to a procedural schedule leading up to the scheduled hearing date.
3. Pursuant to the *Prehearing Order* issued on March 8, 2023, the order of presentation in this case shall be: 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.

¹ The proceeding was held pursuant to K.S.A. 82a-1501(a), K.S.A. 82a-1503(b), and K.S.A. 77-516.

4. Pursuant to the *Prehearing Order* issued on March 8, 2023, any expert witnesses testimony shall be pre-filed written direct testimony, drafted in a question-and-answer format with each line of the pre-filed testimony numbered. At the time of the hearing, that expert witness will be permitted to adopt his or her pre-filed testimony (including any supplemental or rebuttal testimony he or she has pre-filed) as the direct testimony that witness would offer at the hearing and such pre-filed testimony can be admitted to the record before that witness is tendered for cross-examination. The deadlines for pre-filing of expert witness testimony are contained within the procedural schedule below, which the parties had circulated, agreed to, and filed with OAH on March 31, 2023.

5. **PROCEDURAL SCHEDULE –**

Notice of Public Comment Hearing	May 1, 2023
Preliminary Witness Lists	May 15, 2023
Preliminary Exhibit Lists	May 15, 2023
Deadline to Propound Written Discovery	May 19, 2023
Deadline for Expert Witness Disclosures	May 29, 2023
Deadline to Pre-File Written Expert Witness Testimony	May 29, 2023
Deadline to Respond to Written Discovery	June 19, 2023
Public Comment Hearing	June 20, 2023
Deadline to File Final Witness Lists	June 23, 2023
Deadline to Pre-File Exhibits	June 23, 2023
Deadline for Rebuttal Expert Witness Disclosures	June 28, 2023
Deadline to Pre-File Written Supplemental/Rebuttal Witness Testimony	June 28, 2023
Hearing Start Date	July 19, 2023

6. **DISCOVERY –** The parties may engage in further discovery as they prepare for the hearing in this matter.
- a. A party shall have thirty (30) days to respond to any discovery request.
 - b. All discovery is to be completed by June 19, 2023.
7. **PUBLIC COMMENT HEARING –** A public comment hearing in the above matter will be conducted on June 20, 2023 in Hays, Kansas at the Fort Hays State University Student Union, Black and Gold Room.
- a. The public comment hearing will begin at 6:00 p.m., concluding at 8:00 p.m. Time for any attendees to provide public comments may be limited to accommodate

individuals wishing to provide their comments. The ALJ, at his discretion, may allow the proceeding to continue past 8:00 p.m. if necessary to receive comments, or end the proceeding prior to 8:00 p.m. if comments have concluded.

- b. **Notice of the public comment hearing will be issued on or about May 1, 2023.**²
- c. Notice of the public comment hearing will be published on the OAH website and the KDA Website.³
- d. Notice of the public comment hearing may be re-posted by any party on their respective websites, social media websites, or other print or internet publications.
- e. At the beginning of the public comment hearing each party, including intervenors and commenting agencies, will be given an opportunity for a brief presentation of approximately 10 minutes to explain their respective position, and the information they will be looking to present at the formal public hearing. The Cities of Hays and Russell shall give their presentation first, followed by Water PACK/Edwards County, GMD 5, and KDA.⁴
- f. An audio recording will be made to serve as the record of the public comment hearing. However, a party, at its own expense, may elect to secure a court reporter to appear to transcribe the public comment hearing. If a court reporter is secured to provide transcription at the public comment hearing, the party scheduling the court reporter shall provide a copy of the transcript of the proceeding to OAH as soon as it is available.

8. **DISCLOSURE OF EXHIBITS AND WITNESSES** – All parties are to follow the deadlines for disclosing exhibits and witnesses as set forth in the procedural schedule.
 - a. Any exhibits which are not disclosed pursuant to this order may not be admitted to the record at absent good cause.
 - b. Any witness not disclosed pursuant to this order may not be permitted to testify at the hearing absent good cause for the lack of prior disclosure.
 - c. Pre-filed exhibits should be marked to clearly identify the exhibit, including bates stamp/page numbers for quick reference.
9. **WITNESS SCHEDULES** – Any unavoidable scheduling conflicts for witnesses, particularly for any expert witnesses who may be traveling from out of state to testify at the hearing, should be noted to all parties and the ALJ prior to the start of the scheduled hearing. If necessary to accommodate witness availability, witnesses may be permitted to

² This notice will be served on all parties of record.

³ It is noted that K.S.A. 82a-1503(b) specifies that notice of the commencement of the hearing process is to be given by publication of notice in the Kansas Register and at least two newspapers of general circulation in the area of the proposed point of diversion. However, the statute is silent as to publication in either the Kansas Register or any newspapers for the formal public hearing. Notice of the public hearing set to begin on July 19, 2023 may be published in a newspaper or any other publication. However, such publication is not required by statute.

⁴ If any other entity has petitioned to join as an intervenor or has filed notice of an intent to appear as a commenting agency, such entity may be afforded an opportunity to make a presentation as to their position in the case before public comments are received at the public comment hearing.

testify “out of order.” Where necessary, the ALJ may also permit a witness to appear to testify by video conference.

10. **HEARING** – The hearing will begin on July 19, 2023 at 10:00 a.m. in Wichita, Kansas at the Hyatt Regency.⁵

- a. At the discretion of the ALJ, the hearing may continue past 5:00 p.m. on any given day.
- b. Arrangements are being made for audio/visual setup to allow parties to cast exhibits on a projector or large screen during witness examination. Parties shall be required to provide their own computers/laptops capable of connections to present any exhibits.
- c. Arrangements are being made to allow for live video streaming of the proceeding.
- d. A court reporter will be scheduled to be present for the proceeding. The parties will be notified when the court reporter is finalized and may contact the court reporter directly to purchase any transcripts, or to arrange to purchase any same day/next day transcripts.
- e. The hearing will continue through August 2, 2023, unless it is concluded at an earlier date.
- f. At the present time, it is not anticipated that any hearing will be conducted on Wednesday, July 26, 2023. However, this is subject to change if additional information is brought to the attention of the ALJ advising that the parties are available to proceed on that date.
- g. As of the March 31, 2023 prehearing conference, no parties notified the ALJ of any accommodations that were requested for the hearing. If any party becomes aware of the need for any accommodations, notice should be submitted as soon as possible.
- h. Parties may contact the Hyatt Regency directly to book any guest room accommodations and/or any additional meeting rooms to be used as work rooms during the hearing.
- i. **Separate notice will be issued for the hearing to include details of any streaming links when it becomes available, and no later than June 20, 2023.**⁶
- j. Notice of the formal public hearing may be re-posted by any party on their respective websites, social media websites, or other print or internet publications.

11. Pursuant to the Water Transfer Act (WTA),⁷ the prehearing conference in this matter was to conclude within 45 days. The prehearing conference was initiated on February 15, 2023, and was continued to obtain the details necessary to address how the matter would proceed. The prehearing conference concluded on March 31, 2023. The WTA specifies that the

⁵ The facility is not available to begin the hearing on July 18, 2023. It has been confirmed the facility will be able to set up for the proceeding and available to begin the hearing the morning of July 19, 2023.

⁶ This notice will be served on all parties of record.

⁷ K.S.A. 82a-1501 *et seq.*

formal public hearing must commence within 90 and 130 days after the conclusion of the prehearing conference. The hearing commencing on July 19, 2023 will meet these requirements.

12. It is noted that the ALJ is not permitted to engage in ex-parte communications with a party to the proceedings. In typical administrative proceedings, if issues arise prior to the start of a scheduled administrative hearing, an additional prehearing conference may be scheduled at either the motion of one or more of the parties, or on the motion of the ALJ. Prior to the final prehearing conference conducted in this matter pursuant to the WTA,⁸ the parties were asked to address whether any provision of the WTA prohibited the initiation of any additional prehearing or preliminary conferences, if necessary, to address any procedural concerns or other matters of concern leading up to the commencement of the formal public hearing on July 19, 2023. Nothing was presented from any party to suggest the WTA would prohibit additional prehearing or preliminary conferences among the parties and the ALJ if necessary. Therefore, should the need arise to address any issues with the ALJ by any party, a motion should be filed requesting an additional prehearing conference be scheduled. Any such request should include proposed dates and/or times when counsel for each party, including intervenors and commenting agencies, could be available for something to be scheduled by telephone or video conference.
13. Except where specifically noted above, this *Prehearing Order and Procedural Schedule* constitutes notice of any dates or deadlines scheduled herein. Parties should plan to meet all deadlines and appear for any scheduled proceeding unless they have been specifically notified by OAH that a date has been modified or a scheduled proceeding has been continued or cancelled.
14. Any request to extend a deadline should be requested in writing at least one day prior to the deadline.
15. This order shall govern these proceedings until such time as any provision of this order is replaced by a subsequent order. No agreement of the parties alone can modify this order.
16. This order shall govern the proceedings until such time as any provisions of this order are replaced by a subsequent order.

IT IS SO ORDERED.



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

⁸ K.S.A. 82a-1503(b).

Certificate of Service

On April 19th, 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:

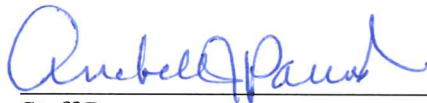
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