BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF THE CITIES OF HAYS, KANSAS AND RUSSELL, KANSAS FOR APPROVAL TO TRANSFER WATER FROM EDWARDS COUNTY PURSUANT TO THE KANSAS WATER TRANSFER ACT	OAH Case No. 23AG0003 AG

Pursuant to K.S.A. § 82a-1501 et seq.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY WATER PACK AND EDWARDS COUNTY

The Water Protection Association of Central Kansas (Water PACK) and Edwards County, Kansas submit the following proposed findings of fact and conclusions of law for the tribunal's consideration.

Dated September 29, 2023
Overland Park, Kansas

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY WATER PROTECTION ASSOCIATION OF CENTRAL KANSAS AND EDWARDS COUNTY

I. INTRODUCTION

The Water Transfer Act (the "Act") application (the "Application") by the City of Hays, Kansas and the City of Russell, Kansas (collectively, the "Cities") seeks to transfer up to 6,756.8 acre/feet of water per year for municipal use.[1] It was heard July 19 through July 31, 2023 with the Honorable Matthew A. Spurgin presiding. Pursuant to the tribunal's directions, Water Protection Association of Central Kansas ("Water PACK") and Edwards County, Kansas (jointly "Intervenors") hereby submit their proposed findings of fact and conclusions of law. For a variety of reasons hereinafter explained, the Application must be denied.

II. THE BACKGROUND AND CONTEXT

The R9 Ranch is located in Edwards County. Water PACK is a trade association organized and operating to promote, foster, and encourage the beneficial, economical, and sustainable use of quality water.

The Cities invoke the Act in seeking approval to transfer water via a pipeline from a location in Edwards County, Kansas to the respective cities. The source property located in Edwards County is jointly owned by the Cities, known colloquially as the R9 Ranch, and was formerly known as the Circle K Ranch.

The proposed transfer is characterized as an interbasin transfer. Interbasin water transfers convey water from one river basin to another using non-natural means, such as pipelines, aqueducts, or canals. Interbasin transfers can significantly affect water

[1] Trial TR. 35:19-24.

supplies, hydrology, and the environment in both donor and receiving basins.

The Cities' efforts to obtain the right to transfer water from the R9 ranch have proceeded on two tracks. The Cities earlier filed and prosecuted a case before the Chief Engineer for the Division of Water Resources to change the use of the water rights appurtenant to the R9 ranch from irrigation to municipal. The Chief Engineer contingently approved the change. That decision was appealed to the Edwards County District Court where the contingent approval was affirmed. Water PACK then sought appellate review. The change of use proceeding is presently pending before the Kansas Supreme Court. The Supreme Court recently remanded the case to the district court for additional fact finding.

The Act was initially adopted in 1983 and then amended in 1993[2]. The Act defines a "water transfer" to mean "the diversion and transportation of water in a quantity of 2,000 acre feet or more per year for beneficial use at a point of use outside a 35-mile radius from the point of diversion of such water." Proposed transfers may not be approved absent compliance with a panoply of enumerated requirements. Most broadly it must be determined that approval of the transfer will provide a net benefit to the State.

The process of approving a transfer consonant with the requirements of the Act is separate and distinct from the process to obtain a change of water use. The impetus for the Act and the *raison d'être* for its existence is plainly to ensure that large-scale transfers of water are limited to amounts consistent with the present and projected needs of the applicant. The evidence presented shows that approval of the Application is precluded for

[2] In 2004, a technical amendment was made to replace the term "hearing officer" with "presiding officer."

the reasons discussed below.

III. ISSUE SYNOPSES

A. The Application Cannot Be Approved in the Absence of Data Showing Future Water Needs and Providing Reliable Population Growth Projections

Entirely inconsistent with the explicit requirements of the Act's enabling regulations, the implicit mandates of the Act itself, and the Anti-speculation Doctrine,[3] the Cities were unable to provide this tribunal with any analysis, or even an approximation, of their future water needs. They have failed abysmally to offer a reliable estimate of future population growth. As to the former, the Cities declined to undertake the requisite water needs analysis and thus do not know how much water they will need in the future. As to the latter, the Cities offer a chimerical population growth projection of 2 percent that is eviscerated by Hays' own expert[4], entirely at odds with historical growth patterns, and markedly different from Harvey Economics' expert analysis.[5] The posited population growth is mere conjecture and is belied by the Cities' experiences over decades and the broader western Kansas experiential model generally.

B. The Volume of Water Sought is Significantly in Excess of Reasonable Needs and, If Approved, Constitutes Waste

"The amount of water beneficially used under a water right must be reasonable: this is an important and uncontroversial corollary of the beneficial use doctrine. Similarly, a

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[3] "The conditional appropriation must be consistent with the governmental agency's reasonably anticipated water requirements based on substantiated projections of future growth within its service area." Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 170 P.3d 307, 315 (Colo. 2007), as modified (Nov. 13, 2007).

[4] TR, 931:13-25; 932:1-16; 947:3-13; Cities Exhibit 2825 at 0103607 ("I conclude, within a reasonable degree of certainty, that an estimated growth rate of 1% annually over the next 10 to 20 years is likely for the City of Hays."

[5] Tr. 1361:22-24; 1362:24-24; 1363:1-20; WP Exhibit 1866 and 1867.

water right does not entitle its owner to waste water." Griggs, Burke W. "*Beyond Drought: Water Rights in the Age of Permanent Depletion*". 62 U. Kan. L. Rev. 1263, 1314 (2014). The concept of reasonable use and absence of waste is a tenet of the Water Transfer Act. "No water transfer shall be approved . . . unless the presiding officer determines that the applicant has adopted and implemented conservation plans and practices that (A) are consistent with the guidelines developed and maintained by the Kansas water office. . . ." K.S.A. 82a-1502.

It is uncontroverted that the amount of water the Cities seek to transfer is greatly in excess of any reasonably anticipated need. The surfeit is waste, not a beneficial use. That the Cities need less water than they seek is evidenced by the fact that the Cities intend to develop the project in phases, precisely because the Cities expressly admit they do not need the water.[6] Moreover, because that is so, the Application is a blueprint for waste. "'Waste of water' means any act or omission that causes any of the following: (4) the application of water to an authorized beneficial use in excess of the needs for this use." K.A.R. 5-1-1. Similarly, the project as envisaged by the Application runs afoul of applicable groundwater management district prohibitions that address the same principle. "Waste of water. A person shall not commit or allow a waste of water as defined in K.A.R. 5-1-1." K.A.R. 5-25-8, *Rules and Regulations Big Bend Groundwater Management District No. 5.*

[6] Tr 330:1-9; Cities Exhibit 956 at Bates No. Cities 0037163, "While we need Change Orders that permit the diversion of the full 7,604 acre-feet, we understand that quantity cannot be justified based on current needs."

C. THE DESIGN PLAN ON WHICH THE APPLICATION IS PREDICATED IS NOTABLY INCONSISTENT WITH THE REQUIREMENTS OF THE ACT

The Act conditions approval of a water transfer application, *inter alia*, on a "plan of design, construction and operation of any works or facilities" . . . which plan shall be in sufficient ***detail*** to enable all parties to understand the impacts of the proposed water transfer." K.S.A. 82a-1502(c) (emphasis added). Here, as admitted by Burns and McDonnell, the Cities' engineers, the only design plan presented to the tribunal is an AACE Class 5 cost estimate. AACE International Recommended Practice No 56R 08 is a guideline for applying cost estimate classification principles to project estimates for engineering, procurement, and construction (EPC) work. The guideline is based on generally accepted cost engineering practices and the practices of companies in the building and general construction industries from around the world. AACE Class 5 estimates do not provide details and are notoriously inaccurate.

> Class 5 estimates are generally prepared based on very limited information, and subsequently have wide accuracy ranges. As such, some companies and organizations have elected to determine that due to inherent inaccuracies, such estimates cannot be classified in a conventional and systemic manner. Class 5 estimates, due to the requirements of end use, may be prepared within a very limited amount of time and with little effort expended – sometimes requiring less than an hour to prepare. [7]

AACE International Recommended Practice No. 56R-08 at 7, Rev. August 7, 2020 https://aacei-pittsburgh.org/wp-content/uploads/2021/11/cost-estimating-classification-system.pdf. (Last visited 9.29.2023).

The absence of a detailed plan was conceded by Burns & McDonnell. "A. There are no

[7] "I wanted to clarify that cost estimates and cost opinions are quite typically done at different scales. So there's – and often they're designated by class from Class 1, which is a very precise cost estimate up to Class 5, which is – it's a little better than arm waiving. This is more like – on the order of what I would call a Class 4 cost estimate." *Radford v. Van Orden*, 168 Idaho 287, 296, 483 P.3d 344, 353 (2021), as amended (Mar. 22, 2021).

details at this point. Q. Okay. A. It's conceptual." (Testimony of Kevin Waddell) Tr. 973:14-16. Because of the nature of the estimate, the resulting plan is merely conceptual and includes ***no details*** — far short of the detailed plan required by the Act.

Remarkably, the Hays City Manager confirmed in his testimony that there is no design plan. "A. If there are future costs that – O&M costs that could affect rate, we don't know what they are yet ***because the project has not been designed***. That would take place after the project has been designed to a point where we could determine what those costs were and how it would affect rates." Tr. 334:4-10 (emphasis added). Absent a reasonably detailed plan, the application cannot be approved.

> While "blueprint quality" plans need not be presented when applying for a permit to appropriate water, we agree with the following statement of the Idaho Supreme Court:
>
> > In order to be able to assess a project's impact on the public interest, the project's design must be definite enough to reflect its impacts and implications…….In all cases the plans should be sufficient to generally apprise the public of the efficacy of the proposed use in the planned facility, and of its potential impact. *Shokal v. Dunn,* 109 Idaho 330, 339 40, 707 P.2d 441, 450 51 (1985).

In re Hitchcock & Red Willow Irr. Dist., 226 Neb. 146, 159, 410 N.W.2d 101, 109 (1987).

D. It is Not Possible to Approve the Application When the Cities Have No Plan to Finance the Project

Similarly indicative of the Cities laissez-faire approach to the project generally and advance planning specifically, the Cities admit they do not know how the project will be

financed[8] — the City of Russell even conceding it does not know how it will pay for its share of the infrastructure cost.[9]

Though the Hays City Manager testified at the evidentiary hearing that Hays is eligible for funding through the Kansas Public Water Supply Loan Fund (Tr. 337:24), despite a request that the document purportedly evidencing the eligibility determination be produced (Tr. 337:15), it was not.[10]

The document was perhaps not produced because it is evident that Hays is not eligible for funding through the program since it is admittedly pursuing the project to promote and facilitate future growth.[11] The loan fund guidelines make clear that projects aimed at future growth are ineligible for funding.

> In accordance with K.A.R. 28-15-56, the following projects and activities are ineligible for participation in the Kansas Public Water Supply Loan Fund:
>
> . . .
>
> Projects primarily intended to serve future growth."[12]

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[8] Q When we took your deposition, Mr. Dougherty, you made the statement that the Cities do not have any firm plans for how the project will be financed. Do you recall that testimony? A Correct. Q. And has that changed since your deposition? A. No." Toby Dougherty testimony, Tr. 339:6-12.

[9] Tr. 562:2-25; 563:1-11.

[10] That omission has consequences. ""This court has held that the failure to produce certain kinds of evidence creates a rebuttable presumption adverse to the party that has unique control over that evidence: "Failure of a party to an action to throw light upon an issue peculiarly within his own knowledge or reach, raises a presumption that the concealed information is unfavorable to him." Becker v. Knoll, 301 Kan. 274, 280, 343 P.3d 69, 74 (2015).

[11] "And we would like to have water to support that continued growth, but I don't know what that growth is going to be, and so, therefore, I don't know what the water needs may be 50 or 75 years into the future." Tr. 360:8-12.

[12](b) No assistance from the fund shall be provided for projects and project costs deemed ineligible for participation by the U.S. environmental protection agency. These projects and project costs shall be listed in the intended use plan. Kan. Admin. Regs. 28-15-56; (e) Ineligible projects. The following projects are ineligible for assistance from the Fund: (5) Projects needed primarily to serve future population growth. Projects must be sized only to accommodate a reasonable amount of population growth expected to occur over the useful life of the facility." 40 C.F.R. § 35.3520

Appendix E List of Ineligible Projects and Activities

https://www.kdhe.ks.gov/DocumentCenter/View/29168/2024-Intended-Use-Plan-for-Kansas-Public-Water-Supply-Loan-Fund-PDF (last visited 9.22.2023).

E. THE VOLUME OF WATER SOUGHT TO BE TRANSFERRED EXCEEDS THE CITIES' REASONABLE NEEDS AS DETERMINED BY REFERENCE TO THEIR APPROVED WATER CONSERVATION PLANS

Throughout the hearing the Cities at times suggested they were victims in the sense of having to adhere to stringent water conservation goals while at other times pointing to their efforts to conserve water resources as a point of civic pride. Wherever those efforts land on the spectrum, they are not a product of altruism in relation to the Water Transfer Act, but rather a statutory constraint.

> (b) No water transfer shall be approved under the provisions of this act: (1) If such transfer would impair water reservation rights, vested rights, appropriation rights or prior applications for permits to appropriate water; and ***(2) unless the presiding officer determines that the applicant has adopted and implemented conservation plans and practices that (A) are consistent with the guidelines developed and maintained by the Kansas water office pursuant to K.S.A. 74-2608, and amendments thereto***, (B) have been in effect for not less than 12 consecutive months immediately prior to the filing of the application on which the hearing is being held and (C) if the transfer is for use by a public water supply system, include the implementation of a rate structure which encourages the efficient use of water that is determined by the presiding officer to be effective and if designed, implemented and maintained properly, will result in wise use and responsible conservation and management of water used by the system.

K.S.A. 82a-1502(b) (emphasis added).

The Kansas water office conservation guidelines referenced in the statute are the Kansas Municipal Water Conservation Plan Guidelines ("Guidelines") that were published in August of 2007. *See Cities' Exhibit 817*. The Guidelines describe water

conservation as, "the utilization of cost-effective water use efficiency practices to curtail the waste of water and to ***ensure that water use does not exceed reasonable needs***. The primary goal of water conservation plans is to achieve more efficient use of the state's limited water resources." (Emphasis added.) *Cities' Exhibit 817*, Bates No. 0021342.

The Guidelines go on to recite that "Kansas Statutes ***require*** water conservation plans for anyone: (1) purchasing water from the State Water Marketing Program; (2) participating in the Water Assurance District Program; (3) sponsoring or purchasing the public water supply portion of a Multipurpose Small Lakes Program project; (4) ***transferring water under the Water Transfers Act***; or (5) ***applying for a loan from the State Revolving Fund***." *Id.* (Emphasis added). The mandatory adoption of conservation plans under the present circumstances must be contrasted with their discretionary utilization in change of use proceedings.[13]

Thus, as applicants under the Act, the Cities are required to adopt and <u>implement</u> conservation plans and practices. And once a Conservation Plan is implemented it must be maintained. "Once implemented, the applicant shall continue to satisfactorily maintain each component of the water conservation plan." K.A.R. 5-3-5j. The requisite conservation plan conclusively establishes a municipality's reasonable water needs. The resulting reasonable needs calculation amounts to a cap on usage. As a consequence,

[13] "The chief engineer may require an applicant for a permit to appropriate water for beneficial use or the owner of a water right or permit to appropriate water for beneficial use to adopt and implement conservation plans and practices. The chief engineer shall not mandate the adoption and implementation of conservation plans and practices except pursuant to a finding that such plans and practices will assure public benefit and promote public interest." K.S.A. 82a-733. The Chief Engineer did not consider conservation guidelines in establishing the reasonable needs limitation in the Cities' change of use proceeding. *Cities' Exhibit 1-2*

requested transfers that, coupled with existing sources, exceed the applicant's established reasonable needs may not be approved. K.S.A. 82a.1502(b).

Because they are pursuing an interbasin water transfer governed by the Act and, in the case of Hays and perhaps Russell, are seeking loan funding from the State Revolving Fund, adherence to a water conservation plan is not a choice for the Cities, it is an obligation. They are required to abide by the Conservation Plans approved for the respective cities by the Kansas Water Office. The reasonable needs determination incorporated in the plans is measured in terms of gallons per capita per day.

The volume of water the Cities seek to transfer in this proceeding significantly exceeds the amounts permitted by their respective Conservation Plans. The city of Russell's most recent Conservation Plan was approved April 1, 2019. *Cities' Exhibit* 1-68. The long-term water use efficiency gallons per capita per day (GCPD) approved by the Kansas Water Office is not to exceed 138 GPCD based on the regional average of the last five reported years (2011 thru (sic) 2015). *Cities' Exhibit* 1-68, Bates Number 0003202.

The city of Hays' most recent Water Conservation Plan was adopted March 27, 2014. *Cities' Exhibit* 1-52. The long-term water use efficiency gallons per capita per day (GCPD) as approved by the Kansas Water Office is not to exceed 95 GPCD. *Cities' Exhibit 1-52*, Bates Number 0002860.

Given that regulatory constraint, a water transfer under the Act is limited to the difference between the maximum usage permitted under the Conservation Plan cap[14] and

[14] For Hays, assuming a population of 21,000, 95 GPCD equates to approximately 2236 acre/feet per year. For Russell, assuming a population of 4500, 138 GPCD equates to approximately 696 acre/feet per year. The Application seeks authority to transfer at least 4800 acre/feet per year on average.

any present or projected shortfall in available water resources. Any transfer in excess of that determinable amount is prohibited and would, by definition, constitute waste as being in excess of the Cities' reasonable needs.

F. THE REQUESTED TRANSFER IS PROHIBITED BY K.S.A. 82A-1502(B) BECAUSE IT IS UNSUSTAINABLE

The Cities define sustainability in respect to the volume of water to be withdrawn from the R9 Ranch as a condition under which "the average volume of water pumped from the well field [will] not exceed the average volume of water recharged to the aquifer." BURNS & MCDONNELL, *Cities' Exhibit 1-3* at Bates 0000352. Employing that equation, the Cities have argued their requested withdrawals are sustainable long-term. But that equilibrium determination, if it was ever correct, is clearly flawed presently.

Steven Larson, a preeminent groundwater modeling expert, has opined that the groundwater model upon which the Cities rely is inaccurate in assessing aquifer recharge rates under non-irrigated conditions.[15] Balleau Groundwater, Inc., the developer of the GMD 5 model, agrees with that conclusion and is accordingly updating the model. Tr. 1501:1-5.

Stated most plainly, if the withdrawal and recharge rates are not in equipoise, by the Cities' own definition the withdrawals deplete the aquifer and are not sustainable. And at least generically, depletion of the aquifer as a consequence of excessive withdrawals equates to impairment if the static water level is unreasonably raised or lowered.

Note the testimony of Lane Letourneau, Division of Water Resources, Water

[15] Tr. 1227:5-17; 1233:22-25; 1234:1-25; 1235:1-25; 1236:1-14.

Appropriation Program Manager: "Q. Okay. There's various ways to -- for someone to suffer impairment, are there not? A. Yes. Q. And is -- are actions that result in the unreasonable lowering of the regional water table one of those? A. Well, yes, by diversion. So -- but -- yes, I can say yes." Tr. 1038:19-25, Tr. 1039:1.

That opinion is consistent with the governing statute.

> With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit.

K.S.A. 82a-711.

Though it has been argued in this proceeding that impairment can only be found if the static water level is unreasonably raised or lowered "beyond a reasonable economic limit,"[16] that interpretation of the statute is incorrect. Made clear by the doctrine of the last antecedent, the economic limit phrase modifies only the "unreasonable deterioration" language. "When interpreting specific statutory language, Kansas courts also apply the last antecedent rule: In construing statutes, qualifying words, phrases and clauses are ordinarily confined to the last antecedent, or to the words and phrases immediately preceding. The last antecedent, within the meaning of this rule, has been regarded as the last word which can be made an antecedent without impairing the meaning of the sentence. *State v. Durham*, 38 Kan. App. 2d 791, 794–95, 172 P.3d 88, 91 (2007). The doctrine is commonly recognized and relied upon.

> First, under the "doctrine of the last antecedent," relative and qualifying words, phrases, and clauses are to be applied to the words or phrase

[16] Tr. 46:6-13; 1310:13-22.

> immediately preceding, and are not to be construed as extending to or including others more remote. (citations omitted).
>
> Second, as a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Hence, language in a clause following a disjunctive is considered inapplicable to the subject matter of the preceding clause.

Quindlen v. Prudential Ins. Co. of Am., 482 F.2d 876, 878 (5th Cir. 1973). *See also*, *Barnhart v. Thomas,* 540 U.S. 20, 26, 124 S. Ct. 376, 380, 157 L. Ed. 2d 333 (2003); *Davis v. Devanlay Retail Grp., Inc.,* 785 F.3d 359, 363–64 (9th Cir. 2015); *Salina J. v. Brownback,* 54 Kan. App. 2d 1, 16, 394 P.3d 134, 144 (2017); *White v. Cnty. of Sacramento,* 31 Cal. 3d 676, 680, 646 P.2d 191, 193 (1982).

Thus, the question of impairment is framed by whether the Cities' withdrawals will unreasonably affect the aquifer physically without consideration of any economic effects. And Kansas courts ascribe an ordinary meaning to the concept of impairment. "The common definition of the word 'impair' is 'to cause to diminish, as in strength, value, or quality.'" *Garetson Bros. v. Am. Warrior, Inc.*, 56 Kan. App. 2d 623, 650, 435 P.3d 1153, 1171 (2019)

Particularly without reference to economic effects, the facts as presented by Mr. Larson and buttressed by Balleau Groundwater are that the withdrawals will diminish, they will impair, groundwater levels in the aquifer.[17] Approval of the Application is thus barred.

G. The Cities Have Offered Only Conjecture in Support of Their Contention That Approval of the Water Transfer Project Will Result in a Net Benefit to the State

Finally, the often-recited suggestion that additional water resources will spur growth is entirely speculative. No evidence was offered of commitments from any business or any

[17] Tr. 1321:1-7. Q. And did he [Mr. Larson] tell you what the number of acre-feet then could be prudently removed from the R9 Ranch? A. He -- he stated a range. Q. Which was? A. 2100 to 2700 acre-feet per year. Q. Thank you." (Testimony of Richard Wenstrom).

individual to move to either of the cities if only additional water resources could be secured. Any business seeking to move to Hays or Russell will encounter insuperable difficulties in obtaining workers.[18] And, most fundamentally, business recruitment is almost always a zero-sum game in which the winning locale prevails at the expense of some other city, often in the same state.[19] Moreover, witness testimony has established that the present and prospective business environment and prospects are good and promising in both cities.[20]

IV. FINDINGS

A. PROCEDURAL HISTORY

1. The City of Hays purchased the approximately 7,000-acre R9 Ranch and its 30 water rights in southwestern Edwards County in 1995.[21] The City of Russell subsequently acquired a percentage ownership interest in the R9 water rights.[22]

2. The cities of Hays and Russell, Kansas (the "Cities") invoke the Kansas Water Transfer Act, K.S.A. 82a-1501 et seq. (the "Act"), in seeking to obtain approval to transfer water via a pipeline from a location in Edwards County, Kansas to the respective cities. The source property located in Edwards County is jointly owned

[18] Tr. 958:19-20. WP Exhibit 8, Bates No. WP002058. ("During the 2022 Housing Assessment, employers and community leaders noted a significant labor shortage. In May of 2023 there are over 430 job openings within a 25-mile radius of Hays (Source: Kansas Works). It should be noted that many employers in 2022 indicated that they are not even listing all open positions due to the labor shortage and do not include expansion opportunities.")

[19] Tr. 405:6-11, Testimony of Doug Williams. ("But Cessna was one of those that looked at our community seriously and then opted to go elsewhere. Q. And they went to Independence, [Kansas] you say? A. They did.") Also see, Tr. 407:12-20; 408:1-6, testimony by Mr. Williams that a small feed yard chose either Salina or Colby over Hays. Counsel for the Cities inquired, "Q. And I understand you're not testifying that you lost the Cessna opportunity solely because of water, right? A. No." Tr. 406:3-6.

[20] Tr. 439:3-14; 440:2-3; 440:6-13-24.
[21] Tr. 133:13-16.
[22] Tr. 484:6-9.

by the Cities and is known colloquially as the R9 ranch.[23] The proposed transfer is characterized as an interbasin transfer. Interbasin water transfers convey water from one river basin to another using non-natural means, such as pipelines, aqueducts, or canals. Interbasin transfers can significantly affect water supplies, hydrology, and the environment in both donor and receiving basins.

3. The Cities' efforts to obtain the right to transfer water from the R9 Ranch, formerly known as the Circle K Ranch, have proceeded on two tracks. In June 2015, the Cities submitted applications to the Division of Water Resources ("DWR") to change the use made of water of the R9 Ranch water rights from irrigation to municipal use. The former Chief Engineer contingently approved the change.[24] That decision was appealed to the Edwards County District Court where the Chief Engineer's master order was largely affirmed. Water PACK then sought appellate review. Water PACK's appeal of the district court order is presently pending before the Kansas Supreme Court where the present Chief Engineer is a party. The Supreme Court recently remanded the case to the district court for additional fact finding.

B. THE WATER TRANSFER ACT

4. The Kansas Water Transfer Act, K.S.A. 82a-1501 et seq. (the "Act"), was initially adopted in 1983 and then amended in 1993. The present iteration defines a "water transfer" to mean "the diversion and transportation of water in a quantity of 2,000 acre feet or more per year for beneficial use at a point of use outside a 35-mile

[23] Tr. 36:19-25.
[24] *Cities' Exhibit* 1-2

radius from the point of diversion of such water." Proposed transfers may not be approved absent compliance with a panoply of enumerated requirements. One is a showing that the transfer will provide a net benefit to the State.

5. "Benefits to the state" is an undefined amorphous phrase, but the statute requires the decision maker to undertake an analysis taking into account all relevant matters, including but not limited to the following:

   a. Any current beneficial use being made of the water proposed to be diverted, including minimum desirable streamflow requirements;
   b. any reasonably foreseeable future beneficial use of the water;
   c. the economic, environmental, public health and welfare and other impacts of approving or denying the transfer of the water;
   d. alternative sources of water available to the applicant and present or future users for any beneficial use;
   e. whether the applicant has taken all appropriate measures to preserve the quality and remediate any contamination of water currently available for use by the applicant;
   f. the proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying the water from the point of diversion, which plan shall be in sufficient detail to enable all parties to understand the impacts of the proposed water transfer;
   g. the effectiveness of conservation plans and practices adopted and implemented by the applicant and any other entities to be supplied water by the applicant;
   h. the conservation plans and practices adopted and implemented by any persons protesting or potentially affected by the proposed transfer, which plans and practices shall be consistent with the guidelines for conservation plans and practices developed and maintained by the Kansas water office pursuant to K.S.A. 74-2608, and amendments thereto; and
   i. any applicable management program, standards, policies and rules and regulations of a groundwater management district.

6. The final administrative arbiter of a water transfer application is a hearing panel consisting of the chief engineer of the division of water resources of the Kansas department of agriculture, the secretary of the department of health and

environment, or the director of the division of environment of the department of health and environment if designated by the secretary, and the director of the Kansas water office. K.S.A 82a-1501. The chief engineer is the designated chairperson of the panel.

7. The panel, in turn, requests the appointment of a presiding officer from the office of administrative hearings to conduct a hearing in accordance with this act. For purposes relevant to the present application, the request for appointment of a hearing officer is made when the water transfer application is complete. The Act neither defines "complete" nor identifies the person or entity charged with making the determination that the application is complete.[25]

8. As provided by K.S.A. 82a-1504, under the Act the presiding officer shall render an initial order either approving or disapproving the proposed water transfer. The presiding officer's order shall include findings of fact relating to each of the factors set forth in K.S.A. 82a-1502(c).

9. The presiding officer may order approval of a transfer of a smaller amount of water than requested upon such terms, conditions and limitations as the presiding officer deems necessary for the protection of the public interest of the state as a whole.

10. An order of the presiding officer disapproving or approving a water transfer, in

[25]The statutory provisions states: "If the chief engineer finds the application to be insufficient to enable the chief engineer to determine the source, nature and amount of the proposed transfer, or if the application is not complete, the application shall be returned for correction or completion or for any other necessary information." Generally, "the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately." *Brown v. Budget Rent-A-Car Sys., Inc.,* 119 F.3d 922, 924 (11th Cir. 1997) (quoting *Quindlen v. Prudential Ins. Co. of Am.,* 482 F.2d 876, 878 (5th Cir. 1973)). The conclusion to be drawn is that it is the panel, rather than the Chief Engineer, that determines whether the application is complete.

whole or in part, is deemed an initial order. The panel is deemed the agency head for the purpose of the Kansas administrative procedure act and is charged with review of all initial orders of the presiding officer in accordance with the Kansas administrative procedure act.

11. An applicant for a water transfer must file with the chief engineer an application in the form required by rules and regulations. If the chief engineer finds the application to be insufficient to enable the chief engineer to determine the source, nature and amount of the proposed transfer, or if the application is not complete, the application must be returned for correction or completion or for any other necessary information. K.S.A. 82a-1503.

12. An applicant under the Act is obliged to comply with applicable management program provisions adopted by a relevant groundwater management district.

C. WATER TRANSFER ACT REGULATIONS

13. For purposes of determining whether a party's Water Transfer Act application is complete, K.A.R. 5-50-2 enumerates a list of representations and information that must be provided. The list largely tracks the requirements of K.S.A. 82a-1502 and includes the following:

> (f) any economically and technologically feasible alternative source or sources of supply available to the applicant and to any other present or future users of the water proposed to be transferred. The water transfer application shall specify why this source of supply was selected over the alternative sources available;
>
> (g) the proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying the water from the point or points of diversion to the proposed point or points of use. The proposed plan shall be in sufficient detail to enable all parties to understand the impacts of the proposed water transfer;

(j) that the proposed transfer will not impair water reservation rights, vested rights, appropriation rights or prior applications for permits to appropriate water;

(m) the economic, environmental, public health and welfare, and other impacts of approving or denying the transfer of water;

(o) the provisions of a revised management program adopted by a groundwater management district that are applicable to the proposed transfer whenever any of the proposed points of diversion are located within a groundwater management district;

(p) whether or not the applicant, and any entity to be supplied water by the applicant, have adopted and implemented conservation plans and practices that fulfill the following requirements:

(1) are consistent with guidelines developed and maintained by the Kansas water office, pursuant to K.S.A. 74-2608 and its amendments;

(2) have been in effect for not less than 12 consecutive months immediately before the filing of this water transfer application; and

(3) provide for a rate structure that encourages efficient use of water and results in conservation and wise, responsible use of water, if the transfer is for use by a public water supply system;

(q) the effectiveness of conservation plans and practices that have been adopted and implemented by the applicant and any other entities to be supplied water by the applicant;

(r) if applicable, population projections for any public water supply system that will be supplied by the water transfer, and the basis for those projections;

(s) the projected water needs of the applicant and of any other entities to be supplied water by the applicant, and the basis for those projections;

(t) the current per capita per day usage of any public water supply user to be supplied water by the applicant, and the current average per capita per day usage of other similar users in a region of the state that is climatically similar. If the applicant's per capita per day usage exceeds the regional average, the applicant shall show why its per capita per day usage is reasonable.

(u) any additional factors that may be required by the chief engineer.

D. THE ROLE OF THE OFFICE OF ADMINISTRATIVE HEARINGS ("OAH")

1. In 1997, the Office of Administrative Hearings (OAH) within the Department of Administration was established for the purpose of conducting administrative hearings for the Department of Social and Rehabilitation Services (now

Department for Children and Families).

2. In 2004, SB 141 was passed, extending the responsibility for conducting administrative hearings for nearly all state agencies to the OAH over a five-year phase-in schedule beginning July 1, 2005, and concluding July 1, 2009. Since July 1, 2009, the OAH has existed as a freestanding agency, separate from the Department of Administration.

3. In 2007, SB 351 was enacted, requiring all agencies, boards, and commissions to utilize the OAH for hearings held in accordance with the Kansas Administrative Procedure Act ("KAPA") on and after July 1, 2009.

4. For all agencies, except for the state board of tax appeals, the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings shall be the presiding officer. K.S.A. 77-514.

E. PUBLIC COMMENTS

1. Pursuant to the Presiding Officer's order, a public comment hearing was held in Hays, Kansas on June 20, 2023. Various public comments were received during the public hearing and written comments were submitted and received.

2. A written comment offered by the Kansas Livestock Association ("KLA") dated June 26, 2023 is notable.[26] KLA explains it has numerous members in the Arkansas River basin that have both stock water and irrigated water rights that

[26] https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/kla-comments-stamped.pdf?sfvrsn=cc79ec1_0

would be affected by the Hays/Russell Water Transfer Application. It voiced a number of concerns:

a. KLA stated that it opposes the Transfer as it was submitted, and requested that the presiding officer, consistent with K.S.A. 82a-1504, approve the transfer of a smaller amount of water along with additional terms and conditions that would protect the cities in times of drought and allow the cities to access the water necessary for actual growth, but at the same time, protect the Arkansas River basin and existing water users near the R-9 Ranch.

b. KLA observed that the Water Transfer Act was enacted by the Kansas legislature to place an additional check on water right owners who seek to transfer water out of one basin for use in another. Per KLA, this limitation gives the water transfer hearing panel additional administrative powers to limit water use beyond the chief engineer's authority pursuant to a change in use application.

c. KLA stated that under K.S.A. 82a-1502(a), an applicant must show "that the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer . . . ." K.S.A. 1502(c) outlines certain items that should be considered in weighing the benefits to the state, but allows the presiding officer to consider items beyond those specifically listed, when it states, "the presiding officer shall consider all matters pertaining thereto..."

d. KLA suggested that central to these additional administrative powers is a concern that an influential actor, like a large municipality, could exploit water resources in a distant basin while avoiding beneficial use of existing resources in the basin where place of use will occur. The Transfer application, as submitted, presents such a problem, and limitations must be imposed to protect the Arkansas River basin.

e. In particular, KLA believes the Transfer fails to produce benefits to the state that outweigh the benefits of a more limited approach to the transfer because it fails the tests found in paragraphs (3) and (4) of K.S.A. 82a-1502(c).

f. The initial issue with the Transfer application is that it overestimates population growth. The application for water transfer claims population growth of two percent, but Hays has grown at less than one percent in the last decade and Russell has lost population. This glaring error overstates the needs of the cities.

g. The second problem is Hays and Russell are attempting to transfer more water than either city currently uses or could reasonably be expected to need in the future, even in extreme drought scenarios. Based solely on Chief Engineer David Barfield's Master Order in the change in use application, the cities would have available, on average, 4,800 acre feet of water, but analysis shows the 2040 demand of the cities is only 3,228 acre feet. This amount of future use

could be met by the cities' existing water supplies under average climatic conditions. Even under a generous one percent growth rate and extreme drought, Hays would only be short 643 acre-feet of water in 2040 and it is not anticipated that Russell would be short water.

h. This begs the question, what are the cities going to do with the water they are asking for via the Transfer? Abandoning the cities' current water conservation activities would weigh against the cities in K.S.A. 82a-1502(c)(7) and is something the cities' application denies. Without additional information, it would seem the cities plan to simply forego use of existing water supplies in the basin where the cities are located, conserving theses supplies for the future, while initiating a significant demand on an out-of-basin supply.

i. KLA would argue this is the exact type of activity the Water Transfer Act was meant to prevent. Given the cities' lack of current or immediate need for this amount of water and the significant concerns and varying professional opinions around safe yield, KLA proposes the presiding officer use his discretion under K.S.A. 82a-1505 to do the following: 1. Limit the immediate transfer to approximately 650 acre-feet, the amount of future need in an exceptional drought that can realistically be expected given the cities' current water resources. 2. Condition the use of transferred water on the cities' continued use of existing available water resources, meaning the cities cannot abandon current water supplies in favor of water from another basin until such available local resources are fully utilized. 3. Allow the cities to make requests for additional water transfers at regular intervals, like every five years, up to the amount of water allowed under a final version of the change in use order.

j. The panel could allow future transfer requests, consistent with the water rights, to be approved by the Chief Engineer up to an amount shown by the cities to be actually necessary because existing supplies are insufficient due to either deteriorating supplies of in-basin water resources or unexpected population growth. Such future transfer approvals should also be conditioned on whether safe yield goals in the basin surrounding the R-9 Ranch have been met by past transfers and are projected to be met for the additional request.

3. Also of note was the written comment submitted by Richard and Jane Wenstrom.[27]

In it they state, in part:

a. My name is Richard J. Wenstrom, and I am writing these comments on behalf of myself and my wife and business partner Jane M. Wenstrom about negative impacts that we are expecting if the water transfer is approved at expected levels (4,800 Acre-Feet/Year up to a maximum of 6,700 Acre Feet/Year).

[27] https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/wenstrom-comments---water-transfer-hearing-panel-june-2023.pdf?sfvrsn=81e19ec1_0.

b. Our farm consists of 2,960 mostly contiguous acres of center pivot irrigation (including 320 acres of dryland) that extend from the NE¼ Section 8, 26-19 South & Southeast to the SE¼ of Section 19, 26-18 in Edwards County including 320 irrigated acres in the northern tier of Kiowa County.

c. But before I make these comments, please allow me to tell you who I am, where our farm is located, and our personal and business history here in this location. Conservation was already a legacy when Jane and I arrived. Jane's father, Clarence Michaelis, a second generation owner of our farm, served on the Edwards County Soil Conservation Board for over 50 years, where he was a pioneer in soil and water conservation. Jane and I took over this operation when her parents retired in 1976, and we farmed continuously until our retirement in 2007. Our farm is located, for the most part, in South Brown Township, Edwards County, Kansas.

d. I hold a BS degree in Agricultural Engineering from North Dakota State University and a MS degree in Irrigation Engineering from Colorado State University. I am a licensed Professional Engineer in California (retired), Colorado (retired) and Kansas. Jane holds a BS degree in Horticulture from California Polytechnic University.

e. Because of this strong interest in irrigation, I early on worked on irrigation pumping plant and well efficiency here on our farm, following the testing and analysis procedures pioneered by the University of Nebraska Ag Engineering Department. This led to many improvements on our farm to save irrigation water and energy. Once our pumping plants were improved, we concentrated on computer-based center pivot control & monitoring and irrigation scheduling in order to apply only the amount of water each irrigated crop required during the growing season.

f. For over 15 years, our farm was a cooperator with the USDA-ARS Water Management Unit, Fort Collins, Colorado, performing climate-based irrigation scheduling by computer using software created for that purpose by the USDA-ARS personnel. Using these techniques, our farm was able to save irrigation water on each center pivot location by up to 10 days of pumping per season.

Recognitions followed for our farm:

- 1987 - Kansas Bankers Association Soil Conservation Award
- 1996 - US Dept of Interior, Bureau of Reclamation Water Conservation Award
- 2007 - Kansas Bankers Association Water Conservation Award
- 2014 - Climate+ Energy Project Model of Innovation Award, Water & Energy
- 2015 - Be the Vision Award from the Kansas Water Office

- Kansas Farm Bureau Century Farm

g. In 1983, in an effort to earn extra income, and to capitalize on the knowledge we had gained on our own farm and my PE license, I formed a company named Pumping Plant Testing, whose purpose was to conduct pumping plant performance tests, conduct water right certification tests required by the Division of Water Resources, conduct pivot re-nozzling tests, and conduct custom irrigation scheduling ……. all for clients located in the area covered by Water PACK and GMD # 5. In the succeeding 10 years, Pumping Plant Testing conducted hundreds of these various tests.

h. Since 2007 when we retired from active farming, Pumping Plant Testing [has] conducted water right certification tests for the Circle K Ranch, in western Edwards County (now the R9 Ranch owned by the cities of Hays & Russell) under contract for the Division of Water Resources, Kansas Department of Agriculture.

i. Since our farm is located in the area just south and southeast of the R9 Ranch owned by the cities of Hays and Russell, we have been concerned about the future effects on our local groundwater source of supply when and if the cities are successful in transferring water according to the current Master Order by the Chief Engineer.

j. Now those concerns are heightened when we learned of the work performed by consultant Steve Larson, S.S. Papadopulos & Associates, Inc. on behalf of Water PACK, our local private organization dedicated to preserving and protecting local groundwater sources to supply water for beneficial agricultural and local use.

k. Mr. Larson has detailed areas of future impairment on our farm if the cities of Hays and Russell are successful in transferring 4,800 Acre-Feet of water per year up to a maximum of 6,700 Acre Feet per year from the R9 Ranch.

l. The impairment is the most in our circles closest to the R9 Ranch, but it appears that just about every water right on our farm would be adversely affected.

m. [T]here [has been] a steady downward trend in the static water levels until the year 2015, the year that the irrigation wells on the R9 Ranch were being taken out of service in anticipation of the water transfer.

n. By the year 2017 all of the irrigation wells on the R9 Ranch had been taken out of service, and the entire ranch was planted to native grasses. There has been no irrigation pumping on the R9 Ranch since that time.

o. The static water level since 2015 on our four irrigation wells has been steadily rising, which gives a direct indication of the negative effect the R9 Ranch has had on our adjacent irrigation wells. This upward trend will undoubtedly change back to dropping static water levels when and if the cities start extracting the projected 4,800 Ac-Ft- 6,700 Ac-Ft per year.

p. Keep in mind that the R9 Ranch will pump water from the aquifer and the output flows will be routed into their pipeline system; there will be little or no chance for recharge back into the aquifer, except for a miniscule amount when and if rainfall happens to occur in amounts that would saturate the native grass deep root systems all over the ranch.

q. Another factor to consider is that the most likely R9 wells to be used for this water transfer diversion are those with the largest amount of water bearing strata. It is common knowledge that these wells are located in the SE corner of the R9 Ranch, closest to our farm property. Again, I refer to the Steve Larson analysis for the impairment figures for this geographical area in his report, which show that this impairment continues on into the distant future.

r. Water quality is a big concern also on our wells in the vicinity of the R9 Ranch. When we first acquired this land in 1989, the irrigation water was not very corrosive, and we occasionally would drink from the faucet on the discharge line in very hot weather. As time went on, however, we noticed more and more corrosion taking place on our irrigation components, and we no longer drank the water.

s. Water sample history indicates high levels of nitrate, sulfate, and Total Dissolved Solids (TDS). I am not a water analysis expert, but our opinion is these increases are directly linked to the pumping going on within the R9 Ranch, pulling these contaminants away from the Arkansas River and moving them to our wells just south of the R9 Ranch. Stories abound from our farm and others about metal irrigation components corroding away … … in some cases bad enough for pivot irrigation systems to fail and fall to the ground.

t. And the worst part of this story is what one cannot see; down in the well corroding well screens and pump components. This has cost us a lot of money in well and irrigation system replacements. We just redrilled a well in this area where the well screen was severely corroded …. the cost was$ 37,000.

u. Our concern is that this extreme corrosion will keep moving south on our farm once the cities resume their pumping.

v. The value of our irrigated land in the vicinity of the R9 Ranch is decreasing. This affects our balance sheet in a negative way. Although we have not sold any of our land and don't intend to, I would estimate that the land in the direct vicinity of the R9 Ranch would be discounted at least 40-50 % below what the rest of our farm would bring, especially once the cities begin pumping enormous quantities of water from the fragile alluvial aquifer underlying the Ranch. Part of the reason for this decrease in value is a decrease in crop production due to lower irrigation pumping rates on the very sandy land next to the R9 Ranch, which we are already experiencing.

H. THE ABSENCE OF DATA SHOWING FUTURE WATER NEEDS AND RELIABLE POPULATION GROWTH PROJECTIONS

1. Mr. Quinday on behalf of the City of Russell confirmed that the transfer application

did not include any projection for Russell of future water needs or projected future GPCD usage. Tr. 570-571.

2. The City of Hays did not obtain a future water needs analysis and Mr. Dougherty testified that he does not know what the City's future water needs will be. "Q. And you don't know what the needs are going to be because you don't have a reasonable-needs analysis, correct? A. I don't know what the needs are going to be because I can't predict the future. Q. And if you had a reasonable-needs analysis, then that would assist you, would it not? A. If the reasonable-needs analysis could predict the future, I guess, but we don't know what's going to happen in the future." Tr. 313:23-25; 314:1-7.

3. Mr. Dougherty testified that he cannot even approximate Hays' future water needs. "Q. So you don't know -- pardon me. You don't know what your future needs will be? A. I can't state exactly what our future needs will be. Our existing sources are inadequate. Q. Okay. Can you state approximately what your future needs are going to be? A. I cannot." Tr. 316:19-25.

4. Over about the last 40 years, Hays grew by an annual average of 0.65 percent per year. *Intervenor's Exhibit* WP 01866 at 3-2 (Harvey Economics Report).

5. Mr. Dougherty conceded that the 2% annual population growth estimate upon which the transfer application is predicated[28] is inaccurate and agreed with the Cities' expert that the correct population growth estimate was one percent. "Q Did you -- did you, the Cities or through your attorneys, hire a woman whose name is

[28] *Intervenor's Exhibit* 01868 (Exhibit 9) at Bates 199.

Ms. Haase? A. Ms. Haase, yes. Q Okay. Let's -- let's look at her direct testimony. This is from, and I apologize for the mispronunciation of Ms. Haase's name, she is asked the question, What is the purpose of your direct testimony? Her answer is, My opinions are set forth in detail in my expert report, but in general, my testimony relates to Hays' population projection. The question is then, In summary, what did you conclude? The answer is, I conclude within a reasonable degree of professional certainty that an estimated growth rate of 1 percent annually over the next 10 to 20 years is likely for the City of Hays. So I'm assuming since that's the Cities' expert that you agree with that number? A. I agree with Ms. Haase." Tr. 326:7-25, Tr. 327:1-3.

6. Mr. Quinday testified that Russell's planning document "for the entire city that we use for everything, our comprehensive plan has a .25 percent annual growth rate." Tr. 565:22-25; 566:1.

7. Susan Walker of Harvey Economics was retained as an expert witness by the Intervenors and testified on their behalf. Harvey Economics was retained by the Intervenors to review and determine the water demand projections and water needs for the Cities of Hays and Russell. Tr. 1361.

8. Ms. Walker holds a Master's Degree in Economics from Colorado State University, as well as a Bachelor of Science (BS) from the University of Vermont. She has over 20 years of professional experience, including 18 years with Harvey Economics. Her work has focused on comprehensive economic impact analyses for public and private projects. Ms. Walker's expertise lies in evaluating demographic and

economic data, preparing forecasts and projections, and estimating impacts to local economies and specific industries. She has worked in planning endeavors related to water, energy, tourism, and other natural resource sectors with a focus on economic and demographic research, analysis, and modeling. She has completed various projects involving rate studies, demand projections, socioeconomic impact analysis, cost-benefit analysis, project financing, and resource and facility valuation. *Intervenor's Exhibit* WP 01867 at 2.

9. Ms. Walker offered the following expert opinions relating to population growth and water needs. *Intervenor's Exhibit* WP 01867 at 4.

   a. Population growth for Hays and Russell is expected to be 0.34 percent per year for Hays and 0.06 percent per year for Russell. Hays will experience modest population growth and Russell's population will be stable for the foreseeable future.
   b. Estimates of firm yield water supplies during drought periods provided in the McCormick Expert Report, as compared to projected water demands, indicate that Hays and Russell currently have sufficient water supplies to meet demands during a moderate drought, similar to that experienced in 2011-2012.
   c. Under exceptional drought conditions, Hays would experience shortages, most likely less than 400 acre-feet, and under optimistic growth assumptions, a shortage of less than 700 acre-feet. Russell is not expected to experience shortages under the most likely or optimistic growth projections.
   d. The Cities do not need the 4,800 acre-feet per year of new water supply included in the water transfer application for the foreseeable future.

I. THE VOLUME OF WATER SOUGHT IS DECIDEDLY IN EXCESS OF REASONABLE NEEDS AND, IF APPROVED, CONSTITUTES WASTE

1. Mr. Dougherty testified that in recent years the Cities, combined, have used approximately 3000 acre/feet of water per year. "Q So the combined application on behalf of the two Cities would be coming from Cities that in recent years cumulatively, between the two of them, have used 3,000 acre-feet per year,

correct? A Correct." Tr. 310:11-16.

2. Mr. Quinday testified that Russell, on average, uses 1000 acre/feet of water per year. Tr. 571:5-11. He also testified that in acquiring a water right Russell is only entitled to that amount that is commensurate with the City's needs. Tr. 574:1-5.

3. Mr. Dougherty in his testimony conceded that the Cities do not need the volume of water they have requested. "Mr. Dougherty, you testified, and we've seen this in other places, that the R9 project is going to be developed in phases; is that correct? A. That's the intent. Q. And you said yesterday that that is, at least in part, because the Cities do not need all the water, right? A. Correct." TR 330:1-9; *see also Intervenor's Exhibit* WP 01871 at Bates 2 (Dougherty Deposition at 154).

4. Mr. Dougherty testified that no water customer in Hays has ever had his or its water cut off due to lack of available water. "So it would be true, however one defines the existing demands or daily demand, there's never been a customer in Hays that has had his or its water cut off, right? A. Not in my tenure." Tr. 317:18-22.

5. The Cities called Paul A. McCormick, P.E. as an expert witness. Mr. McCormick is a Senior Associate Geological Engineer with Burns & McDonnell Engineering Company, Inc. Mr. McCormick was retained to provide an analysis of the maximum yield available from the Cities' existing water sources in the event of 2-year (moderate), 5-year (exceptional), 10-year (decadal), and 20-year (multidecadal) droughts. *Cities' Exhibit* 2828 at Bates 0103744.

6. Mr. McCormick states that the total quantity of water presently available to Hays

from all three wellfield sources combined is 3,675 AF/y. Cities Exhibit 2828 at Bates 0103758.

7. Hays presently uses approximately 2000 acre/feet of water per year and that consumption figure has remained relatively stable for several years. Tr. 309:23-25; 310:1-3.

8. In his report Mr. McCormick concluded that Hays had residual sustainable yields under any of the considered drought scenarios as follows:

TYPE	SUSTAINABLE YIELD
• Moderate Drought	2,549.46 a/f
• Exceptional Drought	1760 a/f
• Decadal Drought	840 a/f
• Multidecadal Drought	480 a/f

Cities Exhibit 2828 at Bates 0103765.

9. Given Mr. McCormick's analysis, and assuming Hays' water consumption continues to be 2000 acre/feet per year,[29] the shortfall in sustainable yield ranges from zero in the case of a moderate drought to 1520 acre/feet in the event of a multidecadal (more than 10 years) drought. *See* Walker testimony to the same effect at *Intervenor's Exhibit* WP 01867 at 4.

J. THE DESIGN PLAN ON WHICH THE APPLICATION IS PREDICATED IS ENTIRELY INCONSISTENT WITH THE REQUIREMENTS OF THE ACT

1. The only expert witness testimony presented by the Cities in relation to the project design plan was Kevin Waddell. Mr. Waddell is employed by Burns & McDonnell as an estimating and pre-construction manager for water infrastructure. Tr. 963.

[29] Essentially consonant with the requirements of the city's state-approved conservation plan.

2. Mr. Waddell prepared a report that was admitted into evidence as Exhibit 2829. Tr. 965. He estimated the cost of the project in 2025 to be 134.9 million dollars. Tr. 972. The estimate is referred to as a Class 5 estimate. Tr. 973. Per Mr. Waddell, the accuracy deviations of a Class 5 estimate ranges from 20 to 50 percent on the low end and 30 to 100 percent on the high end. Tr. 973.

3. Mr. Waddell testified that the proposed plan of design (item G) provides no detail and is merely conceptual. (Testimony of Kevin Waddell) Tr. 973:14-16.

4. The Hays City Manager testified that there is, in fact, no design plan. "A. If there are future costs that – O&M costs that could affect rate, we don't know what they are yet ***because the project has not been designed***. That would take place after the project has been designed to a point where we could determine what those costs were and how it would affect rates." Tr. 334:4-10 (emphasis added).

K. The Volume of Water Permissibly Transferred is Limited by the Applicants' Reasonable Needs as Determined by Reference to Their Approved Water Conservation Plans

1. Mr. Dougherty testified that the City of Hays should not, going forward, be required to comply with its approved conservation plan. "Q. So should that be -- should Hays' future water be capped at the gallons per capita per day that it has been operating at in the past because of its conservation efforts? A. Absolutely not. I think that would be a – an unreasonable and an unfair restriction on future water uses." Tr. 186:14-21.

2. Paradoxically, Mr. Dougherty also testified that Hays intends to keep its conservation measures in place regardless of whether the water transfer

application is approved. "Q. So it's true we just reviewed these conservation measures, and it's the City's intent to keep those conservation measures in place whether the water transfer application is approved or not, right? A. Correct." Tr. 342:12-17.

3. The Act conditions approval of a water transfer application upon "[adoption] and [implementation of] conservation plans and practices." K.S.A. 82a-1502(b).

4. To implement means to "give practical effect to and ensure of actual fulfillment by concrete measures." *"Implement." Merriam-Webster.com Dictionary, Merriam-Webster*, https://www.merriam-webster.com/dictionary/implement. (Last accessed 9.27.2023).

5. The conservation guidelines referenced in K.S.A. 82a-1502(b) are enshrined in the Kansas Municipal Water Conservation Plan Guidelines ("Guidelines") that were published in August of 2007. *See Cities' Exhibit 817.*

6. The Guidelines recite that "Kansas Statutes require water conservation plans for anyone: (1) purchasing water from the State Water Marketing Program; (2) participating in the Water Assurance District Program; (3) sponsoring or purchasing the public water supply portion of a Multipurpose Small Lakes Program project; (4) transferring water under the Water Transfers Act; or (5) applying for a loan from the State Revolving Fund." *Id.*

7. Once a Conservation Plan is implemented, as is true for Hays and Russell, it must be maintained. "Once implemented, the applicant shall continue to satisfactorily maintain each component of the water conservation plan." K.A.R. 5-3-5j.

8. The volume of water the Cities seek to transfer exceeds the amounts permitted by their respective Conservation Plans. The city of Russell's most recent Conservation Plan was approved April 1, 2019. *Cities' Exhibit* 1-68. The long-term water use efficiency gallons per capita per day (GCPD) approved by the Kansas Water Office is not to exceed 138 GPCD based on the regional average of the last five reported years (2011 thru (sic) 2015). *Cities' Exhibit* 1-68, Bates Number 0003202.

9. The city of Hays' most recent Water Conservation Plan was adopted March 27, 2014. *Cities' Exhibit* 1-52. The long-term water use efficiency gallons per capita per day (GCPD) as approved by the Kansas Water Office is not to exceed 95 GPCD. *Cities' Exhibit* 1-52, Bates Number 0002860.

10. "Waste of water" means any act or omission that causes any of the following: (1) The diversion or withdrawal of water from a source of supply that is not used or reapplied to a beneficial use on or in connection with the place of use authorized by a vested right, an appropriation right, or an approval of application for a permit to appropriate water for beneficial use; (2) the unreasonable deterioration of the quality of water in any source of supply, thereby causing impairment of a person's right to the use of water; (3) the escaping and draining of water intended for irrigation use from the authorized place of use; or (4) the application of water to an authorized beneficial use in excess of the needs for this use. K.A.R. 5-1-1.

11. In his testimony, Lane Letourneau, the Division of Water Resources, Water Appropriation Program Manager, stated "Q. Well, I think we can address this by simply the question that fundamental to Kansas water law is the concept that waste

of water is not allowed? A. That's correct." Tr. 1021:8-11.

L. THE CITIES HAVE OFFERED ONLY CONJECTURE IN SUPPORT OF THEIR CONTENTION THAT APPROVAL OF THE WATER TRANSFER PROJECT WILL RESULT IN A NET BENEFIT TO THE STATE

1. Susan Walker of Harvey Economics provided these expert opinions in relation to the question of accrual of economic benefits as a product of approval of the water transfer project. *Intervenor's Exhibit* WP 01867 at 4-5.

    a. Overall, it is HE's opinion that the economic benefits from constructing the R9 Ranch project will be short lived and limited since much of the specialized material and equipment purchased for construction will come from outside Kansas and since workers might be drawn from out of state because of the chronic labor shortage in western Kansas.

    b. Harvey Economics believes the opinion by the Cities' expert, Dr. Hamilton, estimating $43 million in economic benefits from avoiding water shortages in Hays and Russell over the next 50 years, is uncertain and unreliable. His estimate of $117 and $251 million in avoided losses from very extreme droughts is flawed and speculative.

    c. Harvey Economics believes that the economic costs of the project will amount to a minimum of $192 million and, more likely, $241 million once the project is repaid. This does not include annual operations and maintenance (O&M) costs.

    d. In addition to construction costs, for a 65-mile pipeline, other infrastructure and water treatment may be considerable. Together, payments on debt service for construction and the annual operations and maintenance costs will likely be seen in increased water rates for the Cities' water customers.

    e. The net costs of the R9 Ranch project will likely exceed its benefits to the Cities and the State of Kansas.

2. The Hays City Manager is unaware of anyone who has moved to Hays on the expectation that the WTA transfer would be approved. Tr. 380:18-21.

3. Per Doug Williams who is the executive director of Grow Hays, business activity in Hays has been robust. Tr. 440:3. Mr. Williams testified that he feels good about the present economic situation in Hays. *Id.* at 24.

4. Mr. Quinday agreed that Russell's present business prospects are promising. "Q. So would you characterize Russell's business prospects at the moment as promising? A. What do you mean business prospects? Q. People moving back, new business? A. Yes." Tr. 576:13-17.

5. Mr. Quinday testified about his concerns about the availability of water for industrial customers, specifically PureField, but he conceded the company is planning to expand and chose to locate in Russell without being offered financial incentives to do so. Tr. 580:1-10.

6. The GMD5 Management program provides: "The availability of plentiful and renewable supplies of good quality water has helped to make an irrigated agricultural economy a reality in the District. The spin-off from this has bolstered the well drilling industry, irrigation service groups, and irrigation equipment dealers, thus establishing off-farm jobs that help establish a healthy economic base supporting the local communities within the area. Revised Management Program at 13 – WP00621.

7. The GMD5 Management program also provides: "[T]he use of water for irrigation purposes is by far the largest with roughly 90% of all water withdrawn applied to irrigated crops. Indeed the greatest increase in development has been for irrigated agriculture. This increased development has helped to support the economy of the region but this economy can only be maintained if the water resource is sustained." Revised Management Program at 14 – WP00621.

M. FINANCING CAPABILITIES

1. Mr. Dougherty, the Hays City Manager, testified that the City has no firm plans about how the transfer project will be financed. Tr. 339. He confirmed, for example, that the City has not consulted with bond counsel. Tr. 336:21-23.

2. Mr. Quinday, the Russell City Manager, testified similarly stating that he did not know if Russell could finance its 18% share of the infrastructure costs. Tr. 563: 8-11.

3. Mr. Dougherty testified that Hays was eligible for financing through the state revolving loan fund but, despite a request, no documentary evidence of that eligibility or the relationship between eligibility and actual funding was produced. Tr. 337.

4. Mr. Dougherty distinguished eligibility from a loan commitment. "Q. Well, let's be sure we're talking about the same thing because I asked you about a commitment, you just said that you are eligible. I think there's a difference, is there not? A. What I'm saying is we have been notified that we are eligible for funding, we have been selected for funding. But that's not a commitment; a commitment is a contract based off of firm terms, based off of an amount." Tr. 338:5-13.

5. The Hays City Finance Director estimated, at a time when the estimated cost of the water transfer project was 66 million dollars, that financing the project would require a 70 percent water rate increase. Tr. 334:11-25.

N. THE REQUESTED TRANSFER IS PROHIBITED BY K.S.A. 82A-1502(B) BECAUSE IT IS UNSUSTAINABLE

1. The Cities define sustainability in respect to the volume of water to be withdrawn

from the R9 Ranch as a condition under which "the average volume of water pumped from the well field [will] not exceed the average volume of water recharged to the aquifer." BURNS & MCDONNELL, *Cities' Exhibit 1-3* at Bates 0000352.

2. Steven Larson, a groundwater modeling expert retained by the Intervenors, provided a report in which he opined that the groundwater model upon which the Cities rely is inaccurate in assessing aquifer recharge rates under non-irrigated conditions. "First, the change in land use from irrigated to non-irrigated associated with a change from irrigation pumping to municipal pumping will reduce the amount of groundwater recharge associated with rainfall on the R9 ranch land area. The groundwater model used by BMcD to evaluate the potential impacts of a change from irrigation pumping to municipal pumping on the R9 ranch lands was premised on the concept of higher groundwater recharge from rainfall on irrigated land versus non-irrigated land. The failure of the evaluation by BMcD to consider the reduction in groundwater recharge associated with the future change in land use from irrigated to non-irrigated causes their evaluation to understate the potential future negative impacts to groundwater levels that would occur when municipal pumping replaces irrigation pumping on the R9 ranch lands." *Intervenor's Exhibit* WP 01864, 7:240-249.

3. Mr. Larson in his expert report states the following:
   a. "The reduction in groundwater recharge within the R9 ranch area when land is no longer irrigated was estimated to average about 2,000 acre-feet per year over the 51-year simulation period that BMcD used in their simulations. This reduction in groundwater recharge was calculated using precipitation-recharge curves that formed one of the bases for the GMD5 groundwater model that BMcD used in their evaluation."

b. "The inclusion of a reduction in groundwater recharge in the potential future scenarios of municipal pumping significantly increases the impacts to groundwater levels by five times or more in places near the ranch boundary from those projected in the BMcD evaluations. The areal extent of reduced groundwater levels was also significantly increased from about 15 square miles to over 150 square miles when the reduction in groundwater recharge was appropriately considered in simulations of potential municipal pumping from the R9 ranch area."

4. Mr. Larson is a nationally recognized expert in groundwater modeling. Per Mr. Barfield: "Okay. The -- I just want to get your – your sense about this statement, would you agree with me that Mr. Larson is a nationally recognized expert in groundwater modeling? A. I've worked with Mr. Larson for 20 years, and I would agree with that statement, yes." Tr. 1188:15-20.

   Per Mr. Letourneau: "Well, and I think the note that I made was, I think this is close, that you responded to the effect that everyone knows Steve Larson? A. Yes. Q. Okay. And is that because he is a nationally recognized expert in groundwater modeling? A. Absolutely." Tr. 1009:11-17.

5. Balleau Groundwater, Inc., the developer of the GMD 5 model, agrees with Mr. Larson's conclusion regarding recharge rates, and is updating the groundwater model presently. Tr. 1501:1-6.

6. In his direct testimony Mr. Larson stated that groundwater levels are projected to be lower under the municipal pumping simulation than under the irrigation pumping simulation. *Intervenor's Exhibit* WP 01864, 6:210, 7:211.

7. Mr. Letourneau testified that unreasonable lowering of the regional water table can result in impairment. "Q. Okay. There's various ways to -- for someone to suffer impairment, are there not? A. Yes. Q. And is -- are actions that result in the

unreasonable lowering of the regional water table one of those? A. Well, yes, by diversion. So -- but -- yes, I can say yes." Tr. 1038:19-25, Tr. 1039:1.

8. Per Mr. Letourneau's testimony, the State of Kansas considers the determination of impairment to be factually driven. "Q. Okay. So impairment, obviously, both from looking at Garretson and I think from your vast experience and knowledge, impairment is at the basic level a factual question, is it not? A. Yes." Tr. 1039:1-6.

9. Richard Wenstrom farms adjacent to the R9 Ranch and testified at the hearing. He holds a bachelor's degree in agricultural engineering and a master's degree in irrigation engineering. Tr. 1272:5-15. He has lived at his farm address since 1976. Tr. 1274:7

10. Mr. Wenstrom is an original member of Water PACK. Tr. 1283:14.

11. Mr. Wenstrom testified that Water PACK is an association of agricultural producers and businesses organized to promote, foster, and encourage the beneficial, economical, and sustainable use of quality water.

12. Mr. Wenstrom and his spouse own both senior and junior water rights that are adjacent to the R9 Ranch. Tr. 1294:19-21.

13. Mr. Wenstrom testified that there is a significant difference in aquifer recharge rates between land with growing crops and land with native grass – recharge being significantly less with native grass. Tr. 1460-1461:18-25, 1-3.

14. Mr. Wenstrom testified that declining aquifer levels have a negative impact on irrigation well capabilities. Tr. 1315-1316:11-25,1-21.

15. Mr. Wenstrom stated that the level of saturated thickness impacts well productivity. Tr. 1461:18-22.

16. Based upon his background and experience, Mr. Wenstrom believes that the testimony by Mr. McCormick regarding the saturated thickness at the R9 Ranch is inaccurate and overstates the depth. Tr. 1463:18-22.

17. Mr. Wenstrom stated that he was informed by Steven Larson that the number of acre/feet of water that could annually be sustainably withdrawn from the R9 Ranch was between 2100 and 2700 acre/feet. Tr. 1321:1-6.

O. THE REQUISITE STATUTORY FACTORS

1. The Current Beneficial Use Being Made of the Water Proposed to Be Diverted, Including Minimum Desirable Streamflow Requirements

a. The R9 Ranch water rights are currently authorized for irrigation and contingently authorized for municipal use, the latter contingency subject to satisfaction of conditions set forth in the Master Order. (Water PACK Ex. 7, WP001953, WP 002010; Cities 0000154 (describing contingencies)); see also K.A.R. 5-1-1(rr) and (tt) (describing irrigation uses and municipal uses).

b. Wells surrounding the R9 Ranch are used for irrigation, domestic, oil field, and stock water uses. (Cities Ex. 2462 at 87947; WP 01082).

c. Changes to the R9 Ranch water rights, if approved in the quantities desired by the Cities, will impact surrounding points of diversion based on reduced recharge and return flows. (Cities' Ex. 2462 at 87955; Water PACK Ex. 7, WP001961; Larson Report at 3 (“The BMcD projected future scenarios did not account for the reduction in groundwater recharge associated with changing

the status of lands on the R9 Ranch from irrigated to non-irrigated"); Romero Report 3 ("I agree with Mr. Larson's description of this hydrologic concept and associated reduction of local groundwater recharge at the R9 Ranch."); Tr. p. 688 ("I agree with the concept that in some cases the difference between irrigation—irrigated and nonirrigated land that there is a difference in recharge.") Tr. at 1193 ("recharge on irrigated land is greater than on nonirrigated land, I agree with that. Again, it includes this irrigation return flow issue."); Tr. 1225 ("[W]hen you actually look at permeable soils like that, sandy soils that are well drained….are particularly susceptible to enhanced recharge from irrigated land because the moisture content in the soils is maintained by the irrigation, such that when rainfall comes along during that period of time, more of it is able to drain all the way to the groundwater and become groundwater recharge."); see also Tr. 1231-32; 1234-36, 1269 (noting discrepancies between recharge rates based on cropping patterns and soil types); 1460 (noting that vegetation patterns, and in particular native grasses at the R9 Ranch, will affect recharge rates); WP 01517 ("Other works suggest that the potential recharge has increased after the conversion from natural vegetation to grain crops and grass pasture.")

d. "Minimum desirable streamflow (MDS) refers to statutorily-defined and protected specific water levels in designated streams and rivers, reflecting the protection of water rights (existing at the time the MDS law took effect) authorizing the use of water from that given stream or river." *Recommendations, Wichita ASR Phase II Proposal,* Jan. 14, 2022, p. 19. *In the*

Matter of the City of Wichita's Phase II Aquifer Storage and Recovery Project in Harvey and Sedgwick Counties, Kansas, OAH Case No. 18 WATER 14014, available at **Error! Hyperlink reference not valid.** [hereinafter Wichita ASR Recommendation].

e. Where there is a legislatively-designated MDS level for any Kansas watercourse, the Chief Engineer must "withhold from appropriation that amount of water deemed necessary to establish and maintain" the MDS for that watercourse. *Id.* (citing K.S.A. 82a-703a). "The KWAA further states that it shall be an express condition of each and every appropriation right (except domestic use) that was applied for after April 12, 1984, that such right shall be subject to any MDS requirements identified and established on or before July 1, 1990, for the water supply pertinent to that appropriation right. K.S.A. 82a-703b(a)." *Id.* The Master Order omits references to MDS requirements applicable in the Middle Arkansas River or the Rattlesnake Creek subbasin. *Cities' Ex* 1-2.

f. However, pumping at the R9 Ranch is known to impact depletion of the Arkansas River, which is subject to MDS requirements. (*Cities' Exhibit* 818, at Bates No. 0021616 (Referencing a 2003 KWO report entitled, "Stream Depletions of the Arkansas River due to Irrigation Pumping on Circle K Ranch"))

g. DWR certificated the Cities' water rights prior to the enactment of minimum desirable streamflow statutes. *Cities' Exhibit* 958 at Bates No. 0032836.

2. <u>The Reasonably Foreseeable Future Beneficial Use of the Water</u>

a. The R9 Ranch water rights are located on the western edge of GMD5 along the Middle Arkansas River. As of June 2010, the District contained 4,866 irrigation wells and 55 surface diversions. (Cities' Ex. 2297 at Cities 0081002, hereinafter Balleau Model).

b. Well records from KGS indicate that there are about 12,000 self-supplied domestic wells in GMD5, as well as a variety of industrial wells. (Balleau Model at p. 81022). There are also 144 public water supply systems in the District. *Id.* It should also be noted that "[p]eriods of abundant precipitation followed by drought and high temperatures are also linked to increased wildfire activity in the region." (Cities' Ex. 2393 at 0082028). Based on present uses at the R9 in GMD5 noted in the Balleau model, beneficial uses defined in DWR regulations, and climate change, it is reasonable to expect that future beneficial uses of the water include irrigation, municipal, stock, domestic, and recreational uses, as well as contamination remediation, dewatering, fire protection, recreational uses, or artificial recharge. K.A.R. 5-1-1(o); Cities Ex. 1-49 at 0002804.

3. <u>The Economic, Environmental, Public Health and Welfare and Other Impacts of Approving or Denying the Transfer of the Water</u>

This issue is discussed at page 35.

4. <u>The Alternative Sources of Water Available to the Applicant and Present or Future Users for Any Beneficial Use</u>

a. The Cities called Paul A. McCormick, P.E. as an expert witness. Mr. McCormick

is a Senior Associate Geological Engineer with Burns & McDonnell Engineering Company, Inc. Mr. McCormick was retained to provide an analysis of the maximum yield available from the Cities' existing water sources in the event of 2-year (moderate), 5-year (exceptional), 10-year (decadal), and 20-year (multidecadal) droughts. *Cities' Exhibit* 2828 at Bates 0103744.

b. Mr. McCormick states that the total quantity of water presently available to Hays from all three wellfield sources combined is 3,675 AF/y. Cities Exhibit 2828 at Bates 0103758.

c. Hays presently uses approximately 2000 acre/feet of water per year and that consumption figure has remained relatively stable for several years. Tr. 309:23-25; 310:1-3.

d. In his report Mr. McCormick concluded that Hays had residual sustainable yields under any of the considered drought scenarios. His graphic illustration is below. Cities Exhibit 2828 at Bates 0103765.

TABLE 1:
Estimated Wellfield Yield During 2-Year (Moderate) to 5-Year (Exceptional) Drought Conditions

Wellfield Name	Permitted Water Rights (acre-feet per year)	2-Year (Moderate) Drought Sustainable Yield (acre-feet per year)	5-Year (Exceptional) Drought Sustainable Yield (acre-feet per year)
Big Creek	1,429.46	1,429.46	1,040
Dakota	882	120	120
Smoky Hill	2,285	1,000	600
Total	3,675*	2,549.46	1,760

**Permitted water rights total is limited by permit conditions.*

TABLE 2:
Estimated Wellfield Yield During Decadal and Multidecadal Drought Conditions

Wellfield Name	Permitted Water Rights (acre-feet per year)	Decadal Drought Sustainable Yield (acre-feet per year)	Multidecadal Drought Sustainable Yield (acre-feet per year)
Big Creek	1,429.46	620	360
Dakota	882	120	120
Smoky Hill	2,285	100	0
Total	3,675*	840	480

**Permitted water rights total is limited by permit conditions.*

5. **Appropriate Measures to Preserve the Quality and Remediate Any Contamination of Water Currently Available for Use by the Applicant**

   This issue is not addressed.

6. **The Proposed Plan of Design, Construction and Operation of Any Works or Facilities Used in Conjunction with Carrying the Water from the Point of Diversion, Which Plan Shall Be in Sufficient Detail to Enable All Parties to Understand the Impacts of the Proposed Water Transfer**

   This issue is discussed at page 31.

7. **The Effectiveness of Conservation Plans and Practices Adopted and Implemented by the Applicant and Any Other Entities to Be Supplied Water by the Applicant**

   This issue is discussed at page 32.

8. **The Conservation Plans and Practices Adopted and Implemented by Any Persons Protesting or Potentially Affected by the Proposed Transfer, Which Plans and Practices Shall Be Consistent with the Guidelines for Conservation Plans and Practices Developed and Maintained by the Kansas Water Office Pursuant to K.S.A. 74-2608, and Amendments Thereto**

1. Patrick Milan Janssen testified regarding Water PACK and area conservation efforts and initiatives. Mr. Janssen resides in Edwards County, Kansas and has been engaged in production agriculture in Edwards County as an adult since 1993. Tr. 1505:1-14.

2. Mr. Janssen is active in the community, serving on numerous boards. He is currently president of Alliance Ag and Grain and President of the Water PACK board. Tr. 1505:15-25; 1506:1-2.

3. Mr. Janssen resides approximately one mile from the R9 Ranch and has irrigation wells in the vicinity of the Ranch. Tr. 1506:3-21.

4. Mr. Janssen is aware of the water conservation initiatives that Water PACK has been involved in over the years. Tr. 1506:22-25; 1507:1-2.

5. Water PACK started one of the original tech farms in the State of Kansas, partnering with the Kansas Water Office and Kansas Corn. A water tech farm is a place to "test-drive technology associated with trying to make a more efficient use of water, technology such as remote moisture sending probes." Tr. 1507: 9-13.

6. The initial water tech farm implemented mobile drip irrigation, with the objective being to validate or refute the efficiency benefits of this method. Now in its seventh or eighth year, the program has evolved and is integrated into the Kansas Water Office's WISE initiative. The results demonstrated that water savings ranging from 20 to 25 percent could be achieved without compromising crop yields. Tr. 15077:9-

7. The tech farm field consistently used 15 to 20 percent less water as compared to the check field, which is the control field. Tr. 1508:1-19.

8. Water PACK, in partnership with Kansas State University, The Nature Conservancy of Kansas, and other organizations, secured a conservation innovation grant. This grant facilitated the enrollment of 35 fields in a program focused on the implementation of conservation techniques and water preservation. Participants in the program have the opportunity to upgrade their irrigation systems, benefit from field monitoring, and receive education on deficit irrigation practices. Such practices aim to maximize the use of natural rainfall and implement an efficient watering schedule, promoting water conservation. Tr. 1508:21-25; 1509:1-12.

9. Water PACK collaborated extensively with The Nature Conservancy of Kansas on a significant conservation initiative. Their joint effort focused on the removal of invasive trees along a 30-mile stretch of the Rattlesnake Creek, upstream of the refuge, with the aim of enhancing streamflow. By eliminating dense brush and other invasive species from the streambed, they aimed to reduce water consumption in that area. (See Tr. 1509:15-24.)

10. Richard Wenstrom discussed the conservation efforts on his farm, particularly focusing on irrigation scheduling. The main objective was to ensure that plants received the exact amount of water necessary for optimal growth, minimizing water wastage. To achieve this, Wenstrom's farm partnered with the ARS USDA water management unit in Fort Collins, Colorado for over 15 years. This collaboration led to a reduction in irrigation by an average of ten days, translating to a significant amount of water saved. Wenstrom acknowledged that, like many farms, they previously might have been over-irrigating. However, with the

implementation of the new scheduling system, they observed major improvements in their water conservation practices. Tr. 1279:1-25; 1280:1-5.

11. Richard Wenstrom highlighted the recognition his farm received over the years due to their dedicated conservation efforts. The accolades include:

    - An award for soil conservation in 1987.
    - A water conservation award from the Department of Interior U.S. Bureau of Reclamation in 1996, presented by a representative from Washington, D.C.
    - A local water conservation award from the Kansas Bankers in 2007.
    - A "model of innovation" award in water and energy by the Climate and Energy Project in 2014.
    - Recognition as one of the first "Be the Vision" awardees by the Kansas Water Office in 2015.

    In addition to these awards, Wenstrom's farm gained a reputation for its conservation practices. The University of Nebraska acknowledged this by directing international visitors interested in conservation to Wenstrom's farm in Kinsley, Kansas, for firsthand insights. Tr. 1280:14-25; 1281:1-14.

12. Mr. Wenstrom was a founding member of Water PACK. Water PACK's mission statement is to promote, foster, and encourage the beneficial, economical, and sustainable use of quality water. Tr. 1284:13-17.

13. Mr. Wenstrom discussed the efforts of Water PACK, emphasizing their significant role in legislative work in Topeka. They were instrumental in lobbying for the

establishment of the water bank. When prompted to explain the water bank, Wenstrom briefly described it as a water-saving technique. It allows for the redistribution of water from areas with excess to areas with less. Additionally, there's an incentive program he referred to as the "safe deposit box" that promotes water conservation. Tr. 1284:22-25; 1285:1-10.

14. Water PACK has been active in advancing conservation legislation in Kansas. In collaboration with the Kansas secretary of agriculture, they spearheaded a bill on augmentation, receiving significant support from the Kansas Livestock Association and the Farm Bureau. Moreover, Water PACK stands at the forefront of water conservation initiatives. Their prominence in Topeka is amplified by the unique perspective farmers bring to the legislative table, offering a refreshing departure from the usual input of lawyers and lobbyists. Engaging directly with legislators and providing a genuine farming viewpoint is a core strategy of Water PACK. Tr. 1285:11-25; 1286:1.

9. Any Applicable Management Program, Standards, Policies and Rules and Regulations of a Groundwater Management District

1. Applicable GMD5 standards, policies and rules include the following:
   a. 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. As discussed herein, the withdrawals contemplated by the Application are not sustainable.

   b. K.A.R. 5-25-3 which provides that “For all uses of water, the quantity of water

requested shall be reasonable for the proposed beneficial use, and the approval shall neither impair an existing right nor prejudicially and unreasonably affect the public interest. As discussed herein, the quantity of water sought by the Cities is far in excess of their needs and thus unreasonable. In addition, the evidence demonstrates that the withdrawals will have a deleterious effect on the aquifer level and thus directly impair adjacent landowners.

c. K.A.R. 5-25-8 which provides that a person shall not commit or allow a waste of water as defined in K.A.R. 5-1-1. Waste is defined to include "the application of water to an authorized beneficial use in excess of the needs for this use."

P. THE REQUISITE REGULATORY REQUIREMENTS

Per K.A.R. 5-50-2, a water transfer application must provide the following information:

(a) the name and mailing address of the applicant;

(b) the maximum quantity of water proposed to be transferred in a calendar year and the proposed maximum diversion rate;

(c) the location of the proposed point or points of diversion;

(d) the location of the proposed point or points of use;

(e) the proposed use made of the water;

(f) any economically and technologically feasible alternative source or sources of supply available to the applicant and to any other present or future users of the water proposed to be transferred. The water transfer application shall specify why this source of supply was selected over the alternative sources available;

(g) the proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying the water from the point or points of diversion to the proposed point or points of use. The proposed plan shall be in sufficient detail to enable all parties to understand the impacts of the proposed water transfer;

(h) the estimated date for completion of the infrastructure and initial operation thereof;

(i) that the benefits to the state if the transfer is approved outweigh the benefits to the state if the transfer is not approved;

(j) that the proposed transfer will not impair water reservation rights, vested rights, appropriation rights or prior applications for permits to appropriate water;

(k) any current beneficial use of the water that is proposed to be transferred, including minimum desirable streamflow requirements;

(l) any reasonably foreseeable future beneficial use of the water;

(m) the economic, environmental, public health and welfare, and other impacts of approving or denying the transfer of water;

(n) any and all measures the applicant has taken to preserve the quality and remediate any contamination of water currently available for use by the applicant;

(o) the provisions of a revised management program adopted by a groundwater management district that are applicable to the proposed transfer whenever any of the proposed points of diversion are located within a groundwater management district;

(p) whether or not the applicant, and any entity to be supplied water by the applicant, have adopted and implemented conservation plans and practices that fulfill the following requirements:

(1) are consistent with guidelines developed and maintained by the Kansas water office, pursuant to K.S.A. 74-2608 and its amendments;

(2) have been in effect for not less than 12 consecutive months immediately before the filing of this water transfer application; and

(3) provide for a rate structure that encourages efficient use of water and results in conservation and wise, responsible use of water, if the transfer is for use by a public water supply system;

(q) the effectiveness of conservation plans and practices that have been adopted and implemented by the applicant and any other entities to be supplied water by the applicant;

(r) if applicable, population projections for any public water supply system that will be supplied by the water transfer, and the basis for those projections;

(s) the projected water needs of the applicant and of any other entities to be supplied water by the applicant, and the basis for those projections;

(t) plans for any environmental mitigation made necessary by the proposed water transfer;

(u) a list of other federal, state and local permits necessary to complete the proposed water transfer and the projected dates they will be obtained;

(v) the current per capita per day usage of any public water supply user to be supplied water by the applicant, and the current average per capita per day usage

of other similar users in a region of the state that is climatically similar. If the applicant's per capita per day usage exceeds the regional average, the applicant shall show why its per capita per day usage is reasonable.

(w) the projected per capita per day usage of any public water supply user to be supplied water by the applicant;

(x) a copy of the following contingently approved documents;

(1) a permit to appropriate water;

(2) an application for change in any or all of the following:

(A) the place of use;

(B) the type of use;

(C) point of diversion; or

(3) a contract to purchase water pursuant to the state water plan storage act;

(y) pursuant to K.A.R. 28-16-28b and K.A.R. 28-16-28d, the impacts of the proposed transfer on the water quality and designated uses of any stream that may be affected by the proposed transfer; and

(z) any additional factors that may be required by the chief engineer.

Q. THE RELATIONSHIP BETWEEN THE WATER TRANSFER ACT AND THE CHANGE OF USE PROCEEDING

1. Mr. Letourneau devotes much time to working with the Kansas Legislature in relation to water issues. Tr. 1003:16-19.

2. In his testimony at the hearing, Mr. Letourneau stated that the Water Transfer Act is entirely separate from the process for a change of water use. "So it is the case, Mr. Letourneau, that there is a change of use application but there's an entirely separate Water Transfer Act process, correct? A. Correct." Tr. 1010:21-25.

3. Mr. Letourneau reiterated that the Water Transfer Act is a process separate and distinct from a change of use proceeding. "The -- and it would be the case, and tell me if this is out of your lane, Mr. Letourneau, but the -- the Water Transfer Act is part of the water law regime because the legislature believes there's something

different about transfers of a significant amount of money [sic] over a significant number of miles. Is that fair? A. Significant amount of water -- Q Right. A. -- over a significant amount of miles – Q. Right. A. -- correct. Q. And so the legislature has concluded there's something different about that? A. Correct." Tr. 1012:13-25, Tr. 1013:1-2.

4. The discrete nature of the Act and the extraordinary scrutiny intended in relation to large-scale water transfers was emphasized in testimony before the Kansas Senate Energy and Natural Resources Committee on March 16, 1993, regarding House Bill No. 2070.

> Thank you, Mr. Chairman, members of the Committee: I am Stephen A. Hurst, Director of the Kansas Water Office. H.B. 2070, before you today, implements the "Modifications of the Water Transfer Act" Sub-Section of the *Kansas Water Plan* which was approved by the Kansas Water Authority, and would implement to a great extent the draft legislation introduced by the Kansas Water Authority to the House Energy and Natural Resources Committee.
>
> The current Water Transfers Act, K.S.A. 82a-1501 *et seq.,* was passed by the Legislature in 1983 and sets out requirements for the diversion and transportation of water in quantities of 1,000 acre-feet or more per year for beneficial use outside a 10-mile radius from the point of diversion. ***The concept was to provide an extraordinary public interest review process for the movement of large quantities of water, one that goes above and beyond the standard review process for small quantities moving shorter distances. The Act included administrative review procedures and provisions for legislative and judicial review***." (Emphasis added).

Concerning water; relating to certain transfers; Hearing on H.B. 2070 Before the S. Comm. On Energy and Natural Resources, March 16, 1993 (Testimony of Stephen A. Hurst, Director Kansas Water Office).

V. CONCLUSIONS OF LAW

A. THE AUTHORITY OF THE PRESIDING OFFICER

The authority of the Presiding Officer assigned by the Office of Administrative

Hearings is significant if not plenary. The Supreme Court has addressed the issue in relation to federal administrative law judges and endorsed the view that ALJ's wield extensive power.

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See § 556(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, see, *e. g., Wong Yang Sung v. McGrath*, 339 U.S. 33, 36–41, 70 S.Ct. 445, 447–450, 94 L.Ed. 616 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131, 73 S.Ct. 570, 572, 97 L.Ed. 872 (1953). Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U.S.C. § 3105 (1976 ed.). When conducting a hearing under § 5 of the APA, 5 U.S.C. § 554 (1976 ed.), a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. 5 U.S.C. § 554(d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. § 554(d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable. § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. § 7521. Their pay is also controlled by the Civil Service Commission.

Butz v. Economou, 438 U.S. 478, 513–14, 98 S. Ct. 2894, 2914–15, 57 L. Ed. 2d 895 (1978).

The Court's expansive view of an ALJ's authority was echoed and reaffirmed in its recent decision in *Axon Enter., Inc. v. Fed. Trade Comm'n*. "An ALJ assigned to hear an SEC or FTC enforcement action has authority, much like a regular trial judge, to resolve motions, hold a hearing, and then issue a decision." 598 U.S. 175, 181, 143 S. Ct. 890, 897–98, 215 L. Ed. 2d 151 (2023).

As has occurred in many states, in 1991 the Texas Legislature created the State Office of Administrative Hearings. Tex. Gov't Code Ann. § 2003.021. It largely mirrors the Kansas and other state's OAH regimens. This analysis of the ALJ's authority under the Texas act echoes *Butz* and is a useful exposition of ALJ powers.

> "The SOAH[30] ALJ is empowered and directed to initially decide all issues of law and fact independently of the position asserted by the enforcement arm of the agency within the contested case proceeding.
>
> Thus, it is clear that the SOAH ALJ has the express power to (1) weigh the evidence and make findings of facts, (2) determine the applicable law and its meaning, and (3) apply such findings to the underlying facts that result in express findings of facts and conclusions of law. The SOAH ALJ conducting the proceeding acts independently of the agency, and the agency is expressly prohibited from attempting to influence the findings of facts and the application of law by the SOAH ALJ, except by the formal presentation of evidence and legal argument.

BEAL, RON, "*Issuing A Proposal for Decision: An Analysis of the Power of An Administrative Law Judge in Rendering Proposed Findings in A Contested Case Proceeding*" 2 Tex. Tech. J. of Tex. Admin. L. 209, 213 – 214 (2001).

Because an administrative law judge is "functionally comparable" to a district judge, his or her judicial authority is similar. In the matter at hand, a district judge on judicial review would clearly be entitled and obliged to consider all aspects of the transfer application including regulatory and statutory compliance. To hold otherwise would be to

[30] State Office of Administrative Hearings.

imbue the Chief Engineer with largely unchecked powers in relation to regulatory compliance.

At a Kansas Senate Committee hearing in 1983 discussing the proposed Water Transfer Act, the report of this colloquy between Senator Feleciano and Mr. Rahjes of the Kansas Water Authority is noteworthy. "Senator Feleciano asked what would happen if an applicant did not provide all the information the hearing board needed. Mr. Rahjes said he would expect the application to be denied if there was insufficient information." *Interbasin Transfers of Water; Hearing on S.B. 62 Before the S. Comm. on Natural Resources, February 10, 1983* (Minutes of the Senate Committee on Energy and Natural Resources) (Ks. 1983)

Though the Water Transfer Act is silent in respect to administrative review of whether a water transfer application is complete, a useful analogue is K.S.A. 82a-1901.

> Orders of the chief engineer of the division of water resources of the department of agriculture pursuant to K.S.A. 82a-708b and 82a-711, and amendments thereto, and K.S.A. 82a-737 and 82a-770, and amendments thereto, and failure of the chief engineer to act pursuant to K.S.A. 82a-714, and amendments thereto, shall be subject, upon timely request within 15 days of service of the order pursuant to K.S.A. 77-531, and amendments thereto, or the chief engineer's failure to act timely pursuant to K.S.A. 82a-714, and amendments thereto, to an administrative hearing by a hearing officer designated according to subsection (b) and otherwise in accordance with the provisions of the Kansas administrative procedure act.

K.S.A. 82a-1901.

To suggest, as the Cities appear to do, that approval of the water transfer application by the Chief Engineer despite its profound defects is an unreviewable *fait accompli* is to ignore fundamental principles of due process. "The basic elements of procedural due process are notice and 'the opportunity to be heard at a meaningful time and in a

meaningful manner.'" *State v. Lyon*, 58 Kan. App. 2d 474, 479, 471 P.3d 716, 722 (2020). The notion that this tribunal cannot undertake a review of the water transfer application is irrational, unreasonable, and contrary to essential principles of equity and established law. If that is the rule, those opposed to large scale water transfers are effectively neutered and left with only the unpalatable and often functionally impossible option of seeking judicial review.

B. APPROVAL OF THE CITIES' WATER TRANSFER APPLICATION IS PRECLUDED BY THE PRINCIPLES AND REQUIREMENTS OF THE ANTI-SPECULATION DOCTRINE

The anti-speculation doctrine, effectively adopted by Kansas,[31] prohibits the acquisition of a conditional water right without a vested interest or a specific plan to possess and control the water for a particular beneficial use. It ensures that water appropriation is driven by genuine need rather than speculative intentions. Merely storing water for future use without immediate beneficial use is considered speculative hoarding and violates the anti-speculation policy.

The anti-speculation doctrine is a fundamental component of the prior appropriation

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[31] The present version of the Water Transfer Act is a pristine landscape in terms of judicial analysis, but borrows and largely embraces western states' water law precepts, including preeminently the anti-speculation doctrine. The doctrine has been codified in Kansas, Burke Griggs, *Legal Aspects of Large-Scale Water Transfers* (December 1, 2020), and is summarized in the seminal *Pagosa I* decision by the Colorado Supreme Court:

> We hold that a governmental water supply agency has the burden of demonstrating three elements in regard to its intent to make a non-speculative conditional appropriation of unappropriated water: (1) what is a reasonable water supply planning period; (2) what are the substantiated population projections based on a normal rate of growth for that period; and (3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply. In addition, it must show under the "can and will" test that it can and will put the conditionally appropriated water to beneficial use within a reasonable period of time.

Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 170 P.3d 307, 313 (Colo. 2007), as modified (Nov. 13, 2007); *see also* footnote 3, Supra.

system. All western water codes encapsulate the "doctrinal trinity of beneficial use, waste, and forfeiture." "Statutes of nine states intone in nearly identical language that 'beneficial use, without waste, is the basis, measure, and limit of a water right,' and the remainder refer in some way to beneficial use." Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 962-63 (1998). Kansas doctrine is in accord. "[T]he KWAA dedicates water resources to the use of the public, prohibits water rights in excess of the reasonable needs of the appropriators, and subjects water rights to the principle of beneficial use." *Shipe, supra*.

The foundational principles in the anti-speculation doctrine and Kansas law align with the core tenets of western water law, which prioritize optimal use, efficient water management, and the administration of water rights based on priority, while discouraging speculation and waste. *See, e.g.,* K.S.A. § 42-308 (rights not used for three years forfeited); K.S.A. § 82a-718 (rights not used for five years "without due and sufficient cause" deemed abandoned, but multiple and lenient exceptions exist to prevent forfeiture); *Frick Farm Props. v. Kansas Dept. of Agric.,* 190 P.3d 983 (Kan. App. 2008). The doctrine is a logical adjunct to the prior appropriation regimen which recognizes that water in Kansas is a limited and valuable resource. The system operates under the premise that the right to use water does not equate to the right to waste it. Waste of water is defined in Kansas to mean any of the following:

> [A]ny act or omission that causes any of the following:
>
> (1) The diversion or withdrawal of water from a source of supply that is not used or reapplied to a beneficial use on or in connection with the place of use authorized by a vested right, an appropriation right, or an approval of application for a permit to appropriate water for beneficial use;
>
> (2) the unreasonable deterioration of the quality of water in any source of

> supply, thereby causing impairment of a person's right to the use of water;
>
> (3) the escaping and draining of water intended for irrigation use from the authorized place of use; or
>
> ***(4) the application of water to an authorized beneficial use in excess of the needs for this use.***

K.A.R. 5-1-1 (mmmm) (Emphasis added).

The Cities' attempt to transfer water in amounts that greatly exceed their reasonable needs is the archetype for waste as defined.

Two landmark cases from Colorado, *Pagosa I*[32] and *Pagosa II*,[33] have shaped the legal framework surrounding conditional water rights and water appropriation in Colorado and throughout the western states and are edifying in the present milieu. These cases provide essential guidance on the requirements and considerations for granting conditional water rights and the obligations of cities seeking long-term water supplies. They are by analogy as applicable to water transfers as to original appropriations because the base principles remain beneficial use and avoidance of waste.

Pagosa I established three essential elements that a governmental water supply agency must demonstrate to make a non-speculative conditional appropriation: (a) a reasonable water supply planning period, (b) substantiated population projections based on normal growth rates, and (c) a reasonable estimation of unappropriated water necessary to meet the agency's anticipated needs during the planning period. Each of these requirements are incorporated in the regulation governing a water transfer application.

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[32] Pagosa Area Water and Sanitation Dist. v. Trout Unlimited, 170 P.3d 307 (2007).

[33] Pagosa Area Water and Sanitation Dist. v. Trout Unlimited, 219 P.3d 774 (2009).

Pagosa II introduced four non-exclusive factors to consider when determining the amount of a conditional water right: (a) implementation of water conservation measures, (b) expected land use patterns, (c) attainable per capita usage projections, and (d) the amount of consumptive use required to serve the increased population. Again, K.A.R. 5-50-2 explicitly recites the same requirements.

Because they are largely incorporated, the factors identified in Pagosa I and II are familiar to students of the Kansas Water Transfer Act and its implementing regulations. *See* K.A.R. 5-50-2(s) ("To be complete, a water transfer application shall show… the projected water needs of the applicant and of any other entities to be supplied water by the applicant, and the basis for those projections.") A municipality seeking to appropriate water based on projected population growth within a reasonable planning period must reliably demonstrate its future water requirements supported by substantiated growth projections within its service area. *Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.,* 249 P.3d 794 (Colo. 2011). Here the Cities have done neither. They cannot knowledgeably articulate their future water needs and their population projection expert, coupled with the Harvey Report, entirely undermines the 2% growth rate upon which their transfer application is premised.

C. The Cities' Water Transfer Application Is Incomplete and Insufficient

The K.A.R. 5-50-2 regulatory provisions describing the requirements for a completed water transfer application are enumerated herein.[34] Nine of the requirements are either not persuasively met or are entirely omitted.

1. (g) The Proposed Plan of Design, Construction and Operation of Any Works or

[34] *Section P, p. 50, supra.*

Facilities Used in Conjunction with Carrying the Water from the Point or Points of Diversion to the Proposed Point or Points of Use. The Proposed Plan Shall Be in Sufficient Detail to Enable All Parties to Understand the Impacts of the Proposed Water Transfer

The Cities' engineers testified the document the Cities characterize as a design plan is bereft of details. The document they produced is merely conceptual. Tr. 973:9-16. The Hays City Manager: "A. If there are future costs that – O&M costs that could affect rate, we don't know what they are yet ***because the project has not been designed***. That would take place after the project has been designed to a point where we could determine what those costs were and how it would affect rates." Tr. 334:4-10 (emphasis added). Absent a reasonably detailed plan, the Application cannot be approved.

2. (r) If Applicable, Population Projections for Any Public Water Supply System That Will Be Supplied by The Water Transfer, and the Basis for Those Projections

A population projection was required because Hays and Russell seek the water transfer to supply public water systems. But even the Cities concede the 2 percent projection made part of the Application is wildly inaccurate. Hays' own expert predicts 1 percent growth for Hays and offers no opinion in relation to Russell. The 1 percent projection is two-thirds higher than that offered by Harvey Economics. Absent a reliable population growth projection, the Application cannot be approved.

3. (s) The Projected Water Needs of The Applicant and of Any Other Entities to Be Supplied Water by The Applicant, and the Basis for Those Projections

Mr. Quinday on behalf of the City of Russell confirmed that the transfer application did not include any projection for Russell of future water needs or projected future GPCD usage. Tr. 570-571. The City of Hays did not obtain a future water needs analysis and Mr. Dougherty testified that he does not know what the City's future water needs will be. "Q And you don't know what the needs are going to be because you don't have a reasonable-

needs analysis, correct? A. I don't know what the needs are going to be because I can't predict the future. Q And if you had a reasonable-needs analysis, then that would assist you, would it not? A. If the reasonable-needs analysis could predict the future, I guess, but we don't know what's going to happen in the future." Tr. 313:23-25; 314:1-7.

Mr. Dougherty further testified that he cannot even approximate Hays' future water needs. "Q. So you don't know -- pardon me. You don't know what your future needs will be? A. I can't state exactly what our future needs will be. Our existing sources are inadequate. Q. Okay. Can you state approximately what your future needs are going to be? A. I cannot." Tr. 316:19-25. Absent a competent water needs analysis, the Application cannot be approved.

4. (i) That the Benefits to the State If the Transfer Is Approved Outweigh the Benefits to the State If the Transfer Is Not Approved

The only evidence regarding benefit to the State of Kansas that was introduced at the hearing was based upon speculation and conjecture about potential new business opportunities for the Cities if they have access to additional water resources. There was much testimony about what was possible but virtually none framed in terms of what was probable. That prompted this colloquy with Dr. Hamilton. "Q. Dr. Hamilton, have you testified as an expert witness before? A. Yes, I have. Q. And in those circumstances, did you learn from the Court or counsel that had retained you that experts are allowed to testify in terms of what is probable as opposed to what is possible? A. Yes." Tr. 1183:18-25.

It should be recalled that "[s]peculative evidence is inadmissible." *State v. Seacat,* 303 Kan. 622, 643, 366 P.3d 208, 222 (2016). It is inadmissible for a reason. The primary goal

of evidence in legal proceedings is to provide reliable information that helps to prove or disprove the elements of a case. Speculative evidence, by its very nature, is uncertain and based on conjecture rather than established facts.

What should not be forgotten in the context of assessing the net benefit to the State is the centrality of agribusiness to Kansas and the vital role that water plays in sustaining the multibillion-dollar industry.

> **Drought and Water**
>
> Drought has had a significant impact on the state of Kansas over the last couple of years, and the drought conditions have been particularly severe over the past year. By September 2022, all 105 Kansas counties were in some level of drought status, with 67 in emergency status. These extreme drought conditions have had an impact on crop production and have elevated the risk of wildfire, especially in the western half of the state.
>
> While the drought is not unique to Kansas (about a third of the country is suffering from drought) ***we are seeing the effects more directly due to the critical role that agriculture plays in so many communities. Agriculture sustains the economy and provides employment for much of the state, and drought threatens that viability.***
>
> ***This threat becomes even more critical in the region that is supported by the Ogallala Aquifer as a principal water source for agriculture, public water supply, and other industry. In times of drought, water users in this region need to pump more water for irrigation to maintain their production of food and fiber resources.*** Although we don't have annual water use data yet, other factors indicate that pumping certainly increased in 2022. Many water right holders have applied for multi-year flex accounts (MYFA) to provide more flexibility in their water use, as a possible tool to stay in compliance regarding over pumping.
>
> Annual well measurements are currently underway in the aquifer region. This is an annual project in cooperation with the Kansas Geological Survey. The data from those measurements will be available soon, ***but it is likely they will indicate a drop in the Ogallala due to this need for pumping brought about due to the drought.***
>
> ***As noted earlier, our state's robust agricultural economy is significantly bolstered in the region overlaying the Ogallala***

> ***Aquifer. It's difficult to imagine how this region and our entire state might have fared without the availability of this resource and the investments and risks taken by multiple generations of farm and ranch families and agribusinesses. Now, perhaps more than anytime, there's considerable attention being given to the overall trend showing continued depletion of this invaluable resource. The economic viability of Kansas agriculture and our rural communities depend on prolonging the life of the groundwater resources of the state, especially in the western third of the state.*** I believe in Kansans and remain hopeful that all of us working together can make meaningful changes to chart a more promising outcome for future generations.

Agriculture in Kansas: Testimony for the Senate Committee on Agriculture and Natural Resources by Kansas Secretary of Agriculture Mike Beam, Thursday, January 19, 2023 http://www.kslegislature.org/li/b2023_24/committees/ctte_s_agriculture_and_natural_resources_1/documents/testimony/20230119_01.pdf. (Last visited 9.29.2023).

The burden of proof to demonstrate their entitlement to an order authorizing the requested water transfer reposes with the Cities. It is difficult to see that they have proven net benefit to the State by means of the hypothetical business scenarios discussed during the hearing.

5. (j) That the Proposed Transfer Will Not Impair Water Reservation Rights, Vested Rights, Appropriation Rights or Prior Applications for Permits to Appropriate Water

The Cities have clearly not established this element. Steven Larson, a renowned groundwater modeling expert, and Balleau Groundwater, Inc., the author of the relevant GMD 5 groundwater model, agree that the model relied upon by the Cities in determining that their proposed withdrawals from the R9 Ranch were sustainable is flawed and incorrect because it overestimates groundwater recharge under the conditions that would attend the Cities' pumping. Burns & McDonnell defines sustainability in terms of withdrawal and recharge equipoise. Larson makes clear that withdrawals will exceed recharge by a considerable amount. Per his report to Richard Wenstrom, sustainable withdrawals cannot exceed 2700 acre/feet annually. The Cities propose to take at least

4800 acre/feet annually.

6. (m) The Economic, Environmental, Public Health and Welfare, and Other Impacts of Approving or Denying the Transfer of Water

   See Section L, p. 34, *supra*.

7. (o) The Provisions of a Revised Management Program Adopted by a Groundwater Management District That Are Applicable to the Proposed Transfer Whenever Any of the Proposed Points of Diversion Are Located Within a Groundwater Management District

   Applicable GMD5 standards, policies and rules include the following.

   1. 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. As discussed herein, the withdrawals contemplated by the Application are not sustainable.

   2. K.A.R. 5-25-3 which provides that "For all uses of water, the quantity of water requested shall be reasonable for the proposed beneficial use, and the approval shall neither impair an existing right nor prejudicially and unreasonably affect the public interest. As discussed herein, the quantity of water sought by the Cities is far in excess of their needs and thus unreasonable. In addition, the evidence demonstrates that the withdrawals will have a deleterious effect on the aquifer level and thus directly impair adjacent landowners.

   3. K.A.R. 5-25-8 which provides that a person shall not commit or allow a waste of water as defined in K.A.R. 5-1-1. Waste is defined to include "the application of water to an authorized beneficial use in excess of the needs for this use."

   Directly at odds with the GMD5 standards, policies and rules, the proposed transfer is not sustainable in the long-term, the quantity proposed to be withdrawn is

unreasonable and unrelated to the Cities' needs, and withdrawal of the proposed volume of water constitutes waste in that "the application of water to an authorized beneficial use in excess of the needs. . ." is waste

8. (q) The Effectiveness of Conservation Plans and Practices That Have Been Adopted and Implemented by the Applicant and Any Other Entities to be Supplied Water by the Applicant

Applicants seeking an order under the Water Transfer Act must implement a conservation plan. *Cities' Exhibit 817*, Bates No. 0021342. Once it is implemented, it must be maintained. K.A.R. 5-3-5j. The conservation plans establish the municipalities' reasonable water needs which may not be exceeded. The amount of water the Cities seek to transfer, without consideration of their existing water resources, is by itself greatly in excess of the Cities' reasonable needs as imposed by their respective conservation plans. Taken together, the conservation plan obligations severely limit the amount of water that can be consumed and, by imperative extension, the volume of water that can be approved for transfer.

9. (w) The Projected Per Capita Per Day Usage of Any Public Water Supply User to Be Supplied Water by the Applicant

The City of Russell did not supply a projected per capita per day projection. Tr. 570-571:19-25,1-4. Neither did the City of Hays. Tr. 591-592:21-25,1.

D. The Transfer Cannot Be Approved Based Upon the Facts and Information Presented

As made clear herein, the Cities' water transfer application is a combination of incomplete and unconvincing. It is incumbent upon an applicant to conscientiously comply with its regulatory obligations. The failure to do so must have consequences. Here those consequences should be dismissal or denial of the Application.

The Application as presented simply does not enable this tribunal to render the required findings of fact, conclusions of law and policy reasons for its decision. "Applications under the Water Transfer Act are covered by the Kansas Administrative Procedure Act, K.S.A. 77–501 et seq. K.S.A. 82a–1503(c). K.S.A. 77–526(c) provides: 'A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order.'" *Water Dist. No. 1 of Johnson Cnty. v. Kansas Water Auth.*, 19 Kan. App. 2d 236, 241, 866 P.2d 1076, 1080 (1994).

> An administrative agency must assume the responsibility of expressing the basic facts on which it relies with sufficient specificity to convey to the parties, as well as to the court, an adequate statement of the facts which persuaded the agency to arrive at its decision. Thus, there must be findings on all applicable standards which govern the agency's determination, and the findings must be expressed in language sufficiently definite and certain to constitute a valid basis for the order, otherwise the order cannot stand. Kansas Public Service Co. v. State Corporation Commission, 199 Kan. 736, 744–745, 433 P.2d 572 (1967). Findings of ultimate fact expressed in the language of the applicable statute are not enough in the absence of basic findings to support them. *Cities Service Gas Co. v. State Corporation Commission,* 201 Kan. 223, 230, 440 P.2d 660 (1968).

Id. at 241-242 (citing *Blue Cross & Blue Shield v. Bell,* 227 Kan. 426, 433–34, 607 P.2d 498 (1980).

D. Hope Is Not a Strategy

Careful review of the Application and consideration of the testimony and exhibits offered at the hearing reveal that the Cities have embraced a monumental project without adequate substantiation and documentation of various key components of a successful plan. What the Cities have done is to make unsubstantiated assumptions regarding the presumptive effects of approval of the transfer project on future economic and population growth. But neither the anti-speculation doctrine nor the underlying principles embodied in the Water Transfer Act countenance movement of vast quantities of scarce and

valuable water based on optimism alone. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, T*he Portable John Adams*.

VI. CONCLUSION

The practice of purchasing farmland and permanently transferring the water rights to a municipality's water portfolio is called "buy and dry." Zoe Verhoeven, *Water Leasing Under the Agricultural Water Protection Water Right,* 22 U. DENV. WATER L. REV. 41, 42 (2018). The buy and dry practice is an existential concern throughout western states. "If buy and dry in Colorado continues at the current rate, the South Platte River Basin could lose up to one-third of today's irrigated land by 2050. The Arkansas River Basin could lose up to seventeen percent of its total irrigated acreage, and the main stem of the Colorado River watershed could lose up to twenty-nine percent of its irrigated land." *Id.* at 43. The plan under consideration here is the Kansas iteration of the phenomenon. Evidence was presented to demonstrate the expected damaging effect on the aquifer if the Application is approved. Since the Cities concede they do not need the amount of water they are seeking authority to transfer, realistic concerns regarding aquifer depletion deserve heightened consideration.

The Water Transfer Act is fundamentally designed, in part, to serve as a check on large scale interbasin transfers in the absence of demonstrable need. Yet here the Cities do not know how much water they need because they have not undertaken a professional needs assessment. The Application is premised upon a population growth projection that is grossly in error. Common sense, familiar principles of Kansas water law and the core requirements of the anti-speculation doctrine require substantiated information about

both concepts.

Given the currently projected infrastructure costs of 134.9 million dollars[35] and the lack of reliable water needs or population data, it is difficult to discern any net benefit to either the citizens of Hays and Russell or the State of Kansas. Per the Harvey report:

> This scenario analyses of the Cities' net future water need strongly suggest that the Cities will need much less water in the foreseeable future than they have indicated in the KWTA Application and the Reasonable-Need Limitations derived previously. This fact has important implications when considering the benefits of the project.
>
> The R9 Ranch project will entail substantial up-front expenses, including the development of the wellfield and construction of a pipeline. Current estimates place project costs at $134.9 million by 2025.36 Additional costs associated with water treatment and pumping may also apply. Without much future growth, there is a high likelihood that the costs of this project and the water supply it provides will be borne largely or even entirely by the existing customers of the Hays and Russell water systems. These customers will very likely experience major increases in their water rates with little or no benefit. Hence, the R9 Ranch project will very likely result in a net cost to the water ratepayers of Hays and Russell. If water rates do not increase substantially, the financing of the project is brought into serious question.
>
> In sum, the R9 Ranch project as presently described in the KWTA Application produces a net cost to the Cities and the State of Kansas.

Perceptive is this testimony in 1983 by Doyle Rahjes of the Kansas Water Authority emphasizing the gravity and lasting consequences of decisions related to water allocation. Addressing the matter of SB 62, he stated: "This state has strived to distribute its tax burdens in the best interest of the entire state. While occasional errors in tax allocation can be amended in subsequent legislative sessions, water allocation stands in stark

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[35] Roughly equal to a per capita cost for the combined populations of Ellis and Russell counties of $3,655.00.

[36] *The Cities' Response to Water PACK's and Edwards County's Motion for Leave to File First Amened Joint Petition for Intervention, December 23, 2022.*

contrast. Once a water allocation is approved, leading to the laying of a $200 million pipeline stretching over 100 miles and massive investments in new treatment plants, any error becomes nearly, if not utterly, irrevocable in the following session." *Interbasin Transfers of Water; Hearing on S.B. 62 Before the S. Comm. on Natural Resources, February 11, 1983* (Testimony of Mr. Doyle Rahjes, Kansas Water Authority).

The Cities have (1) failed to comply with mandatory provisions in the Water Transfer Act and the attendant regulations; (2) have not demonstrated a need for the water they seek and cannot quantify their need; (3) have not produced a reliable population growth projection; (4) have not produced a design plan, certainly not one that is sufficiently detailed; (5) have not refuted the evidence that demonstrates that the groundwater model upon which they have relied is flawed due to the failure to account for reduced recharge attributable to the cessation of irrigation, thus negatively affecting the aquifer; (6) have failed to refute the evidence that recharge to the aquifer is reduced because of the presence of native grass rather than row crops, thus negatively affecting the aquifer; (7) have failed to demonstrate that they are able to finance the cost of the project; and (8) have produced no evidence, aside from speculation and conjecture, that additional available water resources will spur growth or benefit the State of Kansas as a whole. The Cities bear the burden of proof.

The Application should be denied or the authorized transfer volume reduced to a sustainable level and the tribunal should grant any other relief to which, under law or equity, Intervenors may be entitled.

Respectfully submitted

Dated September 29, 2023
Overland Park, Kansas

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2023, the foregoing was electronically served to all counsel of record by email as follows:

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