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	**)**	**OAH NO. 23AG0003 AG**
FROM EDWARDS COUNTY, KANSAS	**)**	
PURSUANT TO THE KANSAS WATER	**)**	
TRANSFER ACT.	**)**	
	)	

Pursuant to K.S.A. Chapter 77

THE CITIES' RESPONSE TO WATER PACK'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. Introduction

The Cities' Proposed Findings of Fact and Conclusions of Law accurately reflect the factual record in this case. A rational review of the evidence shows that the water transfer will result in overwhelming benefits to the State of Kansas and is in complete accord with Kansas law.

On the other hand, Water PACK paints a skewed picture of the factual record that completely ignores or misinterprets the plain language of the Water Transfer Act ("WTA"), K.S.A. 82a-1501, *et seq*. Water PACK's Proposed Findings of Fact and Conclusions of Law should be rejected because they invite reversal by asking the Presiding Officer to ignore the great weight of the evidence and to apply legal principles that conflict with Kansas law.

It is not an overstatement to say that there is no evidence for a finding that the water transfer should be denied. Every single alleged "fact" in support of Water PACK's arguments is based on a deeply flawed methodology, irrational not-in-my-backyard fears, mischaracterizations, or flat-out falsehoods.

In stark contrast, the Cities' Proposed Findings of Fact and Conclusions of Law paint an accurate and exhaustive picture of the factual record that is faithful to Kansas law. The Cities respectfully request that Presiding Officer enter an Initial Order based on the Cities' Proposed Findings and Conclusions.

II. Water PACK's proposed population projection is factually unsupported, impractical, and punitive.

In its efforts to deny the Cities' the lawful use of their property rights, Water PACK continues its collateral attack on the population projections the Chief Engineer used in his reasonable-needs calculation in the Master Order, insisting that the water allocated to the Cities should be capped using the unlikely "worst-case" population scenario suggested by its retained expert Susan Walker. (Water PACK's Br. at 26–29; 61–62.)

This is an element of Water PACK's attack on the quantity of water that the Cities need which, as discussed below, has been resolved in the Change Application proceeding now on appeal to the Supreme Court and is not a factor for consideration in a water transfer proceeding. Nevertheless, Water PACK's approach and methodology are flawed factually, practically, and as a matter of law. (*See,* discussion of "reasonable needs" limitations, in Section III.)

The evidence shows that Water PACK's population estimates are highly unlikely as a factual matter. Walker testified that the Cities should base their future needs on just 0.34% growth in Hays and 0.06% growth in Russell. The Cities presented substantial evidence showing not only that her methodology was deeply flawed, but that Hays and Russell are vital economic and population centers with substantial ($2 billion-plus) economies causing far-reaching regional and Statewide benefits. (Cities' Br. at ¶¶ 381–409; Tr. Vol. 1 at 55:7–16, 78:5–16; Dougherty Test., Tr. Vol. 1 at 136: 1–13 and 206:5–17; Williams Test., Tr. Vol. 2 at 408:10–25, 412:3–12, 416:18–417:11; 417:14–418:14; 423:16–24;

Quinday Test., Tr. Vol. 2 at 494:8–16, 545:11–20; Letourneau Test., Tr. Vol. 4 at 903:18–904:13; Hamilton Test., Tr. Vol. 7 at 1174:4–1177:12.) Both Cities are growing now. (Tr. Vol. 1 at 77:4–5; Vol. 3 at 575:21–578:2.) The Cities have excellent prospects for increased growth into the future, but only if the water transfer is approved. (*See, e.g.*, Cities' Br. at ¶¶ 235–38; 248–50.)

The reality of the Cities' drought-vulnerable water supplies, and the related perception that the Cities are water-deficient, has stymied their population and commercial growth opportunities for decades. (*See, e.g.*, Cities' Br. at ¶¶ 239–44; 251.) It is uncontroverted that approval of the water transfer would be a "game changer" that would open significant opportunities for the Cities for the "next 50 to 100 years." (*Id.* at ¶ 246.) Obtaining the R9 Ranch Water is "absolutely" an existential issue. (*Id.* at ¶ 247.) Denial of the water transfer (or curtailment of the requested quantity) would compound the Cities' historical struggles, causing "depopulation or the closure of major industries or even the shrinking in Hays of the university, the ... Hays Medical Center, some of our retail, or some of the industrial productivity that Russell has." (*Id.* at ¶¶ 252; 300.)

Water PACK argues that there is no evidence of firm commitments from businesses that want to move to Hays or Russell and that there are no workers to fill jobs if a company did move to Hays. (Water PACK's Br. at 14–15.) Dr. Hamilton and Ms. Haase both testified that there's a labor shortage everywhere. (Hamilton Test., Tr. Vol. 7 at

1136:8–17; Haase Test., Tr. Vol. 5 at 958:12–959:11) So a company looking for a new location will experience that difficulty no matter where they go.

Moreover, denial of the water transfer would not only prevent substantial economic upsides, it would have substantial statewide detriments. For instance, the Cities introduced uncontroverted evidence that Kansans who currently enjoy and rely on Hays for shopping, dining, entertainment, and health care would go across the border to Kearney, Nebraska, for those goods and services if they were no longer available locally. (*Id.* at ¶¶ 252; 404.) And, more immediately, if the water transfer is denied, the uncontroverted evidence shows that a $300-million-dollar capital investment by Russell's largest employer, with significant statewide economic and employment benefits will not happen. (*Id.* at ¶¶ 261–67.) It is no exaggeration, and it is uncontroverted that "the future of Russell" depends on approval of the water transfer. (*Id.* at ¶ 260.)

In fact, the Cities' presented substantial evidence that their drought-susceptible water supplies have directly stunted their growth in the past, showing that Hays' population growth prior to the 1991 drought was 1.81%, which dropped to 1.01% after the drought and the Cities' imposition of draconian conservation measures on its residents and businesses. (*Id.* at ¶¶ 390–92.)

The Cities also presented substantial evidence showing that Hays and Russell have experienced significant population growth in the past—greater than 2% at times—and have consistently grown faster than the county-wide population change that Ms. Walker

mistakenly used as a proxy for the Cities' projected population growth. (*Id.* at ¶¶ 352; 381–88.)

The Cities' expert, Amy Haase, testified that Hays' population is likely to increase by about 1% over the next 10–20 years, even without the water transfer. (*Id.* at ¶¶ 394–400.) And, if the water transfer is approved, Ms. Haase testified that the Cities could "absolutely" achieve rates comparable to historical growth of 1.2%–2.5%. (*Id.* at 401.) Water PACK's punitive approach to projecting the Cities' future population is both impractical and inconsistent with DWR's longstanding practice of allocating water in accordance with the reasonable needs of municipalities. In fact, Mr. Letourneau testified that using a 2% annual population growth rate to establish a municipalities' reasonable needs is a "very common" approach taken by DWR and is not unreasonable. (Cities' Br. at ¶ 408.) And, relating particularly to Russell, DWR frequently considers circumstances when evaluating a municipality's reasonable need for additional water, such as the planned expansion of the Purefield gluten plant, golf courses, and additional housing. (*Id.* at ¶ 409.) In so doing, Mr. Letourneau made the practical distinction between the quantity of water a city will likely require for its day-to-day needs, which is the rock-bottom quantity required for the public health and welfare of its residents, in contrast to the quantity of water allocated to a city for reasonable population and commercial growth opportunities and a cushion to protect against eventualities like drought or pollution of sources, which is precisely what happened to Russell's Big Creek water supply earlier

this year. (*Id.* at ¶ 409; ¶¶ 372–74 (Russell City Manager discussing algae bloom that rendered the one of the City's critical water sources unusable from about September 2022–May 2023).) For these and other reasons, Mr. Letourneau testified that holding redundant water sources is "just smart business" for municipalities, especially those with vulnerable water supplies like Hays and Russell. (*Id.* at ¶ 375–76.)

III. The quantity of water that WTA applicants need is not an issue in a transfer proceeding because that quantity must have already been established under the KWAA or the Kansas Water Plan Storage Act with which transfer applicants must "first comply."

With no citation to the text of the Act, its legislative history, or any other authority, Water PACK argues beginning on page 29 of its brief that the WTA was enacted to ensure that large-scale transfers of water are limited to the present and reasonable future needs of the applicant. (Water PACK's Br. at 3 and 69.) Not so.

A. Water PACK's "reasonable needs" argument conflicts with Kansas law.

The WTA was not designed to protect or benefit transfer applicants ***or*** opponents. The plain text of the statute shows that its purpose is to protect the State of Kansas. K.S.A. 82a-1501a(b)(2) ("best interest of the state"); K.S.A. 82a-1502(a)(1) and (c) ("benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer"); and K.S.A. 82a-1504(a) ("… protection of the public interest of the state as a whole.") There is nothing in the WTA about assessing, much less limiting transfers to the reasonable needs of the applicant.

The implementing regulations are in accord. K.A.R. 5-50-2(i) (stating that a water transfer application must show "that the benefits to the state if the transfer is approved outweigh the benefits to the state if the transfer is not approved"). Under Kansas law, that ends the inquiry; when relevant statutes, read together, are "plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be." *Roe v. Phillips Cnty. Hosp.*, 317 Kan. 1, 5, 522 P.3d 277 (2023) (citation and quotation marks omitted). In that instance, "the court need not resort to canons of statutory construction or legislative history." *Id.* (citation and quotations marks omitted).

In fact, K.S.A. 82a-1504(a) prohibits reducing the quantity requested by the Cities except as deemed "necessary for the protection of the public interest ***of the state as a whole***." (Emphasis added.) Moreover, applicants who seek to transfer water from a water right must comply with the KWAA before they can seek a water transfer. K.S.A. 82a-1507(b). Thus, reasonable quantities will have always been addressed before a transfer application is filed because the KWAA charges the Chief Engineer, not the Water Transfer Panel, with the duty to "enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of the state." K.S.A. 82a-706. For that very reason, obtaining contingently approved change applications pursuant to the KWAA is a

regulatory prerequisite to filing a complete water transfer application—precisely the procedure followed by the Cities and DWR in this in this case. K.A.R. 5-50-2(x)(2).

Though the plain language of the statute makes the meaning of the WTA clear, the legislative history also shows that the WTA is focused on the benefits to the State. There is no indication in the legislative history indicating the quantity of water requested or the needs of the applicant can be challenged in a water transfer. Instead, the WTA, which was first enacted in 1983 and amended in 1993, was designed specifically to protect ***unallocated*** water in Milford Reservoir from acquisition by cities in south-central Kansas.

Milford Lake is located on the Republican River in Geary, Clay, and Dickinson Counties. (Ex. 832 at Cities 0022385.) During the 1970s, the City of Wichita and fourteen other communities in south-central Kansas began looking for a new municipal water supply. (Ex. 1171 at Cities 0066408.) In early 1980, an ad hoc committee was formed. (Ex. 1171 at Cities 0066412.) In January of 1980, the City of Wichita applied for 60,000 acre-feet of water in Milford Reservoir. (Ex. 2482.) Other cities in central and south-central Kansas applied for an additional 68,310 acre-feet. (Ex. 2482: Abilene, Bel Aire, Hutchinson, Lindsborg, McPherson, Newton, Park City, Salina, and Sedgwick.)

The committee commissioned a Feasibility Study dated July 25, 1983. (Ex. 1171.) Alternative A was a system capable of delivering 80 million gallons of water per day consisting of a raw water intake structure at Milford Lake, a treatment facility, approximately 114 miles of 60 to 66-inch transmission pipeline, and approximately 85

miles of smaller pipelines from the mainline to customer cities. (Ex. 1171 at Cities 0066409.)

The discussion about a pipeline from Milford resulted in the passage of the 1983 version of the WTA. (*See, e.g.*, Ex. 723 ("The Kansas Legislature passed the Transfer Act in 1983, mainly as a check on the Wichita pipeline."); Ex. 65 at Cities 0015339, 0015345, 0015346–47, and 0015350; Ex. 1168 at Cities 0066351–53; Ex. 2483 at Cities 0094598–99; Ex. 1169.)

Nevertheless, Public Wholesale Water Supply District No. 10, which included Wichita and the other participating south-central Kansas communities ("PWWSD No. 10"), was formed on October 7, 1988, to secure an adequate source of water on a larger scale than would be feasible for the members acting separately and to transport, distribute, and sell water from that source to its members and others. (Ex. 62.)

Undaunted by the passage of the WTA in 1983, PWWSD No. 10 commissioned a "Conceptual Study" of alternative water supply sources dated December 2, 1991. (Ex. 917.) This study proposed essentially the same project as the 1983 Feasibility Study, Ex. 1171. (Ex. 917 at Cities 0024411.)

The Kaw Valley River Alliance, which consisted of northeastern Kansas municipalities downstream of Milford, and others opposed the pipeline to Wichita. That opposition resulted in the 1993 amendments to the WTA. (Exs. 702, 706, 707, 708, 709, 713, 718, 721, 722, 723, 724, 725, 2494, 2507, 2512, and 2516.) This legislative history makes it

clear that the WTA's singular focus is on the Statewide benefits as a whole. Not owners of irrigated agricultural land and not municipalities. That is the core concept that Water PACK has ignored in this proceeding.

Water PACK's numerous assertions that the Cities do not need water from the R9 Ranch or that they do not need as much as requested are not relevant and should be ignored because ***the issue of reasonable quantity has already been resolved***. The WTA is focused on the allocation of large quantities of water ***owned by the State***. K.S.A. 82a-702. *See also, Williams v. City of Wichita*, 190 Kan. 317, 340–41, 374 P.2d 578 (1962) (upholding the constitutionality of the KWAA and finding that its dedication of all water within the State to the use of the people of Kansas did not violate due process for which compensation was owed). Transfer applicants must "first comply with" the KWAA or the Kansas Water Plan Storage Act, K.S.A. 82a-1301, *et seq*., before they can submit a complete water transfer application. K.S.A. 82a-1507; K.A.R. 5-50-2(x)(1), (2), and (3); and K.A.R. 5-50-7(a), (b), and (c). The KWAA, DWR regulations, and the Water Plan Storage Act limit water use to an applicant's reasonable needs. (K.S.A. 82a-707(e); K.A.R. 5-5-9(a)(5); K.S.A. 82a-1306(a)(2); and K.S.A. 82a-1311a(c)(1). *See also,* Cities' Brief at ¶¶ 773-83.)

The Cities were required to comply with the KWAA during the Change Application process—and DWR ensured that they did, as is abundantly evident from the Master Order Contingently Approving the Cities' Change Applications, issued in March of 2019, almost four years after the applications were filed in spite of the Cities' efforts to

obtain approval sooner. The Master Order imposed the TYRA Limitation, the Reasonable Needs limitations, the consumptive-use reductions, and other terms, conditions, and limitations. (*See, e.g.*, Cities' Br. at ¶¶ 682–85. *See also generally,* Ex. 1-2 (Master Order).)

In 1983 legislation that was a companion to the original WTA,[1] the Legislature imposed requirements on contracts to purchase water pursuant to the Kansas Water Plan Storage Act which requires the Kansas Water Office ("KWO") and the Kansas Water Authority ("KWA") to scrutinize the present and future water supply needs of prospective purchasers of water from the State's storage in federal reservoirs. K.S.A. 82a-1311a(c). In fact, the relevant portion of that provision is a mirror image of K.S.A. 82a-1502(a)(1) in the WTA and requires the KWO and the KWA to determine "whether the benefits to the state for approving the contract outweigh the benefits to the state for not approving the contract." And, like K.S.A. 82a-1502(c), K.S.A. 82a-1311a(c) provides a non-exclusive list of factors that must be considered before approving a contract to sell water from the State's conservation storage water supply capacity in a federal reservoir.

However, and in stark contrast to the WTA, K.S.A. 82a1311a explicitly requires the KWO and the KWA to assess the "present and future water supply needs of the applicant." K.S.A. 82a-1311a(c)(1). The Legislature was clearly aware of the issue, and certainly could have included the same requirement in the WTA, but it did not because

[1] *See, e.g.,* Ex. 1168 at Cities 0066349–53 summarizing S.B. 61 and S.B. 62.

doing so would needlessly duplicate the requirement it imposed in the Water Plan Storage Act and that was already required by the KWAA.

Both the KWAA and the Kansas Water Plan Storage Act require a water transfer applicant to have already established their need for the water they seek to transfer. The fact that the 1983 Legislature included that requirement in K.S.A. 82a-1311a(c)(1) and said that transfer applicants must "first comply with" the KWAA or the Kansas Water Plan Storage Act is a clear indication that the quantity to be transferred is not an issue in a WTA proceeding.

Water PACK is already challenging the Master Order in the change proceeding; it should not be permitted to collaterally attack it on multiple fronts by doing so in this proceeding too—especially when its arguments are so clearly unsupported by the applicable statutes and regulations. Yet that is precisely what it has sought to do from the very outset of this matter.

B. Water PACK's claim that the Cities have not performed a water needs analysis is a red herring and false in any event.

Water PACK claims that the Cities have never performed a "future water needs analysis." But this issue was dealt with exhaustively—and disposed of—during the hearing where it was:

- uncontroverted that the Cities have reached the effective limits of conservation (Cities' Br. at ¶¶ 305–10 and 445–48);

- uncontroverted that the Cities' residents will be limited to just 20 gallons per capita per day in the event of a multidecadal drought (and about 40 GPCD in a decadal drought similar to the dust bowl drought from 1929–1942) (Cities' Br. at § II.D.2; *id.* at § V.A; and Water PACK's Br. at 31);

- uncontroverted that the denial of the water transfer would cause substantial statewide detriments, including direct loss of commerce to Nebraska (Cities' Br. at ¶¶ 246, 247, 252, 300, 252, 404);

- uncontroverted that Russell would lose a $300 million dollar capital-improvement project from its largest employer (*id.* at ¶¶ 261–67);

- uncontroverted that it is common for DWR to utilize a 2% growth factor when calculating future water needs for municipalities (*id.* at ¶ 408); and

- uncontroverted that there is an important and practical distinction between the rock-bottom quantity of water a city will likely require for its day-to-day needs and the quantity that is reasonably allocated to enable future growth and opportunities as well as for source-point drought and contamination redundancies (*id.* at ¶¶ 409, 372–74).

In addition, it is clear from lengthy testimony from Hays' City Manager that Water PACK's repeated allegation that the Cities have not conducted future water needs studies is just wrong. (Dougherty Test., Tr. Vol. 2 at 231:15–236:15 (testifying about numerous studies, including Ex. 1-92 (1977 Black & Veatch Water Supply Memorandum); Ex. 1-102

(2010 U.S. Army Corps of Engineers and the KWO study evaluating the Cities' future water needs at Cities 4917; Ex. 1-127 (2003 Bartlett & West Water Supply Alternatives Study for Hays and Russell); and Ex. 1-144 (2006 Burns & McDonnell water supply study).) Notably, all of these studies were attached as exhibits to the First Amended Water Transfer Application, so Water PACK has been well aware of them from the outset of this proceeding, yet it has continued to claim they do not exist.

IV. Water PACK's argument that the quantity of water allocated to the Cities should be limited to their conservation plan goals is contrary to Kansas law and the Water Transfer Act in particular.

The WTA requires the Presiding Officer to consider: (1) the conservation plans and practices adopted by the Cities, and (2) the conservation plans and practices adopted by "any person protesting or potentially affected by the proposed transfer"; i.e., Water PACK. K.S.A. 82a-1502(c)(7) and (8).

A. Hays and Russell have complied with the conservation factors in the Statewide Benefits comparison; Water PACK and its members have not.

There is substantial evidence that both Hays and Russell adopted and implemented conservation plans—years ago—that have been reviewed and approved by the KWO and that those conservation plans are highly effective. (Cities' Br. at ¶¶ 133–78.) Indeed, those facts are uncontroverted. (Cities' Br. at ¶ 133.) So that factor of the statewide benefits comparison weighs strongly in favor of granting the Cities' Water Transfer Application.

In contrast, there is no evidence that any person or entity protesting or potentially affected by the water transfer has adopted a formal conservation plan, let alone one that has been reviewed and approved by the Chief Engineer, the KWO, or that is consistent with the KWO guidelines. (Cities' Br. at ¶¶ 179–84.) In fact, there is direct and substantial evidence that not only have those people not implemented any kind of formal conservation measures, they continue to tax the aquifer and over-pump their quantities during times of low rainfall. (Cities' Br. at ¶ 180 (Mr. Letourneau testifying: "And I know that absolutely no one out there [in the vicinity of the R9 Ranch] has done a voluntary reduction in any type of water use."); *id.* at ¶ 181 (Richard Wenstrom admitting the same).)

Water PACK invests significant space in its brief discussing the various bona fides of the two Water PACK members who have most vocally opposed to the Cities' water transfer: Pat Janssen and Richard Wenstrom—who also both farm land very near the R9 Ranch, proving that Water PACK's involvement is, at core, a not-in-my-backyard challenge. (Br. at 47–50.) Nevertheless, Water PACK addresses the "conservation efforts" taken by Richard Wenstrom on his farm and various "accolades" that Mr. Wenstrom pointed out that he has received for conservation. (Water PACK's Br. at 48–49.)

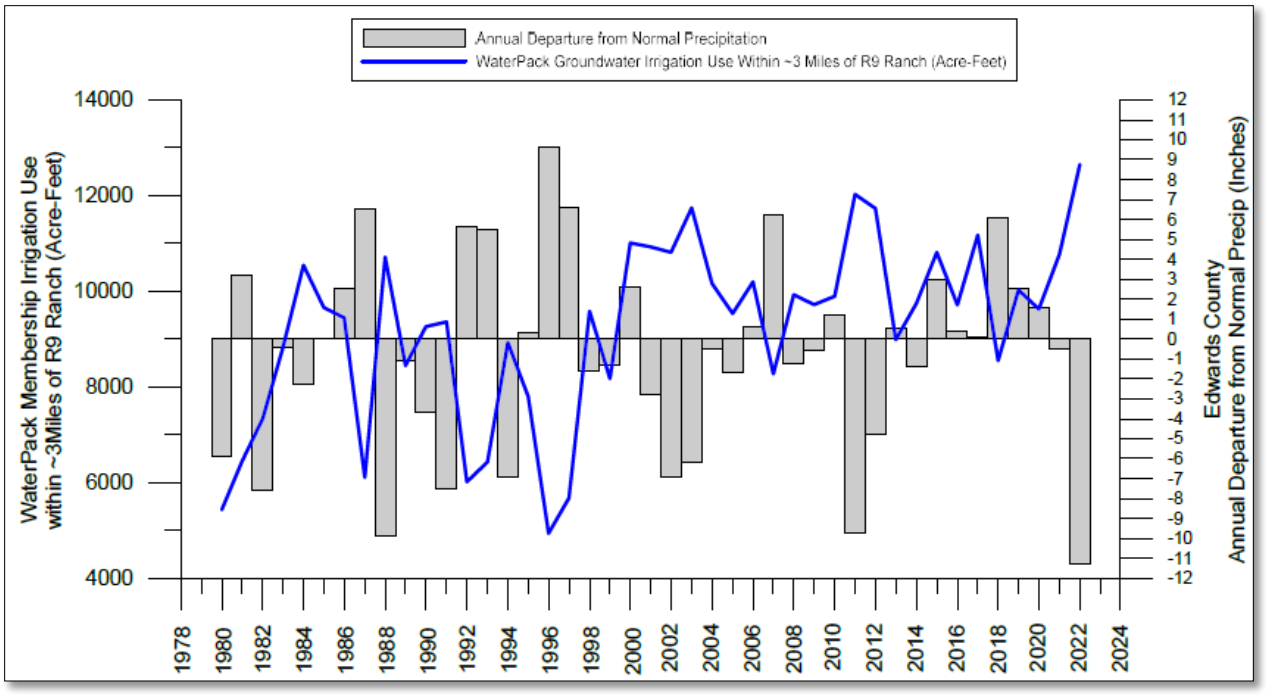
Water PACK does ***not*** claim—and could not honestly do so—that it, Mr. Janssen, or Mr. Wenstrom have implemented conservation plans or practices that are consistent with those developed by the KWO pursuant to K.S.A. 74-2608, as required by the Kansas

Water Transfer Act, K.S.A. 82a-1502(c)(9). Mr. Wenstrom admitted as much under oath. (Wenstrom Test., Tr. Vol. 8 at 1418:9–21.)

The Cities, in contrast, adopted and implemented such conservation plans and practices years ago, and are not only in compliance with those plans, they have exceeded them. (*See,* Cities' Br. at ¶¶ 133–78.)

And while Mr. Wenstrom and Water PACK trumpet their participation in water-banking, in reality, that system hurts the sustainability of the aquifer far more than it helps it. As noted in paragraph 182 of the Cities' Proposed Findings, it simply enables Water PACK members to "deposit" extra water during years of excess rainfall to be "withdrawn" during a drought when the aquifer is at its most vulnerable. And, even with this system, Mr. Wenstrom still overpumped his water rights. (Cities' Proposed Findings at ¶ 183 and Ex. 2683 at Cities 0103398–99.)

Evidence that Water PACK's members have failed to conserve is not merely anecdotal. As illustrated by Exhibit 2877, Water PACK members within three miles of the R9 Ranch use the most water—by far—when precipitation is at its lowest. To see this, one need only look at the very high water use by Water PACK members during the years of low rainfall, e.g., 2002, 2003, 2011, 2012, and 2022.



(*See also,* Cities' Br. at ¶¶ 182–83 (Wenstrom withdrew water deposits during recent drought and overpumped his water rights in 2022).) So, the statutory factor included in K.S.A. 82a-1502(c)(8) evaluating the extent to which ***opponents*** of the water transfer have implemented formal and effective conservation measures ***also*** weighs in favor of granting the water transfer application.

Water PACK's invented "regulatory constraint" concept, that seeks to cap the quantities that the Cities are permitted to transfer by their conservation goals, is a self-serving attempt to turn the WTA upside down.

Water PACK asserts that Hays is subject to a "regulatory constraint" limiting it to no more than 95 GPCD, citing the Hays Municipal Water Conservation Plan dated March 27, 2014, located on page 0002860 of Exhibit 1-52. (Water PACK's Br. at 11.) Water PACK

argues that once adopted, the conservation plan imposes a cap on the amount of water that should be allocated to the municipality, citing K.A.R. 5-3-5j. (*Id.* at 10, 33, and 67.)

There is no such "regulatory constraint." The WTA prohibits transfers unless the applicant has adopted and implemented conservation plans and practices that are consistent with KWO guidelines and have been in effect for at least 12 months before filing a transfer application. K.S.A. 82a-1502(b). The requirement is imposed by the Water Transfer Act, ***not*** by K.S.A. 82a-733 of the KWAA, as Water PACK wrongly implies. By its plain language, K.S.A. 82a-733 does not permit the Chief Engineer to require transfer applicants to adopt conservation plans—it does not even mention, suggest, or imply anything remotely close to that—and Water PACK has produced no evidence or authority that the Chief Engineer has required either City to adopt a conservation plan pursuant to that statute.

The regulations also undercut Water PACK's argument. The Chief Engineer adopted K.A.R. 5-3-5h through K.A.R. 5-3-5l to implement K.S.A. 82a-733. He has the authority to adopt regulations to implement the Water Transfer Act; indeed he has adopted regulations implementing the WTA. K.S.A. 82a-1506 and K.A.R. 5-50-1, *et seq*. The Chief Engineer certainly could have adopted a conservation regulation similar to K.A.R. 5-3-5j as part of the WTA, but he did not. K.A.R. 5-3-5j was ***not*** adopted to implement K.S.A. 82a-1502(b) or any other section of the WTA; rather, according to the regulation's Credits, it was "Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-733;

effective Sept. 22, 2000." Once again, the plain language of the statutes and regulations conflict with Water PACK's arguments.

But even if the Chief Engineer had incorporated a regulation like K.A.R. 5-3-5j into the WTA regulations, it would not compel the punitive result Water PACK seeks because the water-use figures set forth in the Cities' plans are aspirational; they would not rise to the level of "regulatory constraints" under any interpretation of that law—if it existed, which it does not.

Moreover, a municipal water conservation plan is a management tool that is subject to revision. (Ex. 2588 at Cities 0096718, 0096730, and 0096731.) So even if K.A.R. 5-3-5j is applicable, which it is not, K.A.R. 5-3-5l permits changes to approved plans.

The approved Hays' Conservation Plan states:

> **The City goal is to use less than 95 GPCD** which is far less than a reasonable 143 GPCD 5 year regional average. Our City intends to be the leader in municipal conservation in Kansas by carrying out the specific actions in the following plan.

Water PACK wants to twist this aspirational "goal" into an enforceable and punitive cap, arguing that "[a]ny transfer in excess of that determinable amount is prohibited and would, by definition, constitute waste as being in excess of the Cities' reasonable needs." (Water PACK's Br. at 12.) It then presses that argument, repeatedly, throughout its brief. (*Id.* 5, 35, 51, 59–60, and 66.) Nonsense.

Water PACK attempts to turn the statute upside down—asking the Presiding Officer to punish the Cities' conservation efforts and reward those who have done

nothing to conserve. In so doing, Water PACK twists the meaning of the Cities' conservation plans, an interpretation the Presiding Officer should reject outright. Granting the Cities' Water Transfer Application will simply provide them with the same thing that every other municipality in the State of Kansas already enjoys: ***access to*** a reliable and drought-resistant water source that will enable future growth.

Moreover, accepting Water PACK's argument would create little incentive for others to conserve water. Why would any water-right owner publish conservation goals if those goals could be used as a punitive cap restricting growth and exposing drought vulnerabilities? Water PACK asks the Presiding Officer to adopt a policy that would discourage conservation by any water right owner; an ironic position in light of its hollow rhetoric about groundwater being a "vital resource." (*See,* Water PACK's Trial Br. at 16.)

It is uncontroverted that the Cities are the premier stewards of water in the entire State. It is also clear that Water PACK and its members are some of the worst. Despite that, Water PACK asks the Presiding Officer to punish the Cities, discourage conservation, and deny the Cities any opportunity for future growth—or even the benefit of having a drought-resistant water source. If, as Water PACK argues, having access to more water than may actually be used in a given year meets the definition of "waste" under Kansas law (which it clearly does not as discussed in Section V.), then every City—and certainly every irrigator—in Kansas is guilty of it.

But Water PACK's position conflicts with Kansas law. The WTA's requirement that the conservation measures adopted by both the applicant ***and*** the protestors must be considered when evaluating the statewide benefits comparison makes the statutory intent clear: ***if*** the applicant has taken all reasonable steps to conserve (like here) ***and*** the protestors have not (also like here) ***then*** no weight should be attributed to their protestations. Finally, Kansas public policy promotes conservation of the State's water resources. *See, e.g.,* K.S.A. 2-1902(D), K.S.A. 2-1904(e)(7), K.S.A. 82a-733, K.S.A. 82a-741, K.S.A. 82a-745, K.S.A. 82a-903, and K.S.A. 82a-1020. And, while not directly applicable in a water transfer proceeding, in other contexts "due consideration" must be given to previously implemented conservation measures. K.S.A. 82a-744, K.S.A. 82a-745(a)(6), and K.S.A. 82a-1041(a)(4).

V. Approval of the water transfer will not, and as a matter of law, cannot cause "waste of water.".

Water PACK's argument that approval of the transfer would result in "waste" is based on the absurd notion that there is a zero-sum relationship between reasonable need and waste; that the use of ***one drop*** of water more than what Water PACK considers to be the Cities' "reasonable need" is prohibited "waste." Approving an application to transfer water is not "waste" under the KWAA, the WTA, or common sense. As with Water PACK's other arguments, there is no basis under Kansas law for this position and it is totally contrary to common sense.

Water PACK erroneously asserts that "[i]t is uncontroverted that the amount of water the Cities seek to transfer is greatly in excess of any reasonably anticipated need.[2] The [excess] is waste, not a beneficial use." (Water PACK's Br. at 5.) This is simply untrue. The "act" of approving the transfer will not, and by definition cannot, "cause" the "waste of water," which requires an "***act***" that "causes … ***the application*** of water" in excess of reasonable needs. K.A.R. 5-1-1(mmmm)(4).

To "apply" water, it must first be diverted. Approval of the transfer application will permit the Cities to divert water from the R9 Ranch, to transport it to Hays and Russell, and to apply it to an authorized beneficial use. Water diverted from the R9 Ranch can only be wasted if the Cities divert and then apply it "in excess of the needs." Merely approving the transfer cannot "cause," proximately or otherwise, the diversion and application of water in excess of the Cities' reasonable needs.

More importantly, the Cities do not seek to ***divert*** or ***apply*** more water than they need, nor is there any evidence that they have ever or will ever do so. In fact, all of the evidence is to the contrary. (*See,* the discussion of the Cities' conservation efforts in Section III of their Proposed Findings of Fact and Conclusions of Law and Section IV.)

All of Water PACK's arguments, including its arguments about waste of water, are based on its unreasonable assumption that the Cities will divert a full 4,800 acre-feet per

[2] The evidence shows that Cities request is not "in excess," greatly or otherwise, of the Cities' reasonably anticipated needs.

year each and every year for 51 years. The evidence shows Water PACK's assumption is both false and totally impractical. The project will be constructed in two phases; only 7 of the 14 municipal wells will be drilled during the first phase. Diversion of water from the R9 Ranch will increase as needs increase. (Dougherty Test., Tr. Vol. 1 at 100:6–102:9; 213:3–14, and Heidrick Test., Tr. Vol. 5 at 1093: 15–17.)

Water PACK cites Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 Env't L. 919, 933 (1998). (Water PACK's Br. at 59.) Ms. Neuman traced a "century's worth of cases" showing that courts across the west have refused to curtail diversions of water losses because reasonable need is based on local customs. 28 Env't L. at 933-47. "Stated succinctly, '[w]aste can be legally defined as the amount of flow diverted in excess of reasonable needs ***under customary practices.***'" (*Id.* at 933 (quoting Steven J. Shupe, *Waste in Western Water Law: A Blueprint for Change,* 61 Or. L. Rev. 483 (1982)), emphasis added.) Even the source Water PACK relies on in contorting Kansas' definition of waste does not support its argument.

VI. Approval of the water transfer does not violate the inapplicable anti-speculation doctrine which is a limitation on creating new water rights seeking to divert and apply otherwise available unappropriated water.

On page 58 of its Proposed Findings, Water PACK asserts—incorrectly—that granting the Cities' Water Transfer Application would violate the "anti-speculation doctrine." While anti-speculation is an important concept, it is not applicable here. Like

Water PACK's argument that approval of the transfer will cause "waste of water," its anti-speculation argument is misinterpreted, taken out of its proper context, and misapplied.

Water PACK relies exclusively on the inapplicable Colorado version of the anti-speculation doctrine while, bizarrely, conceding from the outset that anti-speculation only applies to "available ***unappropriated*** water**.**" (Water PACK's Opening Statement, Tr. Vol. 1 at 68:22-25 and Trial Brief at 8, n.3 (referring to "non-speculative conditional appropriation of unappropriated water" and "available unappropriated water") (emphasis added).)

In what could be described as a "house of cards," or better yet a failed attempt to perform a sleight-of-hand card trick, Water PACK argues that Kansas' version of the anti-speculation doctrine is summarized by the Colorado Supreme Court in *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited,* 170 P.3d 307, 313 (Colo. 2007), as modified (Nov. 13, 2007). (Water PACK's Br. at 58, citing footnote 31.)

Water PACK argues that Kansas has adopted the anti-speculation doctrine citing a PowerPoint prepared by Burke Griggs. The anti-speculation doctrine prohibits the acquisition of a "conditional water right" which is a creature of Colorado law ***with no Kansas analog***. Nevertheless, Water PACK argues that the Cities' R9 Ranch Water Rights should be assigned an analogous status—pretending they are Colorado conditional water rights—to ensure that the diversion of water proposed by the Water Transfer Application is driven by "genuine" need rather than speculative intentions. Water PACK then argues

(with no factual basis) that the Cities' water transfer should be denied because, based on how Colorado conditional water rights are evaluated, the Cities do not have a "vested interest or a specific plan to possess and control the water for a particular beneficial use," none of which is true.

This is perhaps Water PACK's most egregious distortion of Kansas law. The Cities do not have a Colorado conditional water right because no such creature exists in Kansas. But the Cities ***do own*** the R9 Ranch and they ***do own*** the R9 Water rights, which are real property rights under Kansas law. K.S.A. 82a-701(g). The Cities also have a specific plan to divert water from the R9 Ranch and apply it to a lawful beneficial use.

Water PACK's argument that the proposed transfer runs afoul of the anti-speculation doctrine is nonsense and they offer no authority for the claim that the Cities cannot store water for future use without also applying it to immediate beneficial use because doing so is "considered speculative hoarding and violates the anti-speculation policy." (Water PACK's Br. at 58.) They offer no authority for that proposition. Regardless, that is not a problem, since the Cites won't be storing water for future use. Water PACK is tilting at windmills.

The Kansas version of the anti-speculation doctrine was addressed by Mr. Letourneau during the hearing. He testified that DWR controls speculative applications with the "time to complete" provision in each permit requiring that the diversion works be completed within a specified time. (Letourneau Test., Tr. Vol. 4 at 876:23–878:3 and

880:21–882:3; Vol. 5 1027:12–1028:1.) As Mr. Letourneau testified, the version of the anti-speculation doctrine that Water PACK advocates is nowhere codified in the KWAA, and even Kansas' version of the doctrine does not apply to this water transfer for numerous reasons.

The "anti-speculation" doctrine is not mentioned in the Water Transfer Act or its implementing regulations, and certainly not the inapplicable foreign version for which Water PACK advocates. And when Mr. Letourneau, who has served as DWR's Water Appropriation Program Manager for more than 15 years, was asked how the rule was applied in Kansas, he was crystal clear: it is only applicable to ***new*** water rights; "new water that should be available to somebody else." (Letourneau Test., Tr. Vol. 4 at 876:23–877:2.) The example Mr. Letourneau gave is when a landowner obtained approval for a new water right with the express intent of selling the water to a nearby municipality but then was unable to enter into a water purchase contract with the city. In that instance, DWR dismissed the water right for failure to complete the diversion works within the time limit in the permit. "Because it's a new water right that's not perfected, it not a water right at that point." (Letourneau Test., Tr. Vol. 4 at 877:9–878:8.) The R9 Ranch Water Rights are not "new." The "newest" has a priority date in 1977. No version of the anti-speculation doctrine is applicable here.

VII. The Cities' design plan to transfer water from the R9 Ranch complies with the requirements of the statute because it permits Water PACK to understand the impacts of the proposed transfer on its members; Water PACK ignores substantial evidence presented by the Cities.

Beginning at page 31 of its brief, Water PACK argues that the Cities have failed to provide sufficient information to assess the project's impacts as required by K.S.A. 82a-1502(c)(6) which requires "sufficient detail to enable all parties to understand the impacts of the proposed water transfer." Water PACK and the County are the only "parties" who are entitled to sufficient detail to understand the impacts of the proposed water transfer.

Water PACK incorrectly identifies Kevin Waddell as the City's only witness who testified about the Cities' plan of design for the water transfer infrastructure project. In fact, Mr. Waddell's testimony was limited to the probable costs of the construction project and had very little to do with the plan of design. Water PACK then mischaracterizes testimony from Hays Manager, Toby Dougherty, arguing that there is no plan of design. Again, Water PACK ignores mountains of evidence and skews the evidence it does cite to fit its false narrative.

K.S.A. 82a-1502(c)(6) requires the applicant to present "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." To meet this factor, the evidence needs to be "in sufficient detail to enable all parties to understand the impacts of the proposed water transfer." That limitation makes sense, as it is neither feasible nor prudent to make the significant investment to develop exhaustive plans that may later be fundamentally

altered depending on the outcome of the water transfer proceeding. Water PACK ignores those practical limitations by asking the Presiding Officer to hold the Cities to an impossibly high standard to which no other water user in the State has ever, or could ever, adhere.

Nevertheless, the Cities easily satisfied the statutory requirement. They presented extensive evidence relating to the location of the proposed points of diversion, the project's proposed plan of design, the proposed plan of operation, and the estimated date for completion of the infrastructure via extensive documentation and witness testimony from Burns & McDonnell engineer, Jeffrey Heidrick, the Project Manager. These topics, including Mr. Heidrick's testimony, are addressed in paragraphs 694–753 of the Cities' Proposed Findings of Fact with numerous citations to the record.

The Cities' evidence on this factor included maps and specific details showing the location of the proposed municipal wells as well as the maximum quantity and rate of water to be diverted from those wells (Cities' Br. at ¶¶ 694–97), the source of supply, and the spacing between the new municipal wells and surrounding irrigation wells as well as the centerline of the Arkansas River. (*Id.* at ¶¶ 698–705). ***This*** is all of the information that Water PACK and/or its members need to evaluate the impacts that the construction project could conceivably have on the local aquifer as required by K.S.A. 82a-1502(c)(6). In fact, Water PACK lacks standing to complain about anything else. Of course, the Cities presented much, much more than that.

For example, Mr. Heidrick testified about the two design contracts, the Hays R9 Ranch Pipeline Project Agreement, and the Hays R9 Ranch Wellfield Project agreement—which have been executed as well as other detailed information about the planned wells, gathering lines, raw water storage, and a raw water pump station. (*Id.* at ¶¶ 708–10.) Mr. Heidrick also testified about Exhibits 1-1, 1-37, 1-38, 1-39, 1-40 and 2687, which, together, illustrate the conceptual design and construction of the planned R9 Ranch wellfield, related permitting and other regulatory issues, the selection of optimum well locations, pertinent physical characteristics of the R9 Ranch, well-design parameters, well houses, variable frequency drives, flow meters, check valves, isolation valves, testing tees, sample ports, pressure gages, air relief valves, supervisory control and data acquisition system (SCADA) controls, communication equipment, access roads sufficient to support heavy construction vehicles, and overhead power lines and transformers. (*Id.* at ¶¶ 712–21.)

The Cities further presented eviden1-million-gallonhe planned raw-water collection and conveyance system, including a 1-million gallon storage tank, a custom-built high-service pump station with information about the below-grade enclosure, electrical control and telemetry system, site security systems, and an expanded network of monitoring wells to track the static water levels and water quality, including amendments to incorporate a water-monitoring plan to accommodate concerns expressed by GMD 5. (*Id.*)

The Cities presented evidence relating to a planned 20-inch raw-water pipeline that will run from the R9 Ranch to Schoenchen, Kansas, where it will connect to Hays' existing water system as well as a 10–12 inch pipeline from Schoenchen to Russell's Pfeifer wellfield connecting to its respective system, a corridor between the R9 Ranch and Schoenchen within which the transmission line will be built, and a PowerPoint presentation summarizing the design process, at Exhibit 1-40, to assist in ease of understanding. (*Id.* at ¶¶ 722–25.) These transmission lines will be buried and will have no possible effect on any Water PACK member or the County.

The evidence goes on and on, yet, somehow, Water PACK argues that the Cities presented no evidence, that still more information is needed to ascertain the project impacts, and the water transfer application "cannot be approved" until the Cities do so. (*See,* Water PACK's Br. at 31–32 and 62.) But Water PACK fails to identify ***how*** the evidence should, or even could, be more specific, fails to identify ***which*** impacts it is unable to ascertain in light of the existing evidence, and fails to address how any of this possibly relates to the property or interests of its members—let alone the State as a whole. Most notably, however, Water PACK fails to reference Mr. Heidrick's testimony or any of the exhibits in the record relating to the project design even a single time in its brief. That omission cannot credibly be characterized as an unintentional oversight. Water PACK isn't painting the entire picture because it wants the relevant parts to remain hidden.

VIII. At the hearing and in its proposed findings, Water PACK failed to counter the Cities' overwhelming evidence showing that approval of the Water Transfer will provide significant benefits to the State of Kansas which it blatantly ignores and mischaracterizes.

Water PACK asserts that all of the evidence indicating that the benefits to the State of approving the transfer outweigh the benefits to the State of denying the transfer is conjectural. (Water PACK's Br. at 14, 35, and 63.) "Conjecture" is the "formation or expression of an opinion or theory without sufficient evidence for proof."[3] Water PACK admits that "benefits to the state" is an "undefined amorphous phrase." (Water PACK's Br. at 17.) So, by that definition, the Cities could not produce a "smoking gun" that, standing alone, conclusively demonstrates that the benefits of approving the transfer outweigh the benefits of denying the transfer. Instead, the Cities produced overwhelming evidence establishing that approval of the transfer will provide substantial benefits to the State with no meaningful Statewide detriments. Put simply, the Cities' evidence conclusively demonstrates that the transfer should be approved.

Water PACK also argues that irrigated agriculture has been a boon to the local economy and to the economy in GMD 5, suggesting that removing the Ranch from irrigated ag land would be a detriment. (Water PACK's Br. at 36.) Not so. The evidence shows that center pivots were removed from the R9 Ranch beginning in 2007, and there has been no irrigation on the R9 Ranch since 2017. (Cities' Br. at ¶¶ 11–14.) Any

[3] https://www.dictionary.com/browse/conjecture.

disadvantage to the State from the loss of irrigation on the R9 Ranch (which is unsupported in the record) already occurred years ago. And Water PACK produced no evidence to show that irrigation of the Ranch will resume if the transfer is denied.

Approval of the transfer will result in opening the R9 Ranch to the Kansas Department of Wildlife and Parks Walk-in Hunting Access Program. (Ex. 2458 at Cities 0085253 and 0085315 ("We are preparing the property for the Walk-in Hunting Access Program…."); Ex. 2462 at Cities 0088045; Ex. 2859 and Ex. 2860.) The Kansas Department of Wildlife and Parks Walk-in Hunting Access Program will produce statewide economic benefits. (Ex 818 at Cities 0021720.)

As the County's web site stated, hunting is already a significant source of economic activity in Edwards County with one and possibly two local outfitters.

> Hunting opportunities in Edwards County are always rich.....we are blessed with an abundance of wildlife. Locals and ***Hunters from all over the country*** come to Edwards County to hunt dove, pheasant, quail, turkey, prairie dogs, coyotes and deer.

(Ex. 2643 at Cities 0098483 (emphasis added); *see also* 0098701 and 0098491 ("This makes hunting [in Edwards County] … enjoyed, not only by the local population but ***by people from across the United States.***" (emphasis added).) A large walk-in hunting area will contribute significant revenue to the local economy and benefit the State. (*See, e.g.*, Ex. 818 at Cities 0021720 and 0021392 ("Hunting expenditures ***contribute significantly*** to the [Cimarron River] basin's economy."), emphasis added.)

Water PACK quotes the Secretary of Agriculture, Mike Beam, at length about how dependent the State is on the Ogallala aquifer in the western third of the State. (Water PACK's Br. at 64–65.) The depletion of the Ogallala aquifer is not relevant to this proceeding because the R9 Ranch is not over that aquifer. Mr. Wenstrom made a number of factual mistakes during his testimony, but one thing he was correct about was that there are two sources of supply on the R9 Ranch, the Arkansas River alluvium and the Great Bend Prairie aquifer. (Wenstrom Test., Tr. Vol. 7 at 1297:3–7.[4] *See also*, Ex. 1-67b at Cities 0003172 and 73; Ex. 823 at Cities 0021972 ("The High Plains Aquifer has three components in Kansas: the Ogallala Aquifer, the Great Bend Prairie Aquifer and the Equus Beds."); and Ex. 2161 at Cities 0077433.) There was extensive testimony from several witnesses, including Water PACK witnesses, about when and how the aquifer on the Ranch is recharged but it is uncontroverted that rechange occurs.

A. Water PACK's contention that every penny spent on the construction project is a net "detriment" is unsupported and is an upside-down view of the world.

Beginning on page 35 of its brief, Water PACK presses Ms. Walker's argument that the water transfer should be denied under the theory that every penny the Cities spend on the construction project must be considered detrimental.

[4] Mr. Wenstrom also testified that the proposed municipal wells on the far east side of the R9 Ranch are in the Rattlesnake Creek Basin. *But see* Cities' Findings at ¶¶ 26–30.

Water PACK's theory is not only factually wrong, but also inconsistent with the principal focus of the Water Transfer Act, which requires a comparison of the ***statewide*** benefits of approving the water transfer with the ***statewide*** benefits of denying the water transfer. The Cities addressed the deficiencies of Water PACK's approach at length in their Proposed Findings of Fact and Conclusions of law. (Cities' Br. at ¶¶ 423–62.)

IX. Water PACK cherry-picks statements to serve its arguments but ignores the evidence it cannot spin or mischaracterize to fit its flawed narrative.

Beginning at page 35 of its brief, Water PACK cherry picks statements from certain witnesses in support of a new argument that the water transfer is not "actually" needed because "look at how great things already are in the Cities!" Preposterous.

For example, Water PACK refers to testimony by Mr. Quinday on page 36 that the Purefield gluten operation is "planning to expand" in Russell, but fails to note a critical piece of information provided by both Mr. Quinday and City Councilperson, Brad Wagner: Purefield's plans to expand "hinge[] on whether or not we're allowed to transfer water from the R9 to Russell." (Cities' Br. at ¶ 261–62.) Mr. Quinday elaborated that the planned expansion would be a capital investment of about $300 million dollars, but without a commitment to supply an additional 500,000 gallons of water per day, the expansion simply cannot happen. (Cities' Br. at ¶¶ 265–66.) Mr. Wagner, Mr. Quinday, and Dr. Hamilton all testified that completion of the Purefield expansion would have significant local benefits with ripple effects that would greatly benefit the entire State—but, again, none of it is possible without the water transfer. (Cities' Br. at ¶¶ 261–67.) For

those and other reasons, Mr. Wagner testified that "the future of Russell depends on" approval of the water transfer. (Cities' Br. at ¶ 260.)

Water PACK's approach is typical of its strategy throughout this proceeding—take off-hand comments and partial quotes, ignore context, and use "creative" definitions to paint a skewed picture of the supposed negative impacts of the water transfer. Doing so does not get at the truth but does illustrate Water PACK's desperate and unrelenting efforts to obfuscate it.

X. The Cities' plan to finance the construction project is of no import to this proceeding; regardless, all evidence is that financing will not be problematic.

On page 37 of its brief, Water PACK argues, with no citation to authority, that it is "not possible" to approve the transfer because the Cities do not have a plan to finance the project. Water PACK questions the Cities' ability to obtain financing for the project. Besides being a red herring and irrelevant to the Presiding Officer's evaluation of the water transfer application pursuant to the applicable statutes and regulations, the ***only*** evidence in the record on this issue is that Hays is eligible for funding through the Kansas Public Water Supply Loan Fund. Water PACK introduced no controverting evidence, and—as held by our Court of Appeals: "Uncontroverted evidence should ordinarily be regarded as conclusive." *In re Doe*, 19 Kan. App. 2d 204, 210, 866 P.2d 1069 (1994) (citing *D.M. Ward Constr. Co. v. Elec. Corp. of Kan. City*, 15 Kan. App. 2d 114, Syl. ¶ 6, 803 P.2d 593 (1990).

XI. Use of the R9 Water Rights for municipal use will greatly improve the condition of the aquifer over the long-term and will have negligible impacts even in the impossible event that the Cities pump their maximum quantity 24/7/365.

On pages 37–41 of its brief, Water PACK argues that the Water Transfer is "prohibited" because it is not sustainable. Once again, Water PACK ignores the great weight of evidence, skews facts to fit its purposes, and ignores Kansas law.

From a factual perspective, the Cities addressed the impact that the proposed water transfer will have on the aquifer at and near the R9 Ranch at length in Section VIII of their Proposed Findings of Fact. Like all of its proposed findings, the Cities supported each statement with a specific citation to the record. Water PACK's proposed facts are generally superficial and unsupported, while the Cities' are exhaustive—spanning 106 separate paragraphs over 35 pages devoted exclusively to this issue. (Cities' Br. at 141–76.)

Stated succinctly, the great weight of the evidence presented in this matter shows beyond any doubt that the proposed water transfer will significantly improve the condition of the aquifer, and even under the impossible worst-case scenario that Water PACK focuses on, will have such a negligible impact as to be unnoticeable—even after 51 years of maximum pumping. (Letourneau Test., Tr. Vol. 4 at 867:1–23.)

The facts show that Water PACK's expert, Steve Larson, applied an exaggerated and deeply flawed methodology in calculating water level impacts under the proposed municipal use of the R9 Ranch water rights. And even if one were to adopt Mr. Larson's

mistaken conclusion that water-level impacts are "five times" more than Mr. McCormick concluded, it is just two feet of decline in an area of the Ranch with 140 feet of saturated thickness, "a miniscule amount" that is "covered by regular fluctuations in the water table." (Cities' Br. at ¶¶ 515–22.) As Mr. Letourneau testified, such a decline is so insignificant that a neighboring well owner would not even notice. (Cities' Br. at ¶¶ 523–25.)

Once again that is the worst-case scenario based on an unrealistic assumption that the Cities will pump their maximum allocated quantity of 4,800 acre-feet per year, every single year, for 51 consecutive years. (*See, e.g.*, *id.* at ¶ 526.)

Such a minimal decline is expressly allowed under Kansas law, which allows for a reasonable raising and lowering of the water table. *See,* K.S.A. 82a-711;[5] K.S.A. 82a-711a; K.A.R. 5-25-1(l). *See also,* Cities' Br. at ¶ 557 and Ex. 2867 at Cities 0171967 (testimony of former Chief Engineer David Barfield ("Based on my extensive experience as Chief Engineer of DWR, such use is well within acceptable and standard declines within the State of Kansas—including near and surrounding the R9 Ranch. DWR routinely grants

[5] Following its usual practice of ignoring context, Water PACK argues that because of the last-antecedent doctrine, "beyond a reasonable economic limit," in K.S.A. 82a-711(c) modifies "unreasonable deterioration of the water quality" but not "unreasonable … lowering of the static water level," which Water PACK argues is limited to physical effects on the aquifer without "without consideration of any economic effects." (Water PACK's Br. at 13–14.)

An existing water right can be impaired by an unreasonable lowering of the static water level. K.S.A. 82a-711(c). K.S.A. 82a-711(a) makes every water appropriation right subject to reasonable decreases in the static water level. When determining whether decreases in the static water level are reasonable, the Chief Engineer must consider the economics of diverting or pumping water for the water uses involved.

change applications even though planned water use will result in a reasonable lowering of the static water level at and surrounding the relevant place of use.").)

Water PACK also improperly asks the Presiding Officer to adopt invalid opinion testimony from Richard Wenstrom on page 40 of its Brief. The Presiding Officer should decline to do so and disregard paragraphs 13, 14, 15, 16, and 17 on pages 40–41 of Water PACK's brief. *See,* K.S.A. 60-456(a).

XII. Water PACK's statements about the "requisite statutory factors" are unsupported by the facts and contrary to Kansas law.

In keeping with its strategic approach to obfuscate at every turn, Water PACK includes a lengthy string citation beginning near the bottom of page 41 of its brief that, Water PACK asserts, supports its claim that approval of the water transfer "will impact surrounding points of diversion based on reduced recharge and return flows." In most instances, a cursory review of the citation shows that the document, in fact, does not support Water PACK's claim. In others, a closer review is needed before it becomes clear that Water PACK is misattributing or mischaracterizing the source. And in some cases, Water PACK is relying on sources that were not admitted into evidence. The Cities address each of the citations in turn to make clear that there is absolutely no merit to Water PACK's assertions.

- *Cities' Ex. 2462 at 87955*: This annotated aerial image is simply a repackaging of Mr. McCormick's maximum long-term pumping scenario, and by referencing it, Water PACK tacitly admits the validity of Mr. McCormick's findings. Aside from that, Mr.

McCormick explains in depth that the impacts to the local aquifer under the maximum pumping scenario are negligible, resulting in just "0.4 feet of additional drawdown at the R9 Ranch boundary in the northeast portion of the R9 Ranch." (Ex. 2827 at Cities 0103727.) The so-called "aquifer drawdown" is so miniscule that it will not even be noticed by neighboring water users after 51 years. (Cities' Br. at ¶¶ 523–25.)

- *Water PACK Ex. 7, WP001961; Larson Report at 3*: This citation is a regurgitated summary of Larson's precipitation-enhanced irrigation recharge theory, which has not only been thoroughly debunked by the Cities' evidence and its own internal inconsistencies but does not present an "unreasonable … lowering of the static water level—even under Water PACK's unrealistic worst-case scenario. (*See,* Cities' Br. at ¶¶ 515–26. *See also,* Section XI above.)

- *Romero Report at 3*: KAPA prohibits reliance on any evidence outside of the record in making findings of fact: "Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." K.S.A. 77-526(d). Mr. Romero's report was not admitted into evidence and, as such, cannot be considered in this proceeding. In addition, Mr. Romero's Report is far from a ringing endorsement of Larson's methodology. As noted by Mr. McCormick, Mr. Romero did not actually run the model to evaluate Larson's conclusions (McCormick Test., Tr. Vol. 3 at 694:12–696:2); he merely agreed with the general hydrologic concept; but made no effort to apply or independently evaluate the application of that concept to

the Ranch or within the context of the Balleau Groundwater Model (*see also* Barfield Test., Tr. Vol. 7 at 1195:7–15).

- *Tr. p. 688*: This is a quote of Mr. McCormick's testimony taken out of context to misleadingly suggest that he is in agreement with Larson's conclusions. Not so. Mr. McCormick was crystal clear that the Balleau groundwater model was ***not*** premised on irrigation-enhanced precipitation recharge. (Tr. Vol. 3 at 714:18–715:15.) And while Mr. McCormick agreed that such enhancement can, in a vacuum, exist, he was very clear that it was absolutely ***inapplicable*** to the R9 Ranch because the "ranch is essentially dune sand." (Tr. Vol. 3 at 715:25–716:11 ("Q: In your opinion, is irrigation enhanced recharge a factor on the ranch? A: No, I do not think it is. Q: And what is the basis for that opinion? A: The ranch is essentially dune sand, it's like being on a beach. Water that falls on the ranch immediately sinks into the ground, there are not runoff features, there's not retention features where water is ponded, there aren't streams or rills; it's sand, it's like pouring a bucket of water out on the beach, it goes straight down into the ground.").

- *Tr. at 1193*: Similarly, this is a quotation from Mr. Barfield's cross-examination, cherry-picked to misleadingly state that he is in agreement with Larson. Mr. Barfield's entire expert report and testimony is to the contrary. (*See, e.g.*, Cities' Br. at ¶¶ 527–89. *See also generally,* Ex. 2867.)

- *Tr. 1225*: This quotation is from Mr. Larson's live testimony and includes his nonsensical statement—in strained defense of his flawed conclusions—that sandy

soils actually retain more water than silt and clay. Mr. Larson's statements are contrary to both common sense and the written and sworn statements of individuals with both expertise and actual firsthand experience of the R9 Ranch soils, including Mr. Wenstrom (Ex. 2462 at Cities 0087164–65 ("[O]n these soils...the irrigator keeps pumping and pumping, but most of the water returns to the aquifer through deep percolation without positive consumptive use.")), Mr. McCormick (Cities' Br. at ¶ 587), Mr. Dougherty (*id.* ("Water falls on the sand, it soaks in, and then it's there to use for future years."), Mr. Crispin (*id.* at ¶ 576), and Dr. Harmoney (*id.* at ¶ 582 (testifying that there is no runoff at the R9 Ranch due to high porosity and sandy soils)).

- *Tr. 1231–32; 1234–36; 1269*: These are references to Mr. Larson's defense of his statement that the Balleau Groundwater Model Report is "premised on" precipitation-enhanced irrigation recharge—a patently false statement, as addressed both in Mr. Barfield's report and extensive evidence at the hearing. (*See, e.g.*, Cities' Br. at ¶¶ 527–89. *See also generally,* Ex. 2867.)

- *Tr. 1460*: This is another reference to inadmissible opinion testimony by Mr. Wenstrom relating to the water consumption of native grasses compared to irrigated farmland, and an improper attempt to end-run the Presiding Officer's ruling disallowing Water PACK's attempt to admit the undisclosed expert testimony of Dr. Keller addressing the same topic. (Tr. Vol. 7 at 1209:3–5 (Presiding Officer: "I'm going to deny any request to try to offer Dr. Keller as an expert witness.").)

- *WP 01517*: This is a reference to an article addressing recharge estimates in the "Guarani Aquifer System" in South America. It has no relevance to the recharge conditions on the R9 Ranch.

None of the references relied on by Water PACK actually support its argument that the proposed water transfer will have a significant impact on water levels at or near the R9 Ranch.

A. Water PACK's Minimum Desirable Streamflow argument is frivolous.

In defining Minimum Desirable Streamflow ("MDS") Water PACK, strangely, refers to a different presiding officer's recommendations in Wichita's ASR proceeding rather than the statutory definition.

As explained in the Cities' Proposed Findings of Fact, K.S.A. 82a-703b(b) specifically states that ***all water appropriation rights "having a priority date on or before April 12, 1984, shall not be subject to any minimum desirable streamflow requirements established pursuant to law.***" (K.S.A. 82a-703-b(b) (emphasis added); *see also* Cities' Br. at ¶¶ 687–89).) ***All*** of the R9 Water Rights have a priority date prior to April 12, 1984; in fact, the most junior water right on the R9 Ranch has a priority date of July 1, 1977. (Cities' Br. at ¶ 688.)

Water PACK has known this, literally, for years. In their original Water Transfer Application, filed on January 6, 2016—more than seven years and nine months ago, the Cities made the exact same point, with a citation to an example document from one of

the R9 Water Rights, and similar documents showing the priority for all of the other water rights were prior to the April 12, 1984 statutory date.

Nevertheless, Water PACK has continued to waste the Presiding Officer's and the parties' time by repeatedly raising this irrelevant issue:

- Water PACK raised the MDS issue in its original Petition for Intervention on September 27, 2022. (Water PACK's Br. at 2.)
- In its response brief, the Cities noted again the statutory trigger date with a citation to K.S.A. 82a-703b, filed on October 27, 2022. (Cities' Br. at 15.)
- Water PACK raised the issue again in its Motion to File an Amended Petition for Intervention, filed on December 5, 2022. (Water PACK's Br. at 7.)
- The Cities, once again, stated that MDS is inapplicable under the statute in its response to same, filed on December 12, 2022. (Cities' Br. at 22–23.)
- Water PACK again raised the issue in its reply in support of intervention, filed on January 30, 2023. (Water PACK's Br. at 4.)
- During the hearing Lane Letourneau of DWR testified about the 1984 trigger date for the MDS requirement noting, first, that the statute is inapplicable west of Kinsley because there is no flow in the Arkansas River at the area of the R9 Ranch, and second, that none of the R9 Water Rights are subject to MDS requirements because "[t]hey're senior to that April of 1984 date," which testimony was unchallenged at the hearing. (Letourneau Test., Tr. Vol. 4 at 873:6–874:7.)

Water PACK has, yet again, raised the MDS argument, relying on nonbinding and inapplicable statements from a different presiding officer in a separate OAH matter.

Enough is enough.

B. The Economic, Environmental, Public Health and Welfare and Other Impacts of Approving or Denying the Water Transfer.

Water PACK states that this issue is addressed on pages 34 and 35 of its brief but that does not appear to be accurate. (Water PACK's Br. at 44 and 69.)

C. Alternative Sources of water available to the applicant and other impacts of approving/denying the water transfer.

Water PACK cites to, and adopts as factual, the conclusions and opinions set forth in Mr. McCormick's Wellfield Yield Report and related testimony, Exhibit 2828. (Water PACK's Br. at 45.)

Yet Water PACK then argues the Cities have nothing to complain about because Hays has "residual sustainable yields" under any of the drought scenarios addressed in Mr. McCormick's Wellfield Yield Report. (Water PACK's Br. at 45.) That is a remarkably callous statement in light of the humanitarian crisis that would follow a drought providing residents of the Cities with no more than 20 gallons per capita per day—water levels that the World Health Organization has concluded would not even support basic needs. (Ex. 2823 at Cities 0103530–31.)

D. Appropriate measures to preserve water quality and remediate contamination.

Water PACK does not controvert that this element has been satisfied. (Water PACK's Br. at 46.)

E. Any applicable GMD management program, standards, policies, and rules and regulations.

On page 50 of its brief, Water PACK points to several provisions of GMD 5's regulations, including 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.***" K.A.R. 5-25-1(l) (emphasis added). Water PACK then states, but does not explain, how the Cities' proposed water transfer fails to meet this regulatory definition. (Water PACK's Br. at 50.)

Water PACK also refers to K.A.R. 5-25-3, claiming that the water transfer violates the regulation because, Water PACK argues, the Cities' have requested water in excess of their "reasonable needs" and because municipal use of the wellfield "will have a deleterious effect on the aquifer level and thus directly impair adjacent landowners." (Water PACK's Br. at 50–51.) Again, as discussed in depth above and in the Cities' Proposed Findings and Conclusions, the evidence supports neither of these baseless allegations.

Finally, Water PACK cites K.A.R. 5-25-8 in resuscitating its "waste" argument, which, it argues applies here because the Cities' have sought more water than they need. (Water PACK's Br. at 51.) As discussed above, Water PACK's interpretation of "waste" is a far cry of the plain language of applicable law and should be rejected outright.

XIII. Conclusion

Water PACK's Proposed Findings and Conclusions should be rejected in their entirety.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Cities' Response to Water Pack's Proposed Findings of Fact and Conclusions of Law was served this 27th day of October, by uploading it to OAH Case Nos. 23AG0003 and by electronic mail to the following:

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