BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS

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

COMMENTS OF DWR REGARDING THE APPLICATION OF THE CITIES OF HAYS, KANSAS AND RUSSELL, KANSAS FOR APPROVAL TO TRANSFER WATER FROM EDWARDS COUNTY, KANSAS PURSUANT TO THE KANSAS WATER TRANSFER ACT

COMES NOW, the Kansas Department of Agriculture, Division of Water Resources ("DWR"), by and through counsel, Kate S. Langworthy, and submits the following comments regarding approval of the First Amended Application of the Cities of Hays, Kansas and Russell, Kansas for Approval to Transfer Water from Edwards County, Kansas Pursuant to the Kansas Water Transfer Act ("Application") submitted in the above-captioned matter.

I. BACKGROUND

On May 16, 2019, the cities of Hays, Kansas and Russell, Kansas (collectively, the "Cities") submitted the Application, requesting approval to transfer up to 6,756.8 acre-feet of water per year for municipal use in the Cities. On October 20, 2022, Chief Engineer Earl D. Lewis, on behalf of the Water Transfer Hearing Panel, requested the appointment of a presiding officer from the Kansas Office of Administrative Hearings to conduct a hearing in accordance with the Water Transfer Act, K.S.A. 82a-1501 *et seq.* (the "Act") pursuant to the requirement of K.S.A. 82a-1501a(b) which compels the request when: "an application for a water transfer is complete…" Administrative Law Judge, Honorable Matthew A. Spurgin ("Presiding Officer"), was appointed

to that position and, on November 8, 2022, commenced the proceeding by providing notice of a prehearing conference. The Presiding Officer subsequently issued orders granting Water PACK and Edwards County's ("Joint Intervenors") Joint Petition for Intervention and Big Bend Groundwater Management District No. 5's (GMD5) Petition for Intervention.

DWR is contemplated as a commenting agency under the Act and has been recognized by the Presiding Officer and present through counsel at all pre-hearing conferences and each of the nine days of the in-person portion of the hearing, which commenced on July 19, 2023, and concluded on July 31, 2023. After review of the record and all filings submitted to the Office of Administrative Hearings, DWR intends to provide technical advice regarding the statutory conditions for approval of a transfer that relate to administration of water rights in Kansas. To that end, these comments do not address every applicable requirement of the Water Transfer Act but are confined to those that relate to subjects more directly tied to DWR's technical expertise.

II. DWR'S COMMENTS

A. Governing Law

K.S.A. 82a-1502 lays out the conditions that must be satisfied for a transfer to be approved. The conditions amount to a two-step analysis. First, the statute provides, in relevant part, that "no water transfer shall be approved which would reduce the amount of water required to meet the present or any reasonably foreseeable future beneficial use of water by present or future users in the area from which the water is to be taken for transfer unless: (1) The panel determines that the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer…"[1] In considering whether the benefits to the state for approval outweigh those for disapproval, the statute provides a list of required considerations along with an umbrella

[1] K.S.A. 82a-1502(a)

requirement that the presiding officer shall consider all matters pertaining to the benefits of transfer.[2] Notably, the statute clearly states that the panel need only apply the benefits balancing test if the amount of available water in the area from which it will be taken will be reduced. Second, the statute bars approval of transfers (1) if they would impair existing rights and (2) unless the applicant has adopted and implemented sufficient conservation plans and practices.[3]

B. <u>Approval of the Application Will Not Reduce the Amount of Water Available in the Area Surrounding the Ranch</u>

Based upon consumptive use calculations completed during evaluation of the Cities' change applications, the additional limitations established by the Master Order contingently approving those applications, and the unique circumstances of GMD5, DWR believes that a transfer of water as requested in the Application will not reduce the amount of water required to meet the present or any reasonably foreseeable future beneficial use of water by present or future users in the area from which the water is to be taken for transfer. Though it is true that the Act provides a process separate and distinct from a change of use proceeding, that does not preclude use of information gleaned from one in the other. The Cities own a portfolio of fully perfected water rights on the R9 Ranch, which authorize a total appropriation of 7,647 acre-feet for irrigation purposes and lie within the Big Bend Groundwater Management District No. 5 (the "District").[4] Ownership of a water right entitles the Cities, and all other water right holders, to lawfully divert and use water, even when such diversion and use depletes the groundwater source.[5]

[2] K.S.A. 82a-1502(c).
[3] K.S.A. 82a-1502(b).
[4] Cities Ex. 1-2, Bates No. 0000108, para. 3; Bates No. 0000109, para. 17 and 18; Bates No. 0000112, para. 44.
[5] K.S.A. 82a-702(g); See generally, the Ogallala-High Plains Aquifer in Kansas.

In applying the consumptive use calculations as prescribed by K.A.R. 5-5-9 and contingently approving the municipal use of up to 6,756.8 acre-feet per year, DWR verified that the amount of water diverted for municipal purposes would, at most, be the same as the amount consumed under the original irrigation use.[6] For the exclusive benefit of the public as a whole, the Master Order further subjected diversions for municipal use to a Ten-Year Rolling Aggregate Limitation ("TYRA Limitation") authorizing a total of only 48,000 acre-feet of water to be diverted from the combined R9 Water Rights for municipal use during any, each, and every ten consecutive calendar years.[7] In a practical sense, the question of reduction is an analysis of whether, as it relates to availability of water, the area from which the water will be taken will be worse off after the Cities begin using the water for municipal purposes than it would be if the Cities decided to grow irrigated crops on their land. The conditions and limitations placed on the Cities' water rights by the Master Order thereby ensure that the municipal use as contemplated by the transfer will have no more impact than the historical irrigation for which the R9 Water Rights have previously been used. Therefore, DWR concludes that approval of the Application will not reduce the amount of water available surrounding the R9 Ranch.

In further support of the conclusion that the amount of water will not be reduced, K.A.R. 5-25-4 closes the entirety of the Groundwater Management District 5 to new surface water and groundwater appropriations, with limited exception. By virtue of this closure, the Cities' water rights are deemed to have due and sufficient cause for nonuse and are immune from claims of abandonment.[8] This makes it so that existing beneficial uses and any changes to a water right that may, in some sense, qualify as future beneficial uses will remain subject to current authorized

[6] Cities Ex. 1-2, Bates No. 0000148, para. 224.
[7] Cities Ex. 1-2, Bates No. 0000136-39, para. 159-70; Bates No. 0000148-49, para. 225-30.
[8] K.S.A. 82a-718(e)

quantities and makes reduction of the amount of water required to meet those uses a practical impossibility.

C. The Transfer Will Not Impair Existing Rights

In K.S.A. 82a-711, which governs new appropriations of water and therefore only contemplates interference with senior water rights, the legislature defined impairment to 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." Under the common law principle *expressio unius est exclusio alterius*, by negative implication, the legislature's explicit inclusion of the unreasonable raising or lowering of the static water level implicitly allows for a reasonable raising or lowering of the static water level. This interpretation is consistent with the holding from *Garretson Bros. v. American Warrior, Inc.*, wherein the Kansas Court of Appeals applied the common definition of "impair" to allow a senior water right owner to seek injunctive relief when water use by a junior water right owner "diminishes, weakens, or injures the prior right."[9] Thus, only a senior right may be impaired, and DWR's opinion that the transfer will not impair existing rights is based on an analysis of data relating to those water rights that are senior to the Cities'.

DWR regulations address both direct impairment and impairment due to a regional lowering of the water table.[10] DWR's Water Appropriations Program Manager, Lane Letourneau, testified to the fact that irrigation use on the R9 Ranch has never caused an impairment complaint, and no evidence was presented to counter that testimony.[11] The transfer resulting from approval of the

[9] 56 Kan. App. 2d 623, 650.
[10] K.A.R. 5-4-1; K.A.R. 5-4-1a.
[11] Letourneau Test., Tr. Vol. 4 at 868.

Application would be subject to the limitations and conditions of the Master Order contingently approving the changes to the R9 Water Rights, including reduced pumping rates, well-spacing requirements, and the aforementioned TYRA Limitation.[12] Considering that original rates, quantities, and well-spacing produced no impairment, it logically follows that it is highly unlikely the transfer contemplated by the Application would result in impairment of senior water right holders.

The Joint Intervenors submitted the testimony of Steven Larson to advance their claim that groundwater modeling used by the Cities in support of their Application understates the potential negative impacts to groundwater levels that would occur when municipal pumping replaces irrigation pumping on the R9 Ranch.[13] Larson's report included a table showing the number of individual wells within selected impact levels.[14] Even under Larson's methodology, the greatest level of impact reflected was a lowering of 2.6 feet affecting one irrigation well.[15] The Cities' expert, Paul McCormick, testified that the average saturated thickness on the R9 Ranch is approximately 100 feet.[16] Comparing the lowering of 2.6 feet to 100 feet of saturated thickness, the impact is a lowering of 2.6%, which DWR considers to be reasonable lowering. Even if the Cities' water rights were the most junior in the area, which they are not, the Joint Intervenors' own expert modeler has shown that with a long-term lowering of only 2.6% of the saturated thickness, the transfer would not impair existing rights.[17]

[12] Cities Ex. 1-2, Bates No. 0000122.
[13] Joint Intervenors' Ex. WP 01864.
[14] *Id.* at Exhibit 7.
[15] *Id.*
[16] Cities Ex. 2666; Cities Ex. 2827 Bates No. 0103697-98.
[17] Cities Ex. 2873.

D. Hope Is Not a Strategy

As the Joint Intervenors have pointed out in multiple filings, hope is indeed not a strategy, however, DWR disagrees that the Cities' arguments are the ones based on aspirations. Instead, the Joint Intervenors' contention that approval of the Application would constitute waste[18] appears to rely either on a chimerical foundation that the law prohibits waste merely committed in theory or an unfounded expectation that, if the transfer is authorized, the Cities will about-face, abandon all conservation measures, and apply water in excess of their needs. On the contrary, the law defines waste of water as "any act or omission that causes…(4) the application of water to an authorized beneficial use in excess of the needs for this use."[19] In the absence of an application of water, any claim of waste remains purely theoretical and speculative.

Similarly, the belief that the Cities would commit waste if the Application were approved as submitted has no actual tie to reality. The Cities presented significant evidence and testimony regarding the inadequacy of their current water sources[20] and the conservation practices implemented to meet basic human needs in times of shortage.[21] Hays City Manager, Toby Dougherty, testified both in a pre-hearing deposition as well as during the hearing that Hays has no intention of walking away from their water conservation programs and efficiency measures.[22] Despite the Joint Intervenors' repeated attempts to interpret this commitment as evidence that the Cities do not need the water transfer, a more reasonable interpretation is that the Cities are aware that careful usage is a necessary component of good stewardship of water, and they intend to continue exercising that care. Considering the facts and disregarding the speculation of waste, no

[18] *Water PACK and Edwards County Proposed Findings of Fact and Conclusions of Law,* p. 4-5, para. III(B).
[19] K.A.R. 5-1-1.
[20] *See, e.g.,* Quinday Test, Tr. Vol. 2 at 489:5-490:15 and Williams Test., Tr. Vol. 2 at 410:11-411:6.
[21] *See, e.g.,* Cities Ex. 1762, Bates No. 0072735-37 and Cities Ex. 2653, Bates No. 0103164-73.
[22] Water Transfer Act Public Comment Session, page 8; Dougherty Test., Tr. Vol. 1 at 171:1-172:23.

weight should be given to the Joint Intervenors' unsubstantiated claim that approval of the volume of water sought constitutes waste.

III. CONCLUSION

DWR believes that the record supports the conclusion that approval of the Application is appropriate and lawful. DWR does not believe the transfer would reduce the amount of water required to meet the present or any reasonably foreseeable future beneficial use of water by present or future users in the area from which the water is to be taken for transfer, and DWR does not believe the transfer would impair water reservation rights, vested rights, appropriation rights or prior applications. DWR believes the Cities' modeling work is sound and adequate and constitutes a sufficient showing as to the proposed transfer's impact, and DWR believes this position is adequately supported by the Application and associated exhibits, witness testimony, and the rest of the hearing record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 27th day of October 2023, a true and correct copy of the above Comments of DWR Regarding the Application of the Cities of Hays, Kansas and Russell, Kansas for Approval to Transfer Water from Edwards County, Kansas Pursuant to the Kansas Water Transfer Act was served by uploading it to OAH Case Nos. 23AG0003 and by electronic mail to the following:

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