

**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.

**WATER PACK AND EDWARDS COUNTY  
RESPONSE AND REBUTTAL TO CITIES' PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

Dated October 27, 2023  
Overland Park, Kansas

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**I. SUMMARY OF CITIES’ CONTENTIONS**

The Cities<sup>1</sup> in their proposed findings of fact and conclusions of law offer numerous contentions shrouded as truth. But their principal assertions are inaccurate or incomplete; collectively they are misleading. Broadly summarized, the Cities argue that (i) they own the water rights and effectively have an unfettered right to utilize the rights without regard to demonstrable need,<sup>2</sup> (ii) transferring the water as proposed will not cause impairment and is sustainable as determined by the Chief Engineer,<sup>3</sup> (iii) they have grown weary of water conservation and are entitled to relief,<sup>4</sup> (iv) because of a parochial view of the principles animating the Water Transfer Act (the “Act” or the “WTA”), they

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<sup>1</sup> “Cities” refer collectively to the City of Hays and the City of Russell. “Water PACK” refers to the Water Protection Association of Central Kansas.

<sup>2</sup> “The Cities purchased this – this property on the open market, they own the water rights, and they are entitled to exercise them, just like the irrigators are entitled to exercise theirs.”

Q Is -- is your request for 6756.8 acre-feet, limited to 4800 acre-feet on a rolling average basis, is that a reasonable request in your mind? A Yes, it is a very reasonable request. Q Is it unreasonable? A No, it is a reasonable request. The Cities of Hays and Russell bought an asset on the open market, and those asset -- that asset contains water rights which are governed by ownership rights. *The City of Hays and Russell have the right to put those water rights to use like every other water right owner. Tr. 372-373:18-25, 1-5.*

<sup>3</sup> “Moreover, that – those questions have already been litigated, and Water PACK has lost. The chief engineer is the ultimate authority on impairment, and the former chief engineer has issued an order with explicit findings that the transfer will not impair Water PACK's members' rights.” *Tr. 44:1-8. Tr. 37:14-18. “Most importantly is the R9 Ranch is sustainable.” Tr. 134:14-15.*

<sup>4</sup> “It's time to give the citizens of Hays and Russell what they're entitled to, we would respectfully request that you recommend that the panel approve the transfer as requested.” *Tr. 55:12-16.*

\* \* \*

The Cities of Hays and Russell have the right to utilize water like every other city in the State of Kansas does. There seems to be this idea that we should only be able to use a little bit of our water rights *because we don't need more water*. That flies in the face of Kansas water law. *If an irrigator buys a water right, an irrigation water right, they have the right to use that water right any way they so choose. Tr. 373:10-19* (Emphasis added).

are free to ignore its regulatory requirements;<sup>5</sup> and (v) if the transfer is approved, business will bloom and populations will grow despite the absence of factual proof or support in the economic literature for those posited outcomes. In respect to each contention the Cities are demonstrably wrong.

## II. RESPONSE AND REBUTTAL

### A. Separate from Ownership of Water Rights, the Water Transfer Act and the Anti-Speculation Doctrine Impose a Panoply of Limitations Upon Proposed Interbasin Transfers

Demonstrable need rather than water rights ownership is the cornerstone principle of the WTA. If the questions to be answered by the application process under the Act are only the usage parameters under the applicant’s water rights and whether an interbasin transfer will cause impairment in the donor basin, the Act is superfluous because those issues are addressed, governed, and limited by the Kansas Water Appropriation Act (the “KWAA”) and management programs adopted pursuant to the Groundwater Management District Act (the “GMD Act”).<sup>6</sup>

The requisite determination under the Act is not the maximum permitted usage under the relevant water right. It is, instead, of the available water resource, how much water is needed by the WTA applicant and how much can presently be put to beneficial use? To suggest, as the Cities evidently believe, that ownership and sustainability are the alpha

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<sup>5</sup> “Although I understand that the Cities do not believe that they are required to make the aforementioned balancing determination; *that the Cities believe that the transfer application amounts to a cursory, initial pleading*; and although I acknowledge that the Latest Draft and its exhibits contain a significant amount of information that is responsive to the balancing determination; I still find missing from the document specifics on the effects of approving or not approving the transfer.” Cities’ Exhibit 282 at Bates 0017633 (Chief Engineer Barfield’s April 18, 2019 letter to Traster).

<sup>6</sup> K.S.A. 82a-1507(b) (noting that an applicant must first comply with provisions of both the KWAA and any applicable Groundwater Management District program).

and omega of the inquiry under the Act demonstrates a profound misunderstanding of the Act’s purpose and rationale. In suggesting that they are under the Act “entitled to exercise [the water rights], just like the irrigators are entitled to exercise theirs,” the Cities’ misapprehension and myopia is on full display. An irrigator’s rights are derived from and limited by the KWAA and, in this instance, the Revised Management Program (the “Management Program”) for Big Bend Groundwater Management District Number Five (“GMD5”) dated October 11, 2018 and approved by former Chief Engineer Barfield on January 2, 2019.<sup>7</sup> To the contrary, whether the owner of a water right is entitled to move a large quantity of water a significant distance is governed, entirely, by the WTA.

The Act is not a KWAA redux, a Management Program circumvention, or a secondary adjunct of any other water resource regulatory regime. It is a separate, discrete statutory scheme with an entirely different purpose and focus. Unlike the KWAA, which is designed to fairly and responsibly allocate water resources based upon historical priorities,<sup>8</sup> the WTA, consistent with the law of all western states, exists as a means to assess whether applications to transfer large quantities of water over long distances can be justified based upon accepted conservation principles, demonstrable water needs, and intended beneficial use.<sup>9</sup> Absent documented need, an interbasin water transfer is deemed

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<sup>7</sup> Available at [http://archive.gmd5.org/Management\\_Program/2019-01-02\\_Approved\\_Management\\_Program.pdf](http://archive.gmd5.org/Management_Program/2019-01-02_Approved_Management_Program.pdf).

<sup>8</sup> “The KWAA sought to ‘establish principles for appropriation and use of water with a view toward conservation of this natural resource for the greatest benefit of its people . . . .’” Burke W. Griggs, *Beyond Drought: Water Rights in the Age of Permanent Depletion*, 62 U. KAN. L. REV. 1263, 1321 (2014).

<sup>9</sup> See, e.g., NEB. REV. STAT. § 46-289; *City of San Antonio v. Texas Water Comm’n*, 407 S.W.2d 752, 759 (Tex. 1966) (construing TEX. WATER CODE ANN. § 11.085); NEV. REV. STAT. ANN. § 533.370; OR. REV. STAT. § 537.809.

speculative, equates to waste<sup>10</sup> and is, by definition, inconsistent with the beneficial use requirement.

**1. THE AXIOMATIC PRINCIPLE OF BENEFICIAL USE LIMITS ANY TRANSFER UNDER THE ACT TO THE APPLICANT’S DEMONSTRABLE NEED**

Two normative principles of Kansas law are the intertwined concepts of beneficial use and the avoidance of waste.<sup>11</sup> If a proposed transfer under the WTA is not shown to be for a beneficial use or will result in waste, it cannot be approved.<sup>12</sup> Those concepts are simply incontrovertible.<sup>13</sup>

A use of water can be appropriately categorized as beneficial but diversions under a beneficial use may still be considered waste.<sup>14</sup> Admittedly, beneficial use includes municipal uses. K.A.R. 5-1-1(o). But, importantly, K.A.R. 5-1-1 (mmmm) further provides that “waste of water” means any act or omission that causes “(4) the application of water to an authorized beneficial use in excess of the needs for this use.” The Cities have the burden of proving the volume of water they seek to transfer will be sustainably applied to a beneficial use without waste.<sup>15</sup> As is evident, they cannot sustain that burden. It is not

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<sup>10</sup> K.A.R. § 5-1-1(mmmm)(4) (defining waste as “the application of water to an authorized beneficial use in excess of the needs for this use”); *Id.* § 5-5-7 (prohibiting waste and use of a water right pursuant to a finding of waste).

<sup>11</sup> 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* (Letourneau testimony).

<sup>12</sup> K.S.A. 82a-1502(c)(9) (the presiding officer must consider whether a proposed transfer complies with GMD programs, standards, policies, rules, and regulations); K.A.R. 5-25-8 (“A person shall not commit or allow a waste of water as defined in K.A.R. 5-1-1”).

<sup>13</sup> “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 water right does not entitle its owner to waste water.” Griggs, *supra* note 8, at 1314.

<sup>14</sup> Note 10, *supra*.

<sup>15</sup> See K.S.A. 82a-1504(a) (Presiding officer must make specific findings of fact regarding factors set forth in K.S.A. 82a-1502, factors that include compliance with GMD programs, standards, policies, rules, and regulations).

possible to determine whether the transfer proposed by the Cities will result in waste when the Cities are unable to articulate their needs.<sup>16</sup> The Cities presumably would argue that they will not utilize more water than they need, but water need is an eye-of-the-beholder nebulous concept not subject to any post-approval monitoring mechanism.<sup>17</sup> In that vein, this Kansas Senate testimony while the body was considering the original iteration of the WTA is instructive:

Remarks of Doyle Rahjes to the Senate Committee on Energy & Natural Resources Regarding SB 62 (February 10, 1983) (attached as Exhibit 1 at PDF page 3) (Emphasis added).

Mr. Chairman and Members of the Committee:

I am Doyle Rahjes, an Agra, Kansas, farmer and appointee of Senate President Ross Doyen to the Kansas Water Authority. I serve on the Executive Committee of the Authority and I served as chairman of the Authority's Committee charged with drafting legislation designed to guide the State of Kansas in dealing with proposed transfers of water across river basin boundaries.

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***The decisions to approve water movements may be virtually permanent. There may be no second chance to rectify a mistake.***

For the sake of all water users in this state, we cannot afford a mistake in allocating water to one area at the expense of another area of the state or several areas of the state.

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<sup>16</sup> The Cities do not know how much water they need. Per the Hays City Manager: “Q Okay. So when we talk about what -- what the City of Hays needs, you're telling us that you don't need it now, but you do need it, so when do you need it? A I don't know when we're going to need it.” *Tr. 101:20-24*.

<sup>17</sup> Nebraska, for example, provides for post-transfer monitoring: “For any transfer or change approved pursuant to subdivision (a) of this subsection, the department shall be provided with a report at least every five years while such transfer or change is in effect. The purpose of such report shall be to indicate whether the beneficial instream use for which the flow is maintained or augmented continues to exist. If the report indicates that it does not or if no report is filed within sixty days after the department's notice to the appropriator that the deadline for filing the report has passed, the department may cancel its approval of the transfer or change and such appropriation shall revert to the same location of use, type of appropriation, and purpose of use as prior to such approval.” NEB. REV. STAT. ANN. § 46-290.

***The bill is a water management tool.*** It is designed to provide guidelines, a mechanism for making the best possible check before a decision is made. It is not restrictive. It does not prohibit transfers.

This state has worked to share its tax burdens in the best interest of the state as a whole. If once in a while we make a mistake in allocating taxes, it can be rectified with legislation in the next session. But sharing and allocating water is different. ***When you have approved a water allocation and a \$200 million pipeline has been put down for more than 100 miles and a tremendous investment has been made in new treatment plants, a mistake is next to impossible, if not impossible, to rectify in the next session.***

Thus immutable logic and the express provisions of the Act make clear that water needs must be determined in advance of approval of the transfer application. If water transfer applicants are not required to ascertain and present evidence showing their prospective water needs, it is difficult to discern a purpose for the WTA and even more difficult to identify a reason for K.A.R. 5-50-2(r)(s)(v) and (w), which mandate preapproval provision of information regarding population projections and present and projected water demands. Evidence must be provided to show:

- (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;  
[...]
- (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[.]

Relevant to both the Act's regulatory strictures and the Act overall, the presumption

is always that legislatures and regulatory agencies promulgate statutes and regulations for a purpose. “We will not interpret the DPA contracts so as to render these statutes and regulations superfluous.” *Hercules Inc. v. United States*, 516 U.S. 417, 429, 116 S. Ct. 981, 988, 134 L. Ed. 2d 47 (1996). Here, conceding they do not know how much water they need, the Cities provide no information regarding projected water needs nor data regarding projected per capita per day usage. Though a population growth projection is included in the application, even the Cities concede it is markedly overstated. Without information demonstrating future water needs and a reliable estimate of expected population growth, the Cities cannot confirm future beneficial use without waste and approval of the WTA application is impracticable. As hereinafter discussed, the Cities proposal as structured runs afoul of both the anti-speculation doctrine and regulations applicable to water rights holders in GMD 5.

## **2. THE ANTI-SPECULATION DOCTRINE IS A FUNDAMENTAL IMPEDIMENT TO AND MILITATES AGAINST APPROVAL OF THE CITIES’ REQUEST**

The anti-speculation doctrine,<sup>18</sup> adopted in all western states, has the effect of preventing interbasin water transfers where the applicant cannot demonstrate need and a present beneficial use. The beneficial use requirement is the philosophical anchor for the doctrine. “Indeed, for well over a century, we have made clear that the anti-speculation doctrine is best understood as a component of the constitutional beneficial use requirement itself.” *United Water & Sanitation Dist. by & through the United Water*

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<sup>18</sup> “Anti-speculation doctrine, codified throughout the KWAA, requires specific descriptions and commitments for planned water use.” GRIGGS, BURKE, *Legal Aspects of Large-Scale Water Transfers* (December 1, 2020), p. 30, available at [https://kwo.ks.gov/docs/default-source/kwo-webinars/griggs\\_transfer\\_presentation\\_kwa\\_120120.pdf?sfvrsn=b0908314\\_2](https://kwo.ks.gov/docs/default-source/kwo-webinars/griggs_transfer_presentation_kwa_120120.pdf?sfvrsn=b0908314_2).



*Acquisition Project Water Activity Enter. v. Burlington Ditch Reservoir & Land Co.*, 2020 CO 80, ¶ 17, 476 P.3d 341, 346–47. “Beneficial use is the lynchpin of the prior appropriation system, as it is ‘the basis, measure, and limit’ of a water right. All western water codes encapsulate the ‘doctrinal trinity of beneficial use, waste, and forfeiture.’” ZELLMER, S., 2007, *The Anti-Speculation Doctrine and Its Implications for Collaborative Water Management*. NEV. L. J. 8, P.994, 1004.

All parties, municipalities included,<sup>19</sup> seeking to effectuate a water transfer are constrained by the anti-speculation doctrine and the incorporated principles of beneficial use. The Colorado Supreme Court has encapsulated the doctrine:

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).

As noted in *City of Thornton*, *supra*, note 19, the anti-speculation doctrine requires a municipality seeking approval of a transfer of water to provide convincing evidence of its reasonably anticipated requirements based on substantiated projections of future growth.

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<sup>19</sup> “[A] municipality may be decreed conditional water rights based solely on its projected future needs, and without firm contractual commitments or agency relationships, but a municipality’s entitlement to such a decree is subject to the water court’s determination that the amount conditionally appropriated is *consistent with the municipality’s reasonably anticipated requirements based on substantiated projections of future growth*. *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 39 (Colo. 1996) (emphasis added).

The doctrine has also been interpreted to require proof by the applicant that it is able to finance the water transfer infrastructure and will apply the water to a beneficial use with reasonable dispatch.

This doctrine precludes speculative water right acquisitions without a showing of beneficial use. Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State's water law jurisprudence. Thus, we agree with this limitation on an applicant's showing of third-party need and adopt the anti-speculation doctrine's formal relationship requirement for Nevada. Further, we note that our adoption of this doctrine comports with the language and goals of NRS 533.370(1)(c)(2), which, to protect against speculation, requires the applicant to show both financial ability and a reasonable expectation with respect not only to constructing any work needed to apply the water, but also to “apply the water to the intended beneficial use with reasonable diligence.”

*Bacher v. Off. of State Eng'r of State of Nevada*, 122 Nev. 1110, 1119–20, 146 P.3d 793, 799 (2006).

Ultimately most relevant to this proceeding, the beneficial use/demonstrable need/absence of waste nexus is similarly ingrained in and an integral part of Kansas water law. “The holders of an appropriation right do not own the groundwater—they simply **have a right to use it subject to the beneficial use principle.**” *Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370, 381, 347 P.3d 687, 694 (2015) (emphasis added). Common to all western states, water transfer applications that do not demonstrate a need for the volume of water requested are routinely denied as speculative<sup>20</sup> because absent a demonstrable need the resource will be wasted and, as a matter of accepted doctrine, not consumed beneficially.

Out-of-basin transfers are 100 percent consumptive to the basin of origin.

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<sup>20</sup> Speculation in the water transfer milieu has been defined as “acquiring a resource or good for later use or resale rather than for immediate, actual use.” NEUMAN, JANET C., *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 *Envtl. L.* 919, 964 (1998).

Transbasin diversions already exist. Additional transfers should occur only where the proposed user can demonstrate efficient use of presently developed supplies of water, can provide assurance that any additional water transferred out of the basin will be used in an efficient manner, and can show that this source of supply is the best available alternative.

LAWRENCE J. MACDONNELL and TERESA A. RICE, *Moving Agricultural Water to Cities: The Search for Smarter Approaches*, 14 *Hastings West Northwest J. of Env'tl. L. & Pol'y* 105, 154 (2008).

[https://repository.uchastings.edu/hastings\\_environmental\\_law\\_journal/vol14/iss1/3](https://repository.uchastings.edu/hastings_environmental_law_journal/vol14/iss1/3)  
(last visited 10.22.2023 at 8:42 a.m.)

The Cities in this proceeding, contrary to the perspicuous requirements of the anti-speculation doctrine and the Act’s enabling regulations, offer no evidence of anticipated water requirements, an admittedly flawed and inaccurate population growth projection, an admission that they have not developed an infrastructure financing model,<sup>21</sup> and admit they are uncertain when the project, if approved, will be completed.<sup>22</sup>

The anti-speculation doctrine serves the salutary purpose of “[curbing] the worst potential abuses of market forces by forcing transacting parties to articulate how and when the water will be applied to actual, beneficial uses. . . .” Zellmer, *supra* at 998. As is apparent by reference to the Act’s implementing regulations,<sup>23</sup> the Act is the legislative

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<sup>21</sup> 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.” *Tr.* 339, 6-12.

“So it sounds like it would be fair to say that you don't know whether it can be financed if you (Russell) have to pay 18 percent, fair? A Yeah.” *Tr.* 563:8-11.

<sup>22</sup> “Q Does part of your estimate, which I guess it does, take into account the expected completion date for the project? 981 A I don't recall. I don't recall. Q I don't have anything else, Mr. Waddell, thank you.” *Tr.* 980-981,23-25,1-3.

<sup>23</sup> To be complete, a water transfer application shall show, *inter alia*, the following: (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

embodiment of the anti-speculation doctrine. Together with the Act’s provisions and the ancillary implementing regulations, the doctrine as legislatively and administratively adopted by Kansas<sup>24</sup> is an insuperable barrier to approval of the requested transfer.

**B. Mandatory Adoption of and Adherence to an Approved Conservation Plan Defines and Limits the Cities’ Water Needs**

Importantly and relevant to assessment of the overarching goals of the WTA and the question of how much water is enough for the Cities, a water transfer applicant must develop and adhere to an approved conservation plan.<sup>25</sup> The Kansas Municipal Water Conservation Plan echoes the requirement for those entities seeking to transfer water

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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; (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; (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; (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. K.A.R. 5-50-2.

<sup>24</sup> “Q. You testified, you were asked by Mr. Traster whether you're acquainted with Burke Griggs, correct? A. Correct. Q. And you are, in fact? A. Yes. Q. And, in fact, you worked with him on some level, right? A. Yes, and lucky enough to keep in contact with him. Q. Okay. And he is a noted water law expert, is he not? A. Yes. Q. Okay. So he has written that Kansas has adopted the Anti-Speculation Doctrine, and I think you agree with that from yesterday's testimony? A. Yes.” *Tr. 1022-1023:25,1-16* (Letourneau testimony).

<sup>25</sup> “No water transfer shall be approved under the provisions of this act: . . . (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. . . .” K.S.A. 82a-1502.

pursuant to the WTA.<sup>26</sup> A transfer may not, in fact, be approved absent proof of adoption and maintenance of a plan. An approved conservation plan limits water use by both the participating municipality and entities to be supplied water by the applicant, and thus directly impacts the question of the municipality’s water needs for purposes of the WTA.<sup>27</sup>

The requirement that a WTA applicant adopt, maintain, and submit to the Presiding Officer a conservation plan encompassing entities to be supplied by the applicant illustrates the conservation ethos underpinning the Act, as well as deference to applicable district management programs, and makes clear that the Act is intended to limit transfers to reasonable needs so as to promote and facilitate water conservation and prudent stewardship.<sup>28</sup>

Both California and Kansas have taken a comprehensive, "big picture" view of water transfers. With some provisions, like those addressing conservation practices, these states are evaluating whether the transfer applicant in fact needs the water requested. With others, the provisions instead assume the water is needed, and focus on whether the social, economic and environmental consequences on balance are acceptable, considering the welfare of the state as a whole.

While states like Kansas are attempting to encourage water conservation in the context of water transfers, other states are moving to directly mandate more efficient use of water.

MACDONNELL and RICE, *supra* at 120; *see also* K.S.A. 82a-1502 (“No water transfer shall

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<sup>26</sup> “Other 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.” *Kansas Municipal Water Conservation Plan Guidelines* published in August of 2007. *See Cities’ Exhibit 817 at Bates 21342.*

<sup>27</sup> *See* K.A.R. 5-50-2 (p).

<sup>28</sup> *Id.*; K.S.A. 82a-1020 (“It is hereby recognized that a need exists for the creation of special districts for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; for the prevention of economic deterioration; for associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets. ”)

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[.]”)

As described in the Intervenors’ proposed findings earlier submitted, the approved conservation plans for Hays and Russell, agreed to by the respective cities based upon calculated needs, caps water usage at levels far below the water volumes sought by the Cities and consequently renders the proposed transfer redundant of presently available resources and superfluous.

Framed in terms of possibilities rather than probabilities or commitments,<sup>29</sup> the Cities offer the unsubstantiated argument that additional water could conceivably promote growth. The Cities’ hope for substantial growth is short on facts and long on aspirations. But even theoretically accepting the Cities’ conjectural vision, the Act does not represent salvation. It is neither designed nor intended to function as an economic development initiative. No evidence or argument has been presented to support the view that the Act should be so construed. In the best-case scenario economic and population growth is, at most, ancillary fallout. Conservation is, instead, the galvanizing tenet behind the WTA<sup>30</sup> and, more broadly, represents the expressed public policy of the State.<sup>31</sup> It is the hallmark

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<sup>29</sup> “We have received reports that show with various population growth scenarios what the water demand could possibly be with those growth scenarios.” *Tr. 300:1-4* (Dougherty Testimony). “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*.

<sup>30</sup> A concept presumably neither controversial nor objectionable to the Cities: “Q. So it's true we just reviewed these conservation measures, and it's the City's (Hays) intent to keep those conservation measures in place whether the water transfer application is approved or not, right? A. Correct.” *Tr. 342:12-17*.

“Q. [I]s it the City's (Russell) intention to -- to back away from conservation measures that the -- that have been traditionally imposed in the City? A. No, not at all. Q. So would you intend to keep those in place regardless of what happens with the R9 project? A. Yes.” *Tr. 589:13-20*.

<sup>31</sup> *Compare* K.S.A. 82a-1020 *with* K.S.A. 82a-1507(b) *and* Management Program at 13 (describing GMD5’s sustainability requirements).

against which the question of the net benefits to the state under K.S.A. 82a-1502 must be judged. That conclusion is buttressed by this statutory pronouncement of the State's objectives in respect to conservation and development of water resources:

The long-range goals and objectives of the state of Kansas for management, conservation and development of the waters of the state, are hereby declared to be:

- (a) The development, to *meet the anticipated future needs of the people of the state*, of sufficient supplies of water for beneficial purposes;
- (b) the reduction of damaging floods and of losses resulting from floods;
- (c) the protection and the improvement of the quality of the water supplies of the state;
- (d) the sound management, both public and private, of the atmospheric, surface, and groundwater supplies of the state;
- (e) *the prevention of the waste of the water supplies of the state*;
- (f) the prevention of the pollution of the water supplies of the state;
- (g) the efficient, economic distribution of the water supplies of the state;
- (h) the sound coordination of the development of the water resources of the state with the development of the other resources of the state; and
- (i) *the protection of the public interest through the conservation of the water resources of the state in a technologically and economically feasible manner.*

K.S.A. 82a-927; *see also* K.S.A. 82a-706 ("The chief engineer shall 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 for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation.")

Incorporation of a conservation plan requirement is cogent evidence that the Act's true focus is on an applicant's water needs. The persistent cry for more water without evidence of future needs is not enough. The Cities have unreservedly failed to adduce the requisite

data.

**C. The Cities’ Suggestion That the Question of Potential Impairment as a Consequence of the Proposed Transfer Is Not Before This Tribunal by Virtue of the Chief Engineer’s Consideration of the Issue in the Discrete Change of Use Proceeding is Misguided and Unsupportable**

Subject to the adoption, implementation, and adherence to a conservation plan, no water transfer may be approved if it will cause impairment.<sup>32</sup> Here, appropriately defined, the requested transfer will cause impairment.<sup>33</sup> But incongruously, the Cities argue that the question of impairment is effectively *res judicata*<sup>34</sup> as a result of the Chief Engineer’s findings in the change of use proceeding. They are incorrect.

As a first principle and largely dispositive of the Cities’ argument, *res judicata* is typically not applicable to administrative proceedings. “Clearly, the doctrines of *res judicata* and *stare decisis* are not generally applicable to administrative determinations.”

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<sup>32</sup> (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. . . .” K.S.A. 82a-1502(b).

<sup>33</sup> “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.

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.” *WP Exhibit 01864* at PDF 37 (Larson Testimony and Report).

“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. 1038-1039: 19-25, 1.* (Letourneau testimony).

<sup>34</sup> *Logan v. United States*, 272 F. Supp. 2d 1182 (D. Kan. 2003) (Doctrine of *res judicata*, or claim preclusion, prevents party from relitigating issues that have been determined in prior action; doctrine applies when there has been final judgment on the merits in earlier action in which parties or their privies were identical and causes of action were identical).



*Riedmiller v. Harness*, 29 Kan. App. 2d 941, 944, 34 P.3d 474, 476 (2001).

Second, the WTA directly conditions approval of a water transfer upon a finding that the transfer will not result in impairment absent adoption of conservation measures. The Act does not, directly or by implication, designate the Chief Engineer as the arbiter of that decision – he is not (in the Cities’ parlance) “the ultimate authority on impairment.” For purposes of this proceeding the Chief Engineer has made no determination, one way or the other, that the proposed transfer will or will not result in impairment. Our Court of Appeals has already twice opined on the ordinary meaning of the word “impair” to signify that the “holder of a senior water right may seek injunctive relief to protect against a diversion of water by a holder of a junior water right when that diversion diminishes, weakens, or injures the prior right.” *Garetson Bros. v. Am. Warrior, Inc.*, 435 P.3d 1153, 1171 (Kan. App. 2019) (citing *Garetson Bros. v. Am. Warrior Inc.* 347 P.3d 687, 698-99 (Kan. App. 2015)). Under the *Garetson* definition, any type of impact on junior users or beneficial uses in the donor basin resulting from the Cities’ plans for the R9 Ranch, regardless of magnitude, is deemed to be injurious.<sup>35</sup> What’s more, the Chief Engineer must always enforce and administer Kansas laws pertaining to the beneficial use of water “in accordance with the rights of priority of appropriation.” K.S.A. 82a-706. And under the laws of Kansas and other states following western water law, no person may prevent any waters of Kansas from moving to a person having a prior right to use the same,

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<sup>35</sup> Letourneau Testimony at 1038:6-1039:6. A related consideration is the fact that a one-foot reduction in saturated thickness beneath an irrigated parcel lowers the market value of such a parcel, thus triggering concerns under the Kansas Private Property Protection Act, as well as other condemnation-related protections arising under Kansas constitutional and statutory law. See WPO0545 (one fewer foot of saturated thickness under a parcel decreases its market value by between \$3.42 and \$15.86 per acre).

including via enlargement of an existing water right to the detriment of surrounding water uses. *Wheatland Elec. Co-Op., Inc. v. Polansky*, 265 P.3d 1194, 1201 (Kan. App. 2011) (“When the owner applies to change the right's use, he or she should not automatically be entitled to the same quantity and rate of diversion as with the original use. Different uses demand different quantities of water and return different amounts of water back into the ecosystem. It is reasonable, then, that the new quantity and rate of diversion should depend upon what new use the owner wants to make of the property and how that new use will affect other existing water rights and the public.”)

Third, the procedural posture of the separate KWAA change of use determination negates the application of the doctrine because the parties are not identical, Edwards County not being a party to the KWAA proceeding. What’s more, the Legislature made clear in the WTA that both the KWAA and applicable district management plans are separate and controlling authorities. K.S.A. 82a-1507(b) (The applicant must first comply with both a lawful GMD management program and (if applicable) the KWAA).

Though expert testimony is undoubtedly necessary in respect to the question of impairment, the Act in no sense requires or permits the Presiding Officer to abdicate his responsibility to decide the question in favor of the Chief Engineer. The matter must be resolved based upon evidence presented in this proceeding.

**D. The Cities Are Not Able to Determine Their Future Water Needs and Their Calculated Future Safe Yields Belie Any Need for the Volume of Water They Seek**

The Cities seek to artificially increase their available water resources by means of an interbasin transfer, but the Act only allows transfers in amounts that correspond to

documented need. The evidence in respect to water needs shows two verities. First, the Cities do not know how much water they need. Per the Hays City Manager:

- “Q. So you don't know -- pardon me. You don't know what your future needs will be? 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.*
- “We don't know what our future water need is.” *Tr. 359:16.*
- “Q Okay. So when we talk about what -- what the City of Hays needs, you're telling us that you don't need it now, but you do need it, so when do you need it? A I don't know when we're going to need it.” *Tr. 101:20-24;*

Second, the amount of water the Cities seek to transfer from the R9 Ranch (formerly known as the Circle K Ranch) vastly exceeds the needs determined by the City of Hays own expert who was asked to calculate future safe yields<sup>36</sup> under varying drought scenarios.<sup>37</sup>

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<sup>36</sup> The safe annual yield means the amount of water reliably available in dry years.

<sup>37</sup> Cities Exhibit 2828 at 0103765. “BMcD did not have data to evaluate the long-term aquifer yield for Russell.” Id at 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.*

The tables reveal that in even the most calamitous scenarios modeled by Hays’ expert the city has residual safe yield — 830 acre-feet in the event of a decadal drought and 480 acre-feet upon the occurrence of a multi-decadal drought. The City of Hays confirms the accuracy of those numbers.<sup>38</sup>

On the consumption side of the ledger, Hays has consistently in recent years consumed approximately 2000 acre/feet of water annually. “A. Again, I would have to

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<sup>38</sup> “[W]hat you see is during a decadal drought such as the 1930s drought, our sources produced only 840 acre-feet of water. We consume 2,000 acre-feet of water a year. To cut that less than half is a humanitarian disaster for Hays, Kansas. In a multidecadal drought, our sources, which are part of the historical record, our sources produce less than 500 acre-feet of water.” *Tr. 98:2-10* (Dougherty testimony).

review; Hays uses approximately 2,000 acre-feet on an annual basis. Q. And that's been consistently the case in recent years? A. For the most part, yes.” *Tr. 309-310: 23-25, 1-3* (Dougherty testimony). Based upon the analysis by Hays’ expert, in the case of a multidecadal drought Hays would need an additional 1520 acre-feet of water (2000 a/f – 480 a/f = 1520 a/f).<sup>39</sup> These are the shortfall numbers in the event of the more likely occurrence of exceptional or decadal droughts.

**CITIES FIRM WATER YIELD**

- “Hays used 1,792 acre-feet of water in 2020 but has firm water yield of only 1,760 acre-feet during an exceptional drought. Russel [sic] used 974 acre-feet of water in 2020 but has firm water yield of only 789 acre-feet during an exceptional drought.”
  - Hamilton Report at 14, FN 58.
- “During a decadal drought, for example, Hays’ firm water yield will decline to 840 acre-feet per year, resulting in devastating losses to the Cities.”
  - Hamilton Report at 35.

**PROJECTED SHORTFALL  
EXCEPTIONAL AND DECADAL DROUGHT SCENARIOS**

<u>Hays Exceptional Drought</u>	
2020 Usage	1792 acre-feet
Firm Yield	1760 acre-feet
<b>Shortfall</b>	<b>32 acre-feet</b>
<u>Russell Exceptional Drought</u>	
2020 Usage	974 acre-feet
Firm Yield	789 acre-feet
<b>Shortfall</b>	<b>185 acre-feet</b>
<u>Hays Decadal Drought</u>	
2020 Usage	1792 acre-feet
Firm Yield	840 acre-feet
<b>Shortfall</b>	<b>952 acre-feet</b>

The calculations are damning for the Cities. Even accounting for Russell’s 18% interest

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<sup>39</sup> See WP 01870.

in the R9 water ( $4800 \text{ a/f} \times 18\% = 864 \text{ a/f}$ ), Hays is seeking to transfer a volume of water that exceeds by 2.5 times its documented needs ( $4800 \text{ a/f} - 864 \text{ a/f} = 3936 \text{ a/f} \div 1520 \text{ a/f shortfall} = 2.59\%$ ).

And, of course, there is little certainty and much variability in long-term drought forecasting. That uncertainty was acknowledged by Dr. Layzell, the witness called by the Cities to testify regarding the “frequency, duration, and intensity of drought occurrences over the last 1,000 years, adduced from the paleoclimatic record.”<sup>40</sup> In his report Dr. Layzell notes the inherent uncertainty of long-range drought projection: “Furthermore, certain factors present challenges to effective water-resource management including 1) current levels of uncertainty in predicting future drought occurrence.” *Cities’ Exhibit 2826* at Bates 0103656.

Global water scarcity studies depend on long-term projections of climate, population growth, technology change, and other factors that are deeply uncertain, meaning that neither the appropriate distribution nor the correct systems model is agreed upon. Complicating matters, the coupled human-earth system is complex, exhibiting nonlinearities and emergent properties that make it difficult to anticipate important drivers in the scenario selection process.

DOLAN, F., LAMONTAGNE, J., LINK, R. et al., *Evaluating the Economic Impact of Water Scarcity in A Changing World*. Nat Commun 12, 1915 (2021), <https://rdcu.be/dpcCN> (last visited 10.22.2023 at 10:17 a.m.).

Whether the most pessimistic forecasts of future relentless drought are predictive is unsettled. Well-respected studies<sup>41</sup> often cited suggest annual precipitation over the long-

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<sup>40</sup> *Cities’ Exhibit 2826* at Bates 0103617.

<sup>41</sup> The Climate Science Special Report (CSSR) is designed to be an authoritative assessment of the science of climate change, with a focus on the United States, to serve as the foundation for efforts to assess

term in the Southern Great Plains (including Kansas) is likely to remain relatively static: “Average annual precipitation projections suggest small changes in the region, with slightly wetter winters, particularly in the north of the region, and drier summers. However, the frequency and intensity of heavy precipitation are anticipated to continue to increase, particularly under higher scenarios and later in the century.” EASTERLING, D. R., J. R. ARNOLD, T. KNUTSON, K. E. KUNKEL, A. N. LEGRANDE, L. R. LEUNG, R. S. VOSE, D. E. WALISER, AND M. F. WEHNER, 2017: Precipitation Change in the United States. *Climate Science Special Report: Fourth National Climate Assessment, Volume I*. Wuebbles, D. J., D. W. Fahey, K. A. Hibbard, D. J. Dokken, B. C. Stewart, and T. K. Maycock, Eds., U.S. Global Change Research Program, Washington, DC, USA, 207–230. doi:[10.7930/JoH993CC](https://doi.org/10.7930/JoH993CC) (last visited 10.21.2023 at 6:25 a.m.).

In short, the Cities do not know their future water requirements and, to a certainty, in even the direst future climatic conditions the requested transfer from the R9 Ranch exceeds their needs by a significant multiple.

**E. The Cities’ Contentions Regarding the Expected Catalytic Growth Effect of the Proposed Water Transfer Are Unsupported by Facts or Data and Represent a Solution in Search of an Economic Problem**

**1. THE CITIES ARGUMENTS SUGGESTING THEIR ECONOMIC GROWTH HAS BEEN STYMIED BY LIMITED WATER RESOURCES ARE CHIMERICAL**

“Hays’ water supply problems have already adversely affected its growth, and the wellbeing of both Cities is closely tied to the availability of sufficient water.” *Cities’ Exhibit 0001 at Bates 000034*. That statement made part of the Cities’ WTA application is

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climate-related risks and inform decision-making about responses. <https://science2017.globalchange.gov/chapter/front-matter-about/> (last visited 10.23.2023 at 10:23 a.m.).

distinctly undermined by the Cities’ self-described present economic circumstances. The Russell city manager characterizes the present business climate in the community as promising. The executive director of Grow Hays testified that he is feeling good about the city’s present economic circumstances and considers Hays to be the gem of the high plains. To the extent the Cities confront challenges, their leaders have not previously ascribed them to the lack of water resources. These are testimony excerpts from the transfer hearing by those individuals.

- **Russell** *Tr. 576:13-17* (Quinday)

“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.”

- **Russell** *Tr. 580:1-10* (Quinday)

A. [PureField] have told me that they are planning that expansion in phases, and one of their concerns is the availability of a long-term water supply.

Q. But they're still planning on the expansion, it sounds like?

A. Yes. Q. Okay. PureField is a fairly good size employer for a community the size of Russell, was it offered incentives to come to Russell?

A. I'm not aware of anything.

- **Russell** *Tr. 491-492:22-25,1-7* (Quinday)

A. We're getting a lot of young people move back, to the point that housing is very limited and rentals are -- there's a wait list.

Q. Waiting list for rentals?

A. Yes.

- **Hays** *Tr. 438-440:13-25,1-25,1-24* (Williams)

Q Okay. Okay. Well, let me – let me show – you were – you made a presentation, which I’m sure you recall, to the, I think to the Hays City Commission in January 2023 talking about economic prospects essentially. Do you recall that?

A I do.



Q Let me show you a newspaper article, you can tell us if it’s accurate or not.

A Okay.

Q The – this is from the Hays Post, Mr. Williams, that was dated January 29<sup>th</sup>, 2023, it reports on your appearance, I think, the week prior to that?

A Right.

Q And if we scroll down, there’s just part of this that I want to look at, which is – which is highlighted. And that’s the first place, it talks about the microfactory that will be an incubator for four to six industrial start-ups at a time, allowing manufacturers to operate – operations at a much lower cost than if they were set up in their own location. So that sounds as if that’s a pretty positive development, or at least that’s how it was characterized by the newspaper; is that right?

A Yes.

Q Okay. So if we scroll down and there you’re talking about Imagine Ellis County, and what – what is Imagine Ellis County?

A Imagine Ellis County is a committee, a group we put together within – as a Grow Hays committee to promote Ellis County –

Q Okay.

A – basically.

Q Well, that group, it says, is marketing the area to pull in new residents with a targeted focus on people who may want to leave the hectic living conditions in the Denver and Rocky Mountain front range area. And then it says, business activity in Hays last year was robust. Is that – is that accurate?

A Yes.

Q Okay. It says that 17 new businesses or acquisitions were opened in the community, and I presume that’s correct, right?

A Yes.

Q Okay. And that the trend continues into the new year with five more in the process that will open in the next 60 to 90 days, correct?

A Yes.

Q Okay. And then also it’s reported that you said there are retail developers actively looking at the community, including a couple of big-box retailers, and, again, correct?

A Yes.

Q Okay. So I think that is all of that that we have highlighted. So the – at least based on this indication, economically things in this period of time are – are – you’re feeling good about. Is that a fair statement?

A It is a fair statement.

- **Hays Tr. 423:15-25** (Williams)

A Well, I think Hays is the gem of the high plains. We're -- we're located right on I-70 halfway between Kansas City and Denver, we have a great four-year university that I would put up against any university in the country. We have a tremendous regional medical center. We have great cultural activities because of the university and sporting events, and we have a great culture, it's a safe community. I just can't say enough that we -- we have a terrific community.

- **Hays WPO1867 at PDF 16** (quoting Williams discussing business recruitment impediments without mentioning water)

“According to the Grow Hays’ 2020-2021 Operational Plan, ‘Business recruitment remains the single most challenging objective for Grow Hays. With workforce shortages, high land and housing costs, regional depopulation and the recent pandemic, recruitment of large employers or retail establishments is indeed a challenge.”

- **Hays WPO01867 at PDF 5-6** (Quoting Hays City Attorney complaining that the State of Kansas has unfairly and inaccurately characterized Hays as water resource challenged)

One of the main sticking points involves the perception that the state had given out that Hays is a water-short area unsuitable for industry looking to locate in Kansas.

The Kansas Department of Commerce and Housing will take the lead in making sure the city is portrayed as an area with suitable water supplies. "What we envision is doing some in-house education of state officials so we can get off the milk carton and on the advertising campaign," Bird said, likening the treatment to picturing missing children on milk cartons. "We don't want special treatment. We want truthful treatment. We want to be on the A list," he said.”

These descriptions of the Cities’ economic activities and prospects are not indicative of communities in crisis and certainly not for reasons attributable to the lack of water.

## **2. INFRASTRUCTURE IMPROVEMENTS AND ECONOMIC INCENTIVES GENERALLY ARE UNCOMMONLY A ROBUST CATALYST FOR POPULATION OR ECONOMIC GROWTH**

It will not be lost upon this tribunal that the Cities have failed to identify even one, not one, business enterprise that has committed to open a business in either city or declined to do so because of the reality or perception of inadequate water resources. The one specifically referenced business, Cessna Aircraft, that Mr. Williams speculated may have

chosen Independence, Kansas over Hays based upon concerns about water availability did so for reasons unrelated to water according to published reports. This is Mr. Williams’ testimony: “Well, in that time frame, Cessna was looking at an expansion, and Hays was one of the finalists in that expansion that they were going to do. And they ultimately chose Independence, Kansas as the recipient of that.” *Tr. 404:15-19*. This is a press report discussing Cessna’s selection of Independence as the site for its new plant based upon factors other than water.

Where to build was a more difficult choice. Cessna's Wichita plants were full of Citation and Caravan business. Adding on was possible, but Boyarski says management feared "absorbing the jet mentality: low volume, high customization, slow move rates on the line." Getting out of town would help. Leaving behind the International Association of Machinists and Aerospace Workers wouldn't hurt, even though Kansas is a right-to-work state and not everybody belongs to the union. ***But Cessna didn't want to leave its native Kansas any more than Dorothy did. Thus Independence, 120 miles away--with the choice encouraged by a little tax abatement, some help with worker training, and a two-runway city airport 40 minutes or so by air from the ramp at headquarters.***

[https://money.cnn.com/magazines/fortune/fortune\\_archive/2000/05/01/278934/index.htm#:~:text=Where%20to%20build,ramp%20at%20headquarters](https://money.cnn.com/magazines/fortune/fortune_archive/2000/05/01/278934/index.htm#:~:text=Where%20to%20build,ramp%20at%20headquarters) (emphasis added)  
(last visited 10.23.2023 at 5:40 p.m.)

In addition to providing context about the rationale for choosing Independence over Hays, the passage also illustrates a commonsense observation – net economic benefit to the state only accrues if a new business selects Hays instead of another community located outside of the State of Kansas. Otherwise, it is a zero-sum game for the affected communities but an economic wash for the State.

The Cities must shoulder the burden of establishing a net benefit accruing to the State of Kansas if the water transfer is approved. To the extent a net benefit is viewed through

the prism of economic growth and development that would be contingent upon sustained business recruitment by the Cities, the path is long and the landscape speculative at best. The Hays city manager's testimony: "I'm also not sure how we're going to grow in the future, and so I can't determine that. *Tr. 102:7-9. (Dougherty)*."

The Cities' vacillation regarding future growth prospects is not surprising. There is a wealth of research and several studies that suggest economic benefit analyses can often overstate the impact and understate the cost of infrastructure projects. A few pertinent examples and their key points are:

- HODGE, G. & GREVE, C. (2010), *Public-Private Partnerships: Governance Scheme or Language Game?* Australian Journal of Public Administration, 69: S8-S22. <https://doi.org/10.1111/j.1467-8500.2009.00659.x>. This research highlights the complexities and challenges in ensuring accountability and actual economic benefit when public and private sectors collaborate on infrastructure projects.
- FLYVBJERG, BENT (2016). *Over Budget, Over Time, Over and Over Again: Managing Major Projects*. <https://ssrn.com/abstract=2278226>. Flyvbjerg discusses the prevalent issue of cost overruns and benefits shortfalls in infrastructure projects, emphasizing that this phenomenon is often due to strategic misrepresentation, i.e., promoting projects with deliberately overstated benefits and understated costs.
- ALBALATE, D. & BEL, G. (2012). *The Economics and Politics of High-Speed Rail: Lessons from Experiences Abroad*. <https://www.researchgate.net/publication/269039468>. This paper emphasizes the inconsistencies and overestimations related to the socio-economic benefits of high-speed rail projects globally.
- FLYVBJERG, BENT & HOLM, METTE AND BUHL, SØREN, *How (In)Accurate Are Demand Forecasts in Public Works Projects? The Case of Transportation* (April 1, 2005). Journal of the American Planning Association, vol. 71, no. 2, pp. 131-146. Available at SSRN: <https://ssrn.com/abstract=2238050>. The study shows with very high statistical significance that forecasters generally do a poor job of estimating the demand for transportation infrastructure projects. For 9 out of 10 rail projects, passenger forecasts are overestimated; the average overestimation is 106%.

In reality, economic and population growth are generally precipitated by serendipitous

factors over which municipalities have only marginal control.

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Finally, natural features are all positively associated with economic health. The presence of a national or state park or major lake is significantly associated with economic health. In summary, as far as environmental traits are concerned, it appears that the healthiest communities are those with good weather, natural environmental features particularly parks and water, and that lie close to other larger cities. *Id.* at 228.

Thus, it seems clear that breaking out of past patterns is very difficult for cities. Specifically, if cities were fortunate in the past, they will likely remain healthy in the future regardless of any particular policy actions. Less healthy communities will have to work very hard to improve their fortunes. *Id.* at 229.

Reese concludes and the data confirms that relatively mundane municipal investments are the key to growth.

What does appear related to economic growth? The answer, based on the data here, clearly seems to be investments in policies and activities that make the community a better place to live: good local schools, safe streets,

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<sup>42</sup> REESE, L. A., & MINTING YE. (2011). *Policy Versus Place Luck: Achieving Local Economic Prosperity*. *Economic Development Quarterly*, 25(3), 221-236. <https://doi.org/10.1177/0891242411408292> (cited 36 times since publication) (last accessed 10.23.2023 at 5:10 p.m.).

parks, public buildings, and spaces. In short, investments in activities that have traditionally been the bedrock of local governments appear to make significant contributions to the economic health of communities.

*Id.* at 231. The Cities have hope. But hope is not a strategy. A consistent link between large public infrastructure projects and economic growth is not documented in the economic literature and evidence of that outcome has not been shown here. The Cities have failed to offer probative evidence that their water needs, present and prospective, justify appropriation of the enormous quantities of water proposed or that, if approved, the additional water resource will be transformational.

**F. Certain of the Cities’ Posited Facts Are, In Sum, Unreliable, Incorrect or Misleading**

Discussed above are the quintessential components of the WTA — the preeminent roles of conservation, demonstrable needs, beneficial use and waste. Below is a sampling of observations in respect to specific factual recitations by the Cities that are not supported by the record, the law, or both.

**1. UNRELIABLE TECHNICAL TESTIMONY; CONTRAVENTION OF K.A.R. 5-25-18 AND K.S.A. 82A-708B**

Paragraph 8 of the Cities’ submission cites testimony from the Hays City manager regarding recharge in the Great Bend Prairie aquifer. It also states that the R9 Ranch overlies that aquifer. As a threshold matter, no evidence supports the view that Mr. Dougherty has the background or requisite credentials to opine on recharge in the Great Bend Prairie aquifer.

Moreover, most of the water rights at the R9 Ranch overlie the Middle Arkansas River Basin, except for two water rights (WR 21841 and 21842) sourced from the

Rattlesnake Creek subbasin. *Tr. 1407:20-24* (Wenstrom testimony). To the extent approval of the Cities’ transfer application would permit movement of those two water rights west into the Middle Arkansas River Basin and more than 2,640 feet west from their existing point of diversion, such an approval would violate K.A.R. 5-25-18 (changes of well locations within the Rattlesnake creek basin), as well as K.S.A. 82a-708b, as the latter does not permit a change in the source of supply in connection with a change of use application. “Any owner of a water right may change the place of use, the point of diversion or the use made of the water, without losing priority of right, provided such owner shall . . . demonstrate to the chief engineer that any proposed change relates to the same local source of supply as that to which the water right relates.” *Id.*

**2. OMISSION OF CRITICAL INFORMATION REGARDING THE GMD5 GROUNDWATER MODEL AND RECENT REASSESSMENTS**

Paragraph 19<sup>43</sup> fails to account for GMD5’s reassessment of the Cities’ modeling work. The review resulted in a GMD5 recommendation that the Cities withdrawals from the R9 source be capped at 4000 acre/feet annually.

The paragraph also ignores the fact that Mr. Romero of Balleau Groundwater, the developer of the GMD5 groundwater model relied upon and adjusted by the Cities, later agreed with Mr. Larson’s analysis showing that recharge over irrigated land is substantially greater than precipitation over nonirrigated land. “Q The --

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<sup>43</sup> “GMD5 evaluated the Chief Engineer’s consumptive use calculation and agreed that DWR’s calculations were “accurate to determine the regulatory consumptive use for [the Cities’] change applications. KDA-DWR staff invested substantial effort to be as accurate as possible and follow existing processes for the determination of 6756.8 [acre-feet] cumulative.” (Ex. 266 at Cities 0020383–84).”

certainly will grant you that, it's the concept that we're interested in and the concept being that recharge over irrigated land is substantially greater than precipitation over nonirrigated area, I think that would be a universal concept, would it not? A Again, when it includes the irrigation return flows, it's a -- it's a correct statement.” *Tr. 1193:14-21* (Barfield testimony).

Finally, the paragraph does not mention how the GMD5 later determined that the model presented by the Cities and earlier approved by Mr. Barfield over-estimated recharge in the area that includes the R9 Ranch. *Tr. 1500-1501:20-25, 1-4* (Feril testimony).

**3. FAILURE TO CONCEDE AND ADDRESS THE NECESSITY AND RESULTANT COST OF A WATER TREATMENT FACILITY**

Paragraph 98<sup>44</sup> omits reference to the fact that Hays will be required to construct a reverse osmosis plant to treat water taken from the western portion of the R9 Ranch. *WP Exhibit 1835:9-25* (Dougherty deposition). Neither Hays nor its engineers at Burns and McDonnell have included an estimated cost for constructing a reverse osmosis plant required to treat water drawn from the Middle Arkansas River alluvial.

**4. MISSTATEMENTS REGARDING MEANING AND SCOPE OF K.S.A. 82A-1502(C)(8)**

Paragraphs 179-181 misstate the requirements of K.S.A. 82a-1502(c)(8). K.S.A. 82a-1502(c)(8) does not require those in the donor basin to adopt formal plans; rather, the relevant statutory provision asks about conservation plans and practices adopted by those that might be impacted by the transfer. Regardless, the

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<sup>44</sup> “Russell’s EDR plant will be able to treat water from the R9 Ranch if the water transfer is approved. (Quinday Test., Tr. Vol. 2 at 496:4-9).”



record with respect to conservation in the donor basin is replete with evidence regarding plans and practices adopted by the Intervenors, members of the Edwards County community, and (formally) by GMD5. Tr. 1506-1510:22-25, 1-25, 1-25, 1-25, 22-25 (Janssen testimony); K.A.R. 5-25-4; K.A.R. 5-25-8; Management Program at 16, 18 (noting programmatic efforts intended to conserve water). The Management Program in and of itself represents a formal conservation plan and practice in the donor basin that aligns with the legislative policy highlighted in K.S.A. 82a-1020:

### **Legislative Declaration.**

It is hereby recognized that a need exists for the creation of special districts for the proper management of the groundwater resources of the state, for the conservation of groundwater resources; for the prevention of economic deterioration; for the associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national markets. It is the policy of this act to preserve basic water use doctrine and establish the right of local water users to determine their destiny with respect to the use of groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas. It is, therefore, declared that in the public interest it is necessary and advisable to permit the establishment of groundwater management districts. (History: L. 1972, ch. 386, l; July 1.)

#### **5. RELIANCE UPON ANECDOTAL AND SPECULATIVE EVIDENCE**

Paragraph 244<sup>45</sup> of the Cities’ submission relies solely upon anecdotal and speculative evidence.

#### **6. SUBMISSION OF IRRELEVANT STATEMENTS OF FACT**

Paragraphs 343-345 of the Cities’ submission describing the contents of the Master Order are irrelevant to this proceeding. K.S.A. 82a-1507(b).

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<sup>45</sup> “Hays’ lack of water has resulted in lost and inhibited commercial opportunities available to the City and stunted Hays’ population growth. (Williams Test., Tr. Vol. 2 at 407:2-408:25.)”

7. **SUBMISSION OF MATERIALLY INACCURATE POPULATION GROWTH ESTIMATES**  
Paragraph 408 of the Cities' submission notes testimony from Mr. Letourneau regarding annual population growth assumptions. Mr. Letourneau is not an economist qualified to opine on the Cities' growth projections. And, as established herein, the Cities' own experts undermined the 2% growth projection.
  
8. **FACTUAL CONTENTIONS SUGGESTING THAT THE QUESTION OF SATURATED THICKNESS IS SETTLED**  
Paragraphs 491, 494, 521, 522, and 557 gloss over the imprecision associated with determinations of saturated thickness. Calculation of saturated thickness in those cases where a well is not to barrier requires an exercise in estimation.<sup>46</sup> Moreover, the testimony of Mr. Wenstrom is at odds with the Cities' proposed facts. "Well, let's do this. Based on your experience, would it be your sense or understanding that Mr. McCormick's analysis of what the saturated thickness is at the R9 Ranch is overstated? A I think it is, yes." *Tr. 1463:18-23*.
  
9. **FAILURE TO ADDRESS THE ABSENCE OF RETURN FLOWS IN THE ABSENCE OF IRRIGATION**  
Paragraph 513 of the Cities' submission correctly notes that Mr. Larson's claim relates predominantly to precipitation recharge. The Cities however omit the fact that, unlike under irrigated conditions, an approved transfer eliminates return flows from irrigation, as return flows from irrigation would no longer be present.

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<sup>46</sup> "Q Okay. Is the -- is the depth of the wells that provide -- do the depth of the wells provide data about saturated thickness? A A well may not fully penetrate all of its saturated thickness, I mean, so we just have to go with the best data that we have based on the well logs. Q Okay. So if you've got a well to barrier, then you know how deep the saturated thickness is, correct? A Correct. Q And if you have something less than that, then you're -- you're estimating saturated thickness? A What's the -- what's the estimate based on? Q The -- I'm sorry, the depth -- the depth of the wells that are not at barrier? A Correct, yeah. If we -- we wouldn't -- we would know the producing zones in the well, *but we wouldn't know the total depth of the saturated thickness.*" (Emphasis added).

**10. FAILURE TO ADDRESS THE ISSUE OF THE REDUCED RECHARGE UNDER NONIRRIGATED CONDITIONS**

Paragraph 516 of the Cities’ submission omits reference to any incorporation of new precipitation data in the Management Program, nor any of the new data referenced in Mr. Ferril’s testimony noting that observed recharge was less than recharge modeled by the Cities’ engineers. *Compare* Management Program at 8 (“Precipitation varies considerably from the western edge to the eastern edge, with 20 inches of average annual precipitation in the west to 27 inches in the east.”). *Tr. 1500-1501:20-25, 1-4.*

**11. FAILURE TO RECITE THE CORRECT STANDARD OF ANALYSIS FOR THE PRESIDING OFFICER**

Paragraph 526 misstates the standard that the Presiding Officer must abide by in this proceeding. One of the other standards applicable to this proceeding is whether the transfer will impair other water users; similarly, the WTA asks the Presiding Officer to determine by specific findings of fact whether the transfer would comply with GMD rules and programs when assessing net benefits to the state.

**12. CRITICISM OF LARSON’S FINDINGS AND CONCLUSIONS WITHOUT FACTUAL SUPPORT**

The proposed findings set forth in Paragraph 531 and 589 ignore Mr. Barfield’s testimony and admissions regarding his lack of qualifications as a hydrological modeler, as well as earlier assertions regarding Larson’s expertise in the area. *WP00891*. (“I’m not an expert at developing groundwater models.”); *Tr. 1009:15-17* (Letourneau stating that everyone knows Larson as a nationally recognized

expert in groundwater modeling)(Letourneau); *Tr 1188:15-20* (Barfield noting that he’s known Larson for 20 years and agreeing that Larson is a nationally recognized expert in groundwater modeling).

**13. MISSTATEMENT AND OVERSIMPLIFICATION OF IMPAIRMENT STANDARDS**

Paragraphs 794-795 misstates omits applicable statutory language that measures impairment relative both to the date of the base water right, as well as relative to a change in water right, and omits references to GMD5 regulations that examine whether a change in use or point of diversion will unlawfully enlarge an existing water right to the detriment of other junior water rights senior to the date of the proposed change, as noted below.

**14. REASONABLE ECONOMIC LIMITS IS NOT A QUALIFIER IN RELATION TO LOWERING OF THE STATIC WATER TABLE AND THE CITIES’ LOGIC WOULD REQUIRE CONSIDERATION OF MINIMUM DESIRABLE STREAMFLOWS**

Paragraph 797 is both irrelevant to this proceeding and improperly ties the reasonable economic limits concept (which in any event only applies to new appropriations) with lowering of the static water table. Accepted tenets of statutory construction make clear that the economic limit phrase modifies only the “unreasonable deterioration” language. (*See* discussion of the doctrine of the last antecedent in Intervenor’s proposed findings of fact and conclusions of law at page 13).

Further, to the extent that the Cities wish to apply principles for new appropriations to this transfer application, as required under K.S.A. 82a-708b(a)(2) and *Wheatland Elec. Co-Op.*, 265 P.3d at 1201, then such logic would logically require the former Chief Engineer to have considered minimum desirable

streamflow (“MDS”) requirements with respect to processing of changes of the Cities’ water rights. *See* K.S.A. 82a-703a, K.S.A. 82a-703b, and K.S.A. 82a-703c.

Assuming however that the Cities do not wish their water rights to be subject to MDS requirements, it is nonetheless clear that the Kansas Legislature expressed a plain desire to restore flows in the Arkansas River when they specifically identified MDS requirements for the Arkansas River at Kinsley in K.S.A. 82a-703c, requiring the Chief Engineer to withhold from appropriation in that area “that amount of water deemed necessary to establish and maintain for the identified watercourse the desired minimum streamflow.” It is also clear, as in *Garetson Bros. v. Am. Warrior, Inc.*, that the WTA (as opposed to new appropriations under the KWAA) does not qualify questions of impairment by reference to reasonable economic limits. 435 P.3d 1153, 1171 (Kan. App. 2019) (“[L]ike K.S.A. 82a-717a, the phrase ‘beyond a reasonable economic limit’ is not found in K.S.A. 82a-716.”); *see also* K.A.R. 5-25-3(c)(omitting references to economic considerations with respect to impairment).

15. **MISSTATEMENT OF THE RATIONALE AND HISTORY OF THE HAYS IGUCA**  
Paragraph 903 of the Cities’ submission misstates the reasons for initiation of the Hays IGUCA. In point of fact, the Cities requested creation of the Hays IGUCA because residents of the City of Hays were wasting water and otherwise drilling domestic wells in order to reduce the costs associated with drawing water from the Hays municipal water supply; put another way, Hays sought to reduce both competition and stress upon local water supplies. *See, generally, In the Matter of the Designation of An Intensive Groundwater Use Control Area in Hays, Kansas,*

and the Immediate Area, findings 9-23, available at <https://www.agriculture.ks.gov/docs/default-source/igucas/hays198507.pdf?sfvrsn=2>.

**16. APPENDIX C MISSTATEMENTS**

Appendix C of the Cities’ submissions misstates the nature of their three sets of submissions. They were not amended applications, but instead three separate applications.

**17. THE TRANSFER APPLICATION DOES NOT COMPLY WITH GMD5’S MANAGEMENT PROGRAM, STANDARDS, POLICIES, RULES, OR REGULATIONS (K.S.A. 82A-1502(C)(9)).**

Paragraphs 590-604 of the Cities’ submission omit key items from the Management Program and GMD5 regulations, as well as any material discussion regarding how the Cities’ application complies with the following precepts:

The stabilization of agriculture and the prevention of economic deterioration are major goals outlined in the Groundwater Management District Act and are extremely important to the District. To accomplish these goals, adequate levels of good quality water must be sustained through the administration of a strong management program, which includes education, conservation, and the implementation of policies that will promote the wise use of the resource.

*Management Program* at 13. Both the Management Program and GMD5 regulations emphasize the need for “sustainable yield” of the district’s water resources, defining the term 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); *Management Program* at 13. To safeguard sustainable yield, GMD5 requires those seeking to change a point of diversion to undertake an analysis that examines “all applications

with a priority earlier than the priority established by the filing of the application for change.” K.A.R. 5-25-4(c)(4). All uses of water within the district must be reasonable for the proposed beneficial use and eschew waste, and no approval can impair an existing right, nor prejudicially and unreasonably affect the public interest. K.A.R. 5-25-3; K.A.R. 5-25-8; *see also* Letourneau Testimony at 1051:11-25).

The Cities offered no credible evidence proving that their application would protect existing water rights with priority dates senior to the date of the Cities’ change applications, contrary to the requirements of K.A.R. 5-25-4(c)(4). Indeed, in prior testimony, Barfield unequivocally (and contrary to GMD5 regulations) stated that, “[s]eniors are allowed to interfere with juniors or juniors cannot interfere with seniors as a general matter.” *WP 00862*. Barfield also noted that, even without incorporating native grasses within the model prepared by the Cities’ engineering firm, return flows to existing users would decline and that he had made no specific findings of fact with regard to existing water rights with priority dates junior to those at the R9 Ranch. *WP00874*.

### III. CONCLUSION

The 2022 Kansas Water Plan<sup>47</sup> (the “KWP”) is a five-year blueprint to ensure a reliable, quality water supply. The KWP focuses on addressing water challenges in Kansas, integrating key content from previous water supply visions to create a comprehensive planning guide. A pivotal emphasis of the KWP is on conservation,

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<sup>47</sup> [https://kwo.ks.gov/docs/default-source/water-vision-water-plan/water-plan/complete-kwp-2022.pdf?sfvrsn=57338e14\\_2](https://kwo.ks.gov/docs/default-source/water-vision-water-plan/water-plan/complete-kwp-2022.pdf?sfvrsn=57338e14_2) (last visited 10.25.2023 at 11:55 a.m.).

especially conserving the High Plains Aquifer. Recognizing the increasing unpredictability of extreme events like droughts and floods due to climate change, the KWP stresses the need for state-of-the-art science and technology, along with municipal conservation plans and adaptive planning, to secure a safe water supply and mitigate potential damages from such events. As herein explained, and consistent with articulated State water policy as exemplified by the KWP, conservation and prudent stewardship of Kansas water resources are the root principles underpinning the Water Transfer Act.

But at odds with that policy is the practice of purchasing farmland and permanently transferring the water rights to a municipality's water portfolio – the “buy and dry” phenomenon. VERHOEVEN, Z., *Water Leasing Under the Agricultural Water Protection Water Right*, 22 U. DENV. WATER L. REV. 41, 42 (2018). The buy and dry trend 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 practice. Evidence presented demonstrates the expected detrimental effect on the aquifer if the Application is approved and, particularly given the disjuncture between the Cities’ water needs and their WTA request, the issue of aquifer depletion deserve heightened consideration.

The Water Transfer Act is fundamentally designed to serve as a check on large-scale interbasin transfers in the absence of demonstrable need. Need is determined by



reference to projected population and consonant necessary water consumption. The Cities are not able to provide reliable data in respect to either. Familiar principles of Kansas water law regarding conservation, beneficial use, waste, and the core requirements of the anti-speculation doctrine convincingly militate against approval of the transfer.

Given the currently projected infrastructure costs of 134.9 million dollars,<sup>48</sup> the lack of reliable water needs information or population data, and the tenuous relationship between public infrastructure projects and induced economic growth, 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.<sup>49</sup> 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

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<sup>48</sup> Roughly equal to a per capita cost for the combined populations of Ellis and Russell counties of \$3,655.00.

<sup>49</sup> The Cities’ Response to Water PACK’s and Edwards County’s Motion for Leave to File First Amended Joint Petition for Intervention, December 23, 2022.

Application produces a net cost to the Cities and the State of Kansas.

In arguing that they own the R9 Ranch water rights and are entitled to utilize the rights just as any irrigator would, the Cities effectively would write the Water Transfer Act out of existence. The Act has a purpose. That purpose is not merely to mimic and reiterate the Kansas Water Appropriation Act.

The Cities have failed to comply with mandatory provisions in the Water Transfer Act and the attendant regulations, have not demonstrated a need for the water they seek, have failed to effectively demonstrate a nexus between the proposed project and economic growth, have failed to provide other than speculative evidence that the State would benefit from the water transfer, and cannot effectively refute the evidence that the plan they propose will adversely affect the source aquifer and those that rely upon it. The Application should be denied.

Failing denial, the presiding officer is empowered under K.S.A. 82a-1504(a) to “. . . 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.”<sup>50</sup> The seminal resource for purposes of determining the state’s public interest is the Kansas Water Plan. “The Kansas Water Plan, formulated by the Kansas Water Office, is to serve as a comprehensive plan for the management, conservation and development of the water resources of the state.”

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<sup>50</sup> Kansas Water Plan, *supra*, at 4.

At a recent signing ceremony for [House Bill 2279](#) and [Senate Substitute for House Bill 2302](#) the Governor stressed the essentiality of water conservation.

Saving the critical water sources that power the agriculture industry—the backbone of our state economy—and securing a reliable, safe water supply for residents and businesses across Kansas for years to come are nonpartisan issues,” said Governor Kelly. “There is more to be done, but these bills represent an important step forward in that fight by providing needed funding and clear policies around water management works towards ensuring a safe, sustainable water supply for generations of Kansans to come.”

<https://governor.kansas.gov/governor-kelly-ceremonially-signs-pair-of-bills-investing-in-protecting-water-resources/> (last visited 10.24.2023 at 12:01 p.m.).

The WTA is derived from and based upon the same conservation values. Kansas courts understand the centrality of conservation in relation to the State’s water management priorities. “It is beyond debate that water conservation is necessary in this state and that it serves to protect the public interest.” *Water Dist. No. 1 of Johnson Cnty. v. Kansas Water Auth.*, 19 Kan. App. 2d 236, 243, 866 P.2d 1076, 1081 (1994).

This tribunal is faced with a stark choice between fidelity to the cardinal principles of conservation and beneficial use or, alternatively, ratification of a request to transfer a volume of water far in excess of evident needs that inexorably results in waste. The choice is not difficult. The concept of "beneficial use" is foundational to water law, particularly in the Western United States. The principle is rooted in the idea that water is a finite resource that must be utilized wisely and productively. By requiring that water use be "beneficial," water law inherently prohibits waste. Stated plainly, conservation precepts embodied in the legislation and the anti-speculation doctrine must be the cynosure informing the decision here.

**WHEREFORE**, the Intervenors request denial of the WTA application or a material reduction in the volume of water permitted to be transferred, together with such other relief, under law or equity, to which Intervenors may be entitled.

\* \* \*

Dated October 27, 2023  
Overland Park, Kansas

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2023, the foregoing was electronically served to all counsel of record by email as follows:

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**EXHIBIT 1**

**Remarks of Doyle Rahjes to the Senate Committee on  
Energy & Natural Resources Regarding SB 62 (February 10, 1983)**



## MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources

The meeting was called to order by Senator Charlie L. Angell at  
Chairperson

8:00 a.m. on Thursday, February 10, 1983 in room 123-S of the Capitol.

All members were present except:  
Senator Paul Hess  
Senator Tom Rehorn (Excused)

Committee staff present:  
Ramon Powers, Research Department  
Don Hayward, Revisor's Office  
LaVonne Mumert, Secretary to the Committee

Conferees appearing before the committee:  
Doyle Rahjes, Kansas Water Authority  
Paul E. Fleener, Kansas Farm Bureau  
Ron Gaches, Kansas Association of Commerce and Industry

S.B. 62 - Interbasin transfers of water.

Doyle Rahjes read his written testimony (Attachment 1). Mr. Rahjes emphasized the virtual permanency of decisions to approve water movements. He said it is crucial that the decision-making process outlined in the bill apply to all waters in Kansas. He stressed the importance of weighing the interests of the entire state on interbasin transfers. Mr. Rahjes discussed the Kansas Water Authority's (Authority) reasoning for eliminating legislative review of contracts for interbasin transfers.

In response to a question from Senator Werts about the Tuttle Creek Reservoir, Mr. Rahjes said the Corps of Engineers has held at least two hearings to consider whether to reallocate the water in this reservoir. Mr. Rahjes said it was certainly in the realm of possibility that the water could be reallocated and the State of Kansas have an opportunity to purchase it. He did not know who initiated the hearings but it was not the Authority. Mr. Rahjes answered questions about the Authority making the final decision on interbasin transfers. The Authority is concerned about the possibility of coalitions of votes in the legislature stopping a transfer after extensive hearings and consideration of the Authority. Senator Chaney pointed out that some members of the Authority are politically influenced as well. Responding to questions from Senator Kerr about the relationship of the hearing board, Mr. Rahjes said this three-member panel would be made up of the Chief Engineer, or his representative, as chairman, and representatives of the Division of Environment and Kansas Water Office. This panel will report their findings along with a recommendation to the Authority. Senator Feliciano 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. He said the Authority would have the right to modify the recommendations of the hearing board. Responding to questions from Senator Angell, Mr. Rahjes said the bill does not specifically address existing interbasin transfers but the Authority would not expect to change anything presently in existence.

Paul E. Fleener reviewed his written testimony (Attachment 2). He suggested that S.B. 62 contain a definition of "person" and that the following language be added to line 36 after the period following the word "act": "No interbasin transfer of water shall be approved unless the person requesting such transfer shall have developed and implemented a water conservation plan." He also suggested that the sentence beginning on line 76 and ending in the middle of line 78 should read: "Any recommendation by the panel for an interbasin transfer of water shall have the unanimous approval of the three panel members." Mr. Fleener also urged that the legislature contemplate a resolution memorializing Congress to act on a project such as the North American Water and Power Alliance.

Ron Gaches testified in favor of S.B. 62. He said his association did not deal with some of the specific questions the Committee has raised, but they do feel it is important that Kansas move forward with developing long-range plans and management of the state's water resources. They do endorse the major concepts embodied in the bill. Responding to questions from Senator Kerr, Mr. Gaches said his association does not necessarily endorse the concept of interbasin transfers because the association has members on both sides of the issue, but they do agree that a formal review process should be a necessary ingredient to the decision-making process.

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CONTINUATION SHEET

MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources,  
room 123-S, Statehouse, at 8:00 a.m. ~~XXX~~ on Thursday, February 10, 1983

The meeting was adjourned at 8:59 a.m. by Vice Chairman Kerr.

The next meeting of the Committee will be at 8:00 a.m. on February 11, 1983.

Remarks of Doyle Rahjes  
To The Senate Committee  
On Energy & Natural Resources

Mr. Chairman and Members of the Committee:

I am Doyle Rahjes, an Agra, Kansas, farmer and appointee of Senate President Ross Doyen to the Kansas Water Authority. I serve on the Executive Committee of the Authority and I served as chairman of the Authority's Committee charged with drafting legislation designed to guide the State of Kansas in dealing with proposed transfers of water across river basin boundaries.

Mr. Eugene Shore, a Johnson, Kansas, farmer who represents the western Kansas Groundwater Management Districts and Mr. Henry Strick of Kansas City who represented the Kansas Association of Commerce and Industry also served on the committee.

In the Kansas Water Authority's report to the Legislature, submitted January 18th, we tried to provide you a detailed discussion of the issues that were brought before the authority during months of deliberation on this legislation. The report suggests that there is a deep concern, shared by interests throughout this state, about the imminent interbasin transfers of water.

I commend that report to you along with the report and map that are valuable background on the water supply and demand picture that appears to be developing in this state.

Today, I would like to highlight some of the reasoning that went into the development of Senate Bill 62. I would also like to relate to you the sense of urgency my colleagues and I share regarding action by this Legislature to address interbasin transfers of water.

The job of the Authority is to be a proponent of water law and policy that is in the best interest of this state as a whole and all of its water users' interests. Its job is to advise the Legislature of our recommendations for action that are in the best interest of the State of Kansas. I believe this proposed legislation meets those tests.

Frankly, it is no secret. A major interbasin water transfer proposal is expected to be presented to the state shortly. It is at once good that we can perceive the magnitude of water supply that interbasin transfers can deal with. It is also, at the same time difficult, to think beyond a specific example to try to develop legislation that will stand the test of foresight and time that our water laws must stand to some degree.

The limited potential sites for major new water supply development in Kansas, coupled with the very real potential for water supply deficits in nearly every region of this state, indicate there will likely develop more and more proposals to move significant amounts of water substantial distances. We are talking about water that will, for the most part, be piped at great expense.

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The decisions to approve water movements may be virtually permanent. There may be no second chance to rectify a mistake. For the sake of all water users in this state, we cannot afford a mistake in allocating water to one area at the expense of another area of the state or several areas of the state.

This bill establishes a factfinding hearing process by a board of three water experts, representing the state's knowledge and interest in the current water availability and allocation situation; the public health and welfare of the people of this state and the protection of our environment; plus the future plans and abilities of this state to meet water demands with sufficient supplies.

The bill provides guidelines for weighing all water users' interests and most significantly, a decision finally turns on the public interest of the state as a whole -- a decision made by an Authority whose members represent virtually all water use interests in this state. There is a process for an appeal to court from the decision of the Authority.

The bill is a water management tool. It is designed to provide guidelines, a mechanism for making the best possible check before a decision is made. It is not restrictive. It does not prohibit transfers.

This state has worked to share its tax burdens in the best interest of the state as a whole. If once in a while we make a mistake in allocating taxes, it can be rectified with legislation in the next session. But sharing and allocating water is different. When you have approved a water allocation and a \$200 million pipeline has been put down for more than 100 miles and a tremendous investment has been made in new treatment plants, a mistake is next to impossible, if not impossible, to rectify in the next session.

This state has relied to the extent possible on diversifying its economy so that we can all share in production to the best of our collective abilities to produce for the good of the state as a whole. The question now is how are we to best share and balance economic opportunity in this state which is unquestionably underpinned by the availability of sufficient water supplies?

Water supplies have always been unevenly distributed in Kansas. To date, we have allocated and shared that resource within our own regions of the state. We are now faced with the prospects of allocating and sharing among regions.

This bill applies to all waters in Kansas. I believe that it is crucial we all play by the same rules in this ballgame. More importantly, water, whether it is taken from the ground or the surface, is an equally valuable commodity. I do not believe it would be possible, for example, to fully weigh all alternative sources of water for both the applicant or the basin of origin if one process and person or group of people decided a surface water proposal and another process and person or group of people decided a groundwater issue.

I believe it will be short-sighted and very likely will be a disservice to the people of this state to limit the application of this hearing and decisionmaking process to reservoir storage.

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State-owned municipal and industrial storage exists in only nine of our reservoirs. There are major utilities and cities in Kansas now using a combination of groundwater from well fields, reservoir storage and flowing river water to fully supply their needs.

I believe that it is possible in the future that proposals will be made to condemn existing groundwater wells and move water. I believe it is possible that proposals will be made to buy up surface rights or groundwater or alluvial well rights and move water. I do not think the movement of significant amounts of water will always be limited to reservoir storage or to municipal or industrial water supplies. I believe it is imperative that any proposed interbasin transfer of any water for any purpose come under the close scrutiny that is proposed.

Neither current law nor Senate Bill 61, the marketing act which addresses reservoir storage waters, involve as deliberately the wisdom and expertise of the chief engineer and the Department of Health and Environment in the decisionmaking process. Senate Bill 62, the interbasin transfer legislation, does that very deliberately because when you talk about moving water out of its basin of origin never to generate side benefits or recycling benefits or exchange of uses to the people in that basin of origin again -- you can have effects very different from when water is used within the basin where it originates.

These interbasin transfer decisions must involve every bit of expertise this state can muster. Interbasin transfer decisions must involve weighing the interests of the entire state, not just the two basins involved.

For example, if there is a proposal to move water from Milford or Tuttle Creek reservoirs, if the Corps of Engineers reallocates and the state buys Tuttle Creek storage, then water would be moving from the lower Kansas basin to the Arkansas River Basin. It is not just a question of whether the lower Kansas basin should retain the water or the Arkansas Basin users should have it.

Where the state as a whole is concerned, it is also a question of whether it is more prudent to drop that water off the Kansas River to the Neosho Basin or the Marais des Cygnes Basin where there are deficits developing that could be relieved by transfers in that direction. There is also a question of whether, if Milford or Tuttle Creek water is to move, if it is in the state's best interest to allocate some to the west toward Hays and Russell and the towns interested in developing the Post Rock Public Wholesale Water Supply District because groundwater and surface water supplies in parts of the upper Kansas Basin are very tight too.

The interbasin transfer legislation recognizes that the ramifications of moving water out of a basin of origin are significant. It provides a very special hearing process designed to force the interests involved to deal with the state rather than circumventing it by withholding information and trying only to find the fastest route to court.

The bill provides that three people, experts in their water-related fields with a collective depth of knowledge nearly unmatched elsewhere in the state, would make findings. Their findings and recommendation would be reviewed by the Authority

whose members represent virtually all of our water user interests. I believe that the hearing process, and a court appeal only to determine whether the Authority's decision was based on insufficient evidence or whether it was arbitrary, capricious or fraudulent, is crucial. The bill is designed to protect the state as best we can from abdicating water allocation decisions to the courts.

I would like to highlight another issue of this bill -- the question of whether it places an undue burden upon very small water users by this process of scrutiny. We considered this very seriously. Currently, both the chief engineer and the Water Office do conduct public hearings regarding appropriations and sales of water. At Section 3(b) on Page 2 of the bill, we have provided that if the proposed transfer is for an amount of water of 100 million gallons per year or less (or 307 acre feet or less), the chief engineer may suspend the formal hearing and take on the burden himself of making the findings required under this act.

That may appear to be a small amount of water, especially if you are use to looking at irrigation water use figures. There may be some pressure to raise that exemption. But I would bring to your attention the fact, that by way of measurement, at least 30 percent of our current reservoir water purchase contracts are for this amount of water or less. Most of these smaller purchases are for rural water districts, but I do not believe it would be advisable to consider exempting all rural water districts. Some rural water districts have much larger water demands than our towns. At least one has contracted for a maximum 720 million gallons of water per year and another for about 240 million gallons per year.

I would like to speak to one final element of this bill. The Authority's recommendation to you was that the Authority be the final decision on a transfer of water, subject to appeal to the courts. That did eliminate legislative review and possible revocation of a contract for transfers from reservoir water supply storage. Under current law, you do review the contracts for water purchase, but there is no legislative review or revocation opportunity if an interbasin transfer proposal is to move 100 million gallons of water per day out of the flow of the Kansas River below a reservoir.

The Water Authority would of course yield to your decision on this issue. But we made the recommendation after a good deal of consideration. First, we believed you should consider this alternative. Most importantly, we were very deeply concerned about the inevitable politics of these transfers.

It is not as much a concern about stopping ill-advised proposals, but the politics of approving one. There is a very real possibility that a reservoir transfer proposal could go all the way through the hearing process. Opponents and proponents would make their arguments and enter all their evidence which would be considered in depth. The transfer could be recommended by the panel of experts and approved by the Authority making very detailed public interest findings and yet stopped on the floor of the Legislature by sheer numbers or coalitions of numbers of votes.

We would only ask you to consider whether we really want to strive to develop the best possible guidelines for making tough decisions on allocating water and then, in the end, leave that decision potentially vulnerable to who can line up the most votes one way or another. If the Authority's proposal is not acceptable, I would strongly urge you to give your best effort possible to developing yet another alternative that would protect or remove water allocation decisions from politics as best we can. Thank you Mr. Chairman. I would be pleased to answer any questions.