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May 1, 2024

Water Transfer Hearing Panel
c/o Chief Engineer
KANSAS DEPARTMENT OF AGRICULTURE
1320 Research Park Drive,
Manhattan, KS 66502

In re: Hays/Russell Water Transfer Application
OAH Case No. 23AG0003 AG

Dear Panel Members:

In respect to the referenced matter, enclosed are four copies of Intervenors' Memorandum in Opposition to Approval of Water Transfer Act Application.

Thank you.

Sincerely,

Charles D. Lee

Digitally signed by Charles D. Lee
Date: 2024.05.01 08:45:02 -05'00'

CHARLES D. LEE
Partner

Enclosures

cc: David M. Traster *via email*
Daniell J. Buller *via email*
Donald F. Hoffman *via email*
Melvin J. Sauer *via email*
Kenneth L. Cole *via email*
Lynn D. Preheim *via email*
Stephanie A. Kramer *via email*
Kate Langworthy *via email*
Jay Rodriguez *via email*
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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

INTERVENORS' MEMORANDUM IN OPPOSITION TO APPROVAL OF WATER TRANSFER ACT APPLICATION

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STATE OF KANSAS

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INTERVENORS' MEMORANDUM IN OPPOSITION TO APPROVAL OF WATER TRANSFER ACT APPLICATION

I. INTRODUCTION

The Intervenors, the Water Protection Association of Central Kansas ("Water PACK") and Edwards County, Kansas, oppose approval of the Water Transfer Act ("WTA") application now under consideration by this Hearing Panel (the "Panel"). Water PACK is a nonprofit organization that works to promote, foster, and encourage the beneficial, economical, and sustainable use of quality water resources in Central Kansas. The association primarily involves agricultural producers and businesses in its initiatives. The mission is focused on improving water use practices and sponsoring water conservation projects to ensure that the system of water use remains profitable and sustainable for the long term. Water PACK collaborates with institutions like Kansas State University to enhance water resource management and conservation.

In their "First Amended Application to Transfer Water from Edwards County Kansas to the Cities of Hays and Russell Kansas" (the "Application")[1] the cities of Hays and Russell (the "Cities") seek authorization to pump water to the respective cities from a jointly owned location in Edwards County (known colloquially as the R9 Ranch). Hays is a community in Ellis County, Kansas with an estimated population of 21,136 as of July 1,

[1] Cities Exhibit 0001.

2022.[2] Russell is in Russell County, Kansas. Its 2020 population was 4,401 according to the decennial census.[3]

Procedurally, the WTA statutory framework provides for review and final administrative adjudication of WTA applications by this Panel. Here the Panel is asked to review an administrative law judge's initial order preliminarily approving the Cities' Application.

The Application, the underlying project, and the Presiding Officer's approval thereof are all profoundly flawed. Approval would run counter to the terms and purpose of the WTA and ratify an ill-conceived undertaking that may serve as an imperfect model for future applicants. The defects weighing against approval of the Application are acute and varied, as detailed below.

In urging approval of the Application, the Cities focus myopically on the former Chief Engineer's conclusions regarding sustainability and the absence of harm in relation to the donor basin and their baseless claims that they need and can utilize the volume of water they seek authority to transfer. Due to page constraints, illustrated and discussed hereinafter in only summary fashion is the Intervenor's evidence demonstrating that the transfer will impermissibly cause harm to the donor basin and, necessarily, to the Intervenors. Harm to the donor basin is more expansively considered in the Larson expert

[2] https://www.census.gov/quickfacts/fact/table/hayscitykansas/PST045222.

[3] https://data.census.gov/all?q=Russell%20city,%20Kansas.

report and written testimony,[4] the Intervenors' proposed findings of fact and conclusions of law,[5] and Intervenors' rebuttal to the Cities' proposed findings.[6]

The effects of the transfer to appropriators with water rights in the vicinity of the R9 Ranch are disputed. What is neither effectively addressed nor rebutted by the Cities is the essentially undisputed evidence that they are seeking to transfer a volume of water that cannot be justified based on present or anticipated future needs. This memorandum discusses that issue in depth.

If past is prologue, the Panel may anticipate the Cities and the Division of Water Resources will contend that the former Chief Engineer considered and conclusively resolved most of the consequential issues outlined in the WTA[7] and its attendant regulations[8] during the prior Kansas Water Appropriation Act ("KWAA") proceeding in which he contingently granted the Cities' change of beneficial use application. But that cannot be true. Acceptance of the contention would imply that the WTA functions as a pointless regulatory exercise, serving no purpose and having no consequences.

Contrary to the Cities' expected arguments, whether framed directly or tacitly, the relationship between the KWAA and the WTA is tenuous at best. The KWAA does not supplant the entire regulatory landscape, effectively neutering other statutory provisions governing water issues to the extent they appear inconsistent with KWAA provisions. In

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[4] WP 01864.

[5] https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/2023-09-29-intervenors-proposed-findings-and-conclusions---final-9-29.pdf?sfvrsn=a0c99fc1_0.

[6] https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/20231027_wp-response-to-cities'-pffcl.pdf?sfvrsn=83219cc1_0.

[7] K.S.A. 82a-1502.

[8] K.A.R. 5-50-2.

fact, insofar as there are irresolvable incompatibilities between the WTA and the KWAA in relation to water transfer proceedings, it is the WTA, specifically enacted to govern water transfers, which prevails. "General and special statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, the special statute will prevail unless it appears the legislature intended to make the general statute controlling." *In re Est. of Wolf,* 279 Kan. 718, 724, 112 P.3d 94, 98 (2005) (citing *In re Estate of Antonopoulos,* 268 Kan. 178, 189, 993 P.2d 637 (1999)).

To put it plainly, the WTA should not be seen as a subordinate adjunct to the KWAA, where the Panel must endorse the former Chief Engineer's decisions from a different proceeding without here considering and enforcing the WTA's requirements. The WTA is, instead, discrete from the KWAA. It is premised upon and a reflection of a water conservation ethos requiring allocation of scarce water resources consistent with demonstrable need and as a tool to address critical state and regional water supply issues.

The legislature in enacting and subsequently amending the WTA was aware that large, long-distance transfers of water were different from other more middling transfers — the former to be governed by the WTA, the latter by the KWAA. The difference is patently reflected in the fact that had the Cities proposed a project seeking to move less than 2000 acre-feet of water, or the same volume of water less than 35 miles, the statutory and regulatory requirements and constraints in the WTA would not have affected the transfer and only the KWAA administered change of beneficial use would have been required. The legislative history shows that the functional dichotomy between the WTA and the KWAA was intended.

First, the legislative testimony of Stephen A. Hurst, previous Director of the Kansas Water Office addressing the 1993 revisions to the WTA is illuminating: "The [WTA] concept was to provide an extraordinary public interest review process for the movement of large quantities of water, one that goes above and beyond the standard review process for small quantities moving shorter distances." *Testimony of Stephen A. Hurst, Director Kansas Water Office, Before the Senate Energy and Natural Resources Committee, March 16, 1993, Re: House Bill No. 2070.*

Second, and particularly revealing in this context, is the Cities' 1996 request for amendment of K.A.R. 5-50-2(y), the provision requiring that a proceeding to authorize the change of beneficial use precede the WTA approval process. The request was authored by their present counsel. The Cities stated that, as written, the regulation required that "most if not all of the issues considered when deciding whether to grant a change in place of use, type of use, and/or point of diversion [would] be dealt with exhaustively in the transfer hearing itself."[9] Understanding the regulation's dictates, the Cities thus requested a revision to avoid exactly what it required then and requires now — comprehensive assessment in the WTA proceeding of all questions that overlap with those considered in the change of beneficial use proceeding.[10]

> Moreover, most if not all of the issues considered when deciding whether to grant a change in place of use, type of use, and/or point of diversion will be dealt with exhaustively in the transfer hearing itself. Consideration of an application for these changes filed after the transfer hearing would in all likelihood rely on the evidence presented in the hearing and could probably be considered pro forma.

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[9] *Cities Exhibit 2537,* September 6, 1996 at 7 (Traster, D.).

[10] The request was denied. The regulation remains unchanged from 1996.

Cities Exhibit 2537, September 6, 1996 at 7 (Traster, D.).

But what the Cities understood in 1996 is not what they maintain today. During the prior evidentiary hearing, the Cities argued repeatedly and vociferously that the Presiding Officer was precluded from reexamining earlier decisions made by the former Chief Engineer in respect to issues that also must be addressed in a WTA proceeding.

- "Q. But the issue, the directive that 5-50-2 is about is filing, preparing a complete application, and the statute is abundantly clear that that determination is made by the chief engineer. The question has been resolved." *Tr. 1307:10-15* (Traster, D.).
- "Q. In your discussions -- well, strike that. The chief engineer ultimately issued a Master Order that had -- that dealt with this whole issue of reasonable projected needs capping the quantities that could be used based on Water Appropriation Act requirements, correct? *Tr. 366-367:21-25, 1* (Traster, D.).

Those arguments hit home, the Presiding Officer concluding he was powerless to reconsider or refine the former Chief Engineer's determinations.

> PRESIDING OFFICER: I'll overrule the objection, I'll allow the question but make sure it's getting to something here shortly that is really within my scope of authority in this matter 'cause it sounds like you're still trying to kind of focus on that whole aspect of the quantity of water that was approved in the change application, which I don't have that authority to address that. So if you want

Tr. 1456:12-20.

> application, and there's -- I find nothing in the statutes or regulations that give me any authority to determine if that application is complete, that's the chief

Tr. 1308:12-15 (Presiding Officer's comment).

It is beyond doubtful that the legislature intended to imbue the Chief Engineer with unreviewable authority. Beyond doubt is that the refusal to evaluate the Application to decide whether it complied with regulatory requirements was plainly erroneous. That review would have revealed the Application's underlying fallacies. Given an application that omits rudimentary information required by the WTA and the WTA regulations, the Panel cannot adequately vet the Application. Absent that facility, it cannot be approved.

At the end of the day, it is always the case that focusing on the wrong questions yields wrong conclusions. A paradigmatic literary example is the fictional computer in Douglas Adams' "The Hitchhiker's Guide to the Galaxy" which after 7.5 million years of computation finds that "42" is the answer to the question of the meaning of life. Chastened, the computer confesses its inability to comprehend or even identify the pertinent question. The Presiding Officer's Initial Order is a regrettable product of the same failure to identify and consider the range of issues inherent in review of a WTA application.

The Presiding Officer's acquiescent reliance upon earlier determinations by the former Chief Engineer and his failure to appreciate the central role of the constitutive questions of water needs and project viability inevitably led to the erroneous conclusions reflected in the Initial Order. He failed to recognize that the Water Transfer Act is intended to serve as a check to ensure that water transfers do not exceed the reasonable future needs of the

applicant, an elemental concept endemic to Kansas water law. *E.g., Shipe v. Pub. Wholesale Water Supply Dist. No. 25,* 289 Kan. 160, 167, 210 P.3d 105, 110 (2009) ("In addition, the KWAA dedicates water resources to the use of the public, prohibits water rights in excess of the reasonable needs of the appropriators, and subjects water rights to the principle of beneficial use.").

In declining to consider the broader purpose and scope of the WTA and in concluding he was without authority to address material deficiencies in the Application, the Presiding Officer abdicated his essential and intended role. This Panel has the opportunity to rectify his error.

II. ISSUE ABSTRACTS

A. THE CITIES SEEK AUTHORITY TO TRANSFER A VOLUME OF WATER FAR IN EXCESS OF THEIR REASONABLE NEEDS

The Cities seek authority to transfer a volume of water far greater than their reasonable needs.[11] Granting that authority would run afoul of fundamental water stewardship precepts.[12]

> Out-of-basin transfers are 100 percent consumptive to the basin of origin. 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 Envtl. L. & Pol'y 105 (2008) Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol14/iss1/3.

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[11] "Q And you said yesterday that that is, at least in part, because the Cities do not need all the water, right? A Correct." *Tr. 330:6-9* (Testimony of Hays City Manager). As discussed hereinafter, there is also no credible evidence that the Cities will ever have a need for the amounts of water they seek authority to transfer.

[12] *See, e.g.,* K.S.A. 74-2608 which enunciates the required guidelines to be developed by the Kansas Water Office. "Such guidelines shall . . . (7) consider the reasonable needs of the water user at the time."

The principles of efficient use and documented water needs are paramount considerations under the Act.[13] Application of those essential values prevents approval of the Application. *Id.*

B. THE CITIES ARE UNABLE TO EVEN ESTIMATE THEIR FUTURE WATER NEEDS

Reflective of the WTA's emphasis on a transfer recipient's water needs, its implementing regulations require that an applicant provide information projecting future water needs on both a gross and a gallons per capita per day ("GPCD") basis. But despite the clear regulatory mandates, the Cities provided neither category of information. Neither city can offer any opinion or projection about their future water needs on either a gross or GPCD basis.

C. THE CITIES WTA APPLICATION SUBSTANTIALLY OVERSTATES REASONABLY EXPECTED FUTURE POPULATION GROWTH

Again indicative of the centrality of water needs in considering WTA applications, K.A.R. 5-50-2(r) requires that the application include ". . . population projections for any public water supply system that will be supplied by the water transfer, and the basis for those projections." The Cities' Application utilizes a 2% population growth projection chosen on a pro forma basis by the former Chief Engineer without research or analysis. *Cities Exhibit 0001* at 44.

Perhaps predictably, the two percent population estimate is fanciful. Even the Cities' own expert rebuts that projection. "Based on the above review of both quantitative and qualitative data the city should be able to grow at a 1% [annual] rate." *Cities Exhibit* 2868

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[13] "(b) 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. . . ." K.S.A. 82a-1502.

at 3. The Intervenors' expert is yet more pessimistic about future growth suggesting a 0.34 percent annual growth rate for Hays and a 0.06 percent annual growth rate for Russell through 2045.[14] As discussed in greater detail below but patently evident in any event, even if the Cities' expert's 1% projection is credited, the difference between 1% and 2% growth is notably material in both population numbers and related water demand.

D. What the Cities Characterize as a Design Plan is Merely a Conceptual Estimate That Fails to Comply with the Statutory Requirement for a Detailed Plan

Because the Cities' have failed to develop or provide a detailed design plan for the project, the Application is deficient and inconsistent with K.S.A. 82a-1502(c)(6), which calls for a proposed plan of design, construction, and operation detailed enough to enable all parties to understand the impacts of the proposed water transfer. The Cities' expert confirmed the absence of a detailed plan. "Q. Q Okay. So in preparing your estimate, I'm assuming, and I guess you could correct me if I'm wrong, but I'm assuming that you would be conversant with the details of the construction project? A. ***There are no details at this point.*** Q. Okay. A. ***It's conceptual.***" *Tr 973:9-16* (Waddell testimony) (emphasis added

E. Even at This Late Date the Cities Have No Plan to Finance the WTA Project

Neither city has developed a financing plan for the project.

- The Hays City Manager: "Q. When we took your deposition, Mr. Dougherty, you made the statement that the Cities do not have any firm plans for how the

[14] Per the Intervenor's experts, "Population projections developed by the University of Kansas suggest a 0.34 percent annual growth rate for Hays and a 0.06 percent annual growth rate for Russell through 2045, based on the future outlook for Ellis and Russell counties." *WP Exhibit* 01866 at 7.

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*

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

For reasons explained below, the financial viability of the water transfer project is an important consideration under the WTA.

F. The Volume of Water Sought To Be Transferred Exceeds the Cities' Reasonable Needs as Determined by Reference to Their Approved Water Conservation Plans

The WTA requires municipal applicants to adopt, implement, and maintain water conservation plans and practices. K.A.R. 5-50-2(p). The relevant guidelines for water conservation plans were developed by the Kansas water office and aim to achieve more efficient use of the state's limited water resources. Once a plan is adopted it serves as a functional cap on usage.

Both Cities have approved conservation plans in place. Russell's most recent conservation plan imposes a maximum usage of 138 GPCD. Hays' most recent conservation plan allows for a maximum of 95 GPCD. Consumption that exceeds the amount permitted by the conservation plans, whether facilitated by a water transfer or otherwise, is prohibited.

Though seeking an enormous quantity of water from the R9 Ranch, the Hays and Russell city managers both testified that their respective cities intend to maintain their presently effective conservation measures. Assuming that to be true, the water the Cities seek to transfer is almost entirely surplusage as compared to their conservation plan

constraints and would constitute prohibited waste. That is so because waste includes "the application of water to an authorized beneficial use in excess of the needs for this use." K.A.R. 5-1-1 (mmmm).

G. The Requested Transfer Is Prohibited by K.S.A. 82a-1502(b) Because It Is Unsustainable

The Application cannot be approved because the volume of water the Cities seek to transfer is not sustainable. The Cities define sustainability as a circumstance where the average volume of water pumped from the well field does not exceed the average volume of water recharged to the aquifer.[15] But here the evidence unequivocally establishes that withdrawal and recharge rates are not in equipoise, meaning the withdrawals deplete the aquifer and are not sustainable, as so defined.[16]

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

It must be recalled and understood that it is the Cities' burden to prove a statewide net benefit from approval of the project. Here the Cities' support for that notion is entirely conjectural. The suggestion that additional water resources will spur growth is speculative, as no evidence was provided of commitments from businesses or individuals to move to the cities of Hays or Russell if more water resources were available. Both city representatives agreed that businesses seeking to move to these cities would face difficulties in obtaining workers. Moreover, business recruitment is often a zero-sum

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[15] *Cities' Exhibit 0001-003 at Bates 0000356.*

[16] *See* Larson report, infra; *see also* Donald O. Whittemore, *et. al.*, Kan. Geo. Survey, *2023 Status of the High Plains Aquifer in Kansas*, at 15, (Tech. Series 25)("the pumping reductions required for zero water-level change in Edwards and Pawnee counties would be expected to be greater than the average for all of GMD5 based on the long-term water-level declines shown in these counties [.]"), *available at* https://kgs.ku.edu/sites/kgs/files/files/TechSeriespdfs/TS25.pdf.

game, where one city wins at the expense of another. And, importantly, both city representatives confirmed that the present and prospective business environment and prospects are good, suggesting that additional water resources are not imminently necessary.

Speculation is not proof.

III. FACTUAL BACKGROUND

In their Application the Cities request authorization to transfer 6,756.8 acre-feet annually from the R9 Ranch for municipal use.[17] An acre-foot of water equals 325,872.36 U.S. gallons. *New Mexico v. Gen. Elec. Co.,* 335 F. Supp. 2d 1185, 1196 (D.N.M. 2004). The request equates to 2,201,854,362.048 gallons of water per year. As a matter of context, Hays used 1,792 acre-feet of water in 2020 and Russell used 974 acre-feet.[18] The Cities are thus seeking authorization to transfer vastly more water from the R9 Ranch than they cumulatively consumed as recently as 2020.

A. The Cities Understand and Concede They Do Not Need the Volume of Water They Seek in the Application and Provided No Evidence That They Would Need That Volume in the Future

Here a baseline question is whether the Cities have a demonstrable need for the volume of water they seek to transfer. Since the answer is that they do not, the Application cannot be approved.

A WTA applicant is required as part of the application process to provide information about projected water needs. K.A.R. 5-50-2 states in pertinent part:

> To be complete, a water transfer application shall show the following:
> (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;

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[17] Application at 5.

[18] Direct Testimony of Stephen F. Hamilton on behalf of Cities at 11.

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

Both city managers conceded their refusal or failure to comply with their regulatory obligations.

- The Hays City Manager: "Q. So you don't know -- pardon me. You don't know what your future needs will be? A. I can't state exactly what our future needs will be. Our existing sources are inadequate. Q. Okay. Can you state approximately what your future needs are going to be? A. I cannot." *Tr. 316:19-25.*
- The Russell City Manager: Q. [A]re you aware, let me put it that way, of any document that's part of the Application that projects the future water needs for the City of Russell? A. No." *Tr. 570:14-18* (Russell City Manager testimony).

The centrality under the WTA of water need is an outgrowth of the fact that conservation is integral to the WTA and similar statutes nationwide reflecting the need to manage water resources sustainably while balancing ecological and human needs. The objective is to protect water resources from over-exploitation and to ensure that water transfers do not adversely affect the source or recipient basins.

In Kansas, the WTA specifically incorporates the Kansas Municipal Water Conservation Plan Guidelines ("Guidelines") published in August of 2007.[19] *See Cities' Exhibit 817.* The Guidelines describe water conservation as, "the utilization of cost-effective water use efficiency practices to curtail the waste of water and to ***ensure that water use does not exceed reasonable needs***. The primary goal of water

[19] *See* K.S.A. 82a-1502(b)(2).

conservation plans is to achieve more efficient use of the state's limited water resources." *Cities' Exhibit 817*, Bates No. 0021342 (emphasis added).

Similarly indicative of the WTA's conservation focus is the prohibition on approval of a WTA application in the absence of statutorily mandated conservation measures.

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

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

The Presiding Officer in his order only superficially addressed the question of the Cities' water needs. Instead, he largely parroted the conclusions drawn by the former Chief Engineer during the Cities' KWAA change of beneficial use proceeding. For example, in addressing the reasonable needs component in the Initial Order, the Presiding Officer deferred to the Chief Engineer's determination in the Master Order. "However, it must be recognized that the Master Order approving the change in use already implemented conditions and limitations to the authorized quantity and a reasonable need limitation." *Initial Order* at 74, ¶ 36.

But reliance upon that determination of reasonable needs was ill-advised for at least two reasons. First, the former Chief Engineer failed to consider and account for the Cities' presently available water resources and residual safe yield. Second, he based the

reasonable needs finding upon a population growth projection of two percent[20] that all parties concede to be markedly inaccurate.

According to the testimony of Mr. Letourneau, the 2% projected rate has no scientific or technical underpinning and was instead simply a standardized ballpark guess commonly utilized by the Chief Engineer in considering change of use applications. "Q. And you were asked yesterday about the – that figure of 2 percent in the water transfer application -- or, I'm sorry, in the change of use application and basically said that that's a figure, 1 percent or 2 percent is something that -- that the chief engineer would – would approve as a matter of course? A. Yes, that's -- to us it's reasonable." *Tr. 1013:12-19* (Letourneau Testimony).

Here the Cities concede they do not presently need the volume of water they are seeking approval to transfer and admit they have not taken steps to determine their future water needs. "Q. Mr. Dougherty, you testified, and we've seen this in other places, that the R9 project is going to be developed in phases; is that correct? A. That's the intent. Q. And you said yesterday that that is, at least in part, because the Cities do not need all the water, right? A. Correct." *Tr. 330:1-9*; *see also Intervenor's Exhibit WP 01871* at PDF 2 (Dougherty Deposition at 154).

Not only do the Cities not need the water now, they offered no evidence that they will ever need it in the future. Neither city undertook a future water needs analysis. But fortunately for the Panel's purposes, the Intervenors did. Harvey Economics,[21] the Intervenor's retained water resource experts, addressed the question and prepared a

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[20] *Cities Exhibit 0001-002* at 46, ¶ 237.

[21] http://harveyeconomics.com/.

report.[22] They found that the amount of water sought by the Cities is materially in excess of their reasonable needs. Harvey projects that the City of Hays would need no more than an additional 180 acre-feet supply by 2040.

> Hays' population grew by 0.65 percent per year from 1980 through 2020, but the City's growth slowed to an average of 0.29 percent per year over the course of the most recent decade (2010 to 2020). State projections suggest a 0.34 percent average annual growth rate for Ellis County through 2045. For the sake of scenario planning, HE will apply the 0.34 percent growth rate to Hays through 2040. This will result in a 2040 population of about 22,110, an increase of about 6.3 percent from Hays' 2021 population estimate.
>
> Water use patterns for Hays averaged 86 gpcd from 2008 through 2021, although gpcd trends in Hays are declining. HE will adopt the 86 gpcd for purposes here.
>
> Applying the Hays population projections to the gpcd assumption, the 2040 water demands for Hays would amount to 2,136 acre-feet. This would be an increase of about 180 acre-feet compared with water production in 2022.

Exhibit WP 01867 at 5-2 (27).

In an effort to demonstrate the effect on water demand from future events, the Cities offered evidence of the probability and effects of droughts of various severity and duration. But because they can offer no specific evidence regarding future water needs, a prediction that droughts will occur is immaterial and adds nothing to the WTA assessment, the question being how much water will be needed in the event of a drought?

In any event, though droughts will presumably occur, drought prediction for specific locales is to a degree an uncertain science. "So uncertainty in scientific data upon which the models are based will result in uncertainty in model projections, that I would agree with." *Tr. 997:2-5* (Testimony of Anthony Layzell, Ph.D.). Dr. Layzell's testimony noting drought prediction challenges aligns with the scientific consensus. "In temperate regions

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[22] *Intervenor's Exhibit* WP 01867.

(above 30 north latitude), long-range forecasts have limited reliability. Due to differences in observed conditions and statistical models, reliable forecasts for temperate regions may not be attainable for a season or more in advance." *National Integrated Drought Information System, Outlook and Forecasts,* https://www.drought.gov/forecasts#challenges (last visited 4.26.2024 at 8:03 AM).

Whatever the likelihood and severity, the water availability shortfalls that would be experienced by the Cities during periods of drought are dwarfed by the water volume sought in the Application. Called by the Cities as an expert witness was Paul A. McCormick, P.E. McCormick was retained to provide an analysis of the maximum yield available from the Cities' existing water sources in the event of 2-year (moderate), 5-year (exceptional), 10-year (decadal), and 20-year (multidecadal) droughts. *Cities' Exhibit* 2828 at Bates 0103744.

In his report Mr. McCormick stated that the total quantity of water presently available to Hays from all three wellfield sources combined is 3,675 AF/y. *Cities Exhibit 2828* at Bates 0103758. Hays presently uses approximately 2000 acre/feet of water per year and that consumption figure has remained relatively stable for several years. *Tr. 309:23-25; 310:1-3.* In his report Mr. McCormick concluded that Hays had residual sustainable yields under any of the considered drought scenarios as follows:

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

Cities Exhibit 2828 at Bates 0103765.

The Harvey Report addressed Mr. McCormick's analysis:

4. Estimates of firm yield water supplies during drought periods provided in the McCormick Expert Report, as compared to projected water demands, indicate that Hays and Russell currently have sufficient water supplies to meet demands during a moderate drought, similar to that experienced in 2011-2012.
5. Under exceptional drought conditions, Hays would experience shortages, most likely less than 400 acre-feet, and under optimistic growth assumptions, a shortage of less than 700 acre-feet. Russell is not expected to experience shortages under the most likely or optimistic growth projections.

Per testimony offered by Hays, it has residual firm water yield of 1,760 acre-feet even during an exceptional drought — a small deficit in relation to historical usage patterns. Russell used 974 acre-feet of water in 2020 and during an exceptional drought has remaining firm water yield of 789 acre-feet — also a small difference. *Cities Exhibit 2823* at Bates 0103509, FN 58. Despite the negligible shortfall, the Cities are asking, at minimum, for authority to transfer 4800 acre-feet per year on average. *Tr. 36:19-23.* Hays' percentage share of the requested 4800 acre-feet (3936 acre-feet)[23] is, standing alone, roughly twice its 2020 usage. If the Cities' expert's population growth projection is accepted, and considering as the Panel must[24] the Cities existing water resources, approval of the Application will make available to the Cities a momentous water windfall far in excess of reasonable need even after 20 years.

Cogent and compelling rationales support a policy of limiting water transfers to the recipient's reasonable needs. That salutary policy avoids waste and fosters water conservation practices in the recipient basin, encouraging users to better manage and

[23] Presumably 3936 acre-feet calculated by deducting Russell's 18% interest in the water right.

[24] "[T]he presiding officer shall consider all matters pertaining thereto, including specifically: (4) alternative sources of water available to the applicant and present or future users for any beneficial use." K.S.A. 82a-1502(c)(4).

optimize their existing water resources before seeking additional supplies from other basins (note K.S.A. 82a-1502(c)(4) requiring an assessment of "alternative sources of water available to the applicant and present or future users for any beneficial use).

B. The Cities' Population Growth Projection in the Application is Materially and Demonstrably Erroneous

The Application recites and relies upon a population growth scenario of two percent. "The 2010 population and the 2017 population estimates are from the U.S. Census. Population projections for 2026 and 2036 are based on 2% annual population growth as approved by the Chief Engineer."

(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:**

Table 6				
	2010 Population[157]	July 1, 2017 Estimated Population[158]	2026 Projected Population[159]	2036 Projected Population[160]
City of Hays	20,510	20,845	25,410	30,975
City of Russell	4,506	4,463	5,440	6,632

The 2010 population and the 2017 population estimates are from the U.S. Census. Population projections for 2026 and 2036 are based on 2% annual population growth as approved by the Chief Engineer.[161]

Cities Exhibit 0001 at 44.

The population growth projection utilized by the Cities in the Application is flatly wrong. The significance of that error is hard to overstate because, as the Cities concede, approval of a water transfer is limited to amounts corresponding to their "reasonable needs." *Cities Exhibit 0001 at 44*; K.S.A. 82a-707(e) ("Appropriation rights in excess of the reasonable needs of the appropriators shall not be allowed."). Reasonable water needs are, of course, directly correlated to population.

The 2% projection in the Application is debunked by the Cities' own expert, who estimates 1% growth, and is materially inconsistent with population projections developed by the University of Kansas which suggest a 0.34 percent annual growth rate for Hays and a 0.06 percent annual growth rate for Russell through 2045, based on the future outlook for Ellis and Russell counties. *Tr. 932:3-16.*

The following more recent and much smaller growth projection is from the Cities' retained population growth expert, Amy A. Haase. It shows at most projected growth of 1% for Hays and perhaps as little as .4 percent.

Figure 5: Population Projection
Projected Permanent Population

	2020	2025	2030	2035
0.4% Annual Growth Rate	17,889	18,250	18,618	18,993
1.0% Annual Growth Rate	17,889	18,802	19,761	20,769

Cities Exhibit 2868.

And even the Haase projection greatly exceeds historical population growth patterns. Intervenors retained Harvey Economics to analyze and report upon the reasonably expected population growth for the Cities. Susan Walker of Harvey Economics testified at the evidentiary hearing. Ms. Walker holds a master's degree in economics from Colorado State University, as well as a Bachelor of Science (BS) from the University of Vermont. She has over 20 years of professional experience, including 18 years with Harvey Economics. Her work has focused on comprehensive economic impact analyses for public and private projects. Ms. Walker's expertise lies in evaluating demographic and economic data, preparing forecasts and projections, and estimating impacts to local economies and specific industries. She has worked in planning endeavors related to water, energy, tourism, and other natural resource sectors with a focus on economic and demographic

research, analysis, and modeling. She has completed various projects involving rate studies, demand projections, socioeconomic impact analysis, cost-benefit analysis, project financing, and resource and facility valuation. *Intervenor's Exhibit* WP 01867 at 2.

Ms. Walker addressed the question of projected population growth in her written direct testimony.

> Q. **Is the Cities' growth assumption appropriate?**
>
> A. The assumption of two percent annual population growth appears to be based on outdated information - historical growth from as far back as 1950. Recent trends indicate much lower growth rates for Hays and population decline for Russell. The Cities have not provided sufficient support to substantiate a two percent annual growth rate over the next 20 years.
>
> Q. **What are the actual growth rates for the Cities of Hays and Russell?**
>
> A. Over the last four decades, growth for Hays has averaged about 0.65 percent per year, with slower growth (0.29 percent per year) between 2010 and 2020.Russell has experienced a continuously declining population since 1980. The slow or declining growth is unlikely attributed to water availability solely, but most likely influenced by various factors.

Haase conceded the accuracy of the Harvey growth figures. "Q. So Harvey says that over the last four decades, growth for Hays has averaged about 0.65 percent per year, with slower growth, parenthetically, 0.29 percent per year, between 2010 and 2020. Is that accurate? A. I believe so. Q. And Russell has experienced a continuously declining population since 1980. Is that accurate? A. I believe so but I was not specifically reviewing Russell's material, but to my recollection that sounds correct." *Tr. 931:13-24.*

Mr. Dougherty accepted that the 2% annual population growth estimate upon which the Application is predicated[25] is wrong and agreed with the Cities' expert that the correct population growth estimate was one percent.

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

Ms. Haase, though acknowledging the accuracy of historical census data showing a continuing loss of population, was not asked to opine on Russell's projected growth. But the Russell city manager testified that Russell's planning document "for the entire city that we use for everything, our comprehensive plan has a .25 percent annual growth rate." *Tr. 565:22-25; 566:1.*

Whether one accepts Haase's 1% projected growth estimate, her estimate of 0.4% based upon historical data,[26] the Cities' documented historical growth (or decline in the case of Russell), or the University of Kansas projections, all are markedly different than the 2% growth rate recited in the Application.[27]

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[25] *Intervenor's Exhibit* 01868 (Exhibit 9) at PDF 199.

[26] "If it is assumed that 85% of the students are not included in the city's permanent population then the city grew by approximately 0.4% annually during the 2010s." *Haase Expert Report.*

[27] The 2% figure used in the Application was not the result of professional analysis but was simply a figure typically used by the Chief Engineer. "[One] percent or 2 percent is something that -- that the chief engineer would – would approve as a matter of course? A. Yes, that's -- to us it's reasonable." *Tr. 1013:16-19* (Letourneau Testimony).

In terms of future water needs, expected population growth is of course a critical part of the analysis. Acknowledging the importance, the regulations require that a WTA Application include a growth projection: "[I]f applicable, population projections for any public water supply system that will be supplied by the water transfer, and the basis for those projections." K.A.R. 5-50-2(r). All parties agree the population growth estimate incorporated in the Application is wrong. Any disagreement is only a matter of degree. Approval of the Application when the applicant admits a key element is inaccurate by an order of magnitude is inconceivable.

C. The Design Plan Submitted As Part of the Application is Merely Conceptual and Fails to Comply with the Regulatory Requirements

The WTA conditions approval of a water transfer application, *inter alia*, on a "plan of design, construction and operation of any works or facilities" . . . which plan shall be in sufficient ***detail*** to enable all parties to understand the impacts of the proposed water transfer." K.S.A. 82a-1502(c) (emphasis added). But contrary to the statutory requirement, the Cities submitted no design plan at all. They instead provided a Class 5 cost estimate. This is the testimony of Keven Waddell who prepared the cost estimate. He makes clear the project has not moved beyond the conceptual stage.

> Q. And so you indicated that this is what classification of estimate? ***A. Class 5.*** Q. Okay. So that is the one, if you go over to the ***expected accuracy range, ranges from potential variations on the low end from 20 percent to 50 percent and on the high end from 30 percent to 100 percent?*** A. That's correct. Q. Okay. So in preparing your estimate, I'm assuming, and I guess you could correct me if I'm wrong, but I'm assuming that you would be conversant with the details of the construction project? ***A. There are no details at this point.*** Q. Okay. **A. It's conceptual.**

Tr.972-973:25, 1-16 (emphasis added).

The Class 5 estimate submitted by the Cities, also known as a "conceptual estimate" or "order of magnitude estimate," is used in the very early stages of a project to provide a

rough approximation of the total costs. Class 5 estimates are notoriously inaccurate: "I wanted to clarify that cost estimates and cost opinions are quite typically done at different scales. So there's – and often they're designated by class from Class 1, which is a very precise cost estimate up to Class 5, which is – it's a little better than arm waiving." *Radford v. Van Orden*, 168 Idaho 287, 296, 483 P.3d 344, 353 (2021), *as amended* (Mar. 22, 2021)(quoting expert witness testimony).

As one example of the unsuitability of a Class 5 estimate for WTA purposes, the Waddell estimate omits the most fundamental of details, the pipeline route. "Q Has there been a -- has there been a specific pipeline route selected for the project? A. Not that I'm aware of." *Tr. 975:5-7* (Waddell Testimony).

This chart describes the purpose and severe limitations of Class 5 cost estimates.

56R-08: Cost Estimate Classification System – As Applied in Engineering, Procurement, and Construction for the Building and General Construction Industries — 7 of 21

August 7, 2020

CLASS 5 ESTIMATE	
Description: Class 5 estimates are generally prepared based on very limited information, and subsequently have wide accuracy ranges. As such, some companies and organizations have elected to determine that due to the inherent inaccuracies, such estimates cannot be classified in a conventional and systemic manner. Class 5 estimates, due to the requirements of end use, may be prepared within a very limited amount of time and with little effort expended—sometimes requiring less than an hour to prepare. Often, little more than proposed building type, location, functional space building requirements (SF or m2), and number of stories are known at the time of estimate preparation. **Maturity Level of Project Definition Deliverables:** Key deliverable and target status: Total building area and number of stories agreed upon by stakeholders. 0% to 2% of full project definition. **End Usage:** Class 5 estimates are prepared for any number of strategic business planning purposes, such as but not limited to market studies, assessment of initial viability, evaluation of alternate schemes, project screening, project location studies, evaluation of resource needs and budgeting, long-range capital planning, etc.	**Estimating Methodology:** Class 5 estimates generally use stochastic estimating methods such as area factors and other parametric and modeling techniques. For example, historical unit prices or functional use unit prices driven. **Expected Accuracy Range:** Typical accuracy ranges for Class 5 estimates are -20% to -30% on the low side, and +30% to +50% on the high side, depending on the construction complexity of the project, appropriate reference information and other risks (after inclusion of an appropriate contingency determination). Ranges could exceed those shown if there are unusual risks. **Alternate Estimate Names, Terms, Expressions, Synonyms:** Block schematic estimate, functional area-based estimate or scoping study estimate, concept design, ratio, rough order of magnitude, idea study, concept screening estimate, prospect estimate, rule-of-thumb.

Table 2a – Class 5 Estimate

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

The lack of detail and the inherent unreliability of a Class 5 estimate is startling. This information is excerpted from the chart.

> Class 5 estimates are generally prepared based on very limited information, and subsequently have wide accuracy ranges. As such, some companies and organizations have elected to determine that due to inherent inaccuracies, such estimates cannot be classified in a conventional and systemic manner. Class 5 estimates, due to the requirements of end use, may be prepared within a very limited amount of time and with little effort expended – sometimes requiring less than an hour to prepare.
>
> Typical accuracy ranges for Class 5 estimates are -20% to -30% on the low side, and +30% to +50% on the on the high side.

Id.

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

The Cities do not argue that the Class 5 estimate provides details but rather deflect by making the unsupported assertion that, despite the statute and the regulation, a detailed plan is not required.

> The statute and the regulations require that a transfer applicant provide a "proposed plan of design, construction, and operation" of the collection and transmission system that is in "sufficient detail to enable all parties to understand the impacts of the proposed water transfer." However, full [sic] set of detailed plans and specifications is not required at this stage of the proceeding.

Cities Exhibit 0001 at Bates 0000016.

That may be the Cities' lawyers' interpretation, but it does not align with the plain meaning of the words in the regulation. The Cities should know that because their lawyers

have unsuccessfully argued the same position before. In 1996 the Cities, through their present counsel, submitted a comment in conjunction with proposed revisions to the WTA administrative regulations in which they requested a revision to K.A.R. 5-50-2(g) to eliminate from the WTA application process any requirement for submission of "full blown, detailed engineering drawings and operating guidelines."

> While we recognize that the proposed rule mirrors the statute, we would like to see the rule amended to make it clear that full blown, detailed engineering drawings and operating guidelines are not required in order to submit an application for a water transfer or to proceed to a transfer hearing. Detailed engineering drawings for any transfer project will be expensive.
>
> An applicant should be required to submit preliminary planning documents describing in conceptual form the kind of diversion and transfer works being contemplated. Maps showing the general location of the wells, pump stations, and pipelines should be included. Sufficient

Cities Exhibit 2537 at 2-3.

The revision requested by the Cities was not accepted and K.A.R. 50-50-2(g) remained unchanged, a telling indication that the lawyer's interpretation was not shared by the regulator and that detailed means detailed. The Cities thus know (i) a detailed rather than a conceptual design plan is required; (ii) their proposal to amend the regulation to allow for conceptual in lieu of detailed design plans was rejected; and (iii) they concede through their expert that they have submitted only a conceptual plan devoid of details.

The refusal or failure to comply with the WTA statutory and regulatory requirements has consequences. In the absence of a waiver, compliance with applicable regulations is required. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz,* 415 U.S. 199, 235, 94 S. Ct. 1055, 1074, 39 L. Ed. 2d 270 (1974). Here there was no waiver of the regulatory requirements. "Well, it

was discussed, and actually that was a very key part of this process was Hays was adamant, they said, we do not want to be in the position to where anybody has to waive a rule." *Tr. 875:22-25* (Letourneau Testimony).

The WTA requires submission of a detailed plan for a reason and a design plan is materially different than a cost estimate. Failure to prepare and submit a design plan of sufficient detail is inconsistent with the WTA and its implementing regulations and deprives those who may be affected by the project of a meaningful opportunity to assess its impact. To approve the Application in the absence of the requisite plan would be entirely incompatible with the Panel's role and responsibilities.

D. The Cities Inability to Identify a Financing Source or Mechanism in Relation to Infrastructure Construction Costs Prevents Approval of the Application

Hays does not know how the WTA project will be financed. "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.339:5-12.*

The unsettled status of the Cities' infrastructure financing is problematic for at least two reasons. First, the absence of a prospective funding commitment is assuredly related to the failure of the Cities to obtain a construction design plan. Lenders need to understand what they are financing. They are unable to do so until presented with a detailed construction plan. Similarly, without a detailed plan, the Panel and those opposed to the project are left with no assurances regarding the scope or economic viability of the project and only the ineffectual Class 5 estimate as a template. A Class 5 estimate is not a document that can be meaningfully evaluated and falls far short of the

level of detail required by the WTA.

Second, whether the Cities' project can be financed is a direct consideration under K.S.A. 82a-1502(c)(3) which requires analysis of the economic and other impacts of approving the project. The potential economic benefits of the water transfer, such as job creation, infrastructure development, and long-term economic growth, depend heavily on secure and adequate funding. Uncertainty in financing may delay project initiation and completion, affect economic projections, and undermine potential benefits. Without secure funding, the economic risks of a stalled or incomplete project could lead to wasted resources and financial losses.

Because the lack of secure financing could lead to a range of negative outcomes involving economic, environmental, and public welfare factors, the uncertain status of the project's financing is a critical defect. It renders it challenging and probably impossible to adequately assess whether the benefits of approving the water transfer outweigh the consequences of not approving it.

E. The Volume of Water Sought To Be Transferred Exceeds the Cities' Reasonable Needs as Determined by Reference to Their Approved Water Conservation Plans

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

> (b) No water transfer shall be approved under the provisions of this act: (1) If such transfer would impair water reservation rights, vested rights, appropriation rights or prior applications for permits to appropriate water; and ***(2) unless the presiding officer determines that the applicant has adopted and implemented conservation plans and practices***

> ***that (A) are consistent with the guidelines developed and maintained by the Kansas water office pursuant to K.S.A. 74-2608, and amendments thereto***, (B) have been in effect for not less than 12 consecutive months immediately prior to the filing of the application on which the hearing is being held and (C) if the transfer is for use by a public water supply system, include the implementation of a rate structure which encourages the efficient use of water that is determined by the presiding officer to be effective and if designed, implemented and maintained properly, will result in wise use and responsible conservation and management of water used by the system.

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

The Kansas water office conservation guidelines referenced in the statute are the Kansas Municipal Water Conservation Plan Guidelines ("Guidelines") that were published in August of 2007. *See Cities' Exhibit 817.* The Guidelines describe water conservation as, "the utilization of cost-effective water use efficiency practices to curtail the waste of water and to ***ensure that water use does not exceed reasonable needs***. The primary goal of water conservation plans is to achieve more efficient use of the state's limited water resources." (Emphasis added.) *Cities' Exhibit 817,* Bates No. 0021342.

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

conservation plans under the present circumstances must be contrasted with their discretionary utilization in change of use proceedings.[28]

Thus, as applicants under the Act, the Cities are required to adopt and implement conservation plans and practices. And once a Conservation Plan is implemented it must be maintained. "Once implemented, the applicant shall continue to satisfactorily maintain each component of the water conservation plan." K.A.R. 5-3-5j. The mandatory conservation plan conclusively establishes a municipality's reasonable water needs. The reasonable needs calculation amounts to a cap on usage. As a consequence, requested transfers may not be approved if the end result is water consumption in excess of the applicant's established reasonable needs. K.S.A. 82a-1502(b).

Since the Cities are engaged in an interbasin water transfer regulated by the Act and, in the cases of Hays and possibly Russell, are also seeking loan funding from the State Revolving Fund, adhering to a water conservation plan is not optional—it is mandatory. They are required to abide by the Conservation Plans approved for the respective cities by the Kansas Water Office.

The reasonable needs determination incorporated in the plans is measured in terms of gallons per capita per day. The volume of water the Cities seek to transfer in this proceeding significantly exceeds the amounts permitted by their respective Conservation Plans. The city of Russell's most recent Conservation Plan was approved April 1, 2019.

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

Cities' Exhibit 1-68. The long-term water use efficiency gallons per capita per day (GCPD) approved by the Kansas Water Office is not to exceed 138 GPCD based on the regional average of the last five reported years (2011 through 2015). *Id.* at Bates Number 0003202.

Illustrative of a troubling trend of imprecision, in determining the Cities' reasonable needs in the change of use proceeding the former Chief Engineer utilized a virtually risible GPCD figure for Hays of 149.57. *Initial Order* at 20, ¶ 27. That figure was then recited in the Initial Order by the Presiding Officer and presumably relied upon. But as recognized in Hays' most recent Water Conservation Plan, adopted March 27, 2014, actual GPCD usage was not even close to the Chief Engineer's figure. That Plan imposed a 95 GPCD limit. *Cities Exhibit* 1-52, Bates Number 0002860. The figure was derived from an analysis of documented usage. The GPCD figure for Hays over the period of 2013 through 2017 was, in fact, 95 gallons. *Cities' Exhibit 0899*, Bates 0023585 (*Municipal Water Use in Kansas, 2017*, Kansas Department of Agriculture, Division of Water Resources). Reflecting a downward trend, the actual average GPCD for Hays over the more recent 5-year period (2018-2022) was 78 gallons. *WP Exhibit 01866* at PDF 33.

A water transfer under the Act is limited to the difference between the maximum usage permitted under the Conservation Plan cap[29] and any present or projected shortfall in available water resources. Any transfer beyond that determinable amount is prohibited and would, by definition, constitute waste as being greater than the Cities' reasonable needs. The arithmetic is not difficult. The Cities want too much water.

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

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

The Cities define sustainability in respect to the volume of water to be withdrawn from the R9 Ranch as a condition under which "the average volume of water pumped from the well field [will] not exceed the average volume of water recharged to the aquifer." BURNS & MCDONNELL, *Cities' Exhibit 1-3* at Bates 0000356. Employing that equation, the Cities have argued their requested withdrawals are sustainable long-term. But that equilibrium determination, if it was ever correct, is clearly flawed presently.

Steven Larson, a preeminent groundwater modeling expert, has opined that the groundwater model upon which the Cities rely is inaccurate in assessing aquifer recharge rates under non-irrigated conditions.[30] Balleau Groundwater, Inc., the developer of the GMD 5 model, agrees with that conclusion and is accordingly updating the model. *Tr. 1501:1-5.*

Stated most plainly, if the withdrawal and recharge rates are not in equipoise, by the Cities' own definition the withdrawals are not sustainable because they deplete the aquifer and Arkansas River flows. And at least generically, depletion of the aquifer because of excessive withdrawals equates to impairment if the static water level is unreasonably raised or lowered. *See, e.g.*, K.S.A. 82a-711a.

Note the testimony of Lane Letourneau, Division of Water Resources, Water Appropriation Program Manager: "Q. Okay. There's various ways to -- for someone to suffer impairment, are there not? A. Yes. Q. And is -- are actions that result in the

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

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

That opinion is consistent with the governing statute.

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

K.S.A. 82a-711.

Though it has been argued in this proceeding that impairment can only be found if the static water level is unreasonably raised or lowered "beyond a reasonable economic limit,"[31] that interpretation of the statute is incorrect. Made clear by the doctrine of the last antecedent, the economic limit phrase modifies only the "unreasonable deterioration" language.

> When interpreting specific statutory language, Kansas courts also apply the last antecedent rule: In construing statutes, qualifying words, phrases and clauses are ordinarily confined to the last antecedent, or to the words and phrases immediately preceding. The last antecedent, within the meaning of this rule, has been regarded as the last word which can be made an antecedent without impairing the meaning of the sentence.

State v. Durham, 38 Kan. App. 2d 791, 794–95, 172 P.3d 88, 91 (2007).

The doctrine is broadly recognized and relied upon.

> First, under the "doctrine of the last antecedent," relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote. (citations omitted).
>
> Second, as a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Hence, language in a clause following a disjunctive is considered inapplicable to the subject matter of the preceding clause.

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

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

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

Particularly without reference to economic effects, the facts as presented by Mr. Larson and buttressed by Balleau Groundwater are that the withdrawals will diminish, they will impair, groundwater levels in the aquifer.[32] Approval of the Application is thus improper.

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

Finally, the often-recited suggestion that additional water resources will spur growth, equating to a net benefit for the state, is entirely speculative. No evidence has been offered of commitments from any business or any individual to move to either of the cities if only additional water resources could be secured. Any business seeking to move to Hays or

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

Russell will encounter insuperable difficulties in obtaining workers.[33] And, most fundamentally, business recruitment is often a zero-sum game in which the winning locale prevails at the expense of some other city, often in the same state.[34] Moreover, witness testimony has established that the present and prospective business environment and prospects are good and promising in both cities[35] which suggests that from an economic perspective additional sources of water is not a first order concern.

IV. THE LAW

The anti-speculation doctrine, effectively adopted by Kansas,[36] prohibits the acquisition of a conditional water right without a vested interest or a specific plan to possess and control the water for a particular beneficial use. It ensures that water appropriation is driven by genuine need rather than speculative intentions. Merely storing water for future use without immediate beneficial use is considered speculative hoarding and violates the anti-speculation policy.

The anti-speculation doctrine is a fundamental component of the prior appropriation system. All western water codes encapsulate the "doctrinal trinity of beneficial use, waste, and forfeiture." "Statutes of nine states intone in nearly identical language that 'beneficial

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

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

[35] *Tr. 439:3-14; 440:2-3; 440:6-13-24.*

[36] The present version of the Water Transfer Act is a pristine landscape in terms of judicial analysis but borrows and largely embraces western states' water law precepts, including preeminently the anti-speculation doctrine. The doctrine has been codified in Kansas, BURKE GRIGGS, *Legal Aspects of Large-Scale Water Transfers* (December 1, 2020)

use, without waste, is the basis, measure, and limit of a water right,' and the remainder refer in some way to beneficial use." JANET C. NEUMAN, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 962-63 (1998). Kansas doctrine is in accord. "[T]he KWAA dedicates water resources to the use of the public, prohibits water rights in excess of the reasonable needs of the appropriators, and subjects water rights to the principle of beneficial use." *Shipe, supra.*

The foundational principles in the anti-speculation doctrine and Kansas law align with the core tenets of western water law, which prioritize optimal use, efficient water management, and the administration of water rights based on priority, while discouraging speculation and waste. *See, e.g.,* K.S.A. § 42-308 (rights not used for three years forfeited); K.S.A. § 82a-718 (rights not used for five years "without due and sufficient cause" deemed abandoned, but multiple and lenient exceptions exist to prevent forfeiture); *Frick Farm Props. v. Kansas Dept. of Agric.,* 190 P.3d 983 (Kan. App. 2008). The doctrine is a logical adjunct to the prior appropriation regimen which recognizes that water in Kansas is a limited and valuable resource. *See, e.g.* 82a-706. The system operates under the premise that the right to use water does not equate to the right to waste it. Waste of water is defined in Kansas to mean any of the following:

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

needs for this use.

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

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

Two landmark cases from Colorado, *Pagosa I*[37] and *Pagosa II*,[38] have shaped the legal framework surrounding conditional water rights and water appropriation in Colorado and throughout the western states and are instructive in the present milieu. These cases provide essential guidance on the requirements and considerations for granting conditional water rights and the obligations of cities seeking long-term water supplies.

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

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

Because they are largely incorporated, the factors identified in *Pagosa I* and *II* are familiar to students of the WTA and its implementing regulations. *See* K.A.R. 5-50-2(s) ("To be complete, a water transfer application shall show... the projected water needs of

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

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

the applicant and of any other entities to be supplied water by the applicant, and the basis for those projections[.]") A municipality seeking to appropriate water based on projected population growth within a reasonable planning period must reliably demonstrate its future water requirements supported by substantiated growth projections within its service area. *Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.*, 249 P.3d 794 (Colo. 2011). Here the Cities have done neither. They cannot knowledgeably articulate their future water needs and their population projection expert, coupled with the Harvey Report and other reliable data, entirely undermines the 2% growth rate upon which the Application is premised.

V. CONCLUSION

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

An administrative agency must assume the responsibility of expressing the basic facts on which it relies with sufficient specificity to convey to the parties, as well as to the court, an adequate statement of the facts which persuaded the agency to arrive at its decision.

Thus, there must be findings on all applicable standards which govern the agency's determination, and the findings must be expressed in language sufficiently definite and certain to constitute a valid basis for the order, otherwise the order cannot stand. *Kansas Public Service Co. v. State Corporation Commission*, 199 Kan. 736, 744–745, 433 P.2d 572 (1967). Findings of ultimate fact expressed in the language of the applicable statute are not enough in the absence of basic findings to support them. *Cities Service Gas Co. v. State Corporation Commission*, 201 Kan. 223, 230, 440 P.2d 660 (1968) (citing *Blue Cross & Blue Shield v. Bell*, 227 Kan. 426, 433–34, 607 P.2d 498 (1980).

As herein detailed and explained, the Application suffers from a host of defects, specifically including the expected deleterious effects to be suffered by those near the R9 Ranch. Careful review of the Application and the evidence adduced at the evidentiary hearing reveal that the Cities have embraced a monumental project without adequate substantiation and documentation of various key components of a successful plan. They do not know their future water needs and have relied upon a flawed projection of population growth. They have only a vague notion of how the project will be financed. And the Application does not identify commitments from any entity, conditioned upon approval of the water transfer, to grow an existing enterprise, move a business or start a new business in the Cities.

Given the currently projected infrastructure costs of 134.9 million dollars[39] and the lack of reliable water needs or population data, it is difficult to discern any net benefit to either the citizens of Hays and Russell or the State of Kansas. Per the Harvey report:

> This scenario analyses of the Cities' net future water need strongly suggest that the Cities will need much less water in the foreseeable future than they

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

> 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 2025.40 Additional costs associated with water treatment and pumping may also apply. Without much future growth, there is a high likelihood that the costs of this project and the water supply it provides will be borne largely or even entirely by the existing customers of the Hays and Russell water systems. These customers will very likely experience major increases in their water rates with little or no benefit. Hence, the R9 Ranch project will very likely result in a net cost to the water ratepayers of Hays and Russell. If water rates do not increase substantially, the financing of the project is brought into serious question.
>
> In sum, the R9 Ranch project as presently described in the KWTA Application produces a net cost to the Cities and the State of Kansas.

WP01866 at PDF 38.

What the Cities have done is to make unsubstantiated assumptions regarding the presumptive effects of approval of the transfer project on future economic and population growth. The facts do not support the enthusiasm. And, in the end, they do not support approval of the Application. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." JOHN ADAMS, T*he Portable John Adams*. Neither the anti-speculation doctrine nor the underlying principles embodied in the WTA countenance movement of vast quantities of scarce and valuable water based on optimism alone.

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, and cannot effectively refute the evidence that the plan they propose will adversely affect the source aquifer and those that rely upon it. The Presiding Officer's error in approving the

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

Application naturally has consequences for the Intervenors, but if this Panel compounds the error the longer-term consequences may be of existential dimensions for both Kansas at large and its agricultural sector specifically.

The Application should be denied, and the tribunal should grant any other relief to which, under law or equity, Intervenors may be entitled.

Dated May 1, 2024
Overland Park, Kansas

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