

In The Matter Of:
Hays, Kansas & Russell, KS v
Edwards County, Kansas & Kansas Water Transfer Act

Formal Hearing
Vol. 1
July 19, 2023

Court Reporting Service, Inc.
324 W. Central, Suite B
Andover, KS 67002

Original File 07.19.23 Water Hearing 1.txt

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1 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
 2 STATE OF KANSAS
 3
 4 IN THE MATTER OF:)
 5 THE APPLICATION OF THE)
 6 CITIES OF HAYS, KANSAS) OAH No. 23AG0003 AG
 7 AND RUSSELL, KANSAS)
 8 FOR APPROVAL TO)
 9 TRANSFER WATER FROM)
 10 EDWARDS COUNTY, KANSAS)
 11 PURSUANT TO THE KANSAS)
 12 WATER TRANSFER ACT)
 13
 14
 15 FORMAL HEARING
 16 VOLUME I
 17
 18 This matter came on for Formal Hearing
 19 before Matthew A. Spurgin, Presiding Officer, at
 20 Hyatt Regency Wichita, Riverview Ballroom, 400
 21 West Waterman, Wichita, Sedgwick County, Kansas,
 22 commencing at 10:10 a.m. on the 19th day of
 23 July, 2023.
 24
 25

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1 A P P E A R A N C E S
 2 City of Hays, Kansas appears by its
 3 attorneys, David M. Traster, Foulston Siefkin LLP,
 4 1551 North Waterfront Parkway, Suite 100, Wichita,
 5 Kansas 67206; Daniel J. Buller, Foulston Siefkin
 6 LLP, 7500 College Boulevard, Suite 1400, Overland
 7 Park, Kansas 66210; and Donald F. Hoffman and
 8 Melvin J. Sauer, Jr., Dreiling, Bieker & Hoffman
 9 LLP, 111 West 13th Street, Hays, Kansas 67601.
 10 Also present were Toby Dougherty and Jami Buck.
 11 City of Russell, Kansas appears by its
 12 attorney, Kenneth L. Cole, P.O. Box 431, Russell,
 13 Kansas 67665. Also present was Jon Quinday.
 14 Water PACK and Edwards County appear by
 15 their attorneys, Charles D. Lee and Myndee M. Lee,
 16 Lee Schwalb LLC, 7381 West 133rd Street - Second
 17 Floor, Overland Park, Kansas 66213.
 18 Division of Water Resources appears by
 19 their attorney, Kate Langworthy, Kansas Department
 20 of Agriculture, 1320 Research Park Drive,
 21 Manhattan, Kansas 66502. Also present was Lane
 22 Letourneau.
 23
 24
 25

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1 **PRESIDING OFFICER:** We're now on the
 2 record, this is the hearing in the matter
 3 of the application of Hays, Kansas and
 4 Russell, Kansas, their application to
 5 transfer water, and this was Office of
 6 Administrative Hearing Case
 7 Number 23AG0003 AG. Today's date is
 8 July 19, 2023, it's now 10:11 a.m., my name
 9 is Matthew Spurgin, I'm the administrative
 10 law judge who is presiding over this case.
 11 Would the parties please state their
 12 appearances for the record, and if you
 13 could make sure anything that might be an
 14 unusual spelling is spelled out correctly
 15 so our court reporter can get that.
 16 **MR. TRASTER:** Thank you, Your Honor.
 17 My name is David Traster from Foulston
 18 Siefkin representing the City of Hays;
 19 Daniel Buller is with me. Mel Sauer is
 20 here and Don Hoffman are also attorneys
 21 representing the City of Hays. Also
 22 represented by the city manager, Toby
 23 Dougherty, and the mayor, Mr. Musil,
 24 M-U-S-I-L, is present today. There are
 25 other representatives from the City of Hays

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1 in the room as well.
 2 Your Honor, I would point out that I am
 3 connected to Zoom, but I'm not seeing
 4 anything. I haven't had -- I don't have
 5 the volume up so -- I just wanted to see,
 6 make sure that it was going, and I'm just
 7 noting that I don't have the video, which
 8 is fine, I ...
 9 **PRESIDING OFFICER:** All right.
 10 Looks like more people have joined the
 11 waiting room. I am going to just disable
 12 the waiting room so everybody -- we'll just
 13 disable the waiting room so everybody's
 14 automatically admitted in, and then they
 15 don't have to worry about waiting to be
 16 admitted and I don't have to keep a close
 17 eye on that.
 18 **MR. TRASTER:** I'm going to leave the
 19 meeting, I just wanted to make sure that it
 20 was up and running. Thank you.
 21 **MR. COLE:** Yes, the applicant City
 22 of Russell appears with the city manager,
 23 Jon Quinday, and counsel Ken Cole.
 24 **MR. LEE:** Your Honor, Water PACK and
 25 Edwards County, Kansas appear through

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1 Charles Lee and Myndee Lee of Lee Schwalb,
 2 Schwalb may be a little hard,
 3 S-C-H-W-A-L-B, attorneys of record.
 4 **MS. LANGWORTHY:** Kansas Department
 5 of Agriculture Division of Water Resources
 6 appears by counsel Kate Langworthy and also
 7 represented by Lane Letourneau; last name
 8 may be difficult, L-E-T-O-U-R-N-E-A-U.
 9 **PRESIDING OFFICER:** Okay. Make sure
 10 I get the microphone back on here.
 11 All right. Thank you, everybody. Now,
 12 this hearing is to address the application
 13 pursuant to the Water Transfer Act. Thank
 14 you, everybody, for working with us so far
 15 to get to this point. This is really kind
 16 of a first of its kind, so we're learning
 17 as we go, as we move through this process.
 18 We had a few filings that came in
 19 yesterday just as I was getting ready to
 20 leave Topeka to drive down here. Some
 21 things that were filed by Department of
 22 Health and Environment and the Water Office
 23 indicated that they wanted to be included
 24 on the notice list as commenting agencies.
 25 I do have an order that will be coming out

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1 on that, but with traveling and getting
 2 things sent back remote to my legal
 3 assistant, those have not gotten uploaded
 4 to that E-file system yet. But anything
 5 that's filed in this matter, let's go ahead
 6 and get them included on here.
 7 The way the statute's worded, it says
 8 notice will be sent out to appropriate
 9 commenting agencies, including but not
 10 limited to a list of agencies. There's no
 11 way to know until someone has told us that
 12 they want to be one of those agencies how
 13 we can serve any notice on there. But now
 14 that we have that notice, let's make sure
 15 that anything is sent out there.
 16 That order will be coming out either
 17 today or tomorrow, whenever my assistant is
 18 able to get that uploaded on there. So
 19 just if anything does need to get filed,
 20 just make sure those parties are included
 21 on the service list.
 22 All right. So I guess kind of some
 23 preliminary things. We'll go through with
 24 the witnesses. Those who've had the
 25 prefiled testimony when they are called up

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1 to the witness stand, your witness has that
2 prefiled testimony, just kind of ask that
3 witness if that's the same -- once they're
4 sworn in, ask them if they filed that
5 prefiled testimony, if that's the same
6 testimony that they would offer if they
7 were asked those same questions today.
8 Presumably they will say, yes, it is, or
9 if there's some corrections, they
10 transposed numbers, anything like that,
11 then their testimony on the witness stand
12 they can make those corrections. But,
13 otherwise, they can say that will be the
14 testimony that they would offer, then you
15 can offer that, and we can just go ahead
16 and admit that and they can be ready for
17 cross-examination, kind of speed things
18 along a little bit so we hopefully are not
19 here a month from now still conducting this
20 hearing.
21 If you have questions, just ask as we go
22 along, we'll try to work out things as best
23 we can. Are there any questions the
24 parties have or any concerns about
25 witnesses? I don't know that I caught

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1 anything in the filings about any issues
2 with witness availability.
3 **MR. TRASTER:** Your Honor, there are
4 just a couple matters, David Traster for
5 City of Hays. The --
6 **PRESIDING OFFICER:** Mr. Traster,
7 would you just push the button on there so
8 it lights up on your microphone? I just
9 want to make sure so that Zoom picks that
10 up as well so anybody can --
11 **MR. TRASTER:** It is lit up.
12 **PRESIDING OFFICER:** Okay.
13 **MR. TRASTER:** I guess I -- David
14 Traster for the City of Hays. I -- most of
15 the prefiled testimony has a brief summary
16 of the content of the testimony. Do you
17 want the witness -- do you want us to ask
18 the witness for a brief summary, or is the
19 written testimony -- written summary and
20 the report adequate?
21 **PRESIDING OFFICER:** Why don't we do
22 this. If you have a witness that says, I
23 provided testimony on X, Y, and Z and
24 that's included in my report here, in my
25 testimony that was filed with the report as

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1 an attachment, just like a 50,000-foot view
2 of what it is; and that way if we have
3 anybody observing the hearing, they kind of
4 get a little bit of an idea this person
5 knows about geology, this person knows
6 about engineering, economics, whatever it
7 may be.
8 **MR. TRASTER:** So a brief summary of
9 the topic without going into the details of
10 the subject matter itself?
11 **PRESIDING OFFICER:** Uh-huh. And
12 then those filings are available, they can
13 be accessed if anybody really wants to go
14 through and look at that. For most people,
15 unless they're subject matter experts, a
16 lot of that may be, you know, a foreign
17 language.
18 **MR. TRASTER:** Sure.
19 **PRESIDING OFFICER:** But at least
20 that way, at least what is put out there
21 for anybody who may be observing, they know
22 at least up front before someone starts
23 their cross-examination that John Doe is
24 the witness here, is an engineer and
25 studies hydrology and whatever it may be.

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1 **MR. TRASTER:** Sure, we can do that.
2 The other thing I wanted to -- there are a
3 couple of matters I wanted to address with
4 you.
5 **PRESIDING OFFICER:** Sure.
6 **MR. TRASTER:** So there are two
7 applicants here, the City of Hays and the
8 City of Russell, and we felt that it would
9 be most efficient and most understandable
10 if we would combine the presentation, in
11 other words instead of Hays putting on its
12 entire case and then Russell putting on its
13 entire case, if we could -- because they
14 are interrelated, if we could present them
15 sort of together.
16 The plan at this point is to call
17 Mr. Dougherty and then maybe another
18 witness but then Mr. -- Mr. Quinday, and
19 that way I think the whole -- I think
20 it'll -- the evidence will flow in better.
21 But they are separate parties with separate
22 counsel, and we just -- is that all right
23 with you if we combine the presentation?
24 **PRESIDING OFFICER:** I don't have any
25 objection to that, is there any objection

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1 from any other parties or ...

2 **MR. LEE:** Your Honor, we would only

3 say I'm not sure that the parties -- those

4 parties are precisely aligned, but we can

5 probably sort through that during the

6 process of the hearing.

7 **PRESIDING OFFICER:** I think I'll

8 allow that, Mr. Traster. Just the one

9 thing that I want to be cautious with is

10 we're not having attorneys tag team

11 witnesses. So if you're -- if you're

12 cross-examining a witness as counsel for

13 Hays, you're doing that, you and Mr. Buller

14 are not tag teaming on that. You can ask

15 those questions and then we can allow

16 Russell's counsel to also question that

17 witness. But since we have that

18 distinction there --

19 **MR. TRASTER:** I understand.

20 **PRESIDING OFFICER:** -- not the two

21 of you at the table kind of tag teaming.

22 **MR. TRASTER:** There are four lawyers

23 here for Hays, they don't all get to ask

24 every witness the same questions?

25 **PRESIDING OFFICER:** Yes.

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1 **MR. TRASTER:** Okay. All right.

2 **PRESIDING OFFICER:** All right.

3 **MR. TRASTER:** Understood. And

4 that's -- that's the plan, that was always

5 the plan.

6 So the other question in our mind, you

7 set some deadlines for submission of expert

8 reports and then you set some dead -- and

9 some deadlines for rebuttal reports, and we

10 have both. Not all of the expert reports

11 have rebuttal reports, but several of them

12 do. Those -- how do you want us to

13 proceed, do you want us in our case in

14 chief to address the expert witness -- the

15 expert testimony and the rebuttal, respond

16 to the rebuttal in our case in chief, or

17 are we supposed to wait until our actual

18 rebuttal case to -- to delve into rebuttal?

19 I'm guessing the former, but I wanted to --

20 **PRESIDING OFFICER:** I think if we do

21 it all at once, and then that way if you

22 have John Doe as your witness come up who

23 had that prefiled testimony and then Water

24 PACK's expert had something else and so

25 then John Doe's rebuttal testimony, you

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1 know, my methodology is the correct one

2 because they didn't consider these

3 factors --

4 **MR. TRASTER:** Sure.

5 **PRESIDING OFFICER:** -- something

6 like that. And it would be the same for

7 your witnesses, Mr. Lee, my methodology,

8 whatever it may be, so just address that

9 all, and then we don't have witnesses

10 coming back up and down, and I think that

11 might cause more confusion if witnesses are

12 being recalled more than necessary.

13 **MR. TRASTER:** Well, and there could

14 be some recall if -- if we call a witness

15 and the rebuttal testimony -- there could

16 be some need to recall witnesses, but I

17 think this approach would minimize that, if

18 we can. Otherwise, we'll be calling --

19 **PRESIDING OFFICER:** Yeah, we can't

20 predict everything that's going to happen,

21 but we'll just try to avoid as much of that

22 extra confusion as possible so we can try

23 to make this run as smoothly as possible.

24 **MR. TRASTER:** The other question I

25 have, I've handled a number of

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1 administrative hearings before the Office

2 of Administrative Hearings over the years,

3 but I've never been before you. And

4 normally the witness -- the exhibits are

5 admitted the front end and objections go to

6 weight, not admissibility, and I don't know

7 how you want us to proceed with admission

8 of documents. Do you want us to lay

9 foundation for every document, and if that

10 is going to be the case, we'll be here a

11 long time? And a lot of the documents we

12 have, we've presented turn out not to be

13 relevant, very relevant, but I -- that,

14 again, goes really to weight, not

15 admissibility. So I'm just wondering how

16 you want us to -- do we need to offer

17 every -- every exhibit, and if we don't

18 offer it, it's not admitted? How do you

19 anticipate --

20 **PRESIDING OFFICER:** For this

21 hearing, because of the nature of it, it --

22 this is different than those hearings that

23 I may do that are going to be a two-hour

24 hearing or even a one-day hearing. A good

25 number of the hearings that we do at the

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1 Office of Administrative Hearings, at least
2 one of the parties is a pro se party.
3 Everybody's represented here. I think
4 what might be the best way is if you've got
5 a list of the exhibits, if you want to
6 offer them, offer them, and then if there
7 is no objections we'll admit those. If
8 there are objections or somebody, you know,
9 wants to have foundation laid, those can be
10 addressed as necessary then. Does that
11 make sense?
12 **MR. TRASTER:** It does and I -- I
13 don't mean to be flip about this at all,
14 but, I mean, we have, like, 2800 exhibits.
15 **PRESIDING OFFICER:** I understand.
16 **MR. TRASTER:** And I -- some of them
17 may need foundation, but we would -- many
18 of them are duplicative, unfortunately, but
19 we would just like to have them admitted
20 for purposes of -- so that they can be
21 examined or -- or witnesses can be examined
22 about them, understanding that they go --
23 that all of them, they go to the weight,
24 not admissibility.
25 I don't know that there are any that

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1 are, you know -- well, but given -- given
2 the way that the KAPA, the Kansas
3 Administrative Procedures Act is drafted,
4 you know, the rules of evidence aren't
5 strictly applied and hearsay is admissible
6 and all -- everybody's entitled to put on
7 their evidence, and I'm just suggesting
8 that they -- that it be attached en masse,
9 but we can do it -- we can do it a
10 different way if you would prefer.
11 **PRESIDING OFFICER:** Okay. I guess
12 for the exhibits that you have, then, you
13 can propose those, if you want to offer
14 those, we'll see if there's objections, and
15 if there is not objections, that might save
16 a lot of time even discussing this right
17 now.
18 **MR. TRASTER:** Sure.
19 **PRESIDING OFFICER:** In the same way
20 that any of the other parties may have as
21 well.
22 **MR. LEE:** Your Honor, if I may?
23 **PRESIDING OFFICER:** Go ahead,
24 Mr. Lee.
25 **MR. LEE:** I would -- I would suggest

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1 protocol where the exhibits that
2 Mr. Traster is referring to are
3 contingently admitted and that to the
4 extent they are used actually during the
5 hearing there's an opportunity to object on
6 whatever basis would be appropriate.
7 2800 exhibits, obviously that's
8 unwieldy, but at the same time, without
9 knowing precisely what's going to be used,
10 if we were to take the approach they're
11 admitted unless we object during the course
12 of examination of a witness who is
13 referring to or relying upon an exhibit,
14 that seems to us to maybe meet the issue of
15 trying to be expeditious about this but
16 also without surrendering concerns one
17 might have about a particular exhibit.
18 **MR. TRASTER:** That sounds like a
19 really good idea, they're contingently
20 admitted, they're in the record, and then
21 if there are objections, we will -- we'll
22 address them at the time.
23 **PRESIDING OFFICER:** And all other
24 parties, is that acceptable to everybody
25 else?

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1 **MS. LANGWORTHY:** No objection, Your
2 Honor.
3 **MR. COLE:** Yes.
4 **PRESIDING OFFICER:** Okay. So we'll
5 do that, exhibits will all be contingently
6 admitted. And if there is an objection
7 raised, that objection will be addressed.
8 I am probably going to, I'll just let
9 everybody know, I'll probably error on the
10 side of letting something in and putting it
11 more toward the weight of everything else.
12 As we already brought up from what you
13 said, Mr. Traster, rules of evidence are
14 greatly relaxed for administrative
15 proceedings. My biggest concern, though,
16 is going to be relevancy. On the one hand,
17 I do hate to kind of provisionally admit
18 2800 exhibits and kind of cloud the record
19 with things there, even if they are
20 duplicative, but to make things a little
21 more expeditious with time, that seems like
22 the best way to go.
23 My biggest concern again will be the
24 relevancy. I don't care if something
25 happened in California unless somebody can

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1 somehow tie some -- something that happened
2 in some case there, some evidence from some
3 water being used there to how it's applied
4 here because otherwise that probably is not
5 relevant, if that makes sense to everybody.
6 So --
7 **MR. TRASTER:** Thank you, Your Honor,
8 that's very helpful. My -- I guess my
9 concern is that we don't want to have to go
10 through all 2800 of them. Some of them
11 are, you know, ancillary, supportive,
12 historical, but they may be part of the
13 story in the proceedings.
14 Finally, I think -- well, I won't say
15 finally because I -- one of the things I
16 wanted to let you know is that some of our
17 witnesses are going to be fact and expert
18 witnesses. We intend to call, for
19 instance, Mr. McCormick as a fact witness,
20 and so we will be scrupulous as we can
21 about making sure that there is a bright
22 line, a clear distinction between the
23 testimony that he gives as a fact witness
24 versus delving into his -- the testimony
25 that he might give as a -- as an expert.

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1 And so I just want to advise the Court
2 that that's our plan. And I think
3 Mr. McCormick is a key witness in that
4 regard, there may be one or two others,
5 and we will make it clear at the beginning
6 we'll probably call him as a fact witness
7 first, then offer his expert testimony, if
8 that's acceptable to Your Honor.
9 **PRESIDING OFFICER:** I think that
10 sounds acceptable. Any objections?
11 **MR. LEE:** Your Honor, only to the
12 extent, I guess this is preemptive, but
13 only to the extent fact witnesses aren't in
14 a position to provide opinions and so
15 that's different. So if it's outside
16 what's in his expert report, we would have
17 concerns about that if it's -- if it's
18 couched in the form of opinion.
19 **MR. TRASTER:** And we -- that -- we
20 understand that and we'll try to avoid it;
21 but we also understand that anybody can
22 object, and we'll deal with it at the time.
23 But we will prep our witnesses about
24 opinions and we'll go from there.
25 **PRESIDING OFFICER:** All right. Are

Page 23

1 there any other questions or preliminary
2 matters that the parties would like to
3 address?
4 **MR. TRASTER:** Probably so but I
5 think that's the list of things that I
6 wanted to cover. Thank you, Your Honor, I
7 appreciate your indulgence while we work
8 through these preliminary matters.
9 **MR. LEE:** Your Honor, thank you.
10 Just three quick preliminary matters. One
11 is we would propose and request that the
12 parties advise each other of who is going
13 to testify the following day by the end of
14 the day just for purposes of preparation.
15 So I presume that's not an issue?
16 **MR. TRASTER:** To the extent that we
17 know, I have no objection at all, yeah.
18 **MR. COLE:** No objection.
19 **MR. LEE:** Okay. Secondly, it has
20 come to case that Mr. Harvey, who is one of
21 the authors of the Harvey Economics expert
22 report is not going to be available to
23 testify, but his coauthor Susan Walker will
24 be available. She coauthored the report,
25 she coauthored the testimony, and she

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1 will -- she will adopt the report and adopt
2 the testimony, stand for cross-examination
3 based on what has been presented to the
4 tribunal. So just for purposes of advance
5 notice.
6 And third, we are assuming that we won't
7 be in a position to get to our witnesses
8 until next week, and that is the schedule
9 that we have advised them. If that seems
10 incorrect, then we would need to do
11 something else.
12 **MR. TRASTER:** I would imagine that
13 we'll take the rest of this week at least
14 and probably most of next but -- but
15 depends on a lot of things, like how much
16 cross-examination.
17 **MR. LEE:** Well, Mr. Traster, I'm not
18 verbose as you know, but I'm -- I'm
19 assuming certain things.
20 **MR. TRASTER:** Well, we are all
21 assuming those things.
22 **MR. LEE:** Okay, thank you.
23 **MR. TRASTER:** I guess there is one
24 other preliminary matter, and that is I --
25 I've been sitting to make these comments,

Page 25

1 Mr. Lee has been standing; and I've been
2 sitting 'cause I thought I needed to be
3 close to the mic and because I have some
4 back problems, do you -- how do you --
5 **MR. LEE:** That's -- that's just
6 force of habit for me.
7 **PRESIDING OFFICER:** You can do
8 whatever is comfortable for either of you,
9 I'm not going to be picky about that. I
10 will just ask when you are questioning a
11 witness and we have the witness come up
12 here to sit next to the court reporter, go
13 ahead and step up to the podium there so
14 that we make sure that the witness can hear
15 you clearly and the microphone picks you up
16 clearly as well.
17 **MR. TRASTER:** I just want to make
18 sure there's no disrespect if I don't stand
19 up.
20 **PRESIDING OFFICER:** You're fine.
21 **MR. BULLER:** Your Honor, this is --
22 this is not tag teaming, I -- but with
23 respect to the substitution of Mr. Harvey
24 by Ms. Walker, we were confused about the
25 nature of Water PACK's rebuttal reports

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1 because they were -- Ms. Walker and
2 Mr. Harvey's reports were copied and pasted
3 and -- other than the qualifications.
4 And so, you know, under Kansas law
5 that's duplicative, you have one expert
6 that says if you don't have two experts
7 that say the same thing, and, you know, I
8 can have a case on that, but to the extent
9 that Ms. Walker is presenting rebuttal
10 testimony that is exactly like Mr. Harvey's
11 rebuttal testimony, I presume
12 Mr. Walker's -- or, I'm sorry, Mr. Harvey's
13 rebuttal testimony won't be admitted into
14 the record as evidence. And, you know, I
15 don't think they have to withdraw it,
16 but -- but -- but, you know, having both of
17 them is just cumulative. And so I would
18 suggest that one -- I assume Mr. Harvey's
19 rebuttal would be withdrawn or stricken as
20 the case may be.
21 **MR. LEE:** Your Honor --
22 **PRESIDING OFFICER:** Response?
23 **MR. LEE:** -- if I may address
24 Mr. Buller's comment. We are not
25 suggesting that Ms. Walker is going to say

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1 something different than what Mr. Harvey
2 said. What we're simply saying, she's
3 going to testify to the same thing, same
4 facts and not go beyond what has been
5 provided to -- to the Cities' counsel and
6 to the tribunal.
7 **MR. BULLER:** Then I guess
8 Mr. Harvey's rebuttal report should be
9 withdrawn, I mean, they're the same report,
10 they're literally copied and pasted.
11 **PRESIDING OFFICER:** Okay. It's been
12 filed, it'll be part of the file, but
13 when -- when she appears to testify, her
14 rebuttal testimony would be what she would
15 be adopting as her testimony as if she were
16 giving it today, so that's what would be,
17 then, provided and entered into the record
18 as her testimony as if she were giving it
19 today.
20 **MR. BULLER:** And -- and because
21 we're just learning about this, the
22 question I have is any objections relating
23 to Mr. Harvey's direct testimony would
24 apply with equal force to Ms. Walker --
25 Ms. Walker's adoption of that testimony.

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1 The problem is their qualifications aren't
2 identical, but I guess they're both
3 economists. I guess the question I'm
4 having and I'm struggling, you know, to say
5 it succinctly is any objections that we
6 would otherwise have to Mr. Harvey's direct
7 testimony would apply with equal force to
8 Ms. Walker in adopting that testimony.
9 **MR. LEE:** And we entirely agree with
10 that, Your Honor.
11 **MR. BULLER:** Okay.
12 **PRESIDING OFFICER:** All right. Any
13 other preliminary questions or ...
14 **MS. LANGWORTHY:** Your Honor, with
15 respect to KDHE's motion to leave the
16 record open for opportunity to comment for
17 30 days, we were wondering if it would be
18 possible to extend that to 45 to allow the
19 commenting agencies, particularly the
20 Kansas Water Office -- Mr. Unruh indicated
21 that their regular meeting is August 23rd,
22 and so a 30-day opening may not leave
23 enough time for them to meet and then act
24 or compile a comment to submit for the
25 record, but just wanted to submit that for

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1 your consideration.
 2 **PRESIDING OFFICER:** Okay.
 3 **MS. LANGWORTHY:** Or, excuse me,
 4 Kansas Water Authority, I apologize.
 5 **PRESIDING OFFICER:** I'll take that
 6 under advisement. We'll see where things
 7 play out --
 8 **MS. LANGWORTHY:** Excellent.
 9 **PRESIDING OFFICER:** -- with
 10 everything here.
 11 **MS. LANGWORTHY:** Understood.
 12 **PRESIDING OFFICER:** Excuse me. We
 13 just have to figure out how we're going to
 14 work around all the statutory deadlines for
 15 getting an order out and everything. And I
 16 am speculating that the parties are going
 17 to want to submit potentially either,
 18 however you want to phrase it, like either
 19 post-hearing brief or proposed findings and
 20 conclusions, however we want to phrase
 21 that, I'm speculating the parties are going
 22 to want to do something like that, so we'll
 23 have to figure out time frames for
 24 everything there involved. We got a couple
 25 weeks to do that here, so we'll get that

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1 all figured out here before the end of our
 2 formal hearing.
 3 And I guess I did want to note that I
 4 don't see anybody here for GMD5. Has
 5 anybody heard anything from GMD5?
 6 **MR. TRASTER:** We have not, Your
 7 Honor.
 8 **PRESIDING OFFICER:** Okay. So as far
 9 as for next week, we had left a hearing
 10 date or, what, Wednesday as potentially no
 11 hearing on Wednesday because their counsel
 12 was potentially going to be in another
 13 hearing that was already set somewhere,
 14 Douglas County or Johnson County, or
 15 something.
 16 **MR. TRASTER:** Right.
 17 **PRESIDING OFFICER:** So I just wanted
 18 to see what the status was of that since
 19 they are not here today for this. So we'll
 20 see if we hear anything more from GMD5 by
 21 the end of the week here so we can figure
 22 out what we're doing for next week. We
 23 have the room here booked for all of next
 24 week, we'll kind of see where things go
 25 with -- with everything, if we're going to

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1 be in here on Wednesday or not next week.
 2 **MR. TRASTER:** I have not had a
 3 chance to see the submission -- I have not
 4 seen the request from KDHE for an extra 30
 5 or 45 days before. As you pointed out,
 6 they came in -- those pleadings came in
 7 late yesterday when we were working on some
 8 other things. I don't have any particular
 9 objection to some time, but I do want to go
 10 on the record as saying that the City of
 11 Hays, at least, is very anxious to have --
 12 to get to the end of this and to get the
 13 next statutory time limit running. And
 14 there is a 120-day window for the -- for
 15 the hearing, and we want to move
 16 expeditiously to the end of it. But I
 17 am -- I understood your position that you
 18 want to discuss that as we go along, and
 19 I'm absolutely open to that, I just want to
 20 be clear that we're going to -- we would
 21 like to move this forward.
 22 **PRESIDING OFFICER:** I don't think
 23 there's any intent to drag this out longer
 24 than necessary. There is a lot involved
 25 for everybody here, time, expense,

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1 everything, so the faster we can wrap
 2 things up, the better, but we also don't
 3 want to rush through things and not do a
 4 sufficient job or have sufficient record
 5 for the matter.
 6 **MR. TRASTER:** And I'm not trying to
 7 cut anybody off by any means.
 8 **PRESIDING OFFICER:** All right. So
 9 are there any other preliminary matters?
 10 **MS. LEE:** Sorry.
 11 **PRESIDING OFFICER:** Ms. Lee?
 12 **MS. LEE:** This is very technical.
 13 Is this connected to that -- to that
 14 projector, do you know, this HGMI cord?
 15 **PRESIDING OFFICER:** I --
 16 **MS. LEE:** I don't know which --
 17 **PRESIDING OFFICER:** I think it might
 18 be.
 19 **MS. LEE:** Does anybody know the
 20 screen --
 21 **PRESIDING OFFICER:** Okay. We can go
 22 off the record here for a moment.
 23 (Discussion held off the record.)
 24 **PRESIDING OFFICER:** We can go back
 25 on the record then. Didn't want to put our

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1 court reporter in a position of having to
2 dictate a whole bunch of irrelevant
3 information while we were trying to figure
4 out the technical information there.
5 **MR. TRASTER:** I can't hear you, Your
6 Honor.
7 **PRESIDING OFFICER:** Didn't want to
8 put our court reporter in that position of
9 having to try to dictate everything while
10 they were trying to get the technical
11 aspects worked out there. So -- so if
12 there's no more preliminary matters, then,
13 would the parties like to give some opening
14 statements?
15 **MR. TRASTER:** There's one more.
16 **PRESIDING OFFICER:** One more?
17 **MR. TRASTER:** Yep. If you guys are
18 arguing this --
19 **MR. BULLER:** I believe Water PACK
20 filed a motion relating to Mr. Barfield.
21 **MR. LEE:** We did.
22 **MR. BULLER:** It's your motion.
23 **MR. LEE:** We did, Your Honor, and
24 sounds like you may have seen that or at
25 least have seen it come in.

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1 **PRESIDING OFFICER:** I saw it last
2 night and have not been able to go through
3 that and your response to it fully yet, so
4 we'll take that up at a future point here
5 before we would get to that point of
6 testimony.
7 **MR. LEE:** Sure.
8 **MR. TRASTER:** That's fine. It
9 matters in terms of our preparation of
10 witnesses and the order of witnesses, so it
11 doesn't need to be today but we do need to
12 know whether Mr. Barfield is going to be
13 able to testify, sooner rather than later,
14 but we don't have to take it up now.
15 **PRESIDING OFFICER:** Okay.
16 **MR. LEE:** That's fine, Your Honor.
17 **PRESIDING OFFICER:** Anything else,
18 Mr. Buller?
19 **MR. BULLER:** That's it.
20 **PRESIDING OFFICER:** Okay.
21 **MR. BULLER:** Thank you.
22 **PRESIDING OFFICER:** I guess either
23 Mr. Buller or Mr. Traster, would you like
24 to make an opening statement?
25 **MR. TRASTER:** So is the mic on? I

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1 guess it is.
2 Your Honor, may it please the Court, my
3 name is David Traster, I'm a lawyer from
4 Foulston Siefkin, I represent the City of
5 Hays, and we, Hays -- the Cities of Hays
6 and Russell, as you know, have filed an
7 application to transfer some water from
8 Edwards County to Hays and Russell and --
9 along with our co-applicant.
10 The statute is really very clear, the
11 principal issue in this case is about
12 benefits to the State versus the benefits
13 to the State of denying the transfer. And
14 this is, in fact, not about benefits to
15 Hays and Russell as entities, and if that's
16 the case, it's certainly not about any
17 alleged harm to any of the intervenors or
18 to Edwards County.
19 The application should be approved
20 because we will show that the benefits to
21 the State for approving the transfer far
22 outweigh the benefits to the State for not
23 approving it. Water PACK's arguments about
24 what the Cities need or don't need are not
25 relevant.

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1 The Water Transfer Act -- the Water
2 Appropriations Act, excuse me, indicates or
3 says that appropriation rights in excess of
4 reasonable needs are not permitted, and
5 those reasonable-needs limitations are not
6 established by the Water Transfer Act but
7 by the Water Appropriation Act. The Water
8 Transfer Act doesn't mention the
9 applicant's needs.
10 The Cities are requesting an order
11 approving the transfer of their
12 well-established water appropriation rights
13 in which the Cities have a property
14 interest and which they are entitled to
15 exercise. The -- Hays and Russell are in
16 desperate need of water, but the
17 quantity -- and the quantity to which they
18 are entitled has already been resolved.
19 They're asking for permission to
20 transfer 6756.8 acre-feet per year for
21 municipal use in Hays and Russell,
22 voluntarily limited to 4800 acre-feet per
23 year on average, from the R9 Ranch in
24 Edwards County, which they own. It's a
25 parcel of irrigated property, farmland that

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1 is contiguous, that the purchase -- the
2 Cities purchased in 1995 specifically for
3 the purpose of developing it as a municipal
4 water supply.
5 It's an ideal water source, it has very
6 sandy soils that allow rain -- the rainfall
7 to soak in, there's no discernible runoff,
8 and there are between 45 and 145 feet of
9 saturated thickness on the ranch, averaging
10 about 100 feet of saturated thickness.
11 There are literally hundreds of years of
12 water available for the City of Hays and
13 for the irrigators who oppose this.
14 The Cities purchased this -- this
15 property on the open market, they own the
16 water rights, and they are entitled to
17 exercise them, just like the irrigators are
18 entitled to exercise theirs.
19 The evidence is going to show that the
20 State will reap significant benefits by
21 addressing the Cities' needs, dire need for
22 water. Their existing sources are
23 dependent on surface flow in the Smoky Hill
24 River and Big Creek. Those sources are
25 very dependent on rainfall to the west.

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1 When there is adequate rainfall over a
2 period of years, they can exercise their
3 rights and -- and meet their current needs,
4 but those needs are growing and, in fact --
5 the fact that they are limited during times
6 of drought has created an impression that
7 they are -- they don't have any water and,
8 in fact, a true perception. Right now,
9 those -- those sources are -- are running
10 dry.
11 I would direct Your Honor to the screen,
12 I think Jami's going to put up a image of
13 the area, the Hays Smoky Hill wellfield
14 during October of 2012, it's Exhibit 800;
15 and the next photo is Exhibit 802, which is
16 a -- a photo of the Smoky Hill River near
17 Russell's Pfeifer wellfield downstream from
18 the Hays wellfield during that same
19 drought. You can see that there is no
20 surface -- there was no surface flow in
21 that -- in that very significant drought.
22 There are -- fortunately, in 2014 it began
23 to rain -- well, yeah, and -- but drought
24 is an existential problem for these two
25 cities.

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1 But the evidence is also going to show
2 that there -- that those -- these droughts
3 are not -- are sort of the least of the
4 problem. Dr. Anthony Layzell is a
5 paleo-scientist with Kansas Geological
6 Survey. He is going to testify about --
7 that historically over the last thousand
8 years, there have been numerous droughts
9 spanning much longer than the two- or
10 three-year droughts that we are -- have
11 been experiencing in recent decades.
12 There -- there have been droughts that have
13 lasted 50 years and even one that has
14 lasted 100 years.
15 We'll call Dr. Jeff -- Jeffrey Basara,
16 who's a climatologist. He will testify
17 that based on the global warming and issues
18 that have been modeled worldwide that the
19 prospects of a 10-year drought have
20 increased by 35 to 60 percent. He will
21 testify that the odds of a 26 -- of a
22 20-year drought happening in the next
23 50 years have increased by 60 to 85
24 percent. So these are not speculative
25 issues; there isn't any doubt that we have

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1 had droughts and we will continue to have
2 droughts.
3 But you don't have to look to the past,
4 the ancient past or to the future to know
5 that drought is a problem. I'm going to
6 show you Exhibit 2679, which is a graphic
7 showing the droughts -- the droughts from
8 2010 to 2000 -- to current, and you can see
9 that there are several very significant
10 droughts.
11 And, Jami, if you'd scroll down to the
12 last page of that, this is -- these are the
13 most severe, exceptional droughts over the
14 last 100 or so years. And you can see that
15 we had the drought in the '50s, which is a
16 significant -- one of the most significant
17 droughts, it was bad, and in the '30s it
18 was bad. The droughts since haven't been
19 quite as significant, but all the evidence
20 suggests that we're going to be facing
21 those same kinds of historic droughts in
22 the future.
23 As I said at the outset, this proceeding
24 is about the impacts of approving or
25 denying the transfer to the State as a

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1 whole. It's -- it is to the State's
2 significant benefit to have a reliable --
3 for the Cities to have a reliable
4 drought-resistant water supply that will
5 allow them to grow. They're doing well
6 now, but they really need the ability to
7 weather these droughts.

8 The evidence will show that approval
9 will have a overwhelmingly positive benefit
10 for the State of Kansas. The construction
11 project alone will have a \$167 million
12 impact, with 752 full-time jobs and tax
13 revenue of up to \$4.4 million.

14 Conversely, Kansas will suffer
15 extraordinary economic harm if the transfer
16 is denied. Dr. Stephen Hamilton estimates
17 that the -- that just during one year of
18 a -- one of these 10-year droughts, the
19 loss based on water shortages in Hays and
20 Russell will amount to \$251 million to the
21 State and \$17 million in lost tax revenue.

22 In contrast, Water PACK opposes the
23 transfer to benefit a few irrigators at the
24 expense of more than 26,000 residents in
25 Hays and Russell. They focus entirely on

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1 their local harm. They don't mount any
2 evidence -- haven't mounted any evidence
3 that focuses on the statewide impacts;
4 it -- it is completely focused on a few
5 people near the -- near the ranch.

6 And it's very important to point out as
7 well that the irrigation wells on the ranch
8 have been plugged since 2017; therefore,
9 any economic loss to the community by
10 converting from irrigation to natural grass
11 has already occurred. It's interesting to
12 note that their -- their economist, I guess
13 it's going to be a different one, but their
14 economist doesn't give any credit to the
15 State or suggest there's going to be any
16 benefit to the State from a \$100 million
17 construction project, even though it will
18 clearly have significant benefits.

19 There -- even if there is -- and he
20 assumes that there are no qualified
21 construction companies that can do this
22 job, which is not the case, and, therefore,
23 the funds will flow out of the State.
24 Without even -- and even if that's the
25 case, there will be Kansas employers,

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1 workers, businesses, restaurants, gas
2 stations who will all receive some benefit,
3 even if it is an out-of-state contractor.
4 That evidence is just not there.

5 It's also interesting, and I don't know
6 now given the change in the -- in the
7 expert witness here, but the report
8 indicates -- has opinions about
9 climatology, it has opinions about
10 paleo-science, it has opinions about
11 hydrology, it has opinions about
12 engineering, and it has opinions about city
13 planning, and those opinions, they're
14 not -- there's no foundation for the idea
15 that their -- that their witness will be --
16 is an expert in either -- any of those
17 disciplines. The overwhelming evidence
18 will show that the benefits to the State
19 far outweigh the benefits of denying -- to
20 the State of denying the transfer. It's
21 not even close.

22 Water PACK goes on to make a fairly
23 ridiculous claim about devastating
24 impairment. This isn't the proper forum
25 for administration of impairment

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1 complaints. Moreover, that -- those
2 questions have already been litigated, and
3 Water PACK has lost. The chief engineer is
4 the ultimate authority on impairment, and
5 the former chief engineer has issued an
6 order with explicit findings that the
7 transfer will not impair Water PACK's
8 members' rights.

9 And they lost for a good reason. Water
10 PACK's version of impairment has no basis
11 in Kansas law. We -- Kansas law is
12 specific, stating that reasonable lowering
13 of the water table is permitted. The
14 portion of the High Plains aquifer
15 underlying the ranch is not like the
16 Ogallala to the west that's experiencing
17 significant declines with no recharge.
18 This area does recharge. And the evidence
19 will show that there is about - well, I
20 already said that - 45 feet of saturated
21 thickness near the river, 145 feet on the
22 east side of the ranch.

23 The GMD model, groundwater model shows
24 that with all of the other irrigation wells
25 pumping, the neighbors using the amounts

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1 they've used historically, and with the
2 Cities of Hays and Russell reducing their
3 irrigation rights from over 7700 acre-feet
4 per year to just 4800 acre-feet per year
5 will reduce the decline on the ranch versus
6 resuming irrigation, and that's to the
7 benefit of the neighbors.

8 Their expert is going to testify that
9 there are up to 713 wells that will be
10 impacted by this transfer, most -- many of
11 them are just by less than an inch. And
12 only one well will decline between 2.6 and
13 2.8 feet at -- and will decline more than
14 the GMD model shows if you believe his
15 testimony, which we think is -- should not
16 be believed for a number of reasons; that
17 the -- his report shows that it's an
18 additional 2.6 to 2.8 feet of additional
19 decline after 51 years of continuous
20 pumping at 4800 acre-feet per year over
21 what -- what our -- what our original model
22 showed.

23 Dr. -- we intend to call David Barfield,
24 the former chief engineer, who is an expert
25 on -- he's not a modeler, but he is a -- he

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1 is well versed in reading and reviewing
2 models, and he will testify that those --
3 the conclusions of their expert are
4 fundamentally flawed, there's no legitimate
5 basis -- well, strike that.

6 I'm going to go into a little more
7 detail. As I said earlier, a water right
8 will only impair another water right if
9 there's an unreasonable lowering of the
10 static water level beyond reasonable
11 economic limit, K.S.A. 82a-11 -- excuse me,
12 82a-711, parentheses c -- K.S.A.
13 82a-711(c).

14 The next statute, the next provision,
15 82a-711a, with no parentheses, goes
16 farther. It states that every water
17 appropriation right owned by Hays and
18 Russell and every appropriation right owned
19 by a Water PACK member includes an express
20 condition that allows for the reasonable
21 lowering of the static water level. It
22 specifically allows new permits that may
23 cause or will cause the level to be lowered
24 at the point of diversion of a senior water
25 right.

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1 There's no evidence in the record to
2 indicate that any Water PACK member will
3 not be able to continue to exercise their
4 rights. There's enough water for
5 everybody, the sky is not falling. But
6 that's not good enough for Water PACK.
7 They want to stop the Cities from
8 exercising their rights. Their alleged
9 material lowering or deleterious effect is
10 nothing more than the little shepherd boy
11 crying wolf.

12 But that's not the end of the impairment
13 story. Kansas law applies the western
14 water law doctrine of priority, first in
15 time is first in right, K.S.A. 82a-707.
16 The date of priority and not the kind of
17 use determines whether -- how to allocate
18 water when there is insufficient supply,
19 which there is not, there's plenty for
20 everyone. There are numerous other
21 statutes that deal with this, that say the
22 same thing. Kansas law is clear, first in
23 time is first in right, and this is not
24 complicated or arcane; it's the same rule
25 we all learned in grade school in the lunch

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1 line, no cuts.

2 Water PACK members know the rule, Water
3 PACK lawyers know the rule, in fact their
4 trial brief doesn't just cite but quotes a
5 Tenth Circuit opinion that says that the
6 Division of Water Resources must always
7 protect senior water rights above junior
8 water rights.

9 I would direct you to the screen to show
10 you a spreadsheet showing -- and, Jami, if
11 you could zoom in. There you go. I
12 have -- this spreadsheet shows the -- the
13 water -- the water appropriation rights in
14 priority order with the Hays and Russell
15 water rights on the R9 Ranch in red.

16 It shows all of the senior -- the rights
17 that are junior to Hays and Russell, and as
18 you can see, there are 13 water rights that
19 are junior to the bulk of the Hays and
20 Russell water rights. There are a few of
21 Hays and Russell water rights that are
22 smattered in with the bunch, but there are
23 23 water rights that are junior to every
24 single water right on the ranch. If
25 pumping 4800 acre-feet of water impairs

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1 any -- impairs anyone, it's mostly Water
2 PACK members because there are only three
3 of those water rights who are owned by
4 non-Water PACK members.
5 In their brief, they raised this
6 Anti-Speculation Doctrine, it doesn't help,
7 it doesn't apply, and I'm not going to go
8 into it at this time but it doesn't help
9 them either.
10 Hays and Russell meet all of the other
11 requirements of the Transfer Act. We will
12 show that both Hays and Russell have
13 adopted conservation plans that have been
14 in effect for many years. They have
15 resulted in the lowest gallons per person
16 per day in the state. Water PACK is
17 essentially seeking to punish the Cities
18 for having conserved water and -- which is
19 a violation of Kansas law and something
20 that Water PACK members would never stand
21 for.
22 Both Hays and Russell have implemented
23 great structures that encourage the
24 efficient use of water. In fact, rates
25 are -- rise astronomically for large users

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1 during severe droughts. I would tell you
2 that there are several -- that there are
3 several residential water bills in the City
4 of Hays over \$1,000 for a month's use for
5 residential use, and at least one in
6 Russell, and all in an effort to curtail
7 significant outdoor water use.
8 There are no detrimental environmental
9 impacts. The ranch has been converted to
10 native grass, it will increase habitat,
11 especially for the lesser prairie chicken,
12 it will reduce erosion, and the year-around
13 vegetative cover will help with water loss,
14 reduce water consumption, and improve air,
15 soil, and water quality.
16 There are significant public health and
17 welfare benefits to assuring Hays and --
18 that Hays and Russell have adequate
19 supplies. In fact, one of our witnesses
20 will testify that he -- that during severe
21 drought, especially in the '11 and '12 time
22 frame, there were times when he wondered
23 whether he was going to get up in the
24 morning and be able to turn on the spigot
25 and have water come out.

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1 Because of their location in the state,
2 they've spent decades searching for other
3 sources that are feasible drought
4 resistant. They've looked at Kanopolis
5 Lake, Waconda Lake, Cedar Bluff, Wilson and
6 Fossil Lake. None of those sources are
7 workable.
8 They've looked at -- they've tried --
9 talked about trying to draw more water from
10 the Smoky Hill and Big Creek, which is
11 where they already draw their sources, and
12 there's no more reliable water in that
13 area. They've looked in the Middle
14 Arkansas River, the Pawnee River, the
15 Solomon River, the Saline River. They've
16 looked for groundwater in the Dakota
17 aquifer and the Ogallala aquifer. And I
18 will pause to say that in 1992 the City of
19 Hays did drill several water wells in the
20 Dakota, but they are only -- they're only
21 capable of producing about 120 acre-feet a
22 year.
23 They've even looked at several
24 outside-the-box solutions. The Pikitanoi
25 project that was sponsored by the Kickapoo

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1 Indian Tribe in northeast Kansas was -- was
2 discussed as an alternative, and that
3 didn't work out. They looked at water
4 rights as far away as west of Garden City,
5 there's a large contiguous body of land,
6 irrigated land that they could have
7 purchased, but it's a long -- a lot longer,
8 a lot farther away, and there are other
9 problems.
10 The ranch is the only economically
11 feasible, drought-resistant water supply
12 that the Cities can have. Appropriate
13 measures have been taken to address water
14 quality. Locally, Hays uses contam --
15 diverts water and runs it through a
16 stripper, an air stripper to remediate
17 historical contamination from dry cleaners.
18 I could go into some detail about the
19 design. This is a standard -- this isn't a
20 complicated, rocket science type project.
21 We're not trying to build a nuclear power
22 plant, we're not trying to build a
23 skyscraper here. This is a pipeline
24 project. There will be some disruption
25 during -- during construction but -- and as

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1 I've discussed, the changes are not going
2 to cause impairment. In fact -- and that's
3 the only thing that could be an impact, but
4 I've already said that we're reducing
5 our -- the quantity from 7700 acre-feet for
6 irrigation to 4800 acre-feet per year on
7 average, but it will also reduce the rate
8 of withdraw.

9 The water rights on the ranch currently
10 authorize about 40,000 gallons per minute
11 of diversion. The Master Order limits the
12 Cities to 14 wells, with a maximum of
13 13,950 gallons per minute. The evidence
14 will show that the plan is to divert those
15 to -- to pump those wells on a rotating
16 basis at just 350 gallons per minute, about
17 12 percent of what -- of the irrigation
18 rate. So even apart from the reduced
19 quantity, the rate will reduce -- be
20 reduced further as well.

21 I would also point out that this -- that
22 the plan is not to drill all 14 wells and
23 divert 4800 acre-feet right off the bat.
24 The plan is to do this in two phases, with
25 seven wells to start, so it's likely that

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1 only about half of the water will be
2 diverted from the ranch in the early years.
3 The GMD admits that the transfer complies
4 with all of its regulations, and there's no
5 evidence that -- that this is going to
6 violate the GMD management program.

7 In conclusion, Your Honor, the Cities
8 have spent literally decades struggling
9 with inadequate, drought-susceptible water
10 supplies. For years, they've had to live
11 under the stigma that they lack real
12 reliable water supplies, and that's because
13 they do.

14 Their growth has been stunted, they've
15 lost business opportunities, they can't
16 even take a long shower, water their lawns
17 in many cases, or wash their cars. During
18 the drought, they have legitimate fears
19 about not being able to utilize water for
20 basic purposes.

21 They don't have -- in Hays and Russell,
22 you don't have -- they don't have to live
23 the way the rest of us do, and they've been
24 living that way for decades. They finally
25 have a chance to right the ship. They've

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1 invested enormously in this project and now
2 are faced with challenges with unsupported
3 claims by people who want to deny Hays and
4 Russell their lawfully purchased water
5 rights, will continue to exercise their
6 own.

7 The benefits to the State of approving
8 this transfer are so much greater than
9 denying it that the opponents haven't even
10 tried to focus on statewide benefits;
11 they're focused on local impacts only.
12 It's time to give the citizens of Hays and
13 Russell what they're entitled to, we would
14 respectfully request that you recommend
15 that the panel approve the transfer as
16 requested. Thank you, Your Honor.

17 **MR. COLE:** Ken Cole appearing for
18 the City of Russell. First, I'd like to
19 thank the hearing officer and then
20 ultimately the panel for considering our
21 application, acting upon the application;
22 this has been a long process, a process
23 that started actually years and years
24 before the application was filed.
25 Mr. Traster has done a good job

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1 summarizing the scope and the purpose of
2 this hearing so I won't repeat that. I do
3 want to briefly summarize some of the
4 evidence that'll be presented and -- and
5 bring a focus on the City of Russell.

6 The City of Russell was incorporated in
7 1872. It's in western Kansas, a small town
8 in western Kansas. But unlike most small
9 towns or towns in western Kansas, and most
10 towns in Kansas, it was not built next to a
11 river, which is a little ironic in where
12 we're meeting here today and we can see a
13 large river flowing past this hearing
14 place.

15 This is -- Russell was a railroad town,
16 it's why it was built where it is. The
17 rivers we rely upon, the closest river we
18 rely upon is 7 miles to the south. Our
19 existing sources, as Mr. Traster has
20 indicated, are quite similar to the City of
21 Hays, it's Big Creek and Smoky Hill River.
22 Smoky Hill River is groundwater production,
23 Big Creek is surface water production.
24 Both of those are susceptible to droughts,
25 both of those are at various points

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1 stressed by both the use and in some cases
 2 contaminants that can come down the river.
 3 Neither are reliable.
 4 The evidence has shown that the City of
 5 Russell has for 60, 70 years explored and
 6 looked for another viable, reasonable,
 7 affordable water source. We've -- the
 8 engineering reports on file will list those
 9 various studies, they'll list those various
 10 options, they'll list options that were
 11 explored, all of which were discarded.
 12 Years ago, the Cities looked south to
 13 the ranch in Edwards County, a ranch that
 14 was available to the public at large, a
 15 ranch that they purchased on the open
 16 market, who may finally provide that water
 17 security that everyone looks for and
 18 certainly needs to move forward. After
 19 exploring all other options, the R9 is our
 20 option.
 21 The opposition and some of the reports
 22 that are filed suggest that our communities
 23 and perhaps many communities in western
 24 Kansas are really just at a standstill,
 25 perhaps declining, perhaps it's only a

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1 matter of time. The evidence will show
 2 that's not the case. The evidence will
 3 show that Russell is a vibrant community,
 4 it is a community that people are moving
 5 to, it is a community that has economic
 6 prospects at its doorstep, but it is a
 7 community that is limited. And it's
 8 limited by its available, reliable water
 9 source. You give us that vehicle and the
 10 State will recognize a tremendous amount of
 11 value. Thank you.
 12 **MS. LANGWORTHY:** Your Honor, I was
 13 notified that the feed was lost for the
 14 Zoom.
 15 **MS. LEE:** Yeah.
 16 **PRESIDING OFFICER:** And I'm trying
 17 to get it restored here.
 18 **MS. LANGWORTHY:** Okay. I hope that
 19 the buttons we pushed over there didn't
 20 cause that but ...
 21 (Discussion held off the record.)
 22 **PRESIDING OFFICER:** Should be back
 23 up now. All right. Mr. Lee.
 24 **MR. LEE:** Your Honor, may it please
 25 the tribunal, Charles Lee of Lee Schwalb,

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1 LLC for Water PACK and Edwards County. Our
 2 perspective, as you recognize, is different
 3 from the Cities, but it's different for
 4 reasons other than has been characterized
 5 in the sense that this is not a situation
 6 where Water PACK and its many members or
 7 the County are taking a not in your
 8 backyard approach. What they are doing is
 9 trying to address in a constructive way a
 10 issue that is of existential concern for
 11 members and existential concern, frankly,
 12 for Kansas and throughout the midwestern
 13 states.
 14 There's really, as -- as Your Honor will
 15 see, I think there's five facts, five
 16 issues, concepts that preclude approval of
 17 the request as is. The first of those is
 18 that the Cities need much less water than
 19 they have sought in their application.
 20 We'll talk about that a little bit more
 21 as -- as we go on, but that simply is
 22 not -- is not disputable. They will say
 23 that, they will acknowledge that.
 24 The second issue is the Cities'
 25 application does not provide an analysis of

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1 future water needs. Mr. Traster is
 2 incorrect in saying that needs is not a
 3 component of a water transfer, and we will
 4 show the Court why that is, in fact,
 5 incorrect.
 6 Third issue is that the Cities'
 7 population growth estimates are materially
 8 inaccurate to the tune of at least twice,
 9 and that information comes from the expert
 10 for the Cities. We, in fact, will provide
 11 that same information from our experts, but
 12 in this case this is from the Cities.
 13 The fourth of these is that the transfer
 14 volume will, in fact, materially lower the
 15 water table. To the extent that's true,
 16 which we think is demonstrable, that
 17 equates to impairment, and I don't think
 18 there would be an argument from the other
 19 side about that. The question becomes is
 20 it more than reasonable lowering of the
 21 table, and Mr. Larson, our distinguished
 22 expert, will address that issue.
 23 And the last of these -- or the next of
 24 those issues is that the -- that the
 25 Anti-Speculation Doctrine is, in fact, a

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1 part of Kansas law. We have cited in our
 2 trial brief Mr. Griggs' comment to that
 3 effect, it is -- you can see in looking at
 4 the Water Transfer Act, and particularly
 5 the implementing regulations, that the
 6 principles of the Anti-Speculation Doctrine
 7 that have been adopted in most western
 8 states that share water law concepts with
 9 Kansas that it is, in fact, a vibrant --
 10 vibrant sort of issue and applicable and
 11 helpful here.

12 So the -- the issue of the first of
 13 these, the Cities does not -- do not need
 14 the water that they have requested. They
 15 don't know how much they need because they
 16 have not undertaken a water needs analysis.
 17 We had the opportunity to take
 18 Mr. Dougherty's deposition, who is the city
 19 manager for the City of Hays, and he
 20 acknowledged, in fact, that there was no
 21 such -- no such study undertaken.

22 And that is, in fact, a requirement.
 23 The regulations and specifically Kansas
 24 Administration -- Administrative Regulation
 25 5-50-2 has -- one of the required

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1 components of the application requires that
 2 there be -- that the projected water needs
 3 of the applicant be demonstrated and the
 4 basis for those projections, so that
 5 clearly is contemplated as part of -- as
 6 part of the act. And also related to that
 7 is a similar requirement for a projected
 8 per capita per day usage for public water
 9 supply users. So that is part of the act,
 10 how much do they need, and that is a -- is
 11 a fundamentally important issue in this
 12 proceeding.

13 As I indicated, Mr. Dougherty, who is
 14 the city manager and who's well versed with
 15 this act and has lived it for a period of
 16 time, was asked about a water needs study,
 17 and his response to that in his deposition
 18 was, off the top of my head, I can't tell
 19 you specific reports that have addressed
 20 water needs. And it's not there, it's not
 21 in the application either.

22 This issue of how much is needed
 23 obviously is difficult for the Cities to
 24 know if they don't have a water needs
 25 study, but what they -- what is clear is

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1 that they need less than they are seeking.
 2 The application, and this is just taken
 3 from the application itself, seeks 6,756.8
 4 acre-feet of water per year. Mr. Traster
 5 has alluded to the TYRA limitation of 4800,
 6 which is what the chief engineer imposed on
 7 the Cities, but that is, in fact, the
 8 application.

9 Contrast that with the combined present
 10 usage for the City of Hays and City of
 11 Russell in 2020, that was 2766 feet, so
 12 you're talking about the percentage, that's
 13 something between twice and three times
 14 more than they used in 2020. Henry
 15 Schwaller was - Schwaller perhaps, I may be
 16 mispronouncing his name - acknowledged this
 17 issue. This is the April 12th edition of
 18 the -- 2019 of Hutchinson News, and they're
 19 quoting Mr. Schwaller at a meeting where he
 20 says, and I'm quoting, we certainly don't
 21 need the entire water right, Schwaller
 22 said, but we've been working with other
 23 communities in the area.

24 Well, those other communities, Your
 25 Honor, are not part of this application and

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1 cannot be considered even if there was a
 2 contract in place, which is an issue
 3 addressed by the Anti-Speculation Doctrine
 4 as well. The argument goes on to say that
 5 the R9 more than doubles the water capacity
 6 that Hays and Russell have currently. So
 7 this is directly relevant to how much you
 8 need. They say they don't need this much,
 9 and, of course, as to the previous slide
 10 they don't know exactly how much they do
 11 need.

12 This is acknowledged, again,
 13 Mr. Dougherty's deposition, he is presented
 14 with a quote from the former mayor that I
 15 read to him which is, quote, we certainly
 16 don't need the entire water right now that
 17 we can take from the ranch, end quote, and
 18 my question to him -- to him was, do you
 19 agree with that statement, and his answer
 20 is I do.

21 Harvey Economics, who is our expert on
 22 this subject, states, and Your Honor will
 23 hear this, that Net future water needs for
 24 the Cities will be much less than the
 25 Cities have indicated in their KWTA, Water

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1 Transfer Act, application and supporting
2 information, and there will -- there is a
3 good deal of support for that statement by
4 Harvey Economics.
5 I mentioned the Cities' population
6 growth estimates, that is part of the Water
7 Transfer Act requirements is to look at
8 what future population will be, and it's
9 not -- it's not curious as to why that is,
10 because that has to do with the calculation
11 of what future water needs will be and
12 the -- in this case, the application
13 states, and I'm quoting from that,
14 population projections for 2026 and 2036
15 are based on 2 percent annual population
16 growth, 2 percent as approved by the chief
17 engineer.
18 But, in fact, this is Ms. Haase, who is
19 their population growth expert, and this is
20 her direct testimony, I conclude within a
21 reasonable degree of professional certainty
22 that an estimated growth rate of 1 percent
23 annually over the next 10 to 20 years is
24 likely for the City of Hays. We will see
25 why even that number is suspect, but she

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1 herself, without any further prompting from
2 anybody else, has cut in half the
3 population growth estimate that the City
4 used as part of its application.
5 Harvey Economics, which, of course, is
6 our expert, and I'm quoting from this, that
7 projections developed for Ellis and Russell
8 Counties show a projected population growth
9 rate for Ellis County of .34 percent per
10 year through 2045 and a growth rate of
11 0. -- or .06 percent per year for Russell
12 County.
13 Now, it is true that Ellis County is not
14 coextensive with Hays nor is Russell County
15 coextensive with -- with Ellis County,
16 Ellis County and Russell -- and Hays are
17 not the same thing; however, they are
18 certainly the dominant communities in those
19 cities.
20 This issue that -- of whether there will
21 be a material deleterious effect on the R9
22 area and specifically Water PACK members,
23 that's addressed in the Larson analysis,
24 and what he says is that The inclusion of a
25 reduction in groundwater recharge in the

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1 potential future scenarios of municipal
2 pumping significantly increases the impacts
3 to groundwater levels by five times.
4 Increasing the impact by five times, we
5 would suspect that most folks would say
6 that that is something beyond reasonable
7 and certainly is -- certainly is material.
8 He also says that The failure of Burns &
9 McDonnell to consider the reduction in
10 groundwater recharge, which is an important
11 issue that Your Honor will hear about in
12 this case, understates the potential future
13 negative impacts to groundwater levels that
14 would occur when municipal pumping replaces
15 irrigation pumping on the R9 Ranchlands.
16 Basically, what Your Honor will hear is
17 that there should have been, and you'll
18 hear this not just from Water PACK but also
19 from GMD5, that the -- that the change that
20 is mentioned by Mr. Larson here has a
21 municipal -- has an effect that should have
22 been taken into account and thus the
23 groundwater recharge predictions that the
24 Cities would like to rely on are flawed.
25 The Anti-Speculation Doctrine is

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1 important throughout the West, it is -- we
2 quoted and cited the Pagosa cases in our
3 trial brief, and if one looks at what are
4 really the fundamental constituent elements
5 of the Anti-Speculation Doctrine, one will
6 see that that ties into what the Water
7 Transfer Act is borrowing.
8 The first of those elements that needs
9 to be answered is what is a reasonable
10 water supply planning period? That issue
11 here is basically 51 years. It can be
12 argued that that is too long.
13 But then the second of those elements is
14 what is the substantiated population or
15 what are the substantiated population
16 projections based on normal rate of growth
17 for that period? That simply goes back and
18 is directly incorporated into regulations
19 that say you need to provide us, you
20 applicant need to provide us with what the
21 projected population will be.
22 And third, what amount of available
23 unappropriated water is reasonably
24 necessary to serve reasonably anticipated
25 needs above its current water supply?

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1 Well, we don't have that in the
2 application, and the Anti-Speculation
3 Doctrine will say that we should, and
4 the -- and the -- Your Honor will hear what
5 the current water supply is, including what
6 the current water supply is under decadal
7 drought situations, and that will be, I
8 think, information that -- that you will
9 find important.

10 The last of these issues, we have
11 concerns about where the analytical support
12 for the Cities' efforts is coming. That
13 first box there is a -- is a -- is taken
14 from a memorandum that the City of Hays put
15 together, and I suspect it's hard for you
16 to see, but it talks about what will be
17 paid to Burns & McDonnell if this project
18 proceeds, and it's roughly -- the
19 combination of those two figures is roughly
20 \$8 million.

21 The second of those boxes is a -- the
22 header from an email from Mr. Barfield
23 reaching out to various folks after he
24 retired and went into a private practice
25 and saying would you like to be on my -- on

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1 my mailing list. And the two highlighted
2 names there are David Traster and Toby
3 Dougherty.

4 We talk about that, of course, in our
5 motion to strike Mr. Barfield, and which I
6 realize you have not had an opportunity to
7 see, but it strikes us as untoward. And
8 maybe that's just us and you can tell us, I
9 guess, at the end of the day, but that is a
10 concern we have.

11 So, you know, what -- what Mr. Traster's
12 argument suggests to me is that the Water
13 Transfer Act can be consigned to the
14 dustbin. He acts as if it doesn't have any
15 real meaning in terms of the -- its
16 provisions and says that the only issue is
17 is there benefit to the State or is there
18 not benefit to the State or at least how is
19 that weighed? But that is a -- is a
20 misinterpretation. There wouldn't be any
21 reason for the Water Transfer Act if that
22 were the case.

23 There -- there is a process as you would
24 know about change of use and the Cities
25 went through that. In other words, they --

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1 they prosecuted a change of use proceeding
2 to change the R9 Ranch from irrigation to
3 municipal. If all these factors that are
4 in the regulatory scheme and that are in
5 the Anti-Speculation Doctrine weren't
6 important as part of this, then the -- the
7 Transfer Act becomes superfluous.

8 This issue, and I want to be clear that
9 neither we nor our -- our clients are
10 unsympathetic to the -- the water situation
11 in Hays. We think it will be demonstrated
12 that it is perhaps less dire than -- than
13 may be intimated here, but nonetheless
14 there is, without question, a water issue.
15 But in talking about -- and I'm roughly
16 paraphrasing Mr. Traster, in talking about
17 the issue of the City of Hays, citizens not
18 having to live unlike other citizens in the
19 State, it's hard to see how that changes.

20 We'll -- you'll see in the testimony
21 that Mr. Dougherty, in his deposition, said
22 those conservation measures are not going
23 to change, we are going to keep them in
24 place and the citizens of Hays are used to
25 that and they will live with that. And so

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1 to say that somehow this is -- this is a
2 solution to greener grass, based at least
3 on what Mr. Dougherty has testified about,
4 would be incorrect.

5 The Cities, Your Honor, importantly
6 don't need the water but -- in the volumes
7 that they're talking about, but it is -- it
8 is vitally important, I think, for us all
9 to recognize that the Water Transfer Act is
10 not a zero sum game. The -- it
11 specifically allows for a transfer of less
12 water than the applicant has sought, and if
13 one looks at what are the -- are the -- the
14 important issues here of how much water
15 does the City need, what is going to be the
16 effect of the volume of water that they are
17 seeking on the aquifer, then one is left in
18 a situation that there is a solution to
19 this, and it is a reasonable transfer and
20 not the transfer that they're seeking and
21 do not need.

22 We would ask one of two things, either
23 that the transfer be rejected or that it be
24 modified to allow for transfer of a volume
25 of water more commensurate with what the

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1 Cities' demonstrated needs are, and that
 2 also would ameliorate what we consider to
 3 be the effect on the aquifer in and around
 4 the R9 Ranch. Thank you.
 5 **PRESIDING OFFICER:** All right.
 6 Ms. Langworthy, anything you want -- is
 7 there anything you wanted to present,
 8 Ms. Langworthy?
 9 **MS. LANGWORTHY:** No, Your Honor.
 10 **PRESIDING OFFICER:** All right. So
 11 we're at about 11:50 now, I'm going to
 12 propose that we just go ahead and take a
 13 recess until 1:00 o'clock and then come
 14 back and we'll let the Cities start
 15 presenting their witnesses at 1:00. Does
 16 that sound acceptable to everybody?
 17 **MR. TRASTER:** That would be fine,
 18 Your Honor, thank you.
 19 **MR. LEE:** Yes, Your Honor.
 20 **PRESIDING OFFICER:** All right. We
 21 are in recess, go off the record, and we'll
 22 resume at 1:00 o'clock.
 23 (Thereupon, a lunch recess was
 24 taken; whereupon the following was
 25 had.)

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1 **PRESIDING OFFICER:** All right. It
 2 is after 1:00 now, so I think we can -- I
 3 think we've got everybody back so we can go
 4 ahead and go back on the record and resume
 5 the hearing.
 6 We got our opening statements from
 7 everybody, so, Mr. Traster, would you like
 8 to start with witnesses?
 9 **MR. TRASTER:** Yes, call Toby
 10 Dougherty, please.
 11 **PRESIDING OFFICER:** Mr. Dougherty,
 12 your testimony will be under oath subject
 13 to the perjury laws of the State of Kansas.
 14 Would you please raise your right hand.
 15
 16 **TOBY DOUGHERTY,**
 17 having first duly sworn or affirmed, was
 18 examined and testified as follows:
 19
 20 **PRESIDING OFFICER:** You may proceed,
 21 Mr. Traster.
 22 **MR. TRASTER:** Thank you, Your Honor.
 23 //
 24 //
 25 //

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1 **DIRECT EXAMINATION**
 2 **BY MR. TRASTER:**
 3 Q So, Mr. Dougherty, state your name, please.
 4 A **Toby Dougherty.**
 5 Q And your business address?
 6 A **1507 Main, Hays, Kansas 67601.**
 7 Q And is that the business address of the City of
 8 Hays?
 9 A **It is.**
 10 Q What -- what's your current position with the
 11 City?
 12 A **I'm the city manager.**
 13 Q And how long have you been employed in that
 14 position?
 15 A **Since 2007.**
 16 Q And before that, what were your -- what were
 17 you -- how were you employed?
 18 A **I was the assistant city manager from 2005 to**
 19 **2007.**
 20 Q And before that?
 21 A **Before that, I was the city administrator in**
 22 **Gallatin, Missouri.**
 23 Q And how long were you in that position?
 24 A **A little over two years.**
 25 Q Is that something you were trained for education

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1 wise?
 2 A **Yes, I have a degree in -- from -- sorry, I have**
 3 **a degree from the University of Kansas, yes.**
 4 Q And what's the specialty or --
 5 A **In political science with a minor in public**
 6 **administration.**
 7 Q And in your -- what are your duties in your
 8 current employment as the city manager?
 9 A **I manage the affairs of the city of Kansas, all**
 10 **administrative affairs of the city of Kansas.**
 11 Q City of Hays?
 12 A **I'm sorry, City of Hays.**
 13 Q And how many employees do you -- do you
 14 supervise, either directly or indirectly?
 15 A **Approximately 190 full-time employees currently.**
 16 Q And the -- how many direct reports do you have,
 17 if you know?
 18 A **Approximately 13 direct reports.**
 19 Q Okay. And is one of those direct reports
 20 responsible for the operation of the -- of the
 21 water system?
 22 A **Yes, that would be Jeff Crispin, the water**
 23 **resources director.**
 24 Q So tell us a little bit about the city, you gave
 25 us its mailing address, what's its population?

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1 **A Approximately 22,000, I believe the 2020 census**
 2 **had us at 21, 8 something. Yes.**
 3 Q Is it growing, is the city growing?
 4 **A We are growing, we are one of the few cities in**
 5 **western Kansas that are growing.**
 6 Q And I -- I guess it's a city of the second
 7 class; is that correct?
 8 **A That's correct.**
 9 Q What's the difference -- what is -- is there
 10 something special about that?
 11 **A Classifications of cities are defined by the**
 12 **Kansas statutes, and right now we are a city of**
 13 **the second class. Hays has a population to**
 14 **qualify for a city of the first class, but for**
 15 **logistical reasons in the past, they haven't.**
 16 Q So, I mean, is this -- this doesn't mean you're
 17 a second class city, it just means that that's
 18 your classification?
 19 **A Kansas has four classifications of cities.**
 20 Q And they're based on population and other
 21 factors, it isn't a grading system?
 22 **A Correct.**
 23 Q You didn't get a B in -- on city government,
 24 this is just a designation; is that correct?
 25 **A Correct.**

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1 Q So do you operate a water supply system?
 2 **A We do.**
 3 Q Well, tell us -- tell us a little bit about
 4 Hays, I mean, just set the stage here for us.
 5 **A Hays is the regional economic hub of northwest**
 6 **Kansas. We are home to Fort Hays State**
 7 **University, the largest employer in Hays is the**
 8 **Hays Medical Center. We are a regional shopping**
 9 **and medical services hub. We have a**
 10 **disproportionate amount of retail services,**
 11 **which is reflected in our retail pull factor,**
 12 **which is the amount of people from outside the**
 13 **city that shop inside of the city, and we**
 14 **have -- have had significant growth in that**
 15 **category and expect future growth in that retail**
 16 **category.**
 17 Q When you say disproportionate, what do you mean
 18 disproportionate, meaning --
 19 **A Meaning we are typically in the top five in**
 20 **Kansas cities in retail pull factors.**
 21 Q Sometimes disproportionate has a negative
 22 connotation, you don't mean it in that context
 23 here?
 24 **A No, we mean in a good way.**
 25 Q And so what you're saying is, and correct me if

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1 I'm wrong, but you have exceptional or high --
 2 highly rated trade pull factor?
 3 **A Correct.**
 4 Q Is that a fair way -- I'm not trying to put
 5 words in your mouth but I'm -- so I'll direct
 6 your attention to the screen, can you identify
 7 that document?
 8 **A That is a map showing the annual precipitation**
 9 **across Kansas.**
 10 Q Okay. And it's an exhibit -- for the record
 11 Exhibit 1665. How is this -- what is the
 12 relevance of this -- of this document to -- to
 13 our inquiry today?
 14 **A So Kansas has a wide variation of rainfall from**
 15 **a little over 15 inches in the far southwest**
 16 **part of the state to 46 inches in the far**
 17 **southeast part of the state. Hays is in a band**
 18 **that typically receives 22 to 24 inches of rain**
 19 **per year and --**
 20 Q If I -- so here's Russell and here's Ellis
 21 County.
 22 Jami, I think that we're not seeing the
 23 whole thing. Okay. There we go.
 24 So I've got my pointer on, I think, Ellis
 25 County; is that right?

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1 **A Correct.**
 2 Q It's a little hard to read, so I -- I know where
 3 it is, I just -- and so this band, this orange,
 4 lighter orange band has an average annual
 5 precipitation of what?
 6 **A Of 22 to 24 inches of rain per year.**
 7 Q And the band to the east of that little darker
 8 orange, that's -- is that the band that Russell
 9 is in?
 10 **A That's correct.**
 11 Q And what's their average rainfall?
 12 **A Between 24 and 26 inches of rain per year.**
 13 Q I'm going to point here and just to the west of
 14 the Hays-Trego County line at that reservoir, is
 15 that -- do you recognize that?
 16 **A That would be Cedar Bluff Reservoir.**
 17 Q Okay. And it's in -- it's in a band that has a
 18 little less rainfall than falls in Hays or
 19 Russell, does it not?
 20 **A The yellow band would be 20 to 22 inches of rain**
 21 **per year.**
 22 Q Next I'd like to direct your attention to
 23 this -- this screen -- this - what am I going to
 24 call it - foam board, I guess, and can you
 25 describe what that document is?

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1 **A This is a rendition of the Smoky Hill and**
2 **Big Creek watersheds as they flow into Hays and**
3 **then the Hays and Russell wellfields on the**
4 **Smoky Hill River. The shadings in color are due**
5 **to elevation changes.**
6 Q And for the record, that is Exhibit 2822, and
7 the -- it's specifically at Cities' page 103417.
8 Let's go back to the screen for a moment and
9 look at 2657. Can you tell us what's -- what's
10 being shown here?
11 **A This is a map of Kansas that has Ellis County,**
12 **Russell County, the Cities of Hays and Russell,**
13 **along with Edwards County and the R9 Ranch**
14 **highlighted. It also shows the other population**
15 **centers, I believe in excess of 5,000 in**
16 **population, and it shows the location of the**
17 **High Plains aquifer in a shaded area.**
18 Q So the orange, light orange area is the High
19 Plains aquifer?
20 **A That's correct.**
21 Q So there's a box on here labeled Edwards County
22 and there's an outline in red, I think it's a
23 little hard to see from here, but what's that
24 red box or red highlighted area?
25 **A That would be the boundary of the R9 Ranch that**

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1 **Hays and Russell own.**
2 Q In Edwards County?
3 **A In Edwards County.**
4 Q And just for the record, it's more than 35 miles
5 from Hays and Russell, is that not correct?
6 **A Yes, it is approximately 77 miles from Hays; I'm**
7 **not sure how far it is from Russell, probably**
8 **close to the same.**
9 Q So what's significant about showing the High
10 Plains or the Ogallala aquifer on this map?
11 **A The significance for me is that the High Plains**
12 **aquifer does not provide a source and**
13 **opportunity for a source of water for Hays and**
14 **Russell because we do not overlie that aquifer.**
15 Q So just looking at the map, is this the Smoky
16 Hill River that I'm pointing to?
17 **A It is.**
18 Q And it looks like, for the record, that the
19 Ogallala portion of the aquifer, there's
20 Ogallala north of the -- of the Smoky Hill
21 basin, there's Ogallala south of the Smoky Hill
22 basin, but there's sort of a big blank spot
23 there. Is that a fair characterization?
24 **A Yes, it is.**
25 Q All right. Let's go to the -- the next map, I

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1 think it's 20 -- 2658. Tell us about this map,
2 Mr. Dougherty, please.
3 **A This map shows the same population centers that**
4 **was shown in the previous map, so communities**
5 **with a population of more than 5,000. It also**
6 **shows the same boundaries of Hays, Russell, the**
7 **counties, and then Edwards County and the R9**
8 **Ranch. What it also shows is the major and**
9 **minor alluvium through Kansas, so rivers and**
10 **streams, as well as the reservoirs in Kansas.**
11 Q And for the record, what do you mean by
12 alluvium?
13 **A Alluvium are the areas that are associated with,**
14 **I guess for lack of a better word, the river**
15 **bottoms or creek bottoms, the areas that would**
16 **typically be saturated by flow in a particular**
17 **creek or river.**
18 Q So the -- as I -- as I understand it, the City
19 of Hays has a wellfield, and we'll talk about
20 this in more detail, but inside the City of Hays
21 and then south on the Smoky Hill River; is that
22 correct?
23 **A Correct, we have a Big Creek wellfield that we**
24 **refer to as our city wellfield, and then we have**
25 **a wellfield on the Smoky Hill River 12 miles**

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1 **south of town that we refer to as the Smoky Hill**
2 **wellfield.**
3 Q Let's look back at this map over here on the
4 foam board and can you kind of -- do you have a
5 pointer with you?
6 **A I do.**
7 Q Can you show us Hays and Russell on that map? I
8 can see it, I think, but ...
9 **A So Hays is located here, Russell is located**
10 **here.**
11 Q All right. So -- and where would the Hays Smoky
12 Hill wellfield be in -- on there?
13 **A The Hays Smoky Hill wellfield is due south of**
14 **town. It's on Highway 183, it straddles both**
15 **sides of 183 for a couple miles on each side.**
16 **And then Russell's wellfield in the Smoky Hill**
17 **River is approximately here, it's just a few**
18 **miles upstream of Hays' wellfield.**
19 Q And it's near the -- near a small town there,
20 isn't it?
21 **A The town of Pfeifer.**
22 Q And the Hays wellfield is near what town?
23 **A The town of Schoenchen.**
24 Q You're going to need to spell both of those
25 names for the court reporter, she's already

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1 giving me the evil eye.
 2 **A P-F-I-E-F-E-R.**
 3 Q Maybe --
 4 **A Or is it E-I-F-E-R? Okay. P-F-E-I-F-E-R and**
 5 **Schoenchen is S-C-H-O-E-N-C-H-E-N.**
 6 Q She didn't give me an evil eye, she just knew
 7 that I was going to -- she was going to if I
 8 didn't say something.
 9 So, Mr. Dougherty, what's the -- how has
 10 the Cedar Bluff Reservoir affected the flow in
 11 the Smoky Hill at this -- at the Hays wellfield?
 12 **A Cedar Bluff Reservoir effectively truncates any**
 13 **flow upstream of the dam and impounds that water**
 14 **behind the dam, and because there are not**
 15 **regular scheduled releases from Cedar Bluff**
 16 **Reservoir, most of the water that's impounded**
 17 **behind the reservoir evaporates or stays within**
 18 **the reservoir. So it's effectively cut off the**
 19 **flow 25 miles upstream from our wellfield.**
 20 Q So how is the Hays wellfield, I mean, it's
 21 dependent on flow in the river, is there -- is
 22 there regular flow in the river even though the
 23 Cedar Bluff cut it off?
 24 **A There's periodic flow in the river. There are**
 25 **times when the river runs dry and it's a -- it**

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1 **doesn't take a really lengthy dry spell in order**
 2 **to have the river dry up. But what it means for**
 3 **us is it -- essentially that we depend on**
 4 **rainfall in this area right here, and this is a**
 5 **different watershed, but in this area right here**
 6 **we depend on rainfall in order to benefit the**
 7 **Smoky Hill wellfield.**
 8 Q So rainfall falls directly in the river but then
 9 falls in places enough to run off into the
 10 river. Is that fair?
 11 **A Any -- any rainfall of significance will run off**
 12 **of -- in the watershed into the river. If it**
 13 **makes it to the wellfield, it will provide**
 14 **recharge because the Smoky aquifer is a -- it's**
 15 **a pretty narrow aquifer, but it's very coarse,**
 16 **gravelly aquifer, it makes a natural storage**
 17 **vessel; and it will soak up water fairly**
 18 **quickly, but it depends on water to fill up.**
 19 Q Okay. So let's look at a map 2659, please.
 20 What -- what is this map showing us?
 21 **A This is the same map before showing the cities**
 22 **of the -- over 5,000, the alluvials, the**
 23 **reservoirs, but it also has put the High Plains**
 24 **aquifer back on the visual.**
 25 Q So it -- it shows both the High Plains aquifer

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1 and the alluvial aquifer?
 2 **A Correct.**
 3 Q Is that what you're --
 4 **A Correct.**
 5 Q Okay. And so do you -- can you -- do you -- is
 6 there a distinction or a difference between the
 7 Ogallala aquifer and the High Plains aquifer in
 8 your mind?
 9 **A It's my understanding that the entire aquifer**
 10 **from South Dakota to Texas is the High Plains**
 11 **aquifer, but in Kansas, maybe outside of Kansas,**
 12 **but in Kansas, the portion to the west that**
 13 **is -- receives very little, if any, recharge is**
 14 **referred to as the Ogallala, and the portion**
 15 **that does receive recharge is referred to as the**
 16 **High Plains aquifer.**
 17 Q And so is the ranch, if you know, in -- in the
 18 High Plains or the Ogallala?
 19 **A The ranch is in the High Plains because it does**
 20 **receive regular recharge.**
 21 Q So looking at this map, this 2659, we talked a
 22 little earlier about the idea that there's no
 23 Ogallala in the Smoky Hill River basin and
 24 there's -- you're tapped into the -- the sources
 25 that are available, I mean, you've got two

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1 alluvium -- alluviums, you've got the -- looks
 2 like there's a Big Creek alluvium coming right
 3 through Hays and then some -- the alluvium
 4 from -- for the Smoky Hill, those are your
 5 sources?
 6 **A That's correct. We do have a Dakota wellfield**
 7 **that is not an alluvium, it is a confined**
 8 **aquifer, a deep aquifer, but it provides minimal**
 9 **benefit. These are our main two sources of**
 10 **water.**
 11 Q So how much water does the Dakota produce?
 12 **A On an average annual basis, I believe our last**
 13 **ten years, about 130 acre-feet. I think for**
 14 **planning purposes, probably 120 is a safe guess.**
 15 Q But don't you have a lot more water rights on --
 16 than 120 or 30 in that aquifer?
 17 **A I believe we perfected 700 acre-feet of water**
 18 **rights, but those water rights aren't**
 19 **sustainable because of the nature of the**
 20 **aquifer's decline and the drawdown. And the**
 21 **water is brackish at best, and the more water**
 22 **that's pulled out of the Dakota at a higher**
 23 **rate, the worse the water gets. So I have seen**
 24 **studies of possibly up to 40 percent or more**
 25 **loss due to brine if you -- if you get really**

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1 **deep into the Dakota aquifer.**
2 Q So just from a practical standpoint, and I know
3 you're not a geologist or a hydrologist, but
4 from a management standpoint, you're sticking
5 with about 120 to 30, maybe a little more from
6 time to time, from the Dakota wells. Is that a
7 fair characterization?
8 A **Yes.**
9 Q What are the Cities actually requesting?
10 A **The Cities are requesting the approval to**
11 **transfer 6,756 acre-feet of water from the**
12 **R9 Ranch to the Cities of Hays and Russell, and**
13 **that amount is to be limited by the ten-year**
14 **rolling average limitation, which is 48,000**
15 **acre-feet on a ten-year rolling average.**
16 Q 48,000 or 4800?
17 A **48,000 in total in a ten-year rolling -- in a**
18 **ten-year period is the way the Master Order is**
19 **structured.**
20 Q So over any ten-year period, you can't take more
21 than 48,000, but every time -- every year, that
22 ten-year time frame skips ahead one; is that
23 fair?
24 A **Correct, the way the Master Order is structured,**
25 **our consumptive use number for the water rights**

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1 **on the R9 is 6,756 acre-feet of water, so that's**
2 **our cap; that is the number we could utilize up**
3 **to under the Master Order. But because of the**
4 **ten-year rolling average, that factors into that**
5 **48,000 acre-feet on a ten-year rolling average,**
6 **so in subsequent years we would have to use less**
7 **water if we did use our full allotment.**
8 Q So you -- you can use -- the practical limit is
9 4800 acre-feet per year, you can -- you can
10 exceed it but you pay a price for that in later
11 years. Is that fair?
12 A **Yes, yes, we have the right to use, under the**
13 **Master Order, the 6,756-acre water, but for**
14 **practical reference we refer to the annual**
15 **sustainable water rights as 4,800 acre-feet.**
16 Q Okay. And how did that come to pass, that
17 limitation?
18 A **During the change application process, the city**
19 **engineer asked, actually demanded that we agree**
20 **to utilize the property sustainably.**
21 Q So the city -- the city engineer did?
22 A **No, I'm sorry, the chief engineer for the**
23 **Division of Water Resources demanded during the**
24 **negotiations that the Cities agree to a**
25 **sustainable yield commitment on the property.**

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1 **And we pushed back on that during the change**
2 **application process. We felt like the chief**
3 **engineer didn't have the right to impose that**
4 **process on us.**
5 **There's -- there's actually a letter that**
6 **our neighbor, Richard Wenstrom, wrote. The GMD**
7 **was considering a LEMA, a Local Enhancement**
8 **Management Area, a couple years ago, and so**
9 **there were a lot of submissions and comments in**
10 **that LEMA process. And our neighbor, Richard**
11 **Wenstrom, wrote a letter to the GMD that stated**
12 **any attempt to reduce water rights by regulation**
13 **is an uncompensated taking and should be**
14 **defended in a court of law, and we agree with**
15 **that.**
16 **And so we pushed back pretty heavily on the**
17 **idea of committing to something that is not**
18 **required by regulation. After significant**
19 **discussions with DWR, after discussion with the**
20 **attorneys, after discussions with the governing**
21 **bodies, we determined that we have no will or**
22 **desire to use the property unsustainably, and so**
23 **we agreed for sake of the Master Order to reduce**
24 **our water rights on the R9 property in excess of**
25 **the consumptive use number by approximately**

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1 **28 percent, and that's where the ten-year**
2 **rolling average came from.**
3 Q So how did -- where did the 4800 acre-feet come
4 from?
5 A **During the change application process, we**
6 **contracted with Burns & McDonnell to perform a**
7 **modeling of the property to determine the**
8 **sustainable yield number. We obtained the**
9 **Groundwater Management District Number 5's water**
10 **model from the State after an open records**
11 **request, Burns & Mac then utilized that model in**
12 **order to determine the number, the -- Burns &**
13 **Mac's results were reviewed, I'm not sure if**
14 **peer reviewed is a proper term, but they were**
15 **reviewed by the DWR staff as part of this, and**
16 **in the end DWR concurred that 4800 acre-feet on**
17 **an annual basis, or the ten-year rolling**
18 **average, was the sustainable number for the**
19 **property.**
20 Q What do you mean by sustainable?
21 A **According to Burns & Mac's report, after they**
22 **ran the model, the -- the property was**
23 **essentially no better or worse off after**
24 **51 years of use than it was at the time when the**
25 **model started, when the modeling period started.**

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1 Q So how much water does Hays need?
 2 A We need 4,800 acre-feet on an annual basis, or
 3 48,000 acre-feet on a ten-year rolling average.
 4 Q But you don't need 6756?
 5 A That was -- that was implied in my 48,000
 6 acre-feet answer, but to correct, we need 6,756
 7 acre-feet of water or 48,000 acre-feet on a
 8 ten-year rolling average as per the Master
 9 Order.
 10 Q So you were here for the -- the opening
 11 statements, you heard the opening statements --
 12 A Yes.
 13 Q -- did you not? And you heard that the lawyer
 14 for Water PACK indicated that you testified that
 15 you didn't have any studies to show what your
 16 need was. You heard that -- you heard what he
 17 said about what you testified to, did you not?
 18 A I did.
 19 Q Was his characterization of your testimony in
 20 your deposition accurate?
 21 A No.
 22 Q Why?
 23 A So the -- the way my testimony in the deposition
 24 was mischaracterized is twofold, and it would be
 25 helpful to read the exchange in the deposition

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1 testimony.
 2 Q I can give you the text, if you'd like to have
 3 it.
 4 A No, no, that's fine, I'm just saying if one
 5 wanted to --
 6 MR. LEE: Your Honor, may I approach
 7 the witness?
 8 MR. TRASTER: That's fine with me
 9 but --
 10 A I don't need to see it. I don't need to see it.
 11 MR. TRASTER: Thank you, appreciate
 12 it.
 13 PRESIDING OFFICER: You can ask him
 14 about it when you cross-examine him.
 15 MR. LEE: That's fine. Trying to be
 16 helpful.
 17 A So in preparation for my deposition, I did not
 18 review any documents. In preparation for my
 19 deposition, I met with my attorneys, and I was
 20 advised to tell the truth; and I was advised if
 21 I don't know the answer to something, state as
 22 such.
 23 So during the deposition, I was asked
 24 several lines of questions about studies that
 25 state that Hays needs more water in a very

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1 specific manner, and I tried to inform the
 2 opponent's counsel that it was implied decades
 3 before I came to Hays that we needed more water.
 4 The -- the need for water was established well
 5 before I got to Hays and that our existing
 6 sources were inadequate now, and so I was less
 7 concerned about future need than about current
 8 need.
 9 So the attorney kept pressing the item and
 10 appeared to me to be asking for a report that
 11 said something very specific about needing more
 12 water. So I indicated to the attorney that I
 13 would have to check the record, but I am aware
 14 of reports that showed that we have population
 15 growth scenarios and those population growth
 16 scenarios result in us exceeding our different
 17 yield estimates at different times, but I would
 18 have to reflect the records. And in the end,
 19 the attorney kept asking, and so I finally had
 20 to answer that I can't recall the specific study
 21 you're looking for because that was the truthful
 22 answer at the time.
 23 BY MR. TRASTER:
 24 Q So when you read what he put on the screen, was
 25 that an accurate statement of what you said in

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1 that moment during your deposition?
 2 A I did say I don't recall at that moment.
 3 Q Okay. Have you -- do you think that it's a fair
 4 way to characterize your testimony in the
 5 context of the further discussion that you don't
 6 know and there aren't any studies that deal with
 7 need?
 8 A I -- I do think it's a mischaracterization, and
 9 I would like to go back and restate that the
 10 need for an additional water source was
 11 established decades before I came to Hays. They
 12 knew back in the '90s their sources weren't
 13 sustainable long-term and -- and couldn't
 14 sustain the population they had during droughts.
 15 So it's -- it's a little bit like if you're
 16 very poor, you don't need a study to tell you
 17 you're poor and you need more money. You know
 18 you're poor and you need more money. So most of
 19 our studies are written presuming we need more
 20 water. They talk about the search for
 21 additional water and -- and what waters could be
 22 available, and they talk about safe yield and
 23 sustainable yield of our current sources. And
 24 they talk about growth projections. But there's
 25 a lot of presumption in those studies that we

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1 **need an additional water source; otherwise, why**
2 **would we be looking for water sources?**
3 Q Okay. So let's just step back from studies and
4 the deposition and all that. You said Hays
5 needs water. And so without, you know, any of
6 that, just why does Hays need water?
7 A **We need water because our existing sources are**
8 **inadequate during times of drought. When it**
9 **rains and the Big Creek alluvial is receiving**
10 **water and the Smoky Hill alluvial is receiving**
11 **water, then we can produce our water rights.**
12 **Possibly. We -- we haven't used our water**
13 **rights amount for a long time, but the water**
14 **sources are very productive when there's water**
15 **there. The problem is they dry up very quickly**
16 **and --**
17 Q Does one of them dry up more quickly than the
18 other?
19 A **The Smoky Hill wellfield dries up faster than**
20 **the Big Creek wellfield. The Big Creek**
21 **wellfield is also -- it's slower to dry up, but**
22 **it's also slower to recharge. The Smoky is**
23 **quicker to dry out, it is quicker to recharge.**
24 **So one of the expert reports we presented**
25 **was -- showed the viability of our sources, the**

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1 **production viability of our sources during times**
2 **of drought, and what you see is during a decadal**
3 **drought such as the 1930s drought, our sources**
4 **produced only 840 acre-feet of water. We**
5 **consume 2,000 acre-feet of water a year. To cut**
6 **that less than half is a humanitarian disaster**
7 **for Hays, Kansas. In a multidecadal drought,**
8 **our sources, which are part of the historical**
9 **record, our sources produce less than 500**
10 **acre-feet of water. That's beyond a**
11 **humanitarian disaster. So we have an existing**
12 **need right now for an additional source of**
13 **water.**
14 Q So the Water PACK's expert says that, okay,
15 assuming you need water, the quantity should
16 be -- you should subtract your existing sources,
17 the quantity available from your existing
18 sources from -- from your need. From a public
19 policy standpoint, political science standpoint,
20 what -- is that a valid analysis?
21 A **It's -- no, it's not a valid analysis and it's**
22 **completely unreasonable. If our existing**
23 **sources are not valid during times of drought,**
24 **why would we count them for future planning**
25 **which includes droughts?**

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1 Q So your sources, your existing sources are
2 vulnerable to drought, are they vulnerable to
3 other -- other issues?
4 A **I -- they could be vulnerable to contamination.**
5 **That would be the main thing would be**
6 **contamination.**
7 Q So --
8 A **We don't have a surface water intake so I'm not**
9 **worried about an algae bloom.**
10 Q I don't want to get out ahead of Russell here,
11 but isn't Russell already having some problems
12 with an algae bloom of some kind?
13 A **Russell has a surface water right on Big Creek,**
14 **and, yes, that right, I believe, is limited**
15 **right now due to an algae bloom.**
16 Q So they're vulnerable from drought and there are
17 other things that could happen. You're dealing
18 with -- you've got -- your Big Creek wells have
19 some contamination with dry cleaner solvents as
20 I understand it; is that correct?
21 A **Yes, there is a plume of underground water**
22 **within the City that is -- contains, I think**
23 **it's just dry cleaning chemicals but it could be**
24 **more. And then we have a -- a couple wells that**
25 **we refer to as remediation wells, those wells**

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1 **collect the contaminated water to try to stop**
2 **the spread of the plume and send it to an air**
3 **stripper which removes the chemicals and then**
4 **that goes back into our raw water collection**
5 **system.**
6 Q Okay. I think we're going to get into that a
7 little bit later but -- so during opening
8 statements, Mr. -- counsel for Water PACK put a
9 statement up there by a former mayor, Henry
10 Schwaller, were you -- do you recall seeing that
11 on the screen?
12 A **I do.**
13 Q And it was a quote from a newspaper article,
14 right?
15 A **Yes, I believe it was.**
16 Q And in your deposition, you -- you agreed with
17 the statement that Mr. Schwaller made but it
18 wasn't completely -- the quote wasn't --
19 wasn't -- the quote of the newspaper wasn't
20 complete, was it?
21 A **It was not.**
22 Q How do you know what he actually said?
23 A **I was at the meeting, I was at the Ellis County**
24 **commission meeting when the statement was made,**
25 **but I've also watched the YouTube video of the**

1 meeting.

2 Q So you're not basing it on your memory, you're

3 basing it on watching the vi -- or what are you

4 basing it on, the video?

5 A I'm basing it on the YouTube video --

6 Q Okay.

7 A -- 'cause that's the most recollection of the

8 meeting.

9 Q So is it fair to say that Mr. Schwaller was

10 accurately quoted, but -- but there was -- it

11 was truncated with Mr. Schwaller said or

12 something to that effect?

13 A Correct. The -- the statement Mr. Schwaller

14 made was truncated in the newspaper version.

15 The statement Mr. Schwaller made was, we

16 certainly don't need the entire water right now.

17 Q Is that true?

18 A It's true. The newspaper printed it as, we

19 certainly don't need the entire water.

20 Q Okay. So when we talk about what -- what the

21 City of Hays needs, you're telling us that you

22 don't need it now, but you do need it, so when

23 do you need it?

24 A I don't know when we're going to need it. We --

25 we know we need a certain amount right now to

1 make our existing sources adequate -- or

2 combined with our existing sources to make sure

3 that we can make it through a drought. Now, not

4 knowing the possible severity of future

5 droughts, I don't know when that's going to

6 happen or how much I would need during a drought

7 that our existing sources would be short. I'm

8 also not sure how we're going to grow in the

9 future, and so I can't determine that.

10 What I do know is this is a very expensive

11 project. We are going to be borrowing monies

12 likely up to 30 years to pay back on this. We

13 need to know as communities of Hays and Russell,

14 we need to know that water is going to be there

15 for future generations. Hays and Russell can't

16 afford to invest that amount of money in

17 something that may or may not be there. And --

18 and so that's why we need the assurance of the

19 6,756 acre-feet of water, limit to the ten-year

20 rolling average so the ranch is there for future

21 generations to use if they grow into the full

22 usage of it.

23 Q So are you -- are you asking for water that --

24 for new appropriations, new water rights?

25 A No, these are existing water rights, they were

1 perfected and purchased on the open market in an

2 arm's length transaction.

3 Q So the -- the -- what I saw on the screen was

4 that the Anti-Speculation Doctrine is about

5 unappropriated water, that you can't get

6 unappropriated water. Is this -- are you asking

7 for a transfer of unappropriated water?

8 A We are not.

9 Q So -- and in your -- in your deposition, you

10 said that you didn't recall any studies about

11 need?

12 A Yes.

13 Q And -- and there were other studies that dealt

14 with a lot of other things but you didn't recall

15 studies about need. Do you -- have you been

16 able to review the records since your

17 deposition?

18 A I have.

19 Q Have you been able to identify any specific

20 studies that are about need?

21 A I have.

22 Q And if I was to put Exhibit 1-192 on the screen,

23 please. And scroll to page 7. The internet is

24 wonderful but it's a little slow. So --

25 A What's the title?

1 Q Black & Veatch Water Supply Study Summary Memo.

2 A Oh, that'd be the 1977 Black & Veatch water

3 supply study memo.

4 Q Right, right.

5 A I might --

6 Q We'll move on to -- and come back to that. How

7 about Exhibit 338, Jami? For the record, Jami

8 Buck is a legal assistant and she's helping us

9 today and she can work magic.

10 Can you identify this document?

11 A This is a memo from Joe Aistrup, he was with the

12 Docking Institute at Fort Hays State University,

13 and he wrote a memo to David Pope, who was the

14 chief engineer at the time, that discusses Hays'

15 need for water in order to support future

16 population growth, but the memo also mentions

17 that the lack of available water has had a

18 detrimental effect on our past population

19 growth.

20 Q Jami, could you take us to page 18151, please.

21 Mr. Dougherty, on the -- do you see this

22 graph on the screen?

23 A I do.

24 Q We haven't talked about this yet, but we're

25 going to talk about what happened in 1990, '91

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1 later on, but can you just briefly tell us what
2 happened in 1990, '91, '92 time frame?
3 **MR. LEE:** Your Honor, let me
4 interpose an objection that Black & Veatch
5 is not scheduled to appear, to my
6 knowledge, and this is clearly hearsay.
7 **MR. TRASTER:** Yeah, it's clearly
8 hearsay, hearsay is admissible in an
9 administrative proceeding so ...
10 **PRESIDING OFFICER:** I have down this
11 as page 18151, is it still part of
12 Exhibit 338?
13 **MR. TRASTER:** It's part of 338, and
14 it's 18151 is the page number.
15 **PRESIDING OFFICER:** Okay. I will
16 overrule the objection, you can go to the
17 exhibit.
18 **MR. TRASTER:** Thank you very much.
19 **BY MR. TRASTER:**
20 Q So what happened in the '90, '91, '92 time
21 frame?
22 A **The City of Hays experienced a very severe but**
23 **very short duration drought in 1991. And --**
24 Q So if we look over here at these maps or this
25 Exhibit 2679, the first page and -- and then the

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1 last page, you see some drought -- they indicate
2 some droughts. Is that the time frame we're
3 talking about?
4 A **Correct. So the top visual here shows all of**
5 **the stages of the Palmer Drought Index Rating,**
6 **and the 1991 drought would be right here. This**
7 **just shows exceptional drought in the past 100**
8 **years, and the 1991 drought would be right**
9 **there. So as you can see, it was -- it was an**
10 **exceptional drought, but it was very short**
11 **lived. And what happened is is the City's**
12 **wellfields were unable to meet demands, and that**
13 **was the precipitating event that led to a lot of**
14 **the issues that we're going to talk about.**
15 Q And we are going to go into that. So in any
16 event, what -- what is this -- there's -- the
17 chart number 1 in Exhibit 338 on the page we
18 referred to earlier, 18151, what is it showing?
19 A **It shows population growth and -- shows actual**
20 **growth and a trend line. And the point**
21 **Dr. Aistrup was making in the report is that we**
22 **had good population growth, at times really good**
23 **population growth when we had the thought that**
24 **we had adequate water supplies, but then the '91**
25 **drought changed that and that our growth has**

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1 **been stunted since that point.**
2 Q So --
3 A **And, therefore, Dr. Aistrup determined that**
4 **we -- we need water in order to make sure we**
5 **have adequate growth.**
6 Q So this graph shows population -- actual
7 population from roughly 1950 to 2000, and I'm
8 just reading it, and then the trend line, so
9 what's the significance of the population that's
10 above the trend line and population that's below
11 the trend line?
12 A **Above the trend line means that we were growing**
13 **in excess of the trend, of our past trends.**
14 **Below the trend line means you're growing in**
15 **percentages below the past trends.**
16 Q And can you prove absolutely that that was the
17 only cause was a lack of water?
18 A **I cannot.**
19 Q But is there -- is this an indication that --
20 that lack of water may have affected your
21 growth?
22 A **It is.**
23 Q So let's go to -- turns out that it's not
24 Exhibit 1-192, it's Exhibit 192, and that should
25 have seven pages and be from Black & Veatch and

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1 if you'll go to the seventh page. And blow up
2 the second paragraph, please. So what -- what
3 is it about this that's interesting or --
4 A **I think you have to scroll down, if I recall.**
5 **Water requirements.**
6 Q Why don't you scroll up because I think maybe
7 cut off the top. Nope, nope.
8 We can move on if you prefer.
9 A **Let's move on, I -- I reviewed that one, but I**
10 **think it's on another page.**
11 Q So what -- what do you think -- well, I don't
12 want to ask you to speculate. Let's look at
13 Exhibit 127, no hyphen.
14 **MR. TRASTER:** Your Honor, would it
15 be okay if I took my jacket off?
16 **PRESIDING OFFICER:** Go ahead.
17 **BY MR. TRASTER:**
18 Q Page 4, please.
19 A **I think we may have some old exhibit numbers on**
20 **some of those.**
21 Q 'Cause this isn't what you want?
22 A **This isn't what I -- I wrote down.**
23 Q We'll come back to that.
24 A **I -- I think the exhibit numbers need to get**
25 **confirmed. Can we come back to this?**

1 Q We can.
2 A **Okay.**
3 Q We can.
4 A **I think the exhibit numbers in those reports
5 need to get confirmed.**
6 Q Okay. If that's the worst mistake we make
7 today, it'll be just fine.
8 So I -- I know this exhibit number is
9 right, can you put up 255, please. And scroll
10 down to page 17104. I'm looking for the Big
11 Creek map. There you go.
12 Okay. Mr. Dougherty, this -- this is a
13 map -- well, tell us what this map is, please.
14 A **This map shows the location of the city wells in
15 the Big Creek wellfield as well as the raw water
16 distribution -- or, sorry, raw water collection
17 lines.**
18 Q So --
19 A **And it also shows private water rights,
20 privately held water rights.**
21 Q So the wells that are red dots and with the red
22 labels are the City Big Creek wells, is that --
23 is that what -- is that right?
24 A **Yes.**
25 Q And it's a little hard to read, but I think it's

1 other side of the transmission line, and is it
2 fair to say that the transmission line then
3 follows or drops down to the south and then back
4 to the east? Is that -- am I getting that
5 right?
6 A **That's correct.**
7 Q And along the way -- well, when it gets down to
8 the south end of town, it picks up some other
9 Big Creek wells?
10 A **That's correct.**
11 Q From there, it goes where, to the treatment
12 plant, I guess?
13 A **It -- it goes north adjacent to and parallel to
14 Vine Street, U.S. 183, to the water treatment
15 facility.**
16 Q So north of that, then, are some wells,
17 C20TA REM and C20 REM, what -- what's that?
18 A **Those are the remediation wells that I discussed
19 earlier that are remediating the polluted
20 groundwater.**
21 Q So there's a plume of polluted groundwater in --
22 near those wells?
23 A **Yes.**
24 Q And those -- that groundwater is extracted from
25 those wells, do you just put it right into your

1 17204?
2 What's the page number, Jami?
3 **MS. BUCK: 17104.**
4 **BY MR. TRASTER:**
5 Q 17104 for the record. So these wells are in the
6 Big Creek alluvium. Is that fair?
7 A **That's correct.**
8 Q And tell us a little bit about that, I mean, you
9 said that the watershed -- or the alluvium in --
10 for the Smoky is narrow. Is it also narrow at
11 Big Creek?
12 A **No. The Smoky alluvium is -- in the vicinity of
13 our wellfield is very narrow, very porous, it --
14 it absorbs water very quickly, it -- it depletes
15 very quickly. The Big Creek is more of a broad
16 aquifer, and it takes in water more slowly but
17 it also depletes more slowly.**
18 Q So these wells -- what's the YE2 at the top?
19 A **Those are just different names for wells, those
20 are Yuasa Exide as opposed to City, and it's
21 just -- the City had bought water rights from
22 Yuasa Exide several decades ago and so titled
23 them as such.**
24 Q So the -- up at the northwest corner is the
25 Yuasa wells, and then there's some wells on the

1 system?
2 A **No, it's -- it's extracted from the wells, and
3 it goes to a -- an apparatus called a packed
4 tower or an air stripper. It's -- was financed
5 by KDHE in order to remediate the -- the
6 contaminated groundwater. So it is treated, the
7 contaminants are removed via that process. The
8 water that comes out of the air stripper is
9 water that's safe for us to then put into our
10 raw water collection that we then treat and it
11 goes into our distribution system.**
12 Q So there's some other wells in the middle here,
13 and I'm going to call them C30EM at the
14 northwest and C29EM, what does EM stand for, if
15 you know?
16 A **Those are emergency wells, and those are wells
17 that they are very low in potential quantity,
18 they may not be in very good locations. I don't
19 know if in the historical past they've ever been
20 used for production wells. If -- if -- if they
21 were, it was before advance treatment methods.
22 What they are is emergency wells, and if -- if
23 there was ever a time of emergency, water could
24 be piped directly into the system.**
25 Q So what are the green triangles, if you know?

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1 **A The green triangles are monitoring wells.**
 2 **Q So what do you use those for?**
 3 **A To help determine the relative health of the**
 4 **aquifer.**
 5 **Q So this document is the -- is the aquifer --**
 6 **what do you call this document, I mean, we**
 7 **haven't talked about it?**
 8 **A It's part of a document called the Aquifer**
 9 **Health Index.**
 10 **Q And that's something you use to assess the**
 11 **health of the aquifer?**
 12 **A Right.**
 13 **Q There'll be more about that later but -- so**
 14 **let's go to the next page, can you tell us what**
 15 **this is depicting?**
 16 **A This depicts our Smoky Hill River wellfield, the**
 17 **orange line through the middle of it is**
 18 **U.S. 183, and the City of Schoenchen is**
 19 **immediately to the west of that line to the**
 20 **left; and then as you can see, our wellfield**
 21 **straddles both sides of U.S. 183 in the Smoky**
 22 **Hill River valley.**
 23 **Q And so these pentagons, I guess, are -- are all**
 24 **city municipal wells; is that correct?**
 25 **A Yes, and -- and then there's some monitoring**

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1 **wells interspersed. Or, I'm sorry, I think the**
 2 **gaging stations are identified with the**
 3 **triangles.**
 4 **Q The legend says that there are some Smoky**
 5 **monitoring wells in the small dot, I think I see**
 6 **one here at the far end just below well 19. I**
 7 **think there's one at the far end near well --**
 8 **A And there's three in the middle. There's two**
 9 **more to the right of 183 and one to the left.**
 10 **Q Okay. So at the far right is near well S23M.**
 11 **I'm not seeing -- okay.**
 12 **A It's by S14.**
 13 **Q All right. And those -- are those wells used**
 14 **for the Aquifer Health Index as well?**
 15 **A They are.**
 16 **Q So earlier you testified that these are your two**
 17 **major sources and -- and -- but then there's the**
 18 **Dakota. You also told us that releases from**
 19 **Cedar Bluff are -- it truncates the basin and**
 20 **cuts off flow from the west. Do you recall that**
 21 **testimony?**
 22 **A That's correct.**
 23 **Q So what -- let's look at Exhibit 1-6 -- excuse**
 24 **me, 1-162. So what is this document?**
 25 **A I believe this is a letter from the city**

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1 **attorney, John Bird, at the time in 2003 to**
 2 **Governor Sebelius regarding the potential**
 3 **impairment of the City's Smoky Hill wellfield**
 4 **water rights.**
 5 **Q Did John characterize that as potential**
 6 **impairment?**
 7 **A No.**
 8 **Q He said it was impairment, didn't he?**
 9 **A Correct.**
 10 **Q And there are other documents, but what -- what**
 11 **was the net result of this letter, if you -- if**
 12 **you recall?**
 13 **A The net result of this letter was the creation**
 14 **of a document called the Cedar Bluff Operations**
 15 **Agreement and then a memorandum of understanding**
 16 **with the State of Kansas. The Cedar Bluff**
 17 **Operations Agreement put in place metrics for**
 18 **the City's ability to ask for releases from**
 19 **water rights in Cedar Bluff Reservoir if certain**
 20 **factors were met that -- that allowed us to**
 21 **release water. And then the memorandum of**
 22 **understanding, the State indicated that they**
 23 **would work with us on a few different things,**
 24 **including the Smoky Hill expansion.**
 25 **Q Okay, thank you.**

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1 **MR. TRASTER:** Your Honor, what's --
 2 what's your plan or schedule, do you want
 3 to take a break every hour, every hour and
 4 a half, every two hours, it's up to you
 5 but --
 6 **PRESIDING OFFICER:** We can play it
 7 by ear as we go through this proceeding.
 8 If there's a need for a break, we can take
 9 a break; otherwise, we can kind of wait
 10 till we're between witnesses.
 11 **MR. TRASTER:** Okay. Well, I don't
 12 think -- I think Mr. Dougherty's going to
 13 be on the stand the rest of the afternoon.
 14 **PRESIDING OFFICER:** Okay.
 15 **MR. TRASTER:** So I could use a
 16 break, if we could take five minutes or
 17 maybe ten?
 18 **PRESIDING OFFICER:** Okay. Let's
 19 just go ahead and take a ten -- well, let's
 20 take 13 minutes, we'll come back at 2:15.
 21 **MR. TRASTER:** That would be
 22 wonderful, thank you, Your Honor.
 23 **PRESIDING OFFICER:** Take a short
 24 recess and come back then.
 25 (Thereupon, a recess was taken;

1 whereupon, the following was had.)
2 **PRESIDING OFFICER:** I'm showing 2:15
3 so we can go ahead and go back on the
4 record. And you may resume, Mr. Traster.
5 **BY MR. TRASTER:**
6 Q Mr. Dougherty, I remind you you're still under
7 oath.
8 A **Yes, I agree.**
9 Q So we were talking about the Cedar Bluff
10 Operations Agreement, and that provides for
11 releases or not releases from Cedar Bluff to --
12 what's it -- generally, what's it do?
13 A **The operations agreement put in place a series**
14 **of criteria that if certain metrics are reached**
15 **within our wellfield, it gives the City of Hays**
16 **the ability to ask the Kansas Water Office for a**
17 **release of water from Cedar Bluff from the**
18 **artificial recharge pool, which is a layer**
19 **within the reservoir.**
20 Q And so that's just automatic that you call them
21 up and they release the water?
22 A **I -- I don't believe it's automatic, it's**
23 **spelled out in the agreement. We have asked for**
24 **releases in the past based off of the -- off of**
25 **the metrics in the agreement and those releases**

1 **have happened, but it's not a -- we don't pick**
2 **up the phone and the release starts the next**
3 **day.**
4 Q Sure, but is there always water available to
5 release?
6 A **It's not assured. So the reservoir accounting**
7 **is -- is kind of like a layer cake, and people**
8 **own different layers within the -- the**
9 **reservoir; Russell owns a layer, they have a**
10 **water right in -- in the reservoir, and the**
11 **recharge pool is a layer within that reservoir.**
12 **And so water does have to be available in that**
13 **pool, and there has been times in the past where**
14 **water is not available in that pool.**
15 Q How much -- what is your water right, how much
16 water are you entitled to take from the Smoky
17 Hill River well -- wellfield total, if you know?
18 A **Our total water right, I believe it's 2285**
19 **acre-feet of water, but it's limited by the**
20 **IGUCA to either 2,000 or 2200 acre-feet of**
21 **water.**
22 Q So if I were to tell you that it's 20 -- you
23 have a water right for 2800 acre-feet but you
24 could only take 2285.83 acre-feet from the --
25 because of the IGUCA, would you argue with me?

1 A **No.**
2 Q What's an IGUCA?
3 A **An IGUCA is an Intensive Groundwater Use Control**
4 **Area, and Hays' water supplies are actually**
5 **under two separate IGUCAs, one on the Smoky Hill**
6 **wellfield and then one in the Hays area that**
7 **covers the Big Creek wellfield.**
8 Q So the Smoky wellfield, do you know why -- can
9 you give us some background? That was before
10 your time, was it not?
11 A **It was.**
12 Q I mean, so we'll just let the documents speak
13 for -- for the -- the orders are part of the
14 record, they're in the record and available, and
15 we'll let that -- let that go for now.
16 So you talked about, then, the Big Creek
17 wells, and we showed you the map so we could see
18 kind of where they are, and those are in the
19 Aquifer Health Index, Exhibit 255, and you've
20 also talked about the Big Creek -- you talked
21 about Big Creek and Smoky Hill, but earlier you
22 said there are some Dakota wells. Let's look at
23 map Exhibit 2661. Mr. Dougherty, you have seen
24 this map before, can you tell us what it is
25 depicting?

1 A **This map shows the locations of Hays and**
2 **Russell, along with the City's Big Creek**
3 **wellfield located in blue, the Schoenchen**
4 **wellfield located in yellow, Russell's Pfeifer**
5 **wellfield located in red, and then the Dakota**
6 **wells are depicted in green southwest of the**
7 **city.**
8 Q These green wells here are the Dakota wells that
9 the City of Hays owns?
10 A **That's correct.**
11 Q And there are, like, six of them?
12 A **Six of them.**
13 Q And -- but you can only take 120 acre-feet?
14 A **That's our functional limitation is 120**
15 **acre-feet.**
16 Q So is there a pipeline that comes from the
17 Dakota wells into town?
18 A **There is.**
19 Q And is that -- where does the pipeline
20 terminate?
21 A **I believe it joins one of our raw water**
22 **collection lines around U.S. 183.**
23 Q And -- and then the water goes into the
24 treatment plant?
25 A **Yes.**

1 Q Is there some sort of a -- and I'm not asking
2 you about the specifics, but do you have to
3 blend that water or treat that water or do
4 something to make it usable?

5 A **Well, the -- the water is treated like all of
6 our water. We have a municipal softening
7 facility, and so we use lime softening to treat
8 our water and then we sand filter or chlorinate
9 it and distribute it. So the -- the Dakota
10 water is blended with existing waters. One of
11 the reasons why, when you get above 120
12 acre-feet, it gets a little difficult for us to
13 use that is because the water is -- is so poor,
14 so brackish, and very high in salts that it
15 makes it difficult to blend, it requires advance
16 treatment.**

17 **When the Cities opened up that wellfield --
18 and they opened it up in a reactionary basis in
19 1992 as a result of the 1991 drought, and they
20 actually set up temporary reverse osmosis
21 facilities in the country and then they
22 leased -- I believe on a temporary or term
23 permit, they leased some oil field disposal
24 wells in order to dispose of the brine. All
25 that was done on a term permit basis.**

1 Q Okay. I would also -- so I want to take a look
2 at the legend here a minute. Scroll up a
3 little. So just for the record, the Pfeifer
4 wellfield is shown here, and it shows a surface
5 water intake as well as the City of Russell
6 wells in the river alluvium. And I also, for
7 the record, point out that Russell has a surface
8 water right in the -- in Big Creek. I'm not
9 trying to testify for them but I am testifying,
10 I just want -- for the purposes of the accuracy
11 of this exhibit, I just want to point out that
12 the well -- that the Big Creek surface water
13 rights are not shown and they should have been.
14 My fault.

15 All right. Do you know when those wells
16 were drilled?

17 A **1992.**

18 Q And we'll talk about it -- well, why? What
19 happened in 1992?

20 A **The wells were drilled as a result of the 1991
21 drought.**

22 Q So we've -- you've talked a little bit about
23 that but let's talk about it more. The 1991 --
24 the -- when were the Smoky Hill -- when was
25 the -- were these Smoky Hill wells drilled, if

1 Q So is the -- is this limitation of 120 feet
2 just -- you can bump the hell out of it if you
3 wanted to but you can't use it?

4 A **We have water rights of up to 700 acre-feet.
5 That number is not sustainable because the wells
6 are in a very small geographic area. The Dakota
7 aquifer receives almost no recharge and so
8 the -- the yield requirements for spacing are
9 very large, I believe it's -- if you were to
10 develop new water rights in the Dakota, I
11 believe it's a 4-mile spacing between wells.
12 And so that's to prevent competition with other
13 wells. So we could possibly, like, back in the
14 '90s produce more than 120 acre-feet if we had
15 some advanced treatment, but what we're going to
16 do is deplete the source very quickly, so that's
17 not a sustainable usage of it.**

18 Q Well, when you were testifying about the
19 treatment, I thought, well, that -- is that the
20 limit, you just can't use it 'cause you haven't
21 invested in treatment, but it sounds to me like
22 it might be -- I don't know which end is the
23 limitation, is the limitation in the wellfield
24 or is the limitation in the treatment?

25 A **It's both.**

1 you know?

2 A **I believe in the '50s; what year, I don't know
3 but I believe in the '50s.**

4 Q So they're fairly -- fairly senior water rights
5 in that area?

6 A **Very much so.**

7 Q Are they senior to Cedar Bluff?

8 A **Yes.**

9 Q What happened in 1991?

10 A **In 1991, the City experienced a extreme but -- a
11 brief in time but a very extreme drought that
12 exploited the vulnerability of the City's
13 sources, mainly the Smoky Hill wellfield. So
14 the -- there were several wells in the Smoky
15 Hill wellfield that were pulling air, and the
16 City was not able to meet its daily demands for
17 usage and so had to enact some pretty draconian
18 responses in order to get usage under control to
19 account for the situation.**

20 Q Jami, would you pull up the 2679 on the screen,
21 please. Sorry for the late notice here. Okay,
22 very good, thank you.

23 Now, what I'd like for you to do is zoom in
24 on that 1990, '91 time frame so we can kind of
25 see how that was. So it looks like that -- so

1 the yellow is abnormally dry but not -- they
2 don't call it drought. But -- so here's -- you
3 see '85, it's -- there's a period where it's wet
4 but then right before '90, you got a pretty
5 significant drought, and then '91, it isn't even
6 as significant but you just -- you just came out
7 of one. Is that a fair characterization of
8 that exhibit?

9 **A That's correct.**

10 **Q** So they were able to -- if I'm understanding you
11 correctly, they were able to divert water from
12 the Smoky, you know, in -- in the late 1980s but
13 by 1990, '91 they could not?

14 **A That's correct, and it was a, again, it was a**
15 **short duration in the '90s in the summer where**
16 **all flow stopped in the river for a lengthy**
17 **period of time and -- and the wells were unable**
18 **to produce.**

19 **Q** We'll get into this later, but while we've got
20 this on the screen, there's another drought in
21 2011, '12, '13, right?

22 **A That's correct.**

23 **Q** And that -- I'm showing you, you know, it's
24 after 2000 -- between 2010 and '15, is that the
25 drought that we just referred to?

1 **A Yes.**

2 **Q** And it -- unlike -- I mean, why -- unlike the
3 1991 drought where you had a pretty significant
4 drought ahead of that, in 2012, '11, '12, '13,
5 you didn't have a significant drought but it was
6 dry. Is that a fair characterization of that?

7 **A Yes.**

8 **Q** And we'll come back to that but -- so as a
9 result of the drought in '91, the City of Hays,
10 this is before your time, but the City of Hays
11 drilled these Dakota wells, right?

12 **A That's correct.**

13 **Q** Do they meet this 4-mile spacing requirement
14 that you were talking about?

15 **A They do not.**

16 **Q** And what -- how did you get that done?

17 **A I don't know. I believe it was because it was**
18 **on an emergency term basis, but that would be**
19 **speculation.**

20 **Q** What else happened as a result of that drought?

21 **A The 1991 drought was life changing in many ways**
22 **for the City of Hays. First of all, it -- it**
23 **set off a -- a frantic search for an additional**
24 **water source that had been apparent but somewhat**
25 **muted before that. The second thing it caused**

1 **was the development of the Dakota wellfield.**
2 **They weren't looking long-term Dakota, they were**
3 **looking at we need water right now when that was**
4 **developed. We implemented our conservation**
5 **program at that time, and the conservation**
6 **program that is still in existence today, that**
7 **all started with the -- the drought of the '90s.**
8 **The -- the water rate structures that we have in**
9 **place today were all considered as a result of**
10 **the 1990 drought.**

11 **Q** Was -- you had an election, you voted in a sales
12 tax at that time too, didn't you?

13 **A I believe that was in 1992 is when the residents**
14 **voted for a half cent -- they voted to impose on**
15 **themselves a half cent sales tax allocated to**
16 **water. Hays residents, when you read the**
17 **record, they knew all along an additional source**
18 **was going to be expensive. In 1991, the need**
19 **for an additional source was amplified and,**
20 **therefore, the governing body asked to be put on**
21 **the ballot the sales tax question, and it was**
22 **voted overwhelmingly and -- and we have been**
23 **benefitting from the proceeds of that sales tax**
24 **since.**

25 **Q** So we've heard about how it's Burns & McDonnell

1 **A Yes.**
2 **Q** And it -- unlike -- I mean, why -- unlike the
3 1991 drought where you had a pretty significant
4 drought ahead of that, in 2012, '11, '12, '13,
5 you didn't have a significant drought but it was
6 dry. Is that a fair characterization of that?

7 **A Yes.**

8 **Q** And we'll come back to that but -- so as a
9 result of the drought in '91, the City of Hays,
10 this is before your time, but the City of Hays
11 drilled these Dakota wells, right?

12 **A That's correct.**

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14 that you were talking about?

15 **A They do not.**

16 **Q** And what -- how did you get that done?

17 **A I don't know. I believe it was because it was**
18 **on an emergency term basis, but that would be**
19 **speculation.**

20 **Q** What else happened as a result of that drought?

21 **A The 1991 drought was life changing in many ways**
22 **for the City of Hays. First of all, it -- it**
23 **set off a -- a frantic search for an additional**
24 **water source that had been apparent but somewhat**
25 **muted before that. The second thing it caused**

1 and David Barfield who were selling the City of
2 Hays the bill of goods here to line their own
3 pockets and that's why Hays thinks it needs
4 water, but how long has Hays worked with Burns &
5 McDonnell?

6 **A I think the first reference I see to Burns &**
7 **McDonnell in the record is 2002.**

8 **Q** Well, were they working for Hays in the same
9 manner they are now in 1992?

10 **A I don't believe so.**

11 **Q** Do you have -- let's look at, I hope it's 332.
12 And scroll down, I think there's a -- yeah,
13 there's -- scroll down. There you go. There it
14 is. Why don't you blow that up, Jami.

15 I don't know if you can see it from here,
16 but I'll represent to you that this is
17 Exhibit 332.

18 And I'd like to know the page number, I'm
19 sorry, Jami, I asked you to blow it up before I
20 got -- before I got that in the record. 18059,
21 page 18059.

22 Now let's go look at the vote. So the
23 official vote count on this half cent sales tax,
24 if you can read it, is 3370 yes and 1140 no?

25 **A That's correct.**

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1 Q If I told you that's a 75/25 split, does that
2 resonate with you?
3 A **I would have to agree with that.**
4 Q So the Hays -- the folks in Hays must have
5 thought that water was needed or they wouldn't
6 have voted 75 to 25 for a sales tax, would they?
7 A **I think when your existing sources don't meet
8 daily demands, it implies a sense of urgency
9 that, yes, you need an additional water source.**
10 Q Do you need a study to tell the Hays residents
11 that they need water?
12 A **Not when their existing sources couldn't meet
13 daily demands.**
14 Q So were there any other measures taken at that
15 time that you -- if you recall, to either use,
16 reuse, or conserve water?
17 A **I mentioned the conservation efforts. So the
18 City also started investing in effluent water
19 usage, and so we use our treated effluent in
20 order to irrigate -- currently, we irrigate ball
21 fields, sports complex is irrigated with
22 effluent water, Larks Park is irrigated with
23 effluent water, the Fort Hays Municipal Golf
24 Course is irrigated with effluent water. And
25 depending on the year, we can -- we utilize**

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1 **35 percent of our total produced effluent to
2 irrigate our parks and recreational facilities.**
3 Q And when you say -- I pronounce it a little
4 different, you're probably right and I'm
5 probably wrong, but effluent water is from the
6 Hays water -- wastewater treatment plant?
7 A **It is, we -- we treat our -- our wastewater to
8 standards that allows us to use it for
9 irrigation.**
10 Q Why don't you use it -- if you use some percent,
11 why don't you use it all?
12 A **So Hays is limited by its water rights. With
13 the water right, you either have a consumptive
14 or a nonconsumptive use, and if you don't have a
15 consumptive use, you have a duty to put it back
16 into the, either stream or whatever you pull it
17 out of. And so we do not have consumptive use
18 water rights on Big Creek. Whatever gets
19 utilized in Big Creek has to be put in Big Creek
20 because there are downstream users. And so we
21 are limited to the Smoky and the Dakota
22 wellfield.**
23 **So when you look at our effluent usage,
24 we -- we know with our demands and -- and the
25 potential for growth we have within the existing**

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1 **facilities -- Fort Hays also uses a little bit
2 of the effluent water for -- they have a soccer
3 and a track facility next to our sports complex.**
4 **We don't want to get into a situation where we
5 have obligations for grass that exceed the
6 potential for our -- our consumptive use water
7 rights.**
8 Q So the wells in -- I want to see if I get this
9 right. So the wells in Big Creek are -- you
10 pump water out, you send it to the treatment
11 plant, it goes out in some distri -- do you have
12 a distribution system?
13 A **Yes.**
14 Q That distributes water through Hays?
15 A **We are the sole water supplier for residents
16 within the city limits.**
17 Q And you have pipelines all over the city to
18 supply those?
19 A **Yes.**
20 Q And so that water gets used by residents in
21 their daily activities and then some of it goes
22 back down the sewer, right?
23 A **Yes.**
24 Q Goes back to the sewer plant? So some of that
25 is consumed, I mean, the water that people use

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1 on their lawns doesn't make it back to the
2 wastewater treatment plant, does it?
3 A **It does not.**
4 Q But some of it does?
5 A **Right.**
6 Q And that's the amount that you can't use for
7 other uses, you can't reuse that water?
8 A **Right. I believe there is an implied
9 consumption in municipal usage knowing that some
10 of that water is going to be used for --**
11 Q Sure.
12 A **-- purposes that don't result in water going
13 down the drain.**
14 Q But you can -- but why can you then use the
15 water -- you pump the water out of the Smoky
16 Hill wellfield, it comes to town, it gets
17 treated, it goes out to the customers, it
18 comes -- and gets either consumed or sent back
19 to the wastewater treatment plant, why is
20 that -- why can you use that when you can't use
21 the -- the Big Creek water?
22 A **It's because of the nature of the water right
23 itself. The water right we have is a
24 consumptive use water right. So -- so once we
25 pull the water out of the ground, we have -- we**

1 do not have an obligation to put it back in the
2 source of supply we pulled it out of.
3 Q Okay. So that -- was this -- is this in the
4 time frame when you started using -- we've
5 talked about those remediation wells, did you
6 start using that water at this time too or not?
7 A I believe that was in the mid '90s, I can't tell
8 you the specific year, so I could be wrong, but
9 I think it was early to mid '90s when the KDHE
10 program to implement the remediation wells and
11 then we started receiving the benefit of those
12 remediation wells.
13 Q Something else happened that was significant in
14 1995 too, didn't it?
15 A 1995 is when Hays purchased the R9 Ranch in
16 Edwards County.
17 Q And you weren't there at the time, were you?
18 A I was not.
19 Q Where did you grow up?
20 A I was actually raised in Lucas, Kansas.
21 Q How far away is that from Hays?
22 A It's about an hour.
23 Q So was Hays someplace you've been as -- as a
24 youth and young adult, I mean ...
25 A Oh, yes.

1 the R9 Ranch. Richard Wenstrom, our neighbor,
2 wrote a letter to Secretary Mike Beam as part of
3 the change application process asking for
4 judicial review. Richard's references in that
5 letter to the R9 were --
6 Q Asking for judicial review of the?
7 A I'm sorry, asking for judicial review of the
8 Master Order that was issued to Hays and
9 Russell.
10 Q That had been issued --
11 A Yes.
12 Q -- that had been issued by the chief engineer to
13 approve your change application?
14 A That's correct.
15 Q Thank you.
16 A Mr. Wenstrom referred to the ranch -- soils on
17 the ranch as sandy soils, with low water-holding
18 capacity and rapid permeability resulting in
19 most of the water returning to the aquifer. In
20 these proceedings, John Janssen, who is on the
21 GMD5 board, submitted a letter to the hearing
22 panel where he referred to the ranch as dune
23 sand, with infiltration rates up to 5 inches per
24 hour, actually he said in excess of 5 inches per
25 hour. This is what makes the R9 a very suitable

1 Q So you're familiar with the town?
2 A Yes.
3 Q You were familiar with the town before you
4 became the assistant city manager. Is that
5 fair?
6 A That's correct.
7 Q Tell us about the characteristics of the ranch,
8 what is it about the ranch that makes it a
9 source that you're interested in?
10 A Well, first and foremost, the Cities own the
11 water rights, and -- and so when looking for an
12 additional source, that's typically half of the
13 battle is actually figuring out how to acquire
14 water rights, so we own the water rights. Most
15 importantly is the R9 Ranch is sustainable. It
16 is a natural storage vessel for rain that falls
17 on the property. The property is -- it's along
18 the Arkansas River, it is very sandy soil.
19 Water falls on the sand, it soaks in, and then
20 it's there to use for future years.
21 So during the change application process,
22 there was a public meeting in Greensburg, and
23 Water PACK had hired an expert, Dr. Keller, I
24 can't think of Dr. Keller's first name, but he
25 talked about the porous, sandy soils on -- on

1 storage vessel for water and a long-term
2 sustainable option for us.
3 Q So you bought this ranch in '95, but you sold
4 some to -- to Russell, why'd you do that? Or
5 why did they, you weren't there at the time, but
6 why did they do that?
7 A I believe Russell had an immediate need for an
8 additional source of water and Hays to Russell's
9 proximity means they can thrive off of each
10 other, what's good for Hays and Russell are good
11 for the region, and so therefore the governing
12 bodies agreed that Russell would buy an
13 18 percent interest in the property.
14 Q In my experience of neighboring cities,
15 neighboring towns, you know, in Kansas at least,
16 aren't always so friendly, what's the deal
17 there?
18 A I -- I think maybe it's just because of the
19 need, I mean, we have a common need of an
20 additional water supply.
21 Q Why did -- why didn't Hays and Russell go ahead
22 and develop the ranch in 1995?
23 A I believe it was for two reasons. One, they
24 didn't have the money. I think they -- they
25 probably had to look pretty hard to find the

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1 money to buy this property. The actual sales
2 tax itself wasn't voted in until 1992. Even in
3 1995, that property to develop was extremely
4 expensive and would far outpace their ability to
5 pay for it without incurring significant debt.
6 But at that time, there were still a lot of
7 perceived viable options on the table. And I
8 say perceived because they turned out not to be
9 viable options. But in -- in 1995 there were
10 still options out there that I believe both
11 communities viewed as viable, or potentially
12 viable.
13 Q So did the -- and I think we can go into the
14 details of this later, but has the City,
15 generally speaking, the two cities, Hays and
16 Russell, looked diligently for -- or looked -- I
17 don't want to characterize it. I also think I
18 really messed up earlier and mispronounced the
19 name of the Arkansas River. I might have
20 mispronounced it and said the Arkansas River,
21 and if I did, I -- my deepest apologies to
22 anybody that heard it.
23 And I forget where -- so other potentially
24 viable sources, so, I mean, have you looked for
25 other sources between -- between 19 -- you said

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1 earlier that one of the outcomes of the 1991
2 drought was a diligent search for new sources,
3 and maybe I mischaracterized that but new
4 sources, you were looking for new sources
5 beginning in -- as a result of the '91 drought?
6 A That's correct, and the Cities have looked at
7 many sources.
8 Q So there -- what else -- what -- my
9 understanding --
10 Let's go back to Exhibit 255, Jami. You
11 probably already closed it, but I want to take a
12 look at the -- or -- well, let's look at the
13 Hays -- the Smoky Hill wellfield, which is --
14 next page.
15 So earlier you testified that these 12
16 wells, I think, is this the original
17 configuration of the wells?
18 A It is not. The wellfield was expanded in a
19 project that took place in 2009.
20 Q As the result of some hearings in -- earlier,
21 correct?
22 A As a result of a series of regulatory hearings
23 in Hays held by the chief engineer, David Pope
24 at the time, and I believe those were 2006,
25 maybe 2005 and '6.

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1 Q And those -- that was, in essence, a series of
2 applications to change the points of diversion
3 for the wellfield wells; is that correct?
4 A That's correct.
5 Q And why was that done?
6 A The City expanded their wellfield at -- at
7 recommendation of experts in the field as it was
8 determined that the -- the way the wells were
9 originally constructed and the proximity by
10 which they were drilled was creating unnecessary
11 competition amongst the wells and limiting the
12 City's ability to utilize its full water rights.
13 So the thought was if the wellfield was
14 expanded, then they could get closer to
15 utilizing their full water right and it might
16 make the wellfield more viable during a time of
17 drought.
18 Q So are you saying that sometimes these wells can
19 be too close together?
20 A Yes.
21 Q I note that a couple of the wells over on the
22 west end are still pretty close together. Is
23 that an issue?
24 A I couldn't tell you.
25 Q All right. You're not a hydrologist?

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1 A I am not.
2 Q So was -- was part of the process or the
3 reasoning for expanding the wellfield to just
4 make the -- the storage area bigger?
5 A Yeah, so the City had a water right that they
6 could -- even IGUCA limited right, Intensive
7 Groundwater Use Control Area, and so -- but they
8 felt like their right was limited because it was
9 being pulled out of a very concentrated area,
10 so, yes, by expanding the footprint of the
11 wellfield, therefore, they could pull from a
12 bigger area.
13 Q So that was 2009 that that job, that deal was --
14 that process was completed?
15 A That's correct.
16 Q So that solved all the problems, right?
17 A It did not.
18 Q It didn't? So what -- what happened? I mean,
19 did it improve the situation?
20 A It did. In reviewing the record, there was a
21 lot of faith placed in the potential benefit for
22 the expansion of the Smoky Hill wellfield, but
23 in practicality that didn't provide the benefit
24 that everybody thought it would. So what
25 happened was in 2000 -- beginning in '11, '12,

1 and '13, we experienced a significant short
2 duration drought that really exploited again,
3 once again, the vulnerability of the Smoky Hill
4 wellfield. The wellfield did perform better
5 than it did in the '90s, so the -- the
6 enlargement of the wellfield did make it a
7 little less resistant to drought, but it also
8 showed that the Smoky Hill wellfield is not a
9 viable and sustainable source during times of
10 prolonged droughts.

11 Q So how did you find that out?

12 A We found that out because we saw our water
13 levels declining in the aquifer, the streamflow
14 dried up and -- and then the water levels
15 rapidly declined, and if it wasn't for a release
16 from Cedar Bluff they might have dissipated
17 beyond our usable levels.

18 Q So earlier you testified that this wellfield is
19 dependent on flow in the river from the west.
20 Is that a fair characterization?

21 A Yes.

22 Q During opening, my opening remarks, I had a
23 couple of photographs put up on the screen, I
24 believe one was from October of 2013. Do you
25 recall that photo?

1 A I do.

2 Q I believe it was 803 -- 801 or 80 -- 801, wasn't
3 it? It doesn't matter, we've seen it, we know
4 it's -- it showed the dry creek bed. So --
5 there we go, 800, Exhibit 800. Do you -- are
6 you familiar with precisely -- or approximately
7 where this photo was taken? If not, that's
8 fine.

9 A I'm not, a lot of the channel looks the same
10 down there.

11 Q Okay. So we talked earlier, and I showed you
12 the drought -- or it was dry, not wet during the
13 period in the couple years before 19 -- before
14 2011 and -- and '12 and '13. What was the
15 consequence of that with respect to what
16 happened during that drought?

17 A It was -- it helped exacerbate the problem of a
18 rapid depletion of the aquifer. I think a good
19 analogy is we are in an exceptional drought
20 right now, but the Smoky Hill wellfield is still
21 in relatively okay condition because we've had a
22 lot of wet years.

23 Q So looking at -- back at 2679, it looks like
24 there's an existing drought that's pretty
25 significant right now, right?

1 A Yes.

2 Q In fact, on the last page of 2669 where we're
3 just showing the exceptional drought during the
4 period 1910 to current, it -- it is -- you are
5 in an exceptional drought?

6 A We are still currently in an exceptional
7 drought.

8 Q But what -- I also note that there is -- before
9 2000 -- there was a drought, it looks like in
10 what year, '16, '17, '18, but there's -- it's
11 not abnormally dry prior to right now?

12 A No, those were very wet years.

13 Q So, again, will you just tell me what -- the
14 consequence of that, I mean, comparing 2011,
15 '12, '13 to current situation, I want to make
16 sure I understand?

17 A So the comparison is right now we are in extreme
18 drought, but when you look at the Smoky
19 wellfield, it is in better condition than it
20 would have been in 2012 in extreme drought. The
21 Big Creek wellfield is actually starting to
22 trend down right now because of the extreme
23 drought.

24 But going into the 2011 drought, it had
25 been dry and we had received either below or

1 just right at normal rainfall for a few years,
2 and so when that flash drought hit, it hit very
3 hard and it took a -- a source that was somewhat
4 stressed and it just depleted it very quickly.
5 And so that's where we saw just rapid declines
6 in the water levels.

7 Q So if I'm understanding this correctly, in 2009
8 you expanded the wellfield and at least some
9 people thought it was going to be very helpful,
10 but it was less helpful than expected?

11 A Yes.

12 Q What happened to Big Creek during that period,
13 the Big Creek wells, were they still capable of
14 producing?

15 A During the 2011 drought?

16 Q '11 to '13?

17 A Big Creek wells, they declined to a point that
18 made us very nervous, the flow actually stopped
19 in Big Creek, and -- and that was the first time
20 in a lot of people's memory that flow had ever
21 stopped in Big Creek. And -- and we started
22 seeing some fairly rapid declines in Big Creek
23 again in a manner that we hadn't seen in --
24 in -- since we started tracking well levels in
25 Big Creek. So we were very concerned about --

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1 about the future viability of that.
2 Q What's the current state of Big Creek, is it
3 flowing now?
4 A Yes. Flow has been reducing for about, I'm
5 going to say two years, it's been steadily
6 declining, but there is still a minimum -- a
7 minor flow in Big Creek.
8 Q So let's look at 255, Exhibit 255. Yeah, there
9 you go. Figure 3. And for the record, it's
10 page 17106. 17106. So this document, figure 3,
11 is from the Aquifer Health Index, and it shows
12 2010 to '15 Smoky Hill wellfield?
13 A It does, it does. I believe we have a paper
14 exhibit too.
15 Q Okay. Is that easier to see?
16 A It -- it -- I'm not sure it's over here. I know
17 I saw it earlier. Daniel has it.
18 Q So -- yeah, put it up. You can actually put it
19 over -- yeah, there you go. Thank you, Daniel.
20 So we have figure 3 on an easel here, but
21 we also have it on the screen so everybody can
22 see. Can you tell us what -- what -- what's the
23 significance -- let me back up. So the Aquifer
24 Health Index was done in 2016, or something,
25 right?

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1 A Right. So coming out of the -- actually at
2 the -- at the outset of the 2013, '14 period,
3 with that drought, we were very concerned about
4 Big Creek aquifer, that we didn't have a good
5 understanding of how Big Creek's aquifer
6 responded to drought. So we had Big Creek
7 studied a little bit closer. And then we were
8 also surprised with how rapidly the Smoky Hill
9 wellfield depleted, and so we also had the Smoky
10 Hill aquifer studied in a little more detail.
11 We then had an Aquifer Health Index created
12 that created an index for both aquifers because
13 they are different and they respond differently
14 to rainfall and -- and conditions that deplete
15 them, they are completely different acting
16 aquifers. So we had an Aquifer Health Index
17 created for each wellfield that would show us
18 the relative health of each aquifer. And so
19 what this represents is the index for the Smoky
20 wellfield for a period of time from 2010 through
21 mid to late 2015.
22 Q But that predates the actual aquifer -- the
23 Aquifer Health Index, as I understand it?
24 A What's that?
25 Q It pre -- this time period isn't --

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1 A No, this -- the data predates the creation of
2 the Aquifer Health Index. We've been collecting
3 data on both wellfields for decades as far as
4 well levels and -- and monitoring well levels.
5 Q So the Aquifer Health Index takes data that
6 you've been collecting and it gives you some
7 sort of a reading on the health of the aquifer.
8 Is that a fair way to say it?
9 A Yes.
10 Q And this is just looking back at putting --
11 plugging the data in?
12 A Correct.
13 Q Okay. So I'm going to assume, and correct me if
14 I'm wrong, it looks like there's a column on
15 the -- on the left of zero to 100, is that some
16 sort of a score?
17 A It -- it's a relative health score. As in most
18 scoring, zero is bad, 100 is good.
19 Q In 2010 -- October of 2010 through May -- April,
20 May, June of 2011, it looks like the Aquifer
21 Health Index ranged from 70 up to 90 roughly?
22 A Yes, and what that represents is a regular flow
23 in the Smoky Hill River.
24 Q What happened, then, when it dropped off in
25 2000 -- the middle of 2011?

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1 A That's when it started getting dry, and so even
2 though there is not a flow in the river, there's
3 still subsurface moisture in the aquifer itself.
4 So flow stopped in the river, meaning inflow
5 stopped into the aquifer, and so that meant we
6 started mining water out of the aquifer.
7 And then you can see it went down pretty
8 quickly. With rainfalls, and I'm looking at the
9 time frame, so a little bit of winter, so it
10 could be snow melt as well, the aquifer
11 maintained. Also in the wintertime, the trees
12 and the vegetation along the river go dormant,
13 so it's not pulling that aquifer out. But then
14 as soon as the spring hit, you see the -- the
15 water levels start going down again.
16 Q So it jumps up in April of 2012 a little bit
17 from 60 to 65 or 60 -- a little higher, but
18 then -- it bounces around, but then it starts to
19 take a nosedive, doesn't it?
20 A That's when it got really bad. That's when we
21 started hitting the meat of the drought, and --
22 and the sources just rapidly depleted. As I
23 mentioned before, this is a very narrow channel,
24 and so when you start pulling water out of it,
25 it starts depleting very rapidly when there's no

1 inflow.
 2 Q So it looks like a miracle occurred here in
 3 April of -- of 2013, what happened?
 4 A So that was actually in March of 2013. In
 5 December of 2012, we asked the Kansas Water
 6 Office for a release of water from Cedar Bluff,
 7 and I don't know the -- the amounts of what was
 8 released. But in March of 2012, there was a
 9 release of water for a specific period of time
 10 in order to get water down the channel to Hays'
 11 wellfield. And I know it took nine days or so
 12 for that water to -- we have a report that's
 13 filed as an exhibit, but I think it took about
 14 nine days for that water to actually reach our
 15 wellfield.

16 I can tell you they were releasing water at
 17 a pretty good clip from Cedar Bluff, I don't
 18 remember how many cubic foot a second, maybe 125
 19 or 150, something like that, but the -- the
 20 current mayor and mayor at the time and I were
 21 down there in the wellfield and -- and you could
 22 stand 5 foot from that water in our wellfield
 23 and it would take five minutes to reach you
 24 because it was just soaking into the well so --

25 Q You could stand where?

1 A You could stand in the river channel as the
 2 water was coming down, you could stand 5 foot
 3 away from the -- from the water's edge, I mean,
 4 the head of the water, and it would take it five
 5 minutes to get to you because it wasn't moving
 6 forward as much as it was moving laterally and
 7 down into the aquifer.

8 Q So it was soaking into the aquifer?

9 A Right. So the water took nine days to get to
 10 our wellfield. Our -- our water came from the
 11 joint use pool -- or from the artificial
 12 recharge pool that -- that I talked about
 13 earlier from Cedar Bluff. When the water
 14 reached our wellfield, Russell asked for release
 15 of their water from Cedar Bluff. They own water
 16 rights in Cedar Bluff. Their water rights
 17 made -- their water made it to our wellfield in
 18 a matter of a couple days and then on through
 19 our wellfield in order to make it to Pfeifer's
 20 wellfield, where I believe that's where it
 21 stopped and soaked in, and I don't think any of
 22 it went past Pfeifer's wellfield. So the -- the
 23 increase you see there, that is not due to
 24 rainfall, that is all due to that Cedar Bluff
 25 release.

1 Q Let's go back to 800, if you still have it up.
 2 So looks like the river -- is this showing the
 3 river channel itself --

4 A Yes.

5 Q -- if you know? Now, you said you didn't know
 6 specifically where it was from?

7 A I don't know the location, but I can -- I can
 8 say that is the river channel.

9 Q And so it's dry --

10 A Yes.

11 Q -- right? You're -- you're saying that the
 12 water was flowing from the west and -- and
 13 flowing at the surface and soaking in, is the --
 14 is the riverbed sandy?

15 A Yes.

16 Q Compare the river -- quality of the riverbed
 17 sand to the quality of the sand on the R9 Ranch,
 18 if you can?

19 A It's different but it's both -- they're both
 20 sand.

21 Q So they -- they sort of react the same way?

22 A Yes.

23 Q Water -- water falls on it, it soaks in?

24 A It soaks in, there's -- there's very little
 25 discernible runoff from the R9 Ranch. We don't

1 have any creeks or waterways or anything that
 2 flows off of the ranch.

3 Q All right. So there was this release in 2013 --
 4 there were two releases, the release from Fort
 5 Hays and then Russell asked for a release from
 6 its -- did they do that on purpose, wait to --

7 A Yes.

8 Q -- to get the aquifer full, if you will?

9 A Yes, they purposely waited because they knew
 10 that if -- if the aquifer wasn't saturated at
 11 least to our wellfield, then anything they
 12 release is going to get caught up in our
 13 wellfield and never make it to their Pfeifer
 14 wellfield. So from a strategic standpoint, it
 15 was -- it was a good use of the -- of waiting
 16 for their water right to be released.

17 Q So are you telling me that if Russell has this
 18 big water -- this water right in Cedar Bluff, if
 19 they want to release it, it's basically going to
 20 stop someplace before it gets to their
 21 wellfield? If you know?

22 A So the characteristics of the aquifer are if
 23 there is adequate saturation for water to make
 24 it to their wellfield, then they probably don't
 25 need the release. When conditions are as such

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1 that they do need the water, the aquifer is
2 going to be depleted enough it's never going to
3 make it there.
4 Q Let's go back to 255, please. So there was this
5 release in March of 2013 where we've got this
6 spike in the middle going up, and that doesn't
7 look like it solved the problem?
8 A No, because it was dry. The -- the release
9 saved us from -- from dropping into emergency
10 status further. Now, I'm going to clarify for
11 the record, we had a different classification of
12 drought response before because we didn't have a
13 very good understanding of the aquifer. So we
14 were in warning but not emergency at the time.
15 But after we developed what we thought was a
16 better understanding of the aquifer, in
17 retrospect, we should have been in an emergency
18 but we hadn't declared an emergency yet.
19 Q What's the difference?
20 A What's that?
21 Q What's the difference, I mean, watch or warning
22 or emergency, I mean, what --
23 A It's -- it's all part of our drought response
24 plan. We have different reactionary measures as
25 part of our drought response plan to water

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1 watch, water warning, water emergency.
2 Q And does that affect the rate?
3 A It --
4 Q The rate people pay?
5 A In water warning and water emergency, it does.
6 Q And I think we'll deal with that, but I just
7 want to --
8 A Yes.
9 Q We won't go into that now but -- so it looks
10 like there's a little blip here in maybe July of
11 2013, I mean, it all of a sudden goes up and
12 then it drops off precipitously, what happened
13 there?
14 A So that month there was 7 inches of total
15 rainfall in July of -- of 2013. But it wasn't
16 enough to break the drought or even create an
17 appreciable flow in the Smoky Hill River, so
18 conditions just kept -- went right back down.
19 The aquifer was so depleted, whatever short-term
20 flow was there was taken up, and then the
21 wellfield level started going right back down
22 towards emergency again. And then it started
23 raining, and that's what the last blip you see
24 is it started raining.
25 Q Let's not get there quite so fast. So if it

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1 rains on the -- right on the channel, water is
2 going to soak in, but the channel is fairly
3 narrow. What -- what happens if you have a big
4 rain like this and it's all -- it's been dry,
5 what happens -- how much runoff do you get?
6 A Well, if it's -- if it's a protracted drought
7 and all watersheds that lead into the Smoky
8 watershed are dry, then that's going to soak up
9 a lot of that water before it even -- even
10 reaches the wellfield. I believe it's behind
11 figure 3.
12 Q So back to this -- I can't remember, it's
13 figure 3 and it's Bates number 103417, 103417.
14 If you have -- the flow in Big Creek and Smoky
15 depend on rainfall in the basin is what you've
16 testified to?
17 A Yes.
18 Q And if it's really dry and you get a big rain,
19 some runs off but a lot of it soaks in?
20 A Right.
21 Q And so you'd have -- a big rain doesn't help --
22 one big rain doesn't help, it takes more than
23 one. Is that fair?
24 A Correct, the ground has to reach a certain
25 amount of saturation for water to run off.

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1 Q So then -- so you had a rain in July of '13 --
2 Let's go back to where we were. I
3 appreciate that, Jami, but --
4 So you had a rain in July of '13, it
5 helped -- the release helped, the release from
6 Cedar Bluff helped?
7 A Yes.
8 Q And then the rain helped?
9 A Yes.
10 Q But it didn't solve the problem, you still have
11 a decline in -- in flow in the Smoky from after
12 that July rain to July of '14 or thereabouts,
13 correct?
14 A Correct, there was still a drought in the Smoky
15 Hill watershed, and so there was no discernible
16 flow in the river so we were essentially mining
17 the aquifer.
18 Q So it looks like to me the slope or the trend
19 line from July of '12 to March of '13 was
20 steeper than the trend line from July of '13 to
21 '14, is that -- does that resonate with you, I
22 mean --
23 A It does appear to be slightly shallower.
24 Q So it appears, then, that the rain or the
25 release or both helped a little, but it didn't

1 solve the problem?
2 **A Right.**
3 Q Is that a fair way to read that graph?
4 **A It is, and there could have been some minor rain**
5 **events that helped slow the decline.**
6 Q This isn't a matter of it never rained, it just
7 didn't rain enough. Is that fair?
8 **A Yes.**
9 Q So what happens then in July of 2014?
10 **A That's when it started raining, and we received**
11 **some very large rains with some significant**
12 **runoff and -- and it started recharging the**
13 **aquifer.**
14 Q And so is that the -- it didn't return to the
15 health of the aquifer from the early part of
16 this graph in '10 and early 2011, but at least
17 it was better. Is that fair?
18 **A Right, not in this graph, if -- if you had the**
19 **entire extrapolation of the Aquifer Health**
20 **Index, you'll see it stabilized, it went down**
21 **very briefly, which is what you see at the end**
22 **of this visual, and then we entered a very wet**
23 **period and it went back up to essentially as**
24 **good as we could hope for conditions.**
25 Q When -- when was the last time that -- you've

1 **A I think depending on the year, and I'm not**
2 **saying we could do this year in, year out, but I**
3 **think if -- if both aquifers were as full as**
4 **they could get, we could possibly produce that**
5 **3600 acre-feet water right.**
6 Q You don't because you -- if you produced it,
7 what would happen the next year?
8 **A Well, it's unsustainable. We -- we -- we**
9 **can't -- we wouldn't want to create a situation**
10 **where we're using 3600 acre-feet because we know**
11 **we couldn't do that year in, year out, so it**
12 **would be an unsustainable path forward.**
13 Q Let's look at 2625. Oh, never mind, this is
14 something -- we'll do that later.
15 Almost skipped a whole page, that would be
16 bad. Earlier you said that there are two
17 IGUCAs, one on the Smoky that reduced your water
18 right from 2800 to 2285 and change, but you also
19 said there was a Hays IGUCA. What -- what is
20 that, tell me about that?
21 **A So it's an -- also an Intensive Groundwater Use**
22 **Control Area, and -- and I don't know the exact**
23 **geometry of it, but it encompasses Hays and --**
24 **and Big Creek wellfield or water rights around**
25 **Hays. I do not know off the top of my head if**

1 got water rights for, like, in excess of 3600
2 acre-feet, don't you?
3 **A Yes, 3675 acre-feet, I believe.**
4 Q When was the last that you used -- that Hays
5 used that much water, if you know?
6 **A I believe it was 1983 was the last time we used**
7 **that much water.**
8 Q So right now you're using in the range of 2,000
9 acre-feet?
10 **A That's correct.**
11 Q And if -- if it's during a drought, your usage
12 goes up, doesn't it?
13 **A It goes up. We -- we do a good job of trying to**
14 **get our residents to curtail their usage. The**
15 **natural inclination of people during a drought**
16 **is to use more water, especially for outdoor**
17 **vegetation to try to keep it alive. We try to**
18 **counteract those measures, so you will see some**
19 **appreciable increases in usage during a drought**
20 **but it's not -- it's not like you would see,**
21 **say, in a place like Wichita where, you know,**
22 **there's -- there's not the daily conservation**
23 **measures that we have.**
24 Q So in a wet year, how much water could you
25 produce if you had to?

1 **that IGUCA limited our Big Creek water rights.**
2 **I think it may have limited our total**
3 **availability to utilize our water rights, but it**
4 **also -- there's a lot of competing interests in**
5 **the Big Creek wellfield. There are**
6 **independently owned water rights that are**
7 **separate from the City in Big Creek so those --**
8 **those water rights are covered by this IGUCA if**
9 **the chief engineer wanted to impose**
10 **restrictions. And then there are private wells**
11 **in the area that aren't regulated typically by**
12 **the -- by the State of Kansas.**
13 **And so one of the things we have done is**
14 **the chief engineer has essentially delegated the**
15 **authority during times of water warning or water**
16 **emergency, within the Hays area, we can make**
17 **private wells comply with our water conservation**
18 **guidelines for outdoor watering and -- and --**
19 **and water wasting.**
20 Q So when I was driving over here I noticed that
21 somebody's sprinkler head sprayed water onto the
22 street and there was this wet area on the
23 street. Does that happen in Hays?
24 **A It does, unfortunately, but we try to address it**
25 **very quickly. The -- the City of Hays has a**

1 ordinance prohibiting the wasting of water, and
2 so if you had a -- a misadjusted sprinkler head
3 that was watering the street or if the lawn or
4 vegetation you were watering was overly
5 saturated and what you were putting down was
6 running onto the street, you can actually
7 receive a ticket for that. Now, we don't -- we
8 don't write tickets first, we try to educate
9 first and we warn, and then if necessary and if
10 the behavior doesn't change, we write a ticket.
11 But we are very proactive in trying to address
12 situations like that.

13 Q So I personally have a nice green lawn and I
14 water it and -- but do -- if I want one of those
15 in Hays, how am I going to have a nice green,
16 cool-season grass lawn, how does that -- what
17 would I have to do?

18 A Well, it depends and -- and it really doesn't
19 matter if you're on a private well or a public
20 water supply. If you have an existing home, you
21 have the right to put in cool-season grass and
22 irrigate it. You are subject to, if it's
23 potable water, of paying the bill which can be
24 very pricey because of our conservation rates.

25 Q Like how pricey?

1 Q Okay. Sorry, go ahead.

2 A So back to your question about the lawn, if you
3 were building a new house or a new business, we
4 have adopted landscaping regulations that limit
5 the amount of cool-season turf that can be put
6 in, that limit the amount of overall irrigated
7 area that's allowed on a property, and -- and --
8 and so you're not going to have a big lawn of
9 cool-season grass.

10 We also have requirements in our
11 landscaping regulations that prohibit spray
12 irrigation, overhead spray irrigation within
13 5 foot of a hard surface; that way you avoid
14 that misadjusted sprinkler that waters the
15 streets. There's usually some sort of a rock or
16 a mulch buffer around those areas or people put
17 in subsurface irrigation in order to accomplish
18 that. So you could have some cool-season grass
19 in functional areas, but you're not going to
20 have a vast yard of cool-season grass in Hays.

21 Q And really I think we're on a little bit of a
22 tangent, a good one but still a tangent. I was
23 asking about the terms of IGUCA, and basically
24 it, if I heard you right, allows the City of
25 Hays to regulate private wells, the private

1 A There are people that pay over \$1,000 a month
2 for their water bill because they choose to put
3 some water down on their lawn in the summertime.

4 Q Every year?

5 A Yeah, for the most part.

6 Q I mean, don't the rates go up during a -- during
7 a bad drought? I mean, is that -- or not?

8 A They go -- the conservation tier rates go up
9 during times of water warning and water
10 emergency. Normally, we have the base rate, we
11 have the conservation rate, and then we have a
12 conservation rate tier 2 which catches -- tier 1
13 and tier 2 catch the typical outdoor water use.

14 So back to your lawn question --

15 Q Well, I'm just curious about \$1,000 water bill,
16 I mean, is it two people?

17 A No, it's several people. I don't know the exact
18 number but it's several.

19 Q I'm not asking for that. I certainly don't want
20 you to give me their names, but there are
21 several people who pay voluntarily over \$1,000 a
22 month to water their lawns. Is that what --

23 A Right.

24 Q -- you're telling me?

25 A Right.

1 domestic wells in the same way it regulates
2 water use from the Hays distribution system. Is
3 that a fair way to say it?

4 A It is, in times of water -- water warning and
5 water emergency, yes.

6 Q And so it's my understanding that you have to
7 implement -- it's dele -- you said it was
8 delegated to the City of Hays, the City of
9 Hays -- okay, yeah, you're the one that enforces
10 that, then?

11 A We are the one that enforces it. And I say -- I
12 want to clarify my statement. We also have the
13 ability to -- we have outdoor watering
14 limitations, so between June 1st and
15 September 30th, you can't use -- you can't water
16 outdoor vegetation between noon and 7:00 p.m.
17 because a lot of that water is going to
18 evaporate before it actually reaches the root
19 zone. The IGUCA allows us to implement that --
20 that for private wells too. So every year we
21 request the chief engineer write a letter that
22 requires those private well owners to comply
23 with our ordinances, and then every year the
24 chief engineer imposes that.

25 Q Jami, will you pull up Exhibit 1-100, 1, hyphen,

1 100 and go to page 4737?
 2 So I'll represent to you, Mr. Dougherty,
 3 that this is the order that the chief engineer
 4 issued to expand the -- the Hays wellfield in
 5 the Smoky, but I want you to look at
 6 paragraph 77, can you read it?
 7 **A Jami is going to have to zoom in. Oh, yes. The**
 8 **City believes that an actual shortage of water,**
 9 **as well as a perception of water shortage, has**
 10 **stymied economic development.**
 11 **Q Does the City believe that?**
 12 **A The City still believes that.**
 13 **Q Based on what?**
 14 **A Based on the fact that we have had an inadequate**
 15 **water supply for several decades now; based off**
 16 **the fact that we are essentially the only city,**
 17 **I would -- I would include Russell in this, but**
 18 **essentially the only city in Kansas that for**
 19 **30 years has been acting like a city in the**
 20 **Desert Southwest with regard to our water**
 21 **conservation measures we're imposing on our**
 22 **residents; and -- and just the overall**
 23 **perception in Kansas that we have no water when**
 24 **we are trying to do the best we can to manage**
 25 **our existing sources and make them last as long**

1 **as possible while we find -- while we search for**
 2 **an additional source.**
 3 **Q So you got 3685 acre-feet of water that you**
 4 **could pump, but if you did, it would -- you'd**
 5 **pay the consequence the following year or two,**
 6 **and people know that, is that -- I mean, is that**
 7 **a common understanding as far as you -- do you**
 8 **talk to other city managers about -- about water**
 9 **use and conservation in Hays?**
 10 **A Periodically I do, it's not uncommon -- I mean,**
 11 **we were the only city doing this for a lot of**
 12 **years, so whenever cities were looking to**
 13 **implement water conservation programs or dealing**
 14 **with water issues, sometimes I would get a phone**
 15 **call about why we were doing what we did and how**
 16 **we did it.**
 17 **Q So does the City have a conservation plan that**
 18 **has been approved by the Kansas Water Office?**
 19 **A We do.**
 20 **Q And tell us -- we've talked some about**
 21 **conservation, you've told us about landscaping**
 22 **and watering and other things. Are there**
 23 **other -- is there -- are there other components**
 24 **of the conservation program in Hays that -- that**
 25 **need to be in the record?**

1 **A So our conservation programs started in -- in**
 2 **1991 during the drought, and they started with**
 3 **indoor water use, toilet replacement rebates,**
 4 **they started giving away showerheads, they**
 5 **started educating the schoolchildren as they**
 6 **were learning about the hydrological cycle. And**
 7 **they say they -- I say they, the city**
 8 **commissioners were doing this and -- and city**
 9 **staff that really weren't water education**
 10 **experts were doing this because -- because they**
 11 **had to.**
 12 **Those programs -- and then the outdoor**
 13 **watering stuff, we talked about the**
 14 **prohibitions, the water wasting, that was all**
 15 **implemented in the '90s. The rate structure**
 16 **that we have that -- that penalizes excessive**
 17 **uses of water but provides the -- the lowest**
 18 **water rate for domestic use, that was all done**
 19 **in the '90s.**
 20 **Q Let me stop you there and we're going to talk**
 21 **about rates later, but if I'm on a fixed income,**
 22 **am I going to get hit with a \$1,000 water bill?**
 23 **A Assuming you don't use it outdoors, you won't.**
 24 **Q I mean, the rate, basic -- basic human needs**
 25 **aren't exorbitantly expensive in Russell -- or**

1 Hays, are they?
 2 **A No, the way our water rates are structured is**
 3 **your domestic needs are -- your domestic uses**
 4 **are typically at your lowest rate, and then**
 5 **outdoor uses are at your highest rate. So**
 6 **the -- the rates, all that was put into place.**
 7 **By the time I came along in 2005, all of that**
 8 **was well established. I remember one of the**
 9 **first things I worked on was creating the**
 10 **washing machine rebate program. High-efficiency**
 11 **washing machines were becoming very commonplace,**
 12 **and so we had a commissioner that wanted to put**
 13 **in a rebate program, and -- and I worked on**
 14 **that.**
 15 **In 2011, we decided to take our**
 16 **conservation efforts to the next level, we**
 17 **revamped all of our programs to make sure that**
 18 **we were promoting the most efficient options out**
 19 **there. We hired a water conservation**
 20 **specialist, we were the first city in Kansas to**
 21 **do so. We adopted the green plumbing code, I**
 22 **believe we were the first city in Kansas to do**
 23 **so.**
 24 **Q What's that?**
 25 **A The green plumbing code, it's -- it's part of**

1 Hays, are they?
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 4 **are typically at your lowest rate, and then**
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 20 **specialist, we were the first city in Kansas to**
 21 **do so. We adopted the green plumbing code, I**
 22 **believe we were the first city in Kansas to do**
 23 **so.**
 24 **Q What's that?**
 25 **A The green plumbing code, it's -- it's part of**

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1 the building code, but it is a plumbing code
2 that one facet of it makes sure that homes are
3 designed for efficient water use, both indoor
4 use and irrigation systems used outdoors.
5 Q So that, for instance, I mean, is that part of
6 the reason you have -- can't have a sprinkler
7 head close to a hard surface, or is that
8 something --
9 A That's something different, that's part of our
10 landscaping regulations. That was another thing
11 that we did is we -- we kind of co-opted some
12 landscape regulations from Salt Lake City area
13 that had some water issues, and so we
14 incorporated some of those measures to make sure
15 that we weren't having people put in a lot of
16 nonfunctional turf and then created a situation
17 where they're going to be getting water waste
18 tickets or high water bills, you know, just by
19 the way the property was designed.
20 We -- we started -- we revamped the
21 education program with the water conservation
22 specialist, she's -- she's very good at that,
23 and she just took that to the next level. She
24 started working with the watershed protection
25 specialist --

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1 Q Who is that?
2 A It's Holly Dickman.
3 Q Okay, thank you.
4 A Holly started working with a lady named Stacie
5 Minson, who is the KSU watershed protection
6 specialist. And so they both have limited
7 budgets and limited resources, so they sort of
8 combine their resources to teach people about
9 water quantity and water quality because they
10 are interrelated in a lot of facets, and so we
11 feel like we are doing our -- doing the best to
12 make sure that we stay at the forefront of water
13 conservation techniques.
14 Q So you stated publicly and you stated several
15 times -- well, you stated publicly that Hays
16 plans to continue to conserve water, and you
17 heard this morning that you don't need it
18 because you're going to continue to conserve and
19 so Hays residents can just keep doing what
20 they're doing. Is that -- tell us about your --
21 what your plans are, are you just going to turn
22 on the tap and say, you know, hey, use it all?
23 Is that -- I mean, how -- I mean, I'm serious, I
24 don't know how to -- how are you going to do
25 this?

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1 A We have stated that we have no desire to walk
2 away from our conservation programs, and --
3 and before I get into this, I want to draw a
4 distinction between conservation and efficiency.
5 Conservation just means using less of something.
6 Efficiency means using less but getting a
7 similar outcome, the same or a similar outcome.
8 So --
9 Q And the same or similar, use less water to -- to
10 achieve an outcome that the higher use -- I
11 mean --
12 A Yes, yes. And it's not just water, electricity,
13 you can be efficient with anything. So we talk
14 about conservation because that's the vernacular
15 everybody understands, but we focus a lot on
16 efficiency measures. We want people to take
17 showers, we just want people to use less water
18 while they do that. We want people to be able
19 to wash their cars and have nice landscaping and
20 have sports fields to play on and do laundry and
21 all that stuff, we just want them to do it in a
22 more efficient manner. We have hotels, we want
23 to make sure that they have the most efficient
24 fixtures out there.
25 So we have stated publicly, we have no

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1 desire -- and -- and I speak for myself and from
2 what I've heard the governing body say, we have
3 no desire to walk away from our conservation
4 programs. The reality is those conservation
5 programs are largely voluntary, and so it is not
6 speculation to say that if we are able to secure
7 a long-term source of water, it's human nature
8 for some people to relax, and there could be a
9 natural relaxation of some of our residents.
10 Our residents are very proud of their
11 conservation efforts, but they also know we have
12 a very limited resource we are dealing with. So
13 it is entirely possible that there could be a
14 relaxation which could increase our gallon
15 per capita per day even though we don't change
16 anything in our program. The hardest thing
17 about -- so you mentioned, you asked earlier
18 about calls from other city managers, the most
19 common question I get is how do you pay for
20 something like this, how do you get it started?
21 We already got started. We've crossed the
22 biggest hurdle, so we have no intention of
23 walking away from it. But there are also other
24 things that could affect the gallons per capita
25 per day usage, if that's the metric we want to

1 be held to. We could bring industry in that
2 uses more water, but we avoid, like, everything
3 right now that could use a little more water
4 than we use, that could increase our gallon
5 per capita per day that has nothing to do with
6 our conservation program.

7 We are a retail hub on I-70. We have two
8 travel plazas in the works right now that are
9 going to add hotels and restaurants and -- and a
10 truck stop, an auto travel plaza, and all of
11 that could affect our commerce, but it could
12 affect our gallons per capita per day usage and
13 have nothing to do with conservation measures
14 because --

15 Q Because when I come to town and take a shower, I
16 stay in there for 10 minutes or 15 minutes;
17 whereas, Hays residents don't take those longer
18 showers. Is that -- I mean, I'm being facetious
19 but --

20 A Well, more specifically when you come to Hays
21 and take a shower, you're not a Hays resident,
22 you don't count for that gallon per capita per
23 day.

24 Q Okay.

25 A So if -- if we have 300 more people spending the

1 into the streets. But yet we could see our
2 gallons per capita per day go up, that's just a
3 reality, so to be -- to be held to some
4 unreasonable standard of gallons per capita per
5 day in perpetuity, that's like stating you're
6 poor and you don't spend any money so,
7 therefore, you should just stay poor and not
8 worry about spending any more money.

9 Q Well, I think you can keep your gallons
10 per capita per day lower by just never -- by
11 just dismissing this complaint and then -- then
12 you'll keep your gallons per capita per day
13 down, I mean, that's the logic here really,
14 isn't it?

15 A Possibly, yes.

16 Q That's not what you want to do, is it?

17 A Hays and Russell want the ability to utilize
18 water like every other city in the State of
19 Kansas.

20 Q You've told me that conservation -- you've
21 talked about efficiency versus conservation and
22 that -- should other cities be following some of
23 your examples?

24 A So there are a myriad of reasons why cities
25 should invest in water efficiency and

1 night in Hays taking showers, we're going to
2 make sure that's done in the most efficient way
3 possible, using the most efficient toilets and
4 showers possible. But that water usage could
5 result in our gallons per capita per day
6 increasing regardless of what we do. So --

7 Q Okay. Because I want to be clear about this
8 because I think I misunderstood you. The water
9 that I -- that is used by me and visitors in
10 Hays who don't know about the conservation is
11 water that counts against your gallons
12 per capita per day, doesn't it?

13 A All water we use is -- counts against our
14 gallons per capita per day.

15 Q Okay. I thought you said that it didn't count
16 but it does. Okay, very good.

17 A It does. Okay. So, you know, yes, it is true
18 that we are going to keep our conservation
19 programs in place, but, again, they're largely
20 voluntary and -- and incentive based.
21 They're -- they're not sticks, with the
22 exception of the water runoff and the water --
23 watering, which I don't know why we would ever
24 change that, that just makes sense to, you know,
25 not let people take potable water and run it

1 conservation measures. I served on a panel at
2 the Governor's Water Conference with a council
3 member, I believe he was from Gardner, and
4 Gardner was looking at building a new water
5 treatment facility, and they were doing that
6 because of growth. So if they were to use water
7 more efficiently, they could delay that cost of
8 that water treatment facility.

9 Cities that are growing sometimes have to
10 oversize water mains, and if you can use water
11 more efficiently you can put some of that stuff
12 off. All water has to be pulled from some
13 source, treated, and distributed, which all
14 costs money. It costs money to pull it out, it
15 costs money to treat it, it costs money to store
16 it and distribute it, and it costs personnel
17 money. So the ways you can find efficiency
18 measures to use less of that or have your
19 residents use less, that's more input cost that
20 can be passed on to your residents.

21 So there is always an incentive, regardless
22 of your -- your source, to use water in a more
23 efficient manner. As I said, when you don't
24 have that constraint of source that's looming
25 against you, sometimes it's very hard for cities

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1 to make that initial investment in conservation
2 programs. And that's a lot of times the
3 discussions I have with cities that don't have
4 source issues but say, hey, our residents and
5 our governing body wants to use water more
6 efficiently, how do we start these programs, how
7 do we get them in place, where do we find that
8 money?
9 Q I have a lot of questions about your rate
10 structure, but I think maybe it's time for a
11 short break, if you don't mind, Your Honor?
12 **PRESIDING OFFICER:** Any objection
13 from any other parties?
14 **MR. LEE:** No, Your Honor.
15 **MS. LANGWORTHY:** No, Your Honor.
16 **PRESIDING OFFICER:** All right.
17 Well, we've got 3:40 now, why don't we just
18 come back at 4:00 o'clock.
19 **MR. TRASTER:** That would be great,
20 thank you, Your Honor.
21 **PRESIDING OFFICER:** So off the
22 record on recess here until 4:00 o'clock.
23 (Thereupon, a recess was taken;
24 whereupon, the following was had.)
25 **PRESIDING OFFICER:** About

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1 4:00 o'clock here so we'll go ahead and go
2 back on the record. And, Mr. Traster,
3 before you pick back up with
4 Mr. Dougherty's questioning, can you give
5 me an estimation as to how much more time
6 you think you'll need to complete your
7 examination?
8 **MR. TRASTER:** I'll do my best, Your
9 Honor. I -- I would say I'm halfway
10 through.
11 **PRESIDING OFFICER:** Okay.
12 **MR. TRASTER:** So, you know, I think
13 it's going to make the rest of whatever
14 time you want to take today, and then I
15 don't know what time you want to stop, but
16 it's going -- it's going to take about as
17 much time as we've already spent. And I --
18 I've done some kind of skipping ahead,
19 but -- so it -- but I also might have
20 missed some things so I just -- I don't
21 know.
22 **PRESIDING OFFICER:** Okay. I just
23 wanted to get an idea.
24 **MR. TRASTER:** That's the best idea.
25 **PRESIDING OFFICER:** If you thought

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1 it's going to be, you know, maybe an hour
2 and a half or so, at that point I would
3 say, yeah, let's just keep going, that
4 would be a good stopping place and then to
5 break at that point. I don't know on the
6 first day that I'm going to make everybody
7 suffer by staying here till 10:00 o'clock
8 at night if that's how long you think
9 you're going to take with the witness. As
10 we get later in the hearing, if we need to
11 speed things along, make sure we get done,
12 we may be staying here that late at night
13 but --
14 **MR. TRASTER:** Yeah.
15 **PRESIDING OFFICER:** -- day one, I
16 don't think I'm going to put anybody
17 through that. I don't think anybody would
18 like me if I made them all stay that late
19 for the hearing.
20 **MR. TRASTER:** Sure.
21 **PRESIDING OFFICER:** So let's plan on
22 going till 5:00, give or take when you
23 think you're at a good stopping point --
24 **MR. TRASTER:** Sure.
25 **PRESIDING OFFICER:** -- for the day,

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1 you'll let me know and then we'll address
2 what time we'll pick things up in the
3 morning then to --
4 **MR. TRASTER:** Sure.
5 **PRESIDING OFFICER:** -- get going
6 again.
7 **MR. TRASTER:** Your Honor, counsel
8 asked for a list of the witnesses that
9 we're going to plan for tomorrow, and so
10 just the current plan is to finish up with
11 Mr. Dougherty and then there's a witness,
12 Doug Williams, he is one of the people who
13 spoke at the public meeting, he's the --
14 he's the Grow Hays executive director, if
15 you recall. From there, turn it over
16 to ...
17 **MR. COLE:** Yeah, City of Russell
18 will probably lead off with Jon Quinday,
19 the city manager; Brad Wagner, who spoke
20 briefly at the public comment hearing; and
21 then I haven't decided yet but if I did, it
22 would be Randy Baker so it would be those
23 three witnesses.
24 **MR. TRASTER:** Would be the next ones
25 in order?

1 **MR. COLE:** Yeah.
 2 **MR. TRASTER:** And maybe finish with
 3 all three tomorrow and -- is he as
 4 long-winded as Toby?
 5 **MR. COLE:** You're plowing a lot of
 6 our field.
 7 **PRESIDING OFFICER:** And I'm not
 8 trying to push you to say you have to do
 9 more witnesses than that tomorrow --
 10 **MR. TRASTER:** No.
 11 **PRESIDING OFFICER:** -- but if -- I
 12 don't know what to expect with the
 13 witnesses, if it's going to be, you know,
 14 your -- your questioning and then Mr. Lee,
 15 if he only has five minutes of questioning,
 16 and if Ms. Langworthy has nothing more to
 17 question of those witnesses.
 18 **MR. LEE:** Do we get to vote on that?
 19 **MR. TRASTER:** Because I -- I have a
 20 vote, I know exactly how many minutes I'd
 21 let him have.
 22 **PRESIDING OFFICER:** Maybe -- maybe
 23 he needs more time than that, maybe we
 24 don't even get through those, but if we had
 25 to go, say, two more witnesses after that,

1 who would be your next two after that?
 2 **MR. TRASTER:** Well, definitely after
 3 Toby, it will be Doug Williams and we --
 4 you know, I wasn't even thinking about
 5 cross but -- but it could take awhile. So,
 6 you know, I -- we may not get to all those,
 7 but that's just the order. Doug Williams
 8 is -- I don't think he's going to be -- he
 9 won't take a long time. I mean, really
 10 what we'll be talking about, I think,
 11 are -- he's your witness, how long is he
 12 going to take?
 13 **MR. BULLER:** Yeah, I would be
 14 surprised if it was longer than 45 minutes.
 15 I don't anticipate lots of
 16 cross-examination with him, but, yeah,
 17 maybe an hour, 45 minutes. Maybe less than
 18 that.
 19 **PRESIDING OFFICER:** Okay.
 20 **MR. TRASTER:** Does that help?
 21 **PRESIDING OFFICER:** Well, I guess
 22 for the order that you're looking at, we'll
 23 plan on just those five, but if we would
 24 go -- if those do run very quickly and we
 25 go on to the next witness, who would that

1 next witness be? And then we'll look at
 2 things in the morning after we get, you
 3 know --
 4 **MR. TRASTER:** Sure.
 5 **PRESIDING OFFICER:** -- like lunch
 6 break time, and if we need to kind of say
 7 then that, well, we may look at having
 8 another witness, at least you have some
 9 time over a lunch break there to do some
 10 last-minute preparations if you may need
 11 to, Mr. Lee. I completely understand the
 12 need to anticipate who's coming up, I
 13 just -- I don't want to get to the point
 14 this early in this process where we're
 15 ending the hearing at 3:00 in the afternoon
 16 because we finished all the witnesses we
 17 planned for the day.
 18 **MR. TRASTER:** I don't think that
 19 there's much risk of that. I think our
 20 next two witnesses are going to be Jeff --
 21 huh.
 22 **A Crispin.**
 23 **MR. TRASTER:** Crispin. Jeff Crispin
 24 and Paul McCormick.
 25 **PRESIDING OFFICER:** Okay.

1 **MR. TRASTER:** And both of them -- I
 2 think Jeff is going to take a little while,
 3 you know, more than 45 minutes or an hour.
 4 He's the operator of the water system, and
 5 so he has some knowledge about, you know,
 6 current sources and how they're working,
 7 and I want to go into some depth with him
 8 on the Aquifer Health Index and that sort
 9 of thing. But it's covering some of the
 10 ground we've covered today a little bit.
 11 Paul McCormick is the -- one of the
 12 witnesses that I want to call as a fact
 13 witness prior to his testimony as -- as
 14 a -- his expert witness testimony so he --
 15 he could take awhile.
 16 **PRESIDING OFFICER:** Okay. All
 17 right. That's fine and, you know, I'm not
 18 saying you have to get to them tomorrow,
 19 just --
 20 **MR. TRASTER:** We're going to -- I
 21 think we're prepared and will be to -- oh,
 22 I'm sorry, I didn't realize you were --
 23 **PRESIDING OFFICER:** That's all
 24 right.
 25 **MR. TRASTER:** I think we're going to

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1 be prepared to plow on and one witness
2 after another, there won't be -- unless
3 there's a real -- something unanticipated
4 happens, there won't be any, well, we're
5 done for the day and we don't have our next
6 witness available. I don't think that's
7 going to happen.
8 **PRESIDING OFFICER:** I hope not, I
9 just don't want to waste any time and at
10 the end have everybody be rushed because
11 whatever happens we just need to make sure
12 that everyone's gotten through those
13 witnesses and we have a sufficient record
14 of everything.
15 **MR. TRASTER:** Okay.
16 **PRESIDING OFFICER:** All right. Go
17 ahead and continue with your questioning of
18 Mr. Dougherty, then.
19 **BY MR. TRASTER:**
20 Q Mr. Dougherty, I remind you again that you're
21 still under oath.
22 A **I acknowledge.**
23 Q I forgot to tell her what I wanted next, I'm
24 sorry.
25 So you testified that you have 3685

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1 acre-feet of water available in -- from your
2 sources in Hays and Russell -- or in Hays, in
3 Hays, but that you can't really utilize the full
4 quantity that you have available even though you
5 have the legal right to do that; is that
6 correct?
7 A **Correct.**
8 Q So this idea -- and conservation is measured in
9 gallons per capita per day, I mean, that's one
10 of the measures or one of the indicators of how
11 well people are conserving?
12 A **It is a relative measure of how -- how water
13 wise the City is.**
14 Q So should that be -- should Hays' future water
15 be capped at the gallons per capita per day that
16 it has been operating at in the past because of
17 its conservation efforts?
18 A **Absolutely not. I think that would be a -- an
19 unreasonable and an unfair restriction on future
20 water uses. And I don't believe it's in
21 accordance with Kansas water law. So I
22 mentioned earlier a -- the Groundwater
23 Management District Number 5 was considering a
24 Local Enhanced Management Area, and Water PACK's
25 president, Pat Janssen, wrote a letter of**

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1 **submission regarding that LEMA creation. And**
2 **Mr. Janssen stated that if historical use is the**
3 **basis for future allocations, you will be**
4 **punishing landowners who choose to conserve.**
5 **And I couldn't agree more with Pat on that. We**
6 **have conserved because we have had to, we've had**
7 **no other choice to, no other alternative, but to**
8 **have that restriction held over us in perpetuity**
9 **is completely unreasonable.**
10 Q Are you aware of any rule or regulation that
11 would require you to maintain that level of
12 conservation?
13 A **I am not.**
14 Q Let's look at 2690. Well, we're talking about
15 conservation and your conservation program, you
16 mentioned education in the schools?
17 A **Correct.**
18 Q What -- what is -- what is 2690?
19 A **This is an example of a poster -- so our water
20 conservation specialist, Holly Dickman, every
21 year her and Stacie Minson, the watershed
22 protection specialist, they do a -- they conduct
23 a water poster contest, and this is open to
24 people of all ages from preschool to adult, and
25 there's a theme. I believe this -- I can't tell**

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1 **you the year this is from, but the theme was**
2 **every -- make every drop count.**
3 **And so these posters are submitted, they**
4 **are graded, the city commissioners and some city**
5 **staff get together and they judge these posters.**
6 **And they -- they create different age classes**
7 **and they create different awards for 2nd, 3rd**
8 **place for each age class, and then the posters**
9 **are actually -- and there's prizes given,**
10 **there's a ceremony. Last year -- I believe this**
11 **year's ceremony was at Sternberg Museum, there**
12 **are prizes given out to the winners, and they're**
13 **recognized at the ceremony.**
14 **And then each year the posters are**
15 **displayed during a art walk, which is an event**
16 **that takes place in downtown Hays, so they pick**
17 **a local business and they display these posters**
18 **downtown. So it's -- it's just a way of keeping**
19 **the kids engaged in water conservation mostly.**
20 **It's geared towards young kids, but it's open to**
21 **different age divisions.**
22 Q So this is 2690, is the first page and it's the
23 1st place poster for preschool and it -- it
24 says, Turn off the water when you brush your
25 teeth?

1 **A Right, and this is all about, you know, the**
2 **teaching kids the value of water. And I know**
3 **Holly's going to go to this in more detail when**
4 **she's here, but there's a lot of activities**
5 **geared toward the younger kids because if you**
6 **instill that conservation ethic into those kids,**
7 **then they're just going to naturally use water**
8 **in a more efficient manner as they become**
9 **adults.**

10 **And so that's one of the reasons why we go**
11 **into the schools while the kids are learning**
12 **about water during the hydrological cycle**
13 **because it helps reinforce those -- those**
14 **habits. It also helps condition the parents to**
15 **make sure they're -- they're using water more**
16 **efficiently.**

17 **Q So this exhibit is 16 pages long, and I don't**
18 **want to go through them all because Holly may go**
19 **into it, but, Jami, can you just go -- here's**
20 **another one, this is the 1st place, the second**
21 **page, kindergarten, it's O'Loughlin Elementary,**
22 **Take five minutes in the shower. When you are**
23 **brushing your teeth, don't let your water keep**
24 **running, I guess, I can't read it, but don't**
25 **waste water, use less water, make every drop**

1 count, is that -- so let's -- let's do one or
2 two more. These are just creative posters that
3 kids make?

4 **A Right.**

5 **Q Thank you. Mr. Dougherty, we've talked a little**
6 **bit about your water rate structure in -- in**
7 **Hays, and in some cases you have people who are**
8 **willingly paying \$1,000, over \$1,000, and**
9 **that -- I mean, when you said that, it was over**
10 **1,000, I thought you were being -- when we first**
11 **talked about it, I thought you were kidding, but**
12 **literally you've got people who are paying**
13 **bills, a month bill for \$1,000 for water in**
14 **Hays?**

15 **A Yes, residents, not businesses.**

16 **Q Talk about the structure, how does this work?**

17 **A Hays' rate structure is based off of -- so there**
18 **was a base rate, a lot of cities have base**
19 **rates, and there's an included amount in that**
20 **base amount, I don't remember how many cubic**
21 **feet, maybe 100 cubic feet is included in that**
22 **base rate. And then beyond that base rate,**
23 **there is a regular rate, and that rate is**
24 **calculated by determining -- determining a**
25 **customer's winter average.**

1 **So December, January, February, those bills**
2 **are averaged because that gives us an idea of**
3 **what water is needed for domestic use or -- or**
4 **non-outdoor use. You're typically not**
5 **irrigating a bunch of stuff outdoors or filling**
6 **a swimming pool, or something like that, in**
7 **July -- or January, I mean.**

8 **So the base rate is calculated, and then**
9 **when you get your -- your normal bill, the --**
10 **and I don't -- I don't know the ratios, but**
11 **there is a certain amount of water that's**
12 **charged at that base rate -- or the regular rate**
13 **is charged at the -- up to the winter average.**
14 **So if you use below and up to the winter**
15 **average, you pay the regular water rate, which**
16 **is the lowest water rate available.**

17 **Then there's a conservation tier 1 that**
18 **kicks into place when you exceed that winter**
19 **average, and that's paid at a higher rate. If**
20 **you exceed the next step, and I couldn't tell**
21 **you what that next step is, you get into**
22 **conservation tier 2 where you pay, again, a**
23 **higher rate. So what it does is it allows**
24 **essentially people that want to use more water**
25 **in the summertime for outdoor water uses to do**

1 **that but they're paying at a higher rate. And**
2 **then if they really want to get wild and use a**
3 **lot of water, they get into that tier 2, meaning**
4 **they're going to pay for it.**

5 **So water is a commodity, and it's very hard**
6 **to tell people they can't use a commodity. So**
7 **you put price controls in to try to -- try to,**
8 **you know, create an equilibrium or a balance on**
9 **usage and -- and incent without punishing the**
10 **people that need that water for domestic use.**

11 **Q Okay. Moving on to the next subject, the -- I'm**
12 **wondering if you'd talk about how the planning**
13 **horizon, what is the -- there's been some**
14 **discussion about the planning that -- that Hays'**
15 **plan uses 2 percent population growth and -- and**
16 **it -- and the plan horizon stops at 2041. Can**
17 **you -- can you explain what's going on there?**

18 **A Well, so Hays has a lot of different planning**
19 **horizons. We have a five-year capital**
20 **improvement plan, we have a comprehensive plan**
21 **that was passed in -- or adopted in 2011 that we**
22 **thought might be a 10- or a 15-year planning**
23 **horizon or it could be shorter, could be longer**
24 **depending on how things go.**

25 **Q Is that related strictly to water?**

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1 A No, that's to overall -- all growth. The
2 planning horizon for this project is what we
3 think is -- is the -- the usable life span of
4 the project, and so we view this as a long-term
5 water source. So our planning horizon -- it's
6 also very expensive, so our planning horizon for
7 this project is significantly longer than
8 planning horizons, say, for our five-year
9 capital improvement plan.
10 We recently invested 30 some million
11 dollars in a new wastewater facility. We didn't
12 do that on a five-year planning horizon; we knew
13 that facility was going to last us for decades
14 into the future without having to invest in
15 significant improvement.
16 So the water system is the same way. We
17 are spending most likely over \$100 million on
18 this, with 30-year financing, most likely,
19 moving forward, and we would like to utilize the
20 project after we pay it off for a few years.
21 Our estimates are -- is that this project is
22 going to provide a reliable source of water for
23 a minimum of 50 years and -- and probably
24 significantly longer than that. So that is our
25 planning horizon for this -- this property and

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1 this project.
2 Q So in the course of working through this -- the
3 Master Order and -- and the change application
4 process, there was some discussion about -- I
5 mean, as you know, the Kansas Water
6 Appropriation Act says that water in excess of
7 reasonable needs is not allowed, and that
8 generally applies to new water rights, when you
9 apply for a new water right, but it also applies
10 when you want to change a right from one kind of
11 use to another. You're aware of that?
12 A Yes, I am.
13 Q So you are planning, generally speaking, if I
14 understand you correctly, for about 1 percent
15 growth over the next how long?
16 A So for the foreseeable future, the mid range,
17 the -- the 20 years, we would like to think that
18 we could target a 1 percent growth rate. Could
19 it be lower? Yes. Could it be higher? Yes.
20 We feel that if we have an adequate supply of
21 water that we can achieve growth rates that we
22 haven't seen in the past. But the -- that's a
23 different calculation than the reasonable-needs
24 calculation that is part of the water
25 appropriations and part of our -- our -- our

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1 Master Order here.
2 Reasonable needs is -- is a cap on usage,
3 on -- on future usage, so it's a little bit like
4 a savings account. Mid-range planning is kind
5 of like a budget, you know, you budget your
6 expenditures, you -- you expect to track your
7 expenditures, but it's not the savings account,
8 it's not -- reasonable needs is the cap on what
9 we could grow into into the future, and when we
10 went into the discussions with the Division of
11 Water Resources, we made it very clear this is
12 an extremely expensive project that is going to
13 have to last us for 50 years plus, and we can't
14 do this, it's not cost effective to do this if
15 we know we can only utilize part of it for a
16 20-year period. We have to be able to look
17 beyond and know we can grow into that. And so
18 we were very up front with them that we wanted
19 to have the ability to utilize this project for
20 a myriad of growth factors into the future that
21 we can't account for right now.
22 Q Do you -- do you plan to use every drop of that
23 reasonable-need number, I mean, is that --
24 you're hoping to use all that?
25 A Well, we can't use that. Hays and Russell

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1 combined don't use that right now, but we don't
2 know what's going to happen 30, 40 years into
3 the future. The governing body adopted the
4 joint interlocal agreement with Russell in 2014,
5 we're not through the process yet. So procuring
6 an additional source of water is not like going
7 to the grocery store and getting a gallon of
8 milk, it is a very lengthy process.
9 So the idea that we would get just enough,
10 just enough and maybe you could go back and get
11 more is absurd, knowing that you get just enough
12 and then in two years we have to go through
13 another 15-year process to get just enough more
14 and then we automatically start the 15-year
15 process again. So that's why the
16 reasonable-need cap that we asked for was
17 granted, knowing that this is a very expensive
18 project and it needs to be there in the future.
19 Q So I'm going to put back that 2659, Exhibit 2659
20 which is, as a reminder for the record, the map
21 showing the Ogallala in western Kansas, the High
22 Plains in sort of central Kansas, Hays and
23 Russell, Ellis and Russell Counties, the ranch,
24 and it also shows population centers that are
25 above 5,000, I think you testified?

1 **A It does.**
2 Q What's unusual or different about Hays and
3 Russell than the other population centers in
4 Kansas that have more than 5,000 people?
5 **A The lack of locally available water. So if you**
6 **look at that map, when you get west of**
7 **Hutchinson, the major population centers sit on**
8 **top of the High Plains or the Ogallala aquifer,**
9 **and when you get to the Hutchinson, Wichita,**
10 **Salina, you have reached the part of the state**
11 **that receives enough rainfall to where the**
12 **creeks and the rivers and the streams flow**
13 **year-around reliably, even through times of**
14 **drought, so surface water is a viable**
15 **alternative for those cities. You get far**
16 **enough east you have a lot of reservoir storage**
17 **that is reliably full that can be used for water**
18 **projects as well. So it's not surprising.**
19 Q Jami, would you put up 1665, please.
20 So this is a map that you testified to
21 about first, and you were telling us -- I left
22 my pointer. You were telling us about rainfall
23 in these orange, light orange and dark orange
24 regions in the state and then west, but is there
25 a line or an amount of rainfall that you can --

1 you said something about reliably -- rivers flow
2 reliably. Is there some standard that you're
3 aware of?
4 **A It's my understanding in Kansas, at least, that**
5 **the line that represents 30 inches of annual**
6 **rainfall, which is the transition from the light**
7 **green to the dark green, is where you can expect**
8 **to see reliable year-around streamflow even**
9 **during times of drought. Once -- the further**
10 **west you get, the more uncertain that -- that**
11 **source can be.**
12 Q So Hays and Russell, for the record, are
13 obviously far west of that 30-inch line?
14 **A Yes. And for comparative purposes, Salina**
15 **receives a little over 30 inches of rain a year**
16 **and -- and we receive 22, 23.**
17 Q Now, there are some reservoirs, there's not very
18 many in southwest Kansas, but there are some
19 reservoirs in northwest Kansas, I mean, is
20 that -- why is it that there are so many more
21 reservoirs in the eastern part of the state than
22 north, if you know?
23 **A There's more surface water runoff and therefore**
24 **more potential to have reservoirs.**
25 Q Jami, will you put up Exhibit Number 1-201?

1 And this is a Water Supply Handbook
2 prepared by the Institute for Water Resources at
3 the Water Resources Support Center by the U.S.
4 Army Corps of Engineers and let's go to
5 page 107. Yeah, page 107, if you can skip to
6 that. There's a passage here I want you to be
7 aware of or tell us about. In this paragraph 2
8 at the first full paragraph on -- on page 6-9,
9 and we'll get you the Bates number here in a
10 moment. Well, the Bates number for this is
11 8085, 8085. Can you read that, that second
12 paragraph, that paragraph 2?
13 **A Could you zoom in, please. One more. These**
14 **activities are based on estimates of future**
15 **water requirements. The future may be measured**
16 **in days, years, or decades. The construction of**
17 **major water facilities are planned over many**
18 **years to meet expected water demands extending**
19 **many decades into the future. On the other**
20 **hand, implementation of demanding management**
21 **measures during drought conditions may focus on**
22 **water needs only for the next several days,**
23 **weeks, or months.**
24 Q Can you pull up Exhibit 1-2, please. And go to
25 paragraph 234. 234, this is on Bates page 150.

1 So this is -- maybe it's the previous page,
2 Jami.
3 **MR. TRASTER:** Your Honor, this is
4 just the reasonable-need calculation, I
5 don't think I have any questions about it,
6 I apologize for taking the time.
7 **BY MR. TRASTER:**
8 Q Can you pull up 2659, please. I'm sorry, 2609,
9 please.
10 This is -- can you just tell us what this
11 document is?
12 **A This is a work session memo from February of**
13 **2014 that accompanies the Hays City Commission's**
14 **resolution of intent to develop the R9 Ranch, so**
15 **this is the resolution they adopted that**
16 **directed me to begin the regulatory process to**
17 **develop the R9.**
18 Q And who wrote this?
19 **A I wrote the memo that accompanied the -- the**
20 **resolution.**
21 Q In the first paragraph, you talk about Hays has
22 addressed water shortcoming with conservation
23 programs and efficiency. Read on from there if
24 you will, if you can. I can read it to you if
25 you'd prefer. 'Cause it's a little bit fuzzy.

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1 **A It says, while successful in the short term, the**
2 **measures are not significant enough to ensure**
3 **the current sources will be adequate for a**
4 **50-plus-year planning horizon. That's -- after**
5 **years of studying potential sources, it has been**
6 **determined that the R9 Ranch represents --**
7 **provides the most viable long-term option for**
8 **the City of Hays and the surrounding area.**
9 Q Is that accurate? That was written in 2014,
10 does it remain accurate today?
11 **A It does.**
12 Q Can you pull up Exhibit 3-2, please, Jami.
13 Can you identify this document?
14 **A Is this the water transfer application?**
15 Q It's the cover letter that was sent with the
16 original change applications.
17 And, Jami, if you would, go to page 8498 --
18 I mean the Bates number 8498.
19 So, Mr. Dougherty, beginning on this page
20 and continuing is a discussion about the
21 necessity -- the heading, The necessity for an
22 alternative approach to DWR's traditional
23 reasonable-quantity analysis for municipal use.
24 Have you -- do you recall reading that -- the
25 section of that cover letter?

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1 **A I do.**
2 Q And is it basically the City's justification,
3 explanation for the need to not just limit the
4 analysis to a 20-year planning horizon?
5 **A Yes, I believe we made that clear from the very**
6 **start.**
7 Q And the chief engineer eventually, I mean, not
8 even -- well, the chief engineer agreed with
9 this approach, correct?
10 **A Correct.**
11 Q So is it fair to say that the 2 percent
12 growth -- the 2 percent projection of need,
13 reasonable need is a -- an article of the Water
14 Appropriation Act?
15 **A It is.**
16 Q And it doesn't really -- you're not -- that's
17 not your planning horizon or your growth --
18 planned growth rate? It's a cap on what you --
19 the quantity that you can reasonably use,
20 correct?
21 **A It is, it is a cap that provides us an adequate**
22 **horizon for growth, especially given the length**
23 **it takes to procure an additional water source.**
24 Q So when you -- I don't know how you're going to
25 finance this, I mean, you have some money in the

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1 bank from your 2 percent -- your half cent sales
2 tax?
3 **A Correct.**
4 Q But simple me, you got to go to the banker
5 maybe, the government maybe, but you got to go
6 to the bank to borrow the money to build this
7 project, right?
8 **A Correct.**
9 Q And when you go to the bank to borrow the money
10 and you tell them, well, we've only -- we need
11 to build a project that's going to last us
12 50 years but we've only got a supply that's
13 going to last 20, what's going to happen?
14 **A I don't think we'll get financing. I assume**
15 **that if we have a debt service horizon that**
16 **exceeds our useful horizon, then we won't get --**
17 **we won't get financing.**
18 Q Have you ever applied for state revolving
19 loan -- state revolving loan fund from KDHE?
20 **A For this project?**
21 Q No, no, for anything?
22 **A Yes, we actually received SRF funding or state**
23 **revolving loan funding for our wastewater**
24 **facility upgrade, rebuild that I mentioned**
25 **earlier.**

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1 Q When they were talking to you about lending you
2 the money to build the wastewater, did they talk
3 to you about -- or do the documents show that
4 they wanted you to be able to show them that you
5 had a rate structure that would allow them to --
6 to repay the loan?
7 **A Yes.**
8 Q And -- and did they make any requirements about
9 the idea that you're going to have that rate
10 structure in place as long as that loan is
11 outstanding?
12 **A That actually comes with any loan, but, yes, it**
13 **comes with the bond too, you have a covenant**
14 **that you are going to charge adequate rates to**
15 **cover the debt service, plus operations.**
16 Q There's been some discussion about that Water
17 PACK seems to be very worried about the rates
18 that Hays -- Hays residents are going to have to
19 pay. Is that a worry that they should be --
20 something they should be concerned about, do you
21 think?
22 **A Unless they're ratepayers, I don't think it's**
23 **really any of their concern. It's the residents**
24 **of Hays and ultimately Russell that should be**
25 **concerned about whether or not they want to pay**

1 a rate that covers any debt service.
2 Q And so -- but you've got this -- you've got some
3 money in the bank and there are other ways to
4 finance this outside of just raising rates,
5 aren't there?
6 A It has never been our intent to finance this
7 with an increase in rates. In fact, one of the
8 reasons why the governing body decided in 2014
9 is because we had enough money in the bank and
10 the expected project cost and financing options
11 indicated that we could do this without raising
12 rates. We have a significant amount of money in
13 the bank as a result of the half cent sales tax.
14 We have financing options from the state
15 revolving loan fund and from another federal
16 program called WIFIA, W-I-F-I-A. Both of those
17 are 30-year financing vehicles. And so with the
18 money we have in the bank, with the money we
19 have coming in with the half cent sales tax,
20 with the terms that those financing vehicles
21 offer, it is still our intent to bring the
22 project home without affecting rates.
23 Q So I made the -- in the opening I made the point
24 that this isn't about impact in Hays and it
25 isn't about the impact in Edwards County, it's

1 about the statewide impact, so how does that --
2 I mean, what is the statewide impact, if you
3 know, of approval of this -- of this application
4 versus denial?
5 A The statewide impact of approval is maintaining
6 the economic health of a \$2 billion regional
7 economy. Hays and Russell economies are
8 growing, and we would like to continue growing.
9 And every dollar of sales tax and income tax and
10 commerce that's generated in the Cities of Hays
11 and Russell benefits the State of Kansas. And
12 our economists looked very -- in very much
13 detail on the effects of droughts and the
14 subtraction of those state revenues during
15 droughts. And I think it's important -- it's
16 not measurable because I don't know, but I think
17 it's important --
18 Q It's not measurable, you can't measure it or
19 it's not measurable?
20 A What I'm about to say is not measurable.
21 Q Okay.
22 A I think it's important to understand the
23 potential value to the State that this water
24 creates by allowing that \$2 billion economy to
25 grow in an unfettered manner, without the cloud

1 of a lack of available water over our heads.
2 That's something unmeasurable, and our economist
3 did not measure that because he wasn't
4 comfortable measuring something like that. But
5 I think it's real and I think it's a benefit to
6 the State of Kansas.
7 Q One moment, please. I have some other questions
8 about this, but I -- I didn't write down the
9 exhibit number so I can't pull it up so I think
10 I'm going to come back to that in the morning if
11 that's okay.
12 So what happens if the -- if -- to the
13 state as a whole, in your view, if the water
14 transfer is disapproved, is not approved?
15 A I think the State is going to be losing out on
16 potential revenues in the future, I think the
17 State is going to be realizing a loss of revenue
18 during times of drought in Hays and Russell, and
19 I think that could compound in the future if
20 because of a lack of available water we see
21 depopulation or the closure of major industries
22 or even the shrinking in Hays of the university,
23 the -- the Hays Medical Center, some of our
24 retail, or some of the industrial productivity
25 that Russell has.

1 Q So as a result of this -- the memo we just saw,
2 there were change applications filed with the
3 Division of Water Resources, correct?
4 A Correct.
5 MR. TRASTER: And for the record,
6 those exhibits, those applications are
7 Exhibits 1-5 through 1-36, and the Bates
8 numbers are 432 through 2459. 432 through
9 2459. Your Honor, we have prepared a
10 spreadsheet that has some -- has a list of
11 all the water right files and the starting
12 page for each of the -- of the change
13 applications and some of the critical
14 documents or the critical pages that may be
15 helpful to you, but I haven't -- it's not
16 marked as an exhibit, and I think what I'm
17 going to do is share it with counsel and
18 ask if they have any objections to
19 producing it to you. I probably should
20 have done that before I asked -- told you
21 about it because if they do object,
22 maybe -- anyway, but -- but in each case
23 the original change application, the
24 amended change application, and the second
25 amended change application have bookmarks

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1 in the bookmark sections where you can jump
2 to page 1 of each one of those change
3 applications.
4 **BY MR. TRASTER:**
5 Q So -- I see why I'm confused here. We don't
6 need to go into the details, but just generally
7 speaking, what -- you filed the change
8 applications, according to that letter that I
9 showed you earlier, on June 26th, 19 -- 2015,
10 then what happened?
11 A **Then we had a series of meetings with DWR staff**
12 **to discuss the potential terms of the Master**
13 **Order, to discuss the sustainability requirement**
14 **the chief engineer wanted to impose on us. I do**
15 **recall at the very first meeting that we**
16 **converge -- convened with DWR staff that there**
17 **were, I believe, two members from Water PACK**
18 **that attended that meeting.**
19 **And I remember having a conversation with**
20 **you and the chief engineer at the time, and --**
21 **and it was determined that this is a public**
22 **process and we're not hiding anything, and they**
23 **actually sat in on the first meeting. But I**
24 **don't recall anybody ever coming to another**
25 **meeting.**

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1 **So we went through a process to discuss**
2 **the -- the ten-year rolling average limitation,**
3 **we discussed the modeling, we discussed all**
4 **other facets of reasonable-needs limitation for**
5 **a series of years that led to the issuance of**
6 **the draft Master Order, I believe, in 2018.**
7 Q Jami, can you pull up that June -- June 25th,
8 2015 cover letter, if you can. I believe it's
9 Exhibit 1-2, I think. Oh, yeah, it's 3-2,
10 right, right. So scroll down to the signature
11 block and -- actually not the signature block
12 but who got copies of the letter. There you go.
13 So this letter was sent to a number of
14 people, including Lynn Preheim, the GMD5
15 attorney, and Orrin Feril, the GMD5 manager; is
16 that correct?
17 A **That's correct.**
18 Q So they knew about this from the beginning?
19 A **That's correct.**
20 Q So -- okay. So we had some meetings, the Master
21 Order was issued on June 27th, 2019, and what
22 did it do?
23 A **The Master Order governs the conversions of the**
24 **water rights on the R9 Ranch from irrigation to**
25 **municipal, it determined the points of**

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1 **diversion, it determined the rates of diversion,**
2 **it determined the place of use, it determined**
3 **the -- the reasonable needs, that calculation**
4 **was included, the ten-year rolling average**
5 **calculation was included. And I know there's a**
6 **lot of things I'm missing because it was a**
7 **very comprehensive order.**
8 Q That's fine, I mean, we can look at the
9 document, tell what it does so --
10 A **It also had a provision that the actual changes**
11 **from irrigation to municipal use didn't kick in**
12 **until we signed the contract to drill the first**
13 **production well.**
14 Q So it's also not effective until -- unless and
15 until the transfer is approved, correct?
16 A **Correct. And we viewed it as a two -- as one**
17 **process with two parts, knowing that we had to**
18 **go through the change application process and**
19 **the transfer process in order to be fully**
20 **successful.**
21 Q The two parts being change application and then
22 this proceeding?
23 A **Yes.**
24 Q Why was the ranch selected over other sources?
25 A **Early on, I mentioned that the ranch has very**

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1 **sandy soils and that it's a natural storage**
2 **vessel and that we own the water rights. That's**
3 **what makes it the most viable, sustainable,**
4 **long-term source.**
5 Q What's the water quality like?
6 A **The water quality is variable on the ranch. We**
7 **have pockets of really good water, and we have**
8 **pockets of water that are higher in sulfates and**
9 **total dissolved solids. Nitrates were an issue**
10 **when we were farming and when there was farming**
11 **operations in the ranch, but those are**
12 **lessening.**
13 **But overall, the quality of the ranch water**
14 **is -- is decent, it's good. We can blend a**
15 **significant portion of the ranch water with**
16 **existing sources. I know I've seen reports that**
17 **talk about the blending of up to 5,000 acre-feet**
18 **of ranch water, but those are old reports so I**
19 **can't, you know, determine the viability of**
20 **them.**
21 **Russell has a different treatment method**
22 **than we do, so they can -- they have more**
23 **advanced treatment than we do, so they could**
24 **probably take more of the water unblended than**
25 **we can. But that initial phase of the wellfield**

1 we can use entirely blended without any sort of
2 advanced treatment.

3 Q When you say initial phase, what do you mean?
4 A Right now, the wellfield is conceptual in two or
5 three phases, and that'll be determined during
6 the actual planning process. As we mentioned
7 before, this is a long-term water source. We
8 have 14 well locations identified, municipal
9 well locations, so during design those locations
10 will be identified but not all those wells will
11 be developed during construction because if
12 we're not utilizing the full right right away we
13 don't need the full infrastructure to use the
14 right. So one of the things we will determine
15 during the planning -- or the project design is
16 whether to look at a two-phased approach or a --
17 or a three-phased approach.

18 Q I thought you told me that the well locations
19 were all determined?
20 A The well locations -- let me clarify. The well
21 areas for the locations are determined. So with
22 each of the 14 municipal well sites there is, in
23 the Master Order, there is a geometric shape
24 associated with that well site. And that
25 geometric shape was created because of

1 constraints about not moving a water right more
2 than 10 percent closer to a -- to a stream,
3 which the Arkansas River is, and not getting
4 within a half mile of a different source of
5 supply or a different well. And so there were
6 geometric shapes associated. So one of the
7 things that's going to happen during design is
8 we will do test drilling within those geometric
9 shapes to find the best point of diversion, and
10 that's where the municipal well will be put, and
11 that will then become the point of diversion.

12 Q So you said something about half mile from other
13 wells, Jami, can you pull up 1-1? So what --
14 what is this -- let's skip -- let's go to the
15 second page, it may be a little easier to --
16 okay. Can you zoom in?
17 Okay. So in terms of well locations, can
18 you describe where those 14 wells are or how
19 they're placed?
20 A In this visual, the -- the municipal -- the
21 future municipal wells are letters, the A, B, C,
22 D, and so on. The blue dots represent the
23 irrigation points of diversion that we -- we
24 previously had on the property, and those have
25 all been plugged and -- and -- and

1 infrastructure removed. So those points of
2 diversion were com -- combined into different
3 municipal wells, and -- and in doing so there
4 were certain things we had to avoid and certain
5 requirements we had to adhere to, and so that's
6 why when you look at the overall footprint of
7 the ranch, it contracted for more the points of
8 diversion were at versus where it was when it
9 was an irrigated property.

10 Q So these sort of semicircles that are blocked
11 out on the south --
12 A I can see them. They're neighboring wells.
13 Q Okay. They're --
14 A They're -- they're radiuses from neighboring
15 wells. If you -- if you consider the point of
16 diversion from a neighboring well and you shade
17 a circle with the radius, that's what that
18 represents is a part of that.
19 Q So the regulations don't let you -- you can't
20 move more than a quarter of a mile closer to an
21 existing well for fear of direct impairment,
22 correct?
23 A That's correct.
24 Q What's the radius on these circles?
25 A I believe we went with a half mile.

1 Q Why?
2 A Because we wanted to be respectful of our
3 neighbors' water rights.
4 Q There has been some discussion with -- back to
5 quality. I suppose that some day it might be
6 needed -- you say you can blend the first part
7 of it, but if you have to treat the water on the
8 ranch with an RO, reverse osmosis treatment
9 plant, that -- that produces a waste stream,
10 doesn't it?
11 A It does.
12 Q So would you build an RO plant on the -- in
13 Edwards County?
14 A We would not. And it's -- it's -- RO technology
15 is becoming cheaper, but the advanced treatment
16 required for this, it's not certain that it
17 would be RO, it could be some other kind of
18 advanced treatment. We're not dealing with salt
19 on the ranch, which you typically use reverse
20 osmosis for. We're dealing with total dissolved
21 solids and -- and sulfides and -- or sulfates,
22 one of the two, I'm not a chemist. So there are
23 other treatments available.
24 Russell has an EDR facility,
25 electro dialysis reversal, I believe, is what

1 that stands for. But, yes, that does create --
 2 both create a waste stream and you would have to
 3 dispose of that. And we wouldn't want to create
 4 finished water on the ranch and then have to
 5 dump it into our raw water collection system
 6 where it gets contaminated and then treated
 7 again, that wouldn't make financial sense.
 8 Q Is there any scenario that you can think of that
 9 you would end up doing some sort of a
 10 treatment other -- okay, you're going to
 11 chlorinate the water on the ranch, but -- but is
 12 there any scenario under which the City of Hays
 13 or the City of Russell would decide they're
 14 going to build some sort of a water treatment
 15 plant that's going to generate a significant
 16 waste stream for disposal in Edwards County?
 17 A **Nothing that I could see or that I could foresee**
 18 **ever recommending. Right now, the place of use**
 19 **is Hays, Russell, and the R9. And the only**
 20 **reason it's the R9 is because we need to utilize**
 21 **some of that water for the process of actually**
 22 **producing water. Unless we were selling**
 23 **finished water on the property or to somewhere**
 24 **else where we'd have to go through a process, it**
 25 **does not make sense to do that. So it's very**

1 there's no compelling reason to ever treat and
 2 pump from there.
 3 So back to your question, our existing
 4 sources are not great. We have a municipal
 5 softening facility because we have very hard
 6 water. It's good water but it's very hard. So
 7 we have to go through a lime softening process.
 8 The Dakota wells are not that great of water,
 9 and -- and, again, we, you know, we can blend a
 10 little bit but it's really not good water, so if
 11 we're investing in some sort of advanced
 12 treatment, it makes sense to do it at our
 13 existing facility, not somewhere else.
 14 **MR. TRASTER:** Your Honor, I'm kind
 15 of at a good spot to break, but I could
 16 keep going.
 17 **PRESIDING OFFICER:** Well, I guess we
 18 are at 5:00 o'clock and seems like that
 19 would probably be a good place to end it
 20 then as opposed to going on and putting you
 21 in a position where you're not at a good
 22 spot to break.
 23 **MR. TRASTER:** Yeah. I mean, I can
 24 go on, I'd be happy to, I just -- you said
 25 something about a good spot so that's where

1 expensive to pump -- pump water and treat water,
 2 so you only want to do it once, you don't want
 3 to have to do it twice.
 4 Q So if -- assume that you're going to build --
 5 assume that you're going to build some sort of a
 6 treatment plant, wouldn't you think about
 7 considering treat -- the treatment of some of
 8 the water that you've already got? The existing
 9 sources are good but not perfect --
 10 A **Right, our existing sources have issues, and --**
 11 **and I want to add one more thing to the -- to**
 12 **the possibility or the speculation that you**
 13 **could treat on site and move forward. Advanced**
 14 **treatment such as RO or something like that does**
 15 **create a waste stream. The worse the water is,**
 16 **the larger the waste stream. I mentioned the**
 17 **Dakota wellfield, you know, we could see losses**
 18 **in excess of 40 percent and getting higher**
 19 **depending on how -- how much bad water you take**
 20 **out.**
 21 Q From the Dakota?
 22 A **From the Dakota. That is not the water on the**
 23 **R9. There is not a huge waste stream with that,**
 24 **so you will see yields much higher as a part of**
 25 **your total water that you pump out. So, again,**

1 I am.
 2 **PRESIDING OFFICER:** If you're at a
 3 good spot, we'll go ahead and adjourn for
 4 the night. And then what time,
 5 9:00 o'clock in the morning okay for
 6 everybody?
 7 **MR. TRASTER:** Sounds good.
 8 **MR. LEE:** It is for us, Your Honor.
 9 **PRESIDING OFFICER:** All right.
 10 We'll reconvene at 9:00 a.m. and pick up
 11 the remainder of your questions of
 12 Mr. Dougherty at that point.
 13 **MR. TRASTER:** Thank you so much.
 14 **PRESIDING OFFICER:** All right.
 15 Thank you, everybody, we're adjourned for
 16 the day.
 17 (Whereupon, the proceedings were
 18 adjourned at 5:03 p.m.)
 19
 20
 21
 22
 23
 24
 25

1 CERTIFICATE

2 STATE OF KANSAS)
3 SEDGWICK COUNTY) ss:

4 I, Nancy L. Rambo, a Certified Shorthand
5 Reporter, within and for the State of Kansas, do
6 hereby certify that the foregoing is a true and
7 correct transcript of the proceedings had at the
8 time and place hereinbefore set forth.

9 I further certify that I am not a relative
10 or employee or attorney or counsel of any of the
11 parties, nor am I a relative or employee of such
12 attorney or counsel, nor am I financially
13 interested in the action.

14 WITNESS my hand and official seal at
15 Wichita, Sedgwick County, Kansas, this 1st day of
16 August, 2023.

18 NANCY L. RAMBO, R.P.R., C.S.R.
19 Registered Professional Reporter
20 Certified Shorthand Reporter

21 Costs:
22
23
24
25

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