

**IN THE TWENTY-FOURTH JUDICIAL DISTRICT  
DISTRICT COURT OF EDWARDS COUNTY, KANSAS**

WATER PROTECTION ASSN. OF  
CENTRAL KANSAS,

Plaintiff,

V.

DAVID BARFIELD, P.E., IN HIS  
OFFICIAL CAPACITY AS CHIEF  
ENGINEER, DIVISION OF WATER  
RESOURCES, KANSAS DEPARTMENT  
OF AGRICULTURE,

Defendant,

V.

THE CITY OF HAYS, KANSAS AND  
THE CITY OF RUSSELL, KANSAS,

Intervenors.

Case No. 2019-CV-000005

Pursuant to K.S.A. Chapter 77

**CHIEF ENGINEER'S MOTION  
TO SUBMIT ADDITIONAL EVIDENCE UNDER K.S.A. 77-619**

Defendant David W. Barfield, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture (the "Chief Engineer"), moves under K.S.A. 77-619(a) to submit, as additional evidence to the Court, the two letters attached hereto and identified as exhibits 11 and 13 to the deposition of the Chief Engineer that was held on January 28, 2020, to wit:

- **Dep. Ex. No. 11:** Chief Engineer's letter dated April 18, 2016 with enclosures, to Richard and Jane Wenstrom of Plaintiff Water PACK and CC'd to various other parties; and

- **Dep. Ex. No. 13:** Chief Engineer’s letter dated March 9, 2018 to Orrin Feril of GMD5 and CC’d to Richard Wenstrom of Plaintiff Water PACK.

As more fully explained below, such additional evidence relates to the validity of the agency action at issue in these proceedings at the time such action was taken, and such additional evidence is needed to decide a disputed issue regarding unlawfulness of procedure or of decision-making process.

Although the Chief Engineer rejects Plaintiff’s facial labeling, a recurring claim of Plaintiff’s in this KJRA proceeding has been that the Chief Engineer engaged in “unlawful procedure” or “unlawful decision-making process” in the course of issuing the Master Order. *See, e.g.,* Plf.’s Pet. at 11 (requesting that the Court hold that “the Chief Engineer engaged in an unlawful procedure or failed to follow prescribed procedure”); Plf.’s Supp. Brief to its Mot. for Discovery at 11–13 (claiming that the “Chief Engineer’s conduct in this matter raises concerns regarding unlawful procedures employed by an agency”). One of the particular forms of such alleged unlawful procedure is the “subsequent collaborative drafting of the Master Order by the Cities and Agency[.]” Plf.’s Supp. Brief to its Mot. for Discovery at 12.

To the extent that Plaintiff’s claims of “unlawful procedure” are based on the collaborative or developmental process by which the Master Order was drafted before it was publicly disseminated in draft proposed form in May 2018 or officially issued in March 2019, the attached letters are relevant as additional rebuttal evidence.

The letters are additional evidence showing that Plaintiff had advance notice, years before any version of the Master Order was publicly disseminated or officially issued, that the Chief Engineer and Cities had met to discuss the Cities’ change applications and that those parties would continue to meet. *See* attached **Dep. Ex. No. 11** at 1 (directly informing Plaintiff that “KDA met

with the cities of Hays and Russell on March 24”) and at its enclosed Chief Engineer’s letter dated April 6, 2016, to the Cities and CC’d to Plaintiff (noting that KDA “found the discussion [with Hays’ representatives] informative and positive, and we would like to continue the dialogue with the City”).<sup>1</sup> And the letters are additional evidence showing that Plaintiff was provided with the relevant modeling files months before the public informational meeting of June 21, 2018. *See* attached **Dep. Ex. No. 13** (enclosing flash drive of modeling files to Richard Wenstrom of Plaintiff).

Accordingly, the two attached letters amount to additional relevant rebuttal evidence, akin to waiver evidence, regarding certain of Plaintiff’s “unlawful procedure” claims vis-à-vis Plaintiff’s voluntary decision to refrain from being more involved in the administrative proceedings at issue in this KJRA action. The attached letters meet the test of K.S.A. 77-619(a) and thus the Chief Engineer requests that the Court receive such letters as evidence, in addition to that contained in the Agency Record.

Respectfully submitted,

*/s/ Aaron B. Oleen*

Aaron B. Oleen, S. Ct. #23588

Staff Attorney

Kansas Department of Agriculture

1320 Research Park Drive

Manhattan, Kansas 66502

TEL: (785) 564-6715

FAX: (785) 564-6777

aaron.oleen@ks.gov

*Attorney for the Chief Engineer*

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<sup>1</sup> Notably, such enclosure that previously had been CC’d to Plaintiff—the Chief Engineer’s letter dated April 6, 2016—is in the Agency Record at A.R. 665–68. Other documents already in the Agency Record also show Plaintiff’s advance notice of the collaborative or developmental process of the Master Order’s creation. *See, e.g.*, A.R. 635–636 (Chief Engineer’s letter dated February 19, 2018 to GMD5 and Plaintiff).

## CERTIFICATE OF SERVICE

I hereby certify that the above *Chief Engineer's Motion to Submit Additional Evidence Under K.S.A. 77-619* was electronically filed with the District Court Clerk using the Court's electronic filing system, which will cause service to be made on the following other counsel of record by the transmission of a notice of electronic filing on the date reflected on the electronic file stamp hereto:

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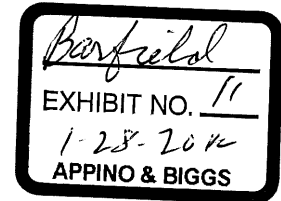
900 SW Jackson, Room 456  
Topeka, Kansas 66612  
(785) 296-3556

Jackie McClaskey, Secretary

Governor Sam Brownback

April 18, 2016

Richard & Jane Wenstrom  
WaterPACK  
306-A N. Main St  
St. John KS 67576



Subject: Water PACK timeline request

Richard and Jane,

This letter is in response to your emails of March 16 requesting information on anticipating timelines for future hearing(s) related to the City of Hays ("Hays") change applications and water transfer application.

As you know, per your open record request and in the public's interest, KDA-DWR has developed a web page to provide documents and information related to our processing of Hays's change applications and the Hays/Russell water transfer application <http://agriculture.ks.gov/HaysR9>. Additional information will be provided on the webpage as the process moves forward.

As you suggest, I cannot provide a definitive determination of how or when these matters will proceed, but below is the best information I have at this time.

We are currently evaluating the Hays change applications. Before the water transfer process will be initiated, the change applications will have to be in a form that can be contingently approved. Our review of the change applications considers statutory and regulatory requirements for changes under our traditional requirements, irrespective of any additional considerations required by the transfer act.

KDA met with the cities of Hays and Russell on March 24. Attached is the letter I sent to Hays on April 6 summarizing the meeting and next steps in our review of the change applications. As the letter notes, Hays is working on additional, detailed modeling and analysis to support its applications, particularly related to the long-term sustainability of its project. At the meeting the Hays stated that it will provide this work as soon as possible and estimated that it should be done by mid-summer this year.

As I have committed to you and other, I will hold a public meeting or hearing prior to contingently approving the City's change applications. I expect to hold the meeting or hearing after Hays has

provided its updated modeling and analysis, and after KDA-DWR and the public have had a reasonable opportunity to review Hays's work. I am hoping this will occur late this summer or early this fall. At this point, the scope of such a meeting or hearing has not been fully determined.

Hays is entitled to request a post-decision hearing upon contingent approval of their change applications. And anyone who believes they have been aggrieved by the contingent approvals may request a review by the secretary of agriculture.

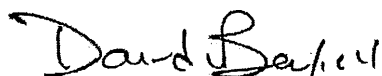
Only after the changes have been contingently approved will the water transfer hearing process be initiated. Attached is a document that outlines the water transfer process timeline. The water transfer public hearing is a minimum of six months after initiation of this process.

In sum, there will be at least two opportunities for public input related to the matter; a public meeting or hearing on Hays's change applications and the water transfer hearing.

Finally, in your letter of March 16 you said, "*When I visited with you after the Water PACK annual meeting in St. John, I asked if there would be time for GMD5 and Balleau to run the model when the exact locations of the 14 water wells were finally determined on the R9 Ranch and you said 'yes'.*" We have the proposed location of the wells in Hays's change applications. Hays has asked for the ability to vary these locations by up to 1,000 feet. Our letter to Hays provides our response to that request. Hays is committed to maintaining at least one-half mile spacing from any neighboring well outside the R9 Ranch border. With those conditions, I believe that the locations provided by Hays are sufficient for your modeling evaluation. Let me know if you do not agree.

Let me know if you have any further questions that I can address at this time.

Sincerely,



David W. Barfield, P.E.  
Chief Engineer  
Division of Water Resources

Attachments: Letter to City of Hays, April 6  
Water Transfer Act Procedure Overview

Cc:  
David Traster, attorney for the City of Hays  
Orrin Feril, GMD 5  
Chris Beightel, KDA-DWR  
Jeff Lanterman, Stafford Field Office, KDA-DWR

1320 Research Park Drive  
Manhattan, Kansas 66502  
(785) 564-6700



900 SW Jackson, Room 456  
Topeka, Kansas 66612  
(785) 296-3556

Jackie McClaskey, Secretary

Governor Sam Brownback

April 6, 2016

David M. Traster  
Daniel J. Buller  
Foulston Siefkin LLP  
1511 N. Waterfront Parkway, Suite 100  
Wichita, KS 67206-4466

RE: Water Right File Nos. 21,729; 21,730; 21,731; 21,732;  
21,733; 21,734; 21,841; 21,842; 22,325; 22,326; 22,327; 22,329;  
22,330; 22,331; 22,332; 22,333; 22,334; 22,335; 22,338; 22,339;  
22,340; 22,341; 22,342; 22,343; 22,345; 22,346; 27,760; 29,816;  
30,083 and 30,084

Gentlemen,

Thank you for meeting with KDA-DWR at our offices in Manhattan on Thursday, March 24 to discuss the City of Hays's (City) pending applications to change the R9 Ranch water rights (Change Applications) to municipal use as part of a project to supply the City of Hays and possibly other municipal users in the region (Project). We found the discussion informative and positive, and we would like to continue the dialogue with the City so that KDA-DWR will have the best information available with which to process and consider the City's Change Applications.

As we noted at the meeting, at this stage, we are evaluating the Change Applications pursuant to applicable statutes and regulations as if the proposed municipal use was occurring at some distance from the existing ranch, but less than 35 miles, i.e. without the additional considerations required by the water transfer act. This includes a review of whether the proposed changes are reasonable and will not impair neighboring water rights over the proposed life of the project.

The following is a summary of the issues that KDA-DWR raised in our letters of January 21 and March 8 of this year, and the statuses of those issues after our meeting with City representatives last week:

**1. Consumptive use analysis (January 21 letter)**

It appears that KDA-DWR has all the necessary information to apply the consumptive use criteria of K.A.R. 5-5-3 and K.A.R. 5-5-9 to the City's Change Applications. It further appears that, after applying the relevant regulations, our consumptive use analysis shows that 7,604 acre-feet of the 7,626 acre-feet requested by the City in its Change Applications is eligible for conversion to

municipal use. KDA-DWR's slightly smaller amount is limited by the amount certified under each right.

**2. Justification for proposed municipal use, proposed amount, project phasing (January 21 letter)**

We understand from our conversation at the meeting that, if the final amount of water allowed by KDA-DWR to be converted to municipal use is acceptable to the City, then the City intends to construct one pipeline for the Project but develop water production capacity over time, with those water rights not needed in the initial phase of the Project "held in reserve", that is, not used, until needed for municipal use. Thus the City clarified its plan to dry up (stop irrigating) with the R9 water rights once cover crops are established. For the most part, this has already occurred, with remainder to be completed in 2016 and 2017.

KDA-DWR requested that the City provide information towards justifying the total quantity sought in the Change Applications as they will be finalized for municipal use, and how water use would be limited to reasonable municipal use in the future. Specifically, we request that the City provide 50-year projections of population, commercial, and industrial growth anticipated to create demand for the R9 Ranch water for the City of Hays, including the specific quantity justified for Hays with the assumptions relied on to develop the projection. To the extent the City of Russell is committed to the project, their needs can also be included.

At the meeting, the City indicated that it would like to have the approval of the Change Applications for municipal and related uses in the full quantity determined to be approvable as consistent with statute and regulatory requirements, even if the City cannot fully justify this demand at this time. Rather, the City proposes that the approval allow the City to bring wells into production as demand develops, subject to specific criteria and review by the chief engineer (e.g. area served, population projections, industrial demand served, existing water rights, etc.). In addition, the City stated that the Project may have drought mitigation benefits for the region that the City will request be considered in determining what is reasonable. In addition to the information requested in the paragraph above, we request the City provide a specific proposal for how it will justify demand beyond this amount and proposed method for review and approval by the chief engineer.

The City has not proposed a methodology for determining a reasonable cap on the rate of the individual wells in the well field. We request this be provided.

**3. Water conservation requirements (January 21 letter)**

In our January 21 letter, KDA-DWR stated that "...the sufficiency of proposed water conservation will be evaluated against the regional averages of per capita water usage for comparable cities in your region..." At our March 24 meeting, Mr. Dougherty stated that the City is proud of its water conservation and will continue to conserve water in the future.

Given the City's strong record of conservation, the dedication of City leaders to continue water conservation, and a plan to keep use within reasonable limits as requested above, it appears that



the City's water conservation requirements are on track for favorable consideration by KDA-DWR.

#### **4. Flexibility in locating points of diversion (January 21 letter)**

The City's preliminary design leading to the Change Applications provides planned locations of the consolidated municipal wells meeting the requirements of KDA-DWR rules. The City has requested flexibility to allow the final locations of the points of diversion to vary by up to 1000 feet without requiring a change application. The justification stated at the meeting is that the final design of the Project well field has not been completed, and for at least some of the wells, will not be completed until future project phases. Optimal final locations for the wells will be based on a number of criteria including access, terrain, power transmission lines, etc. The City does not object to an approval with its requested flexibility that includes specific additional criteria that must be met (e.g. half-mile spacing to neighboring point of diversion outside the R9 Ranch boundary, etc.) but wishes to avoid having to go through the water right change process multiple times to optimize the design of the well field.

KDA-DWR is willing to consider this approach for future phases where needed but urges the City to perform such hydrologic testing and design work as needed to tighten up its Change Applications so that the final locations can be known within 300 feet for the initial phase, and provide reasonable justification for those Project well locations for future phases that the City believes may need more than 300 feet of horizontal location flexibility at the time of approval.

#### **5. Long-term sustainability of the project and effects to the area (March 8 letter)**

At the meeting we were informed that the City, through its consultant, Burns & McDonnell, is enhancing the Groundwater Management District #5 (GMD5) hydrologic model (Model) for use in the Project area specifically to determine what the sustainable level of withdrawals over time of the Project is and the effects of this level of withdrawal on the area. We understand that the City and Burns & McDonnell anticipate that the modeling work will not be finished for three to four months.

The City, through its counsel, Mr. Traster, said that sustainability is a water management goal of the Project. The Project's estimated cost is \$76 Million. The City said that the sustainability of the Project will have to be demonstrated to the finance market so that funding to build the Project can be secured.

Should the modeling work demonstrate that the long-term sustainable yield of the Project area is less than otherwise allowed by KDA-DWR rules, the City will amend its Change Applications accordingly. As noted above, the City envisions that it will request the ability to pump at higher rates and quantities in drought periods.

As the modeling work continues, we encourage the City to engage the stakeholders affected by the Project, including GMD5, WaterPACK and KDA-DWR, to allow an understanding of the model enhancements and future scenarios evaluated; any adjustments to the configurations of the well field and operational plans; and impacts on neighboring wells; the stream, water levels in the area,

and on the long-term health of that part of the basin.

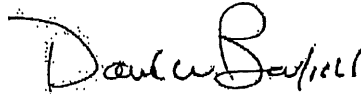
**6. Basin stakeholders' desire to have their concerns heard prior to a decision (March 8 letter)**

At the meeting, the City expressed its desire and commitment to keeping the process towards completing the Project as transparent as possible. We discussed the options for public involvement including informational meetings and formal hearings. For the City, Mr. Traster said that, at this time, the City does not intend to request a pre-decision hearing, but it reserves the right to make such a request.

The City did say, however, that if the chief engineer wishes to hold a pre-decision meeting or hearing of his own volition, the City would not object and would participate in such proceeding.

Thank you for your attention to these requests. If you have questions or comments about these requests or the characterizations made herein, please contact me at (785) 564-6670.

Sincerely,



David W. Barfield, P.E.  
Chief Engineer  
Division of Water Resources

pc: Tohy Dougherty  
City Manager  
City of Hays  
P.O. Box 490  
Hays, KS 67601

Jon Quinday  
City Manager  
City of Russell  
133 W. 8<sup>th</sup> Street  
Russell, KS 67665

PC: Via E-mail  
Stafford City Field Office  
GMD No. 5  
Richard Wenstrom, Water/PACK

# Kansas Water Transfer Act

## WHAT IS A WATER TRANSFER?

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A "water transfer" for purposes of the Kansas Water Transfer Act (K.S.A. 82a-1501 *et seq.*) is the diversion and transportation of water in a quantity of 2,000 acre feet or more per year for beneficial use at a point of use outside a 35-mile radius from the point of diversion for such water. Water transfers are approved upon application, which is reviewed by a water transfer hearing panel.

## WHO SERVES ON THE WATER TRANSFER HEARING PANEL?

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The water transfer hearing panel consists of the Chief Engineer of the Division of Water Resources, the Director of the Kansas Water Office, and the Secretary of Health and Environment (or the Director of the Division of Environment if designated by the Secretary). The panel shall request the appointment of a presiding officer from the Office of Administrative Hearings, knowledgeable in Kansas water law, to preside over the proceeding and issue an initial order approving or denying the water transfer, which is then reviewed and followed by a final order of the water transfer hearing panel.

## WHAT CRITERIA IS CONSIDERED FOR EVALUATING A WATER TRANSFER?

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The act provides for the following criteria that must be met in order for a water transfer to be approvable:

1. No water transfer shall be approved which would reduce the amount of water required to meet the present or reasonably foreseeable future beneficial use of water by present or future users in the area from which the water is to be taken, unless:
  - o The panel determines that the benefits to the state for approving the transfer outweigh the benefits to the state of not approving the transfer;
  - o The chief engineer recommends to the panel and concurs that an emergency exists to the public health, safety, or welfare; or
  - o The Governor has declared that an emergency exists which affects the public health, safety, or welfare.
2. No water transfer shall be approved if:
  - o The transfer would impair water reservation rights, vested rights, appropriation rights, or prior applications for permits to appropriate water; and
  - o Unless the presiding officer appointed by the hearing panel determines that the applicant has adopted and implemented conservation plans and practices that meet certain statutory criteria.
3. When determining whether the benefits of the state for approving an application outweigh the benefits to the state for denying an application, the presiding officer appointed by the panel will consider:
  - o Any current beneficial use being made of the water to be diverted including minimum desirable streamflow requirements;
  - o Any reasonably foreseeable future beneficial use;
  - o The economic, environmental, public health and welfare, and other impacts of approving or denying the transfer;
  - o Alternative sources of water available to the applicant and present or future users;
  - o Whether applicant has taken appropriate measures to preserve the quality and remediate any contamination of water currently available to applicant;
  - o Sufficiency of detailed plan to operate facilities and carry water from point of diversion so that all parties can understand the impacts of the transfer;

- o Effectiveness of conservation plans and practices;
- o Conservation plans and practices by parties in opposition of or who may be affected by the transfer; and
- o Any applicable management program, standards, policies, and rules and regulations of a groundwater management district.

## WHAT IS THE PROCEDURE FOR APPLICATION OF A WATER TRANSFER?

**Step 1:** Application for transfer is filed with the chief engineer, or the chief engineer (plus one other member of the panel) determine it is in the best interest of the state to conduct a water transfer hearing based on:

- an application for permit to appropriate water;
- an application to change an existing water right; or
- a proposed contract for the sale of water from the state's conservation storage water supply capacity.

**Step 2:** Panel requests a presiding officer be appointed by the Office of Administrative Hearings to preside over the proceedings pursuant to the Kansas Administrative Procedure Act.

**Step 3:** Hearing Officer gives notice of prehearing conference not more than 14 days after the panel is assigned that officer

- Given by mail to applicant, parties who have intervened, and commenting agencies
- Shall be published in the Kansas register and at least two newspapers in area of proposed point of diversion

**Step 4:** Presiding officer holds prehearing conference commencing 90-120 days after notice has been given and concluding not later than 45 days after it commences.

**Step 5:** Formal public hearing will be held not less than 90 and not more than 120 days after conclusion of prehearing conference, concluding not later than 120 days after commencement.

- Held in basin of origin
- If deemed necessary by hearing officer, public comment hearing shall be held in basin of use

**Step 6:** Hearing officer issues initial order approving or denying the transfer not later than 90 days after conclusion of formal public hearing

- Shall include findings of fact relating to each factor of benefit to state of approval or denial
- Hearing officer can order approval of a transfer of a smaller amount than requested

**Step 7:** Panel reviews initial order of hearing officer and enters final order not later than 90 days after entry of initial order

- Panel may extend the 90 day limit with written consent of all parties or for good cause.

**Step 8:** Record of any hearing or proceeding maintained and made available for public examination in office of the chief engineer.

STATE OF KANSAS

DEPARTMENT OF AGRICULTURE  
1320 RESEARCH PARK DRIVE  
MANHATTAN, KS 66502  
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GOVERNOR JEFF COLYER, M.D.  
JACKIE McCLASKEY, SECRETARY OF AGRICULTURE

March 9, 2018

Big Bend Groundwater Management District #5  
125 S. Main  
Stafford, KS 67578

Mr. Feril,

Per your request please find enclosed two copies of a USB drive, each containing the modflow modeling files associated with the R9 Ranch evolution related to the pending application for the City of Hays.

This flash drive contains backup files provided to KDA-DWR by Burns & McDonnell Engineers for model scenarios described in the R9 Ranch Modeling Letter Report to Toby Dougherty, City Manager, Hays, KS, dated February 13, 2018. The backup files include seven zipfiles totaling 30 Gbytes in size containing groundwater model files corresponding to scenarios for the report, an Excel file, "R9 Modeled Well Flow Rates.xlsx" associated with the scenarios, and a "read me" text file (Model files readme.txt). The seven zipfiles are associated with model scenarios described in the report; the "read me" file provides some additional explanation.

By copy of this letter I am also sending one USB drive to Richard Wenstrom.

If you experience any problems with the files please feel free to contact our office.

Sincerely,

David W. Barfield, P.E.  
Chief Engineer  
Division of Water Resources

DWB:kh

CC: Richard Wenstrom, WaterPACK

