BEFORE THE WATER TRANSFER HEARING PANEL
STATE OF KANSAS

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

CITIES' RESPONSE TO INTERVENORS' OPENING BRIEF
TO THE WATER TRANSFER HEARING PANEL

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I. Introduction.

Here we go again. Intervenors' brief includes all of the same flawed, unsupported, and illogical arguments that they have been making, unsuccessfully, for years—asking the Water Transfer Hearing Panel to disregard the facts and issue a Final Order in direct conflict with the Water Transfer Act ("WTA"). For example, Intervenors would have the Panel:

- Ignore the WTA's undeniable focus on "statewide benefits" and deny the Application based on unfounded not-in-my-backyard fears. (*See, e.g.*, I.O. at 67, ¶ 7–68, ¶ 8.)

- Ignore the fact that no other water user will be impaired, or even noticeably impacted, by the Cities' use of the R9 Water Rights—even if the Cities were to pump their maximum allowed quantity for 51 consecutive years, which they cannot and will not ever do. (I.O. at 40, ¶¶ 180–91. *See also, e.g.*, *id.* at 42, ¶ 191 ("Letourneau testified that … the Cities use of the R9 Water Rights for municipal water would cause no impact to neighboring wells, even if the Cities continuously pumped their maximum allowed quantity for 51 consecutive years, and even assuming the wors[t] case groundwater modeling scenarios suggested by Intervenor's expert Larson.").)

- Ignore the substantial economic benefits that the State of Kansas will receive if the water transfer is approved. (*See, e.g.*, Ex. 2823 at Cities 0103516–17.)

- Ignore the hundreds of millions in economic detriments that the Cities and the State will suffer if the water transfer is denied. (*See, e.g.*, Ex. 2823 at Cities 0103530.)

- Deny the benefits to the State and Russell of a $300-million capital investment by Russell's largest employer. (I.O. at 45, ¶ 217; Quinday Test., Tr. Vol. 2 at 540:12–22.)

- Ignore the WTA's express prohibition on reducing the quantity requested by the Cities except as deemed "***necessary*** for the protection of the public interest ***of the state as a whole***." K.S.A. 82a-1507(b) (emphasis added).

- Punish the Cities for their State-leading conservation efforts by capping their authorized quantity based on their extraordinarily low historical GPCD water use, despite Kansas law requiring that users be given "[d]ue consideration for past conservation." (Letourneau Test., Tr. Vol. 4 at 1050:6–17.)

- Deny the Cities' lawful right to exercise their real property right to the beneficial use of the R9 Water Rights purchased on the open market. (*See, e.g.*, I.O. at 17, ¶¶ 10–14.)

- Limit the Cities to just 40 GPCD during a drought similar to the dust bowl, and a level that would not even support basic human needs during a prolonged drought. (Ex. 2828 at Cities 0103744:24–0103745:11; *see also* Ex. 2823 at Cities 0103530–31)

- Ignore the fact that the Cities have reached the effective limits of conservation. (Hamilton Test., Tr. Vol. 7 at 1179:17–1180:24. *See also, e.g.*, I.O. at 27, ¶ 76.)

- Deny the Cities a redundant water source, despite uncontroverted evidence that their existing sources are susceptible to upstream contamination, drought, and other perils. (*See, e.g.*, Quinday Test., Tr. Vol. 2. at 481:9–19; *id.* at 484:6–486:4. *See also, e.g.*, I.O. at 31–32, ¶¶ 103–12.)

- Ignore compelling evidence that the Cities' historical population growth has been significantly impeded due to drought and the fact that the Cities had no choice but to impose draconian conservation measures. (Ex. 1-47 at Cities 0002720.)

Intervenors provide lip service to the fact that the KWAA and the WTA are closely related and must be "read together and harmonized." (Br. at 4.) The Master Order contingently approved the Change Applications and conclusively resolved the KWAA issues. While the WTA does not authorize the Panel to alter its terms, the Panel is not bound by the Master Order, which is, nevertheless, persuasive authority in this proceeding. The Panel must follow Kansas law, regardless of the source, but the Panel's specific purposes and tasks are set forth in the WTA. Intervenors' assertion that the statutes contain "irresolvable incompatibilities" is a manufactured argument that the WTA requires an "allocation of scarce water resources consistent with demonstrable need." (Br. at 4.) That argument is a mere fiction, invented by Intervenors, and designed to attack their devastating loss on the merits.

II. The Cities have demonstrated their need for a drought-resistant source of water.

The evidence shows that the Cities cannot divert anywhere near their permitted quantities from existing sources, especially during droughts—let alone provide sufficient quantity for future population and industrial growth.[1] Intervenors argue that the transfer should be denied, claiming

[1] There is a plethora of evidence supporting this point. *See, e.g.*, Ex. 2828; Doughtery Test., and Exhibits referred to in Tr. Vol. 1 at 96:11–13; 97:7–98:25; 101:24–102:8; 105:22–107:5; 121:17–25; 124:9–129:13; 140:2–146:21; 147:24–157:24; Vol. 2 at 237:19–238:12; 242:21–243:5; 317:10–17; 351:18–352:3; 359:16–361:1; Quinday Test. and Exhibits referred to in Tr. Vol. 2 at 467:14–468:9; 470:1–7; 480:6–481:11; 483:18–484:5; 506:18–24; 511:8–513:23; 572:6–22; Ex. 1-4 at Cities 0000386–403; Ex. 3-2 at Cities 0008501–16; Ex. 2823 at Cities 0103500–06.)

that no water supply study has been completed. That is simply not true. The Cities presented extensive evidence that numerous studies have been undertaken, all of which have confirmed the Cities' desperate need for water. (*See, e.g.*, Exs. 1-54, 1-56, 1-92, 1-102, 1-127, 1-128, 1-135, 1-139, 1-144, 255, 338, 821, 918, 1343, 1665, 2077, 2575, and 2599. *See also,* Exs. 1665, 2657–63, and 2679.) Moreover, Intervenors' argument ignores the obvious fact that such a study is superfluous "when [the Cities'] existing sources couldn't meet daily demands." (Dougherty Test., Tr. Vol. 1 at 129:12–13. *See also, id*. at 96:2–25.)

III. The reasonable-needs limitation advocated by Intervenors is contrary to Kansas law, highly inequitable, and undercut by substantial, competent, and credible evidence.

Intervenors have repeatedly argued that the Cities' Application should be denied based on a contrived "reasonable needs" standard. Intervenors use more than 17 pages of their brief on this issue. (Br. at "Issue Abstracts": A, B, C, and F; "Factual Background": A, B, and E.) The WTA does not include a "reasonable needs" requirement.

The WTA was not designed to protect or benefit transfer applicants ***or*** opponents. The plain text of the statute shows that its purpose is to protect the State of Kansas while still honoring water right owners' real property rights. K.S.A. 82a-1501a(b)(2) ("best interest of the state"); K.S.A. 82a-1502(a)(1) and (c) (applying the requirement that the "benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer"—but only when the transfer would reduce the amount of water needed to meet present or reasonably foreseeable future users); and K.S.A. 82a-1504(a) ("… protection of the public interest of the state as a whole.") There is nothing in the WTA about assessing, much less limiting, transfers based on the reasonable needs of the applicant.

The WTA's implementing regulations are in accord. K.A.R. 5-50-2(i) (stating that a water transfer application must show "that the benefits to the state if the transfer is approved outweigh

the benefits to the state if the transfer is not approved"). That ends the inquiry; when relevant statutes, read together, are "plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be." *Roe v. Phillips Cnty. Hosp.*, 317 Kan. 1, 5, 522 P.3d 277 (2023) (citation and quotation marks omitted).

In fact, K.S.A. 82a-1504(a) prohibits reducing the quantity the Cities requested except as "***necessary*** for the protection of the public interest ***of the state as a whole***." (Emphasis added.) Moreover, transfer applicants must "first comply[] with the provisions of the … [KWAA]" before they can even seek a water transfer. K.S.A. 82a-1507(b)(2). Thus, reasonable quantities will have always been addressed before a transfer application is filed because the KWAA charges the Chief Engineer, not the Panel, with the duty to "enforce and administer the laws of this state pertaining to the beneficial use of water and [to] control, conserve, regulate, allot and aid in the distribution of the water resources of the state." K.S.A. 82a-706. For that reason, obtaining contingently approved change applications is a regulatory prerequisite to filing a complete water transfer application. K.A.R. 5-50-2(x)(2).

A. Intervenors ignore the facts that securing a redundant source is permitted and is a practical necessity because the Cities' water sources are susceptible to contamination, drought, and other perils.

Intervenors assert that the Cities do not need more water and should be capped by their existing supplies. (Br. at 3, 14–15, 17, 19–20, 29–32.) They ignore the fact that the "reasonable need" limitation in the KWAA is about more than the quantity authorized on paper. K.S.A. 82a-707(e). The "reasonable needs" of a municipality must account for many factors including, for example, the quantity that can be actually be diverted from each source of supply—year in and year out over the long term, especially during prolonged droughts; planning for future growth; public perceptions in the city, the region and beyond; and consumer needs and demands. For these and other reasons, meeting the reasonable needs of a municipality over the long haul requires

redundant sources.[2] The Cities have been searching for a redundant source for many years. (*See, e.g.*, Ex. 1-47 at Cities 0002720; Ex. 195 at Cities 0016556; Ex. 918 at Cities 0024561 and 63; Ex. 920 at Cities 0024737.)

Thus, DWR routinely approves redundant water rights with overarching limitations to established reasonable needs. (*See, e.g.*, Ex. 1-2 at Cities 0000341.) It is "just smart business ... there [are] ... multiple reasons why you should have flexibility and a redundant supply if you're a municipality or a feedlot or any water user." (Letourneau Test., Tr. Vol. 4 at 889:23–890:9. *See also id.* at 907:20–22; *id.* at 906:15–908:8.)

The Cities' need for a redundant source is absolutely critical for many reasons, especially because their existing sources are highly susceptible to drought and impacts to water quality. For example, Russell was unable to use water from Big Creek beginning in September 2022 during rehabilitation of its water softening plant. Then, in January of 2023, there was an upstream algae bloom that rendered its Big Creek water rights unusable for six months. (Quinday Test., Tr. Vol. 2 at 484:6–486:4.) The crisis was compounded because the City was forced to rely entirely on the Smoky Hill River, depleting the available supply, and because Big Creek does not produce water reliably during the summer months. At one point, Russell was forced to stop supplying water to its industrial customers for a short time. (Quinday Test., Tr. Vol. 2 at 488:15–21.)

The Presiding Officer also acknowledged that redundancies are specifically permitted by the Kansas Drinking Water State Revolving Fund. (I.O. at 59, ¶ 285.g. permitting financing for "resilience and redundancy.") The evidence is clear—the Cities desperately need the R9 Ranch as an additional source of municipal water; their futures depend on it.

[2] *See* footnote 7 addressing the Cities' need for a 50-year planning horizon.

B. The conservation requirements in the WTA do not impose a reasonable-need requirement because the Act is focused on the best interests of the State as a whole, not on the local concerns of neighboring water right holders.

Intervenors ask the Panel to apply a twisted interpretation of the WTA by pressing a "reasonable needs" argument noticeably missing from the text of the statute, which cannot reasonably be interpreted to impose a reasonable-need limitation on transfers.

"[E]ven if the language of the statute is clear, we must still consider various provisions of an act *in pari materia* with a view of reconciling and bringing those provisions into workable harmony if possible." *N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013) (citation omitted). "When the provisions of two or more acts affect the same issue and subject matter, the same rule applies." *McMillen v. U.S.D. No. 380, Marshall Cnty., Kan.*, 253 Kan. 259, Syl. ¶ 7, 855 P.2d 896 (1993) (citation omitted).

Because all water belongs to the State (K.S.A. 82a-702) all transfers must be made from a source governed by either the KWAA or the Water Plan Storage Act, K.S.A. 82a-1301, *et seq*. K.S.A. 82a-1507(b)(2). Both Acts require all applicants, whether for transfers or not, to demonstrate a need for water. K.S.A. 82a-707(e), K.A.R. 5-5-9(a)(5), K.S.A. 82a-1306(a)(2), K.S.A. 82a-1311a(c)(1), and K.A.R. 98-5-4(a)(2). (*See also* Cities' Proposed Findings, ¶¶ 773–83 and I.O. at 52–53, ¶ 262.)

Because neighboring users are fully protected by the prohibition on transfers that impair existing rights, K.S.A. 82a-1502(b)(1), and because the Chief Engineer or the KWO Director will have already established an applicant's reasonable needs, the quantity requested can only be reduced when it is "***necessary*** for the protection of the public interest of ***the state as a whole***." K.S.A. 82a-1504(a) (emphasis added). The Cities complied with the requirement to "first" comply with the KWAA. K.S.A. 82a-1507(b)(2); K.A.R. 5-50-7. (Ex. 1-2.)

The quantities authorized by the R9 Water Rights have already been conditionally reduced based on the authorized quantities, consumptive use, and the reasonable-need limitations. (Ex. 1-2 at Cities 0000111, ¶ 35; *id*. at Cities 0000148, ¶ 224; *id.* at Cities 0000149–51, ¶¶ 231–38.) The TYRA Limitation reduced the quantity even further to a ten-year rolling average of 4,800 acre-feet per year. (*Id*. at Cities 0000148, ¶¶ 225–230.)

The conservation requirements in the WTA cannot be interpreted to impose the unsupported reasonable-need requirement urged by Intervenors. Intervenors presented no evidence that reducing the Cities' requested quantity would benefit the State in any way. In fact, the Presiding Officer found that Intervenors' evidence focused exclusively on local impacts. (I.O. at 67, ¶ 7–68, ¶ 8.) After all, the Intervenors' case focuses exclusively on greed and unfounded not-in-my-backyard fears. The sky will not fall if the transfer is approved.

IV. The required conservation plans do not cap the quantity that can be transferred.

Intervenors argue that the transfer must be denied because the Cities are subject to a fabricated "regulatory constraint," that limits Hays to no more than 95 GPCD and Russell to no more than 138 GPCD from the Cities' approved Water Conservation Plans. (Br. at 11. *See* Ex. 1-52 at Cities 0002860; Ex 1-68 at Cities 0003202.) Intervenors argue, with no citation to authority, that "[o]nce a [conservation] plan is adopted it serves as a functional cap on usage." (Br. at 11.) And "[c]onsumption that exceeds the amount permitted by the conservation plans ... is prohibited." (*Id*.) Intervenors then rely on K.A.R. 5-3-5j, which states that applicants "shall continue to satisfactorily maintain each component of the water conservation plan." (Br. at 31.)

There is no "regulatory constraint."

Intervenors ignore the fact that the KWO Guidelines (Ex. 817) specifically state that conservation plans may need to be revised for several reasons, including when "[a] ***water source***

has been added or the ***amount of water available has changed***." (Ex. 817 at Cities 0021355 (emphasis added).)

In addition to requiring that applicants comply with the reasonable-need requirements in the KWAA or the Water Plan Storage Act, a complete water transfer application requires that applicants have adopted and implemented conservation plans and practices that are consistent with KWO Guidelines and have been in effect for at least 12 months. K.S.A. 82a-1502(b)(2)(B).

The requirement is imposed by the WTA, ***not*** by K.S.A. 82a-733, as Intervenors wrongly imply. By its plain language, K.S.A. 82a-733 does not permit, or even imply that the Chief Engineer can require transfer applicants to adopt conservation plans. And Intervenors produced no evidence to suggest that the Chief Engineer has required either City to adopt a conservation plan pursuant to that statute for any other reason.

Intervenors argue that K.A.R. 5-3-5j, requires "applicants" to "satisfactorily maintain each component of the[ir] water conservation plan[s]" after implementing them. But "applicants" in that regulation refers to applicants for a permit to appropriate water pursuant to the KWAA, ***not*** transfer applicants. K.A.R. 5-3-5j and K.S.A. 82a-733(a).

In fact, DWR's regulations demonstrate that Intervenors' argument is without merit. The water transfer regulations, K.A.R. 5-50-1, *et seq*., do not implement K.S.A. 82a-733. The regulations that Intervenors mistakenly rely on, K.A.R. 5-3-5h through K.A.R. 5-3-5l, implement K.S.A. 82a-733, ***not*** K.S.A. 82a-1502(b) or any other WTA provision. Instead, K.A.R. 5-3-5h through K.A.R. 5-3-5l were each "Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-733; effective Sept. 22, 2000." In contrast, the WTA regulations, K.A.R. 5-50-1, *et seq.*, are authorized by and implement the WTA statutes, K.S.A. 82a-1501, *et seq.*

Even if the Chief Engineer had incorporated a regulation like K.A.R. 5-3-5j into the water transfer regulations, it would not compel the punitive result Intervenors seek because conservation plan requirements imposed by the Chief Engineer must be consistent with the KWO Guidelines, and both K.A.R. 5-3-5l and the Guidelines permit amendments to conservation plans. K.S.A. 82a-733(c). (Ex. 817 at Cities 0021355.)

Because the water-use goals in the Cities' plans are aspirational and especially because they can be amended, they do not rise to the level of "regulatory constraints" under the Guidelines, the WTA, or K.S.A. 82a-733. (Ex. 817 at Cities 0021342, Cities 0021354–55.) The approved Hays' Conservation Plan states:

> **The City goal is to use less than 95 GPCD** which is far less than a reasonable 143 GPCD 5 year regional average. Our City intends to be the leader in municipal conservation in Kansas by carrying out the specific actions in the following plan.

(Ex. 1-52 at Cities 0002860.)

Intervenors ask the Panel to twist this aspirational "goal" into an enforceable and punitive cap. Nonsense. The WTA conservation requirement simply asks prospective transfer applicants to be good stewards of their existing resources. But the WTA and the Guidelines do not require cities to ratchet down to the last drop of water. In fact, Guidelines cannot "require curtailment in water use which will not benefit other water users or the public interest." K.S.A. 74-2608(c)(5). And conservation plans must "consider the reasonable needs of the water user ***at the time***," confirming that conservation plans can be amended. K.S.A. 74-2608(c)(7) (emphasis added.) Intervenors ignore the fact that the Guidelines permit approval of conservation plans with GPCD goals that are up to ***25 percent above*** the regional average, and even higher if there are "very unusual local conditions." (Ex. 817 at Cities 0021344.)

Intervenors attempt to turn the statute and the KWO Guidelines upside down—asking the Panel to punish the Cities' conservation efforts in violation of Kansas public policy[3] and to reward Water PACK members who have done nothing to conserve. In so doing, Intervenors twist the meaning of the Guidelines and the Cities' conservation plans. The transfer will simply provide Hays and Russell with what every other municipality in the State already enjoys: ***access to*** a reliable and drought-resistant water source that will enable future growth.

V. Intervenors ask the Water Transfer Hearing Panel to adopt a perverse incentive that would effectively eliminate proactive municipal conservation measures.

Intervenors ask the Panel to adopt a policy that would discourage conservation; an ironic position in light of the Intervenors' hollow rhetoric about groundwater being a "critical resource." (*See, e.g.*, Intervenors' Reply on Intervention at 2.) Intervenors' approach would perversely incentivize municipalities to game the system by amending their conservation plans 12 months before filing a transfer application increasing their goals to 25% more than the regional average. Intervenors' argument is also contrary to the 2015 Long-Term Vision for the Future of Water Supply in Kansas, which specifically calls for a greater emphasis on water transfers. (Ex 1-57 at Cities 0002987, 0002958, 0002987, and 00029995.)

It is uncontroverted that the Cities are the premier stewards of water in the entire State. It is also clear that Water PACK members are among the worst. (*See, e.g.*, Letourneau Test., Tr. Vol. 4 at 1009:3–5 ("I know that absolutely no one [Water PACK member] out there has done a voluntary reduction in any type of water use."); Wenstrom Test., Tr. Vol. 8 at 1418:9–21(Q: "[A]re you aware of anybody ... within 3 miles of the ranch who has also made ... a voluntary 29 percent

[3] *See* footnote 5.

reduction....? A: No, I have not and for good reason."[4]); Ex. 2683 (2022 Term permit issued in response to Mr. Wenstrom's application to withdraw "water bank safety deposit credits"); Ex. 2683 at Cities 0103398–99 (Notice of Non-Compliance showing Wenstrom's over-pumping).)

Nevertheless, Intervenors ask the Panel to punish the Cities, discourage conservation, and deny the Cities a drought-resistant water source and any opportunity for future growth even though Water PACK members will still be able to divert their full authorized quantities. If, as Intervenors argue, having access to more water than they actually use in a given year meets the definition of "waste" under Kansas law, which it clearly does ***not***, every City—and many irrigators—in Kansas would be guilty of waste. (*See* Section VII for additional discussion of "waste.")

Intervenors' position conflicts with Kansas law, which promotes conservation of the State's water resources.[5] Indeed, there are numerous statutes that reflect the policy that requires consideration of previously implemented conservation measures.[6] The WTA requires consideration of the conservation measures adopted by both the applicant ***and*** protestors. The statutory intent is clear: no weight should be attributed to the Intervenors' protests because the Cities have taken every reasonable step to conserve ***and*** the Intervenors ***have not.***

[4] Mr. Wenstrom's "good reason": irrigation water rights are "very different" than municipal water rights. Farmers must have 18 inches of irrigation water to grow corn and "we're going to do ***whatever it takes*** to get production." "[I]f somebody says that we're limited to 14 [inches], for example, then corn is out, we can't plant corn anymore." Tr. at 1419:2–23 (emphasis added).

[5] Numerous statutory sections in the KWAA and elsewhere support this statement. *See, e.g.*, K.S.A. 2-1902, K.S.A. 2-1904(f)(7), K.S.A. 74-2622(d)(3), K.S.A. 82a-733, K.S.A. 82a-741, K.S.A. 82a-744, K.S.A. 82a-745, K.S.A. 82a-903, K.S.A. 82a-907, K.S.A. 82a-928, K.S.A. 82a-1020, and K.S.A. 82a-1028.

[6] *See* footnote 5.

VI. Measuring the Cities' needs based on average regional use is reasonable, fair, and entirely consistent with Kansas law.

Intervenors are critical of the regional GPCD used to project future water needs during the KWAA change application proceeding, obtusely describing it as "virtually risible." (Br. at 32.) Their attack on the Master Order in this proceeding is not permitted.

KWO Guidelines allow and, in fact, encourage the use of the regional average in municipal conservation plans for utilities whose GPCD is below the regional average and even permits conservation goals that are 25% greater than the regional average. The Guidelines state:

> A water utility whose current GPCD is below the regional average ***may use*** its current GPCD as its goal. A water utility whose current GPCD is above the regional average ***should*** choose a GPCD goal that is lower than its current GPCD. No water utility ***should choose a GPCD goal that is more than 25 percent above the regional average,*** regardless of its current usage, ***unless very unusual local conditions can be substantiated that preclude its use.***

(Ex. 817 at Cities 0021344 (emphasis added).)

Water Pack falsely asserts that the Cities failed to project future water needs on both a gross and a gallons per capita per day ("GPCD") basis. (Br. at 9). Their argument is belied by the evidence. *See, e.g.*, Ex. 1, at 44–46, ¶¶ (r) and (s); *id.* at 47–48, ¶¶ (v) and (w); Ex. 1-52; Ex. 1-68; Ex. 1-4 at Cities 0000391–403; Ex. 3-2 at Cities 0008505–16; Ex. 285 at Cities 0017640; Ex. 819; Ex. 843; Ex. 918 at Cities 0024537–42. *See also*, Exs. 1-73–1-91.)

Intervenors ask the Panel to ignore the Guidelines and to turn a blind eye to other evidence.

VII. Approval of the transfer will not "constitute prohibited waste."

As part of their argument that the Cities should be punished for their past conservation efforts, Intervenors make a ridiculous argument that approving the water transfer would "constitute prohibited waste," citing K.A.R. 5-1-1(mmmm). (Br. at 12, 37–38.) Intervenors' argument is based on the absurd notion that there is a zero-sum relationship between reasonable need and waste; that

the use of ***one drop*** of water more than what Intervenors consider to be the Cities' "reasonable need" is prohibited "waste." Approving an application to transfer water is not "waste" under the KWAA, the WTA, or common sense.

K.A.R. 5-1-1(mmmm) defines "waste of water" as "any ***act*** or omission that causes … (4) the ***application*** of water to an unauthorized beneficial use in excess of the needs for the use." The "act" of approving the transfer will not, by definition, "cause" the "waste of water," which requires an "***act"*** that "causes … ***the application*** of water" in excess of needs. K.A.R. 5-1-1(mmmm)(4). To "apply" water, it must first be diverted. Approval of the transfer will permit the Cities to divert water from the R9 Ranch, to transport it to Hays and Russell, and to apply it to an authorized beneficial use. Water diverted from the R9 Ranch can only be "wasted" if the Cities divert and then apply it "in excess of the needs for the use." Merely approving the transfer cannot "cause," proximately or otherwise, the diversion and application of water in excess of the Cities' needs.

More importantly, the Cities do not seek to ***divert*** or ***apply*** more water than they need, nor is there any evidence that they have ever, or will ever, do so. In fact, all of the evidence is to the contrary. (*See* the discussion of the Cities' conservation efforts in Section III of their Proposed Findings of Fact and Conclusions of Law and Section IV (filed on Sept. 29, 2023).)

Intervenors' arguments, including their arguments about waste of water, are based on their incorrect assumption that the Cities will divert a full 4,800 acre-feet each and every year for 51 years. The evidence shows that Intervenors' assumption is both false and totally impractical. The project will be constructed in two phases; only 7 of the 14 municipal wells will be drilled during the first phase. Diversion of water from the R9 Ranch will increase as needs increase. (Dougherty Test., Tr. Vol. 1 at 100:6–102:9; 213:3–14, and Heidrick Test., Tr. Vol. 5 at 1093: 15–17.)

VIII. The plan of design complies with the WTA because rate and quantity are the only factors that potentially impact Intervenors.

Intervenors argue that the Cities have failed to provide sufficient information to assess the impacts of the proposed plan of design, which, if applicable, would require "sufficient detail to enable all ***parties*** to understand the impacts of the proposed water transfer." K.S.A. 82a-1502(c)(6) (emphasis added). (Br. at 30.) The WTA requires balancing the benefits of approval and denial if, but only if, the proposed transfer reduces the amount of water required to meet the needs of present or future users which this transfer does not. (K.S.A. 82a-1502(a)(1); I.O. at 60, ¶ 288a.i.2. *See also* Section VI of the Cities' Brief.) Nevertheless, Intervenors are the only "parties" who are arguably entitled to information about any "impacts" the proposed water transfer might have.

Intervenors ignore mountains of evidence and skew the evidence they do cite to fit their false narrative. Intervenors ignore Jeff Heidrick's testimony and related exhibits that, as discussed below, address the plan of design in some detail. That omission cannot credibly be characterized as an unintentional oversight. Intervenors are not painting the entire picture because they want the relevant parts to remain hidden. Intervenors then mischaracterize testimony from Hays Manager, Toby Dougherty, arguing that there is no plan of design. (Br. at 26.)

It is neither feasible nor prudent to make the significant investment to develop exhaustive plans that may later be fundamentally altered depending on the outcome of the water transfer proceeding. (*See, e.g.*, Ex. 3-2 at Cities 0008516.) Intervenors ignore those practical limitations by asking the Panel to hold the Cities to an impossibly high standard.

Intervenors' handwringing is based on their unwarranted and indefensible fear that diversion of water from the R9 Ranch will impair their irrigation rights in the distant future. The Cities presented extensive evidence of the location of the proposed municipal wells and the proposed plan of operation from Burns & McDonnell engineer, Jeffrey Heidrick. Mr. Heidrick

testified about Exhibits 1-1, 1-12, 1-37, 1-38, 1-39, 1-40 1766, 1767, 2686, 2687, and 2832 which, together, illustrate the conceptual design and construction of the planned wellfield and related infrastructure. These topics, including Mr. Heidrick's testimony, are addressed in ¶¶ 694–753 of the Cities' Proposed Findings and the numerous citations to the record.

The Cities' evidence included maps and specific details showing the location of the proposed municipal wells and the maximum quantities and rates of water to be diverted from those wells (Cities' Proposed Findings at ¶¶ 694–97) as well as details about the source of supply, and the spacing between the new municipal wells and surrounding irrigation wells (*id.* at ¶¶ 698–705). This is all of the information that Water PACK and its members need to evaluate the impacts that the project could conceivably have on the local aquifer. Of course, the Cities presented much, much more than that.

For example, Mr. Heidrick testified about the two design contracts, the Hays R9 Ranch Pipeline Project Agreement, the Hays R9 Ranch Wellfield Project Agreement, as well as other detailed information about the planned wells, gathering lines, raw water storage, and a raw water pump station. (Exs. 1766 and 1767; Cities' Proposed Findings at ¶¶ 708–10.) Mr. Heidrick also testified about the conceptual design and construction of the planned R9 Ranch wellfield, related permitting and other regulatory issues, the selection of optimum well locations, pertinent physical characteristics of the R9 Ranch, well-design parameters, well houses, variable frequency drives, flow meters, check valves, isolation valves, testing tees, sample ports, pressure gages, air relief valves, supervisory control and data acquisition system (SCADA) controls, communication equipment, access roads sufficient to support heavy construction vehicles, and overhead power lines and transformers. (*Id.* at ¶¶ 712–21.) The Cities further presented evidence of the planned raw-water collection system, including a 1-million gallon storage tank, a custom-built high-service

pump station with information about the below-grade enclosure, electrical control and telemetry system, site security systems, and an expanded network of monitoring wells to track static water levels and water quality, including amendments to the water-monitoring plan to accommodate concerns expressed by GMD 5. (*Id.*)

The Cities presented evidence relating to the planned 20-inch raw-water pipeline from the R9 Ranch to Schoenchen, Kansas, where it will connect to Hays' existing water system as well as a 10–12 inch pipeline from Schoenchen to Russell's Pfeifer wellfield connecting to its respective system, a corridor between the R9 Ranch and Schoenchen within which the transmission line will be built, and a PowerPoint presentation summarizing the design process. (*Id.* at ¶¶ 722–25; Ex. 1-40.) The transmission lines will be buried and will have no possible effect on any Water PACK member or the County.

The evidence goes on and on, yet Intervenors argue that the Cities presented no evidence, that still more information is needed to ascertain the project impacts, and the water transfer application "cannot be approved" until the Cities do so. (Br. at 31–32 and 62.) But Water PACK fails to identify ***how*** the evidence should, or even could, be more specific, fails to identify ***any*** impact that it is unable to understand from the existing evidence, and fails to address how any of this possibly relates to the property or interests of its members—let alone the State as a whole.

IX. Nothing in the WTA or DWR regulations suggests that a water transfer application can be denied because an applicant has not made final financing arrangements.

Intervenors argue, with no citation to authority, that the transfer should be denied because the Cities do not have a plan to finance the project. (Br. at 34.) Intervenors do not attempt to explain how a financing plan impacts them or why this argument is otherwise relevant. After all, they have nothing to fear because the Project will never be built if the Cities cannot obtain financing.

Besides being a red herring and irrelevant, Intervenors' argument is simply wrong. Hays has collected a half-cent sales tax to fund water projects since 1992. (Ex. 332.) And Hays is eligible for funding through the Kansas Drinking Water State Revolving Fund. (I.O. at 59, ¶ 285.g.; Dougherty Test., Tr. Vol. 2 at 336:23–337:10.) Intervenors introduced no controverting evidence, and "[u]ncontroverted evidence should ordinarily be regarded as conclusive." *In re Doe*, 19 Kan. App. 2d 204, 210, 866 P.2d 1069 (1994) (citations omitted).[7]

X. Intervenors' improper attempts to inject new expert rebuttal testimony should be disregarded.

The Intervenors cite evidence outside of the record in violation of their agreement and the Presiding Officer's orders. In what might be considered harmless violations, Intervenors cite census data (Br. at 2, notes 2 and 3) and a 2023 Kansas Geological Survey Report, falsely implying that the report is actually in the record. (*Id.* at 12 note 16).

Beyond that, however, the Cities presented uncontroverted expert testimony that Intervenors now improperly seek to rebut. The deadline to pre-file rebuttal expert witness disclosures was June 28, 2023. (April 19, 2023, Prehearing Order.) Moreover, the Parties agreed, and the Presiding Officer ordered, that no new evidence was allowed after May 31, 2023. (Trans. Vol. 9, at 1527:3–9; *id*. at 1545:6–7; I.O. at 10, ¶ 35.a. ("The parties further agreed that no additional evidence may be submitted to the record absent good cause shown and without further

[7] Intervenors arguments are based on a ± 20-year planning horizon (Br. at 10, 17, and 19; Walker Report at 4.) ignoring the fact that a 20-year planning horizon is not reasonable for Hays or Russell. (Doughtery Test., Tr. Vol. 1 at 193:1–194:1; 196:9–18; 201:1–203:17; Vol. 2 at Vol. 2 at 356:9–357:4; 365:16–20; 369:5–370:8; Ex. 195 at Cities 0016557–61.) The Master Order approved a 50-year planning horizon. (Ex. 1-3 at 35–37, ¶¶ 171–183.)) Longer horizons are used by other planners (Ex. 1-47 at Cities 0002721) and the 2015 Vision for the Future of Water Supply in Kansas plans for 50 years. (Ex. 57 at Cities 0002948 and 3002.)

order of the Presiding Officer following further hearing or with the consent of all parties."). *See also* I.O. at 9, ¶ 29; *id.* at 9–10, ¶ 32.)

In violation of their agreement and the Presiding Officer's Orders, Intervenors attack the opinions of Dr. Anthony Layzell (the Cities' paleoclimatologist) and Dr. Jeff Basara (the Cities' climate-modeling expert) by citing evidence outside of the record. (Br. at 18.) The testimony of those experts was uncontroverted as of the June 28, 2023, deadline and at the hearing. (I.O. at 33, ¶¶ 120–21.) Intervenors also cite new engineering information relating to Mr. Waddell's testimony about the estimated costs of the Project. (Br. at 25–26.)

The Panel should not allow Intervenors to inject improper rebuttal expert opinions or other evidence in violation of their agreement and the Presiding Officer's Orders. These violations are not trivial because the WTA clearly states that the Panel's review of the Initial Order "shall be based on the record of the hearing." K.S.A. 82a-1504(b). *See also*, K.S.A. 77-527 (d) and (h).

XI. Transferring up to 6,756.8 acre-feet per year limited to a ten-year rolling average of 4,800 acre-feet per year is "sustainable" and will not impair existing water rights near the R9 Ranch.

Diversion of up to 6,756.8 acre-feet per year from the R9 Water Rights will not impair existing water rights because the Master Order reduced the quantities authorized for irrigation use as required by the consumptive use regulations, K.A.R. 5-5-3, K.A.R. 5-5-8, and K.A.R. 5-5-9 (1994 version). That quantity is sustainable under Kansas law because "'[s]ustainable yield' means the long-term yield of the source of supply, including hydraulically connected surface water or groundwater, ***allowing for the reasonable raising and lowering of the water table***." K.A.R. 5-25-1(l) (emphasis added). *See also,* K.S.A. 82a-711(c) and K.S.A. 82a-711a. (Ex 1-2 at Cities 0000148, ¶ 224.) Nevertheless, the Master Order reduced the quantity that the Cities could divert from the R9 Ranch even more, to a ten-year rolling average of 4,800 acre-feet per year. (*Id*.)

Intervenors assert that the transfer must be denied because the quantity requested is not sustainable based on the Cities' definition of "sustainability," which they assert is found in Paul McCormick's Groundwater Modeling Report, Ex. 1-3 at Cities 0000356. (Br. at 12, 33.) Besides misconstruing the substance of Mr. McCormick's conclusions, Intervenors cite no authority for the absurd proposition that the WTA incorporates the definition of "sustainability" from a report prepared by an applicant's engineer and then prohibits transfers that are not "sustainable" based on that definition. In fact, sustainability is not a factor to be considered in a WTA proceeding unless reductions in the static water level impair existing rights. K.S.A. 82a-1502(b).

Intervenors concede, as they must, that impairment occurs only when "the static water level is unreasonably ... lowered," citing K.S.A. 82a-711a. (Br. at 33. *See also* Br. at 34 quoting portions of K.S.A. 82a-711(c), and Trans. Vol. 8, at 1450:21–1451:17 where Intervenors' counsel agreed that sustainability allows for reasonable lowering of the aquifer, stating that "we're not fighting about whether there is some other definition for our purposes of sustainability.")

Nevertheless, throughout the change and transfer proceedings, Water PACK has argued that any decline in the static water level caused by the Cities' diversions will impair its members' junior and senior water rights, while its members' continued depletion of the aquifer will not. (Ex. 2462 at Cities 0088103–04 (Dr. Keller stated: "Groundwater levels in the vicinity of the R-9Ranch are declining. This is happening despite a reduction of pumping on the ranch as circles are dried up in anticipation of the pending transfer."); Ex. 1-2 at Cities 0000137, ¶ 160 and Ex. 2462 at Cities 0088024, ¶ 2 (Water PACK defines sustainable yield as "the maximum amount of water that … does not contribute to present and future lowering of the water table in and around the R9 Ranch.")

The latest iteration of this bogus argument asserts that because of the last-antecedent doctrine,[8] "beyond a reasonable economic limit," in the K.S.A. 82a-711(c) definition of impairment modifies "the unreasonable deterioration of the water quality" but not "the unreasonable ... lowering of the static water level." Although it is not clear how it helps the Intervenors, they argue that whether the Cities' diversions will cause unreasonable declines cannot consider any economic effects of a lower water level. (Br. at 35.)

Nevertheless, Intervenors do not explain how making "beyond a reasonable economic limit" inapplicable to "the unreasonable lowering of the static water level" also eliminates "unreasonable" so that any decline, whether reasonable or not, causes impairment when K.S.A. 82a-711a, which must be considered *in pari materia*, states, in part: "in determining such reasonable ... lowering of the static water level ... the chief engineer shall consider the economics of diverting or pumping water...."

Conclusion

The Cities' Water Transfer Application should be approved in full.

[8] "Under the last antecedent rule, qualifying words are 'ordinarily confined ... to the words and phrases immediately preceding.'" *Bruce v. Kelly,* 316 Kan. 218, 231, 514 P.3d 1007 (2022) (citations omitted). However, the last antecedent rule should not be applied to reach a certain result where the language of the statute is plain and unambiguous. *Bruce v. Kelly, supra,* quoting *State v. Kleypas,* 272 Kan. 894, 950, 40 P.3d 139 (2001) and *Link, Inc. v. City of Hays*, 266 Kan. 648, 654, 972 P.2d 753 (1999).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was served this 7th day of June, 2024, by electronic mail to the following:

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