BEFORE THE WATER TRANSFER PANEL
STATE OF KANSAS

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

INTERVENORS' MEMORANDUM IN SUPPORT OF MOTION FOR RECUSAL OF CHIEF ENGINEER FROM PARTICIPATION IN HEARING PANEL

I. INTRODUCTION

The Kansas cities of Hays and Russell (the "Cities") seek approval under the Water Transfer Act to transfer water via a pipeline from a location in Edwards County, Kansas to the respective cities. After an evidentiary hearing in which the Division of Water Resources ("DWR") fully participated, the designated Presiding Officer issued an initial order approving the transfer request. Pursuant to K.S.A. 82a-1504(b),[1] a Hearing Panel (the "Panel") will now be convened to review the initial order and render a final administrative determination in respect to the application. The Chief Engineer of the Division of Water Resources is a designated member and the chair of the Hearing Panel.[2]

[1] "(b) An order of the presiding officer disapproving or approving a water transfer, in whole or in part, shall be deemed an initial order. The panel shall be deemed the agency head for the purpose of the Kansas administrative procedure act and shall review all initial orders of the presiding officer in accordance with the Kansas administrative procedure act. K.S.A. 82a-1504.

[2] "The water transfer hearing panel shall consist of the chief engineer, the director and the secretary. The chief engineer shall serve as chairperson of the panel." K.S.A. 82a-1501a.

As is contemplated by K.S.A. 77-514(b),[3] Intervenors seek the Chief Engineer's recusal from the Hearing Panel (the "Panel") because the division he heads, the Kansas Division of Water Resources,[4] has prejudged the core merits of the matter to be considered by the Panel.[5] To countenance the Chief Engineer's service on the Panel would require overt repudiation of accepted notions of procedural due process.

Two salient incontrovertible facts dictate a decision granting the requested relief. First, as is apparent from their comment,[6] DWR is not neutral in relation to the Water Transfer Act application to be considered by the Panel. It unreservedly supports approval of the application. Second, in the parlance of the Chief Engineer's job description, he is responsible for ". . . directing the operations of the Division of Water Resources in the regulation of water usage. [The] [w]ork involves the interpretation of laws, and the formulation, adoption and implementation of rules, regulations, policies, and programs concerning water resources."[7] The combination of DWR's prejudgment and the Chief

[3] "(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest." K.S.A. 77-514.

[4] (d) "Chief engineer" means the chief engineer of the division of water resources of the Kansas department of agriculture. K.S.A. 82a-1501(d).

[5] "DWR believes that the record supports the conclusion that approval of the Application is appropriate and lawful." *Comments of DWR Regarding the Application of the Cities of Hays, Kansas and Russell, Kansas for Approval to Transfer Water from Edwards County, Kansas Pursuant to the Kansas Water Transfer Act* at 8 (October 27, 2023).

[6] Note 5, *supra*.

[7] *See* attached Exhibit A; *see also* K.S.A. 82a-706 ("The chief engineer shall enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation.").

Engineer's overall administrative responsibility and authority demonstrates actual structural bias and the intolerable appearance of disqualifying impropriety.

The Kansas Supreme Court has addressed the constitutional requirement for unbiased administrative review of adjudicative decisions. "[I]t is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process. This principle applies to administrative agencies which adjudicate as well as to courts." *Davenport Pastures, LP v. Morris Cnty. Bd. of Cnty. Comm'rs*, 291 Kan. 132, 139, 238 P.3d 736 (2010) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009)). Though palpable bias is present and demonstrable here, proof of actual bias is not necessary. The test is the risk of actual bias. "[D]ue process is violated when, under all the circumstances of the case, the "probable risk of actual bias [is] too high to be constitutionally tolerable." *Id.* at 146 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

To quote Justice Biles' concurrence in *Davenport,* as applicable here, ". . . this [is] not a close call." *Id.* at 150.

II. THE BACKGROUND AND CONTEXT

The principal facts are these. The Water Transfer Act (the "Act") application (the "Application") at issue was heard July 19 through July 31, 2023 with Administrative Law Judge Matthew A. Spurgin presiding. The Cities invoked the Act in seeking approval to transfer water via a pipeline from a location in Edwards County, Kansas known colloquially as the R9 Ranch.

The proposed transfer is characterized as an interbasin transfer. Interbasin water transfers convey water from one river basin to another using non-natural means, such as

pipelines, aqueducts, or canals. Interbasin transfers can significantly affect water supplies, hydrology, and the environment in both the donor and receiving basins.

The Cities' efforts to transfer water from the R9 ranch have proceeded on two tracks. The Cities earlier filed and prosecuted a case before the Chief Engineer to change the beneficial use and place of use of the water rights. The former Chief Engineer contingently approved the change. That decision was appealed to the Edwards County District Court where the contingent approval was affirmed. Water PACK then sought appellate review. The change of use proceeding is presently pending before the Kansas Supreme Court. The Supreme Court has remanded the case to the district court for additional fact finding in relation to the question of constitutional standing.

The Act was initially adopted in 1983 and then amended in 1993. The Act defines a "water transfer" to mean "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 of such water."

In considering the requirements and constraints of the Act, the Panel is not writing on a blank slate. Though the Presiding Officer made several statements during the course of the July hearing indicative of his belief that the hearing over which he presided was a first under the Act, that belief was only correct if confined to the Act's present iteration. Squarely at issue in *Water Dist. No. 1 of Johnson Cnty. v. Kansas Water Auth*[8] was an

[8] 19 Kan. App. 2d 236, 866 P.2d 1076 (1994).

application under the original Act to transfer 23,000 acre/feet of water. This is the Court's summary of the controversy:

> Water District No. 1 of Johnson County (the District), a large water utility, applied for a permit to transfer 23,000 acre feet of water per year from the Missouri River pursuant to the Water Transfers Act, K.S.A. 82a–1501 et seq. The District adopted a water conservation plan in conformity with the statutory requirements of the act. The Kansas Water Authority (KWA), the agency responsible for approving water transfers, approved the District's application, but conditioned its approval upon the District meeting conservation goals exceeding the guidelines issued by the Kansas Water Office. The District sought review of that decision in district court pursuant to the Act for Judicial Review and Civil Enforcement of Agency Actions.

Id. at 237.

The dispute in the case centered on the question of the water district's reasonable water needs.

> The KWA believed a stricter gpcd goal was desirable in order to "promote water conservation. Prior to voting on the final order, certain members of the KWA spoke eloquently on the need for water conservation practices in this state. It is beyond debate that water conservation is necessary in this state and that it serves to protect the public interest.

Id. at 243.

Buttressed by relevant and broadly accepted principles of Western states water law, the decision in *Water One* reinforces that which is apparent — the impetus for the Act and the *raison d'être* for its existence are to ensure that large-scale transfers of water are limited to amounts consistent with the present and reasonably projected needs of the applicant.

III. DISCUSSION

A. THE PANEL IS AN ADJUDICATORY BODY

In considering the initial order entered in this matter, the Panel will sit as an adjudicatory body. "Adjudicatory actions are defined as actions that 'culminate in final determination affecting personal or property rights.' (citation omitted). Before such rights may be affected, a hearing must be made available." *Reifschneider v. State*, 266 Kan. 338, 345, 969 P.2d 875, 879 (1998). Adjudicatory proceedings in which a determination of personal or property rights are at stake must be conducted consistent with procedural due process. *Davenport, supra*. Due process mandates that the hearing officer remain neutral, devoid of any preexisting prejudicial interest or bias that could compromise the officer's capacity to impartially assess the evidence. If the hearing officer has prejudged the controversy, or there is an appearance of bias or prejudgment, the officer must recuse.

B. THE STANDARD FOR RECUSAL

The standard for recusal requires an examination not of the adjudicator's subjective bias, but whether, under all circumstances, there exists an unconstitutional potential for bias. This objective standard ensures that the adjudication process remains fair and impartial, the cornerstone of procedural due process. Due process is violated when the probability of actual bias by a decision-maker is too high to be constitutionally tolerable. *See Uhrich & Brown Ltd. P'ship v. Middle Republican Nat. Res. Dist.,* 315 Neb. 596, 998 N.W.2d 41, 51–606 (2023); *Davenport, supra* at 146.

"[T]he standard for disqualifying an administrator in an adjudicatory proceeding because of prejudgment is whether "'a disinterested observer may conclude that (the decisionmaker) has in some measure adjudged the facts as well as the law of a particular

case in advance of hearing it.'" *Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1158 (D.C. Cir. 1979) (citation omitted); *see, e.g., Cinderella Career and Finishing Schools, Inc.* v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970). DWR's formal written advocacy for approval of the Cities' transfer application is an archetypical example of disqualifying prejudgment.

C. THE CENTRALITY OF PUBLIC PERCEPTION

The legitimacy of any adjudicatory system hinges on twin concepts — the reality of fairness and the public perception that the process is free from actual or perceived bias. *Morgan v. United States, 304 U.S. 1, 14–15, 58 S. Ct. 773, 775, 82 L. Ed. 1129 (1938)* ("in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"); *Adams v. Marshall*, 212 Kan. 595, 601, 512 P.2d 365, 371 (1973)("An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open."); *see also*, *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 90, 133 Cal. Rptr. 2d 234, 242-243 (2003)("Just as in a judicial proceeding, due process in an administrative hearing also demands an *appearance* of fairness and the absence of even a *probability* of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena,

militate in favor of assuring that such hearings are fair.")(emphasis in original); *Botsko v. Davenport C.R. Comm'n*, 774 N.W.2d 841, 850 (Iowa 2009)("After stating the broad general principles of procedural due process, the *Nightlife* court emphasized that due process in the administrative setting required 'the *appearance* of fairness and the absence of even a *probability* of outside influence on the adjudication.'")(emphasis in original).

DWR has by its comment assumed an adversarial posture relative to the Intervenors. Whether characterized as manifest actual bias or is viewed as unacceptably indicative of disqualifying prejudgment on the part of the Chief Engineer, elementary notions of due process require the Chief Engineer's recusal.

D. PREHEARING EXPRESSIONS OF OPINION COMMONLY RESULT IN RECUSAL

Because the appearance of fairness is recognized as an essential element of due process, adjudicators are frequently disqualified from participation in an administrative hearing merely because they have voiced prehearing opinions that raise doubts regarding their impartiality. *See, e.g., In re Rollins*, 481 So. 2d 113, 121 (La. 1985) ("The secretary's statements have made it extremely difficult for her to change her position even in the event that evidence adduced at the hearing should warrant it."); *see also Nasha L.L.C. v. City of L.A.*, 125 Cal. App. 4th 470, 484 (2004) (holding that clearly advocating position against project in newsletter article prior to hearing "gave rise to an unacceptable probability of actual bias" requiring recusal); *Mun. Servs. Corp. v. State*, 483 N.W.2d 560, 562, 564 (N.D. 1992) (ruling that hearing officer's statement of firm opposition to permitting landfill prior to hearing constituted precommitment to adjudicative facts).

Examples of mandated recusal resulting from the appearance of prejudgment or bias abound. One, with facts substantially similar to those present here, is *Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298 (Fla. Dist. Ct. App. 2002). There, following an administrative law judge's initial order recommending that a permit be issued to allow certain mining activities, the Department of Environmental Protection (DEP) secretary who was responsible for reviewing the ALJ initial order and issuing a final decision, made this statement:

> We have felt all along that our actions were fully consistent with state laws and Department rules. The public can feel comforted in the knowledge that a totally impartial arbiter has found that the will of their elected representatives is being carried out by the executive branch. The professionals at DEP have dedicated their careers to protecting the environment and their good-faith efforts have been affirmed. At the same time, we constantly look at ways to do better in all areas. As we pledged to the Chairman of the House Natural Resources and Environmental Protection Committee, Rep. Harrington, an internal review of the phosphate mining process is ongoing. With the guidance now provided by Judge Stampelos, that review can now be targeted and accelerated. In the end, we hope to have a process that will serve the public even better.

Id. at 300.

The County sought disqualification of the DEP secretary alleging that it believed that it could not receive a fair and impartial hearing from the agency head on its exceptions to the recommended order. The Court found that disqualification was warranted.

> Pursuant to Florida's statutory scheme, after the recommended order issued, the secretary assumed the role of adjudicator of the legality of the hearing officer's action. In this role, an agency head does not have as much discretion as a trial judge; rather, the agency head sits in a role similar to an appellate judge, determining whether the findings of fact are supported by competent substantial evidence and overturning incorrect applications of law when it explains its reasons for doing so.[2] The timing and content of Secretary Struhs' statement were inconsistent with his role of adjudicator.

> Issuing the statement on the same day that the ALJ issued his recommended order could lead a reasonable person to conclude that, for all practical purposes, the agency head regarded the issuance of the recommended order as the conclusion of the litigation, with the forthcoming final order a mere formality. The agency head's statement went to the very heart of the issue which would be resolved in considering exceptions and issuing a final order—whether department staff correctly concluded that the permit should issue. In this case, the agency head's perceived need to act in his political capacity was outweighed by the need for parties to believe they are involved in a fair process.[3] These factors, along with others not discussed in this opinion, compel us to find that the motion was legally sufficient and should have been granted.

Id. at 301.

The same conclusion was reached in *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754 (D.C. Cir. 1964), *vacated*, *FTC v. Texaco*, *Inc.* 381 U.S. 739 (1965).[9] In *Texaco*, the FTC commission chairman gave a speech, prior to submission of an unfair competition complaint to the commission for decision, which used the respondents as an example of a company that had violated the law. The lower court held that by appearing to have adjudged the specific facts as well as the law of the case in advance of hearing the evidence, the chairman denied respondents their due process. The Supreme Court agreed. "In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act." *Id. at 760.*

Also germane and instructive is the *Model Code of Judicial Conduct for Federal Administrative Law Judges*: "An administrative law judge should disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be

[9] "The United States does not seek review of the ruling that Chairman Dixon was disqualified from participating in this case. We therefore venture no opinion as to the correctness of that conclusion."

questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning the proceeding." National Conference of Administrative Law Judges, Judicial Administration Division, American Bar Association, *Model Code of Judicial Conduct for Federal Administrative Law Judges*, 10 J. NAT'L ASS'N ADMIN. L. JUDGES. (1990) available at https://digitalcommons.pepperdine.edu/naalj/vol10/iss2/4 (last accessed February 19, 2024 at 5:25 pm).

IV. CONCLUSION

To be clear, this motion for recusal should not be construed as questioning the Chief Engineer's integrity or as impugning his academic qualifications or professional capabilities. But "justice must satisfy the appearance of justice, and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." (internal citation and quotation marks omitted). *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980).

Ultimately, evidence of or the appearance of prejudgment requires recusal. That DWR, for which the Chief Engineer is responsible, has prejudged the merits of the Cities' application is not disputable. The Chief Engineer must recuse and refrain from participation in any manner in the Panel's work and deliberations.

# # #

Dated February 22, 2024
Overland Park, Kansas

LEE SCHWALB LLC

By/s/Charles D. Lee
Charles D. Lee, Esq., KS Bar 10277
Myndee Lee, Esq. KS Bar No. 20365
Micah Schwalb, Esq., KS Bar 26501
7381 West 133rd – Second Floor
Overland Park, KS 66213
913-549-8820 (o)
clee@leeschwalb.com
mlee@leeschwalb.com
mschwalb@leeschwalb.com
Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2024, the foregoing was electronically served to all counsel of record by email as follows:

FOULSTON SIEFKIN LLP
David M. Traster, KS #11062
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
T: 316-291-9725|F: 316-267-6345
dtraster@foulston.com

Daniel J. Buller, KS #25002
7500 College Boulevard, Suite 1400
Overland Park, KS 66210-4041
T: 913-253-2179|F: 866-347-9613
dbuller@foulston.com

DREILING, BIEKER & HOFFMAN, LLP
Donald F. Hoffman, KS #09502
donhoff@eaglecom.net
Melvin J. Sauer, Jr., KS #14638
melsauer@eaglecom.net
111 W. 13th Street
P.O. Box 579
Hays, KS 67601-0579
T: 785-625-3537|F: 785-625-8129
Attorneys for City of Hays

WOLK & COLE
Kenneth L. Cole, KS #11003
4 S. Kansas
P.O. Box 431
Russell, KS 67665-0431
T: 785- 483-3711|F: 785-483-2983
cole_ken@hotmail.com
Attorneys for City of Russell

STINSON LLP
Lynn D. Preheim
lynn.preheim@stinson.com
Christina J. Hansen
christina.hansen@stinson.com
1625 N. Waterfront Parkway, Suite 300
Wichita, KS 67206
Attorneys for Big Bend Groundwater Management District No. 5

KANSAS DEPARTMENT OF AGRICULTURE
Stephanie A. Kramer, Staff Attorney
Stephanie.Kramer@ks.gov
1320 Research Park Drive
Manhattan, KS 66502
Attorneys for KDA

KANSAS DIVISION OF WATER RESOURCES
Kate S. Langworthy
Kate.Langworthy@ks.gov
1320 Research Park Drive
Manhattan, KS 66502
Attorneys for the Division of Water Resources

/s/ Charles D. Lee

EXHIBIT A

Chief Engineer/Director Water Resources Division

Job Code	Job Title	Pay Grade
8256B1	Chief Engineer/Director Water Resources Division	38

CONCEPT:
Administrative and professional engineering work in the planning, directing and evaluating of major state wide engineering programs and activities for the Water Resources Division of the Kansas Department of Agriculture. Work involves directing the operations of the Division of Water Resources in the regulation of water usage. Work involves the interpretation of laws, and the formulation, adoption and implementation of rules, regulations, policies, and programs concerning water resources. Responsibilities include directing operations charged with the inspection of dams, levees, and channels, to insure compliance with laws and rules and regulations of the State. Responsibilities include appearing before public groups and representing the state on various committees and river compacts.

TASKS:

- Plans, organizes and directs the evaluation of engineering projects regarding the construction of flood control works, zoning of floodplains by cities; the construction, repair and maintenance of levies; the construction of dams, placing of obstructions in streams; and the changing of course, current, or cross section of streams; establishing of bank lines as boundaries within which counties may clean and maintain stream channels; and bank stabilization and soil erosion control along streams for compliance with state laws, rules, and regulations.
- Establishes rules and regulations based on interpretation of state laws regarding use of water in Kansas.
- Establishes water rights and regulates the appropriation of water for beneficial use.
- Evaluates/approves petitions and applications and issues permits pertaining to drainage districts, dam construction, watershed districts, irrigation districts, and groundwater management districts.
- Participates with other agencies in the preparation of a general, comprehensive state plan of water resources development.
- Plans, develops, and implements long term water resource management strategies.
- Holds hearings, attends conferences, serves on various committees, testifies before the legislature, speaks to civic groups, farm organizations, conservation groups, state and interstate organizations about conservation, control, and use of water in Kansas.
- Represents the agency and the State of Kansas on the Kansas-Nebraska-Colorado Republican River Compact, the Kansas-Colorado Arkansas River Compact, the Kansas-Oklahoma Arkansas River Compact and the Kansas-Nebraska Big Blue River Compact.

LEVELS OF WORK

- Class Group consists of one class.

Minimum Requirements: Licensed as a professional engineer by the Kansas Board of Technical Professions. Seven years of experience in water resources engineering or management, hydrology, and water law administration, including three years of supervisory experience.

REF: 12/13