

**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' MOTION FOR RECUSAL OF CHIEF
ENGINEER FROM PARTICIPATION IN HEARING PANEL**

I. INTRODUCTION

Because of evident organizational bias and the appearance of impropriety, Water PACK and Edwards County (“Intervenors”) move pursuant to K.S.A. 77-514(b)¹ for the recusal of the Chief Engineer, Earl Lewis, from participation in any capacity as a member of the Water Transfer Hearing Panel charged with review and final determination of the Initial Order entered herein by the Presiding Officer. The Division of Water Resources (“DWR”), of which Mr. Lewis is the head, has publicly and in writing prejudged the question of whether the Water Transfer Act application by the cities of Hays and Russell, Kansas (the “Cities”) should be approved.² DWR’s stated position and conclusion is imputable to the Chief Engineer as the head of that division. Disqualification must follow.

“[T]he standard for disqualifying an administrator in an adjudicatory proceeding because of prejudgment is whether “ ‘a disinterested observer may conclude that (the

¹ “(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.

² “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).

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); *accord, Davenport Pastures, LP v. Morris Cnty. Bd. of Cnty. Comm'rs*, 291 Kan. 132, 145-146, 238 P.3d 736, 740 (2010); *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (“[A]n administrative hearing ‘must be attended, not only with every element of fairness but with the very appearance of complete fairness.’”). DWR’s formal written advocacy for approval of the Cities’ transfer application is an archetypical example of disqualifying prejudgment.

To be clear, Water PACK’s motion should not be construed as questioning the Chief Engineer’s integrity or as impugning his academic qualifications or professional capabilities. But “[J]ustice 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).

As good cause for the requested relief Water PACK submits herewith its supporting memorandum.

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Dated February 22, 2024
Overland Park, Kansas

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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:

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