**BEFORE THE WATER TRANSFER PANEL**
**STATE OF KANSAS**

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| 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 |

**The Cities' Response to Intervenors' Motion to Recuse Earl Lewis as member and chairperson of the Water Transfer Hearing Panel**

## I. Introduction.

The Motion to Recuse should be denied for a number of reasons but most importantly because there is no evidence that Earl Lewis has made any decisions about whether the Cities' Water Transfer Application should or should not be approved, or that he otherwise conducted himself in a way that could conceivably give rise to an appearance of impropriety.

Both Intervenors' Motion and its Memo in Support say that they do not question Mr. Lewis's integrity or his academic or professional capabilities. (Mot. at 2 and Br. at 11.) However, those statements appear to be mere lip service. Intervenors cite case after case involving improper conduct of agency heads, and then argue that the facts are "substantially similar to those present here." (Br. at 9.) In fact, there are no similarities, and Mr. Lewis has done nothing improper.

Moreover, there is a presumption that public officers "act fairly, from good motives, and with the purpose and intention of obeying the law. Suspicion, surmise, insinuation, and innuendo are not enough to overthrow this presumption." *Cherokee Cty. v. Kan. Racing & Gaming Comm'n*, 306 Kan. 298, 321, 393 P.3d 601 (2017) (citation and quotations omitted). Thus, the appearance of impropriety is insufficient to constitute a due process violation when there is no evidence that the agency head has prejudged the matter. The cases holding that there is an objective standard for recusal because of a "probable risk of actual bias" do not apply because there is no evidence of a "probable risk," much less "actual bias," in this case.

A motion to recuse should not be used to protest orders with which litigants disagree. *U.S. v. Cooper*, 283 F. Supp. 2d 1215 (2003), *Hall v. Doering*, 185 F.R.D. 639 (1999). Public importance, public notoriety, and the fact that a judge may be generally familiar with the facts of a case is not a basis for recusal. *Tonkovich v. Kan. Bd. of Regents,* 924 F. Supp. 1084 (1996).

Intervenors "seek the Chief Engineer's recusal from the [Water Transfer] Hearing Panel" pursuant to K.S.A. 77-514(b), asserting that the Kansas Department of Agriculture, Division of Water Resources ("DWR"), under the authority of the Chief Engineer, Earl Lewis, "has prejudged the core merits of the matter to be considered by the Panel." (Br. at 2.) Intervenors assert that the bias is "palpable ... and demonstrable" and that Mr.

Lewis's membership on the Panel demonstrates "actual structural bias" and an "intolerable appearance of disqualifying impropriety" that will deny their due process rights. (Br. at 3.)

None of these accusations have even a shred of credibility. After suffering a crushing defeat from the Presiding Officer, Intervenors distort both the procedural and substantive posture taken by DWR throughout this proceeding in a desperate Hail Mary argument.

Of course, in order to make its argument, Intervenors are forced to ignore a myriad of facts that undercut it. They ignore the fact that the Panel members, DWR, the Kansas Water Office ("KWO"), and the Kansas Department of Health and Environment ("KDHE") have each been represented by separate legal counsel throughout this proceeding. They ignore the fact that this arrangement is both typical and, even assuming that DWR's role is functionally different than the Chief Engineer's, has been approved by the Kansas Supreme Court. They ignore the fact that the Water Transfer Act, K.S.A. 82a-1501, *et seq*., specifically lists DWR as a commenting agency. And they fail to explain why the KWO, KDHE, and DWR should be permitted to provide comments but prohibited from recommending approval or denial of a Transfer without simultaneously causing Panel members to be disqualified.

At its core, Intervenors' Motion is an attack on the Water Transfer Act itself, which specifically designates the Chief Engineer as a member and the chairperson of the Panel and DWR as a "commenting agency." K.S.A. 82a-1501a(a) and K.S.A. 82a-1501(i).

Intervenors' Motion is nothing more than sour grapes because the factual contentions and its experts' theories, which Intervenors have been pressing for years have, once again, been shown to be demonstrably false as memorialized in the Presiding Officer's Initial Order.

## II. Intervenors' attempt to challenge the constitutionality of the Water Transfer Act is futile because administrative agencies do not have the power to declare an act of the Legislature unconstitutional.

Intervenors assert that the WTA includes "structural bias" because Mr. Lewis is responsible for directing DWR's operations. As discussed below, DWR and the Water Transfer Hearing Panel are separate state agencies, so the argument is dead on arrival. But more to the point here, as an administrative agency, the Panel can only exercise a ***quasi-***judicial function. As such, it cannot declare a statute unconstitutional; that is a purely judicial function. *Kaufman v. State Dep't of Soc. & Rehab. Servs*., 248 Kan. 951, 954, 811 P.2d 876 (1991) ("Administrative boards and agencies may not rule on constitutional questions; therefore, the issue of the constitutionality of a state statute or an administrative regulation must be raised when the case is appealed to a court of law.") (citation omitted). And constitutionality is always presumed. *State ex rel. Morrison v.*

*Sebelius*, 285 Kan. 875, 883–84, 179 P.3d 366 (2008) ("A statute is presumed constitutional, and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so.") (quotations and citation omitted). Therefore, Mr. Lewis must comply with the statutory requirements unless he determines that he is incapable of being fair and impartial.

## III. Under the WTA, Mr. Lewis serves as chairperson of the Water Transfer Hearing Panel—an entirely different agency than DWR—a structure that the Kansas Supreme Court has specifically approved.

The Legislature can assign different functions to an administrative agency. In *Pork Motel, Corp. v. Kansas Department of Health & Environment*, 234 Kan. 374, 673 P.2d 1126 (1983), the Secretary of KDHE issued an *ex parte* order finding that Pork Motel violated the terms of its water pollution control permit that allowed it to operate a swine-finishing facility. The order was based on an investigative report prepared by agency staff. Pork Motel challenged the *ex parte* order and requested a hearing, which was presided over by another KDHE staff member who had no connection to the investigation or the Secretary's decision to issue the *ex parte* order. Based on the hearing officer's findings and conclusions, the Secretary issued a final order that was upheld by the district court.

Pork Motel appealed, and, like Intervenors here, asserted that it was denied its due process right to a hearing before an impartial examiner because the hearing officer was a KDHE employee. *Id.* at 383. Relying on the U.S. Supreme Court's decision in *Withrow v.*

*Larkin*, the Court held that the Legislature has the power to delegate investigating and judging functions to a single administrative agency and due process is not violated so long as the agency's investigation/prosecution function is kept separate from its adjudication function. *Id.* at 383–84. ("The combination of investigating and judging functions in an agency does not violate due process, and there is no question of the power of the legislature to delegate such a dual role to an agency.") (citing *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456 (1975).) Notably, the *Davenport Pastures* opinion on which Intervenors rely so heavily, itself relies on the *Withrow* opinion. Of course, Intervenors ignore the portion of *Withrow* that the Kansas Supreme Court focused on in *Pork Motel*. (Br. at 3.)

The cases cited by Intervenors beginning on page seven of their brief actually undercut their Motion. Intervenors first cite *Morgan v. United States,* 304 U.S. 1, 14–15, 58 S. Ct. 773 (1938); however, none of the procedural problems in that case are present here. In *Morgan,* the Secretary based his order on detailed findings "prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them." 304 U.S. at 22. There is no indication that Mr. Lewis engaged in any behavior remotely similar to that; he did not engage in *ex parte* discussion with the individuals from DWR who attended the hearing or prepared DWR's

comment, and Intervenors were in no way kept in the dark about the issues addressed in DWR's comment, the Water Transfer Hearing, or anything at all relating to the Cities' Water Transfer Application.

Intervenors also cite *Adams v. Marshall*, 212 Kan. 595, 601, 512 P.2d 365 (1973), which holds that a quasi-judicial administrative hearing must be full, fair, open, and impartial; however, none of the procedural problems in that case are present here. In *Adams*, the Court held that it was a violation of due process for a civil service commission to place a five-minute limit on all cross-examinations. *Id.* at 600–01. Here, the Intervenors were given the unrestricted and unlimited opportunity to call their own witnesses and cross-examine witnesses called by other parties with no limit on the length of time in which they could cross-examine any witness. Moreover, the hearing was open to the public and anyone could attend via Zoom. 212 Kan. at 595, Syl ¶¶ 4–8. *Adams* has no bearing on the Intervenors' attempt to recuse Mr. Lewis—instead, unlike in *Adams*, the Intervenors were given every opportunity to prove their case, unsuccessful though they were.

Intervenors also cite *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 90–91, 133 Cal. Rptr. 2d 234 (2003), for the proposition that administrative hearings require the appearance of fairness and the absence of even a probability of outside influence. In that case, the appearance of impropriety was based on the fact that an

assistant city attorney, who had represented the city in its initial denial of plaintiffs' permit renewal, sat next to and conferred with the hearing officer throughout the hearing. The attorney's presence as the hearing officer's advisor "was the equivalent of trial counsel acting as an appellate court's advisor during the appellate court's review ...." 108 Cal. App. 4th at 94. Neither Mr. Lewis nor his legal counsel ever appeared at the hearing, nor did they ever log in to attend the hearing via Zoom.

The next case cited by Intervenors, *Botsko v. Davenport C.R. Comm'n*, 774 N.W.2d 841, 850 (Iowa 2009), addresses general procedural due process principles and cites *Nightlife,* but the Court drew no bright lines applicable here; in fact, it recognized the *Nightlife* Court's holding "that the combination of investigative and adjudicative functions, standing alone, does not generally create a due process violation in the absence of some showing of bias." *Id.* at 851 (citing *Nightlife*, 133 Cal. Rptr. 2d at 243). The Court went on to say:

> Determining whether an individual's actions amount to neutral participation or are prosecutorial, for due process purposes, is not always clear. Asimow, 81 Colum. L. Rev. at 776–77. As noted by Asimow, while it is possible to take the position that all participation of any kind in prosecution raises the problem, a strict approach is oversimplified and could be quite costly. *Id.* at 776. "***Agency technical staff is a limited and valuable resource" that should be available as a source of expertise to agency decisionmakers.*** *Id.*

*Id.* (citing Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies,* 81 Colum. L. Rev. 759, 776–77 (1981) (emphasis added).).

In order to prove a procedural due process violation, the challenging party bears "the difficult burden of persuasion to overcome the presumption of honesty and integrity in those serving as adjudicators." *Id.* at 849, (citations omitted). Mr. Lewis did not participate in either the Water Transfer Hearing or in DWR's preparation of its comment; so the questions addressed in *Botsko* are not involved here.

Intervenors cite multiple cases beginning on page 9 where agency heads have made public statements indicating that they have prejudged a controversy. For example, Intervenors state that the facts in *Charlotte County v. IMC-Phosphates Co.,* 824 So. 2d 298 (Fla. Dist. Ct. App. 2002) are "substantially similar to those present here." (Br. at 9.)

There are no relevant similarities.

In *Charlotte County*, the Secretary was responsible for reviewing an ALJ's initial order to determine whether or not the findings of fact were supported by substantial competent evidence. But on the same day that the ALJ issued his decision, the Secretary made a public statement clearly indicating that he had already decided to affirm the initial order. Mr. Lewis has made no such statements or otherwise indicated that he has made any decisions in this case.

Fundamentally, there is no need to look to legal opinions from other jurisdictions because *Pork Motel* is highly analogous to this case. The WTA assigns a judging function to the Panel, which, as discussed below, is a separate "administrative agency" from DWR,

the KWO, and KDHE. At the same time, the WTA specifically provides that DWR shall be a commenting agency in water transfer proceedings. K.S.A. 82a-1501(i).

Throughout its brief, Intervenors incorrectly conflate DWR with the Water Transfer Hearing Panel. In truth, they are separate and distinct agencies. The Kansas Administrative Procedure Act ("KAPA"), K.S.A. 77-501, *et seq.*, defines "State agency" as "any officer, department, bureau, division, board, authority, agency, commission or institution of this state ... which is authorized by law to administer, enforce or interpret any law of this state." K.S.A. 77-501(a).

The WTA creates the Water Transfer Hearing Panel, granting it "all of the powers necessary to implement the provisions of this act." K.S.A. 82a-1501a(a). Mr. Lewis is a member and the chairperson of the Panel. *Id*. And the Panel is the KAPA "agency head," K.S.A. 82a-1504(b), defined as the "body of individuals in whom the ultimate legal authority of the state agency is vested by any provision of law." K.S.A. 77-502(b). The WTA assigns several specific duties to Mr. Lewis, including determining when a transfer application is complete and adopting rules and regulations to "effectuate and administer" the Act. K.S.A. 82a-1503(a) and K.S.A. 82a-1506. But ***"[a]ll actions of the panel shall be taken by a majority of the members.***" K.S.A. 82a-1501a(a) (emphasis added).

The WTA designates the "state natural resource and environmental agencies" including KDHE, KWO, and DWR, among others, as "commenting agencies" even though the Chief Engineer, the KWO Director, and the KDHE Secretary or the Director of the Division of Environment are members of the Panel. K.S.A. 82a-1501(i). The role of the commenting agencies is to provide comments on the evidence to aid the Panel's deliberations, but the Panel members are not bound by any of the comments.

The Water Transfer Hearing Panel is a state agency; it is separate and distinct from DWR. And the Panel is the agency head with authority to render a final decision on the Cities' Water Transfer Application. Water PACK's persistent conflation of DWR with the Water Transfer Hearing Panel is deeply mistaken.

## IV. Intervenors apply the wrong standard for recusal.

KAPA governs water transfer proceedings except as specifically provided by the WTA. K.S.A. 82a-1501a(c), K.S.A. 82a-1503(c), and K.S.A. 82a-1504(b) and (c). The Panel is deemed the KAPA agency head. K.S.A. 82a-1504(b). And while KAPA allows an agency head to serve as the presiding officer, K.S.A. 77-514(a), the statute directs the Panel to request a presiding officer from the Office of Administrative Hearings ("OAH"). K.S.A. 82a-1501a(b).[1]

[1] The WTA requires that the hearing officer be "an ***independent person*** knowledgeable in water law, water issues and hearing procedures" (K.S.A. 82a-1501a(c) emphasis added.)

After holding the Water Transfer Hearing, the Presiding Officer must issue a KAPA initial order. K.S.A. 82a-1504(b). The Panel must then review that initial order in accordance with KAPA and the WTA, and issue a KAPA final order. *Id.* Both KAPA and the WTA require the Panel's review to be based on the record developed at the hearing. K.S.A. 82a-1504(b), K.S.A. 77-526(d), and K.S.A. 77-526(d) and (h). As agency head, the Panel has authority to exercise all of the decision-making power it would have had if one or more of its members could have presided over the hearing. However, the Panel must identify any differences between its final order and the Presiding Officer's initial order, and it must state the facts and the legal and policy differences that support any changes. K.S.A. 77-527(d) and (h).

Intervenors' Motion is based on K.S.A. 77-514(b). It states that "[a]ny person serving or designated to serve alone or with others as ***presiding officer*** is subject to disqualification for administrative bias, prejudice or interest." (Emphasis added.) That provision would have applied to ALJ Spurgin but does not apply to Mr. Lewis because the WTA requires a presiding officer provided by OAH. K.S.A. 82a-1501a(a). The statute does not apply to an agency head who does not serve as a presiding officer. [2]

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Intervenors have not suggested that the hearing officer, ALJ Spurgin, is not qualified, that he has some personal interest in the outcome, or that he is biased.

[2] Even though K.S.A. 77-514(b) does not apply, Mr. Lewis should disqualify himself if he determines that he is not capable of being fair and impartial and of making a decision

Moreover, while far from clear, it does not appear that Intervenors assert that Mr. Lewis is incapable of serving as a fair and impartial member of the Panel or of rendering a decision based exclusively on the record. Nor do they argue that Mr. Lewis is unable to give due regard to the Presiding Officer's opportunity to observe the witnesses and attribute credibility accordingly. K.S.A. 77-526(d) and K.S.A. 77-527(d). Instead, as discussed above and in more detail below, Intervenors main attack is on the constitutionality of the WTA itself, asserting that Mr. Lewis's role as a member of the Panel and DWR's role as a commenting agency creates an appearance of impropriety and "actual structural bias" that requires Mr. Lewis's disqualification.

Intervenors do not explain why this is a conflict that appears to be improper or reflects actual bias. The fact that DWR staff reviewed the evidence and applied the law with which they are very familiar and concluded that the transfer application should be approved is not a clear indication that they performed a prosecutorial function that would require a strict separation from the judging function that the WTA assigns to the members of the Panel. DWR's comment can be reasonably interpreted as a mere recommendation—the kind that staff in most agencies routinely provide to agency heads—instead of actually advocating for approval of the Cities' Water Transfer

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based solely on the record. Of course, there is absolutely no evidence and no rational reason to believe that that is the case.

Application. However, the nature of the commenting agencies' role in water transfer cases need not be resolved here because DWR's involvement was, in fact, kept separate from the Chief Engineer's adjudicative role.

## V. DWR staff did not prejudge the merits and Intervenors' argument to the contrary has no basis in fact.

The Intervenors assert that DWR "fully participated" in the Water Transfer Hearing (Br. at 1) and that "DWR's formal written advocacy for approval of the Cities' transfer application is an archetypical example of disqualifying prejudgment" (Br. at 7). Nonsense.

In its role as a commenting agency, the "DWR" comments were prepared by a small group of DWR staff members who were specifically designated to attend the hearing and prepare comments for the Agency. The members of this group were Chris Beightel, P.E., Water Management Services Program Manager; Lane Letourneau, Water Appropriation Program Manager; and Kate Langworthy, DWR staff attorney. The group was isolated behind an ethical screen designed to prevent the exchange of information or communication that could lead to conflicts of interest. (*See, e.g.*, KRPC 1.0(l).) There is no information indicating that there were any *ex parte* communications with Mr. Lewis at any time since.

While DWR staff maintained a separation from Mr. Lewis, likely out of an abundance of caution, the separation would only be required if their function as a commenting agency was somehow prosecutorial instead of adjudicatory.

Ms. Langworthy appeared at several prehearing conferences as counsel for the Kansas Department of Agriculture/Division of Water Resources (KDA/DWR). (Prehearing Order and Notice of Continued Prehearing Conference filed February 21, 2023.) She also appeared at the Public Comment Hearing on behalf of the "Kansas Department of Agriculture Division of Water Resources. (Ex.A, Public Cmt. Hearing Tr. at 1:25–26.) And Ms. Langworthy appeared at the Water Transfer Hearing itself, announcing herself as counsel for the "Kansas Department of Agriculture Division of Water Resources." (Hearing Tr. Vol. 1 at 7:4–5.) Never once has Ms. Langworthy stated, suggested, or implied that she represents Mr. Lewis or any member of the Water Transfer Hearing Panel.

At the Water Transfer Hearing, Ms. Langworthy declined the invitation to make an opening statement. (Hearing Tr. Vol. 1 at 73:5–9.) Likewise, she was specifically given an opportunity to question every witness and similarly had an opportunity to present her own evidence and witnesses on behalf of DWR. She declined each and every time.[3]

[3] Hearing Transcript, p. 347, line 24–348 line 2; 381 lines 13–14; 441 lines 3–6; p. 443, lines 16–18; p. 464, lines 9–12; p. 594, lines 1–2; p. 660, lines 19–21; p. 719, lines 22–25; p. 808,

Mr. Letourneau attended almost all of the hearing and was called as a witness by the Cities. Ms. Langworthy did not ask Mr. Letourneau any questions. So while it is true that DWR attended the hearing, it did not "actively" participate in the manner suggested by Intervenors.

In fact, several commenting agencies attended the hearing. For example, Matt Unruh, the Assistant Director of the Kansas Water Office, was personally present each day. And GMD5 not only attended portions of the hearing, it moved to intervene, its Manager attended[4] and provided sworn testimony, and its counsel even made evidentiary objections. If anything, GMD5 was a more "active" participant than DWR.

In contrast, no member of the Water Transfer Hearing Panel attended even a single day of the hearing, including Mr. Lewis.

After the hearing, On October 27, 2023, DWR staff provided comments, by and through counsel, Ms. Langworthy, as the Legislature specifically permitted by designating DWR as one of several commenting agencies, and as specifically

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lines 2–5; p. 949, lines 7–10; p. 959, lines 13–15; p. 961, lines 5–8; p. 981, lines 4–6; p. 986, lines 15–17; p. 987, lines 22–24; p. 1000, lines 8–13; p. 1042, lines 2–5; p. 1056, lines 21–23; p. 1061, lines 22–25; p. 1077, line 25–p. 1078, line 2; p. 1084, lines 2–4; p. 1095, lines 6–8; p. 1124, lines 12–15; p. 1169, lines 20–22; p. 1184, lines 5–7; p. 1268, lines 10–12; p. 1321, lines 16–21; p. 1376, lines 12–14; p. 1377, lines 21–22; p. 1446, lines 8–10; p. 1464, lines 4–6; p. 1478, lines 4–8; p. 1501, lines 7–9; p. 1515, lines 16–19.

[4] Mr. Feril attended in person on July 28, 2023, Vol. 8, 1328:2–3, but otherwise attended via Zoom.

contemplated by the Presiding Officer in his scheduling order. (K.S.A. 82a-1501(i). *See also* Initial Order at 10.)

In the same way, during the hearing, Mr. Unruh made it clear to the Cities that there were no *ex parte* communications between KWO staff and Ms. Owen. Ms. Owen excused herself during meetings where the Water Authority discussed potential comments to the Panel.

Moreover, it is unremarkable that agency staff prepared written comments and submitted them to the Panel. The former Chief Engineer's Master Order contingently approving the Cities' Change Applications states that he relied on work performed by agency staff. That makes sense; Chief Engineers routinely rely on staff to make recommendations about the resolution of various matters that come before the Chief Engineer. As the Court in pointed out in *Botsko v. Davenport C.R. Comm'n*, 774 N.W.2d 841, 851 (Iowa 2009), "Agency technical staff is a limited and valuable resource that should be available as a source of expertise to agency decisionmakers." Nevertheless, final decisions are made by the Chief Engineer.

Mr. Lewis can accept or reject staff recommendations in those proceedings in the same way that he, as a member of the Panel, can vote to accept or reject the Presiding Officer's findings and conclusions. DWR is a commenting agency and is separate and distinct from Mr. Lewis, who has been represented by separate counsel throughout the

proceeding. DWR's actions have been, since the outset of the proceeding, entirely appropriate and consistent with the WTA as well as with its legal and ethical obligations. There simply is no "appearance of impropriety."

Moreover, the content of DWR's comment is squarely within its standard policy. It applied the facts to applicable law and its regulations and made a recommendation. Specifically, it stated on page 2 of its comment:

> After review of the record and all filings submitted to the Office of Administrative Hearings, DWR intends to provide technical advice regarding the statutory conditions for approval of a transfer that relate to administration of water rights in Kansas. To that end, these comments do not address every applicable requirement of the Water Transfer Act but are confined to those that relate to subject more directly tied to DWR's expertise.

DWR vigilantly performed its duties as a commenting agency, maintained autonomy and confidentiality from Mr. Lewis, and submitted a comment that was entirely consistent with Kansas law and DWR regulations. There is no "appearance" of impropriety under such circumstances. Intervenors just do not like the result.

## VI. Mr. Lewis has done nothing to create an appearance of impropriety, nor is there any indication that he worked with DWR to "prejudge" this case as Intervenors seem to imply.

Pretending that Mr. Lewis's conduct gave rise to an appearance of impropriety, WaterPACK asserts that the standard for recusal is "objective" and not based on an "adjudicator's subjective bias." Relying on the *Davenport Pastures* opinion at page 146,

Intervenors argue that Mr. Lewis "must recuse" because "there is an appearance of bias or prejudgment." (Br. at 6.) Intervenors selective reference to that opinion does not withstand even cursory scrutiny. The sentence that begins on page 145 of the *Davenport Pastures* opinion and runs onto page 146 actually states the opposite: "Based upon this review of Kansas law, we conclude that while Kansas courts and the legislature have due process concerns about dual roles, the mere appearance of impropriety is ***insufficient*** to constitute a due process violation." *Davenport Pastures, LP v. Morris Cty. Bd of Cty. Comm'rs*, 291 Kan. 132, 145–46, 238 P.3d 731 (2010) (emphasis added.) In fact, this is a fundamental holding of the opinion, located in the Syllabus at paragraph 3. *Id.* at Syl. ¶ 3.

*Davenport Pastures* and the other cases that Intervenors cite impose an objective standard requiring recusal when the "probable risk of actual bias [is] too high to be constitutionally tolerable" because, and only because, the officials in those cases had made public statements indicating possible bias or performed both investigation/prosecution and adjudicatory functions prohibited by *Pork Motel*. *Davenport Pastures*, 291 Kan. at 146 (quotations and citation omitted). None of those circumstances exist in this case.

In *Davenport Pastures*, the Morris County Commissioners directed the county attorney to draft a letter denying Davenport's request for damages after the Commission vacated two roads that provided access to leased property. On appeal, the same lawyer

represented the County in the district court, which awarded Davenport $30,000. The same lawyer again represented the County in the court of appeals, which reversed, holding that the district court exceeded the scope of its judicial-review authority. On remand, in consultation with—again—the same lawyer, the Commission awarded $4,050 in damages. The same lawyer again represented the County when Davenport appealed, when the District Court granted the County's motion for summary judgment, and when the court of appeals affirmed. The Kansas Supreme Court reversed, holding that Davenport was entitled to have the amount of its damages determined by a fair and impartial tribunal. Davenport's due process rights were violated because a single attorney acted both as the Board's legal advisor and as an advocate arguing for a small award in the same matter. 291 Kan. at 141. This is akin to the facts in the *Nightlife Partners* case, distinguished in Part III, above; the attorney's conduct "was the equivalent of trial counsel acting as an appellate court's advisor during the appellate court's review ...." Of course, as also discussed above, those facts are entirely unlike the conduct of Mr. Lewis or his counsel, or of DWR or its counsel.

In this case, DWR, as a commenting agency, was represented by Ms. Langworthy and Ms. Kramer represented Mr. Lewis as chairperson of the Water Transfer Hearing Panel. The issues present in *Davenport Pastures* simply don't exist in this case.

The Intervenors also cite *Association of National Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1158 (D.C. Cir. 1979),[5] and *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), for the proposition that the "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.'" (Br. at 6–7.) Intervenors are, again, mistaken.

In *Cinderella*, the Federal Trade Commission filed a complaint charging Cinderella with making false, misleading, and deceptive representations in its advertising about courses of instruction that qualify students to become airline stewardesses. 425 F.2d at 584, n.1. A hearing examiner ruled that the charges should be dismissed, which was later reversed by the full Commission, who entered a cease-and-desist order against Cinderella. While the appeal to the full Commission was pending before him, the Chair of the Commission made a speech in which he was critical of the advertising practices engaged in by Cinderella. *Id.* at 589–90. The D.C. Circuit reversed and remanded,

[5] *Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1154 (D.C. Cir. 1979) is inapposite. In an opinion by Circuit Judge Tamm, the D.C. Circuit held that the *Cinderella* standard did not apply because standard for disqualification in a rulemaking proceeding is not the same as the standard in an adjudicatory proceeding. 627 F.2d 1164.

instructing the other Commissioners to make a decision "without the participation of Commissioner Dixon." *Id.* at 592.

The Court disqualified the Chairman because he made statements in a public speech questioning the ethical standards used by newspapers that accept "good money for advertising [about] ... becoming an airline's hostess by attending a charm school?" *Id.* at 589–90. Dixon's statements suggested that he had determined that Cinderella's advertising violated F.T.C. rules prior to the Commission's issuance of its order. Once again, this has no factual similarity to the circumstances here. Mr. Lewis has made no public statements and given no indication about what he may ultimately decide as one member and the chairperson of the Water Transfer Hearing Panel. Intervenors know this; they cite no evidence indicating that Mr. Lewis has prejudged the Cities' transfer application or that he had anything at all to do with DWR's preparation of its comments. Any implication to the contrary is pure speculation.

The *Davenport Pastures* Court cites both *Kansas Racing Management, Inc. v. Kansas Racing Commission*, 244 Kan. 343, 770 P.2d 423 (1989), and *Pork Motel, Corporation v. Kansas Department of Health & Environment*, 234 Kan. 374, 673 P.2d 1126 (1983). Like *Pork Motel*, discussed above, *Kansas Racing Management* supports denial of Intervenors' Motion.

In *Kansas Racing Management, Inc.* an unsuccessful applicant asserted that it was denied due process because the Commission was represented by two assistant attorneys

general when the attorney general himself had a close business relationship with the successful applicant. The Court rejected the argument that the KBI's investigation and the conduct of two assistant attorneys general assigned as counsel to the Commission were tainted by the fact that the attorney general is the statutory head of the KBI. There was no "appearance of impropriety" in the absence of facts to substantiate that the alleged bias influenced the Commission. 244 Kan. 361–62.

In a more recent case, the Kansas Supreme Court reaffirmed the well-established rule stating that "We have long held that '[t]here is a strong presumption of regularity in administrative proceedings.'" *Cherokee Cty. v. Kan. Racing & Gaming Comm'n*, 306 Kan. 298, 321, 393 P.3d 601, 617 (2017) (citing Pork Motel, 234 Kan. at 384). The Court continued, "There is ever a legal presumption 'that public officers do their duty, that they act fairly, from good motives, and with the purpose and intention of obeying the law. ***Suspicion, surmise, insinuation, and innuendo are not enough to overthrow this presumption.***'" *Cherokee Cty.*, 306 Kan. 298, 321, 393 P.3d 601, 617 (2017) (quoting *Lewis v. City of S. Hutchinson, 1*62 Kan. 104, 120, 174 P.2d 51 (1946) (emphasis added)).

As Intervenors point out, the Cities filed applications to change the R9 Water Rights from irrigation to municipal use, and the former Chief Engineer approved those applications. The Legislature clearly understood that one of the three Panel members would have approved access to a proposed source of more than 2,000 acre-feet of water

before a transfer application could be filed. The Director of the Kansas Water Office would have to approve a contract to purchase water from the State's conservation storage water supply or the Chief Engineer would have to approve permits for new water rights or changes to existing water rights. K.S.A. 82a-1507(b). None of these facts stopped the Legislature from passing the Water Transfer Act or designating DWR as one of the commenting agencies.

The WTA imposes significant obligations on the Chief Engineer. For example, transfer applications must be filed with the Chief Engineer as required by rules and regulations, K.S.A. 82a-1503(a); the Chief Engineer must determine whether an application is "complete," *id*.; and the Chief Engineer adopts all rules and regulations necessary to effectuate and administer the provisions of the WTA, K.S.A. 82a-1506. *See also,* K.S.A. 1501a(b)(2); K.S.A. 1502(a)(2) and (3); and K.S.A. 1503(e) and (f) (setting out duties that are not relevant in this transfer proceeding).

Because the Legislature specifically authorized the Chief Engineer to delegate any duty or function to staff members, K.S.A. 74-510a, and included DWR in the list of commenting agencies, it understood that the Chief Engineer is not DWR and DWR is not the Chief Engineer. K.S.A. 74-510a.

## VII. Conclusion.

Intervenors' Motion should be denied. They claim that Mr. Lewis and DWR have given an improper "appearance of impropriety," but have not, and cannot, point to a single fact or indication that anything "improper" actually occurred. They conflate DWR with the Water Transfer Hearing Panel when those entities are separate and distinct State agencies. Every indication is that Mr. Lewis entirely segregated himself from DWR throughout these proceedings, was represented by separate legal counsel throughout, and deliberately did ***not*** participate in DWR's involvement in the Water Transfer Hearing or in preparation of its comment. DWR submitted a comment with which Intervenors disagree after they received a devastating setback from the Presiding Officer in his Initial Order.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was served this 8th day of March, 2023, by electronic mail to the following:

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**Exhibit A**

**Hays & Russell Application for Approval to Transfer Water**

**OAH No. 23AG0003 AG**

**Transcription of the Public Comment Hearing on June 20, 2023**

**Matt Spurgin:** Okay, we'll go ahead and get started, everybody. Thank you for coming out tonight. So we're gonna go on the record to start the public comment hearing for this matter. 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. This is Office of Administrative Hearings, case number 23, AG 0003 AG. Today is June 20, 2023. It is 06:02 P.M. My name is Matthew Spurgin. I am the administrative law judge presiding over this case. I am recording this public comment hearing, and that is going to be the record of this proceeding. Would the parties who are here tonight please state your appearances for the record, starting with the applicant.

**David Traster:** This is David Traster, the lawyer for [unclear] in Wichita here on behalf of city of Hays.

**Daniel Muller:** Daniel Muller, [unclear], appearing on behalf of the city of Hays.

**Speaker 1:** [unclear] representing Kansas City [unclear] and Edwards counties.

**Speaker 2:** [unclear] LLC in Kansas City, also representing [unclear].

**Kate Langworthy:** Kate Langworthy from the Kansas Department of Agriculture Division of Water Resources.

**Orrin Feril:** Orrin Feril, District Manager for Big Bend [unclear] #5 [unclear].

**Speaker 3:** Is there another counselor for [unclear] case [unclear].

**Speaker 4:** [unclear] City of [unclear] city of Russell.

**Matt Spurgin:** Thank you. Now, this case is regarding an application of the cities of Hays and Russell that was filed by the Kansas Department of Agriculture, Division of Water Resources, seeking to transfer existing water rights. Now, many of you who are in attendance tonight or watching online may already understand water rights and why we are here. We will let the parties explain what they are all seeking and what their purposes in this proceeding. Now, in accordance with the Water Transfer Act, I've been appointed as the judge to preside over this case, including this formal public hearing… Sorry, including this public comment hearing and the formal public hearing that is going to be held next month in Wichita. Now, the formal public hearing that will be in Wichita will allow the parties and the commenting agencies to present their respective positions before a decision is made at presenting witnesses and evidence. Now, that formal public hearing is open to the public for observation. However, it is an administrative hearing conducted pursuant to the Kansas Administrative Procedures Act, and, much like a trial...