

**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) OAH No. 23AG0003 AG
Water from Edwards County, Kansas)
Pursuant to the Kansas Water Transfer Act)
_____)

**ORDER DENYING MOTION FOR RECUSAL OF CHIEF ENGINEER FROM
PARTICIPATION IN HEARING PANEL AND SCHEDULING ORDER**

The Water Transfer Panel (“Panel”) enters this Order Denying Motion for Recusal of Chief Engineer From Participation in Hearing Panel and Scheduling Order in the above-captioned matter, as follows:

Applicable Law

1. K.S.A. 82a-1501a, a provision of the Kansas Water Transfer Act, K.S.A. 82a-1501, *et seq.* (“KWTA”), provides that the water transfer hearing panel shall consist of the Chief Engineer of the Kansas Department of Agriculture, Division of Water Resources (“Chief Engineer”); the Director of the Kansas Water Office; and the Secretary of the Kansas Department of Health and Environment (“KDHE”) or the Director of KDHE’s Division of Environment if designated by the Secretary of KDHE. K.S.A. 82a-1501a further provides that the Chief Engineer shall serve as the chairperson of the panel and that all actions of the Panel shall be taken by a majority of the Panel members.
2. K.S.A. 82a-1501 provides that, for purposes of the Kansas Water Transfer Act, “commenting agencies” means “groundwater management districts and state natural resource and environmental agencies, including but not limited to the Kansas department of health and environment, the Kansas water office, the Kansas water authority, the Kansas department of wildlife, parks and tourism, and the division of water resources of the Kansas department of agriculture.”
3. K.S.A. 82a-1501a(a) provides, “...The panel shall have all powers necessary to implement the provisions of this act.”
4. K.S.A. 82a-1504(b) provides, “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 purposes of the Kansas administrative procedure act and shall review all initial orders of the presiding officer in accordance with the Kansas administrative procedure act....”

5. K.S.A. 82a-1504(b) further provides, “The final order of the panel shall be entered not later than 90 days after entry of the presiding officer’s initial order, except that the panel may extend the 90-day limit...for good cause shown.”
6. K.S.A. 82a-1505(b) provides that reviews of final orders of the Panel in the district court or the appellate courts shall be given precedence.
7. K.S.A. 77-514(b) provides that any person serving alone or with others as a “presiding officer” pursuant to the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.* (KAPA) is subject to disqualification for administrative bias, prejudice or interest.
8. K.S.A. 77-514(d), which governs requests to disqualify a presiding officer pursuant to KAPA states, “A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.”
9. K.S.A. 77-526 provides: “(a) If the presiding officer is the agency head or designated in accordance with subsection (g) of K.S.A. 77-514, and amendments thereto, the presiding officer shall render a final order. (b) If the presiding officer is [not] the agency head...the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 77-527, and amendments thereto.”
10. K.S.A. 77-527 governs the review of initial orders by an agency head.

Facts

11. The record of the above-captioned matter concerning review of a water transfer application submitted by the Cities of Hays, Kansas and Russel, Kansas (“Cities”) reflects that, on October 27, 2023, following the conclusion of the administrative hearing in that matter, which was presided over by a presiding officer with the Kansas Office of Administrative Hearings, the Kansas Department of Agriculture, Division of Water Resources (“DWR”) submitted, in its capacity as a commenting agency in such matter, a document titled “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” (“DWR Comment”).
12. Comments were also submitted by KDHE, the Kansas Water Office, and the Kansas Water Authority, which are all either commenting agencies that are overseen by a member of the Panel and/or public bodies established pursuant to the authority of a commenting agency. The record reflects that neither the Chief Engineer nor any of the other panel members attended the administrative hearing, were involved in the preparation or submission of any commenting agency comments, or participated in any aspect of the administrative hearing. The parties also submitted briefing and had the opportunity to submit responses to all commenting agency comments, and Intervenor Water Protection Association of Central Kansas and Edwards County, Kansas (collectively, “Intervenors”) did submit a response to the DWR Comment.

13. The presiding officer issued an initial order approving the Cities’ water transfer application in February 2024, and the Panel subsequently issued notice of its intent to review such initial order.
14. On February 22, 2024, Intervenors submitted to the Panel a Motion for Recusal of the Chief Engineer From Participation in the Hearing Panel and a memorandum in support thereof (“Motion for Recusal”). The Cities submitted a Response to the Motion to Recuse, and the Intervenors submitted a Reply to the Response (“Intervenors’ Reply”).
15. Intervenors’ primary argument in support of its position that the Chief Engineer should be recused from the Panel is that because the DWR Comment contained the sentence “DWR believes that the record supports the conclusion that approval of the Application is appropriate and lawful,” DWR “is not neutral in relation to the Water Transfer Application to be considered by the Panel” and has “prejudged the core merits of the matter to be considered by the Panel.” Motion for Recusal at 2. Intervenors argue that, in light of this, the fact that the Chief Engineer is the director of DWR, “demonstrates actual structural bias and the intolerable appearance of disqualifying impropriety” as to the Chief Engineer. Motion for Recusal at 3.

Conclusions of Law

16. Neither the Chief Engineer, the Panel, nor any other individual members of the Panel constitutes a “presiding officer” subject to disqualification for administrative bias, prejudice, or interest pursuant to KAPA. The Panel reviews initial orders issued pursuant to the KWTA in its statutorily assigned capacity as an *agency head*, not as a presiding officer subject to disqualification pursuant to KAPA. *See* K.S.A. 82a-1504(b). Although an agency head may serve as a presiding officer who is subject to disqualification pursuant to K.S.A. 77-514, an agency head only acts in that capacity when the agency head presides directly over the hearing that results in an initial order. Here, a separate and distinct individual officer—the administrative law judge—presided over the hearing and rendered an initial order subject to the Panel’s review as an agency head. An agency head is not a “presiding officer” when it exercises review of a presiding officer’s initial order pursuant to K.S.A. 77-527. *Compare* K.S.A. 77-526(a) and (b); *See* K.S.A. 77-527(d).
17. Even if the Chief Engineer was a presiding officer subject to disqualification pursuant to KAPA, neither the allegations made by the Intervenors nor the record of this matter supports the Chief Engineer’s recusal. The KWTA specifically contemplates DWR’s participation in water transfer hearings as a commenting agency as well as the Chief Engineer’s role in reviewing initial orders issued pursuant to the KWTA, not only as a member of the Panel, but as its chair. Accordingly, DWR was acting within the scope of the role that the Kansas Legislature assigned to it in preparing and submitting the DWR Comment, and the Chief Engineer will be acting within the scope of the role the Kansas Legislature assigned to him in serving on the Panel.

18. The case that Intervenor's Motion to Recuse examines in the most detail, *Charlotte County v. IMC-Phosphates Co.*, supports this conclusion. However, the court in that case noted that an agency head serving in certain enforcement capacities did not, per se, disqualify them from a subsequent adjudicatory role. The court wrote, "We recognize, of course, that an agency head may serve investigative, prosecutorial, and adjudicative roles in the same dispute, and that this blending of roles does not, in and of itself, create an unconstitutional risk of bias." *Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298, 300 (Fla. Dist. Ct. App. 2002). Kansas case law supports the same conclusion. See *Pork Motel, Corp. v. Kansas Dep't of Health & Env't*, 234 Kan. 374, 384, 673 P.2d 1126, 1135 (1983), citing *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) ("the combination of investigating and judging functions in an agency does not violate due process...") and *In re Larsen*, 17 N.J.Super. 564, 86 A.2d 430 (1952) ("there is no question of the power of the legislature to delegate such a dual role to an agency.").
19. Under both *Charlotte County* and *Pork Motel*, it would not be per se impermissible for the Chief Engineer himself to have served in an investigative or prosecutorial role in the below administrative proceeding and then serve in an adjudicatory role on the panel. The Chief Engineer did not serve in any such prosecutorial or investigative role in the water transfer hearing and indeed did not have any role in that hearing at all. Also, notably, DWR was not serving in an investigative or prosecutorial capacity when it acted in the statutorily defined role of a *commenting agency* during the administrative hearing, where its only substantive submission was after all evidence had been offered. The record of the administrative hearing makes clear that DWR and the other commenting agencies were not even treated as full parties (of any kind) to the proceeding, and neither DWR nor any other commenting agency are parties to the Panel's review. Per *Charlotte County* and *Pork Motel*, even if DWR had been acting in an investigative or prosecutorial capacity or otherwise been a full party to the hearing, that in itself, without more, would not require that bias be imputed to the Chief Engineer. Further, the KWTA does not require any comment submitted by DWR to be neutral or to refrain from commenting on the merits of the matter or otherwise place any parameters on any of the entities it identifies as commenting agencies. Under the relevant statutes and case law, there is nothing present here that would even require a further Due Process analysis.
20. The Panel further finds that there is no evidence in the record that DWR "prejudged" anything in submitting its comment. To the contrary, the DWR Comment was submitted following the conclusion of testimony and briefing by the parties and, despite being only eight pages long, contains approximately 20 citations to the record and numerous additional citations to relevant statutory and regulatory provisions. The parties were also permitted to respond on the record to all commenting agency comments, as noted, and the Intervenor's did submit a response to the DWR Comment.
21. The Panel notes that the Intervenor's purport to have singled out the Chief Engineer based on the DWR Comment notwithstanding the fact that the other Panel members also head agencies that submitted comments in this matter because, in the Intervenor's opinion, the DWR Comment addressed the merits of this matter, while the other commenting agency comments refrained from doing so. The Panel takes no position as to whether it is correct

that the DWR Comment actually amounted to DWR weighing in on the merits of the proposed water transfer or whether the other commenting agencies did not go so far as to do so. The Panel finds that any such distinction is not determinative. The Panel is of the opinion that any commenting agency would have been permitted to use its comment to fully opine on the merits of this matter without creating bias as to any Panel member or otherwise taking any improper action. In carving out a specific function in this matter for all of the commenting agencies listed in the KWTA, the Kansas Legislature has recognized that the staff of those agencies, separate from the agency heads who are to serve on the Panel, possess valuable expertise and knowledge in this area and should be permitted to provide input and express opinions. To impute bias to any of the agency heads serving on the Panel merely as a result of agency staff fulfilling a role that was specifically assigned to them by the Kansas Legislature would undermine the entire statutory scheme of the KWTA by improperly limiting the roles of the individuals who are some of the most qualified in this state to opine on proposed water transfers and ensure that such proposed water transfers are consistent with the public interest.

22. The fact that the Chief Engineer’s job description states that the scope of his employment “involves the interpretation of laws, and the formulation, adoption and implementation of rules, regulations, policies, and programs concerning water resources” (Motion for Recusal at 2) does not support the conclusion that his recusal from the Panel is required. Rather, it illustrates exactly why he is qualified to serve on the Panel and indeed indispensable to it, as his presence on the Panel will benefit the public interest by ensuring the Cities’ transfer application is appropriately evaluated. This conclusion is bolstered by the fact that the Kansas Legislature has made the Chief Engineer the singular official whose statutory duty it is 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 for the benefits and beneficial uses of all of its inhabitants...” K.S.A. 82a-706. The Panel believes that it is nearly inarguable that there could hardly be a matter more squarely in line with that statutory duty than this one. This conclusion is further bolstered by the fact that, while one individual statutorily required to serve on the Panel, the Secretary of KDHE, is permitted to designate a replacement, such designation is not contemplated as to the Chief Engineer’s position on the panel or his role as its chair.
23. There is no evidence that the Chief Engineer has “prejudged” anything related to this matter or that he will do so. The decision of the Panel will be based on the record of the administrative hearing as required by the KWTA, and the parties will be allowed an opportunity for further briefing and oral argument pursuant to KAPA. The cases cited by Intervenor in this regard are distinguishable. There is certainly no evidence that the Chief Engineer has made any gratuitous extra-record statements related to this matter of the sort made by the presiding officers in the cases cited by the Intervenor or that he has taken any other action that would indicate or give the appearance of bias.¹

¹The Panel notes, in response to Intervenor’s contention that “any reasonable observer would presume that an administrative agency would be loath to publicly advocate a position that was not expressly or implicitly representative of the opinion held by agency leadership” (Motion for Recusal at 4), that, in June 2022, the Chief Engineer issued a final order denying a proposal submitted by the City of Wichita, Kansas related to its aquifer storage and recovery project, notwithstanding the fact that DWR, as a party to the administrative hearing where that proposal was

24. This is also not a situation where bias or prejudice may be presumed under Kansas case law. *See State v. Schaeffer*, 295 Kan. 872, 875-76, 286 P.3d 889, 892 (2012). Specifically, the record reflects that DWR was represented by a different attorney from the Chief Engineer's undersigned attorney during the course of the below administrative hearing (which was presided over by a separate presiding officer associated with an entirely separate state agency from any of the panel members) and that neither the Chief Engineer nor his undersigned attorney participated in the administrative hearing in any way. *Cf. Davenport Pastures v. Board of Morris County Comm'rs*, 291 Kan. 132, 144-46, 238 P.3d 731 (2010).
25. In the absence of any proof, or even allegation, that the Chief Engineer has prejudged the matter, Intervenor's argue that there is an appearance of prejudice, or bias, due solely to DWR's submission of comments as a commenting agency, and the Chief Engineer's responsibility for oversight of DWR and that it is this appearance of prejudice that deprives the Intervenor's of constitutional due process and which requires the Chief Engineer's recusal. But this "appearance" is the result of all participants fulfilling their statutory role: the Chief Engineer as chair of the Panel, and DWR as a commenting agency. If that participation violates the due process rights of the Intervenor's, this amounts to holding the KWTA unconstitutional. Any such finding is beyond the Panel's jurisdiction. The Panel must proceed as though the KWTA is constitutional.
26. Neither actual nor presumed bias is present here, and the Panel unanimously rejects any finding of bias, prejudice, or impropriety of any kind. The recusal of the Chief Engineer from the Panel is neither required nor proper. The Motion for Recusal is denied.
27. The schedule and procedures for arguments by the parties for purposes of the Panel's review shall be as follows:
- a. All parties' briefs shall be due May 1, 2024 and shall be limited to 40 pages in length;
 - b. All parties' reply briefs shall be due May 31, 2024 and shall be limited to 20 pages in length. Written responses to reply briefs shall not be permitted;
28. Information set forth as factual in the parties' briefing shall be limited to the information contained in the record of this matter and shall be supported by appropriate citations to the record. Legal arguments and conclusions set forth in the parties' briefing shall be supported with citations to governing legal authority. Any information offered in violation of this paragraph may be deemed to have been offered without support in the record and accordingly disregarded by the Panel.
29. While reasonable requests for extensions of time will be considered and may be granted if appropriate, the Panel intends to move forward with this matter as expeditiously as reasonably possible, in accordance with the intent of the Kansas Legislature. *See* K.S.A.

considered, had advocated for the approval of the proposal. *See* [wichta-asr-final-order-\(signed-062122\).pdf \(ks.gov\)](#); [dwr-post-hearing-brief.pdf \(ks.gov\)](#).

82a-1505(b). Further requests of the Panel, including for any extensions of time, shall be submitted via electronic mail to ronda.hutton@ks.gov.

30. The parties shall have the opportunity for oral argument, which shall be scheduled at a later date.
31. The Panel hereby finds that extension of the 90-day deadline for the Panel to issue its final order set forth in K.S.A. 82a-1504(b) is warranted for good cause shown, namely the necessity of considering the Motion to Recuse; allowing the parties an opportunity to rebut the communications previously placed on the record of this matter pursuant to the Notice and Memorandum Regarding Receipt of Communications issued on March 12, 2024; and otherwise allowing adequate time for the parties to prepare their cases and for the Panel to deliberate and prepare its final order. The Panel hereby extends the deadline for the issuance of its final order.

IT IS SO ORDERED THIS 1st DAY OF APRIL 2024.

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Chair, Water Transfer Panel

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CERTIFICATE OF SERVICE

I certify that on April 1, 2024, I sent a true and correct copy of the foregoing Order to the individuals listed below via electronic mail and U.S. mail, postage prepaid:

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