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Mike Beam, Secretary

Laura Kelly, Governor

October 20, 2022

Loren Snell, Acting Director  
 Kansas Office of Administrative Hearings  
 1020 S. Kansas Avenue  
 Topeka, KS 66612-1327

Re: APPOINTMENT OF PRESIDING OFFICER FOR WATER TRANSFER HEARING

Dear Mr. Snell:

I am writing this letter on behalf of the Water Transfer Hearing Panel (Panel) to request that the Office of Administrative Hearings (OAH) appoint a presiding officer to conduct a hearing regarding a water transfer application filed by the Cities of Hays, Kansas and Russell, Kansas (Cities) in accordance with the Kansas Water Transfer Act, K.S.A. 82a-1501, et seq., and amendments thereto and rules and regulations adopted thereunder (the Act).

The Act is invoked when an applicant seeks to divert water in a quantity of 2,000 acre-feet or more per year and transport that water for beneficial use outside a 35-mile radius of its point of diversion (*See* K.S.A. 82a-1501). K.S.A. 82a-1501a(b) provides that the Panel, which is to 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 Director of the Kansas Department of Health and Environment's (KDHE) Division of Environment, as designated by the Secretary of KDHE, "shall request a presiding officer from the Office of Administrative Hearings to conduct a hearing in accordance with this Act when: (1) an application for a water transfer is complete..." K.S.A. 82a-1501a(c) requires that the hearing officer be an "independent *person knowledgeable in water law, water issues* and hearing procedures." (*emphasis added.*)

I would also note the existence of K.A.R. 5-50-8, which was never updated following revisions to the Act in 2004. This regulation conflicts with K.S.A. 82a-1501a because it directs the Panel to request nominations for a water transfer hearing officer from the water transfer applicant, entities in the area or basin where the potential point or points of diversion are located, and the Act's designated "commenting agencies." (*See* K.S.A. 82a-1501.) It is the opinion of the Panel that K.A.R. 5-50-8 has been implicitly revoked due to the 2004 amendments to K.S.A. 82a-1501a. To the extent K.A.R. 5-50-8 is not revoked by implication, it is my intention to waive that regulation as to the Cities' water transfer application pursuant to K.S.A. 82a-1904, which provides that the Chief Engineer may grant a waiver of any rule or regulation adopted by DWR for good cause shown and upon a determination that the waiver will not prejudicially or unreasonably affect the public interest and will not impair any existing water right. I believe the

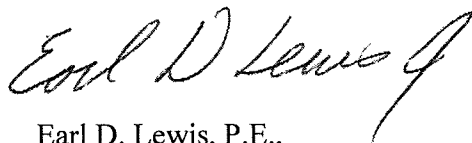
requirements of K.S.A. 82a-1904 are met in this case and that a waiver of K.A.R. 5-50-8 would be appropriate. The Panel has thus elected to move forward with requesting the appointment of a presiding officer from OAH under the authority of K.S.A. 82a-1501a(b), as the Cities' have submitted a complete water transfer application to DWR.

Therefore, the Panel is requesting that OAH appoint a presiding officer to conduct a hearing regarding the proposed water transfer in accordance with the Act. It is the Panel's hope that there is currently an administrative law judge on the Office of Administrative Hearings' staff who meets the relevant requirements of K.S.A. 82a-1501a and who has the workload capacity to conduct the water transfer hearing in a timely fashion and in accordance with the timelines and procedures set out in K.S.A. 82a-1503. I would also note that the Act provides that the Panel "shall review all initial orders of the presiding officer in accordance with the Kansas Administrative Procedure Act (KAPA)," acting as an agency head pursuant to KAPA when it does so, and that any judicial review of the Panel's final order is to have precedence in the district court, the Kansas Court of Appeals, and the Kansas Supreme Court (*See* K.S.A. 82a-1504; K.S.A. 82a-1505).

Finally, the Panel wishes to emphasize the importance of concluding the water transfer hearing in as timely a fashion as possible. As these proceedings relate to the distribution of Kansas's water supply, they concern matters of significant public interest—the Water Protection Association of Central Kansas appealed DWR's contingent approval of the Cities' change applications (filed as a prerequisite to the approval of their water transfer application) to the Kansas Court of Appeals, and, on September 26, 2022, the Kansas Supreme Court granted a motion by the Cities to transfer the case to the Supreme Court due to the importance of its subject matter. Given that the Kansas Supreme Court found it appropriate to expedite the appeal regarding the Cities' change applications, the Panel believes it is prudent for the water transfer proceedings to similarly be conducted expeditiously, in order to provide the parties with a certain resolution as soon as possible.

Accordingly, the Panel would greatly appreciate receiving a response to this letter or notice of the appointment of a presiding officer to conduct the water transfer hearing as soon as possible. Please also send a summary of the relevant qualifications of any hearing officer that OAH does appoint. Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,



Earl D. Lewis, P.E.,  
Chief Engineer,  
Kansas Department of Agriculture,  
Division of Water Resources  
785-564-6658  
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## Snell, Loren F. [OAH]

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**From:** Lewis, Earl [KDA]  
**Sent:** Friday, October 21, 2022 8:53 AM  
**To:** Snell, Loren F. [OAH]  
**Cc:** Kramer, Stephanie [KDA]  
**Subject:** Request for Hearing Officer  
**Attachments:** Letter to OAH re water transfer hearing presiding officer 10.10.22.pdf

Mr. Snell,

I chair the state's water transfer panel which was recently convened. On the panel's behalf, attached you will find a letter requesting the appointment of a hearing officer to conduct the hearing process as prescribed by statute. A hard copy of the letter will follow.

Please feel free to contact me if you have any questions about this matter. Thank you for your assistance.

Earl

**Earl Lewis, PE | Chief Engineer**  
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