KANSAS LIVESTOCK ASSOCIATION

*Since 1894*

To: Senate Committee on Natural Resources
Sen. Larry Powell, Chair

From: Aaron M. Popelka, V.P. of Legal and Governmental Affairs, Kansas Livestock Association

Re: **HB 491 AN ACT concerning water; relating to the division of water resources; groundwater.**

Date: March 11, 2016

*The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 5,200 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, dairy production, swine production, grazing land management, and diversified farming operations.*

Thank you, Chairman Powell and members of the Committee, my name is Aaron Popelka and I am with the Kansas Livestock Association (KLA). KLA appears today as an opponent of SB 491.

KLA has policy that "supports the 'first-in-time-first-in-right' principle of state water laws." KLA policy also acknowledges state law declaring water rights, real property rights. SB 491 would violate both of these policies. The bill would inhibit the ability of a senior water right owner to protect its real property right against injury by a junior water right, and it would substantially devalue the senior water right.

In addition, to substantially diminishing the doctrine of prior appropriation, this legislation appears to represent an attempt to repeal the court decision in *Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370 (2015). *Garetson* is an impairment case where the district court issued a temporary injunction against a junior water right. The district court decision on the temporary injunction was upheld by the Kansas Court of Appeals, and denied review by the Kansas Supreme Court. Any attempt to repeal the court's holding could adversely affect numerous water rights.

The primary argument put forward by proponents of SB 491 is that the court of appeals used the wrong definition of "impairment" under K.S.A. 82a-717a. In examining the court's reasoning in *Garetson*, however, it becomes clear that the court accurately interpreted the term "impairment" contained in K.S.A. 82a-717a, and such an interpretation was intended by the 1957 legislature when it enacted amendments to K.S.A. 82a-711.

Language in K.S.A. 82a-711(c) pertaining to "unreasonable raising and lowering of the static water table" and "beyond a reasonable economic limit" were added in 1957 to support a policy of groundwater development. The court of appeals noted, however, the 1957 legislature purposefully did not amend the definition section, K.S.A. 82a-701, of the Kansas Water Appropriations Act, to redefine impairment. Instead, the legislature made a conscious effort to place the reasonableness definition solely in the statute that governs approval of appropriation permits, K.S.A. 82a-711. This meant the traditional standard for "impairment" would remain in

K.S.A. 82a-717a. The standard of impairment in K.S.A. 82a-717a, as described by the Kansas Court of Appeals, means "to weaken, to make worse, to lessen in power, diminish, or relax or otherwise affect in an injurious manner." It should also be noted that the impairment statute used by the chief engineer during an administrative impairment complaint, K.S.A. 82a-706b, also is replete from language in reference to "reasonable economic limit" or the "unreasonable raising and lowering of the static water table."

SB 491, by redefining the term "impairment" to include the standard for issuing water appropriation permits under K.S.A. 82a-711, would significantly diminish the ability of a senior water right to prevent a junior water right from injuring its senior right. Furthermore, the standard contained in K.S.A. 82a-711 was the standard that led to over-appropriation of certain water formations in the state. Retroactively inserting this standard into K.S.A. 82a-717a would not only perpetuate a flawed standard, but could actually enact a government taking of a real property right.

Furthermore, language in Section 8, subsection (c) of SB 491 could be interpreted to prohibit the chief engineer or a court from enjoining a junior right that is impairing a senior right. This language does not make contextual sense and could be a vehicle for future litigation and mischief. K.S.A. 82a-725 is a statute that authorizes the court to use the chief engineer to investigate and provide the chief's professional opinion as to factual issues at play in an impairment case. The report itself does not create legal precedence and the additional language in subsection (c) would only lead to confusion as to the chief engineer's ability to "control, conserve, regulate, allot, and aid in the distribution of the water resources of the state," in accordance with K.S.A. 82a-706.

SB 491 would also repeal language in the statute pertaining to a "common law claimant". While most individuals should have a vested, appropriated, or domestic water right, tribal lands may have the ability to assert common law claims. Removing this language could disrupt the chief engineer's ability to address such situations, which could encourage such claims to be filed in federal court versus with a state agency or state court. Conversely, because nontribal water right owners must have a vested, appropriated, or domestic right, leaving the language in the statute causes no harm.

KLA also objects to two procedural component of SB 491 found in Section 2 and 3. First, it is unnecessary to adopt much of the procedure described in Section 2. Any order by the chief engineer, under K.S.A. 82a-737 is subject to review in accordance with the Kansas Judicial Review Act (KJRA). This statute already allows for an appeal of the final decision by the chief engineer to the Kansas Secretary of Agriculture. Following the administrative hearing by the Secretary, a party may file an appeal in district court. Furthermore, language in Section 2 should be opposed because it requires a reconsideration of a reconsideration, every time an order is modified. This is not currently part of the KJRA and could add substantial expense to litigating an impairment claim.

Section 3 is also costly and unnecessary. First, it would be inappropriate for the Kansas Department of Agriculture (KDA) to post complaints in pending court cases. Complaints merely represent a party's view of the law and do not represent precedent. Mandating KDA to post this material could lead individuals to misinterpret the complaints content. In addition, requiring the Department to be a clearing house for all legal opinions pertaining to water is duplicative because courts already publish opinions in a searchable format.

Finally, the requirement in Section 3 that the Division of Water Resources notify "any person who has an interest" of "any order" can literally be interpreted to mean every water right owner in the state. Certainly, water right owners who could be materially affected or might have a substantial interest in a pending action should be notified, but this provision is overly broad and should not be adopted.

Finally, KLA is currently engaged with other agricultural stakeholders, KDA, groundwater management districts, the attorney general's office, and other parties who are examining whether some procedural changes could be made in the impairment process to resolve disputes more efficiently. To that end some of the language contained in Section 7, (b)(1)-(3) has been discussed and may be recommended for adoption after further review. However, its current form is far from complete and as printed in the bill could potentially run afoul of due process requirements under the Constitution.

In addition, the working group is discussing ways to avoid abrupt changes in the amount of water available to a water user when a dispute arises, while still protecting the property right of a senior water right owner. However, at the current time the stakeholders have yet to reach consensus. We believe we can reach consensus over the summer months and can have a recommendation for the committee to consider in the next legislative year.

Thank you for the opportunity to submit testimony. KLA urges the committee to reject SB 491.