



Since 1894

Date: February 1, 2024

To: House Committee on Water
Rep. Jim Minnix, Chair

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

Re: **HB 2459 AN ACT water; relating to the Kansas water appropriation act; providing a definition for safe yield; prohibiting the change of the point of diversion of a water right if such change causes the safe yield of the source of water supply to be exceeded.**

Position: Opponent, In-Person

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing more than 5,700 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf, and stocker cattle production; cattle feeding; dairy production; swine production; grazing land management; and diversified farming operations.

Thank you, Chairman Minnix, and members of the Committee, for allowing the Kansas Livestock Association (KLA) the opportunity to share our views on HB 2459. KLA opposes HB 2459 because it would fundamentally change the underlying property right of a water right and prevent senior water rights from fully utilizing their water right.

As a general matter, KLA policy "opposes legislation or state regulation that further restricts the movement of the point of diversion of a water right." It also supports regulations that allow producers to acquire water rights and shift the point of diversion. The ability to move a point of diversion is important to livestock operations because such operations require water in a concentrated area. Due to the steady, sustained use at a low flow rate and centralized distribution systems, shifting points of diversion is important to efficiently operate a facility like a feedyard or dairy. In addition, as a livestock facility expands, irrigation water rights, peripheral to the livestock operation, are often retired and the diversion shifted to existing stockwater wells or split between the irrigation right and a stockwater well.

Many areas of the Ogallala aquifer have exceeded safe yield due to over appropriation, and this regulation is a de facto ban on changes in point of diversion, regardless of the surrounding circumstances of the change. Not only is it a heavy-handed unnecessary change in existing policy, but it may represent a taking of the real property right that underlies all water appropriation permits. Most water appropriations permits have been issued under the current version of K.S.A. 82a-708b which requires a water right owner to do four things to obtain a change in point of diversion:

- (A) Apply in writing to the chief engineer for approval of any proposed change;
- (B) demonstrate to the chief engineer that any proposed change is reasonable and will not impair existing rights;
- (C) demonstrate to the chief engineer that any proposed change relates to the same local source of supply as that to which the water right relates; and
- (D) receive the approval of the chief engineer with respect to any proposed change.

Adding a fifth requirement fundamentally changes the property right and could trigger a constitutional taking, for which the state would have to reimburse a water right owner.

In addition, safe yield is a concept that is important when issuing new water rights and should be examined if an application to move a diversion point is by the most junior water right in the area. However, if a senior water right applies for a change in point of diversion that is reasonable and within the original tract of land to which the water right attached, safe yield should not inhibit the senior water right from moving the point of diversion. In addition, if a region is already exceeding safe yield due to over appropriation, and the two most senior water rights in the area want to consolidate a diversion point, that also should not be inhibited. Neither of these scenarios would be precluded under current law.

If the goal of the bill's sponsor is to drive greater conservation, there are numerous tools that could be used or legislatively enhanced to incentive conservation. Restricting the ability of water rights, especially senior water rights, to move points of diversion is an ill-advised and inefficient means to such an end.

KLA appreciates the opportunity to submit testimony as an opponent of HB 2459 and asks that the Committee not advance the bill.