

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS**

In the Matter of:
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.

OAH Case No. 23AG0003 AG

**COMMENT FROM THE KANSAS DEPARTMENT OF HEALTH AND
ENVIRONMENT**

The Kansas Department of Health and Environment (KDHE) submits this Comment for the captioned matter. On July 19, 2023, the Court issued the “Order Recognizing Kansas Department of Health and Environment and Kansas Water Office as Commenting Agency”. KDHE now submits this Comment regarding the water transfer at issue based on the evidence presented during the hearing for this matter.

KDHE’s authority over water rights is limited. Pursuant to K.S.A. 65-171d(a):

In no event shall the secretary's authority be interpreted to include authority over the beneficial use of water, water quantity allocations, protection against water use impairment of a beneficial use, or any other function or authority under the jurisdiction of the Kansas water appropriation act, K.S.A. 82a-701, and amendments thereto.

The water transfer at issue in this matter from R9 Ranch in Edwards County involves water that lies within the Great Bend Prairie Aquifer, which is part of the larger High Plains Aquifer. The water transfer is not directly subject to the Federal Clean Water Act and KDHE has no comment on items under the jurisdiction of the Kansas Water Appropriation Act.

KDHE has authority over water quality in waters of the State. Given the commodity being transferred in the water transfer at issue is the historic consumptive use of the groundwater by irrigation in Edwards County, KDHE does not foresee any water quality impacts to the Arkansas River, which interfaces with the Great Bend Prairie Aquifer and has established minimum desirable streamflows, pursuant to K.S.A. 82a-703c. Following the decision of the Court, KDHE will appropriately condition the discharge of any increased wastewater from the Cities of Hays' and Russell's permitted wastewater treatment facilities directed down Big Creek, Fossil Creek, and the Smoky Hill River to ensure the Kansas Surface Water Quality Standards, established in K.A.R. 28-16-28b, *et. seq.*, are met. Any impacts to stream crossings from a constructed conveyance of transferred water from Edwards County will be mitigated by provisions of a National Pollutant Discharge Elimination System General Permit for Construction Activities, issued by KDHE. As such, KDHE does not foresee any environmental impacts if this water transfer is approved or denied.

On July 1, 2022, the restriction on using the Drinking Water State Revolving Fund (DWSRF) for water transfer projects was removed from the definition of "project" in K.S.A. 65-163d(c). While the DWSRF cannot fund projects where the need comes solely from future projected growth, KDHE can fund projects that address resiliency and redundancy that accommodate reasonable growth. Pursuant to K.A.R. 28-15-56(b), "no assistance from the fund shall be provided for projects and project costs deemed ineligible for participation by the U.S. environmental protection agency." The United States Environmental Protection Agency has deemed projects ineligible that are "projects needed primarily to serve future population growth. Projects must be sized only to accommodate a reasonable amount of population growth expected to occur over the useful life of the facility." 40 C.F.R. § 35.3520(e)(5).

KDHE does not take a position on whether any future DWSRF applications submitted to KDHE would or would not qualify for funding. KDHE reviews engineering reports that come with DWSRF applications to ensure the projects' needs are not based solely on future projected growth. KDHE would rely on the findings of the Water Transfer Panel to determine if the water transported to the Cities of Hays and Russell accommodates reasonable growth.

KDHE's position provided for in this comment is subject to change due to any future change in circumstances or new information discovered surrounding the water transfer at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of October, 2023, a true and correct copy of the above and foregoing Comment From The Kansas Department of Health and Environment was served on all parties via the Office of Administrative Hearings' electronic filing system.

/s/ Emily L. Quinn

Attorney for KDHE