



Since 1894

June 26, 2023

06/26/2023

Water Transfer Hearing Panel  
c/o Mr. Earl Lewis, Chief Engineer  
Division of Water Resources, Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, KS 66502

Water Resources  
Received  
KS Dept Of Agriculture

**Re: Public comments of the Kansas Livestock Association on Hays/Russell Water Transfer Application, OAH No. 23AG0003**

Water Transfer Hearing Panel Members:

The Kansas Livestock Association (KLA), located at 6031 SW 37<sup>th</sup> Street, Topeka, KS 66614-5129, was formed in 1894, and 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. KLA has numerous members in the Arkansas River basin that have both stockwater and irrigated water rights that would be affected by the Hays/Russell Water Transfer Application, OAH No. 23AG0003 (hereinafter "the Transfer"). KLA opposes the Transfer as it was submitted, and asks that the presiding officer, consistent with K.S.A. 82a-1504, approve the transfer of a smaller amount of water along with additional terms and conditions that would protect the cities in times of drought and allow the cities to access the water necessary for actual growth, but at the same time, protect the Arkansas River basin and existing water users near the R-9 Ranch.

The Water Transfer Act was enacted by the Kansas legislature to place an additional check on water right owners who seek to transfer water out of one basin for use in another. This limitation gives the water transfer hearing panel additional administrative powers to limit water use beyond the chief engineer's authority pursuant to a change in use application. In K.S.A. 82a-1502(a), an applicant must show "that the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer . . . ." K.S.A. 1502(c) outlines certain items that should be considered in weighing the benefits to the state, but allows the presiding officer to consider items beyond those specifically listed, when it states, "the presiding officer shall consider all matters pertaining thereto . . . ."

Central to these additional administrative powers is a concern that an influential actor, like a large municipality, could exploit water resources in a distant basin while avoiding beneficial use of existing resources in the basin where place of use will occur. The Transfer application, as submitted, presents such a problem, and limitations must be imposed to protect the Arkansas River basin. In particular, KLA believes the Transfer fails to produce benefits to the state to

outweigh the benefits of a more limited approach to the transfer because it fails the tests found in paragraphs (3) and (4) of K.S.A. 82a-1502(c).

The initial issue with the Transfer application is that it overestimates populations growth.<sup>1</sup> The application for water transfer claims population growth of two percent, but Hays has grown at less than one percent in the last decade and Russell has lost population.<sup>2</sup> This glaring error overstates the needs of the cities.

The second problem is Hays and Russell are attempting to transfer more water than either city currently uses or could reasonably be expected to need in the future, even in extreme drought scenarios.<sup>3</sup> Based solely on Chief Engineer David Barfield's Master Order in the change in use application, the cities would have available, on average, 4,800 acre feet of water, but analysis shows the 2040 demand of the cities is only 3,228 acre feet.<sup>4</sup> This amount of future use could be met by the cities' existing water supplies under average climatic conditions.

Even under a generous one percent growth rate and extreme drought, Hays would only be short 643 acre-feet of water in 2040 and it is not anticipated that Russell would be short water.<sup>5</sup> This begs the question, what are the cities going to do with the water they are asking for via the Transfer? Abandoning the cities' current water conservation activities would weigh against the cities in K.S.A. 82a-1502(c)(7) and is something the cities' application denies. Without additional information, it would seem the cities plan to simply forego use of existing water supplies in the basin where the cities are located, conserving these supplies for the future, while initiating a significant demand on an out-of-basin supply. KLA would argue this is the exact type of activity the Water Transfer Act was meant to prevent.

Although Chief Engineer Barfield seemed confident his Master Order, which granted the cities a ten-year rolling average of 48,000 acre-feet,<sup>6</sup> would protect safe yield in the Arkansas River basin, that is a contested issue.<sup>7</sup> Given the cities' lack of current or immediate need for this amount of water and the significant concerns and varying professional opinions around safe yield, KLA proposes the presiding officer use his discretion under K.S.A. 82a-1505 to do the following:

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<sup>1</sup> Harvey Economics, *Review of the Reasonable-Need Limitations Determining Future Water Needs for the Cities of Hays and Russell, Kansas*, at 3-1 (May 25, 2023).

<sup>2</sup> *Id.* at 3-2.

<sup>3</sup> *Id.* at 5-4.

<sup>4</sup> *Id.*

<sup>5</sup> Harvey Economics, *Rebuttal Response to Selected Expert Reports Filed on Behalf of the Cities of Hays and Russell*, at Table 3-3 (forthcoming June 29, 2023).

<sup>6</sup> MASTER ORDER CONTINGENTLY APPROVING CHANGE APPLICATIONS REGARDING R9 WATER RIGHTS, at 18 (March 27, 2019), available at [https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/haysr9\\_master-order\\_final\\_complete.pdf?sfvrsn=7e168ac1\\_4](https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/haysr9_master-order_final_complete.pdf?sfvrsn=7e168ac1_4).

<sup>7</sup> See Petition for Judicial Review, *Water Prot. Ass'n. of Cent. Kan. v. Barfield* (May 29, 2019), available at [https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/2019-05-29\\_waterpack\\_v\\_barfield\\_petition\\_63291.pdf?sfvrsn=b7d18bc1\\_0](https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/2019-05-29_waterpack_v_barfield_petition_63291.pdf?sfvrsn=b7d18bc1_0).

1. Limit the immediate transfer to approximately 650 acre-feet, the amount of future need in an exceptional drought that can realistically be expected given the cities' current water resources.
2. Condition the use of transferred water on the cities' continued use of existing available water resources, meaning the cities cannot abandon current water supplies in favor of water from another basin until such available local resources are fully utilized.
3. Allow the cities to make requests for additional water transfers at regular intervals, like every five years, up to the amount of water allowed under a final version of the change in use order. The panel could allow future transfer requests, consistent with the water rights, to be approved by the Chief Engineer up to an amount shown by the cities to be actually necessary because existing supplies are insufficient due to either deteriorating supplies of in-basin water resources or unexpected population growth. Such future transfer approvals should also be conditioned on whether safe yield goals in the basin surrounding the R-9 Ranch have been met by past transfers and are projected to be met for the additional request.

KLA believes a limited and conditional transfer will provide the cities with a more than adequate water supply and allow the cities additional access to their out-of-basin water rights upon a showing of need. Such an approach will also safeguard existing water uses in the basin surrounding the R-9 Ranch by allowing real-time analysis of impact on safe yield.

Sincerely,



Aaron M. Popelka  
V.P. Legal & Governmental Affairs.