



VIA ELECTRONIC TRANSMISSION

June 26, 2023

Water Transfer Hearing Panel
C/O Chief Engineer – Division of Water Resources
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502

06/26/2023

Water Resources
Received

KS Dept Of Agriculture

Re: OAG No. 23AG0003 AG (**R9 Ranch Water Transfer Matter**)

To Whomsoever It May Concern:

The Water Protection Association of Central Kansas (**Water PACK**) does not oppose the R9 Ranch water transfer in principle. Instead, Water PACK expects that the rolling average of 4,800 acre-feet per year (**AFY**) sought by the Cities will impair the water rights and private property rights of Water PACK's members. To prevent future impairment proceedings, the amount of water available to the Cities from the R9 Ranch should be significantly reduced to a more sustainable level (ideally 2,000-2700 AFY) or to a level based upon their actual projected needs (643 AFY in Hays). The Cities should also be required to satisfy burdens of proof regarding the proposed benefits of the transfer.

A reduction in quantities transferred for municipal uses would substantially reduce the likelihood of future litigation regarding impairment and takings, while also satisfying applicable legal standards. *Compare* K.S.A. 82a-1502(b) *with* K.S.A. 82a-706; *see also* Audubon of Kansas, Inc. v. United States Dep't of Interior, 67 F.4th 1093, 1107 (10th Cir. 2023) ("The Water Division enjoys limited discretion under Kansas law, but it always must protect senior water rights above junior rights."); *See Recommendations on the City of Wichita's Proposed Modification of the Aquifer Storage and Recovery Project Phase II Water Appropriation Permits*, in *In Re City of Wichita's Phase II Aquifer Storage and Recovery Project in Harvey and Sedgwick Counties, Kansas*, 18 WATER 14014 at p. 133¹. Reductions in transferrable quantities may also ensure that, per the Water Transfer Act (the **WTA**), the transfer meets present or reasonably foreseeable future beneficial uses in the donor basin, assuming the panel also determines that the benefits to Kansas for approving the transfer outweigh the benefits to the state for rejecting the transfer. WTA at 82a-1502(a).

We also expect that reduced transfer quantities would limit the likelihood of takings proceedings or violations of the Kansas Private Property Protection Act.

With an express purpose of reducing the "risk of undue or inadvertent burdens on private property rights resulting from lawful government actions" (Kansas Statutes. Kansas Legislature, 2013–2014, K.S.A. 77-702) the [Kansas Private Property Protection Act] requires governmental agencies before "any governmental action is initiated" to prepare

¹ <https://www.agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/asr-recommendations-2022-executed.pdf>.

reports that follow guidelines that provide for alternatives to the action that may “reduce the extent of limitation of the use of the private property” and that may “reduce the risk to the state that the action will be deemed a taking” (Kansas Statutes. Kansas Legislature, 2013–2014, K.S.A. 77-706).

John C. Peck, *Legal Challenges in Government Imposition of Water Conservation: The Kansas Example*, 107 AGRONOMY J. 1561 (2015).² Water rights are, after all, a private property right subject to the protections of our eminent domain laws.

With the Kansas Private Property Protection Act in mind, we have enclosed as Attachment A to this letter a map identifying water rights in the area surrounding the property known as the R9 Ranch. Orange parcels on the attached map show points of diversion held or operated by Water PACK members or their affiliates that we expect would be impacted by the proposed transfer. We expect the Cities’ transfer (in its present form) will cost water users surrounding the ranch upwards of \$27 million in present dollars. For wells on the west side of the river, 21 wells would be completely written off by their owners because they cannot be redrilled, effectively converting the associated lands back to pre-development (i.e., dryland conditions) with a loss of over \$10 million in irrigated land value. Of the remaining wells, we project that:

- 20% or 143 of the total on the east side of the river would have to be reset deeper, at an estimated approximate cost of \$15,000 per well or \$2,145,000; and
- 21 wells on the west side of the river could be redrilled at an estimated approximate cost of \$25,000 per well, while 285 wells on the east side of the river could be redrilled at an approximate cost of \$40,000 per well.

Thank you in advance for your consideration of this letter.

Yours truly,

Water PACK

By: /s/ Pat Janssen
Patrick M. Janssen, its President

² Mr. Peck is of counsel to Foulston Siefkin.

