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To: Senate Committee on Agriculture and Natural Resources  
Sen. Dan Kerschen, Chair

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

Re: **SB 48 AN ACT concerning water; relating to the diversion of water; chief engineer; remedies for the impairment of a valid water right or permit to divert and use water.**

Date: February 14, 2017

*The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing nearly 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 cattle production; cattle feeding; dairy production; swine production; grazing land management; and diversified farming operations.*

Thank you, Chairman Kerschen and members of the Committee, my name is Aaron Popelka and I am with the Kansas Livestock Association (KLA). KLA appreciates the opportunity to appear as a proponent of SB 48. We believe this legislation is a common sense approach to resolving disputes among water rights that preserves the priority of senior water right owners, while improving due process for junior water right owners.

SB 48 is the product of collaboration among many water right stakeholders over the past year. Collaborating stakeholders included KLA, other general farm and commodity organizations, the Kansas Department of Agriculture (KDA), the Kansas Water Office, the Kansas Water Authority, groundwater management districts, and various other legal scholars and water experts. The working group that developed this legislation was born out of legislation from last session that most of these same groups opposed. That legislation, HB 2245, would have substantially changed the definition of impairment as it applies between junior and senior water rights. While this legislation represented a stark departure from existing law, it was recognized by a majority of stakeholders that some type of change was needed to address certain existing problems with the impairment process. As a result of the hearing on HB 2245, at the urging of the Chair of the House Agriculture and Natural Resources Committee, KDA brought together the above mentioned working group.

The task of the working group was to identify the most pressing issues with the impairment process, and then craft a specific solution. It became apparent that one of the most pressing issues pertained to the current process for filing an impairment claim. Current law allows a senior water right owner to either file an administrative complaint with the Chief Engineer, or file an impairment claim directly in district court. The ability to file in district court, rather than

first pursue administrative relief, can and has caused significant disruptions in administration of water rights.

First, bypassing the Chief Engineer through the direct judicial remedy route, omits the experts and data at the Chief Engineer's disposal. Furthermore, the Chief Engineer has developed a comprehensive administrative impairment procedure found in K.A.R. 5-4-1 that takes in comments from all affected stakeholders, which is not available under the direct judicial remedy alternative. In addition, by filing in district court, a senior water right can pick and choose those junior water rights it wishes to enforce against, rather than asking the Chief Engineer to conduct an investigation that will analyze all water rights in the zone of influence around the senior water right. This was specifically the case in *Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370 (2015). The *Garetson* case, which was the genesis of HB 2245 last legislative session, involved a plaintiff who only chose to file a complaint against one particular neighbor, rather than file a complaint against all surrounding junior water rights. This type of gamesmanship is what SB 48 tries to avoid. Finally, KLA believes that unlike the court in *Garetson*, the Chief Engineer will strive to find temporary restrictions that avoid complete curtailment of water use by a junior water right during the investigation period.

SB 48 retains the ability of a senior water right to seek judicial remedy, but the senior water right must first file a complaint with the Chief Engineer. Once the administrative process with the Chief Engineer is exhausted, the senior or junior water right owners may appeal the Chief Engineer's decision to district court. Retaining the ability to seek district court review of any impairment decision is key because water rights are property rights, which have certain constitutional protections.

Once an impairment complaint is filed with the Chief Engineer, the Chief Engineer must initiate an investigation within two weeks and complete the investigation within one year, unless good cause necessitates an extension. In addition to the Chief Engineer's water-use data, all affected water right owners may supplement the record by submitting relevant information consistent with the rules of the Chief Engineer. Furthermore, a senior water right may request a temporary order to curtail usage of the junior water right during the year-long investigation if the Chief Engineer finds an impairment is likely and a temporary order would not be adverse to the public interest. This temporary order is subject to additional administrative and judicial review if any water right owner disputes the temporary order.

During the Chief Engineer's investigation of an impairment complaint, SB 48 directs that the review be conducted under K.S.A. 82a-706b, which states: "It shall be unlawful for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same," and gives the Chief Engineer the ability to close junior diversion points. The Chief Engineer has further defined the impairment process under K.A.R. 5-4-1 and K.A.R. 5-4-1a.

KLA believes the amendments to current law contained in SB 48 will create a more predictable and cohesive system of handling impairment complaints. The system should avoid non-water related landowner disputes and allow the Chief Engineer to focus on how water-related data relates to the system of prior appropriation. KLA supports SB 48 and asks the Committee to approve it favorable for passage when it considers the bill.