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August 6, 2018

David W. Barfield, Chief Engineer
Division of Water Resources
Kansas Dept. of Agriculture
1320 Research Drive
Manhattan, KS 66502

Re: The Cities' response to Andrew Keller's / Water PACK's site-specific
consumptive-use analysis

Dear David,

The Water Protection Association of Central Kansas ("Water PACK") retained Andrew Keller of Keller-Bliesner Engineering, LLC, Logan, UT, to provide a "site-specific" consumptive-use analysis of the water rights on the R9 Ranch. We were provided with two sources of information from DWR relating to Keller's analysis:

- ◆ *R9 Ranch Consumptive Use Analysis* — a written Report by Keller dated November 24, 2016, with (unmarked) corrections dated November 12, 2017.
- ◆ *Water Level Trends & Consumptive Use on the R9 Ranch* — a PowerPoint presentation dated June 21, 2018, with audio narration by Keller.

We are not impressed with the Report and had not planned to respond, but in a recent telephone conversation, you asked for the Cities' perspective. Some of the issues we identified are addressed in this letter and the attachment from Burns and McDonnell.

Neither Keller nor Water PACK provided sufficient background documentation to fully evaluate the conclusions contained in the Keller Report; however, even without that data, a number of problems—both legal and factual—are immediately apparent.

The most glaring factual defect relates to Keller's inaccurate conclusion that water levels on the R9 Ranch are in a state of decline, which he presents as the source of his underlying "cause for concern." (Keller PowerPoint, at p. 3.) Keller argues that water levels near the R9 Ranch are declining even though water use on the R9 Ranch itself has been curtailed over the years. We are attaching a brief explanation of actual

water level data that was prepared by Burns & McDonnell showing that Keller's presentation uses incomplete data to draw inaccurate conclusions.

I. Keller's alternative consumptive-use analysis violates both the text and the spirit of Kansas law and public policy.

A. Keller misquotes K.A.R. 5-5-9(c).

Keller relies on K.A.R. 5-5-9, declaring that use of an alternative, site-specific consumptive-use analysis is appropriate under the circumstances, but he misreads that regulation in two important respects.

First, he misquotes the regulation. The subsection (c), site-specific consumptive-use analysis is only triggered when the annual quantity calculated using subsection (a)(1) appears to be unrealistic *and* (2) possibly results in impairment of other water rights. For many years, Kansas courts have warned against substituting "or" for "and."¹ Nevertheless, Keller justifies his alternative calculation by misquoting the regulation as shown.

This "or" should be "and."

K.A.R. 5-5-9 (c): If quantity by K.A.R. 5-5-9 (a) appears unrealistic **or** could impair other water rights the chief engineer shall make a **site-specific net consumptive use analysis**.

This is the basis for the R9 Ranch site-specific net consumptive use analysis we conducted for Water PACK

Keller makes no effort to show that approval of the Cities' change applications as provided in the Master Order could result in impairment and absent such a showing, no site-specific consumptive-use analysis is permitted. By attempting to modify the circumstances under which the Chief Engineer can conduct a site-specific consumptive-use analysis, Water PACK is seeking to change Kansas public policy in a way that would be unfair to the Cities.

B. Keller ignores critical text in K.A.R. 5-5-9(a) and (c).

Second, and perhaps even more importantly, Keller calculates consumptive use improperly based on the future use of the Ranch as grassland. His approach is not only

¹ See, e.g., *Davis v. Vermillion*, 173 Kan. 508, 510 (1952) ("[T]he ordinary interpretation given to the word 'or' is not as a conjunctive; its accurate use is not as a conjunctive and it *never* means 'and' unless . . . absolutely require[d]" by the overall context.).

unfair to the Cities on its face, it is also speculative, inadequately explained and documented, contradicts the longstanding approach required by Kansas law and adopted by DWR for every other water user, and violates the plain text of K.A.R. 5-5-9.

Under that regulation, consumptive use must be based on the original irrigation use made of water during the year of record, evaluated (as DWR always has) on a water-right-by-water-right basis.

This is clear from the first sentence of K.A.R. 5-5-9(a), which provides that changes to water rights must not increase the “net consumptive use from the same local source of water supply *by the original irrigation use.*” (Emphasis ours.) That consumptive use must be based on a water-right user’s historical use is confirmed in subsection (c), which, when applicable, would have you “determine the quantity of water which *was actually beneficially consumed* under the water right.” (Emphasis ours.)

There can be no doubt that the reference in subsection (c) to the past-tense quantity of water that “was actually beneficially consumed” refers to subsection (a)’s “original irrigation use.” In other words, consumptive use under both K.A.R. 5-5-9(a) and (c) looks to the actual net consumptive use during the perfection period.

Keller ignores this regulatory text. Instead, he offers an analysis based on his estimation of the dramatically greater consumptive use he argues will exist under the post-transfer dryland/natural grassland conditions. There is no support for this approach in the regulations and adopting Keller’s approach is not only inappropriate for the Cities’ Change Applications, it is a slippery slope with potential statewide impacts.

Ignoring (as we must) Keller’s argument that the site-specific calculation should be measured by the consumptive use of future grassland on the Ranch, and for the sake of argument only, basing Keller’s calculation on alfalfa and corn consumptive use under his METRIC model actually results in a quantity that *exceeds* the quantity set out in the Draft Master Order by 82.6 acre-feet. The below table follows Keller’s calculation of net consumptive use on his 20th slide, excluding the bogus “Grassland CU of Precip.”

	Alfalfa	Corn
ETc	46.00	35.90
Mean ETrF	0.72	0.72
ETa	33.12	25.85
50% Prob. Eff. Precipitation	15.40	12.20
N.I.R. in inches	17.72	13.65
N.I.R. in Acre Feet	1.48	1.14
Acres irrigated	2,901.00	2,247.00
Total Quantities in Acre-Feet	4,283.81	2,555.59
Total Net Consumptive Use	6,839.40	
Net Consumptive Used per the Master Order	6,756.80	
Difference	82.60 acre-feet	

You have never expressed a concern that the K.A.R. 5-5-9(a) quantity appears to be unrealistic, which is one of the two conditions that must be met before the site-specific consumptive-use analysis under K.A.R. 5-5-9(c) is triggered. Nevertheless, for other reasons, you have insisted on the Ten-Year Rolling Aggregate Limitation which is almost 2,000 acre-feet lower than the quantity authorized by K.A.R. 5-5-9(a) and 2,039.4 acre-feet less than Keller's calculation of consumptive-use. That Limitation was established using industry-accepted practices and scientifically recognized hydrological modeling.

C. Keller's analysis incorrectly focuses on the Ranch as a whole rather than water right by water right.

Keller's analysis is of the Ranch as a whole rather than water right by water right as required by the regulations. For example, he states: "We do not believe there was ever a year when all circle acreages on the R9 Ranch were irrigated." Along the same lines, Keller emphasizes his perception that water use on the Ranch has been "sporadic" including during the perfection period and that consumptive use on the Ranch has not been "on par" with other irrigated properties in Edwards County.

He offers these opinions without explaining their basis and without data comparing actual water use on the Ranch with all or even any other water users. More to the point, Keller's approach is not required by the regulation, is not how other water users are treated, and it is unclear how the regulation could be applied to impose a global reduction without the Cities' consent.

The consumptive-use analysis under both subsections (a) and (c) must be based on one year during the perfection period, not on whether irrigation use during that period was “on par” with other irrigated properties or sporadic thereafter.

II. Factual considerations undercut Water PACK’s concerns and Keller’s Report.

If Water PACK had legitimate concerns relating to the water transfer, water levels in the area, and consumptive use, it is unclear why they waited until now to provide Keller’s Report, which is dated November 24, 2016, but was not provided to DWR or the Cities until July 2018—more than a year-and-a-half later. During the intervening 19+ months, the Cities and DWR spent considerable time, effort, and expense negotiating the Master Order and the Change Approvals following the longstanding approach to the consumptive-use analysis that DWR uses for all Change Applications. The Cities’ and DWR’s work was not conducted in secrecy; Water PACK has been well aware of these negotiations from the outset and should have presented its “alternative” approach much sooner.

The Report states that Water PACK is concerned that the proposed transfer “could impair member water rights and have other negative hydrologic and socio-economic impacts in the vicinity of the ranch.” The Report does not identify the members that might be impacted, nor does it specify any actual or threatened negative hydrologic or socio-economic impacts about which the members claim to be concerned.

The Cities are aware that their neighbor, Richard Wenstrom, is a Water PACK member. We have carefully considered the potential impact on Mr. Wenstrom’s farming operation and are confident that the transfer will not impair any of his senior water rights. We do not know which other neighbors are Water PACK members, so we cannot specifically evaluate the potential impacts, if any, that the transfer might have on them. That said, we are confident that the transfer will not impair any of the senior water rights in the vicinity.

Keller mentions impairment and “other negative hydrologic . . . impacts” but does not identify them. We have no idea what he is referring to and cannot respond to issues he declines to identify. Moreover, the unnamed “socio-economic impacts in the vicinity of the ranch” are more appropriately addressed in the transfer proceeding, not during the change-approval process.

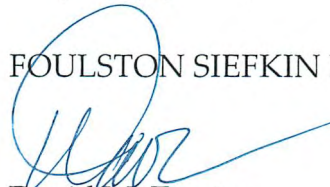
As noted above, Burns and McDonnell has reviewed the Report and informs us that the documentation is wholly inadequate to perform a complete analysis. We also

understand that DWR has requested the backup data and Keller has refused to provide it unless he can come to Kansas to explain it. Given the numerous problems apparent on the face of the documents he has provided, we understand why he is reluctant to provide the data without an opportunity to justify his work.

We have other issues and concerns with Dr. Keller's analysis but do not believe that addressing them is necessary or warrants further time or effort.

Very truly yours,

FOULSTON SIEFKIN LLP



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C: Toby Dougherty
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