



Since 1894

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

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

Re: **SB 182 AN ACT concerning water; relating to water measuring devices; technicians; inspections; liability of water right owners.**

Date: February 21, 2019

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing nearly 5,600 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. KLA appears to today as a proponent of SB 182.

KLA asked the Committee to introduce SB 182 to accomplish three goals:

1. Protect water right owners from being penalized by the Chief Engineer of the Kansas Department of Agriculture, Division of Water Resources (Chief Engineer) in cases where water meter technicians do not perform up to an industry standard;
2. Clarify that the Chief Engineer can penalize water meter technicians who do not perform up to industry standards; and
3. Clarify that the Chief Engineer has the authority to test water meters for accuracy.

Before I explain how the bill operates section-by-section, it is important to understand the genesis for this legislation. In 2018, the Chief Engineer issued a number of orders against water right owners alleging the water right owners allowed their water meters to be tampered with, allowed the display of an inaccurate meter reading, and filed an inaccurate water use report. While each case was different, and I only have direct knowledge of the two cases I worked with KLA members on, there were a number of deficiencies in these cases.

In each of the cases the water right owner needed a water meter serviced and called a third-party water meter technician. While there was some evidence that the water meter technician had done a poor job of servicing the meters, causing the meters in some cases to exceed tolerances, there was no evidence presented by the Chief Engineer that the water right owner had anything to do with the inaccurate meters. Prior to filing the orders, the Chief Engineer decided he lacked authority to penalize the meter technician in question. Instead of coming to the legislature to seek a remedy in statute, the Chief Engineer decided that someone needed to bear responsibility, and as a result, the Chief Engineer decided to file penalty orders against the

only people within his regulatory reach – the water right owners. Not only did the original orders seek to impose a monetary fine, but the orders also sought a one-year suspension of the water rights.

In KLA's opinion, these orders never should have been issued. The only evidence offered by the Chief Engineer demonstrated the water right owners hired an incompetent technician. KLA believes the law should not enable an agency to hold a water right owner responsible for the substandard performance of a contractor hired to fix a piece of equipment. Think about that for a minute. As a water right owner, you know your equipment needs to be repaired to stay in compliance, you hire a repairman to keep the equipment in compliance, and now the government wants to not only fine you for a third-party's actions, but deprive you of your property for a year. Fortunately, most of these cases have been settled with an agreement that the water right owners must test all their other water meters for accuracy. Even the settlement agreements, however, are excessive because in many of these cases the technician in question did not service all the water meters required to be tested.

To ensure the above situation does not occur in the future, SB 182 would do the following:

- Modify K.S.A. 82a706c as follows:
 - Subsection (a) – is a clarifying amendment to add “water measuring device” to make the term consistent with other sections.
 - Subsection (b) – gives the Chief Engineer the option to inspect water measuring devices at an interval of his choosing. This is not a mandate to inspect, but an option available to the Chief Engineer.
 - Subsection (c) – gives the Chief Engineer the option to prescribe tolerances and specifications for water measuring devices, but the tolerances must be the same for new and repaired devices, and account for ordinary wear and tear on the devices. The authority to prescribe tolerances is not a mandate, but it would serve to inform water measuring device technicians about standards of performance the technicians should be meeting.
- Modify K.S.A. 82a-737 as follows:
 - Paragraph (a)(3) – defines “person”. The statute has never defined the term “person”. Adding the definition in conjunction with the definition in paragraph (a)(4) helps clarify that the chief engineer can assess civil penalties under K.S.A. 82a-737(b)(2)(E) on water measuring device technicians.
 - Paragraph (a)(4) – defines a “water measuring device technician”. By using the word “person” in this definition it grants the Chief Engineer authority to assess a \$1,000 penalty for “failure to properly install, maintain or assure the accuracy of acceptable water measuring devices” on a water measuring device technician.
 - Paragraph (a)(5) – defines “seal” as the term is used in subsection (e).

- Subparagraph (b)(3)(E) – this is a technical correction to make “water measurement devices” consistent with “water measuring devices” in K.S.A. 82a-706c.
- Subsection (e) – this subsection grants immunity to a water right owner from liability that results directly from an inaccurate meter if **each** of the following are present:
 1. The meter was worked on by a water measuring device technician;
 2. The water measuring device technician’s seal is present and intact; **and**
 3. The water right owner did not knowingly tamper with the meter or knowingly hire another person to tamper with the meter.
 - If a meter does not have a seal because of age or tampering, the immunity does not apply.
 - In addition, if a meter becomes inaccurate because of ordinary wear and tear, a water right owner could still be held accountable because the chief engineer could test the meter and issue an order requiring repair. If this order is issued under the chief engineer’s general authority, under K.S.A. 82a-737(b)(3), the water right owner would be subject to a penalty for violating an order because the immunity under (e) only applies to (b)(3)(D) and (E).
- Subsection (f) – states that absence of a seal or broken seal on a water meter alone cannot be used to make a finding of an inaccurate water meter. However, if other evidence, like a field pump test, is offered, the absence of a seal or a broken seal can be used to support a violation.
 - Some water meters are old enough not to have seals, some seals corrode over time, and some technicians have been reported compromising seals in their attempt to ensure the seal was intact. This is an attempt to ensure those circumstances are observed by the Chief Engineer.

Finally, while there may be some discussion about the number of cases this involves annually, in KLA’s opinion, protecting one water right owner from false accusations or from a substandard technician merits changes to the statute.

Thank you for the opportunity to submit testimony. KLA asks that the Committee support SB 182 and recommend it favorable for passage.