

Kansas Moratorium Report on Regulation Changes 2015

Kansas Water Appropriation Act

In December 2015, Kansas adopted the following Kansas Administrative Regulation revisions:

K.S.A. 82a-706b. Diversion of water prohibited, when; unlawful acts; enforcement by chief engineer. (a) 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, or for any person without an agreement with the state of Kansas to divert or take any water that has been released from storage under authority of water reservation rights held by the state of Kansas. Upon making a determination of an unlawful diversion the chief engineer or the chief engineer's authorized agents, shall, as may be necessary to secure water to the person having the prior right to its use, or to secure water for the purpose for which it was released from storage under authority of the state of Kansas or water reservation rights held by the state of Kansas: (1) Direct that the headgates, valves, or other controlling works of any ditch, canal, conduit, pipe, well or structure be opened, closed, adjusted or regulated; or (2) within the rattlesnake creek subbasin located in hydrologic unit code 11030009, allow augmentation for the replacement in time, location and quantity of the unlawful diversion, if such replacement is available and offered voluntarily. (b) The chief engineer, or the chief engineer's authorized agents, shall deliver a copy of such a directive to the persons involved either personally or by mail or by attaching a copy to such headgates, valves, or other controlling works to which it applies and such directive shall be legal notice to all persons involved in the diversion and distribution of the water of the ditch, canal, conduit, pipe, well or structure. For the purpose of making investigations of diversions and delivering directives as provided herein and determining compliance therewith, the chief engineer or the chief engineer's authorized agents shall have the right of access and entry upon private property. **(History:** L. 1957, ch. 539, § 10; L. 1965, ch. 557, § 1; June 30; L. 2015, ch. 60, § 1; July 1.)

K.S.A. 82a-708c. Application for term permits to appropriate water; fee. (a) A term permit is a permit to appropriate water for a limited specified period of time in excess of six months. At the end of the specified time, or any authorized extension approved by the chief engineer, the permit shall be automatically dismissed, and any priority it may have had shall be forfeited. No water right shall be perfected pursuant to a term permit.

(b) Each application for a term permit to appropriate water shall be made on a form prescribed by the chief engineer and shall be accompanied by an application fee fixed by this section for the appropriate category of acre feet in accordance with the following:

Acre Feet Fee	
0 to 100	\$200
101 to 320	\$300
More than 320	\$300 + \$20

for each additional 100
acre feet or any part thereof

On and after July 1, 2018, the application fee shall be set forth in the schedule below:

Acre Feet Fee

0 to 100. \$100

101 to 320 \$100

More than 320 \$150 + \$10

for each additional 100
acre feet or any part thereof

The chief engineer shall render a decision on such term permit applications within 150 days of receiving a complete application except when the application cannot be processed due to the standards established in K.A.R. 5-3-4c. Upon failure to render a decision within 180 days of receipt of a complete application, the application fee is subject to refund upon request.

(c) Each application for a term permit to appropriate water for storage, except applications for permits for domestic use, shall be accompanied by an application fee fixed by this section for the appropriate category of storage-acre feet in accordance with the following:

Storage-Acre Feet Fee

0 to 250. \$200

More than 250 \$200 + \$20

For each additional 250
Acre feet or any part thereof

On and after July 1, 2018, the application fee shall be set forth in the schedule below: 10

Storage-Acre Feet Fee
 0 to 250 \$100
 More than 250 \$100 + \$10
 for each additional 250
 acre feet or any part thereof

The chief engineer shall render a decision on such term permit applications within 150 days of receiving a complete application except when the application cannot be processed due to the standards established in K.A.R. 5-3-4c. Upon failure to render a decision within 180 days of receipt of a complete application, the application fee is subject to refund upon request.

(d) Each application for a term permit pursuant to K.S.A. 2013 Supp. 82a-736, and amendments thereto, shall be accompanied by an application fee established by rules and regulations adopted by the chief engineer in an amount not to exceed \$400 for the five-year period covered by the permit.

(e) Notwithstanding the provisions of K.S.A. 82a-714, and amendments thereto, the applicant is not required to file a notice of completion of diversion works nor pay a field inspection fee. The chief engineer shall not conduct a field inspection of the diversion works required by statute for purposes of certification nor issue a certificate of appropriation for a term permit.

(f) A request to extend the term of a term permit in accordance with the rules and regulations adopted by the chief engineer shall be accompanied by the same filing fee applicable to other requests for extensions of time as set forth in K.S.A. 82a-714, and amendments thereto.

(g) An application to change the place of use, point of diversion, use made of water, or any combination thereof, pursuant to K.S.A. 82a-708b, and amendments thereto, shall not be approved for a term permit, except a change in place of use for a term permit approved pursuant to K.S.A. 82a-736, and amendments thereto, for irrigation use may be approved by the chief engineer for an increase of up to 10 acres or 10% of the authorized place of use whichever is less.

(h) The chief engineer shall adopt rules and regulations to effectuate and administer the provisions of this section. **(History:** L.2009, ch. 51, § 2; L. 2014, ch. 133, § 11; July 1; L. 2015, ch. 60, § 2; July 1.)

K.S.A. 82a-736. Multi-year flex accounts. (a) It is hereby recognized that an opportunity exists to improve water management by enabling multi-year flexibility in the use of water authorized to be diverted under a groundwater water right, provided, that such flexibility neither impairs existing water rights, nor increases the total amount of water diverted, so that such flexibility has no long-term negative effect on the source of supply. It is therefore declared necessary and advisable to permit the establishment of multi-year flex accounts for groundwater water rights, together with commensurate protections for existing water rights and their source of supply.

(b) As used in this section:

(1) “Base water right” means a water right under which an applicant applies to the chief engineer to establish a multi-year flex account and where all of the following conditions exist:

(A) The authorized source of supply is groundwater; and

(B) the water right has not been the subject of a change approval to implement the provisions of K.A.R. 5-5-9(a)(2), K.A.R. 5-5-11(b)(2) or K.A.R. 5-5-11(b)(3), in effect upon the effective date of this act.

(2) “Multi-year flex account” means a term permit which suspends a base water right during its term, except when the term permit may be no longer exercised because of an order of the chief engineer, and is subject to the terms and conditions as provided in subsection (e).

(3) “Base average usage” means:

(A) The average amount of water actually diverted for a beneficial use under the base water right during calendar years 2000 through 2009, excluding any amount diverted in any such year that exceeded the maximum annual quantity of water authorized by the base water right; or

(B) if the holder of the base water right shows to the satisfaction of the chief engineer that water conservation reduced water use under the base water right during calendar years 2000 through 2009, then the average amount of water actually diverted for a beneficial use under the base water right during the five calendar years immediately before the calendar year when water conservation began, excluding any amount used in any such year that exceeded the amount authorized by the base water right.

(4) "Chief engineer" means the chief engineer of the division of water resources of the department of agriculture.

(5) "Flex account acreage" means the maximum number of acres lawfully irrigated during a calendar year when no term, condition or limitation of the base water right has been violated and either of the following conditions is met:

(A) The calendar year is 2000 through 2009; or

(B) if water conservation reduced water use under the base water right during calendar years 2000 through 2009, the calendar year is a year within the five calendar years immediately prior to the calendar year when water conservation began. 24

(6) "Net irrigation requirement" means the net irrigation requirement for 50% chance rainfall of the county that corresponds with the location of the authorized place of use of the base water right as provided in K.A.R. 5-5-12, on the effective date of this act.

(c) (1) Any holder of a base water right that has not been deposited or placed in a safe deposit account in a chartered water bank may establish a multi-year flex account where the holder may deposit, in advance, the authorized quantity of water from such water right for any five consecutive calendar years, subject to all of the following:

(A) The water right must be vested or shall have been issued a certificate of appropriation;

(B) the withdrawal of water pursuant to the water right shall be properly and adequately metered;

(C) the water right is not deemed abandoned and is in compliance with the terms and conditions of its certificate of appropriation, all applicable provisions of law and orders of the chief engineer;

(D) the amount of water deposited in the multi-year flex account shall not exceed the greatest of the following:

(i) 500% of the base average usage;

(ii) 500% of the product of the annual net irrigation requirement multiplied by the flex account acreage, multiplied by 110%, but not greater than five times the maximum annual quantity authorized by the base water right;

(iii) if the authorized place of use is located wholly within the boundaries of a groundwater management district, an amount that shall not increase the long-term average use of the groundwater right as specified by rule or regulation promulgated pursuant to K.S.A. 82a-1028(o), and amendments thereto; or

(iv) pursuant to subparagraph (E), the amount computed in (i), (ii) or (iii) plus any deposited water remaining in a multi-year flex account up to 100% of the base average usage;

(E) any deposited water remaining in a multi-year flex account up to 100% of the base average usage may be added to the deposit amount calculated in subparagraph (D) if the base water right is enrolled in another multi-year flex account during the calendar year in which the existing multi-year flex account expires. The total amount of water deposited in any multi-year flex account shall not exceed 500% of the authorized quantity of the base water right; and

(F) notwithstanding any other provisions of this subsection, except when the base water right is suspended due to the issuance of a two-year term permit in a designated drought emergency area for 2011 and 2012, the quantity of water deposited into a multi-year flex account shall be reduced by the quantity of water used in excess of the maximum annual quantity of the base water right during 2011 if the application for a multiyear flex account is filed with the chief engineer on or before July 15, 2012.

(2) The provisions of K.A.R. 5-5-11 are limited to changes in annual authorized quantity and shall not apply to this subsection.

(d) The chief engineer shall implement a program providing for the issuance of term permits to holders of groundwater water rights who have established flex accounts in accordance with this section. Such term permits shall authorize the use of water in a flex account at any time during the five consecutive calendar years for which the application for the term permit authorizing a multi-year account is made, without annual limits on such use.

(e) Term permits provided for by this section shall be subject to the following: 25

- (1) A separate term permit shall be required for each point of diversion authorized by the base water right.
- (2) The quantity of water authorized for diversion shall be limited to the amount deposited pursuant to subsection (c)(1)(D).
- (3) The rate of diversion for each point of diversion authorized under the term permit shall not exceed the rate of diversion for each point of diversion authorized under the base water right.
- (4) The authorized place of use shall be the place of use or a subdivision of the place of use for the base water right.
- (5) The point of diversion authorized by the term permit shall be specified by referencing one point of diversion authorized by the base water right at the time the multi-year flex account term permit application is filed with the chief engineer or at the time any approvals changing such referenced point of diversion of the base water right are approved during the multi-year flex account period. For a base water right with multiple points of diversion, each point of diversion authorized by a term permit shall receive a specific assignment of a maximum authorized quantity of water, assigned proportionately to the authorized annual quantities of the respective points of diversion under the base water right.
- (6) The chief engineer may establish, by rules and regulations, criteria for such term permits.
- (7) Except as explicitly provided for by this section, such term permits shall be subject to all provisions of the Kansas water appropriation act, and rules and regulations adopted under such act, and nothing in this section shall authorize impairment of any vested right or prior appropriation right by the exercise of such term permit.
- (f) An application for a multi-year flex account shall be filed with the chief engineer on or before October 1 of the first year of the multi-year flex account term for which the application is being made.
- (g) All costs of administration of this section shall be paid from fees for term permits provided for by this section. Any appropriation or transfer from any fund other than the water appropriation certification fund for the purpose of paying such costs shall be repaid to the fund from which such appropriation or transfer is made. At the time of repayment, the secretary of agriculture shall certify to the director of accounts and reports the amount to be repaid and the fund to be repaid. Upon receipt of such certification, the director of accounts and reports shall promptly transfer the amount certified to the specified fund.
- (h) The fee for a multi-year flex account term permit shall be the same as specified for other term permits in K.S.A. 82a-708c, and amendments thereto, except as follows:
 - (1) If the base water right is currently suspended due to the issuance of a two-year term permit in a designated drought emergency area for 2011 and 2012, then a holder of such term permit shall be subject to a \$200 application fee for a multi-year flex account term permit if the application is filed on or before July 15, 2012; or
 - (2) if water use under the authority of the base water right exceeded the maximum annual quantity authorized by the base water right during 2011 and the holder of the base water right files an application for approval of a multi-year flex account term permit on or before July 15, 2012, then the application fee shall be \$600.
- (i) The chief engineer shall have full authority pursuant to K.S.A. 82a-706c, and amendments thereto, to require any additional measuring devices and any additional reporting of 26

water use for term permits issued pursuant to this section. Failure to comply with any measuring or reporting requirement may result in a penalty, up to and including the revocation of the term permit and the suspension of the base water right for the duration of the term permit period.

(j) The chief engineer shall submit a written report on the implementation of this section to the house standing committee on agriculture and natural resources and the senate standing committee on natural resources on or before February 1 of each year.

(k) This section shall be part of and supplemental to the Kansas water appropriation act. **(History:** L. 2001, ch. 160, § 16; L. 2005, ch. 142, § 3; L. 2011, ch. 89; § 28; July 1; L. 2012 ch. 7, § 1; July 1; 2015; ch. 60; § 3; July 1.)

K.S.A. 82a-744. Water management and conservation measures; due consideration by chief engineer. (a) The chief engineer shall give due consideration to water management or conservation measures previously implemented by a water right holder when implementing any further limitations on a water right pursuant to any program established or implemented on and after July 1, 2015. The chief engineer shall take into account reductions in water use, changes in water management practices and other measures undertaken by such water right holder. (b) This section shall be part of and supplemental to the Kansas water appropriation act. **(History:** L. 2015, ch. 60, § 5; July 1.)

K.S.A. 82a-745. Water conservation areas; establishment procedures; duties of chief engineer; notice; orders; consent agreement; review. (a) Any water right owner or a group of water right owners in a designated area may enter into a consent agreement and order with the chief engineer to establish a water conservation area. The water right owner or group of water right owners shall submit a management plan to the chief engineer. Such management plan shall be the basis of the consent agreement and order designating a water conservation area and shall: (1) Include clear geographic boundaries; (2) include the written consent of all participating water right owners within the geographic boundaries described in paragraph (1) to enter into the consent agreement and order; (3) include a finding or findings that one or more of the circumstances specified in K.S.A. 82a-1036(a) through (d), and amendments thereto, exist; (4) include provisions regarding the proposed duration of the water conservation area and any process by which water right owners may request to be added or removed from the water conservation area; (5) include goals and corrective control provisions to address one or more of the circumstances specified in K.S.A. 82a-1036(a) through (d), and amendments thereto; (6) give due consideration to water users who have previously implemented reductions in water use resulting in voluntary conservation measures; (7) include compliance monitoring and enforcement; and (8) be consistent with state law. (b) A consent agreement and order of designation of a water conservation area pursuant to this section shall define the boundaries of the water conservation area and may include any of the following corrective control provisions: (1) Closing the water conservation area to any further appropriation of groundwater. In which event, the chief engineer shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such area; (2) determining the permissible total withdrawal of groundwater in the water conservation area each day, month or year, and apportioning such permissible total withdrawal among the valid groundwater right holders in such area in accordance with the relative dates of priority of such rights; (3) reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the water conservation area; (4) requiring and specifying a system of rotation of groundwater use in the water conservation area; and (5) any other provisions necessary to effectuate agreed-upon 30

water conservation goals consistent with the public interest. The chief engineer shall be responsible for the monitoring and enforcement of any corrective control provisions ordered for a water conservation area. (c) The order of designation shall be in full force and effect from the date of its entry in the records of the chief engineer's office. The chief engineer upon request shall deliver a copy of such order to any interested person who is affected by such order and shall file a copy of the same with the register of deeds of any county within which any part of the water conservation area lies. (d) If any corrective control provisions of a water conservation area conflict with rules and regulations of a groundwater management district or requirements of a local enhanced management plan or intensive groundwater use control area that result in greater overall conservation of water resources within which a participating water right is situated, the chief engineer is authorized to amend the provisions of the water conservation area to conform to any rules and regulations or requirements that result in greater conservation of water resources, as determined by the chief engineer. As part of the consent agreement and order of designation, the chief engineer may authorize single-year or multi-year term permits for water right owners to effectuate the water conservation area's conservation goals in accordance with the management plan. (e) Prior to execution of a proposed water conservation area consent agreement and order of designation pursuant to this section, the chief engineer shall notify in writing the groundwater management district within which any participating water right is situated. Such groundwater management district shall be given an opportunity to provide a written recommendation regarding the proposed water conservation area and management plan within 45 days of notification by the chief engineer. The review period may be extended by up to 30 days upon approval by the chief engineer. Subject to subsection (d), any participating water right in a water conservation area shall continue to be subject to all applicable rules and regulations and management plans of the groundwater management district in which the water right is situated. (f) The consent agreement and order of designation shall provide for periodic review of the consent agreement and order, which may be initiated by the chief engineer or upon request of the water right owners in the water conservation area. The consent agreement and order shall specify the frequency of such periodic review, but a review shall be conducted at least once every 10 years. (g) (1) The chief engineer may, with the consent of all participating water right owners, amend a consent agreement and order of designation in order to: (A) Modify corrective control provisions or the boundaries of the designated area; (B) add or remove water rights upon request of such water right owners; (C) terminate a water conservation area upon the request of the water right owners in the designated area; or (D) make other changes the water right owners may request. (2) Any amendments to a consent agreement and order of designation, except amendments that remove a water right upon request of the owner so long as the consent of all participating water right owners is not required pursuant to the management plan, shall be consented to by all participating water right owners within the designated area and the chief engineer and shall be based upon a revised management plan submitted by the participating water right owners. (h) The chief engineer shall adopt rules and regulations to effectuate and administer the provisions of this section. (i) The provisions of this section shall be part of and supplemental to the Kansas water appropriation act.

(History: L. 2015, ch. 37, § 1; July 1.)