

Department of Agriculture, Division of Water Resources
Notice of Hearing on Proposed
Administrative Regulations, Statewide

A public hearing will be conducted at 10:00 a.m. Tuesday, July 25, 2017, in room 124 of the Kansas Department of Agriculture, 1320 Research Park Dr., Manhattan, Kansas, to consider the adoption of proposed regulations.

Individuals wishing to participate by teleconference may go to one of the following locations on the date and time of the public hearing:

Garden City Field Office, 2508 Johns Street, Garden City
Stafford Field Office, 300 S. Main Street, Stafford
Stockton Field Office, 820 S. Walnut, Stockton
Topeka Field Office, 6531 SE Forbes Ave., Suite B, Topeka

This 60-day notice of the public hearing shall constitute a public comment period for the purpose of receiving written public comments on the proposed rules and regulations. All interested parties may submit written comments prior to the hearing to the Secretary of Agriculture, 1320 Research Park Dr., Manhattan, Kansas, 66502, or by e-mail to ronda.hutton@ks.gov. All interested parties will be given a reasonable opportunity to present their views orally on the adoption of the proposed regulations during the hearing. In order to give all parties an opportunity to present their views, it may be necessary to request that each participant limit any oral presentation to five minutes. These regulations are proposed for adoption on a permanent basis. A summary of the proposed regulations and their economic impact follows:

K.A.R. 5-5-9 and K.A.R. 5-5-10 - The proposed amendments to the regulations will modify how the consumptive use of a water right will be calculated when converting an irrigation water right to a different beneficial use made of water.

Economic Impact Statement:

Under current regulations the consumptive use calculation is based on perfected acres by water right. Determining the perfected acres requires a water right owner to contact the Kansas Department of Agriculture's Division of Water Resources or a Groundwater Management District for that number. The proposed amendments will create a more transparent process by adopting a map that contains a conversion factor by county. The conversion factor will allow an owner or a potential new user to calculate the consumptive use of a water right without having to contact an agency for the perfected areas. This will be a conversion from the current authorized quantity. The conversion factor will be easily attained by referring to the map adopted by the regulation.

This regulation is not mandated by federal law.

The proposed amendment will result in no fiscal impact to the department.

The proposed amendments will result in no fiscal impact to other government agencies. The amendment will have a positive fiscal impact to someone wanting to change an existing irrigation water right to another beneficial use by understanding the conversion factor in the beginning of the process.

No other methods were considered by the state.

K.A.R. 5-5-16 - The proposed amendments to the regulation will modify how the consumptive use of a water right will be calculated when converting an irrigation water right to a different beneficial use made of water and adding an additional well to a water right.

Economic Impact Statement:

To ensure we have a consistent method in our current regulations (K.A.R. 5-5-9 and K.A.R. 5-5-10) when we are converting water rights from irrigation to another beneficial use of water and adding an additional well for the new beneficial use. This regulation is not mandated by federal law.

The proposed amendment will result no fiscal impact to the department.

The proposed amendments will result in no fiscal impact to other government agencies. The amendment should have no fiscal impact to the regulated community.

No other methods were considered by the state.

K.A.R. 5-14-11 - The proposed amendments to the regulation will modify how the civil penalty on a delinquent water use report will be applied based on when the water use report and civil penalty is received by the department.

Economic Impact Statement:

To ensure we have a consistent method in our current regulations applying the delinquent water use civil penalty so the water user has a very clear and transparent regulation to understand how the penalty is applied. This regulation is not mandated by federal law.

The proposed amendment will result in a positive fiscal impact to the department for a short amount of time. Currently the penalty is \$50 per water right when the report is filed between March 1 and June 1. After June 1, the penalty is \$250. The statute authorizing this regulation was changed to increase the penalty to \$1000 and a suspension of use until the report is filed. We have approximately 25 files in the \$1000 category. We could potentially see \$9,000 if half of these files comply. Half will close the rights, so we will not see an impact from the closed files. We have approximately 250 files in the \$50 category. Therefore, based on the difference of \$50 increasing to \$250, we could see a \$50,000 increase in first year. We will not sustain this level because the higher penalty will gain compliance. The number of delinquent reports will decrease.

The proposed amendments will result in no fiscal impact to other government agencies. The amendment will have fiscal impact, as described above, to the regulated community if they fail to file their reports. If the reports are filed prior to March 1, there is no penalty or cost.

No other methods were considered by the state.

Any individual with a disability may request accommodations in order to participate in the public hearing and may request the proposed regulations and impact statements in an accessible format. Requests for accommodations should be made at least five working days in

advance of the hearing by contacting Ronda Hutton at (785) 564-6715 or fax (785) 564-6777. Handicapped parking is available on the west side of the building located at 1320 Research Park Drive in Manhattan. Entrance to the building is also located on west side of the building and is accessible to individuals with disabilities. If you have questions about accessibility for any of the above listed teleconference locations, please contact Ronda Hutton at (785) 564-6715 or email to ronda.hutton@ks.gov.

Copies of the regulations and their economic impact statements may be obtained by contacting the Department of Agriculture, Ronda M. Hutton, 1320 Research Park Drive, Manhattan, KS 66502 or (785) 564-6715 or by accessing the department's Web site at agriculture.ks.gov. Comments may also be made through our website under the proposed regulation.

David W. Barfield
Chief Engineer
Division of Water Resources
Kansas Department of Agriculture

K.A.R. 5-5-9. Criteria for the Approval of an application for a change in the use made of water from irrigation to any other type of beneficial use of water. (a) The approval of a change in the use made of water from irrigation to any other type of beneficial use of water shall not be approved if ~~it~~ the change will cause the net consumptive use from the local source of water supply to be greater than the net consumptive use from the same local source of water supply by the original irrigation use based on the following criteria requirements:

(1) The maximum annual quantity of water to be allowed by the approved change approval shall be the ~~net irrigation requirement (NIR) for the 50% chance rainfall for the county of origin, as set forth in K.A.R. 5-5-12, multiplied by the maximum acreage legally irrigated under the authority of the water right in any one calendar year during the perfection period. For vested rights, the acreage used shall be the maximum acreage irrigated prior to June 28, 1945; or~~ authorized quantity of the water right multiplied by the return-flow factor specified for the county within which the change is approved, as shown on the department's map titled "irrigation return-flow percentages in Kansas, by county," dated February 16, 2016 and hereby adopted by reference.

(2) ~~if the applicant establishes to the satisfaction of the chief engineer the need for more flexibility in the authorized annual quantity, the application may be approved subject to the following limits:~~

~~(A) The maximum annual quantity of water to be allowed by the change approval shall be the NIR for the 80% chance rainfall for the county of origin, as set forth in K.A.R. 5-5-12, multiplied by the maximum acreage legally irrigated in any one calendar year during the~~

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~~perfection period. For vested rights the acreage used shall be the maximum acreage irrigated prior to June 28, 1945.~~

~~(B) The new type of beneficial use shall be further limited by a five year fixed allocation of water in which the NIR for a 50% chance rainfall for the county of origin, as set forth in K.A.R. 5-5-12, is multiplied by five times the maximum acreage lawfully irrigated in any one calendar year during the perfection period. For vested rights, the acreage used shall be the maximum acreage irrigated prior to June 28, 1945.~~

~~(C) An application for a term permit which will circumvent the five year allocation of water limit shall not be approved by the chief engineer.~~

~~(3)~~ In determining whether the net consumptive use of water will be increased by the proposed change in the use made of water, the applicant shall be given credit by the chief engineer for any return flows from the proposed type of beneficial use which of water that will return to the same local source of supply as the return flows from the originally authorized type of beneficial use of water, as substantiated by the applicant to the satisfaction of the chief engineer by an engineering report or similar type of hydrologic analysis.

~~(4)~~ ~~(3)~~ The authorized quantity to be changed to the new type of beneficial use of water shall never exceed the maximum annual quantity authorized by the water right.

~~(5)~~ ~~(4)~~ If a water right which that overlaps the authorized place of use of one or more other water rights, either in whole or in part, is being changed to a different type of beneficial use of water, the total net consumptive use of all water rights after the change is approved shall not exceed the total net consumptive use of all of the rights before the change is approved.

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~~(6)~~ (5) The approval for a change in the use made of water shall also be limited by that quantity reasonable for the use proposed by the change in the use made of water in order to prevent waste pursuant to K.A.R. 5-1-1.

(b) Upon request of the applicant, the historic net consumptive use actually made during the perfection period, or ~~prior to~~ before June 28, 1945 ~~in the case of~~ for vested rights, under the water right proposed to be changed shall be considered by the chief engineer, ~~but~~. The burden shall be on the owner to document that historic net consumptive use with an engineering study, or ~~an~~ equivalent documentation and analysis, and demonstrate to the satisfaction of the chief engineer that the analysis submitted by the applicant is a more accurate estimate of the historic net consumptive use than the net consumptive use calculated using the methodology ~~set forth~~ specified in paragraph (a)(1).

(c) If the methods ~~set forth~~ specified in subsection (a) produce an authorized annual quantity of water ~~which appears to be unrealistic and~~ that could result in impairment of other water rights, the chief engineer shall make a site-specific net consumptive use analysis to determine the quantity of water ~~which~~ that was actually beneficially consumed under the water right. If the water right is within a groundwater management district and the district has additional site-specific data available, the data may be submitted to the chief engineer for consideration. The quantity approved shall be limited to the quantity determined to be reasonable by the chief engineer's analysis.

(d) A term permit that would increase the consumptive use of the water right or would otherwise circumvent the limits specified in this regulation shall not be issued to any applicant.

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(Authorized by K.S.A. 82a-706a; implementing K.S.A. ~~1993~~ 2016 Supp. 82a-708b; effective
Nov. 28, 1994; amended P-_____.)

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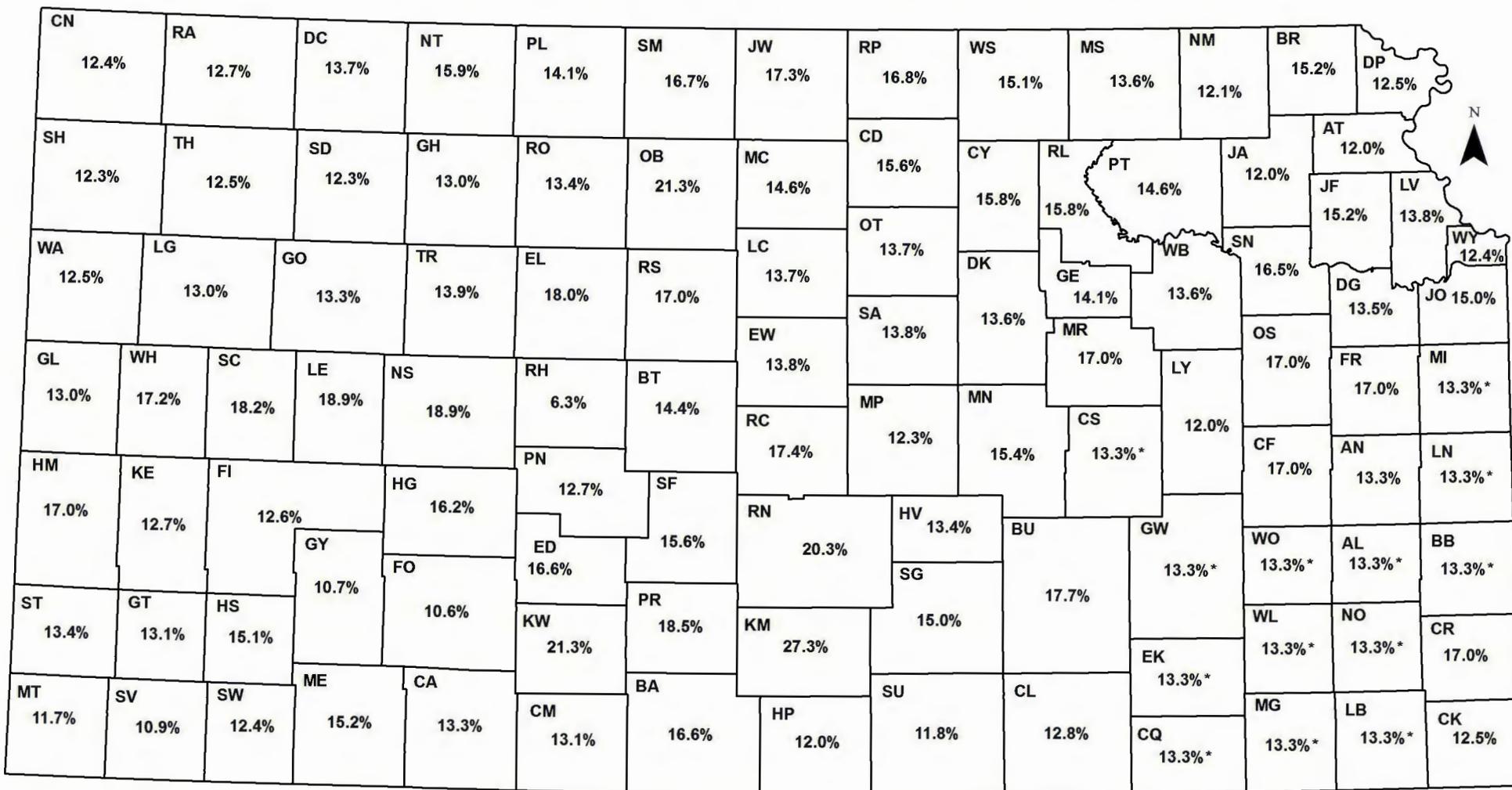
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Irrigation Return-Flow Percentages in Kansas, by County

based on area-weighted average irrigation return flow



Example: A 150 acre-foot irrigation water right is purchased in Gove (GO) County for use in a dairy operation. Applying the default factor from the map (13.3%), the amount of water that the dairy could annually divert with this water right is:

$$150 - (150 \times 13.3\%) = 150 \times (1 - 0.133) = 130 \text{ acre-feet}$$



K.A.R. 5-5-10. Partial changes in the use made of water from irrigation to another type of beneficial use of water. (a) ~~In a case where~~ If an irrigation right is to be divided and only a portion of the rate and quantity will be changed to a different use made beneficial use of water, only that portion of the annual quantity of the water right being changed to a different type of beneficial use of water shall be reduced as necessary to prevent the net consumptive use from increasing substantially.

(b) The authorized place of use for the irrigation right ~~shall generally~~ may be reduced in proportion to the reduction in annual quantity caused by the change. If the irrigator ~~desires~~ wants to retain more than ~~his or her~~ that person's proportional allotment of acres after the change, the procedures ~~outlined~~ specified in K.A.R. 5-5-11(b)(2)(B)(ii) shall be followed to determine whether the irrigator shall be allowed to retain more acreage.

(c) The authorized rate of diversion shall be divided between the irrigation use and the non-irrigation use. ~~Any~~ Each reasonable division of the rate by the parties shall be approved. A reasonable division of the rate shall be based on the actual rate of withdrawal at the time of the application and the existing physical conditions of the water source at the time of the application. The division of the maximum rate of diversion ~~need~~ shall not be required to be proportional to the division of the quantity ~~as long as~~ if the division of the rate of diversion is reasonable to divert each portion of the annual quantity of water after the division of the water right is made.

(d) The division of the annual quantity shall be ~~made~~ calculated as follows:

(1) ~~Step one:~~

(A) ~~Multiply the net irrigation requirement (NIR) for the 50% chance rainfall for the county of origin, as set forth in K.A.R. 5-5-12, times the maximum number or acres irrigated in~~

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any one calendar year during the perfection period. For vested rights, the acreage used shall be the maximum acreage irrigated prior to June 28, 1945.

(B) This will result in Calculate the maximum quantity that could be changed to another type of beneficial use of water if the entire water right were changed pursuant to K.A.R. 5-5-9(a)(1).

(2) ~~Step two:~~

(A) Divide the annual quantity sought ~~desired~~ to be changed to the new beneficial use of water by the maximum quantity that could be changed if the entire water right were changed.

(B) This will ~~The result in~~ shall be the percentage of the entire reduced water right that will be changed to the new beneficial use of water. The remaining percentage of the current water right may ~~can~~ be retained by the irrigation water right owner.

(3) ~~Step three:~~

(A) Multiply the remaining percentage times the total currently authorized quantity. This The result shall be the annual quantity of water which ~~that~~ may be retained by the irrigation water right owner. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 1993 2016 Supp. 82a-708b; effective Nov. 28, 1994; amended P-_____.)

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K.A.R. 5-5-16. Additional wells. (a) An application ~~for approval~~ to change ~~the~~ a point of diversion ~~to add~~ by adding an additional point of diversion to divert groundwater, by either constructing a new well or moving a portion of a water right to a well that has previously been authorized by the chief engineer, shall not be approved unless ~~it~~ the application meets the following requirements:

(1) ~~The provisions~~ Each proposed point of diversion shall meet the requirements of K.S.A. 82a-708b, and amendments thereto, and any applicable regulations adopted by the chief engineer ~~shall be met.~~

(2) The total maximum quantity of water authorized to be diverted each calendar year by the original well or wells, and the additional well or wells, shall not exceed any of the following limits:

(A) The maximum annual quantity of water that has been perfected;

(B) the maximum annual quantity of water authorized to be diverted before approval of the change; or

(C) the maximum consumptive use of water during the perfection period as required by K.A.R. 5-5-3 and as specified in either ~~paragraph (a) (2) (C) (i) or (ii)~~ of the following:

(i) If the water right authorizes the use of water for irrigation use, the consumptive use of water shall be presumed to not be increased in violation of K.A.R. 5-5-3 if the maximum annual quantity requested does not exceed the quantity in acre-feet calculated by use of the following formula: multiply the maximum number of acres legally irrigated in any one year during the perfection period by the 80 percent chance net irrigation requirements (N.I.R.), as ~~set forth~~

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specified in K.A.R. 5-5-12 expressed in acre-feet, and divide that number by a delivery efficiency of 0.85; or

(ii) ~~if the beneficial use authorized is not irrigation, the net consumptive use during the perfection period shall be determined using the best information available.~~ water right authorizes the use of water for irrigation and an additional well or wells are authorized for a beneficial use of water that is not irrigation, the consumptive use of the portion of the water right used for irrigation shall be determined as specified in paragraph (a)(2)(C)(i). The non-irrigation portion of the water right available for diversion shall be determined as specified in K.A.R. 5-5-9 and K.A.R. 5-5-10.

(3) The total maximum rate of diversion that may be authorized for the original well or wells and the additional well or wells shall not be greater than the total maximum rate of diversion that could have been diverted from the original well or wells if they were currently being replaced by new wells at substantially the originally authorized location or locations in the same local source of supply. ~~A reasonable value for~~ The maximum rate of diversion shall be one of the following:

(A) The total rate of diversion based on a current water flow rate test done on the point or points of diversion; or

(B) a value ~~based on~~ resulting from a valid hydraulic analysis, which may include rate tests, pump tests, and water level data, submitted by the applicant and acceptable to the chief engineer based on the veracity of its data and its proper application of scientific principles, showing the current capacity of the aquifer to yield water at the currently authorized point or points of diversion.

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(4) A condition shall be placed on the approval of the application for change authorizing the additional well or wells that provides that, for the sole purpose of administering wells concerning direct impairment, the additional well or wells shall be considered to have the priority of the date the application was filed to add the additional well or wells.

(b) The applicant shall submit the following information:

(1) A well completion log of the currently authorized well or a stratigraphic log of a test hole located within 300 feet of the currently authorized well;

(2) the depth of the currently authorized well;

(3) the current depth to the static water level of the currently authorized well;

(4) a stratigraphic log of a test hole located within 300 feet of the proposed location of each of the proposed additional well or wells; and

(5) any additional information that the chief engineer ~~needs to understand the nature of the proposed additional well or wells~~ may require to understand the nature of the proposed additional well or wells.

(c) The proposed additional well or wells shall meet one of the following conditions:

(1) Meet the well spacing requirements to all other wells with a priority earlier than the date on which the change application was filed; or

(2) if demonstrate by a hydraulic analysis, which may include rate tests, pump tests, and water level data, shows, as submitted by the applicant and acceptable to the chief engineer based on the veracity of its data and its proper application of scientific principles, that the approval of the proposed an additional well within 300 feet of the a currently authorized well location, or within the geographic center of a currently authorized battery of wells, will neither impair any

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water rights senior to the date on which the application for change was filed nor prejudicially ~~and~~ ~~unreasonably~~ affect the public interest, ~~be located within a 300-foot radius of one of the wells, or~~ the geocenter if the currently authorized point of diversion is a battery of wells, authorized pursuant to the water right upon which the change application has been filed.

(d) Each point of diversion authorized by an approval of an application for change for an additional well shall have a specific assignment of a maximum instantaneous rate of diversion and a maximum annual quantity of water.

(e) Each well authorized by a water right that has been changed under the provisions of this regulation shall be equipped with a separate water flowmeter that meets or exceeds the specifications for water flowmeters adopted by the chief engineer.

(f) Each approval of an additional well or wells shall have a condition that reserves jurisdiction for the chief engineer to review the approval of the additional well or wells at intervals of ~~no fewer than~~ at least five years, and not more than 10 years, to determine if the total annual quantity of water actually being withdrawn by all wells authorized by the approval of an application for change is exceeding the total annual quantity of water that could have been physically withdrawn if the additional well or wells had not been approved. If the chief engineer determines during the review that the total annual quantity being withdrawn by all the wells, including the additional wells, exceeds the total annual quantity of water that could have been physically withdrawn by the original well or wells, the total maximum annual quantity that can be withdrawn by all the wells shall be reduced by the chief engineer to the total maximum annual quantity that could have been physically withdrawn by the original well or wells. (Authorized by

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K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. ~~2002~~ 2016 Supp. 82a-708b;
effective Sept. 22, 2000; amended Oct. 24, 2003; amended P- _____.)

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K.A.R. 5-14-11. Civil fines; water use reporting. (a) ~~Each~~ Any owner of a water right or approval of application ~~who fails to perform either of the following shall~~ may be assessed a civil penalty of ~~\$250~~ \$1,000 per year for each water right or approval of application ~~that is not timely filed or that is materially incomplete or inaccurate~~ for which the owner does not perform the following:

(1) Timely submit an annual water use report pursuant to K.S.A. 82a-732, and amendments thereto; ~~or~~ and

(2) submit a complete and accurate water use report ~~as required by~~ pursuant to K.S.A. 82a-732, and amendments thereto.

(b) If the owner submits both the complete and accurate water use report and payment of the civil penalty after March 1 but before June 1, the civil penalty per water right or approval of application ~~shall~~ may be reduced to ~~\$50~~ \$250 for each water right or approval of application.

If the owner submits the reduced civil penalty but not the water use report after March 1, the civil penalty may increase on June 1 to the maximum civil penalty of \$1,000 for each water right or approval of application. The initial reduced civil penalty received after March 1 but before June 1 shall be applied toward the maximum civil penalty owed. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a, and K.S.A. 2016 Supp. 82a-732, and K.S.A. 2016 Supp. 82a-737; effective Oct. 24, 2003; amended P-_____.)

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July 12, 2017

David Barfield, Chief Engineer
Department of Agriculture Division of Water Resources
1320 Research Park Drive
Manhattan, Kansas 66502

Dear Chief Engineer Barfield:

At its meeting on June 26, 2017, the Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning KAR 5-5-9, approval of application for change in the use made of water from irrigation to any other type of beneficial use of water; KAR 5-5-10, partial changes in the use made of water from irrigation to another type of beneficial use of water; KAR 5-5-16, additional wells; KAR 5-14-11, civil fines, water use reporting. After discussion, the Committee had the following comments.

KAR 5-14-11. The Committee asks the agency to explain the rationale of increasing the maximum civil penalty to the statutory maximum level for any owner of a water right who fails to timely submit the annual water use report as required by law. In addition, the Committee notes the discretion given in the rule and regulation as to the amount of the civil penalty and asks how the agency ensures that penalty amount is determined in an objective manner rather than in a subjective manner. Please explain the agency's process.

Request. The Committee requests the agency consider posting proposed rules and regulations plus all attachments on an easy-to-find portion of its website.

Prior to filing with the Secretary of State, review the history sections of the rules and regulations to update them to the most recent statutory citations, making certain the citations for authorizing and implementing statutes are correct and complete. Please indicate your agency's website address in the filing notice where proposed regulations can be located. In addition, if your agency accepts written comments by e-mail include this information in the public notice. Further, e-mail requests for public accommodation should be included as a part of the notice. Finally, verify that the adoption by reference of any materials included in the regulations is properly completed as prescribed in the Policy and Procedure Manual for the Adoption of Kansas Administrative Regulations.

Please make this letter a part of the public record on these regulations. The Committee will review the regulations the agency ultimately adopts, and reserves any expression of legislative concern to that review.

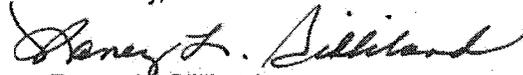
To assist in that final review:

Please inform the Joint Committee and me, in writing, at the time the rules and regulations are adopted and filed with the Secretary of State, of any and all changes that have been made following the public hearing. Please notify the Joint Committee and me, in writing, when your agency has adopted the regulations as permanent; delayed implementation of the regulations; or decided not to adopt any of the regulations.

Also, please indicate separately to the Joint Committee and me, any changes made to the proposed regulations reviewed by the Committee.

Based upon direction from the Committee, failure to respond to each and every comment contained in this letter may result in the request that a spokesperson from your agency appear before the Committee to explain the agency's failure to reply.

Sincerely,



Raney L. Gilliland
Director

RLG/dmb

TESTIMONY ON PROPOSED CHANGES TO KAR 5-5-9, KAR 5-5-10, KAR 5-5-16

My name is Ray Luhman, Manager of Northwest Kansas Groundwater Management District #4, located in Colby, Kansas.

GMD 4 believes that the proposed changes could result in a potential large increase in consumptive use (see attachment) that may not be allowed by KAR 5-5-3. The current regulations fully meet the KAR 5-5-3 requirements of assigning actual consumptive use based on the average needs for corn (by county) and the perfected acres, and offers an alternative if the applicant wishes to increase that number.

The proposed methodology seeks to establish an irrigation return flow percent number by county in lieu of establishing perfected acres for each individual right. Although this could streamline the process, the current process for establishing perfected acres is not very difficult and can be done by DWR in a very timely manner. A simple phone call to the local GMD or DWR gives water users and owners pre-change application information to use when evaluating a water right.

Also, GMD 4 is considering adopting a regulation that reflects the current version of K.A.R. 5-5-9, 5-5-10, and 5-5-16. If other GMDs take the same road, then different areas of the state would have differing regulations when determining consumptive use and change applications. This would complicate the process rather than streamlining it.

We are not necessarily opposed to the concept of having a county return flow percentage, but it is important to understand that the application of a return flow percentage should be applied to recent past diversions and not the entire water right. It needs to be understood that in NW Kansas, and I would guess other areas of the State, the appropriated amounts are far in excess of the amounts that are now being pumped (see attachment). Even though rates of diversion have diminished the ability to pump part of a given right for irrigation, this same rate may very well be sufficient for a non-irrigation use and thus a larger part of the right could be pumped.

It makes little sense to approve a regulation that has the possibility of increasing consumptive use when efforts to reduce pumped amounts are in place or are being proposed.

We recommend 2 possible alternatives. 1: the proposed regulations should be rejected, thus maintaining the current regulations. 2: the proposed regulations should be returned to DWR/KDA for revision to consider recent reported actual pumping.

We think that the regulation changes are being promoted by using the argument for a need for a standardized percentage, but we also very much suspect that the true motive is to increase the amount of an irrigation right that is available for transfer to a non-irrigation use type.

Kansas Farm Bureau appreciates the opportunity to make comments on the proposed amendments to K.A.R. 5-5-9; 5-5-10 and 5-5-16 which modify how historic consumptive water use (CU) is determined and K.A.R. 5-14-11 dealing with civil penalties for failing to submit a statutorily required water use report (WUR) in a timely manner.

K.A.R. 5-5-9; 5-5-10 and 5-5-16

KFB has policy that vigorously supports private property rights. Since water rights are real property rights, every precaution must be taken to ensure any water right modification will not infringe upon the property rights of others while simultaneously protecting the natural resource.

We support the proposed CU regulations to modify water rights provided the safeguards and provisions of K.S.A. 82a-708b, and any other applicable statutes, have been satisfied which include in part a demonstration by the applicant of "reasonableness and will not impair existing rights" and that the "same local source of supply" is being utilized. We would oppose the utilization of the proposed CU determination concepts outside of these statutory guidelines.

Several years ago, KFB expressed to a previous Kansas agriculture secretary and chief engineer the need to simplify CU determinations. We conveyed the concept that every water right certificate of appropriation should clearly define CU as part of the water right determination process moving forward. CU is an important water right attribute for determining value to sellers and buyers alike. This proposed regulation can help alleviate some of that uncertainty.

K.A.R. 5-14-11

The protection, development and administration of water rights is supported in KFB policy. Accurate water use data is needed to achieve these goals therefore we cautiously support the judicious application of authority granted by the 2016 legislature in the passage of H Sub SB 337.

While we fully support the fulfillment of responsibility in filing a complete and accurate annual WUR, we also recognize honest mistakes and oversights do occur. The original intent of SB 337, as we understood, was to target that handful of water right holders who fully aware, simply refused to file a WUR for which we supported enhanced penalties.

The final legislation imposed penalties five times greater than historically applied for any delinquent WUR, including those who have no objection to filing but simply overlooked the deadline. This will potentially yield a much greater penalty than the violation may warrant to tardy but otherwise law-abiding water right holders.

KFB will support the proposed regulation, which is in tune with the legislation passed in 2016 but will ultimately respond to our members once we have some historical perspective on implementation of this regulation. In the future, we would highly encourage the agency to enhance WUR filing deadline awareness and we commend the agency in developing the option to electronically submit WURs.

Hutton, Ronda

From: Freddy Garcia <freddy@jklcon.net>
Sent: Friday, July 21, 2017 4:22 PM
To: Hutton, Ronda; Ron Eakes
Subject: "Comments re Proposed Amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 (calculation of consumptive use of a water right)"

Kansas Department of Agriculture

Division of Water Resources

1320 Research Park Dr.

Manhattan, KS 66502

Re: *Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.*

To whom it may concern:

I am an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

The amendments proposed by DWR, however, will help sustain current investment in the Kansas livestock industry and will encourage future growth. DWR's proposal improves the consumptive use formula applied to change in use applications by:

- 1. Increasing transparency and simplifying application of the rule;*
- 2. Relying on more accurate and available data that is supported by hydrologic science;*
- 3. Recognizing regional differences in return flows, while still allowing for individual studies; and*
- 4. Better ensuring the true value of the property right is available to the water right owner upon conversion.*

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

Hutton, Ronda

From: Kyle AverHoff <averhoff@ucom.net>
Sent: Friday, July 21, 2017 4:40 PM
To: Hutton, Ronda
Subject: "Comments re Proposed Amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 (calculation of consumptive use of a water right)"

To whom it may concern:

I am a dairy farmer and an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

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3. Recognizing regional differences in return flows, while still allowing for individual studies; and
4. Better ensuring the true value of the property right is available to the water right owner upon conversion.

The Governor has repeatedly asked our industry what the state can do to grow the dairy and livestock industry. In our opinion, this is one of the biggest opportunities the state has in regards to that question. This change will simplify a very cumbersome system and increase the likelihood of attracting future dairy and livestock entrepreneurs to all regions of the state. Additionally, it will deliver these benefits while continuing to reduce the total allocations and while bringing a higher value use to the water being pumped. In our opinion, this change is long overdue and "seems to really make sense".

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

Kyle Averhoff
Royal Farms Dairy, LLC
Noble Dairy, LLC

Kansas Department of Agriculture

Division of Water Resources

1320 Research Park Dr.

Manhattan, KS 66502

Re: Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.

To whom it may concern:

I am an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

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Increasing transparency and simplifying application of the rule;

Relying on more accurate and available data that is supported by hydrologic science;

Recognizing regional differences in return flows, while still allowing for individual studies; and

Better ensuring the true value of the property right is available to the water right owner upon conversion.

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

A handwritten signature in cursive script that reads "Ron Eakes". The signature is written in black ink and is positioned to the right of the word "Respectfully,".

(Ron Eakes)

Hutton, Ronda

From: David Clawson <grovecows@gmail.com>
Sent: Friday, July 21, 2017 4:15 PM
To: Hutton, Ronda
Subject: "Comments re Proposed Amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 (calculation of consumptive use of a water right)"

Kansas Department of Agriculture

Division of Water Resources

1320 Research Park Dr.

Manhattan, KS 66502

Re: *Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.*

To whom it may concern:

I am an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

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- 3. Recognizing regional differences in return flows, while still allowing for individual studies; and*
- 4. Better ensuring the true value of the property right is available to the water right owner upon conversion.*

We are currently looking to expand our livestock operation and securing enough water is one of our biggest challenges. We have given up way too much when we have converted irrigation to stock water. Please use this common sense and don't allow emotions from others, who oppose this amendment, cloud sound judgement.

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.



TO: Secretary Jackie McClaskey, Secretary of Agriculture, Kansas Department of Agriculture

FROM: Tim Stroda, President-CEO, Kansas Pork Association

DATE: July 25, 2017

RE: Changes to Consumptive Use Regulations - K.A.R. 5-5-9; 5-5-10; and 5-5-16

The Kansas Pork Association (KPA) appreciates the opportunity to make comments in favor of the proposed amendments to K.A.R. 5-5-9; 5-5-10 and 5-5-16 which simplify how the consumptive use (CU) of water is calculated when changing the type of use from irrigation to other beneficial uses.

KPA is very supportive of the changes being made to the consumptive use regulations. The formula currently in regulation is not an adequate determinant of the actual consumptive use of the water right. In order to come up with a more accurate depiction of the consumptive use, water right holders seeking to change the type of use on a water right had to spend significant resources on experts that could show that the consumptive use was different than the formula in the regulation showed. While the ability to hire an expert to get a more accurate consumptive use figure is still available with this regulatory change, we are hopeful that option will not need to be utilized as often moving forward after this new regulation takes effect.

We look forward to the Kansas Department of Agriculture moving forward with these regulatory changes.

Hutton, Ronda

From: Will Basham <willbasham@gmail.com>
Sent: Monday, July 24, 2017 7:27 AM
To: Hutton, Ronda
Subject: "Comments re Proposed Amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 (calculation of consumptive use of a water right)"

Follow Up Flag: Flag for follow up
Flag Status: Flagged

To whom it may concern:

I am a dairy farmer and an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

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3. Recognizing regional differences in return flows, while still allowing for individual studies; and
4. Better ensuring the true value of the property right is available to the water right owner upon conversion.

The Governor has repeatedly asked our industry what the state can do to grow the dairy and livestock industry. In our opinion, this is one of the biggest opportunities the state has in regards to that question. This change will simplify a very cumbersome system and increase the likelihood of attracting future dairy and livestock entrepreneurs to all regions of the state. Additionally, it will deliver these benefits while continuing to reduce the total allocations and while bringing a higher value use to the water being pumped. In our opinion, this change is long overdue and "seems to really make sense".

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

Will Basham
Noble Dairy, LLC

1700 E. IRON AVE. ■ SALINA, KS 67401
T 785.823.0097 F 913.273.1493



1303 YUCCA ST. ■ SCOTT CITY, KS 67871
WWW.KLAENVIRO.COM

July 21, 2017

Jackie McClaskey, Secretary
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502

Subject: Comments Pertaining to Proposed Amendments of K.A.R. 5-5-9, 5-5-10, and 5-5-16

Dear Secretary McClaskey:

KLA Environmental Services, Inc. appreciates this opportunity to submit comments pertaining to the subject regulations. Our company is the technical division of the Kansas Livestock Association. We provide engineering, agronomic, environmental, and related technical consulting services to the agricultural sector with a primary focus on livestock agriculture. The majority of our work is related to the modification and expansion of existing livestock facilities and the development of new facilities. Our client base includes cattle feeders, dairies, and swine production facilities. Nearly every one of these projects ultimately involves the acquisition or modification of water rights to provide a sufficient supply of water for livestock production. By necessity we have gained substantial experience with the regulatory processes involved in securing these quantities of water, whether by new application or applications to change existing water rights. The single greatest challenge we have faced is the issue of consumptive use and the inconsistency and excessive variability that occurs when consumptive use is determined for an irrigation water right. The methodologies contained in the current versions of K.A.R. 5-5-9 and 5-5-10 do not accurately reflect actual consumptive use. The proposed amendments to these regulations resolve these issues and KLA Environmental Services, Inc. therefore submits these comments in support of the proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16.

Irrigation has been treated differently than other beneficial uses. Consumptive use has been based on assumptions about acres and irrigation quantity that is typically substantially less than authorized quantity. Water right owners find it difficult to understand why a water right that is certified for a specific annual quantity is immediately reduced when some change occurs. Much of this misunderstanding is related to the two methodologies that are currently available to determine consumptive use for irrigation.

The methodology contained in K.A.R. 5-5-9 (a) relies on the maximum acres irrigated during perfection and the tenuous assumption that the quantity irrigated during the perfection period is equivalent to the net irrigation requirement for the 50% chance rainfall for the county of origin (50% NIR). The value for the 50% NIR is based on the assumption that corn was the crop grown and that average weather conditions occurred during the perfection period. Both of these assumptions may be very inaccurate. Perfection period records for many senior water rights are not accurate, especially records pertaining to the extent of acres irrigated, which may be incomplete or undocumented. The original sources for this information are inspection reports or related documentation completed by the Division of Water Resources, which are not readily available to the public. Many water rights were not metered during perfection, so the actual quantity of water used is difficult to determine. Assumption of 50% NIR is not representative of irrigation quantities used during the perfection period, where the goal is to demonstrate that the quantity authorized by the approved application can be reasonably used.

We have worked on a number of projects where we applied the methodology of K.A.R. 5-5-9 (a) to change water use from irrigation to livestock consumption. The resulting reductions in quantity have generally ranged from 25% to 60%. This implies a great amount of variability in the method. Much of this variability appears to be related to the acreage factor. Also, the 50% NIR is generally 55% to 60% of the authorized quantity when expressed in terms of acre-feet per acre. We have observed that the resulting consumptive use quantity is often less than recent irrigation use as indicated by annual water use reports. These discrepancies are inconsistent with the concept of consumptive use.

The alternate methodology stated in K.A.R. 5-5-9 (b) allows for detailed studies to establish consumptive use during the perfection period using other methods acceptable to the Chief Engineer. These studies typically rely on a computer model that calculates theoretical consumptive use during the years of the perfection period. This method relies on weather data records, soils data, and assumptions about the operation and efficiency of the irrigation system used during the perfection period. Establishing crops grown and acres irrigated for perfection periods that occurred 30 to 60 years ago can be quite challenging. These studies require a significant level of technical expertise to address the engineering and agronomic requirements of the computer model and are therefore very time consuming and expensive. The results nearly always show consumptive use levels less than those calculated by the formulas stated in K.A.R. 5-5-9 (a). However, this approach does not lend itself to quick determination of quantity resulting from a change of use from irrigation to any other beneficial use. This can be a detriment to entities wishing to establish or expand a business or facility that must acquire additional water supply.

The issues and concerns stated above led us to approach DWR and KDA staff about developing a better method of determining consumptive use. These discussions and efforts have been ongoing for more than 3 years. The proposed amendments to K.A.R. 5-5-9 and 5-5-10 resolve nearly all these issues and concerns and provide a reliable, science-based method for quickly determining consumptive use related to an irrigation water right. The map entitled "Irrigation Return-Flow Percentages in Kansas, by County" reflects regional differences in irrigation development while being based on a quantifiable method for estimating local return flow, which is the primary factor in determination of consumptive use related to irrigation. The proposed amendments also allow for a detailed study or analysis to establish historic consumptive use, which provides a reasonable option for complex or atypical situations.

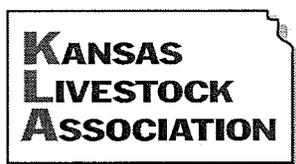
We do suggest two modifications to the proposed amendments:

1. It appears that the proposed description of the calculation to determine consumptive use in K.A.R. 5-5-9 (a) (1) does not correlate with the intent of the "Irrigation Return-Flow Percentages in Kansas, by County" map. We suggest that this statement be revised to read as follows: "The maximum annual quantity of water to be allowed by the approved change shall be the authorized quantity of the water right *minus the authorized quantity of the water right multiplied by the return-flow factor* specified for the county within which the change is approved..."
2. We understand that the proposed amendments to K.A.R. 5-5-9 and 5-5-10 impact some of the provisions of K.A.R. 5-5-16, which relates to additional wells. The formula stated in K.A.R. 5-5-16 (a) (2) (C) (i) appears to be inconsistent with the method illustrated on the "Irrigation Return-Flow Percentages in Kansas, by County" map. K.A.R. 5-5-16 (a) (2) (C) (ii) is somewhat confusing and it is unclear how the criteria would be applied to a situation where an additional well is proposed for stockwatering purposes in conjunction with an existing well that is dedicated to irrigation use. We suggest that these sections be reviewed and revised as needed to provide greater clarity.

Respectfully,



Frank C. Mercurio, P.E.
President



Since 1894

July 24, 2017

Dr. Jackie McClaskey, Secretary
Kansas Department of Agriculture
Division of Water Resources
1320 Research Park Dr.
Manhattan, KS 66502

Re: Kansas Department of Agriculture, Division of Water Resources proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.

Dear Secretary McClaskey:

The Kansas Livestock Association (KLA) respectfully submits these comments in support of the Kansas Department of Agriculture (KDA), Division of Water Resources (DWR) proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right. 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.

KLA has long advocated for a change in the process used to determine the net consumptive use of a water right when applying for a change in use made of water from irrigation to a stockwater use. At the KLA convention last December, KLA members reaffirmed policy calling for changes to the current consumptive use regulations to make them less burdensome on the livestock industry and more accurately reflect actual water consumption.

K.A.R. 5-5-3 requires "the extent of consumptive use shall not be increased substantially after . . . the time allowed in which to perfect water rights has expired" Under K.A.R. 5-5-8, consumptive use is defined as gross diversions, minus waste of water and minus return flows. To carry out the requirements of K.A.R. 5-5-3 and K.A.R. 5-5-8, DWR devised the current regulation in K.A.R. 5-5-9 that regulates the maximum annual quantity of water available when a water right owner applies to change the use of water from irrigation to another use.

In general, K.A.R. 5-5-9 provides two pathways to determine consumptive use and the maximum annual quantity of water allowed under a change application. The first option is "the net irrigation requirement (NIR) for the 50 percent chance rainfall for the county of origin, as set forth in K.A.R. 5-5-12, multiplied by the maximum acreage legally irrigated under the authority of the water right in any one calendar year during the perfection period." K.A.R. 5-5-9(a)(1) (Lexis 2017). The second option is to conduct "an engineering study, or an equivalent

documentation and analysis, and demonstrate to the satisfaction of the chief engineer that the analysis submitted by the applicant is a more accurate estimate of the historic net consumptive use than the net consumptive use calculated using” the NIR formula. K.A.R. 5-5-9(b) (Lexis 2017). Neither alternative is ideal.

The first option for determining the maximum annual quantity of water allowed under a change application, NIR multiplied by maximum acreage irrigated during the perfection period, is imprecise at best. Records for the maximum acreage irrigated during the perfection period are often incomplete or nonexistent. Water meters and annual water use reports were not required by statute when many of the water rights were perfected, and as a result, documents in DWR records are often inaccurate or incomplete.

Furthermore, the NIR calculations are an inaccurate measure of return flows. The NIR formula makes overly broad assumptions that the farmer only grew corn, ignores soil type and depth to groundwater, often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. In regard to irrigation technology, a flood irrigation system will have significantly more return flows than a pivot irrigation system. If a farmer utilizes a pivot irrigation system, more of the farmer’s authorized water quantity is actually consumed by the crop, compared to a farmer utilizing a flood irrigation system. Therefore, if the farmer with a pivot irrigation system wishes to change water use from irrigation to stockwater, the farmer should be able to obtain a larger maximum annual quantity of water than a farmer who utilized a flood irrigation system, if all other factors are equal. The current NIR formula does not recognize this difference.

The flaws in the NIR formula, whether it is total acres irrigated, historic crop rotations, historic weather patterns, or differences in irrigation technology, result in false assumptions. As a result, water right owners converting a water right from irrigation to another use, are often penalized by having their total maximum annual quantity of water reduced as much as 40 percent or more using the NIR formula. Based on engineering studies conducted by KLA Environmental Services, an individual engineering study can result in more than a 50 percent reduction in the return flows assumed by the NIR formula, resulting in more water available to the water right owner in a conversion. Such inaccuracies in the general NIR formula reduce the value of the real property right represented by the water right, and arguably result in a regulatory taking.

While an engineering study is an option and can result in the most precise measure of actual consumptive use of a water right, a study is expensive to conduct and the results are unknown until completion, which can take months. For a potential purchaser of an irrigation water right who intends to convert its use to something other than irrigation, it is difficult to determine the actual value of the water right prior to a sale.

Given the above concerns with the current change in use formula for determining consumptive use of a water right, KLA began to engage KDA in 2013. The idea was to develop a better consumptive use formula for change applications that would replace the flawed NIR formula. From the outset, KLA sought a consumptive use formula that would:

1. Be transparent and easy to apply for a current or prospective water right owner;

2. Rely on more accurate and available data, supported by hydrologic science;
3. Recognize regional differences in return flows, while still allowing individual engineering studies; and
4. Ensure the maximum value of the original property right was preserved upon a change in use.

Over the next three years, KLA worked with KDA to identify potential alternatives that encompassed all the above goals, with particular emphasis on goal four, full realization of the original property right value. While different methods were identified through multiple discussions, KLA believes the process identified in the amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 most effectively meet the above goals.

Better Transparency

The formula proposed by DWR in its amendments to K.A.R. 5-5-9 is more transparent and easier to calculate for an individual landowner. By publishing a map that establishes a predetermined return flow by county and applying that factor to the authorized quantity of water for the irrigation right, DWR proposes to remove the uncertainty of identifying the maximum irrigated acreage during the perfection period. Prospective purchasers of water may now easily know the value of the water right without hiring an engineer to do a study or digging through volumes of DWR or U.S. Department of Agriculture records, if such records even exist. In addition, an agricultural producer wishing to convert an irrigation well to a livestock watering system can easily know the water available when planning an animal feeding facility expansion.

KLA would suggest one technical modification to clarify the language applicable to determining the maximum annual quantity of water. KLA suggests changing, “The maximum annual quantity of water to be allowed by the approved change shall be the authorized quantity of the water right multiplied by the return-flow factor specified for the county within which the change is approved . . .” in K.A.R. 5-5-9(a)(1) as amended, to read as follows: “The maximum annual quantity of water to be allowed by the approved change shall be the authorized quantity of the water right *minus the authorized quantity of the water right multiplied by the return-flow factor* specified for the county within which the change is approved . . .” As stated now, the language is unclear whether the “return-flow factor” is the percentage on the map, or the percentage on the map after the formula is applied in the “Example” below the map. The aforementioned KLA modification should add clarity to the regulation.

More Accurate Data

The amendments to K.A.R. 5-5-9 rely on better and more accurate data than the existing regulation. As mentioned above, the NIR formula is built on flawed assumptions and inaccurate and often unavailable data. Using a return flow factor that takes into account the type of irrigation systems prevalent in a county and applying that information to localized groundwater management district (GMD) groundwater models to determine an area-weighted average irrigation return flow more accurately reflects water consumption in a local area than the NIR formula. Instead of relying on a theoretical calculation based on an assumed crop, unreliable acreage information, and decades-old rainfall data, the amendments use actual irrigation

technology applied to the best available scientific models to estimate return flows, the key component in determining consumptive use.

Regional Differences in Return Flows Recognized

The model maintains a county-by-county approach to the general formula. While a return flow factor individualized to a farm would be ideal, time and monetary constraints make such a proposal difficult for a rule of general application. In addition, a farm specific map would reduce the transparency and ease of application of the regulation. While the general rule is applied on a county-wide basis, an individual engineering study is still available to a water right owner. KLA supports this concept and appreciates DWR retaining this option in K.A.R. 5-5-9(b).

More Accurate Representation of the Property Right

KLA believes the proposed amendments to K.A.R. 5-5-9 more accurately reflect the true value of the property right during a change in use. Kansas Water Appropriation Act (KWAA) defines a “water right” as “a real property right”. K.S.A. 82a-701(g) (Cum. Supp. 2016). An “appropriation right” is:

a right . . . to divert from a definite water supply a specific quantity of water at a specific rate of diversion, provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate to such supply, and to apply such water to a specific beneficial use or uses in preference to all appropriations right of later date.

K.S.A. 82a-701(f) (Cum. Supp. 2016).

The real property status of a water right was confirmed in *Clawson v. State*, 49 Kan. App. 2d 789 (2013), where the Kansas Court of Appeals confirmed that “the KWAA does not authorize the chief engineer to reevaluate and reconsider an approval once a permit has been issued.” *Clawson*, at 807.

Prior to *Clawson*, the Kansas Court of Appeals upheld DWR’s consumptive use regulations as “reasonable, appropriate, and consistent with the statute” because “the statute provides that the chief engineer shall act upon [a change application] using the same provisions applied to new applications.” *Wheatland Elec. Coop., Inc. v. Polansky*, 46 Kan. App. 2d 746, 753-54 (2011). *Wheatland*, however, did not specifically consider the reasonableness of the NIR formula. *See id.* at 749. Instead, the consumptive use formula at issue in *Wheatland* involved “a hearing at which the parties presented evidence on the rights’ historic water use,” suggesting that the consumptive use analysis was conducted under K.A.R. 5-5-9(b). *Id.* at 749.

While *Wheatland* confirmed DWR’s ability to apply a consumptive use factor to change applications, it did not specifically rule on the reasonableness of the NIR formula. This leaves the existing NIR formula subject to challenge, especially given its inadequate factual basis and suspect assumptions. In addition, *Wheatland* did not foreclose the idea that a partial regulatory taking occurs, devaluing the original real property right, when the consumptive use formula is

applied to a change application. *See Wheatland*, at 757. Rather, the *Wheatland* court said the plaintiff did not show “that the chief engineer’s water-usage reduction impacted its rights in such a way as to outweigh the state’s great interest and cause an unconstitutional taking.” *Id.* at 757. The *Wheatland* court’s decision did, however, confirm the ability of DWR to establish or modify a consumptive use formula that is not arbitrary and capricious. *See id.* This means DWR may modify the consumptive use regulation so long as the modification is reasonable or has some factual basis. *See id.*

KLA believes that the amendments proposed to K.A.R. 5-5-9 work to avoid devaluing the underlying real property right by using irrigation system data established through water use reports and applying that data to science-based groundwater models. While the *Wheatland* court found that any loss in property value of a water right was outweighed by the state’s significant interest in establishing the consumptive use rule, as a matter of policy, DWR should minimize regulatory takings when possible. The purpose of applying a consumptive use factor to a change application is to ensure the new use will not consume more water than was previously consumed under the irrigation right. We know based on modeling technology used in the current proposal, and based on individual engineering studies conducted by KLA Environmental Services and other engineering firms, the NIR formula requirements often over-state return flows. Therefore, the proposed amendments to K.A.R. 5-5-9 will further minimize reductions in property value while protecting the state’s interest of preventing impairments and limiting water consumption to no more than that consumed during the perfection period of the water right. In addition, the amendments to K.A.R. 5-5-9 should ward off future legal challenges to the arbitrary nature of the NIR formula in applying the consumptive use concepts of K.A.R. 5-5-3 and 5-5-8.

Suggested Changes to K.A.R. 5-5-16

After reviewing DWR’s proposed changes to K.A.R. 5-5-16, KLA agrees with the amendments to K.A.R. 5-5-16(a)(2)(C)(ii) applying to uses other than irrigation, but disagrees with the retention of the formula in K.A.R. 5-5-16(a)(2)(C)(i). K.A.R. 5-5-16 pertains to an application to add an additional point of diversion. While it makes sense to apply a consumptive use factor, as proposed in K.A.R. 5-5-9, to any new type of use applied at an additional diversion point, there is no reason to apply an NIR consumptive use factor to a new diversion point that retains its original irrigation use. Consumptive use measures the changes in return flows. If there is no change in the type of beneficial use (i.e. the use remains irrigation) there should be no increase in consumptive use as prohibited in K.A.R. 5-5-3. To change K.A.R. 5-5-16(a)(2)(C)(ii), and yet leave the NIR formula of K.A.R. 5-5-16(a)(2)(C)(i) intact is arbitrary and capricious. Furthermore, given the requirements of K.A.R. 5-5-3 and the definition of consumptive use in K.A.R. 5-5-8, applying an 80 percent chance rainfall NIR formula to a change in point of diversion application is unreasonable and lacks any factual basis.

In addition to not fitting the justification behind a consumptive use adjustment, K.A.R. 5-5-16, already provides that a change in point of diversion must follow K.S.A. 82a-708b, and therefore, cannot result in an impairment of a more senior water right. Further curtailment of the water right using an NIR formula is not necessary.

KLA recommends that in the final rule DWR delete subparagraph K.A.R. 5-5-16(a)(2)(C)(i) in its entirety and delete the portion of K.A.R. 5-5-16(a)(2)(C)(ii) that pertains to use of water for irrigation.

Modification of GMD #1 Change in Use Regulation

KLA supports an addition to DWR's proposed rule pertaining to consumptive use of a water right. Currently, one GMD has its own separate consumptive use formula applied to a change in use application. Change in use applications in GMD #1 are currently limited to "the average annual quantity of water actually used in the preceding 10 calendar years, excluding those years in which the water right was enrolled in the water right conservation program, the conservation reserve program, or any other multiyear water conservation program approved by the chief engineer." K.A.R. 5-21-7 (Lexis 2017). As discussed in the "More Accurate Representation of the Property Right" section above, this regulation unreasonably diminishes the real property right that is based on the perfected quantity of water under the water right. This regulation causes irrigation rights to be overvalued compared to other uses and penalizes industries like the livestock industry. It also has the perverse effect of causing excessive use, while still within the confines of beneficial use requirements, to inflate water use prior to a change in use application.

KLA requests that in the final rule, DWR either repeal K.A.R. 5-21-7, or give water right owners in GMD #1 the choice to either use K.A.R. 5-21-7 or the formula being proposed in K.A.R. 5-5-9 when making an application to change the use of water from irrigation to another use.

General Comments

Finally, KLA would like to address some concerns it has heard about this proposal. First, some commenters may believe that consumptive use regulations should be used as a conservation tool. This could not be further from the real purpose of consumptive use and KLA opposes any attempt to use consumptive use factors to conserve water. First and foremost, the state of Kansas has adopted numerous conservation tools into law, which can be applied by individual water right owners, GMDs, and the Chief Engineer. These tools include Water Conservation Areas, Local Enhanced Management Areas, and Intensive Groundwater Use Control Areas, as well as the GMD management plans.

Furthermore, using conservation as a stated purpose for applying the current or future consumptive use regulations subjects the regulations to a future legal challenge. Reliance on consumptive use regulations for conservation purposes disproportionately shifts the burden of conservation onto water uses other than irrigation, such as stockwater, municipal, and industrial uses. These three uses combined represent approximately ten percent of total state-wide water use, with stockwater representing less than one percent of total state-wide water use. A vast majority of all water use in the state of Kansas is irrigation, to which this rule would generally not apply.

The proposed rule does not grant any special privileges to one use over another. As stated in the title of the proposed regulation, it applies to a "change in use made of water from irrigation to *any other type of beneficial use of water.*" K.A.R. 5-5-9 (emphasis added). Whether the change

in use is to stockwater, industrial, municipal, or other approved uses, the formula applies equally. DWR's proposal does not bestow special treatment on the livestock industry. In fact, the rule better equalizes the value of an irrigation water right compared to a water right used for any other beneficial purpose because the proposed rule uses better data and better methodology to determine the true consumption of an original irrigation use.

Summary

KLA appreciates the opportunity to comment on the proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right. KLA strongly supports the concepts identified in DWR's proposed rule. Prior to finalization, KLA recommends DWR make a slight technical change in K.A.R. 5-5-9(a)(1) to clarify the application of the return-flow factor; suggests removing the NIR requirement reduction in K.A.R. 5-5-16(a)(2)(C)(i); and requests that DWR either repeal K.A.R. 5-21-7, or give water right owners in GMD #1 the choice to either use K.A.R. 5-21-7 or the formula being proposed in K.A.R. 5-5-9 when making an application to change the use of water from irrigation to another use.

Sincerely,



Aaron M. Popelka
V.P. Legal and Governmental Affairs

Hutton, Ronda

From: Walker, Jason
Sent: Monday, July 24, 2017 3:19 PM
To: Hutton, Ronda
Subject: RE: public comments

K.A.R. 5-14-11

Tim Boese

24 Jul 2017, 02:20 PM

The Equus Beds Groundwater Management District No. 2 Board of Directors reviewed the proposed changes to K.A.R. 5-14-11 at the July 12, 2017 monthly Board meeting. The District Board of Directors, by approved motion, supports the modifications as proposed to K.A.R. 5-14-11.

These comments are being submitted on the behalf of the Equus Beds GMD2 Board of Directors by Tim Boese, Manager of the Equus Beds Groundwater Management District No. 2.

From: Hutton, Ronda
Sent: Monday, July 24, 2017 8:46 AM
To: Walker, Jason <Jason.Walker@ks.gov>
Subject: public comments

Jason,

Sometime today could you please check and see if there are any public comments for water regs KAR 5-5-9, 5-5-10, 5-5-16 and 5-14-11?

Thank you.

Ronda

Hutton, Ronda

From: tbrown@cattle-empire.net
Sent: Monday, July 24, 2017 4:59 PM
To: Hutton, Ronda
Subject: Comments re Proposed Amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 (calculation of consumptive use of a water right)

Kansas Department of Agriculture
Division of Water Resources
1320 Research Park Dr.
Manhattan, KS 66502

Re: Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.

To whom it may concern:

I am an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

The amendments proposed by DWR, however, will help sustain current investment in the Kansas livestock industry and will encourage future growth. DWR's proposal improves the consumptive use formula applied to change in use applications by:

1. Increasing transparency and simplifying application of the rule;
2. Relying on more accurate and available data that is supported by hydrologic science;
3. Recognizing regional differences in return flows, while still allowing for individual studies; and
4. Better ensuring the true value of the property right is available to the water right owner upon conversion.

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

Thanks,

Trista Brown Priest
Chief Strategy Officer



1320 Research Park Drive
Manhattan, Kansas 66502
(785) 564-6700



900 SW Jackson, Room 456
Topeka, Kansas 66612
(785) 296-3556

Jackie McClaskey, Secretary

Governor Sam Brownback

**Re: Public Comment Related to Proposed Changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16
Submitted by Jackie McClaskey, Secretary Kansas Department of Agriculture**

Three years ago the state committed to implementing at least 75 percent of the Phase I action items described in the Vision for the Future of Water Supply in Kansas within the first year. I am pleased to report that we exceeded that first year target and today have 100% of the Phase I action items underway along with many of the Phase II and III action items. While no one of the action items alone can address the challenges we face with our water supply, there is one that has significant potential to equitably and scientifically assess the way water is managed in the state.

The Vision also calls upon the state to develop more flexible water right management alternatives and to evaluate current consumptive use regulations. I have also heard through countless conversations with livestock facilities and dairies that the state's current consumptive use regulations are confusing and discourage the growth of animal agriculture in Kansas. Agriculture is the largest economic driver in Kansas, valued at more than \$63 billion and accounting for 43 percent of the state's economy. The continued success of agriculture, and in fact, the economic health of the entire state, is dependent on a reliable future water supply. Our current consumptive use regulations limit the growth of agriculture in the state without a corresponding improvement in our long-term water supply. These regulations unnecessarily and unfairly impact animal agriculture, an industry that contributes nearly \$8 billion to the western Kansas regional economy while using less than 2 percent of the region's overall reported water use.

The changes proposed to K.A.R. 5-5-9, 5-5-10, and 5-5-16 provide a simple, science-based alternative to the current calculations – one that will provide one number per county, making it clear and transparent to operations looking to expand or move to Kansas the factor for converting an irrigation right to stockwatering. This number will serve as a simple baseline and anyone providing alternative data and information can advocate for a more favorable conversion factor to the chief engineer.

These are just one more example of how the Vision – which was developed from input from thousands of Kansans – is more than a document sitting on a shelf. The action items are taking shape locally, on the ground, in the form of technology adoption, policy changes, and personal management decisions. I am encouraged by the potential these action items will play in the future of the state's water supply; however, now is not the time to rest on our success. We must not lose momentum from determinedly moving forward towards a shared commitment to have the water resources necessary to support the state's social, economic, and natural resource needs for current and future generations.

Sincerely,

Jackie McClaskey
Kansas Secretary of Agriculture

Hutton, Ronda

From: ANDI D. GORMAN <tadpole28@msn.com>
Sent: Tuesday, July 25, 2017 11:15 AM
To: Hutton, Ronda
Subject: K.A.R. 5-5-9, 5-5-10, and 5-5-16

*Kansas Department of Agriculture
Division of Water Resources
1320 Research Park Dr.
Manhattan, KS 66502*

Re: *Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.*

To whom it may concern:

I am an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

The amendments proposed by DWR, however, will help sustain current investment in the Kansas livestock industry and will encourage future growth. DWR's proposal improves the consumptive use formula applied to change in use applications by:

- 1. Increasing transparency and simplifying application of the rule;*
- 2. Relying on more accurate and available data that is supported by hydrologic science;*
- 3. Recognizing regional differences in return flows, while still allowing for individual studies; and*
- 4. Better ensuring the true value of the property right is available to the water right owner upon conversion.*

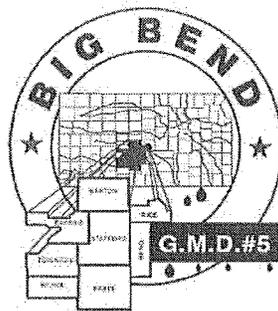
Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

*Meade Co. Feeders, LLC
Meade Co. Feeders II, LLC*

*Andi Gorman,
Manager*

Darrell Wood - Edwards (Pres.)
Fred Grunder - Pratt (V. Pres.)
John Janssen - Kiowa (Treas.)
Jerry Cullop - Rice (Sec.)
Justin Gatz - Reno
Kent Lamb - Stafford
Phil Martin - Barton
Bob Standish - Pawnee
Tom Taylor - At-Large



Orrin Feril, Manager
125 South Main Street
Stafford, Kansas 67578
ph: (620) 234-5352
fx: (620) 234-5718
gmd5@gmd5.org
www.gmd5.org

Comments Concerning
Draft Amendments to K.A.R. 5-5-9
Kansas Department of Agriculture – Division of Water Resources
Orrin Feril, Manager – July 25, 2017

The Big Bend Groundwater Management District No. 5 (“the District”) encompasses 2.5 million acres in south central Kansas and covers all or part of eight counties. There are approximately 4500 large capacity wells withdrawing water from the Great Bend Prairie aquifer, representing agriculture, municipal, industrial, and recreational needs. Economic stability in the area is highly dependent on this water resource. The District board of directors has reviewed the proposed language and hereby makes the following comments, by approved motion.

The proposed regulation amendments are intended to streamline the procedure for determining how the consumptive use of a water right is calculated when converting an irrigation water right to another beneficial use of water. The District believes that the current calculation method utilizing the perfected acres certified by the water right owner and the irrigated requirement for raising corn in the county is sufficient for determining the amount that is consumed by an irrigation water right. In cases where the water right was perfected using a different crop, the current regulation allows for an alternate calculation method. The process for determining the perfected acres for a certified water right is not very difficult and can be completed by KDA–DWR in a very timely manner. It should be the responsibility potential water right purchaser to exercise due diligence regarding the water right in the same manner as any other private property acquisition.

The District believes the current method for calculating the consumptive use of an irrigation water right is conservative and does a better job of protecting the aquifer from potential increases in consumptive use which are prohibited by K.A.R. 5-5-3.

This proposed amendment utilizes a return-flow factor for each county as determined by the distribution of each type of irrigation system within each county. However, the District has not seen evidence of any accommodation for the soil types within each county. While the delivery method for the water throughout the irrigation field does play a significant role in the amount of water utilized by the crop, the soil type also has a significant role that which appears to be missing. As such, there are assumptions in the return-flow factors that the soil types within a county are uniform. This is not the case at all. Soil types can vary dramatically even within a crop field.

Additionally, the District’s interpretation of the proposed language in K.A.R. 5-5-9 (1) is in conflict with the District’s understanding of the intent of this change. The language states that “the approved change shall be the authorized quantity of the water right multiplied by the return-flow factor specified for the county within which the change is approved”. The referenced map shows average county return-flow factors that range from approximately 12-20%. An example is for Stafford County the return-flow factor

is stated as 15.6%. Therefore, utilizing the proposed language in K.A.R. 5-5-9 (1) for a certified water right with 195 acre-feet, the maximum annual quantity of water to be allowed by the approved change shall be 30.42 acre-feet (195 acre-feet multiplied by 15.6%). The map does attempt to correct this issue in the example below the map. The District recommends either the language be updated to reflect this issue or the values for each county be updated to be the complement of the return-flow percentages shown on the map. So instead of showing 15.6% for Stafford County, the percentage should be updated to reflect its complement of 84.4%. This would then allow an applicant to use the map to determine the amount consumed by the crop rather than the amount returned to the aquifer, which the District believes is the intent.

In further review of the referenced map titled "irrigation return-flow percentages in Kansas, by County," the District has a concern regarding the inconsistency between neighboring counties. The District has not been supplied supporting documentation to explain these differences. A few examples are Rush County (6.3%) vs the surrounding counties averaging 15.8% between these 8 counties. On the other hand, the return-flow in Kingman County is nearly 30% while the neighboring counties are 15.6% between those 7 counties. Additionally, Kiowa County at 21.3% is surrounded by counties averaging 14.7% between those 6 counties. This inconsistency would potentially promote these types of changes in certain counties based on this map and in contrast penalize other nearby counties.

The District appreciates the additional language in K.A.R. 5-5-9 5(c) regarding additional site-specific data from the groundwater management district. However, there is concern that this data would only be reviewed by the Chief Engineer in the case where the "annual quantity of water ... could result in impairment of other water rights". In many cases, the groundwater management district may have site-specific data that should be considered in these calculations. The District's goal is to utilize the most accurate data for each change application if site-specific data is available. It is the recommendation, in this case, to move this proposed language to its own subsection of K.A.R. 5-5-9 5.

The above comments are hereby submitted for consideration.

GMD3 TESTIMONY: PROPOSED CHANGES TO KAR 5-5-9, KAR 5-5-10, KAR 5-5-16

KDA/DWR Hearing on July 25, 2017 at 10 AM

My name is Mark Rude, Executive Director of the Southwest Kansas Groundwater Management District Number 3(GMD3). Thank you for this opportunity to provide these comments on the proposed reform of KAR 5-5-9, KAR 5-5-10, KAR 5-5-16.

The board supports the concepts proposed to adopt general presumptive administrative values for irrigation return flows to be used as a percentage reduction value by county for proposed changes in use made of water from irrigation to some other consumptive use, provided there is adequate provision to consider better water right specific values when available. This will prevent the facts associated with each member's real property rights from being discounted or inappropriately ignored in the Chief Engineer's considerations, whether applicant, objector or groundwater manager. A provision allowing agency staff to consider project-specific historical data is necessary to protect the relative local consumptive use under each member-owned water right and its relative priority, rate and quantity in the closed and declining groundwater areas, including most of the High Plains Aquifer in the district.

GMD3 is in the process of revising the management program for the district. There are a number of management program updates being considered to further implement the rights and powers delegated to the members of the district by the legislature, including the right to adopt local groundwater management standards and to request administrative rules needed to implement those standards under the management program for all district members in the public interest. GMD3 reserves this right regarding the nature and purposes of these proposed generalized statewide reforms on consumptive use as the future adopted management program may necessitate a district-specific rule as needed to implement the adopted groundwater management program, with due consideration of basic (emphasis added) laws and policies of the state.

KAR 5-5-9. The GMD3 Board generally supports the map-based concept of the rule, provided any and all site specific data that may be available or provided can be considered as discussed above. Just be sure to check the drafted language as to the intended calculation from the map. Also, there is a concern for section (d) at the bottom of page 3 and any implied prohibition or adverse effect this could have on the use of Term permits that have historically been granted to members of the Associated Ditches diverting from the Arkansas River above Garden City when excess flows have allowed an added acre foot per acre to be made available due to the conservative vested right determinations of those rights in an otherwise water short river system.

KAR 5-5-10. We support the added language in section (c) to update the relative well yield(s) in the declining source of supply.

K.A.R. 5-5-16. The controversial question raised by the KAR 5-5-16 rule in (a)(4) top of page 3 of the rule remains untouched. There is board sentiment that priority should change under such circumstances. So, we have a fundamental question here.

We proposed this priority change concept in our past draft "long move rule" based on this rule provision in KAR 5-5-16 and KDA legal staff reply back was that such a rule provision was not consistent with legislative policy in KSA 82a-708b.

Could we have your reference of the legislative delegation of authority to the chief engineer to change the priority of any portion of a water right by order approving a change application? We wonder if the more appropriate tool from the legislature in such a case may be a new appropriation.

Hutton, Ronda

From: Jeff George <jgeorge@finneycountyfeedyard.com>
Sent: Tuesday, July 25, 2017 11:43 AM
To: Hutton, Ronda
Subject: : "Comments re Proposed Amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 (calculation of consumptive use of a water right)"

To whom it may concern:

I am an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

The amendments proposed by DWR, however, will help sustain current investment in the Kansas livestock industry and will encourage future growth. DWR's proposal improves the consumptive use formula applied to change in use applications by:

- 1. Increasing transparency and simplifying application of the rule;*
- 2. Relying on more accurate and available data that is supported by hydrologic science;*
- 3. Recognizing regional differences in return flows, while still allowing for individual studies; and*
- 4. Better ensuring the true value of the property right is available to the water right owner upon conversion.*

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

Jeff George,

*Manager/Owner
Finney County Feedyard
Garden City, KS.*

Hutton, Ronda

From: harlan house <hdshop@st-tel.net>
Sent: Tuesday, July 25, 2017 12:31 PM
To: Hutton, Ronda
Subject: Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right

I am a water right holder in Sherman County. I am in support of what the Chief Engineer has proposed. I support DWR's proposal.

Thanks for your consideration. Sincerely Harlan D. House Goodland, Kansas. 785 821 1175

Hutton, Ronda

From: Terry Nelson <terry@valleyfeeds.com>
Sent: Tuesday, July 25, 2017 12:56 PM
To: Hutton, Ronda
Cc: Julia Nelson
Subject: Comments on Consumptive Use

*Kansas Department of Agriculture
Division of Water Resources
1320 Research Park Dr.
Manhattan, KS 66502*

Re: *Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.*

To whom it may concern:

I am an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights; DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

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- 1. Increasing transparency and simplifying application of the rule;*
- 2. Relying on more accurate and available data that is supported by hydrologic science;*
- 3. Recognizing regional differences in return flows, while still allowing for individual studies; and*
- 4. Better ensuring the true value of the property right is available to the water right owner upon conversion.*

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed. We are strongly in favor of the improvements that you are considering to help the livestock industry.

Respectfully,

Terry Nelson
1304 W Fox Road
Long Island, Kansas

Hutton, Ronda

From: Julia Nelson <julia@valleyfeeds.com>
Sent: Tuesday, July 25, 2017 1:06 PM
To: Hutton, Ronda
Cc: Terry Nelson
Subject: Comments on Consumptive Use

*Kansas Department of Agriculture
Division of Water Resources
1320 Research Park Dr.
Manhattan, KS 66502*

Re: *Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.*

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- 3. Recognizing regional differences in return flows, while still allowing for individual studies; and*
- 4. Better ensuring the true value of the property right is available to the water right owner upon conversion.*

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

Julia J. Nelson
Valley Feeds, Inc
PO Box 38
Long Island, KS 67647
785-854-7611
Fax: 785-854-7610
www.nelsonagltd.com

Hutton, Ronda

From: Clarke Nelson <clarke@valleyfeeds.com>
Sent: Tuesday, July 25, 2017 1:09 PM
To: Hutton, Ronda
Cc: Terry Nelson
Subject: Comments on Consumptive Use

*Kansas Department of Agriculture
Division of Water Resources
1320 Research Park Dr.
Manhattan, KS 66502*

Re: *Comments on proposed amendments to K.A.R. 5-5-9, 5-5-10, and 5-5-16 pertaining to consumptive use of a water right.*

To whom it may concern:

I am an owner of water rights in Kansas, and I support the Kansas Department of Agriculture (KDA), Division of Water Resources' (DWR) proposed changes to K.A.R. 5-5-9, 5-5-10, and 5-5-16. For too long, the consumptive use adjustments made to change of use applications penalized livestock owners like myself. The current NIR calculations required by K.A.R. 5-5-9 are an inaccurate measure of return flows. It makes overly broad assumptions that the farmer only grows corn, ignores soil type and depth to groundwater, can often inaccurately represent historic rainfall, and does not distinguish between irrigation technologies, which is a substantial component of return flows. As a result, when irrigation rights are converted to stockwater rights, DWR unilaterally devalues my existing water right. In addition, the current NIR formula makes it difficult for a prospective purchaser to assess the true value of a water right. Allowing the current NIR formula to stay in place will adversely impact the livestock industry in Kansas.

The amendments proposed by DWR, however, will help sustain current investment in the Kansas livestock industry and will encourage future growth. DWR's proposal improves the consumptive use formula applied to change in use applications by:

- 1. Increasing transparency and simplifying application of the rule;*
- 2. Relying on more accurate and available data that is supported by hydrologic science;*
- 3. Recognizing regional differences in return flows, while still allowing for individual studies; and*
- 4. Better ensuring the true value of the property right is available to the water right owner upon conversion.*

Thank you for considering my comments, and I ask that you finalize the substance of the amendments to the consumptive use regulations as proposed.

Respectfully,

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