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WATER TRANSFERS IN KANSAS

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Introduction

This article provides an overview of the process required for a water transfer in Kansas, using a proposed change from agricultural use to municipal use as a case study example.

The Kansas Water Transfer Act (KWTA) defines any proposal to move more than 2,000 acre-feet of water per year to a place of use 35 or more miles from the water's point of diversion as a "water transfer." All such water transfers are, pursuant to the KWTA, subject to numerous procedural requirements and extensive review, requiring approval by a panel of three state officials: the Chief Engineer of the Kansas Department of Agriculture, Division of Water Resources (DWR); the Executive Director of the Kansas Water Office; and the Secretary of the Kansas Department of Health and Environment.

In brief, navigating a "water transfer" of previously appropriated water rights under the KWTA is a two-step process. First, the applicant must receive contingent approval from DWR's Chief Engineer to "change" the authorized beneficial use and the authorized place of use to the new location. Second, the applicant must traverse the requirements of the KWTA, which are extensive and complex — albeit somewhat duplicative of the change application procedure.

HISTORY OF THE KWTA

Milford Reservoir, the largest lake in Kansas, played a central role in the evolution of water regulation in Kansas. This US Army Corps of Engineers multipurpose reservoir is on the Republican River, a tributary to the Missouri River via the Kansas River. It has a drainage area of 3,796 square-miles, covers 15,700 surface acres, and contains 351,577 acre-feet in its conservation pool — some or all of which is allocated to the Kansas Water Office. Two-thirds of that water, 235,010 acre-feet (capable of producing approximately 71 million gallons per day), remains available for future use.

The Reservoir feeds into the Kansas River, and major communities downstream from the Reservoir include Junction City, Manhattan, Topeka, Lawrence, and the Kansas City metropolitan area. While their water needs are currently being met from other sources, those communities look to Milford as a future source of water as needed.

In the early 1980s, several communities in Central Kansas began searching for additional water supplies to serve growing municipal demand. Lead by the City of Wichita, the largest City in Kansas, the cities commissioned a 1983 Feasibility Study proposing 114 miles of 60-inch pipeline to move up to 80 million gallons per day (mgd) of unallocated water from Milford Reservoir to supply water to Wichita and a number of other communities along the way.

Due in part to political backlash following the proposal to allocate water from Milford Reservoir, the 1983 Kansas Legislature passed the KWTA, K.S.A. 82a-1501, et seq., which imposed numerous hurdles including an extensive review process and numerous preconditions. 1983 Kansas Session Laws, ch. 341.

Undaunted, the group formed a “Public Wholesale Water Supply District” (PWWSD) in 1988 and commissioned a second “Conceptual Study” — which was completed in 1991. The Study renewed the proposal to divert and treat up to 80 mgd of water from Milford Reservoir to supply cities in Central Kansas.

The 1993 Legislature made substantial amendments to the KWTA, requiring:

- adoption of conservation plans and practices;
- rate structures that encourage the efficient use of water;
- adding a list of factors to be used to determine whether the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer; and
- setting out procedural requirements.

1993 Kansas Session Laws, ch. 219.

After the 1993 amendments, the City of Wichita left the PWWSD and turned its attention to an Aquifer Storage & Recovery (ASR) project that would provide a long-term water source without triggering the amended KWTA. Wichita’s ASR project diverts surface and bank storage water from the Little Arkansas River when flows are high, treats it to drinking water standards, and injects the processed water into the Equus Beds aquifer north of the City. The City accumulates recharge credits that allow it to withdraw this additional water from the aquifer when needed, subject to certain conditions.

While the KWTA was originally enacted in response to Wichita’s water-transfer project and was largely intended to oversee the allocation of water not otherwise spoken for, it applies to all water transfers. Thus, the KWTA includes transfers that involve the transfer of established water rights owned by the applicant, such as the R9 Ranch water rights owned by the City of Hays and the City of Russell.

WATER TRANSFERS GOVERNED BY THE KANSAS WATER TRANSFER ACT

Under the current version of the law, in Kansas, anyone who wants to divert and transport more than 2,000 acre-feet of water per year more than 35 miles must comply with the KWTA. K.S.A. 82a-1501, et seq. See K.S.A. 82a-1501(a)(1) (defining “water transfer”); and K.S.A. 82a-1502(a) (prohibiting a water transfer until the same is approved pursuant to the provisions of the KWTA).

Generally, this requires the water transfer applicant to submit a complete transfer application after which there will be a hearing. A hearing officer then issues an initial order recommending the transfer be approved — in whole or in part — or denied altogether. K.S.A. 82a-1503(b) sets out the timeline and procedure for the presiding officer’s duties. K.S.A. 82a-1504(a) specifies the required findings and statutory guidance that the presiding officer must follow when issuing the initial order. As noted above, a hearing panel consisting of the Chief Engineer of DWR, the

Secretary of the Kansas Department of Health and Environment, and the Director of the Kansas Water Office will then consider the hearing officer's initial recommendation and ultimately decide whether to approve the transfer or not and will then issue a final order. K.S.A. 82a-1501a(a). Any party to the proceeding may then appeal that final order to the Kansas courts.

Compliance with the KWTA is necessarily time consuming and costly, and requires any successful applicant to undertake extensive preparatory groundwork before applying for a water transfer. Kansas regulations impose a multitude of requirements for a "complete" water transfer application. See, e.g., K.A.R. 5-50-2(a)–(z) (listing 26 different requirements for a "complete" transfer application with numerous sub-requirements).

Among other things, these requirements include:

1. preparing a plan of design and construction in sufficient detail to "enable all parties to understand the impacts of the proposed water transfer", K.A.R. 5-50-2(g);
2. adopting and implementing conservation plans for at least 12 consecutive months prior to applying, that are consistent with Kansas Water Office guidelines, K.A.R. 5-50-2(p);
3. water needs projections and plans for environmental mitigation, K.A.R. 5-50-2(r) and (t); and
4. obtaining contingently-approved applications for new water appropriation rights or orders changing existing water rights to the proposed place and type of use. K.A.R. 5-50-2.

There are numerous additional requirements for an applicant to complete an application, and many more to obtain actual approval for the water transfer.

Once a "complete" application has been submitted, the transfer panel will request the appointment of a presiding officer, who will act as a fact finder for the water transfer hearing. K.S.A. 82a-1501a(b). The hearing officer conducts a hearing, which must be held in the basin of origin and is likely to draw interveners. *See* K.S.A. 82a-1503(d) and K.S.A. 82a-1503(c).

BENEFITS COMPARISON & IMPAIRMENT STANDARD

Substantively, the KWTA begins with a prohibition of any transfer that would result in the reduction of water for any present or reasonably foreseeable future beneficial use in the place from which the water is to be taken — unless the benefits to the state for approving the transfer outweigh the benefits to the state for denying the transfer. K.S.A. 82a-1502(a). This statewide "benefits comparison" plays a prominent role in the statute and regulations and includes a number of factors that must be considered. For example, in order for a water transfer application to be "complete," it must show "that the benefits to the state if the transfer is approved outweigh the benefits to the state if the transfer is not approved." K.A.R. 5-50-2(i).

A water transfer application will be denied if it would impair existing water rights. K.S.A.82a-1502(b)(1).

Following the water transfer hearing, the hearing officer will render an initial order, which may approve a transfer for the full requested amount, approve the transfer for a smaller amount of water than requested, or deny the application in whole or in part. K.S.A. 82a-1504(a). The panel must then review the hearing officer's initial order and, within 90 days after its entry, enter a final order that is based on the record of the hearing. K.S.A. 82a-1504(b).

THE KANSAS WATER APPROPRIATION ACT

The KWTA is separate from and subject to the Kansas Water Appropriation Act (KWAA), K.S.A. 82a-701, et. seq., enacted in 1945. The KWAA states that all water within the State is dedicated to the use of the people of Kansas and is subject to the State's control and regulation. K.S.A. 82a-702. The Act adopted the prior appropriation doctrine and made it applicable to both surface and groundwater. K.S.A. 82a-707. The prior appropriation doctrine provides seniority of water rights based on the age of right; i.e., "first in time, is first in right." It also recognized the use of water established prior to 1945 by allowing users to apply for and obtain "vested water rights." K.S.A. 82a-

701(d), K.S.A. 82a-704a. The opportunity to have a vested right recognized closed in 1980. K.S.A. 82a-704a.

Until 1978, the KWAA did not prohibit the diversion of water without a water right. However, those who wished to obtain a "water appropriation right" to begin a new use of water after 1945 were required to file an application with the Chief Engineer, to obtain a permit, and perfect the right by beneficial use of the water in accord with the terms, conditions, and limitations set out in the permit. K.S.A. 82a-701(f), K.S.A. 82a-705, K.S.A. 82a-708a, and K.S.A. 82a-712-14.

Perfecting the right by beneficial use is important. For example, quantities for irrigation are based on acre-feet per acre depending on where the property is located in the State. Assume a permit states that the authorized place of use is 130 acres under a planned center pivot, the left circle (*see* Figure 1). Instead of placing the center pivot in the authorized location shown on the application, the center pivot is offset by the water user and just the area covered by the right circle is actually irrigated during the perfection period.

When the water right is certified, however, only the quantity in the overlapping area counts. The authorized acres that were not irrigated don't count and the unauthorized acres that were irrigated don't count.

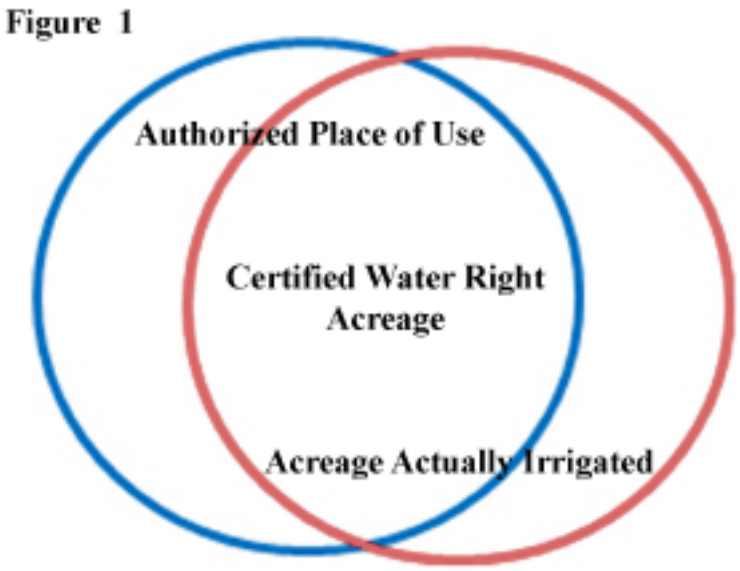


Figure 1: Center Pivots -- Overlapping Irrigated Area

With minor exceptions, including diversion of water for domestic use, after 1978, diversion of water without a vested right or a water appropriation permit has been unlawful. K.S.A. 82a-709. In 1957, the KWAA was amended to, among other things, allow the owner of a water right to apply for approval to change the place of use, the point of diversion, or the use made of the water without losing priority of the right so long as a proposed change is reasonable, will not impair existing rights, and draws water from the same local source of supply. K.S.A. 82a-708b.

THE CITY OF HAYS, KANSAS

Hays is the largest city in northwestern Kansas, with a population of over 21,000. Hays is approximately 11 miles north of the Smoky Hill River and 15 miles south of the Saline River. Big Creek, a tributary of the Smoky Hill River, runs through town.

The City of Hays is the only municipality in Kansas with a population greater than 15,000 that is not located over the Ogallala aquifer, or near a reliable flowing river, a reservoir, or a combination of different water sources. In other

words, Hays is the only large community in Kansas without ready access to a reliable drought-resistant water source.

The City draws water from wells in the Smoky Hill River and Big Creek alluviums, and a small amount from wells in the Dakota formation southwest of the City. While Hays receives about 23.5 inches of precipitation annually, the Smoky Hill River begins in Eastern Colorado and drains areas with as little as 17 inches of annual precipitation with very high annual evaporation rates.

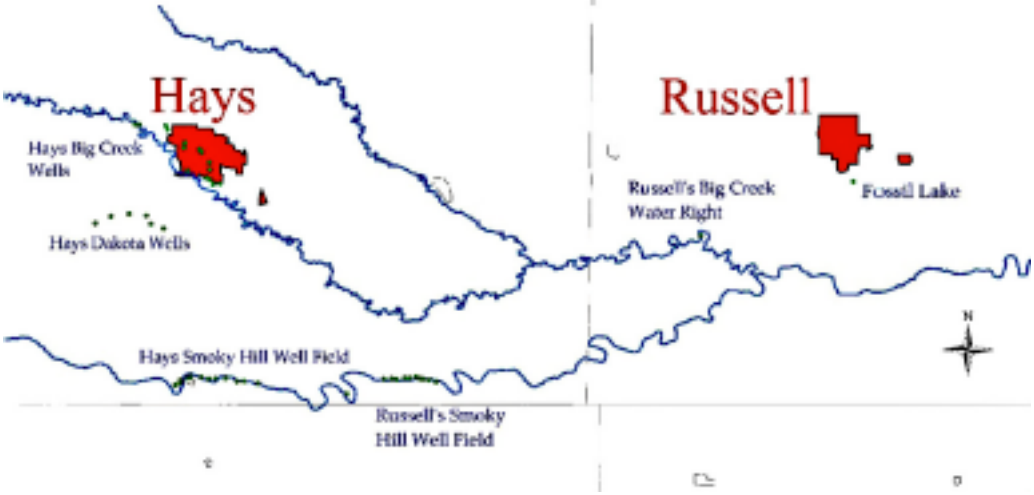
In 1949, the US Bureau of Reclamation began construction of the Cedar Bluff dam on the Smoky Hill River — about 27 miles upstream from the Hays wellfield. The Reservoir cut off the flow that historically recharged the wellfield on the River. Cedar Bluff Reservoir was originally built for irrigation but because of increased diversion of groundwater and high evaporation rates to the west, inflows declined and irrigation use was discontinued. The reservoir is now used for recreation, flood control, and for a small amount of municipal water supply.

Because the Smoky and Big Creek wellfields are sensitive to drought, Hays has imposed significant restrictions on the use of water and has been lauded as a statewide leader in adopting and implementing effective conservation measures. These efforts have paid dividends: during the period from 2010-2015, Hays used an average of 91.5 gallons per person per day while the average use of other communities was and continues to be significantly greater. However, these measures have come at a great economic, social, and political cost to the City — including a perception that Hays does not have sufficient water to sustain significant long-term growth.

THE CITY OF RUSSELL, KANSAS

The City of Russell, population 4,400, is about 30 miles east of Hays, approximately five miles south of the Saline River, and eight miles north of the Smoky Hill River. Like Hays, Russell is not located in an area with nearby access to a sufficient, reliable, and drought-resistant water source. Fossil Creek, a tributary of the Smoky Hill River, passes immediately south of the City where it is dammed to form a small reservoir, Fossil Lake. The City averages 26 inches of precipitation annually but, like Hays, the evaporation rate in the area exceeds the average annual rainfall.

Russell's water supply comes from the Smoky Hill River, Big Creek, and Fossil Lake, all of which are are highly susceptible to drought in the same manner as Hays' sources. Big Creek is particularly unreliable because it frequently runs dry during the summer. The City of Russell has imposed stringent conservation measures that have significantly reduced consumption at costs analogous to those borne by Hays.



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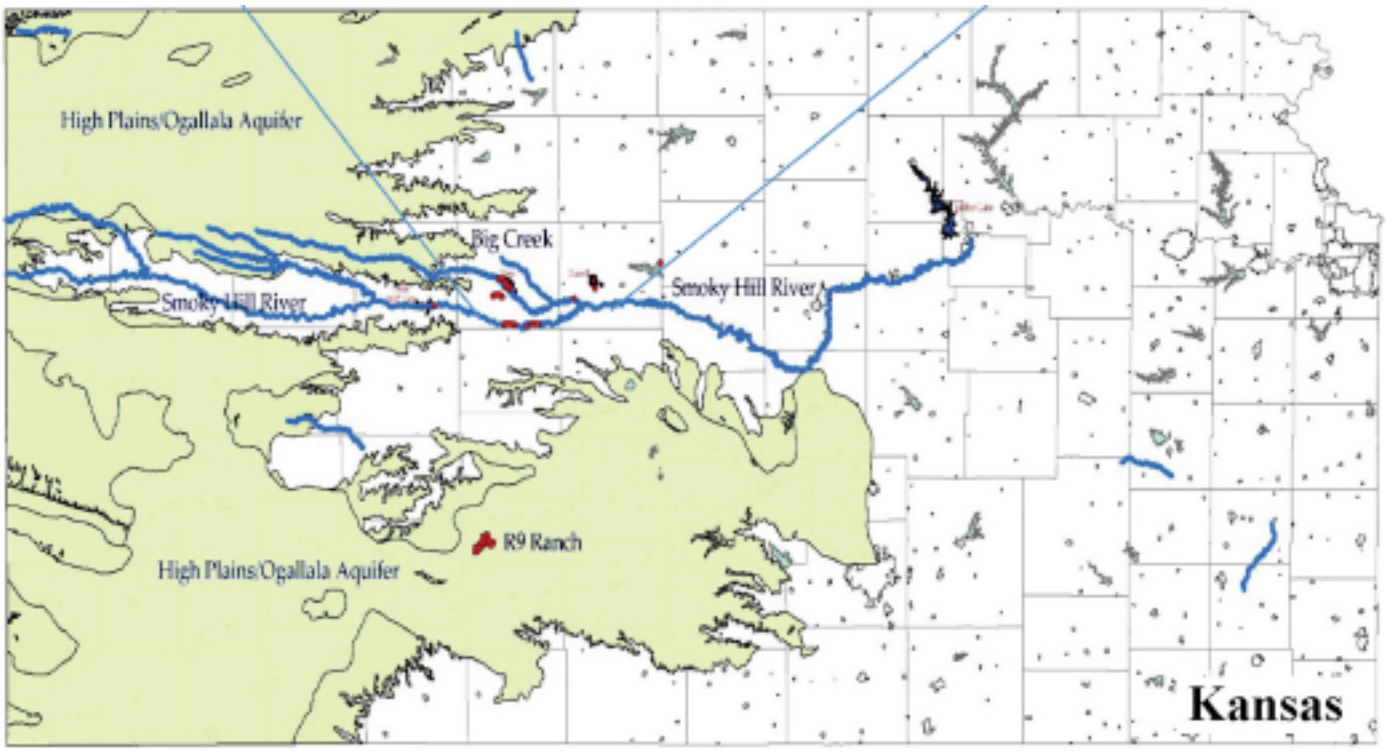

CONVERSION OF IRRIGATION RIGHTS TO MUNICIPAL USE

In 1995, the Cities of Hays and Russell, Kansas (Cities) purchased the "R9 Ranch," a 6,700-acre farm located 70 miles south of Hays near Kinsley, Kansas. The Cities intended to convert the existing irrigation water rights on the R9 Ranch to municipal use in the Cities. Because water rights are real property rights under Kansas law and are appurtenant to and severable from the authorized place of use, by purchasing the R9 Ranch the Cities became legal owners of the Ranch's appurtenant water rights. The Cities planned to change the authorized location and type of use of the R9 Ranch water rights by following the KWTA and constructing pipeline and related infrastructure to divert water from the Ranch to the Cities. The system would then supply Hays and Russell with a much more drought-resistant, long-term supply of water than their existing sources.

Prior to acquiring the R9 Ranch, the Cities had spent years searching for viable alternative long-term water sources. DWR's KWTA regulations require applicants to disclose all other "economically and technologically feasible alternative...sources...available to the applicant" and to specify why a particular source was selected over alternative sources. See K.A.R. 5-5-2(f). Consequently, the Cities spent a number of additional years searching for alternatives after their acquisition of the R9 Ranch. Ultimately, the Cities' respective governing bodies concluded that the R9 Ranch provided by far the best option for meeting their respective long-term water needs and proceeded with the water transfer project for that source of supply.

In 2015, Hays and Russell filed applications to "change" the R9 Ranch water rights from irrigation use on the Ranch to municipal use in the Cities, contingent upon final regulatory approval to proceed with the water transfer. Then, in 2016, the Cities filed a transfer application, which will trigger the KWTA following final approval of the pending change applications. The Cities have received contingent approval of their change applications from the Chief Engineer that will allow the Cities to divert up to 6,750 acre-feet per year from the R9 Ranch to the Cities for municipal use, subject to certain conditions and limitations. The Cities are currently awaiting finalization of that order, which has been challenged in court. Assuming finalization, the Cities plan to proceed with the KWTA proceeding and, upon KWTA-approval, commence construction of the water transfer infrastructure — thus

providing for a drought-resistant water source for the Cities and their residents.

THE CITIES' WATER TRANSFER

Unlike most other Kansas cities, due to their location Hays and Russell had to look far afield to find a reliable source of water. After purchasing the R9 Ranch, Hays and Russell considered numerous alternative sources, but the alternatives all proved unworkable, too expensive, or not drought resistant.

In June of 2015, the Cities filed applications to change the water rights on the R9 Ranch from irrigation to municipal use. Over the next several years, the Cities and DWR negotiated an agreement culminating in a 50-page "Master Order" and 32 separate Orders approving the Cities' change applications, contingent on final approval of the water transfer application. These Orders were issued in March of 2019.

A group of irrigators in the area of the R9 Ranch intervened in the change application proceeding and challenged the Orders. Their challenge was rejected by the Secretary of the Kansas Department of Agriculture, after which the intervenors filed a petition for review in the Edwards County District Court pursuant to the Kansas Judicial Review Act, K.S.A. 77-601, et seq. The judicial review proceeding has been fully briefed and oral argument was completed on January 8, 2021. The parties are now awaiting a decision from the District Court after which either side aggrieved by the decision may appeal to the Kansas Court of Appeals and, potentially, the Kansas Supreme Court. In the meantime, the Cities' application to transfer water from the R9 Ranch to Hays and Russell remains incomplete. The current Chief Engineer has informed the Cities that upon approval of the March 2019 Order by the Courts, the transfer application will be "complete," and the transfer proceeding can begin.

FOR MORE INFORMATION

If you have questions or want more information regarding water transfers in Kansas, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Daniel Buller** at 913.253.2179 or dbuller@foulston.com or **David Traster** at 316.291.9725 or dtraster@foulston.com. For more information on the firm, please visit our website at **www.foulston.com**.

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