

**Report on Implementing Multi-year Flex Accounts (K.S.A. 82a-736)
to
House Standing Committee on Agriculture and Natural Resources
and
Senate Standing Committee on Natural Resources**

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K.S.A. 82a-736 became law May 9, 2001, and it requires the chief engineer of the Kansas Department of Agriculture's Division of Water Resources to implement a voluntary program to allow water right holders to establish flex accounts for groundwater use. The law also requires the chief engineer to submit a written report on the law's implementation to your standing committees by February 1 each year.

K.S.A. 82a-736 was amended by the Legislature in 2005 to change the base average use period from 1996 through 2000 to 1992 through 2002. The amendments also provided for the amount deposited into the flex account not to exceed 90 percent of the base average use multiplied by five, as opposed to being exactly 90 percent of the base average use multiplied by five.

Attached are the current rules and regulations related to K.S.A. 82a-736 originally promulgated in 2002, and revised January 6, 2006, to implement the program. The criteria allow eligible, participating water right holders to use, within a five-year period, an amount of groundwater that is no more than 90 percent of their actual base average use times five and as long as it does not impair other existing water rights.

The law requires that any groundwater water right holder who wants to establish a flex account and exercise its use do so through a application for a term permit filed no later than October 10 of the year preceding the first year for which application is made.

In 2010, water right holders were reminded of the flex account provision and filing deadline through an article in the August 10, 2010 edition of *DWR Currents*, our e-newsletter and an August 10, 2010 news release. As of October 10, 2010, no applications for term permits had been filed with the chief engineer for 2010, nor have we received any applications to date for participation in the program beginning in 2011.

In our day-to-day interaction with water right holders, we make sure that those individuals who we believe could benefit the most from this option know that it exists. We also make our flex account literature available to the public when we have a table or booth at water-related events. Information about flex accounts also is available on our website at <http://www.ksda.gov/appropriation/?cid/297>.

Currently there are no active flex accounts as the limited number of previously filed accounts have expired and not been renewed. Due to the limited interest shown in this program, no additional staff was hired to process applications with applications handled by existing staff in the water appropriation program.

We believe flex accounts can play a role in water management of over-appropriated area, particularly in areas where voluntary measures are adopted. Flex accounts provide for water savings of at least 10 percent while giving the water right holder flexibility to use the water for beneficial purposes over a five-year period without the annual limits on the quantity. This would allow an irrigator, during a year with below-average precipitation, to meet the higher water demand of his/her crop. Likewise, in years with above-average precipitation, the irrigator would use less water. Over a typical five-year period, there will be wetter and drier years, and flex accounts can help water users balance these highs and lows while avoiding civil penalties for overpumping the authorized quantity in a single year.

We continue to promote flex accounts as a viable option for groundwater users who have variable demands from year to year, particularly in areas in need of water management strategies.

As I wrote last year, due to the limited interest in this program so far, I raised the issue in a meeting with managers of the state's groundwater management districts. We agreed to work together to identify how the program can be made more attractive to water right holders in hopes of increasing the utility of this management tool while achieving its water conservation function. No progress was made on the task this past year. I hope to present findings from that work next legislative session.

We continue to hear that water users are put off by the required 10% conservation element, calculated from historic use.

I am currently working with Northwest Kansas Groundwater Management District No. 4, which is seeking means to implement a similar program of multi-use allocations to conserve water in one of its high priority areas. Experience gained in developing GMD 4's program may provide insight into improvements to make this program more attractive.

Additionally, KDA has requested legislation this year to further amend the statutes and perhaps make the program more attractive to groundwater users.

Attachment: Implementing regulations, K.A.R. 5-16-1 to 5-16-7

Division of Water Resources
Flex Account Rules and Regulations
K.A.R. 5-16-1 through 5-16-7

K.A.R. 5-16-1. Definitions. As used in this article of regulations, in the Kansas water appropriation act, and by the chief engineer in the administration of the Kansas water appropriation act, unless the context clearly requires otherwise, the following words and phrases shall have the meanings ascribed to them in this regulation. (a) “Base amount” and “BA” mean the quantity of water deposited into a flex account.

(b) “Base average usage factor” and “BAUF” mean the percentage of the “base average usage,” as this term is defined in K.S.A. 82a-736 and amendments thereto, that is multiplied by five as a part of the calculations set out by K.A.R. 5-16-5 to determine the quantity of water that may be deposited into a flex account. The BAUF shall not exceed the maximum of 90% established by K.S.A. 82a-736 and amendments thereto.

(c) “Base water right” means a vested or certified water right or rights for which the owner applies to the chief engineer to establish a flex account pursuant to K.S.A. 82a-736, and amendments thereto.

(d) “BAU” means the “base average usage” as defined in K.S.A. 82a-736, and amendments thereto.

(e) “Good standing,” only as that term is used in K.S.A. 82a-736, and amendments thereto, in reference to base water rights, means a base water right that meets the following conditions:

- (1) Has been lawfully exercised within the 11-year time period specified in K.A.R. 5-16-5;
- (2) has had all required water use reports filed and any civil fines assessed for failure to timely file a complete and accurate water use report paid; and
- (3) has had no period of nonuse with a duration of five or more consecutive years since January 1, 1990, except for enrollment in the water right conservation program according to K.A.R. 5-7-4, enrollment in the federal conservation reserve program, or enrollment in another multiyear federal or state conservation program.

(f) “Significant water conservation measures” means actual physical changes in a water distribution system or management practices that improve water use efficiency, including the following:

- (1) Conversion from flood irrigation to center pivot irrigation with a nozzle package designed to improve water use efficiency;
- (2) irrigation scheduling;
- (3) conversion to subsurface drip irrigation; and
- (4) removal of an end gun, resulting in a significant reduction in the number of irrigated acres. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2004 Supp. 82a-736, as amended by L. 2005, Ch. 142, § 3; effective Oct. 11, 2002; amended Jan. 6, 2006.)

K.A.R. 5-16-2. Fee to establish flex account and apply for term permit. The filing fee for establishing a flex account and applying for a five-year term permit to exercise the flex account shall be \$400. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 2001 Supp. 82a-708a(d), as amended by L. 2002, Ch. 181, § 21; effective Oct. 11, 2002.)

K.A.R. 5-16-3. Establishing a flex account. (a) A flex account shall be established by filing an application for a flex account and a term permit on a form prescribed by the chief engineer. The five-year period shall begin on January 1 of the next calendar year for which the application has been timely filed, unless expressly authorized by the chief engineer to begin the following January 1. The application shall also show the location of all wells located within one-half mile of the proposed point of diversion, and the names, addresses, and telephone numbers of the owners of those wells. Except as set forth in subsection (e), a separate application shall be filed for each water right and each point of diversion for which the owner desires to establish a flex account. Each application shall be accompanied by the filing fee specified in K.A.R. 5-16-2.

(b) Before any application to establish a flex account and a term permit will be accepted for filing, the application shall be signed by at least one owner of the water right, or a duly authorized agent of an owner of the water right.

(c) Before the flex account can be established or the term permit approved, all of the water rights owners, or a duly authorized agent of the owners, shall verify upon oath or affirmation that the statements contained in the application are true and complete.

(d) If one or more owners refuse to sign the application or if a written request is filed by one or more of the owners to withdraw their signatures from the application before the application is approved, the application shall be dismissed.

(e) A single application to establish a flex account and apply for a term permit may be filed in the following situations:

(1) Multiple water rights authorize the diversion of water from a single point of diversion that diverts water to an identical place of use for a single type of use.

(2) Multiple points of diversion are authorized by the chief engineer to divert water through a single water flowmeter before going to an identical place of use.

(f) The flex account shall not be established, and the term permit to exercise the flex account shall not be valid until both have been approved by the chief engineer. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2001 Supp. 82a-736; effective Oct. 11, 2002.)

K.A.R. 5-16-4. Conditions on the term permit. (a) The place of use authorized by a term permit shall be identical to the place or places of use authorized by the base water right or rights.

(b) The type of use authorized by a term permit shall be limited to one of the types of use authorized by the base water right or rights.

(c) The rate of diversion authorized by a term permit shall not exceed the maximum instantaneous rate of diversion authorized by the base water right or rights. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2001 Supp. 82a-736; effective Oct. 11, 2002.)

K.A.R. 5-16-5. Maximum annual quantity of water authorized by term permit. (a) Except as set forth in subsections (b) through (e), the maximum quantity of water deposited in a flex account and authorized to be diverted in five consecutive calendar years under the authority of a term permit shall be determined in accordance with K.S.A. 82a-736, and amendments thereto, by means of these calculations:

(1) Adding the total actual, legal annual water use of the base water right or rights for the period of calendar years 1992 through 2002;

(2) dividing that total quantity of water by 11;

(3) multiplying that quantity by the BAUF; and

(4) multiplying that quantity by five.

(b) If significant water conservation measures were implemented under the base water rights at any time during the period of calendar years 1992 through 2002, the average annual quantity of water actually used may be calculated using the five consecutive calendar years immediately preceding the implementation of significant water conservation measures, but these five calendar years shall not begin before calendar year 1987. The five-year allocation under the term permit shall be determined by means of these calculations:

(1) Adding the total actual, legal annual water use of the base water right or rights for the five consecutive calendar years;

(2) dividing that total quantity of water by five;

(3) multiplying that quantity by the BAUF; and

(4) multiplying that quantity by five.

(c) If water use records for a base water right are inadequate to accurately determine actual water use during any calendar year during the period used to determine the base average usage, then that year shall be counted as having no water use.

(d) No flex account shall be allowed if the flex account is inconsistent with the provisions of any intensive groundwater use control area created pursuant to K.S.A. 82a-1036 through K.S.A. 82a-1040, and amendments thereto.

(e) If water was authorized to be diverted for less than the entire period used to determine the base average usage, the five-year allocation shall be determined by means of these calculations:

(1) Adding the total actual, legal annual water use of the base water right or rights for the entire period used to determine the base average usage;

(2) dividing the total quantity by the number of years, or parts thereof, that water was authorized to be diverted by the chief engineer;

(3) multiplying that quantity by the BAUF; and

(4) multiplying that quantity by five.

Water rights that authorized use of water for less than two calendar years during period used to determine the base average usage shall not be eligible for a flex account. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2004 Supp. 82a-736, as amended by L. 2005, Ch. 142, § 3. 82a-736; effective Oct. 11, 2002; amended Jan. 6, 2006.)

K.A.R. 5-16-6. Flex accounts and term permits. (a) The duration of the flex account and term permit shall be five consecutive calendar years.

(b) There shall be no extension of a flex account or a term permit beyond the period of five consecutive calendar years originally authorized.

(c) There shall be no carryover of unused quantities of water from one flex account or term permit to another flex account or term permit.

(d) Only one flex account shall be in force for a point of diversion or a water right at any time.

(e) A water flowmeter meeting the requirements of the chief engineer shall be installed on each point of diversion authorized by the term permit. If an existing water flowmeter had been required on or after September 22, 2000 or if there is no existing water flowmeter, the water flowmeter shall meet the requirements of the chief engineer in effect at the time the term permit is approved. If a water flowmeter was installed before September 22, 2000, the water flowmeter shall meet the requirements of K.A.R. 5-1-6(b).

(f) Only an entire water right, or a portion of a water right that has been formally divided, may be deposited in a flex account.

(g) All water diverted pursuant to a term permit and the base water rights associated with the term permit shall be counted against the quantity of water deposited in the flex account. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2001 Supp. 82a-736; effective Oct. 11, 2002.)

K.A.R. 5-16-7. Conditions under which a base water right may be exercised. Each term permit approved by the chief engineer according to this article shall include the condition that if the term permit can no longer be exercised because of an order issued by the chief engineer, including an intensive groundwater use control area order, a minimum desirable streamflow order, or an order to administer water rights to prevent impairment, then any base water right may be exercised to the extent that all of the following conditions are met:

(a) The base water right is in priority.

(b) The annual quantity of water authorized by the base water right has not been diverted during that calendar year.

(c) The five-year allocation authorized by the term permit has not been used.

(d) The use of water under the base water right does not impair water rights senior to the base water right. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2001 Supp. 82a-736; effective Oct. 11, 2002.)