

MEMO



DATE: December 13, 2016
TO: Kansas Water Authority
FROM: Tracy Streeter
RE: Securing Waters Leaving the State

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Attached is a revised scope of study prepared by David Pope, Lee Rolfs, John Peck and Burke Griggs to address the methods and legal issues relative to the concept of securing waters leaving the state of Kansas. The revised scope is in response to KWA discussion at our October meeting and suggestions to evaluate downstream impacts on the Missouri River and possible consequences of securing waters subject to the Interstate Compact and possible tribal water right impacts in Oklahoma.

Should the KWA choose to advance this study for funding consideration, we will need to consider including this as a funding recommendation in the KWA Annual Report to the Governor and Legislature.

Attachment

Report on Legal and Policy Issues regarding Large-Scale Transfers of Interstate Water Supplies for Beneficial Use within Kansas

**Revised Scope of Work Proposal to the Kansas Water Office
December 12, 2016**

David Pope, Pope Consulting LLC
Leland Rolfs, Rolfs Consulting
John C. Peck, University of Kansas School of Law/Foulston Siefkin LLP
Burke W. Griggs, Washburn University School of Law
(collectively, the “Consulting Group”)

Executive Summary.

The Kansas Water Office (“KWO”) has requested that the four of us (the “Consulting Group”) put together a scope of work describing how we can provide guidance to the KWO and the Kansas Water Authority (“KWA”) on the following topics.

1. 2016 S. Sub. for HB 2059, which sought to amend certain procedures for the appropriation of surface water that would otherwise leave the State of Kansas.
2. The effect of large-scale transfers of interstate water supplies on Kansas’s relations with the water rights and interests of Native American Tribes within the Missouri River Basin and also in Oklahoma.
3. The legal and policy implications of large-scale transfers of interstate water supplies as they relate to the pursuit of effective and optimal methods of securing Kansas’s ability to harvest Missouri River Basin flood flows.

This proposal briefly summarizes the research and analysis required to perform this work. Pursuant to the suggestions made for additional work at the KWA meetings since September, the revised estimate for the total cost of this work is \$189,500.

1. Memorandum 1: Analysis of 2016 S. Sub. for HB 2059.

Large-scale irrigation interests in western Kansas, most prominently Southwest Kansas Groundwater Management District No. 3 (“GMD3”) revived the idea of a large-scale transfer of Missouri River waters to west-central Kansas several years ago. During the 2015-16 legislative session, GMD3 championed S. Sub. for H.B. 2059, which, among other things, would have made it easier for an applicant for water rights related to such a transfer to obtain approval. The bill did not pass, but continued interest in the subject has encouraged the KWO and members of the KWA to articulate a position on the matter.

To that end, KWO has requested the Consulting Group to provide an analysis of the bill, together with recommendations for subsequent legislation, for review by KWO and the KWA. A memorandum on the bill would include the following:

- a. A detailed analysis of the bill in its final 2016 form.
- b. A summary and analysis of the larger legal, administrative, and regulatory issues raised by the bill, at both the state and federal law levels.
- c. Recommendations for how the KWO (and the KWA) might draft a bill of its own to address these issues.

2. Memorandum 2: Tribal Issues related to Large-Scale interstate water transfers.

Large-scale transfers of interstate water supplies affect other states' interests, but they also affect the water interests of the tribal nations within the Missouri River Basin and downstream in Oklahoma. Under federal law, Native American tribes are sovereigns entitled to large and senior water rights; but many tribes have yet to quantify, establish, and develop these rights. Therefore, any consideration of large-scale transfers of excess river flows must account for tribal water rights settlements and development. An analysis of these tribal issues would include the following:

- a. A summary of the state and federal laws regarding tribal claims to water supplies that may affect Kansas's ability to secure large-scale interstate water transfers.
- b. A more detailed summary of the water claims made by tribes within the Missouri River Basin.
- c. A more detailed summary of the water claims made by tribes within Oklahoma, including potential claims on the Arkansas, Cimarron, Grand-Neosho, Medicine Lodge, Salt Fork, Spring, and Verdigris River Basins.

The preparation of this second memorandum would likely require travel by one or more members of the Consulting Group to relevant capitals, tribal centers, and federal centers within Oklahoma, as well as the 10-state Missouri River Basin (MT, ND, MN, WY, SD, IA, NE, CO, KS, MO). (This does not include the Canadian Provinces of Alberta and Saskatchewan, which contribute waters to the Basin.) Because this is a matter for further discussion with the KWO, travel costs are **not** part of this estimate.

3. Memorandum 3: Guidance for the effective securing of Missouri River Basin flood flows.

The 2015 update of the U.S. Corps of Engineers' 1982 study to divert Missouri River flows to western Kansas contained reports by Pope and Rolfs summarizing the most prominent legal and financial challenges facing such diversion projects. A sound and thorough analysis of these legal and financial issues would require a substantial investment of work and time. But given the high costs (and potential political and legal risks) of such a project, it is important that

the State understand the legal issues it would raise. At a minimum, such an analysis would include the following:

- a. An analysis of the issues raised under Kansas law, most importantly the Kansas Water Appropriation Act, the Kansas Water Transfer Act, and the State Water Plan Storage Act, but with consideration of how other aspects of state law might impinge on these issues.
- b. An analysis of the issues raised under the respective state laws of the Missouri River Basin States, and, as necessary, those of the Mississippi River Basin as well.
- c. An analysis of the issues raised under federal law, most importantly that of interstate water allocation, federally-supported water infrastructure (such as the Reclamation Act, the Pick-Sloan Act, and the Water Resources Reform and Development Act), and federal environmental law.
- d. A guide for framing new state legislation to address large-scale interstate transfers of surplus water, such as a possible "Surplus Surface Water Security Act."
- e. A guide for framing new federal legislation, including a possible interstate compact for the equitable apportionment of the waters of the Missouri River Basin, including its flood flows.
- f. An analysis of the legal, policy, and political issues and challenges which Kansas would potentially face from states on the Mississippi River Basin downstream of St. Louis. Due to its increased scope and complexity, an analysis of Mississippi River Basin-related issues would substantially increase the time and expense required to complete this memorandum.

The preparation of this second memorandum would also likely require travel by one or more members of the Consulting Group to relevant capitals, tribal centers, and federal centers within the Mississippi River Basin downstream of St. Louis (MO, IL, KY, TN, AR, MS, LA). Because this is a matter for further discussion with the KWO, travel costs are **not** part of this estimate.

4. Cost estimate.

The Consulting Group has provided the KWO with a preliminary breakdown of the time commitments required to complete these tasks. Where possible, Peck and Griggs would employ law students at the University of Kansas and Washburn University, who could perform basic legal research at an inexpensive rate. The current time estimate for the work outlined above is approximately 850 hours of work: between 700 and 750 hours of work by the Consulting Group, and an estimated 800 hours for student research. The current cost estimate for this time and work is \$189,500. To emphasize, this estimate does **not** include the travel which is likely necessary to complete work on Memoranda 2 and 3.