

MEMO



DATE: October 17, 2016
TO: Kansas Water Authority
FROM: Tracy Streeter
RE: Securing Waters Leaving the State

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Attached is a 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. As you recall, the Kansas Water Authority raised concerns during the 2016 Legislative Session relative to Senate Substitute for HB 2059 which proposed amendments to the Kansas Water Appropriations Act process pertaining to water right applications proposing to transfer waters exiting the state. A February 10 KWA conference call on this topic resulted in a letter to members of the Legislature. In that letter, the KWA offered to conduct an open and transparent review of methods to secure surface waters that are leaving our state.

This topic is a discussion item for the August 19 KWA meeting. We will review the contents of the scope of work, corresponding budget and options for moving forward on this issue.

Attachment

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

Scope of Work Proposal to the Kansas Water Office October 15, 2016

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Leland Rolfs, Rolfs Consulting
John C. Peck, University of Kansas School of Law/Foulston Siefkin LLP
Burke W. Griggs
(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 information and 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 in Oklahoma.
3. 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, and estimates the total cost for that work at \$114,500.

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

Several years ago, 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. 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. Tribal Issues related to Large-Scale interstate water transfers.

Large-scale transfers of interstate water supplies may affect other states' interests, as well as 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 what are often 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 flood flows must account for both the legal and the operational status of tribal water rights 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 Medicine Lodge, Arkansas, Neosho, and Spring Rivers.

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 which such diversions 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 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.

- c. A guide for framing new state legislation to address large-scale interstate transfers of flood water, such as a possible “Flood Water Security Act.”
- d. A guide for framing new federal legislation, including a possible interstate compact for the equitable apportionment of flood flows in the Missouri River Basin.

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 400 and 450 hours of work by the Consulting Group, and an estimated 400 hours for student research. The current cost estimate for this time and work is \$114,500.