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January 6, 2023

ATTORNEY GENERAL OPINION NO. 2023- 1

Stephanie A. Kramer, Chief Counsel
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502

Re: Waters and Watercourses—Appropriation of Water for Beneficial Use—
Multi-Year Flex Accounts; Definitions, Establishment, Conditions; Term
Permits; Fees

Waters and Watercourses—Appropriation of Water for Beneficial Use—
Kansas Water Banking Act

Synopsis: Holders of groundwater rights may establish either a multi-year flex account
or place their water in a safe deposit account in a water bank, but not both.
Cited herein: K.S.A. 82a-736; 82a-761; 82a-762; 82a-763.

* * *

Dear Ms. Kramer:

As Chief Counsel at the Kansas Department of Agriculture, you ask whether holders of groundwater rights may establish a multi-year flex account pursuant to K.S.A. 82a-736 and also place the same water right into a safe deposit account pursuant to the Kansas Water Banking Act, K.S.A. 82a-761, *et seq.* Assuming this is not possible, you also want to know whether water rights placed in a safe deposit account in prior years may be subsequently placed into a multi-year flex account and whether the “enrollment” of a right in a safe deposit account is sufficient to preclude the holder of the water right from establishing a multi-year flex account.

We conclude that those who have placed a water right in a safe deposit account may not place the same water right in a multi-year flex account, including users who placed that right in a safe deposit account in prior years. We further conclude that enrollment of a water right is the equivalent of placing a water right in a safe deposit account.

We must consider various statutes to answer your questions. The review of statutory provisions begins with the text selected by the Legislature, giving words their ordinary, everyday meanings. Only when the statute's language is ambiguous is it appropriate to use tools of statutory interpretation.¹

Multi-Year Flex Accounts

In 2001, the Kansas Legislature first established multi-year flex accounts to provide versatility to holders of groundwater rights in how much water they can use over a certain timeframe to account for greater or lesser demand.² Currently, holders of groundwater rights may generally place up to five years of their approved groundwater withdrawals into a multi-year flex account.³ The Chief Engineer of the Division of Water Resources issues term permits to these holders, authorizing them to use up to the total amount of the water in the account at any time over the course of the years stated in the permit.⁴ In effect, multi-year flex accounts allow holders of groundwater rights to either borrow against future use by exceeding their annual authorized quantity or store water for future use during the term of the permit by using less than the annual authorized quantity.⁵

Kansas Water Banking Act

At the same time the Legislature established multi-year flex accounts, it also authorized the chartering of "water banks," which are private not-for-profit corporations that can facilitate the banking of surface water or groundwater, or both.⁶ Water banks can offer two services: (1) they may provide a "safe deposit account" in which holders of water rights place their water for use in future years, and (2) they may "lease" to another person or entity for a period of time water rights that have been "deposited" in the bank.⁷ To date, only one water bank has been chartered in this state: the Central Kansas Water Bank Association (CKWBA).⁸ CKWBA, which is located in Stafford, has the same geographic boundaries as Big Bend Groundwater Management District No. 5 (GMD5).

The key statutory language that limits the use of multi-year flex accounts and water bank accounts provides, "Any holder of a base water right that has not been deposited or

¹ *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022).

² L. 2001, ch. 160, § 16.

³ K.S.A. 2022 Supp. 82a-736(c)(1)(D).

⁴ K.S.A. 2022 Supp. 82a-736(d), (e)(2). The term permit suspends the underlying water right over the course of the permit's term. K.S.A. 2022 Supp. 82a-736(b)(3). As you state in your letter, we assume for the purpose of answering your questions that all water rights are otherwise eligible to participate in a multi-year flex account or water bank and that the Chief Engineer could lawfully issue any term permit.

⁵ To discourage water users from unnecessarily pumping any remaining water at the end of the permit's term, the Legislature later added a provision allowing water users to carry forward one year's worth of water into a subsequent multi-year flex account if a new account is established in the calendar year immediately succeeding the year that the prior account expires. L. 2005, ch. 60, § 3; K.S.A. 2022 Supp. 82a-736(c)(1)(F).

⁶ L. 2001, ch. 160, §§ 1-13; K.S.A. 2022 Supp. 82a-762(l).

⁷ K.S.A. 2022 Supp. 82a-762(f), (j), (l).

⁸ <https://ckwba.org/>.

placed in a safe deposit account in a chartered water bank may establish a multi-year flex account . . .”⁹

You believe the language clearly precludes those who have “deposited” (*i.e.*, placed into an account for lease by another person or entity) water rights in a water bank from also establishing a multi-year flex account.¹⁰ We agree. Nonetheless, you believe that the language is less clear when it comes to water rights “placed in a safe deposit account.” More specifically, you point to slightly different language in the Water Banking Act and K.S.A. 82a-736 describing the placement of a water right into a safe deposit account. The Water Banking Act twice references water “from” a water right, while K.S.A. 82a-736(c)(1) speaks only of the entire water right.¹¹ We do not believe these slight variations render K.S.A. 82a-736(c)(1) ambiguous about who may utilize a multi-year flex account.¹² Therefore, those who have placed a water right in a safe deposit account may not establish a multi-year flex account.¹³

We note that GMD5 has expressed concern with this interpretation, believing that accounting procedures can concurrently track usage of a water right placed in both a safe deposit account and a multi-year flex account, meaning the net consumptive use of water in a hydrologic unit would not increase. While this may be possible, the words used by the Legislature are of paramount concern, and they may not be ignored even when a purpose of the statute can be fulfilled irrespective of the text.¹⁴ Rather, we think the legislative purpose of preventing net consumptive use underscores the plain language of K.S.A. 82a-736(c)(1), requiring water users to choose between placing their water right in either a multi-year flex account or safe deposit account.

In addition, you want to know whether the limitation in K.S.A. 82a-763(c)(1) applies to a water right that has been previously placed into a safe deposit account or if it applies only during the year in which the multi-year flex account is established. The statute uses the phrase, “has not been,” which is in the present perfect tense. “This means that the action has been completed at or before the present.”¹⁵ In this instance, the Legislature’s use of the present perfect tense means that if a water right has been previously placed into a

⁹ K.S.A. 2022 Supp. 82a-736(c)(1).

¹⁰ See K.S.A. 2022 Supp. 82a-762(f) (defining the verb use of “deposit” as the “deposit of a water right, or portion of a water right, in a water bank for the purpose of having the bank lease water from such water right, or portion of a water right, to another person or entity”).

¹¹ K.S.A. 2022 Supp. 82a-763(c) (“unused water from the water right”); K.S.A. 2022 Supp. 82a-764 (“water from a water right”).

¹² See *In re Tax Appeal of BHCMC*, 307 Kan. 154, 166, 408 P.3d 103 (2017) (explaining that a “statute [is] ambiguous if [it] contains ‘provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language, and leaves us generally uncertain which one of the two or more meanings is the proper meaning’”).

¹³ Given our answer to this question, we also do not believe a water user could exhaust the water in a safe deposit account and then register for a multi-year flex account in the same year.

¹⁴ See *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 367, 361 P.3d 504 (2015).

¹⁵ *State v. Hurtado*, No. 113,627, 2016 WL 4161365, at *4 (Kan. App. 2016) (unpublished opinion); see *In re D.H.*, 57 Kan. App. 2d 421, 429, 453 P.3d 870 (2019) (explaining that the use of the present perfect tense in child in need of care cases indicates the Legislature wanted the court to consider circumstances that occurred in the past up until the present time).

safe deposit account at any point in time, then it may not be placed in a multi-year flex account. While this may seem like a strict interpretation of the statute, it accords with the Legislature's precise designations of other timeframes found throughout the same statute.¹⁶ Of course, if the Legislature did not intend for such a result, it alone can remedy the issue.¹⁷

Finally, you want to know if "mere enrollment" of a water right in a safe deposit account qualifies as "placed in" a safe deposit account, meaning that a water right currently enrolled with a water bank would have to be withdrawn before it could be eligible for a multi-year flex account. The Water Banking Act does not reference an "enrolled" water right, and the regulations implementing the Act speak of only water rights enrolled in the water right conservation program and the conservation reserve program.¹⁸ Considering that the plain meaning of "enroll" in this instance is "to put in a record"¹⁹ or "to register . . . into an official record,"²⁰ we believe enrolled water rights are "placed in" a safe deposit account for the purposes of K.S.A. 82a-763(c)(1).

CONCLUSION

Holders of a water right who have placed a water right in a safe deposit account may not place the same water right in a multi-year flex account. This limitation includes water rights that were placed in safe deposit accounts in prior years as well as water enrolled in a safe deposit account.

Sincerely,

Derek Schmidt
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¹⁶ See, e.g., K.S.A. 82a-736(b)(4), (b)(6), (c)(1)(E), (f), (j).

¹⁷ See *State v. Fitzgerald*, 308 Kan. 659, 672-73, 423 P.3d 497 (2018) (Stegall, J., dissenting) ("Put plainly, this institution does not rewrite statutes. Our task is to interpret the plain meaning of the words chosen by the Legislature. If it intended something other than these words, it is the Legislature's job to fix the mistake.").

¹⁸ K.A.R. 5-17-1(b)(2).

¹⁹ Webster's Universal College Dictionary 267 (1997).

²⁰ Black's Law Dictionary 610 (9th Ed. 2009).