

NORTHWEST KANSAS GROUNDWATER MANAGEMENT DISTRICT NO. 4

STATEMENT OF ISSUE - TESTIMONY

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ISSUE: Sunsetting WRCP

DWR is proposing to amend KAR 5-7-4 to sunset WRCP – thus eliminating one of Kansas' water conservation efforts.

BACKGROUND:

WRCP was conceived and implemented in 1992 to accomplish: 1) providing private, active water right owners in areas that are over-appropriated or formally closed by local regulation a program to set aside (conserve) water use for a specified time; and 2) providing non-private water right owners a place to park water rights they may obtain for future anticipated uses – all the while providing a recognized “due and sufficient cause for non-use” so that the water did not need to be used periodically to maintain the right. Regulations were enacted in 1992 (KAR 5-7-4) which covered all these issues.

CONCERNS & COMMENTS:

1. There are 39 water rights in WRCP currently within GMD 4 that total 4,644 AF of authorized water rights. These 39 water rights have reported using an annual average of 1,086 AF per year every year between 1990 and the year prior to their enrollment in WRCP which we believe is NOT being used every year they remain in WRCP. Cumulatively, 14,749 AF of reported water use had been used by these 39 water rights prior to enrollment in WRCP.
2. There are 31 water rights within GMD 4 that had been in WRCP but no longer are. Of these rights: 15 are back in use based on WRIS, post-WRCP water use data; 8 have exited WRCP 5 or more years ago and have had no post-WRCP use reported in WRIS; 7 have exited WRCP less than 5 years ago and have had no post-WRCP use reported in WRIS; and 1 has been dismissed. From these data 50% of the water rights exiting WRCP in GMD 4 have been placed back into use. This percentage could go as high as 75% depending on how many of the 7 exited rights (less than 5 years removed) are placed back into use. Only abandonment will insure that no future use occurs from the 8 rights which have exited WRCP more than 5 years ago. It appears to us that retaining these 8 water rights on the books but outside of WRCP is a larger problem that should also be addressed. Of course, the expensive and time consuming effort of dismissing water rights for non-use will only increase significantly with the elimination of WRCP.
3. Based on the estimated \$133.00 average unit cost of a WRCP contract quoted by KDA/DWR (Fact Sheet – Phasing Out the Water Rights Conservation Program, September 2009), it has cost the state of Kansas \$5,187.00 to enroll the 39 GMD 4 contracts. These contracts have cumulatively pumped 11,047 AF of water between WRCP start date of 1992 and 2007 – a 15 year span. If these 39 contracts average 15 years in WRCP the cost of this reduced water use will have been approximately \$.47 (47 cents) per AF. Even if 50% of these contracts will never pump again, the cost will have been less than a dollar

per AF. There is no better value to water saved than WRCP – regardless of the true quantity of water saved.

4. GMD 4 has discussed various options of reducing consumptive water use within its established High Priority Areas (HPAs). Among the ideas discussed has been that of acquiring water rights by the district, conserving these while alternative, higher income uses can be identified, then changing a reduced amount of the controlled water rights to identified higher economic uses – thus fully conserving the water during the identification phase and reducing consumptive use in trade for the higher economic returns of the alternative water uses in the implementation phase. Such an approach reduces CU AND increases economic returns on the lesser water used. WRCP is critical to this possible approach.

Moreover, GMD 4 offers incentive funding for GMD 4 water right owners to enter into WRCP through the Northwest Kansas Groundwater Conservation Foundation.

5. The KDA/DWR Fact Sheet stated that the existing Due and Sufficient causes for non-use stated in KAR 5-7-1 are available and sufficient in lieu of WRCP. The fact that these reasons are: firstly, discretionary by the chief engineer; secondly, of much shorter duration than WRCP; and finally that most of them do not even apply to WRCP situations, makes all of them a significantly inferior alternative to the water right owners than the guaranteed, secure nature of a WRCP contract with the chief engineer.

Following are the 10 due and sufficient reasons for non-use (numbered 1 - 10) and why each reason either is less adequate than WRCP or does not apply to a WRCP situation:

(1) Adequate moisture is provided by natural precipitation for production of crops normally requiring full or partial irrigation within the region of the state in which the place of use is located.

This reason requires the water right owner to plant and fertilize a crop requiring full or partial irrigation for the upcoming year. Only if that year is wet enough such that irrigation is NOT required is this a valid reason. This means that every normal year and dry year this crop will need to be irrigated. The WRCP contract allows the producer to plant dry land crops and not irrigate at all for all years – a definite water conservation measure. Simply reporting that moisture was adequate for a dry land crop planted is NOT a due and sufficient reason for non-use – even for a crop that is normally irrigated, but planted and fertilized at a dryland rate for a non-irrigated yield.

(2) A right has been established or is in the process of being perfected for use of water from one or more preferred sources in which a supply is available currently but is likely to be depleted during periods of drought.

In closed areas where WRCP applies no other rights can be established to utilize this reason.

(3) Water is not available from the source of water supply for the authorized use at times needed.

No one knows what the chief engineer will do if a water right owner reports for 5 consecutive years that his or her supply is not available during irrigation season for

his or her authorized use – irrigating a corn crop. WRCP settles the issue up front, guaranteed. In fact, it is the WRCP program that frames this reason appropriately and allows water right owners a plausible alternative.

(4) Water use is temporarily discontinued by the owner for a definite period of time to permit soil, moisture, and water conservation, as documented by any of the following:

(A) Furnishing to the chief engineer a copy of a contract showing that land that has been lawfully irrigated with a water right that has not been abandoned is enrolled in a multiyear federal or state conservation program that has been approved by the chief engineer;

(B) enrolling the water right in the water right conservation program in accordance with K.A.R. 5-7-4; or

(C) any other method acceptable to the chief engineer that can be adequately documented by the owner before the nonuse takes place.

This of course is the reason created for WRCP.

(5) Management and conservation practices are being applied that require the use of less water than authorized. If a conservation plan has been required by the chief engineer, the management and conservation practices used shall be consistent with the conservation plan approved by the chief engineer to qualify under this subsection.

No one knows what the chief engineer will do if a water right owner reports for 5 consecutive years that conservation is being applied that requires NO water use. In the past, DWR has argued that this reason is very short lived and falls under the 5 years provided by law in which no reasons for non-use are required. If this remains the case, then a WRCP contract settles this issue definitively, up front – guaranteed – and is a far better product for the producer. If this is not the current interpretation, then the producers inability to know what the interpretation is, still makes the WRCP contract a far better product.

(6) The chief engineer has previously approved the placement of the point of diversion in a standby status in accordance with K.A.R. 5-1-2.

This reason does not apply to normal water users and their water use. It requires that two wells are present and maintained by the water right owner. If this is the case, the standby well does not have to pump but retains it's water right which is limited to the primary well.

(7) Physical problems exist with the point of diversion, distribution system, place of use, or the operator. This circumstance shall constitute due and sufficient cause only for a period of time reasonable to correct the problem.

This is another of the short-lived reasons that are covered in the 5 years provided by law. It is also at the discretion of the chief engineer so the water right owners have

no assurance until after the fact that their reason will be declared valid. The WRCP contract is a superior product.

(8) Conditions exist beyond the control of the owner that prevent access to the authorized place of use or point of diversion, as long as the owner is taking reasonable affirmative action to gain access.

This reason covers extraordinary circumstances that normally do not apply to regular water rights. The extraordinary conditions are also out of the control of the water right owner so this is NOT a reason that can be purposely used or planned to be used by any water right owner in the absence of WRCP.

(9) An alternate source of water supply was not needed and was not used because the primary source of supply was adequate to supply the needs of the water right owner. The owner shall maintain the diversion works on the alternate source of supply in a condition that will allow the owner to effectively use the alternate source of supply in a timely manner.

This reason also covers a specific case that is far from the ordinary situation. To use it, a water right owner would have to secure an alternative supply of water for his or her beneficial use, which is not possible in a closed area where WRCP is available. If the owner already has an alternate source of supply, it needs to be maintained for use in a timely manner – where “timely” is currently interpreted by the agency as a very short time – a matter of days. A WRCP contract would allow the pump to be pulled and stored properly for the duration of the contract.

(10) The chief engineer determines that a manifest injustice would result if the water right were deemed abandoned under the circumstances of the case.

This reason is at the discretion of the chief engineer and no water right owner could plan for such a reason for non-use. The surety of the WRCP contract is a far better choice.

In summary, most of these specific reasons either do not apply to WRCP, cannot be alternatively used by producers wishing to conserve water use over longer periods of time than 5 years, or are too risky for producers as they are determined solely by the chief engineer after the fact.

6. While the true quantity of conserved water can never be precisely known (and is certainly less than the face values of the water rights enrolled) the fact that the cost per AF of even the most conservative estimates is exceedingly low, we feel the elimination of this program sends a message to the public that water conservation is worth very little.

Such a state action could also change the decision dynamic of those not currently choosing to use their right (enrolled in WRCP) to start pumping again to maintain their property value.

7. Any fiscal savings to the agency with the elimination of WRCP will be offset several times over by the agency's costs of administering exiting water rights in 5 years to insure they do not re-assume pumping water they have no right to. This process involves the required 3-year no-use notice, the conduct of verified reports on all non-used water rights, the subsequent hearing process to consider abandonment, the final order of abandonment and any appeals that come from this process. If the agency cannot or chooses not to administer these rights in 5 years, an even larger problem is created by

these seemingly valid water rights being held on the books when they are either re-activated for irrigation, or are sold or transferred to others. In the selling or transfer of water rights (both valid and invalid) the calls to DWR to determine water right status will have to be handled as well at an administrative cost.

RECOMMENDATIONS:

- 1) Withdraw the amendments to KAR 5-7-4 that sunsets the WRCP program and commit to solving the funding issues. Funding solutions could include:
 - a) Amend KSA 82a-708 to provide for an application filing fee for all WRCP applications sufficient to maintain the program;
 - b) Seek Legislative support for increased 2010 agency budget to fund the program;
 - c) Assist GMD's in developing a suitable local regulation to assume as much of the administrative and tracking responsibilities as possible – significantly lowering DWR costs;

Alternatively;

- 2) Amend KAR 5-7-4 such that WRCP is temporarily suspended while the budget crisis exists, while also amending KAR 5-7-1 such that a due and sufficient cause for non use includes enrollment in a temporarily suspended WRCP program.

Alternatively;

- 3) Amend KAR 5-7-1 (4) (A) to allow for locally developed conservation programs.



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