

**Testimony Supporting House Bill 2172
to the House Committee on Water
by Kenneth Titus, Chief Counsel
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Good morning Chairman Highland and members of the committee, I am Kenneth Titus and I serve as Chief Counsel at the Kansas Department of Agriculture. Thank you for the opportunity to present testimony in support of House Bill 2172.

The multi-year flex account or “MYFA” established by K.S.A. 82a-736 allows a water user to operate their water right over a five-year period with an allocation based on past average use or the net irrigation requirement (NIR). The NIR for each county is a number calculated by the USDA that is roughly the average amount of water needed under average climatic conditions to grow corn and is adopted by regulation at K.A.R. 5-5-12. MYFAs allow a water user to overpump in a season without a penalty, so long as they stay within the total five-year allocation. They also allow a water user to roll forward any unused annual quantity into a subsequent MYFA, which reduces the pressure to use more water than is necessary in any given year because the water right owner will realize the benefit in the future.

There are numerous benefits that have been realized since MYFAs were first authorized, including use as a five-year planning tool and as a drought mitigation tool. At present, there are approximately 500 water rights enrolled in a MYFA. While this is a relatively small percentage of active water rights, in many circumstances, MYFAs serve an important role in providing flexibility and helping water rights maintain compliance.

Although a MYFA may be established with an allocation based on past use or NIR, a water right must have reported beneficial water use between 2000–2009 to be eligible, regardless of the allocation basis. When the MYFA statute was modified in the 2012 legislative session, this past period was selected as the basis for calculating average usage because it prevents users from running up their average use just prior to applying for a MYFA; however, over time, requiring use between 2000–2009 has limited participation by water rights that were not perfected prior to this period. There are approximately 1,600 water rights not eligible to participate in a MYFA because they have no historical water usage from 2000–2009. As the number of certified water rights continues to increase, we believe that it is appropriate to amend the MYFA statute and allow an additional calculation method for these files. Often, water right owners will own multiple water rights and will not realize their newer water rights are ineligible to participate in a MYFA, causing an unintentional compliance problem due to overpumping. For those water rights with no historical use during 2000–2009, our proposed amendment will create an

alternative base average usage based on the applicable NIR as a substitute for past use from 2000–2009.

The current statute also prohibits any water right from participating in a MYFA if that water right has ever been subject to a change application which expanded acreage due to an improved efficiency irrigation system pursuant to K.A.R. 5-5-11, even if the water right has since reverted back to its original acreage. If a water user is willing to revert back to their original acreage, they should be allowed to enter a MYFA, and thus we have proposed several amendments that allow this, without allowing for the additional acres previously irrigated to be considered when making MYFA calculations.

Finally, we have proposed that several obsolete sections of the statute be cleaned up. The references to drought permits issued in 2011 and 2012, which were predecessors to the MYFA, are no longer available to water users and need to be referenced.

After discussion with stakeholders about this bill, we would ask the committee to adopt the following amendments, which would strike the reference to the public interest and serve to clarify the intent of the bill in defining how the chief engineer might evaluate MYFA applications.

On page 2, the definition of base average usage in section (b)(4)(B) should be amended as follows:

(b)(4)(B) if water use records are inadequate to accurately determine actual water use or upon demonstration of good cause by the applicant, the chief engineer may calculate the base average usage with less than all 10 calendar years during 2000 and 2009 ~~if it is determined that approval of such a multi-year flex account would be in the public interest.~~ In no case shall the base average usage be calculated with less than five calendar years during 2000 and 2009; or

On page 3, the terms regarding the length of a MYFA in section (c)(1) should be amended as follows:

(c) (1) Any holder of a base water right that has not been deposited or placed in a safe deposit account in a chartered water bank may establish a multi-year flex account where the holder may deposit, in advance, the authorized quantity of water from such water right for any five consecutive calendar years, ~~except when the chief engineer determines a shorter period is necessary for compliance with a local enhanced management area or intensive use groundwater area and the corrective controls in the area do not prohibit the use of multi-year flex accounts in~~ ~~the public interest,~~ and subject to all of the following:

We believe it will be beneficial to expand this voluntary program to newer water rights and believe our proposed amendments will make this statute easier to understand, for both staff and the impacted water users, and ask for your support of this amendment.

Thank you for this opportunity and I will stand for questions.