

File No. 50939	13. County: CY - CLAY Basin: Big Blue River Stream: Deadman Creek Trib 2		
Structures File No:	Aquifer Code:	Special Use Area:	

14. Points of Diversion, Rates & Quantities										Qty AF		Rate gpm		Storage Qty AF		Storage Rate	
PDIV	Qualifier	S	T	R	ID	'N	'W	Comment (AKA Line)	Auth	Add	Auth	Add	Auth	Add	Auth/Add	Overlaps	
CHK	89974	NW NE SE	21	6	4E	4	2606	942	110	110	1200	1200	110	110	NF	+	
																+	
																#	
																^	
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																++	

15. Limitations	Type:	Quantity:	Rate:	combined with file no(s):
	Type:	Quantity:	Rate:	combined with file no(s):

16. Metering Metering Required Anti-Reverse Required Seal Required Compliance Date: 12/31/2026

17. Place of Use						NE¼				NW¼				SW¼				SE¼				Total	Owner(s)	Chg?	Overlaps		
PDIV	S	T	R	ID		NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE						
CHK	71171	21	6	4E	2			40	39									40	40	39	39	237	5b	<input type="checkbox"/>	+		
																									<input type="checkbox"/>	+	
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18. Point of Diversion and Place of Use Overlaps * 50940 + # ^	** ++ ## ^^
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MEMORANDUM TO FILE

Division of Water Resources, Water Appropriation Program

Date: August 2, 2024

From: Colin Barclay, Environmental Scientist

Re: New Application File No. 50,939 – Durwin Mall

Summary

Durwin Mall has filed the above referenced application to appropriate 110 acre-feet of surface water directly out of a tributary of Deadman Creek for storage and re-diversion in a 4.1-acre reservoir. The rate of diversion is at a rate of natural flows and a re-diversion rate of 1,200 gallons per minute to irrigate 237 acres of ground in Clay County, Kansas. File No. 50,939 is paired with File No. 50,940 which is a proposed pump site out of Deadman Creek. The place of use is owned by the applicant, and they have signed the application form affirming legal access to the point of diversion. File Nos. 50,939 and 50,940 will have a complete place of use overlap. Structures has determined that the dam that is to be constructed for file no. 50,939 is considered a class "A" low hazard dam and meets the exemption as per K.S.A. 82a-301(d)(1).

Reasonable Quantity and Safe Yield

Maximum reasonable quantity for storage was determined to be 110.35 acre-feet. As per K.A.R. 5-6-5 maximum reasonable annual quantity for storage of water for beneficial use in a reservoir. The maximum reasonable annual quantity in a reservoir shall be limited to the lesser of the following.

As per K.A.R. 5-6-4, a runoff calculation was prepared and found that 110.35 acre-feet of runoff could be expected on a 20% chance of occurrence from the following variables.

- 152-acre drainage area.
- Mean annual precipitation of 30 inches per year.
- Soil covers complex number of 77.

As per K.A.R. 5-6-5(b)(1)(A) and (B) Three years of direct and indirect use was calculated to be 870.624 acre-feet of water.

- 237 acres of ground x 1.2 acre-feet per acre per year in Clay County = 284.4 acre-feet of direct use
- 17 inches of net evaporation /12 inches per foot = 1.416 feet of net evaporation x 4.1 surface acres = 5.808 acre-feet of indirect use
- 285.4 acre-feet of direct use + 5.808 acre-feet of indirect use = 290.208 acre-feet per year
- 290.208 acre-feet per year x 3 years = 870.624 acre-feet.

As per K.A.R. 5-6-5(2)(A) 1 year of direct, indirect, and reservoir capacity was calculated to be 324.408 acre-feet of water.

- 237 acres of ground x 1.2 acre-feet per acre per year in Clay County = 284.4 acre-feet of direct use
- 17 inches of net evaporation /12 inches per foot = 1.416 feet of net evaporation x 4.1 surface acres = 5.808 acre-feet of indirect use
- Reservoir capacity is 34.2 acre-feet

- 284.4 acre-feet of direct use + 5.808 acre-feet of indirect use + 34.2 acre-feet of reservoir capacity = 324.408 acre-feet.

The place of use is identified as 237 acres. The requested quantity of 110 acre-feet only provides for .464 acre-feet per acre. However, the requested quantity is the maximum that can be requested because of the limitations of the drainage area so it should be considered reasonable. The applicant will need to manage the limited water that is available on the 237-acre place of use during the times of the year they are unable to directly divert the waters of Deadman Creek through File No. 50,940.

Nearby Water Rights

Six (6) nearby neighbors were found to be within one-half ($\frac{1}{2}$) mile upstream and downstream of the applicant's property boundary. Nearby notification letters were sent out on March 21 and April 8, 2024. One written complaint was received from Rick and Geraldine Lippert dated, May 20, 2024, as well as a documented correspondence with the Lippert's taken by Brett Bunger, Water Commissioner of the Topeka Field Office dated April 22, 2024. The Lippert's own the property on the Northeast side of the confluence of Deadman Creek and West Fancy Creek.

The Lippert's have shown strong opposition to the approval of this application. The Lippert's winters approximately 80 cattle on their property from the period of November 1 to May 1 each year. They have expressed concerns that there will not be enough water to continue their cattle operation. However, the applicant has indicated that they would typically only be filling the reservoir during high flow events which typically occur during the irrigation season. Based on data from a recent publication "Average Precipitation Distribution: A Kansas Climate Primer", it is reasonable to assume that a higher stream flow is likely to occur in Deadman Creek during the summer months based on recent climate data that suggests the region experiences higher amounts of precipitation during the summer months than it does during the winter months (Sittel, 2024).

The USGS report "Estimates of Flow Duration, Mean Flow, and Peak-Discharge Frequency Values for Kansas Stream Locations" documents some conditions of Deadman Creek at the confluence of West Fancy Creek, which is where the Lippert's property is located. With a contributing drainage area of 21.6 square miles, the USGS estimates a mean flow of 7.38 cubic feet per second (3,312 gallons per minute) within Deadman Creek before it empties into West Fancy Creek (USGS, 2004). Mean flow only characterizes the average streamflow through a stream when considering high and low flow events throughout a typical year. Based on this USGS mean flow characteristic, if the applicant uses his full 1,200 gallons per minute rate which is 36.23% of available flows, that should still leave 2,112 gallons per minute (4.71 cubic feet per second) or 63.77% of available flows that will continue downstream to the downstream landowner.

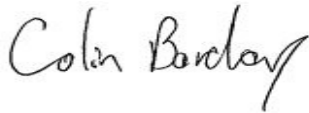
As per K.A.R. 5-3-22, maximum reasonable quantity of water for livestock and poultry. Reasonable quantity for cattle is defined as 15 gallons per head per day which equates to 1,200 gallons per day for the 80 heads of cattle. This will equate to .015% of the USGS baseflow number or .039% of the flow available if the applicant is simultaneously pumping from the stream. When taking into consideration the USGS data indicating that 63.77% of flows will be available to the downstream landowners and that the irrigation season typically occurs during the months of April through October which is when higher flow events occur. Impairment of downstream landowners appears unlikely. In addition, the conditions of the permit will specify that the applicant must maintain enough water to satisfy senior downstream water users further ensuring impairment does not occur.

In addition, one phone conversation dated August 2, 2024, was documented from Matt Sump who appears to be the tenant farmer for Rick and Geraldine Lippert. He had similar concerns as the Lippert's. Mr. Sump expressed concerns that Deadman Creek cannot support two pumpsites as it barely supports the existing pumpsite under File No. 50,234. He also expressed concerns that the streamflow in this area (Deadman Creek and Fancy Creek) has diminished over the years and is concerned about his needs in the future if streamflow continues to diminish.

Recommendations

The above referenced application was sent to Nathan Westrup, Water Commissioner of the Topeka Field Office and recommended for approval in an e-mail dated July 25, 2024.

The application complies with all regulations concerning reasonable quantity, safe yield, and minimum spacing requirements. Approval of the application will most likely not impair senior water rights nor prejudicially or unreasonably affect the public interest. Therefore, it is recommended that the referenced application be approved.



Colin Barclay
Environmental Scientist
Water Appropriation Program

RE: 50939 & 50940 review and recommendation

Westrup, Nathan [KDA] <Nathan.Westrup@ks.gov>

Thu 7/25/2024 1:11 PM

To: Barclay, Colin [KDA] <Colin.Barclay@ks.gov>; Johnson, Shaun [KDA] <Shaun.Johnson@ks.gov>

That would be fine, although I wouldn't necessarily describe it as baseflow. I don't think there is much in the way of groundwater contribution to streamflow in the area. Deadman Creek is very much driven by precipitation and runoff.

Once the response letter is sent, I have no objection to approval.

Thanks!

Nathan Westrup, Water Commissioner

Topeka Field Office

Division of Water Resources

Kansas Department of Agriculture

Phone: 785-296-7064

Mobile: 785-230-2991

Nathan.Westrup@ks.gov

From: Barclay, Colin [KDA] <Colin.Barclay@ks.gov>

Sent: Thursday, July 25, 2024 11:52 AM

To: Westrup, Nathan [KDA] <Nathan.Westrup@ks.gov>; Johnson, Shaun [KDA] <Shaun.Johnson@ks.gov>

Subject: Re: 50939 & 50940 review and recommendation

Nathan,

I can add something to the memo that mentions the higher precipitation during the summer months.

I think we could say, "that it is reasonable to assume that a higher baseflow is likely to occur in Deadman Creek during the summer months based on recent climate data that suggests the region experiences higher amounts of precipitation during the summer months than it does during the winter months (Sittel, 2024)."

I think Ken and Kristen are still working on the response letter.

Colin Barclay

Environmental Scientist

Division of Water Resources

Kansas Department of Agriculture

Phone: (785) 564-6628

Colin.Barclay@ks.gov

From: Westrup, Nathan [KDA] <Nathan.Westrup@ks.gov>
Sent: Thursday, July 25, 2024 9:48 AM
To: Barclay, Colin [KDA] <Colin.Barclay@ks.gov>; Johnson, Shaun [KDA] <Shaun.Johnson@ks.gov>
Subject: RE: 50939 & 50940 review and recommendation

Colin,

Nice job. If it isn't too much trouble, I think it might be worth putting a little more analysis into the availability of water during irrigation season.

How about something along these lines:

Mean annual volume = 5,343 AF (based on mean of 7.38 cfs)

Irrigation season (June – Sept) volume = 2,671 AF (based on ave monthly precip [Agronomy eUpdate May 30th, 2024 : Issue 1006 \(ksu.edu\)](#))

If you correlate seasonal precipitation to flow, you could say that the mean flow during irrigation season might be more like 11.2 cfs.

What do you think?

Has the response letter been drafted?

Nathan Westrup, Water Commissioner

Topeka Field Office

Division of Water Resources

Kansas Department of Agriculture

Phone: 785-296-7064

Mobile: 785-230-2991

Nathan.Westrup@ks.gov

From: Barclay, Colin [KDA] <Colin.Barclay@ks.gov>
Sent: Tuesday, July 23, 2024 4:11 PM
To: Westrup, Nathan [KDA] <Nathan.Westrup@ks.gov>; Johnson, Shaun [KDA] <Shaun.Johnson@ks.gov>
Subject: 50939 & 50940 review and recommendation

Nathan and Shaun,

I have attached my draft memos for applications 50,939 and 50,940 for your review and recommendation. This is Durwin Malls applications. We have received some concerns from a nearby neighbor that I have documented in the memos. I included some additional information from the USGS report "Estimates of Flow Duration, Mean Flow, and Peak-Discharge Frequency Values for Kansas Stream Locations" in the nearby neighbor section of both applications.

Please let me know if you need anything else.

Colin Barclay

Environmental Scientist

Division of Water Resources

Kansas Department of Agriculture

Phone: (785) 564-6628

Colin.Barclay@ks.gov

THE STATE OF KANSAS

KANSAS DEPARTMENT OF AGRICULTURE
Mike Beam, Secretary of Agriculture

DIVISION OF WATER RESOURCES
Earl D. Lewis Jr., Chief Engineer

APPROVAL OF APPLICATION and PERMIT TO PROCEED

(This Is Not a Certificate of Appropriation)

This is to certify that I have examined Application, **File No. 50,939** of the applicant

**DURWIN F MALL
825 HIDDEN VALLEY DR
CLAY CENTER, KS 67432**

for a permit to appropriate water for beneficial use, together with the maps, plans and other submitted data, and that the application is hereby approved and the applicant is hereby authorized, subject to vested rights and prior appropriations, to proceed with the construction of the proposed diversion works (except those dams and stream obstructions regulated by K.S.A. 82a-301 through 305a, as amended), and to proceed with all steps necessary for the application of the water to the approved and proposed beneficial use and otherwise perfect the proposed appropriation subject to the following terms, conditions and limitations:

1. That the priority date assigned to such application is **January 10, 2023**.
2. That the water sought to be appropriated shall be used for irrigation use on land described in the application, as follows:

Sec. Twp. Range	NE¼				NW¼				SW¼				SE¼				TOTAL
	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
21 - 6S - 4E			40	39									40	40	39	39	237

3. That the appropriation sought shall be limited to all natural flows of an unnamed tributary to Deadman Creek designated in the office of the Chief Engineer as Deadman Creek Trib 2 (Big Blue), not needed to satisfy all vested rights and prior appropriation rights to be incrementally accumulated, as reservoir storage space becomes available, to a maximum extent of **110 acre-feet** of water per calendar year, in a reservoir created by a dam located in the Northwest Quarter of the Northeast Quarter of the Southeast Quarter (NW¼ NE¼ SE¼) of Section 21, more particularly described as being near a point 2,606 feet North and 942 feet West of the Southeast corner of said section, in Township 6 South, Range 4 East, Clay County, Kansas, to provide **110 acre-feet** of water as needed for direct irrigation use, to be withdrawn, released or otherwise diverted from the reservoir at a re-diversion rate of approximately **1,200 gallons per minute (2.67 c.f.s.)**. A reasonable maximum re-diversion rate will be established during the perfection period and assigned at certification.


4. That installation of works for diversion of water shall be completed on or before **December 31, 2026**, or within any authorized extension thereof. The applicant shall notify the Chief Engineer and pay the statutorily required field inspection fee of \$400.00 when construction of the works has been completed. Failure to timely submit the notice and the fee will result in revocation of the permit. Any request for an extension of time shall be submitted prior to the expiration of the deadline and shall be accompanied by the required statutory fee of \$100.00.
5. That the proposed appropriation shall be perfected by the actual application of water to the proposed beneficial use on or before **December 31, 2030**, or any authorized extension thereof. Any request for an extension of time shall be submitted prior to the expiration of the deadline and shall be accompanied by the required statutory fee of \$100.00.
6. That the applicant shall not be deemed to have acquired a water appropriation for a quantity in excess of the amount approved herein nor in excess of the amount found by the Chief Engineer to have been actually used for the approved purpose during one calendar year subsequent to approval of the application and within the time specified for perfection or any authorized extension thereof.
7. That the use of water herein authorized shall not be made so as to impair any use under existing water rights nor prejudicially and unreasonably affect the public interest.
8. That the right of the appropriator shall relate to a specific quantity of water and such right must allow for a reasonable raising or lowering of the static water level and for the reasonable increase or decrease of the streamflow at the appropriator's point of diversion.
9. That this permit does not constitute authority under K.S.A. 82a-301 through 305a to construct any dam or other obstruction; nor does it grant any right-of-way, or authorize entry upon or injury to, public or private property.
10. That all diversion works constructed under the authority of this permit into which any type of chemical or other foreign substance will be injected into the water pumped from the diversion works shall be equipped with an in-line, automatic quick-closing, check valve capable of preventing pollution of the source of the water supply. The type of valve installed shall meet specifications adopted by the Chief Engineer and shall be maintained in an operating condition satisfactory to the Chief Engineer.
11. That acceptable water flow meters shall be installed and maintained on the diversion works authorized by this permit in accordance with Kansas Administrative Regulations 5-1-4 through 5-1-12 adopted by the Chief Engineer. These water flow meters shall be used to provide an accurate quantity of water diverted as required for the annual water use report (including the meter reading at the beginning and end of the report year).
12. That the applicant shall maintain accurate and complete records from which the quantity of water diverted during each calendar year may be readily determined and the applicant shall file an annual water use report with the Chief Engineer by March 1 following the end of each calendar year. Failure to file the annual water use report by the due date shall cause the applicant to be subject to a civil penalty.
13. That no water user shall engage in nor allow the waste of any water diverted under the authority of this permit.

14. That diversion of natural flows shall not take place unless there is water available to satisfy all demands by senior water rights and permits.

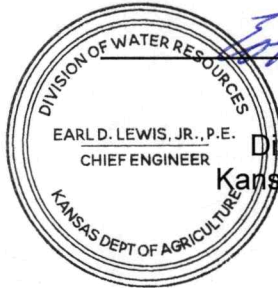
15. That the right to appropriate water under authority of this permit is subject to any minimum desirable streamflow requirements identified and established pursuant to K.S.A. 82a-703c for the source of supply to which this water right applies.

16. That failure without cause to comply with the provisions of this permit and its terms, conditions and limitations will result in the forfeiture of the priority date, revocation of the permit and dismissal of the application.

Ordered this 17th day of December, 2024, in Manhattan, Riley County, Kansas.




 Earl D. Lewis Jr., P.E.
 Chief Engineer
 Division of Water Resources
 Kansas Department of Agriculture



State of Kansas)
) SS
County of Riley)

The foregoing instrument was acknowledged before me this 17th day of December, 2024, by Earl D. Lewis Jr., P.E., Chief Engineer, Division of Water Resources, Kansas Department of Agriculture.



 Notary Public



1320 Research Park Drive
Manhattan, KS 66502
785-564-6700
www. agriculture.ks.gov



900 SW Jackson, Room 456
Topeka, KS 66612
785-296-3556

Mike Beam, Secretary

Laura Kelly, Governor

December 26, 2024

DURWIN F MALL
825 HIDDEN VALLEY DR
CLAY CENTER KS 67432-1578

RE: Appropriation of Water
File Nos. 50,939 and 50,940

Dismissal of Application
File No. 50,487

Dear Mr. Mall:

Enclosed are permits authorizing you to proceed with construction of the proposed diversion works and to appropriate water for beneficial use. **Your attention is directed to the enclosures and to the terms, conditions, limitations, and requirements specified in each permit, with specific reference to Paragraph Nos. 5, 9, 16, 18 and 19, of the Approval of Application and Permit to Proceed, File No. 50,940.** Also enclosed is a Findings and Order, dismissing Application, File No. 50,487, as requested in your form letter dated April 25, 2024.

For your new permits, notices must be filed on the enclosed form once the diversion works have been completed. Failure to complete the diversion works within the time allowed, or within any authorized extension of time thereof, will result in dismissal of the permits. If you need extensions of time, you must request them before the deadline for completion set forth in the permits. Any request for an extension of time must be accompanied by the statutorily required fee, which is currently \$100.00, per file number.

An annual water use report must be filed with the Chief Engineer by March 1, following the end of each calendar year. If a complete annual water use report is not received by the deadline, then a fine may be assessed and all water use under such permit or right may be suspended. Reports submitted in paper form will be assessed a \$20 per file number paper filing fee. In order to avoid this filing fee, you may submit your report online at kswaterusereport.org.

The approval of your applications constitutes permits to appropriate water. They do not give authority to construct any dam or other stream obstruction regulated by K.S.A. 82a-301 through 305a. They do not give authority to access any right-of-way or authorize trespassing upon or injury to public or private property. It may also be necessary for you to comply with other local, state or federal requirements.

DURWIN F MALL

File Nos. 50,487, 50,939 and 50,940

Page 2 of 2

Also included with your new permits is an informational sheet that sets forth the procedure to obtain Certificates of Appropriation which will establish the extent of your perfected water rights. Additional information and applicable forms may be found on our website at agriculture.ks.gov/dwr. If you have any questions or need assistance with any of these requirements, please contact our office at 785-564-6640, or your local Topeka Field Office at (785) 296-5733. If you call, please reference the file number so we can help you more efficiently.

Sincerely,

A handwritten signature in blue ink that reads "Kristen A. Baum". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Kristen A. Baum
New Applications and Changes Supervisor
Division of Water Resources

KAB:kak:ccb
Enclosure(s)
pc: Topeka Field Office

RIGHT TO A HEARING AND TO ADMINISTRATIVE REVIEW

If you are aggrieved by this Order, then pursuant to K.S.A. 82a-1901, you may request an evidentiary hearing before the Chief Engineer or request administrative review by the Secretary of Agriculture. Failure to request an evidentiary hearing before the Chief Engineer does not preclude your right to administrative review by the Secretary.

To obtain an evidentiary hearing before the Chief Engineer, a written request for hearing must be filed within 15 days after service of this Order as provided in K.S.A. 77-531 (i.e., within a total of 18 days after this Order was mailed to you), with: Kansas Department of Agriculture, Attn: Legal Division, 1320 Research Park Drive, Manhattan, Kansas 66502, FAX (785) 564-6777.

If you do not file a request for an evidentiary hearing before the Chief Engineer, you may petition for administrative review of the Order by the Secretary of Agriculture. A petition for review shall be in writing and state the basis for requesting administrative review. The request for review may be denied if the request fails to clearly establish factual or legal issues for review. See K.S.A. 77-527. The petition must be filed within 30 days after service of this Order as provided in K.S.A. 77-531 (i.e., within a total of 33 days after this Order was mailed to you), and be filed with: Secretary of Agriculture, Attn: Legal Division, Kansas Department of Agriculture, 1320 Research Park Drive, Manhattan, Kansas 66502, FAX (785) 564-6777.

If neither a request for an evidentiary hearing nor a petition for administrative review is filed as set forth above, then this Order shall be effective and become a final agency action as defined in K.S.A. 77-607(b). Failure to timely request either an evidentiary hearing or administrative review may preclude further judicial review under the Kansas Judicial Review Act.

CERTIFICATE OF SERVICE

On this 26 day of December, 2024, I hereby certify that the foregoing Approval of Application and Permit to Proceed, File Nos. 50,939 and 50,940, and the Dismissal of Application, File No. 50,487, dated December 17, 2024, were mailed postage prepaid, first class, US mail to the following:

DURWIN F MALL
825 HIDDEN VALLEY DR
CLAY CENTER KS 67432

With photocopies to:

KDA-DWR Topeka Field Office



Division of Water Resources