

{As Amended by House Committee of the Whole}

As Amended by House Committee

As Amended by Senate Committee

Session of 2017

SENATE BILL No. 46

By Committee on Agriculture and Natural Resources

1-20

1 AN ACT concerning water; relating to water conservation areas; **relating**
2 **to the diversion of water; chief engineer; remedies for the**
3 **impairment of a valid water right or permit to divert and use**
4 **water;** amending K.S.A. 82a-716 and 82a-717a and K.S.A. 2016
5 Supp. {82a-701,} 82a-745 and 82a-1906 and repealing the existing
6 sections.
7

8 *Be it enacted by the Legislature of the State of Kansas:*

9 **{Section 1. K.S.A. 2016 Supp. 82a-701 is hereby amended to read**
10 **as follows: 82a-701. When used in this act, unless the context indicates**
11 **otherwise, the following words shall have the following meanings:**

12 (a) "Person" shall mean and include a natural person, a
13 partnership, an organization, a corporation, a municipality and any
14 agency of the state or federal government.

15 (b) "Chief engineer" means the chief engineer of the division of
16 water resources of the Kansas department of agriculture.

17 (c) "Domestic uses" means the use of water by any person or by a
18 family unit or household for household purposes, or for the watering
19 of livestock, poultry, farm and domestic animals used in operating a
20 farm, and for the irrigation of lands not exceeding a total of two acres
21 in area for the growing of gardens, orchards and lawns.

22 (d) "Vested right" means the right of a person under a common
23 law or statutory claim to continue the use of water having actually
24 been applied to any beneficial use, including domestic use, on or
25 before June 28, 1945, to the extent of the maximum quantity and rate
26 of diversion for the beneficial use made thereof, and shall include the
27 right to take and use water for beneficial purposes where a person is
28 engaged in the construction of works for the actual application of
29 water to a beneficial use on June 28, 1945, provided such works shall
30 be completed and water is actually applied for such use within a
31 reasonable time thereafter by such person, such person's heirs,
32 successors or assigns. Such a right does not include, however, those

1 common law claims under which a person has not applied water to
2 any beneficial use within the periods of time set out in this subsection.

3 (e) "Appropriator" means and includes a person who has an
4 appropriation right that has been perfected in conformity with article
5 7 of chapter 82a of the Kansas Statutes Annotated, and amendments
6 thereto.

7 (f) "Appropriation right" is a right, acquired under the
8 provisions of article 7 of chapter 82a of the Kansas Statutes
9 Annotated, and amendments thereto, to divert from a definite water
10 supply a specific quantity of water at a specific rate of diversion,
11 provided such water is available in excess of the requirements of all
12 vested rights that relate to such supply and all appropriation rights of
13 earlier date that relate to such supply, and to apply such water to a
14 specific beneficial use or uses in preference to all appropriations right
15 of later date.

16 (g) "Water right" means any vested right or appropriation right
17 under which a person may lawfully divert and use water. It is a real
18 property right appurtenant to and severable from the land on or in
19 connection with which the water is used and such water right passes as
20 an appurtenance with a conveyance of the land by deed, lease,
21 mortgage, will, or other disposal, or by inheritance.

22 (h) *"Impairment" means the unreasonable raising or lowering of the*
23 *static water level or the unreasonable increase or decrease of the*
24 *streamflow or the unreasonable deterioration of the water quality at the*
25 *water user's point of diversion beyond a reasonable economic limit.*

26 ~~Section 1.~~ {Sec. 2.} K.S.A. 82a-716 is hereby amended to read as
27 follows: 82a-716. If any appropriation, or the construction and
28 operation of authorized diversion works results in an injury to any
29 common-law claimant, such person shall be entitled to due
30 compensation in a suitable action at law against the appropriator for
31 damages proved for any property taken. Any person with a valid
32 water right or permit to divert and use water may, *after first*
33 *exhausting the remedies available under K.S.A. 82a-717a, and*
34 *amendments thereto, restrain or enjoin in any court of competent*
35 *jurisdiction a subsequent diversion by a common-law claimant*
36 *without vested rights without first condemning those common-law*
37 *rights. After first exhausting the remedies available under K.S.A. 82a-*
38 *717a, and amendments thereto, an appropriator shall have the right to*
39 *injunctive relief to protect his or her prior right of beneficial use as*
40 *against use by an appropriator with a later priority of right.*

41 ~~Sec. 2.~~ {3.} K.S.A. 82a-717a is hereby amended to read as follows:
42 82a-717a. (a) No common-law claimant without a vested right, or
43 other person without a vested right, a prior appropriation right, or an

1 earlier permit shall divert or threaten to divert water if such diversion
2 or threatened diversion impairs or would impair any vested right,
3 appropriation right, or right under a permit to appropriate water. But
4 any common-law claimant with a vested right, or other person with a
5 vested right, a prior appropriation right, or an earlier permit may
6 divert water in accordance with any such right or permit although
7 such diversion or use thereunder conflicts with the diversion, use,
8 proposed diversion, or proposed use made or proposed by a common-
9 law claimant who does not have a vested right, or other person who
10 does not have a vested right, a prior appropriation right or an earlier
11 permit.

12 ~~(b) (1) Moreover, Any common-law claimant with a vested right,~~
13 ~~or other person with a vested right, a prior appropriation right, or an~~
14 ~~earlier permit may restrain or enjoin in any court of competent~~
15 ~~jurisdiction, in accordance with this subsection, obtain an order from the~~
16 ~~chief engineer that limits, curtails or prevents any diversion or proposed~~
17 ~~diversion that impairs or would impair such right in the event that~~
18 ~~any such diversion or proposed diversion is made or is threatened to~~
19 ~~be made by any common-law claimant, or other person who does not~~
20 ~~have a vested right, a prior appropriation right, or an earlier permit.~~

21 (2) Any common-law claimant with a vested right, or other person
22 with a vested right, a prior appropriation right, or an earlier permit who
23 claims impairment of such right by any other person without a prior right
24 to the same water shall submit a complaint to the chief engineer in
25 accordance with rules and regulations of the chief engineer.

26 (A) Within two weeks of receiving a complaint of impairment, the
27 chief engineer shall initiate an investigation of such complaint and
28 provide notice of such investigation to the complainant and the allegedly
29 impairing party or parties. As part of the investigation, the chief engineer
30 shall provide an opportunity for the parties to submit any relevant
31 information, including submission of an engineering study that meets
32 standards designated by the chief engineer through rules and regulations.

33 (B) Following the investigation, the chief engineer may issue an
34 order, consistent with K.S.A. 82a-706b, and amendments thereto, and rules
35 and regulations of the chief engineer, that limits, curtails or prevents the
36 diversion and use of water by any person without a prior right to the same
37 water or that otherwise disposes of the complaint.

38 (C) The chief engineer shall complete any investigation initiated
39 pursuant to this subsection within 12 months of the date the complaint was
40 submitted to the chief engineer; provided that the chief engineer may
41 extend the investigation for good cause by notifying the parties in writing
42 of the amount of time needed to complete the investigation.

43 (3) Concurrent with submission of a complaint under paragraph (2),

1 *or during the pendency of the chief engineer's investigation pursuant to*
2 *the complaint, the complainant may petition the chief engineer to issue a*
3 *temporary order, to be effective until a final order is issued under*
4 *paragraph (2)(B), that limits, curtails or prevents the diversion and use of*
5 *water by any person without a prior right to the same water upon a*
6 *finding by the chief engineer that a substantial likelihood exists that*
7 *impairment is occurring or will occur and that an order limiting,*
8 *curtailing or preventing diversion and use of water by any person without*
9 *a prior right to the same water would not be adverse to the public interest.*

10 (4) *Any order issued by the chief engineer pursuant to this subsection*
11 *is subject to review in accordance with the Kansas judicial review act.*

12 ~~Section 1. Sec. 3. {4.}~~ K.S.A. 2016 Supp. 82a-1906 is hereby
13 amended to read as follows: 82a-1906. (a) The division of water resources
14 of the Kansas department of agriculture shall post all complete
15 applications and all orders issued by the division pursuant to K.S.A. 82a-
16 706b, 82a-708a and 82a-708b, and amendments thereto, *and K.S.A. 2016*
17 *Supp. 82a-745, and amendments thereto*, on its official website.

18 (b) The division, in conjunction with the groundwater management
19 district within which such water right is situated, shall notify all water
20 right owners with a point of diversion within half a mile, or further if
21 deemed necessary by a rule and regulation of the chief engineer, of a water
22 right pending request or application pursuant to K.S.A. 82a-706b, 82a-
23 708a and 82a-708b, and amendments thereto, *and K.S.A. 2016 Supp. 82a-*
24 *745, and amendments thereto*, except for change applications requesting a
25 point of diversion move 300 feet or less from the currently authorized
26 location.

27 Sec. ~~2. 4.~~ {5.} K.S.A. 2016 Supp. 82a-745 is hereby amended to read
28 as follows: 82a-745. (a) Any water right owner or a group of water right
29 owners in a designated area may enter into a consent agreement and order
30 with the chief engineer to establish a water conservation area. The water
31 right owner or group of water right owners shall submit a management
32 plan to the chief engineer. Such management plan shall be the basis of the
33 consent agreement and order designating a water conservation area and
34 shall:

- 35 (1) Include clear geographic boundaries;
- 36 (2) include the written consent of all participating water right owners
37 within the geographic boundaries described in paragraph (1) to enter into
38 the consent agreement and order;
- 39 (3) include a finding or findings that one or more of the
40 circumstances specified in K.S.A. 82a-1036(a) through (d), and
41 amendments thereto, exist, *or include a finding or findings that the area*
42 *within the geographic boundaries described in paragraph (1) has been*
43 *closed to new appropriations by rule, regulation or order of the chief*

1 *engineer;*

2 (4) include provisions regarding the proposed duration of the water
3 conservation area and any process by which water right owners may
4 request to be added or removed from the water conservation area;

5 (5) include goals and ***one or more of the*** corrective control provisions
6 ~~to address one or more of the circumstances specified in K.S.A. 82a-~~
7 ~~1036(a) through (d), and amendments thereto, *or include a finding or*~~
8 ~~*findings that the area within the geographic boundaries described in*~~
9 ~~*paragraph (1) has been closed to new appropriations by rule, regulation*~~
10 ~~*or order of the chief engineer provided in subsection (b);*~~

11 (6) give due consideration to water users who have previously
12 implemented reductions in water use resulting in voluntary conservation
13 measures;

14 (7) include compliance monitoring and enforcement; and

15 (8) be consistent with state law.

16 (b) A consent agreement and order of designation of a water
17 conservation area pursuant to this section shall define the boundaries of the
18 water conservation area and may include any of the following corrective
19 control provisions:

20 (1) Closing the water conservation area to any further appropriation
21 of groundwater. In which event, the chief engineer shall thereafter refuse
22 to accept any application for a permit to appropriate groundwater located
23 within such area;

24 (2) determining the permissible total withdrawal of groundwater in
25 the water conservation area each day, month or year, and apportioning
26 such permissible total withdrawal among the valid groundwater right
27 holders in such area in accordance with the relative dates of priority of
28 such rights;

29 (3) reducing the permissible withdrawal of groundwater by any one
30 or more appropriators thereof, or by wells in the water conservation area;

31 (4) requiring and specifying a system of rotation of groundwater use
32 in the water conservation area; and

33 (5) any other provisions necessary to effectuate agreed-upon water
34 conservation goals consistent with the public interest.

35 The chief engineer shall be responsible for the monitoring and
36 enforcement of any corrective control provisions ordered for a water
37 conservation area.

38 (c) The order of designation shall be in full force and effect from the
39 date of its entry in the records of the chief engineer's office. The chief
40 engineer upon request shall deliver a copy of such order to any interested
41 person who is affected by such order and shall file a copy of the same with
42 the register of deeds of any county within which any part of the water
43 conservation area lies.

1 (d) If any corrective control provisions of a water conservation area
2 conflict with rules and regulations of a groundwater management district
3 or requirements of a local enhanced management plan or intensive
4 groundwater use control area that result in greater overall conservation of
5 water resources within which a participating water right is situated, the
6 chief engineer is authorized to amend the provisions of the water
7 conservation area to conform to any rules and regulations or requirements
8 that result in greater conservation of water resources, as determined by the
9 chief engineer.

10 (e) *To provide flexibility in the management of water resources, as*
11 *part of the consent agreement and order of designation, the chief engineer*
12 *may authorize ~~single-year or multi-year term permits for water right~~*
13 *owners to effectuate the water conservation area's conservation goals in*
14 *accordance with the a management plan that allots water authorized by*
15 *existing water rights, subject to the following limitations:*

16 (1) *The management plan shall be limited to the term of the water*
17 *conservation area;*

18 (2) *the management plan may allow, in any given calendar year, the*
19 *water use of an individual water right or rights to exceed the annual*
20 *authorized quantity of the individual water right or rights participating in*
21 *the management plan, provided that the water use shall not exceed the*
22 *total annual authorized aggregate quantity and rate of all the water rights*
23 *participating in the management plan in any given calendar year;*

24 (3) *the authority granted through the management plan shall*
25 *supersede the participating water rights during the term of the water*
26 *conservation area or until the management plan is suspended by the chief*
27 *engineer in accordance with this subsection; and*

28 (4) *for purposes of determining priority, the management plan shall*
29 *be assigned the priority date of its effectuation.*

30 (f) **In addition to a management plan under subsection (e), as a**
31 *part of the consent agreement and order of designation, the chief engineer*
32 *may include the use of multi-year flex accounts as authorized by K.S.A.*
33 *2016 Supp. 82a-736, and amendments thereto.*

34 (g) *No management plan authorized under a water conservation area*
35 *shall be allowed to impair any water right. At any time during the term of*
36 *a water conservation area, if the chief engineer determines that*
37 *impairment may be occurring, following a complaint and preliminary*
38 *investigation into relevant physical facts, the chief engineer may suspend*
39 *operation of the water conservation area. In the event of such suspension,*
40 *each participating water right may be operated in accordance with its*
41 *permitted terms and conditions as in effect prior to operation of the water*
42 *conservation area. Upon conclusion of an investigation by the chief*
43 *engineer and a finding of impairment, the chief engineer may terminate*

1 *the water conservation area, or may modify the water conservation area*
2 *subject to consent of the participating water right owners, to alleviate any*
3 *impairment.*

4 ~~(e)~~*(h)* Prior to execution of a proposed water conservation area
5 consent agreement and order of designation pursuant to this section, the
6 chief engineer shall notify in writing the groundwater management district
7 within which any participating water right is situated. Such groundwater
8 management district shall be given an opportunity to provide a written
9 recommendation regarding the proposed water conservation area and
10 management plan within 45 days of notification by the chief engineer. The
11 review period may be extended by up to 30 days upon approval by the
12 chief engineer. Subject to subsection (d), any participating water right in a
13 water conservation area shall continue to be subject to all applicable rules
14 and regulations and management plans of the groundwater management
15 district in which the water right is situated.

16 *(i) The chief engineer shall provide notification, as specified in*
17 *K.S.A. 2016 Supp. 82a-1906, and amendments thereto, to all water right*
18 *owners with a point of diversion within 1/2 a mile, or farther if deemed*
19 *necessary by a rule and regulation of the chief engineer, of the boundaries*
20 *of a water conservation area. **Notification shall include a reference to an***
21 ***electronic publication of the management plan and any relevant***
22 ***technical analysis.***

23 ~~(f)~~*(j)* The consent agreement and order of designation shall provide
24 for periodic review of the consent agreement and order, which may be
25 initiated by the chief engineer or upon request of the water right owners in
26 the water conservation area. The consent agreement and order shall specify
27 the frequency of such periodic review, but a review shall be conducted at
28 least once every 10 years.

29 ~~(g)~~*(k)* (1) The chief engineer may, with the consent of all
30 participating water right owners, amend a consent agreement and order of
31 designation in order to:

32 (A) Modify corrective control provisions or the boundaries of the
33 designated area;

34 (B) add or remove water rights upon request of such water right
35 owners;

36 (C) terminate a water conservation area upon the request of the water
37 right owners in the designated area; or

38 (D) make other changes the water right owners may request.

39 (2) Any amendments to a consent agreement and order of
40 designation, except amendments that remove a water right upon request of
41 the owner so long as the consent of all participating water right owners is
42 not required pursuant to the management plan, shall be consented to by all
43 participating water right owners within the designated area and the chief

1 engineer and shall be based upon a revised management plan submitted by
2 the participating water right owners.

3 *(l) No water right shall be perfected pursuant to a water*
4 *conservation area.*

5 ~~(h)~~—*(m) Notwithstanding K.S.A. 82a-1039, and amendments*
6 *thereto, nothing in this section shall be construed as limiting or affecting*
7 *any duty or power of a groundwater management district granted to*
8 *such district by the Kansas groundwater management district act.*

9 *(n) The chief engineer shall ~~may~~ shall* adopt rules and regulations to
10 effectuate and administer the provisions of this section.

11 ~~(i)~~—~~(n)~~ *(o) The provisions of this section shall be part of and*
12 *supplemental to the Kansas water appropriation act.*

13 ~~Sec. 3-5, {6.}~~ **K.S.A. 82a-716 and 82a-717a** and K.S.A. 2016 Supp.
14 **{82a-701,}** 82a-745 and 82a-1906 are hereby repealed.

15 ~~Sec. 4-6, {7.}~~ This act shall take effect and be in force from and after
16 its publication in the statute book.