

Kansas Water Law and the Ownership of Water Resources in Kansas

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I have prepared this outline of Kansas water law for the benefit of the Interim Committee on Natural Resources. By the standard of legislative testimony, it is painfully long; by the standards of a legal treatise, it is painfully short and incomplete. Nonetheless, it is intended as a basic guide to the structure and operation of Kansas water law, as that law has established property rights in the use of water, and how owners of Kansas water rights have (and have not) protected those rights. I will limit my oral testimony to the basic elements of this written testimony, so that I can answer the questions of the committee.

I. Introduction: Kansas Water Law before 1945

- a. Climate and Westward Expansion
- b. Hydrology and the relative unimportance of groundwater before 1945
- c. Kansas Water Law before 1945: a hybrid of two distinct legal doctrines
 - i. Riparianism, according to the English and American Common Law, starting in 1861.
 - ii. Prior Appropriation for surface waters in western Kansas, starting in 1886.
- d. By the 1940's, basic problems with this hybrid water law had become clear:
 - i. The Kansas Supreme Court held in 1944 that Kansas water law was ineffectual to regulate groundwater pumping. *State ex rel. Peterson v. Board of Agriculture*, 149 P.2d 604 (Kan. 1944).
 - ii. The Supreme Court of the United States effectively held that Kansas water law was incapable of quantifying how much water Kansas and its water users had lost due to over-use in the Arkansas River Basin in Colorado.
 1. *Colorado v. Kansas*, 320 U.S. 383 (1943): Kansas cannot defend what it cannot quantify.
 - iii. Interstate Compact negotiations on the Republican and Arkansas Rivers (1940's) revealed similar weaknesses. Kansas leaders recognized the imperative need to quantify all of the actual and potential water rights in Kansas's interstate basins, including rights to groundwater supplies—so Kansas could maximize its claims, including those to receive federal reservoir storage.
 1. Republican River Compact (1943)
 2. Arkansas River Compact (1949)
- e. In response to these legal problems, Governor Schoeppel formed a committee to recommend reforms to Kansas water law. That committee produced two remarkable documents in record time (1944-45):
 - i. GEORGE S. KNAPP *ET AL.*, THE APPROPRIATION OF WATER FOR BENEFICIAL PURPOSES: A REPORT TO THE GOVERNOR ON THE HISTORIC, PHYSICAL, AND LEGAL ASPECTS OF THE PROBLEM IN KANSAS (1944).
 - ii. A full draft of what became, with some modifications, the 1945 Kansas Water Appropriation Act (“KWAA”).

II. The Kansas Water Appropriation Act: a skeletal summary.

- a. *Dedication of the waters of the state to the public.*
 - i. K.S.A. § 82a-702. “**All** water within the state of Kansas is hereby dedicated to the **use** of the people of the state, subject to **the control and regulation** of the state in **the manner** herein prescribed.” (emphasis added).
 1. “**All**” means both surface and groundwater.
 2. “**use**”: under the KWAA, the focus is on beneficial **use** of water.
 3. “**control and regulation**”: police power of the State of Kansas, acting through the chief engineer.
 4. “**manner**”: doctrine and procedure for granting, administering, and protecting water rights.
 - ii. What does this “dedication to the people” mean? Does it really mean that the people of the state of Kansas are the title owners of the waters of Kansas?
 1. No. State “ownership” of water resources = State power to control and regulate according to the state’s police power.
 - a. The concept of state ownership of its water resources is a legal fiction, a surrogate for state control. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).
- b. *Jurisdiction and Power*: the chief engineer of the division of water resources (“DWR”) is the statutory office in charge of administering the laws relating to the beneficial use of water. K.S.A. § 82a-706.
 - i. Has jurisdiction over both groundwater and surface water. *Id.*
 - ii. All water rights other than domestic rights require permission from the chief engineer. K.S.A. §§ 82a-705, 82a-728. (Domestic rights—those held for household purposes—do not require a permit.)
 - iii. Chief engineer has the power to impose penalties on those who use water without a permit or in violation of the terms of their permit. K.S.A. § 82a-728.
 1. These include civil penalties (fines) and reductions in allowable water usage.
 - iv. The chief engineer is the lead water officer in charge of administering Kansas’s four interstate compacts. He or she holds that power under federal and state law, because interstate compacts are federal as well as state statutes.
- c. *Water Law Doctrine*: the chief engineer shall “control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants **in accordance with the rights of priority of appropriation.**” K.S.A. § 82a-706.
 - i. Abolition of water rights held under the riparian doctrine. Those with pre-1945 uses given the opportunity (until 1980) to “prove up” their water use to the chief engineer and have these rights recognized as “vested rights” integrated within the prior appropriation system. K.S.A. §§ 82a-703, 82a-704a.
 - ii. Between persons with water rights, “the first in time is the first in right.” K.S.A. § 82a-707(c).
 1. Priority of the water right, and not its type of beneficial use, governs its protections. While the KWAA appears to contain a hierarchy of uses (at

K.S.A. § 82a-707(b)), that hierarchy defers to priority (as stated at K.S.A. §§ 82a-707(b) and 82a-707(c)).

- iii. Note that the chief engineer **does not have a clear independent duty to conserve water supplies separate from those allocated to water rights. The chief engineer is fundamentally a reactive officer, responding to owners' rights for protections.**
- iv. The chief engineer fulfills his or her statutory duty according to the prior appropriation doctrine in three basic ways, balancing the duty to put water to beneficial use with the duty to protect the "public interest."
 1. *In granting new water rights.* K.S.A. §§ 82a-711, 82a-711a.
 - a. If water supplies are available—that is, if their use does not **"impair"** existing water rights—
 - b. And, their use for a new water right does not unreasonably affect the public interest, then the chief engineer "shall approve" the application. K.S.A. § 82a-711.
 - c. In evaluating whether the application protects the public interest, the chief engineer must consider minimum desirable streamflows, the dynamics of the local water supply, all prior rights, and any other matters. K.S.A. § 82a-711(b).
 - d. In the context of **new water rights applications**, "impair" means impairment "beyond a reasonable economic limit." K.S.A. §§ 82a-711(c), 82a-711a.
 - e. Why this qualification and redefinition of "impair" exists for new water rights applications: to accommodate the post-1957 development of groundwater rights to the High Plains-Ogallala Aquifer. Because a strict definition of "impair" would have effectively prohibited new water rights across the Ogallala.
 2. *In reviewing applications to change existing water rights.* K.S.A. § 82a-708b.
 - a. What cannot be changed: the priority of a water right and its authorized quantities. K.S.A. § 82a-708b(a). (But see below at III.a.2).
 - b. What can be changed: its place of use, its point of diversion, or the type of use made of water. *Id.*
 - i. Place of use: where the water is put to beneficial use.
 - ii. Point of diversion: the location from which the water is diverted (as in the headgate from a stream or a groundwater well.)
 - iii. Type of use made of water: *e.g.*, from an irrigation right to a municipal right.
 - c. If the applicant demonstrates that the change does not impair existing rights, then the chief engineer shall approve the change. *Id.* Much of the chief engineer's analysis is performed pursuant to the "no injury rule."
 - i. A senior water right cannot be changed in such a way that its use impairs "existing rights," including any

potentially impaired junior rights. A senior water right does not carry with it the unilateral right to be changed according to its owner's wishes.

- ii. In other words, the owner of a junior water right is entitled to the conditions of the water supply at the time his or her water right was approved.
- iii. This makes sense within the prior appropriation system: consider the following example. A 2017 change to a 1960 (senior) water right must not impair any senior **and** junior (1960-2017) water rights, because that proposed change *is itself* junior to those senior and junior rights.
- iv. The chief engineer typically requires a reduction in the authorized quantities of the water right to be changed, so as to protect all existing rights affected by the change.
 1. Changes in point of diversion: if an applicant seeks to move her well closer to an existing well, and thus exert a greater impact on that existing well than previously, then DWR may require, as a condition of granting the change, a reduction in the authorized quantity of her right.
 2. Changes in place of use: because all existing water rights in the area depend to some extent on return flows to the water system, then DWR may require, as a condition of granting the change, a reduction in the authorized quantity if the proposed place of use is more distant from the recharge area.
 3. Changes in consumptive use. Some uses are more consumptive than others. Thus, a change to a more consumptive use (*e.g.*, from irrigation to municipal use) will require a commensurate reduction in the authorized quantity as a condition for granting the change.
- d. In the context of **applications to change existing rights**, “impair” means “impair.” There is no qualification (as there is with new water rights applications) of “impair” to mean impairment “within a reasonable economic limit.” *Id.*
- e. Because most areas of Kansas are “over-appropriated”—that is, there are more water rights than there is water to satisfy them—there is more activity in changing existing water rights than in applying for new water rights.
 - i. Combining existing rights to a common place of use.
 - ii. “Chasing water” by moving the well to a better area of water supply.

3. *In administering water rights in times of shortage.*
 - a. The chief engineer has considerable latitude in deciding how to protect senior water rights when a senior right owner “makes a call” on the water supply and requests that junior owners be shut down. K.S.A. § 82a-706b.
 - b. DWR water commissioners typically make these administration decisions, which can be complex depending upon the conditions in the basin and the water rights requesting protection.
 - c. If the chief engineer decides that reducing junior water rights to protect a senior right would not actually produce “wet water” to the senior right’s point of diversion, then such a “call” is deemed to be “futile,” and the chief engineer will most likely not “administer” (shut down) some (or all) junior rights in that situation. This is known as the “futile call” doctrine.
 - i. Justification: a water right is not a guarantee of water.
 - d. See below at III.b.

- d. The Constitutionality of the KWAA has been repeatedly upheld.
 - i. *Williams v. City of Wichita*, 374 P.2d 578 (Kan. 1962).
 - ii. *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164 (Kan. 1981).

III. The Kansas Appropriation Water Right and How an Owner Protects it.

- a. What a Kansas Appropriation Water Right is.
 - i. A Kansas water right is any:
 1. “vested right” (a pre-1945 water right that has been approved post-1945) or
 2. an “appropriation right” (rights applied for after the KWAA was enacted in 1945)
 3. “under which a person may lawfully divert and use water.” It is a **usufructuary** right. K.S.A. § 82a-701(g).
 - a. A water right is **not** the ownership of water, but the right to use that water. K.S.A. § 82a-707(a).
 4. It is a “**real property right** appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land” K.S.A. § 82a-701(g).
 5. Domestic rights are full KWAA rights; they just don’t require a permit from the chief engineer, provided the domestic use is a beneficial use. K.S.A. § 82a-705a.
 - ii. Attributes of a Kansas Water Right.
 1. Priority. This cannot be changed.
 2. Authorized quantities (annual use and rate of diversion). This cannot be increased, but it can be decreased as condition for granting a change, subject to the no-injury rule.
 3. Place of use. This can be changed, subject to the no-injury rule.
 4. Point of diversion. This can be changed, subject to the no-injury rule.

5. Type of use made of water. This can be changed, subject to the no-injury rule.
- iii. Because a Kansas Water Right is a real property right, it is transferable, either wholly or partially, by conveyance. K.S.A. § 82a-701(g).
 1. Therefore, those seeking better (older) water rights and additional water supply can purchase, lease, or otherwise obtain those rights. Prior appropriation rights have the advantage of transferability, separate from the land. *Id.*
 2. In putting those obtained water rights to a different place of use, or type of use, the buyers/lessees/renters must obtain permission from the chief engineer pursuant to K.S.A. § 82a-708b. (See above.)
- b. Owners can protect their rights through the “administrative route” or through the “judicial route.” The ability to protect a Kansas water right is one of the most valuable components of the right.
 - i. By asking the chief engineer to administer water rights, according to the priority of the water rights drawing from the same source of water supply. (See above at II.c.3).
 1. Statutes
 - a. K.S.A. § 82a-706.
 - b. K.S.A. § 82a-706b.
 - c. K.S.A. § 82a-707(c).
 2. Regulations set forth the procedure for protecting senior rights.
 - a. K.A.R. § 5-4-1.
 - b. K.A.R. § 5-4-1a.
 - ii. By going to court. The KWAA offers multiple protections for the judicial route. These protections exist because a water right is a real property right, entitled to full due process protections.
 1. K.S.A. § 82a-716.
 2. K.S.A. § 82a-717a.
 3. K.S.A. § 82a-719.
 4. K.S.A. § 82a-721a.
 5. K.S.A. § 82a-725.
 6. The Kansas Supreme Court has recently upheld the efficacy of the judicial route, upholding an injunction against a junior right that DWR found was impairing a senior right. *Garetson Bros. v. American Warrior*, 347 P.3d 687 (2015), *rev. denied* (2016).
 - iii. Under 2017 amendments to the KWAA, (in response mostly to *Garetson*), the legislature attempted to integrate these two routes, requiring a water right holder claiming impairment to exhaust his or her administrative remedies before seeking relief in court.
 1. K.S.A. § 82a-716 (2017)
 2. K.S.A. § 82a-717a (2017).
 3. The legality of this amendment has yet to be tested in court. It may run afoul of two areas of legal authority:

- a. Separation of powers concerns (between the executive/administrative branch and the judicial branch); and
 - b. Other broad statutory authority entitling senior owners to independent relief through the courts (K.S.A. § 82a-721a).
- c. Water rights owners have repeatedly relied upon the clear protections of the KWAA to protect their rights. This is especially true in surface-water dominant basins, such as the Neosho River Basin. That is largely because the prior appropriation doctrine works fairly well in protecting surface water rights: the administration of junior rights makes water available to senior rights relatively quickly in a surface-dominated basin.
- d. However, many water rights owners, especially those with groundwater rights to the High Plains-Ogallala Aquifer, have not protected their rights as the KWAA assumed or intended that they would. There are hydrological and local reasons for why owners of Ogallala-based groundwater rights have generally refrained from seeking the protections afforded senior rights under the KWAA.
 - i. The problem of groundwater over-appropriation. DWR granted far more water rights between 1955 and 1970 than the High Plains-Ogallala Aquifer could provide over the long term.
 - 1. Why? Because the water was available for appropriation,
 - 2. And the chief engineer has the duty to grant water rights and put water to beneficial use, provided that new rights do not impair existing rights “beyond a reasonable economic limit.” K.S.A. § 82a-711; *see* Section II.c above.
 - ii. The problem of slow hydrological response to the administration of junior groundwater rights.
 - iii. The potentially draconian consequences of water rights administration in the Ogallala context.
 - iv. The concern of local groundwater communities regarding these draconian consequences.
 - v. Starting in the 1970’s, Kansas began to take steps to address these hydrological, political, and cultural obstacles.

IV. Addressing the Problem of Groundwater Depletion and its effects on Property Rights in Water, 1972-Present

- a. The Groundwater Management District Act, K.S.A. § 82a-1020 *et seq.* (“GMD Act”).
 - i. The Basic Contours of the GMD Act (enacted 1972).
 - 1. Original Purpose: to reward local initiatives to conserve groundwater supplies at a time when DWR was not pursuing conservation, by forming local groundwater management districts (“GMDs”).
 - 2. GMD’s have their own assessment and taxing authority, and have become the most important political force in Kansas water.
 - 3. GMD’s propose management plans and regulations for their respective districts, which are developed in consultation with the chief engineer and approved as state regulations enforced by the chief engineer.

- a. GMD's have taken steps to close areas to new water rights applications. However, this does fundamentally address the problem of over-appropriation in western Kansas.
 - b. Some of these regulations have accelerated the problem of groundwater depletion. *See, e.g.*, K.A.R. § 5-23-4a(b).
 - 4. The GMD Act expressly states that it places no limitation on the chief engineer's authority under the KWAA. K.S.A. § 82a-1039.
- ii. The most prominent tool for reducing water use across the High Plains-Ogallala Aquifer: establishing Intensive Groundwater Use Control Areas ("IGUCAs"), K.S.A. § 82a-1036 to -1038 (1978).
 - 1. Basic Procedure and Consequences
 - a. The chief engineer, the GMD, or local irrigators (via a petition) may initiate proceedings to form an IGUCA.
 - b. The chief engineer then holds hearings to consider three basic things:
 - i. Whether conditions merit an IGUCA;
 - ii. What the boundaries of the IGUCA should be; and
 - iii. What the "corrective control provisions" (usually reductions in water rights quantities) should be.
 - c. IGUCAs are then established by order of the chief engineer.
 - 2. Successes: IGUCAs have restored some degree of balance to connected surface and groundwater systems across western Kansas. At this writing, there are eight IGUCAs.
 - 3. Failures: no IGUCAs have been established across the non-renewable portions of the Ogallala Aquifer. Reasons for that failure:
 - a. The chief engineer has so far not initiated proceedings to establish an IGUCA on his own initiative. That is largely out of political caution and his lack of a clear statutory duty to conserve the water resources of Kansas independent of protecting water rights that depend on those resources.
 - b. Local irrigators fear the unpredictability of the IGUCA process: they may seek to reduce groundwater pumping and initiate an IGUCA, only to find that the chief engineer establishes boundaries or orders pumping reductions that are different and in excess of what they had planned or feared.
- iii. A recent tool to avoid the pitfalls of IGUCA's: Local Enhanced Management Areas ("LEMAs"), K.S.A. § 82a-1041 (2012).
 - 1. Basic Procedure and Consequences, as distinguished from IGUCA's.
 - a. The GMD (acting through its elected board) votes to move forward with a LEMA, and submits a management plan for the LEMA to the chief engineer.
 - b. The chief engineer holds hearings similar to those of an IGUCA, but with one signal difference: the hearings are limited to the management plan. The chief engineer cannot deviate substantially from the plan; he either approves the LEMA or rejects it. This difference in procedure is intended to protect

against unintended regulatory consequences, such as unanticipated borders or increased reductions in pumping.

2. Success: GMD4 SD-6 LEMA, 2013-2018
 - a. Extended for the period 2018-2022 (2017).
 3. Further LEMA Activity:
 - a. GMD1 (proposed GMD-wide LEMA, voted down 2014)
 - b. GMD4 (proposed GMD-wide LEMA, currently under review)
 - c. GMD5 (proposed LEMA to address the impairment of the Quivira National Wildlife Refuge)
- iv. Some prominent legal problems regarding the GMD Act.
1. Are GMD's achieving their original purpose, or, as Professor John C. Peck noted, might "the foxes be guarding the chicken house?"
 2. The lack of any IGUCA over the non-renewable portions of the High Plains-Ogallala Aquifer.
 3. The relationship between the GMD Act and the KWAA.
 - a. How to resolve the opening paradox of K.S.A. § 82a-1020: how can "local water users determine their destiny" while preserving "basic water use doctrine"—namely, prior appropriation, when irrigators do not favor prior appropriation calls as a regulatory tool?
 - b. Do IGUCA and LEMA orders that impose reductions in groundwater rights regardless of their respective priorities violate the prior appropriation doctrine of the KWAA?
 - c. Can owners of groundwater rights affected by IGUCA and LEMA orders protect their water rights through the judicial route?
 - d. Do IGUCA- and LEMA-ordered reductions in groundwater rights to both renewable and non-renewable areas of the High Plains-Ogallala Aquifer rise to the level of governmental takings?
 - e. Or is the collective failure by DWR and the GMD's to slow the permanent depletion of non-renewable groundwater supplies in itself a taking on a regional scale?
- b. Groundwater-motivated amendments to the KWAA.
- i. Multi-Year Flex Accounts. K.S.A. § 82a-736 (esp. 2011, 2012).
 1. Enables a groundwater right holder to use his or her authorized quantities more flexibly, by extending the compliance period from annually to five years.
 2. Depending on the situation, this can increase or decrease overall water usage.
 - ii. Water Conservation Areas. K.S.A. § 82a-745 (2015).
 1. Think of WCA's as voluntary, miniature LEMA's.
 2. Statutorily unnecessary, but enacted to standardize the process and encourage conservation.

- iii. Water Rights Conservation Program, in statute: protection from abandonment. K.S.A. §§ 82a-741, 82a-718(d) (2011).
 - 1. Placed in statute what had been in regulations; no effective change in DWR practice.
- iv. Abolishing abandonment of water rights in closed areas: K.S.A. § 82a-718(e) (2012).
 - 1. The apparent good news: no more “use it or lose it.”
 - 2. The bad news: the problem of hidden water rights that cannot be terminated. May promote further speculation.

V. Other property rights in Kansas Water.

- a. Storage Capacity in reservoirs as a Property Interest.
 - i. The State’s property interest in federal reservoirs: that of a permanent easement to the storage space within the reservoir.
 - ii. The KWO purchases permanent storage space in reservoirs, and then acts as a long-term broker to purchasers of water storage in two ways:
- b. First: State Water Plan Storage Act, K.S.A. §§ 82a-1301 to -1320 (first enacted 1974).
Basic Structure:
 - i. Kansas agrees to pay the United States for conservation storage for municipal and industrial (“M&I”) purposes.
 - ii. Under the State Water Marketing Program, the state acquires “water reservation rights” from the chief engineer for the purpose of diverting and storing water in the reservoir.
 - iii. State enters into long-term contracts with M&I users to sell the water from storage, drawn from these water reservation rights.
 - iv. Receipts from the contracts enable the state (it is hoped) to partially repay the federal government.
 - v. Interest in the state water marketing program has proved to be less than anticipated, indicating problems in the distribution of reservoir water supply benefits during droughts.
- c. Second: Water Assurance Program Act, K.S.A. §§ 82a-1320 to -1328 (1986).
 - i. Enacted in response to the shortcomings of the State Water Plan Storage Act.
 - ii. Enables M&I users downstream from federal reservoirs to join together in Water Assurance Districts (“WADs”), issue bonds, and aid the state in repaying the United States for adding conservation storage space to federal reservoirs.
 - iii. In return, WAD members are promised reservoir releases sufficient to meet certain prescribed target flows on the river.

VI. Conclusion: Who owns the problem of permanent depletion of Kansas’s water Resources?

- a. The KWAA is a fundamentally sound water code, and one of the better western water law codes.
 - i. But it depends upon owners of water rights to affirmatively protect their rights.
 - ii. It lacks a clear statutory command to conserve the water resources of Kansas independent of those rights.
 - iii. Neither DWR nor water rights owners have embraced the most powerful tools at their command to conserve water resources.

1. IGUCA's and LEMA's
 2. Priority administration
 3. Water Rights adjudications
- iv. As a consequence, the state, DWR, and GMD's have effectively condoned and even promoted the acceleration of the depletion of the High Plains-Ogallala Aquifer.
- b. The state faces a statewide problem of permanent depletion of its water resources, across water resource categories.
 - i. Depletion of groundwater supplies across the High Plains-Ogallala Aquifer.
 - ii. Loss of perennial streamflows across most of western Kansas due to groundwater over-pumping—flows upon which many surface rights in eastern Kansas depend.
 - iii. Depletion of storage capacity in federal reservoirs as a result of siltation caused by erosion upstream.
 - iv. These are private property problems, because permanent depletion makes property rights less secure. A real property right predicated upon a disappearing resource is a pathetic legal fiction.
 - v. This is also a problem about the public. We are witnessing, by permanent depletion, the dispossession of waters dedicated to the public, a dispossession that violates the public interest.
 - vi. These problems are solvable, largely because of the basic soundness of Kansas water law. The question is whether the state and its citizens have the political will to do so.
 - c. Some concluding questions for the committee to consider:
 - i. Should we impose upon DWR and the chief engineer the explicit duty to preserve and/or conserve the water resources of Kansas?
 - ii. Should we reform the relationship between DWR and the GMDs, as other states, most prominently Arizona and California, have done?
 - iii. Should we adjudicate the rights to the High Plains-Ogallala Aquifer?
 - iv. Should the State reconsider the public and private value of water stored in federal reservoirs?
 - v. Should the state commission another legal study of Kansas water law and its problems, as occurred in 1945, 1957, and 1978?

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