Recent Developments in Water Law
John Peck

May 28-29, 2015
University of Kansas School of Law
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I. Introduction
   A. Lecture coverage
   B. Kansas Water Appropriation Act, K.S.A. 82a-701, et seq.
   C. Helpful websites
      2. County maps: https://www.ksdot.org/burtransplan/maps/Mapscounties.asp

II. Legislation
   A. 2014 Legislative Session: 2014 House Bill 2599: granted an easement on the north bank of the Kansas River in Wyandotte within Kansas City, Kansas, to be used as an emergency boat ramp)
   B. 2015 Legislative Session
      1. 2015 Sen. Bill 52: This bill, with its counterpart 2015 House Bill 2059, proposes amending four sections of the Water Appropriation Act.
         a. K.S.A. 82a-706b.
            (1) This section gives protection to holders of water rights and those who have an agreement with the state to divert water released from storage
            (2) 2015 Sen. Bill 52 proposes to empower the chief engineer to “allow augmentation for the replacement in time, location and quantity of the unlawful diversion, if such replacement is available and offered voluntarily.”

(1) This section provides for term permits—permits for “a limited specified period of time in excess of six months,” but it prohibits changes in type of use, point of diversion, or place of use otherwise allowed regular appropriation rights under Section 708b.

(2) 2015 Sen. Bill 52 would amend the section to permit similar changes under Section 708b for term permits.

c. K.S.A. 82a-736.

(1) This section on multi-use flex accounts would be amended

(2) Section 736 (c) provides the rules for the establishment of such accounts by a water right holder.

(3) Current Section 736 (c) provides that the amount of water deposited in the account may not exceed one of three possible figures based on base average usage, the annual net irrigation requirement, or a figure that won’t increase the long-term average use.

(4) The bill would add a fourth possible way to derive the amount of water: any one of the other three plus “any deposited water remaining in a[n] . . . account up to 100% of the base average usage.” The details of this derivation are then spelled out in a new subsection 736 (c)(1)(E).

d. K.S.A. 82a-1041.

(1) This section deals with LEMAs—Local Enhanced Management Areas—a concept first enacted by the legislature in 2012.

(2) Sen. Bill 52 would make several technical amendments to Section 1041 to bring it in line with proposed changes in Section 736, discussed above.

(3) It would also add an additional factor for the chief engineer to consider when reviewing a LEMA plan submitted by a groundwater management district: “. . . whether the plan . . . gives due consideration to water users who already have
implemented reductions in water use resulting in voluntary conservation measures.”

2. 2015 S.B. 64
   
a. K.S.A. 82a-1601, et seq. is the Multipurpose Small Lakes Program Act, which has a purpose of providing public water supply storage and water related recreational facilities.

b. S.B. 64 would change the rate of interest the state charges local entities to purchase public water supply storage in a class I, II, or III project.

IV. Attorney General Opinions: The Kansas attorney general’s office issued no opinions relating to water resources in the last year.

III. Kansas Appellate Court Cases:
   
   A. Stone v. Gibson, 230 Kan. 224, 630 P.2d 1154 (1981) (Water Appropriation Act’s then-new amendment requiring permits to divert water, except for domestic use, and making it a crime to divert water without a permit, was found not to be an unconstitutional taking of private property)

   B. Few Kansas appellate court cases between 1981 and 1997

   C. But starting in 1997, Kansas courts began to see more cases:


      2. Hawley v. Kan. Dept. of Ag., 281 Kan. 603, 132 P.3d 870 (2006) (in dicta, court stated that K.S.A. 82a-718 makes Kansas a forfeiture state, not an abandonment state, for loss of water rights for non-use, so the intent of the water right holder is not relevant)


      4. Frick Farm Properties, L.P. v. Kan. Dept. of Ag., 289 Kan. 690, 216 P.3d 170 (2009) (court relied on Hawley dicta that Kansas is a forfeiture state, and held that once DWR files its verified report under K.S.A. 82a-718 claiming forfeiture, the burden shifts to the water right holder to prove “due and sufficient cause” for the non-use)

6. *Nelson v. Kan. Dept. of Ag.* (44 Kan. App. 2d 1042, 242 P.3d 1259 (2010)) (DWR found a forfeiture of water right for non-use; showing deference to DWR expertise and interpretation, court of appeals held that the taking up of groundwater by alfalfa roots doesn’t constitute a diversion or beneficial use of water, and thus the water right was forfeited)

7. *Cochran v. Kan. Dept. of Ag. & the City of Wichita*, 291 Kan. 898, 249 P.3d 434 (2011) (court held that neighboring holder of senior water right has the right to appeal the granting of a new permit based on the KJRA and the KAPA)

8. *Wheatland Electric Coop., Inc. v. Polansky*, 46 Kan. App. 2d 746, 265 P.3d 1194 (2011) (DWR has power to limit consumptive use on approving an application to change a vested right; Kansas statutes do not authorized partial abandonment of water rights)


1. Holder of vested right for groundwater for 240 acre-feet annually at 600 gpm sought injunction against neighbor with an appropriation right on the basis of impairment; court defined “impairment” using common, ordinary, dictionary meaning of the word, followed the recommendation of the chief engineer appointed under K.S.A. 82a-725 to investigate and make a report, found that the junior well under the appropriation right was impairing the well of the vested right holder, and issued a preliminary injunction.

   a. K.S.A. 82a-725: chief engineer as appointed expert (cf special masters appointed in U.S. Supreme Court interstate water cases with the chief engineer’s appointment as expert under Section 725)

   b. (A similar case in a Kansas district court in 1972 involved impairment of a groundwater irrigation right by nearby junior irrigation wells and an industrial well. Based on the chief
engineer’s Section 725 report in that case, the Mitchell County District Court held that “[t]here is impairment when plaintiff’s authorized diversion rate is decreased by at least 20 per cent in addition to the rate reduction caused by the pumping of plaintiff’s irrigation well.”  Duane File v. Solomon Valley Feedlot, Inc., et al (Dist. Ct. of Mitchell Co., No. 8831, Nov. 29, 1972, Conclusions of Law No. 5)

c. The court held that the vested right was being impaired when operations of neighboring wells prevented the vested right from pumping 240 acre-feet at 404 gpm during the irrigation season.

2. Questions:
   a. Will a new case be treated the same if it is a contest between two vested right holders or between two appropriation right holders?
   b. Relevance of K.S.A. 82a-711 reference to impairment when making an initial application for an appropriation permit?
   c. Should the legislature or DWR define “impairment”?
   d. How is the chief engineer’s powers and duties under K.S.A. 82a-725 different from a special master appointed by the U.S. Supreme Court in an interstate water dispute?
   e. How much deference to give to the chief engineer’s Section 725 report?

IV. DWR Activities

A. Litigation: for a summary of the following matters, see the KBA Kansas Annual Survey, water law chapter, to be published in June 2015:


3. Wheatland Electric Cooperative, Inc. v. Kansas Department of
Kansas law permits the establishment of several types of special water districts.

B. Groundwater management districts (GMDs) are given special attention in the annual survey because geographically they cover roughly one fourth of the entire state in western and south-central Kansas, and they include in their boundaries a majority of the water rights in the state, mostly devoted to irrigation use.

C. The websites of the five GMDs provide valuable information, including online newsletters: www.gmd1.org (Western Kansas GMD No. 1); www.gmd2.org (Equus Beds GMD No. 2); www.gmd3.org (Southwest Kansas GMD No. 3); www.gmd4.org (Northwest Kansas GMD No. 4); and www.gmd5.org (Big Bend GMD No. 5). Some GMDs also publish and mail newsletters. Some have on-line blog sites. See, e.g., http://nwksgmd4.blogspot.com/.

D. See the Kansas Annual Survey, water law chapter, for information reported by the GMDs.
VI. Miscellaneous

A. U.S. Supreme Court Cases


   a. This case was originally filed in 1998, and it settled in 2003. Nebraska has had difficulty complying with the Settlement Agreement.

   b. In 2010, Kansas filed suit in the U.S. Supreme Court to enforce the Settlement Agreement. On November 13, 2013, Special Master William J. Kayatta issued his final report:

      (1) Nebraska had violated the Compact, entitling Kansas to damages of $3.7 million;

      (2) Kansas was entitled to an additional $1.8 million, to be disgorged from Nebraska’s gains;

      (3) Other remedies Kansas sought (river master, injunction, contempt finding, reduction of irrigation in Nebraska) were either not available in this proceeding or not necessary; and

      (4) Nebraska should prevail on its counterclaim for reformation because the Settlement Agreement involved a mutual mistake that should be reformed by adopting Nebraska’s proposed “solution.”

   c. The parties argued the case in the U.S. Supreme Court in October 2014. KU Law Professor Steve McAllister, Solicitor General of Kansas, argued the case for Kansas.

   d. The Supreme Court rendered its opinion on February 24, 2015. It overruled the exceptions to the Special Master’s Report and adopted the Special Master’s recommendations.
(1) Justice Kagan wrote the majority opinion. She sprinkled it throughout with pithy and sometimes humorous words, plays on words, metaphors, and phrases.

(2) Kansas’ damages for Nebraska’s breach: Neither side disputed the special master’s finding that Nebraska had exceeded its allocation of water by 17%, 70,869 acre-feet, resulting in damages to Kansas of $3.7 million, and Nebraska had agreed to pay these damages.

(3) Kansas’ claim for disgorgement:

(a) For a good description of this issue, see a student comment by Brendan McNeal, “Tough (Water) Justice: Disgorgement as a Remedy for Breach of Interstate Water Compacts,” 63 Kan. L. Rev. ____ (2015) (upcoming))

(b) Because an interstate compact is a contract between two or more states and the federal government, one naturally thinks of contract remedies in cases of breach.

i) Restatement 2nd of Contracts versus Restatement 3d of Restitution and Unjust Enrichment

ii) Section 39(1) of the Restatement 3d of Restitution and Unjust Enrichment (2010) permits an award of disgorgement if there has been “a deliberate breach of contract” that results in profit to the breaching party.

a) The special master found that Nebraska had “knowingly failed” to comply with the compact and ordered disgorgement in the amount of $1.8M, because Nebraska’s gains had exceeded Kansas’ loss.

b) The court concluded that Nebraska had wasted time and not taken adequate steps to follow the Settlement Agreement.

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c) It was uncontested that “an acre-foot of water is substantially more valuable on farmland in Nebraska than in Kansas,” which meant that Nebraska’s reward for breaching the Compact was much larger than Kansas’ loss, “likely by many multiples.” (at p. 14).

d) Citing the restitution restatement, Nebraska argued that disgorgement requires a “deliberate breach of contract,” but the court didn’t buy Nebraska’s attempt to distinguish a deliberate breach from the special master’s finding of knowing failure.

e) Regarding the $1.8M figure for disgorgement, the court accepted the special master’s selection of a point between no profits and full profits, saying “disgorgement need not be all or nothing.”

(4) Nebraska’s Counterclaim for Reformation: The claim was that the Settlement Agreement’s Accounting Procedures contained a mistake in that it charged Nebraska for its imported water from outside the Republican River basin.

(a) This was a mutual mistake.

(b) The court cited an earlier interstate water dispute for authority to “protect subsidiary technical agreements to promote accuracy in apportioning waters under a compact.”

(c) Thus, the court’s authority to solve interstate water disputes “encompasses modifying a technical agreement to correct material errors in the way it operates and thus align it with the compacting States’ intended apportionment.”

e. Dissenting opinions: Several justices (Roberts, Scalia, and
Thomas) filed opinions, one joined by Alito, in which they concurred in part and dissented in part, but to different parts.

B. Governor’s 50 Year Vision: “A Long-Term Vision for the Future of Water Supply in Kansas”

1. Introduction:

   a. In October 2013 Governor Brownback made a call for action for a 50-Year Vision for the Future of Water in Kansas with a goal of ensuring a reliable water supply. Feedback gained from stakeholder meetings served as the basis of the draft Vision for the Future of Water in Kansas.

   b. A “preliminary discussion draft” was produced and disseminated on July 1, 2014.

   (1) It contained a section titled “Propose Changes to the Kansas Water Appropriation Act and Rules and Regulations to Promote Better Balance Between Efficient Water Use and Economic Benefit.”

      (a) The list of “potential action items” contained several suggestions that were later adopted in the final Vision, which is discussed below. But one was the following action item: “Consider pros and cons of elimination or modification of the priority system in groundwater areas with limited recharge.”

      (b) On October 13, 2014, Secretary of the Kansas Department of Agriculture Jackie McClaskey’s “guest column” titled “Kansas Water Vision-Development of the Second Draft”: “[T]he evaluation of the pros and cons of priority under the Kansas Water Appropriation Act will be eliminated . . . We feel that any change in the Act as it pertains to the ‘first in time, first in right’ provisions will achieve little and divert attention away from the dozens of strategies in the Draft that are widely supported by Kansans.”

      (c) The removal from the vision of any evaluation of the basic structure and policy underlying the Kansas Water Appropriation Act seems to imply that any attempts to alter the depletion of the groundwater
aquifers will be based on voluntary actions by water users rather than regulatory imposition of pumping restrictions.

(d) (Examples of state control measures to save water

i) Kansas Intensive Groundwater Use Control Areas (IGUCAs)

ii) General impairment lawsuits

iii) Public Trust Doctrine, California

iv) Arizona groundwater statute)

(2) At the Annual Governor’s Conference on Water held in Manhattan on November 18-19, 2014, the governor unveiled the Vision report.

(3) On January 15, 2015, the Kansas Water Authority approved the report, with several minor changes. Both the Vision and the memorandum detailing the changes appear at http://www.kwo.org/50_Year_Vision/50_Year_Vision.htm.

2. Summary of Relevant Sections of the 80-page Vision Statement

a. The Vision is contained in an 80-page report.


c. Following those short sections are lengthier chapters:

(1) Water Conservation.

(a) Conduct drought simulation exercises.

(b) Develop financial and non-financial incentives to encourage irrigation water conservation

(c) Give greater support to local entities in LEMA
development, management, and expansion of the LEMA concept.

(d) Develop an option for local economic development entities.

(e) Update the State Water Plan to provide to control phreatophytes (water-loving plants).

(2) Water Management.

(a) Assess suitable locations for additional water assurance districts (WADs).

(b) Evaluate minimum desirable streamflow (MDS) targets based on updated data.

(c) Modify target flows on the Kansas River.

(d) Develop a long-term strategy for representing Kansas in interstate water issues.

(e) Promote a “better balance between efficient water use and economic benefit.”

(3) Technology and Crop Varieties: (contains practical recommendations for water users, but little of interest directly to a water lawyer).

(4) Additional Sources of Supply.

(a) Restore water supply lost due to reservoir sedimentation with dredging and other techniques.

(b) “[A]llow for the transfer of water supplies between basins where feasible and cost effective.”

i) Review “opportunities to increase utilization of the Missouri River to meet Kansas’ needs while recognizing and protecting the existing users.”

ii) “[C]omplete evaluation of large water transfers including legal, environmental,
economic and technical issues” and “identify suitable areas and ability to transfer water to areas of need.”

(e) Evaluate use of low quality water is also recommended.

i) This would include “treated wastewater effluent, grey water, stormwater runoff, oil and gas flow back and produced water, brackish surface and ground water and other waters with elevated levels of contaminants.”

ii) Identify “all barriers that may exist to allow the use of lower quality waters.”

a) A potential legal barrier to the reuse of water arises when the reuse by a water right holder follows the originally intended use: such reuse may cause harm to other users due to the increase in consumptive use and the lower quantity of the returned effluent to the stream, thereby adversely impacting downstream water right holders.


(5) Other Sections of the Vision Statement: The last three main sections of the Vision Statement—Economic Analysis, Measuring Success with a Regional Approach, and Be the Vision—are more general and less on point to this survey.

C. Missouri River Pipeline Project

1. November 19, 2013, executive director of Southwest Kansas GMD No. 5
Mark Rude’s presentation to a special joint legislative committee of the Kansas Legislature titled “Conserving the Ogallala Aquifer and Kansas Surface Water.” It was a proposal to develop a pipeline project that would move surplus water from the Missouri River in northeast Kansas to western Kansas would help the nation’s ability to continue to feed its people.

2. Background

a. 1977 U.S. Department of Commerce study of the High Plains Ogallala Aquifer, part of which involved the possibility of diverting Missouri River water to western Kansas.

(1) September 1982, the U.S. Army Corps of Engineers published a report “Reconnaissance Study, Alternate Route B, Water Transfer from Missouri River to Western Kansas” (online at http://www.gmd3.org/Extra/WaterXferFromMORiverToWKSPDF.pdf)

(2) In the winter 1982, the Kansas Law Review published my article “Legal Constraints on Diverting Water from Eastern to Western Kansas, 30 Kan. L. Rev. 160 (1982).


(4) 1982 law review article: various legal hurdles to a Missouri River diversion project such as protection of the place of basin of origin, interests of upstream and downstream states on the Kansas River, legal problems in transporting the water, and institutional problems.

   (a) Project would require statutory amendments, new interstate compacts, and new institutional mechanisms

   (b) Because of the movement of the water to much higher elevations, “such proposals would probably be financially impractical without a policy decision from Washington that the high plans region,
including Kansas and its neighboring states, should be irrigated to allow the production of as much food as possible,” a policy decision that might result “from worldwide food shortages and changing international economic conditions.”  (Id.)

b. 1983, the legislature enacted the Kansas Water Transfer Act, K.S.A. 82a-1501, et seq., which put restrictions on moving water in quantities of 1,000 acre-feet or more a distance of ten miles or more.

(1) Extensive amendments to the Water Transfer Act in 1993, including changing the definition of a water transfer to 2,000 acre-feet of water a distance of over 35 miles.


3. The 2014 Kansas Aqueduct Study

a. In 2013, the KWO formed a Stakeholder Advisory Committee to help assess the proposed aqueduct project, identify issues, and provide recommendations.

b. In January 2015, the KWO and the Corps of Engineers released a report on the study: “Update of 1982 Six State High Plains Aquifer Study, Alternate Route B” (online at http://www.kwo.org/projects_programs/Aqueduct/Rpt_Aqueduct_Study_Update_012715_kf.pdf.) (hereafter, “the Study”)

c. The Study is comprised of seven chapters, and has many key points:

(1) Demand. Demand for the water for irrigation at the terminus and en route could range from 4.2-6.5 MAF (million acre-feet), and municipal demand would increase that figure.

(2) Water availability. Average annual yield expected at least half the time ranges from 0.9 MAF at the lowest end to 3.2 MAF at the highest end of pumping and storage capacity.

(3) Water transfer system. Up to 6.9 MAF of excess average annual Missouri River flows would be available using a
30,000 cfs diversion capacity, which would require construction of a new lock and dam on the Missouri River.

(a) A 0.7 MAF reservoir near White Cloud, Kansas could store the water before sending it into a 360-mile-long, concrete-lined canal, with 15 pump stations for a net uphill climb of 1,745 feet.

(b) The canal would follow the southern line of the Kansas River basin to a proposed terminal reservoir near Utica, Kansas, within the Ogallala Aquifer.

(4) Probable costs. The projected cost for delivered ranges from $300 per acre-foot to $800 per acre-foot.

(5) Legal and legislative issues (Prepared by David Pope, former chief engineer of DWR, and Leland Rolfs, former legal counsel of DWR)

(a) Water at the Source.

i) The Missouri River is one of the most complex in the nation to manage—prior appropriation in Western states and the riparian doctrine in the East.

ii) U.S. 1944 Flood Control Act, the Pick-Sloan Plan has constructed several large mainstem reservoirs and several tributary reservoirs.

iii) Many Indian reservations with Federal reserved water rights lie within basin states.

iv) The Corps of Engineers operates the system using a Master Water Control Manual and Annual Operating Plans.

v) Several interstate compacts involve Missouri River tributaries, but no compact exists to allocate water to Kansas directly from the Missouri River.

vi) Project would require compliance with the Water Appropriation Act, which does not
allow impairment of existing water rights

a) The filing fee under K.S.A. 82a-708a of approximately $20 per 100 acre-feet of water would amount to about $1M.

b) Modifications of the Water Appropriation Act might be required.

c) The Kansas Water Transfer Act and other Kansas statutory requirements would also have to be met. Corps permits would have to be obtained.

(b) Water en route: storage of water in the existing 24 federal reservoirs along the proposed aqueduct route, water quality, construction of the aqueduct across existing roads, railroads, pipelines, and power lines.

(c) Issues at the destination: The Study assumes construction of a terminal reservoir, and a distribution system out of this reservoir would have to be developed.

d) Institutional issues: A useful institutional analogy might be the Kansas Turnpike Authority, and the legislature could likewise establish a Kansas Aqueduct Project Authority.

e) Environmental considerations: Invasive species, historic preservation, sedimentation issues, the Clean Water Act, the Rivers and Harbors Appropriation Act of 1899, the National Environmental Policy Act, the Endangered Species Act, and the Farmland Protection Policy Act.

(f) Political assessment.

i) Interstate coordination

ii) While the project may generate both local and regional concern, given its potential
benefits “the project may also receive a large amount of support.”

4. Current Situation

a. On March 19, 2015, the Associated Press reported that the project would cost $18 billion to build and $1B per year to operate, and that KWO director Tracy Streeter had told The Hutchinson News that “state officials don’t plan to pursue a proposal to build an aqueduct and concrete-lined canal from Doniphan County to Utica in western Kansas”–“[t]his thing is not likely to happen.”

b. The article said, however, that GMD No. 3 had commissioned a $20,000 study of the “economic impact to the state if the aqueduct is not built.” That study was to be completed in a few weeks and presented to the legislature. (online at http://m.cjonline.com/news/2015-03-19/water-office-missouri-river-aqueduct-unlikely-be-built#gsc.tab=0).


1. Facts:

a. July 2012, Governor Brownback placed all counties under an Emergency Drought Stage Order, and during this drought, the city imposed a set of restrictions called the Stage 2 Water Restrictions, which imposed fines from $150 to $500 for violations.

b. Various water users were restricted in various ways: lawn and garden watering, car washes, golf courses, and swimming pools.

c. Under these restrictions, the city limited the hours of operation of the car wash to between 9 p.m. and 10 a.m., modified in August 2012 to allow car washes to remain open from 9 p.m. Thursday to 8 p.m. Saturday.

d. Claiming that the restrictions had resulted in a loss of business of 75% and that revenue was only 50% of pre-restriction revenue, the car wash sued the city for an injunction, claiming that the city had singled out car washes and violated its constitutional rights by limiting hours of operation, restrictions that lacked a rational basis.
2. District Court: Judge J. Thomas Marten denied plaintiff’s request for a temporary injunction, concluding that there was little evidence of irreparable injury, that the plaintiff had remained in business for half a year under these restrictions, and that denying an injunction would “still leave the plaintiff the opportunity to seek monetary damages for its lost revenue.”

3. This case is not a water rights case. The opinion does not mention water rights.
   a. As a public water supplier, presumably the city held water rights and provided water to paying customers.
   b. The case is interesting just in showing the types of governmental responses that can arise in times of serious drought.
      (1) In such times, local and state governments often have to react.
      (2) The serious drought in the Southwest U.S., especially the responses to the drought in California, illustrate such responses.

VII. Summary and Conclusions