

Kansas Water for Change

Law Targeted in 2012

Why Change Water Law Now?

The Brownback administration has stated that the 2012 Kansas Legislature needs to review Kansas water law. “Now is the time to remove any roadblock that stops us from prolonging the life of Kansas’ most important aquifer – the Ogallala. Current water law does not promote or reward conservation,” it is said. And, “2012 must be the year that Kansas makes the progressive step forward to provide the necessary means to reduce the depletion rate of the aquifer!” It is true that the past efforts to

reduce the depletion of the aquifer haven’t done enough if the goal is for the Ogallala to be a sustainable resource. The problem is, the Ogallala hasn’t been used in a sustainable manner for fifty years or more. No one is saying we must STOP depletion, because that likely means virtual cessation of groundwater use.

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What are the laws that purportedly need to be changed?

There are three items in water law targeted by the Governor’s Office which appear to have some capacity to affect owners of municipal water rights. They are:

- 1) elimination of the so-called Use-It-or-Lose-It statute in areas deemed to be closed to new appropriations;
- 2) modification of the statute allowing a more user friendly (meaning larger) five-year authorized quantity instead of an annual quantity limit;
- 3) creation of Local Enhanced Management Areas in Groundwater Management Districts.

The vault and piping in the above photograph are one of many similar points of diversion authorized (or formerly authorized) under an existing water right for industrial use. While a casual observer may think that this well is abandoned and in need of plugging, the water right authorizing it remains active. If this water right would be in a “closed area,” it would not be subject to abandonment under proposed changes to the Water Appropriation Act. The photo was taken in January 2012.

Let's look at a few facts before we review the rhetoric. What is referred to as "Use-It-or-Lose-It" is found in K.S.A. 82a-718 and was in the original Kansas Water Appropriation Act adopted in 1945. Before the last modifications to this statute in 1999, it stated, "All appropriations must be for some beneficial purpose. Every water right of every kind shall be deemed to be abandoned and shall terminate when without due and sufficient cause no lawful, beneficial use is henceforth made of water under such right for three successive years." The legislature heard arguments that it was unreasonable for three years to be the time period to establish a condition of water right abandonment so the statute was changed to require a period of five successive years of non-use without due and sufficient cause to be evidence of abandonment.

Take a look at K.A.R. 5-7-1 on the following page. There are 11 different, acceptable reasons for non-use that can be used to claim due-and-sufficient cause. The eleventh reason sounds similar to what is proposed (before the start of the current legislative session anyway) for the change in K.S.A. 82a-718. So all that is proposed for Use-It-or-Lose-It is promotion of reason No. 11 of the regulation to statute status, where it can't be tweaked (or removed) by the Chief Engineer as easily. This represents very little real change in the name of conservation.

It has been claimed and apparently believed that the Use-It-or-Lose-It statute forces people to use their water rights. This is true, to an extent. The water right must be used once every five years, or have a legitimate excuse to not use it once every five years. The regulation itself, does not cause depletion of the Ogallala Aquifer, at least at the rates that have been measured in the last 40 years. The law does not require the full authorized annual quantity to be pumped every year, or any year, either. If there is a misunderstanding of this law by the water right owning public and the press, changing the law won't eliminate this misunderstanding, and depletion will likely continue.

Abandonment is part of water law because without it, the risks faced by new (junior) water users could be significantly high and curtail further development of the water resource. An example of how the absence of abandonment creates unnecessary uncertainty or risk is a scenario where a new water user sees adequate flow in the river next to his property for his proposed project. He or she knows that a water

right for all of that flow exists upstream from him or her. The upstream water right is senior in priority, but has gone unused for many years. Does he or she risk money and time to start a new project that would be jeopardized if the senior water right is put back into use years after it was last exercised? Should this unused senior water right be allowed to exist forever without any use? With hearing officers, courts, etc., tasked with hearing cases of abandonment defined by reasonable laws, the risk of the unused water right can be diminished and the water can be used by others that have productive projects.

In the recent discussions about abandonment in Kansas water law, it is stated that the development phase of water rights has long since past in most of the Ogallala Aquifer

and therefore abandonment is no longer needed. However, there is little to no discussion of the "redevelopment" of Kansas water rights. Advertisements have been printed in the Montezuma Press that the city of Montezuma is interested in buying land with water rights, presumably so they can be converted to municipal use. National Beef Packing Co. was required to provide 1,000 acre-feet to the city of Dodge City to expand their plant (and use more city-

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K.A.R. 5-7-1. Due and sufficient cause for nonuse.

- (a) Each of the following circumstances shall be considered "due and sufficient cause," as used in K.S.A. 82a-718, and amendments thereto:
- (1) Adequate moisture from natural precipitation exists for the production of grain, forage, or specialty crops, as determined by the moisture requirements of the specific crop.
 - (2) A right has been established or is in the process of being perfected for use of water from one or more preferred sources in which a supply is available currently but is likely to be depleted during periods of drought.
 - (3) Water is not available from the source of water supply for the authorized use at times needed.
 - (4) Water use is temporarily discontinued by the owner for a definite period of time to permit soil, moisture, and water conservation, as documented by any of the following:
 - (A) Furnishing to the chief engineer a copy of a contract showing that land that has been lawfully irrigated with a water right that has not been abandoned is enrolled in a multiyear federal or state conservation program that has been approved by the chief engineer;
 - (B) enrolling the water right in the water right conservation program in accordance with K.A.R. 5-7-4; or
 - (C) any other method acceptable to the chief engineer that can be adequately documented by the owner before the nonuse takes place.
 - (5) Management and conservation practices are being applied that require the use of less water than authorized. If a conservation plan has been required by the chief engineer, the management and conservation practices used shall be consistent with the conservation plan approved by the chief engineer to qualify under this subsection.
 - (6) The chief engineer has previously approved the placement of the point of diversion in a standby status in accordance with K.A.R. 5-1-2.
 - (7) Physical problems exist with the point of diversion, distribution system, place of use, or the operator. This circumstance shall constitute due and sufficient cause only for a period of time reasonable to correct the problem.
 - (8) Conditions exist beyond the control of the owner that prevent access to the authorized place of use or point of diversion, as long as the owner is taking reasonable affirmative action to gain access.
 - (9) An alternate source of water supply was not needed and was not used because the primary source of supply was adequate to supply the needs of the water right owner.
 - (10) The chief engineer determines that a manifest injustice would result if the water right were deemed abandoned under the circumstances of the case.
 - (11) The water right is located in an area of the state that is closed to new appropriations of water by regulation or order of the chief engineer but is not closed by a safe-yield analysis.
- (b) In addition to circumstances considered due and sufficient cause pursuant to subsection (a), both of the following requirements shall also be met to constitute due and sufficient cause for nonuse of water:
- (1) The reason purporting to constitute due and sufficient cause shall have in fact prevented, or made unnecessary, the authorized beneficial use of water.
 - (2) Except for the temporarily discontinued use of water as provided by paragraph (a)(4) and for physical problems with the point of diversion or distribution system as provided by paragraph (a)(7), the owner shall maintain the diversion works in a functional condition.
- (c) Each year of nonuse for which the chief engineer finds that due and sufficient cause exists shall be considered to interrupt the successive years of nonuse for which due and sufficient cause does not exist.
- (d) When a verified report of the chief engineer, or the chief engineer's authorized representative, is made a matter of record at a hearing held pursuant to K.S.A. 82a-718, and amendments thereto, that establishes nonuse of a water right for five or more successive years, the water right owner shall have the burden of showing that there have not been five or more successive years of nonuse without due and sufficient cause.

(Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2009 Supp. 82a-718; modified, L. 1978, ch. 460, May 1, 1978; amended May 1, 1986; amended May 31, 1994; amended Oct. 24, 2003; amended May 21, 2010.)

supplied water) approximately ten years ago. They either didn't try or they tried and failed to find those water rights and instead have offered the city \$3,600,000 in lieu of obtaining the water rights last year. The city accepted the offer in November of 2011. There are likely others looking for more or better water rights too. While there is some uncertainty created if a water right has a long period of non-use but is not yet declared to be abandoned, a similar uncertainty exists with unused water rights becoming active again.

The suspension of Use-It-or-Lose-It will likely increase uncertainty and risk if water right valuations are based on the expected life of the aquifer. Not knowing if unused water rights in the local area will be exercised again and accelerate aquifer depletion will create more risk for investments in water saving technology installations, ownership transfers and authorized use changes for cities and industries.

In reality, Use-It-or-Lose-It should be regarded as Use-the-Water-Now-or-Lose-It-to-My-Neighbor.

There is no incentive to use less water, to have less grain to harvest and a smaller profit, if the other nearby water users don't reduce their water use and use what the conservation-minded person left in the aquifer for presumably his or her own use in latter years.

The second change that is proposed is a modification of the Multi-year Flex Account statute, K.S.A. 82a-736. Since 2001, that statute gave the Chief Engineer authority to approve a term permit (for a period not to exceed five years) with a five-year quantity, instead of the historical annual quantity of a permanent water right. The five-year quantity to be authorized by the existing statute is an average of past annual water usage (over a specific period of time) times five and then reduced by 10 percent. Very few irrigation water right owners felt that the increased flexibility outweighed the 10 percent conservation component and there have been few term permit applications filed asking for this. It is now proposed that the 10 percent



This monitoring well, in the area of the industrial wells, appears to have been damaged by agricultural or construction activities, and may be unusable for water level measurements or water quality testing. This lack of maintenance, combined with no water use over five years, would likely be strong evidence in an abandonment hearing.

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conservation component reduction be removed and to allow a five-year quantity, which is 500 percent of the average annual usage in a specific, previous time period. Will approving a term permit for irrigation (which suspends use of the underlying permanent water right) that allows what historically was used in five years to be diverted in what could be three years or less accomplish anything that resembles conservation? What if everybody in a specific area pumped all of their five-year quantity in three years? Will the chances of direct impairment of a senior water right by junior water rights not increase?

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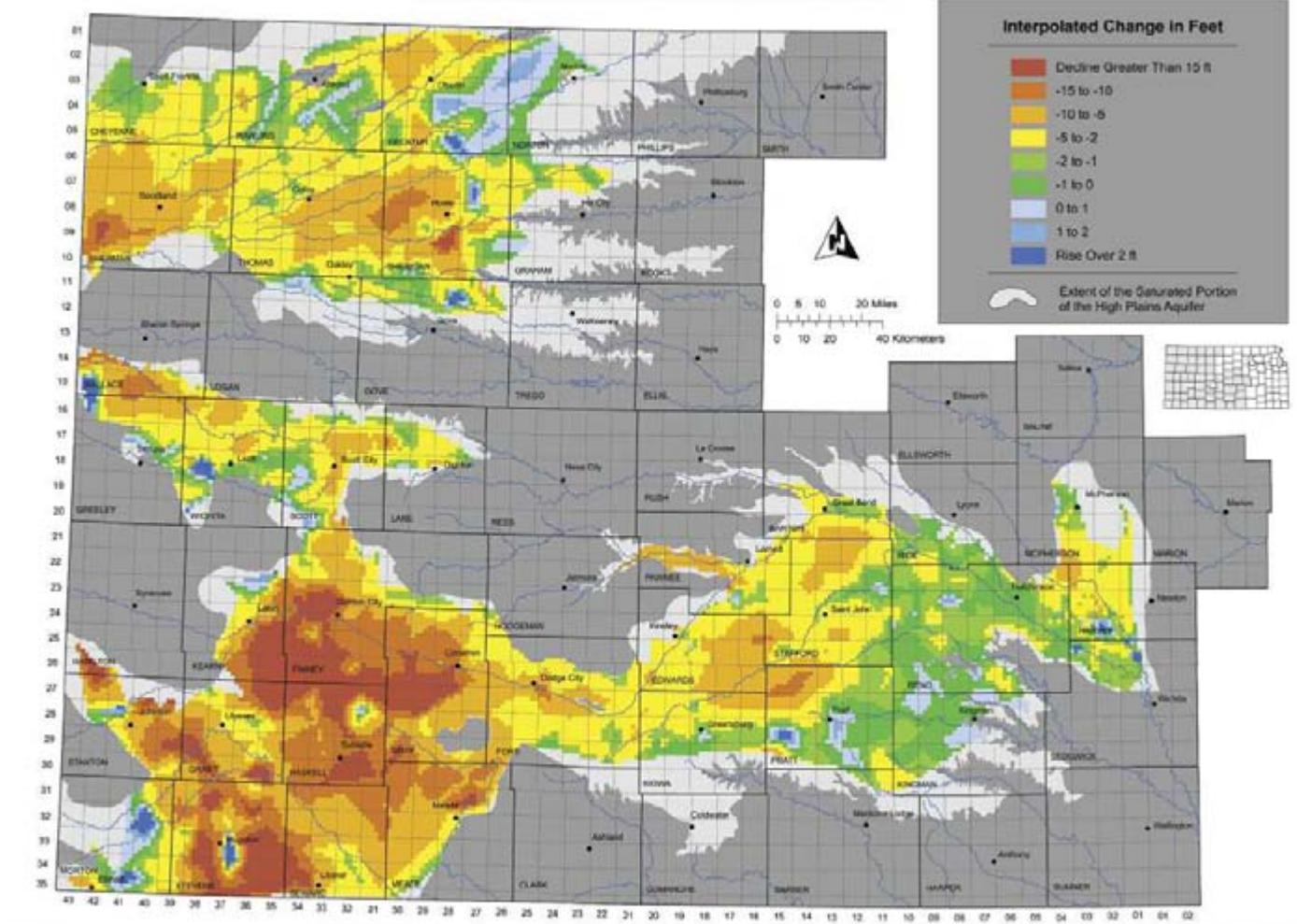
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Average Change in Water Table Elevations from 2000 to 2005 for the High Plains Aquifer in Kansas

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KGSR Open-File Report 2006-6

The Kansas Geological Survey made a conscientious effort to ensure the accuracy of this report. However, the Kansas Geological Survey does not guarantee this document to be completely free from errors or inaccuracies and disclaims any responsibility or liability for interpretations based on data used in the production of this document or decisions based thereon. This report is intended to make results of research available at the earliest possible date, but is not intended to constitute final or formal publication.

Groundwater data obtained from the Water Information Storage and Retrieval Database (OWASRT) at <http://www.igs.ku.edu/igrt/water/owasrt/index.html>

Projection: Standard Parallel
Central Meridian: 98.25 degrees West
Latitude of Origin: 36 degrees North

April 23, 2006

It could be that until the drought of 2011, there was enough flexibility in the annual quantities authorized under most irrigation rights. Last summer was different. More than 1,000 irrigation water rights (and probably closer to 2,000) were presumably over-pumped last summer, because more than 2,200 special term permit applications were filed by December 31, 2011, to cover last year's over-pumping with some of this year's quantity. (Some water rights have multiple wells, so there can be multiple, single well, term permit applications under a permanent water right.) Changing this statute is an attempt to make diversions aquifer-neutral over five seasons, in a time that some think will continue to be much drier than normal. It is designed to keep irrigators in compliance with their water rights, and be able to have a harvestable crop in two or three seasons – not to promote conservation.

This proposed change raises concerns because it has the capacity to change the traditional hydrology of local areas. While some public water supply systems may see an increase in demand that might be 10 to 20 percent above

average during drought conditions, a group of irrigation water rights with five-year flex permits could pump up to 100 percent more water in a single year. Owners of municipal water rights (many of which are senior rights in an area) typically need a steadier supply of water over the course of an entire year or five-year period. They have no need of these flex permits and certainly are more vulnerable to having less water because of the potential increased diversions in dry years.

The third item up for consideration is allowing groundwater management districts the authority to propose specific geographic areas within their boundaries for more stringent local solutions to groundwater level declines. Because human beings probably fear the unknown more than anything in life, residents of groundwater management districts are reluctant to invite the Chief Engineer to consider the establishment of an Intensive Groundwater Use Control Area (IGUCA) within their boundaries. While the IGUCA concept has been shown to work on a broad scale, most people want to find the fairest solution to a problem

and generally are hopeful that locally-imposed restrictions are more likely to be implemented with less pain than an solution ordered from Topeka.

This proposal appears to have real conservation at its core. It brings the users of groundwater in a common area together, to consider and adopt solutions that will prolong the life of “their” aquifer. Because there has been a lot of work with this concept over many previous years, the chances of reducing depletion are much higher than with the previous two proposals. The stakeholders in these areas appear to possess a much better understanding of the Ogallala Aquifer, Kansas Water Law, the local economy whose foundation has been established on groundwater and the future. It would be a shame if this proposal was somehow left out of any water law changes approved by the Legislature.

What is conservation?

Conservation can mean many things to many people. For some it means using the least amount of water while being profitable, leaving as much in the aquifer for future use. It can mean scheduling water use at the proper time to minimize the water used while still achieving maximum crop production. It may mean adopting water-use

Conservation and depletion reduction will not be achieved with the proposed changes to water law, if they are not followed with continued education and discussion.

reducing technology, allowing water to be used over a longer growing season with multiple crops, possibly on more acres. Others say that conservation is also achieved when the water that is used creates a product with a higher value than a lower value product, water use quantity being equal. Some would say using no water is the ultimate in conservation.

Conservation and depletion reduction will not be achieved with the proposed changes to water law, if they are not followed with continued education and discussion. The proposals are only small steps, even if some think the steps are sideways. The Division of Water Resources has shown it is willing to work with the other stakeholders to find solutions. And if the annual water levels measured under the supervision of the Kansas Geological Survey are dramatically lower than the water levels from early-2011 because of the drought and high volumes of pumping, more discussion needs to be held more often.

Douglas S. Helmke has been the Water Rights Tech at KRWA since June 2000, and also a Wellhead / Sourcewater Protection Tech since 2003. He holds professional geologist certification in Kansas and Missouri. Doug received a B.S. degree in geology from Kansas State University.



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