

Legally (Relevant



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Looking Back, Looking Forward

Change seems to be everywhere with the beginning of 2022. Three areas with legal implications are discussed below.

Vaccination Mandates in the Workplace

Many employers have adopted policies concerning COVID-19 vaccinations by employees. For employers charged with protecting public health, vaccinations help keep employees healthy, at work available to perform the mission.

Some employers, including KRWA, have been required to adopt such policies. In the case of KRWA, that requirement came as the result of a subcontract with NRWA for the vital Circuit Rider program, as the renewed contract with USDA Rural Development for that program contained that requirement.

The application of a vaccination policy differs from employer to employer and can be very situation-dependent. The rules remain fluid, with federal guidance, state legislative action and court cases seeming to change weekly.

For most employee workplace vaccination policies, as with other workplace physical requirements, federal and state law require that there be provision for an exception based on employee health conditions that prevent the employee from complying with the policy, as well as an exception for employees who choose not to comply based on sincerely held religious belief. If an application is granted, the employer then determines if the employee can be accommodated without creating undue hardship on the employer.

In the case of COVID employer vaccination policies, applications for exception based on health conditions have been rare, while applications based on religious belief have been more common. In considering applications for these exceptions, employers have long been discouraged from inquiring deeply into the sincerity of the religious belief, considering such inquiries to be extremely difficult to perform fairly.

The Kansas legislature took this proposition to the ultimate end with the enactment of HB 2001, signed into law by Governor Kelly on November 23, 2021. This law prohibits Kansas employers who receive such an application for exception to a vaccination requirement from inquiring into the sincerity of an employee's religious belief. In effect, the legislation results in a "no look" rule for an employee claiming the religious belief exception. An employee who believes his or her employer has violated this law may file a complaint with the Kansas Department of Labor to investigate and report findings, with possible

referral to the Kansas Attorney General for legal action. Substantial civil penalties may be assessed for each violation.

Another significant provision in HB 2001 is that employees discharged from employment based on failure to vaccinate in accordance with an employer vaccination policy are entitled to full and immediate unemployment benefits. Generally, an employee's discharge due to failure to comply with a lawful employment policy results in denial of unemployment benefits. HB 2001 changes that result in this limited circumstance.

The end to this story has not yet been written. Looking back two years, it is hard to imagine that this would be a subject of a "Legally Relevant" column. Systems' responsibilities to their customers, to provide safe workplaces for all of their employees while retaining a vital workforce and respecting individuals' personal beliefs all require awareness and vigilance.

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The 2020 Census Results – What Do They Mean?

The 2020 U.S. Census is complete. The results have been analyzed and are available to everyone. A search of the census for Kansas will reveal a wealth of information in easy-to-use formats on a county-by-county basis, including population, population changes, residents' age, etc.

This information can be a helpful planning tool for water systems across the state. Changes in population and demographics can be useful in predicting future demand, as well as changes in a

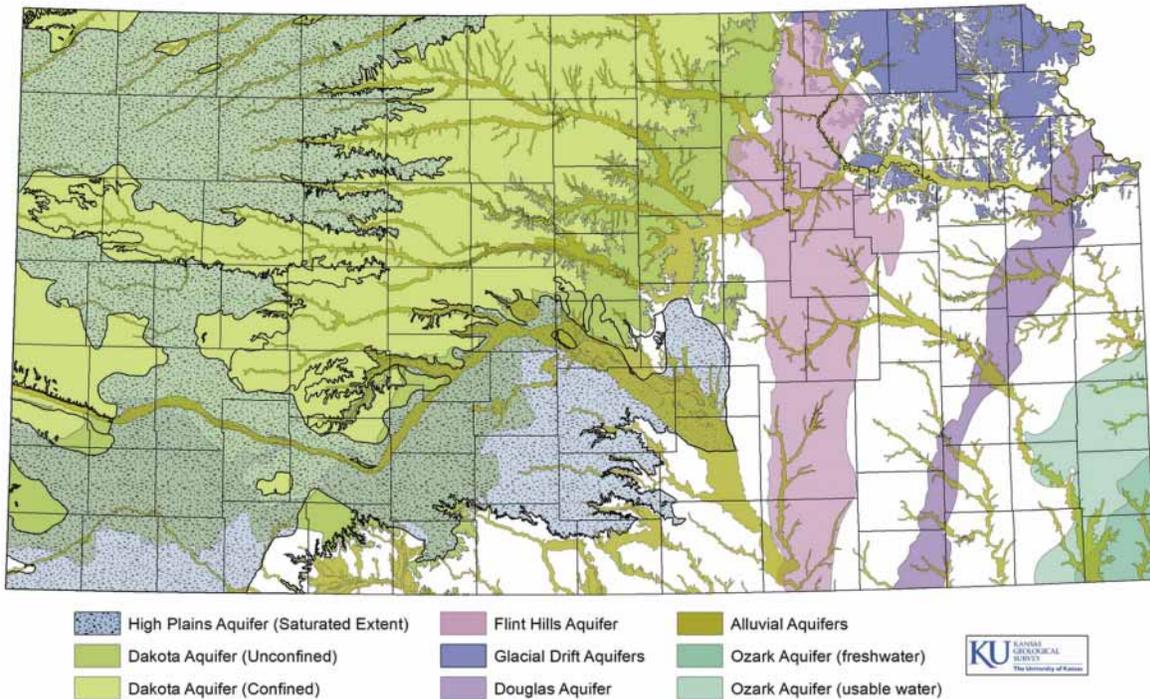
user base. When that demand and user base is growing, system growth needs to be considered as part of a long range plan. But what if, as is the case for many Kansas water systems, the trends point the other direction – declining demand and user base?

Those systems experiencing decline like this are likely looking at an economic reality. Because of the outsized role of fixed costs in the water industry's cost structure, reduced demand and reduced numbers of customers tend to reduce income without an equivalent reduction in costs. Boards and managers can address this in two ways: 1) plan for (potentially significant) increased rates and fees; or, 2) find efficiencies.

In searching for efficiencies, special attention should be paid to options available under Kansas law. It may be that this is best and most easily achieved by contracting for services, whether for maintenance and repair, bookkeeping/billing, or even management and operation. Kansas statute 82a-619 provides broad authority for contracting for services. The benefit of contracting for services is that a contractor (which may be a neighboring RWD or city) may have excess capacity, as well as the needed tools and equipment, insurance, etc., to provide the needed service much less expensively than the system can provide all of those things itself. Contracting is not permanent, as it can be for a limited time so that if it is not working well, it can be terminated.

Other options of a more permanent nature include consolidation (KSA 82a-639 through 645), acquisition of an RWD by a neighboring city (KSA 82a-649) and acquisition of an RWD by another RWD (KSA 82a-650). These options have varying procedures, and each has their advantages and disadvantages in a given situation. Legal counsel needs to be consulted to help in evaluating these options and advising the management and board on suitability.

Census data is but one consideration in planning a future course for a water system. No one can predict the future, but it is not difficult to imagine that one or more of the tools described above will be needed for a good many water systems in Kansas in the years ahead.



This graphic shows the major aquifers of Kansas. Most of the High Plains Aquifer is closed to new appropriation.

The Future of Water Law in Kansas

Since 1945, Kansas water law has followed the Prior Appropriation Doctrine. So-called "western water law" which generally has been adopted by the states west of the Missouri River, the doctrine regards water to be owned by the people of the state, not the owner of the land where the water is found. It may be used for beneficial purposes (appropriated) through a permitting system, administered in Kansas by the Department of Agriculture, Division of Water Resources. Failure to use a water right without due and sufficient cause (good reasons) may result in the water right being deemed abandoned.

With origins in the civil law of Spain and Mexico, the Prior Appropriation Doctrine was promoted in the 19th century by mining companies seeking to develop and protect their mining claims. The doctrine has benefits in its relative simplicity – the first to use a supply of water for a beneficial purpose has the prior right, superior to that of other users who come later. In times of shortage, later users may be made to limit their use to the extent their use prevents prior users from fully enjoying their use.

That first-in-time, first-in-right feature is central to western water law, and would seem relatively straightforward to apply. But it can be cruel in its application as a lower priority user making a very important use of water (for example, watering livestock, or supplying water to an RWD or city) may be lower in priority to a less important use. The system can be the source of much conflict, which plays out in the DWR, and sometimes into the courts. The problem is amplified as water sources evolve and precipitation swings from excess to drought. To make matters worse, many areas have been over-appropriated, with permits to use water exceeding the water available for use.

Efforts are underway to tweak the law, providing for various kinds of "banking" or deferred use intended to encourage conservation without loss of the valuable water right. But there is also consideration of this entire system of water law, with its roots in a desire to develop a mostly undeveloped region, and whether it is ideal in a modern world where overdevelopment and overuse is the risk.

A future column will study these questions.

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