Legally Relevant

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Kansas Water Law Basics

First, what this article is not. It concerns the basics of Kansas water law - the fundamentals of what gives us the right to the use of water in a specified place from a specified source, and the limitations on such rights. It does not concern regulation of water quality or the many other aspects of "water law" that water systems deal with on a day-to-day basis.

While this article will cover Kansas water law basic principles, it is not anywhere close to a thorough explanation of water law – that would take the whole magazine. It is also more theoretical than practical. There have been many good articles on various aspects of water law that have practical application to water systems published in The Kansas Lifeline. A list of some can be found at the end of this article. Also, with specific questions about how to understand your water right, buying a water right, or making changes to a water right, you can start by contacting KRWA staff who can get you pointed in the right direction.

So why bother learning about the basics of water law? Because it matters – to everyone who serves as an elected official, a manager, and everyone else working to meet peoples' needs for water—today and into the future. Of course, much of the work and decision-making on water supplies will be made with the help of professional consultants, including attorneys, engineers, and hydrologists. Still, it helps with those discussions to be conversant with the subject to understand what is being recommended and why.

Everything changed in 1945

Until 1945, the law of water in Kansas had followed that of the eastern United States, borrowed from England. Surface water was treated as belonging to the owners of land that adjoined the water, and groundwater was governed by the "absolute ownership" rule, which held that landowners had the right to use all the groundwater they could pump from their land however they pleased. All that changed in 1945, when the legislature enacted the Kansas Water Appropriation Act (KWAA), thereby adopting the "prior appropriation doctrine" (PAD) as the water law of the state. The PAD was in effect in most western states. It replaced the old law with a permitting system that treats the water as a resource of the state, to be permitted for beneficial use by a state agency, the Kansas Department of Agriculture, Division of Water Resources (DWR), according to a system of priority based on the time of application.

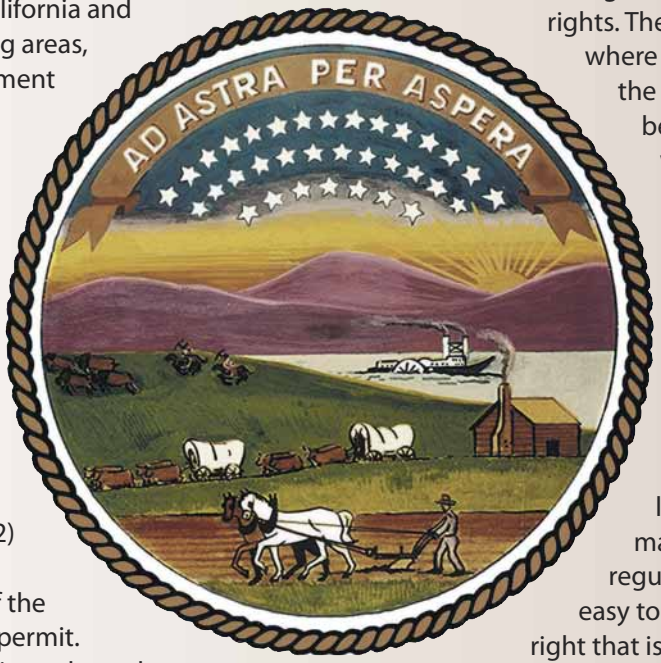
There are some important exceptions to the permitting system. Initially, those exceptions included vested rights – uses made before 1945, but those vested rights have now been converted to a form of permit. The other important exception consists of "domestic uses", such as an individual's use of water for household, garden and livestock

watering. Domestic users have the same rights to prevent impairment of their use as other water rights holders. Most importantly, unless there is a water right, or there is a right to use without need for a permit, such as with a domestic use, there is no right to the use of water and any attempted use would be illegal.

Water rights are important property rights. They are attached to the land where the water is used, NOT to the land where the water is being diverted.

Current Water Law in Kansas

The PAD originated in California and Colorado's hard rock mining areas, designed to protect investment in large-scale mining operations and encourage development of the largely undeveloped western United States. Resources seemed unlimited. Today, those resources are fully committed, often overextended.



The PAD has two core principles: 1) that water be put to beneficial use; and, 2) that water availability is governed by the priority of the date of application for the permit. This latter principle comes into play only in times of shortage – that is, the right of the user is affected when there isn't enough water to go around to everyone who has a permit.

Water rights all have specific attributes, consisting of a designated place of use, point of diversion, amounts and rates of authorized diversion, and a type of use. Changes in these attributes can be made under certain circumstances upon application to DWR. Cities' and water districts' use is called municipal use.

Water rights are important property rights. They are attached to the land where the water is used, NOT to the land where the water is being diverted. Thus, the water right that is used from a well (place of diversion) is not attached to the land where the well is located but to the land where the water is put to its beneficial use. This is a vital fact, misunderstood not only by many (most?) landowners but by a good many lawyers who do not regularly deal in water law. It's easy to understand that a water right that is used to irrigate a field is attached to the land where the irrigated crop is located, but where is the place of use for a water right that serves a city or water district (a municipal use)? For that type of water right, the place of use is generally described as the "City of _____" or "territory of RWD No. __ " and its environs.

Water rights are transferable. Water rights will generally transfer with a transfer of ownership of the land where the water is

For further reading ...

Check these articles concerning water rights and administrative issues in prior issues of *The Kansas Lifeline*.

- *DWR Passes the Torch* – https://krwa.net/portals/krwa/lifeline/2003/DWRChief.pdf
- *Kansas Department of Agriculture Simplifies Consumptive Use Rules for Water Right Conversion* – https://krwa.net/portals/krwa/lifeline/1803/KDAsimplifiesRules.pdf
- *What's a LEMA? (And the Alphabet Soup of Kansas Water Law)* https://krwa.net/portals/krwa/lifeline/1811/AlphabetSoup.pdf
- *The Consequences of Overpumping Water Rights* https://krwa.net/portals/krwa/lifeline/2011/ConsequencesOverpumpingWaterRights.pdf
- *Ozark Aquifer Reopening for Appropriation* https://krwa.net/portals/krwa/lifeline/1103/1103_098.pdf

Mega-bill Introduced to 2022 Legislative Session

A 286-page "mega-bill" was introduced to the 2022 Kansas legislature in February. Following months-long, intensive study by the Kansas House Committee on Water, the bill was ambitious to say the least. HB 2686 would have transferred water regulation permitting from KDHE and the Department of Agriculture, Division of Water Resources, and water planning from the Kansas Water Office to a new single cabinet-level agency, the Department of Water. It would have made significant changes to the way water, particularly water used for irrigation from the major aquifers, would be regulated.

Although supported by a wide range of stakeholder groups, including conservationists, outdoor sportsmen and cities, the bill met a wall of opposition from the major agricultural organizations, including the Kansas Farm Bureau, Kansas Livestock Association and Kansas Corn Growers. That opposition centered on what was perceived to be an expanded role for state government in water regulation, with opponents preferring local control. When the bill stalled in committee, a substitute bill was offered as a replacement. Drastically scaled down from the original, the substitute bill merely required detailed financial reporting by the state's groundwater management districts over the next five years, and evaluation of conservation efforts, apparently in response to a view that some of the GMDs have been largely ineffective to conserve the aquifers they serve. The Substitute failed to gain House approval and the bill died.

Perhaps the original HB 2686 was overly ambitious. It covered a wide range of facets of water, some of which set off alarms among some stakeholders. There were some problems in the legislative process once the bill was introduced. Time will tell, but no one will be surprised if elements of this bill resurface in the future.

Read more about this in the article "Water Issues Garner Significant Attention During 2022 Kansas Legislative Session" in this issue by Ken Kopp, KRWA Water Rights and Source Water Specialist.

being used unless expressly excluded from the transfer. Water rights can also be sold separately from the land to which they are attached, subject to approval by DWR, and may be put to a different type of use (for example, changed from an irrigation to a municipal use), again subject to approval by DWR. Note that a change in the type of use will frequently result in a change in the amount of authorized use, a significant factor for cities and RWDs to consider when weighing a proposed purchase of a water right.

So what happens in times of shortage when there isn't enough water to go around for everyone who has a water right? There is nothing anyone can do to make it rain so that a dry stream will flow, and there is not much that can be done in the short term if a well goes dry because of widespread decline in the aquifer. But if the water that a water right holder is entitled to is unavailable (impaired) because of the use by someone who has a lower (junior) priority right, the prior (senior) right holder may seek administration. The process usually begins with that senior right holder making a complaint to DWR. DWR will then begin an investigation. This can be a reasonably short process, but in others, this can take a considerable amount of time, involving measurements taken over several weeks. In some instances, the results of the investigation will be inconclusive. But if the senior right holder's ability to take water is in fact being impaired by the use of a junior right's holder, the Chief Engineer of the DWR can issue an order to reduce or cease use. That order may be appealed to the Secretary of Agriculture, and even that decision can be appealed in court. Water rights holders also can bypass DWR and take the claim straight to district court. Needless to say, in extreme circumstances, this process may extend from a few weeks, to months, and even years. In one such case, Garetson Bros. v. American Warrior, the dispute lasted more than 14 years.

Conclusion

The law governing water in Kansas has since 1945 followed that of the western states, relying on the prior appropriation doctrine. Under that system, the water does not belong to the owner of the land that adjoins the lake or stream, or the land where the well is located, but to the state, which can issue a permit to use water for a specified beneficial use, at a specified maximum quantity and rate of flow, to be diverted and used at specified places. Unless the use falls within an exception from the need for a permit, such as domestic use, it is illegal to use water without complying with this permitting process.

The priority of rights embodied in the permit system becomes critical in times of shortage when the water right holder with the earlier permit can demand that a user with a later permit reduce or stop using water. In times when water is becoming increasingly scarce, demands are shifting, the economic and societal benefit of some uses is in transition, the KWAA/prior appropriation doctrine finds itself under increasing criticism. In the next Legally Relevant article, we'll consider these criticisms and how the law is adapting to these changing circumstances.