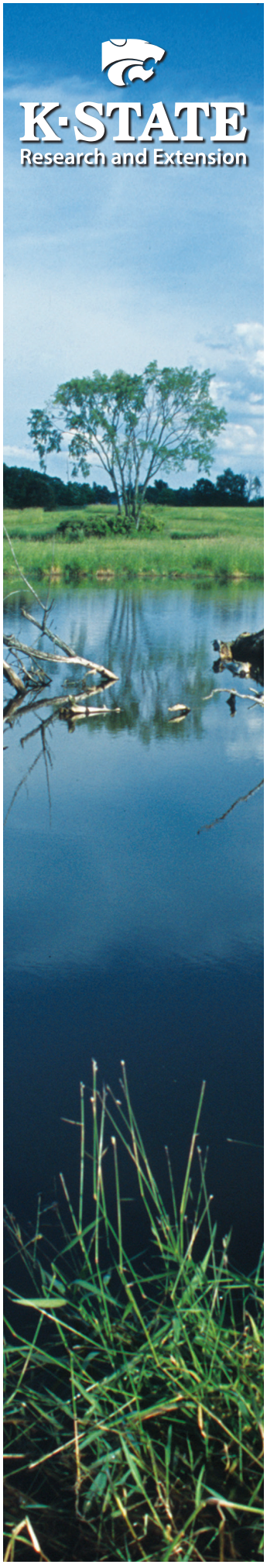

Water Primer: Part 5

Water Law

Introduction

Kansas water law was initially based on common law that featured two broad classes of application: one for surface water and the other for groundwater. Surface water common law was the **riparian doctrine**.

The Latin roots of *riparian* mean "pertaining to or situated on the bank of a river." The general principle of the riparian doctrine is that the individuals who own the land immediately adjacent to or land that is crossed by a stream have the right to the water flowing in the stream. Therefore, the only surface water right holders were those who owned riparian land.

The common law principle with regard to groundwater was that groundwater belonged to the landowner. The landowner could use as much groundwater as desired without regard for needs of neighboring owners or fear of legal action. This policy is often referred to as the **doctrine of absolute ownership**.

Important dates for Kansas water policies are shown in Table 1. The common law statutes were established in Kansas in 1868 by the Kansas legislature. Many eastern U.S. states still use common law principles. However, in western U.S. states, water law has shifted to some form of the **appropriation doctrine** of water use instead of common law principles of riparian and absolute ownership. The common law principle (riparian doctrine) works reasonably well in surface water rich areas, such as the eastern United States, particularly in light of the type of water use occurring during the developmental period of the United States. During this period, flowing water in streams and rivers was used as a power source to turn water wheels. So while water was diverted from a stream or river, for the most part, it was eventually returned to the original source. Application of common law principles proved to be inadequate as populations grew, and demands for water increased, especially in more arid regions.

Kansas began to incorporate the water appropriation concepts into water law with the 1917 legislation that created the State Water Commission and the 1919 appointment of the State Irrigation Commissioner. The legislature called for development of watersheds. While the legislature did not shift from the common law principles, it did introduce appropriation concepts.

In 1927, the old legislation was replaced with the creation of the Division of Water Resources (DWR) as part of the State Board of Agriculture and created the position of Chief Engineer (head of DWR) in 1933. However, a 1944 court decision on the Equus Beds area of Kansas demonstrated the need for an improved water policy for the state. This resulted in the governor forming a committee to study Kansas water law and make legislative recommendations. The process culminated in the 1945 Kansas Water Appropriation Act (KWAA). The KWAA is referred to as the **prior appropriation doctrine**; this method of governing water use sets priorities following the principle of "first in time, first in right."

Kansas Water Appropriation Act

The concept of prior appropriation developed in the water-short areas of the western United States. The basic concept is that the individual who establishes a beneficial use first, has the priority right. Important features of the KWAA are shown in Table 2. All

the water in the state is owned by the people of the state, but it can only be used by individuals who follow the process to put the water to beneficial use, except for private domestic use.

Non-private water use must be permitted for use by the rules of the water appropriation act. New appropriations are junior to those preceding (called senior) and appropriations may continue until the resource is fully allocated. The right to use water is a property right that may be bought and sold. Major legislative changes made to the KWWA are noted in Table 3. Significant water legislation was passed in 2012, as shown in Table 4.

Kansas Groundwater Management District Act

In Kansas, the Division of Water Resources within the Department of Agriculture issues and administers water rights. However, by the late 1960s, areas of the Ogallala Aquifer were in decline. The concern about over-development resulted in the enactment of the Groundwater Management District (GMD) Act. While GMDs still must operate within the basic water law doctrine of the state, their formation was to allow local water users more input into determining the policies for water use in their areas.

Interstate Compacts

Neither surface water nor groundwater respect state boundaries; therefore, individual states sharing important surface water flow can develop agreements on how to share the water supply. Kansas is involved in four interstate river compacts. In addition, Kansas also participates in the Missouri River Basin Association of States and Tribes. The four compacts are noted in Table 5.

Table 1: Significant Events for Kansas Water Agencies and Kansas Water Law

Year	Event
1861	Statehood
1868	Adopted Common Law Principles: Surface water — Riparian Doctrine Groundwater — Absolute Ownership
1917	Formed State Water Commission (SWC)
1927	Created the Division of Water Resources (DWR) and abolished the SWC
1945	Kansas Water Appropriation Act (KWAA) passed
1949	First court challenge to KWAA. Upheld by Kansas Supreme Court
1955	Established Kansas Water Resources Board
1957	KWAA amendments including definitions of "water rights"
1972	Groundwater Management District Act
1978	KWAA amended to require water rights for all non-domestic uses
1978	GMD Act amended, Intensive Groundwater Use Control Area (IGUCA) provision added
1981	KWRB changed to Kansas Water Authority and Kansas Water Office
1983	Water Transfer Act enacted
1984	Minimum desirable streamflows established
1989	Water use reporting improved via penalties for failure to report
2001	Water Banking Act enacted
2012	Significant new water legislation (see Table 4)

Water Rights

There are two types of water rights in the state of Kansas. These are vested water rights and appropriation water rights. Vested water rights are based on water put to use before June 23, 1945, the date of the Water Appropriation Act. A vested right is senior to any appropriation right. There are not many vested rights and they tend to have been appropriated small quantities. Since 1980, no new vested water rights can be granted in the state.

The appropriation water right is by far the most common type of water right in the state. The water right has six main attributes, in addition to identifying who is putting the water to use. These attributes are: 1) priority date, 2) maximum rate of diversion, 3) maximum annual quantity, 4) point of diversion, 5) place of use, and 6) type of beneficial use.

Application Process. Any person may apply for a permit to appropriate water. This is the first step in the process of establishing a water right. The application for a water permit is filed with the chief engineer of the Division of Water Resources (DWR). Anyone who wishes to use water for any purpose other than domestic water supply must file an application that includes information describing the proposed attributes of the use and pay a filing fee.

The application is reviewed by DWR and a GMD, if the area of use is within a district. The application will be approved and a permit to proceed will be issued if it is determined that water is available for appropriation at the proposed site that would not interfere with other area water rights, minimum desirable stream flow or other public interests, and the application meets all other DWR requirements.

The permit holder can now proceed in developing the authorized diversion works, which is most often a well but could also be a stream pump station or retention dam. Once the diversion works are completed, the permit holder notifies DWR for a site inspection. All inspection fees and installation requirements must be completed before the notice and proof of completion are accepted. The holder usually has one full year in addition to the remainder of the application acceptance year to complete the diversion works.

The appropriation permit holder now begins a period to "perfect" the water right or put the water to use as authorized by the permit. The perfection period usually lasts five years, although the period can be extended if requested before expiration of the original period. During this time, the largest amount of beneficial use, up to the limits of the original terms and condition of the application permit, will determine the water right.

Table 2: Significant features of the 1945 KWAA

1. All water in Kansas was dedicated to people of Kansas for use by the public but subject to regulation and control by the Chief Engineer.
2. Both surface water and groundwater could be appropriated by use by obtaining a permit from the Chief Engineer.
3. The principle of "first in time, first in right," or the prior appropriation doctrine, was the guiding principle for deciding disputes between appropriators.
4. Existing uses (pre-1945) were riparian or groundwater rights that were not being used.
5. Termination of water rights could occur after three years of non-use.

Table 3: Important Modifications to the 1945 KWAA

Year	
1957	Water right defined as a "real property right appurtenant to and serviceable from the land on or in connection with which the water was used."
1957	Potential impairment definition expanded beyond quantity aspects to include quality aspects.
1977	Exceptions to the mandatory water permit process were made; exceptions included domestic users and salt water production wells associated with the oil and gas industry.
1981	It became illegal to appropriate water without a permit except for 1977 exemptions.

The application limits on total quantity of withdrawal are established by the state. For example, although each county has a specific application amount limit, in general irrigation applications are limited to no more than 2 acre-feet/acre in the western one-third of Kansas, 1.5 acre-feet/acre in central Kansas, and 1.0 acre-foot/acre in eastern Kansas. Therefore, a permit might request a volume of 320 acre-feet for a quarter section (160 acres) in western Kansas.

DWR conducts a field inspection after the perfection period to determine and verify the major attributes of the proposed water right. Once the inspection is complete and pertinent information relative to the site is reviewed, the appropriation permit holder will receive a draft certificate or appropriation for review. Any comments from the permit holder on the draft certificate must be made to DWR within 30 days.

Assuming the draft certificate is accepted, the permit holder receives the actual certificate, which must be filed with the register of deeds in the county where the authorized point of diversion is located. The permit holder now has completed the process for establishing a water right, which can be maintained as long as the terms and conditions of the right are followed.

Maintaining a Water Right. One of the major conditions of maintaining a water right is filing the annual water use report. This report is required during the perfection

Table 4: 2012 Kansas Water Legislation Summary

Bill Number	Title	Description
HB 2516	Amendment of the Kansas Water Banking Act	A water bank establishes procedures to allow short-term water leases between willing buyers and sellers. The bill adds more permanence to the banking program and modifications that may aid increase in banking activity.
HB 2517	Amendment of the Water Right Transition Assistance Program (WTAP)	WTAP is a voluntary, incentive-based water right retirement program. It establishes the procedure to allow the permanent dismissal of irrigation water rights and is focused on reducing consumptive groundwater use in over-appropriated areas. The bill made improvements in WTAP and extends the program to the year 2022.
HB 2451	Amendment of the Kansas Water Appropriation Act with regard to water right abandonment	HB 2451 amends the KWAA and applies to areas closed to new water right appropriations. Its intent is to eliminate any "use it or lose it" water policy attributes in Kansas water policy.
SB 148	Water right division agreements	SB 148 makes clear the authority of a water right owner to divide that water right into two or more distinct water rights without losing priority.
SB 272	Amendment of the Multi-Year Flex Account Program (MYFA)	The MYFA program allows an irrigator to switch from an annual allocation of water to a five-year water allocation (term permit) period. It expands the irrigators' capabilities and options to manage their crop water but without increasing long-term water use under the original water right.
SB310	Amendment of Groundwater Management Act to allow Local Enhanced Management Areas (LEMA)	The LEMA concept developed from the IGUCA (see Table 2, 1978). LEMA establishes a process that allows local communities of producers to collectively decide their future by initiating the implementation of conservation plans that meet their local goals within their groundwater management district.

period. The report is required even in years of no water use and the reason for non-use should be explained. A water right is considered abandoned after three years of non-use without due and sufficient cause for non-use. Due and sufficient causes for non-use include water being unavailable from the source (no stream flow or stored water), adequate natural rainfall, crop rotation to dryland crop or an enrollment in conservation reserve program, or pollution of existing source.

One criticism of the water right development and maintenance process with regard to water conservation is that many feel it promotes a "use it or lose it" attitude. During the perfection period, the permit holder knows that a certificate will only be issued for the maximum amount of water used. Although an extension of the perfection period can be requested, if very low water use occurs during the perfection period, the permit holder interprets a certificate that is issued for less than the maximum allowable amount as "lost" water. Another factor that perpetrated this concept is the annual allocation of the quantity of water. Each year the total amount of the water right is available for use, any amount of the annual allocation that is not used during the year does not carry over into the next use year. Many individuals feel that this is lost water, especially in a groundwater system where the "unused" water remains available and does not flow away as in a surface water supply.

Transferring a Water Right. There are currently more than 30,000 active water rights in the state of Kansas. With water resources developed to their maximum or beyond in many areas of the state, it might be expected that individuals may want to change type of use, place of use, or location of use as their operations change or as current right holders sell their water right to other interests. Kansas law does

allow changes in the water right as long as specific change procedures are followed. The change procedure is subject to approval by the chief engineer (DWR) who reviews the proposal to determine if the proposed change is still for a beneficial use and has a reasonable allocation for the proposed use. The proposed change cannot impair an existing water right and cannot prejudicially affect public interest. Another important criterion is that it will not increase consumptive use.

One common change has been the conversion of an irrigation water right to municipal or industrial use. The consumptive use policy will allow no more water to be consumed by the proposed use than what was consumed by the irrigation use plus an irrigation efficiency factor. Irrigation might apply water to a field that could be returned to the source as run-off or deep percolation and therefore was not consumed or removed permanently from the source. This is considered as part of the change process.

Resolving Conflicting Uses. Although time is the chief factor in establishing the seniority of a right, the appropriation act has a section that establishes a preference for conflicting uses of water. It states "where use of water for different purposes conflict, such uses shall conform to the following order of preference: Domestic, municipal, irrigation, industrial, recreational, and power uses."

The section establishes these preferences for conflicting uses of water, but the next sentence states that priority of date, not the type of use, establishes the preference in time of shortage.

This section also mentions condemnation, although it does not expressly grant condemnation power. Condemnation is the process by which a government, usually state or local, can take private property for public use upon payment of just compensation. It has been suggested that one possible interpretation is that a municipality with an inadequate water supply and with a junior water right to a nearby irrigation right, for example, could not take action to limit the senior irrigation right use based on seniority or date of permits. However, the city could use the condemnation process on the irrigation right because the city has condemnation power. There are other interpretations as to the potential application of this section as well.

Table 5: Kansas Interstate Compact Agreements

Year	Compact	States Included
1943	Republican River (KSA 82a-518)	Colorado, Nebraska, Kansas
1949	Arkansas River (KSA 82a-520)	Colorado, Kansas
1965	Arkansas River (KSA 82a-528)	Kansas, Oklahoma
1971	Big Blue (KSA 82a-529)	Nebraska, Kansas

Federal Water Policy

The administration of water rights is primarily a function of individual states. The federal government has a role and had a larger influence in western states because land in the west was at one time largely the property of the U.S. government, which transferred to private ownership by various acts. Although the water rights are largely administered by the states, the federal government still has the right to reserve water for specific purposes as long as it complies with state authority. There are several other constitutionally based federal authorities such as the commerce clause, which gives Congress the power "to regulate commerce with foreign nations, among the several states, and with the Indian Tribes." This section places all navigable streams under federal control. The federal government also has interests in flood mitigation, and private utilities must be licensed before dam construction because this could have an effect on navigable streams. Since most streams and rivers cross state boundaries, interstate compacts are encouraged by the federal government as the basis of agreements between states, which must be ratified by Congress after being negotiated by the states. The Supreme Court hears any interstate compact disputes. These agreements can deal with quantity and/or quality issues.

Another avenue for federal influence into state water policy is through environmental laws, beginning with the 1965 amendment of the 1948 Federal Water Pollution Act, which extended the federal role and jurisdiction to include all navigable water and required states to set water quality standards for interstate waters. In 1972, the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), was passed to address enforcement issues that still remained from previous legislation, as well as continue the federal role of providing financial assistance for the construction of municipal sewage treatment plants.

Another important federal act is the Safe Drinking Water Act (SDWA) that was passed in 1974 to help protect public health by regulating public drinking water supplies. The act has been amended several times to require additional efforts to protect drinking water and its sources.

Environmental Laws Affecting Water

Kansas established laws governing water use and protection before the federal CWA and the SDWA were established. As new agencies were formed and new technologies were developed, laws were modified. Many of these modified laws remain in effect and may be more restrictive than the federal law. Laws that regulate water are logically divided into water quantity and water quality. Laws regarding quantity are specifically delegated to the states; there are no national water rights.

The CWA and the SDWA are the two major national laws that form the basis for water quality regulations in the United States. States work with the EPA to address and meet the provisions of these laws. States can be more — but cannot be less — restrictive than the federal law. Kansas also has laws that relate to water quality, several predating federal law. Although they are less comprehensive than the federal law, they are important in protecting Kansas water.

Clean Water Act. The landmark Clean Water Act was passed by congress in 1972 after more than a decade of escalating water quality problems, including major fish kills in Kansas and a river in Ohio catching fire multiple times. The CWA requires permits for all point source discharges, including those from wastewater treatment plants, industry, and livestock containment facilities larger than 1,000 head. The CWA established the goal of obtaining fishable and swimmable waters and set in place timetables and procedures to accomplish this goal. The EPA, through authority of the CWA, requires the states to monitor and report water quality via the biannual 305b report. The CWA requires EPA to monitor the water quality progress and report the status to Congress. The EPA establishes overall principle and leaves to the states the details and extent of monitoring. Kansas has a long record of excellent monitoring that places it far ahead of most states. This monitoring gives Kansas a good knowledge of water quality conditions since about 1980.

The Clean Water Act charges the states to identify beneficial uses for stream segments (reaches) and to set water quality standards for streams and lakes for these uses. The CWA established the procedure to set total maximum daily loads (TMDLs) for stream reaches that do not meet the water quality standards for identified uses. Kansas and other states are in the process of addressing TMDL provisions of the CWA. Because beneficial uses and stream standards are set by the states, there may be discrepancies on streams that cross state lines.

The TMDL process is designed to set responsibility and establish a procedure to move closer to our national goal to meet surface water quality standards in an orderly manner. However, as with most changes, setting and implementing TMDLs to improve water quality is time consuming, expensive, and involves opportunity for conflict.

Safe Drinking Water Act. The Safe Drinking Water Act (SDWA) was passed in 1974 and amended in 1977, 1980, and 1986. This act requires the EPA to develop national drinking water quality standards and to establish requirements for treatment, monitoring, and reporting by public water systems. Water systems that have 15 connections or serve at least 25 people per day for at least 60 days per year must have a public water supply permit. This includes noncommunity systems serving schools, churches, and restaurants as well as community systems serving trailer parks, rural water districts, cities, and towns.

The EPA is charged by the SDWA to set standards and to review and update standards. To date, standards have been set for 81 contaminants. Public water systems in Kansas are also required to test for more than 20 unregulated contaminants, some of which may be regulated in the future. Drinking water regulations are constantly being developed, reviewed, and revised. This means that regulation of contaminants is likely to change in the future as more is learned about their health effects and occurrences.

For the SDWA, the federal government sets drinking water standards through the EPA. The state government, through the Kansas Department of Health and Environment, is authorized by primacy to implement drinking water standards in Kansas. Local water utilities are responsible to build, operate, and maintain local wastewater systems with state oversight. They also monitor and report results to KDHE, and KDHE prepares a summary report to EPA. The utility also prepares the annual Consumer Confidence Report to inform the consumer of the drinking water condition.

A Final Note

A clean, reliable supply of water has and will remain an important resource for having a good quality of life and economic well-being. Kansas water law planning procedures and water law have been developed to cope with water resource competition to both protect the public interest and the rights of individual users. The variability of supplies and complexity of the hydrologic interactions make water resource management a difficult task.

Reference

Brownback, Sam and Wadley, James B. 1989. *Kansas Agricultural Law*, 2nd ed. Topeka, Kan.: Lone Tree Publishing

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