

**Recommendation for a Study of Modern Kansas Water Law**

Burke W. Griggs

Associate Professor, Washburn University School of Law

burke.griggs@washburn.edu

Testimony before the Joint Interim Committee on Natural Resources

2017.11.10

I have prepared this testimony in response to a request from Chairman Sloan and Ms. Heather O'Hara, Principal Research Analyst for the Kansas Legislative Research Department. This testimony recommends that the Legislature authorize funding for a comprehensive legal review of modern Kansas water law, as it confronts two fundamental problems: the physical problem of permanent water resources depletion across the state, and the textual problem of the law's accumulated ambiguities and contradictions. Both problems are getting worse. In my opinion as a private lawyer, a government lawyer, and a law professor, such a study is sorely needed. This testimony does three things: (1) it provides some brief background to previous legal and policy studies of Kansas water issues; (2) it points out recent legislative problems that have arisen from confusion over Kansas water law that a study could help avoid; and (3) it concludes with a preliminary description of a proposed study, including a list of its potential participants.

**I. Background.**

Kansas has conducted four major studies of Kansas water issues since 1944. The last comprehensive legal study was conducted in 1957.

The first and most ambitious was conducted at the behest of Governor Schoeppel in 1944.<sup>1</sup> This study was undertaken in recognition that Kansas water law was fundamentally deficient in regards to groundwater, to interstate allocation of water resources, and to the issue of jurisdiction over the State's water supplies. This report provided a review of these problems, as well as a review of how several western states had responded to those problems in their own water codes. It concluded with draft legislation for the 1945 Kansas Water Appropriation Act ("KWAA"). The 1945 legislature adopted most of that legislation, upon which most of its water law depends.

Shortly after the enactment of the KWAA, the development of the High Plains-Ogallala Aquifer presented new and difficult legal problems regarding the development of non-renewable groundwater supplies. Largely in response to these problems, the Kansas Water Resources Board conducted a substantial follow-up study in 1956.<sup>2</sup> The primary authors of this report were two national authorities on water law: Wells A. Hutchins, a senior attorney for the United States Department of Agriculture, and Professor Earl B. Shurtz, of the University of Kansas. The 1956 Report thoroughly reviewed how the 1945 KWAA had performed over the previous ten years, and analyzed the legal problems associated with large-scale groundwater development. Like the 1944 Report, it drafted legislation in response to these problems which produced the 1957 amendments to the KWAA—the last time the KWAA has been systematically revised.

<sup>1</sup> GEORGE S. KNAPP, *ET AL.*, THE APPROPRIATION OF WATER FOR BENEFICIAL PURPOSES: A REPORT TO THE GOVERNOR ON HISTORIC, PHYSICAL, AND LEGAL ASPECTS OF THE PROBLEM IN KANSAS (1944).

<sup>2</sup> KANSAS WATER RESOURCES BOARD, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER (1956).

Events since the 1950's have repeatedly affirmed the merits and utility of the 1944 and 1956 reports. The constitutionality of the KWAA was repeatedly and consistently affirmed by the Kansas Supreme Court during the 1950's and the 1960's—unlike in other states, where supreme courts were regularly overruling state water law, most notably in Colorado. The 1957 amendments to the original 1945 KWAA established a legal clarity for groundwater development while protecting existing rights. This solid legal structure of the KWAA also enabled the state to compile comprehensive regulations for water usage.

The 1956 Report remains the last comprehensive study of Kansas water law. In 1978, the Governor's Task Force on Water Resources issued a report consisting of thirty-nine different recommendations concerning Kansas water policy.<sup>3</sup> Many of these recommendations involved issues of local stakeholder participation as well as reservoir-based water supply management. The 1978 Report influenced subsequent legislation related to the Kansas Water Office, and its role in brokering reservoir storage to entities across the state. Importantly, the Task Force recommended that the state hire permanent attorneys with expertise in water law, and urged the State's law schools to teach water law on a regular basis.<sup>4</sup>

One of those teachers, Professor John C. Peck of the University of Kansas School of Law, produced two reports on specific aspects of Kansas water law. The first, commissioned by the Kansas Water Office in the early 1980's, was a study of the Water Transfer Act, which resulted in several amendments to the original act. The second, commissioned by the United States Department of Commerce at about the same time, concerned the legal aspects of diverting water from the Missouri River to western Kansas.

In 2015, the Kansas Water Office and the Kansas Department of Agriculture completed *A Long-Term Vision for the Future of Water Supply in Kansas* ("Kansas Water Vision").<sup>5</sup> Compiled at substantial expense and with impressive coordination among state agencies, regional water entities, and thousands of stakeholders' and citizens' individual input, the Kansas Water Vision provides a series of recommendations, or "action items," for how the State should meet its most pressing water supply needs. Like similar studies conducted by other western states (most notably Colorado), the Kansas Water Vision is essentially a goal-setting document.

The 1978 Report and the Kansas Water Vision are fundamentally policy reports. As for the Kansas Water Vision report, it intentionally does not contain any substantive legal analysis of the sort found in the 1944 and 1957 Reports.

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<sup>3</sup> GOVERNOR'S TASK FORCE ON WATER RESOURCES, FINAL REPORT OF THE GOVERNOR'S TASK FORCE ON WATER RESOURCES (1978).

<sup>4</sup> *Id.* at 20.

<sup>5</sup> KANSAS WATER OFFICE, A LONG-TERM VISION FOR THE FUTURE OF WATER SUPPLY IN KANSAS (2015), available at [https://kwo.ks.gov/docs/default-source/water-vision-water-plan/vision/rpt\\_water\\_vision\\_reformatted\\_kf1d56e11da40b6667970cff000032a16e.pdf?sfvrsn=0](https://kwo.ks.gov/docs/default-source/water-vision-water-plan/vision/rpt_water_vision_reformatted_kf1d56e11da40b6667970cff000032a16e.pdf?sfvrsn=0) (last accessed November 9, 2017).

## II. Problems related to the lack of a study.

Since Kansas last conducted a comprehensive study of Kansas water law in 1956, the waterscape of State, and indeed the world, has been completely transformed. The lack of a current evaluation of the law has raised three general problems.

First, the conditions under which owners of Kansas water rights hold and protect their rights have changed dramatically. Groundwater now dominates surface water; permanent depletion of water resources raises fundamental questions in property law about the defensibility of Kansas water rights; and the loss of perennial streams and groundwater-dependent ecosystems across the state raises worrisome threats of federal environmental regulation. These changes have brought new and unforeseen pressures upon the KWAA, leaving both the chief engineer and the courts with little guidance in novel factual situations. As a result, water rights owners have become concerned about the potential unpredictability of both regulatory and legal action, frustrating a core element of their property rights: the right to protect themselves. I listed a number of these problems in my October 31, 2017 testimony.

Second, the lack of a report has created (or worsened) what I call “legislative spot-zoning.” In response to both particular lawsuits and pet policy peeves, the legislature has enacted legislation that is problematic on its own, or is problematic in regards to the structure of the KWAA and the interdependence of its individual statutes. Influential stakeholders, as well as the State itself, can lose sight of this structure and this interdependence; and in so doing, the legislature can waste precious time and resources, as well as causing unnecessary confusion and cost-inefficient litigation. Examples of such legislation abound. They include:

- K.S.A. § 82a-740 (2008), which forbade any Public Wholesale Water Supply District from using eminent domain to obtain a water permit in Douglas County. This statute, enacted in response to one lawsuit, *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160 (2009), was meaningless and unenforceable from the day it was passed, because its wording did not apply to the parties involved in the lawsuit.
- K.S.A. § 82a-707, which claims to set forth the “principles governing appropriations” of water, but is in fact a jumbled and contradictory provision, largely because it has been amended piecemeal, most recently in 2010.
- K.S.A. § 82a-718(e) (2010), which excludes from forfeiture any groundwater right located in an area that has been closed to new water rights. Enacted with good intentions to get rid of the “use it or lose it” rule for Kansas water rights, the amendment provided a solution to a problem (pumping water merely to save a water right) that does not exist. Worse, the amendment has potentially paved the way for litigation in the future concerning the revival of long-dormant water rights.
- K.S.A. §§ 82a-741(e) (2011) and 82a-1041(k) (2012), which require the chief engineer to adopt rules and regulations for Water Conservation Areas and Local Enhanced Management Areas respectively; but these two statutes are silent on when those rules and regulations need to be adopted, or how the lack of such rules and regulations (as at

present) affect the status of WCA or LEMA proceedings initiated prior to the adoption of such rules and regulations.

Finally, the ambitious policy recommendations contained in the 2015 Kansas Water Vision report raise numerous legal issues about the durability and enforceability of the “action items” it recommends. The 2015 Kansas Water Vision expressly did not consider a legal study of the KWAA or other Kansas water law. However, given the investment the state has made in the “vision” process—not to mention the political and legislative capital the State has invested in its recommendations—it seems sensible to conduct sufficient legal analysis of these “action items” to ensure that they are legally permissible, and if not, to help the legislature determine whether legislation is necessary to make them so.

The best and most enduring water legislation across the West has usually been enacted in the wake of such studies. Such was the case in Kansas with the 1945 KWAA and the 1957 amendments; such was the case with Colorado, and its enactment of its major groundwater legislation in the 1960’s (the 1965 Ground Water Management Act and the 1969 Water Rights and Determination Act); similar studies in Arizona and California have produced well-framed legislation since then.

### **III. Recommendations for such a study.**

#### *a. Preliminary Scope*

I would recommend a comprehensive legal study of Kansas water law that includes at least the following topics:

- i. A review of the KWAA, K.S.A. § 82a-701 *et seq.*, as it has been amended since 1945, with particular focus on the problem of permanent water supply depletion;
- ii. A review of the Groundwater Management District Act, K.S.A. § 82a-1020 *et seq.*, both on its own and in regards to its relationship with the KWAA;
- iii. A review of the principal acts concerning the storage of water in federal reservoirs, the State Water Plan Storage Act, K.S.A. § 82a-1301 *et seq.* (1974) and the Water Assurance Program Act, K.S.A. § 82a-1330 *et seq.* (1986);
- iv. A review of the Kansas Water Transfer Act, § 82a-1501 *et seq.*;
- v. An examination of every statutory section of the above-listed acts to unearth and bring attention to the many ambiguities and other textual problems that have arisen since 1957;
- vi. Changes in federal water law since 1957 that affect the protection and enforcement of Kansas water rights, including Kansas’s rights to interstate water resources such as its interstate streams, rivers, and aquifers;
- vii. Changes in federal and state environmental law, most notably the Endangered Species Act and other legislation, that have substantially complicated western states’ water law regimes;

- viii. An analysis of takings issues under Kansas water law; and
- ix. An analysis of whether Kansas should consider conducting water rights adjudication proceedings throughout the state.

*b. Personnel*

I am glad to report that two prominent experts in Kansas water law have offered to participate in such a comprehensive analysis. The first is Professor John C. Peck, of the University of Kansas School of Law. The second is Leland E. Rolfs, the long-serving (but now retired) Senior Legal Counsel for the Division of Water Resources. Between 1978 and 2008, Mr. Rolfs was the principal defender of the KWAA and the principal author of most of the regulations related to the KWAA—an exceptionally long period of service for a government lawyer. I would suggest a preliminary roster composed of nine people—three principal investigators and a six-person planning and review committee, largely in imitation of how the 1944 and 1956 studies were staffed.

- i. Principal Investigators/Authors:
  - 1. Griggs, Washburn University School of Law;
  - 2. Peck, University of Kansas School of Law; and
  - 3. Leland E. Rolfs, Private Consultant.
- ii. Planning and Review Committee:
  - 1. The chief engineer, Division of Water Resources, Kansas Department of Agriculture;
  - 2. The director of the Kansas Water Office;
  - 3. An assistant (or special assistant) attorney general knowledgeable in water law;
  - 4. One lawyer with experience representing one (or more) of Kansas's Groundwater Management Districts;
  - 5. One lawyer from the U.S. Department of Interior Solicitor's Office; and
  - 6. One lawyer from the Kansas Legislative Research Department.

*c. Timeline and Cost of Study*

Because of the explosion in natural resources law since 1957, the scope of such a proposed study would necessarily and substantially exceed that of the 1944 and 1956 studies. As a result, the study may take longer to complete than these earlier studies, which were completed in an impressively short time (a mere five months for the 1944 Study, and “several months” for the 1956 study). As sketched out above, I would estimate the study to take two years. Unless, of course, the legislature decides otherwise. The scope of the study would necessarily affect its cost, which is too premature at this time to estimate.

I am happy to stand for any questions you may have regarding this testimonial response to the Chairman's request—or anything else you might want to discuss regarding water law.