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EVOLVING WATER LAW AND MANAGEMENT IN THE U.S.: KANSAS

JOHN C. PECK*

I. INTRODUCTION

Situated in the geographical center of the country, Kansas is a state in the tier of states from the Dakotas to Texas that mark the transition from the humid East to the arid West.¹ Elevation rises from under seven hundred feet above sea level in eastern Kansas to over four thousand feet in the west.² Rivers generally run from the dry west to the wetter east.³ Western Kansas is underlain by the High Plains Aquifer, which extends its reach to several other states.⁴ Roughly one-third the state's population resides in the two main population centers—the Kansas City-Lawrence-Topeka corridor in northeast Kansas and the Wichita-Salina area in central to south-central Kansas.⁵

This article focuses on the last fifty years of Kansas water allocation management. It excludes water quality and interstate issues. To understand this period and to place it in context, however, one must view the preceding period from statehood in 1861 to 1965. After briefly describing this earlier period, this article examines the fifty years from 1965 to 2015, and then concludes with some observations about the future.

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1. DOUGLAS G. GOODIN ET AL., CLIMATE AND WEATHER ATLAS OF KANSAS 4 (reprint 2004) (1995). Annual precipitation ranges from more than forty inches in southeast Kansas to around seventeen inches in southwest Kansas. *Id.* Kansas has an area of 82,278 square miles, which ranks fifteenth in the country. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 223 (2012) <http://www.census.gov/library/publications/2011/compendia/statab/131ed.html> (last visited Nov. 12, 2016). Its population is just over 2.8 million in 2010, ranking thirty-third, but its population density of 34.9 people per square mile ranks only thirty-ninth. *Id.* at 18-19.

2. U.S. CENSUS BUREAU *supra* note 1, at 226.

3. UNITED STATES DEPARTMENT OF AGRICULTURE NATIONAL RESOURCE CONSERVATION SERVICE, KANSAS ANNUAL PRECIPITATION, (Oct. 18, 2007) https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_032018.pdf (last visited Nov. 13, 2016).

4. V.L. MCGUIRE, CHANGES IN WATER LEVELS AND STORAGE IN THE HIGH PLAINS AQUIFER, PREDEVELOPMENT TO 2005, at 1 (May 2007), <http://pubs.usgs.gov/fs/2007/3029/pdf/FS20073029.pdf> (last visited Nov. 13, 2016).

5. See U.S. CENSUS BUREAU, QUICK FACTS: KANSAS, <http://www.census.gov/quickfacts/table/POP060210/20> (last visited Oct. 14, 2016) (stating that the total population for the state of Kansas on July 1, 2015 was 2,911,641); see also U.S. CENSUS BUREAU, AMERICAN FACT FINDER, <http://factfinder.census.gov/faces/tables/services/jsf/pages/productview.xhtml?src=bkmk> (last visited Oct. 14, 2016) (stating that the combined population for Kansas City, Lawrence, Topeka, Wichita, and Salina is 810,266).

II. WATER MANAGEMENT PRIOR TO 1965

Kansas achieved statehood in 1861.⁶ In both the territorial laws⁷ and the early state statutes,⁸ Kansas adopted the common law. The state was gradually settled from the wetter eastern part of the state to the dryer west,⁹ which accounts for Kansas' adoption of the common law water allocation doctrines of the eastern states—riparian rights for rivers¹⁰ and the English rule or absolute ownership for groundwater.¹¹ In the late eighteenth century, the legislature enacted statutes that hinted at moving toward the prior appropriation doctrine of the western states,¹² but when actual disputes arose, the Kansas Supreme Court chose not to recognize the doctrine, favoring the common law instead.¹³

Floods and droughts prompted Congress to adopt flood control and reclamation acts that impacted Kansas.¹⁴ The 1930's drought in Kansas caused the governor and legislature to study the situation with a view toward changing the water allocation rules of the common law. After a 1944 Kansas Supreme Court case affirming adherence to the absolute ownership doctrine for groundwater,¹⁵ the governor appointed a task force to review the law.¹⁶ It published its report in December 1944.¹⁷ The legislature accepted the recommendation of the report task force that Kansas change from common law water-allocation concepts to prior appropriation, and it enacted the 1945 Water Appropriation Act.¹⁸

The 1945 Water Appropriation Act fundamentally changed water allocation law in Kansas. It declared all water to be "dedicated to the use of the people of the state,"¹⁹ preserved rights of then-existing water users through "vested rights,"²⁰ authorized all new users of water—except for domestic users—to obtain "appropriation rights"²¹ through a permit application process,²² made the chief engineer of the Division of Water Resources (DWR) the prime water administrator of the state,²³ established the "first-in-time, first-in-right" doctrine of the

6. An Act for the Admission of Kansas into the Union, ch. 20, § 1, 12 Stat. 126 (1861).

7. Act of 1855, ch. 96, § 1, 1885 Kan. Sess. Laws 469 (adopting the common law as the rule of action in Kansas).

8. *See, e.g.*, Act of Mar. 3, 1868, ch. 119, § 3, 1868 Kan. Sess. Laws 1122 (codified at KAN. STAT. ANN. § 77-109 (2015)) (concerning the general statutes and their effects in Kansas).

9. Greg Bradsher, *How the West Was Settled*, PROLOGUE, Winter 2012, at 28.

10. *See, e.g.*, Clark v. Allaman, 80 P. 571, 579 (Kan. 1905); Frizell v. Bindley, 58 P.2d 95, 101 (Kan. 1936).

11. *See State ex rel. Peterson v. Kansas State Bd. of Agric.*, 149 P.2d 604, 608 (Kan. 1944).

12. *See, e.g.*, Act of Feb. 19, 1886, ch. 115, § 1, 1886 Kan. Sess. Laws 154 (allowing surface water rights to be acquired by appropriation).

13. *See, e.g.*, Clark, 80 P. at 571; Frizell, 58 P.2d at 95.

14. *See* Flood Control Act of 1944, ch. 665, §§ 1, 6, 9(a)–(b), 58 Stat. 887, 887, 890–91.

15. *Peterson v. Kansas State Bd. of Agric.*, 149 P.2d at 608.

16. *See* Henry S. Buzick, Jr. et al, *The Appropriation of Water for Beneficial Purposes*, 37 J. AM. WATER WORKS ASS'N 601 (1945).

17. *Id.*

18. Water Appropriation Act, ch. 390, 1945 Kan. Sess. Laws 365 (codified at KAN. STAT. ANN § 82a-701 (2015)). *See* Buzick, *supra* note 16, at 626.

19. *Id.* at §2 (codified at KAN. STAT. ANN § 82a-702 (2015)).

20. *Id.* at §§1(d), 4 (codified at KAN. STAT. ANN §§ 82a-701(d), 82a-704a (2015)).

21. *Id.* at §§1(f), 3, 5 (codified at KAN. STAT. ANN §§ 82a-701(f), 82a-703, 82a-705 (2015)).

22. *Id.* at §§11–12 (codified at KAN. STAT. ANN §§ 82a-711, 82a-712 (2015)).

23. *Id.* at § 6 (codified at KAN. STAT. ANN § 82a-706 (2015)).

western states for disputes based on impairment,³⁴ and provided that water rights were lost if not used for three successive years without due and sufficient cause.³⁵ In several cases, both state and federal courts upheld the constitutionality of the Act.³⁶

The 1957 legislature amended the Act in several important ways. It expressly defined all water rights as “real property.”³⁷ It provided that three attributes of water rights could be changed with prior approval of the chief engineer: the type of use, place of use, and point of diversion.³⁸ And, it added a section permitting district courts to order the chief engineer to act as referee to investigate and report on the physical facts of the case and offer an opinion.³⁹

New appropriation permits exploded during the twenty-year period after the 1945 Act went into effect. The chief engineer approved over 11,500 permits, mostly for irrigation from groundwater.⁴⁰ This was the era before strict well spacing or depletion formulae⁴¹ that would later slow the rate of DWR approvals of new permit applications. The standard for granting a new permit was, and still is, whether the proposed diversion would impair an existing right or adversely affect the public interest.⁴²

Prior to 1966, the U.S. Corps of Engineers and the Bureau of Reclamation constructed fifteen major reservoirs in Kansas.⁴³ Congress enacted the Water Supply Act of 1958, enabling reservoirs to be sized to include water supply storage, if a local entity would agree to reimburse the government for the cost.⁴⁴ Kansas’ largest reservoir, Tuttle Creek Reservoir, had originally been designed as a dry dam to hold flood waters only, but after the drought of 1952–1956, water supply storage was added.⁴⁵

Water resources planning statutes were spotty prior to 1955. That year, the legislature created the Kansas Water Resources Board⁴⁶ and in 1963 enacted

24. *Id.* at §7(c) (codified at KAN. STAT. ANN § 82a-707(c) (2015)).

25. *Id.* at §18 (codified at KAN. STAT. ANN § 82a-718 (2015)).

26. *See, e.g.,* *Baumann v. Smrha*, 145 F. Supp. 617, 625 (D. Kan. 1956); *Williams v. City of Wichita*, 374 P.2d 578, 595 (Kan. 1962).

27. Act of Apr. 8, 1957, ch. 539, § 1(g), 1957 Kan. Sess. Laws 1075, 1076 (codified at KAN. STAT. ANN. § 82a-701(g) (2015)) (relating to appropriation of water for beneficial uses).

28. *Id.* at § 4 (codified at KAN. STAT. ANN. § 82a-708b (2015)).

29. *Id.* at § 25 (codified at KAN. STAT. ANN. § 82a-725 (2015)).

30. This figure can be gleaned from data on a water rights search tool. *Water Information Management and Analysis System (WIMAS)*, KAN. GEOLOGICAL SURVEYS, <http://hercules.kgs.ku.edu/geohydro/wimas/index.cfm> (last visited Jan. 28, 2016). *See infra* note 121.

31. These types of rules appeared first in 1979. *See, e.g.,* KAN. ADMIN. REGS. § 5-22- 2 (2016) (regulating well-spacing requirements in the Equus Beds GMD No. 2).

32. KAN. STAT. ANN. § 82a-711(c) (2015).

33. KAN. WATER OFFICE, STATE WATER PLAN WATER SUPPLY AND STORAGE PROGRAM, THE SEVENTH REPORT TO THE GOVERNOR AND LEGISLATURE OF KANSAS 8–9, tbl. II-1 (1982).

34. Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 319 (codified as amended at 43 U.S.C.A § 390b (2012)).

35. History of Tuttle Creek Lake, U.S. ARMY CORPS OF ENG’RS, <http://www.nwk.usace.army.mil/Locations/District-Lakes/Tuttle-Creek-Lake/History/> (last visited Oct. 21, 2016); *see also* KAN. WATER RES. FACT-FINDING & RESEARCH COMM., APPENDIX TO WATER IN KANSAS, 1955, A REPORT TO THE KANSAS STATE LEGISLATURE at G 1 to G 2, G 8 to G 9 (1955).

36. Act of Apr. 14, 1955, ch. 356, § 1, 1955 Kan. Sess. Laws 724.

statutes that provided for broad, proactive planning efforts.³⁷ Reacting to Congress' Water Supply Act, Kansas amended its constitution to enable the state to fund the water supply component of federal reservoirs.³⁸

III. WATER MANAGEMENT IN THE LAST FIFTY YEARS, 1965-2015

A. INTRODUCTION TO WATER MANAGEMENT IN THE LAST FIFTY YEARS

The last fifty-year period has seen wide-ranging attempts by the legislature, the courts, and administrative agencies to solve Kansas' water problems. The legislature has amended numerous sections of the 1945 Water Appropriation Act and added new ones. Some amendments have been mere tweaks, but many have made substantial changes in the law. The new sections have provided for both clarification (such as requirements for sand and gravel pits³⁹ and division of water rights⁴⁰) and new programs (such as minimum desirable streamflows,⁴¹ multi-year flex accounts,⁴² and water banking⁴³). The legislature added new statutes outside the Water Appropriation Act that impact water rights, such as the Groundwater Management District Act in 1972,⁴⁴ the Water Plan Storage Act in 1974,⁴⁵ the Water Transfer Act in 1983,⁴⁶ the Water Assurance Program Act in 1986,⁴⁷ and changes in the administrative structure of the DWR in 1995.⁴⁸ The most important of these are discussed below.

Courts, mostly in the latter part of the period, have helped clarify statutory ambiguities in areas such as water right abandonment, the structure of the DWR, water right impairment, and appeal powers. At the administrative law level, the DWR has continued to grant water appropriation permits, but at an increasingly slower rate.⁴⁹ The role of administrative law has grown. The DWR has promulgated regulations on all aspects of water appropriation rights,⁵⁰ and the Kansas Water Office has created policies dealing with water storage in large reservoirs.⁵¹ Groundwater management has helped slow the rate of depletion of aquifers.⁵² Proactive and comprehensive water resources planning efforts of

37. State Water Plan Act, ch. 514, 1963 Kan. Sess. Laws 1174 (codified at KAN. STAT. ANN. §§ 82a-901 to -954 (2015)).

38. KAN. CONST. art. XI, § 9.

39. KAN. STAT. ANN. § 82a-734 (2015).

40. § 82a-742.

41. § 82a-703a to -703c.

42. § 82a-736.

43. § 82a-763 to -771.

44. § 82a-1020 to -1035.

45. § 82a-1301 to -1320.

46. § 82a-1501 to -1508.

47. § 82a-1330 to -1345.

48. *Id.* at § 74-560. This statute provides that the secretary of agriculture is to be appointed by the governor. The secretary of agriculture, in turn, appoints the chief engineer of the DWR. KAN. STAT. ANN. § 74-506(d) (2015). *See also* Hellebust v. Brownback, 42 F.3d 1331 (10th Cir. 1994); *infra* text accompanying notes 87-92.

49. The DWR approved almost 30,000 permits before 1980 and about 19,400 since. *See supra*, note 30.

50. *See* KAN. ADMIN. RECS. §§ 5-1-1 to -50-8 (2009).

51. *See* KAN. ADMIN. RECS. §§ 98-1-1, 98-5-1 to -5-9 (2009).

52. Wayne Bossert, *Groundwater Management in GMD4: Has it Succeeded?*, 15 KAN. J. L.

the Kansas Water office began to grow in the mid-1980s.⁵³

B. WATER RESOURCES PLANNING

By the beginning of this fifty-year period, the Water Resources Board had published a series of useful reports, including ones on water law,⁵⁴ and the legislature had adopted the State Water Plan Act.⁵⁵ The year 1981, however, marked the beginning of the modern era of planning when the legislature abolished the board and replaced it with the Kansas Water Office (KWO) and its director, and the Kansas Water Authority (KWA).⁵⁶ In 1984, the legislature changed the name from the State Water Plan Act to the State Water Resources Planning Act.⁵⁷ In 1985, it made the process of amending the State Water Plan more dynamic and provided more flexibility and proactive planning⁵⁸ by dropping the old idea of a static state water plan in favor of a continuing planning process.⁵⁹ The KWO was charged with updating the State Water Plan annually and presenting it to the legislature with recommendations,⁶⁰ and the legislature could pick and choose what recommendations, if any, it wanted to adopt. Many substantive changes have resulted from the process, including, for example, minimum desirable streamflow requirements⁶¹ and water assurance districts.⁶²

C. WATER RIGHTS

Water rights are defined as “real property rights” in the Kansas Water Appropriation Act.⁶³ Due to the increasing numbers of filings for water right permit applications in the 1960s, the recognition of groundwater depletion in the aquifers, and the need of tighter controls,⁶⁴ major developments and changes in

& PUB. POL'Y 541, 553 (2006) (“GMD4 has successfully managed its groundwater in twelve different ways. (1) It has stopped new development, and stopped the decline in water levels from getting worse.”).

53. See, e.g., KAN. STAT. ANN. § 82a-901 to -954 (2015) (especially § 82a-906).

54. See e.g., KANSAS WATER RES. BD., BULL. NO. 3, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER (1956); KANSAS WATER RES. BD., BULL. NO. 5, REPORT ON THE LAWS OF KANSAS PERTAINING TO GROUND WATER (1960). The author of these reports was Professor Shurtz of the KU Law School, who also wrote KANSAS WATER LAW, a handbook. KANSAS WATER RES. BD., KANSAS WATER LAW (1967). The first two reports contained recommendations for changes in the law.

55. State Water Plan Act, ch. 514, 1963 Kan. Sess. Laws 1174 (codified at KAN. STAT. ANN. §§ 82a-901 to -954 (2015)).

56. Act of May 13, 1981, ch. 302, §§ 1, 2, 3 & 10, 1981 Kan. Sess. Laws 1180, 1180, 1184 (codified at KAN. STAT. ANN. §§ 74-2613 to -2615, -2622).

57. Act of Apr. 6, 1984, ch. 379, § 20, 1984 Kan. Sess. Laws 1810, 1820 (codified at KAN. STAT. ANN. § 82a-947).

58. Act of Mar. 19, 1985, ch. 341, §1, 1985 Kan. Sess. Laws 1451, 1451 (codified KAN. STAT. ANN. § 82a-906) (concerning water and the multipurpose small lakes program). See also John C. Peck & Doris K. Nagel, *Legal Aspects of Water Resources Planning*, 37 KAN. L. REV. 199, 211-17 (1989).

59. Peck & Nagel, *supra* note 58.

60. *Id.* at 215 (citing to the Act of Mar. 19, 1985, ch. 341, §1, 1985 Kan. Sess. Laws 1451, 1451 (codified KAN. STAT. ANN. § 82a-906)).

61. KAN. STAT. ANN. §§ 82a-703a to -703c (2015).

62. KAN. STAT. ANN. § 82a-1333 (2015).

63. KAN. STAT. ANN. § 82a-701(g) (2015).

64. John C. Peck, *Groundwater Management in Kansas: A Brief History and Assessment*, 15 KAN. J. L. & PUB. POL. 441, 443 (2006) [hereinafter Peck, *Groundwater Management*].

water rights law have occurred in the last fifty years.

1. Stricter Rules for Water Diversions and Water Rights

Several significant statutory and regulatory changes have occurred since 1965 that increase state regulation. These involve rules restricting diversion of water without a permit, requiring reports on annual use and metering, and providing consequences for violating terms and conditions of water rights. Combined, these controls have had a significant impact on Kansas water users.

The 1945 Water Appropriation Act established a system for acquiring new appropriation rights. It did not, however, require entities seeking to divert water to obtain an appropriation right. Water users who diverted water without a vested or appropriation right could be enjoined by holders of these rights if the diversions impaired the rights.⁶⁵ The 1977 legislature made it a crime to divert water without a permit, with a few exceptions including for domestic use.⁶⁶

In 1988, the legislature enacted annual use reporting requirements.⁶⁷ Failure to file a report by March 1 of the year following the end of the previous calendar year can result in a \$250 fine.⁶⁸ Knowingly filing a document with false information was made a class C misdemeanor.⁶⁹

Since 2008, the chief engineer has required all new non-domestic wells and pump sites to be equipped with a water flowmeter.⁷⁰ Groundwater management districts also require meters. For example, Northwest Kansas GMD No. 4 requires meters for non-domestic wells permitted or drilled after 1980.⁷¹

The 2001 legislature enacted K.S.A. 82a-737,⁷² which imposed civil penalties for violations of the appropriation act; violations of orders relating to intensive groundwater use control areas; or violations of terms, conditions, or limitations imposed by the chief engineer. The latter violations include diverting water from unauthorized points of diversion or onto unauthorized places of use, failing to comply with terms of conservation plans, exceeding maximum annual quantities or rates of diversion, failing to install or to maintain water measuring devices, or using water for other than the permitted type of use.⁷³ Possible penalties include fines and modification or suspension of water rights.⁷⁴

2. Minimum Desirable Streamflow

Based on recommendations of the Kansas Water Office in the 1984 State Water Plan, the legislature introduced specific minimum desirable streamflow

65. KAN. STAT. ANN. § 82a-717a (2015).

66. Act of Apr. 11, 1977, ch. 356, § 2, 1977 Kan. Sess. Laws 1169, 1170 (codified at KAN. STAT. ANN. § 82a-728) (providing for temporary permits to appropriate water).

67. Act of Apr. 21, 1988, ch. 395, § 1, 1988 Kan. Sess. Laws 2445, 2445 (codified at KAN. STAT. ANN. § 82a-732 (2015)).

68. *Id.*

69. *Id.*

70. KAN. ADMIN. REGS. § 5-1-7 (2016).

71. KAN. ADMIN. REGS. § 5-1-7 (2016).

72. Act of May 9, 2001, ch. 160, § 14, 2001 Kan. Sess. Laws 1409, 1417 (codified at KAN. STAT. ANN. § 82a-737 (2015)).

73. *Id.*

74. *Id.*

(MDS) rates in 1985.⁷⁵ The statute designates the streams and rivers covered and provides monthly MDS in cubic feet per second at specific locations.⁷⁶ Water rights with priority dates on or before April 12, 1984 are not subject to MDS.⁷⁷ The DWR has enforced MDS in recent years.⁷⁸

3. Abandonment of Water Rights

Kansas follows general western water principles regarding loss of water rights for non-use. The DWR became active in holding hearings to declare water rights abandoned under K.S.A. 82a-718 and declared many water rights abandoned.⁷⁹ Several recent appellate court cases have helped clarify various issues.

Dicta in a 2006 case declared Kansas to be a forfeiture state, not an abandonment state, for loss of water rights for non-use, which means that the water user's intent is not relevant in the determination.⁸⁰ The Kansas Supreme Court in 2009 held that once the DWR files its verified report under K.S.A. 82a-718 claiming forfeiture, the burden shifts to the water right holder to prove "due and sufficient cause" for the non-use.⁸¹ In 2010, the court of appeals showed deference to DWR expertise and interpretation in upholding the DWR's determination that the taking up of groundwater by alfalfa roots does not constitute a diversion or beneficial use of water, and thus the water right should be forfeited.⁸² In another case, the court of appeals in 2011 held that Kansas statutes do not authorize partial abandonment of water rights.⁸³

75. Act of Apr. 12, 1985, ch. 338, § 2, 1985 Kan. Sess. Laws 1446, 1446 (codified at KAN. STAT. ANN. § 82a-703c (2015)). The legislature first provided for MDS in 1980. See Act of Apr. 18, 1980, ch. 332, § 2, 1980 Kan. Sess. Laws 1334, 1334 (codified at KAN. STAT. ANN. § 82a-703a (2015)). See also Act of Apr. 6, 1984, ch. 377, § 1, 1984 Kan. Sess. Laws 1809, 1809 (codified at KAN. STAT. ANN. § 82a-703b (2015)).

76. KAN. STAT. ANN. § 82a-703c (2015). For example, the MDS on the Republican River at Concordia in July is 150 cfs. *Kansas Minimum Desirable Streamflows (MDS), in cubic feet per second (ft³/s)*, U.S. GEOLOGICAL SURV., <http://ks.water.usgs.gov/table-of-kansas-minimum-desirable-streamflows> (last visited Sept. 23, 2016).

77. KAN. STAT. ANN. § 82a-703b(b) (2015).

78. Over several months in 2012, for example, during a multi-year drought affecting much of the state, the DWR administered junior water rights on many rivers in favor of MDS. John C. Peck, *Water Law, in 23 KANSAS ANNUAL SURVEY OF LAW* 361, 367-68. (2012).

79. The legislature changed the 3-year non-use period to 5 years in 1999. Act of Apr. 17, 1999, ch. 122, § 1, 1999 Kan. Sess. Laws 763, 763-64 (codified at KAN. STAT. ANN. § 82a-718 (2015)).

80. *Hawley v. Kan. Dep't of Agric.*, 132 P.3d 870, 881 (Kan. 2006).

81. *Frick Farm Prop. v. Kan. Dep't of Agric.*, 216 P.3d 170, 180-81 (Kan. 2009).

82. *Nelson v. Kan. Dep't. of Agric.*, 242 P.3d 1259, 1267 (Kan. Ct. App. 2010). See also *Frank v. Kan. Dep't. of Agric.*, 198 P.3d 195, 201 (Kan. Ct. App. 2008) (giving "substantial deference to the agency's interpretation of [the statute]."). In a 2015 case upholding a trial court's finding of impairment by a junior water right holder, appellant American Warrior, Inc., the appeals court upheld the trial court's decision to allow the chief engineer's report filed under KAN. STAT. ANN. § 82a-725 into evidence without requiring the report's author to testify. *Garetson Bros. v. Am. Warrior, Inc.*, 347 P.3d 687, 696 (Kan. Ct. App. 2015), *petition for cert. filed* Apr. 30, 2015, *petition for cert. denied* Jan. 25, 2016.

83. *Wheatland Elec. Coop., Inc. v. Polansky*, 265 P.3d 1194, 1206 (Kan. Ct. App. 2011).

4. Cases Construing the Water Appropriation Act

In 1981, the Kansas Supreme Court once again ruled on the constitutionality of the Water Appropriation Act.⁸⁴ The court upheld the Act's 1977 amendment requiring permits to divert water, except for domestic use, and making it a crime to divert water without a permit.⁸⁵ The court held that this amendment was not an unconstitutional taking of private property.⁸⁶ In a 1993 case,⁸⁷ plaintiffs argued that the law establishing the water rights administrative structure was unconstitutional under the "one-person, one-vote" principle of *Reynolds v. Sims*⁸⁸ because the chief engineer, who controls water allocation in Kansas, was appointed by the state board of agriculture, the members of which were elected by delegates selected from private agricultural associations, not by the voting public as a whole.⁸⁹ Because the state board exercised general governmental powers affecting the lives of all Kansans, including power over the use and control of water, a federal district court agreed with the plaintiffs and ordered the entire department of agriculture put in the hands of the governor as receiver until the legislature could correct the situation.⁹⁰ In 1995, the legislature established the Kansas Department of Agriculture with a governor-appointed secretary⁹¹ and gave the secretary power to select the chief engineer.⁹²

Kansas appellate courts decided some other non-constitutional cases. In 2011, for example, the Kansas Supreme Court decided *Cochran v. Kan. Dept. of Ag. & the City of Wichita*,⁹³ which involved appeal rights under K.S.A. 82a-711. K.S.A. 82a-711 appears to limit appeals on water right permit applications to the applicant: it states that "[a]ny person aggrieved by any order . . . by the chief engineer relating to that person's application . . . may petition for review thereof."⁹⁴ Based on reading that section together with the Kansas Judicial Review Act⁹⁵ and the Kansas Administrative Procedures Act,⁹⁶ however, the *Cochran* court held that a holder of an existing water right has the right to appeal the granting of a new permit to a neighbor whose prospective new permit might impair that right.⁹⁷ In another 2011 case, the court of appeals recognized the DWR's power to limit consumptive use on approving an application to change a vested right.⁹⁸ In 2013, the court of appeals held that the chief engineer has

84. See *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1174 (1981); see also *Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan. 1956); *Williams v. City of Wichita*, 374 P.2d 578, 595 (Kan. 1962).

85. KAN. STAT. ANN. § 82a-728 (2015).

86. *Gibson*, 630 P.2d at 1174.

87. *Hellebust v. Brownback*, 824 F. Supp 1511 (D. Kan. 1993), *aff'd*, 42 F.3d 1331 (10th Cir. 1994).

88. *Reynolds v. Sims*, 377 U.S. 533 (1964).

89. *Hellebust*, 824 F. Supp at 1511, 1524.

90. *Id.* at 1524.

91. Act of Apr. 28, 1995, ch. 236, § 1, 1995 Kan. Sess. Laws 1053, 1053 (codified at KAN. STAT. ANN. § 74-560 (2015)).

92. *Id.* § 9 (codified at KAN. STAT. ANN. § 74-568 (2015)).

93. *Cochran v. Dep't of Agric.*, 249 P.3d 434 (Kan. 2011).

94. *Id.* at 411 (quoting KAN. STAT. ANN. § 82a-711(c)).

95. KAN. STAT. ANN. § 77-601 to -631 (2015).

96. *Id.* § 77-501 to -566 (2015).

97. *Cochran*, 249 P.3d at 441-444.

98. *Wheatland Electric Coop., Inc. v. Polansky*, 265 P.3d 1194, 1195 (Kan. Ct. App. 2011).

no power to retain jurisdiction to make reductions in the approved diversion rate and annual quantity authorized to be perfected.⁹⁹ In 2015, the court of appeals helped define “impairment” in a case of a vested right holder claiming impairment by nearby appropriators.¹⁰⁰ Absent a clear definition of “impairment” in either the statutes or regulations, the court adopted a common dictionary definition—“impair”: “To cause to diminish, as in strength, value, or quality”—and held that the appropriation right was impairing the vested right.¹⁰¹

5. Condemnation of Land and Water Rights

In 1997, the court of appeals held that water rights may be the subject of eminent domain actions.¹⁰² In 2009, in a case dealing mostly with standing and ripeness, the Kansas Supreme Court seemed to recognize that a wholesale water supply district has the power to condemn a temporary easement to conduct well testing against the objection of the landowner who held no water rights.¹⁰³ A Leavenworth district court judge recently had a land condemnation case in which Suburban Water, Inc., a private water supply company, claimed to have statutory eminent domain power enabling it to condemn land from several landowners to drill a water well for a point of diversion and construct a treatment plant.¹⁰⁴ The Elders—who were defendants along with other landowners in the condemnation action—then in a separate suit sought and obtained a preliminary injunction against the company, claiming that the company is not a “hydraulic company,” which is one of the types of private companies given condemnation power in the statute.¹⁰⁵ The Elders subsequently settled both the injunction case and the condemnation case with Suburban Water, Inc. before a permanent injunction hearing. As to the other landowner defendants in the condemnation action, the district court then ruled that Suburban Water, Inc. “meets the definition of a hydraulic corporation, as that term was used in 1871. . . and therefore . . . has the power of eminent domain pursuant to K.S.A. 26-504.”¹⁰⁶

99. *Clawson v. Dep’t of Agric.*, 315 P.3d 896, 906 (Kan. Ct. App. 2013).

100. *Garetson Bros. v. Am. Warrior, Inc.*, 347 P.3d 687 (Kan. Ct. App. 2015), *cert. denied*, Jan. 25, 2016. *See also supra*, note 82.

101. *Id.* at 698 (citing *Impair*, AMERICAN HERITAGE DICTIONARY (4th ed. 2006)). A district court case from Mitchell County in 1972 involved groundwater impairment of an irrigation right by nearby junior irrigation wells and an industrial well. The judge adopted the chief engineer’s definition from his report in that case: “[t]here is impairment . . . when plaintiff’s authorized diversion rate is decreased by at least [twenty percent] in addition to the rate reduction caused by the pumping of plaintiff’s irrigation well”. *File v. Solomon Valley Feedlot, Inc.*, et al, No. 8831 at Conclusions of Law No. 5 (Dist. Ct. of Mitchell Cnty. Nov. 29, 1972).

102. *Sullivan v. City of Ulysses*, 932 P.2d 456, 459 (Kan. Ct. App. 1997).

103. *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 210 P.3d 105, 107 (Kan. 2009).

104. *Suburban Water, Inc. v. Elder*, No. 2015-CV-75 (Leavenworth Co. Dist. Ct. 2015).

105. *Elder et al. v. Suburban Water Inc.*, No. 2015-CV-203 (Leavenworth Co. Dist. Ct. 2015). The statute in question is KAN. STAT. ANN. § 17-618, first enacted in 1868, and amended in 1871 to give “hydraulic companies” eminent domain power to condemn land.

106. Order Granting Petitioner’s Motion for Leave to File its Second Amended Verified Petition, Granting Petitioner’s Second Amended Verified Petition and Order Appointing Appraisers, *Suburban Water, Inc. v. Elder*, No. 2015-CV-75, at 8 (Leavenworth Co. Dist. Ct. 2015).

6. DWR Policies and Regulations

The DWR has promulgated regulations since 1978.¹⁰⁷ In 1983, under Chief Engineer David Pope, the DWR also began issuing written “administrative policies” and “administrative procedures.”¹⁰⁸ These policies—like regulations—relied on specific statutory authority, and the DWR used these policies to guide personnel in decisions about many issues arising on a daily basis, both substantive and procedural.¹⁰⁹ Unlike official regulations, however, these policies had not gone through the official process of approval required for regulations. It was unclear whether the policies and procedures had the effect of law (i.e., the status of officially promulgated regulations), and the DWR was adopting many official regulations at the same time.¹¹⁰ The legislature changed all this in 1999 when it required the DWR to turn all policies and procedures into regulations.¹¹¹ Through a months-long process of writing and rewriting policies and holding hearings, the DWR changed its policies and procedures into official regulations.¹¹²

7. Conservation Plans and Practices

The concept of conservation plans and practices began in 1986 when the legislature amended K.S.A. 82a-711 to allow the chief engineer to require applicants for appropriation rights to “adopt and implement conservation plans and practices . . . consistent with . . . guidelines developed by . . . the Kansas Water Office.”¹¹³ In 1991, the legislature expanded the requirement to holders of existing water rights.¹¹⁴ Requirements for, and evaluation of, conservation

107. The first administration regulations of the DWR appeared in Kansas Administrative Regulations (1978), v. 1, and contained a total of 16 sections, §§ 5-1-1 to 5-7-3. KAN. ADMIN REGS. §§ 5-1-1 to 5-7-3 (1978).

108. The DWR placed copies of these policies and procedures in the KU Law School Library, and they are available for viewing.

109. These policies became quite voluminous and somewhat difficult to find because they predated the internet, and the practicing bar or others could not readily access official copies. A typical example included “Administrative Procedure 83-12,” which meant the twelfth policy or procedure adopted in 1983, titled “Time Allowed to Complete Construction of Diversion Works.”

110. In 1993, however, the Kansas Court of Appeals held in *Bruns v. Kansas State Bd. of Tech. Professions*, that a written internal policy of the Kansas State Board of Technical Professions not filed and published as required by KAN. STAT. ANN. § 77-425 had “no force or effect.” *Bruns v. Kansas State Bd. of Tech. Professions*, 864 P.2d 1212, 1216 (Kan. Ct. App. 1993).

111. Act of Apr. 25, 1999, ch. 130, § 12, 1999 Kan. Sess. Laws 832, 839-40 (codified at KAN. STAT. ANN. § 82a-1903 (2015)) (relating to the decision of the chief engineer and the issuance of certificates).

112. John C. Peck, *Water Law*, 12 KANSAS ANNUAL SURVEY OF LAW 263, 264-65 (2001).

113. 1986 Kan. Sess. Laws ch. 392 § 3. This provision amended K.S.A. 82a-711, but in 1999, the legislature amended K.S.A. 82a-711 to move the provision to newly-enacted K.S.A. 82a-733. See KAN. STAT. ANN. § 82a-733 (2015). See also KAN. STAT. ANN. § 74-2608(c) (2015) (imposing the duty on the KWO to develop the guidelines for conservation plans and practices and lists the elements and factors to be considered).

114. KAN. STAT. ANN. § 82a-733 (2015); see also KAN. STAT. ANN. § 82a-701(g) (2015) (defining a “water right” to include both vested and appropriation rights).

plans and practices then expanded into areas such as water transfer applications¹¹⁵ and applications to purchase water under the state water marketing program.¹¹⁶

8. Multi-Year Flex Accounts, and Other Measures

Because the annual quantity of a Kansas water right is fixed once the water right is certified, the user has little flexibility to vary that amount.¹¹⁷ This quantity restriction can be onerous, especially to irrigators during drought years, and overpumping can lead to civil penalties.¹¹⁸ In 2001, the legislature enacted K.S.A. 82a-736, which allows water right holders to create multi-year flex accounts on a voluntary basis and thus to use over a five-year period water quantities that exceed their permitted amounts in some years and that are less in other years during the period.¹¹⁹

During the drought of 2011 and 2012, the DWR adopted special rules that added even more flexibility. Two-year drought emergency permits, which were for the combined quantity of 2011 and 2012 years, allowed participating irrigators to borrow water from their 2012 quantities to use during 2011. The DWR processed over 2,250 applications for these permits.¹²⁰

D. GROUNDWATER MANAGEMENT

By the mid-1960s, policy makers recognized that the large numbers of irrigation wells were causing groundwater mining in western Kansas.¹²¹ The legislature enacted a statute in 1972 that enabled creation of groundwater management districts (GMDs).¹²² The express purposes of the act were proper

115. KAN. STAT. ANN. § 82a-1502(c)(7) (2015).

116. KAN. STAT. ANN. § 82a-1311a (2015).

117. KAN. STAT. ANN. § 82a-708(b) (2015) (Water right holders may seek permission from the chief engineer to change only the type of use, place of use, and point of diversion of water rights. The permitted annual quantity cannot be increased.).

118. KAN. STAT. ANN. § 82a-737 (2015). *See also* Act of May 9, 2001, ch. 160, § 14, 2001 Kan. Sess. Laws 1409, 1417-18.

119. Act of May 9, 2001, ch. 160, §16, 2001 Kan. Sess. Laws 1409, 1424-26 (codified at KAN. STAT. ANN. § 82a-736 (2015)). KAN. ADMIN. REGS. § 5-16-3 establishes the procedures for filing an application for a multi-use flex account. Various modifications in the statute occurred over the years. For example, at first, the statutory language required the participant to suffer a ten percent loss in the total five-year quantity that would be placed into the account because the DWR and the legislature attempted to promote conservation. The requirement remained in effect until 2011.

120. Peck, *supra* note 78, at 367.

121. "The expanding utilization of groundwater in the western part of Kansas for agricultural and other purposes has in general led to the depletion of the resource. Thus, a 'mining' situation exists and, given increasing demand, will continue to develop." LAWRENCE F. KELLER, KANSAS GROUNDWATER POLICY SEMINAR, KANSAS WATER RESOURCES RESEARCH REPORT 9 (1975). "It is recognized that the declining water table in much of western Kansas poses serious problems." STATE OF KANSAS, INTERIM REPORT OF THE GOVERNOR'S TASK FORCE ON WATER RESOURCES 65 (1977) [hereinafter INTERIM REPORT]. From 1945 to 1950, 334 permit applications were filed; in the 1950s, 5730 applications; and in the 1960s, 6433 applications. *See supra* note 30 (data gathered from WIMAS website water rights tool, by trial and error; by plugging in appropriation right file numbers to determine dates of filing in the various decades, one can determine the number of applications filed by decade).

122. Act of Mar. 17, 1972, ch. 386, 1972 Kan. Sess. Laws 1416 (codified at KAN. STAT. ANN. §§ 82a-1020 to -1035 (2015)). A 1968 law had attempted to enable these districts. Act of

management and conservation of groundwater, prevention of economic deterioration, and stabilization of agriculture.¹²³ Basic “water use doctrine” was to be preserved, presumably prior appropriation under the 1945 Act. Local users were to “determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas.”¹²⁴ Though basic water law was to be preserved, the Act permitted some local autonomy in establishing standards and policies and in recommending regulations to the DWR. Local water users created five GMDs in the 1970s in western and south-central Kansas.¹²⁵ Each GMD has its own regulations that deal with well-spacing, depletion or safe-yield formulae, metering, and other such matters.¹²⁶ Although most administrative regulations in Kansas are applicable uniformly throughout the state, GMDs are apparently permitted to have unique regulations that apply only within their geographic areas.¹²⁷ GMDs once enjoyed the power to have enforceable “standards and policies,”¹²⁸ but the 1999 legislature forced all GMD standards and policies to be turned into DWR regulations by March 1, 2000, or they would become void.¹²⁹

The legislature amended the GMD Act in 1978 to enable the designation of intensive groundwater use control areas (IGUCAs) within or outside GMD boundaries.¹³⁰ The chief engineer can establish IGUCAs after a hearing and a determination that groundwater levels were declining excessively.¹³¹ In an IGUCA, the chief engineer has extraordinary powers—including the right to reduce pumping by appropriators without regard to priority date.¹³² The chief engineer has designated nine IGUCAs in western and central Kansas.¹³³

The Walnut Creek IGUCA, established in 1992, is the most significant.

Mar. 20, 1968, ch. 403, 1968 Kan. Sess. Laws 827. However, no districts were formed under that statute. INTERIM REPORT, *supra* note 121, at 45.

123. KAN. STAT. ANN. § 82a-1020 (2015).

124. *Id.*

125. KAN. GEOLOGICAL SURV., *Ground Water Management Districts*, <http://www.kgs.ku.edu/Hydro/gmd.html> (last visited Feb. 3, 2016).

126. KAN. ADMIN. REGS. § 5-21-1 to -9 (2015), for Western Kansas GMD No. 1; KAN. ADMIN. REGS. § 5-22-1 to -17 (2015), for Equus Beds GMD No. 2; KAN. ADMIN. REGS. § 5-23-1 to -15 (2015), for Southwest Kansas GMD No. 3; KAN. ADMIN. REGS. § 5-24-1 to -11 (2015), for Northwest Kansas GMD Beds GMD No. 4, and KAN. ADMIN. REGS. § 5-25-1 to -20 (2015), for Big Bend GMD No. 5.

127. At least that was my conclusion in 1980, despite KAN. CONST. art. II, § 17, which prohibits enactment of special laws when general laws may be made applicable. John C. Peck, *Kansas Groundwater Management Districts*, 29 U. KAN. L. REV. 51, 72-73 (1980).

128. See Act of Apr. 14, 1978, ch. 437, §1, 1978 Kan. Sess. Laws 1713, 1713; KAN. STAT. ANN. § 82a-1028 (1997).

129. Act of May 6, 1999, ch. 130, § 12(b)(2), 1999 Kan. Sess. Laws 832, 839-40. The legislature then amended KAN. STAT. ANN. § 82a-1028 to remove GMD power to enforce standards and policies, and to limit them to administrative standards and policies relating to “management of the district.” Act of May 17, 2002, ch. 137, § 5, 2002 Kan. Sess. Laws 775, 778-80.

130. A governor’s task force study of various water policy issues recommended this change. INTERIM REPORT, *supra* note 121, at 68 (specifically, recommendation #14).

131. KAN. STAT. ANN. § 82a-1036, -1038 (2015).

132. KAN. STAT. ANN. § 82a-1038 (b)(3) (2015).

133. *Intensive Groundwater Use Control Areas (IGUCAs)*, KAN. DEP’T OF AGRIC., <https://agriculture.ks.gov/divisions-programs/dwr/managing-kansas-water-resources/intensive-groundwater-use-control-areas> (last visited Oct. 3, 2016) (describing the histories and functions of these IGUCAs).

Located at the eastern end of the Walnut Creek basin in west-central Kansas is the Cheyenne Bottoms Wildlife Area, a very important migratory bird stopover point.¹³⁴ The Kansas Fish and Game Commission (now the Department of Wildlife and Parks) owned surface water rights for water from Walnut Creek and the Arkansas River, which was diverted through canals to maintain the water level in the Bottoms.¹³⁵ In the next three decades, withdrawals of water from irrigation wells located in the Walnut Creek alluvium, located upstream from the Bottoms, caused groundwater levels and baseflow to decline on a long-term basis.¹³⁶ The chief engineer initiated an IGUCA hearing in Great Bend rather than order a direct administration of water rights.¹³⁷ Testimony established that the long-term sustainable yield in the basin was 22,700 acre-feet,¹³⁸ and, yet, almost 80,000 acre-feet per year was authorized under vested and appropriation rights.¹³⁹ The chief engineer's IGUCA order established two groups in order to achieve sustainable yield: holders of "senior appropriation rights" and holders of "junior appropriation rights" (i.e., those senior to October 1, 1965 and those junior to that date, respectively).¹⁴⁰ He ordered extensive reductions in annual pumping by the senior irrigation rights group on the basis that these rights, if used efficiently, did not require as much water as the permits allowed.¹⁴¹ He ordered much greater reductions for the junior irrigation rights group to achieve sustainable yield.¹⁴² The order was not appealed, leaving unanswered the constitutional question of whether this curtailment amounted to a taking of property without compensation.

The order curtailing pumping in the Walnut Creek basin put other water rights holders and regions of the state on notice of the power that the chief engineer holds under the IGUCA law, which has led to three further developments. In 1994, for example, four entities signed an agreement to attempt to solve potential problems in delivering water to the Quivira National Wildlife Refuge: the U.S. Fish and Wildlife Service, which holds a water right for the refuge similar to that of the state of Kansas for the Cheyenne Bottoms; the Big Bend GMD No. 5; the Water Protection Association of Central Kansas (WaterPack); and the DWR.¹⁴³ In 2000, the Rattlesnake Creek Management Program became effective with the goal of stabilizing streamflow and groundwater

134. DAVID POPE, FINDINGS, CONCLUSIONS, AND ORDER, IN THE MATTER OF THE DESIGNATION OF AN INTENSIVE GROUNDWATER USE CONTROL AREA IN BARTON, RUSH AND NESS COUNTIES, KANSAS 22 (Dec. 1, 1992), <https://agriculture.ks.gov/docs/default-source/igucas/wc1992.pdf?sfvrsn=2> [hereinafter 1992 IGUCA ORDER]. "[T]he long-term sustainable yield of the aquifer within the boundaries of the proposed control area . . . is no more than approximately 22,700 acre-feet per year." *Id.* at 96. Yet, almost 80,000 acre-feet per year were authorized under vested and appropriation rights. *Id.* at 21.

135. WETLANDS CENTER, *The Facts About Water at Cheyenne Bottoms*, (Oct. 17, 2012), <http://wetlandscenter.fhsu.edu/the-facts-about-water-at-cheyenne-bottoms/>.

136. 1992 IGUCA ORDER at 95.

137. *Id.* at 1.

138. *Id.* at 96 ("[T]he long-term sustainable yield of the aquifer within the boundaries of the proposed control area . . . is no more than approximately 22,700 acre-feet per year.").

139. *Id.* at 21.

140. *Id.* at 102.

141. *Id.* at 109.

142. *Id.*

143. See RATTLESNAKE CREEK/QUIVIRA PARTNERSHIP, RATTLESNAKE CREEK MANAGEMENT PROGRAM PROPOSAL 5 (2000), <https://agriculture.ks.gov/docs/default-source/bmt-rsc/>

declines.¹⁴⁴ Strategies include, *inter alia*, water right purchases by the state, a water bank, and flexibility for water right holders in annual quantities diverted.¹⁴⁵

The next development occurred in 2012 when the legislature encouraged voluntary action by enabling creation of local enhanced management areas (LEMAs).¹⁴⁶ Unlike IGUCAs, in which either a GMD or a group of eligible members in a GMD may initiate the process by recommending it to the chief engineer, a LEMA can be created only at the request of a GMD.¹⁴⁷ A GMD can file an application proposing creation of a LEMA, along with proposed geographic boundaries, goals, and corrective control provisions.¹⁴⁸ The DWR holds hearings to determine whether the statutorily prescribed conditions exist, the public interest requires control measures, and the geographic control measures are reasonable.¹⁴⁹ Possible control measures are essentially the same as for IGUCAs.¹⁵⁰ In 2012, the DWR approved the Sheridan 6 (SD-6) LEMA in Northwest Kansas GMD No. 4, the goal of which is to reduce pumping within the LEMA's boundaries by twenty percent in five years.¹⁵¹

Lastly, the 2015 legislature created the possibility of another type of voluntary conservation measure—water conservation areas (WCAs).¹⁵² WCAs and LEMAs are similar, except that WCAs may be established by voluntary acts of water users. LEMAs require initiation by a GMD and a hearing, while water users can form a WCA by mutually agreeing to do so and submitting a management plan to the chief engineer.¹⁵³

E. LARGE WATER DIVERSIONS

The 1945 Water Appropriation Act placed no limitations on long-distance or inter-basin diversions. Likewise, the 1957 amendments, which prohibited changes in place of use without prior permission of the chief engineer, placed no express restrictions on the place of use.¹⁵⁴ The legislature enacted the Kansas Water Transfer Act in 1983.¹⁵⁵ This act required an application, hearing, and

rsc_management.pdf?sfvrsn=2 (last visited Oct. 3, 2016); *see also Rattlesnake Creek Management Plan*, KAN. DEPT. OF AGRIC., <https://agriculture.ks.gov/divisions-programs/dwr/managing-kansas-water-resources/information-about-kansas-water-resources/rattlesnake-creek-management-plan> (last visited Oct. 3, 2016).

144. BASIN MANAGEMENT TEAM, RATTLESNAKE CREEK PARTNERSHIP 3, 4 (2009), https://agriculture.ks.gov/docs/default-source/bmt-sc/eight_year_review_12_1_09.pdf?sfvrsn=2 (last visited Oct. 3, 2016).

145. *See* John C. Peck, *supra* note 64, at 452.

146. Act of March 30, 2012, ch. 62, 2012 Kan. Sess. Laws 382 (codified at KAN. STAT. ANN. § 82a-1041 (2015)).

147. KAN. STAT. ANN. §§ 82a-1036, -1041(a) (2015).

148. KAN. STAT. ANN. § 82a-1041(a) (2015).

149. KAN. STAT. ANN. § 82a-1041(b) (2015).

150. The wording varies slightly, but the measures appear to be identical. *Compare* KAN. STAT. ANN. § 82a-1038(b) (2015) *with* KAN. STAT. ANN. § 82a-1041(f) (2015).

151. A LEMA proposed to include an entire county in Western Kansas GMD No. 1, however, was rejected by voters there. It would have reduced pumping by twenty percent in six years. *See* WESTERN KANSAS GROUND WATER MANAGEMENT DISTRICT NO. 1 1, <http://www.gmd1.org/index.html> (last visited Oct. 3, 2016).

152. Act of Apr. 15, 2015, ch. 37, § 1, 2015 Kan. Sess. Laws 386, 386-88.

153. *Id.*; KAN. STAT. ANN. § 82a-1041(a)-(b) (2015).

154. KAN. STAT. ANN. § 82a-708b (2015).

155. Act of May 9, 1983, ch. 341, 1983 Kan. Sess. Laws 1541 (codified at KAN. STAT. ANN.

approval for diversions of one thousand acre-feet or more of water a distance of ten miles or more,¹⁵⁶ modified in 1993 to two thousand acre-feet of water a distance of thirty-five miles or more.¹⁵⁷ An application is first reviewed at a hearing by a hearing officer, followed by review by a three-person panel consisting of the chief engineer, the director of the KWO, and the secretary of the Kansas Department of Health and Environment.¹⁵⁸ Statutory factors to be applied include, *inter alia*, “the economic, environmental, public health and welfare and other impacts of approving or denying the transfer of the water.”¹⁵⁹ No transfer is permitted if it would reduce present or future water needs of the basin of origin unless “the benefits to the state of approving the transfer outweigh the benefits to the state for not approving the transfer.”¹⁶⁰

Johnson County Water District No. 1 was successful in obtaining approval of the one Water Transfer Act transfer attempted to date.¹⁶¹ The city of Hays owns a ranch sixty-five miles south of the city and in June 2015 filed change applications for 7500 acre-feet of irrigation water rights tied to that ranch to initiate a transfer.¹⁶² In January 2016, it filed a Water Transfer Act application to move the water to Hays and Russell.¹⁶³

F. RIVERS AND RESERVOIRS

Several events set the creation of the Kansas Water Marketing Program in motion: construction of large federal reservoirs, enactment of the federal Water Supply Act of 1958, and amendment of the Kansas Constitution to enable the state to “be a party to . . . works for the conservation or development of water resources.”¹⁶⁴ The legislature enacted the Water Plan Storage Act in 1974 under which the state could obtain storage rights to waters entering federal reservoirs and sell the water to municipal and industrial (M&I) users.¹⁶⁵ For example, M&I users, such as the cities of Lawrence and Baldwin and rural water districts in Douglas County, have water supply contracts with the KWO under the Kansas Water Marketing Program.¹⁶⁶

§§ 82a-1501 to -08 (2015)).

156. KAN. STAT. ANN. §§ 82a-1501(a)(1).

157. Act of Apr. 16, 1993, ch. 219, § 1, 1993 Kan. Sess. Laws 851, 851-853 (codified at KAN. STAT. ANN. § 82a-1501 (2015)).

158. KAN. STAT. ANN. § 82a-1501a (2015).

159. KAN. STAT. ANN. § 82a-1502 (c) (2015).

160. *Id.* at § 82a-1502(a).

161. Water Dist. No. 1 v. Kan. Water Auth., 19 Kan. App. 2d 236 (1994).

162. Press Release from Big Bend Ground Water Management District No. 5, GROUNDWATER HI-LITES, *Cities of Hays & Russell/R9 Ranch*, (Jan. 2016) (on file with author); see also Mike Corn, *Hays Makes First Filing to Use Ranch Water*, HAYS DAILY NEWS (July 13, 2015), http://www.hdnews.net/news/local/hays-makes-first-filing-to-use-ranch-water/article_15465b42-870f-55b2-8746-2e6ca7dd7c77.html; Mike Corn, *Hays, Russell Get Closer Look at Water Transfer Plan*, HAYS DAILY NEWS (June 24, 2015), http://www.hdnews.net/news/local/hays-russell-get-closer-look-at-water-transfer-plan/article_317163ae-c3b2-525d-b381-f8dc06e3bc61.html.

163. Big Bend Ground Water Management District No. 5, *supra* note 162.

164. KAN. CONST. art. XI, § 9.

165. Act of Mar. 22, 1974, ch. 452, §§ 1-20, 1974 Kan. Sess. Laws 1514, 1514-20 (codified at KAN. STAT. ANN. § 82a-1301 to -1315 (2015)). By 1982, 97 applications to purchase water had been filed. KAN. WATER OFFICE, *supra* note 33, at 19-21, tbl. III-2.

166. KAN. WATER OFFICE, KANSAS-LOWER REPUBLICAN RIVER BASIN at 3-4 (2009), http://www.kwo.org/Water%20Plan/KWP2009/Rpt_KLR_Entire_Basin_Section_KWP_

The slow pace of water marketing contracting coupled with the annual repayment requirements of the state to the federal government led to the enactment of the Kansas Water Assurance Program Act in 1986.¹⁶⁷ The legislature sought to provide another basis for obtaining funds and providing more secure water supplies to M&I users.¹⁶⁸ Users with water rights from both the river and the groundwater alluvium could establish water assurance districts (WADs) downstream from a federal reservoir and fund operations with user fees and bonds.¹⁶⁹ Instead of obligating themselves with the forty-year, take-or-pay contracts used in the marketing program, a WAD could agree to pay KWO for the establishment of designated streamflows at specific locations, to be made up of the natural streamflow and releases from reservoir storage.¹⁷⁰

IV. WATER MANAGEMENT IN THE NEXT FIFTY YEARS

Twenty years have elapsed since I wrote a fifty-year anniversary perspective of the 1945 Kansas Water Appropriation Act.¹⁷¹ In the conclusion to that article, I left some questions open about the next fifty years: Will the Water Appropriation Act last that long, or will it have been repealed or replaced? Will Kansas have adopted the Public Trust Doctrine, strict protection of private property rights, or some reasonable compromise between the two? Will our aquifers have been depleted? Will water be moved around the state for irrigation or municipalities? Will Wichita be moving water from Milford Reservoir to Wichita? Will the federal reservoirs have filled with sediment? Will Kansas still be litigating with Colorado and Nebraska? Will Kansas be marketing water to other states or importing water from Canada? These questions are still relevant, now twenty years later.

Coincidentally, in 2014 when my co-authors and I were preparing our panel presentations for the national conference, Governor Brownback announced “A Long-Term Vision for the Future of Water Supply in Kansas,” in which he issued a call for action for the next fifty years. After a year of study, drafts, and

2009.pdf.

167. Water Assurance Program Act, ch. 391, § 1-12, 1986 Kan. Sess. Laws 2023, 2023-28 (codified at KAN. STAT. ANN. § 82a-1330 to -1338 (2015)).

168. KAN. WATER OFFICE, KANSAS WATER PLAN, MANAGEMENT SECTION, SUB-SECTION: LARGE RESERVOIR MANAGEMENT 2 (1985).

169. KAN. STAT. ANN. § 82a-1360 to -1368 (2015) (allowing WADs to take advantage of revenue bonds issued by the KWO); see John C. Peck, *Kansas Water Assurance Districts*, 40 U. KAN. L. REV. 903, 919 (1992).

170. Peck, *supra* note 169, at 919. Three WADs have formed, serving 1,153,000 Kansans, just less than half the state: Kansas River Water Assurance District No. 1, Maris des Cygnes Water Assurance District No. 2, and Cottonwood/Neosho River Basins Water Assurance District No. 3. *The Kansas River Water Assurance District No. 1 and The Cottonwood and Neosho River Basins Water Assurance District No. 3: Hearing on H.B. 2685 Before the S. Comm. on Nat. Res.*, 2012 Leg. Sess. (Kan. 2012) (statement of Galen E. Biery, Conferee), http://www.kslegislature.org/li_2012/b2011_12/committees/misc/ctte_s_nat_res_1_20120302_07_other.pdf. For the Kansas River WAD, target flows at two locations on the Kansas River are provided by releases of assurance water. These help provide minimum desirable streamflows on this river in lieu of having MDS provided by statute as is done for other rivers and streams.

171. John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective*, 43 U. KAN. L. REV. 735 (1995).

hearings, the governor unveiled the report in November 2014, and it was finalized in early 2015.¹⁷² It covers many subjects, addresses many problems, and proposes some solutions. Interestingly, however, one key aspect of Kansas water law—that of priority under the Water Appropriation Act—was deleted from consideration. “Voluntary, locally driven and market-based solutions” would be the focus.¹⁷³ Skeptics might argue that wholly voluntary solutions by water users themselves will never solve our current groundwater depletion situation and that more effective action is required to curtail groundwater pumping in the future, such as: direct state regulatory action, like IGUCA orders throughout western and south-central Kansas; judicial or legislative imposition of the Public Trust Doctrine; legislatively enacted phased-in pumping reductions; or impairment lawsuits by holders of senior water rights. But at the very least, the idea of at least studying “first-in-time, first-in-right” should not be discarded.

There are still thirty years to go to answer the questions posed in 1995. But some of these questions can be addressed now. The Appropriation Act appears to be safe; at least, its basic tenets appear to be safe. The legislature has amended the Act over the last fifty years in the numerous ways described above—by massaging many sections of the Kansas Water Appropriation Act, as well as introducing new concepts such as minimum desirable streamflow, groundwater management districts, intensive groundwater use control areas, water assurance districts, multi-year flex accounts, and dynamic water resources planning. First in time, first in right remains the guiding principle in obtaining and administering water rights.¹⁷⁴ However, lack of a statutory definition of “impairment” makes it difficult to predict outcomes and decide cases.¹⁷⁵ The basic concept of water rights as property rights seems secure. But Kansas also maintains the usual differences between water rights and regular property rights in land that makes water rights less firmly entrenched than land rights. For example, water rights can be lost for non-use. Pumping may have to be curtailed in deference to senior water rights and water rights may be suspended for violations of terms and conditions. Despite the fact that the legislature enacted legislation in 1995 that ostensibly protects private property rights from excessive regulation,¹⁷⁶ developments in the last fifty years have lessened the strength one assumes of regular real property rights through reduction of annual quantities in an IGUCA situation,¹⁷⁷ imposition of conservation plans and metering requirements on existing water rights,¹⁷⁸ and imposition of civil penalties for violating the Water Appropriation Act or any rule and regulation, or for violating

172. On January 2015, the Kansas Water Authority approved changes from earlier drafts. See *Vision for the Future of Water Supply in Kansas*, KAN. WATER OFFICE, <http://www.kwo.org/The-Vision.html> (last visited Jan. 29, 2016). See also Memo from Vision Team, Kan. Water Authority to All (Jan 30, 2015), http://www.kwo.org/Vision/memo_ChangesMadetoFinalVision_01-3015_sm.pdf (regarding changes made to the vision document).

173. Tracey Streeter & Jackie McClaskey, *Guest Column: Kansas Water Vision-Development of the Second Draft*, KAN. AG NETWORK (Oct. 13, 2014, 4:01 PM), <http://kansasagnetwork.com/2014/guest-column-kansas-water-vision-development-of-the-second-draft/>.

174. KAN. STAT. ANN. § 82a-707(b), (c) (2015).

175. See *Garetson Bros. v. Am. Warrior, Inc.*, 347 P.3d 687 (Kan. Ct. App. 2015); see also *supra* note 101 and accompanying text.

176. See KAN. STAT. ANN. § 77-701, *et seq.* (2015).

177. See *supra* notes 134–36.

178. KAN. STAT. ANN. § 82a-733 (2015).

an IGUCA order.¹⁷⁹ The constitutionality of these results has not been tested in Kansas courts. In regard to recognizing the Public Trust Doctrine as California did in 1983 *National Audubon v. Superior Court*,¹⁸⁰ the Kansas Supreme Court had a chance to do so in a stream-access case in the 1991, *Meek v. Hays*, and it refused to do so in that context.¹⁸¹

Kansas may experience long distance movement of water if the water transfer project of the cities of Hays and Russell is approved and implemented.¹⁸² Yet, the rebirth of a possible pipeline from the Missouri River to southwest Kansas appears to have been tabled, at least for the present.¹⁸³ Wichita has dropped its idea of obtaining water from federal reservoirs in the Kansas River Basin, relying instead on conservation efforts and more water from the Equus Beds created by its aquifer storage and recovery (ASR) project.¹⁸⁴ Sedimentation in federal reservoirs is a concern and is being addressed in the Governor's Fifty-Year Vision.¹⁸⁵ Water marketing by Kansas to other states seems unlikely given our own water supply problems, and while many large water diversions are often suggested in the press, like ones from the Great Lakes or Canada, they seem unlikely as well, given the costs involved, other demands on federal spending, proprietary claims of local users, and uncertainties due to climate change. Kansas has hopefully reached the end of further litigation with Colorado and Nebraska.¹⁸⁶

Other opportunities and challenges may present themselves in the next fifty years. More reuse of water, such as the Dodge City wastewater reuse project,¹⁸⁷ is possible, although reuse itself creates issues in prior appropriation states like Kansas.¹⁸⁸ New innovations in irrigation and conservation techniques may be developed or invented. Recent legislative developments in state spending and tax reform could potentially lead to further cuts or even elimination of departments, including the DWR and the KWO. Nothing is certain except that the

179. KAN. STAT. ANN § 82a-737(b) (2015).

180. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

181. *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1357 (Kan. 1990).

182. See *supra* notes 162–63 and accompanying text; see also Kathy Hanks, *A Tale of Two Cities – Municipal Water Issues Plague Hays, Russell*, HUTCHINSON NEWS (July 26, 2014), http://www.kansasagland.com/news/stateagnews/a-tale-of-two-cities—municipal-water-issues/article_75b9b704-17e6-5908-8bcb-ac42045cbf42.html.

183. Associated Press, *Water Office: Missouri River Aqueduct Unlikely to be Built*, TOPEKA CAPITAL-JOURNAL ONLINE (March 19, 2015), <http://m.cjonline.com/news/2015-03-19/water-office-missouri-river-aqueduct-unlikely-be-built#gsc.tab=0>.

184. CITY OF WICHITA, WICHITA AREA FUTURE WATER SUPPLY: A MODEL PROGRAM FOR OTHER MUNICIPALITIES (2015), <http://www.wichita.gov/Government/Departments/PWU/UtilitiesDocuments/WICHITA%20AREA%20FUTURE%20WATER%20SUPPLY.pdf> (last visited Nov. 19, 2016).

185. KAN. WATER OFFICE, A LONG-TERM VISION FOR THE FUTURE OF WATER SUPPLY IN KANSAS 14 (2015), http://www.kwo.org/Vision/rpt_Kansas_Water_Vision_%20Final_%20Draft_%20012815.pdf (last visited Nov. 19, 2016).

186. See *Kansas v. Colorado*, 556 U.S. 98 (2009); see also *Kansas v. Nebraska*, 135 S.Ct. 1042 (2015).

187. *Wastewater Treatment*, DODGE CITY, <http://www.dodgecity.org/index.aspx?NID=114> (last visited Nov. 16, 2016); Roy Slattery & Sarah Unruh, *New \$17-Million Wastewater Plant Completed at Dodge City*, KAN. LIFELINE (March 2012), <http://www.krwa.net/portals/krwa/lifeline/1203/018.pdf> (last visited Nov. 19, 2016).

188. Jay F. Stein et al., *Water Use and Reuse: The New Hydrologic Cycle*, 57 ROCKY MT. MIN. L. INST. 29-1 (2011).

next fifty years in water resources management in Kansas will likely be as interesting and challenging as the last fifty years.

