

History of Kansas Water

2008

Speech given by Senator Janis Lee

Welcome to the 36th District – to Hays Kansas – a community that is more aware of the importance of water than almost any other in our state – a community that perfected water conservation numerous years ago and continues to use less water per capita than almost any other city in Kansas.

I am honored to have been invited to share a few thoughts with you today at this conference.

Kansas has a long and proud history of water law. Kansas is fortunate that our water law was developed relatively early in the last century, before most of the state realized how important and how precious water was to become.

History is conveniently divided into pre 1945 and post 1945.

A review of Kansas water law from Territorial days to 1945 tells us that as a territory Kansas adopted the common law in existence at the time which was the riparian doctrine.

- Land ownership along a stream gave the right to use water from the stream;
- Water rights were not lost by nonuse.

However a person who owned land along the stream did not own the water only had the right under certain conditions to use the water as it flowed by the land. Even the government did not own the water under the riparian doctrine.

To better understand this doctrine we need to remember that the primary use of water from streams and rivers was to turn water wheels for mills or factories of the early stages of the Industrial Revolution.

For groundwater, Kansas applied the common law of “absolute ownership doctrine” which allowed landowners to withdraw water and use it as they pleased, regardless of the effects on their neighbors.

Under both of these common law doctrines, water users did not know the extent of their rights, because the rights were not qualified or filed of record.

This doctrine worked as long as it was only applied to the eastern portion of the United States. But when this law crossed into the arid region, it was soon found to be inadequate.

Thus the need for the appropriation doctrine was created.

The “Arid Region Doctrine of Appropriation” evolved with the following characteristics, which are the foundations of post 1945 Kansas water law.

1. It had its origins west of the 100th meridian and was and is unknown in the humid portion of the country.
2. It permits the use of water for “beneficial” or useful purposes as distinguished from the “reasonable” use of the common law.
3. It permits the diversion of water from the stream.
4. The water may be used both on riparian or nonriparian lands.
5. It grants the first appropriator an exclusive right - later appropriator’s rights are conditioned by prior rights.
6. Under the arid-region doctrine, the continuation of the right depends upon beneficial use. Not to use the water is to forfeit it.

A brief review of the history of the origins of Kansas water law and then, post 1945, the integration of the appropriations doctrine into Kansas’s water law includes:

In 1917 the legislature created the State Water Commission and in 1919 the State Irrigation Commissioner. Duties included working out a general plan for development of all watersheds in the state to ensure that “water development of all kinds throughout the state conformed to the general plans.” This legislation contained the first hints of an appropriations system but lacked specificity and detail.

Ten years later in 1927 the legislature abolished the Commission and Commissioner when it conferred their duties on the newly created Division of Water Resources (DWR) within the State Board of Agriculture. In 1933, the legislature made the Chief Engineer head of DWR.

In 1944 a court decision came down (involving Wichita and the Equus Beds in Harvey Co.) that demonstrated the confusion in the law and triggered the legislature’s interest in changing water use doctrine. Soon after that the Governor appointed a committee to study Kansas water laws to make suggestions for improvement.

The Committee held a conference in Oct. 1944. In December the Committee presented their report which concluded with suggested legislation.

The Committee sought to establish “an orderly system for the appropriation and use of water” and noted the historical change in the use of water since statehood: “from an economy which required that stream flow be maintained without diminution, and which justified the adoption at that time of the common law, to one which more and more has its foundation in the appropriation and diversion of water for beneficial use.”

The result was the Kansas Water Appropriations Act which became law on June 28, 1945. The Act was passed less than ten months after the Kansas Supreme Court’s decision and less than four months following the Committee’s report! This Act made a fundamental and profound change in Kansas Water law and policy.

The purpose of the law was “An act to conserve, protect, control and regulate the use, development, diversion and appropriation of water for beneficial and public purposes, and to prevent waste and unreasonable use of water.”

The Act dedicated “all water within the state of Kansas...to the use of the people of the state, subject to the control and regulation of the state.” Thus, groundwater and surface water doctrines were combined into one. The most important change involved the dedication of the water to the use of the public.

The Act made DWR’s Chief Engineer the principal administrator of the law. Since its creation 1929 DWR has had only 5 Chief Engineers: George Knapp (1919-1951), Robert V. Smrha (1951-1972), Guy Gibson (1972-1983), David Pope (1983-2007) , and the newly appointed David Barfield.

The first court challenge to the new law came in 1949 wherein the Kansas Supreme Court upheld the validity of the Act.

In 1955 the legislature established the Kansas Water Resources Board that subsequently authored a Report in 1956 indicating that amendments and additions were needed to the 1945 Water Appropriations law.

Many of the amendments recommended by the Report which were adopted in 1957 were significant. Perhaps the most important was the addition of “water rights” as a defined term to include either a vested right or an appropriated right. The definition further stated: “It is a real property right...”

Arno Windscheffel, a lawyer from Smith Center and Chairman of the Kansas Water Resources Board, commenting on the actions taken by the 1957 legislature, wrote in a water law article for the Law Review Journal; “Within the last few years, we in Kansas have witnessed a legal phenomenon. A few short years ago Kansas practically had no water law. In those few years Kansas has come up with a water law which had taken other western states almost a century to acquire.”

Fast forward to 1974 when Kansas enacted the State Water Plan Storage Act creating the “water reservation right” a type of water right held by the state which enables the state to store water in federal reservoirs and to sell the water to cities and industries.

In 1981 the Water Resources Board was changed to the Kansas Water Authority and the Kansas Water Office, with its Director.

In 1982, the legislature enacted the Water Transfer Act to prescribe a framework under which large diversions of water over long distances might receive deliberation over and above that required by the Appropriations Act because the legislature wanted more structure in the decision making process.

We have finally come to legislative actions that have occurred during my tenure which began in 1989.

In the early 90’s the legislature dealt with several water quality issues including federal subtitle D landfill requirements, the state underground storage tank – and later, the above ground storage tank issues as well as the dry cleaner contamination issues. The later three of these culminated in the creation of consumers funded trust funds, which were dedicated solely for the cleaning up of spills to preserve groundwater quality.

In 1993 the original version of the Transfer Act was amended (primarily because of growth in Johnson Co.) by increasing the quantity and distance to 2000 acre-feet per year moving 35 miles or more in distance. In addition the original requirement for the approval of the Water Authority and the permissive disapproval of the legislature were removed from the law.

In the early 2000’s the legislature passed legislation dealing with the classification of streams in Kansas, legislation responding to water quality rather than quantity issues.

And finally in more recent years as a result of a heightened awareness of water quantity and the depletion of the Ogallala the legislature has enacted legislation to provide voluntary opportunities for incentives to permanently retire water rights.

These voluntary, incentive based programs include:

CREP: The Upper Arkansas River Conservation Reserve Enhancement Program a USDA Farm Service Agency – State partnership designed to help reduce the over-appropriation along the Upper Arkansas River Corridor. It was announced recently that federal officials were providing a \$22.7 million funding package to initiate the nation’s first conservation program, Kansas’ CREP, to permanently retire water rights on irrigated land.

Water TAP: The Water Transition Assistance Program a state funded program to purchase and permanently retire irrigation water rights in areas that are over-appropriated. Although the water right is retired, the land use is not restricted and could be dry land farmed.

From water law to water use;

Although evidence of irrigation in Kansas has been identified as beginning around 1650 by the Taos Indians along Beaver Creek in what is now Scott County State Park, the first major efforts toward large-scale irrigation development in the state began in the 1880's with the construction of canals to divert surface water from the Arkansas River.

When surface water diversions into the canals proved to be inefficient and unreliable, the future of large-scale irrigation in Kansas came to be dependent on the development of pumping plants using groundwater as the source of water. With the passage of the Water Appropriation Act in 1945 and the Groundwater Management District (GMD) Act of 1972, rapid expansion of irrigated acres occurred throughout the 1970's and 1980's.

Irrigation represents by far the largest use of water in the state. With the development of center pivot sprinkler systems in the 1960s, irrigation in Kansas expanded considerably. In 1960 approximately 1 million acres were irrigated. The number of irrigated acres grew to 3.4 million in 1980 and then decreased to 3.1 million by 2005.

Center pivot systems became the dominant irrigation system during the 1990s. In 1974, only 28 percent of the land was irrigated by sprinkler systems (all types), but by 1997 almost 70 percent of the land was irrigated by sprinkler systems (which were almost exclusively center pivots).

Currently irrigation remains the largest use of water in Kansas but the percent of total use has declined from 91% in 1980 to 85% in 2005. Irrigation water use totaled approximately 6 million acre-feet in 1980 and decreased to 3.1 million acre-feet in 2005. (in 2006 to percentage for irrigation had declined again to 83%)

Public supply water use has increased along with population and growth in service areas, now represents 12% of total use.

Industrial use remains about 3-4% of total use.

Overall water consumption was approximately 6.7 million acre-feet in 1980 but decreased to 3.6 million acre-feet by 2005 – a 46% reduction in water consumption in 25 years.

Now to 2008 and the future in Kansas –

How are we as a state going to manage the needs of our rapidly growing bioenergy industry with our limited water resources and current water law? How do CREP and the WaterTAP programs fit into this equation?

Back when our state was founded one would never have dreamed that energy and water would have come to be so entwined!

From the national perspective, according to the Energy Information Administration, the U. S. is the world's largest energy producer, consumer, and net importer. The U.S. also ranks eleventh worldwide in reserves of oil, sixth in natural gas, and first in coal.

While U.S. oil production has been declining in recent years. The consumption of petroleum products in the U.S., even with the anticipated conservation measures, is expected to grow from 40.28 quadrillion BTU's in 2005 to 50.97 quadrillion BTU's in 2030 a 26%+ increase.

The use of alternative fuels, such as ethanol and biodiesel is projected to increase substantially because of higher prices projected for traditional fuels and the support for alternative fuels provided in recently enacted Federal legislation.

Ethanol use is projected to grow from 4 billion gallons in 2005 to 14.6 billion gallons in 2030 (about 8 percent of total gasoline consumption by volume). Depending upon the source of reference, the ethanol production process consumes 3-4 gallons of water for every gallon of ethanol produced so increasing the production of ethanol almost four times will require the consumption of 40 to 50+ billion gals. (or 123,000 to 154,000 acre-feet) of water nationwide per year.

The ethanol supply is expected to be produced from both corn and cellulose feedstocks, but domestically grown corn is expected to be the primary source, accounting for 13.6 billion gallons (over 90%) of ethanol.

How will our state address the increased need for irrigated crops to be grown in Kansas if the ethanol industry in Kansas is to be part of the expansion in production?

That is the question that hopefully our presenters will answer today.

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