“Business as Usual” or a New Paradigm: Do We Need a Fundamental Change?

By

David M. Traster
FOULSTON SIEFKIN LLP
Wichita, Kansas

Presented at the
2003 Kansas Economic Policy Conference
The University of Kansas
“Business as Usual” or a New Paradigm: 
Do We Need a Fundamental Change?

By

David M. Traster
FOULSTON SIEFKIN LLP
Wichita, Kansas

In 1945 the Kansas legislature enacted the Kansas Water Appropriation Act\(^1\), which declared that all of the water in Kansas belongs to the State of Kansas, and is subject to appropriation under the terms and conditions of the statutory scheme.\(^2\) The constitutionality of this fundamental change in Kansas water law has been upheld by the Kansas Supreme Court on several occasions and is no longer in serious question.\(^3\) The Act established a procedure under which those who were utilizing water before enactment of the statute could continue to use water under what are termed “vested rights.”\(^4\) Water use, which began after 1945, is based on a permitting system. In the beginning, permitting was optional but is now mandatory. Under current law it is illegal to divert water except for domestic use without a permit from the Kansas Department of Agriculture, Division of Water Resources (“DWR”).\(^5\)

It is beyond the scope of this paper to describe the Water Appropriation Act in detail, but there are a number of fundamental principles that provide a foundation for Kansas water law. Those principles include at least the following:

- All water belongs to the State and is subject to appropriation under the permitting program.\(^6\)
- Once a permit is granted, it becomes a property right appurtenant to and severable from the land where the water is to be used.\(^7\)
- Wasting water is not permitted\(^8\) and all water rights must be for a reasonable quantity.\(^9\)
- All water in the State may be appropriated for a beneficial purpose.\(^10\)
- Once appropriated, the owner of a water right must either utilize the water for its specified beneficial use or the water right will be lost. In other words: “use it or lose it.”\(^11\)
• In a period or a location of short supply, a senior water right prevails over a junior water right. “The first in time is the first in right.”

Under Kansas law, failure to use either an appropriation right or a vested right for a period of five years without due and sufficient cause may result in termination of the water right. There is some debate about exactly how this statute should be interpreted and applied, but water must be utilized or the water right is subject to termination by DWR. There are numerous reasons for non-use that are acceptable, but simply not utilizing the water because of a lack of desire to irrigate, for instance, is not due and sufficient cause.

The fundamental structure of the Act encourages development and use of water, not conservation of the resource. In recent years, however, the State has taken steps to encourage conservation of water. The focus has changed. Some of these steps have been administrative policies and attitudes that govern the way in which the Water Appropriation Act is administered by DWR. In other cases, statutory and regulatory provisions have been enacted which allow for non-use of water without subjecting a water right to the risk of an abandonment proceeding. For example:

• Water in excess of “safe yield criteria” may no longer be appropriated in the first instance.

• Water rights associated with lands which are enrolled in DWR’s Water Rights Conservation Program are not subject to abandonment.

• Lands enrolled in the federal Conservation Reserve Program will not be subject to abandonment.

• The Kansas legislature recently enacted a “water banking” program and created “flex accounts,” both of which allow non-use of water.

• Requirements for conservation plans by water appropriators have been imposed in numerous circumstances.

As noted above, in most of the State, new water appropriation applications are predicated on meeting safe yield criteria. This is true for all areas outside of established groundwater management districts. There are five groundwater management districts in Kansas and two of them, the Big Bend Groundwater Management #5 and the Equus Beds Groundwater Management District #2, also have safe yield policies. The only places in the State where safe yield is not the rule are in Western Kansas Groundwater Management
District #1, Southwest Kansas Groundwater Management District #3 and Northwest Kansas Groundwater Management District #4. To use a safe yield policy in the western quarter of the State would result in virtually no water use at all.

The extent of the Ogallala Aquifer and the boundaries of the three western Kansas Groundwater Management Districts are shown on the map below.
Within these three GMDs, public policy has allowed the mining of water as a natural resource. It is being taken much faster than it is being replaced by nature. For example, the Southwest Kansas Groundwater Management District #3 established a “planned depletion” policy under which no more than 40% of the saturated thickness may be depleted within a 25-year period.23

The reality is that even with this limitation in place there are areas of the State where water appropriation rights far outstrip the 40% in 25 years limitation. For example, there are locations near Dodge City where up to three times the allowable quantity has been appropriated.

It is the author’s opinion that the current system is adequate to address long-term water supply concerns in the eastern two-thirds of the State where there is sufficient rainfall to allow for the recharge of aquifers which are utilized for water production. Additional regulation and creative solutions are going to be needed to actually achieve a safe yield balance. The State will need to commit the resources it takes to acquire large numbers of water rights and retire those rights if it is serious about the long-term sustainability of water resources in these areas. Even if the State takes little action, the aquifers in the eastern two-thirds of the State will generally be recharged by rainfall, and economics and the current provision of the Water Appropriation Act will likely solve most of the problems. The solutions may be painful, difficult and costly but, as a general proposition, there is no need for a fundamental reassessment of the structure of the Water Appropriation Act.

The situation in western Kansas is dramatically different. The fact is that there is very limited recharge to the Ogallala Aquifer and even less to the Dakota Aquifer except along major river channels. Where water is available, it is being used by irrigators to supplement very scarce rainfall.

Existing water rights drive a massive economic engine in western Kansas. Water is pumped to the surface and huge quantities of grain and other feed are grown in an area once described as the “Great American Desert.” This grain is fed to cattle that are, in turn, slaughtered and shipped out of western Kansas. The economic domino effect is staggering and affects the entire State. This economic structure depends upon continued mining of the water resource. As the water resource depletes over time, the economy of western Kansas and the State as a whole will be in peril.
Vast quantities of water remain in large parts of western Kansas, and a disaster may not be imminent; however, there can be no doubt that the water resources of western Kansas will someday be depleted if something is not done. The Water Appropriation Act as now constituted, even with the conservation “patches” described above, will never solve the problem created by the mining of water and the “use it or lose it” philosophy established in the Water Appropriation Act.24

Western Kansans are an independent lot, but they see the problem and can be counted upon to help with a solution if one is to be found. The impact of depletion on the economy in that part of the State will be direct and significant, and finding a solution does and should matter more to western Kansans than to others. But because the impact is so far-reaching, a solution to this policy problem should matter to all of us. However, water rights are property rights, and because of the economic interests that have grown up around the use of Ogallala water, the State cannot change the rules by legislative fiat or by regulatory pronouncement. The solution that worked in 1945 will not work again.

The bottom line is that it is naïve to assume that the current structure of the Water Appropriation Act, which at bottom is focused on full development, patched with the conservation measures discussed above, will even begin to approach solving the problem of over-appropriation of water in western Kansas. Moreover, economic interests have grown up around the water rights that will preclude a major overhaul of the Water Appropriation Act. It may be possible to purchase substantial numbers of water rights in the eastern two-thirds of the State and have an impact on the quantity of water available for future users. Purchasing sufficient water rights to solve the problem in western Kansas is a pipe dream.
Endnotes

1  K.S.A. 82a-701 et seq.
2  K.S.A. 82a-702
4  K.S.A. 82a-704 (now repealed); see also K.S.A. 82a-704a.
5  K.S.A. 82a-705; K.S.A. 82a-725
6  K.S.A. 82a-702
7  K.S.A. 82a-701(g)
8  K.S.A. 82a-706(d); K.S.A. 82a-737(b)(3)
9  K.S.A. 82a-707(e)
10  K.S.A. 82a-703
11  K.S.A. 82a-718
12  K.S.A. 82a-707c
13  K.S.A. 2002 Supp. 82a-718
14  K.A.R. 5-7-1
15  “Safe yield” refers to the concept that no more water may be appropriated than is actually being recharged from rainfall.
16  K.A.R. 2002 Supp. 5-3-16a
17  K.A.R. 2002 Supp. 5-7-4
18  K.A.R. 2002 Supp. 5-7-4a
19  K.S.A. 2002 Supp. 82a-761 et seq.
20  K.S.A. 2002 Supp. 82a-736
21  K.A.R. 2002 Supp. 5-3-16a
22  GMD #2 – K.A.R. 5-22-7; GMD #3 – K.A.R. 5-25-4
23  K.A.R. 5-23-4
24  This is not to suggest that simply eliminating the abandonment statute would solve the problem.