

Legal Aspects of Large-Scale Water Transfers

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Summary of Presentation

1. What a Water Right is and how it is obtained.
2. Changing a Water Right.
 - A. The public/private balance.
3. The Kansas Water Transfer Act.
 - A. Heightened scrutiny for large water transfers.
4. Water Transfers and the Federal Law of the Missouri River Basin
5. Wargaming the “Kansas Aqueduct Project”

What a Water Right is (and is not)

- A right to use water, **not** to the water itself.
- Western states: prior appropriation rights.
 - Severable from the land where it is used.
 - Protection by priority, not equity.
- The Kansas Water Right. Kan. Stat. Ann. 82a-701 *et seq.*
 - The public interest prong.
 - The private, real property prong.
- What is a Kansas water right? *A usufructuary right– the private right to use water that is dedicated to the public.*

Obtaining a Kansas Water Right

- By application to the Chief Engineer, DWR
- The attributes of a water right:
 - Priority (does not change)
 - Authorized quantity and rate (does not change)
 - Point of diversion (can change)
 - Place of use (can change)
 - Type of use (can change)
- By purchase, lease, rent, or other conveyance.
 - Water rights can be partially sold and divided.
 - Priority and authorized quantities transfer with the conveyance.
 - If the new holder wishes **to change** the use of the water right, that change is subject to approval by the chief engineer.

Changing a Kansas Water Right

- What **cannot** be changed:
 - priority
 - maximum authorized quantities (annual volume and rate)
- What **can** be changed:
 - Place of diversion
 - Place of use
 - Type of use (e.g., from irrigation to municipal)
- Applicant for a change must satisfy the two prongs of a Kansas water right:
 - The public prong. Change must be in the public interest.
 - The private property prong. Change must not impair existing rights.
 - The no-injury rule.

A crude hypothetical.

- Irrigator has a water right with a 1948 priority, and quantities of 100 AF/yr and 800 gpm, pumping from his farm in Lyons County and irrigating his farm ground.
- Of the 100 AF he pumps and applies to his crops, 80 AF waters his crops and 20 AF seeps below and back in to the basin. Consumptive use is therefore 80%.
- City of Emporia wants to buy the water right, and change the use made of water to municipal use, which under DWR regulations is 100% consumptive. Seller wants to sell.
- Therefore, the irrigator only has 80 AF of consumptive use to sell. City will likely need to buy 125 AF of irrigation water rights to convert to 100 AF of municipal use.

Some examples of sales made with the plan to change the use of water.

- Sales from irrigation → municipal rights
 - Ark River Basin, Colorado
 - Sellers: owners of ditch rights or groundwater rights
 - Buyers: front range cities and suburbs of Denver
 - The “buy and dry” problem. Losses in local economic production (primary) and tax revenues (secondary).
- Sales from irrigation → industrial rights
 - Ark River Basin, Kansas
 - Sellers: irrigation rights owners
 - Buyers: Tri-State Energy (Sunflower)
 - A higher economic use of the water.
- In both situations, consumptive use is the measure of the water right conveyed.
- “Buy and Dry” versus the fact that water flows uphill to money.

The Water Transfer Act, K.S.A. 82a-1501 *et seq.*

- Governs changes in the use made of water in excess of 2,000 AF/yr or a change in place of use greater than 35 miles.
- First step: obtain approval of the change from the chief engineer, pursuant to the KWAA, 82a-708(b) and regulations.
- Second step: obtain approval at a hearing called under the WTA, involving a panel consisting of three agency heads:
 - Chief engineer, DWR
 - Director, Kansas Water Office
 - Secretary of KDHE (or his authorized designee)

The higher standard under the WTA

(part one)

- First rule: 82a-1802(a). Applicant must meet a higher standard of consideration for *future* uses.
- Exception: *unless* the applicant can show one of two things:
 - The benefits of the proposed use > those of the existing use, or
 - An emergency (unlikely to be used often).

The higher standard under the WTA

(part two)

- Second Rule: 82a-1502(b). Water transfer will not be approved if it impairs existing rights, *and*,
- Additional considerations for wise and responsible water use and management, especially water conservation plans and rate structures.

The higher standard under the WTA

(part three)

- A more strenuous review of the public interest.
82a-1502(c).
- How does the hearing officer determine whether the benefits of the transfer outweigh current water use under the water right? Nine statutory considerations.
 - 1. Present use, incl. MDS
 - 2. Future use
 - 3. Economic, environmental, public health and welfare
 - 4. Are there alternative sources of water for both the applicant and present or future users in the area?
 - 5. Has applicant taken water quality measures and contamination precautions?
 - 6. Are the water works sufficient?
 - 7. Are water conservation plans effective?
 - 8. Do protestants have a better plan?
 - 9. GMD management plans and regulations.

Two timely examples.

- The real: The Edwards County/Hays and Russell Transfer.
 - Irrigation rights owned by Hays in Edwards County.
 - Proposed change in place of use to municipal use by Hays and Russell.
 - Proposed change in place of use to the Hays/Russell metroplex.
 - DWR reviewed and approved the change pursuant to the KWAA.
 - Irrigators in Edwards County have challenged the transfer.
- The hypothetical: the “Kansas Aqueduct.”
 - **Not** an existing right: a proposed application for a large water right.
 - Diverting (excess?) water from the MO River in NE KS, and piping it across the state to a terminal reservoir in western Kansas.

The Immediate Future: the Edwards County— Hays/Russell Transfer

- The current public interest and economic value of present irrigation in Edwards County
- The public interest and economic value of proposed municipal use in Hays and Russell
- The private property rights of Hays, which owns the water right in Edwards County.
- The heightened scrutiny of the transfer under the Water Transfer Act.
- This application may make useful Kansas law.

Federal Law

- Most water law is state law, because water rights are property rights and state courts have jurisdiction over property disputes.
- But in the event of a conflict, federal law trumps state law, pursuant to the Supremacy Clause of the U.S. Constitution.
- The Water Transfer Act did not anticipate interstate and federally-involved water transfers.

The Missouri River Basin



A thoroughly federalized basin.

1. Flood Control Act of 1944: the grand bargain.
 - A. Corps (Navigation and flood control) east of the 98th Meridian.
 - B. Reclamation (Irrigation) west of the 98th Meridian.
2. Reclamation does not build large projects west of the 98th Meridian on the MO River, but smaller projects on tributaries.
3. Corps-Reclamation rivalry does not go away.
4. Federal environmental law intensifies the basin's legal complexity (1970s)
5. The Talmud of the Missouri: the Corps Master Manual.

The Federal Law of Interstate Compacts and Decrees

1. Yellowstone River Compact (1950)
2. Belle Fourche River Compact (1943)
3. Upper Niobrara River Compact (1962)
4. North Platte Decree (1945, updated since)
5. Laramie River Decree (1922)
6. South Platte River Compact (1923, amended 1939)
7. Republican River Compact (1943)

Reserved Water Rights in the Basin

What a Reserved Water right is: an implied, reserved, federal right.

1. Fort Peck-Montana Compact (Assiniboine and Sioux Tribes) (1985)
2. NPS-MT Compact (1994)
3. USF&WS-MT Compact (1995, 1997)
4. Chippewa-Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999
5. MT-Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation (2001)
6. Crow Tribe Water Rights Settlement Act of 2010
7. Big Horn Adjudication (2014)
8. Northern Cheyenne IRWRSA of 1992 (1993)
9. Kickapoo Reserved Water Rights Settlement (2016)
10. And more to come.

Recovery Implementation Plans

A state-federal tool that seeks to avoid “hard” management of flows and habitat pursuant to the Endangered Species Act.

The Platte RIP: Colorado, Wyoming, Nebraska, and the United States. Instream flow protections and *out-of-basin diversion protections*.

The Interstate and Federal Dynamics

- Upstream states with non-consumptive, recreational interests (MT, ND, SD, IA)
- Missouri: downstream, navigational interests
- States with “mixed” interests (NE, KS)
- The Corps: master of the Missouri. Balancing diverse state and diverse federal interests (ESA, navigation) within the Master Manual
- Reclamation: balancing upstream irrigation projects
- US F&WS: ESA, RIPs
- Tribal interests (held in trust by the USA)

Litigation and Federal Power

- *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988).
- *South Dakota v. Nebraska*, 485 U.S. 902 (1988).
- *South Dakota v. Kansas City Southern Industries, Inc.* 880 F.2d 40 (8th Cir. 1989).
- *South Dakota v. Ubbelohde*, 330 F.3d 1014 (2003).
- *Florida v. Georgia*: the problem of sovereign immunity
- What these mean: interstate conflicts waged via proxy battles with the United States. See, e.g., *Missouri v. United States & North Dakota* (filed 2/2020) (challenging a 15,000 AF out-of-basin diversion).

The Kansas Aqueduct Project

- Would harvest high/flood flows off of the Missouri mainstem near the Nebraska border, and distribute that water across Kansas as it traverses the state.
- 3.4 MAF, 1800' rise, 300 mi., \$18B, \$1B annual costs
- \$470/AF (vs. pumping costs for groundwater). Likely higher, given need to transport water from collecting reservoir in west-central Kansas.
- Analyses: John C. Peck (and Michael Ramsey), *Legal Constraints on Diverting Water from Eastern Kansas to Western Kansas*, 30 KAN. L. REV. 195 (1981); David Pope and Leland Rolfs, update to 1982 Corps evaluation (on KWO website).

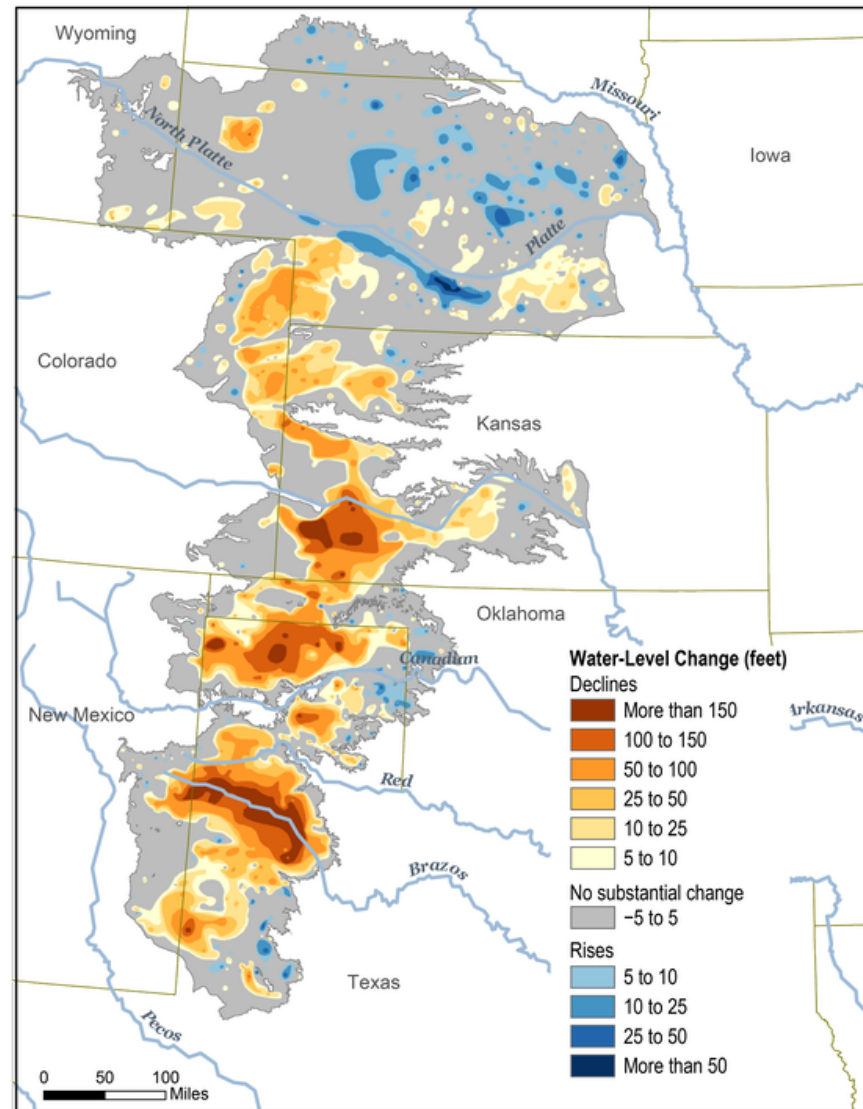
Depletion across the High Plains-Ogallala Aquifer

MO River Basin: SD, WY, NE, KS, CO

12 MAF permanent depletion annually

But contrast Kansas with Nebraska.

And, **all** of these states (except SD) have been to SCOTUS in the past 10 years over interstate water conflicts.



Wargaming the KAP

- Federal (and interstate) legal issues
- State legal issues
- Market demand issues

Occasional reference to an analogous project, the Central Arizona Project.

First legal issue: the Corps.

- The Corps controls the MO River Basin. *See* cases, *supra*.
- The USA holds a navigational servitude on all navigable rivers, allowing it to destroy state-law property rights without compensation. *U.S. v. Willow River Power Co.*, 324 U.S. 429 (1945).
- Providing for a KAP almost certainly requires the revision of the Corps' master manual.
- And likely substantial amendments to federal water law (1944 WCA; subsequent WRDAs)
- Query: can Kansas muster sufficient political support to substantially amend federal water law?

Second legal issue: the States

- MO will certainly sue KS to challenge the KAP; *see* cases, *supra*. Jurisdiction in this case is original and exclusive with SCOTUS.
- Would Kansas defend such a case?
- If so, KS and MO will likely make allocation claims to the unallocated waters of the MO River Basin, asking SCOTUS to allocate a basin. The Court has not done so since 1945.
- Would the Court even accept the case? Unlikely, if *South Dakota v. Nebraska*, 485 U.S. 902 (1988) is any guide; really a question of Corps management.
- If the Court accepts the case, what will the Corps do? It enjoys sovereign immunity. Absent its consent, the Court's interstate allocation of waters is unenforceable. *Florida v. Georgia* (2020).

Third legal issue: a Compact?

- All MO Basin states (and tribes) could negotiate an interstate compact, allocating the waters and regulating the water uses of the basin. That could certainly provide for a KAP-like project. **Kansas would necessarily be part of that compact.**
- However,
 - The USA (the Corps) would almost certainly need to be a signatory party to the Compact. Feasible?
 - States (especially MO) *would likely insist upon an anti-export provision*, prohibiting out-of-basin diversions. Like the Great Lakes Compact.
 - Most of the KAP service area is **outside** the MO River Basin. So vulnerable to an anti-export provision.

Fourth legal issue: federal environmental law

- ESA compliance is a major driver of the Corps' MO River Master Manual (pallid sturgeon, piping plover, least tern)
- Flood/pulse flows can be necessary to protect endangered species; *Ideker Farms*.
- NEPA review for “any federal action substantially affecting the environment.”
- Major diversions such as the KAP could affect water quality standards under the CWA (but could potentially improve water quality in Kansas)

First state law issue: eminent domain

- Most large federal water projects originate in, occupy, and traverse largely federal and state land. See, e.g., Glen Canyon Dam and Lake Powell.
- Kansas has almost no federal land and very little state land.
- Thus the need for eminent domain to build the KAP. A long-established aspect of water projects.
- Will Kansas leaders endorse eminent domain actions statewide that transfer private property to the KAP and the USA?

Second state law issue: the anti-speculation doctrine

- KAP water would be state water, out of Kansas's interstate allocation of the MO River.
- Chief engineer would review applications for use of that water pursuant to the KWAA.
- Anti-speculation doctrine, codified throughout the KWAA, requires specific descriptions and commitments for planned water use.
- Courts are alert to speculative claims and often reverse water agencies' approval of such claims. E.g., *Central Delta Water Agency v. State Water Resources Control Board*, 124 Cal. App. 4th 245 (2004).

Legal lessons of the CAP

- AZ began trying in the 1930s; CA always stopped it in Congress.
- Did not become legally feasible until AZ secured a 2.8 MAF allocation of the Lower Colorado River in *Arizona v. California* (1963). (The MO is unallocated, remember.)
- CA supported CAP in exchange for all CAP water having a priority **junior** to all CA water.
- Federal support for CAP conditioned upon substantial state law groundwater reform; → Arizona Groundwater Management Act of 1980.

The Value of Irrigation to Western Kansas

- The value of agriculture to the Kansas economy is a difficult and contentious subject.
 - USA: Under 10% of the Kansas Economy.
 - KDA: Above 40% of the Kansas Economy.
- Over 90% of Kansas groundwater is devoted to agriculture.
- John C. Leatherman (KSU), Hanas A. Cader, and Leonard E. Bloomquist, *When the Well Runs Dry: The Value of Irrigation to the Western Kansas Economy*, KANSAS POLICY REVIEW, Spring 2004 at 7, 17 20 (estimating a 7-10% decrease in the GDP of the state over the long term due to groundwater depletion).
- Recent study by the Yale School of Forestry, 2016:
 - \$1.1 Billion loss in depletion of natural capital from 1996-2005 (groundwater resources) across the Kansas High Plains-Ogallala Aquifer). Or \$110 Million/year.
 - What is “natural capital”? The resources of the *public*.
 - Upon which private property rights depend.

At \$470/AF: the first question

- Assume a 125 acre, $\frac{1}{4}$ -section crop circle in Meade County with a NIR of 18"; 187.5 AF.
- $187.5 \text{ AF} \times \$470/\text{AF} = \$88,360$. (Not counting post-reservoir transportation costs.)
- Assume 300 bu/ac corn yield, = 37,500 bu.
- Market value of crop, at \$4.20/bu: \$157,500.
- Net income after paying for KAP water: \$69,140.
Or \$553.12/acre.
- **Does irrigator make a profit after accounting for all other non-KAP water expenses?**

At \$470/AF: the second question

- Assume Meade County irrigator has groundwater rights at NIR of 18”.
- Assume (quite safely) that his pumping and irrigation costs are substantially less than \$470/AF.
- **In what situation would he purchase KAP water when he can pump High Plains-Ogallala groundwater?**

At \$470/AF: the final questions

- Who subsidizes the KAP to lower the price to a point where irrigators will commit to purchasing KAP water? Likely a state-federal cost share. How much subsidy is necessary?
- How supportive will other MO River Basin states (16 senators) be of subsidizing the KAP (2 senators)? 4 of these 16 senators represent states that have lost interstate water cases to Kansas.

The Economic Lesson of CAP

- Irrigators promised to purchase subsidized CAP water. This promise critical to ensuring congressional approval of CAP in 1968.
- Irrigators formed Reclamation districts through which to contract to purchase CAP water.
- Irrigators reneged on their contracts, and Reclamation districts filed for bankruptcy.
- Phoenix and Tucson compensated for the lack of irrigation demand.
- **Lesson: the question is not whether irrigators *can* pay; it is whether they *will* pay.**

Some observations.

- There are **a lot** of legal issues in play with large water transfers, especially interstate transfers.
- Kansans can change state water law. Doing so here wouldn't make much of a difference.
- Kansans and Americans can change federal water law and force changes to the Master Manual. The odds of that are probably low, unless KS can build a basin consensus.
- Almost all large-scale inter-basin transfer projects were built during the “Big Dam Era” (1930s-60s), and before modern environmental law.
- Water flows uphill to money. Is there sufficient demand/ money/federal support for MO River water across Kansas? Imagine the CAP without Phoenix and Tucson. Hard to imagine.

Transfers raise important issues.

- They force us to consider **statewide** water interests and the public, not just local interests.
- They cause interstate and intrastate lawsuits, and deep and lasting intrastate rifts.
 - WY, CO, CA, AZ, UT, NV, MO River Basin
- They force Kansas to evaluate its relationship with federal power and with other basin states. What can be done? What should be done?
- How can we restructure ag subsidies to secure water supplies, when existing subsidies promote groundwater overpumping?

A brief read.

Matthew R. Sanderson, Burke Griggs, & Jacob A. Miller, *Farmers are depleting the Ogallala because the government pays them to do it*, THE CONVERSATION, November 9, 2020.