

Some Legal Responses to Drought in Kansas

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Waters of the United States: Adapting Law for Degradation and Drought

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I. Introduction

A. Some definitions of “Drought”

1. Note: “drought” versus “drouth”
2. Kansas Water Plan, April 1984, Sub-section: Minimum Desirable Streamflows, Glossary: “**Drought.** A period of deficient precipitation and runoff extending over an indefinite number of days.”
3. Wester’s New Collegiate Dictionary (1980): “A prolonged period of dryness.”
4. Oxford English Dictionary, 6th 3d.: “A prolonged period of abnormally low rainfall, leading to a shortage of water.”
5. U.S. National Weather Service: “[A] deficiency in precipitation over an extended period, usually a season or more, resulting in a water shortage causing adverse impacts on vegetation, animals, and/or people . . . [and is] a normal recurrent feature of climate that occurs in virtually all climate zones, from very wet to very dry . . . a temporary aberration from normal climatic conditions [and] thus it can vary significantly from one region to another.”
6. David Craft, USDA Natural Resources Conservation Service (NRCS): “Precipitation less than 75 percent of the average.”¹
7. Thomas V. Cech, PRINCIPLES OF WATER RESOURCES, HISTORY, DEVELOPMENT, MANAGEMENT, AND POLICY (2003), at 52: “Drought is very different from aridity. Aridity is a permanent climatic condition in a

¹ “NRC Rural Papers,” Kansas Rural Center, No. 247 (January - February 2013), at 1.

region, whereas drought is a temporary lack of moisture.”

8. Thus, some variables and uncertainties: size of region, degree of deficiency of precipitation, types of water uses by the people affected, and the length of time
- B. Some examples of drought and lack of rain in literature:
1. *The Story of Aqua Pura*, William Allen White (1896) (short story about small western Kansas town that flourishes during wet years and disappears during and after long drought)
 2. *Drought's End*, Frank Halliwell (poem seeking end to drought)
 3. *THE GRAPES OF WRATH*, John Steinbeck (novel about the Dust Bowl era)
 4. *The Rime of the Ancient Mariner*, Samuel Taylor Coleridge (ship at sea stalled with no wind—“Water, water, every where, Nor any drop to drink”)
- C. Potential legal responses to drought in Kansas
1. Judicial decisions
 2. Legislation
 3. Administrative responses
- D. Scope of paper: Limited to Kansas legal responses and thus does not include Federal responses by Congress or various administrative agencies such as the USDA Farm Services Agency, the Risk Management Agency, the Natural Resources Conservation Service
- E. Difficulties in finding material and drawing conclusions
1. Drought periods?
 2. Conclusions about drought being the cause of the legal response?

II. **Historic drought periods in Kansas**

- A. Source of information
1. Pre-1900:
 - a. Kansas Geological Survey (KGS)
 - b. Kansas Department of Agriculture, Annual and Biennial Reports

- c. Kansas Historical Quarterly, articles on dust storms
- d. Kansas Natural Resources Council
- e. Kansas Water Resources Board

2. Post 1900

- a. United States Geological Survey (USGS)
- b. Kansas Water Resources Board²
- c. National Climatic Data Center

3. Current

- a. Kansas Water Office³
- b. National Weather Service (Palmer Drought Severity Index (PDSI))⁴
- c. AgWeb⁵
- d. Kansas Geological Survey⁶
- e. Kansas Rural Center⁷

B. Some drought periods suggested by various sources

- 1. 1859-1868
- 2. 1872-1875
- 3. 1892-1901
- 4. 1909-1919
- 5. 1929-1941
- 6. 1952-1957
- 7. 1962-1972
- 8. 1974-1982
- 9. 1988-1992

² See, e.g., Water in Kansas, Report to the 1955 State Legislature, Kansas Water Resources Board, at 17 (January 1955).

³ See <http://www.kwo.org/>

⁴ See <http://www.crh.noaa.gov/ict/?n=drought> (National Weather Service Online)

⁵ See <http://www.agweb.com/>

⁶ See <http://www.kgs.ku.edu>, specifically http://www.kgs.ku.edu/Hydro/Publications/2012/OFR12_18

⁷ See <http://kansasruralcenter.org/>

10. 2002-2006
11. 2010-2013

III. Judicial decisions

A. Some pre-1945 cases

1. *Clark v. Allaman*, 71 Kan. 206, 80 P 571, 70 L.R.A. 971 (1905) (lower riparian irrigator sued upper riparian irrigator for injunction; “The years of 1900 and 1901 were excessively dry. Then the test came, and the difficulties between the various appropriators of water arose.”)
2. *Atchison, Topeka & Santa Fe. Ry. Co. v. Shriver*, 101 Kan. 257, 166 P. 519 (1917) (railroad company, a riparian owner, sued mill owner to enjoin destruction of a dam constructed by railroad company during “an unprecedented drought, which the [trial] court felt impelled to classify as an act of God”; supreme court affirmed district court’s refusal to order an injunction because by the time of the trial, “normal conditions had been restored” and “the cause of the litigation—dearth of water resulting from excessive drought—had ceased to exist”)
3. *Fizell v. Bindley*, 144 Kan. 84, 58 P.2d 95 (1936) (in 1911 plaintiff irrigator filed appropriations to irrigate from a river under 1886 statutes that ostensibly set up system of prior rights among water users who also filed; plaintiff sued other irrigators (all but one from river water), some of which had filed after plaintiff, while others irrigated without filing; after several dry seasons, there was insufficient water for all; court held that the common law riparian law of reasonable use applied, meaning all riparian users have a reasonable share of the water, irrespective of filings or date of first use)
4. *Seglem v. Skelly Oil Co.*, 145 Kan. 216, 65 P.2d 553 (1937) (suit for damages by downstream riparian owner against upstream industry for pollution caused by discharges of brine, oil, and “noxious refuse” into the creek during drought, making the water unfit for livestock, killing trees, and leaving sediment on bottom land; jury verdict for \$3,500 against defendant reversed; acknowledging that drought may have exacerbated the damages, court nevertheless ruled against plaintiff based on 2-year statute of limitations)

B. Some post-1945 cases

1. *Huber v. Schmidt*, 180 Kan. 80, 299 P.2d 33 (1956) (plaintiff downstream

domestic user sued upstream irrigator for injunction due to defendant's drying up the creek in drought conditions; prior to the hearing, an 8" rain fell, so the trial court dismissed the suit; on appeal, the Supreme Court reversed, stating that even if the rain "did occur and for the time being did saturate the soil and restore a flow of water . . . as soon as that result abated, as in ordinary course it would, then plaintiff would be in the same position as when he commenced the action")

2. *Baumann v. Smrha* (145 F.Supp. 617 (1956) (no active pumping; rather, plaintiff, a "passive irrigator" (plant roots reached to the water table) sued for declaratory judgment that the 1945 Water Appropriation Act was unconstitutional in declaring all water to be dedicated to the use of the public, thus taking groundwater that prior to 1945 had belonged to the surface owner; court acknowledges the fact that "the water level might have declined as much as four feet without pumping because of drought, but that the rest of the decline must be attributed to pumping," but upheld the Act based on *Emery v. Knapp* (1949))
3. *Weaver v. Beech Aircraft Corp.*, 180 Kan. 224, 303 P.2d 1956 (lower riparian land owner sued upper owner for injunction, claiming the taking of all the spring water emptying into the creek was unreasonable; supreme court admitted that "severe drought conditions" may have affected flow in the stream and from the spring, but that defendant was taking *all* the water, which was unreasonable; the court also noted that no party had obtained appropriation rights)
4. *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962) (case involved claims by landowners near Wichita's municipal groundwater wells that their land values had gone down due to Wichita's wells lowering the water table; plaintiff relied on "sub-irrigation" (roots naturally reaching down to groundwater), not on irrigation pumping; drought from 1951 to 1957 lowered water table to 11.38 feet below the land surface; water table had risen to be 5.31 feet below the land surface in 1958; court denied plaintiff's claim and upheld the Kansas Water Appropriation Act against a claim of an unconstitutional taking of property without compensation)
5. *Rural Water District No. 6 Butler County, Kansas v. Ziegler Corp.*, 9 Kan. App.2d 305, 677 P.2d 573 (1984) (arbitration award appeal involving liquidated damages in contractor's delay, caused in part by drought conditions; arbitrator had extended completion date due to drought, but awarded liquidated damages for several months's delay beyond that date; court upheld award for district against contractor)
6. *State ex rel. Meek v. Hays*, 246 Kan. 99, 785 P.2d 1356 (1990) (issue of

navigability of stream and the right of canoeists to float on the stream against rights of riparian landowners; finding that “[d]uring times of drought, portions of Shoal Creek are impassable by even a canoe or small boat,” the trial court, affirmed on appeal, held that the stream was non-navigable, thus declaring that riparians land owners also owned the bed of the stream and that floating on the stream would constitute trespass)

7. *Lierz v. Lierz*, 191 P.3d 363 (Table), 208 WL 4140637 (Kan. App. 2008) (unpublished opinion) (dispute over rights to water behind dam on plaintiff’s land under easement agreement with defendant, the dominant tenement; regarding future injury, appeals court noted that plaintiff needed water “only in dry years” and that the trial court “characterized the years immediately prior to the filing of this lawsuit in 2005 as ‘drought conditions’”)

IV. **Kansas Constitution:** Article 11, Section 9 (permits state to be party to public works involving improvements for flood control works and works for the conservation and development of water resources (1958)

V. **Legislation**

- A. Pre-1945 water statutes: Drought not mentioned specifically, but perhaps can be inferred as one of the background reasons for some legislation:
 1. 1866 (irrigation companies empowered to construct canals)
 2. 1886 (stream water may be used for irrigation by appropriation, and first in time is first in right)
 3. 1889 (ditch and canal companies empowered to condemn water rights)
 4. 1891 (waters west of 99th meridian to be devoted first to irrigation use, subject to domestic, 2nd to industrial use; irrigation districts may be created)
 5. 1899 (irrigation companies empowered to condemn to aid in establishing reservoirs, lakes, or ponds for water storage)
 6. 1917 (Kansas Water Commission established to investigate problems of, *inter alia*, domestic water supply and irrigation; to establish river gaging stations; to make general plan for development of river basins; repealed 1927)
 7. 1919 (Division of Irrigation created in State Board of Agriculture, under

control of commissioner of irrigation; duties of commissioner included gathering data, visiting sites, and making quarterly reports to state board)

8. 1927 (legislature abolished Water Commission and Division of Irrigation; Division of Water Resources (DWR) created to take over duties)
9. 1933 (Chief Engineer made head of DWR)

B. The 1945 Water Appropriation Act: Activity related to and resulting from 1930s drought:⁸

1. 1940 (Governor appointed committee and held conference to study problems and make recommendations; committee report recognized need for a state plan to control the water resources)
2. 1941 (legislature repeals part of 1886 Act and established administrative procedures for handling applications for water appropriations)
3. 1944 (*State ex rel. Peterson v. Kansas State Board of Agriculture*, 158 Kan. 603, 149 P.2d 604 (1944) (affirmed common law doctrine of absolute ownership for groundwater; concluded that the chief engineer had been given no power over groundwater allocation))
4. 1944 (Governor appoints committee to study state water law, which produces “The Appropriation of Water for Beneficial Purposes: A Report to the Governor” (Dec. 1944) recommending adoption of Doctrine of Prior Appropriation)
5. 1945 (legislation adopts the Water Appropriation Act)

C. The Water Planning Acts

1. 1917 (Kansas Water Commission established to investigate problems of, *inter alia*, domestic water supply and irrigation; to establish river gaging stations; to make general plan for development of river basins; repealed 1927)
2. 1955 (Kansas Water Resources Board and executive director established)
 - a. Charged with working on working out a state water plan of water resources development

⁸ Richard Pfister, WATER RESOURCES AND IRRIGATION, PART IV OF ECONOMIC DEVELOPMENT IN SOUTHWESTERN KANSAS, KU School of Business (March 1955)

b. Background: “The State of Kansas had no sooner recovered from the spectacular floods of 1951 when it plunged into one of the most severe droughts in Kansas history from 1952 through 1956. This sequence of disasters led to legislative creation of the Kansas Water Resources Board in 1955 as a move to try to do something to avert or at least alleviate future crises through aggressive planning.”⁹

3. 1963 (State Water Plan Act, 82a-901 *et seq.*)
4. 1981 (Kansas Water Resources Board replaced by the Kansas Water Authority, the Kansas Water Office, and the director of the Kansas Water Office)
5. 1984 (State Water Resource Planning Act: major amendments to K.S.A. 82a-901a, *et seq.*)
6. 1985 (K.S.A. 82a-906 amended to provide dynamic planning process, under which KWO presents annual water plan and recommendations to the legislature)

D. The Kansas Water Plan Storage Act

1. 1958 (Federal Water Supply Act of 1958, 43 U.S.C. 390b: Permitted enlarging federal reservoirs (multi-purpose reservoirs of the Bureau of Reclamation (primarily irrigation projects) and Corps of Engineer (primarily flood control projects), to enable creation of additional storage for municipal and industrial purposes, if “State or local interests shall agree to pay for the cost of such provisions”)
2. 1974 (Kansas Water Plan Storage Act, K.S.A. 82a-1301, *et seq.*—Water Marketing)
 - a. Plans for Tuttle Creek Reservoir, originally planned as a “dry dam” were modified after the 1952-1956 drought to include supply storage¹⁰
 - b. The 1974 Kansas Water Plan Storage Act contained no preamble or section giving purposes of the act

⁹ *Interim Report of the Governor’s Task Force on Water Resources*, at 5 (1977).

¹⁰ Appendix to Water in Kansas, Report to the 1955 State Legislature” (1955), at G1-G2.

- c. The Kansas Water Plan Storage Act created a method for the state to obtain a water storage right in federal reservoirs (“water reservation rights”) “for a drought having a 2% chance of occurrence in any one year” (i.e., a drought so severe that it occurs statistically only once in 50 years; but “drought” is undefined)
 - d. Established procedure to sell the stored water under the State Water Marketing Plan to various M&I users under long-term contracts
 - e. State’s marketing contracts did not bring in sufficient moneys to repay the state’s annual payment obligations to the U.S.¹¹
- E. The 1986 Water Assurance District (“WAD”) Act, K.S.A. 82a-1330, *et seq*
- 1. Purpose
 - a. The Act contained no preamble or section giving purposes of the act
 - b. 1984 Kansas Water Plan, Subsection: Minimum Desirable Streamflows (also discussed below in Section V.F.2.)
 - (1) MDS may consist of releases from reservoirs
 - (2) “To fully realize the benefits from reservoir storage, the state must gain more control over their operation than is presently possible.”
 - (3) Policy Recommendation: “The state should attempt to enhance streamflows, using reservoir water, through moderate droughts . . . ”
 - c. 1984 Kansas Water Plan, Management Section, Sub-Section: Assurance Program
 - (1) 1983 drought created acute situation on Verdigris River; that incident plus a general lack of interest in the water marketing plan indicated problems “in the distribution of reservoir water supply benefits during drought periods”

¹¹ John C. Peck, *Kansas Water Assurance Districts*, 40 Kan. L. Rev.903 (1992), at 912.

- (2) Recommendation: develop assurance program in conjunction with marketing program to provide enhanced water supplies to downstream users
- d. 1985 Kansas Water Plan, Management Section, Sub-Section Large Reservoir Management
 - (1) WAD Act created new method of generating funds to repay the federal government for adding conservation water storage to federal reservoirs
 - (2) WAD Act created method of supplying water to downstream M&I water right holders to meet water requirements under their water rights during drought situations

2. Operation:

- a. Downstream M&I water right holders organize WAD
- b. WADs finance themselves by issuing bonds
- c. WADs contract with the state to maintain target flows at defined points on the river

F. Amendments to the Water Appropriation Act

1. Conservation Plans

- a. Admin. Pol. No. 89-1 (Jan. 1989): chief engineer empowered to require applicants for permits to appropriate water to adopt and implement conservation plans and practices
- b. 1991 (K.S.A. 82a-733: chief engineer may require applicants for water rights permits as well as holders of water rights to adopt and implement conservation plans and practices
- c. Plans and practices must be consistent with the guidelines prepared by the Kansas Water Office pursuant to K.S.A. 74-2608 (c)

2. Minimum Desirable Streamflow (MDS)

- a. 1980 (K.S.A. 82a-703a: permitted legislature to establish MDS on specific streams and required chief engineer to withhold water from appropriation)

- b. Kansas Water Plan, April 1984, Sub-section: Minimum Desirable Streamflows
 - (1) Recommended that the state identify MDS on “those streams with sufficient opportunity to achieve such streamflows and with real needs to be protected from future appropriation of water.”
 - (2) Identified specific streams for MDS
 - c. 1985 (Legislature adopted K.S.A. 82a-703c, a table that specifies MDS for specific streams)
3. Multi-year flex accounts: K.S.A. 82a-736 (enacted 2001, amended 2005, 2011, 2012) (special rules for “base water rights currently suspended due to the issuance of a two-year term permit in a designated drought emergency area for 2011 and 2012”)

G. Miscellaneous statutes dealing specifically with drought:

- 1. Kansas Water Office:
 - a. K.S.A. 74-2608 (enacted 1955, amended 1967, 1981, 1986, 1991) (requires KWO to develop and maintain guidelines for water conservation plans and practices and establish guidelines as to when drought conditions exist)
 - b. K.S.A. 82a-1414 (enacted 1974, amended 1995) (permits director to grant weather modification permits on an emergency basis in drought without prior publication of required notices)
 - c. K.S.A. 82a-1303 (enacted 1974, amended 1983, 1986) (permits KWO to acquire water reservation rights in amount sufficient to insure a yield of water from the reservoir during a drought having a 2% chance of occurrence during any one year)
 - d. K.S.A. 82a-928 (enacted 1965, amended 1981, 1986, 1987) (water plan policies to achieve long range goals include “the design of municipal water systems to provide an adequate water supply to meet the needs during a drought having a 2% chance of occurrence”)
- 2. Counties:

- a. K.S.A. 82a-408 (enacted 1941) (with permission of county commission, provides access to water in reservoirs during times of drought)
 - b. K.S.A. 19-3001 to -3004 (enacted 1941) (permits counties to spend money for pump and well equipment to be used during drought emergencies)
 - c. K.S.A. 12-16,117 (enacted 1994) (provides immunity for government bodies providing assistance to other bodies in times of disaster (includes drought))
3. Governor:
- a. K.S.A. 48-924 (enacted 1975, amended in 1991, 1994, 2001, and 2002) (makes governor responsible for “meeting the dangers to the state and people presented by disasters”; governor authorized to declare a proclamation that a state of drought exists in specific areas or communities or statewide and “shall effect implementation of drought contingency plans contained in state approved conservation plans”)
4. Board of Education:
- a. K.S.A. 72-1106e (enacted 2001) (state school board may waive rules on duration of school years in case of disasters (includes drought))
 - b. K.S.A. 72-8234 (enacted 1989) (local school boards may participate in disaster relief programs (includes drought))
 - c. K.S.A. 72-6458 (enacted 2008) (for eight specified school districts in which disaster emergencies (including drought) have been declared, creates rules dealing with computing general fund budgets based on adjusted enrollments)
5. Soil Conservation Districts: K.S.A. 2-1902 (enacted 1937, amended 1955, 1979) (background reasons for establishing soil conservation districts include the consequences of soil erosion, including “a diminishing of the underground water reserve, which causes water shortages, intensified periods of drought, and causes crop failures)
6. Insurance:

- a. K.S.A. 40-901 (enacted 1927, amended 1951, 1965, 1967, 1969, 1970, 1971, 1972, 1984) (allows stock fire insurance companies to insure property against loss by drought)
- b. K.S.A. 20-1027 (enacted 1931, amended 1937, 1961, 1965, 1969, 1979, 1984) (allows mutual fire and tornado insurance companies to insure property against loss by drought)

VI. **Administrative Agencies**

- A. Note: Various administrative agencies including DWR, KWO (including groundwater management districts), and the State Conservation Commission have administrative regulations that refer specifically to “drought”
- B. The Division of Water Resources
 - 1. Granting of new permits: example, KP&L permit for water from the Kansas River for Jeffrey Energy Center (1982)—no water diversion allowed when river flow is less than 900 cfs
 - 2. Administration of water rights: example, 2010 Stevens County case
 - 3. Administration of MDS: example, 2011 and 2012 administration of water rights junior to MDS on several Kansas rivers and streams
- C. The Kansas Water Office
 - 1. Guidelines for Conservation Plans and Practices: Required by K.S.A. 74-2608 (c) (http://www.kwo.org/reports_publications/Reports_Publications.htm)¹²
 - 2. Drought Planning and Response Activities
 - a. Website: http://www.kwo.org/reports_publications/Drought.htm
 - (1) Information on drought conditions in Kansas
 - (2) Additional program information

¹² Guidelines for industrial use:

http://www.kwo.org/reports_publications/Reports/RPT_1986_Kansas_Industrial_Water_Conservation_Plan_Guideline_091307_sj.pdf ; for municipal use:

http://www.kwo.org/reports_publications/Reports/rpt_2007%20WCP_Guidelines_081507.pdf ; for irrigation use:

http://www.kwo.org/reports_publications/Reports/Rpt_2006_KS_Irrig_WC_Guidelines.pdf

- b. Drought Response¹³
 - (1) Drought Monitoring
 - (2) Governor's Drought Response Team
 - (a) 11-member team assembled when KWO advises
 - (b) Executive Order 03-17: Operations Plan for the Governor's Drought Team, phased response approach
 - i) Drought Watch
 - ii) Drought Warning
 - iii) Drought Emergency
- c. Drought Preparedness: State and Local Actions¹⁴
 - (1) Drought Vulnerable Public Water Suppliers
 - (2) Municipal Water Conservation Plans
 - (3) Water Marketing and Water Assurance Programs
 - (4) Multipurpose Small Lakes Program
 - (5) Public Wholesale Water Supply Districts
 - (6) Minimum Desirable Streamflow
 - (7) Public Water System Capacity Development
- D. Governor's Office: Governor's Drought Response Team
- E. Kansas Adjutant General's Department, Kansas Division of Emergency Management (situations requiring immediate response (e.g., the need for pumps and pipe))¹⁵

VII. Conclusion

¹³ See "Drought Preparedness," Fact Sheet No. 13a, Kansas Water Office (June 2004)

¹⁴ See "Drought Response," Fact Sheet No. 13b, Kansas Water Office (June 2004).

¹⁵ *Id.*, at 2.