

Protecting Water Rights Across the West

Burke W. Griggs

Washburn University School of Law

burke.griggs@washburn.edu

Testimony before the House Water Committee

Kansas Legislature

March 16, 2021

Chairman Highland has requested me to return to the Committee and provide testimony regarding how other western states protect water rights. My earlier testimony (“An Overview of Kansas Water Law,” January 26, 2021) concentrated on Kansas law. This testimony provides a brief survey of how states with water laws similar to those of Kansas have developed substantive and procedural laws that protect individual water rights and the water supplies upon which those rights depend. The committee may find it useful to have my earlier testimony handy as they review this testimony. I hope that you will be able to review it in advance of my oral testimony, so that the Committee can spend most of that time asking questions.

I. Which states are most comparable to Kansas?

In drafting this testimony, I have selected states with doctrinal and jurisdictional water laws that are most comparable to Kansas. That is, I have selected examples from states that follow the prior appropriation doctrine for both surface and groundwater, and that place jurisdiction over the state’s water resources into one agency. These two criteria rule out Nebraska, Oklahoma, Texas, Arizona, and California—large, groundwater-dependent states that legally separate groundwater from surface water, and apply different legal rules to these two hydrologically connected supplies. As a consequence of this bifurcation, these states have been plagued with numerous legal problems for decades—leading state courts to apologize for their own water law.¹

Having ruled out these states as improper analogues, my third criterion is to look to hydrology—to states where groundwater has become an important, if not the most important, source of water supply in many parts of the state. Putting these three criteria together, the aptest states for comparison are Colorado, New Mexico, and Wyoming, especially because they too overlie the High Plains-Ogallala Aquifer. Idaho, Nevada, Oregon, Utah, and Washington also provide apt comparisons. But don’t worry—what follows is not a recitation of all of these states’

¹ See, e.g., North Gualala Water Company v. State Water Resources Control Board, 139 Cal. App. 4th 1577, 1590-91, 43 Cal. Rptr. 3d 821, 831 (2006) (“As the present case illustrates, classification disputes in this field quickly take on an Alice-in-Wonderland quality because the legal categories . . . are drawn from antiquated case law and bear little or no relationship to hydrological realities.”); Collier v. Arizona Dept. of Water Resources, 722 P.2d 363, 366, 150 Ariz. 195, 198 (Ariz. Ct. App. 1986) (“Arizona water law has developed into a bifurcated legal system in which percolating groundwater is regulated under a set of laws completely distinct from the laws regulating surface water. While this bifurcation provides a workable legal system, it often ignores the scientific reality that groundwater and surface water are often connected.”); Spear T Ranch, Inc., v. Knaub, 269 Neb. 177, 183, 691 N.W.2d 116, 125 (Neb. 2005) (“But Nebraska water law ignores the hydrological fact that ground water and surface water are inextricably linked. Instead of an integrated system, we have two separate systems, one allocating streamflows and the other allocating ground water.”)

water laws and administrative regimes. Rather, my point is that some states are more comparable to Kansas than others.

Given these criteria, I have selected several of the most telling examples of protecting water rights from across the West.² It cannot be stressed enough how seriously states take their job of protecting these property rights—and the supplies upon which they depend.

II. What the State protects when it protects a water right.

By way of review, keep in mind the attributes of a western water right: its priority, its authorized quantities (amount of annual use and rate of diversion), its point of diversion, its place of use, and its type of use. Across the West, state agencies and courts are mostly focused on protecting the first three attributes. In times of water shortage, rights holders with senior priorities are entitled to protect their rights against holders of junior rights—so that they can use the water supplies to which they are entitled. Junior water rights also have protections: senior rights cannot make subsequent changes to their rights that injure juniors—this is the “no-injury rule.” And both senior and junior rights are protected by a fundamental requirement: no one can obtain a new water right if it would impair existing rights.

Thus, protecting water rights generally boils down to two things: protecting individual water rights, but also maintaining, as far as possible, the hydrological system upon which these interconnected property rights depend. Because almost every western state has either constitutional or statutory language dedicating the water supplies of the state to the people, western states, like Kansas, must also consider the public interest.

III. How the Western States protect water rights.

A. Administration of Water Rights in times of shortage.

As described in my earlier testimony, Kansas has excellent legal and regulatory provisions for protecting water rights in times of shortage. Under Kansas law, the chief engineer has the non-discretionary duty to protect rights according to their respective priorities.³ All Kansas water rights holders, even those subject to restrictions in Intensive Groundwater Use Control Areas (IGUCAs) and Local Enhanced Management Areas (LEMAs), retain these protections. It is my understanding that Chief Engineer Lewis and Mr. Lane Letourneau, Program Manager for DWR, have explained the details of the Kansas system to the Committee.

There are numerous examples across the West of state engineers taking the necessary steps to protect senior rights—or being forced to do so by the courts. There are two relatively recent examples. During the severe drought of 2000-2001, owners of senior rights in Colorado—many with water rights predating statehood in 1876—“made a call” on the South Platte and

² Most of these cases and examples can be found in REED D. BENSON, BURKE W. GRIGGS, AND A. DAN TARLOCK, WATER RESOURCES MANAGEMENT (8th ed., 2021).

³ KAN. STAT. ANN. § 82a-706b(a) (“It shall be unlawful for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same . . . Upon making a determination of an unlawful diversion the chief engineer . . . shall” administer junior water rights.).

Arkansas Rivers. That is, they requested the Colorado state engineer and his subordinate division engineers to shut down all junior water rights that were impairing their senior rights.⁴ The state and division engineers promptly ordered the administration of water rights in each basin according to their respective priorities. As a consequence, more than 1,000 junior groundwater wells along the Arkansas and South Platte River Basins were shut down to protect senior rights.⁵ Because those junior water rights were shut down according to their respective priorities, they did not have any valid takings claims: it is an express condition of prior appropriation rights that their owners are not guaranteed water, and that their use of water is subject to that water being available.⁶

A second example comes from Idaho. During the 1990s, excessive groundwater pumping, together with drought, impaired senior surface water rights in the Snake River Basin. Senior rights holders repeatedly requested the Idaho state water engineer (known as the Director of the Idaho Department of Water Resources) and his regional deputy, known as a watermaster, to shut off junior groundwater rights. They refused, based on the belief that they did not have the legal authority to protect senior surface rights absent a determination that shutting down junior groundwater rights would be effective in providing water to surface rights. The senior water rights holders sued the Idaho DWR, and the trial court found that the agency owed them a clear legal duty to distribute water under the prior appropriation doctrine. The trial court issued a writ of mandamus ordering Idaho DWR to administer water rights accordingly, and the Supreme Court of Idaho affirmed. (A writ of mandamus is a court order, ordering a state agency or state executive to perform a non-discretionary legal duty.) As the court stated, “the director’s duty . . . is clear and executive. Although the details of the performance of the duty are left to the director’s discretion, the director has the duty to distribute water.”⁷ The state subsequently developed rules for the conjunctive management of surface and groundwater rights.⁸

Shutting down hundreds and even thousands of valuable property rights in times of water shortage is a serious matter. As these cases indicate, it places western state water engineers in the crosshairs of junior water rights holders, who are often large and well-funded groundwater interests. The importance of the job—of protecting property rights according to the prior appropriation doctrine—explains why most state engineers enjoy substantial civil service protections. States that do not protect senior water rights and do not protect their state water engineers often find themselves on the losing end of cases brought before the Supreme Court of the United States.⁹

⁴ Colorado’s state engineer of the Colorado Division of Water Resources is generally analogous to the Kansas chief engineer. Each major river basin in Colorado is assigned a “division engineer,” who is primarily responsible for the administration of water rights in his or her basin. For example, the South Platte River Basin is “Division 1,” and the Arkansas River Basin is “Division 2.” Division engineers in Colorado are analogous to water commissioners in Kansas.

⁵ See Lain Strawn, *The Last GASP: The Conflict over Management of Replacement Water in the South Platte River Basin*, 75 U. COLO. L. REV. 597 (2004); Empire Lodge Homeowners’ Association v. Moyer, 39 P.3d 1139 (2001).

⁶ See, e.g., Kobobel v. Dep’t of Natural Resources, 249 P.3d 1127 (Colo. 2011).

⁷ Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994).

⁸ RULES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES, IDAHO ADMIN. CODE § 37.03.11 (Oct. 7, 1994).

⁹ See, e.g., Kansas v. Nebraska, 574 U.S. 445 (2015); see also Section IV.A below.

B. Review of Changes to Existing Water Rights and Applications to Export Water Supplies.

Western states also protect water rights by reviewing potential changes to existing water rights.¹⁰ Generally speaking, on a right-by-right basis, most western states follow procedures similar to those of Kansas in this regard. Western states also review applications for large-scale, regional transfers of water supplies, transfers which may disrupt the reliance interests of entire groups of existing water rights holders.¹¹ In my earlier testimony, I described the way in which Kansas DWR has reviewed the applications by the cities of Hays and Russell to change their irrigation water rights in Edwards County to municipal rights to be used in Ellis and Russell Counties.

A recent and vivid example of a large-scale transfer application can be found in the San Luis Valley of Colorado, a high mountain valley with substantial groundwater supplies. A water speculator sought to export 200,000 acre-feet of groundwater annually from the Valley, and market that water to the thirsty Denver suburbs.¹² Local irrigators protested the application and brought the matter to Colorado water court, alleging that the export of such a large amount of groundwater violated statutory protections to which holders of irrigation rights in the Valley were entitled. The trial court agreed, and held that the speculator's proposal significantly underestimated its impact on groundwater supplies and groundwater-dependent wetlands. The Supreme Court of Colorado affirmed.¹³

A second prominent example comes from Nevada. In 1989, what is now the Southern Nevada Water Authority (SNWA), the water agency of greater Las Vegas, filed 145 applications with the Nevada state engineer to appropriate between 190,000 and 800,000 acre-feet of groundwater annually from northern Nevada, and pipe it 300 miles south to Las Vegas for municipal use. More than 830 opponents filed protests to the application. Protestants ranged from the Presiding Bishop of the Church of Latter-Day Saints (a large landowner in the area) to Native American tribes, environmental plaintiffs, and two Utah counties. The Nevada state engineer initially approved SNWA's applications for over 80,000 acre-feet annually, and multiple parties appealed. The White Pine County District Court reversed these grants and remanded the matter back to the state engineer. A new state engineer reversed course and denied the applications. SNWA appealed the decision. In 2020, the court issued a strongly worded decision affirming the denial of SNWA's applications, on the grounds that they would have impaired existing groundwater and surface water rights.¹⁴ As the court stated, "Nevada law cannot be clearer. The rule is to ensure that the basins from which water is taken—and put to beneficial use—will not be depleted and can be sustained in perpetuity."¹⁵

¹⁰ See, e.g., KAN. STAT. ANN. § 82a-708b.

¹¹ See, e.g., KAN. STAT. ANN. § 82a-1501 *et seq.*

¹² This is a lot of water. For example, it is two-thirds of the amount of water to which Nevada is entitled under the Colorado River Compact. *Arizona v. California*, 373 U.S. 546 (1963).

¹³ *American Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (1994). The case centered on the issue of whether the groundwater at issue qualified as "tributary" or "non-tributary" groundwater, an important distinction in Colorado water law. Kansas does not recognize such a distinction, but the case remains illustrative for showing how the state protected existing groundwater interests in the native basin.

¹⁴ *White Pine County v. Wilson*, Seventh Judicial District Court of Nevada, Case No. CV-1204049 (March 9, 2020).

¹⁵ *Id.*, at 9.

SNWA did not appeal the decision. After investing about \$330 million in the pipeline project from northern Nevada, SNWA wrote it off and will rely instead on its new low-level pumping station at Lake Mead, a project that cost upwards of \$800 million.

C. *Public Interest Review.*

Because water is a public resource, most western states have strong laws requiring their water resources agency to deny applications for new water rights or for changes in existing rights where those applications are not in the public interest. Kansas is one of those states.¹⁶ Utah, Washington, Nevada, and Wyoming all have similar statutory language as Kansas does in this regard.¹⁷ The consideration of the public interest has a long lineage in western water law, dating back at least to the Wyoming Constitution of 1890. Of course, public interest review does not confer unlimited discretion on the state agency to make decisions it views as optimal. Early case law construed the term “public interest” to include matters of public health, safety, and economic efficiency.¹⁸

However, it is important to note that times change, and so do our standards. What we deem to be “beneficial uses” and to be “reasonable” amounts of water have changed over time.¹⁹ So too does our appreciation of what factors we are to consider in determining the public interest. Numerous modern cases have depended on contemporary conceptions of the public interest—most notably the importance of environmental and recreational values—in reviewing water rights applications.²⁰

IV. **Agency Procedures and Judicial Review of Actions taken to protect Water Rights.**

Part III provided several examples of how western states employ substantive water law to protect water rights. Equally important is the procedural law through which these substantive protections are enforced. What follows are some useful examples to consider.

A. *Rulemaking and Agency Action.*

One of the most important ways in which a state water resources agency protects water rights is by enacting regulations pursuant to state statutes. In this regard, most western states follow administrative procedures generally similar to those of Kansas.

¹⁶ KAN. STAT. ANN. §§ 82a-711, 82a-708b.

¹⁷ UTAH CODE ANN. § 73-3-8; WASH. REV. CODE ANN. § 90-03.290; NEV. REV. STAT. ANN. § 533.370; WYO. STAT. ANN. § 41-4-503.

¹⁸ The standard case is *Young & Norton v. Hinderlider*, 15 N.M. 666, 110 P. 1045 (N.M. 1910).

¹⁹ For example, nearly a century ago westerners viewed the flooding of fields in the winter to be a reasonable use of water—as long as it was dedicated to the purpose of drowning gophers. In 1935, the California Supreme Court disagreed. “What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal.2d 489, 45 P.2d 972, 1007 (1935). The language has been repeatedly quoted with approval by other western states. *See, e.g., State, Dep’t of Parks v. Idaho Dep’t of Water Administration*, 530 P.2d 924 (Idaho 1974).

²⁰ E.g., *Shokal v. Dunn*, 707 P.2d 441 (Idaho 1985); *Stempel v. Dept. of Water Resources*, 82 Wash.2d 109, 508 P.2d 166 (Wash. 1973).

That said, it is important to note that groundwater irrigation interests often succeed in enacting regulations that are actually hostile to the long-term protection of property rights, especially senior water rights. For example, Colorado approved rules for groundwater pumping in the Arkansas River Basin in 1973. These rules actually encouraged the over-pumping of basin groundwater, violating the Arkansas River Compact and forcing Kansas to sue Colorado in 1985. Kansas's victory in *Kansas v. Colorado* provided the necessary impetus that allowed the Colorado State Engineer to enact rules in 1995 that ordered pumping of all post-1949 wells to be discontinued, unless their depletions to stateline flows could be replaced.²¹ The same rules similarly limited the aggregate pumping from all pre-1949 wells to 15,000 acre-feet annually.²²

Across the state line, Kansas Groundwater Management Districts (GMDs) have become a most powerful force in state water politics. Their influence can be seen in the rulemaking process. It is important to note at the outset that Kansas GMD's do not have any management authority over water rights in Kansas: they submit management rules and regulations to the chief engineer, who then considers and adopts them.²³ But in Southwest Kansas GMD3, the chief engineer has largely deferred to local irrigators by adopting policies that condone the further depletion of the High Plains-Ogallala Aquifer. For years, GMD3 followed regulations that adopted a “depletion formula” that was intended to limit excessive groundwater development. But instead, this formula became—in the words of GMD3’s own counsel—“an open throttle on aquifer mining,” exacerbating the depletion problem.²⁴ Although GMD3 has since closed the district to new water rights applications, this decision has not significantly addressed the damage done to senior water rights by over-appropriation.

Given the serious depletion of the High Plains-Ogallala Aquifer and problems with groundwater management across the state generally, it is well past time to ask a politically uncomfortable but absolutely necessary question: are GMDs fulfilling their intended role to conserve the state’s water resources?²⁵ Or have the GMDs, in the words of Professor John C. Peck and others, merely played the role of the “fox guarding the chicken house?”²⁶ He posed that question fifteen years ago. A candid conversation about the merits and demerits of Kansas GMDs is long overdue.

²¹ The Arkansas River Compact was approved by Congress in 1949, thus the distinction between pre-1949 and post-1949 wells.

²² COLO. DIV. OF WATER RES., AMENDED RULES AND REGULATIONS GOVERNING THE DIVERSION AND USE OF TRIBUTARY GROUNDWATER IN THE ARKANSAS RIVER BASIN, Rule 3.1 (1995). For a fuller description of how *Kansas v. Colorado* forced groundwater law reform in Colorado, see Burke W. Griggs, *Interstate Water Litigation in the West: A Fifty-Year Retrospective*, 20 U. DENV. WATER L. REV. 153, 204 (2018).

²³ KAN. STAT. ANN. §§ 82a-1028(o), 82a-1029; KAN. ADMIN. REGS. §§ 5-21-1 to 5-35-30.

²⁴ Michael K. Ramsey, *Kansas Groundwater Management Districts: A Lawyer’s Perspective*, 15 KAN. J.L. & PUB. POL’Y 517, 522 (2006). Mr. Ramsey, one of the most capable water lawyers in the state, has represented GMD3 for several decades.

²⁵ KAN. STAT. ANN. § 82a-1020 (permitting the establishment of groundwater management districts “for the conservation of groundwater resources” among other policy goals).

²⁶ John C. Peck, *Groundwater Management in Kansas: A Brief History and Assessment*, 15 KAN. J.L. & PUB. POL’Y 441, 457 (2006).

B. The Independence of the State Water Engineer.

As more fully described in my previous testimony, Kansas is the only state in the Union that subordinates the agency responsible for water rights protections to a department of agriculture, *and* subjects the state engineer's decisions to administrative review by a political appointee. These two features of Kansas law often threaten the apolitical, impartial technical processes that are so critical to the protection of property rights. The reasons behind this embarrassing uniqueness largely have to do with historical accident, and not statutory or regulatory design.

Kansas would do well to review how other states have established and protected the independence of the state water engineer. For example, the Wyoming Constitution (and the Water Law of 1890, enacted at statehood) established the office of the state engineer and the Board of Control (roughly similar to our water commissioners), which together review water rights-related decisions. Other western states have established distinct court procedures to protect the impartiality of the water rights protection process. That brings me to the next topic.

C. Judicial Review and Water Courts.

Under Kansas law, water rights matters can take place at three levels. The first is at DWR, where DWR conducts hearings on matters such as applications for new water rights, for changes to existing water rights, and hearings regarding water rights abandonments. Because such matters involve the determination of property rights, DWR has established hearing procedures to protect the holders of water rights. Certain important decisions of the chief engineer, such as those just described, may be appealed to a second level—that of the Secretary of Agriculture, pursuant to the Kansas Administrative Review Act (KAPA).²⁷ The third level is judicial review pursuant to the Kansas Judicial Review Act (KJRA), where state courts review whether DWR made the appropriate agency decision, based on the law and the evidence in the administrative record.²⁸ Under a typical KJRA appeal, the record is limited to the record established at the first level—that of the agency hearing.

Several states have found this limitation to be a problem in the context of protecting water rights. Between 1967 and 1971, for example, New Mexico amended both its constitution and its water law to allow district courts unlimited review over issues presented at the agency level—including the power to find facts.²⁹

Other western states have specially-designated water courts to consider matters such as new water rights applications and changes to water rights. Colorado, which does not have a permit system for most of its water rights, has a water court established pursuant to the Water Right Determination and Administration Act of 1969.³⁰ Seven water divisions were created in

²⁷ KAN. STAT. ANN. § 82a-1901.

²⁸ Kan. Stat. Ann. § 82a-724.

²⁹ N.M. CONST. art. XVI, § 5; N.M. STAT. ANN. § 72-7-1. The history of these changes is summarized in Lion's Gate Water v. D'Antonio, 147 N.M. 523, 226 P.3d 622 (N.M. 2009).

³⁰ COLO. REV. STAT. §§ 37-92-101 to -602.

the state; each division has a division engineer who reports to the state engineer. “Water matters” are considered in a water court in each division, with a water judge, referee, and a water clerk. Applicants seeking water rights or changes to existing rights file with the clerk; after providing public notice, objectors can file statements of opposition to the applications. After consulting with the division or the state engineer, the referee makes a ruling, approving, approving in part, or denying the application. Interested parties who are dissatisfied with the ruling may file a protest. A protest results in a hearing at which the water judge determines the issues *de novo*. These cases typically involve lawyers and water engineers, and can thus be expensive. The referee’s rulings are reviewed by the water judge, who can confirm, modify, or reverse them. Appeals of the Water Court’s rulings go directly to the Colorado Supreme Court. Montana also has a water court system.

The New Mexico and Colorado procedures merit reflection. New Mexico has a permit system similar to that of Kansas, while Colorado does not have a permit system. Yet both states, whose substantive water law is generally similar to that of Kansas, provide their respective courts with *de novo* review of agency decisions relating to water rights. Clearly, these states made deliberate decisions to establish independent court jurisdiction over all matters relating to the protection of water rights. New Mexico went as far as amending its state constitution in 1967 to do so. Colorado did so after an extensive study of its water law during the 1960’s, a study which ultimately produced the Water Rights Determination and Administration Act of 1969. Both states made these fundamental changes to their state water laws for sound reasons, grounded in concerns about the separation of powers. They did not want to delegate excessive authority to a state administrative agency under the executive branch, at the expense of the legislative and judicial branches of state government.

V. Conclusion.

In these examples show, western states take the protection of water rights very seriously. State water engineers have administered thousands of water rights across entire river basins to protect senior water rights. State courts have denied efforts to transfer hundreds of thousands of acre-feet of native groundwater to distant places, if such transfers would impair existing rights or threaten the long-term sustainability of local water supplies. Given the magnitude and difficulty of these decisions to protect property rights, western states have provided state water officials the necessary political independence to make them in an impartial and technically sound manner. Some states have even gone as far as to grant the courts the power of *de novo* review in evaluating agency decisions regarding water rights.

This concludes my written testimony. I am happy to stand for questions for as long as you would like. Thank you for your interest in Kansas water law. Please review it carefully, so that you may reform it wisely.