

1320 Research Park Drive  
Manhattan, Kansas 66502  
(785) 564-6700



900 SW Jackson, Room 456  
Topeka, Kansas 66612  
(785) 296-3556

Jackie McClaskey, Secretary

Governor Sam Brownback

**Testimony on HB 2245**  
**House Committee on Agriculture and Natural Resources**  
**Lane Letourneau**  
**Water Appropriation Program Manager**  
**Kansas Department of Agriculture**  
**February 17, 2016**

Chairman Schwartz and members of the Committee, my name is Lane Letourneau and I serve as the Water Appropriation Program Manager at the Kansas Department of Agriculture (KDA). I appreciate the opportunity to provide information on current practices related to impairment investigations for the discussion of HB 2245.

At issue is whether the state's statutory process for investigating and addressing impairments provides an appropriate means for protecting water rights. KDA is interested in identifying alternatives to best address this issue without reducing the ability of an individual to protect his or her water right.

Currently, the Kansas Water Appropriation Act contains statutes related to the protection of private property rights on a first in time, first in right basis. The system is set up so that the most senior water right holder will have claim to the available water first and will gain the most economic benefit in use of a limited resource. The Act provides two paths for our citizens to protect their water rights. One path is an administrative path and the other allows a water right holder to go directly to district court.

HB 2245, as introduced during the 2015 Legislative Session, seeks to narrow the paths or opportunities available to a water right owner to protect a senior water right. The statutory changes proposed in HB 2245 may put an unfair and inappropriate burden on senior and vested water right holders, changing the characteristics of their water property rights and potentially reducing the value of such water rights. HB 2245 does, however, raise an important discussion about the impairment process — a process that is critically aligned with the overarching need to preserve and protect private property rights to water.

In January, the KDA Division of Water Resources (DWR) convened a meeting with the Groundwater Management Districts (GMDs), a subcommittee of the Kansas Water Authority (KWA), Kansas Livestock Association (KLA), Kansas Farm Bureau (KFB), Kansas Water Office (KWO), and Kansas Grain and Feed Association (KGFA) to discuss potential alternatives to the current impairment investigation process. While the group made progress during the initial meeting, we have scheduled a follow-up meeting with this group for Feb. 29, 2016, to continue the discussion. Also included in the discussion are representatives from the Kansas Water Congress and the Kansas Attorney General's office.

I appreciate the opportunity to appear today to provide information related to HB 2245. Additional information is provided with this testimony to provide a summary of the current practices related to water right impairments.

## **Summary of Current Practices Related to Impairment**

K.S.A. 82a-707 provides that the date of priority of every water right of every kind, and not the purpose of use, determines the right to divert water at any time when the supply is not sufficient to satisfy all water rights.

K.S.A. 82a-706b(a) makes it unlawful to divert waters of this state from moving to a person having a prior right to that water, and provides that the Chief Engineer, upon making a determination of unlawful diversion, shall, as necessary, secure water for the senior user. This applies to both groundwater and surface water. To secure water, the Chief Engineer may direct that any diversion works may be opened, closed, adjusted or otherwise regulated, essentially curtailing the diversion of water by a junior user. The Chief Engineer or the Chief Engineer's authorized agents will deliver a copy of such a directive to the persons involved either personally or by mail or by attaching the notice to the diversion works, and this directive is considered legal notice to all persons associated with that point of diversion. See K.S.A. 82a-706b(b).

K.A.R. 5-4-1 and 5-4-1a are the DWR regulations regarding impairment investigations when we are required to implement the administrative path. K.A.R. 5-4-1 applies to the distribution of water between users when a prior right is being impaired. A complaint may be submitted in writing to the Chief Engineer, after which an investigation regarding the physical conditions involved is conducted. The law allows a reasonable raising and lowering of the water table. Part of our investigation includes determining whether there is a working point of diversion, the need for the water, and whether any well is fully utilizing the aquifer. This section provides an opportunity for participation in the investigation by the Groundwater Management District (GMD) where the water right is situated, and provides that any data acquired during the investigation is provided to the complainant throughout the investigation process.

Upon completion of the investigation, the Chief Engineer prepares a report stating the relevant findings, and the initial report is posted on the DWR's website. If the initial report shows impairment, potentially affected parties have an opportunity to submit written comments. Additionally, the report is provided to the GMD where the right is situated, for their review and comment. Following review of the comments, the Chief Engineer will issue a final report.

Based on the final report, if the complainant desires the Chief Engineer to regulate water rights found to be impairing the complainant's right, the user may submit a request to secure water on a form provided by DWR. If within a GMD, and if the report finds that impairment is substantially due to direct interference, the GMD board may recommend how to regulate the impairing rights to satisfy the impaired right. The Chief Engineer will give a written notice and directive to the water users regarding whose rights must be curtailed in order to satisfy the senior user.

K.A.R. 5-4-1a comes into play if the impairment is being caused by a regional lowering of the water table, as opposed to direct interference. The same process for investigation of the impairment is followed in these cases. If the area of complaint is within a GMD, the GMD board will recommend steps to satisfy senior users, which can include following the management program, amending the management program, or other means. These recommendations are submitted to the Chief Engineer in writing within six months of the determination that impairment is caused by a regional lowering of the water table, or a longer time if extended by the Chief Engineer. If outside a GMD, the Chief Engineer will conduct a study to determine the appropriate course of action, balancing the effectiveness vs. economic impact of any corrective measures.

A couple of examples of water rights administration are:

- **Minimum Desirable Streamflow established in 1984 by KSA 82a-703.** We treat this like a surface water right with a 1984 priority with a flow protected to a USGS stream gage. During years of low flows we administer approximately 350 water rights that are junior to MDS.
- **Gooch/Mills.** These rights are in Stevens County, Ogallala Aquifer, close to one mile apart, with 400 feet of saturated thickness. These wells touch one another when fully operating simultaneously. There is enough water available to both parties, just not at the same time. Based on pump tests and analysis, we were able to determine a water level that if the junior water maintains a pumping level above, the senior water right will not be impaired. Thus, with some management both wells can operate.
- **Kolbeck.** This case is in Ford County, south of Dodge City. The senior right is a domestic right and was very concerned they were losing two feet of aquifer per year. They filed an impairment complaint on the juniors in the area. Our pump test did not show direct well-to-well impact, therefore, we could not find well to well impairment. Curtailing pumping on a junior water right would not instantaneously increase the ability to divert water. This is a regional lowering of the water table situation.

### **District Court Proceedings and Garetson**

In lieu of proceeding under a K.A.R. 5-4-1 investigation of impairment, a water user may pursue injunctive relief under statutory provisions designed to protect users with a prior right. K.S.A. 82a-716 and 82a-717a afford a senior water right holder the right to seek injunctive relief, and in some cases monetary damages in district court, to protect his or her prior right against a junior water right holder. Senior water right holders are not required to first seek a remedy from the Chief Engineer. However, the district court has the authority pursuant to K.S.A. 82a-725 to order DWR or the Chief Engineer to act as a “referee” in such a matter, whereby the court directs DWR to investigate and report on any or all physical facts involved. The report is provided to the parties to the litigation for an opportunity to file objections to the report. The report and objections filed serve as evidence of the physical facts.

In some cases, a senior water user may be able to obtain a temporary injunction, to stop the impairing activity while a case is still pending. For a temporary injunction to be issued, the court looks at the relative harm of issuing versus not issuing, among other factors. An injunction may not be appropriate in many cases. In *Garetson v. American Warrior Inc.*, the Kansas Court of Appeals upheld a ruling by a district court that granted a temporary injunction to a senior user based on a finding that the junior user’s use of water was impairing the senior user’s vested right. In that case, DWR had already completed extensive testing of the wells in question before the complaint was brought in district court, and that existing analysis, along with more analysis framed in a report to the court, was considered by the court. The Supreme Court recently denied review of the Court of Appeals opinion in that case, and it is now back with the district court for a final decision on the merits of the case.

### **Well impact demonstration**

We have heard there is a fear that more owners with senior water rights will be taking junior water right holders to court. Almost every application to relocate a well in southwest Kansas raises questions. Therefore, the agency is currently working with stakeholders to implement a demonstration that the location of the new well will have very little effect on the neighboring wells. This demonstration will protect what is already there and should alleviate any frivolous impairment claims. The information will be up front in the process.