

Contrasts in Water Law in Missouri, Oklahoma and Kansas

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Going west from Missouri, the average annual precipitation declines by half in 400 miles, the evaporation rate begins to exceed the precipitation rate, and streamflow is responsive primarily to snowmelt in the Rocky Mountains as local rainfall becomes generally insignificant.

The western boundary of Missouri roughly corresponds to the divide between that part of North America where the supply of water from precipitation and inflowing streams has seemed ample.

That the driest portion of Kansas and Oklahoma is underlain by the magnificent Ogallala aquifer is a geographic irony that gave rise to great agricultural opportunity, providing some of the impetus for each state's necessity to regulate groundwater withdrawals. In addition to irrigated agriculture and water livestock, the oil and gas industry's need for freshwater meant that the legislatures would craft regulatory systems that accommodated the desires of farmers, ranchers and oil and gas producers. At the same time, larger municipalities in much of Kansas and Oklahoma began developing surface water reservoirs for their needs, rather than relying heavily on alluvial aquifers and bedrock aquifers. The history of water supplies in Kansas and Oklahoma is instructive.

Under these conditions, state water law in Missouri has followed the traditions of wetter places, while the water law of the western states has been created and evolved to address issues of scarcity. As the supply of usable water in Missouri becomes scarce,

Missourians should look at how the legislators and courts of its western neighbors have confronted the scarcity they have always accepted.

The water law of the wetter states is often said to be the law of riparian rights, while the law of the arid states is said to be prior appropriation, or “first in time, first in right.” However, these labels are too general to be helpful.

- “Riparian rights” simply means the rights of owners of land to use of water in adjacent streams and lakes, with conflicts being resolved on a case-by-case basis, with no real application to groundwater.
- “Prior appropriation” —usually defined as “first in time, first in right—in practice includes the application of several other principles to a complex set of regulations for allocating surface water and groundwater in Kansas and Oklahoma and other western states. The law of prior appropriation has roots in federal laws regarding the perfection of mining claims, but is not implemented through allocation systems administered by state agencies, usually called water resources boards or something similar. The system of regulation of groundwater withdrawals shares many aspects of regulation of oil and gas production through well-spacing and mandatory reporting of well data, and limiting production.

The states of the United States (other than Louisiana) chose to subject themselves to the common law, which means that courts would apply rules of law that have been fashioned by judges in England and the United States under various principles, such as “stare decisis,” which means that a rule of law applied to a set of facts would be applied similarly to similar facts. These legal rules were often found in treatises compiled first in England and later in America, in which the authors summarized written decisions of courts, identifying rules of law applied and developed under the facts of each case.

Louisiana followed the civil law tradition, which essentially means rules of law that evolved in continental Europe, which was sometimes assembled into codes, which are something like statutes. The rules of common law and civil law are often analogous, so that the distinction is often not important.

In Missouri, Kansas and Oklahoma, water law arrived the same way that other laws arrived. The territorial governments adopted the common law and enacted statutes similar to those of eastern states. The common law version of water law, with no allocation system and each case being decided on its own facts, became impractical decades ago in parts of Kansas and Oklahoma, and the principles of riparian rights have been supplanted, though not totally eliminated, particularly with respect to streams.

The withdrawals of groundwater in western portions of Oklahoma and Kansas for irrigation are of a volume that dwarfs municipal and industrial uses of groundwater, even in the more populous parts of these states. Withdrawal rates of 50 to 100 million gallons per day occur in some counties, primarily for sprinkler irrigation.

This overview primarily looks at the right to divert stream water and the right to use groundwater under legal rules applicable in Missouri, Kansas and Oklahoma. The laws relating to rights to take water from streams will receive less emphasis.

Missouri and Reasonable Use

Missouri's Right to Divert Water

Missouri law distinguishes the right to divert surface water (rainwater not in channels) from the right to divert water in natural watercourses. A person who causes flooding by obstructing a natural watercourse is strictly liable for damages, regardless of intent or lack of negligence, while the liability of a person who diverts stormwater

runoff is determined by application of a rule of reasonableness, which means nobody knows what is permitted; only a judge or jury can determine that, after the fact.

Klokkenga v. Carolan, 200 SW3d 144 (Mo.WD 2006), contains a thorough discussion of whether a watercourse is natural. A natural watercourse is a stream in a defined channel, though it may flow only intermittently.

The reasonable use rule was adopted by the Missouri Supreme Court in *Heins Implement Company v. Missouri Highway & Transportation Commission*, 859 SW2d 681 (1993), with the express purpose of getting rid of the common enemy doctrine and the modified common enemy doctrines, which had limited the liability of persons who diverted surface waters to protect their own interests, regardless of the downstream effects. The court summarized the rule as follows:

Perhaps the rule can be stated most simply to impose a duty upon any landowner in the use of his or her land not to needlessly or negligently injure by surface water adjoining lands owned by others, or in the breach thereof to pay for the resulting damages. The greatest virtue of the reasonable use standard is its ability to adapt to any set of circumstances while remaining firmly focused on the equities of the situation.

Right to take surface water and groundwater

The word “riparian” is simply an adjective that refers to ownership of land adjacent to a watercourse or body of water. Missouri’s riparian owners may withdraw water from streams for irrigation or other uses, subject only to the doctrine of reasonable use, which holds that one riparian owner’s use is limited at the point that it unreasonably interferes with the rights of other riparian owners. Reasonableness is a fact question for courts. Section 393.030 RSMo allows withdrawal from non-navigable streams for the purpose of supplying water to any city, town or village.

Riparian rights do not apply to groundwater. Missouri law recognizes that the ownership of land includes the ownership of groundwater that may be extracted from a well on the land, as though water were any other mineral. This idea is called "ownership in place," as distinguished from the "rule of capture," which gives the landowner the right to take whatever is on his land, such as a wild animal. The rule of capture is applied in some states (*e. g.*, Texas) to minerals that move, such as oil and gas, rather than those which don't, such as coal and iron ore. In reality, Missouri law relating to groundwater is essentially undeveloped.

Riparian uses that have been recognized by Missouri courts include household use, irrigation of crops, livestock watering, and industrial uses, and the key factor applied by courts is whether the use is reasonable. I am not aware of any Missouri appellate opinions regarding groundwater that use the term "riparian rights." A rancher v. sodbuster dispute, *Ripka v. Wansing*, 589 SW2d 333 (Mo.SD 1979) gave the Southern District of the Missouri Court of Appeals a chance to refer to the factors mentioned in the Restatement of Torts, Second §§ 850-850A, to be considered in determining the reasonableness of riparian uses, as follows:

- (a) the purpose of the use,
- (b) the suitability of the use to the watercourse or lake,
- (c) the economic value of the use,
- (d) the social value of the use,
- (e) the extent and amount of the harm it causes,
- (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
- (g) the practicality of adjusting the quantity of water used by each proprietor (riparian owner),

- (h) the protection of existing values of water uses, land, investments and enterprises, and
- (i) the justice of requiring the user causing harm to bear the loss.

The State of Missouri does not allocate surface water or groundwater, but makes a small effort to monitor the amount of water withdrawn from streams, lakes and underground. In 1983, the legislature created the classification of “major water user,” requiring such users to report their usage to DNR. The definition is found in § 256.400 RSMo, and applies to “any person, firm, corporation or the state of Missouri, its agencies or corporations and any other political subdivision of this state, their agencies or corporations, with a water source and equipment necessary to withdraw or divert one hundred thousand gallons or more per day from any stream, river, lake, well, spring or other water source.” DNR’s Missouri Water Resources Center in Rolla (573 368-2175) collects the reports, though the rate of compliance with the reporting requirements is fairly low.

Until the Missouri General Assembly takes on the allocation of surface water and groundwater, large quantities of good water will continue to be wasted. Any dispute will be subject to the expensive and uncertain process of litigation, with no statutory guidance.

As we look at the regulatory systems for allocating surface water and groundwater in Kansas and Oklahoma, we can see that the divergent interests of municipal water suppliers, rural water districts, irrigators, users of process water, recreational users and hydroelectric generators will be in direct conflict. The Missouri legislature, in the not-too-distant future, will have to ask strong lobbies to compromise.

Key concepts in Kansas and Oklahoma water laws

In 1945, the Kansas legislature enacted the Water Appropriation Act, recognizing vested rights properly preserved, but requiring an appropriation process for creation of any right to groundwater or surface water other than domestic use. Similarly, Oklahoma's legislature created an appropriation system for groundwater and surface water in 1957, also making an exception for domestic use. In 1973, the Oklahoma legislature modified its prior appropriation system for groundwater to an allocation system giving surface owners a right based on acreage owned in a particular basin. In a 1993 decision, the Oklahoma Supreme Court held that Oklahoma's allocation system did not completely replace riparian rights to stream water.

The allocation systems of Kansas and Oklahoma cannot be understood without defining key concepts. The following discussion relies heavily on online publications of the Kansas Division of Water Resources and the Oklahoma Water Resources Board and others. Here are good sites for beginning research:

- Kansas:
http://www.ksda.gov/includes/document_center/dwr/Publications/KansasWaterResources.pdf
- Oklahoma: <http://www.owrb.ok.gov/>; see especially http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/joint_committee/WATER%20LAW_MANAGEMENT%20IN%20OKLAHOMA.pdf for a helpful discussion of Oklahoma water law evolution.
- Oklahoma Water Law blog (www.oklahomawaterlaw.com) by James Milton, who is a Tulsa attorney, who reviewed the Oklahoma portion of this material. Jim does a great job following hot issues in water law relating to municipal supplies, federal-state conflicts, and rural water districts, among other issues, and not just in Oklahoma.

Concept	Kansas	Oklahoma
<p>Appropriation right. A right granted to take water for a beneficial use, according to a priority system based on the date of the permit. In droughts, later priority appropriators may get nothing.</p>	<p>Diversion of water in Kansas purely under a prior appropriation system now implemented in a regulatory system.</p> <p>However, other riparian rights are recognized, such as the right of riparian owners to keep recreational canoeists off of streams, other than the Kansas, the Arkansas and the Missouri Rivers.</p>	<p>For reasonable uses from streams by riparian owners, appropriation is not required, since Oklahoma Supreme Court decision in 1993 affirmed that allocation system did not displace riparian rights.</p> <p>Oklahoma's allocation system adopted in 1973 has moved considerably away from prior appropriation, since it also involves proportional reductions in case of short supply regardless of permit date; see discussion under "basin."</p>

Concept	Kansas	Oklahoma
<p>Basin. Whether for a stream or aquifer, the basin defines the quantity of water that may be allocated. The state water plans of Kansas and Oklahoma are basin-specific.</p>	<p>The chief engineer of the Division of Water Resources may institute a procedure to define an “Intensive Groundwater Use Control Area,” if it appears that withdrawals are unsustainable or other threats emerge.</p> <p>Kansas also has groundwater management districts which may assist permit holders and applicants.</p>	<p>Groundwater allocation applications require identification of the basin or subbasin from which the groundwater will be drawn, which underlies the applicant’s land.</p> <p>The OWRB determines the maximum annual yield (MAY) of each basin, so that the allocations under permits are for an equal proportionate share (EPS) of the MAY.</p> <p>A 2003 law allowed for designations of “sensitive sole source groundwater basins,” which may not be impaired by permits.</p> <p>Permits for transfers out of basins are tightly restricted. Exports out of state are prohibited.</p>
<p>Beneficial use. If a water right is not applied to a beneficial use within a specified period, it is lost.</p>	<p>Beneficial uses are defined as domestic use, stockwatering, municipal, irrigation, industrial, recreation, waterpower, artificial recharge, hydraulic dredging, contamination remediation, dewatering, fire protection, thermal exchange, and sediment control in a reservoir. If no use is made for three successive years, owners and tenants are given two years to use or lose the right, after notice and hearing.</p>	<p>Agriculture, irrigation, public water supply, power generation, navigation, recreations, propagation of fish and wildlife.</p> <p>Allocation of stream water is forfeited if not used for seven consecutive years.</p> <p>Grand River system water may not be allocated by OWRB; statute gave complete control to GRDA.</p>

Concept	Kansas	Oklahoma
<p>Consumptive use. Refers to actual “shrinkage” in volume during beneficial use.</p>	<p>Changes in permits require a showing that the change will not substantially increase consumptive use, such as by evaporation, evapotranspiration, conversion to wastewater. Contrast a cooling tower with generating hydropower.</p>	
<p>Diversion. The point of diversion works with the first- in-time in time concept, to protect the prior right of a downstream diverter. It has other implications.</p>	<p>The Kansas Water Transfer Act restricts transportation of water (at least 1,000 acre-ft. per year) more than 10 miles from the point of diversion. Applies to water in streams, groundwater, and in reservoirs under reservation rights.</p>	<p>Oklahoma prohibits the use of anything but “excess water” outside of its “area of origin.”</p>
<p>Domestic use, which is not subject to the allocation system</p>	<p>Domestic use means the water is used by a person or by a family unit or household for household purposes, or for watering livestock, poultry, farm and domestic animals used to operate a farm, and to irrigate two acres or less to grow a garden, orchard or lawn.</p>	<p>Water used by individuals, families or household for household purposes, including water for animals as long as the number of grazing animals does not exceed the grazing capacity of the acreage (i. e., not feedlots); irrigation use is limited to three acres. Other minor uses may not exceed 5 acre-feet per year.</p>
<p>Impairment. Holders of water rights can adversely affect other holders by the manner of use. A consideration in new applications and applications for transfers or changes in permits.</p>	<p>Regulations restrict or tightly regulate well operation that changes static water level and dense well spacing. For streams, impairment may be from changing water levels, point of diversion, and type of use.</p>	<p>Applications for new appropriations or changes in permits must show that the request will not interfere with existing domestic uses or other appropriations.</p>

Concept	Kansas	Oklahoma
Public interest. What is seen as important may change.	A catch-all term for policy considerations not reflected in statutes, such as economic development, the public trust doctrine, or ecological values or just politics.	State engineer’s ability to assert public interest rationale in particular cases has been taken away; however, federal public trust doctrine remains significant with respect to Indian tribes, navigation and endangered species.
Reporting requirement. Because of the possibility of losing the right with non-use, reporting is mandatory	Annual reporting required.	Annual reporting required. Failure to report can result in cancellation of permit.
Stream water	Kansas regulations determine whether a watercourse is a stream on the basis of area drained, in three zones, from west to east, 640 acres, 320 acres or 240 acres.	If in a defined watercourse, stream water is owned by the public and subject to allocation, whether or not intermittent. Surface water belongs to the landowner. Stream water allocations may not impair domestic uses. Water in lakes and ponds is “stream water” for regulatory purposes.
Surface water	Kansas does not distinguish between sheet flow and streams.	Oklahoma landowners own the water falling on their land or in sheet flow. Oklahoma law is similar to Missouri law, applying a test of reasonableness with respect to diversions.
Use it or lose it. This is the important corollary of the beneficial use concept.	To avoid loss of a right because of non-use, the holder can state that water was not available due to drought, rainfall was adequate, land was enrolled in conservation program, etc.	Forfeiture is automatic with respect to portions of allocation not used.

Concept	Kansas	Oklahoma
Vested rights are rights existing when the allocation system took effect	Rights documented on June 28, 1945 are vested unless later adjudicated. Vested rights applications could not be filed after 1980.	Vested rights determinations were complicated because of statutory changes, though all vested rights should have been determined by 1980.
Waste. Kansas and Oklahoma prohibit waste of water, even domestic water. In Missouri, there are no restrictions against wasting water, except to the extent that it unreasonably deprives another riparian owner of water.		

The challenge for Missourians

In western Missouri and in the Bootheel of Southeast Missouri, localized scarcity of water is becoming a reality. Kansas and Oklahoma grappled with these issues when their populations were much smaller and when the legislators were subjected to only a few powerful special interests, primarily municipalities, oil and gas, ranchers and farmers.

Crafting solutions for assuring ample clean water will require that legislators have faith in science, that scientists respect the daunting responsibilities of legislators, that executive branch officials refrain from naming villains and embracing victims, and that lobbyists work together for common solutions, not just competitive advantage.