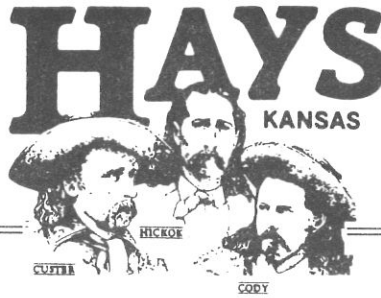


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KENT STEWARD

January 4, 2011

REAP

Attn: Dane Baxa
Executive Officer – Water Resources
1845 Fairmont, Campus Box 155
Wichita, KS 67260

RE: CONSERVATION AS A BENEFICIAL USE OF WATER

Dear Dane:

I appreciate the opportunity to speak to REAP at the upcoming monthly meeting. The City of Hays is soliciting support for legislation that would include conservation as a beneficial use of water. Enclosed with this letter is an issue paper put together on the subject as well as the legislation that was introduced during the 2010 legislative session.

Current Kansas law requires that a water right be put to a “beneficial use”. The result is the current use it or lose it system that exists statewide. Including conservation as a beneficial use would allow a water right holder to enroll a perfected water right in conservation. The result would be that the water would not be pumped, but the right would not be reduced or taken away, as in the eyes of the law it is being put to a beneficial use.

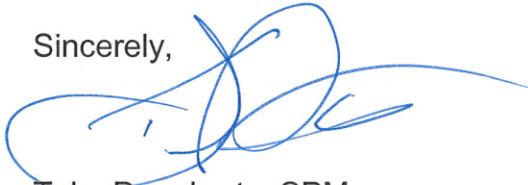
The City of Hays feels that there are many positive benefits to this legislation. First and foremost, it will stop the process of pumping water only to preserve a water right. This could have a positive impact on the State’s fragile aquifers.

The legislation would also provide a valuable planning tool for cities, water districts and industrial users. Currently, a city is prohibited from adequately planning for the future by simply acquiring additional water sources. With the current requirements that the water be put to a beneficial use, it is very difficult for some cities to acquire the necessary water sources to adequately plan for the future. This has led to a situation where cities wait until the last minute to address serious water supply problems.

Principal supporters of the issue are the City of Hays and the Kansas Department of Agriculture's Division of Water Resources. Other supporters include the Cities of Garden City, Dodge City, Hutchinson, Ottawa, Lenexa, the Kansas Water Office, the Kansas Cooperative Council, the Kansas Water Congress, the Kansas Livestock Association and Groundwater Management Districts 1, 2, 3, 4 and 5.

I look forward to discussing this issue in more detail at the meeting on Monday. Please feel free to call me if you have any questions prior to that time.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Toby Dougherty', with a large, stylized flourish extending to the right.

Toby Dougherty, CPM
City Manager

aw

Enclosure

Conservation as a beneficial use of water

Issue

The City of Hays is advocating legislation that would include “conservation” as a beneficial use of water. This would allow holders of a perfected water right to enroll that right in conservation. The water would not be pumped while in conservation. This would protect the right holder from the “use it or lose it” provisions of the current law as the Division of Water Resources could not reduce or eliminate a right that is enrolled in conservation. The new law would benefit all water right holders. Cities and other water suppliers, as well as farmers, utilities, and industrial users would benefit tremendously from this legislation as it would allow for more adequate planning for future water needs.

The legislation

The general premise of this potential legislation is to establish a new beneficial use of water to be defined as “conservation use.” This issue was brought to the forefront when the Department of Agriculture introduced SB 510 during the 2010 legislative session. This concept would allow the owner of a valid and perfected water right to place it in conservation, protecting the right for future use. It is anticipated similar legislation will be introduced during the 2011 Legislative Session.

Brief History of Water Law in Kansas

Kansas water law has been relatively stable since the passage of the Water Appropriation Act in 1945. The basic function of the law is that the water is dedicated to the use of the people of the state and that water rights are available to persons if they put the water to a beneficial use. There are 14 separate “beneficial uses” of water which include irrigation, domestic, stockwatering, municipal, industrial, etc. Under the current law, water rights can be forfeited if they are not used for five consecutive years without good reason. This rule is known as “use it or lose it.” When conflicts between water rights arise the state law is based on first in time, first in right. That is, the priority of use is based on the age of the right. Older, or “senior” water rights have priority over newer, or “junior” rights in times of shortages allowing the owner of the senior right full benefit of the limited resource.

History of the “Conservation Use” Issue

During the 2010 legislative session two bills were introduced that dealt with the general concept of non-use of water. HB 2565 was limited in scope and will be discussed in more detail later on. SB 510, heard in the Senate Natural Resources committee, contemplated adding a new beneficial use of water to be defined as a “conservation use.” This bill was modeled on similar statutes in other western states, such as Texas, Colorado, Utah and California. It would allow an existing irrigation right, for example, to be changed to a conservation use. Once this change was approved the irrigator would no longer have to pump water to avoid the abandonment of his right. In fact, diversion of water would be prohibited from a conservation use water right. Nothing in SB 510 would prevent a conservation use right from

being changed to a different beneficial use but it would still be subject to the normal change procedures in KSA 82a-708b.

Benefits of Change

The fundamental benefit of adopting a conservation use is that it would allow the water right owners, who are pumping simply to avoid abandonment, another method to preserve their valuable property right. Cities and other public water suppliers can purchase quality water rights as they come available, allowing them to more adequately plan for future needs without being forced to put the water into immediate service. Additionally it should result in more flexibility in future planning for individuals, energy and industrial users. Individuals will be able to pass rights to their heirs with less concern over abandonment.

If water users could participate in conservation where active pumping is not required it could preserve the long term viability of the state's depleted aquifers, potentially rejuvenate stream flow in certain areas, and reestablish riparian habitat.

Who would benefit from this legislation?

Anyone who owns a water right could potentially benefit from this legislation. This includes farmers, ranchers, cities, water suppliers, utilities, and industrial users.

Who supports this legislation?

In addition to many cities, this legislation is supported by the Kansas Water Office the Kansas Department of Agriculture and the Division of Water Resources.

Frequently Asked Questions

- *If water rights can be enrolled in conservation for a long period of time what would keep someone from hoarding water?*
 - o If someone wanted to hoard water, they could do so at this time as there is nothing in the current Statutes that would prohibit it.
 - o In the current environment where most individuals own only a few water rights, it would be difficult if not impossible to hoard enough water to seriously impact the available supply. Without broad collaboration it would be difficult to tie up enough water to seriously impact the price.
 - o If a person owned an extremely large number of water rights it would be possible to hoard a local supply for an extended time period. However in order to make this possible you'd have to assume that the value of water will escalate enough to outgrow both the net present value of money, as well as inflation, by a significant margin in order to return a

- future profit. This was a consideration in recent years in Texas where an individual attempted to obtain enough water supplies to sell water to D/FW, San Antonio or El Paso. Even with such large population bases it has not proven to be a profitable endeavor. In Kansas, such an effort would be further complicated by the Kansas Water Transfer Act (KSA 82a-1501 et seq.) which limits the movement of large quantities of water over a long distance (more than 35 miles).
- *What impact might this have on persons trying to obtain water rights?*
 - o It is likely this legislation would have very little impact on those seeking new water rights. In open areas a person simply needs to locate an available source of supply and apply for a new right. In a closed area the abandonment of an existing water right could make water available, but in reality most closed areas are significantly overappropriated, and abandoning a few water rights would not bring the available water back above the safe yield formula.
 - o For those seeking to purchase existing rights it would give them more flexibility in how/when to purchase water. They wouldn't be forced to purchase at the time of need, but rather could obtain water rights when they came available and save them for future use/planning without being forced to put them to active use in the interim period.

 - *Will DWR reduce my rights if I place it in conservation?*
 - o No.

 - *What would stop a city or water district from condemning my water and then placing it into conservation for decades?*
 - o In general condemnation proceedings are used as a last resort due to the inherent conflict and expense. As a result it is unlikely that a city would resort to such an action for planning decades down the road. Some entities can clearly condemn water rights, while others cannot. SB 510 would not change that. That said, a city or water district would face a more difficult burden to show, in a condemnation proceeding, that it was necessary to condemn water rights that it planned to put into conservation use only, while not consuming that water for decades.

 - o The proposed legislation allows for better planning. It is more likely that a city or water district would have to resort to condemnation in order to obtain water rights under the current laws.

 - Was there legislation passed last year that allowed for non-use of a right in closed areas?
 - o HB 2565 (ultimately H Sub for SB 316) addressed non use in areas closed to new appropriations. In this case, any water right that is located in an area that is closed to new appropriations shall be deemed to have due and sufficient cause for non-use. As long as means of diversion are available to put the water to use if necessary the water right shall not be subject to abandonment. This bill ultimately passed as House Substitute for SB 316 and was signed into law.

- While this legislation does benefit water right holders in closed areas, it is not the optimal solution. The areas in question are closed because they are over appropriated or periodically there is not enough sustainable yield to satisfy all of the right in the area. In most cases, the water right owners is not pumping simply because there is not water available to pump. While it is true that a right holder can not have the right taken away for non use, the holder must keep the means of diversion in place to put the water to use. This could prohibit cities and other public water suppliers from purchasing rights for future use.
- *Isn't there a program that allows water holders to set them aside for five or ten years?*
 - The WRCP program which was introduced in 1992 did allow for this, but the program was eliminated last year due to budget constraints. A similar federal program EQIP is still recognized as a reason for non-use but is more limited in scope and individuals must apply and be accepted to participate. Both programs rely on federal dollars as water right owners are compensated for non-use.
- *Is it possible to limit the applicability of conservation use?*
 - *Areas close to new appropriation:* Areas can be “closed to new appropriation” in two ways: 1) by rule of the chief engineer; or 2) by being fully appropriated. Under the new law (H Sub SB 316), groundwater rights within areas closed by rule cannot be abandoned due to non-use as long as their point of diversion can divert water within a reasonable timeframe. Conservation use would not require the diversion works to be maintained. Fully appropriated areas not closed by rule do not have this protection.
 - *Caps on water quantity or time enrolled in conservation use:* While this may address the concern of individuals/entities hoarding water, it may seriously limit the ability of a municipality or others to plan far into the future. For example, the ability to secure and preserve a significant quantity of water for future use may be very beneficial to certain municipalities. In a declining aquifer, some water right holders may change water rights to conservation to slow the decline near their better wells. In areas of water quality concerns, water right holders may change water rights to conservation to better control the migration of poor quality or contaminated water.
 - *Limit conservation use only to right owned by municipalities:* We believe conservation of water is an important policy goal and should be available to citizens statewide. The current use it or lose it philosophy contributes to less efficient water use in many cases.

SENATE BILL No. 510

By Committee on Agriculture

2-2

9 AN ACT concerning water; relating to the beneficial use of water.
10
11 *Be it enacted by the Legislature of the State of Kansas:*
12 Section 1. (a) As used in this section, "conservation use" means the
13 maintenance of a water right for future use.
14 (b) Conservation use shall be a distinct beneficial use of water. Diver-
15 sion under a conservation use water right shall be prohibited.
16 (c) A vested or certified water right which has not been deemed aban-
17 doned pursuant to K.S.A. 82a-718, and amendments thereto, may be
18 changed to a conservation use pursuant to K.S.A. 82a-708b, and amend-
19 ments thereto, and any rules and regulations as promulgated by the chief
20 engineer.
21 (d) A conservation use water right may be changed pursuant to K.S.A.
22 2009 Supp. 82a-708b, and amendments thereto, and any rules and reg-
23 ulations promulgated by the chief engineer.
24 Sec. 2. This act shall take effect and be in force from and after its
25 publication in the statute book.