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**Testimony on Water Issues to  
2015 Special Committee on Agriculture and Natural Resources  
By Lane Letourneau, Program Manager, Water Appropriation,  
and Robert Large, Chief Legal Counsel,  
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This morning we will be providing an informational overview of current practices related to impairment investigations, general information other DWR administrative proceedings, and the requirements for appointment of the Chief Engineer.

Impairment investigations

*Administrative process:*

Currently, the Kansas Water Appropriation Act contains some very thoughtful statutes related to the protection of private property rights on a first in time first in right basis. The Act provides two paths to our citizens to protect their water rights. One path is an administrative path and the other path allows a water right holder to go directly to district court. The system is set up so that the most senior person will have right to the available water first and gain the most economic benefit by using a very limited resource. It is important to know that having a water right does not guarantee water will be available to divert.

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 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 that any well is fully utilizing the aquifer. This section provides an opportunity for participation in the investigation by the groundwater management district 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 department'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 groundwater management district 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 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 quick examples of water rights administration are:

(1) 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.

(2) Gooch/Mills. These rights are in Stevens County, deep 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.

(3) Kolbeck. This case is in Ford County, south of Dodge City. The senior right is a domestic right very concerned they are 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 impairment.

## *District Court Proceedings*

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.

### Other DWR administrative proceedings

K.S.A. 82a-1901, first enacted in 1999, provides the framework for review of orders of the Chief Engineer. Subsection (a) provides that orders issued pursuant to certain sections of the water appropriation act and the groundwater management district act are subject to review by the Secretary of Agriculture. Following an administrative hearing conducted by an independent hearing officer, a Respondent, or DWR, may petition the Secretary for review of the hearing officer's decision. The Secretary generally may deny the review if there does not appear to be a basis for review, may issue an order modifying the hearing officer's order, or may remand the matter for further proceedings. The Secretary's order upon review may be appealed to district court pursuant to the Kansas judicial review act.

K.A.R. 5-14-10 is the DWR regulation that establishes categories of violations under the water appropriation act, for example, falsifying water use reports, overpumping and meter tampering, . The regulation provides that civil penalties may be assessed. In addition, the statutes and regulations provide for temporary suspensions or reductions of water rights.

In all enforcement cases, the case begins with an investigation by the DWR field office for the region where a water right or permit is situated. If there are violations found, in many cases a notice of noncompliance issued. For violations that are repeated or would trigger an immediate penalty, the matter is referred the DWR compliance and enforcement unit at the headquarters office in Manhattan. This unit will prepare a draft order that is reviewed for legality by an attorney prior to issuance. After issuance, the 15/30 day clock begins to run for requesting a hearing.

In all cases, an opportunity for an informal settlement conference is provided to the Respondent. The purpose of these settlement conferences is to answer questions and have a back and forth exchange regarding the violations and any corrective actions. This model of offering settlement conferences has been successful in improving the level of compliance of water users who have faced violations. In many cases, DWR will agree to reduce or modify a penalty based on mitigating factors or as an acknowledgement of corrective measures undertaken by water users. It is very important to know that we do not have very many hearings related to non-compliance. During 2015, DWR has had one hearing related to non-compliance. Another hearing was held regarding the denial of a new application. A large number of settlement conferences have been held, most of which resulted in a mutually acceptable settlement option. These settlement conferences are conducted either in person or by phone. We work very hard to accommodate our water users in this process.

## Appointment of the Chief Engineer

The Chief Engineer is appointed by the Secretary of Agriculture pursuant to K.S.A. 74-506d. The Chief Engineer is the Chief Administrative Officer of the Division of Water Resources. Employees of DWR are designated as classified employees pursuant to that section. The current Chief Engineer is a classified employee. The qualifications of the Chief Engineer are currently defined in the class specifications for the position of Chief Engineer under the state civil service classifications.

With the passage of HB 2391 during the 2015 legislative session, which allows appointment of an unclassified employee in the event of a vacancy in a classified position, it is the current plan of the agency that unclassified employees will fill such vacancies.

Thank you for the opportunity to speak with you today and for your continued support of Kansas water users.