

# Water Law in Kansas History

by John C. Peck

## Introduction

In this article, I will explore how Kansas law historically has been applied to that most fundamental of our natural resources: water.

The subject of water law encompasses many different types of water problems. It involves, for example, disputes in times of shortage between two water users on a river or between two water users pumping from groundwater. It may involve fights between a person using water from a river and a person using water from nearby groundwater—as the current dispute involving the Cheyenne Bottoms wetland area near Great Bend illustrates. It also involves disputes caused instead by too *much* water—i.e., flooding and drainage problems.

Water law often involves battles between state governments. Kansas is currently facing Colorado in the United States Supreme Court concerning the Arkansas River. There is also a dispute between the so-called “lower basin states” of the Missouri River Basin (Missouri, Kansas, Iowa, and Nebraska), who want continued flow of the Missouri River for barge navigation purposes, and the “upper basin states” of North and South Dakota and Montana, who want the Corps of Engineers to keep the water in the South Dakota reservoirs for their important recreational interests.

Finally, water law can involve water quality issues, disputes concerning the rights of the public to use water for recreational purposes, real estate disputes on property boundaries marked by water courses like rivers or streams, questions involving eminent domain

powers of governmental units and private companies, and numerous other possible controversies. Most controversies, however, involve who gets water. In a nutshell, the battle cry, whether yelled by an individual, company, or the state, has been, “This is *my* water!”

Water law is diverse and ever changing. The industrial revolution affected the Kansas landscape, causing people, transportation methods, and industry to change. Old Kansas maps reveal numerous mills powered by steam, horses, wind, and water. Water mills on Kansas rivers and streams were labeled by type. An 1874 inventory showed a total of fifteen water-power saw mills in the state, eighty water-power flour mills, and thirteen water-power saw and grist mills.<sup>1</sup> Steamboats traveled the Missouri and Kansas Rivers, and, yes, even the Arkansas River. Ferry companies charged tolls to cross rivers. Therefore, the various laws dealing with all aspects of water have had to change with the times.

In this article, I look at all three branches of government and some of the interesting problems each has faced in dealing with various water problems in the state of Kansas. I will start first and deal mostly with the cases from the Kansas Supreme Court, then briefly cover the Kansas Legislature, and finally cover even more briefly the executive branch.

## Selected Cases

Like many other states, Kansas has quite a number of water law cases that have reached its appellate courts. Some have been very significant. Others are

## FOOTNOTES

1. The Third Annual Report of the State Board of Agriculture, at 245 (1874). I am interested in learning about the existence, whereabouts, and history of water mills

in Kansas during this period and would appreciate any information my readers could provide.

less important, but they present interesting facts. Some are interesting because of who wrote the opinions. Still others simply contain some beautiful language. Take, for example, the 1905 case of *Clark v. Allaman*.<sup>2</sup> The opening paragraph sounds like a selection from the writings of the naturalist John Burroughs:

The parties to this litigation are contesting for the right to enjoy one of nature's benignities. As if relenting from her severity toward the semiarid plains of Wallace County, where atmosphere and soil are parched in almost continuous drought, she has caused a number of springs of pure and wholesome water to break from the bosom of the earth and form the unfailing stream of Rose creek. Here wild things came in early days to slake their thirst; here the hunter of the bison and the wild horse lay in wait; and here the irrigation farmer came to practice agriculture.<sup>3</sup>

In my research of appellate cases, I had hoped to find some classic criminal cases involving water

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rights—a farmer shooting another farmer for using his water, or a downstream mill owner convicted of criminal trespass for destroying an upstream dam. The best I could find in the appellate record, however, were two criminal cases that barely mentioned water. One might be deemed a water law case; the other, hardly. The former involved the prosecution of one Lewis Wahl in 1886 for allegedly unlawfully putting a part of the carcass of a dead animal into Mud Creek, in violation of a statute that prohibited such acts—an early water quality case.<sup>4</sup> The latter case, *State v. McAnarney*,<sup>5</sup> was a 1905 case involving a defendant charged with second degree murder for killing his father by puncturing him in the neck with a tin can. He claimed that he had merely found his father in a well, lying face down in the water, drowned, apparently a suicide. The supreme court was impressed enough with his claim that it reversed the conviction for a new trial.

2. 71 Kan. 206, 80 P. 571 (1905).

3. *Id.* at 208.

4. *State of Kansas v. Wahl*, 35 Kan. 608 (1886).

5. 70 Kan. 679, 79 P. 137 (1905).

6. Thanks to Professor Homer Socolofsky of Kansas State University and Professor Paul Wilson of the University of Kansas School of Law, who brought the Lane case

That was not a real water law case.

Although not a reported case, during territorial days, James H. Lane killed his neighbor Gaius Jenkins in Lawrence in a land dispute involving the location and use of a well. Lane was discharged by the court for lack of proof of murder, so no appellate record exists.<sup>6</sup>


But there are some "real" water law decisions. Several involve the question of whether certain rivers are navigable. Under old and established rules, the state owns the beds of rivers that are "navigable," determined at the time of statehood, while adjacent landowners own the beds of "nonnavigable rivers." Who owns the bed helps determine other rights such as whether the public can navigate the river or take sand and gravel from the river bed or ice from the river.

Whether a river is navigable appears to be a simple question. Our history indicates, however, that reasonable minds can differ on the issue. For example, United States Senator John J. Ingalls from Kansas once declared the Kansas River to be navigable, but only "by catfish and then only at certain seasons of the year." In 1864, the Kansas Legislature declared the Kansas River to be nonnavigable.<sup>8</sup>

When the Kansas Supreme Court was presented with the issue in the case of *Wood v. Fowler*,<sup>9</sup> decided in 1882, it had to face that earlier legislative determination of nonnavigability. The court decided that the Kansas River was a navigable river despite what the

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to my attention at the presentation of this paper in Topeka on October 4, 1991. For details, see W. Connelley, "The Lane-Jenkins Claim Contest," Kansas Historical Collections, v. XVI, 1923-1925, at 21-176.

7. The Kaw River Nature and History Trail Guide, KS Hist. Soc. (1986), at 24.

8. Laws of 1864, at 180.

9. 26 Kan. 682, 40 A.R. 330 (1882).

Legislature had decreed. Justice David J. Brewer wrote:

It is true in 1864 an act was passed by the state legislature declaring the Kansas and certain other rivers not navigable; but the plain implication of the act is that the streams had theretofore been considered navigable and its purpose was to sanction the bridging and damming of such streams . . .<sup>10</sup>

Sometimes a court faces conflicting judicial definitions of the term "navigable river." In the 1914 case of *State, ex rel., v. Akers*,<sup>11</sup> where the Kansas Supreme Court was grappling with questions of whether the Arkansas River was navigable and which definition to apply, it quoted Iowa's Judge Dillon, who said the following when trying to apply "absurd rules of the common law"<sup>12</sup> to the question of whether the Mississippi River was navigable:

If . . . this river is navigable, then it is so in spite of the common law; or, more correctly speaking, it is navigable, because the common law, not having any applicability to this river, has nothing to do—I repeat it, the common law has nothing to do—with the question as to whether it is navigable or not navigable.<sup>13</sup>

Our supreme court has been imminently practical on this issue of navigability. Justice Brewer did not even require evidence to conclude that the Kansas River was navigable:

[It] would seem absurd to require evidence as to that which every man of common information must know. To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller and less-known streams; and yet, within the limits of any state the navigability of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge . . . we know that the Kansas is the largest river wholly within the limits of the state; that it has been recognized as the prominent geographical feature dividing the state into northern and southern Kansas; that in early territorial history it was in fact navigated, a few steamboats going up and down its waters; and that its volume of water is such that in its natural condition it is capable of being used for purposes of navigation, and so coming within the

recognized definition in this country of a navigable stream.<sup>14</sup>

As to the Arkansas River, the court was even more practical, or, should one say, overreaching? In a 1912 case called *Dana v. Hurst*,<sup>15</sup> the court held that the Arkansas River for its whole length in Kansas was navigable at statehood, thereby placing the beds in the ownership of the state, although the court admitted that:

to hold that this stream is navigable is equivalent to ruling that sand may be navigated. But let it be said once more that present navigability is not and can not be determinative.<sup>16</sup>

The facts of these old cases involving navigability make interesting reading today. The *Wood v. Fowler*<sup>17</sup> case mentioned above regarding navigability of the Kansas River involved ice dealers who had leased land from a person named Matthias Splitlog who owned Wyandotte County land adjacent to the Kansas River.

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***Determination of navigability as of statehood was and still is the rule for stream bed ownership purposes.***

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Ice was a "commodity of great value,"<sup>18</sup> in the words of the court, and these dealers had built ice houses on the banks of the Kansas River to store large quantities of ice for marketing in Kansas City. Because other people also wanted this ice, however, these dealers sued to enjoin the others from taking ice from the river adjacent to the land the dealers had leased from Mr. Splitlog.

Who could take ice depended on who owned the bed of the Kansas River: if the Kansas River was a navigable river, the state owned the bed and the public could then take ice; if it was a nonnavigable river, the ice dealers here under Mr. Splitlog's ownership would have the sole right to the ice. Justice Brewer's court held that the Kansas River was a navigable river, entitling anyone to the ice.

Determination of navigability as of statehood was and still is the rule for stream bed ownership purposes. This rule shows why a recent district court upheld the state's ownership of the bed of the almost totally dried up Arkansas River near Ingalls, which lies between Dodge City and Garden City, against the ownership claims of adjacent land owners.<sup>19</sup> The rule also

10. *Id.*, at 688.

11. 92 Kan. 169, 140 P. 637 (1914).

12. *Id.*, at 195.

13. *Id.*

14. *Wood*, *supra* note 9, at 687, 688.

15. 86 Kan. 947, 122 P. 1041 (1912).

16. *Id.*, at 963.

17. *Supra*, note 9.

18. *Id.*, at 685.

was applied recently by the Kansas Supreme Court when it held that Shoal Creek in Cherokee County was nonnavigable at statehood, thereby placing ownership of the bed in adjacent landowners and depriving the public of a chance to canoe the creek.<sup>20</sup> In this decision, the court refused to adopt the emerging and powerful "public trust" doctrine, which would make nonnavigable streams available to the public. The court left the matter to the Legislature.

As previously discussed, Justice Brewer, in 1882, wrote an important decision on the issue of navigability. But he also addressed other water law issues. In 1877, he wrote the opinion in *Shamleffer v. Council Grove Peerless Mill Company*,<sup>21</sup> in which he stated that the common law rule of riparian rights applied in Kansas. Under the common law, landowners adjacent to streams had rights in the flow of the stream, but could not divert the water from the channel for beneficial use. This holding deprived the Peerless Mill Company of any right to have water run from the Neosho River through an artificial channel to its mill pond.

In 1881, Justice Brewer wrote another important decision in *Emporia v. Soden*,<sup>22</sup> which involved a riparian owner who had powered his mills for nineteen years with water behind a dam constructed on the Cottonwood River. The city of Emporia then purchased an upstream riparian tract, dug a twenty-five foot diameter well that was twenty-six feet deep and located seventy-five feet from the river. When the city pumped from the well, the river level went down, causing a shutdown of Soden's mill. Soden sued for an injunction and he prevailed. On appeal, Justice Brewer's court held for Soden against Emporia. The court was ahead of its time in recognizing the interconnection between groundwater and surface water, as the law to that time had essentially separated the two water sources, even though the science of hydrology already recognized the interconnection.

Justice Brewer had thus written at least three very important water law decisions in Kansas when he was elevated to the United States Supreme Court in 1890. Kansans thus would have hoped that, with Brewer's background in writing water law decisions and his being from Kansas, they would fare well in the landmark case of *Kansas v. Colorado*<sup>23</sup> decided by the U.S. Supreme Court in 1907 and written by Justice Brewer. But this hope proved as futile as Kansas' "call on the river" (a water law term meaning that a downstream

user is seeking to enjoin upstream diversions). Kansas had sued Colorado for using too much water from the Arkansas River. This sounds familiar, of course, because we are currently involved in a similarly captioned case involving the same river.<sup>24</sup> While the 1907 U.S. Supreme Court held that downstream states like Kansas have an equitable share of interstate rivers and that downstream states have the right to seek an equitable allocation of the river if damaged sufficiently, it concluded that Kansas had not suffered enough damage to justify an apportionment by the Supreme Court. Despite Justice Brewer's ruling against Kansas, legal historian Brian Moline has stated that *Kansas v. Colorado* "is still regarded from a technical perspective as . . . [Brewer's] . . . ablest effort."<sup>25</sup>

Another 1907 case, *Jobling v. Tuttle*,<sup>26</sup> decided by the Kansas Supreme Court, is interesting factually, albeit of almost no moment legally. In 1887, in the town of Gueda Springs, near Arkansas City and Winfield, there were "seven springs, possessing great medicinal and curative properties."<sup>27</sup> "[T]he waters of the springs had acquired a widespread reputation for possessing medicinal qualities and had begun to attract visitors."<sup>28</sup> At that time, the owner of the springs, to induce construction of "a large and commodious hotel,"<sup>29</sup> sold adjacent land for the hotel, promising *orally* that the purchaser, his hotel guests, and his successors in interest would have "free and uninterrupted use of the mineral waters for drinking purposes"<sup>30</sup>—forever.

The Loomis Hotel was built, but "forever" lasted only until 1905, when the owner of the springs closed them, denying the hotel owner and the public the right to use the springs. The hotel owner sued the springs' owner for continued use of the water, but he lost. Perhaps that is why Gueda Springs is still but a spot on the road, never having achieved the status envisioned by the hotel owners. David Maslen, the current city attorney of Gueda Springs, reports that the springs barely trickle today and that the most pressing legal problem facing Gueda Springs now is horse picketing in city road ditches, not water rights problems.<sup>31</sup> That is too bad. Perhaps the most valuable waters in this country today are the various mineral waters that are bottled and sold to a gullible, yuppie population. Apparently, the water was not that good anyway, as the following account of gunfighter Luke Short's final

19. *Renick Bros., Inc. v. State of Kansas*, No. 79-C-58, Gray County District Court.

20. *State ex rel. v. Hays*, 246 Kan. 99, 785 P.2d 1356 (1990).

21. 18 Kan. 24 (1877).

22. 25 Kan. 566 (1881).

23. 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956 (1907).

24. *Kansas v. Colorado*, Original No. 105, United States Supreme Court.

25. Moline, B., "David Josiah Brewer, Kansas Jurist," 55 J.K.B.A. 7, 10 (1986).

26. 75 Kan. 351, 89 P. 699 (1907).

27. *Id.*, at 354.

28. *Id.*, at 352.

29. *Id.*

30. *Id.*

31. Phone conversation, September 3, 1991.

days indicate:

The next time Kansas newspapers carried the name of Luke Short they were announcing his final days on earth. Luke . . . checked in at the Gilbert hotel in Gueda Springs . . . about August 25, 1893. Gueda Springs was at that time a health resort, its springs reportedly containing health-restoring minerals. Luke was suffering from dropsy.

The springs did not help Luke, however, and in less than a month he was dead.<sup>32</sup>

The most important case in Kansas water law history is probably *Williams v. the City of Wichita*,<sup>33</sup> decided in 1963. The Kansas Legislature previously had changed basic water law with enactment of the 1945 Water Appropriation Act. Pre-1945 law was the common law, based on ownership of land either along rivers or above groundwater resources. Advantageous land ownership was the key to having water rights, not actual water use. When the change was made to the prior appropriation system in 1945, which thereafter would require a permit from the state before one could use water, the legislature attempted to protect existing rights as so-called "vested rights." Vested rights were those based on the common law land ownership concept, but included only those water rights being used at the time of the new Act; those rights not being used simply were lost under this legislation.

One Williams, who owned land above groundwater preserves in Harvey County, challenged this statute, claiming that it involved an unconstitutional taking of property without compensation. Technically it did. On June 27, 1945, Williams had a recognized property right in the water even though he was not using it, but on June 28, the very next day when the new Act went into effect, he no longer had that right. Unfortunately for Mr. Williams and others similarly situated, the supreme court upheld the constitutionality of the statute. As interesting as the holding is the blistering diatribe written by Chief Justice Alfred G. Schroeder in his lone dissent. He wrote:

Not to be outdone by the legislature in the confiscation of private property, the Supreme court of Kansas today upholds the constitutionality of the 1945 Water Appropriation Act . . . by decreeing an established property right (one which even the

legislature and the city of Wichita recognized) to be nonexistent. If such arbitrary exercise of the police power of the state withstands the federal constitutional test of due process, the formula has been found, and the precedent is established, by which all private property within Kansas may be communized without cost to the state. Arbitrary power and the rule of the Constitution cannot both exist.<sup>34</sup>

### Legislation.

From the beginning, indeed from before the beginning—in territorial days—our legislature has dealt with various water matters.

The 1855 General Territorial Laws, for example, dealt in great detail with the business of "boatmen."<sup>35</sup> One section attempted to deal with the problem of inebriated boatmen; it stated:

No charge made against any boatman for spirituous liquors, while employed or during his engagement, shall be recoverable or allowed, but at a reasonable rate; nor for any sum exceeding the one-tenth part of his wages, for the time in which the charges shall be made.<sup>36</sup>

Another section dealt with the serious problem of what might be called "steamboat drag racing:" the criminal statutes made it manslaughter in the third degree for a steamboat captain, through ignorance or neglect in

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trying to "exceed any boat in speed," to allow boiler steam to burst and kill someone.<sup>37</sup> One chapter prescribed how bridges were to be built.<sup>38</sup> Another chapter regulated the running of ferries,<sup>39</sup> and another the erection of dams for water mills.<sup>40</sup> Various special territorial laws then enabled the construction of specific toll bridges and the maintaining of ferries across specific rivers; several individuals, for example, were given permission under the name of the Kansas River Navigation Company to employ steamboats on the Kansas River.<sup>41</sup>

Later, other interesting acts were passed. An 1859 act made it unlawful to destroy bridges, mill dams, or

32. N. Hiller and J. Snell, "Great Gunfighters of the Kansas Cowntowns, 1867-1886," at 414 (1963). Thanks to KU law student Jan Oleen for bringing this information to my attention.

33. 190 Kan. 317, 374 P.2d 578 (1962).

34. *Id.*, at 341 (emphasis in original).

35. Cpt. XV.

36. *Id.*, art. I., sect. 12.

37. *Id.*, cpt. XLVIII, section 17.

38. *Id.*, cpt. XVIII.

39. *Id.*, cpt. LXXI.

40. *Id.*, cpt. CXIII.

41. Territorial Laws of Kansas 1857, at 166, "Navigation of the Kansas River," sections 1 & 2.

other dams erected to create hydraulic power; and to do damage to vessels by arson, burglary, larceny, or setting them adrift.<sup>42</sup>

Still later came important legislation concerning water resource planning. In 1895, the Legislature required "full and complete drainage . . . maps" to be prepared to represent "the topography, flood areas, geographical structure, and all other details essential to as complete a knowledge as possible of the practical condition of irrigation in Kansas west of the 98th meridian."<sup>43</sup> Later legislation advanced the water resources planning efforts with creation in 1917 of the Kansas Water Commission,<sup>44</sup> later changed in 1927 to the Division of Water Resources of the State Board of Agriculture.<sup>45</sup>

Those early planning statutes also resulted in legislation in the 1880's and 1890's enabling the appropriation of water in western Kansas for irrigation and industrial purposes.<sup>46</sup> Most importantly it provided that the water "may be diverted from natural beds, basins or channels for such purposes and uses."<sup>47</sup> Permitting diversion from the channel was an important legislative innovation, because Kansas had recognized the common law from statehood, and the common law was the riparian law natural flow theory, as applied in the *Council Grove Peerless Mill Company* case mentioned above.<sup>48</sup> This theory provided that riparian owners had rights to the water, but had to use it in such a way as not to diminish it in quantity or quality—thus, no diversions. The Kansas Legislature changed that rule with the 1891 legislation.

The legislation was fostered in part by interest in developing large irrigation ditches in southwestern Kansas, and the legislation helped foster the ditches. With colorful names such as the Minnehaha Irrigation Company, the Great Western Irrigating Canal, the Suez Irrigating, Water Power and Manufacturing Company (with its Suez Canal), the Alamo Ditch Company, and the Amazon Canal, grand irrigation schemes were planned and constructed. One, the Lake Koehn Navigation, Reservoir, and Irrigation Company, sought to divert water from the Arkansas River to the Cheyenne Bottoms to be used there for irrigation purposes. Many projects were abandoned shortly thereafter, due to the low flows in the Arkansas River in the summer which were caused in part by even greater development of irrigation across the state line in Colorado.<sup>49</sup> Several of these ditches and companies, like the Frontier Ditch Company, still

exist today and have some of the oldest and greatest water rights on the Arkansas River.

In 1945 after a governor's study, the Legislature abolished the old rules of water rights adhered to since statehood by adopting the most important legislation in Kansas water law history. The Kansas Water Appropriation Act<sup>50</sup> capsulized the basic rule: "first in time is first in right." No longer was there a sharing concept for stream water or an absolute ownership concept for groundwater. In the Appropriation Act, as described above in the discussion of *Williams v. Wichita*,<sup>51</sup> the Legislature made water a public resource and required persons to obtain permits before putting water to use. That Act has been extensively amended since then, and the whole concept of a water right as a property right has evolved and is continuing to evolve.

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In this century, the Legislature also has enacted enabling legislation for formation of numerous types of water districts to solve various water problems: drainage districts, watershed districts, rural water, water supply, irrigation, groundwater management, and numerous others including our newest type of district, the water assurance district.

### Executive

The largest agency that administers water laws is the Division of Water Resources. Interestingly, the division falls under the Kansas State Board of Agriculture, which is not under the governor. Since 1945, it has received over 40,000 water rights applications. It administers the water rights laws and approximately 30,000 active water rights with a staff of about 90 persons. Besides handling the permit process and recording of the permits, the division deals with dam construction and safety, handles litigation concerning water rights, and plays an important role in interstate water litigation.

Another important administrative agency is the Kansas Water Office. That office and its predecessor, the Kansas Water Resources Board, have been important catalysts in bringing about change in water use philosophy. Established in the 1950's, the Water Resources Board worked with federal water agencies

42. Kansas Territorial Laws 1859, cpt. 28, sect. 99.

43. Act of Mar. 5, 1895, c. 162 Kan. Sess. Laws 300.

44. Laws of Kansas 1917, cpt. 172, sect. 1.

45. Laws of Kansas 1927, cpt. 293, sect. 1.

46. Laws of Kansas 1891, cpt. 133, art. 1, sect. 1.

47. *Id.*

48. Note 21, *supra*.

49. See generally Pfister, R., "Water Resources and Irrigation," Economic Development in Southwestern Kansas, Part IV., at 48-61 (1955).

50. Laws of 1945, cpt. 390, now found at K.S.A. §§ 82a-701, *et seq.*

51. Note 33, *supra*.

in the construction of the large flood control reservoirs to provide water supply pools for cities and industries. The board worked on early water plans to help guide the state.

When the Legislature created the Water Office from the Water Resources Board in the early 1980's, it changed the whole water resources planning concept to a dynamic process, now respected even outside our borders. The director of the Water Office and his twenty-member staff are constantly studying water problems and proposing solutions, legislative and otherwise.

#### Conclusion.

From territorial days to the present, the law has played an extremely active and important role in water resources allocation and development in the state of Kansas. Today, the names of the players are different, and water law nomenclature has changed from water mills, steamboats, and riparian rights to terms like the public trust doctrine, interbasin transfers, and groundwater management districts. But the battle cry is still and will probably always remain the same: "This is *my* water!"

#### Endnotes

*This article is based on a talk presented at the Annual Meeting of the Kansas State Historical Society in Topeka, Kansas, October 4, 1991. The article appears in a separate publication of the Society, and the Society has given permission to the Kansas Bar Association to publish the article in this issue of The Journal.*

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