SAVING THE OGALLALA AQUIFER: KANSAS'S DUTY TO PROTECT INTERGENERATIONAL WATER RIGHTS

*By: Leah Stein**

I. INTRODUCTION

Judge J. Skelly Wright once began an opinion by saying that "man's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations."[1] Although some may narrowly view Judge Wright's sentiment as a compelling preface to an EPA-favored opinion, when considered in a broader context, this line serves as a stark reminder that we, as humans, are rapidly changing our environment in irreversible and irreparable ways. As we engage in change of such magnitude, it is important to consider not only the effects on current populations, but also how the effects of our actions today impact the rights of future generations.[2]

In recent years, Kansas's changing environment has sparked national interest.[3] In particular, one of the state's most utilized resources, the Ogallala Aquifer[4], which

* J.D. Candidate, May 2025, University of Kansas School of Law. As a proud member of the Kansas Journal of Law and Public Policy, I want to thank my fellow editors for their thoughtful and thorough work on this Article. Growing up in southwest Kansas, I witnessed firsthand the critical role water plays in our communities. As an essential resource for our state, I hope the Ogallala Aquifer is protected and that the proposals in this Article inspire practical solutions for preserving our natural resources.

[1] Ethyl Corp. v. EPA, 541 F.2d 1, 6 (D.C. Cir. 1976).

[2] *See* Aiofe Daly, *Intergenerational Rights are Children's Rights: Upholding the Right to a Healthy Environment Through the UN Convention on the Rights of the Child*, SOC. SCI. RSCH. NETWORK, (Oct. 4, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4141475 [https://perma.cc/4B6R-W23L] (discussing the impact of climate change and impacts on intergenerational equity).

[3] Mira Rojanasakul, Christopher Flavelle, Blacki Migliozzi & Eli Murray, *America is Using Up its Groundwater Like There's No Tomorrow*, N.Y. TIMES (Aug. 28, 2023), https://www.nytimes.com/interactive/2023/08/28/climate/groundwater-drying-climate-change.html [https://perma.cc/9HT9-7Q6V] ("Groundwater loss is hurting breadbasket states like Kansas, where the major aquifer beneath 2.6 million acres of land can no longer support industrial-scale agriculture.").

[4] *See* Greg Doering, *Kansas Makes Historic Investment in Preserving the Ogallala Aquifer*, FARM TALK (May 21, 2024), https://www.farmtalknews.com/news/kansas-makes-historic-investment-in-preserving-the-ogallala-aquifer/article_86a6a308-179c-11ef-9aa8-1fa01ea4d166.html [https://perma.cc/52ZB-MVLC] (explaining that water from the Ogallala is used to support Kansas crops and livestock).

spans across eight states[5] and is a water source for many, has garnered attention due to its rapid depletion.[6] As scholars across the nation review evidence of depletion, questions have arisen as to whether the problem is rooted in global environmental crises or specific farming practices.[7] Research suggests that the Ogallala Aquifer's decline is not driven by weather or by individual farmers' preferences but rather is driven by agricultural policies.[8]

As aquifer depletion is recognized as a large-scale policy issue, and as the government is most often held responsible for reshaping policy, it should be no surprise that the Kansas legislature has taken a heightened interest in water conservation efforts.[9] However, despite this heightened interest, the actions of legislators cast doubt on a statewide commitment to preservation of the Ogallala.[10] The question to be asked, then, is "what would create statewide commitment to preservation?" This question provides the overarching theme for this Article.

To this theme, this Article further ties in the idea that preservation efforts today have longstanding effects. Like all environmental issues, which test the conflict between the rights and duties of Earth's current stewards, "[a]quifer loss is a generational test of our values and obligations to each other."[11] Beyond the conflict of our obligations to each other, humans today also face the challenge of "…balancing the water needs of the present with the long-term needs of the future."[12]

---

[5] Michon Scott, *National Climate Assessment: Great Plains' Ogallala Aquifer drying out*, CLIMATE.GOV (Feb. 19, 2019), https://www.climate.gov/news-features/featured-images/national-climate-assessment-great-plains'-ogallala-aquifer-drying-out#:~:text=The%20Ogallala%20Aquifer%20underlies%20parts,Dakota%2C%20Texas%2C%20and%20Wyoming [https://perma.cc/UJ25-XBYV].

[6] *See* Rojanasakul, *supra* note 3.

[7] Burke W. Griggs, Matthew R. Sanderson & Jacob A. Miller-Klugesherz, *Farmers are Depleting the Ogallala Aquifer Because the Government Pays Them to Do It*, AM. BAR ASS'N (Feb. 27, 2022), https://www.americanbar.org/groups/environment_energy_resources/resources/trends/2022/farmers-depleting-ogallala-aquifer-because-government-pays-them-do-it/ [https://perma.cc/C263-QDKD].

[8] *Id.*

[9] Allison Kite, *Kansas Legislators Renew Efforts to Save Ogallala Aquifer*, KAN. REFLECTOR (Jan. 17, 2023), https://kansasreflector.com/2023/01/17/kansas-legislators-renew-efforts-to-save-ogallala-aquifer/ [https://perma.cc/3CLH-6TQF].

[10] Allison Kite, *Kansas Legislation Got 'Watered Down' but Will Help Aquifer Conservation Efforts*, KAN. REFLECTOR (May 12, 2023),https://kansasreflector.com/2023/05/12/kansas-legislation-got-watered-down-but-will-help-aquifer-conservation-efforts/ [https://perma.cc/JSZ7-3BN8] ("The Senate version [of the bill] dedicated millions less to water priorities, and rather than dedicate a portion of the state's sales tax for it, the Senate wanted to divert general fund dollars.").

[11] Lucas Bessire, *Aquifer Loss is a Generational Test of Kansas Values and Obligations*, WICHITA EAGLE (June 6, 2021), https://www.kansas.com/opinion/guest-commentary/article251825068.html [https://perma.cc/QEN5-Z5EA].

[12] David R. Steward, Paul J. Bruss, Xiaoying Yang, Scott A. Staggenborg, Stephen M. Welch & Michael D. Apley, *Tapping Unsustainable Groundwater Stores for Agricultural Production in the*

This Article argues that the current system for water rights adjudication in Kansas is flawed and, thus, has prevented the state from properly exercising its duty to protect water rights for future generations. Intergenerational rights are intimately connected to the problem of aquifer depletion. For this reason, Kansas must protect future water rights and the Ogallala by creating a system of water courts to adjudicate water matters and restoring deference to agency interpretation of ambiguous statutes during judicial review.

Part II of this Article provides essential background for understanding Kansas water law, the history of the Ogallala Aquifer, and how humans have depleted it over time. Part III explains how the problem of aquifer depletion has been perpetuated by Kansas's ineffective system of adjudication. It also addresses the state's disregard for future generational interests in natural resources, like the Ogallala. Part IV argues that the state legislature should remedy Kansas's flawed water rights adjudication system by creating water courts to deal solely with water matters, like those in Colorado and Montana. Additionally, Part IV argues that restoring the practice of agency deference during judicial review on issues of regulatory and statutory interpretation would further aid these courts. Part V discusses the practical considerations for implementing these legal remedies and grounds them in the policy goal of preserving water rights for future generations.

While in recent years there has been an increase in scholarly writing on the Ogallala Aquifer[13] and how states can better address conservation efforts, there has been a lack of research specifically addressing the remedies proposed in this Article. There has also been a lack of overarching policy consideration—like protecting intergenerational water rights. As Kansas looks to preserve the Ogallala Aquifer, it must employ legislative and judicial remedies whenever possible to advance the protection of intergenerational water rights.

II. HISTORY OF KANSAS WATER LAW AND DEPLETION OF THE OGALLALA AQUIFER

To understand Kansas's role in preserving the state's water resources, it is imperative to understand the structure of Kansas water law as well as the history of depletion of the Ogallala Aquifer.

A. Kansas Water Law

In Kansas, water rights are considered real property.[14] However, "a water right does not constitute ownership of the water itself; it is only a usufruct, a right to use water."[15] Prior to 1945, Kansas followed the riparian doctrine for surface water and

---

High Plains Aquifer of Kansas, Projections to 2110, PROCEEDINGS OF THE NAT'L ACAD. OF SCIS. (Aug. 26, 2013), https://www.pnas.org/doi/full/10.1073/pnas.1220351110 [https://perma.cc/2D2R-W5PQ].

[13] *See, e.g.*, Warigia M. Bowman, *Dustbowl Waters: Doctrinal and Legislative Solutions to Save the Ogallala Aquifer before both Time and Water Run Out*, 91 U. COLO. L. REV. 1081 (2020).

[14] KAN. STAT. ANN. 82a–701(g) (2023).

[15] Shipe v. Pub. Wholesale Water Supply Dist. No. 25, 210 P.3d 105, 110 (Kan. 2009); *see* KAN. STAT. ANN. 82a–707(a) (2023).

the absolute ownership doctrine for groundwater.[16] Since passing the Kansas Water Appropriation Act[17] (KWAA) in 1945, Kansas transitioned from the riparian doctrine to the appropriation doctrine.[18] The appropriation doctrine uses "a permit system for acquiring water appropriation rights based upon 'first in time, first in right.'"[19] Thus, to gain an individual water right, one must be the first person to divert the water from any source and use it for a beneficial purpose.[20] If water has not been diverted and used for such purpose, it is considered unused and belongs to all people of the state.[21] Therefore, Kansas courts approach questions concerning water rights "upon the basis of the interest of the people of the state without losing sight of the beneficial use the individual is making or has the right to make of the water."[22]

The KWAA remains in place today. However, in 1972, to address some of the issues of water depletion, the legislature adopted the Groundwater Management District Act[23] with the purpose of "reward[ing] local initiatives to conserve groundwater supplies."[24] Since their creation, Groundwater Management Districts (GMDs) "have become the most important political force in Kansas water."[25] GMDs propose management plans and regulations for their respective districts, which are approved as state regulations enforced by the chief engineer.[26]

In 1978, Kansas amended the Groundwater Management District Act to include specific provisions for the initiation of proceedings for and designation of Intensive Groundwater Use Control Areas (IGUCAs).[27] These provisions allow the chief engineer of the Kansas Department of Agriculture, Division of Water Resources (DWR) to exercise control and implement protective measures in areas where groundwater levels are declining excessively "or other conditions exist warranting additional regulation to protect public interest."[28] In 2012, GMDs were granted the authority to recommend the approval of Local Enhanced Management Areas

---

[16] Hawley v. Kan. Dep't of Agric., 132 P.3d 870, 879 (Kan. 2006).
[17] *See* Cochran v. State, Dep't of Agric., Div. of Water Res., 249 P.3d 434, 439 (Kan. 2011); KAN. STAT. ANN. 82a-701, et seq.
[18] *Id.*; F. Arthur Stone & Sons v. Gibson, 630 P.2d 1164, 1168 (Kan. 1981) (explaining that the riparian doctrine conferred on owners of land contiguous to a watercourse the right to use water on their land subject to a few exceptions.)
[19] *Hawley,* 132 P.3d at 879 (citing John C. Peck & Constance Crittenden Owen, *Loss of Kansas Water Rights for Non–Use,* 43 U. KAN. L. REV. 801, 805 (1995)).
[20] *Cochran*, 249 P.3d at 439.
[21] *Hawley,* 132 P.3d at 879.
[22] *Cochran*, 249 P.3d at 439.
[23] KAN. STAT. ANN. § 82a-1020 (2023).
[24] *An Overview of Kansas Water Law: Testimony before the House Comm. on Water*, 2021 Leg. Sess. (Kan. 2021) (Testimony of Burke W. Griggs, Washburn Univ. Sch. of L.).
[25] *Id.*
[26] *Id.*
[27] KAN. STAT. ANN. §§ 82a-1036; 82a-1037; 82a-1038 (2023).
[28] *Intensive Groundwater Use Control Areas (IGUCAs),* KAN. DEP'T OF AGRIC. (2016) https://agriculture.ks.gov/divisions-programs/dwr/managing-kansas-water-resources/intensive-groundwater-use-control-areas [https://perma.cc/32K8-B884].

(LEMAs) to the chief engineer.[29] A LEMA allows GMDs to set goals and control measures to aid in water conservation upon the approval of the chief engineer.[30]

B. The Ogallala Aquifer

More than two billion people around the world rely on aquifers as their primary water source.[31] Further, groundwater is "used to irrigate more than half of the world's food supply."[32] Since the 1930s, groundwater extraction has significantly increased as millions of wells have been drilled in the United States "to meet the demand for municipal, industrial, and agricultural water needs."[33]

The Ogallala Aquifer covers 174,000 square miles underneath eight states: Texas, New Mexico, Oklahoma, Kansas, Colorado, Wyoming, Nebraska, and South Dakota.[34] The Ogallala provides thirty percent of all groundwater used for irrigation in the United States.[35] It also supplies nearly all the water used for various purposes in the High Plains region.[36]

Despite the Ogallala's vast size, it is the "most rapidly diminishing source of fresh water in the West."[37] For over seventy years, farmers have withdrawn water from the Ogallala Aquifer for irrigation purposes, which has resulted in a "highly unsustainable rate of use."[38] For example, the Ogallala lost ten cubic kilometers every year between 2000 and 2008.[39] In 2015, groundwater pumping had depleted the aquifer by 276 million acre-feet. [40]

To further emphasize the alarming rate at which the Ogallala is depleting, one Kansas State University study predicts that if current withdrawal rates continue, sixty-nine percent of the Ogallala's volume will be depleted by 2060.[41] Looking ahead to the possibility of total depletion, scientists predict that the Ogallala will empty if nothing is done in the "medium-to-long run" of approximately 100 years.[42]

---

[29] KAN. STAT. ANN. § 82a-1041 (2023).
[30] *Fact Sheet: Local Enhanced Management Areas*, KAN. DEP'T OF AGRIC. (Feb. 2018), https://www.agriculture.ks.gov/home/showpublisheddocument/4958/638466570307230000 [https://perma.cc/TJH6-3VDB].
[31] Susan E. Ness, *Water We Cannot See: Codifying a Progressive Public Trust to Protect Groundwater Resources from Depletion*, 76 VAND. L. REV. 953, 955 (2023).
[32] *Id.*
[33] *Id.*
[34] Emilie T. Pinkham, *A State Out of Water: How a Comprehensive Groundwater-Management Scheme Can Prevent the Imminent Depletion of the Ogallala Aquifer*, 3 GEO. WASH. J. ENERGY & ENV'T. L. 268, 268 (2012).
[35] Danielle Spiegel, *Can The Public Trust Doctrine Save Groundwater?,* 18 N.Y.U. ENV'T. L.J. 412, 416 (2010).
[36] Pinkham, *supra* note 3434, at 269.
[37] Burke W. Griggs, *General Stream Adjudications as a Property and Regulatory Model for Addressing the Depletion of the Ogallala Aquifer*, 15 WYO. L. REV. 413, 415 (2015).
[38] Bowman, *supra* note 13, at 1086.
[39] *Id.*at 1087.
[40] Griggs, *supra* note 37.
[41] Roxana Hegeman, *Ogallala Aquifer Will Be 69 Percent Depleted in 50 Years, K-State Study Says*, WICHITA EAGLE (Aug. 26, 2013), https://www.kansas.com/news/article1121517.html [https://perma.cc/C7FW-84XY].
[42] Bowman, *supra* note 13, at 1087.

The water in the Ogallala is mostly fossil water, or water that was once "continental ice sheets" during the ice ages.[43] Other water in the Ogallala is the product of rain and snowmelt.[44] As such, the Ogallala is slow to replenish.[45] The hydrological cause of rapid groundwater depletion is over-pumping, while the "less obvious legal cause is over-appropriation."[46] Over-appropriation means that the state has granted more water rights and permits which allow for more water use than "the aquifer can sustainably provide."[47] Despite this problem, "none of the states overlying the aquifer have ordered permanent reductions in pumping, much less … address[ed] the problem of over-appropriation."[48] Due to the Ogallala's important role of supplying water for drinking and irrigation, "the effects of it going dry would be catastrophic."[49]

III. EXPLAINING THE PROBLEM AND ITS PERPETUATION THROUGH KANSAS LAW

Water rights adjudication is critical to the analysis of aquifer depletion because it focuses on the remedy as opposed to the causation. While the problem may have begun with granting too many water rights in the state, efficient and effective resolution depends on targeting areas that are failing to promote the goal of aquifer preservation.

Kansas's current system for granting, examining, and adjudicating water rights in the state is failing to promote the goal of aquifer preservation. Kansas has structured its administrative water authority so that it retains immense amounts of power, and the judiciary is not well-equipped to challenge such power. Under Section 82a-1901 of the KWAA, the Secretary of Agriculture has administrative authority over the chief engineer in regard to the granting of new water rights, changes to existing water rights, and civil penalties for water overuse.[50] In his report to the Kansas legislature, Professor Burke Griggs said that "[t]he subordination of the Division of Water Resources of the Kansas Department of Agriculture and the chief engineer, who are vested with the duty to grant, protect, and administer water rights, to a political appointee … raises all sorts of conflicts of interest problems, not to mention legal problems."[51] With conflict of interest problems existing in the DWR, it seems that the state would be sure to emphasize separation of powers principles, including standard checks and balances between government branches,

---

[43] Juli Hennings & Harry Lynch, *Depleting the Ogallala Aquifer*. EARTH DATE (Aug. 24, 2022), https://www.earthdate.org/episodes/depleting-the-ogallala-aquifer [https://perma.cc/3RTX-PL52].
[44] *Why Does the Ogallala Aquifer Need to be Preserved*?, FARM, https://www.farm.vc/learn/why-does-the-ogallala-aquifer-need-to-be-preserved [https://perma.cc/DMR4-CVMN].
[45] *Id.*
[46] Griggs, *supra* note 37, at 416.
[47] *Id.*
[48] *Id.*
[49] Bowman, *supra* note 13, at 1089.
[50] KAN. STAT. ANN. § 82a-1901(c) (2024), AN OVERVIEW OF KAN. WATER LAW: TESTIMONY BEFORE THE H. COMM. ON WATER, H. 2021-2022, 1st Sess., at 3-4 (Kan. 2021) (testimony by Burke W. Griggs).
[51] *Id.* at 4.

by positioning the judiciary so that it is properly equipped to challenge improper actions by the DWR. However, the structure of water rights adjudication in Kansas suggests otherwise.

A. District Courts in Kansas

Kansas adjudicates its water matters in district courts, where judges are not water law experts and are not required to defer to an agency's interpretation of a statute. The Kansas Judicial Review Act (KJRA) allows for judicial review of any "final agency action."[52] Final agency action is defined as "the whole or a part of any agency action other than nonfinal agency action."[53] An agency's final order is generally considered to be an action "which determines the legal rights and duties of the parties.[54]

While the district courts have power to review final agency action, the judges reviewing such action are not hydrology experts. Therefore, district judges will interpret and apply the law through the lens of a general law-trained adjudicator as opposed to an adjudicator that is an expert in water law. This application creates a problem, especially when it is combined with district courts' lack of deference to an agency's interpretation of a statute.

B. Lack of Deference by Kansas Courts

Prior to 2010, with regard to questions of law, Kansas courts had given deference to an agency's interpretation of a statute if there was a rational basis for it.[55] In 2010, however, the Kansas Supreme Court declared that an agency's statutory interpretation "is not afforded any significant deference on judicial review."[56] Instead, whether an agency has exceeded its statutory authority requires interpretation of the statutes establishing the agency, which presents a question of law subject to unlimited judicial review (*i.e.*, de novo review).[57] In a 2013 case before the Kansas Court of Appeals, the court applied this zero-deference rule and interpreted the KWAA de novo "just as it does all other statutes."[58] Emphasizing its abandonment of agency deference, the Kansas Supreme Court in *Douglas v. Ad Astra Information Systems* declared that the doctrine of deference has been "permanently relegated to the history books where it will never again affect the outcome of an appeal."[59] Subsequent decisions have clarified that this rejection of deference applies to both statutory and regulatory interpretations.[60] In a water rights case, the court once again confirmed that Kansas has abandoned deference when it said "it no longer gives deference to an agency's interpretation of a statute and,

---

[52] KAN. STAT. ANN. § 77–607 (2023).
[53] KAN. STAT. ANN. §§ 77–607(b)(1–2) (2023).
[54] Guss v. Fort Hays State Univ., 173 P.3d 1159, 1164 (Kan. Ct. App. 2008).
[55] Clawson v. State, Dep't of Agric., Div. of Water Res., 315 P.3d 896, 903 (Kan. Ct. App. 2013).
[56] Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Ass'n of Univ. Profs., 228 P.3d 403, 410 (Kan. 2010).
[57] Ryser v. State, 284 P.3d 337, 345–46 (Kan. 2012).
[58] *Clawson*, P.3d 896 at 903.
[59] Douglas v. Ad Astra Info. Sys., L.L.C., 293 P.3d 723, 728 (Kan. 2013).
[60] Woessner v. Lab. Max Staffing, 471 P.3d 1, 6 (Kan. 2020).

therefore, has unlimited review."[61] The lack of agency deference during judicial review combined with adjudication in the district court, where judges are not experts in water law, creates an insulation issue within the district courts. The DWR is insulated from the judiciary when it grants rights,[62] and the judiciary is insulated from the DWR when it adjudicates these rights.

IV. THE SOLUTION: WATER COURTS, AGENCY DEFERENCE, AND INTERGENERATIONAL EQUITY

To combat the catastrophic event of the Ogallala running dry, Kansas must reform its laws and systems that perpetuate depletion. Two important ways to advance preservation of the Ogallala through legal reform are: 1) adjudicating water matters in water courts rather than district courts and 2) deferring to agencies for issues of statutory interpretation when adjudicating water matters. Additionally, these legal reforms should be framed through a lens of intergenerational equity to instill a statewide commitment to longstanding preservation.

A. Adjudication of Water Matters

Although Kansas has amended its water law to provide for regulation of water usage through Groundwater Management Districts, Intensive Groundwater Use Control Areas, and Local Enhanced Management Areas, depletion of the Ogallala Aquifer persists. Therefore, other remedies are needed. To locate such remedies, it is helpful to look to those states that have taken different measures to reform their water law. In Colorado and Montana, reshaping water law came in the form of creating water courts with jurisdiction to resolve all water matters in their respective states.

1. Water Courts in Colorado

The Water Right Determination and Administration Act of 1969 (the "1969 Act") created seven water divisions in Colorado.[63] Each water division has a division engineer appointed by the state engineer, a water judge appointed by the Supreme Court, a water referee appointed by the water judge, and a water clerk assigned by the district court.[64] Water judges have authority to adjudicate matters pertaining to water rights, the use and administration of water, and all other issues within the water division.[65]

---

[61] Cochran v. State, Dep't of Agric., Div. of Water Res., 249 P.3d 434, 440 (Kan. 2011).
[62] *See* discussion *supra* Section III.
[63] *Water Courts*, COLO. JUD. BRANCH, https://www.coloradojudicial.gov/water-courts [https://perma.cc/25HX-2DMR].
[64] *Id.*
[65] *Id.*

Colorado Water Court judges are appointed to renewable one-year terms.[66] To serve as a water court judge, an individual must reside in the district to which they are appointed and have been licensed to practice law in Colorado for at least five years.[67] Typically, the adjudication process for a water matter begins when an individual or corporate entity seeking to establish a water right files an application with the water clerk.[68] After this filing, the water clerk publishes a summary of the application to provide notice to interested parties who may then file statements of opposition to an application within the time allowed by statute.[69] Those with affected rights "must appear to object and protest as provided in the 1969 Act or be barred from claiming injury to their water rights as a result of claims made in an application."[70]

In Colorado, water courts retain exclusive jurisdiction over all water matters.[71] Whether a claim constitutes a water matter turns on the distinction between "actions involving the use of water and those involving the ownership of a water right."[72] Water matters involve the use of water, including "applications for initial decrees and for decrees approving augmentation plans, applications for changes of decreed water rights, and matters concerning the scope of previously decreed water rights and the abandonment, laches, and adverse possession of water rights."[73] Conversely, issues involving ownership of a water right, which frequently arise "in conjunction with the conveyance of property and other rights," do not constitute water matters; they fall under the general jurisdiction of district courts.[74] The phrase "water right" is defined in section 37–92–103(12) of the 1969 Act and means "a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same."[75] Thus, if an issue turns on ownership of a water right, like an issue of land ownership, it belongs with the district court. However, if

---

[66] COLO. REV. STAT. § 37-92-203(2) (2024).
[67] COLO. CONST. art. VI, § 11; *Water Courts*, *supra* note 63 (explaining that water judges are district judges appointed by the Supreme Court).
[68] *Water Courts*, *supra* note 63; *see Self-Represented Guide to Colorado Water Courts, Water Ct. Comm.* (Feb. 2024), https://www.coloradojudicial.gov/sites/default/files/2024-02/WaterCourtsGuide.pdf [https://perma.cc/5RQ9-QDW6] (discussing individuals and corporate entities filing water rights applications as self-represented parties).
[69] *Water Courts*, *supra* note 63.
[70] *Id.*
[71] Kobobel v. Colo. Dep't of Nat. Res., 249 P.3d 1127, 1132 (Colo. 2011); *see also* COLO. REV. STAT. § 37-92-203(1) (2023).
[72] *Kobobel*, 249 P.3d at 1132; *see also In re* Water Rights of Tonko v. Mallow, 154 P.3d 397, 405 (Colo. 2007) (explaining this distinction).
[73] Allen v. State, 433 P.3d 581, 584 (Colo. 2019); *see also* S. Ute Indian Tribe v. King Consol. Ditch Co., 250 P.3d 1226, 1234 (Colo. 2011) ("Water courts are authorized to construe and make determinations regarding the scope of water rights adjudicated in prior decrees."); *Kobobel,* 249 P.3d at 1132 (holding that a determination of the "scope of [a] right to use [ ] decreed water rights" constituted a water matter); *In re Tonko,* 154 P.3d at 404 (holding that "[a]pplications for a change of decreed water rights" are water matters); Crystal Lakes Water & Sewer Ass'n v. Backlund, 908 P.2d 534, 536 (Colo. 1996) (holding that whether a party is subject to the terms of an augmentation plan is a water matter).
[74] Humphrey v. Sw. Dev. Co., 734 P.2d 637, 641 (Colo. 1987) (finding that an ownership dispute occurred where "the district court was required to analyze deeds, contracts, and other documents that established the chain of title to certain decreed water rights").
[75] *S. Ute Indian Tribe*, 250 P.3d at 1234.

the issue falls outside of this narrow scope of ownership and instead fits within the broad category of water use, it is a water matter and may be heard by the water court.

2. Water Courts in Montana

In 1972, the Montana Constitution was amended to recognize the existence of private water rights.[76] Further, the amendment required that "the legislature shall provide for the administration, control, and regulation of water rights."[77] The Montana Legislature responded by enacting the Montana Water Use Act[78] in 1973.[79] The Montana Act required, among other things, that water rights existing prior to July 1, 1973 be finalized through a statewide adjudication process.[80] To aid with this adjudication process, the Montana Legislature established a system of water courts in 1979.[81] Upon their creation, jurisdiction for the determination and interpretation of existing water rights was placed exclusively in the water courts.[82] The Montana Code provides that "a water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant."[83] Water courts were created with the purpose of expediting the adjudication of water rights claims.[84]

Montana water courts are managed by a Chief Water Judge, an Associate Water Judge, four District Water Judges, and water masters.[85] Water judges are elected by a committee of judges and chosen from a pool of district court judges, retired judges, and other judges within the water division.[86] Water judges have a term of four years, subject to continuation of the water division by the legislature.[87] Water masters are appointed by judges and may also hear evidence on behalf of the judge and make recommendations to the judge about a claim's disposition.[88]

---

[76] Irma S. Russell, *Evolving Water Law and Management in the U.S.: Montana*, 20 U. DENV. WATER L. REV. 35, 41 (2016) (citing Mont. Const. art. IX, § 3(1)).
[77] MONT. CONST. art. IX, § 3(4).
[78] *Water Rights in Montana*, MONT. DEP'T OF NAT. RES. & CONSERVATION 2 (April 2014), http://leg.mt.gov/content/Publications/Environmental/2014-water-rights-handbook.pdf [https://perma.cc/L27F-VQG8]; MONT. CODE ANN. §§ 85–2–101 to 1001 (2023).
[79] *Water Rights in Montana*, *supra* note 78.
[80] *See* MONT. CODE ANN. §§ 85–2–212 to 214 (2023).
[81] *In re* Dep't of Nat. Res. & Conservation, 740 P.2d 1096, 1100 (Mont. 1987).
[82] MONT. CODE ANN. § 3-7-501(1) (2023).
[83] MONT. CODE ANN. § 85-2-227(3) (2023).
[84] *A Short History of the Water Court*, MONT. LEG. ENV'T POLICY OFFICE 3 https://archive.legmt.gov/content/Committees/Interim/2015-2016/Water-Policy/Meetings/Sept-2015/WaterCourt_history.pdf [https://perma.cc/L2QJ-QTW6].
[85] MONT. JUD. BRANCH, *Water Court*, https://courts.mt.gov/courts/water/ [https://perma.cc/B2TA-7H2C].
[86] MONT. CODE ANN. § 3-7-201(1) (2023).
[87] MONT. CODE ANN. § 3-7-202 (2023).
[88] MONT. CODE ANN. § 3-7-301 (2023); *Post Decree Water Court Assistance Standard Operating Procedures*, MONT. DEP'T OF NAT. RES. & CONSERVATION WATER RES. DIV. 9 (Jan. 2024), https://dnrc.mt.gov/_docs/water/adjudication/Guidance-2024/248-SOP-20241.pdf [https://perma.cc/C7PR-SDAL].

There are several steps to adjudicating a water rights claim in Montana. First, the Montana Department of Natural Resources and Conservation examines a claim to determine if it is "complete, accurate, and reasonable."[89] The department then prepares a summary report for each claim in a basin or subbasin, which is submitted to the Water Court for use in adjudicating existing rights.[90] After the report is shared with the Water Court, a water master is assigned to oversee the case.[91]

The water master is responsible for consolidating claims, conducting conferences, reviewing settlement agreements, conducting hearings, and issuing decisions in a Master's Report.[92] After a Master's Report is issued, a Water Judge will review it and may adopt it as the Court's decision.[93] The entry of judgment of this Final Decree begins the appeal-filing period, and all appeals from the Water Court are made directly to the Montana Supreme Court.[94]

B. Administrative Agencies and Deference

In addition to creating water courts, Kansas should restore the practice of deference to agencies during judicial review. Decisions made by administrative agencies, like the DWR within the Department of Agriculture, often come under judicial review when a party decides to appeal a decision made by an Administrative Law Judge (ALJ). ALJs preside over administrative hearings at both the state and federal level and typically "have the power to administer oaths, make rulings on evidentiary objections, and render legal and factual determinations."[95] After a final decision is made by an ALJ, parties may file an appeal with the district court in certain circumstances.[96]

When questions under judicial review by the district court pertain to issues of statutory interpretation and statutes are rendered ambiguous, some courts have adopted a doctrine whereby they defer to the agency's interpretation of the ambiguous statute.[97] However, since the U.S. Supreme Court first introduced the practice of agency deference during judicial review in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[98] many have questioned the practice's compatibility with the Constitution's separation of powers requirements and the Administrative Procedure Act.[99] Now that the practice has been overturned at the

---

[89] *Water Rights in Montana*, *supra* note 78, at 9.
[90] *Water Right Claim Examination Rules*, MONT. SUP. CT. 21 (Dec. 5, 2006), https://courts.mt.gov/external/Water/A-Legal%20Resources/claim_exam_rules.pdf [https://perma.cc/WHF3-7SRX].
[91] *See Adjudication Guidebook*, MONT. WATER CTS. 19, https://courts.mt.gov/External/Water/A-Legal%20Resources/Adjudication%20Guidebook.pdf [https://perma.cc/H4JD-KEC5].
[92] *Id.*
[93] *Id.* at 32.
[94] *Id.* at 37.
[95] *Administrative Law Judges*, JUSTIA (May 2024), https://www.justia.com/administrative-law/administrative-law-judges/ [https://perma.cc/TJ5A-6TKE].
[96] *Appeals From Administrative Proceedings & Your Legal Options*, JUSTIA (May 2024), https://www.justia.com/administrative-law/appeals-from-administrative-proceedings/ [https://perma.cc/7ZN9-K686].
[97] *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).
[98] *See id.*
[99] *See* Luke Phillips, *Chevron in the States? Not so Much*, 89 MISS. L.J. 313, 313 (2020).

federal level,[100] it is likely that even more states will follow suit. As evidence of states' skepticism of agency deference, it is helpful to look at the recent surge in states abandoning their own standards of deference to administrative agencies' interpretations of statutes.[101] Although several states, including Kansas, have abandoned the practice of affording deference to administrative agencies' interpretations of statutes and regulations, others have fully retained the practice, like Montana, or apply it in some instances, like Colorado.

1. Deference by Montana Courts

Montana courts defer to an agency's interpretation of the rules and regulations it promulgates. The Montana Supreme Court "afford[s] an agency's interpretation of its rule 'great weight,' and will 'defer to that interpretation unless it is plainly inconsistent with the spirit of the rule.'"[102] While Montana affords agency deference to both statutes and regulations, it is "more deferential to an agency's interpretation of its regulation than it is to an agency's interpretation of a statute."[103]

On highly technical matters and those requiring scientific expertise, the Montana Supreme Court "grants great deference to agency expertise."[104] In *Montana Environmental Information Center v. Department of Environmental Quality*, the court said it "acknowledges that it is not comprised of hydrologists, geologists, or engineers, and that protecting the quality of Montana's water requires significant technical and scientific expertise beyond the grasp of the court."[105] The court, however, made sure to emphasize that it still retains the inherent power to review administrative proceedings to ensure that "agency decision-making is scientifically-driven and well-reasoned" and thus requires the agency be able to "cogently explain why it has exercised its discretion in a given manner."[106]

2. Deference by Colorado Courts

In Colorado, courts apply a less deferential approach than Montana courts. Rather than automatically deferring to an agency's interpretation of a statute, Colorado courts "may consider and defer to an agency's interpretation of a statute."[107] This means that courts are not bound by the agency's interpretation but may consider the agency's interpretation as persuasive evidence during their de novo review.[108] The Colorado Supreme Court has given examples of when deference to

---

[100] *Loper Bright*, 144 S. Ct. at 2273.
[101] Phillips, *supra* note 99, at 314.
[102] Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 451 P.3d 493, 500 (Mont. 2019).
[103] *Id.*
[104] Flathead Lakers Inc. v. State Dep't of Nat. Res. & Conservation, 530 P.3d 769, 781 (Mont. 2023).
[105] *Mont. Env't Info. Ctr.*, 451 P.3d at 500.
[106] *Id.* (quoting Nat'l Parks Conservation Ass'n v. EPA, 788 F.3d 1134, 1142–43 (9th Cir. 2015)).
[107] Gessler v. Colo. Common Cause, 327 P.3d 232, 235 (Colo. 2014).
[108] El Paso City. Bd. of Equalization v. Craddock, 850 P.2d 702, 704 (Colo. 1993).

an agency's interpretation is not warranted, including when the interpretation is contrary to the statute's plain language.[109] Additionally, deference may not be appropriate where an agency's construction of a statute has not been uniform.[110] Colorado courts agree, however, that "the construction of statutes by administrative officials charged with their enforcement should generally be given deference by a reviewing court."[111]

C. Intergenerational Rights and the Theory of Intergenerational Equity

The theory of intergenerational rights is that "when future generations become living generations, they will have certain rights to use the natural system for their welfare and certain obligations to care for it."[112] These obligations hold current and future generations accountable to each other and create a "partnership of generations across time."[113] For issues like the rapid withdrawal of water from aquifers, there is a "conflict[] between immediate satisfaction of needs and long-term maintenance of the resource."[114] Because of this conflict, means must be developed "to reconcile intergenerational concerns with the demands of the living generation."[115]

Connected to intergenerational rights is the theory of intergenerational equity which is a comprehensive policy and legal framework developed by Professor Edith Brown Weiss in her book, *In Fairness to Future Generations*.[116] Brown Weiss's theory "posits that there are two essential relationships—to the natural system and to other generations of the human species."[117] With regard to the first, Brown Weiss establishes that humans are "part of the natural system" as we are both affected by the system and engage in actions that affect the system.[118] And while several species engage in this reciprocal relationship with the environment, Brown Weiss states that "[a]s the most sentient of species, [humans] have a special responsibility to care for the system." Brown Weiss integrates rights and responsibility at the level of moral and legal identity and "posits the present generation of humans as both beneficiaries of a planetary legacy passed down from the past and as trustees of the planetary legacy for future generations."[119]

In 1989, Brown Weiss proposed three principles of intergenerational equity which are options, quality, and access.[120] The first principle, options, requires each generation "to conserve the diversity of the natural (and cultural) resources base, so that it does not unduly restrict the options available to future generations in solving

---

[109] *Gessler*, 327 P.3d at 235.
[110] State Dep't of Revenue v. Woodmen of the World, 919 P.2d 806, 817 (Colo. 1996).
[111] *Id.*
[112] Edith Brown Weiss, *Intergenerational Fairness and Water Resources, in* SUSTAINING OUR WATER RESOURCES, NAT'L ACADS. PRESS 3, 5 (1993).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 21 (1988).
[117] Brown Weiss, *supra* note 112, at 4.
[118] *Id.*
[119] Lynda M. Collins, *Revisiting the Doctrine of Intergenerational Equite in Global Governance,* 30 DALHOUSE L.J. 79, 93 (2007).
[120] Brown Weiss, *supra* note 112, at 5.

their problems and satisfying their own values."[121] To accomplish this principle, generations may "develop[] new technologies that create substitutes for existing resources or that exploit and use resources more efficiently."[122] The second principle of intergenerational equity is the conservation of quality.[123] This principle requires that "each generation maintain the quality of the planet so that on balance it is passed on in no worse condition than when received."[124] Finally, the third principle of intergenerational equity, access, states that "each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations."[125] Brown Weiss, using an example for water preservation, explained that "[t]he principle of access … means that the present generation must incorporate the full cost of supplying water … to ensure that the real price of water resources to future generations is not significantly higher than to the present generation."[126]

Considering these three principles of intergenerational equity in relation to the issue of aquifer depletion, it is evident that Brown Weiss's approach provides the framework for balancing the needs of the current generation to use the Ogallala against the needs of future generations. The intergenerational equity framework does not require the current generation to cease all use of water but rather provides that any use should not leave the environment in a worse condition than before. This approach aligns with theories for recharging aquifers[127] and other methods that balance use and preservation.

In her article, Brown Weiss discusses the work conducted by the National Research Council (NRC) on the Mexico City Aquifer since "sustainable use of the aquifer … is inherently an intergenerational problem."[128] The Mexico City Aquifer, like the Ogallala, is subject to rapid depletion because of "continued pumping in excess of recharge rates, location of urban settlements over recharge areas, and institutional barriers."[129] Brown Weiss commends the study of the Mexico City Aquifer by the NRC for being "intergenerational in the sense that it addresses the rights of future generations to a potable water supply."[130] However, she critiques the same study for failing to "address ways in which the interests of future generations

---

[121] Brown Weiss, *supra* note 112, at 5.
[122] *Id.*
[123] *Id.* at 6.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Artificial Groundwater Recharge*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/mission-areas/water-resources/science/artificial-groundwater-recharge#overview [https://perma.cc/4KQ8-ZLJ9] ("[R]echarge is the practice of increasing the amount of water that enters an aquifer through human-controlled means." Means of recharge include "redirecting water across the land surface through canals, infiltration basins, or ponds; adding irrigation furrows or sprinkler systems; or simply injecting water directly into the subsurface through injection wells.").
[128] Brown Weiss, *supra* note 112, at 7.
[129] *Id.*
[130] *Id.*

in a sustainable supply of fresh water could be integrated into administrative decision making and even into the marketplace."[131]

By analyzing Brown Weiss's theory of intergenerational equity and considering the ways in which she suggests it be applied to a problem like aquifer depletion, lawmakers in Kansas have a clear policy framework for moving forward with legal remedies to address the depletion of the Ogallala. Intergenerational equity is not just a framing mechanism or abstract theory to persuade current rights holders to preserve natural resources. It is a framework for considering how actions taken today will impact the economic, personal, and legal interests of future generations in natural resources, like the Ogallala.

V. ADOPTING THE SOLUTION: EVALUATING PUBLIC POLICY AND PRACTICAL CONSIDERATIONS

Kansas can and should address the issue of the Ogallala's depletion by advancing legislative and judicial remedies whenever possible. One legislative remedy is the creation of water courts that deal solely with water matters, like those used in Colorado and Montana. One judicial remedy is deferring to agencies, like the DWR, for issues of statutory and regulatory interpretation that arise during judicial review. Making these changes to the adjudication structure for water matters in Kansas will have a significant effect. However, making changes to a complex system without a purpose or end goal comes with significant risk. For this reason, these two proposed changes to Kansas law should be rooted in preservation, specifically in the idea that the state has a duty to preserve water for future generations. In combining the proposed legal remedies with this policy goal, the rule moving forward is this: to protect intergenerational rights to water, it is critical that Kansas prioritizes water rights adjudication through the expert lenses of agencies and water law practitioners by creating water courts and reinstating judicial deference to agency interpretations of statutes and regulations.

A. Public Policy Rationales that Support Prioritizing Intergenerational Equity for Water Rights

Public policy rationales support the use of an intergenerational equity framework to address issues of water depletion in Kansas and surrounding states. When it comes to resolving environmental issues, it is critical to switch the perspective from short term to long term. By reframing environmental issues, and specifically the issue of the Ogallala's depletion, as intergenerational rights issues, the state draws in the interest of all current and future stakeholders. By framing the issue as one between current and future stakeholders as opposed to just current stakeholders, the state can relieve tension between members of the same community that may have adverse interests and different needs for water. These community members should not be positioned to consider their rights in perspective to each other but rather their rights in perspective to those of their children and grandchildren who will one day inherit their land and need access to water on said land.

---

[131] Brown Weiss, *supra* note 112, at 7.

B. Practical Considerations for Implementing the Proposed Legal Remedies

Implementing a water court system and restoring agency deference are two legal remedies that will advance water preservation in a practical and effective manner. Kansas should look to Colorado and Montana as examples for passing legislation to adjudicate water rights in designated water courts. Further, Kansas should look to the reasoning of courts in jurisdictions that have chosen to retain the practice of agency deference in matters of statutory interpretation.

1. Implementing Water Court System

To implement a water court system like those that exist in Colorado and Montana, the Kansas Legislature will need to create a new set of statutes governing this system. As both Colorado and Montana have had water courts in place for several decades, Kansas legislators can rely on several resources for creating a water court system. Instating water courts in Kansas has several benefits, including furthering and advancing other preservation efforts, creating consistency in water law, and streamlining the legal process for water rights adjudication.

a. Advancing other Preservation Methods

In adopting a water court system, Kansas should consider the advantages that come with placing experts in water law into adjudicatory roles. For example, one recent article analyzing the problem of the Ogallala's depletion suggested that a general stream/aquifer adjudication could be used to "clarify property rights in Ogallala water, especially by recognizing the undeniable distinctions and boundaries between its different water supplies, and by decreeing rights to them accordingly."[132] The article suggested that this general adjudication applied to the Ogallala would "enable[] the holders to protect those rights more effectively than they currently can, and … enable the state to better manage its water supplies and protect the public interest."[133] If a general water rights adjudication has the opportunity to provide such a sweeping remedy for issues of over-appropriation, it follows that an expert in water law should conduct such an important adjudication.

b. Creating Consistency Despite Complex Water Law

Water laws are complex and therefore, specialized courts are necessary to adjudicate disputes fairly. Currently, appeals of water matters are being heard in district courts, where judges do not have the specialized knowledge required to adjudicate water matters. By establishing specific water courts staffed by judges with expertise in hydrology and water law, Kansas will ensure more consistent

---

[132] Griggs, *supra* note 37, at 419.
[133] *Id.*

decisions on water matters. Such decisions will not only be consistent with each other, but they will also be consistent with enacted laws and regulations. Experts in hydrology and water law, serving in the role of adjudicator, will not only correctly apply the law but they will understand the underlying policy behind the law. Therefore, novel issues that may arise before a water court will be adjudicated in a manner that is consistent with the principles of Kansas water law and does not disrupt any framework that has been established by expert committees. While this process will likely take time, "a water court could develop … a body of law providing predictability, consistency, and certainty to water users and management agencies alike."[134]

c. Streamlining Legal Process

Another benefit to the state's creation of water courts is that the new legal system will streamline the legal process for adjudicating water rights, which can involve complex technical issues, including hydrology, engineering, and environmental science. Having specialized courts allows for more efficient handling of water cases and helps prevent backlogs in the judicial system. With expert judges handling matters and those matters making up a docket consisting solely of water matters, courts will be able to effectively resolve legal disputes.

2. Adopting Agency Deference

There are few practical considerations and steps for the judiciary to reinstate the practice of agency deference during judicial review, and those considerations that do exist, such as applying the law moving forward, lean in favor of adopting the policy. The act of reinstating agency deference will be simple because it is up to the judiciary. There is no legislative action required for the court to return to its former practice of deference. The Kansas Supreme Court will be responsible for this change as it will need to overturn *Douglas v. Ad Astra Information Systems* in which it held that courts review agency decisions de novo.[135]

C. Arguments Against Water Courts and Agency Deference

One of the leading arguments against water courts is that they "[do] not serve all of those entities interested in water, including especially those who do not own water rights."[136] In addition to being available only as a remedy for those who own water rights, water courts present a significant barrier to public participation in the water court system because it is "virtually imperative for those filing applications or statements of opposition to be represented by counsel."[137] The lack of public participation in Colorado Water Court adjudication is clear because "in the hundreds of Colorado water matters filed and resolved annually, there are only a few in any

---

[134] John E. Thorson, *A Permanent Water Court Proposal for a Post-General Stream Adjudication World*, 52 IDAHO L. REV. 17, 49 (2016).
[135] Douglas v. Ad Astra Info. Sys., L.L.C., 293 P.3d 723, 728 (Kan. 2013).
[136] Melinda Kassen, *Colorado Water Courts: Should They Change?* 3 (Conf. on Strategies in Western Water Law and Policy: Courts, Coercion and Collaboration, 1999).
[137] *Id.* at 4.

given year where members of the public have participated actively."[138] Given these challenges with participation and representation in water courts, opponents to water courts will likely argue that this adjudication structure is unsuitable for Kansas.

When it comes to arguments against deference, it is important to note that Kansas is not the first state to reject the idea of agency deference.[139] Proponents of Kansas's zero-deference approach are likely to cite other states' abandonment of agency deference as well as the Supreme Court's overruling of *Chevron* deference[140] as reasons to reject agency deference of statutory interpretation during judicial review. In its rejection of deference, Kansas courts have said that it is within the power of the legislature, not the administrative agency, to establish public policy. Further, the courts have said that unlike the legislature, which was created by the Kansas Constitution, administrative agencies are creatures of statute, which means their power and authority are defined and limited by enabling legislation.[141] This means that Kansas administrative agencies have no common-law powers.[142] Thus, any authority claimed by an agency or board must be conferred in the authorizing statutes either expressly or by clear implication from the express powers granted.[143]

D. A Rebutting Perspective

These arguments against creating water courts and reinstating agency deference are unpersuasive. First, the argument that water courts do not serve all people and entities with interests in water is without merit. While there may be some lack of public participation in matters adjudicated by water courts, there is no strong evidence revealing that this lack of participation is any more severe than what exists under the current adjudicatory structure through district courts.

Next, the argument commending Kansas's rejection of deference is also unpersuasive. Kansas need not throw out the idea of agency deference simply because the Supreme Court eliminated the practice at a federal level.[144] Whatever reasons exist for the Court's reversal of the doctrine should not influence decisions by the states, since challenges with administrative law at a federal level are not identical to challenges at the state level. Further, while it may be the role of the legislature to establish public policy, the court reinstating the practice of deference is not infringing upon this role. As mentioned earlier, agency deference for issues of

---

[138] Kassen, *supra* note 136, at 5.
[139] *See* Daniel M. Ortner, *The End of Deference: The States That Have Rejected Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 24, 2020), https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/ [https://perma.cc/53TF-JJS4].
[140] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2273 (2024).
[141] Pork Motel, Corp. v. Kan. Dept. of Health & Env't, 673 P.2d 1126, 1132 (1983).
[142] Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors, 228 P.3d 403, 410 (Kan. 2010).
[143] *See* Pork Motel, Corp., 673 P.2d at 1132.
[144] *Loper*, 144 S. Ct. at 2273.

statutory interpretation is a common judicial practice. Therefore, the decision to reinstate agency deference is within the discretion of the court.

VI. CONCLUSION

The state of Kansas has a duty to preserve the Ogallala Aquifer for future generations. To engage in useful and meaningful preservation efforts, the legislature and judiciary must evaluate flawed systems and processes and opt for change whenever necessary. The framework of intergenerational water rights is a useful tool for encouraging legislators, the judiciary, and citizens to prioritize the preservation of their state's natural resources. In Kansas, creating a system of water courts to adjudicate water matters and restoring judicial deference to agency interpretation are just two remedies, out of many, that promote and advance the theory of intergenerational water rights. While these changes alone are unlikely to resolve the problem of aquifer depletion, they are important legal, policy-based remedies that advance the goal of preservation.