SB 430 - LOCAL CONTROL OR NOT

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PRIOR TO SB 430

In 1972 the Kansas Legislature passed the Kansas Groundwater Management District Act. This act was designed to allow local landowners and water users more influence in groundwater management decisions when they formally organized met all the criteria set out in the act. It was never intended to give locals complete autonomy in resource decisions, but few argue that the intent was to significantly increase their involvement and influence. The opening section of this act, the legislative declaration, says it best:

"K.S.A. 82a-1020. Legislative declaration. ...It is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with respect to the use of groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas...."

In crafting the procedures of how locals would determine their own destiny, the Legislature provided 19 district powers. Two of these powers most directly relating to this paper were: 1) the power to adopt and enforce standards and policies relating to groundwater management which are not inconsistent with the GMD Act or state law; and 2) the power to recommend regulations to the chief engineer of the division of water resources which are necessary to enforce the policies of the board.

There have been two plausible interpretations of these powers that have been discussed over the years. One is a recognition by the Legislature that the GMD's would be dealing with all groundwater management issues - including the water right issues covered within the Water Appropriation Act, and, all other groundwater issues within the authorities of other state agencies (most notably the Kansas Department of Health and Environment). The specific power to recommend regulations through the chief engineer was to address all the water right issues, while the specific authority to adopt and

enforce local policies was the tool intended to address all the other (non-DWR) groundwater management issues.

The second interpretation postulated that the districts were given two enforcement tools for water rights issues, and one enforcement tool for non-water right issues. For the water rights issues the two enforcement tools were: 1) to adopt formal regulations (making their local water rights policies state law); and/or 2) to locally adopt "policies" for local enforcement. The first option being more formal and legally defensible while the latter option would be more flexible, but less legally defensible. For the non-water rights issues the districts could only adopt a local "policy" and could only locally enforce it via the courts. Either way, no one seemed to be interpreting these powers as being contradictory to each other - that is until the 2001 Legislature.

The 2001 Legislature felt that the GMD's should not have the authority to adopt and enforce local policies and amended KSA 82a-1903 to require all GMD, non-administrative policies to be placed into formal regulations. They cited the court case of Bruns vs the Board of Technical Professions for their justification. This case declared that state agencies could not have enforceable policies when they had the authority to promulgate regulations, as policies were not publicly developed and they could circumvent the regulation process. The GMD's argued that the Bruns decision was correct for state agencies with the authority to promulgate regulations, but that it was not on point in that the GMD's had no authority to promulgate regulations (only recommend same to a state agency). There was no reason to bring the GMD's under mandatory regulation requirements, and there was no conflict in the two GMD powers they sought to reconcile.

Due to some technical language problems in the original 2001 legislation amending KSA 82a-1903, the 2002 Legislature also introduced HB 2710, designed to correct the missed intentions of last year's bill. This bill was eventually amended into SB 430.

House Substitute for SB 430

SB 430 began on January 24, 2002 as a simple bill to amend the disability certification procedures for certain hunting permits. In March, 2002 the House amended SB 430 to substitute a new bill concerning GMD's and their powers. This became House Substitute for SB 430. (The original hunting issues under SB 430 were amended into SB 504). Eventually House Substitute for SB 430 was amended again to include language concerning several issues desired by the Rural Water Districts, and to incorporate the HB 2710 corrections.

Finally House Substitute for SB 430 ended up (relative to GMD's only): a) requiring all GMD's to place all non-administrative policies into regulation

form. Regulations to be recommended to DWR were required by January 1, 2003, and all others by January 1, 2004; b) restricting the GMDs' power to adopt and enforce local polices to only *administrative* policies; c) giving the GMD's the power to recommend groundwater-related regulations to other state agencies in addition to DWR; and d) allowing the GMD's to enforce locally recommended regulations to state agencies by suitable action, administrative or otherwise.

Post House Substitute for SB 430

There is little argument that House Substitute for SB 430 changed the way Kansas GMD's do business. Whereas before the GMD's could recommend regulations to the chief engineer, they could also adopt and enforce local policies if he or she would not adopt recommended regulations, or would try to unduly influence them. Now the GMD's ***must*** recommend regulations to the state agencies - who can adopt them, or not. This arrangement has increased the state's influence over local GMD activities significantly.

One disadvantage of SB 430 is the fact that all GMD regulations are technically regulations of the state agency adopting them, and must be enforced by that agency since this law did not adequately provide a local enforcement mechanism. Since the GMD's had been assuming selected enforcement responsibilities of the state agencies prior to SB 430, they had the ability to direct agency manpower and dollars elsewhere. This has been raised as an issue to Governor Elect Sebelius' BEST process.

Another disadvantage is the effect this legislation may have on the development and implementation of the Kansas Water Plan's new Ogallala Management strategy. This new plan calls for the GMD's to divide the Ogallala up into aquifer sub-units, prioritize these into high, medium and low priority sub-units, set groundwater budgets to reduce the declines, and finally implement enhanced management programs to reach the budget goals. Local monitoring and enforcement of these programs will likely be prominent issues. With no local capabilities in these regards, what incentives do the GMD's have to aggressively develop solutions? Moreover, with limited budgets and manpower, what incentives do the state agencies have for adopting and assuming local regulations for active local programs?

Issues still remaining after SB 430 are:

1) It is clear the legislature intended for the GMDs to be capable of enforcing their regulations. The language they provided in the act, however, turned out to be inadequate to allow this. The 2003 Legislature needs to be receptive to correcting their earlier language.

2) The Legislature also intended that the state agencies process the GMD proposed regulations in a reasonable length of time. Their law says:

"Within 90 days after receipt of a final draft of proposed rules and regulations recommended by a groundwater management district, the chief engineer shall: (1) Approve or reject the proposed rules and regulations for adoption; and (2) either initiate procedures pursuant to the rules and regulations filing act to adopt the approved proposed rules and regulations or return the rejected proposed rules and regulations, together with written reasons for the rejection, to the groundwater management district."

At least 2 of the state agencies are interpreting this language such that the 90 days does not start until the proposed regulations are in final form for public hearing. This interpretation will allow the state agencies to completely ignore locally proposed regulations until the GMD board agrees to any and all state wording changes. The legislature also needs to address this issue as well.