

## RESOLUTION 2024-18

A Resolution Setting Out the Policy of Barton County, Kansas, on Water Conservation, Use and Administration and Requiring Coordination with any Federal Agency that Negatively Impacts Barton County Residents

**WHEREAS**, water conservation is an important and integral component of meeting future water demands, in Barton County, Kansas, and throughout Kansas, and is addressed under the State Water Resources Planning Act in a manner that is comprehensive, coordinated and continuous, including the 5-year updated Kansas Water Plan overseen by the Kansas Water Office and based on a long-term vision for conservation and future water supplies; and

**WHEREAS**, numerous communities, towns, counties, water districts, irrigators, water providers and others throughout Kansas have implemented water conservation measures in recent years that demonstrate a statewide commitment to conservation; and

**WHEREAS**, as defined by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) and interpreted by the U.S. Supreme Court (*Sackett v. EPA*), there are no "waters of the United States" (WOTUS) in Barton County, and therefore, EPA and U.S. Army Corps of Engineers jurisdiction over discharges in Barton County extends only to year-round continuous-flowing streams with a direct surface connection to the Missouri River; and

**WHEREAS**, an Executive Order issued by the President, January 27, 2021, established "the goal of conserving at least 30 percent of our lands and waters by 2030," but did not identify waters to be conserved, nor mechanisms for doing so, though several federal agencies appear to be pursuing that vague goal; and

**WHEREAS**, a proposed Kansas Nebraska National Heritage Area has led to widespread concerns among citizens of Barton County about its potential impacts on land and water use, as well as governance; and

**WHEREAS**, Section 6 of the Land and Water Conservation Fund requires all land acquired or developed with LWCF funding to be maintained perpetually in public outdoor recreation use. The program is used for fee title land acquisitions, conservation easements and often the associated water rights, which results in a permanent encumbrance on local land and water resources, often without local government approval; and

**WHEREAS**, the U.S. Forest Service operates the Cimarrón National Grasslands in Southwest Kansas, but has no jurisdiction over fishing, hunting, water or land use outside the grassland's boundaries; and

**WHEREAS**, the National Park Service operates the Tallgrass Prairie National Preserve, five national historic trails and four national historic sites in Kansas, but has no jurisdiction over wildlife, water or land use outside the boundaries of those sites; and

**WHEREAS**, the Bureau of Reclamation and Corps of Engineers own 25 reservoirs in Kansas, built for purposes of water supply, flood control and recreation, and both agencies are required to manage those facilities in accordance with the purposes for which they were built; and

**WHEREAS**, the U.S. Fish and Wildlife Service operates the Flint Hills, Kirwin, Marais des Cygnes and Quivira National Wildlife Refuges in Kansas, but has no jurisdiction over fishing, hunting, water or land use outside the boundaries of those refuges; and

**WHEREAS**, the operation of national wildlife refuges, under the National Wildlife Refuge System Improvement Act of 1997, requires each refuge to operate under a conservation plan that is "to the extent practicable, consistent with fish and wildlife conservation plans of the State in which the refuge is located," a mandate the agency has not taken seriously enough; and

**WHEREAS**, recent federal demands for reduction in water use by Kansas farms and ranches are not necessary for the protection of wildlife, but are a threat to agriculture in this region; and

**WHEREAS**, the Kansas Attorney General and Division of Water Resources have sought to work with the U.S. Interior Department to find workable "compromise" that could result in scaling back water use by working farms, rather than defending local interests; and

**WHEREAS**, any effort to scale back the use of water for agriculture in Barton County threatens the public health, safety and welfare of our citizens; and

**WHEREAS**, most farms and ranches in Barton County pre-date federal wildlife refuges and other federal reservations, often by generations; many of the area's oldest farms have water rights that may seem junior under Kansas law, but this is often a result of failure to adjudicate earlier, and/or to object to later filings, and should not be viewed as prima-facie proof that farms are more recent water users; Barton County, as keeper of land records, is in the best position to resolve such questions and federal agencies should defer to the County in making such determinations; and

**WHEREAS**, numerous federal laws enacted during the past 50 years reaffirm federal policy that water and wildlife belong to the people of the states and are managed under state authority:

- The Mining Acts of 1866 and 1870 explicitly granted water rights, rights of possession, rights-of-way and rights to construct ditches, canals and reservoirs, for agricultural entry to lands that were determined to be without certain minerals, including most of Kansas.
- The McCarran Act of 1952 waives the sovereign immunity of the United States in cases concerning ownership or management of water rights, requires federal water rights to be adjudicated in state courts and recognizes the primacy of state water laws.
- The Endangered Species Act of 1973 Sec. 2 established congressional intent that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." That requires active coordination with state and local governments, not merely seeking input. The Act further provides (Sec. 6) that "Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein."

- The Endangered Species Act of 1973 Sec. 4 further requires the federal government to take all state and local efforts into account before listing any species or designating critical habitat: "The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas."
- Federal Land Policy Management Act of 1976 (FLPMA) Sec. 302 disclaimed any federal authority to regulate hunting and fishing on public lands and adjacent waters, and acknowledged the "authority of the States for management of fish and resident wildlife." That law also, in Sec. 401, reaffirmed ranching as a primary objective, declaring the importance of range improvements that would "lead to substantial betterment of forage conditions with resulting benefits to wildlife, watershed protection, and livestock production."
- The National Wildlife Refuge System Improvement Act of 1997, while authorizing water rights purchases, explicitly disclaimed "a reserved water right, express or implied, in the United States for any purpose," protected all previously existing water rights, denied any effect on existing state and federal laws regarding water quality or water quantity, and reaffirmed principles of the McCarran Act.

**WHEREAS**, Federal courts have long recognized the primacy of state water law over federal attempts to control water:

- The Constitution's "equal footing" doctrine guaranteed to states the same control over their water that the original 13 colonies inherited from British common law after the revolution (*Martin v. Waddell*; *Pollard v. Hagan*; *Shively v. Bowlby*; *U.S. v. Rio Grande Dam and Irrigation Co.*, *Tarrant Regional Water District v. Herrmann*).

- In *Kansas v. Colorado*, the Supreme Court more clearly extended the equal footing doctrine to include state primacy over the allocation of water within the states' respective boundaries. The court ruled that the federal government has the right to continued flow of waters on its lands, only as far as necessary for the specified beneficial use of the federal property.
- In *California v. United States*, the court further affirmed "that, except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters." That ruling explained, "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."; and

**WHEREAS**, the history, economy, culture and quality-of-life in Barton County are inextricably linked to agriculture, the future prosperity of which is crucial to the public health, safety and welfare, and

**WHEREAS**, Barton County and its citizens will be harmed if this policy is violated and/or policies are implemented inconsistent with it.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Barton County, Kansas, that it is the policy of this County that:

- Regardless of water rights, no federal agency should undertake any new water use that might increase consumption, nor should any new federal water rights be acquired in Barton County without the express agreement of the County Commission and the Kansas Legislature, nor should any additional land or other property be acquired unless specifically accompanied by an absolute disclaimer of any reserved federal water rights.
- No monies from the Land and Water Conservation Fund, rents, royalties or any other federal funding sources should be used to acquire property or water in Barton County without the express agreement of the County Commission and the Kansas Legislature.

- Existing federal legal rights notwithstanding, no federal water rights should be exercised in any way that diminishes the availability or use of water for agriculture in Barton County.
- Stream bypasses or other water management practices should never be required as a condition of federal permits or licenses, nor should federal land management plans include criteria that suggest the need for such bypasses or flow requirements.
- No national heritage area should be created in Barton County without specific language absolutely and permanently disclaiming any related water rights or relationship to land or water use planning, regulation or administration.
- All matters involving water rights and water quality should remain in state jurisdiction as matters of primary state interest. Federal agencies should defer to state law and cooperate with state and local governments in all matters regarding water supply or water quality.
- Barton County should be directly involved in federal water and wildlife decisions, including matters related to endangered species, not merely with input equal to an individual, but as a full jurisdictional partner whose policies carry the weight of general public opinion.
- Under the requirement for wildlife refuges to be managed consistent with state conservation plans, as a subdivision of the State of Kansas, Barton County will assert its jurisdiction to hold public hearings regarding any proposed changes to the management of such areas that could affect this County and federal managers will be expected to attend, disclose details of any proposed changes and answer any questions that may arise.
- The Kansas Chief Engineer and Division of Water Resources should administer water rights in Barton County with the goal of maintaining agriculture and other existing uses, resisting any attempts to change water uses to the detriment of agriculture, especially any such changes sought by federal agencies.
- The Chief Engineer and Division of Water Resources should decline enforcement of improper federal water claims and federal agencies should not rely on the State to help subordinate its own citizens to federal interests.

- Barton County may elect to take legal action to defend its citizens' interests in water and the Kansas Attorney General is expected to defend the interests of this County and its citizens against any and all changes in federal water policy that could be harmful to local interests, especially agricultural and municipal/industrial interests and should make clear the State's intention to defend those interests in court if necessary.
- It is the sense of Barton County that all Kansas Counties should work together as one coalition to defend the essential existing water system against all threats, including federal control. This should be official state policy and official policy in all counties.

Adopted this 17<sup>th</sup> day of September, 2024.

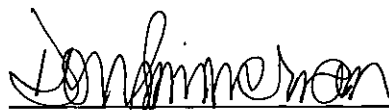
BARTON COUNTY COMMISSION

  
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Barb Esfeld, Chairman

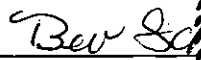
  
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Shawn Hutchinson, Commissioner

  
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Duane Reif, Commissioner

  
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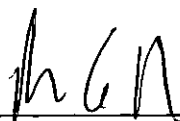
  
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Donna Zimmerman, Commissioner

ATTEST:

  
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Bev Schmeidler  
County Clerk



APPROVED AS TO FORM:

  
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Patrick Hoffman  
County Counselor

