

Kansas Water Rights: Changes and Transfers

By:

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I. Introduction

Kansas lies on the border between water abundance and water shortage. Southeast Kansas receives over forty inches of annual rainfall; southwest Kansas receives under sixteen. Western Kansas has abundant but diminishing ground-water reserves. Kansans use these resources extensively. We are nearing a time when most of the water in the state will be appropriated under our permit system.¹ When that happens we will likely move into another era: water rights will be obtained primarily by purchase or condemnation rather than by filing with a state official.

Other western states, where large-scale transfers of water rights have occurred, are already witnessing this change. Numerous conferences,² judicial decisions,³ and publications have recently addressed this topic.⁴

This article deals with "changes" and "transfers" of water rights in Kansas. By "change" we mean changes in attributes of a water right, such as changes in the type of use, place of use, or place of diversion. By "transfer" we mean a legal change of ownership. Changes by an owner are possible without a transfer of ownership, but changes are often necessary when a transfer is made. A transfer of ownership will often, but not necessarily, involve a change in type of use, place of use, or place of diversion.

In this article, we will attempt to describe our current law of water rights and transfers and will offer illustrations of changes in rights by right holders and of transfers from one right holder to another. We will distinguish between transfers of water on the one hand and water rights on the other. And, we will discuss interstate transfers. We will deal with voluntary transfers and leave involuntary transfers, like condemnation, for another article. We allude to pricing of water and water rights, but due to space constraints give little treatment to that important subject.

II. Overview of Kansas Law of Water Rights

A. History

American water rights law for streams is commonly

divided into two major classifications — riparian and prior appropriation. The riparian system, used primarily in the water-abundant eastern states, is based on land ownership along the stream. Land ownership alone gives the owner a water right, but that right is subject to other water rights along the stream. In times of water shortage, a judge must determine how the owners will share that water.

The prior appropriation system evolved in the drier western states. It depends upon a time priority system — first in time is first in right. A water right is generally obtained by filing an application with a state official. Once a right is obtained, the owner may enjoin an impairing use that is "junior" in time, i.e., one obtained after the senior right was obtained.

American groundwater law has recognized several different doctrines. Until 1945, Kansas followed the "absolute ownership" doctrine,⁵ which allowed pumping water from one's land and using it anywhere regardless of the adverse affects on neighbors.

Kansas courts adopted the riparian and absolute ownership systems in the 1800's,⁶ and many water rights were obtained under those systems. With the enactment of the Water Appropriation Act in 1945, now found at K.S.A. sections 82a-701, *et seq.*, the Kansas legislature adopted the prior appropriation system for both streams and groundwater. The Act provided a procedure for preserving those rights existing by actual water use prior to 1945 as "vested rights."⁷ Since 1945, all water rights have been obtained by prior appropriation.

B. Obtaining a Water Right: The Appropriation Process

To use water for any purpose within the State of Kansas, with exceptions such as domestic use, one must first apply to the chief engineer of the Division of Water Resources of the Kansas State Board of Agriculture for a permit.⁸ Once a permit is obtained, the permit holder has a specific period of time to complete the works of diversion by drilling, casing and equipping the well, building a dam, or setting up a pump site.⁹ If the diversion works are not com-

FOOTNOTES.

1. See Section II. B.
2. For example, the University of Denver and Watershed West sponsored programs on "Water Marketing" in Denver in September 1986 and 1987.
3. See, e.g., *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982); *El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).
4. See, e.g., *Water Market Update*, published monthly by Western Network, Santa Fe, N.M.; *Water Values and Markets: Emerging Management Tools*, Freshwater Foundation, 1986; W.H.

Fischer and W.R. Fischer, *Title and Valuation of Water Rights*, 30 Rocky Mtn. Min. L. Inst. 16-1 (1985).

5. *State, ex rel., v. Board of Agriculture*, 156 Kan. 603, 149 P. 2d 604 (1944).

6. *City of Emporia v. Soden*, 25 Kan. 410 (1881).

7. K.S.A. 82a-701(d), -704 (now repealed) and -704a.

8. K.S.A. 82a-701(c), -705, -705a & -728.

9. K.S.A. 82a-713; K.A.R. 1987 Supp. 5-1-1(h).

pleted within the time allowed, or within an authorized extension of time, the permit will be revoked.¹⁰

If the diversion works are completed within the time allowed, the permit holder may proceed to "perfect" the appropriation right by applying water to beneficial use in accordance with the terms of the permit.¹¹ If the permit holder does this within the period of time for perfection set forth in the permit, a real property right, with five basic attributes set forth below, vests in the landowner.¹²

It is then the responsibility of the Division of Water Resources of the Kansas Board of Agriculture to certify the extent to which the permit holder has perfected the right to appropriate water for beneficial use.¹³ This certificate is filed with the Register of Deeds of the county in which the point of diversion is located and in the office of the chief engineer.¹⁴

C. Nature of a Water Right in Kansas

When acquiring a water right by application, or when buying, selling, or otherwise transferring water rights, one must keep in mind that a water right is a "real property" right.¹⁵ It is not personal property nor a mere license.

A water right, whether a vested right, an approved application for a permit to appropriate water, or a certified right, carries with it five attributes. First, it is limited to a maximum annual quantity of water, in gallons or in acre-feet.¹⁶ Second, it is limited to a maximum instantaneous rate of diversion, in gallons per minute (g.p.m.) or cubic feet per second (c.f.s. or second-feet).¹⁷ Third, the water may be used only for beneficial uses authorized by the chief engineer.¹⁸ Fourth, the water may be put to beneficial use only upon the authorized place of use.¹⁹ Fifth, the water may be diverted only from the authorized point, or points, of diversion.²⁰

A typical example of a water right would be a permit authorizing a person to divert water from a well located near the center of the NW ¼ of Section 6, Township 6 South, Range 8 West, of the 6th P.M., for irrigation use on that quarter section, at a maximum rate of 1,000 g.p.m., and limited to a maximum annual quantity of 200 acre-feet.²¹

III. Changes in a Water Right Without a Transfer of Ownership

A. Introduction

Prior to July 1, 1957, the chief engineer had no statutory authority to approve a request by water right holders

10. *Id.*

11. K.S.A. 82a-712.

12. K.S.A. 82a-701(g).

13. K.S.A. 1987 Supp. 82a-714.

14. *Id.* Although water right holders have real property interests when they begin the use of water in accordance with the terms of their permits, the extent to which diversions have taken place is not officially determined until certified by the Division of Water Resources. *Id.*; K.A.R. 5-3-3. The authors disagree among themselves whether the applicant has a real property interest at the time the permit is approved or at the time water is first diverted.

15. K.S.A. 82a-701(g); A water right is "... a real property right appurtenant to and severable from the land on or in connection with which the water is used ..."

16. K.S.A. 82a-701(f), 709(c), & 712; K.A.R. 5-3-1(b). An acre-foot of water is "the amount of water that will cover one acre to a depth of one foot." F. Trelease and G. Gould, *Water Law Cases and Materials*, 4th ed. (1986), at 18.

17. K.S.A. 82a-701(f), -707(d), & -709(c); K.A.R. 5-3-1(b).

18. K.S.A. 82a-701(f) & -703; K.A.R. 1987 Supp. 5-5-1(f).

19. K.S.A. 82a-712 & -709(g).

20. K.S.A. 82a-701(f), -709(d), & -712; K.A.R. 5-3-4(b)(3).

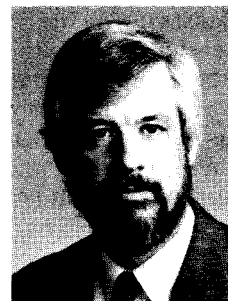
21. Other specific considerations may be attached to the approval of a permit, such as requirements for a flow meter, check valve, and water level measurement tube. K.S.A. 82a-706c; K.A.R. 5-3-5c, 5-3-5d.

About the Authors

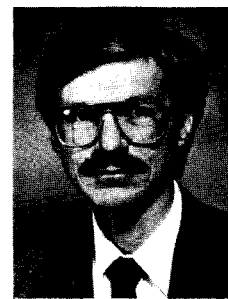
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to make changes in water rights.²² In 1956, the Kansas Water Resources Board scrutinized the Water Appropriation Act and recommended many changes. One of the recommended changes was the addition of a statute allowing changes of water rights within certain limitations.²³ The Legislature responded by enacting a statute nearly the same as the one now found at Section 708b of the Water Appropriation Act.²⁴

Under that section, a water right owner may change three of the five basic attributes of a water right: the place of use, the point of diversion, and the use. If the water right holder wishes to change one of these characteristics of his permit, he must file an application with a filing fee and receive approval to make the change.²⁵

Suppose, for example, that an irrigation well collapses and cannot be economically repaired. The owner wishes to plug the well, move over fifty feet, and drill a new one. The Act requires the owner to file an application to change

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the point of diversion from one authorized location to another.²⁶ It does not matter whether the well is being moved ten feet or a quarter of a mile.

By administrative policy,²⁷ before the chief engineer will approve a change in one or more of the three basic attributes of a water right, he may have to determine the extent to which the rate of diversion and the maximum annual quantity of a water right have been perfected.²⁸

B. Requirements for Changes.

1. **In Writing.** The owner must apply in writing on a form prescribed by the Division of Water Resources; it must be signed by all owners of the water right, including spouses, and notarized.²⁹ This requirement may give rise to problems when the ownership of the authorized place of use has been divided, e.g., by foreclosure or probating an estate, but the water right has not been expressly partitioned by agreement or otherwise.³⁰ Even if water has never been applied to a particular part of the authorized place

22. Report on the Laws of Kansas Pertaining to the Beneficial use of Water, Bulletin No. 3, Kansas Water Resources Board, Topeka, Kansas, November, 1956, by Earl B. Shurtz, at 75, 135.

23. *Id.* The Board commented: "It seems essential that the priority of an appropriation right should not be made to depend upon the continuance of the particular beneficial purpose. Nor should it be made to depend upon the continuation of a use at a particular place or the continuance of a particular diversion. Inasmuch as the Water Appropriation Act possibly makes such limitations, it seems desirable to provide affirmatively that an appropriator may, without losing his right or priority, change his water use from one beneficial use to another, change his place of water use, and change his point or method of diversion." *Id.* at 75.

24. *Id.* at 135.

25. K.S.A. 1987 Supp. 82a-708b and K.A.R. 5-3-1.

26. K.S.A. 1987 Supp. 82-708b.

27. This policy is an unwritten policy of the Division of Water Resources.

28. If the time to perfect the water right has expired and the time cannot be extended, only the rate of diversion and the annual quantity that the applicant has perfected by actual use may be changed. The perfected rate of diversion and annual quantity are not known until an approved permit is certified. After the time to perfect a permit has expired, the chief engineer's staff will inspect the site to determine the extent to which a water right was perfected in accordance with the terms, conditions, and limitations of the permit. This field inspection includes an actual test of the rate of the diversion under normal operating conditions and an analysis of the maximum quantity of water used during any one calendar year in accordance with the terms, conditions, and limitations of the permit within the period of record.

Because of manpower shortages in the past, the Division of Water Resources has not always been able to conduct a timely field inspection so that a water right may be certified. This back-

of use, all owners of all the land designated as an authorized place of use must sign the change application.³¹

2. **Reasonableness.** The owner must "demonstrate to the chief engineer that any proposed change is reasonable."³² For example, the owner may be required to show that the amount and rate of diversion of water are not too high or too low for the beneficial use that will be made after the change is approved. The chief engineer would probably not approve an amount in excess of three acre-feet of water per acre on any irrigated crop land. Nor would the chief engineer likely approve irrigation of an entire quarter section of land at a maximum instantaneous diversion rate of only fifty gallons per minute.

3. **No Impairment.** The owner must also demonstrate that the proposed change will not impair existing water rights.³³ For groundwater, impairment includes an unreasonable raising or lowering of the static water level. Generally, no direct impairment occurs if the well location meets spacing requirements set by regulation or policy. These spacing requirements, designed to prevent direct impairment of one well by another, vary from an overall statewide spacing requirement between large capacity wells of a quarter mile to a spacing requirement in one part of the Dakota aquifer of two miles.³⁴ High capacity wells must generally be spaced a minimum of 800 feet from a domestic well.³⁵

The same non-impairment requirement exists for changes in rights on streams. Impairment includes unreasonable changes in water level, streamflow, and water quality.³⁶ Changes in point of diversion, type of use, or place of use can affect water level, streamflow, or water quality.

4. **Consumptive Use.** The change applicant must show that the change would not result in a substantial increase in the consumptive use.³⁷ Consumptive use is the amount of water actually consumed while it is being applied to a beneficial use, including water evaporated and evapotranspired. Consumptive use varies from nearly zero percent in a flow-through hydro-power plant, to almost 100 percent where the water is put into cooling towers and evaporated. Many levels of consumptive use exist between these extremes. A municipality diverting water from a river may return 50 percent of the water originally diverted; an irrigator may return 15 percent of the water to the aquifer through deep percolation.

If, for example, the original maximum annual quantity diverted is 100 acre-feet, 50 acre-feet are consumed in some manufacturing process and the other 50 acre-feet are

log has dramatically decreased during the past few years due to increased funding for the certification process. However, if an applicant wants to have a field inspection as soon as possible, the applicant may hire a private contractor, who must be approved by the chief engineer prior to the field inspection, to do the inspection. The permit holder pays for the field inspection by the private contractor. A list of approved private contractors is available from the Division of Water Resources. Other contractors may be added to the list if they can demonstrate their qualifications to the satisfaction of the chief engineer.

If the time to perfect the water right has not expired, certification is generally not required prior to the approval of the change application if the proposed change is for a replacement well a short distance away. Even if the time to perfect has not expired, certification will probably be required by the chief engineer before a change may be approved where the change involves a change in the use of the water or expansion in the authorized place of use for irrigation.

29. K.S.A. 1987 Supp. 82a-708b(a)(1); K.A.R. 5-5-1; K.A.R. 5-5-1.

30. For example, two contiguous quarters owned by A and serviced by a well on one of the quarters may have appurtenant water rights. But the quantities of water under the water right may not be proportional to the acreage. A transfer of each quarter from A to different persons with no mention of the water right can cause problems and confusion.

31. See note 29, *supra*.

32. K.S.A. 1987 Supp. 82a-708b(a)(2).

33. *Id.*

34. K.A.R. 1987 Supp. 5-23-3(b)(1).

35. D.W.R. Admin. Policy No. 85-4.

36. K.S.A. 1987 Supp. 82a-711. See Section III, B. 6 *infra* text, at note 43.

37. K.A.R. 5-5-3.

returned to the river, the water right owner cannot subsequently change that water right to another use that will consume all 100 acre-feet of that water. This restriction protects other appropriators downstream who have the right to rely on the consumptive use pattern of the senior water right holder who is seeking to change his or her water right.

5. Local Source. Next, a change applicant must demonstrate that the change relates to the "same local source of supply" as the original right.³⁸ Obviously, it would be unreasonable to allow a water right holder for irrigation to keep the same priority if he were switching from a Kansas River diversion to a well drilled into the Dakota formation. The key word is "local." Although neither statutes nor regulations define the term, the policy of the chief engineer is to restrict changes in groundwater points of diversion in the same aquifer to moves of one quarter mile or less,³⁹ but longer moves may be approved if in the public interest. A longer move may mean that the well is not drawing its water from the same "local" source of supply and that a different set of water users would be affected by the new

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If an applicant seeks to change the point of diversion on a river, the chief engineer, in determining whether the same "local source of supply" is involved, will take into consideration other factors. Are tributaries either added or eliminated at the new proposed point of diversion? Are groundwater contributions to the base flow at the proposed point of diversion different than at the authorized point of diversion?

6. Process as a New Application. Another requirement is that the chief engineer process the application according to the same provisions prescribed for the processing of new applications to appropriate water.⁴¹ Applicants for changes in point of diversion are also required to have flow meters that meet the specifications of the chief engineer on the new points of diversion.⁴² A replacement well may also have to meet the same spacing requirements as a new well in that area.

An exception to this requirement is that some change applications do not need to meet depletion or safe yield criteria in effect in the area where the point of diversion

is located if the diversion works have already been completed.⁴³ A groundwater management district may restrict the number of applications that can be approved in a two-mile radius surrounding the proposed point of diversion, with a goal of protecting the public interest against rapid, long-term lowering of the water table. An application for a new well permit would be denied if the addition of this well would cause the local safe yield or allowable depletion policy to be violated. But a change application might seek to move the point of diversion of an existing well a short distance or to change a type of use such that the change would not alter recharge or runoff characteristics. If these changes were sought, the change application would not be affected by these district depletion or safe yield formulas because no additional water would be withdrawn from the area.

7. Public Interest. A proposed change may not "prejudicially and unreasonably" affect the public interest.⁴⁴ The public interest consideration has increased importance with the emergence of the public trust doctrine in water rights law.⁴⁵ Economic development is no longer the primary guide to public interest. While several states by statute define public interest, Kansas does not. Section 711 of the Act does require the chief engineer to consider the following: established minimum desirable streamflow requirements; the area, safe yield and recharge rate of the appropriate water supply; the priority of existing claims of all persons to use the water of the appropriate water supply; the amount of each claim to use water from the appropriate water supply; and all other matters pertaining to the question. Recent non-Kansas court decisions indicate a trend toward public interest review in water rights change law.⁴⁶

8. Additional Place of Use. When the applicant wants to increase the size of the authorized place of use, a water meter may be required.⁴⁷ For example, an owner currently diverting water onto one quarter section of land may wish to double the authorized place by adding a second quarter section to the authorized place of use. A meter is required in this hypothetical case because by policy the authorized place of use has been increased by more than twenty-five percent and the potential for violation of the maximum annual quantity limitation on the permit has been greatly increased.⁴⁸

9. Additional Wells. Another type of change requiring an application is one to add an "additional well."⁴⁹ An "additional well" is one that is "an additional point of diversion authorized by the chief engineer under an existing permit to appropriate water or an existing water right in response to an application for a change in point of diversion filed by the water right holder."⁵⁰ An additional well may be needed for use as a standby well, for fire protec-

38. K.S.A. 1987 Supp. 82a-708b (a)(3).

39. D.W.R. Admin. Proc. No. 85-4. Some states do not have such tight restrictions on changes in points of diversion. In New Mexico, for example, the owner of a water right may change the location of a well by applying to the state engineer and showing that the change will not impair existing rights, will not be contrary to conservation of the water in the state, and will not be detrimental to the public welfare. N.M. Stat. Ann. § 72-12-7 (1987). If such a policy were in effect in Kansas, a well in the Ogallala Aquifer in Wallace County could theoretically be changed to allow withdrawal under that same priority from the Ogallala Aquifer in Finney County.

40. D.W.R. Admin. Proc. No. 87-6. K.A.R. 5-25-10. K.S.A. 1987 Supp. 82a-708b and 82a-709(f).

41. K.S.A. 1987 Supp. 82a-708b(a).

42. D.W.R. Admin. Proc. 87-3.

43. K.A.R. 5-22-7; & 1987 Supp. 5-23-4, 5-24-2, & 5-25-4.

44. K.S.A. 1987 Supp. 82a-711.

45. Public interest was one of the main topics of discussion at the Eighth Annual Summer Program, "Water as a Public Resource: Emerging Rights and Obligations," University of Colorado Law School, June 1-3, 1987.

46. *Id.* D. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*. Professor Grant cited several recent cases in which public interest was a factor in the decision, including *Stempel v. Department of Water Resources*, 82 Wash. 2d 109, 508 P.2d 166 (1973); *Shokal v. Dunn*, 109 Idaho 330, 707 P. 2d 441 (1985); *In re Howard Sleeper*, Rio Arriba County Cause No. RA 84-53(C), appeal docketed *Ensenada Land & Water Ass'n v. Sleeper*, No. 8720/8830 (Ct. App. N.M. 1985); and *In re Application for Water Permit No. 4580A-3*, Findings of Fact, Conclusions of Law, and Final Decision of South Dakota Water Management Board (Oct. 29, 1986).

47. D.W.R. Admin. Proc. No. 83-14. The 1966 Arizona case of *Salt River Valley Users' Assoc. v. Kovacovich*, 3 Ariz. App. 28, 411 P.2d 201 (1966), established that a water right holder could not, without approval, use water saved by conservation methods on additional lands, because a water right by definition is appurtenant to a certain piece of land.

48. D.W.R. Admin. Policy No. 83-14.

49. D.W.R. Admin. Policy No. 85-12.

50. *Id.*

tion, or for making possible the division of a water right.⁵¹

10. Water Transfer Act. A change could be large or important enough to trigger the approval requirements of the Water Transfer Act. However, since that Act would more likely involve a change in conjunction with a transfer of ownership, we will leave that discussion to section IV.C.II., below.

11. Other Requirements and Constraints. An application for change must be accompanied by the statutorily required filing fee, which is currently \$50.⁵² The applicant must also file a notice and proof of completion of the new diversion works at the newly authorized location.⁵³

The chief engineer might deny a change application if it would affect statutory minimum desirable streamflows.

An applicant for a change could face other constraints. The chief engineer might deny a change application if it would affect statutory minimum desirable streamflows. If the change were large enough, the federal government's navigational interests might be impaired or downstream states might object that they would lose their equitable share of the river water.⁵⁴ Environmental and water quality objections might be made by downstream water right holders, citizens, or governments.

IV. Transfers of Water Rights

A. Introduction

Many areas of the State of Kansas are reaching the status of full appropriation. Additional new appropriation rights cannot be permitted in many areas. In the future, the only way someone coming into a closed area may acquire a water right for beneficial use is to lease it or acquire it from the current water right owner.

Voluntary transfers of ownership of water rights may occur in several ways. A holder may sell the land with the appurtenant water right to a buyer who uses the water for the same purpose, or to a buyer who wishes to make a change in the right. A holder may sell the land and retain the water right. A holder may sell the water right and retain the land with the purchaser then taking steps to have the water right attach to another piece of land. A holder may die, and the water right may pass to another by will or intestate succession. A holder may sell to an out-of-state purchaser, or a Kansan might purchase an out-of-state right. A holder may sell water without selling a water right. A holder may lease water or water rights.

B. Transfers without Changes

As shown above, owners may make changes in water rights. Ownership of water rights may also be transferred, with or without changes described above.

The simplest case is a transfer of land with an appurtenant water right where the transferee uses the water for the same purpose. The Water Appropriation Act states that "such water right passes as an appurtenance with the conveyance of the land by deed, lease, mortgage, will or other voluntary disposal, or by inheritance."⁵⁵ Thus, as with other appurtenances such as buildings and easements, water rights pass whether mentioned in the instrument or not. The Act does not require approval of the chief engineer of such a transfer of the ownership of a water right; however, since continuation of use of the water requires filing the annual use reports with the chief engineer,⁵⁶ the new owner should inform the chief engineer of the ownership change for record keeping purposes.

An examining attorney for a buyer wishing to confirm that a valid water right exists would need to check in the office of the chief engineer in Topeka or one of the Division's four field offices for an approved application, vested right, certificate, or other information, such as evidence of loss of the right for non-use. A certificate might also have been filed in the register of deeds of the county where the point of diversion is located.⁵⁷ Since a domestic water right may exist without a permit or certificate, evidence of such a right might be found on the land itself.⁵⁸

C. Transfers with Changes

1. Examples and requirements. As stated above, ownership transfers accompanied by changes can occur in several situations. Regardless of the context in which the combination of transfer and change occur, the permission of the chief engineer must be obtained for the change, if not for the transfer of ownership itself.⁵⁹ The same requirements under section 708b described in Section III. B., above, must be met, whether the application seeks a change in use, place of use, or point of diversion. Thus, the change must be reasonable, must not impair existing rights, must relate to the same local source of supply, must meet the same requirements for obtaining a new permit, etc.⁶⁰ The transfer may not increase consumptive use.⁶¹ This requirement has led to a further rule of thumb that the recipient of the right can take only the amount consumed by the original use.⁶² Other constraints, such as environmental and water quality concerns might come into play in a transfer coupled with a change.

An example of a transfer and change relates to the additional well discussed in Section III. B. 9., above. If one well was originally authorized to irrigate two quarter sections of land and the owner either sells or wills the quarter sections to two separate individuals, sharing one well may no

51. *Id.*

52. K.S.A. 1987 Supp. 82a-708b(b).

53. D.W.R. Adm'n. Policy No. 87-3.

54. See, e.g., *ETSI Pipeline Project v. Missouri* 484 U.S. _____, 108 S.Ct. 805, 96 L.E. 2d 898 (1988), which involved downstream states in the Missouri River Basin and their challenge to a purchase of 50,000 acre-feet of water per year from Oahe Reservoir in South Dakota by Energy Transportation Systems, Inc. (ETSI) for use in a coal slurry pipeline project.

55. K.S.A. 82a-701(g).

56. The form used by the Division of Water Resources "Approval of Application and Permit to Proceed" (DWR 1-201 (Rev. 4-23-85)) subjects the permit to several conditions, one of which reads: "7. That the applicant shall maintain records from which the quantity of water actually diverted during each calendar year may be readily determined. Such records shall be furnished to the Chief Engineer-Director within 30 days of receipt of the annual water use report form."

The form titled "Certificate of Appropriation for Beneficial Use of Water." (DWR 1-400 (Revised 12-5-84)) contains a similar condition, but gives March 1 as the date the records must be reported each year. The 1988 legislature enacted H.B. 3007, which requires owners of water rights to file annual water use reports on or before March 1 of every year. Prior to that enactment, the requirement was administrative, not legislative.

57. K.S.A. 82a-714.

58. K.S.A. 82a-701(c), -705, & -728. It is advantageous for holders of domestic rights to file them in order to make their priority a matter of record.

59. K.S.A. 1987 Supp. 82a-708b.

60. See Section III. B., *supra*.

61. See Section III. B. 4., *supra*.

62. F. Trelease and C. Gould, "Water Law Cases and Materials," 4th ed. at 201 (1986).

longer be practicable. If the water right must be divided, it may be necessary to place an additional well into service. In such a case, the owners of the water right (all owners, including spouses, of the land that is designated as the authorized place of use in the permit or vested right) may file an application to add an additional point of diversion.⁶³ Very stringent criteria must be met in order to obtain approval of an additional well in this situation.⁶⁴ These criteria require that no water right senior to the change application be materially injured by approval of the addi-

These criteria require that no water right senior to the change application be materially injured by approval of the additional well.

tional well. To prove lack of injury, the applicant must comply with the following: meet all regular criteria for change applications; have the right certified; meet local restrictions on well spacing; accept a limitation to the maximum rate of diversion actually used in the three years preceding the date the change application is filed; and show that the approval of the additional well will not increase the rate of the overall long-term decline in the water table.⁶⁵

Where the applicant for a change is a contract buyer of the water right, the signatures of the contract sellers must also be obtained because the contract sellers are still the legal record owners of the property until the sale is complete. The most common error in submitting an application for change is a failure to have the application signed by all owners of the water right, including their spouses.

2. The Water Transfer Act.⁶⁶ In 1983, the Kansas legislature provided additional restrictions on "water transfers," defined in the Water Transfer Act as "the diversion and transportation of water in a quantity of one thousand acre-feet or more per year for beneficial use outside a ten-mile radius from the point of diversion of such water."⁶⁷ The Act's provisions may thus be triggered when an owner seeks a change without a transfer of ownership as well as when ownership is transferred. The subject water includes water found in streams, groundwater aquifers or stored in reservoirs under water reservation rights held by the state under K.S.A. Sections 82a-1301, *et seq.*

A change in water use involving a "water transfer," whether or not involving a transfer of ownership, involves additional requirements in obtaining state approval. In addition to approval of the change application by the chief engineer described in Section III, above, the transfer must be approved through a lengthy administrative process beginning with a hearing before a panel consisting of the chief engineer as chair, the Director of the Kansas Water Office, and the Secretary of the Kansas Department of Health and Environment or the Director of the Division of Environment, if so designated by the Secretary.⁶⁸

The hearing must be conducted to determine whether,

based on a number of matters to be considered,⁶⁹ the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer. The findings of the panel are subject to judicial review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Action.⁷⁰ To date, no one has applied for approval of a water transfer under the Act.

An example of a water transfer would be the purchase of 20,000 acre-feet of water annually from a federal reservoir by a public wholesale water supply district which desires to pipe it a distance of 75 miles to sell to seven different municipalities and rural water districts. In such a case, the annual quantity used outside the ten-mile radius from the point of diversion (where the longitudinal axis of the dam crosses the center line of the stream),⁷¹ is more than 1,000 acre-feet per calendar year, so the Act's requirements must be complied with.

D. Transfers of Water versus Water Rights

The sale of water can occur in Kansas under the water marketing program provided for in K.S.A. Sections 82a-1301 *et seq.* Under that Act, the state, having acquired space to store water from the federal government in federally-constructed reservoirs and having acquired a water reservation right from the chief engineer to divert and store water in that space, sells water under contract to municipal and industrial users.⁷² These users can have water rights and contract rights at the same time. The city of Lawrence, for example, has water rights in the Kansas River and purchases water from the state from Clinton Reservoir.

The Water Appropriation Act does not expressly allow sales of water under a water right.

The Water Appropriation Act does not expressly allow sales of water under a water right. However, since section 708b allows changes in use, places of use, and points of diversion with permission of the chief engineer, it appears that the holder of a water right could sell water for other uses at other places with permission of the chief engineer. The same requirements for a regular change, discussed in Section III, above, would apply.

A sale of a water right differs from a sale of water in several respects. Since the sale of a water right involves the sale of real property, that sale terminates the seller's interest, and the buyer takes the right in perpetuity (subject to loss for non-use under section 718, etc.). The sale of water is the sale of personal property, not real property, and the seller continues to own the water right. The sale of a water right necessitates valuing the right and fixing a price, as is done for land. The price could be \$2,000 per acre-foot, for example.⁷³ The sale of water generally involves a unit cost, e.g., 15 cents per 1000 gallons, or \$200

63. K.S.A. 1987 Supp. 82a-708b.

64. D.W.R. Adm'n. Proc. No. 85-12.

65. *Id.*

66. K.S.A. 82a-1501, *et seq.*

67. K.S.A. 82a-1501 (a).

68. K.S.A. 1987 Supp. 82a-1503 (d).

69. K.S.A. 1987 Supp. 82a-1503 (e).

70. K.S.A. 1987 Supp. 82a-1505 (a).

71. K.S.A. 82a-1501 (b) (1).

72. K.S.A. 1987 Supp. 82a-1305.

73. See Water Market Update, *supra* note 4, for examples.

per acre-foot. The chief engineer has long required annual use reports to be filed in order to ensure that the water is put to a beneficial use. With the enactment of House Bill 3007, the 1988 legislature has now made such annual reports mandatory and subjected the non-reporting owner to a civil penalty. If water is sold, the owner of the water right is responsible for reporting and must be sure that the reports are made.

Whether to sell the water right or the water depends on the long-term needs and desires of the seller and buyer. Sometimes an in-between solution is better — leasing water or water rights. Leases that involve the three basic changes, place of use, type of use, or point of diversion, would require prior approval of the chief engineer.

V. Interstate Transfers

A. Introduction

As intrastate water changes and transfers increase, the likelihood of interstate transfers also increases. The United States Supreme Court opened the door to increased interstate water movement in 1982 with *Sporhase v. Nebraska*.⁷⁴ There, a district court had denied the request of landowners to use water pumped from their land in Nebraska to irrigate land they owned in Colorado. The district court relied on a Nebraska statute prohibiting interstate movement of water to states such as Colorado that did not have reciprocal legislation. The Supreme Court of Nebraska affirmed. The United States Supreme Court reversed the state court, holding that water is an article of commerce and that such reciprocal legislation violates the commerce clause except in certain limited circumstances — namely, if the state as a whole suffers a water shortage, water is being transported within that state from areas of abundance to areas of shortage, and imports and exports are roughly equal.⁷⁵ If these three conditions exist, conservation reasons might be used to support a reciprocity statute or even a total ban on exports.

Section 726 of the Kansas Appropriation Act was a reciprocal statute similar to Nebraska's. The legislature amended it in 1984 to allow transportation of Kansas water to points outside Kansas. However, the chief engineer can condition the permit to protect the public interest, including an express condition that "should any such water be necessary to protect the public health and safety of the citizens of this state, such approved application may be suspended, modified or revoked."⁷⁶

Section 702 restricts water use to people of the state, and section 706 limits use to all of its inhabitants.

Galen Buller⁷⁷ suggested that still other sections of the Kansas Appropriation Act could inhibit water movement from Kansas to other states: section 702 restricts water use to people of the state, and section 706 limits use to all of

its inhabitants. However, amended section 726 should govern, allowing movement of water from Kansas. In any case, the Water Transfer Act, K.S.A. sections 82a-1501, *et seq.*, is applicable to interstate transfers as well as intrastate transfers.

Transfer of water from our four neighboring states into Kansas should be governed for the most part by the *Sporhase* case as well. A cursory look at the laws of Colorado, Nebraska, Missouri, and Oklahoma follows.

B. Colorado

Colorado has several statutes restricting intrastate transfers and sales of water and water exportation. Intrastate water transfers follow the general rule that a transfer cannot harm water rights senior to the date of the change application, either in rate, quantity, availability, distribution or timing.⁷⁸

Water exportation is subject to the additional requirements that:

1. "the proposed use of water outside this state is expressly authorized by interstate compact or credited as a delivery to another state pursuant to section 37-81-103 or that the proposed use of water does not impair the ability of this state to comply with its obligations under any judicial decree or interstate compact which apportions water between this state and any other state or states;"
2. "the proposed use of water is not inconsistent with the reasonable conservation of the water resources of this state;"
3. "the proposed use of water will not deprive the citizens of this state of the beneficial use of waters apportioned to Colorado by interstate compact or judicial decree."⁷⁹

Colorado Revised Statutes also authorize a fee of \$50 per acre-foot to be assessed and collected by the state engineer on water diverted, carried, stored, or transported in the state of Colorado for beneficial use outside the state measured at the point of release from storage or at the point of diversion.⁸⁰

These statutes were enacted by the state of Colorado in response to the *Sporhase* decision in an attempt to utilize every means possible to stop transfers of water to points outside the state of Colorado. For instance, one of the statutory restrictions is that any water transferred outside the state must be credited under that receiving state's compact allocation. Since all drainage basins coming out of Colorado are under compact, any transfer has to be considered as part of compact deliveries. This places a ceiling on the amount of water that could be exported from Colorado equal to all the downstream states' current compact allocations. The \$50 per acre-foot annual fee also makes it highly uneconomical to transfer water outside the state.

B. Nebraska

Nebraska's reciprocity statute Rev. Stat. Neb. section 46-613.01, which was the subject of *Sporhase* and which focuses on groundwater, was amended in 1984. The section includes a recognition that for the health, safety, and welfare of the state, restrictions on water exports are necessary. Permits are granted only upon consideration by the

74. 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

75. *Id.* at 958, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

76. K.S.A. 82a-726.

77. Comment, *The Constitutionality of the Kansas Groundwater Antiexportation Statute*, 31

Kan. L. Rev. 429 (1983).

78. Col. Rev. Stat. § 37-92-302 (1986 Supp.).

79. Col. Rev. Stat. § 37-81-101 (3) (a) (b) & (c) (1986 Supp.).

80. Col. Rev. Stat. § 37-81-104 (1986 Supp.).

Director of Water Resources of the following factors: whether the proposed use is a beneficial use of ground water; the availability to the applicant of alternative sources of surface or ground water; any negative effect of the proposed withdrawal on surface or ground water supplies needed to meet reasonable future demands for water in the area of the proposed withdrawal; and any other factors consistent with the purposes of this section that the director deems relevant to protect the interests of the state and its citizens. The director can include reasonable conditions on proposed uses to carry out the purposes of the section.

Nebraska also has a statute governing interbasin transfers from streams, which is similar in many respects to our Water Transfer Act. Under section 46-289, the director must consider a number of factors in deciding whether to grant an interbasin transfer application.⁸¹

If the overall benefits to the state and the applicant's basin are greater than or equal to the adverse impacts to the state and the basin of origin, the application is considered to be in the public interest. The section is not expressly limited to intrastate transfers, but "river basin" is defined to include only specifically named basins in the state, some of which are also found in Kansas.

Intrabasin transfers are also regulated by statutes similar to our change statute.

Intrabasin transfers are also regulated by statutes similar to our change statute.⁸² To be approved, such changes cannot adversely affect other water appropriators in the same basin, must use the water from the same source, may not diminish the water supply, and must be in the public interest. The water must also be applied to a use in the same preference category as before (Nebraska prefers domestic uses over all others, and agricultural uses to manufacturing uses).

The Kansas-Nebraska Big Blue River Compact⁸³ affecting the Big Blue and Little Blue Rivers flowing from Nebraska into Kansas also limits interbasin transfers. Section 5.4 reads as follows:

"In the event of any importation of water into the Big Blue River basin by either state, the state making the importation shall have exclusive use of such imported water, including identifiable return flows therefrom. Neither state shall authorize the exportation from the Big Blue of water originating within that basin without the approval of the administration."

Technically, this provision gives Nebraska a veto over any exports from the basin, including waters from Tuttle Creek

Reservoir, since the administration is made up of two members from each state and a non-voting member.

C. Oklahoma

Oklahoma statutory law contains no express limitations *per se* on interstate movement of water, but several sections bear on the issue. Applicants for stream water rights for water to be used in the stream system are given a preference over applicants for stream water rights for waters to be transported and used outside the system.⁸⁴ Irrigation water rights from streams can be changed and become appurtenant to other lands upon approval of the Water Resources Board if it is impracticable "to beneficially or economically use water for irrigation" on the appurtenant land and if the change can be made "without detriment to existing rights."⁸⁵ Rights involving other types of use may have the use, place of diversion, or storage changed with approval of the Board under the same considerations as changes in irrigation rights.⁸⁶ Ownership transfers of water rights must be filed of record in the office of the Board, but transfers apart from the appurtenant land are prohibited "except in the manner specially provided by law."⁸⁷

Oklahoma statutes do not mention changes or transfers of rights in groundwater. According to an Oklahoma water law authority, however, "[i]t is common practice for landowners . . . to lease ground water to municipalities or other users . . . [and if] . . . water can be leased, there is no compelling reason to prevent it from being severed completely."⁸⁸ Oklahoma groundwater law is no longer based on the reasonable use or even the appropriation doctrine, but rather on an allocation system whereby overlying acreage is allocated amounts of available groundwater.⁸⁹

While Oklahoma statutes do not expressly proscribe water exports, section 37-119 could theoretically operate as a ban. That section requires all written contracts for the sale of city water to persons outside the city limits to state expressly that the contract may be abrogated when the city needs the water for its own purposes. Several Oklahoma cities are located on state boundaries, and if the water is provided by the Oklahoma side, the non-Oklahoma part of the city could be cut off. Or if cities near state boundaries provide water to users in other states, those users could be cut off under that statute.⁹⁰

D. Missouri

Missouri law on the subject of interstate water movement is somewhat less clear. Missouri, unlike its neighbors to the west, follows the riparian reasonable use doctrine rather than appropriation law and thus has even less clear statutory guidance on water transfers.⁹¹ Water use for the most part is limited to riparian lands, but methods are available to enable nonriparians to gain access to stream water, such as purchasing, condemning, or contracting with com-

81. These factors include the following: 1) the economic, environmental, and other benefits of the proposed transfer; 2) any adverse impacts of the proposal; 3) current beneficial uses made of the unappropriated water in the basin of origin; 4) reasonably foreseeable future beneficial uses of the water in the basin of origin; 5) the economic, environmental, and other benefits of leaving the water in the basin of origin for current or future beneficial uses; 6) alternative sources of water available to the applicant; and 7) alternative sources of water available to the basin of origin for future beneficial uses.

82. Rev. Stat. Neb. §§ 46-290, et seq. (1984).

83. K.S.A. 82a-520.

84. Okla. Stat. Ann. tit. 82, § 105.12 (1988 Supp.).

85. Okla. Stat. Ann. tit. 82, § 105.22 (1988 Supp.).

86. Okla. Stat. Ann. tit. 82, § 105.23 (1988 Supp.).

87. Okla. Stat. Ann. tit. 82, § 105-24 (1988 Supp.).

88. Anderson, *The Conveyance of Water Rights*, 50 Okla. Bar J. 2711, 2718 (Dec. 29, 1979).

89. Okla. Stat. Ann. tit. 82, § 1020.9 (1988 Supp.).

90. Interestingly, one of the most important pre-Sporhase cases was *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex., 1966), *aff'd per curiam* 385 U.S. 35, 87 S. Ct. 240, 17 L. Ed. 2d 34 (1966), which involved an attempted importation of groundwater by an Oklahoma city from a Texas landowner. In *City of Altus*, the court concluded that a Texas statute forbidding interstate exportation of groundwater without approval of the legislature imposed an impermissible burden on interstate commerce.

91. Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri?*, 47 Mo. L. Rev. 429, 432-443 (1982).

peting rights, or gaining rights by adverse possession.⁹² According to Professor Peter Davis, Missouri follows "what might be called the 'eastern correlative rights' rule" for groundwater which "provides that each landowner may use percolating groundwater on his own land or on other non-overlying land, or make any use of his own land that affects percolating groundwater, provided his neighbor is not unreasonably injured."⁹³

Unregistered diversions are declared nuisances that can be enjoined.

Missouri statutes require that anyone withdrawing an average of more than 100,000 gallons per day during any

92. *Id.*, at 437-438.

93. *Id.*, at 441.

thirty-day period from groundwater or surface water must file an official registration document with the division of geology and land survey of the department of natural resources.⁹⁴ Unregistered diversions are declared nuisances that can be enjoined.⁹⁵ Otherwise Missouri has no statutory law that might impact a diversion from Missouri into Kansas. However, Missouri, like her neighbors, is governed by *Sporhase*, so it could not prevent the exportation of water to Kansas without complying with *Sporhase*.

VII. Conclusion

Kansas lawyers are likely to see more water rights changes and transfers in the future. They may range from a simple request to change the point of diversion of a small well a few feet to a major transfer of water out of state that would involve the Water Transfer Act as well as the law of another state.

94. Mo. Stat. Ann. §§ 256.400, -405, & -410 (1987 Supp.).

95. Mo. Stat. Ann. § 256.415 (1987 Supp.).

'88 KBA Committee Chairs Announced

KBA President Dale L. Pohl has announced the Association committees and their chairs for his term. They are:

- Alternative Dispute Resolution: Prof. Nancy G. Maxwell
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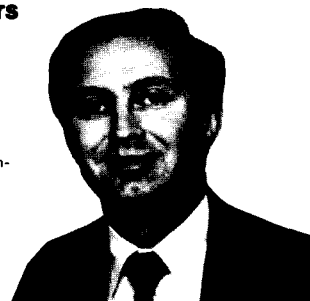
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