

By John C. Peck

## I. Introduction

**L**awyers representing buyers of water rights must study both the quality of the title of the water right and the quality of the water right itself. In a 1997 article,<sup>1</sup> I outlined some title and related considerations in water rights purchases. I suggested then that a separate article should consider "the quality of the water right aside from title and the other matters casually mentioned but not discussed in this article."<sup>2</sup> If an individual, corporate, or public client wishes to purchase water rights, either with land or separate from the land, or wants an analysis of its own water rights, the lawyer needs to know where to obtain and how to decipher the information, what kind of legal analysis is helpful, and how to present the information and analysis to the client. This article covers these matters, but not water quality per se or matters such as fraud in describing the water rights in a sale.<sup>3</sup> Yet, due to the sheer size and number of the Kansas statutes and regulations governing water law, and to the myriad differences in situations lawyers encounter, all this article can do is to lay out some basic principles, procedures, and ideas on how to approach a new problem.

\* My thanks to Leland Rolfs and Diane Worth for their very helpful substantive and editorial comments.

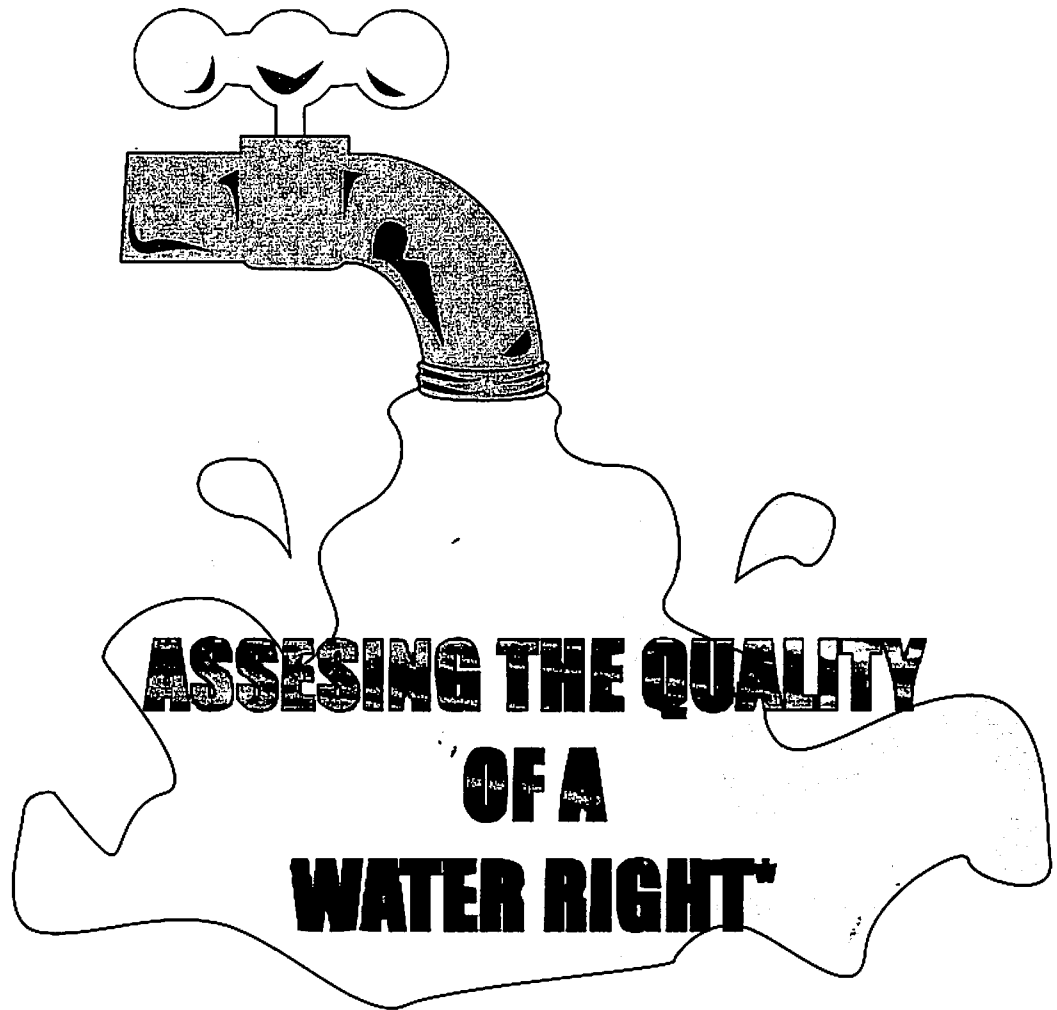
### FOOTNOTES

1. Peck, J., "Title and Related Considerations in Conveying Kansas Water Rights," 66 J.K.B.A. 38 (Nov. 1997) (hereafter "Title and Related Considerations").

2. *Id.* at 39.

3. "Quality of the water right" does not mean water quality. This article relates to how good a water right is, not how clean the water under a water right is. Some buyers of water rights need to be concerned with water quality, but that is a separate issue, one sometimes involving scientists and engineers. For information on water quality law, look to the excellent works of Coggins and Glicksman: Glicksman, R., and Coggins, G., "Groundwater Pollution I: The Problem and the Law," 35 U. Kan. L. Rev. 75 (1986); Glicksman, R., "A Guide to Kansas Common Law Actions against Industrial Pollution Sources," 33 U. Kan. L. Rev. 621 (1985); Coggins, G., and Glicksman, R., PUBLIC NATURAL RESOURCES LAW (West Group 1990, 3 volumes); Glicksman, R., "The Impact of Federal Environmental Protection Laws on Water Allocation," in the 26TH ANNUAL INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN, ch. 7 (1996) (discussion of impact of water quality laws on state water rights); see also Glicksman, R., "Watching the River Flow: The Prospects for Improved Interstate Water Pollution Control," 43 Wash. U. J. Urb. & Contemp. L. 119 (1993).

For a case involving fraud in a sale of irrigated land, see *Nordstrom v. Miller*, 227 Kan. 59, 605 P.2d 100 (1980) (court permitted rescission of contract for sale of irrigated land when seller knew that irrigation wells pumped water from the Niobrara formation and that the land would be dry land soon, but seller told buyer that the water production was from the Ogallala aquifer).



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## II. Some Preliminary Matters

### A. Summary of Kansas Water Law

For water rights, Kansas is a so-called prior appropriation state.<sup>4</sup> Under the Water Appropriation Act of 1945 ("the Act"),<sup>5</sup> a potential water user must obtain a permit before diverting water, with exceptions for domestic and several other limited uses.<sup>6</sup> Much of the state is now over-appropriated, which means that in those locations one may no longer obtain a new water right by filing an application with the Division of Water Resources of the Kansas Department of Agriculture ("DWR") because of DWR and groundwater management district ("GMD")<sup>7</sup> regulations.<sup>8</sup> In other areas, however, such as along most stretches of the Kansas River in northeast Kansas, obtaining a new permit is still possible.

While water itself is personal property, a water right is a real property interest,<sup>9</sup> a so-called usufructuary right, a right to use water from a specific source for a specific use. Being real property interests, water rights can be bought and sold,<sup>10</sup> separate from the appurtenant land or with the appurtenant land.

### B. Water versus water rights

Either water or water rights may be the subject of sales transactions, and the lawyers helping to craft the deals should distinguish between the two in negotiation and in documentation.<sup>11</sup> Even a buyer of just water and not water rights should be concerned about the quality of the water right held by the seller of the water. A prudent lawyer for such a buyer should investigate the quality of the water

right held by the seller and have the water seller "prove up" the status of the right.

### C. Need for water rights analysis

Water rights may need analysis outside the arena of a sale. Industrial, municipal, irrigation, water power, stockwater, recreational, and even domestic water users should routinely insure that their water rights are in good standing and have no problems. Sometimes the first indication of a problem comes in a letter from DWR informing the user of a possible abandonment<sup>12</sup> or a violation of some regulation or some condition or limitation of the water right. Or the problem surfaces first on the death of the owner when the beneficiaries or devisees begin to face problems of co-ownership.<sup>13</sup> Prudent water users will periodically study the quality of their water rights to insure they are in good shape, just as prudent landowners occasionally review compliance with zoning and building codes and walk over their land to check the buildings and boundaries.

### D. High transaction costs and no title insurance

Transaction costs including legal fees for water rights transfers can be high, sometimes higher than those for straight real estate transfers of comparable value.<sup>14</sup> In transfers of water rights, title insurance companies do not issue policies that cover water rights *per se*.<sup>15</sup> Thus, the buyer must require an abstract of title, which, indeed, causes still higher transaction costs. My own work has borne out the fact that even small water rights transfers can contain complexities that bump up costs. A seller of water rights from an irrigated quarter section, for example, may have earlier sold off a 5-acre tract to someone wanting to build a rural

4. The tier of states from the Dakotas to Texas and those west use the appropriation system, while states to the east use the "riparian doctrine." The riparian doctrine bases the right to use water on ownership of land along a stream.

5. K.S.A. §§ 82a-701, et seq. (1997) and (2000 Supp.).

6. *Id.*, § 728 (1997).

7. See K.S.A. §§ 82a-1021, et seq. (1997) and (2000 Supp.) for the legislation establishing GMDs. There are five GMDs: Western Kansas GMD No. 1, with its office in Scott City; Equus Beds GMD No. 2, with its office in Newton; Southwest Kansas GMD No. 3, with its office in Garden City; Northwest Kansas GMD No. 4, with its office in Colby; and Big Bend GMD No. 5, with its office in Stafford. GMD regulations are really DWR regulations, based on K.S.A. § 82a-1028(o) (1997), which gives GMDs the power to recommend to the chief engineer regulations "necessary to implement and enforce the policies of the board."

8. In some places, large areas are totally shut down to new permits. See, e.g., K.A.R. §§ 5-23-4a & 5-23-4b (2000) for restricted areas in Southwest Kansas GMD No. 3. In other places, safe yield and depletion formulae employed by DWR and the GMDs effectively negate the possibility of obtaining a new permit depending on the specific location of the proposed point of diversion. See, e.g., K.A.R. 5-21-4 (2000) (safe yield for Western Kansas GMD No. 1) and K.A.R. 5-23-4 (2000) (depletion for Southwest Kansas GMD No. 3). Scarcity of water is not limited to Kansas. See, e.g., "Private Sector Sets Water Sale to Californians," *The New York Times*, Tues. Dec. 26, 2000, at A1, col. 5, and A20, col. 1 (public agency buying large quantities of privately owned water for the first time).

9. K.S.A. § 82a-701(g) (1997).

10. See Peck, J., Rolfs, L., Ramsey, M., and Pitts, D., "Kansas Water Rights: Changes and Transfers," 57 J.K.B.A. 21, 25-26 (July 1988)

(hereafter "Kansas Water Rights: Changes and Transfers"). See also "Title and Related Considerations," *supra* note 1.

11. See *Sullivan v. City of Ulysses*, 23 Kan. App. 2d 502, 932 P.2d 456 (1997), and companion cases—*Coffee v. Sullivan* (No. 94-CV-30, Grant County District Court, No. 77,661, app. dismissed), and *City of Ulysses v. Coffee* (No. 95C29, Finney County Dist. Court), cases involving, *inter alia*, condemnation of water rights and reformation of a deed for land and water rights, and stemming in part from a contract to sell water instead of water rights.

12. K.S.A. § 82a-718 (2000 Supp.). See also Peck, J. and Crittenden Owen, C., "Loss of Kansas Water Rights for Non-Use," 43 U. Kan. L. Rev. 801 (1995)(hereafter "Loss of Kansas Water Rights"). See also Section IV.E., *infra*.

13. See Section IV.B.3., *infra* on dividing the rate of diversion.

14. "[M]any economic factors influence whether a reallocation will occur. . . . Additional expenses . . . [include] obtaining public agency approval of changes in use and point of diversion, . . . upgrading the quality of the water to meet intended new uses, . . . and providing . . . that the change will not impair the holders of other vested water rights. . . . In addition to transaction costs related to water rights, there typically are engineering and capital costs . . . associated with transporting, storing and treating the purchased water." Weatherford, G., and Shupe, S., "Reallocating Water in the Arid West," *WATER MARKETING: OPPORTUNITIES AND CHALLENGES OF A NEW ERA: COLLECTED ESSAYS ON THE MARKETING & TRANSFER OF WESTERN WATER RIGHTS*, at 1-9 and 1-10 (Sept. 1986).

15. "Counsel must then trace the chain of title to the seller. The job is complicated by the fact that most title insurance companies will not insure title to water rights; and most abstract companies will not certify their abstracts to include water rights." Fischer, W., "Water Title Examination," 9 Col. Lawyer, 2043, 2045 (Oct. 1980).

home, but the seller may have inadvertently failed to mention water rights in the deed. That tract owner may now own a proportionate share of the irrigation water right

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without knowing it. Another complexity is that the water right may be subject to abandonment.<sup>16</sup> Other problems may exist that dictate the hiring of a hydrologist or other water professional. It is wise to warn clients from the beginning that the legal and other transaction costs of a water rights analysis, whether as part of a sale or apart from a sale, may be high and that it is difficult to predict how high until the water rights files and the abstract of title are studied.

**E. When a water right becomes a real property interest**

Section 701 (g) of the Act states that water rights include both vested rights<sup>17</sup> and appropriation rights and that a water right is a "real property right." As such, water rights for many purposes are treated like land.<sup>18</sup> A tangential, but important, preliminary question sometimes arises: When in the process of maturation of a water right does the permit turn into a water right and into a real property interest?

The issue could be relevant in a number of contexts.<sup>19</sup> For example, assume that a landowner has obtained a permit to appropriate water, has not yet constructed the diversion works, and is still within the time period the permit allows to construct the diversion works—typically sometime prior to December 31st of the calendar year following the

year in which DWR issues the permit. The question arises whether the permit holder has a water right, a real property interest, or anything of value.

DWR's general position is that a permit does not become a water right, and therefore does not become a real property interest, until perfection—i.e., until the holder diverts water under the authority of the permit.<sup>20</sup> DWR's position has merit for some situations. Moreover, it comports with historical water appropriation law, especially the law prior to the creation of the administrative permit system, when water rights were developed by diverting water and not by first obtaining a permit.<sup>21</sup>

DWR's position in that context, however, does not cover the question for all situations. A mere permit even before perfection gives the holder something of value. If A has obtained a permit to appropriate water and prior to perfecting the water right A sells to B the land on which the water is to be used, B may proceed with constructing the diversion works and with perfecting the water right, thus enabling B to preserve the priority date established by A. DWR recognizes B's right to do so.<sup>22</sup> Or, if neighbor B attempts to obtain a permit in the vicinity, the existence of A's earlier permit, although not yet matured into a water right by perfection, may cause DWR to deny B's application, either because B's proposed use will result in too much water being taken<sup>23</sup> or will violate well spacing requirements.<sup>24</sup> If B really wants or needs a permit, B could contract with A for A to give up A's permit. If A's permit were the last possible permit granted in the vicinity because of safe yield rules, the permit would have some value—perhaps less value than a water right, but some value. It would likely be subject to condemnation, just as a fully perfected water right would be. Having it is better than not having it. Thus, whether the unperfected water right is technically a real property interest or not, it is something of value in sales, condemnation, and other contexts.

16. K.S.A. § 82a-718 (2000 Supp.). See Section IV.E., *infra*.

17. See Section IV.B.1., *infra*.

18. We use deeds for conveyances, not assignments or bills of sale. We use mortgages, not UCC Article 9 security interests, if a water right is put up as collateral for a loan. We recognize that the statute of frauds requiring written contracts for sales of land is applicable to sales of water rights, but not for sales of water for which the UCC statute of frauds might govern depending on the dollar amount of the transaction. A farmer selling a water right separate from the land could arguably follow the Internal Revenue Code rules on like-kind exchanges and postpone capital gains taxes by purchasing land with the proceeds. I.R.C. § 1031 (a) (1) (1986 Code). That section states in part: "No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment."

19. See "Loss of Kansas Water Rights for Non-Use," *supra* note 12, at 806-808, for treatment of the issue of when in the loss context a water right in its maturation process becomes a real property interest.

20. See "Loss of Water Rights for Non-Use," *supra* note 12, at 807. See also, "Kansas Water Rights: Changes and Transfers," *supra* note 10, at 23, text and note 28, which discusses DWR policy not to permit changes until a water right is certified.

21. See Gould, G. and Grant, D., *CASES AND MATERIALS ON WATER LAW*, 6th ed. (2000) (hereafter "WATER LAW") at 119 & 120, Note 1 ("[o]nce the application to beneficial use was made, an unfiled appropriation was a completed and vested right"), and at 60, Note 3 ("rights in water are perfected only when captured (applied to beneficial use)—until then, 'an appropriator obtains protected, albeit inchoate, rights in water by taking 'a first step' towards appropriation." Under the direction of State Engineer Elwood Meade, Wyoming was the first state to enact

legislation creating an administrative permit system. See *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 236 P. 764 (1925).

22. Phone conversation with Leland Rolfs, Staff Attorney, Ks. Dept. of Agriculture and Special Ass't Attorney Gen., Sept. 26, 2000, who quoted former chief engineer Guy Gibson as saying that "the permit is a license that runs with the property." See *WATER LAW*, *supra* note 21, at 200, Note 9, for authority on both sides of the question of whether inchoate permits by themselves can be transferred, and for authority that applications for permits cannot be transferred.

23. K.A.R. § 5-21-4 (2000), § 5-23-4 (2000), and § 5-24-2 (1997) include the quantities of "earlier priority applications" in the depletion formula of GMD No. 1, No. 3, and No. 4, respectively. GMD No. 2 and No. 4 do the same thing with their safe-yield formulae in K.A.R. § 5-22-7 (1997) and § 5-25-4 (1997). Outside the boundaries of the GMDs, DWR uses a safe yield analysis and includes in the analysis "the combined authorized annual quantities under all groundwater rights and approvals of applications, and requested by pending applications with a senior priority . . ." K.A.R. § 5-3-11 (d)(1)(C) (2000). "Calculated recharge" outside the boundaries of GMDs is "calculated using the data shown in water resources investigations report 87-4230, plate no. 4, dated 1987, prepared by the United States geological survey." *Id.*, § 5-3-11 (d)(1)(D) (2000). This report is available from the U.S.G.S.

24. The regulations on well spacing do not address the issue of potential new wells from pending but not-yet-approved applications. See K.A.R. § 5-21-3 (2000), § 5-22-2 (1997), § 5-23-3 (2000), § 5-24-3 (1997), and § 5-25-2 (1997). However, neither DWR nor the GMDs would generally approve a new application were the well location to violate a well-spacing rule when applied to a senior application, until they had made a decision on the senior application.

### III. Obtaining the water rights information

#### A. In General

A client may engage an lawyer from the inception of the project, or the client may bring a signed contract that binds it as a buyer of a water right. If the former, the lawyer has a better chance of crafting the contract to insure that the client is buying what it really wants and needs – a water right versus water, for example, or all the water rights appurtenant to a quarter section of land versus one specific water right among several appurtenant water rights. In any case, the lawyer's first chore is to find out exactly what rights the client is purchasing, then to gather pertinent information about those water rights, next to learn and apply the law to the situation, and lastly to draw conclusions and make recommendations.

Information in general about water rights can be found in several places—in DWR files in the DWR home office in Topeka or in one of the field offices in Stafford, Garden City, Stockton, or Topeka (now located in the same building as the DWR main office), depending on the location of the water rights; in GMD offices;<sup>25</sup> or, in the case of domestic water rights, on the land itself.<sup>26</sup>

#### B. DWR and GMD information

Lawyers close enough geographically to visit the DWR field office personally may examine the water rights files before requesting copies. Most of the time, however, one does this by mail or fax using a DWR Request for Open Records<sup>27</sup> Access Form obtainable from the field office. A call beforehand will aid personnel there in learning what is desired. They can tell the lawyer what it will cost and whether payment must be made before or after receiving the information.

The extent of the information requested will depend on the purpose of the study and the financial ability of the client to pay for extensive copying. While routine correspondence and intra-office memoranda in a water rights file may contain information germane to the inquiry, sometimes such information is irrelevant. One may request all of the contents of a file, in which case DWR personnel will copy the whole file, except for matters deemed confidential due to some privilege,<sup>28</sup> such as internal legal opinions, etc.. Or, one may request only specific items, such as "all DWR documents (application for permit, permit, certificate, change

orders and other orders, and annual use reports)." A typical request should include the water right's computer printout summary,<sup>29</sup> copies of all the official documents in the file, and copies of the annual use reports, but this latter data is also shown on the computer printout summary. Sometimes it is helpful to compare the information contained on the computer printout summary with that in the actual document, if that information is central to the inquiry. For example, if the water use during the perfection period is crucial in determining the quantity to be certified, the computer printout summary should be checked against the actual annual use reports.

The information contained in one document may lead to a request for more information. Some DWR permits, for example, do not expressly spell out the irrigated land covered by the permit, instead referring back to the "land described in the application." In that case, the original application should be obtained and examined.

Some files are relatively clean and uncluttered. Others are full of complexity caused by the nature of the water right, changes in the water right, and problems of the owners through the years. The size of the water right, i.e., in annual quantity of water permitted, does not necessarily determine the complexity of the file. Ironically some of the smaller, less valuable water rights are more complex and problematic than larger ones.

The GMD offices have information on all the files located within the boundaries of the GMD. GMD personnel are very helpful in providing information, as well as in aiding the lawyer in analysis. With the plethora of statutes and regulations, and previously of DWR<sup>30</sup> and GMD policies,<sup>31</sup> the occasional water lawyer, indeed even the seasoned water lawyer, can only with great difficulty find and interpret all of the potentially relevant rules that bear on any given issue or project. Calling DWR and GMD personnel early and seeking advice and direction often saves time, produces valuable information, and lays the groundwork for the further relationship that will follow as the project moves to completion.

The mathematical and scientific techniques DWR and GMD personnel employ in analyzing the water right are useful. For example, the lawyer may request computer

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25. See note 7, *supra*.

26. Domestic rights require no prior permit from DWR, although one may obtain a permit before creating a domestic right. K.S.A. §§ 82a-705 and -728 (1997). K.S.A. § 82a-701(c) (1997) defines domestic uses as "the use of water by any person or by a family unit or household for household purposes, or for the watering of livestock, poultry, farm and domestic animals used in operating a farm, and for the irrigation of lands not exceeding a total of two (2) acres in area for the growing of gardens, orchards and lawns."

27. See K.S.A. §§ 45-216, et seq. (1993) and (2000 Supp.).

28. See K.S.A. § 45-221 (2000 Supp.), which states that certain documents need not be opened; K.S.A. § 45-221 (b) protects, for example, "[r]ecords which are privileged under the rules of evidence,

unless the holder of the privilege consents to the disclosure."

29. See Section IV.C., *infra*.

30. Legislation in 1999 (S.B. 287, codified at K.S.A. § 82a-1903(a)(1) & (2) (2000 Supp.)), required DWR to change its administrative policies and procedures to rules and regulations for them to have the force and effect of law. These regulations appeared in the Sept. 7, 2000 issue of the Kansas Register, at page 1476, and became effective Sept. 22, 2000.

31. See *Id.* The legislature abolished GMD policies as it did DWR policies if the policies had the force and effect of law. See K.S.A. § 82a-1903(b)(1) & (2) (2000 Supp.).

analyses, maps, and diagrams showing location of wells within circles of a given size. Such maps, diagrams, and lists of owners of water rights show important information about location of other wells (for well spacing requirement purposes), about the total quantities of water being withdrawn within circles of various radii for applying safe-yield or depletion formulae in the regulations,<sup>32</sup> or about the relative location of water rights.

**It is sometimes useful to examine the site where the water is being diverted and used under the authority of the water right.**

The relationship between the GMDs and DWR is an important one. The enabling legislation for GMDs in the early 1970s resulted in the establishment of the five GMDs. The stated purpose of creating GMDs was, and is, "to establish the right of local water users to determine their destiny with respect to the use of the groundwater"<sup>33</sup> while at the same time "to preserve basic water use doctrine"<sup>34</sup> and to insure that the GMDs perform their roles without "conflict[ing] with the basic laws and policies of the state of Kansas."<sup>35</sup> While legislation enacted by the 1999 session of the Kansas Legislature<sup>36</sup> may call into question this fundamental goal, the general object stated in the GMD statute of providing some measure of local control still stands. The GMDs are not arms of DWR or even state agencies. They are a type of local unit of government.

### C. Information in the field

It is sometimes useful to examine the site where the water is being diverted and used under the authority of the water right. The site visit is useful in the case of domestic water rights, which need not be recorded and which therefore may have no public records to examine. And, as in the case of other types of land transactions, it is usually helpful to have viewed the land before doing further work on the

project in the office. Sometimes errors can be found. For example, because one attribute of every water right is its point of diversion, seeing the land can uncover errors in the location shown on the permit or even the certificate.

## IV. Assessing the Water Rights Information

### A. Introduction

The analysis begins with examination of DWR documents, which show the attributes of the water rights and the conditions on the permit and certificate. One also studies the annual use reports, and DWR correspondence. Sometimes the buyer will be purchasing the water right with a view toward using the water for a purpose different than its current use or for use at another location, so the lawyer must bear in mind the necessity of eventually filing applications for changes under section 708b of the Act.<sup>37</sup>

### B. Attributes of water rights

The attributes of a Kansas water right are the priority date, annual quantity, diversion rate, point of diversion, place of use, and type of use.<sup>38</sup>

#### 1. Priority date and file number

Under the appropriation system, the principle "first in time, first in right" governs. In times of conflict, a senior right takes precedence over a junior right. A senior right holder can seek administration of the rights by DWR or seek to enjoin the holder of a junior right that is impairing the senior right.<sup>39</sup>

Kansas recognizes two general types of water rights, vested rights and appropriation rights. Vested rights are water rights being exercised under the common law at the time the Act went into effect in 1945.<sup>40</sup> Persons claiming those rights filed information with DWR to obtain recognition of the rights, and DWR issued "determinations" for

the public, and § 82a-707(a) (1997) states that "[s]urface water and ground waters of the state may be appropriated . . ." DWR classifies the source of water for every right as either surface water or groundwater, and then further classifies the source by specific river basin—for example, "groundwater in the drainage basin of the Little Arkansas River" or "the natural flows in the Little Arkansas River." A permit from the Dakota Aquifer might show the source as "groundwater in the drainage basin of the Arkansas River," but have a condition that "the source of supply will be restricted to withdrawal of water from the Lower Cretaceous (Dakota) Formation, thereby precluding withdrawal of water from any overlying water-bearing strata." Despite using the rigid system of two classes of water, DWR recognizes the interconnection between groundwater and surface water. See Peck, J. and Nagel, D., "Legal Aspects of Kansas Water Resources Planning," 37 U. Kan. L. Rev. 199, 281-318 (1989) (hereafter "Water Resources Planning").

39. K.S.A. § 82a-717a (1997). These remedies are possible, however, only if by administration or injunction the senior right holder can have its water needs met by curtailing pumping by the junior right holder. See K.A.R. § 5-4-1 (2000); see also WATER LAW, *supra* note 21, at 68, Note 4.

40. See the original K.S.A. § 82a-704 (now repealed) for the procedure.

32. See, e.g., K.A.R. § 5-21-4 (2000) (safe yield for Western Kansas GMD No. 1) and K.A.R. § 5-23-4 (2000) (depletion for Southwest Kansas GMD No. 3). K.A.R. § 5-23-4 (2000) contains the following formula:

$$\text{Allowable Aquifer Yield} = \frac{0.40AMS}{25} + \frac{AR}{12}$$

Allowable aquifer yield = the amount of water, measured in acre-feet, available annually for appropriation from a proposed point of diversion (well).

A = the "area of consideration," as defined in K.A.R. 5-23-1 (c).

M = feet of average saturated thickness of the high plains aquifer within a two-mile radius.

S = the storage coefficient or a specific yield of 15 percent.

R = average annual recharge and return flow which shall be a minimum of one inch per year.

33. K.S.A. § 82a-1020 (1997).

34. *Id.*

35. *Id.* See Peck, J., "Kansas Groundwater Management Districts," 29 U. Kan. Law Rev. 51 (1980).

36. K.S.A. § 82a-1903(b)(1) & (2) (2000 Supp.). See note 30 *supra*.

37. See Section IV.F., *infra*.

38. The source of water is sometimes listed as a separate attribute of a water right. See, e.g., WATER LAW, *supra* note 21, at 27, Note 1. K.S.A. § 82a-702 (1997) dedicates "all" water in the state to the use of

these rights until 1980.<sup>41</sup> DWR uses a numbering system for vested rights that incorporates the name of the county where the vested right's point of diversion is located. A vested right in Sedgwick County, for example, might be numbered "SG-13," i.e., the thirteenth vested right recognized in Sedgwick county. But the numbers themselves are meaningless in terms of relative priority among vested right holders.

DWR began numbering appropriation rights consecutively in 1945, when the Act was passed. To date DWR has assigned over 44,000 numbers for appropriation applications.<sup>42</sup> Examples are File No. 9,141 with a priority date of February 4, 1963, and File No. 43,280 with a priority date of March 19, 1998. The permit may be for either groundwater or surface water.<sup>43</sup> The date of the water right is the date the application arrives in DWR's office.<sup>44</sup> DWR will certify the right at a later date, but the priority date is the date of arrival of the application, not of DWR's issuance of the permit or the certificate.

While generally there is a clear distinction between vested and appropriation rights, some anomalies exist. For example, the two large industrial water rights held by the U.S. Army for the Sunflower Army Ammunition Plant on the Kansas River near DeSoto carry file numbers 37 and 38.<sup>45</sup> Yet, their dates of first use, April 1, 1943, and January 20, 1943, respectively, predated the 1945 Act, which means they seemingly could have been determined as vested rights and not appropriation rights and which would have given them an even higher priority.

In a conflict between a vested right and an appropriation right, the vested right should prevail because by definition all vested rights predate appropriation rights. While the Act enables the chief engineer to administer water rights when there are conflicts between two appropriation rights or a conflict between a vested right and an appropriation right,<sup>46</sup> it does not address conflicts between two vested right holders. The chief engineer in those cases would likely defer to the courts.<sup>47</sup>

With these principles in mind, the lawyer for the buyer of the water right will want to note the type of water rights, vested or appropriation, and the priority dates and numbers of the appropriation rights. In general the lower the num-

ber of an appropriation right the better, all other things being equal. If, for example, there were two water rights side by side on a stream and they were equal in all regards but priority date, the more senior right would be preferred to the junior right, meaning that if they were both on the market, the senior right would theoretically command a higher price. In the case of two adjoining rights of equal priority (two vested rights, for example) and equal in all other regards, the upstream right may be better, if only because the onus of seeking relief typically falls on the downstream user.<sup>48</sup>

In the typical transaction, however, the file numbers and priority dates are simply facts to be noted; the buyer is usually not making a comparison of dates and file numbers with other water rights. In fact, while in general one can say that senior rights are superior to junior rights, it is the relative geographic position to other rights in the vicinity that is more important in the analysis than are absolute file numbers. For example, a buyer could be purchasing a water right, say, file number 2,109, which in absolute terms viewed in the state as a whole, is a very senior right. However, if this right sits near two vested rights and a more senior appropriation right, the seemingly low number and senior status of No. 2,109 is not as strong as it might be were it located somewhere else away from the vested rights and the more senior appropriation right. Two actual case examples further illustrate this point.

First is the 1972 district court case of *File v. Solomon Valley Feedlot, Inc.*<sup>49</sup> Plaintiff alleged that his irrigation wells under File No. 6,081 were being impaired by nearby irrigation and industrial (feed lot) water rights. The district court enjoined several rights causing impairment.<sup>50</sup> The impairing wells were all within one mile of plaintiff's wells, and they had file numbers ranging from No. 7,266 with a priority date of April 8, 1957 to No. 14,952 with a priority date of

***In a conflict between a vested right and an appropriation right, the vested right should prevail because by definition all vested rights predate appropriation rights.***

41. K.S.A. § 82a-704a (1997). Determinations were made for years after 1980, but the cut-off date for filing was July 1, 1980.

42. This does not mean that there are over 44,000 active water rights in Kansas. Once a number is issued, that number remains, even if the permit is never perfected to create a water right or if the water right is abandoned. DWR does not replace these numbers with new permits, but rather continues to issue permits with new, "increasingly higher numbers. Sometimes DWR does not issue a permit even if DWR has assigned a number.

43. See note 38, *supra*, for more information about the two classifications for the sources of water, groundwater and surface water.

44. K.S.A. § 82a-707(c) (1997); K.A.R. § 5-3-2 (2000).

45. See K.S.A. § 82a-735 (2000 Supp.), which permits only the State of Kansas to negotiate with the Army to purchase these rights.

46. K.S.A. § 82a-717a (1997); K.A.R. § 5-4-1 (2000).

47. K.A.R. § 5-10-5 (2000) provides, however, that in cases where DWR has administered appropriation rights under K.S.A. § 82a-706b (1997), DWR shall "administer the water available from that source of supply among the holders who have active vested rights . . . on a proportional basis . . . The proportionment may be accomplished by a pro rata reduction in the rate or quantity that each vested right shall

be allowed to divert, by setting up a rotation system or by any other equitable method."

48. "You'd rather be upstream with a shovel than downstream with a water right." Western water law maxim. This holds true whether the water users are individuals on a stream or states sharing an interstate river. "The upstream state has a natural geographic advantage. It has first access to the water. It can take what it wants, leaving the downstream state to complain if the upstream use exceeds its compact share. An enforcement action by the downstream state is not only difficult and expensive, it almost always requires years to complete. Generally, a preliminary injunction is not available, and the upstream state continues to have use of water during the long trial." Third Report, Arthur L. Littleworth, Special Master, *Kansas v. Colorado*, No. 105, Original, in the Supreme Court of the United States, at 102 (Aug. 2000).

49. No. 8,831 (Mitchell Co., Kan. Nov. 29, 1972).

50. The basis of impairment in that case was pumping by nearby water users that caused plaintiff's pump rate to drop "at least 20 per cent in addition to the rate reduction caused by the pumping of plaintiff's irrigation well." *Id.*, Conclusions of Law, No. 5.

April 3, 1968. A water right further away that was not enjoined was No. 12,091 with a priority date of July 22, 1966.

**The water right applicant sets out the desired quantity, generally in acre feet but sometimes in gallons.**

A second example is the Walnut Creek Intensive Groundwater Use Control Area (IGUCA)<sup>51</sup> established in 1992 by the chief engineer after weeks of hearings conducted over several months in 1990 and 1991 in Great Bend. The focus was the large, senior, surface water rights from Walnut Creek and the Arkansas River held by the Kansas Department of Wildlife and Parks. Wildlife and Parks and several environmental groups sought to protect the Cheyenne Bottoms from diversions by junior appropriators upstream in Barton, Rush, and Ness Counties. The Order<sup>52</sup> established safe yield in the river basin by creating two large

classes of water rights—the Order calling them “senior rights” (those with priority dates of October 1, 1965 and earlier) and “junior rights” (those with later dates). The Order cut back permissible annual quantities of all appropriation rights, but the Order cut back the so-called “senior rights” less than it cut back the “junior rights.”

The relevance of these two cases is that there were water rights cut back or regulated, and yet throughout the state there are numerous rights that have not been cut back that are less senior to many of these that were cut back in those two cases, because they do not lie in those areas.<sup>53</sup> So it is the relative position of the right to other nearby more junior rights that is important, not the priority date in and of itself.

## 2. Annual quantity

The water right applicant sets out the desired quantity,<sup>54</sup> generally in acre feet but sometimes in gallons.<sup>55</sup> When issuing the permit, DWR will allow only reasonable quantities. Due to the decrease in annual precipitation moving westward from about forty-four inches in southeast Kansas to about sixteen inches in southwest Kansas,<sup>56</sup> for many decades DWR has prescribed annual quantities for irrigation rights that increased from eastern to western Kansas: one acre-foot per acre in the eastern third of the state, one

and one-half in the middle third, and two in the western third. A new regulation contains a detailed map showing permitted annual irrigation quantities for each county. The regulation contains gradations in tenths from one to two acre feet per acre for each county.<sup>57</sup> For example, Johnson County is permitted 1.0, Sedgwick County 1.3, Edwards County 1.5, Greeley County 1.8, and Hamilton County 2.0 acre feet per acre. Regulations prescribe reasonable annual quantities for livestock and poultry as well.<sup>58</sup>

DWR may eventually certify the water right to an annual quantity less than the quantity in the permit, because the certified quantity is limited to the amount of water used in any one year during the perfection period in accordance with the terms, conditions, and limitations of the permit.<sup>59</sup> If the water right being purchased is not yet certified, the buyer should examine the annual use reports and discuss with DWR personnel the annual quantity likely to be certified. Because of the disparity in the permitted versus the certified annual quantity, the buyer may want to condition the purchase on ultimate certification at a certain level, or base the cost of the right on the certified quantity and not the permitted quantity.

Moreover, the buyer may wish to use the water for another purpose or may want to change the place of use. In either case, the amount of water the buyer may be able to use after the purchase and after obtaining DWR permission for the change may be less than that permitted or certified. This point is discussed below in Section IV.F.

## 3. Rate of diversion

The permit prescribes the maximum instantaneous diversion rate<sup>60</sup> in gallons per minute (g.p.m.) and cubic feet per second (c.f.s.), usually the rate requested in the application.<sup>61</sup> If the owner can achieve that rate during the perfection period, DWR will certify the water right to that rate. A buyer of the water right needs to be sure that the permitted rate is sufficient for the buyer's intended purposes.

A water right division often creates problems with rates of diversion.<sup>62</sup> Take the case, for example, of a purchase by A of a quarter section of land that has an appurtenant water right, but the same water right is also appurtenant to an adjacent quarter section owned by B. A and B now own adjacent quarter sections, but have a common but undefined ownership in the appurtenant water right. They may

51. K.S.A. § 82a-1036 to -1038 (1997) and (2000 Supp.).

52. Order in the Matter of Designation of an Intensive Groundwater Use Control Area in Barton, Rush, and Ness Counties, Kansas (DWR, Jan. 29, 1992).

53. A similar example is found in the State of Idaho in the case of *Baker v. Ore-Ide Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973). Water users were “mining” a small aquifer (pumping more than is being replenished). The legislature had required safe yield, so the court shut off sixteen of twenty wells, in order of priority, sufficient to create safe yield. Other, more junior rights in the state were not affected.

54. K.S.A. § 82a-709 (1997) requires the application to contain the proposed annual quantity.

55. An acre foot is the quantity of water that covers one acre to a depth of one foot, or 43,560 cubic feet. Irrigation rights generally employ acre feet as the quantity measurement. One acre foot equals

325,851 gallons. Annual quantities for municipal rights are often shown in million gallons.

56. K.A.R. § 5-6-12 (2000).

57. K.A.R. § 5-3-24 (2000).

58. K.A.R. § 5-3-22 (2000).

59. K.A.R. § 5-8-3 (a) (2000).

60. An applicant should state the maximum instantaneous diversion rate, not the normal instantaneous diversion rate, e.g. 120 g.p.m. even if 100 g.p.m. will be the normal rate. Municipalities, for example, often use a lower rate in the winter, but a higher rate in the summer when demand is higher.

61. K.S.A. § 82a-709 (1997) requires the application to contain the proposed maximum rate of diversion.

62. See “Title and Related Considerations,” *supra* note 1, at 41.



contract to divide the ownership of the water right through a contract and deeds.<sup>63</sup> The divided water rights would then have separate ownership and would free up the owners to make future sales or to make changes in those divided rights.

Typically, the contract would provide that each owner receive an annual quantity proportionate to acreage each owner receives. If there is a well on each quarter, each party would receive a well. But there is typically only one well. They could agree to joint use, with easements and a sharing of future operation and maintenance costs. It may be better, though, to give the one well to the land owner where the well is located and have the other owner drill a new well. But herein lies the rub. Not only will the parties have to deal with questions of the regulations on additional wells<sup>64</sup> and well spacing,<sup>65</sup> but they will also be faced with the problem of insufficient rates of diversion. Like the annual quantity of a water right, the rate of diversion may not be increased. However, the rate of diversion may be the subject of an entirely new water right obtained for the sole purpose of increasing the rate of diversion. If the applicant meets the requirements of the regulation,<sup>66</sup> DWR will issue a new permit that contains a rate only and no annual quantity (actually the new right has a rate and annual quantity, but is limited to the total annual quantity of the other right or rights so there is no new net water quantity). The new permit would have a new, high file number and very junior status, but a rate nonetheless. These regulations may require current pumping rate information from flow tests.<sup>67</sup> Regarding priority of the two divided rights, the water right division contract could provide that one of the divided rights has a priority over the other one, or it could provide that neither divided right has priority over the other one.

#### 4. Place of use

The application must contain a description of the intended place of use.<sup>68</sup> Once established in the permit and certificate, it cannot be changed without prior permission from DWR.<sup>69</sup>

In most cases the documents clearly describe the place of use. For example, an irrigation right may say the "NW 1/4 of Section 15-T12S-R5W" or a municipal right may state that the water can be used "within the corporate boundaries of the city of Lawrence and immediate vicinity and within the boundaries of Rural Water District No. 4 of Douglas County." In other cases the place of use is not so clear. Permit applications, especially the early ones in the 1940s

and 1950s, may not have contained a decent diagram of the place of irrigation. The permit may state that twenty-four acres may be irrigated in the SW 1/4 NW 1/4 (forty acres). Recently, then, a ten-acre tract may have been sold from the forty, with nothing stated in the deed about the water rights. If the ten-acre tract is part of the original twenty-four acres of irrigated land, part of the water right would be appurtenant to the ten-acre tract. But without knowing exactly what land was originally irrigated, one cannot know for sure.

#### 5. Type of use

The Act defines domestic use<sup>70</sup> and names domestic, municipal, irrigation, industrial, recreational, and water-power uses in a preference list.<sup>71</sup> DWR regulations define those uses<sup>72</sup> and also name additional "beneficial uses of water":<sup>73</sup> stockwatering, artificial recharge, hydraulic dredging, contamination remediation, dewatering, fire protection, and thermal exchange, all of which are defined.<sup>74</sup>

The buyer's lawyer should check the type of use prescribed in the permit or certificate against the use the buyer intends to make of the water. If they are different, the buyer will need to obtain a change order from DWR. Sometimes the use the buyer wishes to make does not conform precisely with the types DWR has listed and defined in the regulation. For example, someone might purchase an irrigated orchard, which will be turned into a golf driving range. The regulation defines "irrigation use" to include "the watering of golf courses . . ." <sup>75</sup> so watering a driving range would arguably be an irrigation use as well. Or, a city might purchase an irrigation right, which the city will use to water parks and provide water for local industries. "Municipal use" is defined as "the various uses made of water delivered through a common distribution system" operated by cities and public water distribution districts.<sup>76</sup> In this case the city would have to obtain DWR permission to change from irrigation to municipal use if the city puts the water into a common distribution system. The buyer's lawyer should check with DWR personnel to obtain an advanced reading about whether DWR will require a change order for the intended use.

**Typically, the contract would provide that each owner receive an annual quantity proportionate to acreage each owner receives.**

63. See K.A.R. §§ 5-5-5 and 5-8-1 (2000).

64. K.A.R. § 5-5-16 (2000).

65. See K.A.R. §§ 5-4-4 (2000) for areas outside the boundaries of GMDs, and §§ 5-21-3 (2000), 5-22-2 (1997), 5-23-3 and 5-23-3a (2000), 5-24-3 (1997), and 5-25-2 (1997), for well spacing requirements in the GMDs.

66. K.A.R. § 5-4-5 (2000).

67. K.A.R. § 5-5-16 (2000), which deals with additional wells, states that "[t]he total maximum rate of diversion that may be authorized . . . shall not be greater than the total maximum rate of diversion that could have been diverted from the original well or wells if they were currently being replaced by new wells . . . . A reasonable value for the maximum rate of diversion shall be one of the following: (A) the total rate of diversion based on a current water flow rate test done on the

point or points of diversion \* \* \*

68. K.S.A. § 82a-709 (1997).

69. K.S.A. § 82a-708a (1997). See also K.A.R. § 5-5-11 (2000) (applications for change in place of use for irrigation purposes).

70. K.S.A. § 82a-701(c) (1997).

71. *Id.*, § 707(b).

72. K.A.R. § 5-1-1 (2000).

73. K.A.R. § 5-1-1(o) (2000).

74. K.A.R. § 5-1-1 (2000). This regulation also defines the types of use mentioned but not defined in the Act (municipal, irrigation, industrial, recreational, and waterpower).

75. K.A.R. § 5-1-1(pp) (2000).

76. *Id.*, § 5-1-1(rr) (2000).

## 6. Point of diversion

Every water right has one or more designated points of diversion. The permit may describe the location as "the NW 1/4 SW 1/4 SE 1/4," in which case the well would be somewhere in the described ten-acre tract. DWR ultimately attempts to describe all points of diversion as X feet north and Y feet west of the southeast corner of the section. The exact location can be very important in a water rights purchase because of DWR regulations limiting the distance that points of diversion can be moved under change orders. One regulation, for example, limits a change in location of the point of diversion of only up to one half mile.<sup>77</sup> If the right being purchased has a point of diversion over a half mile away from the desired location of the point of diversion, the applicant would have difficulty obtaining the change order and might have to seek an exception to the regulation.<sup>78</sup>

### C. The computer printout

On request DWR provides a computer printout for any water right. In just a few very concise pages, the printout shows a world of information.<sup>79</sup> The computer sheet also includes an "action trail," which lists important events in the history of the right, chronologically from the date of the permit application to the present. The action trail gives, for example, the perfection period, the date of the proposed certificate, and the date the certificate was issued. These computer printouts provide very helpful, basic, "skeletal" information, but they are no substitute for the original documents, which put meat on the bones. If there are conflicts between a document and its printout, the document will prevail, which is another reason to study the original documents.

### D. Conditions in the permit or certificate

Every permit and certificate contains pre-printed conditions the buyer's lawyer should study. These have changed through the years, so documents from different eras may contain different conditions. For example, recent permits contain a statement that the chief engineer "retains jurisdiction in this matter with authority to make such reasonable

reductions in the approved rate of diversion and quantity authorized to be perfected . . . ." A holder of a right obtained prior to the addition of this condition might claim an unconstitutional taking if the chief engineer were to reduce the annual quantity, analogizing this to a taking by the government of a strip of land without compensation.<sup>80</sup>

It is, however, the typed-in condition rather than the pre-printed one that should typically be of more concern to the water right buyer. Such conditions often place limitations on either annual quantity or rates of diversion. Often the condition ties in to another water right. For example, a condition may state that "the quantity of water approved under this application is further limited to the quantity which combined with Application No. 3,223 will provide a total of not more than 250 acre-feet of water for industrial purposes at the chemical plant."<sup>81</sup> Or a condition may limit a right such that "when pumping in combination with water right file No. 3,223 the pump rates combined may not exceed 1,000 g.p.m." Or a condition may state that one of two permitted wells is for standby purposes only.

### E. Possible abandonment

Water rights can be lost in whole or in part for non-use without "due and sufficient cause."<sup>82</sup> Until 1999, the abandonment period was three successive years, but is now five successive years of non-use.<sup>83</sup> Indications about potential abandonment can appear in DWR correspondence or water use reports, or from field inspection. If the non-use is serious and long term, and the owner cannot show DWR a valid excuse, DWR may either send a letter warning of non-use<sup>84</sup> or a notice of a hearing to declare the water right abandoned. Short of this, however, annual use data shown on the computer printout will sometimes indicate to a buyer that the subject water right has a potential abandonment problem. A field inspection could reveal that a well has collapsed or been plugged and is no longer pumping water.

Sometimes the potential abandonment is not so obvious. Take the case, for example, of an owner who has pumped from an unauthorized well. DWR maintains that unlawful pumping, not just the failure to pump, can lead to an abandonment.<sup>85</sup> Such information might be difficult to glean from DWR documents.

To obviate a potential problem of abandonment, a buyer

77. K.A.R. § 5-23-3(b) (2000).

78. K.S.A. § 82a-1904 (2000 Supp.) allows the chief engineer "with good cause shown" to grant an exception to a regulation "if the chief engineer determines that the exemption or waiver will not prejudicially or unreasonably affect the public interest and will not impair any existing water right."

79. It shows the type of the water right (vested or appropriation), source (groundwater or surface water), status (certified or not), priority date and other relevant dates, applicant's name and address and current correspondent's name and address, authorized annual quantity and rate of diversion, limitations, authorized points of diversion, places of use and their owners, DWR field office and if relevant the GMD, river basin, any special use areas such as IGUCAs, field inspection rate tests, meter information, overlaps, historic water use information, and existence of a water rights conservation program contract. (K.A.R. § 5-7-4 (2000) enables a holder of a water right to enroll the right in the water rights conservation program, which then allows the holder not to pump the right for a period of time not to exceed ten years. During the contract period, the right then is not in jeopardy of being declared

abandoned for non-use under K.S.A. § 82a-718 (2000 Supp.).)

80. See "Water Resources Planning," *supra* note 38, at 238-280 (1989), for a discussion of this question in the context of mandatory implementation of conservation measures. *But see Imperial Irrigation Dist. v. State Water Resources Control Board*, 225 Cal. App. 3d 548, 275 Cal. Rptr. 250 (1990) (against a claim that the state could not reduce its vested water right without compensation, court held that a state-imposed water conservation plan that would reduce the annual quantity of the right could be enforced).

81. See, e.g., K.A.R. § 5-8-3(b) (2000), which provides rules for limiting junior water rights when the junior and the senior water rights have a common authorized place of use.

82. K.S.A. § 82a-718 (2000 Supp.). See also "Loss of Kansas Water Rights," *supra* note 12.

83. *Id.*

84. Since 1999, this warning is now required after three successive years of non-use.

85. See "Loss of Kansas Water Rights," *supra* note 12, at 828-830, for arguments pro and con.

should require a condition in the contract that DWR certify the water right to be in good standing.

## F. Anticipating filing for change orders

Because the Act prohibits making changes in water rights (as described below) without prior DWR permission, buyers of water rights must anticipate such changes and take pre-contract precautionary measures. The most important point is to know what water right attributes may be changed: Type of use, place of use, and point of diversion may be changed; priority date, file number, annual quantity, and rate of diversion may not be changed.<sup>86</sup>

A prudent buyer will make the contract conditional on DWR approval for any needed changes. Even prior to signing the contract, the lawyer should visit with DWR personnel to learn of potential problems with the plan.

One type of change—place of use—needs further discussion. A “rule of thumb” in Western water law is that only the amount of water consumed can be changed to a different place of use.<sup>87</sup> For example, a buyer of a right with 100 units being totally consumed (no return flow to the stream) in a factory could change the entire 100 units to another place of use, because there would be no harm to anyone downstream. A buyer of a water right with 100 units used for water power (0% consumption because all water returns to the stream after running through the turbines) could not change any part of the water right to another location. A buyer of an irrigation right for 100 units that consumes 40 units and returns 60 units could change only 40 units to another location.

Kansas law follows this rule of thumb in several complex regulations.<sup>88</sup> Buyers seeking to change the place of use must contend with this rule and negotiate accordingly. For example, if a city is purchasing an irrigation right of 100 acre feet annual quantity to be used in the city for municipal use, the city will not be able to use all 100 acre feet after the purchase, but will generally be limited to a smaller quantity, unless the irrigation is 100% consumptive.<sup>89</sup> The purchase price could be based on the quantity DWR permits to be changed and not the quantity of the original water right.

## G. DWR Correctional Orders

Sometimes errors appear in the DWR documents. One typical error is the land description error, in which a permit or certificate mistakenly states, for example, that the water right covers the NW 1/4 of the SW 1/4, rather than the correct NW 1/4 of the SE 1/4. Other errors appear, such as the location of the point of diversion, annual quantities, or rates of diversion. When these errors are discovered and brought to the attention of DWR personnel, they will correct the error with a correctional order, a kind of nunc pro tunc order. These orders are intended to correct typograph-

ical and clerical errors, not to change substantive matters in which a change order or some other type of order would be required.

## V. The Water Rights Status Report

A type of “letter report” can be used to present the water rights assessment to the client. It is a report because that is what it purports to be and do—provide information about the status of the water right. Unless the client wants a formal opinion letter, the letter report would not be written as such, and nor does it probably rise even to the level of an advice letter. It is possible for a court to construe the letter report as a legal opinion and apply the same standards of care if the letter report includes advice or formally stated opinions. The letter report includes the facts of the contents of the file and may also include deductions and conclusions about the current status of the particular water right.

The format of the letter report is simple. After the introduction comes a detailed description of the water right as shown in the records and if applicable from a field study. The description would provide information about the attributes of the water right—the priority date, annual quantity, rate of diversion, point of diversion, place of use, and type of use. It would describe changes requested by the owner and approved or not approved by DWR. It might describe nearby senior rights and information about historic administration of the water right in question. It would then point out possible errors in documents that need to be corrected with a “correctional order” or explain why such an order might not be possible. It would point out troubling conditions and limitations in the permit or certificate. It might point out that a period of non-use appears to make the right vulnerable to abandonment and that unless facts reveal otherwise DWR might declare it abandoned.

This letter report on the quality of the water right is separate from the opinion letter concerning title to the water right.<sup>90</sup>

**DWR maintains that unlawful pumping, not just the failure to pump, can lead to an abandonment.**

*(continued next page)*

86. K.S.A. § 82a-708b (2000 Supp.). *But see* Section IV.B.3., *supra*.

87. *See* WATER LAW, *supra* note 21, at 196, Note 3.

88. K.A.R. §§ 5-5-3, 5-5-8 through 5-5-12 (2000).

89. For example, drip irrigation or use of water in a different watershed might be 100% consumptive.

90. *See* note 1, *supra*.

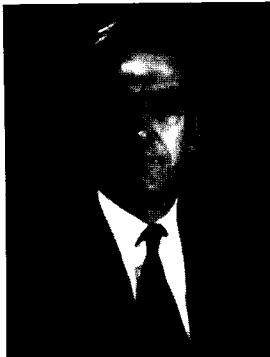
## VI. Conclusion

Like other states, regions, and countries, Kansas is facing increasing stress on its water resources, leading to disputes, sales transactions, applications to change attributes of water rights, and novel management proposals.<sup>91</sup> More lawyers willing to practice water law will be needed to help resolve these tensions. A new water right problem can be daunting to the lawyer whose practice does not generally include

water law matters. This article has attempted to provide the basic information needed by lawyers and others who are trying to understand the quality of a water right, whether the right is the subject of a dispute, purchase, change, management proposal, or evaluation by the owner. This article and the earlier, companion article on title aspects of water rights transfers will hopefully be useful—indeed an encouragement—to the lawyer in taking the first steps of the analysis.

91. See, e.g., "A New Idea for Managing the Ogallala Aquifer for the Future," KWO & KDA/DWR Public Information Sheet 1/2001 (suggests creating two pools for management purposes, the "Usable Pool" and the "Conservation Pool"; the usable pool could be depleted, while annual

pumping from the conservation pool "would be based on the recharge rate, plus any additional volume necessary for the water to sustain communities and the environment."



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