

Title and Related Considerations in Conveying Kansas Water Rights

By John C. Peck¹

Introduction

Sales of water rights are becoming more common in Kansas. As stated in a 1988 *Journal* article: "We are nearing a time when most of the water in the state will be appropriated under our permit system. 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."²

While new water rights may still be obtained in some places in Kansas by applying to the Division of Water Resources (DWR), there has been an increase in the numbers of sales and condemnations of water rights since the 1988 article. For example, the cities of Wichita, Dodge City, and Valley Center have purchased nearby irrigation water rights. The Kansas Court of Appeals recently upheld the condemnation of water rights by the City of Ulysses.³

A water right is usually purchased with the land, such as when a purchaser buys an irrigated tract of land. For this article, however, I generally assume that the water right is being purchased separate from the land. An example is a city purchasing a nearby irrigation right. In either case, a buyer needs to be concerned with both title to the water right and the validity of the water right. A seller may have good title to the water right, but the water right may have problems, or a seller may have problems with title to the water right, but the water right itself may be in perfectly good standing and of good quality.

Under the Kansas Water Appropriation Act,⁴ a water right, whether a vested right⁵ or an appropriation right, is "a real property right appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal, or by inheritance."⁶ A water right does not constitute ownership of the water itself.⁷ It is only a usufruct, a right to use water.⁸ When a city purchases an irrigation right apart from the land and thereby severs it from the land to which it is appurtenant, the city has to obtain permission from DWR to change the place of use and the type of use — and the point of diversion, if a new well is to be drilled.⁹ Before approving a change application, DWR generally requires that the right be certified.¹⁰

The purpose of this article is to highlight briefly, without going into much detail or analysis, some of the title and related questions the buyer's lawyer might face when the client seeks to purchase a water right. I will leave to a future article the consideration of the quality of the water right aside from title and of other matters casually mentioned but not discussed in this article.¹¹ To some extent, the problems are intertwined. The location of the land and water right within a special water district, for example, implicates both title and quality problems.¹²

II. Some Title Questions in Water Rights Transfers

A. Abstract of title versus title insurance

Title insurance companies generally do not insure the title to a water right. Indeed, the title insurance commitment for the appurtenant land generally lists the water right, if it has been certified and filed of record, as a specific exception to coverage. Abstracts of title are becoming rare in many parts of Kansas, and many title companies will either refuse to make an abstract or will charge a very high price for the abstract. Even if the abstract is more expensive, it is preferable to a title insurance commitment in the water rights context.

Despite lack of availability and cost constraints of abstracts, there are several reasons a buyer's lawyer should

require an abstract of title to the appurtenant land if possible. The abstract provides basic information about all muniments of title, as well as other recorded documents that adversely affect title. Many abstracts provide copies of some of these documents, such as oil and gas leases. Examination of deeds and other muniments of title will reveal if the grantor has ever reserved water rights. For example, the United States as owner might have conveyed land, but excepted out "existing water rights and flowage rights of record, if any." Or a deed from an individual might have conveyed land, but excepted "the exclusive right to all water power and flowage rights."

Even oil and gas leases should be examined. An oil and gas lease may have included a grant to the lessee of the right to "use water." Technically, such a grant should not be recognized under the Kansas Water Appropriation Act, because with only a few exceptions water use is prohibited without permission of the Chief Engineer.¹³ But it does create an apparent cloud on the title. If there is a lease of record and the lease includes a water use clause, the buyer should ensure that the lease has expired or should obtain a quitclaim deed to the water rights from the lessee.

If the buyer cannot obtain an abstract, the buyer should obtain a title insurance commitment on the appurtenant land, along with copies from the records of all muniments of title and all exception documents. Sometimes a combination of an abstract and title insurance is necessary. For example, a city may be purchasing the water right separate from the land, for which the city should require an abstract. The city may also need to acquire a well site and pipeline easements, for which the city may use title insurance.

B. The deed

The buyer should require a general warranty deed from the seller, unless the seller is a trust or executor or other such entity from whom a special warranty deed would suffice. Whether land and appurtenant water rights are being purchased together or just the water right is being purchased separate from the land, I suggest that the deed be drafted to describe specifically the water rights being transferred: for example, "all water rights appurtenant to the NW 1/4 ...

FOOTNOTES

1. My sincere thanks to Diane Worth for editing this article, and to Leland Rolfs, Laura Palmer, and Robert E. Nugent for their very helpful comments.

2. Peck, J., Rolfs, L., Ramsey, M., and Pitts, D., "Kansas Water Rights: Changes and Transfers," 57 J.K.B.A. 21 (July 1988) (footnotes omitted) (hereafter "Changes and Transfers").

3. *Sullivan v. City of Ulysses*, 23 Kan. App. 2d 502, 932 P.2d 456 (1997).

4. K.S.A. §§ 82a-701 to -734 (1989 and 1996 Supp.).

5. A vested right is a right to continue using water after 1945, based on a water right pre-existing the 1945 Water Appropriation Act. Prior to July 1980, DWR established and determined all vested rights under Section 704a of the Act.

6. *Id.*, § 701 (g) (1989).

7. *Id.*, § 707 (a) (1989).

8. *Id.*, §§ 701 (g) & 707 (a) (1989). See *Williams v. City of Wichita*, 190 Kan. 317, 338, 374 P.2d 578, 594, cert. dismissed, 375 U.S. 7, reh'g denied, 375 U.S. 936 (1963).

9. *Id.*, § 708b (1996 Supp.).

10. *Id.*, § 714 (1996 Supp.). See *Changes and Transfers*, *supra* note 2,

at 23, n. 28.

11. These matters include, *inter alia*, the priority date, the possibility of abandonment, the pump rate, other water rights in the vicinity and their relative priority dates, location in or near water districts and intensive groundwater use control areas, safe yield considerations, consumptive use, physical problems necessitating easements, and certification questions.

12. The abstract or title insurance commitment would note, for example, the creation, existence, and location of the special district as a possible cloud on the title. The regulations of the district can affect the quality of the water right.

13. K.S.A. § 82a-728 (1989) makes several exceptions, including domestic use and "the production and return of salt water in connection with the operation of oil and gas wells in accordance with the written approval granted therefor by the Kansas corporation commission pursuant to K.S.A. 1980 Supp. 55-901" K.S.A. § 701 (c) (1989) 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."

including, but not limited to, vested right DG-002 and appropriation water rights No. 3,156 and No. 33,567, but excluding domestic rights" I make this suggestion even though Section 82a-701(g)¹⁴ states that water rights pass automatically with a sale of the land. In the case of purchasing only water rights, while one could say in the deed "all the water rights appurtenant to the SW 1/4 ...," it is preferable to add language such as "including, but not limited to, vested right DG-004 and appropriation water rights No. 3,156 and No. 33,567, but excluding domestic water rights" This practice of specifically spelling out the numbers and types of water rights forces the parties to focus on the existence and proper descriptions of the water rights.

The Water Appropriation Act provides that a water right is appurtenant to but severable from the land on which the water is used.

C. Title to the water right

1. In general. The Water Appropriation Act provides that a water right is appurtenant to but severable from the land on which the water is used.¹⁵ Arguably, while most water rights are appurtenant to land, some water rights are not. For example, a city's water right may describe the place of use as the land within the city limits. The city water system then distributes the water to be used at homes and businesses served by the city's distribution lines, but the city does not own the land where the water is used, except for parks, city buildings, and other municipal lands.¹⁶ Generally, the chain of title to the water right is the same as the chain of title to the land to which the water right is appurtenant. It is possible for a water right to have a separate chain of title, although this situation would be unusual in Kansas, because generally a water right is appurtenant to some land and generally water rights have not been severed from the land in sales. A water right could have its own separate chain of title in a case in which the right has been severed from the land (or never have been appurtenant to the land, as in the case of the city mentioned above), and the right has been sold at least one time.

DWR documents, such as the permit and the certificate,¹⁷ are not determinative of ownership of the water right. DWR issues the permit to the applicant, who may or may not be the "owner" of the water right (the applicant may not be the owner because the Water Appropriation Act permits persons other than the owners of land to apply for and obtain a permit, but gives "control" of the water right to the owner of the land¹⁸).

The owner of the water right does not typically file the permit with the register of deeds. To review the permit, the examiner must obtain a copy either from DWR in Topeka or from a DWR field office (Topeka, Garden City, Stafford, or Stockton). Only vested rights, certificates for appropriation rights, or change orders related to water rights would typically be filed with the register of deeds. The certificate describes the water appropriation right, the appurtenant land, and the apparent owner at the time the right is certified. But deeds and other forms of conveyance, not the DWR water rights documents, determine the make-up of the chain of title and ownership.

2. DWR change order as deed. Typically the chain of title would consist of the usual muniments of title such as deeds, probate cases, court cases such as quiet title actions or divorces, and foreclosure actions resulting in sheriff's deeds. A question pertaining to title of a water right is this: In cases in which a DWR change order has added appurtenant land to a water right, is the DWR change order tantamount to a deed? Because a change order may add appurtenant land to a water right and because a water right is "subject to the control of the owners of the lands,"¹⁹ it can be argued that a change order that adds land to a water right acts effectively as a deed, thus vesting ownership of a part of the water right in a new owner. This new ownership would then require the signature of the owner of this new land when the owner of the water right either sells it or seeks a change order from DWR.

Say, for example, that A owns the NW 1/4 of Section 14 and has an appurtenant irrigation right. Through a DWR change application and an order, A has added the west 80 acres of the NE 1/4 of Section 14 to the water right such that A can now irrigate 240 acres rather than the original 160 acres. This 80-acre tract was owned by his neighbor B from whom A rented the tract. A now wants to sell the quarter section. B could argue that B owns the portion of the water right now appurtenant to the 80-acre tract, even though A has never executed a deed to B. DWR takes the position that the change order in this situation can operate as a deed, at least in the sense that DWR would require the signature of B as a co-owner if a change application were filed.

That B does not own any part of the water right is supported by arguments under general property law concepts. A deed is the document for voluntarily conveying land to another person, and the common law regarding conveyancing²⁰ and the statutes governing the writing of deeds²¹ and the recording of deeds²² have certain formality requirements, such as words of grant, delivery of the deed by the grantor,²³ and acknowledgment by the grantor. Can there have been a conveyance without delivery or without using the form and words of a deed?

14. Throughout the text of this article, section numbers refer to sections of the Kansas Water Appropriation Act, K.S.A. §§ 82a-701 through 754 (1989 and 1996 Supp.), *supra* note 4.

15. K.S.A. § 82a-701(g) (1989). See text at note 6, *supra*.

16. In some instances, DWR has recognized water rights that are not appurtenant to land, but those water rights were created by contract to solve specific problems.

17. K.S.A. § 82a-714 (1996 Supp.).

18. *Id.*, § 708a (1989).

19. *Id.*

20. See Casner, A., "American Law of Property," v. III, § 12.1 *et seq.* (1952) (hereafter referred to as "Amer. Law of Prop.") for various methods and requirements of conveyancing.

21. K.S.A. §§ 58-2203 (1994) (form of a warranty deed) and -2204 (1994) (form of a quitclaim deed).

22. *Id.*, -2221 (1994) (recording instruments).

23. "Except as a grantor may be estopped to deny it, delivery by him is absolutely essential to a transfer of title. Amer. Law. of Prop., *supra* note 20, § 12.64, at 311-312 (footnotes omitted).

The DWR form for the application for the change in place of use under section 708b of the Act is arguably tantamount to a deed. This application form requires the owner of the water right to verify the contents of the application and further contains a notary signature, but it does not contain an acknowledgment. Yet, if a deed becomes valid and recordable by being acknowledged by the grantor after the fact of signing, then arguably an instrument such as a change application with a signature witnessed by a notary contemporaneously with the signing could be deemed equally effective.

Regardless of the answer to the question, the buyer's lawyer should take the position that any owner of the water right's appurtenant land must sign a deed. Those owners may include individuals whose land was added to a water right by a change order.

3. Title to the land to which the water right is appurtenant.

Considerations other than those just discussed indicate that title to the appurtenant land is important. The Appropriation Act provides that "[a]ny rights to the beneficial use of water ... shall attach to the lands on or in connection with which the water is used and shall remain subject to the control of the owners of the lands ..."²⁴ A water right may be appurtenant to lands owned by more than one person, even though only one person seems to control the water right, a situation that can be created in several ways. One way is the change order discussed immediately above. A second way to create the situation is for a testator with two irrigated quarter sections served by one well on one quarter to devise one quarter to one child and the other quarter to the other child. Third, the owner may convey one quarter to one person and the other to another person with nothing stated in the deeds about the water rights. Fourth, the owner may sell small parts of the original appurtenant land. Take, for example, a water right originally described in 1952 as appurtenant to "ABC Inc.'s industrial site located in the NW 1/4 of Section 5" From this quarter section, ABC Inc. then sells a 5-acre tract to XYZ Corp., conveys a tract to the county for a road, and sells a 40-acre tract to a nearby farmer, with nothing stated in any of the deeds about water rights. These new owners own a portion, undetermined, of the water right.

In each of these situations, the purchaser of the water right will need signatures of all the owners of the water right,

which now include the owners of the various tracts of land to which the entire water right is appurtenant. If a seller of the water right will not or cannot comply, the problem will have to be solved in other ways. For example, the various landowners may divide the ownership of the water right by agreement. They can then apply to the chief engineer for a "division" of the water right through a change application such that the various water right components are separated.²⁵ Or, some of the landowners could voluntarily give up the right by filing a request on a DWR form. Or, one landowner could seek to have a part of the water right on another landowner's tract declared abandoned because no water has been used on that tract for more than three years.²⁶

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D. Matters that can affect title

1. In general. Section 701(g) states that the water right passes "with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal, or by inheritance."²⁷ A title examiner must therefore carefully check muniments of title other than deeds to ensure that water rights have passed properly. A short- or long-term lease would include the water rights unless reserved. A mortgage of land includes the appurtenant water right unless reserved. A will that devises land would also devise the appurtenant water rights unless excluded.

A general rule of property law is that a conveyance of land includes appurtenances such as improvements and easements.²⁸ In setting out examples of types of voluntary transfers, Section 701(g) by negative implication suggests that involuntary transfers of land (other than "inheritance," which follows the list of types of voluntary transfers²⁹ in Section 701(g)) do not automatically include the appurtenant water rights.³⁰ This implication would mean, for example, that in condemnation of land, if the condemnor does not mention appurtenant water rights, arguably the land taken would not include the water rights.

Other questions typical of any title examination can arise in the water right context as well: questions about how to handle

24. K.S.A. § 82a-708a (1989).

25. See K.A.R. § 5-5-5 (1994). Each newly divided part of the water right would then have a designation following the water right number: for example, Appropriation Right No. 38,260 might become two rights, No. 38,260-D1 and No. 38,260-D2.

26. See K.S.A. § 718 (1989) and K.A.R. §§ 5-7-1, *et seq.* (1996 Supp.). See also Peck, J. and Owen, C., "Loss of Kansas Water Rights for Non-Use," 43 Kan. L. Rev. 801, 831 (1995).

27. K.S.A. § 82a-701 (g) (1989).

28. *Cockrill v. Downey*, 4 Kan. 426 (1968) (timber); *Reddon v. Barber*, 4 Kan. 445, 96 Am. Dec. 18 (1868) (a sign); Burdick, W.L., "Burdick on Real Property," § 284, Appurtenances, at 763 (1914). See also, Berger & Johnstone, "Land Transfer and Finance, Cases and Materials," 4th ed., (1993), citing Cribbet and Johnson, *Principles of the Law of Property*, 3d ed., at 210-212 (1989).

29. By separating inheritance from the list of voluntary transfers, the legislature seemed to imply that inheritance would be an involuntary transfer. One could knowingly avail himself of the intestate succession provisions to pass property to heirs by not having a will, and in this sense the passing of property could be deemed to be voluntary instead

of involuntary.

30. "Arguably another interpretation of this section is that a water right cannot pass with the land in an involuntary transfer, but rather only in voluntary transfers. Because the U.S. Army Corps of Engineers took large numbers of water rights along with the bottom land in their land acquisitions for reservoirs, this construction of the statute would render these water rights condemnation nullities." Peck, J. and Weatherby, K., "Condemnation of Water and Water Rights in Kansas," 42 Kan. L. Rev. 827, 832, n. 39 (1994). See also *Sullivan v. City of Ulysses*, *supra* note 3, at 505: "Sullivan argues that because condemnation involves an involuntary transfer, an appurtenant water right cannot pass with the land unless the eminent domain statutes expressly confer the authority to condemn water rights. We disagree."

One could also argue that by setting forth specific types of voluntary conveyances in Section 701 (g), the legislature was not necessarily attempting to abrogate the general rule that appurtenances pass with conveyances, both voluntary and involuntary. The intent was arguably merely to emphasize that water rights generally pass with transfers of land, most of which are voluntary in nature.

conveyances by trusts and corporations, absence of signatures by spouses, name variations in documents, and incomplete court records. For most of these questions, the *KBA Title Standards Handbook*³¹ is the reference.

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pass as well and should ensure that the court decree states to whom the water rights pass. If nothing has been stated about the water rights in a divorce case, regardless of whether it is contested or settled, this failure to mention the water rights could later create questions between the divorcing parties about ownership of the water rights or could create title problems when one of the parties attempts to sell the water rights. To clear title in such a case, the buyer may need to acquire deeds from both of the divorcing parties.

3. Mortgages. A city or industry may be purchasing an irrigation water right that is appurtenant to land encumbered by a mortgage. Section 701(g) states that a water right passes with a conveyance by mortgage, so unless the mortgagor has expressly excluded the water right in the mortgage, the mortgage has included the water right. The buyer of the water right separate from the land should require that the mortgagee release the mortgage as to the water right; absent such a release, the title is impaired. The release should refer to the book and page number of the recorded mortgage and state that the mortgage has been released as to interests in the water right, and the release should describe the vested right or appropriation right by official DWR number.

4. Judgment liens and mechanics' liens. Kansas statutes provide that "any judgment ... shall be a lien on the real estate of the

2. Divorce: a hybrid. If parties to a divorce case divide land in a settlement agreement,³² the court's acceptance and incorporation of the agreement in the decree would probably pass the appurtenant water rights as well, because the agreement and decree probably operate as a voluntary conveyance under Section 701(g). In contrast, if the court divides the land in a decree after a contested divorce action,³³ arguably this division would constitute an involuntary disposal of the land, meaning that the water rights do not automatically pass. In this case, the lawyer for the recipient of the land should request that the water rights

judgment debtor within the county in which the judgment is rendered, and in other counties where the judgment is filed."³⁴ Water rights are "real property interests" under Section 701(g); therefore, water rights would be subject to judgment liens just as the appurtenant land would be. For example, if P sued O for a breach of contract or for a tort and won a money judgment for \$50,000, P's judgment would become a lien on O's land and appurtenant water rights in the county of the judgment. Or, if Husband, for example, obtained a decree of divorce and alimony against Wife, and Wife owned land in that county, the alimony judgment would become a lien on Wife's non-homestead land as well as appurtenant water rights in the county. Judgment liens attached to water rights must be released to create good title in the water rights.

To protect a person who provides "labor, equipment, material, or supplies ... for the improvement of real property,"³⁵ Kansas law provides a mechanic's lien, which becomes a "lien upon the property."³⁶ If the property being improved has an appurtenant water right, the mechanic's lien would arguably attach to the water right as well. For example, a contractor could construct a house on a tract of land that has an appurtenant irrigation water right. A mechanic's lien for non-payment would attach to both the land and the water right.³⁷

5. Foreclosures. Foreclosure suits for mortgages, taxes, judgment liens, or mechanics' liens can involve water rights. Typically, the transactions leading up to a foreclosure do not involve water rights alone. Mortgagees, for example, take security in the land alone or in the land and the water right, but typically not solely in the water right. Unpaid taxes become a lien on the real estate and the water right together, but not on just the water right. A plaintiff obtains a judgment lien, sometimes totally unbeknownst to the plaintiff, by virtue of having obtained a judgment in some unrelated matter against the defendant judgment debtor; the judgment becomes a lien on the real property of the debtor — the land and appurtenant water right. Failure to pay for work that improves real property can result in a mechanic's lien "upon the property"³⁸ in favor of the provider of the work. Foreclosing of any of these liens can involve the transfer of the water right as an appurtenance to the land.

The mortgage foreclosure suit regarding land with appurtenant water rights is arguably different from the foreclosure suit for taxes, judgment liens, and mechanics' liens. In the mortgage foreclosure suit, the mortgagor has in a sense voluntarily disposed of the water rights in the original mortgage; at least, section 701(g) states that the water right passes as an appurtenance in a mortgage.³⁹ In foreclosure

31. *Kansas Title Standards Handbook*, 6th ed., Kansas Bar Association, (1995).

32. K.S.A. § 60-1610 (b)(3) (1996 Supp.).

33. *Id.*, § 60-1610 (b)(1) (1996 Supp.).

34. K.S.A. § 60-2202 (1994). See Pearson, J., "Kansas Artisan's & Mechanic's Liens: An Unnecessary Tangle," 63 J.K.B.A. 28 (Sept. 1994), for a description and discussion for liens that apply to personal property.

35. *Id.*, § 60-1101 (1994).

36. *Id.*

37. See Buckley, M., "Kansas Mechanics' Lien Laws: Filing — Enforcing — Defending," 57 J.K.B.A. 27, 29 (May-June 1988), for a discussion of the extent of the coverage of the lien on the property.

38. K.S.A. § 60-1101 (1994). See text at notes 35-37, *supra*.

39. Kansas mortgage law, however, provides that a mortgage does not serve to pass title to the property mortgaged, but rather the mortgagor retains title and the mortgagee receives a lien. See, e.g., *Missouri Valley Investment Co. v. Curtis*, 12 Kan. App. 2d. 386, 745 P.2d 683 (1987) ("mortgage is not a conveyance of an interest in land", *id.* at 388); cf. *Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) (mortgage is interest in real property that secures creditor's right to payment). Title does not pass until the mortgage is foreclosed, the property is sold, and the redemption period passes. "Actions to enforce liens serve the dual purpose of producing a sale of the security and of then or later foreclosing all rights of redemption. Not until this latter has occurred are these sales transferred from the [title] examiner's schedule of liens to a place in the chain of title." Amer. Law of Prop., *supra* note 20, v. IV, at 785 (1974).

suits for taxes, judgment liens, and mechanics' liens, the property owner has typically not done anything voluntarily to indicate a conveyance of the property.⁴⁰

**... the
plaintiff
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documents.**

These possible differences between mortgage foreclosures on the one hand and other types of foreclosure suits on the other hand can lead to interesting results. Assume that the law of Kansas is that in an involuntary disposal of real property, the water right must be specifically mentioned or it is reserved unto the owner. Assume, too, that the water right is not specifically mentioned in any of the court documents in which a plaintiff files a foreclosure action in any of these situations. Foreclosure for taxes, judgment liens, and mechanics' liens under these assumptions would result in the ownership of the water right remaining in the owner and not being transferred to the holder of the lien. Foreclosure of a mortgage, on the other hand, would result in the water right's passing as an appurtenance of the land, because mortgages are specifically mentioned in section 701(g) as voluntary conveyances.

To be fully protected in acquiring the water rights in any of these types of foreclosure suits, the plaintiff should describe the real estate and the appurtenant water rights in the petition, notices, decree, and all other court documents. If the water rights are not considered or mentioned at all in the proceedings, the foreclosing plaintiff might end up with the anomaly that the plaintiff (except in the case of the mortgage foreclosure) would own the land, but the original owner would still own the water right.⁴¹

6. Utility easements. The examining attorney should study and draw the location of all existing utility easements. While these easements do not necessarily impair title to the water right being purchased, the location of utility easements may have an impact on locating water pipeline and well easements needed by the buyer. A city purchasing an irrigation water right, for example, may have to relocate the well that

has formerly been used for irrigation. Well spacing requirements of DWR or the groundwater management district may dictate that the well be located in a certain area. But the existence of utility easements may have an impact on whether the city can lay a pipeline from the new well location to its main lines.

7. Tenants. Because Section 701(g) provides that a water right passes with a lease, and because possession of land gives notice of any rights held by the possessor,⁴² a buyer of water rights should inquire about the existence of any tenants. If there are any tenants, the buyer should require a quitclaim deed to the water rights from the tenant.

8. Bankruptcy. A voluntary⁴³ or involuntary⁴⁴ bankruptcy proceeding appearing in the chain of title creates title questions. The immediate seller of the water rights or one of the seller's predecessors in title might be shown as having gone through bankruptcy. Characterization of the bankruptcy proceeding as either voluntary or involuntary probably does not determine the question of whether the disposal of the water rights is voluntary or involuntary under Section 701(g). Because the bankruptcy estate consists of all the property of the debtor,⁴⁵ it would include appurtenant water rights, regardless of whether the bankruptcy is voluntary or involuntary. If the water right is part of the bankruptcy estate, the title to the water right "passes to the trustee by operation of law without any conveyance from the bankrupt."⁴⁶ The bankrupt can seek to have the property declared exempt property;⁴⁷ the trustee can abandon the property;⁴⁸ or the trustee can dispose of the property.⁴⁹ Kansas law, which governs the question of whether property is exempt, exempts as homestead up to 160 acres of farming land,⁵⁰ which could include water rights, both for domestic and for irrigation use.⁵¹ The title examiner should review the bankruptcy file to learn if water rights have been expressly mentioned. If not, the examiner must draw conclusions about ownership of the water rights based on the interplay of the Bankruptcy Code, the Kansas homestead exemption statute, and the Kansas Water Appropriation Act, or on abandonment or disposition of the water rights by the trustee.

40. This is true, unless the very ownership of property as a citizen of this state indicates an acquiescence in the laws of the state, including paying taxes, judgments, and labor contracts and thereby indicates a voluntary conveyance at the time of foreclosure.

41. See text accompanying notes 28-30, *supra*.

42. See, e.g., *Miller v. Green*, 264 Wis. 159, 58 N.W.2d 704 (1953).

43. 11 U.S.C. § 301 (1993).

44. *Id.*, § 303 (a) (1993).

45. *Id.*, § 541(a)(1) (1993).

46. *Amer. Law of Prop.*, *supra* note 20, v. IV., § 18.65, at 776 (1974).

47. *Id.*, § 522 (1993 and 1997 Supp.).

48. *Id.*, § 554 (1993).

49. *Id.*, § 363 (b) (1997 Supp.) and § 704 (1) (1993).

50. Kan. Const. Art. 15, § 9 (1989); K.S.A. § 60-2301 and - 2302 (1994) (160 acres of farming land or one acre in a city).

51. At least one state statute contains an express provision for exempting water rights. See Idaho Code § 11-605 (1990) (exemption for water rights not to exceed 160 inches of water for irrigation of lands, but exemption is listed in section covering personal property). Interesting questions arise, beyond the scope of this article, concerning attempts to exempt water rights. If the bankrupt lists only the real property (to which the water right is appurtenant) and does not mention water rights, is this sufficient to

exempt the appurtenant water rights, or does the trustee in bankruptcy hold the water rights? Reading Section 541 (a)(1) and Section 522 of the Bankruptcy Code together with Section 701 (g) of the Kansas Water Appropriation Act seems to provide that title to all the property first passes to the trustee and then the exempt property comes back to the bankrupt:

"[Section 541 (a) (1)] ... includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under ... 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate." Notes of Committee on the Judiciary on § 541, Senate Rpt. No. 95-989.

If the bankrupt lists the land and then includes a phrase such as "including the water rights" without being more precise, can the trustee raise a claim of insufficiency in the bankrupt's description of the water rights as exempt property? In a case concerning mineral interests, *Re Wenande* (1989, BC DC Wyo.) 107 BR 770, 21 CBC 2d 1424, held that stating "mineral interests" was insufficient to constitute a claim of exemption and that mineral interests needed to be more specifically described to provide the trustee with notice. See also 9A Am Jur 2d Bankruptcy, § 1117 (1991).

9. UCC documents. Because water rights are real property, the UCC typically would not bear on title questions regarding the water right. But these documents, filed with the Secretary of State or the register of deeds, may indicate that a bank or other lender has a security interest in parts of irrigation equipment or other equipment or fixtures that relate to the water right. If this equipment is being purchased with the water rights, the buyer should obtain a release from the holder of the security interest.

10. Indications of future land and water use. If the seller retains the land and sells the water right, the buyer wants to be sure that the seller and successors in title will obtain no future water rights appurtenant to this land (except possibly domestic water rights) that could compete with the buyer or continue to drain the water supply. To protect against future water use by the seller, the buyer should insist on a "dry-up covenant" in the contract, a covenant that provides that the owners and their successors will not irrigate the land to which the water right is appurtenant or otherwise use the water except for domestic use. The buyer also should seek to overcome the doctrine of merger by including the dry-up covenant, one that runs with the land, in the deed. Well spacing, depletion, or safe yield requirements, or other regulations of DWR or groundwater management districts, may in effect act as a dry-up covenant, but the buyer should not rely solely on these regulations.

The buyer of the water rights may learn that the seller who is retaining the land intends to subdivide the land into small parcels for residential development. If the retained land is subject to a dry-up covenant except for domestic water rights, these domestic water rights that are developed later, considered cumulatively, could become sizable. For example, if a quarter section were subdivided into thirty-two tracts with five acres each for houses, and if each house had a domestic well for one acre foot per year, the development would have thirty two acre feet of water rights. Although these would be junior to the water right the buyer is purchasing, they still compete for water from the same source and could be a problem requiring the purchaser later to seek administrative or judicial relief.

11. Restrictive covenants. A restrictive covenant covering land could inadvertently affect the appurtenant water right. For example, a water right for industrial use could cover a large tract of industrial property. The owner may have sold smaller tracts to other industrial users, and these entities may have filed a covenant restricting the land to industrial uses

only, without mentioning or even considering water rights. If the restrictive covenant covers the land to which the water right is appurtenant, however, it would arguably cover the water right as well. The covenant could thereby arguably restrict the water use to industrial use and thereby make more difficult a sale of all or a portion of the water right to a city for municipal use. A counter argument is that under the Water Appropriation Act, the chief engineer has the sole power to determine water use.⁵²

12. Existence of special water districts. The location of the land and water rights within special water districts lead to special considerations. If they are within a groundwater management district, the GMD rules and policies may have an impact on the sale and future use of the water rights and on drilling new wells. If they are within an existing, proposed or possible future intensive groundwater use control area (IGUCA),⁵³ the water rights may later be curtailed or diminished. DWR's Wet Walnut Creek IGUCA Order in 1992,⁵⁴ for example, limited groundwater pumping from the basin to a safe yield figure.⁵⁵ The Order cut holders of some rights from their allotted eighteen inches per year to amounts ranging from twelve to fourteen inches per year; it cut others from eighteen inches per year to amounts ranging from five to seven inches per year.⁵⁶

13. Property taxes and GMD user fees. County practices vary on methods of considering water rights in ad valorem tax assessment.⁵⁷ The examining attorney should insist that all property taxes and groundwater management district user fees⁵⁸ be paid to preclude a tax lien on the water rights.

III. Other Considerations

A. Water Transfer Act

The Water Transfer Act⁵⁹ is invoked when one seeks to move at least 2,000 acre feet a distance of 35 miles or more. A transfer under the Act involves special approval procedures, including a hearing before a specially appointed hear-

The examining attorney should insist that all property taxes and groundwater management district user fees be paid to preclude a tax lien on the water rights.

52. K.S.A. § 82a-706 (1989). An analogous situation (related as well to the last section on dry-up covenants) would be a combined golf course and residential development where the developer obtains an irrigation water right for the golf course. If the surrounding lots are then sold without some kind of covenant restricting development of domestic water rights, the home owners could obtain domestic water rights that, albeit junior to the golf course's water right, compete for the water from the same water supply. Again, would such a covenant be enforceable in light of the Chief Engineer's powers under the Kansas Water Appropriation Act?

53. See K.S.A. §§ 82a-1036 through -1038 (1989 and 1996 Supp.).

54. See Conclusions 21 through 24, and Section 10 of the Order, "In the Matter of the Designation of An Intensive Groundwater Use Control Area in Barton, Rush and Ness Counties, Kansas," Division of Water

Resources, April 1, 1992.

55. DWR defines safe yield as "[t]he long term sustainable yield of the source of supply including hydraulically connected surface water or groundwater." K.A.R. § 5-1-1 (x) (1996 Supp.). In other words, the amount of water permitted to be withdrawn cannot exceed the amount of water that recharges the source of supply.

56. Section 10 of the Order, *supra* note 53.

57. For a discussion of taxation of water rights in Kansas, see Peck, J., and Smith, R., "Improving Effectiveness in Planning and Equity Financing of State Water Resources Management," Part III., at 36, Kan. Water Resources Research Inst., U. of Kan., Jan. 1985.

58. See K.S.A. § 82a-1028 (h) (1989), which empowers groundwater management districts to "levy water user charges and land assessments"

59. K.S.A. §§ 82a-1501 to -1508 (1996 Supp.).

ing officer, followed by a review by a three-person panel consisting of the chief engineer, the director of the Kansas Water Office, and the secretary of Kansas Department of Health and Environment. Factors considered by the hearing officer and panel include, among other things, present and future use of water at both ends of the proposed project; economic, environmental, public health and welfare, and other impacts; conservation plans; and alternative sources of supply.

The title examiner in a water rights conveyance must treat the examination much the same as that of a regular land sale.

B. Interstate water diversions

In the 1988 article,⁶⁰ some of the interstate implications of Kansas water diversions, including a description of the laws of our four surrounding states, were discussed in detail. Those implications derive in part from a United States Supreme Court case and a Kansas statute that was revised in light of that case. In *Sporbase v. Nebraska*,⁶¹ the United States Supreme Court held that water is an article of commerce and that the Commerce Clause prohibits states from unduly impeding interstate movement of water. Section 726 of the

Water Appropriation Act states that the chief engineer may permit diversions of water from Kansas to other states if the applicants comply with the requirements of the Kansas Appropriation Act, the Water Transfer Act, and other state laws; but the chief engineer may condition such a diversion such that it must be "necessary for the protection of [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 by the chief engineer for such necessity."⁶² Thus, if a conveyance of Kansas water rights in any way involves another state, the title examiner should refer to these authorities and the 1988 article.

IV. Conclusion

The title examiner in a water rights conveyance must treat the examination much the same as that of a regular land sale. But water rights can involve other considerations and new questions. Each case seems to bring on new complications, for which there is little or no case law authority; moreover, statutes and administrative regulations often seem to raise more questions than they solve. Perhaps this explains why title insurance does not cover water rights, but it also places a heavy burden on the examining lawyer.

60. See Changes and Transfers, *supra* note 2, at 27-29.
61. 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982).

62. K.S.A. § 82a-726 (1989).

About the Author



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