

This sign was seen in Ness County on Kansas Highway 96 east of Brownell, Kansas, in July 2014. It is unclear if water is being sold for oil well drilling and hydraulic fracturing or to ranchers needing water for cattle. It is also unknown if a water right permit has been secured for the uses requiring a permit. Signs like these may be more common if the demand for water continues to increase and if the recent drought intensifies.

# So You Want to Buy a Water Right? Do It Right!

In the years before World War II and its conclusion, Kansas didn't have a state-specific water right law. Owners of land with surface water had a right to the water that flowed across their property. Owners of land with groundwater had a right to use any and all of the water they could pump. With the growth of industry and the cities where that industry was located, it was recognized that a more orderly method of distributing the water resources was needed to promote orderly economic growth. On June 28, 1945, the Kansas Water Appropriation Act was established.

While the law allowed for the state to issue water rights and resolve disputes among water users, it took 32½ years for the law to be updated to require every non-domestic use of water to have a water right. That year of 1978 was a big one for water law. Less than three months after the effective date of the new law requiring water use to occur with the authority of a water right, the Division of Water Resources took significant steps to restrict where new water rights could be obtained. The Chief Engineer of the Division of Water Resources declared a moratorium on the approval of

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new water rights in an area of McPherson County, and followed that order with a similar order in the Pawnee River area of Pawnee County a few months later. The result of these moratoriums is the McPherson Intensive Groundwater Use Control Area and Pawnee Intensive Groundwater Use Control Area. People who discuss water law for a living refer to these areas by the acronym, IGUCA (pronounced I • 'gü • ka), as in "McPherson IGUCA".

Now, if you know by first hand experience there is groundwater below the land you are standing on, it is likely that you cannot receive a new water right permit to use that water. That water below you has been appropriated for some other Kansan's use. The easy water in Kansas has been found, and a water right permit is probably in place to use it. Finding new water is like finding new oil; you are going to have to develop a reasonable thesis to predict its occurrence and drill for it until you find it.

If additional water is needed for continued growth, and the prospect of finding new water is low or too expensive,

“old water” might be the answer. Because Kansas water rights are considered to be real property rights, they can be sold, leased, inherited, etc. And since 1957, water rights can be changed to new places of use, to new locations for the point of diversion and to new uses made of water (example: irrigation to municipal use). While it is easy to say the ownership can be transferred, there are many details to consider before signing a check and taking a piece of pipe from a water right seller.

If you find a suitable water right with a willing seller, here are the steps to make the ownership transition as simple as possible.

### 1. Determine if the water right is in good standing.

What does this mean? While water rights are property rights, there are responsibilities that owners must fulfill to keep them active and viable. One of the requirements of the owner is to file the annual water use report. There are civil penalties that are assessed for failing to file a complete and accurate water use report, which makes compliance very high with the filing of the report. The current emphasis is on the filing part of the statute, but if better accuracy and completeness is desired in the future, there could be a push to use the penalty more often. While reports may get filed regularly, if the reports contain false information, the water right could be seriously jeopardized. Other things that could jeopardize a water right could be the unauthorized replacement of a water well, irrigating unauthorized land with no irrigation of the authorized place of use, or failure to comply with a meter order. Be more than sure that the property you are considering to purchase is going to work for you and not against you.

### 2. Determine if the water right is connected to any other water rights.

What does this mean? Assume that the water right available for sale is authorized for irrigation use. It may have a single well that uses a single center pivot irrigation system. This would be a simple water right to understand and change. However, consider the complexity if another water right has the same well irrigating a different field, or another water right irrigating the same field with a different well? There is no limit to the number of water rights that could share the same well and the same field. This complexity, and the Division of Water Resource’s desire of the past to be friendly to the water right community, may have issued certificates of appropriation with additional limitations on the quantity of water and rate of diversion when combined with senior (older) water rights. The limitations could make the water right



When a water right is proposed to have an additional well, the total rate of diversion certified for that water right is subject to reduction. The concern is that a water right with a high capacity well should not be allowed to “restore” the high rate lost to significant water level declines by adding a second well, thus allowing continued water level declines at a pace similar to that in the past. If a new well is needed, the rate to be authorized for the new well will be equal to the reduction of the current rate of diversion at the existing well. If an additional well was proposed for the water right authorizing the irrigation well above, it would be in the interest of the owner to control the apparent waste of water. Note that no water meter is installed when this photo was taken in 2012.

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not authorize any rate of diversion or quantity of water above what has already been authorized by the other water rights. The result is that the water right may have nothing to be changed to the new use without reductions of the other water rights. Other conditions to consider are ones that limit simultaneous pumping or standby well authorization.

### 3. Determine what area was legally irrigated during the perfection period.

What does this mean? This information is critical, to calculate how much water is available to a different authorized use, when the water right is changed to municipal use. In retrospect, the Division of Water Resources now recognizes it was a mistake to provide water right certificates for an owner's entire farm in some cases, when significantly less land was irrigated in the early years of the permit, instead of the actual land that was irrigated. Proper water resource management, and the law, requires that there be no negative effect to other water rights when water rights are changed. By using the original acres irrigated, the consumptive value of the usual crop of corn for the county in which the water right is located and an irrigation efficiency value, the amount of water allowed for a new 100 percent consumptive use can be calculated. A reduction of the authorized quantity for the new use should be expected.

**There are limits to the distance a water well can be relocated from its original location. In some parts of Kansas, it is as little as 1,320 feet.**

### 4. Determine if the water quality is suitable for municipal use.

What does this mean? Public water systems that deliver fresh water without the need for filtration or other treatment should know if the water from a purchased water right will be compatible with the existing quality of the water sold to their customers. Purchasing a water right that would require blending or outright treatment could significantly increase the cost of the water right, if blending or treatment is possible. If a significant relocation of the water well under the water right is planned, the water quality at the proposed new location should be determined.

### 5. Determine the location of the new well.

What does this mean? Most (if not all) irrigation wells cannot be used for municipal (drinking water) use. The irrigation well construction standards are not equal to the specifications adopted by the Kansas Department of Health and Environment for municipal wells. It's also likely that the seller of the water right will not want a municipal well, and its 100-foot-minimum sanitary easement, located in the center of the quarter section with a power line going in and a pipeline going out under the field. There are limits to the distance a water well can be relocated from its original location. In some parts of Kansas, it is as little as 1,320 feet. For a well in the center of a quarter

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In August 2006, the flow in the Republican River just south of the Nebraska line was not much more than a trickle, as shown in this photograph from the bridge west of Republic, Kansas. Minimum Desirable Streamflow (MDS) was not being met at the stream gages at Concordia and Clay Center for all of 2006 (with one exception at Clay Center in September). In October of 2006, the average monthly flow at Concordia was 19.9 c.f.s. when the MDS value is 65 c.f.s. If it was determined that administration of “junior-to-MDS” water rights would restore streamflow, the Chief Engineer could have suspended the operation of those water rights to do so.

section, this leaves very little leeway for moving out of the cornfield. The sales agreement should include a clause that the sale is conditional on either a permanent easement or outright sale of land for the new well on either the seller’s property or that of a neighbor’s land. It should also be conditional on approval of any water right and public water supply permit changes. Don’t forget that the water quality at the new well location needs to be acceptable too.

#### **6. Determine the local source of supply.**

What does this mean? Kansas water law requires that there be no changes of the local source of supply when a well under a water right is replaced. The local part refers to the distance of the relocation. The source of supply refers to the aquifer. Water wells in the Dakota Aquifer cannot be changed to an alluvial aquifer, and vice versa, if there is no natural hydrologic connection between the two aquifers. This same statute controls the replacement of wells in the Ogallala Aquifer from being drilled deeper into the Dakota Aquifer in many locations. The same concept can apply to surface water rights if an intake would be proposed to be located on a nearby, but different, stream.

#### **7. Determine the reliability of the water supply.**

What does this mean? Some water rights are better than other water rights. Water rights in aquifers that experience seasonal or longer-term variations in water levels and quality might be less desirable than other water rights that are available. The priority date may also matter. A water right with an early priority date may be able to pump longer when water supplies are reduced by drought. Minimum Desirable Streamflow (MDS) designations on some Kansas rivers and creeks have stopped the operation of water rights with priority dates after April 12, 1984. The purchase of a water right that cannot be used when it

is most needed should have less value than a water right with a priority date on or before April 12, 1984, where MDS exists.

#### **8. Determine the ownership of the water right.**

What does this mean? When drawing a contract for sale or deed, be sure that all owners of the water right and their spouses sign the document that transfers the ownership of the water right, just as if land were being sold. Use an attorney to determine that the document is in proper form.

#### **9. Determine the costs of the new well and other necessary equipment, power supply, pipeline, well and pipeline easements, and / or well site purchase.**

What does this mean? A low priced water right farther from your community may cost more than an expensive water right close to town. As they say in the real estate business, location, location!

#### **10. Determine if the entire water right is being offered for sale.**

What does this mean? The sale of a portion of a water right can be much more complex than the sale of an entire water right. The complexity is magnified when the authorized acres for irrigation are more than the acres that were irrigated during the perfection period. The complexity rises even more if there is only one well under the water right. The recommended first step is to determine the current rate of diversion for irrigation. The addition of another well (for the new municipal use) under a water right requires that the current rate of diversion delivered through the current irrigation system be the basis for splitting the rate of diversion between the two wells. While the water right may have been perfected using flood irrigation with a high rate of diversion, the perceived extra rate and quantity which is now not needed for the current center pivot irrigation may not really be

available for change. After determining the rate of diversion to be sold / purchased (in addition to the other parameters), efforts to divide the water right between the sellers and purchasers and the accompanying application for change for the purchased right can be initiated. The Division of Water Resources has been administratively doing divisions of water rights for years, but recently, the process has been codified in the Kansas Water Appropriation Act (K.S.A. 82a-742), with the requirement that a filing fee be submitted to accomplish the division request. The rate of diversion reduction (from the current operation) and the quantity reduction (to stay at or below the original consumptive use) can be accomplished with the change of the purchaser's water right after the water right is divided.

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requirement to have an acceptable water flow meter installed. In rare instances, reports of monthly water use and / or water level measurements from an observation well might be required. Its use might be suspended or its annual quantity temporarily reduced until the owner brings the water right into compliance with a regulation or a meter order. It might be in the process of being sent to an abandonment hearing. All of these things and more must be known before a check is written to buy a water right.

The Kansas Rural Water Association is here to educate and assist public water systems. Be efficient, and let KRWA assist you with your water rights issues. KRWA has staff members who have personally negotiated scores of options to test drill and purchase well sites. Make sure you do it right – and last of all, negotiate as a neighbor and friend, not as someone who's coming to "take the other guy's water".

Purchasing a water right is more than buying some or all of a neighbor's authorized quantity. Every Kansas water right has a file number, a priority date, an authorized quantity, an authorized rate of diversion, and an authorized use made of water. It will have an authorized place or places of use and an authorized point or points of diversion. It may be limited to other water rights; it may have restrictions against simultaneous diversion; it probably has a

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