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ATTORNEY GENERAL OPINION NO. 79-276

The Honorable Joseph C. Harder
State Senator, Twenty-Fifth District
Box 317
Moundridge, Kansas 67107

Re: Waters and Watercourses--Permits for Appropriation of Water for Beneficial Uses--Inchoate Rights Granted Thereunder

Synopsis: The Board of Directors of an irrigation district established pursuant to K.S.A. 42-301 et seq. may not transfer a water rights application number issued pursuant to K.S.A. 82a-710, since the mere issuance of a number conveys no rights, either vested or inchoate. Likewise, the Chief Engineer of the Department of Water Resources is also without such power. However, once a permit is granted under K.S.A. 82a-712, an inchoate appropriation water right is created which may be transferred, insofar as it is a real property right as defined by K.S.A. 82a-701(g).

* * *

Dear Senator Harder:

You request our opinion whether certain procedures for transference of a water application number are allowed by law. Specifically, you first ask whether the current Board of Directors of Kanopolis Irrigation District No. 7 may either give or sell all or part of the District's water rights application number to a new district to be formed within the current boundaries of K.I.D. No. 7. Secondly, you inquire whether the Chief Engineer of the Department of Water Resources may transfer the water right application number currently held by K.I.D. No. 7 upon the dissolution of the original district, without any action to that effect having been taken by the current K.I.D. No. 7 Board of Directors.

As we understand the situation, K.I.D. No. 7 was created in 1960. A water right application was made shortly thereafter, and was assigned No. 8392. On February 13, 1962, the application was approved, and the district was granted use of 55,000 acre-feet of water from the reservoir behind the Kanopolis Dam. As of this time, no water has ever been delivered by the district for irrigation, and, while distribution works have been planned, they remain unbuilt. As a result, the District's water right remains unperfected.

In 1976, the district applied for an extension of time to perfect its right, which was granted by the Chief Engineer of the Department of Water Resources, with said extension to run until December 31, 1980. Also in 1976, a petition calling for the dissolution of K.I.D. No. 7 was signed by 175 persons and submitted to the Chief Engineer. A hearing was held thereafter by the Chief Engineer, pursuant to K.S.A. 1978 Supp. 42-722 (amended in 1979), with the evidence indicating that the district, while not very active, could not be found to merit dissolution under the terms of the statute. Accordingly, the petition was denied.

Your initial inquiry concerns whether the directors of K.I.D. No. 7 may give or sell all or part of their water rights application to a new district which would be formed within the boundaries of the existing district. The law in this area is entirely statutory in nature, with detailed procedures having been set out by K.S.A. 82a-701 et seq., regarding the appropriation of water for beneficial use, and K.A.R. 5-3-1 et seq., on the same subject. As we read these provisions, the assignment of a number pursuant to K.S.A. 82a-710 confers no rights upon an applicant, beyond giving him priority over other applications submitted after that date. K.S.A. 82a-707(c). As no determination has been made as to the merits of the application, the number given to it is merely a procedural device which facilitates the handling of the application, together with the numerous accompanying documents such as maps, plats, plans and drawings. As such, the possession of an application number alone endows the holder with no rights, either tangible or intangible, which he may transfer to another, either by gift or sale. To hold otherwise would vitiate the clear import of the statutory scheme set out by 82a-701 et seq., namely that the state (acting through the Chief Engineer) must determine whether a proposed use will be in the public interest before any action is taken, and that the principle of "first in time, first in right" applies to prospective users.

Nor can it be maintained that the above procedure may be circumvented, for 82a-705 and 82a-709 specifically reserve the acquisition of water appropriation rights to those applicants who first obtain the approval of the Chief Engineer, and hence, by implication, who comply with the prescribed application procedures. This same conclusion was reached by the late Will Hutchins in his exhaustive treatise, Water Rights in the Nineteen Western States. At pp. 315-316, Vol. I, he notes:

> "In most states in which administrative procedures for appropriating water are in effect, the procedure provided by the current statute is either held or assumed to be the only way in which an intending appropriator may acquire an appropriative right . . . .
>
> "The intent of the legislatures that this specific, detailed procedure shall be exclusive is generally apparent from the wording of their declarations."

Accordingly, it is our opinion that the district is without the power to transfer its application number to a proposed new district.

We also conclude, for much the same reason, that the Chief Engineer is without the power to make such a transfer upon the dissolution of the existing district. The role of the Chief Engineer in the water appropriation process is that of an impartial arbiter who is authorized by K.S.A. 82a-711 to make certain determinations before an application is approved. Broad as his powers are, nowhere do we see that he is also authorized to favor certain applicants over others, in disregard of the statutory and administrative procedures which assign priority based on date of filing. If numbers could be reassigned by the Chief Engineer as he willed, this priority system would be a mere fiction, and applicants near the top of the list (in terms of time of application) could be passed over in favor of others, such as the proposed new district. This would also have the effect of eliminating the impartiality of the Chief Engineer, and inject a partisan note into what is now a neutral allocation of an increasing scarce public resource. To allow the Chief Engineer to assign an existing application number to a new district which is not "first in time" would be to allow the circumvention of the clearly prescribed statutory processes through which an applicant must proceed in order to gain an application number.

However, the above conclusions are not completely dispositive of the matter here. It is our information that the process has proceeded past the stage where the district has only an allocation number, for the application has in fact been granted by the Chief Engineer pursuant to 82a-712, although not perfected yet by the district. The district has the right to proceed with construction, and may not be stopped or interfered with by anyone who does not have a vested right, a prior appropriation right or an earlier permit. K.S.A. 82a-712. As such, the district is the holder of an "inchoate" right, and the real question becomes whether it may transfer this right to another district. Hutchins at Vol. I, p. 584 notes:

> "One who has undertaken to appropriate water but who has not completed his appropriation does not have a water right in the full sense of the term, but he nevertheless has a substantial right."

Once again, Kansas statutes and case law are of relatively little help. That some water rights may be transferred would appear to be settled by K.S.A. 82a-701(g), which states:

> "'Water right' means any vested right or appropriation right under which a person may lawfully divert and use water. It 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." (Emphasis added.)

What is not clear from the above is the scope of the term "appropriation right"--does it include all rights, or just those which have been perfected under K.S.A. 82a-714?

Kansas authority is not helpful in answering this question, while cases from other jurisdictions differ. There are a number of California cases which have held that an inchoate appropriative right is, pending perfection of the appropriator's right to take water, nevertheless a possessory interest which is property. Miller & Lux, Inc. v. Bank of America, 28 Cal. Rptr. 401 (1963); County of Tuolumne v. State Bd. of Equalization, 24 Cal. Rptr. 13 (1962); and Yuba River Power Co. v. Nevada Irrigation Dist., 207 Cal. 521, 279 P. 128 (1929). The conclusion that the filer owns

a property right, even though he has not completed his diversion facilities or perfected his right to actually appropriate water, was also reached by the Court in Silver Lake Power Co. v. City of Los Angeles, 176 Cal. 96, 167 P. 697 (1917). Especially germane is the following language discussing the nature of a filing to appropriate water:

> "The property right is not dissimilar to that which this court declares belongs to the locator of oil lands, in peaceable and in diligent prosecution of work seeking a discovery of oil, before the discovery is actually made. Such a locator, we have held, has a possessory right which is property . . . ." 167 P. at 699. (Emphasis added.)

On the other hand, the Supreme Court of Idaho has held that a permit to appropriate water is not real property, but instead is a covenant given by the state to construct the necessary works so as to acquire a right. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45 (1927). The law in Idaho is clouded, however, by the presence of other decisions which seem to hold that water right permits may in fact be assigned or conveyed. See, e.g., Gard v. Thompson, 21 Idaho 485, 123 Pac. 497 (1912).

In our opinion, the California cases seem preferable, in that they are more consistent, more recent and more numerous. In addition, we note that several provisions of California law dealing with the appropriation process and the existence of an unperfected, inchoate right are similar to those of Kansas. See West's Annotated Calif. Water Code, §§1450, 1455, 1610, and 2800 et seq. In another water law context, Kansas has been referred to as following California principles, Kansas Water Law, p. 6 (1967), and it is our conclusion that the principles enumerated in the California cases cited above should apply in this area as well.

There exists authority from California and elsewhere which holds that appropriation rights are alienable and may be transferred. Wright v. Best, 19 Cal. 2d 368, 121 P.2d 702 (1942), Osage County Water Dist. v. City of Riverside, 171 Cal. App.2d 518, 340 P.2d 1036 (1959), and cases cited therein at 340 P.2d at 1039. Even more specifically, Oregon has held that an inchoate appropriation of a predecessor in title may afford a basis for a perfected right by one succeeding to his rights. Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 P. 472 (1896). And, according to Hutchins in Water Rights in the Nineteen Western States:

> "The general rule that an appropriation of water may be initiated by one party and completed by another has been recognized throughout practically the entire history of the appropriation doctrine in the West. The purpose of completion by another may have been part of the appropriator's original plan, or it may have resulted from circumstances that developed after the project was under way." Vol. I, p. 548.

It remains to be determined whether title to an inchoate appropriative right vests in the irrigation district itself or in each and every landowner within such district. The answer is supplied by K.S.A. 42-711(h), which provides in pertinent part: "The legal title to all property acquired by district [sic] shall vest in the district in its corporate name." Given the fact that an appropriation right is considered a real property right by K.S.A. 82a-701(g), and our opinion that an inchoate appropriative right is also an interest in real property and therefore transferable, we are of the opinion that an irrigation district in possession of an inchoate appropriative water right may transfer such right.

Very truly yours,

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