

## KANSAS FARM BUREAU LEGAL FOUNDATION

# Leasing the Land *and the Water*

If you were to ask a farmer what their most valuable resource is, it is a good bet that “land” would be their answer. If that farmer irrigates, then it is also likely that a large makeup of their land value, maybe even most of it, is attributable to their water resource.<sup>1</sup> Given that water is such an important and valuable resource to farmers, it is curious that water is sometimes given such little attention when agreements are made to lease agricultural land.

While there are many reasons to address water rights in lease arrangements, among the most important, to me anyway, is how the Division of Water Resources (DWR), within the Kansas Department of Agriculture, enforces the Kansas Water Appropriation Act (KWAA).<sup>2</sup> Recent developments in the way water right conditions are enforced make it crucial for water right owners to protect their water rights, even when they are not involved in the day-to-day farm operations. For instance, many violations of water right conditions and KWAA can result in stiff penalties, including monetary penalties up to \$1,000 per day, and suspension of the water right for up to 5 years.<sup>3</sup> Moreover, these penalties are assessed directly against the water right, by way of a quantity reduction or suspension, or against the owner of the water right, by way of a civil penalty.<sup>4</sup>

Many farmers and ranchers lease land under oral agreements, which are enforceable under Kansas law within certain limitations.<sup>5</sup> However, when it comes to protecting a person’s interest in a water right, it is imperative to have a written agreement so that all of the necessary details can be conveyed and agreed upon. Written lease agreements, in general, do a great job of helping to communicate important details of an arrangement, and therefore, to identify differences between the parties’ understanding of the agreement, reducing surprises later in the lease relationship.

Generally speaking, a lease agreement for agricultural land that includes a water right should detail the authorizations and limitations of the water right, what are the parties’ obligations as to the water right, and the remedies in the instance of a breach by either party.

### The Elements of a Water Right:

The lease agreement should expressly communicate what, if any, water right is part of the land being conveyed by the lease.<sup>6</sup> Water rights are identified by a file number and are made up of 6 elements: 1) quantity, 2) rate, 3) place of use, 4) point of diversion, 5) type of use, and 6) priority date.<sup>7</sup> The file number and each element should be clearly articulated in the lease agreement, along with any other applicable conditions or limitations. One way to accomplish this would be to attach the water right certificate or vesting order, along with any changes or other conditions, as an exhibit to the lease agreement. One may argue that the tenant should be aware of all of these elements because water right certificates are recorded with the county land records office, providing legal notice to interested parties.<sup>8</sup> However, if the landowner is really interested in protecting their water right, attaching a copy of the water right certificate or vesting order is a very simple first step to doing just that. This can help avoid inadvertent violations of the water right and KWAA.

### The Obligations of the Parties:

While this list is likely not exhaustive, there are some responsibilities the parties may want to assign in the lease agreement:

- Maintenance and repairs: Who is responsible for maintaining and repairing the diversion works and the flowmeter? Consider things like:
  - Frequency of maintenance, and
  - Listing approved flowmeter repairpersons – agreed upon by both parties.
- Water use reporting: Will the owner or tenant report water use? Consider things like:
  - If the tenant will be responsible for reporting water use, the necessary paperwork will need to be filed with DWR to designate the tenant as the water use correspondent,
  - Whether the landlord wants the tenant to regularly report water use to them during the irrigation season, and

- Whether the landlord has the right to make regular physical inspection of the diversion works and flowmeter, including by an agent of the landlord hired to monitor the use of their water right – which is especially relevant for absentee landowners.

### Protections for the Farm Tenant:

Not all lease provisions are designed to benefit the landlord. For example, the farm tenant may want the landlord to make certain warranties or representations about the water right. Such things could include:

- If the authorized rate is higher than the current well capabilities, what are the tenant's expectations as to rate, and will there be any recourse if the rate becomes unacceptable for the tenant's purposes?
- Has the flowmeter been regularly and recently serviced so that it is in good working condition? Has a rate test been performed recently? What is the age of the diversion works and when were they last serviced?
- Is the water right in good standing, or have past KWAA violations subjected it or the owner to enforcement actions in the past 5-10 years?
- Does the landlord know of any KWAA violations for which DWR has not taken official action?

Having provisions that address these questions in the lease agreement can help make sure the parties have a meeting of the minds as to the terms and conditions of

the lease, and can help protect the farm tenant's interest in the lease – so they actually get what they have bargained for.

### Remedies for Breach:

Finally, having clearly defined remedies, such as early termination rights and indemnification, in the event of a contract breach, can be very helpful in deterring a violation of the KWAA, and protecting both parties' business interests. The following items should be given consideration:

- Who will be responsible for paying any civil penalty that arises out of the tenant's operation of the water right?
- Under what circumstances will either party be able to terminate the lease agreement?
- What happens if the water right does not meet a warranty provided by the landlord, or one or more of the landlord's representations proves to be inaccurate?
- Will consequential damages be available to either or both parties?<sup>9</sup> If so, the lease needs to provide for them.

### Conclusion:

There are undoubtedly more considerations when entering into a lease for farm land that includes a water right. Hopefully this paper has helped identify some important aspects of such an agreement, and raised awareness of the importance of providing for water rights in farm leases.

<sup>1</sup> In fact, it was recently reported that average irrigated land values in Kansas are more than twice that of regionally comparable non-irrigated land values. Taylor, M.R. 2018. "2017 Kansas County-Level Land Values for Cropland and Pasture." <http://www.agmanager.info/land-leasing/land-buying-valuing>.

<sup>2</sup> K.S.A. 82a-701 *et seq.*

<sup>3</sup> For example, *see* K.A.R. 5-14-10(m), K.A.R. 5-14-12(e).

<sup>4</sup> For example, *see* K.A.R. 5-14-10(n), K.A.R. 5-14-12(b).

<sup>5</sup> To learn more about Kansas agricultural lease laws, here are two great resources: McEowen, R.A., 2017. "Kansas Agricultural Lease Law." <http://washburnlaw.edu/practicalexperience/agriculturallaw/waltr/articles/docs/2017-002KansasAgriculturalLawLease.pdf>; Westfahl, J.A., 2005. "Kansas Agricultural Lease Law." <https://www.bookstore.ksre.ksu.edu/pubs/C668.pdf>.

<sup>6</sup> K.S.A. 82a-701(g).

<sup>7</sup> If looking for more basic information about water rights in Kansas, visit the Kansas Department of Agriculture, Division of Water Resources website at <http://agriculture.ks.gov/divisions-programs/dwr/water-appropriation/water-law-basics>.

<sup>8</sup> It would also behoove the tenant to do a little research of their own, by requesting a copy of the water right file from DWR through an open records request. A little due diligence by a tenant can go a long way. <http://www.agriculture.ks.gov/document-services/open-records-request>.

<sup>9</sup> For instance, if the tenant overpumps the authorized quantity and the resulting penalty includes a suspension of the water right, will the landlord be able to recover lost business income for the years during the suspension? Conversely, if a tenant chooses to terminate the lease agreement after the landlord's breach of warranty, will the tenant be able to recover lost business income for the remainder of the lease term?

Disclaimer: This document is intended for informational purposes only and NOT provided as legal advice. Information contained in this paper is limited by considerations of space and the laws that exist at the time of its publication. Our laws are subject to change yearly through legislative procedures, regulatory rulemaking, and judicial determinations. Additionally, this document does not and shall not be construed to establish an attorney-client relationship. If you have legal questions, you should contact a private attorney with water law experience for advice relating to your specific facts and circumstances.