

Rex Buchanan: The date is October 28, 2019. I'm Rex Buchanan, former director of the Kansas Geological Survey. With me is former Representative David Heinemann, who is our videographer. We're at the Kansas State Historical Society in Topeka to conduct an interview that is part of the Kansas Oral History Project series examining the development of water policy during the 1970s, '80s, and '90s. In these interviews, we learn about policy development through the eyes of legislators, administrators, and others who were involved in those decades.

The Kansas Oral History Project is a not-for-profit corporation created for the purpose of collecting oral histories of Kansans who were involved in shaping and implementing public policy during the last half of the 20th century. Recordings and transcripts of these oral history interviews are accessible to researchers and educators through the Kansas State Historical Society and the Kansas State Library. Transcription of these interviews is funded in part by a grant from Humanities Kansas and private donations.

Today I'll interview Leland "Lee" Rolfs, who was an attorney for the Kansas Water Resources Board and the Kansas Department of Agriculture as well as Special Assistant Attorney General from 1978 through 2008. Lee was involved in water policy formation when he monitored and testified for legislative committee hearings. In his role as Agency Counsel, he represented the Department of Agriculture in administrative hearings, at District Court enforcement actions and appeals, and conducted administrative hearings and water law seminars. His expertise in the field of water law enabled him to assist the [Kansas Department of Agriculture,] Division of Water Resources [(DWR)] with the development of rules and regulations to implement the Kansas Water Appropriations Act, the Groundwater Management District Act, and water structure laws.

Lee was the legal advisor to three Chief Engineers, including Guy Gibson, David Pope who was also interviewed for this series, and David Barfield. The extent of water policy outside Kansas boundaries provided the backdrop for Lee's role as legal advisor to the State on four interstate river compacts and as a member of the Kansas litigation team in two important interstate lawsuits, *Kansas v. Nebraska and Colorado* and *Kansas v. Colorado*.

Since leaving state service, Lee has continued to be involved in implementation of water policy by providing consulting services to Kansas Water Office, the Missouri River Association of States and Tribes,

and the Division of Water Resources in the Kansas Department of Agriculture. He has been teaching water law at the Washburn University School of Law since 2008.

Thank you for agreeing to contribute to this series, Lee.

Leland Rolfs: You're welcome.

RB: So, let's start a little bit with your background, just to be clear before we get into the meat of this. You started in effect in the Division of Water Resources in 1978. Is that accurate?

LR: That's correct. I came to work as the first legal counsel that was hired in water resources because of the result of the Governor's Task Force [on Water Resources] in 1977 and '78. They felt more needed to be done in terms of educating lawyers and having legal assistance to the agencies. I don't know that they immediately provided funding, but they created the first position to do that in the State of Kansas. They created actually two positions, one in the Division of Water Resources. I originally worked half-time for the Division of Water Resources and half-time for the Kansas Water Resources Board. At the same time, they created a position over at KU [University of Kansas (KU)] to have an emphasis on teaching water law in Kansas. That was occupied by John Peck.

RB: So, you were half-time with DWR, the Kansas Water Resources Board. Was that part of—at that time, it would have been the Board of Agriculture.

LR: It was the Board of Agriculture and the Kansas Water Resources Board, which were two separate agencies.

RB: Separate entities.

LR: The Department of Agriculture was primarily enforcement of laws, and the Water Resources Board was primarily water policy.

RB: Does it go away with the establishment of the Water Office?

LR: It went away, and it was replaced by the Water Office and the Kansas—it escapes me—I'm trying to think—the Water Office was the staff part of it.

RB: Basically, the Water Authority.

LR: The Water Authority. Those two entities replaced the Water Resources Board.

RB: When that took place, did you then go to DWR fulltime, or did you stay in that legal role for both of those entities?

LR: It was originally intended to be a one-year thing, that I would work half-time for each one. Then because the Division of Water Resources used so much of my time, more than half, they sort of let it go informally for two years, and I worked more for the Water Resources Board the second year. Then after that, I no longer worked for the Water Resources Board.

RB: So, was the assumption of making that temporary in the beginning, that there was just so much new in terms of creation of Groundwater Management Districts, all of these different acts that were going on that they needed that legal expertise for a little while, but then they might go away?

LR: They were just in the process of formulating the State Water Plan and implementing some of the things. I think they thought that my assistance was needed to deal with that in the Water Resources Board.

RB: I guess this sort of strikes me, and we can maybe return to this at the end, in an awful lot of cases in Kansas, water is informed by science and ag[ricultural] economics, but the role of law looks to me like it's just as important as any of those things in this whole process.

LR: I think so. I guess originally state water planning was part of the Kansas Board of Agriculture, and because things in the enforcement realm always seemed more urgent than planning, all the resources from planning kept getting sucked into the enforcement. People wanted permits. People wanted

enforcement of their water rights, those sorts of things. So, they decided to separate the two and create a separate planning agency.

RB: When you first started there, were you dealing primarily with enforcement issues or were you dealing with the law behind the rules and regs [regulations (regs)] that got that enforcement— “started” isn't the right word because it would have been enforced all along, but you know what I mean. It really becomes a much bigger deal in terms of enforcement in the late seventies. So, were you sort of helping establish that machinery to do that or were you actually engaged in the nuts and bolts of enforcement itself?

LR: Well, both. I was involved in enforcement right away in various ways. But when I first came there, the way Chief Engineer Guy Gibson operated was he was reluctant to put things in writing—his policies, procedures, his regulations. In fact, when I came, there was basically—I think there were eight regulations that covered two-and-a-half pages. Those were fairly recent.

Gradually, as time went on, he sort of changed his mind about that and decided that he would have more written policies, more regulations. That was one of my primary goals through my whole career, to fill in the gaps in the Kansas Water Appropriation Act and add a lot more detail.

RB: It must be interesting—in effect, Guy [Gibson] is your client, if you want to look at him that way, to have a client who doesn't want to put things in writing. That's a pretty incredible statement, considering what state government does, especially in the water world, where those rules and regs are kind of the life blood of what people do.

LR: Absolutely. I think in general, in any kind of system, people like knowing what the rules are, whether you're playing football, or whether you're having a water right. They like them to be clear, fair, and understandable, and all of those things.

RB: What were the big enforcement issues in those early years?

LR: The first ones I remember had to do with water structures actually. There was a lot of controversy in Stranger Creek. Stranger Creek kept flooding all of the time. There were some plans formulated to deal with it. I can't remember whether they were [U.S. Army] Corps [of Engineers] plans, but they were going to put some watershed dams in the basin. As most of those projects go, some people are for it, and some people are against it. They couldn't ever get enough momentum to get a watershed district going to help stop the flooding. There were also some plans for some levees and that sort of thing. That was early on, one of the projects I worked on.

RB: What about on the groundwater side in terms of enforcement? Back in those early days, there wouldn't have even been a requirement for metering.

LR: True.

RB: This is back in an era when you're really making a transition from this era of water plentitude to sort of then applying the legal system to the recognition of limited resources. Is that a fair statement?

LR: Well, there became concern in about 1972 about the amount of water that was being used, primarily from the Ogallala [Aquifer] in western Kansas. That's when the [laws authorizing] Groundwater Management Districts [(GMD)] were passed. The people in western Kansas said, "We need to do something to slow down development, to regulate what's going on." At that time, the Water Appropriation Act was not mandatory. There was no criminal penalty. It was not illegal to drill a well without a permit. Most people did because they could get protection. They would get a priority in the priority system. Most people did file, but finally in 1972, the districts started formulating policies about how many new wells could be permitted, and that slowed that down.

Finally, in 1978, when the Governor's Task Force [1978 Report of the Governor's Task Force on Water Resources] said that this ought to be mandatory, that's when KSA 82-728 was passed and said it's illegal to use water for nondomestic purposes without a permit.

RB: One of the arguments you will hear throughout western Kansas even to this day is that places are over-appropriated. There's too many water rights for the amount of water that's out there. One of the

arguments that the locals will make is, "Well, they gave us too many water rights. It's not our fault. We asked for the water rights, and they gave it. If we're over-appropriated, it's the state's fault." What do you think of that argument?

LR: A lot of development started occurring—this is before my time out there, but in the late sixties, early seventies, and by the time the districts got organized, that in-place policies decided how fast they wanted to mine the Ogallala [Aquifer], some areas were extremely heavily developed. There were other issues going on. There wasn't enough data to even know how much water was out there or how fast we were using it. Water rights, as you mentioned, weren't metered. There was some water reporting system, but it was not comprehensive by any means.

RB: So, in some respects, it was a function of maybe not knowing what all was going on, but also maybe sort of a mindset as well, in terms of what was important or what wasn't.

LR: Right. In any individual farmer/irrigator's self-interest, drilling wells is a good idea.

RB: Going through the system so you're in line for a water right is a good idea, too. Clearly, is there a sense that when Guy [Gibson] was Chief Engineer, that he wasn't harder on people in terms of those additional water rights? Or is it just a function of the way things worked?

LR: I think there was a change. Originally the Groundwater Management District was asked for by the local western people, they wanted more controls. They wanted a system in place to slow down and stop or reverse development. I think Guy Gibson at that point in time was more reluctant to do that. He was not really in favor of that.

Now, as time went on, the roles flipped. Guy Gibson and later David Pope were much more interested in regulating and slowing down and reducing development. And the districts went the other direction. They weren't as interested in—they had stopped development, but they were unwilling to take the next step and maybe come up with more controls.

RB: Let's continue to talk about groundwater. Then we'll make a shift to surface water. That's obviously a big part of your story. On the groundwater side, when Guy [Gibson] leaves, and Dave Pope comes along, and then there began to be more of these various instruments that people apply to groundwater depletion. How involved were you with the development of, say, IGUCAs [Intensive Groundwater Control Area] or any of those other instruments that Dave [Pope] begins to use? Was Dave the first person to use those?

LR: You're going way back in my memory. I think McPherson IGUCA was the first one. It had to do somewhat with pollution down around there, and it was a water shortage area. I think that was the only one in place before I came. The rest of them, I was involved, I think in all of them that are in existence today. I think there are seven or eight, something like that.

RB: At least. There may be a few more than that. Most of them—they're not water quality issues. They're water quantity issues.

LR: Primarily, yes. I think the McPherson [IGUCA] was related to both.

RB: Were you involved with this implementation of those things then?

LR: I participated in the hearings on those.

RB: How did those go down? Today we haven't had a new one for a long time. You occasionally hear a little conversation about it, but you don't get a lot of conversation about them. They're not real popular in my sense with the locals. I think that is a fair statement. Were they at the time? How were they viewed at the time?

LR: Well, it is varied, and over time, it has changed also. One of the first ones was the Lower Smoky [Hill IGUCA] below Cedar Bluff Reservoir. The hearing lasted less than a day. I'm not sure any attorneys showed up. The presentations were made, decisions were made, and Chief Engineer Pope closed the area to new appropriations. He cut back people to what K State [Kansas State University] said was a reasonable quantity of water for irrigation in that area. Previously it had been eighteen inches. I think he

cut them back to sixteen or fifteen and only on active acres. He ordered meters on everybody, which was fairly new at the time. That was kind of the end of it. There were no appeals, no anything.

Then if we sort of fast forward to the Wet Walnut Cheyenne Bottoms, things went totally the other way. I think there were something like eleven attorneys, twenty-one days of hearing. I was not involved in the hearing phase of that because I was in California in trial. I think it ended up being about a 115-page order and involved cutting people back over strenuous objections. It was kind of interesting to me anyway. I'd been in California in trial. I had not been involved in the hearings at all. I came home. My former attorney Rebecca Liggett said, "I'm quitting. I'm going to Washington D.C. and be an attorney there." David said, "Here's all the information for the hearing. You write up the order." So, with a lot of assistance from DWR staff, we got the order written. It was about 115 pages.

Then I had to go back to California. Then I hired Connie Owen who currently does some contract work for hearings. She was new. Six hours after the order got issued, it got appealed in District Court. I said, "Welcome on board, Connie. Go defend this."

RB: That's pretty incredible to go from the Smoky and doing something in a day to the process that you talked about. And the process you talked about doesn't even take into account—I know Dave [Pope] went out there fairly regularly, had lots of meetings, tried to develop a consensus about where should we go with this.

LR: Absolutely. That's kind of where they are in Quivira [National Wildlife Refuge (Quivira)] now.

RB: Right. In retrospect, I would say that almost everybody I talked to considers though that Walnut [Creek] IGUCA a success story.

LR: Absolutely.

RB: Both in terms of process and end result, as they look back on it now, after several decades.

LR: Several things happened. David Pope said, "I think we need to check in on this." He created a taskforce to meet annually to review what's going on, water levels, usage, problems, anything. They met, I don't know, fifteen, sixteen times and never made any real major changes to the fundamental concepts.

RB: Which is pretty incredible, under the circumstances.

LR: Yes, it is.

RB: And yet, having said that, as you look at that IGUCA, which looks like a success story, Quivira is a very similar situation that's being dealt with today. Occasionally people raise the specter of an IGUCA. Maybe they talk about it seriously, but I don't get the sense that that's the road that we're going down, if we're going down any road at all at this point.

LR: Originally the people that ran Quivira realized—they saw what happened at Wet Walnut and said, "We'd like to come up with our own solution" and started working on it. Groundwater Management District was involved. I don't know when that IGUCA was. It was '95?

RB: Quite a while ago. That sounds right.

LR: Somewhere in the early nineties, I think. They still haven't come up with a solution for Quivira. They're still working on it.

RB: Now we've shifted gears a little bit to groundwater or surface water interaction. Let's talk about surface water issues. Then we'll come back to groundwater-related stuff here at the end. Just as somebody who looks at your career from the outside casually the way I do, *Kansas v. Colorado* seems to me like the story of your life.

LR: Well, twenty-five years of my life.

RB: How did that wind up in your lap?

LR: I started with the Division of Water Resources in August 1978. In the position I was in, I went with Guy Gibson at that time, and the rest of the staff went to, as representatives, to all the State Water Compacts, all four of them. Our Kansas River compact between Kansas and Colorado was one of them. We went to those meetings.

At about that time in the late seventies, water flow in the Arkansas River was dropping off dramatically. Colorado was continuing to develop on their side. Finally, it came to a point, we had some internal investigations. We made a lot of complaints to the Compact Administration saying, "Hey, you're taking some of our water," and ultimately Colorado balked. The Compact Administration can investigate some things, but it takes a unanimous action of Colorado and Kansas to take any action. Well, Kansas kept saying, "Hey, we need action." Colorado said, "No, we don't," and that's pretty much the way it went. Administratively, we weren't getting anywhere.

RB: When do you begin to talk about a legal remedy? I realize a compact is a legal remedy, but outside of the compact legal remedy, I guess. It may not be the best way to put it, but you know what I mean.

LR: You're straining my memory on dates here, but I think—

RB: That's part of the point.

LR: Mid-eighties, '86, somewhere in there, we hired Spronk Water Engineers out of Denver to do an analysis and try to get some information. Colorado kept saying, "You don't have any specific information that we're harming you and that we're doing bad things." We hired them. Finally, we got enough data to start thinking about we needed to do something.

RB: And this is mainly data on stream flow?

LR: Well, it's data on water usage—how much water the basin is generating. What is Colorado doing with it? How much is getting to Kansas? How much should get to Kansas? The compact doesn't just say

Colorado gets a 100-acre feet and Kansas gets 50-acre feet. It's not designed that way. It's designed on percentages.

RB: Is it taking into account the stream water—surface water/groundwater interaction issue? Clearly there's ditch irrigation on both sides of the border. Does the compact also take into account, or did you all take into account, the impact of alluvial wells up and down the river?

LR: The compact does not specifically mention groundwater. Even in the litigation, when we raised our complaints, Colorado never raised that as a defense.

RB: Okay. So, there's pretty early on recognition of that groundwater/surface water connection.

LR: And the basic problem was post-compact wells in Colorado impacted the flow of the river. They just continued to drill and drill and drill.

RB: So, when do you actually file that lawsuit? For some reason, I was thinking '85. I may not be remembering this right.

LR: I think we filed December of '86, maybe. I can come up with that information.

RB: We can track that down. What happened then?

LR: Well, the first thing that happened, just a little procedural history. Any dispute between two states can only be decided in the United States Supreme Court. So, the only place that you can file the case is in the United States Supreme Court. So, we filed in the United States Supreme Court.

Then the Court gets to say whether they're even going to hear the case, and many cases they reject. First, we had to convince the United States Supreme Court to take the case. We had to file a Motion for Leave to File, which is to get permission. So, we did that. Of course, Colorado opposed it. Colorado said we hadn't exhausted our administrative remedies, and they weren't hurting us, and they were wonderful. But eventually the Court accepted the case, and they appointed a special master, which is

sort of like a judge. The US Supreme Court, all nine justices aren't going to sit there and hear this case for years and years. So, they appoint somebody to do that job, to make a record and make recommendations to the Court, both legal and factual.

So, they appointed Wade McCree, who was in Ann Arbor, Michigan, I think, somewhere in Michigan. We had a meeting, a preliminary hearing with him. About a year later, we got a notice that he died very suddenly. He wasn't that old, I can't remember, sixties maybe. So, they had to appoint another special master. All this takes time.

Then they appointed Special Master Arthur L. Littleworth, out of California, with the firm of Best Best and Krieger, to be special master. So, he started holding hearings in Pasadena [, California]. We switched gears from Michigan out to Pasadena.

RB: How long does this go on?

LR: Well, the trial, I'm trying to think when the trial started, early '90. There was a gap of four or five years after we filed while we did all the work, put the case together, to get the data from Colorado. That was one of the major problems. Colorado said, "You can't prove that we're hurting you, and we have all the data, and you don't, and we're not giving it to you."

RB: When you said there was a trial, it's an actual lawsuit of *Kansas v. Colorado*, only instead of going in front of a standard jury, it's going in front of a special master.

LR: Right.

RB: Is that special master than making the determination of who wins and who loses? Does he make a recommendation to the Supreme Court? How does that work?

LR: He creates a record. It's in the form of reports to the Court. Then he makes a recommendation both as to the law and to the facts. Then it's totally up to the [U.S.] Supreme Court, whether they follow that or not. They can do anything they want.

RB: How long did that whole trial phase take?

LR: I think it occurred over three to four years, the actual trial part of it. We spent 270 days in the courtroom in Pasadena.

RB: So, then a recommendation is made to the [U.S.] Supreme Court. How long does it take for them to rule?

LR: There were actually a series of recommendations. There were five separate reports the special master sent to the Court. In each case, the Court can decide whether to hold oral argument, or whether they—what they want to do. On each recommendation, they take an action. We have five reports.

RB: And those are staged over time?

LR: They were over time, yes. We sort of bifurcated the hearing with first started are they guilty, and then secondly what are we going to do about it if they are.

RB: Just as an outsider to not just this lawsuit but to the legal process in general, it's always really hard for me to understand the timeframe that we're talking about. We talk about geologic time. It sort of feels like what was going on here, at least from a distance.

LR: I think so.

RB: If you're involved with it, it probably makes perfect sense to the people involved with it. To outsiders, it's kind of head scratching.

LR: The problem was so complex. There had to be a computer model developed to look at stream flow in Colorado, irrigation, everything that has stream impacts, and the data gathering was enormous. I don't know if we developed the technology, but we started using satellite imagery to document irrigated

acres in Colorado to try to figure out what crops they were growing, how much water was being consumed, on and on and on.

Part of the problem was, we'd hold one phase of the trial, and we'd get an answer on some issue, and then by the time we got to it again, we were three years behind in the data. So, we'd have to update the computer model, get three years more data, put it in the computer model, and then come in and say, "Well, they've also done this and this and this." That just kept going forward in iterations.

RB: When is this resolved? Maybe "resolved" is the wrong word. It does eventually come to an end.

LR: It was almost twenty-five years from the time it was filed until the final gavel came down.

RB: For some reason, in my mind, I was thinking 2005. It would be maybe even later than that.

LR: It was about twenty-five years. I can't recall the exact dates. It was before I left in 2008.

RB: How much of that were you personally responsible for? How much did you farm out to other people? How does that work?

LR: There were many people that worked on the case. The Division of Water Resources provided staff, information, data for Kansas components. Colorado made counterclaims against us. It's hard to imagine how the downstream state can be violating the compact, but they thought we were. None of those claims ever turned out to be legitimate.

RB: I assume you hired other attorneys to help you in this process.

LR: Originally the attorney we hired was Richard Simms from Santa Fe, New Mexico. He was Chief Counsel. He had experience in Texas v. New Mexico case. He had interstate water experience in the US Supreme Court.

Early into the trial, it was taken over by John Draper from Santa Fe, New Mexico, as chief counsel. I worked on it the entire time. There were other attorneys from those two offices in Santa Fe that worked on the case.

RB: How does that work?

LR: We had technical consultants, Spronk Water Engineers out of Denver. We had Steve Larson out of Maryland who was a computer modeler. There were a number of other people.

RB: Who was the point person in all of this? If I had to go find out who was actually in charge, was it you? Was it the Chief Engineer? How did that work?

LR: In the litigation, the counsel of record is in charge. It was either Richard Simms or John Draper.

RB: So, the person in effect you've hired. Were you the one making that decision?

LR: That was made through the Attorney General's office.

RB: So, they're involved in this process as well.

LR: For much of the time, they had one of their attorneys also there. [Kansas Attorney] General Stephan was very involved, and [Kansas Attorney] General Stovall was also involved.

RB: Was it hard to convince people like that, the Attorney General's office—you're living in the water world. They're not. Was it hard to convince them to expend significant state resources to go down this road?

LR: Spending money was kind of out of my wheelhouse. That was a different pay grade to decide. Basically, the legislature made special appropriations to fund the litigation.

RB: So, people understood the significance of the issue in this process.

LR: The people in western Kansas came in, the Chief Engineer, the Attorney General, all went in and lobbied to proceed with this action. Running interstate litigation is incredibly expensive. I do not know to this day how much it cost. I read in the paper it cost 20 million for the litigation. We recovered more than that. When we initially started, no one had ever recovered money in a contested interstate litigation case on water. That was one of the things we did.

RB: But the real focus, at least in the conversation that I've had with Dave [Pope] over the years, is people wanted recompense. They wanted water. That was the focus, to get water back, being delivered in the river.

LR: When we started, we were just asking for them to quit violating the compact and give us our water every year into the future. It was a year later, after we filed, that the US Supreme Court ruled that money damages were a possibility between two states in a water case. We immediately amended our petition before the U.S. Supreme Court to ask for money damages. We ultimately recovered 34 million, something like that, more than the litigation cost.

RB: As you look back on that today, I would assume that you consider that a success story.

LR: Absolutely. I have statistics about how much water usage changed in Colorado, but we definitely changed the way they did business and used water in the basin.

RB: And water has been and continues to be delivered to the state line, I assume.

LR: Absolutely.

RB: The way it was supposed to be.

LR: According to the compact. In fact, I don't think we've had any compact violations since the litigation has been over. It's analyzed annually based on the computer and the hydrologic institution model and determined whether they're staying within the compact.

RB: And to draw comparison to the lawsuit on Republican v. Nebraska, which seems to just raise its ugly head back and forth all the time, the Colorado lawsuit doesn't do that, right? Is that a fair statement?

LR: I'm not directly involved in either at the current time, but from my understanding, that's true.

RB: One of the stories that I've heard over the years probably from Dave, not so much from you, is just stories about loading up U-Haul trucks to go to California.

LR: That was one of my many jobs. Originally in the case our consultants are in Denver, Washington DC. Of course, a lot of our data is here and in Santa Fe. The trial would go on for three or four weeks. I think three was the longest we ever did. Three weeks at a time. Occasionally we'd take breaks and come back. Originally, we didn't have computers. We didn't have scanned documents. We didn't have all of those things.

RB: It was all paper?

LR: Everything was paper. At one point, we had seventeen file cabinets of files just in California. So, when we came back, we needed that information to work to prepare for the next trial segment. So, we had to get it back here. So, one of my jobs was we rented a 24-foot Penske truck, loaded copiers, file cabinets, desks, computers, whatever we had on there. I drove them from Pasadena. Usually, I went from Pasadena and then to Santa Fe and then up to Denver and then back to Topeka. I don't know how many times I made the trip, three or four.

RB: There's something about that I just find hugely entertaining. I'm not quite sure why. It doesn't quite fit with my idea of how all of this proceeds.

LR: As time went on, we had more and more scanned documents, more and more computerized stuff. We didn't have to keep doing that. We relied more on Federal Express sending ten boxes home instead of a truck load.

RB: Some of the other stories that I've heard over the years is sort of the stress, the toll, the stress in this process put on everybody involved. Can you speak to that?

LR: It was extraordinarily stressful, I thought, and I think most people would agree. Like I said, we spent over a period—maybe three years, we spent 270 days in the courtroom out there. At one point, I figured—I can't remember the numbers now. I figured out that we were spending ten man-hours preparing for every hour in the courtroom. Besides just the courtroom time, there was an enormous amount of preparation time. Of course, we generally worked from noon on Sunday until Friday night, sometimes Saturday morning. We maybe got twenty-four hours off a week. The rest of it, we were starting at 7:00 in the morning and working until 10:00, 11:00 at night. It was just on and on and on.

RB: Isn't this the case that I heard one of the stories about, at least one of the consultants that eventually had trouble in this trial process?

LR: It was our chief modeler [Tim Durbin]. He had developed the whole hydrologic institution model, and he had spent three or four days on direct examination where we laid out the modeling, his testimony. Then Colorado had been cross-examining him for three weeks. So, fifteen days on the stand. We came back Friday night from trial. He had finished the cross. We were getting ready to do redirect, to clean up things that were happening, and I don't think he ever came back to the Residence Inn where we were staying. We never saw him again. Right in the middle of the trial, our computer expert—I guess our computer expert crashed.

He was hospitalized. Colorado screamed and yelled and said the case ought to be dismissed and everything. He was examined by a doctor. [Colorado demanded that their doctor be allowed to examine him, which he did]. Both reports given to the court said he could not continue. The special master graciously allowed us time to redo our case and fix the problems that we had. That took almost a year. Then we went back to trial again. But it was earthshaking.

RB: The magnitude of all of this. Was it hard to convey the technical nature of all of this information to a special master that I assume is a judge versed in the law, not necessarily in engineering or geohydrology?

LR: Actually, Special Master Littleworth is an attorney with a private firm, Best Best and Krieger in California. Fortunately, he had vast experience in water right issues. California has many of them. He was, I think, involved in the San Francisco Bay Delta hearings, many complex problems. So, he had years of experience in water. He knew the terminology and the law. He was extremely good.

RB: So, given the amount of money and time and sort of personal involvement, was it worth it?

LR: I think it was worth it for Kansas. There were times personally—we were all exhausted, fatigued, and everything. But I think we needed to do it for the state of Kansas. The amount of water coming across the state line in the Arkansas River is not enormous. Our entitlement many years is—I can't remember numbers now, 100,000 acre-feet. It's not enormous compared to the total water use in Kansas. People used to ask me, "Is it worth spending all this money to keep 100,000 acre-feet in western Kansas?" I said, "Well, ask me that question when the Ogallala's dry, how much that 100,000 acre-feet of annually renewable water is worth."

RB: In a part of the world in which surface water is incredibly rare. It's interesting you bring that up because that may sound like a small amount of water, but in that part of the world, it's not a small amount of water. It's one of the largest rivers in the state. It has to have that water. We'll take a quick break in a second, but I do want to say that even today, the magnitude of that lawsuit and the extent of it in terms of time and such that when I talk about the Arkansas River and lack of stream flow today, the first thing everybody says is, "Yes, Colorado is not giving us our water." I always say, "No, that got dealt with. If there's a problem with the Ark[ansas River] today, it's not Colorado. It's Kansas." But that lawsuit made such an impression on the people of Kansas. That's still today what they associate with stream flow.

LR: The primary users of that water that comes across the state line are irrigators.

RB: A lot of ditch irrigation.

LR: Five ditch irrigators, and they have water rights to that water. It's not like Chief Engineer Gibson or Pope or Barfield gave them those water rights. Those water rights were [established] between 1880 and 1890.

RB: Some of the oldest water rights of the state.

LR: Absolutely. That's when they achieved those water rights, which are real property rights. It wasn't the fact that just in the seventies, somebody gave them these enormous water rights. They've been in existence shortly after statehood, actually.

RB: For a long time.

LR: Yes, twenty years after statehood is when they got these water rights.

RB: I'm not sure how well known that is within the state. You guys got so much attention from that lawsuit. It's almost like everything else that's happened once that water hits the state line—I always say it reminds me of that comic strip, “Pogo.” “We've met the enemy, and he is us.” That's not the way people like to look at it. It's a lot easier to blame Colorado. Why don't we take a quick break?

RB: We're back with Lee Rolfs after a quick break. We've been talking about the *Kansas v. Colorado* lawsuit that occupied a lot of your time. Was that the most important case you were involved with as you look back in perspective?

LR: I would say it's in the top three. It probably is the most important.

RB: What would the other two be?

LR: *Kansas v. Nebraska and Colorado* on the Republican [River] would be one. The F. Arthur Stone case before the Kansas Supreme Court [would be the other].

RB: What's that one about?

LR: It was dealing with the constitutionality of the mandatory requirement put in place by the legislature in K.S.A. 82a-728, the criminal penalty in the Water Appropriation Act.

RB: As you're involved in those things, you must have the sense that they are as important as they are in retrospect, if you see what I mean. You're aware that you're making sort of water history in this process, aren't you?

LR: At the time, I think even going through it, we knew these things were important, yes.

RB: How does that feel? I know that's a standard reporter's question, but you probably don't get it very often.

LR: No.

RB: Or do you think about it at the time? Or do you think about it only in retrospect? Or do you think about it at all?

LR: A lot of time when you're doing it, you're so busy, you're caught up, and you don't have time to think about the grand future a hundred years from now. Occasionally you sort of contemplate that, but I think as we've been looking back—John Draper and I have been thinking about writing a law journal article or something about the Arkansas River litigation. We've been going through, looking at all of the legal issues, the things of first impression, the things that have never been decided before, the fact that we got money in an interstate litigation over the objection of the opposing state, the first time it had ever been done. So, there were a lot of groundbreaking things that we accomplished in this case. Some of it only in retrospect do we have time to sit back and go, "That was pretty good."

RB: As I look at that, certainly at the same time that Dave Pope [Chief Engineer] was dealing with Colorado, none of the other issues go away. All the other issues that in some respects are really coming to a head in terms of groundwater depletion and everything else that you want to look at, and he'll walk

you through all of those issues. They don't get put on pause just because he's in California. I assume the same thing was true for you.

LR: Absolutely. One quick example, while we were in litigation in California, the legislature passed a law that said all Groundwater Management District policies had to become regulations. They could not be enforced—

RB: I remember that.

LR: So, we would be in trial all day in California. We had a deadline. It had to be done by a certain time. As soon as I got done with the trial and with my evening chores on that, I would work on the computer and also get on the phone and talk to Groundwater Management District managers, talk to David Pope, trying to negotiate how we were going to change all of these policies into rules and regulations. So that was my after-9:00-at-night job. That was just one example that didn't go away.

RB: Codifying something into rules and regs is no small thing.

LR: No, not at all.

RB: It's a multi-stage, extremely complex process, and I'm sure in the water world, just like everything else, it's even more complex in water than it is anyplace else.

LR: The Groundwater Management District has to be happy with it. Of course, their constituents have to be happy with it. The Chief Engineer has to be happy with it. The Attorney General has to be happy with it. The legislature has to be happy with it. There are a lot of people that have a say in this. It is time consuming.

RB: Just as I listen to you and Dave [Pope] both talk about this, I don't get the picture of you guys as the average state employee. I remember thinking about this at the time, just casually watching it. I'm not sure people quite appreciate all the pain and suffering and time away from home that you all went

through, in effect, for the state of Kansas. I don't know what your salary was like at DWR, but I can't imagine that you got rich in this process.

LR: No.

RB: That 20 or 30 million dollars probably didn't come to you.

LR: No, we didn't get a percentage. I think that was the hardest part, was being gone 270 days plus all the prep days. There was a time period, for instance, when we were defending depositions in Garden City because Colorado came over to take all of these depositions. I bet they took depositions of fifteen or twenty people. We had to go down there and attend those depositions, go through the records with those witnesses, make sure they weren't turning over anything confidential, sitting through this whole process, preparing for these. We were taking some depositions, too.

There was a period of time—I left home every Sunday night, drove to Garden City, stayed in a hotel. We worked all week. Saturday morning, I'd get up, drive back to Topeka, and I'd get to spend twenty-four hours, and then I'd turn around and go back. I did that six or eight weeks in a row probably. It was hard on the family. You miss your kids' ballgames and birthdays, all those kinds of things. There is a cost personally.

RB: Did you ever think about quitting?

LR: I kept hoping I could see the light at the end of the tunnel. This was originally projected to be a three- or four-month deal. It didn't turn out to be that way.

RB: Instead, it's more like fifteen or twenty years.

LR: Yes.

RB: But you never thought about walking away in that process.

LR: No, I can't say I ever thought about walking. [Note added by Mr. Rolfs after the interview: Rex, upon reflection, I'd have to attribute that trait to my father, Marvin Rolfs, a math professor at Fort Hays State University. His attitude was that if there was a worthwhile job to do, you did it. It just didn't matter whether it was hard, boring, onerous, or difficult otherwise, you just did it because it needed to be done. I still wonder sometimes whether that is a good quality or a bad quality, but that's the example he set for me.]

RB: And this connects a little bit to that, what got you interested in water law to begin with? Or did you start out that way? Was it just the job that became available? How did you start down this path?

LR: When I was three years old, I didn't say I wanted to be a water lawyer or anything. I had taken water law at KU from Earl Shurtz who wrote Bulletin #3 in [1956] about the Water Appropriation Act [*Report on the Laws of Kansas Pertaining to the Beneficial Use of Water*, Bulletin Number 3, Kansas Water Resources Board, November 1956]. Even then, I had no super inclination. When I was clerking for the Kansas Supreme Court with Justice Miller from '76 to '78, my time there as clerk was limited to two years. Arnold Windscheffel [a former Chairman of the Kansas Water Resources Board] came over one day and said, "Hey, they just created this new job over at the Legislature, and I think you'd be great for it." So, I went over and interviewed for the job.

They asked me what I knew about water law, and I said, "Very little." Guy Gibson, who hired me, he told me later, he said, "One of the reasons we hired you is because you were the only person we felt was honest and told us that you didn't really know anything. We could train you and make good use of you." I don't know who the other candidates were.

RB: So, in some respects, you're learning the intricacies of Kansas water law on the job.

LR: Absolutely. Doing research on each particular issue—Guy Gibson had, shall we say, "a cantankerous personality."

RB: He was forceful. You knew when he was in a room, that's for sure.

LR: He was extremely knowledgeable about water law, water rights, technical issues. He was, in many ways, a great teacher about that sort of thing. I had all kinds of other people helping me along the way.

RB: So today having the value of looking back at Kansas water law, if you could change some things about Kansas water law, and you didn't have to go to the legislature to do it, you could just snap your fingers, what would they be?

LR: I'd have to say that fundamentally I think the Water Appropriation Act is pretty sound fundamentally. I think Kansas had great foresight in 1945, particularly when it made a system where there's one priority system for groundwater and surface water, and it takes into account interaction between the two.

RB: Absolutely.

LR: I mean, there are other states that still aren't there.

RB: Or have been drug there, kicking and screaming in spite of all of the evidence to the contrary, which is Nebraska.

LR: Hydrologists and modelers and engineers have known for years that there's a connection between groundwater and surface water. The law has lagged far behind that for many years. Nebraska is one of those cases.

RB: A prime example.

LR: Texas would be another.

RB: In effect that one system recognizes, doesn't make that differentiation.

LR: Right.

RB: First in Time, First in Right work okay?

LR: Yes. The Water Appropriation Act without a doubt was in its terms and in its philosophy at the time was to encourage development of water resources and development of the economy in the state of Kansas. Now, over time, that emphasis has shifted away from that, but at the time it was put in place, and it did [promote economic development.]. It did that by protecting people who wanted to make investments in water and other industries. People don't like spending millions or thousands of dollars on something if they don't know they have a secure water right to put to use in that business or whatever they need. They need that protection.

RB: So, in effect the system encourages people to put water to a “beneficial use” is kind of the standard phrase.

LR: Absolutely. The whole act is designed and recognized as basically beneficial use. Now we think of other things about the environment, about fish and wildlife, about habitat, about all these other things, but I don't think back in 1945, there was a big emphasis.

RB: So, in effect, as we enter a period of— “shortage” may not be quite the right word, but a period when water is not as plentiful or considered as infinite as it was, how should the law change to recognize that? Or should it?

LR: The Water Appropriation Act deals extremely well with direct interference with surface water rights with each other and with direct interference with wells with each other.

RB: Impairment.

LR: Yes, but it doesn't deal as well with long-term overall decline of water table and an aquifer that's being mined, like the Ogallala, and how to do that is a really good question.

RB: Do you spend time thinking about that?

LR: I've spent a fair amount of time thinking of it. I haven't come up with a great solution. I mean, there are all kinds of alternatives to reduce consumption. There are probably eight or ten different legal authorities that can be used to do that but whether they're politically viable, whether they're practical, all those other things, that's another question.

RB: If you need something to do in terms of entertainment value, suggest a change to Kansas water law to the legislature and then see what happens. Right now, priority is strictly first in time, first in right. There are different kinds of water rights. The stamp of the date determines the priority of your water right. Should people take a look at different types of uses having different priorities here? Are there other ways to establish that as opposed to simply time?

LR: That's another good question. I have thought more about that. There are certain things we can all agree we have high priority. If you ask a whole group of people what would be highest priority, everybody would probably be saying for domestic or household use. We all need water for cooking, cleaning, bathing, and flushing our toilets, that sort of thing, and probably municipal use that furnishes those types of things to municipal owners.

But when you get beyond that, then who is going to decide? If you're an irrigator, you probably think irrigation is the most important thing. If you run a Frisbee factory and you need water, you'd probably say that's the most important. If you're a golfer, you'll probably say water in the golf course. Me, I like to fish. I'd probably say fishing is the next highest priority.

So, we would all disagree. So, who are we going to have decide that issue? Who do we want to delegate that responsibility to? The Chief Engineer? The legislature? The district court? Who's going to make that decision, what the next important use of water is?

RB: I don't get the sense that anybody's got the stomach for that. This may go back a little bit, about your comment about certitude. Everybody's made a lot of decisions, assuming the system that's currently in place is going to be the system we deal with on down the road. To change the rules in the middle of the game obviously is not going to go down well with much of anybody, unless you're a big winner there. Where do you think we're headed then, in terms of water law and its implications in the

state? There have been impairment cases on groundwater, not many, right, but a few. Is there more of that coming? Are we looking at water law war out there? What does the future hold here? Are we just going to quietly watch the Ogallala dry up and go away?

LR: I think there are two different answers. There are a number of systems we've sort of adopted as sustainable water use. We're not appropriating more than is being replenished on an annual basis on the average. Then we have the other systems like the Ogallala essentially being mined. We're taking out feet per year and putting in half inches per year. How that system is going to turn out or not, I don't know. They've been talking about it since I started and went to the Governor's Task Force meeting in 1978, "The Ogallala is going down. We've got to do something about it." Today we're saying, "The Ogallala is going down. We've got to do something about it."

RB: Is the legal machinery in place to do it? Is that legal machinery sufficient?

LR: I think the legal machinery is there to do it. There are a variety of ways that could be used to cut back existing water use. There are people out there that say the water's there. It's just like oil or gas or gold or silver in the ground. Let's use it and it's gone, and we'll do something else. What I tell my water law class is, maybe not. This isn't like energy where we have alternatives. Water is a necessity. Without it, we don't have industry. We're not living here. We're not doing anything. There is no alternative to this. So, if we use up the water supply, what are we going to do? We're not going to be here. That's the simple answer.

RB: I've heard both sides of those arguments. What good is it doing underground, which I understand. On the other hand, I've also heard economists talk about substitutability. I've always wondered, what do you substitute for water? I'm not aware that there's anything else that you can use that way.

LR: A Supreme Court justice said, "Water is a necessity." That's clear and simple. That's where we are.

RB: Do you think we're headed for lots of lawsuits out there?

LR: I would have thought actually that there would have been more before now. I think our water law system and our water administration has dealt fairly in general with people. So that has stopped a lot of that from happening. I mean, the Ogallala water supply is going down. Some of our other water supplies were polluting. So, in essence, our water supply is diminishing. As we have more people and more uses, more industries, and other things that use water in this country, the demand—the supply is going down. The demand is going up. That just bodes for problems.

RB: A couple of questions to finish up. As you look at how other states have handled, in the west, somewhat similar situations in a lot of cases -- every state is different, -- but has anybody done any better than Kansas has?

LR: I haven't attended interstate meetings recently. Back when I was doing so, we would talk about water problems. Usually, we were ahead of most of the other states. I'd say, "We're trying to deal with Issue D here," and they'd say, "No, we're still back on A. We haven't even figured that out." I think Kansas overall has an extremely good system. It's done primarily through the administration of the Chief Engineer. I think it's a stable system. It's a fair system. Improvements could be made, but I think overall we've got a basically strong system that will equal anything throughout the West.

RB: It's a pretty complex system in terms of the number of agencies and institutions and individuals who have their thumb in the pie. You were at DWR. I always tell people, "They're the 600-pound gorilla in the room. They're the ones with the water-rights world." You spoke about water quality issues, and then there are all of these other agencies that impinge on both quality and quantity, surface, and groundwater. It's incredibly—I don't think anybody can argue it's not a pretty complex system that the state has come up with. I also tell people, sometimes I think that's by design. That's how the state wanted it, a fairly complex system. As you watched it evolve, is that characterization accurate, do you think?

LR: I'm not sure they designed it just for the sake of having complexity, and I also recall back when the State Water Council was created to foster communication between all of those agencies you just mentioned and try to coordinate what's going on. We get a new application for water quantity. Yet the Kansas Department of Health and Environment may have a water quality issue. If we approve that well,

it may affect where that pollution is going or what problems. So, none of it is in isolation. Everything we do affects somebody else on something.

RB: In some respects, it's sort of a Kansas solution to government in the sense of its multiple agencies in which cooperation and coordination is key to effectiveness. Does that probably characterize it accurately?

LR: Cooperation and knowledge and education. The more data you have, the better decisions you can make. When you know what the recharge is, when you know how much water is coming out of the ground, when you know what the soil types are, how water moves underground, all of those things add to your ability to regulate in a meaningful, consistent, fair way.

RB: And it does feel like the state is in good shape. I always tell people, without good data, you're not going to make a good decision. Just because you've got good data doesn't assume that you'll make a good decision, but it's pretty hard to make a good decision without it. That's one of the areas where I think the state has been really successful.

LR: We went from basically nobody having water meters on wells to pretty much everybody having water meters on wells. Water level measurements in January throughout the state and the water system I think pretty accurately tracks the water levels in most of the major aquifers and so on. Knowing all of those things is helpful.

RB: Most of that information today is digitally available. It's really easy to go track down and follow, if you want to, compared to pawing through paper records, even as of ten years ago.

LR: When I started, there was some water use data maybe on 60 percent of the rights submitted, and that wasn't very good. Now it's close to 100 percent, and the data is very good. It's followed up. It's all digitized in a map, graph. It's out there.

RB: Back in the early days, they were sort of estimating their water use based on how long they ran a pump.

LR: Right, an old pump test and [the time water was used] written in a log.

RB: Then they would sort of do this. It was to your benefit to make sure that that number was high, so you maintained that water right process.

LR: Right. There was no follow-up. If you added an extra zero to your number and said you pumped an extra 10,000-acre feet, nobody checked. It wasn't compiled anywhere. They were an individual—there was a paper record and an individual water right file. There was no compilation of that data.

RB: Where did you grow up, Lee?

LR: Grade school and junior high, I was in Topeka. I went to Hays High School, Ohio University in Athens, Ohio for undergraduate, then Chicago for four years with the IRS [U.S. Internal Revenue Service] then back to KU, then back to Topeka. I've been here ever since.

RB: How hard is it for somebody that doesn't come with—I assume you don't have any direct ag background in this process.

LR: Other than my grandparents were involved with agriculture, other than that.

RB: But to go out and deal with folks in the irrigation community.

LR: No.

RB: What was that like?

LR: Being a Kansas native, born in Lawrence, I always felt like I could talk to people. That wasn't my primary job dealing with the public in terms of things.

RB: So, you didn't ever feel like it was an adversarial—the Chief Engineer is kind of the point person in that process, but you were part of it.

LR: Contrary to some attorney-type positions, if you're working for an individual client, your client wants you to win. My goal wasn't ever really to win. It was to be fair and right and correct. I would have attorneys call me up and say, “Well, this happened. This happened. This happened. That's not right.” I'd check it out. If we screwed up, I'd call them back and say, “Hey, we screwed up. We'll fix it.” I didn't feel like I had to be right all the time.

RB: That is really interesting. I've always viewed the law as just, at least in the courtroom setting, as this sort of adversarial relationship that somehow was supposed to get to a common point. That's a different role.

LR: I guess I felt our role was to administer the law fairly, correctly, and use the right facts. Occasionally we made mistakes. I think overall we did a fantastic job.

RB: One last question, did this move from the Board of Agriculture to the Department of Agriculture make any difference in any way to you or DWR in this process? That was in what? '92, '94, somewhere in there, it seems like that that's when it took place?

LR: I can't recall the date.

RB: Something like that I'm pretty sure.

LR: When the Board was there, we had to meet with the Board annually or more often, and they reviewed everything that we did. So, we had different bosses in a way. When that went away, it was a little different feeling. I can't say that my job changed a whole heck of a lot.

RB: Either before or after that change, obviously there was political interest in *Kansas v. Colorado* and those kinds of lawsuits. Were you pretty insulated from that sort of political pressure, let's say on use of the Ogallala? Did politics ever enter into your world at all? Were you isolated from that?

LR: I always felt like we were fairly isolated from it. I know that the Chief Engineers probably felt more pressure. Down at my level, I did my job.

RB: It didn't get transmitted that way?

LR: No. I mean, we had to go to legislative hearings and respond to things that the legislators raised as concerns. I never cared what party was in power. We worked with whoever it was and did our job. That's the way I felt about it.

RB: My memory is, the times that I saw you in action in the legislature, you had a certain authority with them. I don't remember you getting beat up. I'm sure you did maybe a time [or two]. At least when I was in the room, I don't remember seeing anything quite like that.

LR: I felt like, the times I did testify or a lot of times I helped other Chief Engineers with testimony and that sort of thing, we tried to be as honest as we could and as informative as we could.

RB: Based on what you did on statutes or rules and regs at that point, there's not a lot to argue about it, it doesn't seem like—

LR: I got a lot of questions from the rules and regs committee [Joint Committee on Administrative Rules and Regulations], but we just answered their questions. I think we got along pretty well with them.

RB: That was always my impression just from watching at a distance. Considering the contentious nature of the world that you lived in, it was kind of impressive. Anything else that we didn't talk about that we should have?

LR: There's a lot we could talk about probably. I can't think of anything.

RB: I do think at some point it would be good to sit down with you and Dave [Pope] and sort of have you compare notes a little bit, combine the legal and the engineering/hydrology world in this conversation. I

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do think that the Kansas v. Colorado just seems like such a monumental thing that, fifty years from now, people are going to look back at it. I think they recognize its significance today and will continue to.

Thank you, Lee.

LR: Glad to be here.

[End of File]

