

Interview of John Peck by Rex Buchanan, February 5, 2021

Kansas Oral History Project, Inc.

Rex Buchanan: I'm Rex Buchanan, the former director of the Kansas Geological Survey. The date is February 5, 2021. I'm at my home in Lawrence, Kansas interviewing KU Law professor emeritus John Peck who is at his home in Mission, Kansas. We're conducting this interview over Zoom.

John is a native Kansan and graduated from Kansas State University in 1968 with a degree in civil engineering. After working three years for the US Public Health Service and the EPA in Washington, DC, he earned his law degree from the University of Kansas School of Law in 1974. He practiced law in Manhattan, Kansas from 1974 to 1978 and joined the KU Law Faculty in 1978. He taught contracts, land transactions, water law, and family law. John is a nationally recognized authority on Kansas water law. After forty-one years of teaching at KU, he retired in 2019. He remains in law practice in an Of Counsel position at Foulston Siefkin, LLP in Overland Park. His representative clients include municipalities, power plants and other industries, irrigators, golf courses, and special water districts.

John's interview today is part of the Kansas Oral History Project series, examining the development of water policy during the 1970s, '80s, and 1990s. In these interviews, we explore water policy through the eyes of water experts, administrators, legislators, farmers, environmentalists, and others who were involved in development in implementation of that policy.

The Kansas Oral History Project is a nonprofit corporation created to collect and preserve oral histories of Kansans who are involved in shaping and implementing public policy during the last half of the twentieth century. Recordings and transcripts of these oral history interviews are accessible to researchers and educators online at ksoralhistory.org and through the Kansas Historical Society in the State Library of Kansas. The Kansas Oral History Project is supported by donations from individuals and grants from Evergy and Humanities Kansas.

John, thanks for agreeing to do this today. I appreciate you taking the time. Let's start a little bit with your background. You grew up sort of north-central Kansas and went to K-State [Kansas State University], got a degree in engineering. You did wind up after a few years going to law school. In my experience, that combination of backgrounds in engineering and the law is pretty unusual. What brought that on?

John Peck: Rex, when I was in engineering school, the Vietnam War was just starting up. In the late sixties, I received my draft notice. I thought I was probably going to go to Vietnam, but then I found another branch of the service that most people have never heard of, the Commissioned Officer Corps of the U.S. Public Health Service, which at that time was taking engineers in addition to medical people. So, I applied for a position with the U.S. Public Health Service and got into that service with the help of Senator Carlson, who happened to be from Concordia, [KS]. He wrote a nice letter on my behalf.

So, I spent three years with the Public Health Service in Washington, D.C., and I was assigned to at first, the Public Health Service's National Air Pollution Control Administration. Then when

those departments, water and air and solid waste that were formerly in the Public Health Service, were transferred to the EPA [U.S. Environmental Protection Agency], I was moved lock, stock, and barrel over to the EPA. So I was actually in the room when the EPA started, and Bill Ruckelshaus was named the first EPA director.

But in any case, that's when I began to get away from pure engineering—I mean, I was writing reports on air pollution and helping establish the so-called “air quality control regions” around the country, appearing at public meetings. But I began to work with some lawyers, and frankly, I'd never—well, I guess I had met one lawyer growing up. That was a judge that handled my Boy Scout merit badge in citizenship in the community or something. But in any case, I began to work with lawyers, and I saw how they worked with legislation, and that's basically what we were doing.

We were implementing legislation, and I got more and more afraid to go back into graduate school in the mathematics. The more I got away from the mathematics, the more afraid I was that I couldn't make it in graduate school. I always wanted to go to graduate school, and I slowly evolved to law. It had nothing to do with water at that time. It just had to do with a change in my thinking about what I wanted to do for a career. I saw law as having the potential for a lot more greyness than the black and white that I kind of felt like I was taught in engineering school. So that's a long answer to a short question, but that's how I got into law. It was just an evolution in thought.

RB: I have a follow-up question to that, but let me—grey versus black and white. What do you mean by that exactly?

JP: Well, by that, I mean that my training in engineering school was to study various subjects like statics and dynamics and strength of materials and that kind of thing and learn some formulas and learn how to apply those formulas to various problems and to come up with an answer on an exam. And it seemed to be fairly clear-cut. It had an answer.

RB: The answer was either right or wrong.

JP: Well, we had to show our work, but the answer—there seemed to be a mathematical answer. When I got into EPA and saw that these lawyers were arguing all the time about what this word meant or what this statute meant or how do you apply this statute to a set of facts, I grew much more comfortable with that kind of thinking. And that's one thing that I have relished about my law training and my practice is that there always seemed to be at least two sides to every question, and there are no really black and white answers, as we see in the current situation with the impeachment and all that news.

RB: There's room for ambiguity.

JP: Absolutely.

RB: It's pretty much true with life as opposed to other components. Let me ask you this because in working with you over the years, it seemed to me that your engineering background really came in handy and helped inform your legal background. At least that's how it seemed to me. Is that right?

JP: No question about it. I mean, I took some water resources courses in engineering school, not thinking that I'd ever become a lawyer and do water law. I think that background in hydrology and hydraulics and I think I even took a course that included some dam design, but my training in mathematics has actually helped me. I mean, for example, as you know, the Groundwater Management Districts [GMDs] have some regulations that actually contain algebraic formulas. They set forth the algebraic formula in the regulation, and they tell what all the terms mean. It's been fun for me to try to translate that into English for people to be able to understand. So, I don't think there's any question a technical background has helped me.

RB: It also gives you I think a certain level of credibility that other people in the legal profession don't necessarily have when they wade into technical issues like the world that I'm accustomed to. Just the fact that you have that background I think provides a level of comfort that's a little unusual.

JP: Well, I'll tell you what. It's not really earned, I don't think, Rex. [laughter] I haven't had to prove myself in testimony anywhere that I actually understand, I mean, anything about modeling or anything like that. I have not had to do any of that. So I agree. I think it helps me. It gives me kind of a stamp of approval when I am introduced as an engineering graduate and a lawyer. That helps. But I'll tell you, most of what I learned in engineering school except the process of thinking, which I am very, very grateful for, most of that has been lost.

RB: Let's move on a little bit in terms of you practiced law for a little while. When did you develop this interest in water law? At what point does that become one of the things that you specialize in?

JP: That's really interesting because in law school, we had a really good law professor who taught water law among other things. His name was Earl [B.] Shurtz [former law professor at University of Kansas School of Law], and you've heard of Earl Shurtz because he wrote several of the very important early papers on Kansas water law back in the fifties and the sixties. But I didn't take Water Law. In fact, I don't even remember even considering taking that. We had a whole plethora of courses we could choose from, and the thought that I would ever end up with a water law case—well, I'm not even sure I even knew it was in the curriculum.

So, I went to Manhattan because I had gone to K-State. I loved Manhattan. My partner there, one of them was Richard Seaton, who was a K-State attorney. And, I didn't have any water

cases in Manhattan although our firm did have one that involved some kind of a drainage question, but otherwise I had never heard of the Appropriation Act {Kansas Water Appropriation Act, K.S.A. 82a-701, et seq.] or anything.

So, I was then contacted by Dean Martin Dickinson of the Law School who asked me to consider moving from law practice to the faculty, which came as a total surprise to me. And, after a few months of thinking and visiting with my wife about it, we decided, "Okay, we'll interview for that job," and I got that position as an associate professor.

So, I got down to KU [University of Kansas] to visit with Martin Dickinson, and he said, "What would you like to teach?" and I said, "Well, contracts and land, because that's the kind of work I'd been doing. And maybe family law because I'd handled some divorces and adoptions," and he said, "What about water law?" I said, "Water law? I don't even know what that is, Martin." I didn't take the course. He said, "Well, Professor Shurtz has become disabled. And there was a Kansas Water Resources Board report [ref. *Final Report of the Governor's Task Force on Water Resources*, State of Kansas, Topeka, 1978.], interim report, the year before that highly encouraged both KU and Washburn [University School of Law] to teach water law." And, he said, "We would like you to teach water law, if you're willing." I said, "Well, okay. I don't know anything about it."

This would have been in the spring of '78, and then I started teaching in the fall of '78, and I didn't have to teach water law until the spring of '79. So I wondered, "How am I going to learn anything about this?" And I contacted Jim Powers of the Kansas Water Resources Board. He was the head then. I said, "Jim, I'm supposed to teach water law here, and I don't know anything about it." I said, "I have a casebook I can buy and use," but I said, "I need some help." And he said, "Well, first of all, I'll send you all the publications of your colleague, Earl Shurtz, Professor Shurtz," which he did, and by the way, Rex, those publications are still highly valued by lawyers in the state. We read them. We discuss them. We argue about them. I'm talking about the small water rights fraternity.

And so, he sent me those. He said, "Well, better yet, John. I'd like to hire you to work on a project with us. We've been asked by the federal government to look into the possible movement of water from the Missouri River to Western Kansas, and we'd like somebody to do a legal study of that. Would you be interested?"

So, that's how I began to cut my teeth was to prepare for teaching that class in the spring of '79, to begin to work on the legal aspects of moving water from the Missouri River to Western Kansas, which was just fascinating and still is, and then to prepare for my water law class and to teach it. That's how I got started.

RB: So you were teaching a course that you never took.

JP: That's right.

RB: How did then your involvement, it goes from the Water Resources Board to eventually the [Kansas] Water Office and [Kansas] Water Authority and changes in sort of the regulatory and administrative mechanisms dealing with water in Kansas. Does your involvement then continue with those organizations as they grow and develop? Talk about that a little bit.

JP: OK, well, in Lawrence, we happened to live right next to Joe Harkins. The former Kansas Water Resources Board, which at one time I think the executive head was Professor Bob Smith of the Civil Engineering School of KU, but the Legislature changed that to the Water Office in the early eighties, I think it was. They had one director, and then they brought in another director by the name of Joe Harkins.

Well, Joe Harkins happened to be our neighbor in Lawrence. I didn't know he knew anything about water. In fact, I learned that he may not have known much about water, but Joe Harkins is one of the best administrators I've ever encountered. I think Joe to me is like a CEO of a major corporation. If it's GM, that's good, but he can move over to head a drug company, or he can move over to head a software company because of his skills as an administrator.

So Joe Harkins knocked on my door one night. He said, "John, we're starting to work on a water plan, a new water plan, and I need somebody inside, a lawyer who can analyze some of the legal aspects of this new water planning process." I said, "What do you mean? I don't want to leave KU." He said, "Would you be willing to come over here for the summer and the fall?" I think it was 1984 or so. So I talked to my dean at that time, and he said, "Sure, we'll let you go for that amount of time."

So I began to work with the Kansas Water Office and Joe Harkins. There were several developments out of that for me personally, Rex. The first was that I said, "I don't even know what the water plan is, Joe," and he handed me a copy of the very first so-called water plan. I still have the copy. It's maybe fifteen or seventeen, nineteen pages long. It's yellow with age now. It was set in some kind of font, and then there were drawings, and there were graphs in there. He said, "Well, this is the water plan." I looked at the statute, and it says that the legislature at that time was supposed to consider and *incorporate* the water plan into the law." *Incorporate* it. I looked at that document, and I looked at the legislation, and it looked to me like maybe the legislature had incorporated that document, and that really bothered me because, first of all, it wouldn't appear in the Kansas statutes that all lawyers use. We all have those red books behind our desks. We pull them out, and we read them.

I learned that there are some other things that have been incorporated by reference in the Kansas statutes. For example, the Internal Revenue code is incorporated into our law because our state income tax is based in part on the federal figures. I think maybe the national traffic

code may be or something like that. But you can actually get a hold of those copies easily if you have to, if you're a lawyer, but this little pamphlet didn't look to me like a water plan [statute].

That was the first memo I wrote in the summer. That was the first change that was then made in the following legislative session was to change the language so that they don't incorporate the water plan into the statute, but rather it became a dynamic process by which the State Water Office every year or whenever produces more versions of the plan, which are sent to the authority, which are sent to the legislature to be considered, and then they could pass legislation. [Note added by John Peck after the interview: "Joe Harkins' decision to promote this important legislative change was based on recommendations made in the Final Report of the Governor's Task Force on Water Resources published in 1978."]

And based on that, they passed, for example, the Water Assurance District Act. I remember that fall of 1984. That was one of my first assignments after that memo was to write the first version of the legislation for the Kansas Water Assurance District Act. I had never written legislation before, and I found out how hard it is to write legislation, even a draft.

So that was my first big project after that, and I am forever grateful to Joe Harkins for hiring me and giving me that opportunity, and I admire him greatly.

RB: I just wanted you to know, John, that I have had Water Assurance Districts explained to me multiple times, and on rare occasions, for about five minutes, I think I understand what they are, and then that goes away, and I'm still confused by it, and now I know who to hold responsible for that. Joe was the first person that we talked to in this series. And I would kind of like to go back and talk to him again after we get finished up because you're exactly right. He brings an approach, an administrative approach to water that seems to me hugely influential even though he didn't have much of a water background in this process.

You almost make it sound like a fair amount of what happened to you career wise is almost accidental. Somebody calls you and asks you to teach a course that you've never taught. You happen to live next door to Joe Harkins. It sounds kind of coincidental almost.

JP: Absolutely. In fact, I had to give a little talk about this subject of kind of my career a couple of years ago. I attributed everything in my career to four out-of-the-blue phone calls. The first one was Martin Dickinson asking me to consider moving to KU. The second one was by a farmer east of Lawrence in 1979 or '80. See, what happens, Rex, is I published an article on that Missouri River transfer possibility. And then I published an article on Groundwater Management Districts. That was my first big article. As you know, law professors are supposed to publish. That's half of what we do. And that's where we help make our name and give us some credibility in the practicing bar, either locally or statewide or nationally.

So, we publish what are called law review articles, and a law review is a publication that every law school has in the country. We have two at KU. They're edited by students. Part of each issue is written by students, but they also have these articles. That's the way we learn, and that's the way we disseminate our knowledge.

What happened was, I wrote that article on the Missouri River. Then I wrote one on Groundwater Management Districts that was funded by the KU research grant back in 1980 or so. Then your name begins to get out there, like you supposedly know something. So back to the phone call I got from this farmer east of town. He said, "Mr. Peck, I have a water right, and I'm irrigating corn, and for some reason, I'm not getting any water. I'm not permitted to get any water out of the Wakarusa River this year, and I'm looking up at Clinton Reservoir, and they're all waterskiing up there. I have a water right that predicated that lake. What's the deal?" I said, "I don't know. I'll try to find out."

So it was there that I learned about the Kansas Reservation Rights that the state gets to fill and to keep water in the big federal reservoirs and how they relate to the priority system in the Appropriation Act to downstream and upstream farmers and other people. So what I did from that, Rex, was I gave him some kind of an answer that probably didn't make him happy, and then I wrote an article on federal reservoirs, and then that article was probably my third one, and then it just kind of tumbles like that. You get your name out, and then you get more calls, etc.

So let me just interject the other two phone calls, and then we can pursue them if you want to —the third one was in 1988 or so, when the City of Wichita Legal Department and the City Manager called me to see if I would help the City of Wichita acquire some groundwater rights. That started my consulting in water rights in general. Then the fourth call I got was in the early 2000s when I got an email from Sri Lanka, asking me to do an international project.

So your question is right on point, Rex. These things have just come out of the blue for me. I'm very fortunate, and each one has changed my life.

RB: The article about Groundwater Management Districts, GMDs, we've talked about them a lot in this interview process because they appear to me to be the epitome of the philosophy of the value of local control versus state control. What was your perspective on GMDs at that time? What is it today? Have they fulfilled that promise, do you think?

JP: That's an interesting question, because we did a whole symposium on that whole question in about 2006 in the Law School. But, Rex, when I first took on that subject as a scholarly interest, it was just because I had to find some topic to write about. [laughter] I'm serious. As a new law professor in water law who knew nothing about water law, I did look at the recent session laws, which is the compilation of laws that have just been passed by the legislature in 1979 or so, and I saw that there'd been some amendments to the Groundwater Management

District Act, which was enacted in 1972. I thought, "Okay. I'll write an article on Groundwater Management Districts."

So my wife and I piled the kids in the car and we took a trip out to western Kansas in the summer of 1980. If you look at your weather information, you'll see that was maybe the driest summer we've ever had in my lifetime.

RB: I remember that summer. It wasn't just dry. It was hot. I think there were almost like thirty consecutive days of 100 degree temperatures. That was an ugly, ugly summer.

JP: My sons were trying to play baseball, and they put the evening games off an hour. But that's also the summer that I received that phone call from the farmer east of Lawrence. So, I wrote that article, not knowing anything about Groundwater Management Districts, and I tried to analyze that statute, every word, to try to look for potential problems and lawsuits and that kind of thing. I think the one that sticks with me after all this time and is still an issue with me is the fact that the original Groundwater Management District Act, which enabled the creation of the Groundwater Management Districts, was amended in 1978 or '79 to add the possibilities of these IGUCAs, the intensive groundwater use control areas. The one new power that was given to the chief engineer that bothered me, and I'm talking about "bother," not from a moral sense, but rather from a sense of a potential legal problem—remember, I see things from both sides. I'm just trying to raise the issue—was the fact that the chief engineer seemed to be given the power to cut back on water rights outside of the priority system, which the Water Appropriation Act of 1945 seemed to set in stone.

So I raised that issue first in that article in 1981 or whenever that article was published. The same issue existed when we had the Cheyenne Bottoms IGUCA, which I know a little bit about. It still exists with the Local Enhanced Management Areas, with the LEMAs, but not with the newest district. I forget what they're called at the moment, [water conservation areas, WCAs] which are totally voluntary on their part.

So I raised that issue way back then. That was the first main problem I saw with that act.

RB: Because that priority system is sort of foundational for water law in Kansas, first in time, first in right. Anything that violates that seems to violate the foundation of water law, right?

JP: In theory. The background is the U.S. Constitution's protection of property. In '45, we enacted the act that set into place the priority system. In 1957, after Professor Shurtz's recommended changes, they added a section that said that water rights are "real property rights," which means that they're like real estate, like land, and the federal Constitution protects owners of land from having the land taken without compensation. So it was my thought at the time that if one had the water right for so many acre feet, and the government

comes in and reduces that water right, that that is a potential taking. That's still an issue nationwide. Lawyers are still arguing on either side of that.

RB: How were you involved in the Cheyenne Bottoms IGUCA, the development of that? That was a big deal. Dave Pope talked about it a fair amount. As I look back on it, it looks like a successful resolution of what had been a very difficult problem. What was your role in that?

JP: Well, it was kind of a limited background role, but I was certainly in the forefront of being able to witness everything. In the late eighties, when the Cheyenne Bottoms was having issues filling up its pools, I think we had a dry spell in the late eighties, and the Kansas—it may have been the Fish and Game Commission back then. I don't know if it was Parks and Rec. I can't remember when that change took place. But they had a very early water right for a large amount of water from both Walnut Creek and the Ark [Arkansas] River. I think it was 50,000 acre feet a year.

So there were complaints, I think, by the Fish and Game Commission to the Chief Engineer, "Hey, you've got to help enforce the water right here." There was a serious issue about whether you could integrate groundwater and surface water rights. Were the nearby irrigators in the alluvium affecting the stream and the Walnut Creek and the Ark River?

I know some meetings were held out in Great Bend that I wasn't privy to. This was before I became involved. Then when it looked like they were going to pursue this IGUCA, some farmers out there banded together—I think there were two different groups. One was WaterPACK, Water Protection Association of Central Kansas, and the other I think may have been the farmers who were directly involved in the Walnut Creek, I think. That's my recollection.

Each of those were represented by a lawyer in Great Bend. So there were two lawyers in Great Bend. I got a call from one of them saying, "You know, we're representing these farmers, and we're very concerned that the State may come in here and try to regulate them. Would you be interested in just coming on as a consultant for us?" and I said, "Well, sure."

So I was actually just a consultant. I didn't take part in any hearing except to attend and then to take part in meetings. But, Rex, the whole setting was so interesting to me. We had a series of hearings in the Holiday Inn in Great Bend, and this is in the wintertime when it was snowy and icy. In fact, my wife Pam took her ice skates out for one of these and ice skated in the Cheyenne Bottoms, which was an unforgettable experience for her, being alone with nobody but birds.

After this hearing, I think there were twelve different parties, and each one had a table. It wasn't like a courtroom where you have two tables. You had twelve tables in the ballroom of the Holiday Inn. Up front was David Pope; Rebecca Liggett, a former student of mine who was his legal counsel at the time. Lee Rolfs wasn't working on that case. He did everything else, but he didn't do that case. Then they would bring up the witnesses, but at the tables were the City

of Great Bend, the City of Hoisington, the Groundwater Management District #5, WaterPACK, other farmers, the Kansas Sierra Club, the Kansas Audubon Society represented by Frank Austenfeld and John Simpson, both very capable lawyers.

We had I don't know how many days of testimony. Then there were a couple evenings where they allowed the public just to come in and comment on the question of whether the State should control these water rights of the farmers, the upstream alluvial irrigators, to protect the water in the Cheyenne Bottoms.

One of the most striking bits of testimony, as far as I was concerned, was brought by I think the environmental interests. He was an ornithologist from Boston and a very impressive-looking guy. He looked like an [tall, handsome, Spanish] opera singer. He came in and I'll never forget, he said something like when asked the question, "How important are the Cheyenne Bottoms?" he said something like, "The Cheyenne Bottoms in my opinion is one of *the most important migratory bird stopover points in the western hemisphere.*" I mean, that really had an impact. He talked about how they would band these shorebirds, which are birds that have the long, spindly legs, and they would weigh them before they fed in the muck to get a few more grams before they flew south to South America.

The long and short of it was, as you said, David Pope and the Division of Water Resources came out with kind of a compromise solution. And by "compromise," I mean the chief engineer did not enforce priorities perfectly. In other words, it is true that there were something like 800 upstream irrigation rights, most of whom were junior in priority to the Cheyenne Bottoms right. And what Dave could have done would have been, "Okay, we're going to shut down the junior most until we finally get the amount of water we would like for the Cheyenne Bottoms."

But instead he set up two classes of water rights—one he called "senior water rights" and one he called "junior water rights." The senior water rights, if I recall correctly, had dates of October 1, 1965 and before, and the junior were after that or something. My memory is a little cloudy on this. But he then cut back the senior water rights only to the amount that he thought would keep them from wasting the water, and that idea had been found constitutional in a California case, that if you have, say, thirty-six inches of water, and you really only need thirty, or you're wasting the other six, the state has the power to cut back that without a claim of taking a property. But the junior water rights, he cut back substantially like 60 or 70 percent.

This goes back to my article, Rex, on whether that was a taking of property or not. The farmers, of course, felt that they had lost, and they filed an appeal of that decision, but then the Chief Engineer I think offered—now Dave could confirm this or not—but as I remember, he offered to let them pump at the same rate for one more year if they would accept the order and drop the appeal, and I think that's what happened. From that case, we have no resolution to the question of whether that order was constitutional. We still don't have that resolution.

RB: And that may not necessarily be a bad thing, and the reason I think this is really important is everybody involved, and I'll give Dave a lot of credit for this—engineered a solution that was the result of a lot of conversation and a lot of consensus building, right? It looks to me like a model. I know you don't have the similar kind of background on Quivira National Wildlife Refuge, which is going through a similar thing only from a federal point of view. But it does seem to me like what happened there [Cheyenne Bottoms] is sort of a roadmap for how things maybe ought to happen. What do you think now, looking back, however, thirty-five years after the fact?

JP: Well, I have to admit that I have admired that order, but, you know, you're kind of asking the wrong person here, just because when I was involved as a consultant, trying to argue the other side, and that's what lawyers do, whether the public likes it or not. We're hired to do the best we can and make the best arguments we can for the side that hires us, as long as it doesn't go against some moral principle that we have. And in your question about--you used the word "ought," which is, of course, the basic question in moral philosophy--whether something ought to be done.

But I have told Dave personally that I admire his decision in that case, and I think it's gotten a lot of play nationally. I have talked about that decision at national meetings and at international meetings and I haven't given a position either way. I'm just saying this is the way this decision was made, and that we still don't have a resolution on the [constitutionality of the] order because the appeal was dropped.

RB: Real quickly, I want to go back. I'm not sure you answered my question about Groundwater Management Districts in retrospect. That is, again, using the same kind of perspective, and I realize you may not be as intimately involved with the GMDs today, but what is your perspective on—has that GMD local control idea worked? Has it been a success? What do you think about that?

JP: I think in retrospect—and this is what I said in that symposium in 2006 when that was the question. Does groundwater management work? But I said that in the sense that we have attempted to manage; we have slowed down the lowering of the water table; we have controlled any kind of unhinged pumping without any kind of regulation at all. I mean, before 1945, people could just pump as they wanted to. In fact, really until 1979, when they made it a crime to divert water without a permit, you could still pump without any kind of repercussion. Then in '78, they made that change.

I think that, yes, I think it has added some predictability. GMDs have stopped new permits in some areas. Overall, we have slowed down the pumping. I think it's obvious we're not going to shut it all down, or there might truly be a constitutional issue with the taking of property. But I would say overall, they have been beneficial.

Let me just add that the reason for that symposium that we had, Rex, was that I attended an international meeting in India a couple of years before that, and there was an international expert from India who, when one of the subjects of the day was groundwater management, said, "Frankly, I don't think I've ever seen groundwater management anywhere in the world that works." I wrote him later. His name was Tusaar Shaw. I said, "Dr. Shaw, would you mind coming to Kansas to defend that statement?"

We brought him to KU. At the symposium, Burke was a student then. Burke Briggs was a student and the editor of the journal that sponsored that symposium. But we had Lee Rolfs and Wayne Bossert, I think, and Mike Ramsey, and some other people who came in to talk about the history of our GMDs, and I basically said what I just said to you a minute again that, yeah, I think overall, they've been beneficial. Well, Tusaar Shaw said, "Well, maybe they have," but he said, "Look, you have spent literally millions in administrative costs"—when you think about the salaries, it's millions we have spent. And he said, "Your groundwater tables are going down." He said, "In India, we have spent zero. Our water tables are going down." So have they worked? I think they have, but Tusaar was very skeptical.

RB: You've clearly worked with a lot of the administrative machinery in the State and in various roles as consultant and representing other interests. What about your legislative interaction? Have you been involved—how have you been involved in the legislature in this process?

JP: Very tangentially. You and I were talking about this the other day, Rex. I am a lawyer, but I am a transactions lawyer. I did not become a trial lawyer in part because I do not like direct disputes. I like to try to understand problems and work out deals. So my involvement with the legislature has been very limited. If I recall correctly, I've never actually testified on a particular bill—I could be wrong there, but most of my experience with the legislature has been invitations to speak to some committee, but to give a general overview of water law to educate mainly the new legislators.

RB: Basically informational hearings.

JP: Exactly. And in a couple instances, I actually at the legislature's prompting worked on a report, for example, when we proposed some changes, when the legislature thought that the original 1983 Water Transfer Act might need some amendment because nobody was using it. The legislature asked KU and the Water Office basically, could somebody do a study? So, a student and I did a study of the Water Transfer Act, and we proposed some amendments that were adopted to change the Water Transfer Act. So it would be that kind of thing that I would have worked on.

But unlike you, who had to go in and face the ire of the legislators, I just would go in and people would ask polite questions. So my experience was always very positive.

RB: But the upshot of that is then you become in their eyes sort of the credible objective expert that they can go to with questions, and the upshot is they really listen to your answers and are guided by those. That was my impression from what I saw in that process. Is that how it felt to you?

JP: Well, that I don't know. I don't have any way to gauge that, but I have been asked several times to return. Certainly not like you have been and others who have to defend potential legislative changes.

RB: I think I've asked you this question in the past, John, but if you could raise a magic wand, and change something, change some aspect of Kansas water law today, what would it be? What do you find most problematic?

JP: I don't think you've asked me that before, Rex.

RB: Really?

JP: In a way, I wish we could go back to 1945 and foresee the groundwater depletion and try to control it at the beginning rather than retroactively, like we've tried to do. I mean, in '45, we set in motion the requirement that for people to get valid property rights, they had to apply for a permit. And then, of course, the center pivot irrigation inventions were coming in, and all of a sudden, the groundwater revolution exploded, and so did the permits. I don't think the division early on was very conservative in granting permits.

RB: That's an interesting way to put it.

JP: You know, I'm not blaming them. It created a huge industry. So you've got the tension of the economics on the one hand and the protection of the groundwater on the other hand. But it's hard for me to say right now what we could do. If we could have done something back then like we do now—I mean, the chief engineer won't allow a permit with the various two-mile radius well spacing regulations we have. If we could have had that back then rather than the general statement in the Water Appropriations Act that allows a chief engineer to grant a permit if it's in the public interest and if it doesn't affect any other senior water user adversely. That's really loose.

RB: I'm going to ask the question this way. The driving foundation of Kansas water law is priority and time. Should it be? Should all that matters—and I know this may not be completely true legally, but in effect, the main thing that matters is when you have a water right. Should it matter how you want to use that water? This is something I know that Joe Harkins has talked about. The possibility of, say, reserving some water rights for industrial, municipal, or whatever other kinds of users as opposed to just strictly first in time, first in right. Any thoughts about that or not?

JP: Well, I'm not an economist. But the way it has been explained by the people with a lot more economic sense and knowledge than I have is that the market just takes care of that. In other words, if we get to the point where cities produce more value than nearby irrigators, the irrigators will sell their water rights to the cities. That's, of course, happening. And so there are some states that do regulate use more than we do. That is, priority of use. It's not priority. *Priority* is a time idea under Kansas law. *Preference* is the gradation of uses. But some states try to do that by legislation. Most of the western states have let water rights just evolve, and then they are changed as the economic situation changes. I think that's a pretty good argument, but I don't know.

RB: And there is some of that, cities or municipalities, purchasing water rights and basically diverting that water from, say, the irrigation that sort of buy and dry process. How does Kansas stack up, do you think in terms of water law compared to other states? I realize every state is different. Every situation is different, and it depends on what you're trying to accomplish, but every state is different even though most states in the west subscribe to western water law. Every one of them is different in various ways. How do you think the Kansas approach stacks up with other states?

JP: Well, I'm biased, but I have such admiration for the people in the Division of Water Resources over the decades, starting with David Pope and Lee Rolfs who for thirty-five years or so, guided us in that department. I think with respect to groundwater regulation and with respect to administration, that Kansas has been a model and is respected by other states and other countries. I mean, we have broadcast our methods in other countries. Rex, you and I were together in India where we did that. I think we have a good system. David Pope has done a good job of attempting to strike a balance between just total strict adherence to the Prior Appropriation Doctrine and trying to accommodate other interests in other situations. But I think we're highly thought of. Now I think you'd have to ask people outside the state what they think.

RB: Yes, and it is always sort of interesting because I will sometimes hear folks in Nebraska talk about how they think they've got the best system, and I look at what goes on up there and sort of scratch my head about trying to rectify those two statements. One other thing, John, again priority and time is the driving force here. One of the things that I've always been sort of surprised about is the lack of impairment complaints as particularly the Ogallala is drawn down. There have been impairment complaints. There've been lawsuits, the results of those impairment complaints. But by and large, irrigators, who are the big water users out there, as those draw-downs take place, they are getting impaired, but they are reluctant, clearly reluctant to file impairment complaints. Why is that? And I realize your answer might be, "Go ask them!"

JP: Well, it is, but, Rex, a couple things. I don't know. My sense is that Kansans are not just inherently litigious people. I mean, the farmers that I grew up with, I wasn't raised on a farm, but I worked with a lot of farmers in the Concordia area. In fact, that's where I saw irrigated corn for the first time in the Republican River Valley. But I just don't think they're very litigious, and you know, in some cases, I think that lawsuits aren't filed because one farm or one person may own two or three water rights. Some are junior, and some are senior.

In fact, I think that probably happened out in the Cheyenne Bottoms, where you had so many, 800 or so irrigation rights. There were probably people with senior rights and junior rights. I know there was a case up in the Beloit area called *File v. Solomon Valley Feedlot*, where some of the plaintiffs were named File, and some of the defendants were named File. So that's an unusual case where you're suing your own family members. I think people are really reluctant to sue their neighbors.

There is a recent case, as you know, that actually went to the Supreme Court in Kansas, an impairment case that's kind of the classic where you have a senior vested right suing several other irrigators that are junior within about a one-and-a-half mile radius of that farm. That's very unusual in Kansas.

RB: It is unusual.

JP: It has surprised me over the years, too, Rex, that there isn't more of that.

RB: And I think you're right. Some of it is maybe the nonconfrontational attitude that most Kansans have. Those family connections were involved in some of the lawsuits that you're talking about, too. It's just pretty difficult to sue your own family in that process, and nobody would want to do it.

I always thought that the lowering of the Ogallala would be the equivalent of the Full Employment Act for lawyers. It would lead to so many impairment complaints. All of your students and all of their students would have more business than they knew what to do with. That has not been the case.

JP: Correct.

RB: The upshot in some respect, I think, is probably encouraging decline in water levels. Is that one of the—

JP: You know, I think another reason that we haven't had more litigation is that, it's one thing, if you're on a stream, and you have a downstream water right, and some upstream user pumps a large amount, and you can immediately see the effect. It's another thing if you're out in the Ogallala, and you've got hundreds or thousands of irrigators that are different distances apart,

so it's harder to prove. But I agree with you about kind of the surprise that there isn't more work for lawyers.

I remember early on, one of my law faculty colleagues said, "John, you're going to be in Water Law." He said, "It reminds me of the scene from The Graduate [1967 movie] where the friend says, 'Get into plastics! That's going to be the future.'" And it probably was, in plastics. But in Kansas water law, I can count on the fingers of two hands the number of former students I've had that I know either have practiced or do practice water law. And they are outstanding lawyers, in fact, I wish—I wrote down a bunch of the names of the people in anticipation of your questions today that I've interacted with, and I think it will be a shame if I can't mention some of those.

RB: Go ahead. I just have this vision of somebody instead of saying "plastics" to you saying "water."

JP: That's what it was.

RB: That's what it always seemed like to me, too. Who is that cast of characters? Certainly it's impossible to talk about water without talking about a range of other disciplines—economics and sociology and all of those kinds of things. But the law always jumps into this issue. I live the world of the geology, geohydrology world, and yet the law seems to be just as important to what happens out there as the physical presence of the water, which somehow was a little surprising to me when I first started worrying about this world.

So, there are a whole cast of characters like Lee Rolfs is somebody that immediately comes to mind, and your name comes up, and Mike Ramsey's name comes out in the Garden City area, Dave Traster, some of those kinds of folks in the Kansas v. Colorado lawsuit and the lawyers involved in that. Who else is the cast of characters here?

JP: Well, you mentioned Mike Ramsey, but he was in my very first water law class. When I admitted to my class, "I don't know much about this subject, we're going to learn together," and then Mike came up after class and said, "Well, Professor Peck, I grew up on an irrigation farm. I have a degree from K-State in ag engineering and a master's in irrigation science from the University of Arizona, and I'm here because of this course. I'm in law school." I said, "Well, that's no pressure." In any case, Mike has become a close friend and confidante and is sometimes on the other side of a case that I've worked on. I admire him as maybe the finest water lawyer in the state of Kansas.

And in that group would be Dave Traster. Ken Titus now is a former student of mine, now head of the Department of Agriculture's legal division in DWR. Rebecca Liggett and Don Pitts and Connie Crittenden Owen. Those are the people who worked inside this system. Well, David

Traster has worked on the outside. Adam Dees who's now an up-and-coming water lawyer who represented GMD 4 recently.

And then all of the people that I worked for, worked with in the state, starting with Jim Power and then Bob Smith, and then Guy Gibson used to come to my class before David Pope became chief engineer, and David Barfield later on. Let me just check a couple things here because I wrote some down that I don't want to forget. In the KGS, of course, you and Don Whitemore. Bill Hambleton, I knew, but didn't know well. The GMDs, Mark Rude and Wayne Bossert. I forgot to mention Mike Armstrong who's the head of WaterOne in Kansas City is a former student of mine.

I just feel real fortunate to have been able to work with all of these really, really good people, nationally and internationally, too, as you know. We had a trip to India together. And, Rex, before we forget, I wanted to show you a cartoon, a political cartoon that came out in the Wichita paper after the Cheyenne Bottoms case. I meant to show you this when I was talking about the Cheyenne Bottoms. I don't know if you've seen this or not.

RB: I think you have to hold it up higher. I see somebody flying, and it's Cheyenne Bottoms. I think you're going to have to read us what the cartoon says though, John.

JP: So this is a cartoon that appeared in the Wichita Beacon after the Cheyenne Bottoms decision came out. And it shows two ducks down in the Cheyenne Bottoms with their celebratory hats on and balloons and a big sign that says, "The Cheyenne Bottoms Water Rights Victory Party." The two ducks are talking to each other. Meanwhile overhead are these people flying. One duck says to the other one, "Whoa! What kind of migratory fowl are they?" and the other one said, "The worst. Lawyers for the farm interests."

I cherish this cartoon because I figure I'm one of those people up there, but also because I contacted the cartoonist. I just thought it was such an interesting cartoon. I said that I'd like to have a copy of it. Actually what happened was my students in one of my classes when I just printed off a copy, called the Wichita Beacon guy and said, "Can we buy that original?" and he said, "Well, for \$100," and they said, "Can't you send us something else for less?" So for \$10, they sent them a very nice print that's this size and I have that hanging up on my wall in my office at KU. I love that cartoon.

RB: Well, it's always nice to know what value you're worth at that point, somewhere more than \$10 and less than \$100, I guess. Actually, the other thing it does sort of tell you is when an environmental water issue rises to the level of a political cartoon, that shows you again, and I say this every chance I get, the important role that water plays in the state. I think it's so important and so ingrained that sometimes we don't even think about it, but I think it just dominates this state in different ways from one end of the state to another in ways that people maybe sometimes don't appreciate as much as they should.

You know, when I talk about water and water law, sometimes I can see people sort of roll their eyes and want to walk away. Yet I find that intersection of the law and economics and science and agriculture to be just a fascinating place for a lot of really, really important conversations and decisions. So I think with that, John, anything we should touch on that we haven't talked about at this point?

JP: Well, I sent you an email saying I'd just like to mention the international work, although the only thing that has done really is to broadcast what we do and to allow people to compare our systems with their systems. Burke Griggs, who is another student who is one of my former students, top students, former head of the legal department at the Division of Water Resources, now a really truly nationally known scholar at the Washburn Law School, Burke helped me with a couple projects. One was that conference we had, that symposium I mentioned, and then we brought a group of six Asian experts, water experts to KU for three weeks back in about 2008, I think it was, and you were a big part of that. You were a big part of that because you helped lead a field trip that lasted two or three days over Kansas, and what we did with that group was to show them what we do and what we have, and then each of the members of that group, those six Asian experts, presented what their countries do, and we did some comparison, and out of that came two articles that Burke Griggs and I published together on the subject of comparative water law, which I think is important.

RB: You know, the other part of that, John, that still sticks with me that I think about a lot was watching the reaction of that group of folks when we took them out to Western Kansas. Their reaction both in terms of water and water law, but also just their reaction to the place itself because most Americans already have this viewpoint of what they think they're going to see when they go to Western Kansas, and sometimes it fits, the reality fits with their preconceptions, and sometimes it doesn't. That group of folks, I don't think had any idea what to expect out there, and their reaction was unlike anything I'd ever seen from any group of people I've ever hung around with out there. I still think about coming back and their reaction to the emptiness in parts of western Kansas. They were almost frightened. I'd just never seen anything like that. It helped me look at the place differently, too.

JP: I might mention that the countries represented were India, Bangladesh, Nepal, and China. That's where the group came from. But, Rex, back on the question about people's perception of water law and boring and that kind of thing, how do you think I feel when I meet somebody new and they say, "What do you do?" and I say, "I'm a lawyer." "Well, what kind?" They expect trial lawyer or tax lawyer or something really cool like corporate lawyer, environmental lawyer, and I say, "I'm a water lawyer," and I get blank stares all the time and have to explain that unless the person I'm speaking to is from, say, west of Highway 81. Otherwise, nobody knows about it.

RB: All right. I know what you mean. Actually usually when you tell somebody that, they start looking for the nearest exit or somebody else they can go talk to to get away from you. I have a good friend who occasionally, Burke Griggs and I and Don Worster, who you know from the KU history department who's done a lot of work in water, would get together with a fourth guy, and Don and Burke and I would begin to talk about the arcane details of water and water law, and the fourth member of this group would immediately run for the exits because he just couldn't take it. And yet to me, I like it. I could listen to people talk about some of these things all day long and be still ready for more, and I'm sure you are.

John, I appreciate you doing this. I think you're a pretty key component to this whole conversation, and one of the members of that cast of characters you walked through whose names people will still be talking about, and this conversation we had will then give them some background, I think to do that and maybe even be helpful to some future law students, too. I do appreciate you doing this, John. You're one of the good guys. I'm glad you agreed to do this. It's been a good conversation.

JP: Rex, I was surprised, but I'm just honored to be in this group of water people that you would consider interviewing. So thank you very much to you and the Historical Society.

RB: Thank you, John. I appreciate it.

JP: Thank you.

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