

ANALYSIS AND RECOMMENDATIONS REGARDING KYRGYZ WATER POLICY

Kyrgyzstan Land Reform (KLR) Project

Chemonics International, Inc.

*Allen Decker, Chief of Party
Report Author: Benjamin W. Reed, Esq.*

Contract No. *PCE-I-00-97-00039-00, Task Order 809*

31 January 2000

This publication was produced for review by the United States Agency for International Development. It was prepared by Chemonics International Inc. The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

EXECUTIVE SUMMARY

Currently, Kyrgyz water law is internally inconsistent, and is also inconsistent with superseding laws. Such rights as are guaranteed to water users are nebulous at best, and the economic costs of vindicating those rights are high.

What must be done is to provide water users with a coherent and cohesive system of laws that allocate rights and responsibilities appropriately. Users must have rights that allow them to function in an economically efficient fashion, and responsibilities that encourage them to do so. Users must have a means through which they can have conflicts resolved without excessive expense. Finally, users' rights must be both permanent and inalienable.

ANALYSIS OF EXISTING LAW RELATING TO WATER USE

The current structure of water law; methods of adjudication and enforcement of water rights.

The main document of in Kyrgyz law is the Law "On Water, a comprehensive document that governs water use in the Kyrgyz Republic. Complementary legislation includes portions of the laws "On Land," "On Licenses," and the various related implementing regulations. The structure of the Law "On Water" is based in the state's constitutional ownership of all the waters within its borders. Several important elements of the law "On Water" are ambiguous; others produce inconsistent results when viewed together with other laws. The law permits appropriation by an end user in accordance with a license granted that user. The user has no quantitative right to water, however, nor is there any mechanism in the law for determining by what means, or even if, the user's quantitative right may be established.

The law "On Water" provides for the private ownership of irrigation infrastructures. Some of these infrastructures were "owned" by collective farms when the assets of those collective farms were transferred to the farm's members. The mechanism by which this transfer has taken or may take place, however, is unclear. According to Chapter 17 of the law "On Land," ownership of the infrastructure should be wholly in the state. In actuality, these infrastructures may have passed into common ownership, as described below. In any event, while the infrastructures are in state ownership, the law requires water users to maintain and improve the serviceability of the infrastructure. This puts water users in an untenable economic position of having to maintain water systems for which they have no ownership or control.

Much of the language in the law "On Water" is permissive, rather than compulsory. The law does not clearly entitle users to a predictable amount of water. Furthermore, neither the law nor its administering regulations appear to provide for a systematic method by which water rights may be adjudicated or enforced.

The law sets out that the use of water must be in accordance with the terms of concessions, leases, and licenses to which the user has subscribed. However, the law's provisions also permit use without concession, lease, or license, if the end user observes special requirements set by authorized bodies and the use does not require "special facilities or equipment." This is apparently in conflict with the law "On Licenses," which is a more recent law and, therefore, should prevail. The *de jure* situation is therefore somewhat muddled.

The *de facto* regime is apparently no less confused. In practice, the Raion Water Departments (RWDs) enter into contracts with the end user (typically an individual farm), with the largest association of end users – village government (which is often the rump government of the old *kolkhoz*), or formally or informally structured Water Users Associations (WUAs).

One issue that will need to be addressed is that water users are charged by RWDs for the water they consume at the farm gate, and not at the diversion point. Thus, if a farmer is a good distance from a main canal, he bears neither the cost relative to that distance, nor, more importantly, to the efficiency of the delivery canal, and therefore has no economic interest in maintaining or improving that efficiency.

Elements of the Civil Code and the Land Code that impact water law.

Ownership rights on natural resources are vested in the Kyrgyz government by the Constitution; however, persons other than owners may have substantive rights in property that they do not themselves own, as set out in Article 228. Constitutional articles most pertinent to the Law on Water are Articles 229, 231, 232, and 233-11.

Article 229 provides for such use as is provided for by law or as is agreed upon by a contract between the owner and a third party. This permits the state to contract with landowners for the use of water resources without giving up any of the indicia of ownership in those water resources. Articles 230 and 231 provide for third parties' right of economic and operative management of property. Under this article, state-owned or communal enterprises or institutions may manage property owned by the state. The owner determines the extent of the revenue to which he may be entitled. Neither Article 230 nor 231 provide for more than a use interest, and managers may in no case sell or otherwise dispose of the property. A parallel may be made between these Articles and one that would provide for private use rights in property owned by the state. While these Articles were clearly written to allow state-owned or local authorities to administer state resources, they might serve as a model for the way in which end users might manage water resources. Since the two Articles entitle the state to a part of the profit derived from the use of the resource, however, the state might more usefully tie revenue to the water diverted from main canals, as indicated above.

Article 232 provides that citizens may make use of widely accessible state- and communally-owned property. This could conceivably extend to the use of irrigation

canals and other constructs for water transport; however, this use probably extends more to recreational, rather than economic, use.

Chapter 13, Articles 266-274, defines the parameters within which the Right of Common Property functions, and by which it may be created or dissolved. This portion of Kyrgyz law allows common owners of land to establish rights with respect to land and to improvements thereon as a tenancy in common. Irrigation infrastructures may be operating under this law if their ownership was in the collective farm and has passed to individual landowners. If it were not for the fact that the Law "On Land" sets aside all land occupied by water as Land of the Water Fund (see below), this portion of Kyrgyz law would function as a conceptual framework for WUAs being formed as bottom-up, rather than top-down, organizations.

In the Land Code, the portion that most directly impacts water issues is Chapter 17, which allocates land on which bodies of water exist, and an undefined area around those bodies of water, to the Water Fund. The Chapter appears to designate the Water Fund Land as a protection zone, and to require use of that land by the supervisors of the water object be protected. Currently, the state probably owns the network of water delivery systems, as well as that land underneath and adjacent to that network, and thus has responsibility for operations and management of that network.

The law "On Licenses"

According to Article 9 of the Law "On Licenses," the Kyrgyz government shall require a license for business activity involving the use of water facilities, resources, and constructions. This is in conflict with a portion of the law "On Water," but the practical effect is not entirely clear. These licenses may be issued permanently, and may be alienable, but whether they are or not is an open question. The law "On Water" was not written with the law "On Licenses" in mind. Substantial reformulation will be required to bring the two laws into accord.

Codified short-term and long-term private use rights and resulting formal and informal incentives

Presently, the only rights private users enjoy are those to contract with the RWDs for the provision of water. RWDs are not necessarily obligated to contract with users, however, and the basis on which the length of those contracts is determined is somewhat unclear. The RWD is not required to contract with the user, although the law prevents the RWD from refusing to contract arbitrarily. It is unclear what administrative checks might prevent the RWD from so refusing.

In practice, the user typically receives a 1-year license from the RWD, which is not a significant change from prior practice prior to independence. The result is that peasant farmers have no ability to rely on water delivery in the long term, and must of necessity conduct themselves as if the amount of water they receive in a year will be the largest

amount that they will ever receive. This conduct results in maximum use (and overuse) of the resource.

In conclusion, there is no clear method to establish user rights. Essentially, individual end users, whatever their character, depend upon the RWD for its provision of water by contract. The existing code structures do not explicitly allow for the establishment of user rights.

Existing provisions that provide for the establishment of water user associations and the effectiveness of these provisions.

To date, the WUAs that have been established are of two sorts: those contemplated by the Model Charter On Water Users' Associations, and the more informal associations of water users. The Model Charter has been endorsed by Government Resolution, which is an administrative endorsement, but lacks the strength of a normative act. Those seventy-five or so WUAs that follow the Model Charter are typically top-down organizations formed by and around the rump government of the former collective farms. More informal WUAs do not follow the model structure, and are simply groups of farmers loosely organized to more effectively bargain for, or use, their rights to water. The exact number of informal WUA's is estimated to be roughly five hundred, but is unknown.

Whether the provisions of the Model Charter are entirely effective or not, or even appropriate, is an open question. The head of the working group that established the Model Charter is Aleksandr Kostyuk, the head of the Ministry of Agriculture and Water Resources' Department of Water Resources (DWR). Accordingly, the effort that has already been committed to WUA development should not be dismissed lightly. In the sense that the WUA provisions provide a coherent and cohesive set of regulations for transparent WUA governance, they provide a good springboard for drafting other water law. As well, the WUA charter was drafted by a multi-organizational working group, which provides a solid foundational example of the potential success of such working groups. It is questionable, however, whether contemplating a complex legal structure to manage collective water rights in what is otherwise a legal vacuum is an appropriate use of time and resources. Establishing a WUA in an environment in which the WUA and its members have no clearly defined long-term water rights can have the effect of inhibiting investment in new facilities or rehabilitation of the old, and lead to a reduction in water supply. As well, WUAs and their members could be put in the position of having to mount legal battles to defend nebulous rights, which is an economically inefficient use of resources.

Given anecdotal evidence on the current organizational structure of WUAs, the official WUA structure is substantially similar to that of the kolkhoz and sovkhoz. This leads an observer to wonder whether the WUAs have the financial and administrative management expertise necessary for effective and transparent self-governance.

The current role of the Ministry of Agriculture and Water Resources, individual persons within that Ministry, and of other relevant political and legal entities

While the principal agency responsible for administration of water resources in the Republic is the Division of Water Resources, other agencies are involved as well. The Jojorku Kenesh (the main legislative body of the Republic) establishes the basic rates for water uses, and the Cabinet elaborates those rates. The Ministry of Geology is responsible for licensing groundwater use, the Minister of Environmental Protection is responsible for surface water licenses, and the State Agency for Hydro-Meteorology is responsible for collection of data. Placing these functions under a single authority would probably be more desirable. The most significant entity within the government with which the Land Reform Project plans to interact will be the Department of Water Resources (DWR). The DWR has the responsibility for the operations, management, and maintenance of the water resources of the country. We also plan to seek guidance from the Prime Minister's cabinet; part of the Prime Minister's brief is to set policy as concerns water resources. There are also two government entities that function as extension agencies: the RADS and RCLAR. Arguably, they are functionally comparable since they provide technical assistance to peasant farmers and compete for resources within the government. One significant question is whether the DWR has the structural capability to function as a repository for information on available and allocated water resources and rights; and, if it does not, what agency does.

POLICY ANALYSIS AND RECOMMENDATIONS

Kyrgyz water law is not, at present, in such a state as to be susceptible to fine-tuning. Legally speaking, it is internally inconsistent and incomplete. It is also in direct conflict with other, superceding, laws. Practically speaking, water rights are handled either through a variant on the old collective farm system, through a centralized administration on the farm or local level, or simply acquired *ad hoc* by appropriating the amount of water needed at a particular time for a particular purpose. In short, there is no uniformly applied law or practice.

The Kyrgyz water delivery system was designed for a centrally administered system of irrigation. It is, as such, economically unsuitable for use in a system of private land ownership. There are three reasons that this is so:

- First, not all plots of land sold at auction are served by water delivery systems.
- Second, the physical mechanisms to regulate water flow are limited relative to the new number of water users – there are fewer headgates to control irrigation than there are farms using irrigation.
- Finally, many of the water delivery systems are in disrepair, and whether their repair is economically feasible is an open question.

The DWR and the Prime Minister's office have both taken the position that the Model WUA Charter is an excellent starting point. Both recognize that a great deal of progress has been made in the field of land reform without similar progress in the field of water law reform. Both offices also stated that they believe the state should maintain control to the extent that it can. Nevertheless, they see the WUA structure as being a useful way to

keep the state's presence at one remove from direct control, and to allow private management of the water resource. As noted above, however, the WUAs are operating in a regulatory environment that is somewhat unpredictable.

Policy Recommendations

The challenge in Kyrgyzstan is to implement a system of water laws that will allow the government to maintain a desired level of control, both at the national and the local level, so as to inhibit excessive or destructive use, but not impede economic efficiency and beneficial use of the resource by the end user. The system should also allow for sufficient stability of use rights by the end user as to allow for settled expectations as to both the amount of water each user will receive and the priority of that user's receipt of water. This will, in turn, institutionalize a relatively stable value for agricultural land in Kyrgyzstan.

Regarding the determination and notification of rights

1. Any new water law should provide for the administration, control, and regulation of water rights. It should do so by establishing a central system of records of current rights, as well as local mirrors of that system. It should, first, identify the total amount of water available annually, without distinction between surface and groundwater. The state should reserve in itself such rights to water as are necessary for the international agreements it has made with its downstream neighbors. Subsequently, it should establish rights in landowners to contract for the beneficial use of such waters as they can appropriate through existing or proposed water delivery systems.

2. Water rights ought to be determined by the DWR on the basis of the total amount water required by users within a drainage (or irrigation system) for the economically viable beneficial use to which the water is currently allocated. If, for example, a specific area within a drainage is producing a crop that requires X amount per day per hectare of water over the growing season of that crop, then that X-per-day amount would be the total amount of water allocated to each user who cultivates that crop on the basis of the number of hectares cultivated.

If this allocated quantum of water is greater than the irrigation system will sustain, then the contract rights should be only those that can be sustained. This amount will obviously fluctuate depending on the condition of the water delivery system. It provides an informal incentive to individual farmers or WUAs to maintain their water delivery systems.

If the per-individual contract rights are greater than that amount of water that the area requires for the beneficial use contemplated, the state may either reserve contract rights to that water in itself or in that oblast' or raion, or allow further water to be appropriated – for example, by extending existing water delivery systems or establishing new systems.

3. Contracted water rights should be severable from the land with which they are associated, and salable to any other entity. This would serve the significant function of

allowing landowners whose land is economically not suitable for farming, or not served by irrigation systems, to sell their water rights while retaining their land for other purposes. More economically efficient water users would benefit thereby, and the land would remain in the hands of its current owners.

Currently, a joint project staffed by TACIS contractors and employees of the DWR's Irrigation Institute has conducted a survey of the geographic and hydrologic characteristics of water delivery systems. The project will, additionally, make comments as to the current and potential economic viability of the water delivery systems, and as to whether or not particular systems are reasonably recoverable. Once this has been completed, it should be used as the basis for implementation of the new water law.

4. For administrative purposes, every major drainage area in Kyrgyzstan should be set aside as a discrete area, and the water flow characteristics of each area compiled from TACIS/Irrigation Institute data. Allocations of available water and individual water rights should be compiled and available at the raion level, so that individual farmers can determine whether there is available water for any further appropriation they have in mind, and whether it is available in sufficient quantity to make their planned appropriation viable.

5. The water rights each individual receives should be contracted for not less than five years in order to maximize stability of value in the land and of the water rights. At the end of this period, a procedure should be in place for review of the network of water delivery systems in each major drainage, so that as the amount of water available for beneficial use changes – whether because of a change in efficiency of delivery, change in use, or some other reason – the amount of water to which each landowner is entitled may change.

The landowner's rights to contract should be based on the date to which each landowner first became entitled to contract, so that should the amount of water available for appropriation within a year be insufficient for all landowners, the landowners with seniority in appropriation will have priority over landowners whose rights are junior.

Recommendations regarding operations and maintenance

The emphasis of the law should be that the state owns the water within its boundaries for a beneficial public use. Special attention should be paid to development and reclamation. The most significant concern is whether the government or landowners will support the operations and maintenance of the current network of water delivery systems.

6. The principles driving the operation and maintenance of the water delivery system must be rooted in sound economics. The government would determine what portion of the extant network it feels it has the capability to support, and turn everything else over to private ownership based on the land ownership in the area irrigated. The individuals or WUAs will then be obliged to make an economic determination as to whether, and to what extent, they can support the irrigation system currently in place.

7. The law should provide for a disinterested body of subject matter experts to make initial determinations with respect to disputes rising out of water use, allocation of rights, and other private or state action. This body would consist of either an administrative panel or a court of limited jurisdiction. The point of such a forum is to allow individual water users to settle their grievances with a lower transactional cost than would be entailed in judicial resolution. The law should additionally allow for the administrative determination that water delivery systems, or water rights, that have not been used for a beneficial purpose for a significant amount of time have been abandoned.

Assuming that market forces (not politics) will drive such a determination, allowing either the state or private parties to ask for such a determination will force water users to efficiently and fully use what rights they have, or risk loss of those rights to more efficient users. Implementing abandonment effectively eliminates the government's responsibility to compensate inefficient water users for a taking.

Recommendations regarding alienation of rights and market development

8. The law should clearly provide for the storage of water, and for the exchange of water rights between and among individuals and WUAs. Between irrigating seasons, water is typically not used, and the more individuals themselves store, the less responsibility the state will have to do so. Additionally, permitting exchange of water and water rights will naturally promote the development of an internal water rights market. Such a provision should not interfere with the beneficial use rights of other appropriators.

9. The law should also contemplate the use of salvage water. Developed waters are, obviously, water made available for use by artificial means: reservoired and imported waters and shallow groundwater (swamps and other seepage). Salvage waters are a function of the application of more efficient methods of water use, such as changing from flood irrigation to drip irrigation. These are waters that are used pursuant to the prior method of use, but are made available for other uses through greater efficiency. The new water law should allow them the same priority date as the original use from which the water was salvaged. This will encourage users to make as efficient use as possible of the water to which they are entitled in order. If users were simply to make a new appropriation of salvage water, the new appropriation would be a junior appropriation, and it would lose out to older (but possibly less efficient) appropriations in times of low water.

Of course, a distinction must be made between salvage use that is a beneficial use (e.g., crop irrigation or storage) and salvage use that is not (e.g. sale of water, as opposed to water contract rights). The problem with creating a free market for water is that (a) the water rights are owned by individuals, but the water is owned by the state, and (b) creation of such a market could conceivably create a conflict of interest in the award of water rights.

10. There should be a mechanism for recognition, valuation, and compensation of significant economic loss due to actions of either water user association or of governmental authorities. If a WUA were to make a decision to terminate irrigation of a portion of land it felt was not economically viable, the landowner would have to have some administrative recourse so that the WUA was not simply taking the landowner's property without recompense. A similar mechanism would have to be in place to prevent the national government from causing any takings of water rights. Valuation of the taking should be based on the appraised value of the beneficial use of which the owner is being deprived. If the loss is significant, compensation should be due. It is entirely possible that the loss may be relatively insignificant; in the event, it can be ignored. The point, however, is that there should be a mechanism for recognition, valuation, and compensation of significant loss. Some administrative forum external to the WUA should be in place to ensure that a disinterested party has the final say over whether water rights have, in fact, been abandoned.