Approved: 03/03/09
Date

MINUTES OF THE SENATE AGRICULTURE COMMITTEE

The meeting was called to order by Chairman Mark Taddiken at 8:30 a.m. on February 10, 2009 in Room 446-N of the Capitol.

All members were present except:
Steve Morris- excused

Committee staff present:
Raney Gilliland, Kansas Legislative Research Department
Corey Carnahan, Kansas Legislative Research Department
Jason Thompson, Revisor of Statutes Office
Judy Seitz, Committee Assistant

Conferees appearing before the Committee:
Allie Devine, Vice President and General Counsel, Kansas Livestock Association (KLA)
Woody Moses, Kansas Aggregate Producers Association (KAPA)
Steve Swaffar, Director of Natural Resources, Kansas Farm Bureau (KFB)
Constantine Cotsoradis, Deputy Secretary, Kansas Department of Agriculture (KDA)

Others attending:
See attached list.

Chairman Taddiken noted the Committee had received a copy of an article that appeared in the January 27, 2009 issue of *Grass and Grain* about the K-5 Walton Rural Life Center Charter School in Newton (USD 373) which uses technology and agriculture to teach fifth grade students.(Attachment 1)

Chairman Taddiken opened the hearing on **SB 185 - Water rights, nonuse, due and sufficient cause**.

Raney Gilliland, Kansas Legislative Research Department, briefed the Committee on **SB 185**. This bill amends a section of the water appropriations act K.S.A. 82a-718. He said the current portion of the law is regarding water rights and their abandonment in terms of due and sufficient cause for abandonment. Mr. Gilliland also said that currently, unless there is due and sufficient cause , the Chief Engineer of the Division of Water Resources (DWR) has the authority to declare a water right abandoned. The new language indicates that any person whose water right was declared abandoned and terminated prior to July 1, 2009 and had supplied the Chief Engineer with adequate information regarding adequate moisture for crop production as a justification for nonuse, could request reconsideration of the abandonment proceeding through the Chief Engineer.

Allie Devine, Vice President and General Counsel, Kansas Livestock Association (KLA), appeared in support of **SB 185** (Attachment 2). She said the DWR has an internal "adequate moisture analysis" which they use to determine whether adequate moisture existed.

Ms. Devine said that the National Agriculture Statistics Service (NASS) data is not reflective of actual farming practices. It is the understanding of the KLA that prior to 2009, if a particular crop was not reported as an irrigated crop on at least three (3) reports from a particular county to NASS, the crop was not reported by NASS.

Ms. Devine said there are four fundamental flaws in the analysis used by the DWR:

1. statute does not require such analysis of what crops "normally requiring full or partial irrigation within a region of the state"
2. NASS data is not reflective of the actual farming practices of the individual
3. the analysis removes any "judgement" on the behalf of landowners
4. places the burden of proof on the producers to prove that the state's data is faulty when it was never designed for such a purpose

Ms. Devine said that a simple phone call could resolve many of these issues. She also said the regs ought not work against conservation and the judgement of the producers

Minutes of the Senate Agriculture Committee at 8:30 a.m. on February 10, 2009 in Room 446-N of the Capitol.

The KLA proposed some additional language to **SB 185.**

Ms Devine stood for questions.

Woody Moses Kansas Aggregate Producers Association, presented testimony in support of **SB 185** (Attachment 3). He said that the current water policy promotes use and conservation at the same time. Mr. Moses said one of the issues is who has the "burden of proof" in these cases. Currently the"burden of proof" is placed upon the water right owner as opposed to the one (DWR) who brings the claim.

He also requests the Committee work toward the establishment of a meaningful notification system because it will encourage the DWR to bring necessary abandonment hearings so that water can be made available to other users or to otherwise let the current users use the water and put it to beneficial use.

Mr. Moses stood for questions.

Steve Swaffar, Director of Natural Resources, Kansas Farm Bureau (KFB), presented neutral testimony on **SB 185** (Attachment 4). He said that many of the KFB members have the same concerns which were shared by Ms. Devine. He said the issue of adequate moisture needs some clarification and should be addressed . Mr. Swaffar said that **SB 185** as written could jeopardize the effectiveness of K.S.A. 82-718 to remove truly abandoned water rights from use. He said that it would be the intention of the KFB to work with other stakeholders and the agency in attempting to develop a solution which improves the process and makes it more understandable to the public, while at the same time protecting the basic premise upon which the statute was built.

Mr. Swaffar offered to stand for questions.

Contsantine Cotsoradis, Deputy Secretary, Kansas Department of Agriculture (KDA), appeared as an opponent to **SB 185** (Attachment 5). He testified that the bill, as written, changes the fundamental principles of the Kansas Water Appropriation Act. He said the Chief Engineer is mandated to manage the state's water and appropriate its use for the benefit of all Kansans. Mr. Cotsoradis said that under rules and regulations there are 18 separate provisions for due and sufficient cause for nonuse, including sufficient moisture. Current law already allows five consecutive years of nonuse without due and sufficient cause before a water right can be declared abandoned. He also stated that current law requires the KDA to send a notice when three consecutive years of nonuse are accrued and that gives the water right holder a full two years to remedy a nonuse problem. He also said the KDA is committed to working with water right holders to help them prevent inadvertent abandonment of their water rights.

Mr. Cotsoradis stood for questions.

Lane LeTourneau, Program Manager, DWR, KDA, answered questions.

Ms. Devine also responded to questions.

Written testimony in opposition to **SB 185** was filed by Constance Owen, Attorney at Law (Attachment 6).

Chairman Taddiken requested that the conferees find some language to address their concerns with **SB 185** by next Tuesday.

The next meeting is scheduled for February 11, 2009.

The meeting was adjourned at 9:30 a.m.

SENATE AGRICULTURE COMMITTEE GUEST LIST

DATE: 2-10-09

NAME	REPRESENTING
LANE LETOURNEAU	KDA
CV Cotsoradis	KDA
Leigh Keck	Hein Law Firm
Jason Darland	Pinegar + Smith
Kent Askren	KFB
Steve Swaffar	KFB
RYAN EAGLESON	CAPITOL LOBBY GRP, LLC
Ellie Wurtz	Ks. Livestock Association
Woody Moses	KAPA

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GRASS & GRAIN

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Walton school includes rich learning from ag experiences

By Cindy Baldwin

There are aphids in the greenhouse.

That was the news that greeted fifth grade students at Walton Rural Life Center Charter School when they came back from Christmas break, and they all knew what that meant. If something wasn't done soon, their anticipated harvest of tomatoes and green peppers destined to be sold in salsa kits would be in peril.

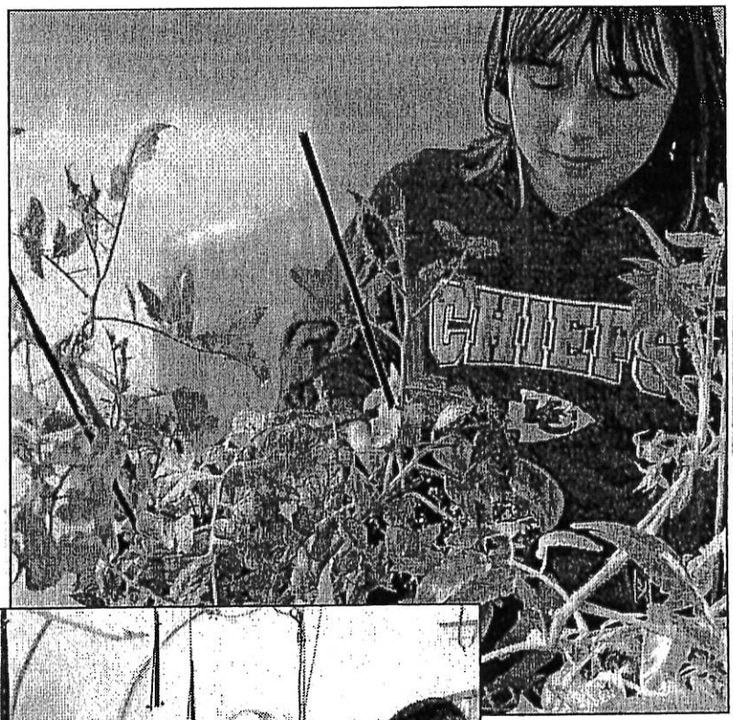
That lesson was learned last year when aphids also attacked the plants in the greenhouse and, almost before the students realized what was happening, they had lost 90 percent of the plants, reducing their projected tomato harvest from 200 pounds to less than 10 pounds. A real problem when the class had already pre-sold salsa kits based on those projections and had to purchase produce to fill their orders.

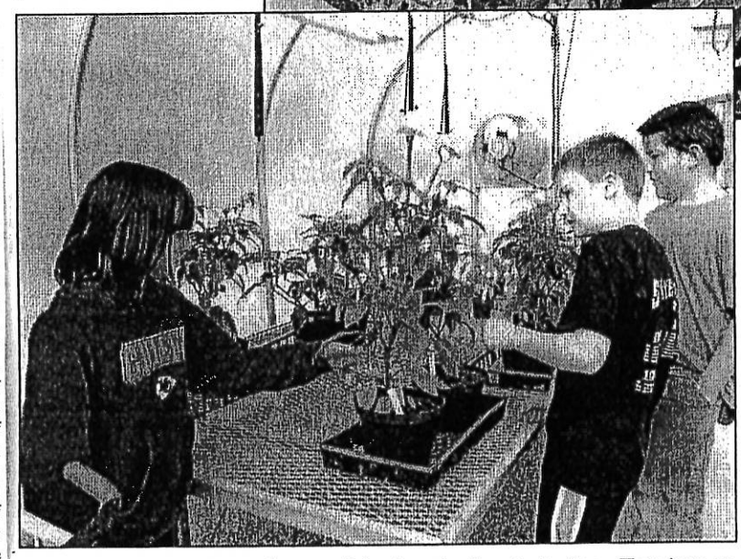
Knowing what could happen, the students lost no time. By the end of the week, they had identified the type of aphid they were dealing with and how the tiny insects introduced disease into the plant. They researched five methods — including live ladybugs — to attack them. The plants were grouped and each group was treated with one of the methods so students could observe which worked best. They had considered the pros and cons of different responses to the problem, projected results of each and had developed a PowerPoint presentation to explain to their parents and other interested members of the community what they were doing. As fifth-grade students Seth Guerraro, Madison Aycock and Kyler Sweely examined the peppers and tomatoes two weeks later, they found more live aphids — they hadn't won the battle yet.

"They are learning real life greenhouse experiences here. The main tool for fighting aphids is diligence. You just have to keep fighting them," Jacque Spangler, a master gardener who works as a paraprofessional with the school's greenhouse and garden. "Planting gives (the students) a great learning opportunity. They find out there are a lot of bumps in the road and they need to learn how to handle them."

The aphid war is just one of the agriculture-related experiences that students at the Walton K-5 charter come into contact with each day.

When the school was chartered in 2006, the decision was made by faculty, the school district (Newton USD 373) and the community that the school's curriculum would be agriculture/technology project based and would draw on the farm families and rural values of the community. An advisory group of area residents was formed and teachers began reworking their curriculum to meet the state standards while incorporating agricultural-based experiences and knowledge into their classrooms. Even though Walton is a charter school, it is still held to the same curriculum standards as any other elementary school in the state — its teachers, however, can adapt learning to fit the school's mission. The school is breaking new ground. It is one of only two elementary charter schools in the United States with an agricultural/technology-based curriculum. The faculty — all of whom were in place when the new curriculum was implemented — has found many creative, hands-on ways to bring ag into the classroom. The entire group has attended summer courses offered by the Kansas Foundation for Agriculture in the Classroom and has utilized other resources, including the school's advisory group and farm families who have partnered with each grade, to enrich what they teach.





At the Walton school youth are encouraged through hands-on learning, complete with problems that arise unexpectedly.

Above: Madison Aycock inspects a tomato plant.

Left: After an outbreak of aphids in the greenhouse Madison Aycock, left, Kyler Sweely, center and Seth Guerraro look at the green peppers. The vegetables will eventually be included in the salsa kits that help provide funding for the school.

"We incorporate agriculture into our class rooms every day, every grade," Derrick Richley, the school's fourth-grade teacher, said.

The salsa kit project is just one example of how the project-based curriculum can introduce real life skills to students while teaching math, science, language arts and social studies concepts in an agricultural framework.

Students develop a business plan for the salsa kit business including costs of inputs — all the plants except the cilantro are raised from seed in the school's greenhouse and on-site garden — and selling price. A marketing plan is drawn up and students pre-sell the kits, which include enough produce to make a batch of salsa. All students share in the work of seeding, tending and harvesting the plants. When problems arise, students determine what the problem is and research possible solutions. Students take full ownership of the project with the guidance and support of faculty members. Money raised from the project is used for school projects and for seed money for next year's effort.

Fourth grade students are designing a butterfly house project for which they have developed a business plan, arranged for a loan to purchase the initial materials to build the houses and intend to begin production next week. They've also learned about butterflies, their life cycles, what they eat and what kind of ecosystem attracts them. They have researched the process that turns trees into the lumber and steel into the nails they will be using to build the houses. And, it was all their idea, according to Mr. Richling.

Students also learn from more traditional farming experiences. Kindergartners, for example, hatch eggs each spring. The chickens from last spring's hatch are now producing eggs in the school's chicken house. The eggs have been used for class activities and sold to community members. There haven't been a lot of them, according to farming partner Allan Entz who "chicken-sat" over Christmas vacation on his farm.

"They hatched 15 eggs and 12 of them were roosters," he said. "But, we were getting an egg or two every day we had them."

The school also has two resident goats, Petey and Bebe. Students take turns feeding the animals, walking the goats and gathering the eggs with the responsibilities rotated among home room groups.

In addition to the greenhouse and vegetable garden, the school grounds also feature a butterfly garden and an area planted to prairie grasses. A new barn will soon replace the borrowed temporary pens and shelters for the goats and chickens and provide an outside pen for larger animals. Field trips to the sponsoring farms are frequent activities where students have experienced planting and harvesting of crops and a variety of activities with animals. Students visited Entz's farm last spring to watch as he vaccinated and branded cattle. He had corn growing at the time, and the students went out to the field where they learned how to count plant populations and project yield as part of a math activity.

"It's neat that they are teaching ag stuff," Entz said. "This is a rural school, but lots of kids that go here don't really live on a farm. It's exciting for them to see the rural aspect and farm life. With the animals at the school, they learn that you have to be there, about the responsibilities of chores."

But, there's more than traditional farming activities happening at the school. It

Continued on page 3

Even with their non-traditional emphasis on agriculture, the classrooms still focus on the basics of writing, reading and arithmetic.

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Attachment 1

Ag charter school provides rich learning environment

Continued from page 1

also incorporates the latest technology from laptops for students in the third through fifth grades to Smartboards in each classroom. A wind turbine, constructed in partnership with Westar, Kansas State University and the Wind for Schools program, provides power for the greenhouse and an opportunity for students to learn about alternative energy sources. A KSN Weatherbug station helps teach about weather and provides data for graphing activities.

Does the hands-on, project-based approach to learning work? The answer is a resounding yes, according to Walton principal Natise Vogt.

"We had 100 percent of our third, fourth and fifth grade students proficient or above in math (on the state assessment tests) last year, received the Standard of Excellence in math and reading the past two years and we were recognized in 2008 as one of 40 schools that scored in the top five percent on Kansas performance assessments," Vogt said. "I think it has something to do with our hands-on learning curriculum. We're like a family here. It's an exciting environment."

Vogt believes that the problem solving, project based focus of the school generates an enthusiasm for learning among students, teachers and staff that will last even after the fifth grade students move on to the district's middle school. It offers a very different way of learning and, because it is tied to the rural economy around them, provides very relevant examples of how the skills and facts that students are learning in the classroom relate to real life. The older students who have experienced "normal" school as well as the new approach would agree.

"I like the projects we do here. They're fun," Seth Guerraro said.

Classmate Kyler Sweely added that his favorite part of the school was the animals. "There's no other school in (Newton District) 373 that has animals like this."

Madison Aycock said she liked everything about the school and would miss it when she went on to middle school. Interestingly, all three of the students had petitioned to enroll at Walton Charter School.

The success of the school has draw the attention of families living outside the Walton attendance area, according to Vogt. The school had been facing declining enrollment when the charter school was being considered, but now is at near capacity. Any student living in the Walton attendance area may enroll in the charter school and, if there are openings, students living outside the area may apply. Each year the school has had to turn students away because they have reached the maximum enrollment. There are currently 122 students attending the facility. Interestingly, a high percentage of students — as many as 40 to 50 percent in some grades — are not from farming backgrounds, Vogt said. She added she also receives a lot of inquiries from teachers in other buildings in the Newton district who would like to transfer to the building if there are openings. So far, there have been none, she said. However, just like the aphids in the greenhouse, there are problems ahead for the Walton school that must be solved if they are going to continue, according to Vogt.

The field trips and ag-related activities incorporated into the school day have costs that are above and beyond normal school funding. As part of its charter, the school received federal monies for the first three years to establish the curriculum. Knowing that this funding was available for a limited time, the staff used it to purchase technology and learning resources, build the greenhouse and establish the gardens as well as fund day-to-day curriculum-related expenses.

That funding ends in June. That amounts to nearly $140,000 will not be available in the 2009-10 school year. While the district is very supportive of what the school is doing, there are just not funds in the budget to replace the federal dollars, Vogt said, and that means many of the school's activities will be curtailed if additional funding is not secured.

The school staff, families and partnering farm families have started a fund raising effort to support the school's ag-related curriculum. In addition to fund raising events, the schools advisory board, staff and families are also reaching out to businesses and individuals who have connections to agriculture and see the benefits of incorporating agriculture into the learning process.

Those interested in supporting the Walton Rural Life Elementary School are encouraged to contact Vogt at the school (620) 837-3161 to see how they can be part of keeping agriculture in the school.

KANSAS LIVESTOCK ASSOCIATION

Since 1894

TESTIMONY

To: Senate Committee on Agriculture
Senator Mark Taddiken, Chairman

From: Allie Devine

Date: February 10, 2009

Subj: **Senate Bill 185 –** Water rights, nonuse, due and sufficient cause.

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 5,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, dairy production, grazing land management and diversified farming operations.

The Kansas Livestock Association supports SB 185.

KSA 82a-718 provides that all appropriations of water must be for some beneficial purpose. Every water right of every kind shall be deemed abandoned and shall terminate when, without due and sufficient cause no lawful, beneficial use is made of water under the appropriation for 5 successive years.

K.A.R 5-7-1 defines the circumstances which shall be considered "due and sufficient cause." K.A.R. 5-7-1 (1) describes one of ten circumstances of what is "due and sufficient cause" that being that "adequate moisture is provided by natural precipitation for production of crops normally requiring full or partial irrigation within the region of the state in which the place of use is located."

DWR has an internal "adequate moisture analysis" which is used to determine whether adequate moisture existed. One of those points is a determination of whether a crop reported by the water users is "considered irrigated in that region of the state".

"DWR obtains the percentage dryland/irrigated from National Agricultural Statistics Service (NASS). If the percentage of irrigated is higher, we {sic} consider the crop normally irrigated. If

Senate Agriculture Committee
2-10-09
Attachment 2

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the percentage of dry land is higher, DWR requests the following from the owner: If an irrigation system is available; seed population and fertilizer application; yield data."

The NASS data is not reflective of actual farming practices. It is our understanding that prior to 2009, if a particular crop (irrigated sorghum, dryland sorghum) was not reported on at least 30 reports from a particular county to NASS, the crop was not reported by NASS. For example, if NASS did not receive at least 30 reports of irrigated sorghum from producers in Dickinson County, it would not report sorghum as irrigated in Dickinson County.

If a producer from Dickinson County then reported to DWR on his water use report that he had "adequate moisture" and did not irrigate, DWR would not consider this "due and sufficient cause for non-use". In some circumstances, every water right would be in jeopardy of abandonment because NASS doesn't report the crop for that county.

This "analysis" is fundamentally flawed because:

1. The statute does not require such analysis of what crops "normally requiring full or partial irrigation within a region of the state"
2. The NASS data is not reflective of the actual farming practices of the individual.
3. The analysis removes any "judgment" of the landowner and the capitalistic desire to "put water to beneficial use" for profit.
4. Places the burden of proof on the producer to prove the states "data" is faulty when in fact it was never designed for such a purpose. The data is "homogenized" while the "water right" is specific to a parcel.

The most troubling aspect of this process is the "misunderstanding" it poses for producers. Most producers believe that nonuse is a "good thing" and they are protecting the resource by conserving it. The interpretation by the Department is counter intuitive to producers.

DWR recognizes that this process does not "work" for central and eastern areas of the state where moisture is available. We understand that the Department opposes SB 185 as it is currently written. We have been working with the division to develop language to resolve the issues but have not reached agreement. We believe this issue needs addressed and hope the legislature will continue to pressure the Department to resolve this issue. At a minimum, we believe it is important that the "judgment" of the producer be "reinserted" into this process.

We look forward to working with the committee and the Department to resolve these issues.

Non-use review process

- Review reasons for non-use compare to 5-7-1, if due and sufficient cause exists notify the owner.
- Cannot find due and sufficient cause; go to status panel, which is 4 water commissioners, water appropriation program manager, and legal staff.
- Cannot find due and sufficient cause, 30 day letter to owner requesting more information, work with owner as long as it takes.
- Cannot find due and sufficient cause, prepare draft verified report containing all of the information DWR has showing why the file should be found forfeited by abandonment allowing the owner to comment
- Still no due and sufficient cause, conduct a hearing allowing the owner to present their case to a hearing officer. DWR adds nothing new to the verified report.
- Final decision is based on outcome of the hearing

Adequate moisture analysis

KAR 5-7-1 (a) (1) Due and sufficient cause for non-use .....adequate moisture is provided by natural precipitation for production of crops normally requiring full or partial irrigation within the region of the state in which the place of use is located.

- Are there 5 or more years of non-use with this as a recurring reason?
- Are the crops reported as grown considered irrigated in that region of the state?
    - DWR obtains the percentage dryland/irrigated from National Farm Statics. If the percentage of irrigated is higher, we consider the crop normally irrigated.
    - If the percentage of dryland is higher, DWR requests the following data from the owner:
        - If an irrigation system is available
        - Seed population and fertilizer application
        - Yield data
- Research is done by using the 50% NIR from the Kansas Irrigation Guide to determine the crop water needs
- Monthly precipitation data is available from KState weather stations
- If precipitation for the months which irrigation is required greater than the crop water needs, due and sufficient cause exists for full or partial irrigation depending on the farmer's cultural practices.
- Yield data is used to determine if yields are higher than the average dryland rate in the area, this is considered due and sufficient cause for partial irrigation. If yields are equal to or greater than the average irrigated yield, this is considered due and sufficient cause for full irrigation.
- How the land is taxed can also be used as an indication of abandonment.

SB 185 on page 1 strike lines 38-41 and insert the following:

(c)For purposes of this section, a water right shall be presumed not abandoned if the holder of such right has filed a verified water use report indicating "adequate moisture" as due and sufficient cause for non-use and if any of the following are present:

1. Diversion works;
2. Production of a crop(add language to allow for disasters/or crop failure unrelated to use of the water right);
3. Overt acts by the water right holder illustrating their intent not to forfeit the right.

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KAPA

Kansas Aggregate
Producers' Association

Edward R. Moses
Managing Director

TESTIMONY

Date: February 10, 2009

Before: Senate Committee on Agriculture

By: Woody Moses, Kansas Aggregate Producers Association

Regarding: SB 185 – Abandonment Procedures

Good Morning Chairman Taddiken and Members of the Committee:

My name is Woody Moses, Managing Director of the Kansas Aggregate Producers Association. The Kansas Aggregate Producers Association (KAPA) is an industry wide trade association comprised of over 170 members located or conducting operations in all 165 legislative districts in the state that provides basic building materials to all Kansans. I appreciate the opportunity to appear before you today with our comments on SB 185 a measure dealing with the administration of abandonment hearings.

Winston Churchill once said Russia "is a riddle, wrapped in a mystery, inside an enigma." Too many of us who deal with water law, the same thing may apply for Kansas water law at times appears to work at cross purposes with many twists, turns and nuances. First there is the desire to promote the beneficial use and application of water in the public's interest yet at the same time many measures to promote conservation are overlaid upon the law. Thus creating a policy that both promotes use and conservation at the same time. Just as confusing, we always have a question as to whether water is a property right or merely a permission to use water. As many of you on the Senate of Natural Resources committee are currently dealing with water rights surrounding eminent domain and in this case it seems we are viewing water as a property right. On the other hand through the use of Intensive Groundwater Use Control Areas (IGUCAS) and impairment proceedings, we tend to view water as a licensing procedure similar to holding and using a driver license. This naturally creates an environment for those using the system that is confusing and potentially devastating to say the least. However we deal with it can lead to disastrous impacts for those people trying to understand and work the system. As an example,

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2-10-09
Attachment 3

attached to your testimony, you will find a Washburn Law Journal article regarding what is known as the Hawley v. Kansas Department of Agriculture case in which a couple lost a substantial amount of money as a result of the statute contained the bill before you today. You are encouraged to read this article as it will give you good background on the issues incorporated into SB 185. The bill before you today emanates from the result of policy changes made in 1999 to provide notice and later interpreted by the Supreme Court in the Hawley case. So while SB 185 appears to be relatively narrow it touches upon the application and use of the abandonment statue, much broader in scope, which we would like to bring to your attention. Summed up in the form of policy questions they are:

1. Should water be lost when no impairment occurs?
2. Who should have the burden of proof
3. Should effective notification procedures be restored?

Should water be lost when no impairment occurs?

In hearings on HB 2404 the Chief Engineer of the Division of Water Resources (DWR) repeatedly stated that the purpose of abandonment was to provide the junior water right holders protection of their investments from impairment by a senior water right holder not putting the water to beneficial use. However, in practice this does not appear to be true. For example one of our members is currently involved in an abandonment hearing in Pawnee County where it appears the abandonment procedure is being used for another purpose other than to protect a junior water right holder. Specifically this action involves the desire of our member who purchased the water right with the land in order to convert it to sand and gravel processing operation, and similar to the Hawley case, was advised by DWR the water right was in good standing. However, upon receiving the change application DWR advised that the water right would have to be further evaluated for its standing prior to proceeding with the application change. After, this review DWR determined that there were five years of non use during the life of the water right that it was recommending an abandonment hearing. At this hearing the argument was made that the proceeding was not in order as the proposed use would not have resulted in the impairment of junior water right holders as the proposed use was to cover diversion by evaporation. As sand & gravel pits have no wells, no draw down and no cone of depression it is impossible to impair surrounding wells senior or junior. However DWR took the position that strictly five years of nonuse was sufficient for the abandonment of the water right. The consequence has been that this member has been unable to open the proposed sand & gravel operation, resulting in the creation of a market shortage in Pawnee County and the establishment of a monopoly. Directly in conflict with KSA 82-711 which requires the chief engineer to approve or modify applications "to conform to the public interest to the end that the highest public benefit and maximum economical development may result from the use of such water". As this particular water right is located in a closed area, if abandoned, this water will be lost forever and will not be available for beneficial use to anyone else in the area. A sad result as the purpose of the abandonment statue is make water available to those who will put it to beneficial use.

Who should have the burden proof?

Abandonment proceedings also have another quirky aspect in that through rule and regulation (5-7-1(d)) the 'burden of proof" is placed upon the water right owner as opposed to the one who

brings the claim (DWR). Especially when it is considered that this shift in the burden has been created by the same agency that serves a both the judge and prosecutor in abandonment proceedings. If water is considered to be a property right or a right of some other type, should not the burden of proof be upon the party making the termination claim? We feel in many respects that this is unfair as the chief engineer has already been granted a prima facie case by statue. Water right holders faced with the loss of several thousand dollars and the decline of land values associated with the loss of a water right should not, when confronted with a prima facie, have to also assume the burden of proof in order to protect their investment.

Notification and Resumption of Use

In the actions taken by the Legislature on HB 2404 in 1999, it appeared that the policy of the Legislature was to move towards a system of providing water right holders with a notice of non use prior to the expiration of the five year period of nonuse and allow for a resumption of water use. However, it appears the Supreme Court in the Hawley decision has negated most of this policy especially with respect to notification. During the intervening 10 years DWR has now had time to review all of the non use issues and should have brought the appropriate abandonment actions. We simply encourage this committee to revisit the issue with respect to the Hawley decision and work toward the establishment of a meaningful notification system. We submit that it makes good sense to do this as it will encourage DWR to bring necessary abandonment hearings so that water can be made available to other users or otherwise let the current users use the water and put it to beneficial use.

Thank you for the opportunity to provide these comments before you today. I will be happy to respond to questions at the appropriate time.

Approved: 3-16-99
Date

MINUTES OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson Senator David Corbin at 8:15 a.m. on March 11, 1999 in Room 254-E of the Capitol.

All members were present.

Committee staff present:
Raney Gilliland, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Lila McClaflin, Committee Secretary

Conferees appearing before the committee:

Others attending:
Mary Jane Stattelman, Attorney, Kansas Department of Agriculture
David Pope, Director, Water Resources Program, Kansas Department of Agriculture
Mike Beam, Kansas Livestock Association
Leslie Kaufman, Kansas Farm Bureau
Clark Duffy, Kansas Water Office

See attached list.

The hearing on **HB 2404** was opened by Vice-Chairperson Morris. Staff was called on to brief the Committee on **HB 2404: Termination of water right; notice to user of due and sufficient cause exception.**

Mary Jane Stattelman said she had discussed the bill with David Pope when it was introduced on the House side. She said in the last few years they have reviewed some abandoned water rights and this has created more interest than has been shown in the past. This legislation would add some safe guards to protect peoples water rights. She said the only cost to them would be the data search and the notification procedure. And she thought currently there are sufficient options in place that allows people to protect their water rights. In response to a question regarding circumstances that are considered "due and sufficient cause" for non use, a list of 10 specific circumstances that are used to make this determination was provided (Attachment 1).

David Pope said the Division of Water Resources is not proactively seeking abandoned water rights. The water right owner is statutorily entitled to a notice and hearing to allow full consideration of all evidence, before a final decision is made on abandonment. He responded to questions about when the procedure is used and the criteria used to make the determination, and he gave several examples of when this might happen, and how it might protect a junior water right owner's investment.

Mike Beam supported the bill, as they liked the extended time from three to five year period for using appropriated water in order to preserve a water appropriation right. They liked the notification procedure established in subsection (b), and the "due and sufficient" cause provision in the bill. He urged the committee to give the bill favorable consideration (Attachment 2).

Leslie Kaufman, Assistant Director, Public Affairs Division, Kansas Farm Bureau, said the passage of **HB 2404** which would create a notification process that protects water rights during periods of non-use, would allow their members to better adapt to their varying needs (Attachment 3).

3-4

SPECIAL WATER ISSUES AND CONCERNS

ABANDONMENT (K.S.A. 82a-718)

Water is a life sustaining natural resource. Every Kansan is entitled to the opportunity to beneficially use the water resource to the limits of its availability. If water is not to be used as prescribed under the terms, conditions, and limitations of a water right the owner must show due and sufficient cause for non use so as not to deprive others that opportunity. Prior appropriation doctrine and related statutes define water held by the state as a public resource to be beneficially used by the people. This fact obligates the Chief Engineer to protect the water right owners opportunity to use the water beneficially. It is further provided in the statutes that if the water resource is not used beneficially for 3 consecutive years without due and sufficient cause the owner shall forfeit his right to its use in order to ensure others are not deprived of the opportunity to use it for their beneficial use.

The concept of beneficial use is considered so important that it is defined in the statutes by type of use, some of which are non consumptive. However, it is also recognized that users may endure circumstances that would prevent them from reasonably maintaining beneficial use even after three years. Therefore, regulations set forth a number of acceptable reasons (due and sufficient cause) for not using water that will protect the water right against forfeiture.

Specific circumstances that are considered due and sufficient cause for non use: (KAR 5-7-1)

1) Adequate moisture is provided by natural precipitation for production of crops normally requiring full or partial irrigation within the region of the state in which the place of use is located
2) A water right has been established or is in the process of being perfected for use of water from one or more preferred sources in which a supply is available currently but is likely to be depleted during periods of drought
3) water is not available from the source of water supply for the authorized use at times needed
4) water use is temporarily discontinued by the owner for a definite period of time to permit soil, moisture and water conservation, as documented by:
    a) enrollment in a multi year federal or state conservation program
    b) enrollment in the Division of Water Resources water right conservation program (KAR 5-7-4)
    c) any other conservation method acceptable to the Chief Engineer in advance
5) management and conservation practices are being applied which require the use of less water than authorized
6) a well has been previously approved as a standby well
7) physical problems exist with the point of divesion, distribution system, place of use or operator; reasonable efforts must be taken to correct the problems
8) conditions exist beyond the control of the owner which prevent access to the place of use or point of diversion; reasonable efforts must be taken to gain access
9) an alternate source of water supply was not needed and was not used because the primary source was adequate
10) any other reason constituting due and sufficient cause as determined by the Chief Engineer

Every effort is made to provide a way to protect a water right if the circumstances for non use are legitimate. However, the Division of Water Resources is obligated to ensure that negligence or selfish interests are not depriving others of an opportunity for beneficial use of water.

The water right owner is statutorily entitled to a notice and hearing to allow full consideration of all evidence, before a final decision is made on abandonment. The Division is not proactively seeking abandoned water rights. However, water rights that are part of a property transaction, seeking a certificate of appropriation, or change application are examples of circumstances when the water right must be in good standing and not abandoned for the transition proceed.

Senate Energy & Natural Resources

Attachment: 1

Date: 3-11-99

Kansas Legislature

82a-711

Chapter 82a.--WATERS AND WATERCOURSES
Article 7.--APPROPRIATION OF WATER FOR BENEFICIAL USE

82a-711. Permits to appropriate water; standards for approval of use; review of action on application. (a) If a proposed use neither impairs a use under an existing water right nor prejudicially and unreasonably affects the public interest, the chief engineer shall approve all applications for such use made in good faith in proper form which contemplate the utilization of water for beneficial purpose, within reasonable limitations except that the chief engineer shall not approve any application submitted for the proposed use of fresh water in any case where other waters are available for such proposed use and the use thereof is technologically and economically feasible. Otherwise, the chief engineer shall make an order rejecting such application or requiring its modification to conform to the public interest to the end that the highest public benefit and maximum economical development may result from the use of such water.

(b) In ascertaining whether a proposed use will prejudicially and unreasonably affect the public interest, the chief engineer shall take into consideration:

(1) Established minimum desirable streamflow requirements;

(2) the area, safe yield and recharge rate of the appropriate water supply;

(3) the priority of existing claims of all persons to use the water of the appropriate water supply;

(4) the amount of each claim to use water from the appropriate water supply; and

(5) all other matters pertaining to such question.

(c) With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit. Any person aggrieved by any order or decision by the chief engineer relating to that person's application for a permit to appropriate water may petition for review thereof in accordance with the provisions of K.S.A. 2007 Supp. 82a-1901 and amendments thereto.

History: L. 1945, ch. 390, § 11; L. 1957, ch. 539, § 16; L. 1977, ch. 356, § 6; L. 1980, ch. 332, § 3; L. 1986, ch. 392, § 3; L. 1991, ch. 292, § 3; L. 1999, ch. 130, § 5; July 1.

3-6

Burden of proof

From Wikipedia, the free encyclopedia

The **Burden of proof** (Latin: *onus probandi*) is the obligation to shift the assumed conclusion away from an oppositional opinion to one's own position (this may be either a negative or positive claim). The burden of proof may only be fulfilled by evidence.

Under the Latin maxim *necessitas probandi incumbit ei qui agit*, the general rule is that "the necessity of proof lies with he who complains." The burden of proof, therefore, usually lies with the party making the new claim. The exception to this rule is when a prima facie case has been made.

He who does not carry the burden of proof carries the benefit of assumption, meaning he needs no evidence to support his claim. Fulfilling the burden of proof effectively captures the benefit of assumption, passing the burden of proof off to another party.

The burden of proof is an especially important issue in law and science.

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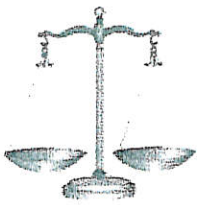

Evidence

Part of the common law series

Types of evidence

Testimony · Documentary
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Exculpatory · Scientific
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Relevance

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Kansas Legislature

Kansas Administrative Regulation 5-7-1

NOTE: Online K.A.R.s are updated annually. To obtain the latest version of a regulation please check the Kansas Register to see if an updated version has been published, or contact the agency enacting the regulation.

5-7-1 Due and sufficient cause for non-use. (a) Each of the following circumstances shall be considered ``due and sufficient cause,'' as used in K.S.A. 82a-718, and amendments thereto:

(1) Adequate moisture is provided by natural precipitation for production of crops normally requiring full or partial irrigation within the region of the state in which the place of use is located.

(2) A right has been established or is in the process of being perfected for use of water from one or more preferred sources in which a supply is available currently but is likely to be depleted during periods of drought.

(3) Water is not available from the source of water supply for the authorized use at times needed.

(4) Water use is temporarily discontinued by the owner for a definite period of time to permit soil, moisture, and water conservation, as documented by any of the following:

(A) Furnishing to the chief engineer a copy of a contract showing that land that has been lawfully irrigated with a water right that has not been abandoned is enrolled in a multiyear federal or state conservation program that has been approved by the chief engineer;

(B) enrolling the water right in the water right conservation program in accordance with K.A.R. 5-7-4; or

(C) any other method acceptable to the chief engineer that can be adequately documented by the owner before the nonuse takes place.

(5) Management and conservation practices are being applied that require the use of less water than authorized. If a conservation plan has been required by the chief engineer, the management and conservation practices used shall be consistent with the conservation plan approved by the chief engineer to qualify under this subsection.

(6) The chief engineer has previously approved the placement of the point of diversion in a standby status in accordance with K.A.R. 5-1-2.

(7) Physical problems exist with the point of diversion, distribution system, place of use, or the operator. This circumstance shall constitute due and sufficient cause only for a period of time reasonable to correct the problem.

(8) Conditions exist beyond the control of the owner that prevent access to the authorized place of use or point of diversion, as long as the owner is taking reasonable affirmative action to gain access.

(9) An alternate source of water supply was not needed and was not used because the primary source of supply was adequate to supply the needs of the water right owner. The owner shall maintain the diversion works on the alternate source of supply in a condition that will allow the owner to effectively use the alternate source of supply in a timely manner.

(10) The chief engineer determines that a manifest injustice would result if the water right were deemed abandoned under the circumstances of the case.

(b) In order to constitute due and sufficient cause for nonuse of water, the reason purporting to constitute due and sufficient cause shall have in fact prevented, or made unnecessary, the authorized beneficial use of water.

(c) Each year of nonuse for which the chief engineer finds that due and sufficient cause exists shall be considered to interrupt the successive years of nonuse for which due and sufficient cause does not exist.

(d) When a verified report of the chief engineer, or the chief engineer's authorized representative, is made a matter of record at a hearing held pursuant to K.S.A. 82a-718, and amendments thereto, that establishes nonuse of a water right for five or more successive years, the water right owner shall have the burden of showing that there have not been five or more successive years of nonuse without due and sufficient cause. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2002 Supp. 82a-718; modified, L. 1978, ch. 460, May 1, 1978; amended May 1, 1986; amended May 31, 1994; amended Oct. 24, 2003.)

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82a-718. Abandonment of water rights; notices; hearing; review of action; exceptions.

(a) All appropriations of water must be for some beneficial purpose. ***The purpose of abandonment is to protect junior water rights from impairment***. Every water right of every kind shall be deemed abandoned and shall terminate when ***(1)*** without due and sufficient cause ***(2)*** no lawful, beneficial use is ~~***henceforth***~~ made of water under such right ***(3)*** for five successive years. Before any water right shall be declared abandoned and terminated the chief engineer shall conduct a hearing thereon. Notice shall be served on the user at least 30 days before the date of the hearing. The determination of the chief engineer pursuant to this section shall be subject to review in accordance with the provisions of K.S.A. 2007 Supp. 82a-1901, and amendments thereto.

Termination of a water right under this section must be proved by clear and convincing evidence of each of the requirements of subsections (a)(1), (2) and (3) of this section. The ***admission into evidence at the hearing of a*** verified report of the chief engineer or such engineer's authorized representative ***that establishes each of the requirements of subsections (a)(1), (2) and (3) of this section*** shall be prima facie evidence of the abandonment and termination of any water right***, but not the burden of proof, to the owner of the water right.***

(b) When no lawful, beneficial use of water under a water right has been reported for three successive years, the chief engineer shall notify the user, by certified mail, return receipt requested, that: (1) No lawful, beneficial use of the water has been reported for three successive years; (2) if no lawful, beneficial use is made of the water for five successive years, the right may be terminated; and (3) the right will not be terminated if the user shows that for one or more of the five consecutive years the beneficial use of the water was prevented or made unnecessary by circumstances that are due and sufficient cause for nonuse, which circumstances shall be included in the notice.

(c) The provisions of subsection (a) shall not apply to a water right that has not been declared abandoned and terminated before the effective date of this act if the five years of successive nonuse occurred exclusively and entirely before January 1, 1990. However, the provisions of subsection (a) shall apply if the period of five successive years of nonuse began before January 1, 1990, and continued after that date.

Attention Kansas Water Right Holders: Be Nice to Your Neighbors, They're Policing Your Water Rights [*Hawley v. Kansas Dep't of Agric.*, 132 P.3d 870 (Kan. 2006)]

Tyler A. Darnell*

I. INTRODUCTION

You have just inherited a large piece of family farmland. Your father, who left you the land, spent the last five years in a nursing home. The land had been rented out by your father throughout his last years, but you desire to take it back and begin farming it yourself. Much to your delight, you discover that there is a valuable water right attached to the land, allowing you to irrigate your land from the adjacent river. Being cautious, you inquire about the right to the local water resources office, which is responsible for monitoring water rights. The office tells you that the right is indeed valid, but that you must install a meter to keep track of your usage. The office inspects the meter to its satisfaction, and you subsequently spend $70,000 for irrigation equipment to use the right attached to your land.

After irrigating your crops for almost two years, you get a letter from the state water resources office explaining that your neighbors have complained about your recent use of water and that the office has begun inspecting whether your right still exists. Eventually, the inspection reveals that prior to your use, the water right had not been used for over five consecutive years. As a result, the state water resources office concludes that your right has been abandoned and is no longer valid, information that would have been useful two years and $70,000 ago. You appeal the decision of the water resources office to the state supreme court, which affirms the termination of your right. Consequently, what was once a pleasant surprise and a promising investment has now become an extremely expensive lesson in state water law.

* B.S. 2003, Kansas State University; J.D. Candidate 2007, Washburn University School of Law. I thank everyone who assisted me with this project. I especially thank Professor Myrl Duncan, who provided me with tremendous guidance, insight, encouragement, and editing. I also thank my editors, Molly McMurray and Keron Wright, for their helpful edits and suggestions. Thanks to Professor David Pierce for recommending this case to me. Thanks also to Sara Tillett for her patience and encouragement throughout this process. I dedicate this work to my parents, whose love and inspiration has given me the courage to always aim high and achieve whatever I set out to do in life.

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The above facts closely resemble those before the Kansas Supreme Court in *Hawley v. Kansas Department of Agriculture*.[1] As in the hypothetical above, the Kansas Supreme Court upheld the administrative termination of a water right. Unfortunately, the court said much more than necessary and may have fundamentally altered Kansas water law in the process.

II. CASE DESCRIPTION

In July of 1953, Emmet E. Conzelman applied to the Kansas Department of Agriculture, Division of Water Resources (DWR) to obtain a water right to irrigate from the Republican River in Republic County, Kansas.[2] On October 9, 1953, DWR approved Conzelman's application and assigned him water right number 1,575 "for irrigation purposes."[3] Finally, on May 11, 1960, DWR found Conzelman's right to be perfected and issued him a certificate of appropriation for water right number 1,575, with a priority date of July 6, 1953.[4]

Upon Conzelman's death on July 30, 1982, his land and accompanying water right passed to his son, Max Conzelman, who held the right until his death on December 1, 2000.[5] The right then passed to Max Conzelman's daughter and son-in-law, Karen and Marlin Hawley.[6] In 2001, Marlin Hawley contacted the DWR Field Office in Stockton, Kansas to inquire about the status of the water right attached to the land.[7] During this meeting, Mr. Hawley learned that although the right had not been used for a long time, it was nonetheless valid, and he was free to use it.[8] Based on this information, the Hawleys spent $70,000 on irrigation equipment and began using the water right by pumping 180 hours during 2002.[9] In December 2002, DWR informed the Hawleys that they were required to install a water flow meter before watering in 2003.[10] The Hawleys complied, and DWR subsequently inspected and approved

1. 132 P.3d 870 (Kan. 2006).
2. *Id.* at 874.
3. *Id.*
4. Brief of Appellant at 1, *Hawley*, 132 P.3d 870 (No. 04-93690-AS). The seven year gap between approval and perfection was due to an erroneous property description on the original application. The error did not affect the priority date. *See Hawley*, 132 P.3d at 874.
5. Brief of Appellant, *supra* note 4, at 2. Max held the property on which the right was located jointly with his mother, Cecile E. Conzelman, until she died in 1991. *Id.*
6. *Hawley*, 132 P.3d at 874. The Hawleys obtained the right as trustees of Max Conzelman's estate. *Id.*
7. Brief of Appellees at 2, *Hawley*, 132 P.3d 870 (No. 04-93690-AS).
8. *Id.*
9. *Id.* The Kansas Supreme Court apparently misquotes Marlin Hawley as saying he pumped only 80 hours in 2002. *Hawley*, 132 P.3d at 875. DWR's records, however, show the right had 180 hours pumped in 2002. Water Information Management and Analysis System, http://hercules.kgs.ku.edu/geohydro/wimas/index.cfm (last visited Jan. 21, 2007) (click "Accept"; type "1575" in "Water Right Number" field; type in email address; click "Select Water Rights"; click "A 1575 00" hyperlink; select "2002" in "Water Use Year(s)" dropdown box).
10. *Hawley*, 132 P.3d at 875.

the meter.[11]

In May 2003, six neighboring water right holders petitioned DWR to initiate abandonment proceedings, claiming that before the Hawleys' recent use, the right had not been used since 1970, and thus the right should be terminated under Kansas law.[12] In July of 2003, DWR began investigating and questioning the Hawleys about the previous nonuse.[13] Based on that investigation, a representative of DWR issued a report recommending that the chief engineer of DWR hold a hearing to determine if the right was abandoned due to nonuse.[14] On December 24, 2003, after pumping 70 hours for the year, Marlin and Karen Hawley received notice that DWR had commenced abandonment proceedings.[15]

A. DWR Administrative Hearing

On January 6, 2004, the Hawleys filed a motion to dismiss, claiming that DWR failed to give them notice of potential termination after three consecutive years of nonuse, as required by chapter 82a, section 718(b) of the Kansas Statutes Annotated.[16] The hearing officer, appointed by the chief engineer of DWR, denied the motion, stating that notice in section 718(b) only applied to water rights that had not been used for exactly three years, not those that had already been unused for five years which could be terminated under section 718(a).[17] On February 11, 2004, the hearing officer conducted the abandonment hearing and discovered that the water right had been used only once between 1959 and 2002 when the Hawleys resumed use.[18] Because of the duration of nonuse, the hearing officer concluded that the water right had been abandoned and should be terminated pursuant to section 718(a).[19]

On April 19, 2004, the chief engineer of DWR officially adopted the conclusion of the hearing officer, thereby terminating the Hawleys' water right.[20] The Hawleys quickly filed a petition for administrative review with the Secretary of Agriculture, asserting that they were entitled to notice under section 718(b) before their right could be terminated.[21] The appeal was unsuccessful, and on May 12, 2004, the Secre-

11. *Id.*
12. *Id.* at 874.
13. *Id.*
14. *Id.* at 875.
15. *Id.*
16. Brief of Appellees, *supra* note 7, at 3.
17. *Hawley*, 132 P.3d at 876. The specifics of section 718(a) and (b) are explained in detail, *infra* section III.B.2.
18. Initial Order Declaring Water Right Abandoned and Terminated, *In re* Water Right, File No. 1,575, Case No. 03 WATER 2969, at 1, 7 (Kan. Dep't of Agric., Div. of Water Res. 2004) (on file with author). The right was used in 1970. *Id.* at 4.
19. *See id.* at 8.
20. *Id.* at 7.
21. *Hawley*, 132 P.3d at 877.

tary of Agriculture denied the Hawleys' petition, upholding the termination as a final agency decision.[22]

B. Republic County District Court

The Hawleys next sought relief by petitioning the Republic County District Court for judicial review of DWR's termination of their right.[23] They again asserted that the termination was invalid because DWR had not given them proper notice.[24] The district court reversed DWR's decision, concluding that the notice under section 718(b), enacted in 1999, was to be applied retroactively and was therefore "a condition precedent to [DWR] being able to initiate an administrative action to declare [the Hawleys'] water rights abandoned and terminated."[25]

The district court examined the 1999 amendments to section 718, which extended the period of nonuse from three to five years in subsection (a), and created the notice requirement after three years of nonuse in subsection (b).[26] The court reasoned that because the substantive element of the amendment (extending the nonuse period to five years) was intended to apply retroactively, the procedural element (notice after three years) must also be retroactive; "[o]therwise, you would have a situation where the legislature expanded a right yet the accompanying procedure and remedy would not apply."[27] Because DWR did not furnish the Hawleys with the required notice, the district court set aside DWR's termination of the right.[28]

C. Kansas Supreme Court

DWR appealed the district court's judgment to the Kansas Court of Appeals.[29] The Hawleys immediately filed a motion to transfer the case directly to the supreme court.[30] The Kansas Supreme Court granted the Hawleys' motion and, after hearing the case, reversed the district court and reinstated DWR's termination of the Hawleys' water

22. Order Denying Petition for Administrative Review, *In re* Water Right No. 1,575, Case No. 03 WATER 2989, at 2 (Kan. Dep't of Agric. 2004) (on file with author).

23. *Hawley*, 132 P.3d at 877.

24. Petition for Judicial Review at 4, Hawley v. Kansas Dep't of Agric., Case No. 04-CV-07 (Republic Co. Dist. Ct. 2004).

25. Judgment Form at 5, *Hawley*, Case No. 04-CV-07.

26. *Id.* at 3-5.

27. *Id.* at 5. In other words, if a person had not used their right for three years at the time the amendment was passed, the substance of the amendment would give them an additional two years before their right could be deemed abandoned. Thus, the procedural notice should also apply and entitle that right holder to notice before abandonment proceedings can be brought.

28. *Id.* at 5-6.

29. Notice of Appeal at 1, *Hawley*, Case No. 04-CV-07.

30. Brief of Appellees, *supra* note 7, at 4. The motion was filed pursuant to chapter twenty, section 3017 of the Kansas Statutes Annotated. The record does not reveal any specific reasons why the Hawleys wanted to bypass the court of appeals.

right.[31] The court spent the bulk of the opinion deciding that section 718 was a forfeiture statute, not one of abandonment, an issue the court raised sua sponte.[32] The court then adopted DWR's ruling that section 718 was unambiguous and that it clearly did not "require . . . [DWR] to comply with the notice requirements of subsection (b) before . . . pursu[ing] termination of a water right under the authority of subsection (a)."[33]

The court explained in dicta that its holding was supported on other grounds as well.[34] First, the court believed that its holding was "consistent with the premise upon which the [Kansas Water Appropriation] Act is built[:] . . . holders of water rights who fail to use the rights lose the rights."[35] The court also asserted that there are plenty of other "safeguards" within the law that help to prevent the termination of a water right.[36] Because of those safeguards, the court reasoned, "it is unlikely that the legislature intended to bestow yet another opportunity for relief under circumstances like those of the instant case."[37] Next, the court held that even if it were to find section 718 ambiguous, "rules of statutory construction" would produce the same result.[38] Finally, the court suggested that its ruling was equitable because allowing the Hawleys to continue using their right would unjustly impinge upon the neighboring junior right holders.[39]

III. BACKGROUND

A. Basics of Water Rights Law

There are two major systems of water rights law governing the use of surface water in the United States.[40] The riparian doctrine[41] is used

31. Hawley v. Kan. Dep't of Agric., 132 P.3d 870, 871 (Kan. 2006).
32. *Id.* at 880-87.
33. *Id.* at 888.
34. *Id.*; *see infra* note 119.
35. *Hawley*, 132 P.3d at 888.
36. *Id.* The safeguards the court referred to were the notice in subsection (b), the ability for a holder to demonstrate "due and sufficient cause" for nonuse in subsection (b), and the provision in subsection (c) eliminating consecutive periods of nonuse occurring entirely before January 1, 1990, from consideration for termination. *Id.*
37. *Id.*
38. *Id.* at 888-89.
39. *Id.* at 889.
40. George A. Gould, *Water Rights Systems*, *in* WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES, 6, 8 (Kenneth R. Wright ed., 1990). There are various other approaches taken by states with respect to groundwater. *Hawley*, however, dealt only with surface water rights, and thus, groundwater systems are irrelevant to this comment. The Kansas Water Appropriation Act (the Act), discussed *infra* section III.B, applies to both surface and groundwater.
41. Because Kansas does not use this doctrine, and it was not involved in *Hawley*, a brief explanation of the riparian doctrine shall suffice for the purposes of this comment. Essentially, the doctrine provides that a person owning land bordering a body of water is entitled to use the adjoining water simply by owning such land. *See* 1 ROBERT E. BECK, WATER AND WATER RIGHTS § 7.02 (1991). Also, because riparian rights are a part of the land, they are not lost simply by nonuse. *Id.* § 7.04(d). There are many more aspects of the riparian doctrine than are discussed here. *See id.*; A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES (Thomson West 2006); WATER RIGHTS

in the eastern half of the United States where climates are humid and water supplies are generally plentiful.[42] In the western United States, with arid climates and less plentiful water supplies, most states, including Kansas, utilize the prior appropriation doctrine.[43] A brief discussion of prior appropriation is useful in understanding the issues involved in *Hawley*.

1. The Prior Appropriation Doctrine: Priority

In the western United States, where water is generally more limited than in the east, the prior appropriation doctrine governs the use of surface water.[44] Unlike their riparian counterparts, most prior appropriation states maintain that the water is a community resource controlled by the state, which has authority to establish how and by whom the water is used.[45] Under this doctrine, the state regulates the use of water, issuing permits to qualifying applicants, thereby appropriating to them the right to use a specified amount of water for a particular purpose.[46]

The prior appropriation doctrine is grounded on two basic principles.[47] The first is priority—"first in time, first in right."[48] A water right is given a priority date based on the date it is appropriated, with seniority going to the earliest dates.[49] When there is a shortage of water, the state will limit usage, beginning with the most junior water rights, working up the priority ranks as far as necessary to fulfill the quantity appropriated to the most senior right holders.[50] During a drought, the junior water right holders bear the entire burden of the shortage, ensuring that the more senior right holders receive their entire allotted amount.[51]

2. The Prior Appropriation Doctrine: Beneficial Use

The second fundamental principle of the prior appropriation doctrine is beneficial use; the existence of the right is based solely on putting water to use for a beneficial purpose.[52] Under this principle, the right holder is generally entitled to the right so long as he is putting the

OF THE FIFTY STATES AND TERRITORIES, *supra* note 40.

42. Deborah L. Freeman, *Introduction*, *in* WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES, *supra* note 40, at 1.

43. WILLIAM GOLDFARB, WATER LAW 32-33 (2d ed. 1988).

44. *Id.*

45. Gould, *supra* note 40, at 9.

46. William R. Fischer & Ward H. Fischer, *Appropriation Doctrine*, *in* WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES, *supra* note 40, at 26.

47. Gould, *supra* note 40, at 9.

48. *Id.*

49. TARLOCK, *supra* note 41, § 5.30.

50. Gould, *supra* note 40, at 9.

51. TARLOCK, *supra* note 41, § 5.30.

52. Gould, *supra* note 40, at 9.

water to beneficial use,[53] as determined by the state.[54] Because the appropriated right depends on beneficial use, "nonuse of water for a long period may result in loss of the water right by forfeiture or abandonment."[55] Prior appropriation states vary on whether rights are lost through forfeiture or abandonment.[56]

In abandonment states, nonuse of the right for a statutorily determined period of time must be accompanied with intent by the owner to abandon that right.[57] To terminate a right for abandonment, the party claiming abandonment has the burden of proving intent.[58] Although nonuse by itself does not constitute abandonment per se, it is usually "the best evidence of intent to abandon."[59] In most abandonment states, "long periods of non-use raise a rebuttable presumption of intent to abandon."[60] If, however, no intent is found, the reasons for nonuse become irrelevant and the right is retained by the appropriator.[61]

In forfeiture states, the loss of a water right is more abrupt than in abandonment states. Most forfeiture statutes "provide that if water is not . . . put to a beneficial use for a prescribed period of time, the right is lost and the water again becomes public subject to appropriation by others."[62] Intent to relinquish the right is irrelevant. [63] Once the statutory period of nonuse has expired, the right is lost.[64]

Whether a state terminates a water right through abandonment or forfeiture, most prior appropriation states provide various reasons excusing nonuse, which will prevent the termination of the right after the period of nonuse has passed.[65] Such reasons may include drought, adequate moisture, and enrollment of the appurtenant land in a conservation program.[66] Whatever the specific reason, its existence will allow the right holder to survive a claim of forfeiture or abandonment.[67]

B. Kansas Water Law - The Kansas Water Appropriation Act

Kansas uses the prior appropriation doctrine to govern the use of surface water. Kansas was originally a riparian state, and landowners

53. *Id.*
54. *See* GOLDFARB, *supra* note 43, at 35-36.
55. Gould, *supra* note 40, at 9.
56. TARLOCK, *supra* note 41, § 5.87.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* § 5.88.
63. *Id.*
64. *Id.*
65. *Id.* § 5.89.
66. *Id.*
67. *Id.*

inherently held the right to use water bordering their land.[68] In 1945, however, the Kansas Legislature passed the Kansas Water Appropriation Act (the Act), which codified the prior appropriation doctrine and dramatically altered water rights law in the state.[69]

1. General Provisions of the Act[70]

At the outset, the Act articulates one of the basic principles of prior appropriation, beneficial use, by providing that "all waters within the state may be appropriated for beneficial use as herein provided."[71] The Act vests the chief engineer of DWR with the authority to "enforce and administer the laws of this state pertaining to the beneficial use of water."[72] Any non-domestic use of water must be approved by the chief engineer.[73] This approval is sought by applying to the chief engineer for a permit to appropriate.[74] Furthermore, anyone "may apply for a permit to appropriate water," but he or she must follow the application requirements specified in the Act.[75]

Along with the procedures for appropriation, the Act also sets out the second principle of the prior appropriation doctrine: priority.[76] Under the Act, the priority of a water right is based on the date the application for the right was filed with the chief engineer.[77] As in other prior

68. *See* John C. Peck, *Water Quality and Allocation*, *in* FUNDAMENTALS OF WATER LAW IN KANSAS: PROTECTING WATER RIGHTS, USE AND QUALITY 1, 3 (2003).

69. *Id.* The Act applied the prior appropriation doctrine to both surface and groundwater. *Id.* ("All water within the state is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed." KAN. STAT. ANN. § 82a-702 (1997)).

70. The provisions listed in this section involve only aspects of the Act relevant to this comment. There are various other technical elements (e.g., listing specific desired streamflows for certain rivers) that are included in the Act but need not be mentioned here. For a complete analysis of the Act, see Peck, *supra* note 68. For more on the history of the Act, as well as its constitutionality, see *Stone v. Gibson*, 630 P.2d 1164 (Kan. 1981), and *Williams v. City of Wichita*, 374 P.2d 578 (Kan. 1962).

71. KAN. STAT. ANN. § 82a-703 (1997).

72. *Id.* § 82a-706. This provision also requires the chief engineer to "control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation." *Id.* As Professor John C. Peck, Connell Teaching Professor of Law at the University of Kansas School of Law, put it, "the Chief Engineer is the 'water czar' of Kansas, if there were such a thing." Peck, *supra* note 68, at 5.

73. KAN. STAT. ANN. § 82a-705.

74. *Id.* § 82a-709.

75. *Id.* § 82a-708a (Supp. 2005). The application requirements are specified in sections 82a-708a-710 of the Kansas Statutes Annotated. For an extensive explanation of the application process and the steps involved in obtaining a water right under the Act, see Peck, *supra* note 68.

76. "As between persons with appropriation rights, the first in time is the first in right." KAN. STAT. ANN. § 82a-707(c) (1997).

77. *Id.* Because Kansas was a riparian state before the passage of the Act, the Act does take into account those rights existing prior to 1945. These rights are referred to in the Act as "vested rights." *Id.* § 82a-701(d) (Supp. 2005). Any persons holding a right prior to the passage of the Act simply had to make a claim to the chief engineer, pursuant to section 82a-704a(a), that they held a vested right. Under section 82a-704a(f), vested rights claims could not be made after July 1, 1980. Under section 82a-701(d), all vested rights "share a common priority date of June 28, 1945." John C. Peck & Constance Crittenden Owen, *Loss of Kansas Water Rights for Non-Use*, 43 KAN. L. REV.

appropriation states, priority under the Act "determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights that attach to it."[78]

A perfected appropriation becomes a water right, which is a real property interest that is part of, or can be separated from, the land on which it is located.[79] Because of its status, a water right is not limited to ownership by the original appropriator, who can transfer the right to another, either by itself or with the appurtenant land.[80] Furthermore, if the appurtenant land is conveyed in any manner with nothing mentioned in the conveyance about the right, it "passes with the land."[81] Also, if a right holder wishes to change either "the place of use, the point of diversion or the use made of the water," he must submit an application to the chief engineer requesting such a change.[82] If the chief engineer approves the change, the holder retains the priority date of the original application.[83] These are the only three changes the Act allows right holders to make to the original appropriation, but each must be approved by the chief engineer.

2. Abandonment – Section 718

Although a water right is considered a real property interest, it is still subject to the principle of beneficial use. Section 718, the statute at issue in *Hawley*, provides that a right can be terminated for nonuse. Prior to 1999, section 718 read:

> All appropriations of water must be for some beneficial purpose. Every water right of every kind shall be deemed abandoned and shall terminate when without due and sufficient cause no lawful, beneficial use is henceforth made of water under such right for three successive years. Before any water right shall be declared abandoned and terminated the chief engineer shall conduct a hearing thereon in accordance with the provisions of the Kansas administrative procedure act. Notice shall be served on the user at least 30 days before the date of the hearing.
>
> The verified report of the chief engineer or such engineer's authorized representative shall be prima facie evidence of the abandonment and termination of any water right.[84]

DWR has defined which circumstances constitute "due and sufficient

801, 805 (1995). This is the date the Act was passed, and as a result, all vested rights are superior to any right appropriated under the Act. *Id.* While vested rights have more protection under the Act than appropriated rights, they can still be lost through nonuse. *Id.* at 805-06.

78. KAN. STAT. ANN. § 82a-707(b) (1997).

79. *Id.* § 82a-701(g) (Supp. 2005).

80. Peck, *supra* note 68, at 16. For more on the transfer of a Kansas water right, see *id.* at 18-20.

81. *Id.* at 18. This includes "conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal, or by inheritance." KAN. STAT. ANN. § 82a-701(g) (Supp. 2005).

82. *Id.* § 82a-708b(a).

83. *Id.*

84. *Id.* § 82a-718 (1997).

cause" for nonuse.[85] The excusable circumstances include, for instance, uncontrollable weather conditions such as adequate moisture[86] or drought,[87] as well as enrolling the right in a water conservation program.[88] Apparently, the chief engineer handles most abandonment proceedings without much difficulty or judicial intervention because, before *Hawley*, there were "[n]o appellate court cases . . . appear[ing] in Kansas . . . on the subject of loss of water rights for non-use."[89]

In 1999, the Kansas Legislature made significant changes to section 718.[90] The original language of section 718 was placed into section 718(a), and the period of nonuse in subsection (a) was changed from three to five years.[91] Aside from the extension of time required for abandonment, the previous language of section 718 remains intact.[92]

Perhaps the biggest change to section 718 in the 1999 amendment was the addition of subsection (b), which states:

> When no lawful, beneficial use of water under a water right has been reported for three successive years, the chief engineer *shall* notify the user, by certified mail, return receipt requested, that: (1) No lawful, beneficial use of the water has been reported for three successive years; (2) if no lawful, beneficial use is made of the water for five successive years, the right may be terminated; and (3) the right will not be terminated if the user shows that for one or more of the five consecutive years the beneficial use of the water was prevented or made unnecessary by circumstances that are due and sufficient cause for nonuse, which circumstances shall be included in the notice.[93]

By requiring the chief engineer to give notice to right holders reporting

85. KAN. ADMIN. REGS. § 5-7-1 (2006).
86. *Id.* § 5-7-1(a)(1).
87. *Id.* § 5-7-1(a)(2).
88. *Id.* § 5-7-1(a)(4)(A) (2006). Section 5-7-1 of the Kansas Administrative Regulations provides the full list of "due and sufficient" causes for nonuse.
89. Peck & Owen, *supra* note 77, at 803. Although this statement was made in 1995, it remained true until the decision in *Hawley* was issued.
90. *See* Ron Smith, *1999 Legislative Wrap Up*, 68 J. KAN. B. ASS'N 16, 29-31 (1999).
91. *See* KAN. STAT. ANN. § 82a-718(a) (Supp. 2005).
92. The current text of section 82a-718(a) reads:

> All appropriations of water must be for some beneficial purpose. Every water right of every kind shall be deemed abandoned and shall terminate when without due and sufficient cause no lawful, beneficial use is henceforth made of water under such right for five successive years. Before any water right shall be declared abandoned and terminated the chief engineer shall conduct a hearing thereon. Notice shall be served on the user at least 30 days before the date of the hearing. The determination of the chief engineer pursuant to this section shall be subject to review in accordance with the provisions of K.S.A. 2005 Supp. 82a-1901, and amendments thereto. The verified report of the chief engineer or such engineer's authorized representative shall be prima facie evidence of the abandonment and termination of any water right.

Id. It is interesting to note the conflict that exists between section 718 and section 42-308 of the Kansas Statutes Annotated. Section 42-308 is part of the chapter on irrigation, predating the adoption of the Act, and provides that a water right is forfeited after three years of nonuse. While section 308 was somewhat consistent with the previous version of section 718, the 1999 amendment puts the two sections in direct conflict with each other. *See* Peck & Owen, *supra* note 77, at 826; Peck, *supra* note 68, at 22-23; KAN. STAT. ANN. § 42-308 (2000). This is an obvious oversight by the Legislature, but this problem has never been addressed by the court. *See* Peck, *supra* note 68, at 22-23.
93. KAN. STAT. ANN. § 82a-718(b) (Supp. 2005) (emphasis added).

three successive years of nonuse, subsection (b) places an onus on DWR in policing and maintaining the status of water rights within the state.

The final change of the 1999 amendment was the creation of subsection (c). This change was significant because it prevented the chief engineer from terminating certain rights that had not been used for five successive years.[94] Any right with five successive years of nonuse occurring exclusively before January 1, 1990, cannot be declared abandoned under subsection (a) for that period if it had not yet been terminated by July 1, 1999, the effective date of the amendment.[95] If, however, the period of nonuse extended past the January 1, 1990, cutoff, that right is still subject to abandonment.[96]

The 1999 amendment to section 82a-718 appeared to significantly alter the rules concerning the loss of a water right for nonuse in Kansas. Unfortunately, the Kansas Supreme Court seems to be of the view that there was little, if any, change.

IV. COURT'S DECISION

Hawley v. Kansas Department of Agriculture was the first opportunity for the Kansas Supreme Court to interpret the 1999 amendments to section 718.[97] Specifically, the court was called upon to decide whether DWR erroneously interpreted section 718 when it concluded that section 718(b) notice is "not a condition precedent to termination of a water right pursuant to" section 718(a).[98] The court first conducted an in-depth discussion of the loss of a water right under Kansas law, concluding that section 718 is a forfeiture statute rather than one of abandonment.[99] Ultimately, the court agreed with DWR's interpretation of section 718.[100]

Prior to its analysis of the Hawleys' claims, the court went through a lengthy examination of how a Kansas water right is lost through non-

94. *See id.* § 82a-718(c).

95. *Id.* The full text of subsection (c) states:

> The provisions of subsection (a) shall not apply to a water right that has not been declared abandoned and terminated before the effective date of this act if the five years of successive nonuse occurred exclusively and entirely before January 1, 1990. However, the provisions of subsection (a) shall apply if the period of five successive years of nonuse began before January 1, 1990, and continued after that date.

Id.

96. *Id.*

97. *See supra* note 89 and accompanying text.

98. Hawley v. Kansas Dep't of Agric., 132 P.3d 870, 873 (Kan. 2006). The court was not deciding whether the Republic County District Court's interpretation was correct because judicial review of DWR's termination "was made pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA)" (Kan. Stat. Ann. § 77-601 et seq.), which required the supreme court to treat the appeal of DWR's order "as though [it] had been made directly to this court." *Id.* at 873, 877-78 (quoting Blue Cross & Blue Shield of Kansas, Inc. v. Praeger, 75 P.3d 226, 245 (Kan. 2003)). Furthermore, under the KJRA, "[t]he party asserting the agency's action is invalid bears the burden of proving the invalidity." *Id.* at 878.

99. *Hawley*, 132 P.3d at 887.

100. *Id.* at 889.

use. Although the issue was not argued by either party, the court concluded that section 718 is a forfeiture statute, and thus intent is irrelevant to the termination of a water right.[101] First, the court noted that the language in section 718, that a water right "shall be deemed abandoned," does not automatically render the statue one of abandonment.[102] The court pointed to several other Kansas statutes with similar language and noted that this same "language has served to automatically terminate certain rights as a matter of law, irrespective of one's actual intent."[103] Pointing to other instances where Kansas courts have interpreted the word "deemed" as dispositive,[104] the court ruled that "the legislature's chosen language 'shall be deemed abandoned and shall terminate' clearly means that by operation of law those water rights shall terminate, regardless of a party's intent."[105] For further support, illustrations were given from other states that have interpreted similar water rights statutes to be forfeiture statutes.[106] Finally, the court stated that the 1999 amendment adding subsection (b) made no mention of abandonment or requiring intent to abandon.[107] Therefore, the court concluded that section 718 is a statute of forfeiture.[108]

The court then turned to the actual controversy between DWR and the Hawleys. DWR argued that the plain and unambiguous language of section 718 dictates that notice under section 718(b) is not a condition precedent to the chief engineer terminating a right pursuant to section 718(a).[109] Such a reading of section 718, DWR reasoned, "is consistent with the [statute's] purpose of providing notice to those users whose water right is in jeopardy of being terminated, i.e. before five successive years of nonuse."[110] Providing section 718(b) notice to the Hawleys "would not have served this purpose since the water right was already deemed by . . . 718(a) to be abandoned and terminated due to extensive nonuse."[111] Alternatively, DWR argued that even if the statute was ambiguous, rules of statutory construction dictate that it would be improper to retroactively apply the notice provision of section 718(b) to a

101. *Id.* at 887.
102. *Id.* at 882.
103. *Id.* The court examined sections 55-1,120(a)(3) and (b)(2), 8-1021, 66-1,129a, 3-316, 72-8801(a), 72-6433(b), and 58-3935 of the Kansas Statutes Annotated. *Id.* Each statute specifies that something "shall be deemed abandoned" upon the occurrence of a stated event. *Id.*
104. *See id.* at 883.
105. *Id.* at 883-84.
106. *Id.* at 884-85 (examining supreme court decisions from Idaho, Nevada, and Oregon).
107. *Id.* at 887.
108. *Id.*
109. Brief of Appellant, *supra* note 4, at 17. DWR claimed that "[n]o where in the language of . . . 82a-718 is [there] legislative intent . . . requir[ing] the chief engineer to comply with subpart (b) prior to pursuing termination of a water right under authority of subpart (a). No ambiguity exists . . . because only one interpretation can be made." *Id.*
110. *Id.*
111. *Id.* at 18.

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right that had already been unused for five years.[112]

The Hawleys, on the other hand, argued that section 718 is ambiguous and therefore requires analysis under the rules of statutory construction.[113] Such an analysis, they argued, reveals "the clear intent of the statute"—that section 718(b) notice is a mandatory condition precedent to the termination of a water right.[114] The Hawleys asserted three grounds in support of this claim. First, the use of the word "shall" makes the notice mandatory.[115] Second, "by increasing the period of nonuse . . . and then inserting a . . . notice requirement," the legislature clearly intended "that holders be notified of the potential abandonment prior to losing this important and valuable property right."[116] Finally, the Hawleys reasoned that by adding the notice requirement, the legislature intended to prevent inequitable situations like theirs from occurring.[117] In addition to being mandatory, the Hawleys argued that section 718(b) notice also applies retroactively, serving as a condition precedent to "all abandonment actions initiated after 1999."[118]

In deciding whether section 718(b) notice is a condition precedent to termination, the court did little of its own analysis.[119] Instead, the court simply recited and adopted the earlier findings of the DWR hear-

112. *Id.* at 19-20. DWR believed that section 718 should not be applied retroactively because of the general rule that "statutes operate prospectively unless the language clearly indicates the legislature intended them to operate retrospectively." *Id.* (citing Southwestern Bell Tel. Co. v. Kansas Corp. Comm'n, 29 P.3d 424 (Kan. Ct. App. 2001)). DWR argued that nowhere in the plain language of section 718(b) was there "basis to show the legislature intended the notice requirement . . . to apply retroactively." *Id.* DWR also contended that because part of the statute was substantive, "the whole act must be viewed as substantive" and applied prospectively. *Id.* at 20 (citing Steinle v. Boeing Co., 785 F. Supp. 1434 (D. Kan. 1992)). Finally, DWR claimed that retroactive application of the notice requirement was improper because the only reasonable interpretation of section 718(b) "requires notice *only* to the users of those water rights for which three successive years of nonuse had been reported, but for which five successive years of nonuse has not occurred." *Id.* (emphasis in original).

113. *See* Brief of Appellees, *supra* note 7, at 6-7.

114. *Id.* at 6.

115. *Id.* at 6-7.

116. *Id.* at 7.

117. *Id.* "[I]t only makes sense that the legislature was acting to prevent such injustices from occurring without notice and an opportunity to remedy the deficiency." *Id.*

118. *Id.* at 8-9. For support, the Hawleys noted that while "[s]tatutes are generally to be applied prospectively[,] . . . this rule does not apply if the statutory change is procedural or remedial in nature. In that event, the statute should be applied retrospectively." *Id.* (citing In re Tax Appeal of Alsop Sand Co., Inc., 962 P.2d 435 (Kan. 1998)). The Hawleys pointed out that section 718(b) is procedural because it "provides the procedure and means by which relief is obtained." *Id.* In response to DWR's argument that section 718 must be viewed as substantive and therefore applied prospectively, the Hawleys pointed to Kansas authority holding that "procedural and substantive laws can coexist within the same statute." *Id.* at 9 (citing Shirley v. Reif, 920 P.2d 405 (Kan. 1996)). Because section 718(b) is procedural, the Hawleys asserted it can and should be applied retroactively. *Id.* at 9.

119. The court did claim that its holding was supported by other grounds:

> First, our holding is consistent with the premise upon which the entire Act is built . . . holders of water rights who fail to use the rights lose the rights. . . . Second, there are other safeguards in the Act available to a water right holder so he or she does not always lose the right if it is not used in the prescribed number of successive years. . . . Finally, . . . application of the rules of statutory construction leads to the same conclusion.

Hawley, 132 P.3d at 888-89. This limited analysis, however, came only after the court adopted DWR's findings. Furthermore, it is clearly dicta, as the court admitted that these grounds were merely observations and "not necessary to our resolution of the issue." *See id.* at 888.

ing officer.[120] Accordingly, the court ruled that section 718 is not ambiguous and held:

> [N]owhere in the plain and unambiguous language of the statute is there legislative intent to require the chief engineer to comply with the notice requirements of subsection (b) before he pursues termination of a water right under the authority of subsection (a), *i.e.*, after 5 or more successive years of nonuse have occurred.[121]

After holding that section 718(b) notice is not required, the court simply labeled as moot the Hawleys' arguments for its retroactive application.[122]

V. COMMENTARY

A. Errors Within the Opinion

While the court's opinion may seem somewhat insignificant and uncontroversial at first, it actually creates serious problems for water right holders. First, the court's unwarranted conclusion that section 718 is a forfeiture statute prematurely foreclosed debate on the issue before any party could argue the case for abandonment. Second, by altering the nature of the statute, the court's interpretation of section 718 raises major concerns for the consistency of water rights adjudication in Kansas.

1. The Court's Conclusion that Section 718 is a Forfeiture Statute is Dictum and will Harm Future Litigants

a. The Court's Analysis of Forfeiture Versus Abandonment is Dictum

A large portion of the court's opinion is devoted to deciding that section 718 is a forfeiture statute as opposed to one of abandonment.[123] This issue, however, was irrelevant to the case and neither party argued it.[124] In the first paragraph of the opinion, the court identified "[t]he sole issue [as] whether DWR erroneously interpreted . . . 82a-718 when it concluded that one of the notice provisions of the statute, subsection (b), was not a condition precedent to termination of a water right pursuant to subsection (a)."[125] Notwithstanding this articulation of the narrow question at hand, the court reached out to decide the forfeiture-abandonment issue. It appears that the court, while referring to an article for background on Kansas water law, observed the issue contained

120. *Id.* at 887-88. The court quoted the hearing officer's findings and simply said "[w]e agree." *Id.* at 888.
121. *Id.* at 888.
122. *Id.* at 889.
123. *Id.* at 880-87.
124. *See generally* Brief of Appellant, *supra* note 4; Brief of Appellees, *supra* note 7.
125. *Hawley*, 132 P.3d at 873.

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within the article and, sua sponte, decided to resolve it.[126]

In the debate over whether the statute is one of forfeiture or abandonment, "[t]he question is whether [the] element of intent is required for the loss of water rights for non-use."[127] As discussed above, the parties only argued whether notice in subsection (b) is required to terminate a water right, not whether intent is required.[128] Notice is either required by the statute or it is not; whether the Hawleys intended to abandon the right is completely irrelevant. For this reason, the court's "holding"[129] that section 718 is a forfeiture statute is dictum.

Obiter dictum is defined as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."[130] The court's ultimate holding would be the same regardless of whether section 718 is an abandonment or forfeiture statute. It would not have mattered whether the Hawleys' right was *forfeited* after five years, regardless of intent, or if it was *abandoned* after five years, based on a finding of intent. The court's interpretation of section 718(b) has the same effect—notice would not be required because "[five] or more successive years of nonuse have occurred."[131] Whether those five years were the result of an intent to abandon is irrelevant. Accordingly, the court's analysis and decision that section 718 is a forfeiture statute is "unnecessary to the decision in the case and therefore not precedential."[132]

b. Consequence of Premature Analysis

The court's decision that section 718 is a forfeiture statute did not affect the Hawleys because they did not argue the issue.[133] Furthermore, the court's ultimate holding would have terminated the Hawleys' right regardless of section 718's status. Future litigants, however, may be adversely affected by the court's "holding" that section 718 is a forfeiture statute. This issue is vitally important and should not have been resolved by the court sua sponte. An article by John C. Peck and Constance Crittenden Owen poses two hypothetical situations that illustrate the importance of this distinction between the two forms of termination:

126. "Peck and Owen opine that a question exists whether the Act makes Kansas an 'abandonment' or a 'forfeiture' state. Their article presents arguments on both sides of the issue but offers no ultimate conclusion. . . . Because the Act's fundamental nature is of assistance in deciding the issues in the instant case, we will consider it." *Id.* at 880. The court believed resolving the issue to be "of assistance," not that it was necessary. *Id.*

127. Peck & Owen, *supra* note 77, at 820.

128. *See generally* Brief of Appellant, *supra* note 4; Brief of Appellees, *supra* note 7.

129. "Accordingly, for all the reasons amply set forth above, we hold that the statute is one of forfeiture." *Hawley*, 132 P.3d at 887.

130. BLACK'S LAW DICTIONARY 1102 (8th ed. 2004).

131. *Hawley*, 132 P.3d at 888.

132. BLACK'S LAW DICTIONARY 1102 (8th ed. 2004).

133. *See generally* Brief of Appellees, *supra* note 7.

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> First, A, a holder of a water right obtains a right in the 1950s and uses it until the 1970s when A's well collapses. A drills a new well in a different location without obtaining permission of the Chief Engineer and continues to this day pumping water, ostensibly under the water right. A has not intended to relinquish the right.
>
> Second, B inherits or purchases land with an appurtenant vested right to use water from a stream running along the back corner of his property. Assume that B does not know that the right exists. Or assume that although B knows there is such a right, B thinks that it is for groundwater, not for surface water, and test wells for groundwater prove insufficient supplies. B does not pump water for ten years. B can honestly testify that B has had no intent to give up a water right.[134]

In both instances, under a forfeiture statute, the right is terminated because intent is irrelevant. Therefore, a Kansas right holder in a similar situation would undoubtedly want to argue that section 718 is an abandonment statute.[135] Unfortunately, that party will be precluded from arguing the issue if DWR or the court adheres to the *Hawley* dicta as precedent.

The court went to great lengths in supporting its claim that section 718 is a forfeiture statute.[136] As a result, a future Kansas water right holder wanting to argue the case for abandonment will have a tough hill to climb, and such an argument may fall on deaf ears, as the court appears to have already made up its mind on the issue. But the court seems to have forgotten that an adversarial system is premised upon a dialogue between litigants; it should not have decided an issue of such importance without first allowing opposing parties to argue for and against it.[137] Perhaps the court was demonstrating an eagerness to terminate water rights in such an over-appropriated, water-scarce state.[138] *Hawley*, however, was neither the time nor the place for such an assertion. Furthermore, directing Kansas's water law policy is undoubtedly beyond the scope of the court's authority.

2. The Court's Interpretation of Section 718's Notice Requirements Fundamentally Alters the Statute

After considering the actual issue presented, the Kansas Supreme

134. Peck & Owen, *supra* note 77, at 820-21.

135. *See id.*

136. The court spent eight pages of its seventeen page opinion on the issue and cited the arguments for forfeiture from Peck and Owen's article, United States Supreme Court cases, seven other Kansas statutes with similar language, and case law from five other jurisdictions in supporting its finding. *Hawley*, 132 P.3d at 880-87.

137. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 375, 408 (1995) (quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)). For a brief overview of arguments for and against the position that section 718 is an abandonment statute, see Peck & Owen, *supra* note 77, at 820-28.

138. *See* Peck, *supra* note 68, at 33.

Court held:

> [N]owhere in the plain and unambiguous language of the statute is there legislative intent to require the chief engineer to comply with the notice requirements of subsection (b) before he pursues termination of a water right under the authority of subsection (a), *i.e.*, after 5 or more successive years of nonuse have occurred.[139]

If the court intended to limit its holding to those instances where the five years of nonuse occurred before subsection (b) was added to the statute, it provided no such qualification in the opinion. As a result, the court virtually eliminated subsection (b) from the statute.[140]

Essential to the court's holding was its view that section 718 was unambiguous.[141] Under Kansas law, however, "[a] statute is ambiguous when two or more interpretations can fairly be made."[142] It is possible to give two fair, but different, interpretations of section 718—either notice under subsection (b) is required before termination pursuant to subsection (a), or it is not. Neither section makes reference to the other, and on the face of the statute, the proper or intended interaction between the two does not seem clear. Thus, contrary to the court's opinion, section 718 appears to be ambiguous. This ambiguity is further evidenced by the fact that the Republic County District Court gave a significantly different meaning to the statute than did DWR and the supreme court.[143] Because of this ambiguity, the court should have engaged in a more thorough analysis of the rules of statutory construction.[144] As discussed below, such an analysis would have allowed the court to terminate the Hawleys' right while keeping the statute fully intact. Unfortunately, the court's interpretation of section 718 alters the statute and will produce unforeseen consequences.

a. Rule of Construction: Avoid Unreasonable Results

In its limited analysis of statutory construction, the court cited the "general rule . . . [that] statutes are construed to avoid unreasonable results. There is a presumption that the legislature does not intend to enact useless or meaningless legislation."[145] The court, citing the DWR hearing officer, reasoned that subsection (b) notice (warning the owner of potential abandonment) would be "useless and meaningless" if it applied to water rights that had already gone unused for five successive

139. *Hawley*, 132 P.3d at 888.
140. *See infra* Part V.A.2.a.
141. *See Hawley*, 132 P.3d at 888.
142. LINK, Inc. v. City of Hays, 972 P.2d 753, 757 (Kan. 1998).
143. *See supra* Part II.A.-C.
144. After finding the statute to be unambiguous, the court did engage in some analysis, claiming that the rules of statutory construction supported its ultimate holding, "even if [it] were to determine the statutory language to be ambiguous." *Hawley*, 132 P.3d at 888-89 (Kan. 2006). This analysis, however, is dicta. *See supra* note 119.
145. *Id.* at 889.

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years because under subsection (a), those rights are already terminated.[146] Unfortunately, this interpretation produces exactly the result the court sought to avoid; it renders the required notice of subsection (b) useless and meaningless.

Again, the court held that DWR is not required to give section 718(b) notice before terminating a water right pursuant to section 718(a).[147] Under the Kansas Water Appropriation Act, however, subsection (a) is the *only* way DWR can declare a water right abandoned.[148] Consequently, the court's holding allows DWR to terminate a water right after five years of nonuse, regardless of whether subsection (b) was complied with—rendering subsection (b) useless.

To illustrate, assume that a particular water right has not been used for five successive years, from 1999 to 2004, and that DWR did not give the right holder notice required by subsection (b) in 2002. Now assume that the right holder resumed use soon after the five year period and has regularly used it since. Under the court's opinion, such a right can still be terminated under subsection (a), irrespective of the fact that DWR violated subsection (b)'s mandate because "nowhere in the plain and unambiguous language of the statute is there legislative intent to require the chief engineer to comply with the notice requirements . . . before he pursues termination of a water right under the authority of subsection (a)."[149] Consequently, under the court's ruling, there is no incentive for DWR to comply with subsection (b); it can instead simply wait for the five years to lapse and determine that right abandoned pursuant to subsection (a). Thus, failure by DWR to comply with subsection (b) will not hinder its ability to terminate water rights. Such a result seems unreasonable and could not have been intended by the Kansas Legislature.

b. Rule of Construction: Different Provisions Must be Construed Harmoniously

Another rule of statutory construction would have prevented the court's nullification of subsection (b). This rule, long recognized by the court, dictates that, "[i]f possible, effect must be given to all provisions of the act, and different provisions must be reconciled in a way that makes them consistent, harmonious, and sensible."[150] As discussed above, the court's interpretation of subsections (a) and (b) makes the two provisions anything but harmonious.

The court's interpretation of section 718 gives full effect to the lit-

146. *Id.*
147. *Id.* at 888.
148. *See* KAN. STAT. ANN. § 82a-718 (Supp. 2005).
149. *Hawley*, 132 P.3d at 888.
150. State *ex rel.* Stephan v. Kansas Racing Comm'n, 792 P.2d 971, 979 (Kan. 1990) (citing State v. Adee, 740 P.2d 611, 614 (Kan. 1987) and *In re* Estate of Estes, 718 P.2d 298, 301 (Kan. 1986)).

eral language of section 718(a) alone, rendering section 718(b) useless. Thus, subsections (a) and (b) of section 718 do not work together under the court's analysis. The two subsections can work together if section 718(b) notice is required before pursuing a termination under section 718(a). DWR argued that requiring notice under section 718(b) would nullify section 718(a).[151] But if subsection (b) notice is required before terminating a water right under subsection (a), subsection (a) still has effect. DWR could still terminate a water right after five years of nonuse as long as it had given notice after three years. If DWR did not give notice after three years, it could still terminate a right under subsection (a) by giving notice and waiting two more years to initiate the action. Under the court's analysis, section 718(a) nullifies subsection (b). If, however, subsection (b) notice is required, subsections (a) and (b) can work together, making them "consistent, harmonious, and sensible."[152]

The court could have upheld DWR's termination of the Hawleys' right without nullifying subsection (b) by confining its holding to those situations in which the five years of nonuse occurred before the addition of subsection (b). Right holders in this category, such as the Hawleys, would not be entitled to subsection (b) notice because their statutory period of nonuse occurred before the notice requirement existed. This approach would have made the interaction of subsections (a) and (b) irrelevant, because subsection (b) did not exist at the time the Hawleys' right qualified for abandonment proceedings. Instead, the court simply held that if five years of nonuse has occurred, subsection (b) notice is not required.[153] Unfortunately, this sweeping statement appears to encompass all situations involving five years of nonuse, including those with the nonuse occurring after the addition of subsection (b). This reading nullifies subsection (b)'s mandate that notice *shall* be given.[154]

B. Hawley *Fosters Inefficient Adjudication of Water Rights and Other Inequitable Consequences*

1. Inefficiency

The court's interpretation of section 718 will lead to further inefficiency in adjudicating water rights in Kansas. If the court were con-

151. Brief of Appellant, *supra* note 4, at 20-23. DWR argued that section 718(b) notice was not required because such an interpretation "nullifies the provisions of . . . 718(a)." *Id.* at 21. For support, DWR claimed that, regardless of the term "shall," notice in section 718 is not mandatory because the statute does not include a consequence for failure to give the notice. *Id.* at 21-22 (citing Expert Envtl. Control, Inc. v. Walker, 761 P.2d 320 (Kan. Ct. App. 1988); Paul v. City of Manhattan, 511 P.2d 244 (Kan. 1973)). Without clear legislative intent, DWR asserted, it is impermissible to interpret section 718 this way because it "would alter the application of . . . 718(a) and significantly change the workings of the Kansas Water Appropriations Act." *Id.* at 20-21.

152. *Stephan*, 792 P.2d at 979.

153. *See supra* Part IV.

154. *See* KAN. STAT. ANN. § 82a-718(b) (Supp. 2005).

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cerned with the Act's principle of "use it or lose it," it should have placed a burden on DWR to actively seek out those rights that are classified as abandoned. Instead, the court nullified the only provision of the Act aimed at administrative efficacy.[155]

By holding that section 718(b) notice is not required to terminate a water right pursuant to subsection (a), the court pulled the teeth from the only part of the Act requiring DWR to monitor nonuse before several years can pass and use of the water right is resumed. Under the court's holding, if three years of nonuse occur, and DWR does not provide section 718(b) notice, DWR can still terminate that right after two more successive years of nonuse.[156] DWR has no incentive to comply with section 718(b)'s mandate. As a result, water rights, including those experiencing unintentional nonuse, can be terminated in spite of the fact that notice would have alerted the holder that abandonment was possible if the right was not used within the next two years.

At the very least, the court should have held that notice is not required if the five years of nonuse occurred before the amendment was passed, and that notice is required for every right that experienced its third successive year of nonuse on or after the passage date of the Act. While this would not remedy the Hawleys' situation, it would prevent such a situation from happening in the future. Instead, the court's overbroad conclusion that section 718(b) notice is not mandatory for *any* abandonment action will allow DWR to continue its inattentive monitoring of water rights usage, increasing the likelihood that a situation similar to the Hawleys' will happen in the future. DWR can simply wait for neighboring water right holders to complain, as in the Hawleys' case, and only inspect for nonuse at that time. This is also unfair to the neighbors, as it places upon them the burden of policing others' water rights.

2. Inequitable Consequences – Possible Scenarios

Not only does the court's interpretation of section 718 foster inefficiency, it also creates a high potential for inequity. To illustrate, assume a landowner obtained a water right in 1945 and used it every year until January 1, 1985, when he stopped using it for any reason not classified by DWR as "due and sufficient." The owner resumed using his right on January 2, 1990, and has continually used it since. This right is no longer valid, and at anytime DWR can terminate it, regardless of what the owner has expended to use the right.[157]

155. *See supra* Part V.A.2.
156. *See supra* Part V.B.2.
157. The specific dates used in this situation illustrate a right with the longest possible period of use following five successive years of nonuse that is still subject to termination. Section 718(c) pro-

Another inequitable situation made possible by the court's holding involves a right holder who stopped using his water right in 1999, again for any reason not classified as "due and sufficient," and then did not receive subsection (b) notice from DWR in 2002. If the right holder resumed using the water after five years of nonuse (i.e., in 2004), he can now use this right until someone complains about it, which could conceivably be a long period of time, and at that point, DWR could terminate the right.[158]

In both of the above situations, the affected right holder appears to have no recourse under the court's holding. As a result of the opinion, neither right holder could argue that section 718 requires intent to abandon or that he was entitled to notice under section 718(b).

3. Solution – Resumption of Use Doctrine

Outside of a statutory amendment clarifying section 718, the problems created by the court could be resolved by applying the resumption of use doctrine. Its applicability to the Hawleys' situation and other similar scenarios would remedy both the inefficiency and inequity surrounding the court's interpretation of section 718. Examining the doctrine's successful application in other states can serve as a guide to future Kansas water right holders facing abandonment proceedings who now have limited options under the court's decision in *Hawley*.

The resumption of use doctrine provides that if the statutory period of nonuse has passed, resuming use of the water right before abandonment proceedings are brought will cure the nonuse and revalidate the right.[159] The doctrine originated in Idaho in 1937,[160] and has since been successfully asserted numerous times by Idaho water right holders.[161] Idaho is not unique, however; Wyoming[162] and Nevada[163] also recognize the resumption of use doctrine. Recently, the Idaho Supreme Court analyzed the doctrine and reasserted its validity in *Sagewillow, Inc. v.*

vides that "if the five years of successive nonuse occurred exclusively and entirely before January 1, 1990," the right is not subject to termination. KAN. STAT. ANN. § 82a-718(c) (Supp. 2005). Therefore, if this right holder resumed use *after* January 1, 1990, that period of nonuse still qualifies his right for termination by DWR, regardless of his continual use since.

158. The dates used in this situation reflect the addition of the section 718(b) notice requirement in 1999. This hypothetical illustrates that a situation like the Hawleys' could occur under the court's holding even if the entire period of nonuse occurred after the notice requirement was enacted.

159. Sagewillow, Inc. v. Idaho Dep't of Water Res., 70 P.3d 669, 680 (Idaho 2003).

160. *See* Zezi v. Lightfoot, 68 P.2d 50 (Idaho 1937).

161. *See* Jenkins v. State, 647 P.2d 1256 (Idaho 1982); *In re* Application of Boyer, 248 P.2d 540 (Idaho 1952); Wagoner v. Jeffery, 162 P.2d 400 (Idaho 1945); Carrington v. Crandall, 147 P.2d 1009 (Idaho 1944).

162. Laramie Rivers Co. v. Wheatland Irrigation Dist., 708 P.2d 20 (Wyo. 1985). "[E]ven though a water right may be qualified for abandonment before beneficial use is resumed, abandonment will not be declared where beneficial use has been reinitiated prior to the filing of the petition." *Id.* at 31.

163. Town of Eureka v. Office of State Eng'r, Div. of Water Res., 826 P.2d 948 (Nev. 1992). "[S]ubstantial use of water rights after the statutory period of non-use 'cures' claims to forfeiture so long as no claim or proceeding of forfeiture has begun." *Id.* at 952.

Idaho Department of Water Resources.[164]

Sagewillow involved facts similar to those in *Hawley*. A rights holder began using numerous water rights that had either been unused or partially unused for almost twenty years.[165] After resuming use of several water rights, neighboring water right holders complained, petitioning the Idaho Department of Water Resources to declare some of the rights forfeited, and others partially forfeited.[166] The Idaho Supreme Court reviewed the history of the doctrine and synthesized prior holdings to give a current definition:

> Under the resumption-of-use doctrine, statutory forfeiture is not effective if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party. A third party has made a claim of right to the water if the third party has either instituted proceedings to declare a forfeiture, or has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, or has used the water pursuant to an existing water right.[167]

Idaho's forfeiture statute is very similar to Kansas's section 718(a).[168] In fact, for support that section 718 was a forfeiture statute, the Kansas Supreme Court compared section 718 to Idaho Code section 42-222(2), which the Idaho Supreme Court interpreted to be a forfeiture statute.[169] Ironically, while the Idaho case cited by the Kansas Supreme Court did interpret the Idaho statute as one of forfeiture, it also reiterated the viability of the resumption of use doctrine.[170]

The resumption of use doctrine would serve three beneficial purposes in the aftermath of the court's decision in *Hawley*. First, it would place more of a burden on DWR to initiate abandonment proceedings immediately after a water right experiences five consecutive years of nonuse. The doctrine would force DWR to become more active and effective in adjudicating water rights because if the right holder resumed use before DWR brought abandonment proceedings, it would not be able to terminate the right unless another five year period of nonuse oc-

164. 70 P.3d 669 (Idaho 2003).
165. *Id.* at 673.
166. *Id.*
167. *Id.* at 680 (citations omitted).
168. Section 42-222(2) of the Idaho Code Annotated states:

> All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223.

IDAHO CODE ANN. § 42-222(2) (Supp. 2006).
169. *See* Hawley v. Kansas Dep't of Agric., 132 P.3d 870, 884-85 (Kan. 2006).
170. Carrington v. Crandall, 147 P.2d 1009 (Idaho 1944). "It is also true that, although statutory abandonment did actually occur, the forfeiture is not effective if, after the five-year period, the . . . appropriator resumed the use of the water prior to the claim of right by a third party." *Id.* at 1011. It seems odd that the Kansas Supreme Court did not even mention the doctrine in *Hawley*.

curred after the resumption of use. Adopting the doctrine would benefit neighboring water right holders who would not only have more certainty about the status and stability of their own water right, but would also be relieved of the burden of policing the rights of others. Furthermore, if DWR terminates every right at the five year point, a repeat of the situation in *Hawley* would be prevented.

The second benefit of the resumption of use doctrine is equity. A right holder like the Hawleys, who expends significant time and money to use a right he believes still exists, would not be deprived of his investment. If a water right's nonuse were to go unnoticed by DWR and its use eventually resumed, DWR's mistake would not fall on the holder of that right. Therefore, as discussed above, the doctrine would create a strong incentive for DWR to police water rights. Such an incentive is currently nonexistent under the ruling in *Hawley*.

A third benefit is that the resumption of use doctrine would "soften the blow" of the court's nullification of subsection (b). If a right holder had not used a right for five years and was not given notice by DWR after the third year of nonuse, presumably, he will not be able to use the lack of notice as a defense. Thus, assuming the right was used again before abandonment proceedings, the resumption of use doctrine would give that holder at least one defense in the wake of *Hawley*.

The resumption of use doctrine could become an important asset to Kansas water right holders. Although it is uncertain whether the court would adopt the doctrine, it could serve as a valuable defense tool to a water right holder facing abandonment proceedings.

VI. CONCLUSION

The Kansas Supreme Court appears to have effectively eliminated section 718(b). In holding that subsection (b) notice is not required before pursuing termination under subsection (a), the court virtually eradicated the only part of section 718 aimed at administrative efficacy. As a result, DWR has no incentive to actively monitor the nonuse of water rights, creating the potential for the reoccurrence of a *Hawley*-type situation in the future.

A major concern caused by the court's opinion is that a future water right holder facing abandonment proceedings will presumably have two less options in trying to retain his right. First, the holder will be precluded from arguing that section 718 is an abandonment statute requiring an intent to abandon. Second, he will not be able to argue that he was entitled to subsection (b) notice.

It is possible that the court in *Hawley* simply said too much. Perhaps the court was speaking only to the Hawleys' specific situation in reaching the overbroad conclusion that section 718(b) notice is not re-

quired before any subsection (a) termination. Maybe the court did not intend for the holding to cover situations in which the five years of non-use occurred after the addition of section 718(b). If so, when faced with the issue again, the court could clear up some of the problems created by the opinion. It is, however, uncertain when the court will hear the issue again. *Hawley* was the first appellate decision in Kansas interpreting section 718; nearly all abandonment proceedings are disposed of at the administrative level. Accordingly, it will be DWR, not the Kansas Supreme Court, which will be implementing the rules laid out in *Hawley*. DWR will then be free to apply the errors of the *Hawley* decision until another case is appealed to the Kansas Supreme Court, whenever that may be.

The resumption of use doctrine is a potential solution to the problems created by the court's opinion. If, in fact, section 718 is a forfeiture statute and subsection (b) notice is not a condition precedent to terminating a water right, the resumption of use doctrine could still save a water right from termination. The challenge will lie in getting the Kansas Supreme Court to adopt the doctrine. The resumption of use doctrine has been successfully used for many years in other prior appropriation states with statutes similar to section 718(a), and it would be a valuable addition to Kansas water law by providing a tremendous benefit to water right holders facing abandonment. Furthermore, the doctrine would give DWR a much needed incentive to actively police water rights, preventing inequitable terminations from happening in the future.

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Kansas Farm Bureau
POLICY STATEMENT

Senate Agriculture Committee
SB 185: An act concerning water rights

February 10, 2009
Submitted by:
Steve M. Swaffar
Director of Natural Resources

Kansas Farm Bureau is the state's largest general farm organization representing more than 40,000 farm and ranch families through our 105 county Farm Bureau Associations.

Chairman Taddiken and members of the committee thank you for the opportunity to provide testimony today on Senate Bill 185 pertaining to what constitutes due and sufficient cause for nonuse of a water right.

Kansas water policy has historically supported the development of our states water resources but in recent years the focus has shifted to water management as it's become apparent that some areas of the state are either fully or over-developed.

Historically, the premise of this abandonment law was to prohibit anyone from hoarding a water right they were not putting to beneficial use so that someone else who had a genuine use of the water could do so. This statute is still very important and applicable today, especially in areas of our state that are open to new appropriation of water. It also serves to protect existing water right holders who might be adversely impacted by a water right which is technically "dead" from being allowed to come back into service and compete for the water supply.

SB 185 as written could jeopardize the effectiveness of KSA 82-718 to remove truly abandoned water rights from use. It does, however, bring to light the need to clarify the process for determining the circumstances that justify the use of "adequate moisture" as being due and sufficient cause for nonuse.

Clarifying the process for determination of due and sufficient cause for nonuse is complicated. At this point we feel it would serve everyone's best interest if there could be more discussion to help sort out reasonable solutions. We would be glad to work with other stakeholders and the agency in attempting to develop a solution which improves the process and makes it more understandable to the public, while at the same time protecting the basic premise upon which the statue was built.

Thank you for allowing me to provide this testimony on behalf of our members. KFB stands ready to assist you as you consider this important measure.

Kansas Farm Bureau represents grassroots agriculture. Established in 1919, this non-profit advocacy organization supports farm families who earn their living in a changing industry.

Senate Agriculture Committee
2-10-09
Attachment 4

KANSAS
DEPARTMENT OF AGRICULTURE

Kathleen Sebelius, Governor
Adrian J. Polansky, Secretary

www.ksda.gov

Testimony on Senate Bill 185
to
The Senate Agriculture Committee

by Constantine V. Cotsoradis
Deputy Secretary
Kansas Department of Agriculture

February 10, 2009

Good morning, Mr. Chairman and members of the committee. I am Constantine Cotsoradis, deputy secretary of agriculture, and I am here to testify in opposition of Senate Bill 185.

We understand and support the intent of SB 185, which is to protect water rights from inadvertent abandonment, but we cannot support this bill in its current form. As written, the bill changes fundamental principles of the Kansas Water Appropriation Act. Attached to my testimony is the legal analysis of this bill prepared by our legal staff.

Briefly, the chief engineer is mandated to manage our state's water and appropriate its use for the benefit of all Kansans. From time to time, a water right holder will stop using his or her water right. The chief engineer will investigate the nonuse and may determine that the owner forfeited his or her water right because he or she abandoned a project. The water from that right can then be made available to others who seek to use it for a beneficial purpose.

Under rules and regulations of the chief engineer, there are 18 separate provisions for due and sufficient cause for nonuse, including sufficient moisture. These provisions ensure that water users have options for preserving a water right while conserving water. They also prevent water rights form being declared abandoned inappropriately.

This bill provides such a low standard for due and sufficient cause for nonuse that it comes close to nullifying the abandonment provision of the statute. Under the provisions in this bill, it is hard to conceive that any water right will ever be determined abandoned by the chief engineer unless it is abandoned voluntarily. This, of course, is contrary to current law and prior appropriation doctrine, and it would be a detriment to future development by farmers, ranchers, municipalities and industry.

Current law already allows five consecutive years of nonuse without due and sufficient cause before a water right can be declared abandoned. The right remains in good standing as long as due and sufficient cause exists. Current law also requires us to send a notice when three consecutive years of nonuse are accrued, and that gives the water right holder a full two years to remedy a nonuse problem.

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Senate Agriculture Committee
2-10-09
Attachment 5

The agency is committed to working with water right holders to help them prevent inadvertent abandonment of their water rights. Last fiscal year we reviewed 138 files with more than five consecutive years of nonuse and found 110 of those to be in good standing. So far this fiscal year, we have reviewed 71 files and found 60 to be in good standing. This review goes much deeper than looking at annual water use reports. We also work with water right holders to glean additional information.

Staff understand the value of these property rights, and they know that in any gray area, the "tie goes to the owner."

Another provision of the bill allows for reconsidering water rights already deemed abandoned by the chief engineer. Water rights have been abandoned by the chief engineer since 1945. There is a very real possibility that a large number of water rights previously deemed abandoned could be reinstated. This provision would create a huge expense for our agency, and it could harm water right holders who developed a right on water previously abandoned.

We are committed to working with the Kansas Livestock Association and the Kansas Farm Bureau to address their concerns without making substantial changes to the fundamental principles of the Kansas Water Appropriation Act or by limiting the chief engineer's authority to manage the state's water for the benefit of all Kansans.

I will answer questions at the appropriate time.

Legal Analysis of Senate Bill 185

Kansas Department of Agriculture

February 5, 2009

Since the Kansas Water Appropriation Act was adopted in 1945, Kansas has followed the doctrine of prior appropriation. The Kansas law of prior appropriation is founded on three basic principles. First, the owner of a water right must put water to beneficial use in order to retain that right. K.S.A. 82a-707(a). Second, water rights exist in order of priority: first in time is first in right. *Id.,* 82a-707(b)-(c). Finally, a water right is a real property right. *Id.,* 82a-701(g). Hence, it is the duty of the chief engineer to "enforce and administer the laws of this state pertaining to the beneficial use of water . . . in accordance with the rights of priority of appropriation." *Id.,* 82a-706. These principles have been upheld by the Kansas Supreme Court. *Williams v. City of Wichita,* 190 Kan. 317, 374 P.2d 578 (1962); *Hawley v. Kansas Department of Agriculture*, 281 Kan. 603, 132 P.3d 870 (2006).

Senate Bill 185 changes Kansas water law. It allows the owner of a water right to simply claim adequate moisture as a due and sufficient cause for nonuse of the water right. Merely claiming adequate moisture, whether true or not, is sufficient cause for nonuse of water under the proposed bill. It creates a presumption that cannot be rebutted or challenged by anyone. With this change, the chief engineer is now prevented from establishing that a water right has been abandoned. This proposed change is unnecessary and contradicts the first principle of Kansas water law, that a water right is either used or lost.

Adequate moisture is already established as a due and sufficient cause for nonuse of the water right under current Kansas water law and regulations. For instance, if an irrigator presents evidence to show there was adequate moisture for crops that ordinarily require irrigation, the water right is protected from abandonment. K.A.R. 5-7-1(a)(1). In evaluating the irrigator's contention, the chief engineer relies on the factual record: the water right owner's yearly use report, established irrigation requirements, and precipitation and moisture data provided by the United States Geological Survey, the National Weather Service, and other third-party professional agencies. The chief engineer's determination is professional, disinterested, technical and serious; as such, it is entitled to a large degree of deference under Kansas law. *Frick v. Kansas Department of Agriculture,* 40 Kan. App.2d 132, 190 P.3d 983 (2008). Senate Bill 185 eliminates this factual determination.

Senate Bill 185 is also retroactive. It allows any former owner of a water right that the chief engineer has declared abandoned to petition for review of the chief engineer's decision. The chief engineer cannot contest that owner's self-proving claim of adequate moisture. The former owner could compel the restoration of such water right. This retroactive provision in the bill violates the principle of priority in Kansas water law. It threatens the property rights of other water rights owners. Priorities of water rights would be disturbed and even displaced by the restoration of an abandoned right. Owners of valid water rights could lose them, simply by the procedural fiat of a claimant filing for the restoration of a long-abandoned water right.

Senate Bill 185 violates Kansas water law and guts the powers of the chief engineer to enforce it. This could threaten Kansas's ability to comply with the Republican River Compact. In *Hinderlider v. La Plata Ditch Co.,* the United States Supreme Court established a basic rule: that an interstate water allocation compact limited a state's allocation to that established in the compact, regardless of the amount of allocations granted in that state prior to the compact. Senate Bill 185 is contrary to *Hinderlider.* By rendering the chief engineer powerless to prevent the restoration of water rights based on an uncontestable claim of adequate moisture, every abandoned water right in the upper Republican Basin could be restored, increasing Kansas' consumptive use. Powerless to prevent such an increase, the chief engineer would be forced to reduce valid water rights in that basin to prevent Kansas from overusing its allocations under the compact. Until the chief engineer is able to reduce those valid rights, Kansas could fall out of compliance. Such noncompliance would put Kansas into a very difficult position regarding the current litigation against Nebraska over the Republican River Compact. It is difficult for Kansas to prevail in a breach of contract suit when Kansas is also in breach of the contract.

In sum, Senate Bill 185 violates the three basic principles of Kansas water law, and it does so by greatly reducing the chief engineer's power to enforce them. It could threaten Kansas' compliance under the Republican River Compact as well. It is contrary to six decades of Kansas water law, and it could have chaotic consequences.

TESTIMONY IN OPPOSITION TO SB 185
SENATE AGRICULTURE COMMITTEE
HEARING DATE: TUESDAY, FEBRUARY 10, 2009

Submitted by: Constance C. Owen, Attorney at Law
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913-568-3703, connieowen@everestkc.net

I am writing in opposition to SB 185. It modifies K.S.A. 82a-718, which determines when a water right is legally deemed abandoned. With all due respect, it is critical that this Committee understand the far-reaching disruption this bill would cause. SB 185 may make a few people happy right now, but it will endanger the water rights and water use of far more.

To introduce myself, I am an attorney who has practiced Kansas water law for seventeen years. I used to serve as Legal Counsel for the Division of Water Resources, Kansas Department of Agriculture. For the past five years, I have served as hearing officer for the Department of Agriculture regarding just such abandonment issues. An order of mine interpreting the operation of this statute was affirmed by the Kansas Supreme Court. *Hawley v. Kansas Department of Agriculture*, 281 Kan. 603, 622, 132 P.3d 870 (2006). I co-authored a law review article on water right abandonment with Prof. John Peck of the KU Law School. Peck and Owen, *Loss of Kansas Water Rights for Non-Use*, 43 Kan. L. Rev. 801, 815-816 (1995).

In short, SB 185 would eviscerate the long-standing principles of western water law embodied in the abandonment statute, K.S.A. 82a-718. The concept of water right abandonment is a key component of the Water Appropriation Doctrine, which governs the use of water in all the western states of the U.S. This concept is this: once a water right is developed through active use, it will disappear if there is a sustained period of nonuse without good reason. Good reason is defined by regulation, using the term "due and sufficient cause." Under Kansas law, if a water right is not used for five successive years without due and sufficient cause, it will terminate by operation of law. K.S.A. 82a-718. Intent is not relevant, only the fact of nonuse and the reasons for nonuse.

SB 185 will allow "due and sufficient cause" for nonuse based on "*adequate moisture for crop production as determined by the owner or*

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operator of the land." Further, SB 185 would allow for the resurrection of water rights already deemed abandoned by law. These provisions present problems because:

1. To retroactively apply a new "due and sufficient cause" standard, per SB 185, would potentially disrupt nearly every water right that has been granted and developed since 1945 (the date our Water Appropriation Act was enacted). The most fundamental rule of our water law is "first in time is first in right." In times of shortage, the older rights prevail over the newer. In order to evaluate each application for a water right, calculations have to be made as to whether there is enough water in that area and whether the proposed use will harm an existing user. If water rights long dead are resurrected, these calculations will then be skewed. Other existing water right holders, who have proceeded in reliance on these dead rights staying dead, will be subject to possible impairment and reduction. In simpler terms, the "places in line" for priority in use of water, will be all repositioned, to the detriment of existing water right holders. Owners of water rights that are decades old will see the strength of their water rights and perhaps their very supply of water, endangered. They will have every reason to be most unhappy with SB 185. SB 185 will create far more problems than it will solve.

2. Contrary to what might be a first impression, the current abandonment law protects other water right holders, who have a direct interest in its consistent continuation. It is easy to see why some water right holders see abandonment rules as "bad." But other water right holders, those who consistently exercise their water right, will see it as unfair to equally protect water rights that have not been used or needed. It is also true that someone seeking the right to use water for a new use (whether irrigation, industrial or municipal) may be prevented from that use by keeping an otherwise "dead" water right "on the books." A new water right cannot be permitted if all the water in that given area is already "spoken for." It has been my experience that there are many water right holders or would-be users who support the current abandonment law as it stands.

3. Adequate moisture is already designated as due and sufficient cause for nonuse, in K.A.R. 5-7-1(a)(1), if the crops grown were of a kind normally requiring full or partial irrigation. The regulation is consistent with long-standing water law because it requires a showing that irrigation would have occurred but for the adequate moisture. SB 185 could be used to save a

water right even when a non-irrigated crop was planted and the crop would have prospered anyway. SB 185 detaches the reason for nonuse from any relationship to the need to irrigate. This relationship is critical to the principles and policies of water law.

4. SB 185 is not necessary because adequate moisture, properly established, is already designated as due and sufficient cause for nonuse. If an irrigator (who planted crops needing irrigation) did not, in fact, irrigate due to adequate moisture, his water right will not be subject to abandonment.

5. As addressed in the law review article, one of the greatest difficulties with administering the abandonment statute is documentation and credibility. The law is fact-based. Facts require credible documentation. SB 185 allows the unsubstantiated statement of a very biased source (the owner of the water right) to determine the outcome of application of the law. This situation is contrary to the fair and consistent administration of the law.

6. Designating the circumstances that constitute due and sufficient cause by statute removes the flexibility needed to address evolving concerns for conservation and management. Although western water law arose with a pro-development bent, over the years the "due and sufficient cause" regulations have been modified to encourage conservation and data-driven management. This flexibility allows the agency to ease the "use it or lose it" reputation of water law. Statutes are far more long-term in their application. It is in the best interest of all water users to keep due and sufficient cause guidelines in regulation form, rather than statute.

7. SB 185 would retroactively allow the revisiting of any number of completed abandonment cases if a water right owner had supplied data about adequate moisture. This does not require any level of credibility of such "data." In my experience, "data" supplied by water right owners can be anything from a vague memory to actual Kansas Geological Survey measurements taken on site. To grant the former material the same believability as the latter defies common sense, not to mention evidentiary credibility.

Thank you for your kind consideration. I urge you to prevent the passage of this bill.