An Agricultural Law Research Article

Attention Kansas Water Right Holders: Be Nice to Your Neighbors, They're Policing Your Water Rights

by

Tyler A. Darnell

Originally published in WASHBURN LAW JOURNAL
46 WASHBURN L. J. 429 (2007)

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 As a result, the state water resources office concludes that your right has been abandoned and is no longer valid, information that would have been useful two years and $70,000 ago.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.

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

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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

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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.

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.

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.

> 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

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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.

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).

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.*

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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-

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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 nonuse 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.