Loss of Kansas Water Rights for Non-Use

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I. INTRODUCTION

Since 1945, Kansas has followed the law of prior appropriation for water rights. The Water Appropriation Act describes water rights as real property. One of the basic attributes of the prior appropriation system of the Western states, where water is scarce, is that holders of water rights who fail to use the rights lose the rights.

This Article deals with the loss of water rights for non-use in Kansas. Water rights under the "first in time, first in right" system are subject to temporary curtailment by a more senior right or by the establishment of an intensive groundwater use control area (IGUCA). They may be lost if the holder fails to fulfill the conditions on the permit, such as constructing the diversion works on time. Although in some states, water rights, like other forms of real estate, can be lost by adverse possession, Kansas law expressly precludes this possibility. This Article does not deal with these types of curtailment or loss; it focuses only on loss for failure to use the right.

The subject has become important in recent years because new water rights are increasingly difficult to obtain from the Division of Water Resources (DWR), the state agency charged with water rights administration. Much of the state is under a moratorium on new permits because of full appropriation of available water supplies. Where new

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2. Id. § 82a-701(g) (1989).
3. Id. §§ 82a-706b, -717a (1989).
5. KAN. ADMIN. REGS. 5-3-6 (1992).
   Failure of the applicant or his or her successors to comply with the provisions of the approval of application and permit to proceed and its terms, conditions and limitations without good cause shall result in the forfeiture of the priority date, revocation of the permit and dismissal of the application.

Id.

rights cannot be obtained from DWR, entities must attempt to purchase them or, if they have condemnation power, to condemn them. The water right in the hands of the purchaser or condemnor is only as good as it was in the hands of the seller or condemnee, however, and these rights may be subject to being lost for non-use.

In this Article, we will discuss the Kansas law of the loss of water rights for non-use—both its history and its current status, some current issues, and recent DWR administrative experience regarding loss of water rights. We will generally use the term “abandonment” for the loss by non-use, even though we discuss whether Kansas has an abandonment or a forfeiture law.

II. Kansas Statutory Law on Abandonment of Water Rights

Kansas started as a riparian doctrine state for surface water and as an absolute ownership doctrine state for groundwater. Under these doctrines, both of which are based on land ownership next to the water source, water rights are generally not lost solely by failure to use the water.\(^8\) Kansas began to introduce notions of prior appropriation in the western part of the state through legislation in the late 1800s and at that time enacted K.S.A. section 42-308.\(^9\) The current version of section 42-308 reads:

**User: forfeiture.** Any right of appropriation shall exist and continue only by the exercise thereof in a lawful manner. The failure of the appropriator continuously to apply such water to lawful and beneficial uses, for a period of three years, without due and sufficient cause shown for such failure, shall constitute a forfeiture and surrender of such right.\(^10\)

The 1945 Water Appropriation Act included new sections 82a-717 and 718, which also adopted this three year period,\(^11\) but section 42-308 was retained as well within the chapter called “Irrigation.” The legislature amended section 718 in 1957 to add specificity about both the substance and procedure in declaring water rights abandoned.\(^12\) Other changes have occurred since 1945. The legislature adopted the

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8. See David H. Getches, Water Law in a Nutshell 14, 21, 65 (2d ed. 1990) [hereinafter Nutshell].


Kansas Administrative Procedure Act\textsuperscript{13} (KAPA) in 1984. In 1988, the legislature amended section 718 into its current version, making it subject to KAPA:

\textit{Abandonment of water rights; hearing.} 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.\textsuperscript{14}

Other important sources of law on the subject include DWR regulations and administrative policies. No appellate court cases have appeared in Kansas, however, on the subject of loss of water rights for non-use.

DWR follows a standard procedure in determining whether a particular water right is subject to abandonment. When a question is raised regarding a given water right, DWR personnel review the file to ascertain whether use of water or due and sufficient cause can be readily determined. If so, the file will be documented as in good standing, that is, not subject to abandonment at that time. If not, DWR generally contacts the water right owner and requests additional information from which such a determination can be made.

If the outcome of that evaluation is that a water right meets the statutory criteria for abandonment, a hearing must be conducted in accordance with KAPA.\textsuperscript{15} DWR has historically held rather informal hearings, while adhering to the traditional adversarial format. DWR presents its position first, followed by the water right holder's presentation. The water right holder may be represented by counsel, although such representation is not required. Cross-examination of witnesses is allowed. The rules of evidence do not govern these proceedings. However, KAPA requires the hearing officer to give the parties a reasonable opportunity to be heard and to present evidence.\textsuperscript{16}

After the hearing is closed, the hearing officer has thirty calendar days in which to issue a written decision, identified under KAPA as the initial order.\textsuperscript{17} This time period may be waived or extended with the

\begin{itemize}
  \item \textsuperscript{14} Id. § 82a-718 (1989).
  \item \textsuperscript{15} Id. § 77-501 to -550 (1989 & Supp. 1994).
  \item \textsuperscript{16} Id. § 77-524(a) (1989).
  \item \textsuperscript{17} Id. § 77-526(g) (1989).
\end{itemize}
written consent of all parties or for good cause shown.\textsuperscript{18} A party may seek review of the initial order by the Chief Engineer, whose decision would then be the final order, as defined by KAPA.\textsuperscript{19} A request for a Chief Engineer's review must be submitted within fifteen days after the initial order.\textsuperscript{20} After the Chief Engineer has issued his final order, a party may petition the Chief Engineer for reconsideration within fifteen days after issuance of the final order.\textsuperscript{21} This last step is not required for a party to exhaust administrative remedies. An aggrieved party may seek judicial review pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions\textsuperscript{22} (KJRA) within thirty days after the final order has been issued, or after the order on reconsideration is issued, if reconsideration is requested.\textsuperscript{23}

The KJRA sets up an appellate-style review process, rather than a standard civil trial. The district court's scope of review is limited, granting a great deal of deference to agency actions; presenting additional evidence or raising issues not presented at the agency level is generally prohibited.\textsuperscript{24}

When it applies, the KJRA is the exclusive means of obtaining judicial review of agency actions, and the KJRA requires exhaustion of administrative remedies before resorting to the courts.\textsuperscript{25} This Act applies to actions of the Chief Engineer.\textsuperscript{26} Parties must exhaust their administrative remedies before seeking judicial review of any action of the Chief Engineer. As an example, in one recent case, a party sought to raise the issue of abandonment of a water right in district court without having proceeded through the DWR hearing process required by K.S.A. section 82a-718. The trial court agreed to stay the proceedings until such a hearing was held and completed, which ultimately resulted in voluntary dismissal of the entire lawsuit.\textsuperscript{27}

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  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} \textit{Id.} \textsuperscript{77-527(b)} (1989).
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} \textit{Id.} \textsuperscript{77-529 (Supp. 1994).}
  \item \textsuperscript{22} \textit{Id.} \textsuperscript{77-601 to -627 (1989 & Supp. 1994).}
  \item \textsuperscript{23} \textit{Id.} \textsuperscript{77-613(b) (1989), as amended by H.B. 2180, Kan. Leg., 1995 Sess.}
  \item \textsuperscript{25} \textit{KAN. STAT. ANN.} \textsuperscript{77-606, -607(a)(2), -612 (1989); Expert Env'tl Control, Inc., v. Walker, 13 Kan. App. 2d 56, 58-59, 761 P.2d 320, 322-23 (1988).}
  \item \textsuperscript{26} \textit{KAN. STAT. ANN.} \textsuperscript{77-603(a), 82a-724 (1989).}
  \item \textsuperscript{27} \textit{Lindenman v. Austerman, No. 92-C-45; 93-C-51 (Graham County District Court).}
\end{itemize}
III. SOME CURRENT ISSUES

A. Are Vested Rights Subject to Abandonment?

Kansas recognizes two general types of water rights, appropriation rights and vested rights. When the Water Appropriation Act (the Act) was adopted in 1945, it created a permit system for acquiring appropriation rights. That permit system adopted the prior appropriation system of “first in time, first in right,” based on the date and time of filing an application for a permit to appropriate water. This system pertained to nondomestic beneficial uses of water initiated after the passage of the Act.

The Act also established formal recognition for beneficial uses of water existing at the time the Act became effective. These uses, once claimed and proven, were granted the status of vested rights. Vested rights all share a common priority date of June 28, 1945, unless their relative priorities are adjudicated by a court of law. All vested rights carry a priority senior to all appropriation rights. Under the Act, nondomestic vested rights can no longer be claimed or determined.

Because section 718 provides that “[e]very water right of every kind” is subject to abandonment, and because section 701(g) defines “water right” as “any vested right or appropriation right,” it follows that vested rights can be lost through abandonment. Vested rights, however, have one protection not shared by appropriation rights. Both vested rights and appropriation rights contain conditions on how water may be lawfully used pursuant to the particular right. All water rights specify an authorized type of use (e.g., irrigation or municipal), annual quantity, maximum peak rate of pumpage, place of use (e.g., the given tract of land that may be irrigated), and point of diversion (e.g., the location of the well or pump site). Although both vested rights and appropriation rights are subject to both civil and criminal legal enforcement for failure to comply with conditions, only appropriation rights and permits may be dismissed for such failure. Vested rights can be lost only through

30. Id. § 82a-707(c) (1989).
31. Id. §§ 82a-701(d), -704a (1989).
32. Id. § 82a-701(d).
33. Id. § 82a-704a(f).
34. Id. § 82a-718 (1989).
35. Id. § 82a-701(g).
36. Id. §§ 82a-706d, -728 (1989).
Thus, vested rights enjoy stronger protections than appropriation rights, but are, nonetheless, subject to abandonment.

B. When is an Appropriation Right Subject to Abandonment?

An appropriation of water goes through several stages in maturing to a property right. Upon receipt of an application, DWR personnel review it under a variety of statutory and regulatory criteria. If an application is approved, the approval document is formally called “an approval of application and permit to proceed” and is commonly referred to as “the permit.” The permit sets deadlines for the construction of the diversion works and for the beneficial use of water as authorized. These deadlines must be met or the permit may be dismissed for failure to comply with its conditions.

Each permit allows a period of years, usually five, in which to use water and fully perfect the right. DWR can extend the period upon “good cause shown by the applicant.” When the perfection period plus any extensions have expired, DWR personnel review the file and conduct a field inspection to calculate the extent to which the water right has been perfected. The calculation is documented in a certificate of appropriation. The certificate represents the final stage of the development of an appropriation right. Because the appropriation right is a kind of real property right, the certificate must be filed in the register of deeds office in the county where the point of diversion is located.

An appropriation right thus goes through several maturing stages, or periods, from first being a permit to becoming a certified water appropriation right: the period from the time DWR grants the permit to the time the permit holder constructs the diversion works; from then

38. KAN. STAT. ANN. § 82a-703 (1989).
39. Being subject to abandonment makes a vested right from a stream different than the riparian right upon which the vested right was based. The riparian right was not subject to abandonment for non-use, but was subject to diminution by other riparian owners’ sharing of the stream.
40. See KAN. STAT. ANN. § 82a-711(b) (Supp. 1994) (including streamflow requirements, water supply recharge rate, and priority of existing claims).
41. The deadline is typically December 31 of the calendar year following the year in which the permit is granted.
42. KAN. ADMIN. REGS. 5-3-6 (1992).
43. KAN. STAT. ANN. § 82a-713 (1989).
44. See id. § 82a-714 (Supp. 1994).
45. Id.
46. Id. § 82a-701(g) (1989).
47. Id. § 82a-714.
to the time the permit holder perfects the water right by using the water; from then to DWR's issuing the certificate; and from then on. The issue is when (i.e., during which of these periods) does an appropriation right first become subject to abandonment. Because the abandonment statute applies to "[e]very water right of every kind," and because, in DWR's view, an appropriation water right comes into being with the actual application of water to beneficial use as authorized by the permit, it appears that abandonment applies to water rights after perfection occurs.

In one instance, a hearing officer took a different view and held that a water right does not come into existence until a certificate is issued by DWR. The hearing officer further found that, if a water right did not yet exist, there was no water right to abandon and the matter had been brought to hearing prematurely. In that case, the appropriator had received approval of his application, had constructed the diversion works and had diverted water for two years during the perfection period, but then had discontinued the use of water. The equipment was not in adequate condition to be tested at the time of the field inspection, and a certificate had not been issued. DWR sought review before the Chief Engineer, who overturned the hearing officer's rulings. The Chief Engineer ruled that a water right comes into existence with the actual beneficial use of water as authorized by the permit. Thus, it appears that, under DWR's interpretation, the application of the abandonment statute is not tied to the issuance of a certificate.

During the earliest stages of development of the right prior to first use of the water, abandonment does not yet apply. Indeed, DWR takes the position that the permit holder does not yet have a water right prior to first use. Rather, the permit sets forth the conditions under which a water right may be developed. The actual use of water in accordance with the given conditions is what perfects a water right; therefore, prior to the use of water, an appropriation right does not exist. Because abandonment applies to "[e]very water right of every kind," only a water right, and not merely a permit, may be lost through abandonment. Thus, in order for abandonment to apply to an appropriation right, water must have been used (as authorized), and then discontinued.

48. Id. § 82a-718 (1989).
49. In the Matter of the Abandonment and Termination of Appropriation of Water, File No. 33,216 (Final Order Nov. 7, 1994).
51. Id. § 82a-718.
52. See id.
for at least three successive years without due and sufficient cause for the non-use. 53

C. What Constitutes Due and Sufficient Cause for Non-Use?

The Water Appropriation Act designates two criteria for the abandonment of water rights: (1) lack of use for at least three years in a row and (2) lack of due and sufficient cause for the non-use. 54 Non-use is relatively simple to determine and is typically not in dispute in an abandonment hearing, 55 but "due and sufficient cause" calls for administrative interpretation. DWR has attempted to provide guidance in regulation and administrative policy. 56 DWR recently amended the "due and sufficient cause" regulation, K.A.R. 5-7-1, effective May 31, 1994, to add several new causes and provides the most specific standards to date.

1. Earlier versions of K.A.R. 5-7-1

The first version of K.A.R. 5-7-1, adopted in 1978, listed five grounds for due and sufficient cause. 57 The amended version of 1986 made a slight change in one of the grounds and added a sixth, catch-all provision allowing "[a]ny other reason constituting due and sufficient cause as determined by the chief engineer." 58

a. Adequate moisture

The first reason listed, which remains in effect today, is adequate moisture "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." 59 Some water right owners have unsuccessfully attempted to argue that this provision exists when there has been adequate rainfall, without regard to the type of crops grown or those crops' standard irrigation requirements. 60 One Ottawa County

53. Id.
54. Id.
55. See, however, infra part III.D.
57. KAN. ADMIN. REGS. 5-7-1 (May 1, 1978).
58. Id. 5-7-1(f) (1992).
59. Id. 5-7-1(a) (1992); id. 5-7-1(a)(1) (May 31, 1994).
60. In the Matter of the Abandonment and Terminations of Water Rights, File Nos. 6000 and
farmer, for example, had switched from growing feed grains for dairy cattle to growing wheat. The trial court upheld DWR’s finding of abandonment in part because wheat does not require irrigation in that part of the state. Unless the crops grown would have normally required some irrigation in that part of the state, the amount of rainfall is irrelevant. In other words, if the crop grown was a dryland crop normally requiring no irrigation in the given area, no amount of rainfall will constitute due and sufficient cause.

b. Preferred source

The second legal excuse for non-use, also still in effect, is “[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.” This reason, referred to as the “preferred source” reason, applies to a rather narrow set of circumstances. The water right holder must typically possess two water rights, probably one for surface water and one for groundwater. If the groundwater source is not used because the surface water right is currently available but is likely to be depleted during periods of drought, there will likely be due and sufficient cause for non-use of the groundwater source.

The argument was made in one case that the reverse should be true, that use of a groundwater right instead of a surface water right should have constituted due and sufficient cause for non-use of the surface water right. This argument failed. Not only did the facts fail to comport with the meaning of this provision, but the particular use of the groundwater right was, at the time, in violation of law.

c. Water not available

The third reason, also still in effect, is “[w]ater is not available from the source of water supply for the authorized use at times needed.” For example, during a prolonged drought, a stream may run low or not run at all. Whether this circumstance has existed at a given time is

8783 (Dec. 15, 1993); In the Matter of the Water Right, File No. 22,664 (Nov. 18, 1992).
61. In the Matter of the Abandonment and Termination of Vested Right, File No. OT 006, Case No. 84-C-138 (District Court of Ottawa County, Kansas).
62. Id.
63. KAN. ADMIN. REGS. 5-7-1(b) (1992); id. 5-7-1(a)(2) (May 31, 1994).
64. In the Matter of the Abandonment and Termination of Water Right, File No. 15,360 (Final Order Mar. 4, 1993). The groundwater right had been restricted from use by an order of the Chief Engineer enforcing minimum desirable streamflows, as required by K.S.A. § 82a-703a.
65. Id.
66. KAN. ADMIN. REGS. 5-7-1(c) (1992); id. 5-7-1(a)(3) (May 31, 1994).
often relatively simple to establish. DWR, however, expects water right holders to exercise their ability to enforce their priorities against junior water rights. If a water right holder is claiming that water was not used because no water was available, but the water right carries the highest priority for the given source and water would have been available had the holder requested administration (enforcement of the priority system\textsuperscript{67}), then due and sufficient cause may be denied.\textsuperscript{68}

d. Soil and water conservation

The fourth and fifth reasons, which address conservation, have been the subject of administrative policy and regulatory change in recent years. These efforts reflect DWR's attempts to encourage water conservation, while adhering to the Water Appropriation Act's protection of active and reasonable use of water.

The earlier versions of K.A.R. 5-7-1(d) provided as a due and sufficient reason for non-use that the "[p]urpose for which water is used is temporarily discontinued for a definite period of time to permit soil, moisture and water conservation."\textsuperscript{69} This provision has unsuccessfully been used as support for the argument that, because any non-use of water must, by definition, result in water conservation, due and sufficient cause for non-use must exist any time water is not used. The key concepts that have generally defeated this argument are that (1) conservation must have been the purpose for non-use, (2) the non-use must have been for a definite period of time, and (3) the non-use must have been temporary.\textsuperscript{70} Moreover, if this argument is taken to its natural conclusion, every non-use of water would constitute conservation, so no water right could ever meet the statutory definition of abandonment.

One example of due and sufficient cause under this provision is enrollment in the federal Conservation Reserve Program (CRP), in which highly erodible land is taken out of production, usually for a period of ten years, for the purpose of enhancing soil and water conservation.\textsuperscript{71} DWR specifically recognized CRP enrollment as due and sufficient cause for non-use in an administrative policy adopted in 1987,\textsuperscript{72} which stated that DWR would view CRP enrollment as due and

\textsuperscript{67} See id. 5-4-1 (1992) (procedure for distribution of water between users).
\textsuperscript{68} Admin. Policy 92-3, supra note 56.
\textsuperscript{69} See KAN. ADMIN. REGS. 5-7-1(d) (1978).
\textsuperscript{70} In the Matter of the Abandonment and Termination of Appropriation of Water, File No. 35,714 (Supplemental Final Order Jan. 4, 1995).
\textsuperscript{72} Admin. Policy 87-9, supra note 56.
sufficient cause for non-use only if the water right was not already subject to abandonment at the time of enrollment. 73

The other conservation provision allows due and sufficient cause for non-use when “[m]anagement and conservation practices are being applied which require the use of less water than authorized.” 74 This provision represents some difficulty in documentation. In addition, the question arises whether it allows protection from abandonment only for the water right holder who uses some water, but less than the maximum amount authorized, but affords no protection for the water right holder who uses no water at all. In either case, the question remains what documentation or evidence can successfully establish that a conservation practice or purpose was employed.

DWR generally accepts evidence in the form of documentation that the water right holder has decided ahead of time to conserve water. The greatest administrative difficulty with the “conservation” provision has been determining the credibility of an undocumented, after-the-fact claim that the reason water was not used was for the purpose of conserving water or employing a conservation practice. For example, when other reasons for non-use have been reported previously, such as the high cost of repairing a pump, “adequate rainfall,” or the high cost of fuel, an after-the-fact claim of water conservation may appear questionable.

DWR addressed this dilemma by issuing two administrative policies in 1992, elements of which were later adopted as amendments to the “due and sufficient cause” regulation, K.A.R. 5-7-1, in 1994. 75 Administrative Policy 92-3 sets forth criteria for establishing enrollment in government farm programs, other than CRP, as due and sufficient cause. For example, the authorized place of use must be enrolled as irrigated land, not dryland, and the owner must submit adequate documentation of enrollment. In its more general provisions, the policy also states that an attempt to use water must, in fact, be prevented by due and sufficient cause, and that abandonment will not be avoided when due and sufficient cause existed if the water user did not need, or attempt to use, the water as authorized. 76

The other 1992 policy is Administrative Policy 92-4, which created the Water Rights Conservation Program. 77 This program allows DWR to contract with a water right holder, who promises to use no water

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73. Id.
75. Id. 5-7-1(a)(4), (a)(5) (May 31, 1994); Admin. Policy 92-3, supra note 56; Admin. Policy 92-4, supra note 56.
76. Admin. Policy 92-3, supra note 56.
77. Admin. Policy 92-4, supra note 56.
under a given water right for a definite period of years (five to ten).78 In return, DWR assures that due and sufficient cause for non-use will be recognized for the duration of the contract period.79 These contracts are binding on successors in interest, and a breach by use of water during the contract period will result in all years covered by the contract being designated as years of non-use without due and sufficient cause.80 The policy sets forth certain eligibility criteria for entry into the program, primarily that the water right must not already be subject to abandonment81 and that the water right be located in an area closed to new appropriations or in some other area designated by the Chief Engineer as an area “where it would be in the public interest to allow water rights to be placed in the WRCP.”82

The Water Rights Conservation Program became effective in regulation form on May 31, 1994.83 This regulation echoes the administrative policy in most respects, establishing certain procedures and criteria for eligibility,84 review of abandonment issues,85 field inspections by DWR staff,86 and requests for renewal.87 The regulation also specifies the water right holder’s responsibilities before and after the contract period.88 One difference of note between the policy and the regulation is that the contract period may now be as few as three years, instead of five, with a maximum of ten years.89

2. Amended version of K.A.R. 5-7-1: Clarification of old reasons, and “new” reasons constituting due and sufficient cause for non-use

DWR’s amendment to K.A.R. 5-7-1 in May 1994 was an attempt to accomplish two goals: to clarify the conservation ground90 and to provide several new grounds for non-use91 (new in the sense of appearing in regulation form, instead of just administrative policy form). The amended regulation now allows due and sufficient cause when water use is temporarily discontinued for a definite period of time to

78. Id. at I.E.1.
79. Id. at I.C.
80. Id. at I.F.
81. Id. at I.D.4.
82. Id. at I.D.1(b).
83. KAN. ADMIN. REGS. 5-7-4 (May 31, 1994).
84. Id. 5-7-4(b) to (e).
85. Id. 5-7-4(c)(4).
86. Id. 5-7-4(c) & (e)(3)(C).
87. Id. 5-7-4(e)(1).
88. Id. 5-7-4(d), (e)(1), (e)(2), (e)(5).
89. Id. 5-7-4(e)(1).
90. Id. 5-7-1(a)(4) (May 31, 1994).
91. Id. 5-7-1(a)(5) (May 31, 1994).
permit soil, moisture and water conservation, upon certain described documentation.\textsuperscript{92} The conservation effort may be documented by providing the Chief Engineer "a copy of a contract showing that land which has been lawfully irrigated with a water right which has not been abandoned is enrolled in a multi-year federal or state conservation program which has been approved by the chief engineer."\textsuperscript{93} As an alternative, the water right holder may enroll the water right in the Water Right Conservation Program pursuant to K.A.R. 5-7-4.\textsuperscript{94} Or, the water right holder may establish temporary non-use for conservation by "any other method acceptable to the chief engineer which can be adequately documented by the owner in advance."\textsuperscript{95}

Thus, DWR has attempted to diminish the credibility problem by the requirement that documentation be provided showing a deliberate decision to conserve water before the non-use begins. This requirement also places a clear obligation on the water right holder to provide such documentation to the Chief Engineer in advance in order to secure protection for the water right as well as to secure the assurance that such documentation will protect the water right for those particular years.

Likewise, DWR amended the provision to allow due and sufficient cause for non-use when conservation practices result in the use of less water than authorized.\textsuperscript{96} When a water conservation plan has been required by the Chief Engineer, the water right holder, in order to qualify for due and sufficient cause for non-use, must be able to show that such a plan has been submitted, approved, and implemented in the manner approved.\textsuperscript{97}

The amended version of K.A.R. 5-7-1 also contains an expanded list of reasons that can constitute due and sufficient cause for non-use.\textsuperscript{98}

The previous regulation listed six relatively specific circumstances; the

\textsuperscript{92} Id. 5-7-1(a)(4).

(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) furnishing to the chief engineer a copy of a contract showing that land which has been lawfully irrigated with a water right which has not been abandoned is enrolled in a multi-year federal or state conservation program which has been approved by the chief engineer; (B) enrolling the water right in the water right conservation program pursuant to K.A.R. 5-7-4; or (C) any other method acceptable to the chief engineer which can be adequately documented by the owner in advance.

\textsuperscript{93} Id. 5-7-1(a)(4)(A).

\textsuperscript{94} Id. 5-7-1(a)(4)(B).

\textsuperscript{95} Id. 5-7-1(a)(4)(C).

\textsuperscript{96} Id. 5-7-1(a)(5).

\textsuperscript{97} Id.

\textsuperscript{98} Id. 5-7-1(a).
new version lists nine, in addition to the catch-all provision. Previously, three of the four “new” reasons were viewed by DWR as establishing due and sufficient cause, but were documented in administrative policy only. 99 Thus, three of these four reasons are not actually new, but have only recently appeared in regulation form. A fourth reason now appears in writing for the first time. The four new reasons are discussed below.

a. Standby status

K.A.R. 5-1-1(y) defines a “standby well” as:

a well which can withdraw water from the same source of supply as the primary well to be used only when water is temporarily unavailable from the primary well or wells authorized to be used on the same place of use because of mechanical failure, maintenance or power failure . . . [and] fire protection or a similar type of emergency. 100

If the Chief Engineer has previously approved a particular point of diversion for standby status pursuant to K.A.R. 5-1-2, that approval constitutes due and sufficient cause for non-use from that point of diversion. 101

b. Physical problems

If there have been physical problems with the points of diversion, distribution systems, places of use, or the operators themselves, these problems constitute due and sufficient cause only for a period of time reasonably necessary to correct the problem. 102 For example, serious health problems of the operator can constitute due and sufficient cause for non-use for a reasonable time, but not indefinitely. In one case, a hearing officer determined that ten years of ill health was beyond the time reasonable to have obtained assistance in running the operation. 103

c. Circumstances beyond the owner’s control

When conditions exist beyond the control of the owner that prevent access to the authorized place of use or point of diversion, there will be due and sufficient cause for non-use as long as the owner is taking reasonably affirmative steps toward gaining access. 104 An illustration

100. KAN. ADMIN. REGS. 5-1-1(y) (May 31, 1994).
101. Id. 5-7-1(a)(6).
102. Id. 5-7-1(a)(7).
104. KAN. ADMIN. REGS. 5-7-1(a)(8).
of this circumstance is the situation of water right holder \( A \), whose right prescribes \( A \)'s land as the place to be irrigated, but also prescribes the point of diversion to be a well on adjacent land owned by \( B \). Suppose that there is a falling out between the two parties and that \( B \) denies \( A \) access to the well. Under amended K.A.R. 5-7-1, \( A \) will be protected from abandonment as long as \( A \) can show that \( A \) is taking steps to gain access to the well. Such steps may include written requests or demands to \( B \) to gain access, written offers to negotiate an easement, written demands to enforce any existing easements or contracts for entry, or even the filing of a lawsuit to enforce or establish an easement.\(^{105}\) DWR had taken this position of forbearance for circumstances beyond the owner's control in an administrative policy\(^{106}\) even prior to promulgating the regulation.

DWR's interpretation of "beyond one's control" does not extend to an innocent buyer. In cases in which a person buys land believing it to be authorized for irrigation, whether based on a seller's representation or unfounded assumption, and the water right is already in jeopardy of abandonment, the buyer acquires the water right in the same status as that held by the seller. Neither the buyer's failure to ascertain correct information nor the buyer's reliance on the seller's representations will restore a water right to good standing if it is in jeopardy of abandonment.\(^{107}\) The same is true regardless of whether such representations are made by the seller, a realtor, or the buyer's or seller's lawyer.

Another category of reasons not constituting due and sufficient cause for non-use (under this provision or any other) is economics.\(^{108}\) For example, if the price of fuel or pump repairs is high enough or crop prices low enough to make the operation of irrigation equipment...

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105. The Water Appropriation Act provides no authority for impliedly attaching an easement to a water right. Thus, a water right only grants the right to use water; it does not grant access or entry onto private property. Old irrigation statutes, of questionable applicability for appropriation rights acquired under the Water Appropriation Act of 1945, still exist and could conceivably provide the basis for a claim of an easement of necessity. See, e.g., K.S.A. § 42-316, which provides for rights of way for industrial uses, and § 42-317 for condemnation of rights of way for domestic or industrial uses. The term "industrial" in these sections, enacted in 1891, may have had a broader meaning than the term has today, and indeed may include irrigation. The introductory section to the 1891 act was titled "Irrigation." It stated that the purpose of the act was to provide for and regulate waters for industrial purposes. Act of Mar. 10, 1891, ch. 133, art. I, § 1, 1891 Kan. Sess. Laws 223, 223. Another possible way to claim an easement might be under theories of implied easements by necessity. See 2 AMERICAN LAW OF PROPERTY § 8.38 (A. James Casner ed., 1952).


unprofitable, such circumstances will not constitute due and sufficient cause for non-use.109 Because two years of non-use may pass without any jeopardy of abandonment, these two years are viewed by DWR as adequate to arrange for any necessary repairs. In addition, if the water right holder can document efforts to bring the system back into operation, even if the task is not completed within the third year, DWR will likely view those proven efforts to be due and sufficient cause.110 The principle that economic decisions do not constitute due and sufficient cause has been upheld in numerous administrative decisions111 and by courts of other states.112

d. Alternate source

When an alternate source of water supply has not been needed and has not been used because the primary source of supply has been adequate to meet the needs of the water right owner, due and sufficient cause exists for non-use of that alternate supply.113 To qualify for this provision, however, the owner must maintain the diversion works for the alternate supply in order to be able to divert water in a timely fashion.114 This provision expands upon the “preferred source” reason listed in K.A.R. 5-7-1(a)(2) and now allows due and sufficient cause for circumstances that were previously unprotected.

3. Other issues settled by amended K.A.R. 5-7-1

a. Change from an administrative policy to regulation

The 1994 amendments to the “due and sufficient cause” regulation also gave the force of law to certain interpretations of the abandonment statute that had previously existed only in administrative policy. The

109. Id.
110. Id.
111. In the Matter of the Abandonment and Termination of Appropriation of Water, File No. 27,074 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Appropriation of Water, File No. 26,142 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Vested Right, File No. ED 021 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Water Right, File Nos. 6000 and 8783 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Appropriation of Water, File No. 29,307 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Water Right, File No. 22,664 (Nov. 18, 1992); In the Matter of the Abandonment and Termination of Vested Right, File No. GH 006 (Nov. 20, 1992; Final Order May 20, 1993).
113. KAN. ADMIN. REGS. 5-7-1(a)(9) (May 31, 1994).
114. Id.
regulation now states that in order to constitute due and sufficient cause for non-use the reason given as due and sufficient cause must have in fact prevented the use of water or made such use unnecessary.\textsuperscript{115} This concept is found in Administrative Policy 92-3.

b. Calculation of the three-year time period

The new version of K.A.R. 5-7-1 also gives guidance on how to calculate the required minimum three years in a row of non-use without due and sufficient cause for the non-use. Any year for which DWR finds due and sufficient cause for non-use will interrupt the successive years of non-use for which due and sufficient cause does not exist.\textsuperscript{116} In other words, suppose there are five years in a row of non-use (e.g., 1990-1994) and no apparent due and sufficient cause for any of them. If the water right holder can establish due and sufficient cause for the third year (\textit{i.e.}, 1992), there is no longer a period of three successive years without due and sufficient cause. There will only be two unconnected two-year periods of non-use. In this scenario, the water right is not subject to abandonment at the end of 1994. However, if one more year (\textit{i.e.}, 1995) follows with no use without due and sufficient cause for the non-use, another successive three-year period will have occurred and the right will be subject to abandonment for 1993 through 1995.

c. Burden of proof

Finally, the last amendment to K.A.R. 5-7-1 may be the most significant. It speaks to the burden of proof in abandonment hearings. The Act states that the verified report of the Chief Engineer, or the Chief Engineer’s authorized representative, “shall be prima facie evidence of the abandonment and termination of any water right.”\textsuperscript{117} DWR has historically interpreted this statement as placing on DWR the initial burden of proof, which is fully met upon completion of the verified report. As stated above in the discussion of the procedures in the abandonment process,\textsuperscript{118} the verified report is the document that contains the results of the DWR staff’s investigation into the apparent abandonment of a water right. According to DWR interpretation, once the verified report is completed, the burden shifts to the water right holder to prove affirmatively either (1) that water was used in any given year, or (2) that due and sufficient cause for non-use existed in any

\begin{itemize}
  \item \textsuperscript{115} Id. 5-7-1(b).
  \item \textsuperscript{116} Id. 5-7-1(c).
  \item \textsuperscript{117} KAN. STAT. ANN. § 82a-718 (1989).
  \item \textsuperscript{118} See supra notes 15-27 and accompanying text.
\end{itemize}
given year. DWR has usually interpreted the water right holder’s standard of proof to be a preponderance of the evidence.

This interpretation comes into question in circumstances in which the water right holder claims due and sufficient cause but provides little or no supporting evidence. For example, “adequate moisture” might be claimed, but no evidence provided (or no expert evidence provided) regarding the crops grown, the irrigation requirements applicable to those crops in the given area of the state, or the amount of rainfall occurring in that area during that year. DWR has taken the position that such arguments fail to meet the water right holder’s burden of proof, because they do not affirmatively establish the claims made. The water right holder often argues that DWR has failed to offer evidence to show these claims are not true. DWR counters that it need not do so, that the verified report is all it need produce. No hearing officer has yet ruled against DWR on this issue. DWR’s position is reflected in the fact that the hearing procedures have been rather informal, with no prehearing conferences or orders. The water right holder is generally not required to produce exhibits, name witnesses, or identify arguments before appearance at the hearing. Because DWR’s view is that the water right holder must affirmatively overcome the verified report, DWR has historically viewed it as unnecessary to require prehearing orders or for DWR to submit evidence to disprove a water right holder’s contentions.119

DWR has attempted in the new version of K.A.R. 5-7-1 to put this argument to rest.120 That section states DWR’s interpretation of the placement of the burden of proof on the water right holder once the verified report is completed and made a matter of record at the

119. Were DWR to change its stance on this issue, the hearing procedures may become more formalized and complex, requiring prehearing conferences and orders to identify exhibits, witnesses, and arguments before the hearing is held.
120. KAN. ADMIN. REGS. 5-7-1(d) (May 31, 1994).
hearing.\(^{121}\) What it does not specify is the standard of proof to be required of the water right holder.\(^{122}\)

121. Counterarguments, not necessarily supported by the authors, can be made on the burden of proof issue, that the burden on DWR should be higher than mere preponderance of the evidence, and that DWR's initial showing should not create a rebuttable presumption. Such an argument may proceed as follows. The statute is silent on both questions. An old, accepted maxim of equity is that "equity abhors a forfeiture." Because DWR in its Administrative Policy No. 92-3 reads § 718 as a forfeiture statute and not an abandonment statute, see infra text accompanying notes 129-52, DWR should have the burden of proof even beyond its current burden of providing a verified report. DWR should also be held to a burden of proving a forfeiture by the high standard long accepted in forfeiture matters generally, see Christiansen v. Virginia Drilling Co., 170 Kan. 355, 360, 226 P.2d 263, 267 (1951) (involving forfeiture in an oil and gas lease in which the court said that forfeitures "are not favored . . . and are considered harsh exactions, odious and to be avoided when possible" and that statutes imposing forfeitures should be strictly construed and in a manner favorable to the person whose property is being seized), and in water rights matters in particular, see Jenkins v. State, Dep't of Water Resources, 647 P.2d 1256, 1261 (Idaho 1982) (in water rights abandonment cases "[f]orfeitures are not favored, and clear and convincing proof is required to support a forfeiture."). See also KANSAS WATER RESOURCES BOARD, BULLETIN NO. 3, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER 58 (Nov. 1956) [hereinafter REPORT]: "Courts disfavor forfeitures. This is especially true when property rights have vested. Nor is the provision for forfeiture of vested rights upon failure to use water beneficially for a certain number of years, either prior or subsequent to 1945, free from constitutional difficulties."

The language of § 718, when read in conjunction with the definitions of "prima facie," see infra note 122, means that if DWR prepares its verified report and there is no response by the holder of the water right, the Chief Engineer may declare the right lost. If the water right holder denies the assertion in the report and offers some evidence to the contrary, the prima facie evidence is overcome. Based on the above-mentioned definitions, once the water right holder denies the assertion and presents some facts to the contrary, the burden still rests with DWR to prove the abandonment or forfeiture—if an abandonment, by a preponderance of the evidence; if a forfeiture, by clear and convincing evidence.

122. If the burden of proof is on the water right holder, as K.A.R. 5-7-1 now provides, the standard should arguably be the preponderance standard, not the clear and convincing standard. Section 718 states that "[t]he verified report of the chief engineer . . . shall be prima facie evidence of the abandonment and termination of any water right." Black's Law Dictionary defines "prima facie evidence" as "evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence." BLACK'S LAW DICTIONARY 1071 (5th ed. 1979). Black's definition is taken from a Kansas case, State v. Haremza, 213 Kan. 201, 206, 515 P.2d 1217, 1222 (1973), and further states that "until its effect is overcome by other evidence, will suffice as proof of fact in issue . . . or until proof can be obtained or produced to overcome the inference. Id. (citing Duncan v. Butterowe, Inc., 474 S.W.2d 619, 621 (Tex. Ct. App. 1971)). The last phrase of this definition indicates that the burden is merely the preponderance standard. See supra note 121 for arguments that the burden of proof should rest with DWR, not with the water right holder.

The clear and convincing standard is rarely required, although in an interstate water case, the U.S. Supreme Court held that Colorado had to meet a clear and convincing standard to support a proposed diversion that would upset existing water rights in New Mexico. Colorado v. New Mexico, 459 U.S. 176, 187 (1982),reh'g denied, 459 U.S. 1229 (1983),appeal after remand, 467 U.S. 310, 316 (1984). The clear and convincing standard is found in "certain exceptional controversies in civil cases" or in "a limited range of claims and contentions," and the preponder-
D. Is Kansas an "Abandonment" or a "Forfeiture" State?

1. Introduction

The argument is sometimes raised in Kansas abandonment cases that abandonment of one's water right must necessarily include the intent to relinquish the right. This argument is based on the common law definition of abandonment of property rights, which does include the element of intent.123 Under Western water law, water rights abandon-
ment differs from water rights forfeiture in one main regard: abandon-
ment requires that the holder have intent to lose the water right for non-
use, while forfeiture can result even when the holder does not intend to
give up the right.124 Abandonment preceded forfeiture in the West and
was generally a common law rule with no set time limit on non-use.
A long period of non-use established a rebuttable presumption of intent
to abandon the right, which could be overcome by other testimony.125
Forfeiture has been a statutory concept in which the legislature sets
forth a predetermined time limit for non-use that will result in the loss
of the water right, regardless of intent.126 The question is whether this
element of intent is required for the loss of water rights for non-use in
Kansas.

Two hypothetical situations illustrate why the question is important.
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.127 Second, B inherits

124. See NUTSHELL, supra note 8, at 177-81.
125. See, e.g., In re C.F. & I. Steel Corp. v. Purgatoire River Water Conservancy Dist., 515
127. These are essentially the facts from the case In the Matter of the Abandonment and
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.\textsuperscript{128} Intent in these hypothetical
cases would not be relevant at a DWR hearing if our law is construed
as a forfeiture law, but would be relevant if ours is an abandonment
law.

We will present a summary of the legislative history and then follow
with brief summaries of arguments on both sides of this issue. Because
the Chief Engineer’s view is that, although the Water Appropriation Act
employs the word “abandoned,” it is, in fact, a forfeiture statute
requiring no intent,\textsuperscript{129} we will present the forfeiture argument before the
abandonment argument.

2. Legislative history

Kansas water law prior to 1945 generally was based on the common
law. No loss of water rights resulted from the failure to use the right,
either for surface water or for groundwater. Section 42-308,\textsuperscript{130} when
first enacted in 1891 as part of the early irrigation statutes recognizing
prior appropriation west of the 99th meridian, used the term “abandon-
ment” in stating that a right under those statutes could be lost after three
years of non-use.

The original Water Appropriation Act as proposed and adopted in
1945 did not contain a section like current section 718 on loss of the
right for non-use. The Act contained section 717, which stated that
appropriations must be for a beneficial purpose and that the water right
“terminated” when the appropriator ceased to use the right for three
years. The Act’s original section 718 gave the procedure, not the
substance, for declaring the loss of a water right, apparently tying the
procedure to the version of section 42-308 existing at that time. That
procedure in section 718 used the term “forfeit,” not “abandon.” The
1945 Act also made a significant amendment to section 42-308: As
originally enacted in 1891, section 42-308 stated that “failure . . . to

\textsuperscript{128} These are essentially the facts in In the Matter of the Abandonment and Termination of
Appropriation of Water, File No. 2745. In that case, the water right holder defaulted at the hearing
and allowed the right to be declared abandoned without contesting the matter.

\textsuperscript{129} Admin. Policy 92-3, supra note 56.

\textsuperscript{130} See text accompanying notes 9-10.
apply . . . water . . . shall be deemed an abandonment . . . ." The 1945 Act did not provide a new abandonment section, but rather amended section 42-308 to read “failure . . . to apply . . . water . . . shall constitute a forfeiture.” “Abandonment” was thus changed to “forfeiture.” The legislature was apparently trying to make section 42-308 read with section 718 so that consistent “forfeiture” language was used. Section 42-308 reads the same today.

In November 1956, Professor Shurtz wrote and published a lengthy report for the Kansas Water Resources Board proposing major amendments to the 1945 Act.\textsuperscript{131} Shurtz’s suggested revisions of section 717 (currently section 718) would have used neither the word “forfeiture” nor the word “abandonment”; he proposed instead “cease and terminate.”\textsuperscript{132} His suggested revision of then section 718, the procedures section, would have maintained the continued use of the term “forfeited.”\textsuperscript{133}

The 1957 session of the legislature, however, after receiving Shurtz’s report and after holding extensive hearings on the proposed amendments with such water law dignitaries as Wells Hutchins (hired by the Water Resources Board as a legal consultant to testify at the legislative hearings), went directly contrary to Shurtz’s recommendations insofar as the critical language is concerned. In summary, the legislature did not amend section 42-308, thereby leaving “forfeiture” language. It repealed section 717, which had contained neutral language. It amended section 718, the procedures section, as follows: it took the neutral language that had been in section 717 and placed it into section 718; it added “abandonment” language; and it took original section 718, which had contained “forfeiture” language and changed that language to “abandonment” language.

In short, the legislature made section 718 consistent throughout by using abandonment language. The forfeiture language in section 42-308 remained the same, because the legislature did not amend that section. And yet section 718 did not state that intent was an element of abandonment. Those sections have remained unchanged since then, with the exception of amendments to section 718 not pertinent to this issue that were enacted in 1988.\textsuperscript{134}

\textsuperscript{131} See REPORT, supra note 121.
\textsuperscript{132} Id. at 143.
\textsuperscript{133} Id.
3. Argument that ours is a forfeiture statute

Forfeiture law, in contrast to abandonment law, is statutory, based on non-use for a rather short period of time, with no element of intent required. The very fact that Kansas has a statutory solution to non-use is one argument that ours is a forfeiture rule. In his 1972 survey of the various state systems, some of which are true abandonment, some forfeiture, and some a mixture of both, Wells Hutchins classified the Kansas statute as a forfeiture law. In discussing K.S.A. section 82a-718, Hutchins wrote: "Despite the basic differences between abandonment and forfeiture when strictly construed, the phrase, 'shall be deemed abandoned' probably indicates that the legislative declaration of abandonment and termination discards any necessity of intent on the part of the water right holder."

The issue involves statutory interpretation. The controlling rule of statutory construction is to give effect to the intent of the legislature. Determining legislative intent is not limited to consideration of the language used in the statute, but may include "the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the varying constructions suggested." The evolution of K.S.A. section 82a-718 supports a conclusion that ours is a forfeiture statute. Section 717 of the original 1945 Water Appropriation Act stated merely that a right "shall terminate" when the holder ceases to use it. A related provision, original section 718, outlined the administrative procedure, with the requirement that the Chief Engineer notify such water right holders and that the notice contain the statement, "unless due and sufficient cause be shown the water appropriation will be forfeited and canceled." These provisions clearly indicate Kansas' early appropriation law as a forfeiture law.

Shurtz's 1956 Report suggested that the "due and sufficient cause" concept be consolidated into the declaration statute, section 717, in the statement, "Every water right of every kind shall cease and terminate when without due and sufficient cause no lawful, beneficial use is

136. 2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 303, 319, 327 (1972).
137. Id. at 319.
139. Id. at 536, 750 P.2d at 426.
140. KAN. GEN. STAT. § 82a-717 (Supp. 1945).
141. Id. § 82a-718 (1949).
henceforth made of water under such right for three successive years." He also recommended some clarification of the procedural aspects of section 718 and in doing so referred to the "forfeiture" of water rights and the "forfeiture procedure." Although the legislature chose the language "shall be deemed abandoned" instead of "shall be forfeited," the rest of the statutory language remained intact. It appears reasonable to read the 1957 language as indicative that the legislature's intent was to retain the forfeiture character of the law, but that it inadvertently used a less than precise term to do so. This interpretation is consistent with Hutchins' subsequent categorization of the Kansas law as a forfeiture statute.

The notion that the Kansas Legislature used the word "abandonment" but, in fact and law, created a forfeiture statute is not without precedent in Western water law. The Nevada Supreme Court has chosen to interpret its water right non-use law as a forfeiture statute, despite the statute's use of both terms, "abandonment" and "forfeiture."

The interpretation of K.S.A. section 82a-718 as a forfeiture statute is consistent with the fundamental premise of the Water Appropriation Act and prior appropriation doctrine. That premise is that active use of water is rewarded and protected. The prior appropriation system rewards active efforts to bring water under control. The doctrine places the burden on the user to earn the right to use water; under the riparian system, the right to use water is a kind of entitlement arising from ownership of land. The Kansas Supreme Court has described the prior appropriation doctrine as rewarding development "by giving the early appropriator the fruits of his industry," and as "discouraging waste of a valuable resource and distribut[ing] the resource in response to demonstrated need."

The prior appropriation doctrine adopted by the Kansas Water Appropriation Act is development-oriented; it does not reward passive behavior. In order to acquire a water right in Kansas, one must file an application justifying approval, build diversion works as approved

142. REPORT, supra note 121, at 143.
143. Id.
144. Id. at 18.
145. See HUTCHINS, supra note 136, at 319; supra notes 136-37 and accompanying text.
149. KAN. STAT. ANN. § 82a-711 (Supp. 1994).
within the time allowed,\textsuperscript{150} and actually put water to beneficial use as authorized within the time allowed.\textsuperscript{151} Whether a water right is perfected at all, and if so, to what extent, is entirely dependent on the actions of the applicant. Intent of the applicant has no bearing on whether a water right is perfected; only the conduct matters.

Thus, it is consistent to view the conduct of the water right holder, rather than his intent, as the controlling measure of whether a water right is maintained. This view ensures that all aspects of a water right’s existence are equally dependent upon the conduct of the water right holder.

For these reasons, the Chief Engineer has consistently interpreted K.S.A. section 82a-718 as a forfeiture statute.\textsuperscript{152} Numerous decisions resulting from abandonment hearings have been based, at least in part, on the principle that intent to relinquish or retain a water right is not relevant to whether it has been abandoned pursuant to K.S.A. section 82a-718.\textsuperscript{153} Even if one accepts, for the sake of argument, the notion that section 718 is a true abandonment statute requiring intent to relinquish the water right, the language of the statute creates a strong presumption of abandonment not inconsistent with this view. Intent can be inferred from conduct. The statute specifies that upon the occurrence of two facts (no use for three consecutive years and lack of due and sufficient cause), abandonment is “deemed” to have occurred. Thus, under the “intent” view, after three successive years of non-use for which there is not due and sufficient cause, the law deems the elements of abandonment to have been established.

\textsuperscript{150} Id. § 82a-714 (Supp. 1994).
\textsuperscript{151} KAN. ADMIN. REGS. 5-3-6 (1992).
\textsuperscript{152} Administrative Policy 92-3, supra note 56, states this view, which had been DWR’s position long before Administrative Policy 92-3 was promulgated in 1992.
\textsuperscript{153} In the Matter of the Abandonment and Termination of Vested Right, File No. GH 006 (Nov. 20, 1992; Final Order May 20, 1993); In the Matter of the Abandonment and Termination of Water Right, File No. 14,188, Appropriations of Water, File Nos. 7329 and 30,933 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Appropriation of Water, File No. 27,074 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Appropriation of Water, File No. 26,142 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Vested Right, File No. ED 021 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Water Rights, File Nos. 6000 and 8873 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Appropriation of Water, File No. 29,307 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Water Right, File No. 3161 (Dec. 15, 1993); In the Matter of the Abandonment and Termination of Vested Right, File No. MP 008, Water Rights, File Nos. 6111 and 1770 (Nov. 19, 1992); In the Matter of the Abandonment and Termination of Water Right, File No. 22,664 (Nov. 18, 1992).
4. Argument that ours is an abandonment statute

Rules of statutory construction, the legislative history leading to the enactment of section 718, and the contrast between our statute and those of other Western states provide arguments that this statute could be construed as an abandonment, not a forfeiture, statute. Kansas applies the rule of statutory construction that "words . . . that have acquired a peculiar and appropriate meaning in law . . . shall be construed according to their peculiar and appropriate meanings." Section 718 uses the term "abandon" three times, its title uses "abandonment," and it does not use the term "forfeiture." In Western water law, abandonment has required an intent to give up the right; forfeiture requires no intent. Because these words have long been so defined, this rule of statutory construction requires them to be so construed. Section 42-308, which originally contained "abandonment" language that was later amended to read "forfeiture" instead of "abandonment," may have questionable applicability today in light of the more recent enactment of section 718 of the Appropriation Act. Because section 42-308 is still on the books, however, it should probably be read with current law, because "[s]tatutes in pari materia should be read together." The use by the legislature of a different term in the newer section 718—abandonment—should thus be read to contrast with the language in the older section 42-308—forfeiture.

Shurtz clearly recommended in 1956 that the forfeiture language in section 718 be maintained. The legislature just as clearly chose not to adopt his recommendation to use the term "forfeited." Hutchins wrote a law review article during the 1957 legislative session for a water law symposium sponsored by the Kansas Law Review, in which he noted that abandonment and forfeiture "are not identical" and that this fact leads to confusion when "[s]ome of the forfeiture statutes use the term 'abandonment.'" Immediately after the 1957 legislative session when Hutchins wrote about the 1957 amendments, he expressed misgivings about what the legislature had done:

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154. KAN. STAT. ANN. § 77-201 (Supp. 1994).
155. 2 WATERS AND WATER RIGHTS §§ 17.01 to .04 (Robert E. Beck ed., 1991) [hereinafter Beck].
It is the personal opinion of the author that this use of the term "abandon" is unfortunate, in that it disregards the fundamental principle that abandonment depends on both intent and relinquishment and may take place instantly, whereas forfeiture results from nonuse for a prescribed period regardless of the intent of the water right holder.\textsuperscript{159}

As stated above,\textsuperscript{160} while on later reflection Hutchins seems to have read our statute as a forfeiture statute, at the time of the enactment he saw serious problems with its language.

The legislature seems to have chosen the word "abandonment" over the word "forfeiture" in section 718. No legislative committee documents or correspondence seem to be available to explain why. But Hutchins' postsession article indicates that he wished the legislature had used forfeiture language as he and Shurtz had recommended.

Statutes from other Western states are generally not as confused as are the Kansas statutes.\textsuperscript{161} They do not say that failure to use the right for a period of time is abandonment without a direct reference to forfeiture. Yet "[f]orfeiture must be distinguished from abandonment even if a particular statute may not do so"\textsuperscript{162} for the reason that abandonment requires intent.\textsuperscript{163} The New Mexico Supreme Court apologized in 1969 for confusing abandonment and forfeiture in past decisions: "We regret that forfeiture and abandonment have been used

\begin{itemize}
\item \textsuperscript{159} WELLS A. HUTCHINS, THE KANSAS LAW OF WATER RIGHTS 55 n.143a (1957).
\item \textsuperscript{160} See supra notes 136-37 and accompanying text.
\item \textsuperscript{161} The following summarizes some of these states' statutes.
\textbf{Colorado:} Statute states that ten years of nonuse creates a rebuttable presumption of abandonment. See COLO. REV. STAT. § 37-92-402 (11) (1990); Beaver Park Water, Inc. v. City of Victor, 649 P.2d 300, 302 (Colo. 1982) ("[N]onuse for a long period of time [is] evidence of an intent to abandon," but "[n]onuse alone will not establish abandonment where the owner introduces sufficient evidence to show . . . there never was any intention to permanently discontinue the use of the water.").
\textbf{Nebraska:} Statute uses term abandonment in title, but not in body. See NEB. REV. STAT. § 46-229.02 (1993).
\textbf{South Dakota:} Separate statutes for abandonment, see S.D. CODIFIED LAWS ANN. § 46-5-36 (1987), and forfeiture, see id. § 46-5-37 (Supp. 1995).
\textbf{Utah:} Abandonment and forfeiture used in the statute, but not interchangeably; one can lose the right for either abandonment or failure to use water for five years. See UTAH CODE ANN. § 73-4-11 (1989); In re Escalante Valley Area, 363 P.2d 777 (Utah 1961) (recognizing a difference between abandonment and forfeiture, requiring intent in abandonment).
\textbf{Wyoming:} Statute says that failure to use for five years, intentionally or unintentionally, is considered abandonment and owner forfeits right, see WYO. STAT. § 41-3-401 (Supp. 1994); use of words "intentionally or unintentionally" indicates legislature understood abandonment to require intent.
\item \textsuperscript{162} Beck, supra note 155, § 17.03(b).
\item \textsuperscript{163} Id. § 17.03(a).
\end{itemize}
interchangeably, as the element of intention is required in the doctrine of abandonment. This is not so in forfeiture.\textsuperscript{164}

Still another reason for this construction is that forfeitures are not favored in the law.\textsuperscript{165} Allowing evidence of the intent of the water right holder would make hearings on abandonment more difficult, but more fair in the forfeiture setting. For these reasons, a court construing section 718 could conceivably read it as an abandonment statute and thus permit evidence of intent, despite DWR's policy of interpreting it to be a forfeiture statute.

E. Can a Water Right be Declared Abandoned for Unauthorized Use, as Compared to Non-Use?

Each water right carries conditions on how water may be used under that particular right. The standard conditions, although there may be more in any given case, are the following: maximum annual quantity, peak rate of pumpage, point of diversion, place of use, and type of use. No water right, appropriation or vested, can legally be exercised in violation of these conditions.\textsuperscript{166} Although such conditions are subject to enforcement by DWR (administrative, civil, or criminal), only permits and appropriation rights may actually be revoked for failure to comply.\textsuperscript{167} Thus, unauthorized use of a permit or appropriation right may result in its loss for failure to comply with law. But does unauthorized use equate to non-use, triggering the abandonment statute?

Just as they do for the question of abandonment versus forfeiture, arguments exist on both sides. DWR takes the position that unauthorized use equates to non-use.\textsuperscript{168} We present that argument first.

1. Argument that unauthorized use equates to non-use

The Water Appropriation Act deems a water right abandoned when, without due and sufficient cause, there is "no lawful, beneficial use" for at least three years.\textsuperscript{169} DWR has generally interpreted the reference to "lawful" use as meaning that only the use of water in accordance with the conditions of the water right count as "lawful beneficial use" of water. In other words, in DWR's view, unauthorized use of water is,

\textsuperscript{165} See supra note 121.
\textsuperscript{166} KAN. STAT. ANN. § 82a-728 (1989).
\textsuperscript{167} See supra notes 36-37.
\textsuperscript{168} Admin. Policy 92-3, supra note 56.
\textsuperscript{169} KAN. STAT. ANN. § 82a-718 (1989).
in fact, non-use, and the question to be asked is whether unauthorized use constitutes due and sufficient cause for non-(lawful)-use.

DWR's administrative policy speaking to this issue states, "The fact that water was only used for an unauthorized type of beneficial use or only on an unauthorized place of use is not considered to be due and sufficient cause for non-use unless it was caused by an error or omission by DWR." The emphasis is in the original policy section. This statement reflects the notion that it would not serve public policy to encourage the illegal use of water by allowing such violations to protect water right holders from abandonment.

In light of this policy statement, a water right should be subject to abandonment if the only use of water for at least three years was for a different type than authorized or on a different place than authorized. Although the policy statement is silent on the other categories of conditions, DWR views any unlawful use, including an unauthorized point of diversion, as failing to constitute due and sufficient cause for non-use.

2. Argument that unauthorized use should not necessarily equate to non-use

DWR's position on this issue is harsh in some cases. Take the hypothetical mentioned above about farmer A whose well casing breaks and A drills, without prior permission from DWR, a substitute well at a time when drilling a well without a new permit was not unlawful (i.e., prior to 1978). A pumps and uses water for irrigation for many years without interruption, until DWR learns about the unpermitted well and seeks to declare the water right abandoned. Should A's position be equated with that of another farmer B who shuts down B's well for the same period and does not pump at all? It can be argued that the abandonment statute should be used only for cases when water was not pumped at all and that water use from an unpermitted, substitute well is not a ground to declare abandonment.

While DWR's Administrative Policy 92-3 may seem to support DWR's position that use of a water right from a new, unpermitted well is tantamount to using the right illegally and therefore making such use the subject of an abandonment action, section 718 does not clearly support that position. It uses the phrase "lawful, beneficial use." The word "lawful" could arguably be read to modify the word "beneficial," not the word "use," thus focusing on the type of use and not other

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171. See supra text accompanying note 127.
172. KAN. STAT. ANN. § 82a-728 (1989).
questions of its technical legality. One could thus read section 718 to mean that the use must be a lawful, beneficial use, like those given in K.A.R. 5-1-1(f)—domestic, municipal, irrigation, industrial, etc. Using water to flood gopher holes, for example, could be seen as beneficial from a farmer’s viewpoint, but perhaps not a “lawful, beneficial use” from DWR’s standpoint. The legislative intent behind section 718 was to cover either non-use or the wrong type of use, not the permitted use from a wrong well. Oregon has interpreted a similar statute. In an administrative decision dated 1979, the Water Resources Director held that a mere change in point of diversion coupled with continued use of the right for the permitted purpose does not constitute an abandonment or forfeiture.

IV. OTHER ADMINISTRATIVE ASPECTS OF ABANDONMENT

A. Administrative Limitation on Abandonment Occurring Entirely Prior to 1988

The 1992 Administrative Policy 92-3 contained a rather interesting, often misunderstood, provision. For a combination of reasons (including a 1988 statutory mandate for water right holders to report water use annually, DWR’s efforts to enforce that law, and DWR’s limited personnel and financial resources), DWR decided it would not pursue determinations of abandonment in cases “in which the period of at least three successive years of non-use occurred exclusively and entirely prior to 1988 (that is, up to and including 1987).”

174. See In the Matter of Cancellation of a Water Right in the Names of Clarence H. Oxman & Frank C. Oxman to Use the Waters of Willow Creek (on file with Professor Peck). Thanks to Stephen M. Bloom, Esq., of Pendleton, Oregon, for the copy of the decision.

In other situations, Oregon would apply abandonment principles for unlawful use of the water. For example, Oregon distinguishes between using the water for a purpose other than what the right allows, which is grounds for abandonment, and pumping water from a point of diversion other than where the right allows, which is not grounds for abandonment. Oregon has ruled that failure to use water under an irrigation right and instead using the water for the purpose of wetting ground to assist with plowing constitutes a ground for forfeiture. See Hennings v. Water Resources Dept’, 622 P.2d 333, 335 (Or. Ct. App. 1981). In some respects Oregon law is the basis of our law. See THE APPROPRIATION OF WATER FOR BENEFICIAL PURPOSES: A REPORT TO THE GOVERNOR ON HISTORIC, PHYSICAL AND LEGAL ASPECTS OF THE PROBLEM IN KANSAS 23 (Dec. 1944), in which a governor’s committee recommended legislation that changed water rights law in Kansas from the common law to the prior appropriation law. This report was the basis for the 1945 Water Appropriation Act.

175. Admin. Policy 92-3, supra note 56.
Two key concepts are involved. First, the period of at least three successive years of non-use must have occurred exclusively and entirely prior to 1988. Thus, if non-use occurred during 1986, 1987, 1988, 1989, and 1990, the limitation does not apply, and the entire period of non-use must be evaluated for due and sufficient cause. Second, in determining whether the period of non-use occurred exclusively prior to 1988, one looks only to whether water was used. No consideration of due and sufficient cause is relevant. If the only period of non-use occurred prior to 1988, but the water right has consistently been exercised (at least once every three years) since then, then the water right does not have at least three successive years of non-use since 1987. Thus, it will not be subject to abandonment for that earlier period of non-use and will, by definition, be safe from abandonment at the present time, as well. In order for this limitation to apply, one looks only to when the years of non-use occurred.

Even if this limitation does not apply, the water right holder may still be able to establish for DWR that (1) water was used in any given year or (2) due and sufficient cause for non-use exists for any given year. The statutory principles of abandonment remain unchanged. 176 The limitation is simply a method DWR has chosen to manage its workload efficiently.

B. Partial Abandonment

DWR interprets the abandonment statute as establishing the possibility that portions of water rights can be abandoned. 177 Few hearings have actually been held in which DWR has sought a declaration of partial abandonment. 178 However, in a few cases when DWR sought a declaration of abandonment of an entire right, the hearing officer declared only a portion abandoned. 179

This interpretation can create the appearance of conflict with DWR’s attempts to foster water conservation. Therefore, DWR has attempted

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177. Admin. Policy 92-3, supra note 56. Some state statutes are clearer on the subject than § 718. See, e.g., Wyo. Stat. § 41-3-401(f) (Supp. 1994): “An appropriation for irrigation use is not subject to partial abandonment for failure of the appropriator to irrigate part of the lands described in his permit or certificate of appropriation during the successive five (5) year period if . . . .” See also N.M. Stat. Ann. § 75-5-78 (Michie 1978): “When the party entitled to the use of water fails to beneficially use all or any part of the water . . . for a period of four [4] years, such unused water shall . . . revert to the public and shall be regarded as unappropriated public water . . . .”
178. But see, e.g., In the Matter of the Partial Abandonment and Termination of Water Right, File No. 19,837 (May 21, 1993).
179. See, e.g., In the Matter of the Abandonment and Termination of Water Right, File No. 2954 (Final Order Mar. 4, 1993).
to define by administrative policy the circumstances in which partial abandonment can occur. These circumstances include the following: water rights that authorize more than one point of diversion and one point has been abandoned; water rights that authorize more than one type of use and one of those uses has been abandoned; and water rights that authorize use on more than one place of use and one of those places of use has been abandoned. Use of less water than authorized, if it does not fall within these categories, may well be insulated from abandonment by the grounds allowing due and sufficient cause for conservation practices listed in K.A.R. 5-7-1(a)(4) or (5).

One instance in which partial abandonment was pursued and ultimately declared involved two distinct tracts of land owned by two separate families. The water right authorized use on both tracts from a single well. Several years prior to the hearing, the family without the well decided to grow crops using only dryland practices instead of growing irrigated crops. The other family, however, continued to grow irrigated crops. The water right was found to have been abandoned as to the no-longer-irrigated tract. The annual quantity was likewise reduced to account for the abandoned portion while leaving a reasonable quantity for the land that continued to be authorized for irrigation. There is no preset formula for such calculations.

C. Condition of the Diversion Works

One factor to be considered by DWR in determining whether a water right has been abandoned is the condition of the diversion works and distribution system. When a DWR staff member makes the field investigation necessary to preparing a verified report, the staff member checks and documents the presence and condition of the equipment. According to DWR policy, the fact that the diversion works or distribution system do not exist at the time of the investigation help substantiate that the water right has been abandoned. However, the mere presence of operational equipment is not viewed as enough to establish that the water right has not been abandoned if the statutory criteria of three successive years of non-use without due and sufficient cause are met.

183. See id.; KAN. STAT. ANN. § 82a-718 (1989).
V. CONCLUSION

This Article attempts to provide a relatively comprehensive picture of current Kansas law on loss of a water right due to non-use. A key concept in this area of the law is that the question of why water has not been used is as important, if not more important, than the non-use itself.

This Article points out several potential problems with current law in this area. Legislation and regulation can never provide clear solutions for all the myriad questions that can arise from real fact situations. But several of the potential problems we have identified could be solved with regulative or legislative amendments.

The issue of when a water right becomes subject to abandonment proceedings could be clearly stated in a regulation. Likewise, the issue of whether our law is an abandonment or forfeiture law could be clarified by legislation. In any event, K.S.A. section 42-308 should be repealed. It adds nothing, is not part of the Water Appropriation Act, is not applied by DWR, and simply continues to confuse the matter. Finally, the regulation on burden of proof could be modified to identify what standard of proof is required to meet that burden.