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## Nelson v. State Dep't of Agric., 242 P.3d 1259 (Kan. Ct. App. 2010)

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Nelson v. State Dep't of Agric., 242 P.3d 1259 (Kan. Ct. App. 2010)

## KANSAS

**Nelson v. State Dep't of Agric., 242 P.3d 1259 (Kan. Ct. App. 2010)** (holding that growing alfalfa did not constitute diversion or beneficial use of a water right; economic reasons such as cost of lifting, fuel, and pumping did not constitute a due and sufficient cause for nonuse; adequate rainfall was not due and sufficient cause for nonuse; and low river flows was not a due and sufficient cause for nonuse).

The chief engineer of the Kansas Division of Water Resources ("DWR") issued an agency order declaring Norman and Gloria Nelsons' ("Nelsons") water right abandoned. After DWR denied their administrative appeal, the Nelsons appealed to the District Court of Russell County ("district court"), which found that substantial evidence did not support the agency's declaration of abandonment. DWR appealed, and the Kansas Court of Appeals ("court") reversed and remanded with directions for the district court to adopt the order suspending the water right.

In 2004, the Nelsons purchased agricultural land and the associated water right from Otto C. Eulert ("Eulert"). Before the purchase, the Nelsons contacted DWR to check on the status of the water right. DWR advised them of a potential abandonment issue due to Eulert's nonuse. The Nelsons purchased the land and submitted a letter to DWR with three explanations for the nonuse: (1) it was too expensive and labor-intensive to divert; (2) alfalfa, which was the crop rotation, did not require irrigation; and (3) that upstream users' diversion left little water to use.

Based on Kansas's system of prior appropriation for water rights, the failure of a water right holder to put his or her water to lawful, beneficial use, for any five consecutive years, in the absence of due and sufficient cause, leads to termination of the right. A due and sufficient cause must be one that precludes irrigation or facilitates production of a normally irrigated crop without irrigating. The question before the court was whether substantial evidence indicated that Eulert failed to put his right to lawful, beneficial use for any five consecutive years without due and sufficient cause.

The court first determined that there was no lawful, beneficial use. The Nelsons argued that the consistent cropping of alfalfa should constitute beneficial use under the water right because alfalfa crops draw from groundwater with the same supply source as the water right. The court deemed this argument moot because there was no evidence that a point of diversion existed. Diversion is the act of harnessing and distributing water via a well, pump, dam, or other viable irrigation device. Sub-surface irrigation by natural absorption requires no control of water through any of these devices, and the court held that it was not diversion. Ultimately, the court found no beneficial use and next looked at whether due and sufficient cause for nonuse existed.

The court also held that there was no due and sufficient cause for

nonuse. First, the court found that the Nelsons' economic reason for nonuse, prohibitive pumping costs, did not constitute a due and sufficient cause. Instead, Eulert merely opted not to irrigate because it was too expensive to divert the water. These economic reasons did not actually prevent irrigation. Next, the court contemplated the Nelsons' argument that adequate rainfall alleviated the need to divert the water. The Nelsons argued that because Eulert's alfalfa crops relied on groundwater they did not require full or partial irrigation. However, the court found that this was not due and sufficient cause for nonuse because adequate rainfall is only an acceptable cause where a crop requires full or partial irrigation. Irrigation was only necessary to start an alfalfa crop, and because alfalfa did not require irrigation in subsequent years, adequate rainfall was not an acceptable reason for not irrigating in those years. Finally, the court looked at the unavailability of water due to low flows. When Eulert filed reports of low flows, the court found either: (1) the reports were not the sole reason for nonuse because they accompanied claims of nonuse due to economic reasons, or (2) Eulert did not start alfalfa crops in those years, which rendered irrigation unnecessary because those crops had already rooted to groundwater and suggested that low flows did not in fact prevent irrigation because there was no need to divert water.

The court concluded by finding that the agency provided substantial evidence to support their findings of fact and conclusions of law. The court reversed and remanded with directions to reassign the order terminating the Nelsons' water right.

*Jonathan King*

## NEBRASKA

**Cent. Neb. Pub. Power & Irrigation Dist. v. N. Platte Natural Res. Dist., 788 N.W.2d 252 (Neb. 2010)** (holding that litigants, including public power and irrigation districts, without a substantial interest in the outcome of a case and who assert a claim based on third parties' interests and rights do not have standing).

Central Nebraska Public Power and Irrigation District ("Central") claimed that, under the Administrative Procedure Act ("APA"), the North Platte Natural Resources District ("NRD") erroneously implemented new rules that lowered ground water allocation from fourteen inches per acre to twelve. Central asserted that a lower ground water allocation would decrease surface water in Pumpkin Creek, which, in turn, would not feed as much water into the North Platte River and deplete the amount of water available for storage in Lake McConaughy. Central managed Lake McConaughy and supplied water for irrigation and power stations, using water to produce power. It petitioned the Scotts Bluff County District Court ("district court") to require NRD to reverse the new regulations for ground water