

9-1-2006

Hawley v. Kansas Dep't of Agric., 132 P.3d 870 (Kan. 2006)

Charles Sweet

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Charles Sweet, Court Report, Hawley v. Kansas Dep't of Agric., 132 P.3d 870 (Kan. 2006), 10 U. Denv. Water L. Rev. 191 (2006).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

passage, navigation, commerce, or transportation. At common law, tidewater beds extended to the high water mark and the Crown owned the soil between the high-water mark and the low-water mark. The court reiterated the rule that Georgia now holds title to the beds of all tidewaters within the state, except where a private party can trace its title to a valid crown or state grant which explicitly conveys the tidewater beds. The burden is on the grantee to show an explicit conveyance that demonstrates clear intent on the part of the crown to part with ownership of the tidewater beds in question. Further, the court strictly construes any ambiguity in Royal grants against the grantee.

Upon reviewing Black's grant, the court found that the words were completely illegible. The court held that indecipherable Crown grants were inadmissible at summary judgment and Black failed to present other evidence supporting his claims at the motions hearing. The court added that, even if the Crown issued grants containing the language alleged by Black, they would still lack clear intent on the part of the Crown to convey ownership of the tidewater property along Sterling Creek. Therefore, the court affirmed the decision of the lower court and granted summary judgment in favor of Floyd and the State of Georgia.

Jonathan Long

KANSAS

Hawley v. Kansas Dep't of Agric., 132 P.3d 870 (Kan. 2006) (holding that the Kansas Division of Water Resources correctly applied a Kansas water right forfeiture statute because the Kansas legislature intended for water rights to comply with a "use it or lose it" philosophy).

Karen and Marlin Hawley ("Trustees") inherited the right to appropriate water from the Republican River in Kansas from their father, Max, who had received the right from his father, E.E. Conzelman. The record showed that the water users failed to put this water right to beneficial use for thirty-one successive years, from 1971 to 2001. In May 2003, the owners of other water rights in the same area requested the Kansas Department of Agriculture's Division of Water Resources ("DWR") pursue a abandonment trial for the water right.

In December 2003, the DWR filed a report concluding the Trustees had made no beneficial use of the water from 1971 to 2002 and had not shown sufficient cause for the non-use. DWR gave notice to the Trustees of a hearing to determine whether the water right should be abandoned and terminated under the Kansas Water Appropriation Act.

After a formal termination hearing, the chief water engineer adopted the DWR hearing officer's recommendation to issue an order of termination of the water right. The Trustees filed a petition for ju-

dicial review, and the Republic County District Court entered judgment in their favor and set aside the DWR's termination of the water right. The DWR appealed the decision to the Supreme Court of Kansas.

The sole issue before the court was whether the DWR correctly interpreted a Kansas statute originating from the Kansas Water Appropriation Act which allowed for the termination of a water right after five successive years of non-use. The statute contained a notice provision requiring the chief engineer to notify the water right holder after three years of non-use that abandonment and termination procedures would commence if the water right holder failed to beneficially use of the water within five years. The Kansas legislature designed this provision to give the water right holder the opportunity to take action to remedy the situation to preserve the right.

The Trustees did not use their water right for thirty-one successive years, and thus the debate concerned whether or not this lengthy period negated the notice provision. The DWR argued that the lengthy period of non-use made the three year notice requirement a moot issue, while the Trustees maintained that the notice requirements were substantive, remedial, and should have been applied retroactively. The Trustees further argued that the DWR's compliance with the notice provision of the Kansas statute was a condition precedent to the termination of a water right, no such notice had been given, and as a result, the court should have set aside the termination order.

The court engaged in an extensive discussion of the history and development of Kansas water law, which is based on a system of prior appropriation for water rights, to ascertain legislative intent. The court concluded that the Kansas legislature intended to create an act of forfeiture in the statute. It based this conclusion upon three foundations: case law from other jurisdictions with similar statutes such as Nevada; the interpretation of the phrase "shall be deemed abandoned" in general property law; and the 1999 amendment to the Kansas Water Appropriation Act. The 1999 amendment increased the permitted non-use period from three to five years, and the court determined that this did not change the original interpretation of the statute as one of forfeiture and not abandonment, but merely extended the timeframe for termination of a water right.

Accordingly, the court found that the DWR correctly interpreted the Kansas statute. Specifically, the court held that the DWR's interpretation of the statute agreed with the fundamental principle that "[b]ecause all water within the state is dedicated to the use of the people of the state, subject to control and regulation of the state, then holders of water rights who fail to use the rights lose the rights." The court concluded that the State could place conditions on the retention of a right that it created.

The court also found that the Kansas statute contained other safeguards to prevent a water right holder from losing his or her right. These safeguards included a provision that the water right holder may demonstrate good reason for non-use, and a list of acceptable reasons for non-use. Because these safeguards are built into the statutory scheme and the overriding motivation behind the scheme is “use it or lose it,” the legislature could not have intended to provide for other safeguards it did not explicitly mention.

Based upon its holdings, the court reversed the district court’s order and affirmed the DWR’s decision declaring that the water right should be abandoned and terminated.

Charles Sweet

MONTANA

Mont. Trout Unlimited v. Mont. Dep’t of Natural Res. and Conservation, 133 P.3d 224 (Mont. 2006) (holding an interpretation of groundwater must consider prestream capture of tributary groundwater).

Montana Trout Unlimited and eleven other petitioners (collectively “Trout”) filed suit in the District Court of the First Judicial District, County of Lewis and Clark, against Montana Department of Natural Resources and Conservation (“DNRC”) seeking writ of mandate compelling DNRC to make a determination of whether groundwater was immediately or directly connected to surface water before processing groundwater applications on the Upper Missouri River basin under the Basin Closure Law. Trout also argued that DNRC’s definition of “immediately or directly connected to groundwater” inappropriately excluding prestream capture of tributary groundwater. DNRC and Trout entered into a stipulation where DNRC agreed to consider whether groundwater was immediately or directly connected to surface water prior to processing permits, but retained its definition of groundwater. The district court granted summary judgment in favor of DNRC. The issues on appeal in the Supreme Court of Montana are whether Trout exhausted its administrative remedies before seeking judicial relief and whether DNRC’s interpretation of groundwater—immediately or directly connected to surface water—was correct as a matter of law.

The court determined that Trout need not exhaust its administrative remedies because the futility exception applied. The court found that Trout was not required to participate in agency proceedings that were costly and expressly prohibited by the legislature. The Basin Closure Law expressly prohibited DNRC from processing applications for groundwater which were immediately or directly connected to surface water. Therefore, it was futile to require Trout to wait for DNRC to