

MINUTES OF THE House COMMITTEE ON Energy & Natural Resources

The meeting was called to order by Rep. David J. Heinemann at _____
Chairperson

3:30 a.m./p.m. on March 14, 1984 in room 519-S of the Capitol.

All members were present ~~except~~

Committee staff present:

- Ramon Powers, Legislative Research
- Theresa Kiernan, Revisor of Statutes' Office
- Pam Somerville, Committee Secretary

Conferees appearing before the committee:

- David Pope, Division of Water Resources, Kansas State Board of Agriculture
- Clark Duffy, Kansas Water Office

Hearing on: SB 555 - An act relating to water; concerning the diversion of water for use in other states; amending K.S.A. 82a-726 and repealing the existing section.

David Pope, Chief Engineer-Director, Division of Water Resources, Kansas State Board of Agriculture, appeared before the committee to address SB 555. Mr. Pope said, in essence, the bill deals with the interstate transfer of water. Mr. Pope stated currently the only statute authorizing the appropriation of water for use outside the state of Kansas is K.S.A. 82a-726. Several proposed amendments were offered and are outlined in Attachment 1. In closing, Mr. Pope urged passage of SB 555 as amended.

Mr. Pope submitted written testimony addressing SB 556, which amends various sections of the State Water Plan Storage Act. In addition, K.S.A. 1983 Supp. 82a-1301 is amended to define "surplus waters" as waters within the conservation water supply capacity committed to the state, but not required to meet contractual requirements under the Act. (See Attachment 1).

Hearing on: SB 562 - An act relating to water supply and sewage; defining certain terms; amending K.S.A. 65-161, 65-165, and 65-167 and repealing the existing sections.

Mr. Clark Duffy, Kansas Water, appeared in support of SB 562, which would amend K.S.A. 65-161, 65-165, and 65-167. As written, the bill defines the terms discharge, indirect discharge, and direct discharge. The amendment would require indirect dischargers of sewage

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Energy and Natural Resources,
room 519-S, Statehouse, at 3:30 ~~am~~/p.m. on March 14, 1984

to comply with all applicable pretreatment regulations and water quality standards. A brief question and answer period followed Mr. Duffy's presentation. The hearing concluded on SB 562.

There being no further business before the committee, the meeting was adjourned at 4:30 p.m. The next meeting of the House Energy and Natural Resources Committee will be held March 15, 1984 at 3:30 p.m. in Room 519-S.



David J. Heinemann, Chairman

Date 3-14-84

GUESTS

HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE

| NAME | ADDRESS | ORGANIZATION |
|-------------------|------------|----------------------------|
| CR Duffly | Topoka | Kansas State Office |
| Ed Remert | " | Ks League of Voters |
| Helen Steinhilber | RV | LWW - govt. |
| Rick Kready | Topoka | KPI / Ben Burman |
| Sharon Givoni | " | " |
| Burt DeBam | Osoyo City | State Rep |
| Louis Stroup Jr. | McPherson | KANSAS MUNICIPAL UTILITIES |
| DAN MCGEE | GREAT BEND | WESTERN POWER / CENTEL |
| John Fund | Whiting | Ks. Moral Union |
| Ruth Seares | Topoka | KECZ - DWW Byrd |

STATEMENT BY DAVID L. POPE
CHIEF ENGINEER-DIRECTOR
DIVISION OF WATER RESOURCES
KANSAS STATE BOARD OF AGRICULTURE

TO HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE

MARCH 14, 1984

SENATE BILL NOS. 555 & 556

Mr. Chairman, members of the Committee, thank you for this opportunity to appear to testify on these two bills.

SENATE BILL 555

The first bill, Senate Bill 555, was included in the Kansas Water Authority legislative report and deals with the interstate transfer of water.

Last year, Senate Bill 61 was enacted which governs the sale of water from state controlled storage in Federal reservoirs. Senate Bill 61 authorized the sale of water for use outside the State of Kansas. (K.S.A. 1983 Supp. 82a-1305)

Currently, the only statute authorizing the appropriation of water for use outside the State of Kansas is K.S.A. 82a-726.

K.S.A. 82a-726 authorizes withdrawal and use of groundwater in an adjoining state if the Chief Engineer finds the withdrawal and transportation of such groundwater is (1) reasonable, (2) not contrary to the conservation and use of groundwater, (3) not otherwise detrimental to the public welfare and (4) the state in which the water is to be used grants reciprocal rights to withdraw and transport water from that state for use in this state.

(Emphasis supplied)

This statute only had limited application because it applied only to groundwater and there was only one other state which had such a reciprocal provision. That state was the State of Nebraska.

Attachment 1

3-14-84

On July 2, 1982, in the case of Sporhase v. Nebraska, the United States Supreme Court struck down the Nebraska interstate water use bill, which was nearly identical to Kansas' K.S.A. 82a-726.

In that case, the United States Supreme Court declared that groundwater is an article of commerce and therefore subject to congressional regulation and that the reciprocal provision in the Nebraska law was a burden on interstate commerce.

The Supreme Court stated,

"if it could be shown that the state as a whole suffers from a water shortage, that intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance and that the importation of water from adjoining states would roughly compensate for any exportation to those states, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision." (Emphasis supplied)

The Court goes on to say that,

"Demonstrably arid states conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and the purpose to conserve and preserve water."

The U.S. Supreme Court appears to conclude that a reciprocity provision or even a total ban on the export of water, would be permissible as long as it was done solely to protect the health and safety of the state enacting the provision, however, any reciprocity provision or total ban on the export of water that even hinted at being an economic protection for the citizens of the state would probably be declared an unconstitutional burden on interstate commerce by the United States Supreme Court.

Sporhase was followed by a decision on January 17, 1983, in a case between the City of El Paso and the State of New Mexico, in which a Federal District Court essentially said that interstate transfers of water could not be banned unless they were necessary for "human survival."

The New Mexico Federal District Court's decision heavily rests on the United States Supreme Court opinion in Sporhase v. Nebraska. New Mexico argued that the purpose of its statute was to conserve and preserve New Mexico's internal water supply.

The District Court interpreted Sporhase and other U.S. Supreme Court opinions to find that,

"A state may discriminate in favor of its citizens only to the extent that water is essential to human survival. Outside of fulfilling human survival needs, water is an economic resource. For the purposes of constitutional analysis under the Commerce Clause, it is to be treated the same as other natural resources." (Emphasis supplied)

The Court went on to hold,

"Interstate usage of water can be restricted and controlled to the same extent as intrastate usage."

The Court went on to cite the Sporhase case for the proposition that a state could impose the same withdrawal and use restrictions on out of state users as it does on its own citizens.

Both the Nebraska and New Mexico decisions have left an ominous cloud on the validity of the Kansas statute.

The Chief Engineer is now faced with a statute prohibiting him or her from approving an application to appropriate water for surface water to be used outside the State of Kansas or approving an application to use groundwater unless an adjoining state grants reciprocal right. Because no other state currently has a valid reciprocity statute, the Chief Engineer is essentially prohibited by Kansas law from approving any application to appropriate water within Kansas for use outside of the State.

The Chief Engineer is also faced with the Sporhase and El Paso decisions saying it is unconstitutional to deny use of water outside the State of Kansas unless it is necessary for protection of the public health and safety.

If the Chief Engineer denies such an application, he or she will probably get sued because of the Sporhase case. If he or she approves the application, he or she would probably get sued because the approval would violate Kansas state law. If the Chief Engineer denies approval of an application to appropriate water in violation of the U.S. Constitution, he or she is exposing the state to liability for attorneys fees incurred by the applicant, which could be quite a substantial sum.

In order to resolve this dilemma, which has actually been raised by the filing of two applications to change the place of use to allow use of water in Oklahoma, Senate Bill 555 was suggested to the Kansas Water Authority by the Division of Water Resources. Senate Bill 555 was then recommended to the legislature by the Kansas Water Authority. The two applications to use water in Oklahoma have been held pending resolution of this matter by the legislature.

Essentially, this statute would allow the Chief Engineer to approve an application to appropriate water for use in another state if it met all of the requirements that an applicant would have to meet if the water were to be used within the State of Kansas, including Senate Bill 62, (now K.S.A. 1983 Supp. 82a-1501 et seq.) which requires approval of transfers of water for use more than 10 miles from the point of diversion and in an amount of over 1,000 acre feet per year. Senate Bill 62 also allows the Chief Engineer to convene a panel if an application is for less than 1,000 acre feet per calendar year and is being transferred less than 10 miles.

These existing statutory provisions should provide adequate safeguards against large quantities of water being transferred out of state which could cause harm to the public health and safety of the State of Kansas.

Further, SB 555 would require the Chief Engineer to condition any rights to transfer water out of the state in such a way that the permits may be suspended, amended or cancelled if the water should be needed for public health and safety reasons within the State of Kansas.

K.S.A. 82a-730 provides that K.S.A. 82a-701 to 82a-725, inclusive, are part of the Kansas Water Appropriation Act. K.S.A. 82a-729 provides that K.S.A. 82a-727 and 82a-728 are a part of the Kansas Water Appropriation Act. K.S.A. 82a-726 has never been made a part of the Kansas Water Appropriation Act and I feel that it should be made a part of the Kansas Water Appropriation Act so that it will operate as a supplement to K.S.A. 82a-702 which provides that,

"All water within the state of Kansas is dedicated to the use of the people of the subject to the control and regulation of the state in the manner herein prescribed." (Emphasis supplied)

I recommend that K.S.A. 82a-726, as amended, be specifically made a part of and supplemental to the provisions of the Kansas Water Appropriation Act.

As Chief Engineer-Director, Division of Water Resources, Kansas State Board of Agriculture, I support passage of SB 555, as amended, with the modification recommended above.

SENATE BILL 556

The comments of the Division of Water Resources are directed only at that portion of Senate Bill 556, which extends the notice time necessary to have the Chief Engineer protect flows released under contract from two to four working days.

This issue arose when the standard form contracts for purchase of water were being drafted by the Kansas Water Authority. First, it was felt that two working days notice to the Director of the Kansas Water Office might not

provide sufficient working time for the Division of Water Resources to be notified and have time to physically get out and assess river conditions prior to a release of water. Secondly, the language was drafted so that it could be read to prohibit the purchaser from giving more than two days notice and therefore, preventing planning and preparation. In order to clarify this situation, it was suggested the Chief Engineer be given four working days notice in order to protect such flows and make it clear that the purchaser could request releases more than four days in advance, if he or she so desired.

The Division of Water Resources certainly will do everything possible to protect flows as soon as possible after notification, but it was felt the Division should not be held responsible for protecting flows under very short notice situations.

I would be happy to respond to any questions you might have at this time.

KANSAS WATER OFFICE
 Status of Water Marketing Program
 January, 1984

Background

The Kansas Water Office (KWO) administers agreements with the federal government to purchase water supply storage space in nine of the 24 federal reservoirs in Kansas. This storage has a yield capability of about 306 million gallons per day (mgd).

Projections for the state's share of the capital costs of these nine reservoirs is approximately \$69.9 million which will be paid back over a 50-year period. Additionally, the state must pay operation and maintenance costs associated with the water supply storage.

Impacts of Contracts on Total Storage

As of January 1984, the Kansas Water Office has entered into 21 contracts which obligate about 24 percent of the storage space presently being purchased from the federal government.

TABLE 1

| Reservoir | Amount of Water Under State Control mgd | Contracts Approved by Leg. mgd | % of Reservoir Supply | New Contracts Before Leg. mgd | % Contracted |
|---------------|--|--------------------------------------|-----------------------------|---|-----------------|
| Big Hill | 7.11 | 1.5 | 21.1 | | 21.0 |
| Clinton | 18.80 | 13.438 | 71.5 | .137 | 72.2 |
| Council Grove | 5.62 | 3.301 | 58.7 | .004 | 58.8 |
| Elk City | 16.35 | 5.206 | 31.8 | | 31.8 |
| Hillsdale | 17.38 | .957 | 5.5 | .005 | 5.8 |
| John Redmond | 26.50 | 26.499 | 100.0 | | 100.0 |
| Marion | 5.69 | 1.711 | 30.1 | | 30.1 |
| Milford | 128.62 | 20.00 | 15.6 | | 15.6 |
| Perry | 79.50 | 0.00 | 0.0 | | 0.0 |
| TOTAL | 305.57 | 72.612 | 23.7 | .196 | 23.8 |

Handwritten notes:
 All 21 contracts
 3.11.84

Payments and Revenues

The annual payment to the federal government for water storage space will be approximately \$1,945,000 for FY 1984. Estimated revenues from water contracts is about \$1,094,000. Approximately \$382,000 of the revenue will be deposited into the State Conservation Storage Water Supply Fund which was created by the 1983 Legislature.

It is estimated that the maximum payment for any one year will be approximately \$4 million. Revenue forecasts, based on projected water use, indicate that water sales will generate at least \$4 million a year after the year 2000.

TABLE 2
Payments and Revenues by Year

| Pd. on Year | <u>Payments to Fed. Government</u> | | <u>Revenue</u> | | Cum. Rev. as % of Cum. Pd. |
|-------------|------------------------------------|---------------------------|-----------------------------------|-----------------------------|-------------------------------------|
| | Total \$ Paid Out | Cumulative \$ Paid Out | \$ Revenue from water sales | Cumulative \$ Revenue | |
| 1 1975 | 228,638 | 228,638 | 0 | 0 | |
| 3 1976 | 368,919 | 597,557 | 360 | 360 | .86% |
| 4 1977 | 801,892 | 1,399,449 | 0 | 360 | .03% |
| 5 1978 | 886,253 | 2,285,702 | 311,200 | 311,560 | 13.6% |
| 6 1979 | 1,216,698 | 3,502,400 | 311,200 | 622,760 | 17.8% |
| 7 1980 | 1,414,956 | 4,917,356 | 449,021 | 1,071,781 | 21.8% |
| 8 1981 | 1,538,018 | 6,455,374 | 449,946 | 1,521,727 | 23.6% |
| 9 1982 | 1,676,390 | 8,131,764 | 798,896 | 2,320,623 | 28.5% |
| 9 1983 | 1,663,717 | 9,795,481 | 898,783 | 3,219,406 | 32.5% |
| 9 1984 | 1,944,822 | 11,740,303 | 1,093,761 (est) | 4,313,167 | 36.7% |