

Approved 4/28/84
Date

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 15, 1984 in room 519-S of the Capitol.

All members were present except: Rep. Judy Runnels (excused).

Committee staff present:

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

Conferees appearing before the committee:

Phil Martin, Kansas Water Office
Mr. Lynn Burris, Parks and Resources Authority
Rep. Burt DeBaun, Kansas House of Representatives
Randy Warner, Melvern Resident
Kenny Roberts, Melvern Resident

Mr. Phil Martin, Kansas Water Office, appeared briefly before the committee to address proposed water legislation referred from the Senate. He touched briefly on SB 497, SB 510, SB 555, SB 556, SB 735 and SCR 1646. Mr. Martin said that he supported all of the issues; however, SB 510 would need language drafted to address a bi-annual review of the proposed measure.

Hearing on: SB 381 - An act concerning the state park and resources authority; authorizing the purchase of certain lands for state parks; amending K.S.A. 74-4545 and repealing the existing section.

Mr. Lynn Burris, Kansas State Park and Resource Authority appeared before the committee in support of removing the Corps of Engineers from the Melvern site and transferring their responsibilities to the State Park and Resource Authority. He outlined several aspects of the financial ramifications which are contained in Attachment 1.

Rep. Burt DeBaun, appeared in opposition to SB 381. Rep. DeBaun stated there would be a loss in jobs and revenue and he felt the Corps was doing an outstanding job of maintaining the facility and saw no reason for the state to undertake additional tasks.

Randy Warner, a Melvern resident, appeared in strong opposition to the state taking over the Melvern reservoir and stated the Corps was handling things very well.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Energy and Natural Resources,
room 519-S, Statehouse, at 3:30 ~~xxx~~/p.m. on March 15, 1984.

Kenny Roberts, a Melvern resident, appeared in opposition to SB 381 and reiterated Mr. Warner's remarks. A brief question and answer period followed.

The Chairman then called for final action on bills previously heard in Committee.

SB 497 - An act supplementing the Kansas Water Appropriation Act; condition water appropriation rights to minimum desirable streamflow requirements. SB 497 would condition all appropriate rights applied for after the effective date of the act so that such rights would be subject to any minimum desirable streamflow requirements. Representative Fox moved to recommend SB 497 favorable for passage. Representative Farrar seconded the motion. Motion carried.

SB 510 - An act relating to state water resource planning. Representative Fox made a conceptual motion to amend Section 4 to address adopting resolutions. Representative Farrar seconded the motion. Motion adopted. Representative Fox moved to recommend SB 510 favorable for passage as amended. Representative Farrar seconded the motion. Motion carried.

SB 735 - An act concerning water; incorporating by reference a section of the state water plan pertaining to minimum desirable streamflows. Representative Fox moved to recommend SB 735 favorable for passage. Representative Barr seconded the motion. Motion carried.

SCR 1646 - A concurrent resolution requiring the commencement of negotiations for the purchase of additional water supply storage capacity in federal reservoirs. Representative Fox moved to recommend SCR 1646 favorably. Representative Niles seconded the motion. Motion adopted.

SB 555 - An act relating to water; concerning the diversion of water for use in other states; amending K.S.A. 82a-725 and repealing the existing section. Representative Ott made a conceptual motion to amend. Representative Farrar seconded the motion. Motion adopted. Representative Fox moved to report SB 555 favorably as amended. Representative Grotewiel seconded the motion. Motion carried.

SB 556 - An act amending the state water plan storage act. Representative Farrar moved to recommend SB 556 favorable for passage. Representative Sughrue seconded the motion. Motion carried.

CONTINUATION SHEET

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room 519-S, Statehouse, at 3:30 ~~am~~/p.m. on March 15, 1984.

There being no further business before the committee, the meeting was adjourned at 4:50 p.m. The next meeting of the House Energy and Natural Resources Committee will be held Monday, March 19, 1984 at 3:30 p.m. in Room 519-S.



David J. Heinemann, Chairman

Date 3-15-84

GUESTS

HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE

NAME

ADDRESS

ORGANIZATION

NAME	ADDRESS	ORGANIZATION
Connie Butts	Melvern	
Quila Casey	Overland Park	
Harvie Butts	Melvern	
Randy J. Warner	Melvern, Ks	
Kenneth B. Bachtel	Melvern, Ks.	
Russel Priest	Melvern, Ks.	
Louise Priest	Melvern, Ks.	
Marie Vize	Melvern, Ks.	
Jan Green	Melvern, Ks.	
Dale Green	Melvern, Ks.	
Bill Patterson	" "	
Tom M. Freeman	Melvern, Ks.	
Doreen Roberts	Melvern, Ks.	
Marceline Drastill	" "	
Dave Hill	" "	
Tabitha Burkhead	Lyndon, Ks.	
Frank Burkhead	Lyndon, Ks.	
Carlynn McMillin	Lyndon, Ks.	
Mary Fund	Whiting, Ks	Rural Center

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.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 3-15-81 BY [signature]

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 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.