

MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources

The meeting was called to order by Senator Charlie L. Angell at
Chairperson

8:00 a.m./~~xxx~~ on Tuesday, January 17, 1984 in room 123-S of the Capitol.

All members were present except:
Senator Paul Hess

Committee staff present:
Ramon Powers, Research Department
Raney Gilliland, Research Department
Don Hayward, Revisor's Office
LaVonne Mumert, Secretary to the Committee

Conferees appearing before the committee:
Joe Harkins, Director, Kansas Water Office
Lee Rolfs, Legal Counsel, Division of Water Resources, Kansas State Board of Agriculture

The minutes of the January 12, 1984 meeting were approved.

Joe Harkins told the Committee that the Water Office's key legislative proposal is the Minimum Streamflow Section of the State Water Plan. The second submission from the Water Office is a set of four contracts for the sale of water from federal reservoirs. Mr. Harkins said the Water Office strongly supports the bill which has been introduced which will change the process for adoption of sections of the State Water Plan. They are also in favor of S.B. 497 which deals with minimum streamflow standards. He said they will also be reviewing a set of rules and regulations that have been adopted that implement S.B. 61, the state water marketing program. Mr. Harkins stated that the Kansas Water Authority has been active in the development of several legislative proposals and the Water Office, as a member of the Authority, participated in that process. The Water Office favors all of the proposals that will be presented by the Water Authority. Mr. Harkins also favors the bill which would make all employees of the Water Office, with the exception of clerical and business personnel, unclassified. Mr. Harkins said he feels it is essential for his agency to have this flexibility. Senator Kerr asked about the proposed time frame for completion of the State Water Plan. Mr. Harkins replied that the entire procedure is scheduled to be completed during 1984, and the Plan is to be submitted to the 1985 Session of the Legislature. They plan to have 11 public hearings this summer in the same communities the hearings were held last summer. Chairman Angell asked about the validity of the basic water data developed by the U.S. Geological Survey. Mr. Harkins responded that there are many weaknesses in the available supply data. For instance, they are not sure of the location of all groundwater aquifers and the volume of water stored in many of them. Data concerning water demand is even poorer. There are reporting requirements for water users, but Mr. Harkins said they do not have a high degree of confidence in the data that is received. He pointed out it is also necessary to have reliable population projections and because the available data is very limited, his agency has had to develop some of their own data in this area. Chairman Angell asked how a State Water Plan can be developed without complete water data. Mr. Harkins said he is confident it is possible to do planning without having all the data which might be desired. He said if they wait until the data is complete, it would be too late for planning to have any effect. Senator Gannon asked about the Ogallala Aquifer. Mr. Harkins answered that it continues to be drawn down each year, and it is projected that will continue. The Ogallala does not recharge at an appreciable rate, but it is such an enormous supply that he expects irrigation to continue for many years. Chairman Angell asked about the relationship between the Water Authority and the Water Office. Mr. Harkins replied that the agencies have a very awkward organizational relationship. They have duties that are very similar, yet separate. Mr. Harkins feels that progress is being made and pointed out the fact that the agencies succeeded in working together to produce the first section of the State Water Plan as being evidence they can get the job done. He noted that, in general terms, the cooperative relationships between the many water-related agencies are very high. Chairman Angell asked Mr. Harkins how he feels about the member of the Water Authority who do not have voting rights. Mr. Harkins answered that he does not feel it is a good arrangement and creates two classes of members. He feels it reduces the level of commitment and interest.

S.B. 497 - Water appropriation rights conditioned to minimum streamflow requirements

Mr. Harkins said they have begun the process of establishing minimum streamflow standards. He stated that it is possible for additional appropriations to be made to the point that it will not be possible in the future to establish a minimum desirable streamflow. He told the

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 Senate COMMITTEE ON Energy and Natural Resources,

room 123-S, Statehouse, at 8:00 a.m. ~~p.m.~~ on Tuesday, January 17, 1984.

Committee it is possible that during the process of setting streamflow standards there could be a rush of applications for appropriations from those streams that have been targeted. He indicated there is no evidence up to this time that any such rush of applications has started, but since the process will take several years, this bill is a good preventive measure if such a rush should occur. Mr. Harkins strongly supports the bill but recommends that lines 24 and 25 be amended to read: "priation right applied for or granted after the effective date of this act, that such right shall be subject to any". Mr. Harkins indicated that this would clear up any question of the law being retroactive.

Lee Rolfs read his written testimony (Attachment 1). His agency supports the bill, but they suggest that removing the words "or granted" from line 24 and making the bill effective on publication would clear up some possible problems of retroactivity. Responding to a question from Senator Kerr, Mr. Rolfs said he could not think of any possible problems with the bill other than those he had already mentioned. Answering a question from Senator Werts, Mr. Rolfs said he does not feel the bill adds to or limits the authority of the Chief Engineer.

The Chairman adjourned the meeting at 8:56 a.m. The next meeting of the Committee will be at 8:00 a.m. on January 18, 1984.

Senate Energy & Natural Resources

Jan. 17, 1983

<u>Name</u>	<u>Organization</u>
Barbara Bohan	KAC
Drew W. Wyatt	Kans Farmers Union
Lars Hatfield	Farmer
Richard D. Keady	KPL / Gas Service
Chuck Caverec	KWO / Governor's Fellow
CR Duffy	KWO
Tom Sales	KWO
Ed Bennett	K League of Voters
Jean Lee	LWD
Jessy Goodwood	KG & E
Roy P. Oberhel	K.C.P.L.
Delard E. Rolf	DWR - KSBA
Devin K. Nagel	Budget
Pat Schater	Budget
William W. Hambleton	KG
Chris McKenzie	League of Ks. Municipalities
Harod Bhatia	KPL
Bill Perdue	KPL

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

PRESENTED BY LELAND E. ROLFS, LEGAL COUNSEL
DIVISION OF WATER RESOURCES
KANSAS STATE BOARD OF AGRICULTURE

TO SENATE ENERGY & NATURAL RESOURCES COMMITTEE

JANUARY 17, 1984

SENATE BILL 497 CONCERNING CONDITIONING WATER APPROPRIATION
RIGHTS TO MINIMUM DESIRABLE STREAMFLOW REQUIREMENTS

Thank you, Mr. Chairman and Committee members, for this opportunity to appear here today. Mr. Pope asked that I express his regrets in that he had a speaking conflict out of town today and is unable to attend.

It is our understanding that the purpose of Senate Bill 497 is to protect the streams of Kansas, that are not already over-appropriated, from becoming over-appropriated before the Kansas Water Office, the Kansas Water Authority and the Legislature have the opportunity to designate minimum desirable streamflow in all the streams of the State of Kansas in which they wish to do so. The Division of Water Resources understands this concern and supports efforts to ensure minimum streamflow requirements are not defeated by massive filings of applications to appropriate water on these streams.

The Division of Water Resources does, however, have one major concern about Senate Bill 497 as drafted. In New Section 1, it provides that,

"it shall be an express condition of each and every appropriation right applied for or granted after January 1, 1984, and before July 1, 1988, that such right shall be subject to any minimum desirable streamflow requirements identified and established pursuant to law for the source of water supply to which such right applies."
(Emphasis supplied)

The language "or granted" in the above sentence would make any pending surface water application now on file with the Division of Water Resources, but not approved, subject to minimum streamflow requirements.

Attch. 1

A check of the records of the Division of Water Resources shows that there were 65 applications to appropriate surface water which were filed prior to January 1, 1984, and which have not been either approved or dismissed. All 65 of these applications would be subject to Senate Bill 497 as written. Of these applications, nine are for municipal use, seven are for industrial use, 31 are for irrigation use, 17 are for recreation use and one is for a combination of stockwatering and recreational use.

Under the Kansas Water Appropriation Act, the priority date of filing is the key date to which all Division of Water Resources policies, regulations and statutory requirements are tied, not the date of the approval of the application. The language, as currently written in Senate Bill 497, would provide no clean cutoff date for ease of administrative purposes, but worse still, it could provide some very arbitrary effects in the actual administration of water rights.

For example, if an application to appropriate water were filed with the Division of Water Resources in September of 1983, had been in proper form and was processed and approved by the Division of Water Resources prior to January 1, 1984, that person would not be subject to the minimum streamflow requirements. If, however, an application were filed by another individual on January 2, 1983, but had not been approved, for any reason, prior to January 2, 1984, and such application was ultimately approved, that person would be subject to the minimum streamflow requirements. This could mean that in the actual administration of water rights in the field that a person with a later priority date might not be shut off during minimum streamflow regulation but a person with an earlier priority date on the same stream might be shut off during the minimum streamflow regulation.

Because the priority date is the key in the Water Appropriation Act to a person's water right, this will be extremely difficult, if not impossible, to explain to water right holders during administration of water on streams.

The retroactive effect of Senate Bill 497, as currently drafted, could be remedied by deleting the phrase "or granted" from line 24 of New Section 1 of Senate Bill 497 and making the bill effective on publication, not January 1, 1984.

This element of retroactivity has two effects. First, it subjects persons to requirements of the law which were not in effect at the time they filed and got their priority dates. Secondly, it could subject this bill to a possibility of being struck down in the courts and thus defeating the whole purpose of the bill. The Division of Water Resources feels the deletion of the phrase "or granted" would not defeat the purpose of the minimum streamflow legislation and at the same time, strengthen the Act against any possible court challenges.

The other effect of Senate Bill 497, which the Division of Water Resources feels should be pointed out, is the openendedness of this statute. It provides that any permits applied for or granted after January 1, 1984, and before July 1, 1988, will forever be subject to any minimum desirable streamflow requirements established pursuant to law by the legislature at any time in the future, whether it be next year or the year 2050. This could have the effect of introducing an almost insurmountable element of instability into the planning of persons wishing to utilize water for beneficial purposes. This might mean that a city or an industry who is deciding whether to appropriate surface water could be extremely reluctant to make a substantial investment during this period of time because they will not be able to predict with any accuracy how reliable the source of surface water supply would be because they will never know what minimum

streamflow requirements will be set by the legislature, if any, or when they will be set. This problem could be alleviated by adding a cutoff date on line 27 of the Bill for minimum desirable streamflow to be established by the legislature.

Another concern with this bill is that K.S.A. 1983 Supp. 82a-711 requires the Chief Engineer to determine whether water is available for appropriation at the time the application is approved. K.S.A. 1983 Supp. 82a-711 currently requires the Chief Engineer to take into account only "established" minimum desirable streamflows. Because under Senate Bill 497, minimum desirable streamflow values will not have been established on many streams at the time applications are processed, it will be difficult to determine whether any water is available for appropriation. The Chief Engineer will not be able to know whether the application should merely be processed with a condition saying that it is junior to minimum desirable streamflow requirements which may be established, or whether the application should, in reality, be denied outright.

Thank you for this opportunity to appear here today and I would be happy to answer any questions you might have.