

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./~~pm~~ on Tuesday, January 31, 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:

Dave Pope, Chief Engineer, Division of Water Resources, State Board of Agriculture  
Clark Duffy, Kansas Water Office

Senator Gordon moved that the minutes of the January 27, 1984 meeting be approved. Senator Roitz seconded the motion, and the motion carried.

Chairman Angell said that the Committee had been asked to introduce a bill concerning notices of proceedings initiated by the State Corporation Commission or the Attorney General. Senator Roitz moved that the Committee introduce such a bill (3 RS 2062). Senator Werts seconded the motion, and the motion carried.

S.B. 555 - Diversion and transportation of water for use in other states

Dave Pope read his written testimony regarding S.B. 555 (Attachment 1). He explained that the bill was brought about by recent decisions of the U. S. Supreme Court and a federal district court concerning interstate transfers of water. S.B. 555 would establish the criteria which would have to be met before the Chief Engineer would grant an application to appropriate water for use in another state. Senator Feleciano asked Mr. Pope about the contract with an Oklahoma rural water district. Mr. Pope said that the City of Coffeyville holds appropriation rights and also has an existing contract for water from the Elk City Reservoir. Coffeyville is not able to utilize all of this water and so wanted to sell some to South Coffeyville and the Oklahoma rural water district. The water would be used basically for residential use. Responding to questions from Senator Feleciano, Mr. Pope said he feels the language in S.B. 555 would provide some protection for the state of Kansas. He stated that the contracting party would know up front that the contract was conditioned. Answering questions from Senator Gannon, Mr. Pope said this bill would not supersede the formulas already in place. He noted that Colorado already has enacted a law which would allow a Kansas irrigator to apply for Colorado water. Responding to questions from Senator Rehorn, Mr. Pope said that this bill only deals with water rights not contracts. He agreed that an appropriation could not be revoked on the basis of Kansas's own economic wellbeing. Senator Rehorn asked if it wouldn't be better to take no action and let a state take the initiative and sue Kansas. Mr. Pope replied that if the matter went to court, Kansas would almost surely lose the case as matters now stand. However, if the statutes define the terms and conditions for an interstate transfer up front, he feels Kansas would have a much better chance of winning a court case. Mr. Pope also pointed out he has the two applications to use water in Oklahoma pending right now and has no authority to either grant or deny them. Answering questions from Chairman Angell, Mr. Pope said that he does not believe Colorado is granting any diversion rights on the Arkansas River but Nebraska is still granting rights.

The Committee discussed the problem with the State of Colorado involving the Arkansas River. it was agreed to have a hearing on the matter on February 21.

S.B. 556 - State water plan storage act amendments

Mr. Pope read his testimony on S.B. 556 (Attachment 1). His remarks were directed to the portion of the bill dealing with increasing from two to four days the notice time to have the Chief Engineer protect flows released under contract.

Clark Duffy testified that the Kansas Water Office supports both S.B. 555 and S.B. 556, both of which were recommended by the Kansas Water Authority. He said the bill provides that surplus waters can be sold at two different rates -- the long-term rate for public health uses and a rate double the long-term rate for other uses. Mr. Duffy explained the provision

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./~~xxx~~ on Tuesday, January 31, 1984  
concerning the interest computations which was requested by the state treasurer's office.

Senator Feleciano moved that the Committee introduce a concurrent resolution concerning minimum desirable streamflows (3 RS 1992). Senator Werts seconded the motion, and the motion carried.

The meeting was adjourned at 8:59 a.m. by the Chairman. The next meeting of the Committee will be at 8:00 a.m. on February 1, 1984.

Senate Energy + Natural Resources

Jan. 31, 1984

Ed Reinert

Cliff Duffy

Mary Ford

Glenn E. Kirk

John Campbell

Rick Kready

Bill Anderson

Chip Wheeler

Richard E. Pol

Doris Dage  
Diane L. Pope

Ks League Women Voters

Kansas Water Office

Ks. Rural Center

U.S. Bureau of Reclamation

KS A.G.

KPL / Gas Service Co.

Water Dist No 1 of So Co.

Ks Legis. Policy Group

DWR - KSBA

Budget

DWR KSBA

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

TO SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

JANUARY 31, 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 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 and that state was the State of Nebraska.

Atch. 1

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 fall in the face of the scrutiny of the United States Supreme Court.

This 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 onimous 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 ground-water unless an adjoining state grants reciprocal right. Because no other state currently has a valid reciprocity statute, the Chief Engineer is essentially prohibited 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 Supreme Court case. If he or she approves the application, he or she would probably get sued because it would be in violation of state law.

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 less than 10 miles.

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

Further, the proposed draft requires that the Chief Engineer 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.

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.

Also in line 174 of this bill, the word "notice" was left out after "four working days."

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