

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./~~p.m.~~ on Friday, February 17, 1984 in room 123-S of the Capitol.

All members were present except:

Senators Richard Gannon (Excused), Francis Gordon (Excused), Paul Hess, Fred Kerr (Excused) and Ed Roitz

Committee staff present:

Ramon Powers, Research Department  
Chris Stanfield, Research Department  
Don Hayward, Revisor's Office  
LaVonne Mumert, Secretary to the Committee

Conferees appearing before the committee:

Attorney General Robert Stephan  
John Campbell, Attorney General's Office  
Dave Pope, Chief Engineer, Division of Water Resources, State Board of Agriculture

Senator Werts moved that the minutes of the February 15 and 16 meeting be approved. Senator Rehorn seconded the motion, and the motion carried.

Attorney General Stephan read his written statement (Attachment 1). He reviewed the history of the Arkansas River Compact and the Arkansas River problem. He said that the preliminary investigation has revealed that Kansas has been denied up to 50,000 acre feet of water per year for most of the last decade and the estimated economic impact to Kansas is two and a half million dollars a year. General Stephan said the state has four options: (1) to do nothing, (2) to pursue binding arbitration, (3) to enter into negotiations, and (4) litigation. He recommends the last three actions. He said he is requested \$65,000 in his proposed budget for the next year to continue expert study on the matter.

Senator Werts asked about U. S. Supreme Court cases similar to the Arkansas River matter. General Stephan said there have been two, one in 1907 which took seven years, and one in 1943 which took 15 years. The second case resulted in the Arkansas River Compact. He noted that there are a lot of lawsuits against Colorado right now. The Trinidad and John Martin Reservoirs are both Corps of Engineers projects. Senator Feleciano questions why Kansas can't exert influence through its congressional delegation, such as Senator Dole, upon the Corps concerning the Arkansas River problem. General Stephan stated that until now they have not had concrete facts and figures to prove Kansas' loss. He said the additional \$65,000 he is requesting would be: \$45,000 to \$50,000 for further work in hydrology, \$5,000 to \$10,000 concerning economic aspects and \$5,000 to \$10,000 for legal review by outside counsel. Senator Chaney questioned why it wouldn't be better to go ahead and file suit and then negotiate with Colorado. General Stephan replied that he thinks it will take another year to get sufficient evidence and that the Supreme Court would be displeased if attempts were not made to negotiate and arbitrate. Senator Chaney asked how much water Kansas is entitled to receive. General Stephan said that Kansas is guaranteed the natural flow without any material depletion.

John Campbell advised that Texas is suing New Mexico on a compact adopted about the same time as the Arkansas River Compact and the subject river shares the same characteristics as the Arkansas River. Hopefully, this case will be completed within a year, and this information could be very helpful to Kansas in its action. Chairman Angell asked if Colorado is still making appropriations along the Arkansas River. Mr. Campbell replied they are not making any surface appropriations but wells can still be drilled under a complicated augmentation plan. Mr. Campbell told the Committee that Colorado will paper-transfer water, that never actually leaves a reservoir, to another reservoir or sometimes a specially created "pool". He said they are able to get records from the Corps and the U. S. Geological Survey, but have difficulty in getting some Colorado records.

General Stephan said he thought Senator Rehorn's suggestion of a joint resolution to the Kansas congressional delegation would be affirmative. Responding to questions from Senator Werts, Mr. Campbell said that a case is initially filed with the U. S. Supreme Court, who refers it to a special master. The special master holds the hearing or trial and then makes recommendations to the Supreme Court. Responding to a question from Chairman Angell, Mr. Campbell said that water courts are a special branch of the Colorado court system. Senator Vidricksen asked if Kansas can sue to recover monetary damages in the matter.

CONTINUATION SHEET

MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources,  
room 123-S, Statehouse, at 8:00 a.m.~~pm~~ on Friday, February 17, 1984.

General Stephan said he had never heard of that being done, but it would be a possibility to consider. The Committee discussed the matter of the Corps' jurisdiction on reservoirs.

David Pope read his written statement (Attachment 2). He supports the Attorney General's request for additional funding for study on the Arkansas River dispute. Answering a question from Senator Rehorn, Mr. Pope said that Colorado's position has been that Kansas has not had sufficient facts to enter into meaningful negotiations.

The meeting was adjourned at 9:04 a.m. by the Chairman. The next meeting of the Committee will be at 8:00 a.m. on February 21, 1984.

# Senate Energy + Natural Resources

Feb. 17, 1984

<u>Name</u>		<u>Organization</u>
Russell & Brites	Allamore	Ks Water Auth.
James P. Sinegan	Topeka	Att. Gen.
John Campbell	LI	AKJ
Joe HARKINS	"	RWD
Rick Kready	"	KPL / Gas Service Co
John Blythe	Manhattan	Ks Farm Bureau
Ed Reinert	Topeka	Ks League of Voters
EDWARD DE KEISER	DEERFIELD	ASSOC. DITCHES
Howard C. Corrigan	Garden City	Div of Water Res.
Adel E. Relf	Topeka	DWR - KSBA
David R. Hays	"	" "
Ralph Dross	St. John	BBGWMD #5
Tom STILES	<del>Topeka</del>	<del>BB</del> KWO
WHITNEY B. DAMRON	TOPEKA	KNRE
Steve Watson	Topeka	Kansas Farmer magazine
Lon STANTON	Topeka	NORTHERN NATURAL GAS
Mary Fund	Whiting	Kansas Rural Center
Ruth Wilkin	Topeka	Girl Scout

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE:

Thank you for this opportunity to appear before the Committee today and present testimony regarding our State's concern over the Arkansas River.

The Arkansas River is an important economic asset to the State of Kansas. The waters of the Arkansas, as they flow across the state line from Colorado, help serve the needs of Kansas agriculture, industry, and municipalities. These waters in western Kansas are appropriated from the surface of the River and the river aquifer, both of which depend on flow coming from the State of Colorado.

The Arkansas has long been recognized as a valuable natural resource worth protecting. In 1948, the states of Kansas and Colorado entered into the Arkansas River Compact, a binding agreement, ratified by Congress, the intent of which was to protect the interests of both states in securing the benefits of the Arkansas. The Compact was the result of five years of negotiation. It followed two United States Supreme Court decisions regarding the river, its development and distribution.

From 1949 to 1974, the Arkansas River Compact benefited both Colorado and Kansas. These benefits were secured in large part thanks to the service of the members of the Arkansas River Compact Administration. However, in 1974, a dangerous trend developed. The amount of water which crossed the state line drastically decreased.

In response to this diminishment of the Arkansas, the office of the Attorney General, in conjunction with the Governor's office, Division of Water Resources, and the Kansas Water Office, began working with the Kansas members of the Compact Administration in order to find a solution to this problem. The result of this cooperation was evidenced by a united front of Kansas officials and private citizens, all working in search of a way to reverse the decline of the Arkansas.

A meeting between the Colorado Attorney General and myself was held, as were Compact Administration meetings, both on a formal and informal basis, all of which sought common ground with Colorado on which to address this problem. Colorado's standard response to the Kansas claims of injury was a request for proof and a denial of guilt.

Thus, it became evident that unless and until Kansas invested sufficient resources, necessary to document its claims of wrongful depletion, a resolution of this problem could not occur. In response, the Legislature last year appropriated money for a water project to be administered through the office of the Attorney General. The primary purpose of this project was to determine whether adequate demonstrable evidence existed showing that a depletion of the waters of the Arkansas River, as measured at the Colorado-Kansas state line, had occurred, and that such depletions were the result of developments within the State of Colorado--developments which would be, in fact, contrary to the provisions of the Arkansas River Compact.

Atch. 1



I am here today to report that the preliminary investigations authorized by the Legislature have been completed. These investigations have revealed the following:

1. For the better part of the last decade, as a result of development in Colorado, Kansas has been denied up to 50,000 acre-feet of water per year, which, pursuant to law, should have crossed into the State of Kansas. This amount of water, considered over a 10-year period, is greater than the total volume of water held in the conservation pool at the largest reservoir in Kansas, Tuttle Creek.

2. The economic impact of this unlawful depletion is being studied. To date, the denial of 50,000 acre-feet of water per year is estimated to cost Kansas economy over two and a half million dollars annually. This figure is based on the very conservative estimate placing the value of water at \$25 an acre-foot. It should be noted this loss is not borne alone by the farmers of western Kansas. The depletion of the Arkansas River has had an economic impact on the personal incomes of not only those engaged in farming, but in manufacturing, construction, energy, transportation, wholesale and retail sales, as well as the service industries. The unlawful depletion of the Arkansas River over the past decade represents the potential loss of tens of millions of dollars to the Kansas economy.

The studies conducted to date are a beginning; however, much more needs to be done. But, in the final analysis, studies are only useful if they are a prelude to action. Based on the studies in hydrology, economics, combined with the legal analysis of this office, today, I believe the State now has before it four options regarding future action or inaction on this matter.

The first option is to acquiesce to Colorado's depletion of the Arkansas River. We, as a state, can ignore this situation. I would strongly urge that the Legislature not adopt this option. The cost on the Arkansas River alone would be millions of dollars. The message sent not only to Colorado, but to other states, with which we have now, or may in the future have, interstate water compacts would be disastrous.

The second option is to pursue binding arbitration which is specifically provided for in the Compact. Armed with new information, it may well be that this process will become acceptable to Colorado. The advantages of arbitration includes speed, lessening of expense, and a general approval by the United States Supreme Court. However, it should be noted that Kansas cannot force Colorado into binding arbitration. Neither could an arbitration decision be directly enforced. But, arbitration could lead to meaningful negotiations. Furthermore, the facts proved within the arbitration process constitute prima facie evidence in court. This could be very important in future litigation. I would recommend this option be explored to its fullest extent. But, this option, binding arbitration, by itself, is not enough.

The third option is to enter into negotiations. Working with the Compact Administration, the officials of both Kansas and Colorado could meet and attempt to resolve differences between the two states. Negotiations could

either be a substitute for or supplement to the arbitration process. However, like arbitration, negotiations by themselves would not, in my opinion, prove effective. I would recommend that the negotiations option be explored to its fullest extent, in conjunction with the arbitration process and the fourth option available to the State of Kansas--litigation.

The option of litigation is available to the state. In my opinion, based on recent United States Supreme Court decisions, Kansas could file suit in the Supreme Court of the United States. Furthermore, if sufficient evidence is gathered as to the cause and extent of Colorado's depletion of the Arkansas River and its economic impact on this state, which corroborates the findings of fact made as of today, I believe we would win such a court battle. There are drawbacks to litigation. Litigation is costly and time-consuming. The Court has expressly stated that negotiations are preferable to litigation in the resolution of interstate water disputes. It is my recommendation that the option of litigation be held temporarily in reserve, but with the express understanding that if the options of arbitration or negotiations fail, that suit will be filed against Colorado in the Supreme Court of the United States. I believe that only if Colorado is convinced we are serious about the Arkansas River, serious enough to invest the time and resources necessary for a successful litigation before the United States Supreme Court, that the options of arbitration or negotiations can have a chance at success.

The resolution of interstate water disputes is a complicated and often costly pursuit. The Attorney General's office stands ready to work with the Governor, the Legislature, the Division of Water Resources, the Kansas Water Office, and the Compact Administration in seeking a successful resolution to the depletion of the Arkansas River. However, my office, even in conjunction with the other agencies named, must have the support of the Legislature. Without legislative support, the prospects of a successful resolution of the Arkansas River problem are very dim.

In my proposed budget for the next fiscal year, I am requesting \$65,000 in order to continue expert study into the specifics of this matter. In addition, our budget request will provide funds for the continuation for legal assistance and support of the Kansas position on the Arkansas.

## CONCLUSION

Today, I am requesting the support of the Committee to continue the work already begun. The Arkansas River is an asset worth millions to the State of Kansas. More importantly, it is symbolic of the water crisis which currently faces the western portion of the United States. Without legislative support, the full rights of the State of Kansas to its water resources cannot be protected against the increasingly fierce competition of other states.

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

TO SENATE ENERGY & NATURAL RESOURCES COMMITTEE

FEBRUARY 17, 1984

RE: POSSIBLE LEGAL ACTION TO RESOLVE THE KANSAS-  
COLORADO DISPUTE ON THE ARKANSAS RIVER

Mr. Chairman and members of the Committee, thank you for this opportunity to comment on the report presented to you by Attorney General Robert Stephan this morning.

I have reviewed the Preliminary Assessment of the Development and Administration of Water Resources of the Arkansas River prepared for the Office of the Attorney General by Simons, Li & Associates, Inc.

As most of you are aware, the increasing lack of adequate water in the Arkansas River Valley has been of great concern to me and the Division of Water Resources for a number of years. That concern has been reflected by past actions of the Division of Water Resources. In 1977, the Chief Engineer declared a moratorium in the Arkansas River Valley in Hamilton and Kearny Counties, Kansas, suspending any new development of groundwater resources. This moratorium was established so that a study could be made by the U.S. Geological Survey. This study and report was completed last fall. Since that time, I have been working with the Southwest Kansas Groundwater Management District No. 3 concerning what future course of action to take in this area.

As a result of these negotiations, the District has forwarded a request to our office for initiation of proceedings to designate an intensive groundwater use control area in all of the Arkansas River Valley within District No. 3. In the very near future, I will be initiating proceedings to designate an

*Attch. 2*

intensive groundwater use control area in that portion of the Arkansas River Valley in Hamilton County, which is outside District No. 3, and in that portion of the Arkansas River Valley which lies in Kearny, Finney, Gray and Ford Counties inside Groundwater Management District No. 3.

I am very pleased that the legislature has recognized the concerns about the decreasing water supply in the Arkansas River Valley and, as a result, did fund the study which has been reported to you here today.

I feel the Arkansas River Compact has provided numerous benefits to the State of Kansas and set standards which establish the amount of water to which Kansas is entitled. But, standards are of no benefit if they are not adhered to or enforced.

Starting back in 1980, the Kansas members of the Arkansas River Compact began to formally raise various issues concerning possible violations of the Compact by the State of Colorado. No Compact actions are possible without unanimous agreement of both the States of Kansas and Colorado. To date, Colorado has resolutely refused to enter into any meaningful negotiations, or to even send the matter to arbitration. Colorado has stated there are no factual issues to arbitrate and that they will not arbitrate legal issues. Early last year, Colorado basically told the State of Kansas if they wanted any more water than they were getting, they would have to sue the State of Colorado.

The report you have before you here today is a preliminary report and contains a preliminary factual analysis of the situation. Although I feel it is an excellent report, I feel that before the State of Colorado might be willing to enter into any meaningful negotiations or before a lawsuit could be filed against the State of Colorado, it is necessary that additional hydrologic engineering and legal study be made in this matter. I feel this report confirms the State of Kansas' earlier concerns that Kansas may not be getting all the water to which it is entitled. On that basis, I feel that further study is warranted.



As the Chief Engineer of the Division of Water Resources, which is responsible for administration of water rights in the State of Kansas, and as a member of the Arkansas River Compact Administration, I hereby recommend the legislature fund additional hydrologic engineering and legal study into the Kansas-Colorado Arkansas River dispute during the next fiscal year.

Of course the question you are probably all thinking is--why should the State of Kansas spend money on this issue?

In addition to the direct benefits of surface water irrigation in Hamilton, Kearny and Finney Counties, other benefits the State of Kansas might realize would be: (1) augmented streamflow which would benefit fish and wildlife habitat, (2) recharge to the alluvium and Ogallala aquifers through the streambed of the Arkansas River, (3) recharge to these aquifers in the area where the water is used for irrigation purposes, (4) direct benefit to the State of Kansas in terms of increased property, sales and income taxes, (5) preservation of water in storage in the Ogallala Aquifer for future years, and last, and perhaps most important, (6) preventing the State of Colorado from allowing this situation to become worse than it is now. If the State of Kansas sends the signal to Colorado that Kansas is not willing to stand up for its fair and equitable share of the Arkansas River, state line flows could decrease even further.

I feel that it is critical that the State of Kansas immediately send a strong, unequivocal message to the State of Colorado that Kansas is willing to do whatever is necessary to ensure that the State of Kansas receives its fair and equitable share of the waters of the Arkansas River to which it is entitled under the terms of the Arkansas River Compact. This message can be sent by funding the additional study and research necessary to substantiate the State of Kansas' claims that the provisions of the Arkansas River Compact have been, and are being, violated. I therefore support the Attorney General's request for funding for this work.

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