

Approved 2-12-85
Date

MINUTES OF THE Joint COMMITTEE ON Energy and Natural Resources

The meeting was called to order by Representative Ron Fox at
Chairperson

3:30 ~~am~~/p.m. on January 23, 1985 in room 313-S of the Capitol.

All members were present except:
Senator Ben Vidricksen - Excused
Senator Eric Yost - Excused

Committee staff present:
Ramon Powers - Research Department
Don Hayward - Revisor's Office
Nancy Jones - Committee Secretary

Conferees appearing before the committee:
Joseph F. Harkins - Director, Kansas Water Office

Minutes of the meeting as drafted by the House Committee are attached.

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.

MINUTES OF THE JOINT COMMITTEE ON ENERGY AND NATURAL RESOURCES

The meeting was called to order by Representative Ron Fox at
Chairperson

3:30 ~~4:30~~ p.m. on January 23, 1985 in room 313-S of the Capitol.

All members were present except:

All members were present.

Committee staff present:

Ramon Powers, Legislative Research
Raney Gilliland, Legislative Research
Theresa Kiernan, Revisor of Statutes' Office
Don Hayward, Revisor of Statutes' Office
Nancy Jones, Senate Committee Secretary

Betty Ellison,
House Committee Secretary

Conferees appearing before the committee:

Joseph F. Harkins, Director, Kansas Water Office

The meeting was called to order by Chairman Ron Fox. He asked that committee members defer questions until a later time if possible in order to cover the planned agenda.

Mr. Harkins, Director of the Kansas Water Office, discussed a number of recommendations listed in the Kansas Water Plan. Topics reviewed included reservoirs, water management, small lakes, minimum desirable streamflows, urban and rural flood management. Regarding large reservoir management, Mr. Harkins called attention to drought contingency plans as well as an assurance program which would provide access to water during drought and expanding capacity of present reservoirs. The proposal recommended buying storage rights in federal reservoirs while chances of getting a favorable price are greater; however, space would not be bought without a signed contract to assure a firm commitment from a purchaser for the water. Chairman Fox asked Mr. Harkins to provide an overview of the federal government's policy regarding this matter for the Joint Committee.

A slide presentation entitled, "The Story of Water and Watershed Projects" was shown, followed by discussion of policy recommendations regarding the multipurpose small lakes program.

Brief questions were answered following some of the recommendations under consideration.

The meeting was adjourned at 5:10 p.m.

The next joint meeting of the Senate and House Committees on Energy and Natural Resources will be held on January 24, 1985 at 3:30 p.m. in Room 313-S.

Joint Briefing on State Water Plan

Tuesday, January 22nd

<u>Time</u>		<u>Conferee</u>
3:30	1. History of Kansas Water Planning A. Proposal #23	Harkins
3:45	2. Planning Process and Purpose A. Coordination B. Continuous C. Comprehensive	Harkins
4:15	3. Hydrologic Concepts A. Hydrological Cycle	Harkins
4:45	4. Appropriation Act A. Riparian Doct. B. Appropriation Doct.	Pope
5:15	5. Management Section A. Missouri River Management B. Southeast Mining Pollution	Harkins

Wednesday, January 23rd

3:30	(Management Continued) C. Large Reservoir Management D. New Reservoirs E. Water Marketing F. Large Reservoir Finance G. Small Lakes Program H. Minimum Desirable Streamflows I. Urban Flood Management J. Rural Flood Management	Harkins Harkins & Stiles
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ATTACHMENT 1

Thursday, January 24th

Time

Conferee

3:30 (Management Continued)

K. Local Planning

L. Research

4:00

M. Water Authority Report to Legislature

Martin

N. Committee Chairmen Statements

-- Federal and State Affairs

Alexander

-- Management

Rahjes

-- Conservation

Knight

-- Quality

Abramson

-- Research

Shore

-- Development

Hambleton

-- Minimum Streamflow

Binder

4:45 Conservation

Harkins

A. Agricultural Conservation

B. Municipal Conservation

C. Industrial Conservation

Monday, January 28th

3:30 Quality

A. Existing Policy

Harkins

B. Organic Chemicals in Drinking Water

C. Public Water Supply Protection (Small Impoundments)

D. Public Water Supply Protection (Aquifers)

E. Agriculture Runoff

F. Oil & Gas Regulatory Program

G. Countywide Water/Wastewater Plans

H. New Subdivision Water and Wastewater Plans

I. Groundwater Information System

J. Mineral Intrusion

4:45	Development	Harkins
	A. Basin Guidelines	
	B. Basin Planning	
5:00	Fish, Wildlife, Recreation	Harkins
	A. Planning Schedule	
5:15	Summary - Kansas Water Plan	

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

TO JOINT COMMITTEE OF SENATE AND HOUSE ENERGY AND NATURAL RESOURCES
JANUARY 22, 1985

Chairman Werts, Chairman Fox and Members of the Joint Senate and House Energy and Natural Resources Committee. I appreciate the opportunity to appear before you to discuss the administration of water law in Kansas and how our statutes evolved historically as compared to the current system.

The State of Kansas historically has used two differing approaches to water resources administration, these are (1) the common law or riparian doctrine and (2) the appropriation doctrine.

The common law or riparian doctrine was created as part of the Old English Common Law, and was brought to Kansas by the early settlers from England, as they sought to establish blanket adoption of general laws.

The basic principle of the common law doctrine, as applied to streams, was based upon location. It stated that each person owning land upon a stream shall have the right to have such water continue to flow past his land undiminished by any use, other than domestic and stockwatering. Significant withdrawals for beneficial consumptive use, such as irrigation or municipal supply, were forbidden under this method until the courts relented and began to recognize that each riparian owner could take stream water for use upon his land as long as he wasn't wasteful, and as long as his diversion and use were reasonable with respect to other riparian owners on the same stream. However, the circumstances of each individual case determined whether the diversion and use of each riparian owner with respect to others was reasonable. This approach caused uncertainty to the riparian owners in the quantity he or she would be entitled

ATTACHMENT 2

to use. As new diversions were added, the water supply for individual users was diminished into unusably small quantities or rates.

In the administration of groundwater, special rules were developed to discriminate between "underground streams" and "percolating water". Underground streams were viewed by the courts as surface streams and the riparian doctrine was applied. In the case of "percolating water", the courts applied the English or common law rule of absolute ownership. This rule was based on the legal maxim: "to whomsoever the soil belongs, he owns also to the sky and to the depths." Thus the landowner could take as much of the "percolating water" as he wanted regardless of the effect on his neighbors. The State of Texas still uses the absolute ownership concept for groundwater.

The courts in the midwest realized the common law rule of absolute ownership was not workable, and chose to follow the fundamental maxim that a man must use his property in such a manner as not to injure that of another. This approach was referred to as the "American" or reasonable use doctrine, and stated that a landowner had no absolute property right to underground percolating water. Rather that his right was to a reasonable, beneficial use with respect to the other landowners through whose lands the water percolated. The State of California has adopted this doctrine into an elaborate system of rules, and refer to it as the correlative doctrine.

The second approach to water administration, the prior appropriation doctrine, has its origin in the laws of Imperial Rome. This doctrine was incorporated into the Southwestern United States by the Spanish emigrants who moved to that area. In 1620, when the Pilgrims landed at Plymouth Rock, such towns as Taos and Santa Fe, were the political and commercial centers of the western area. The customs and laws of this western area concerning water and water rights had as its background the old Roman water law, and such influence existed when the western states were created.

In addition, the settlers moving west soon realized that the English common law and the riparian doctrine was inappropriate for the arid and semi-arid west. Water was frequently in short supply and it was necessary to divert and store water when it was available because there was not sufficient water available for all users during a drought or even during the summer after the streamflow had receded after the spring snowmelt. They also felt those persons who constructed dams, canals and other works for the diversion of water were entitled to protection for their investment and hard work against a person coming along at some later time and cutting off the water upstream. Currently, the appropriation doctrine is used almost exclusively for surface water administration in the 17 western states and many of the same states for groundwater administration.

Consequently, the doctrine of prior appropriation is based upon the time of use and the actual application of water to beneficial use without regard to the ownership of land contiguous to the stream or overlying the aquifer which is a major limitation with the riparian doctrine. An appropriation right pertains to the watercourse or groundwater source of supply and is a right to the use of the water from such source, not ownership of the water itself. This doctrine considers the quantity of water applied to any beneficial use. Beneficial uses in Kansas include domestic, municipal, irrigation, industrial, recreation, water power, stockwater and artificial recharge.

The basic concept here is briefly translated as "the first in time, first in right". The holder of an earlier priority appropriation may continue to divert from a source when the naturally available water supply becomes insufficient for all those holding rights. As the volume of a stream drops, the diversion gates are closed in reverse order of their priorities, and as the stream volume increased the gates are opened in the order of priority.

The prior appropriation doctrine also establishes the concept of public ownership of water, subject to the control and regulation of the state. Upon proper authorization from the state, a permit is issued to the individual allowing the diversion of a fixed quantity of water from a source, either surface water or groundwater, when all senior water rights have been satisfied. This property right attaches to a particular parcel of land for the authorized purpose. The right transfers with the land when the ownership changes unless specifically withheld. The location of the diversion, the place of use and/or the purpose of use may be changed by following statutory procedures as long as it does not adversely affect the holder of any other water right.

Kansas adopted the common law or riparian doctrine approach at its first territorial Legislature in 1855. However, the pure application of this doctrine did not provide for any beneficial consumptive use of water, so as settlers moved west to the more arid portions of Kansas, the 1866 session of the State Legislature recognized irrigation as a viable and necessary use of the water of the state. In 1876, the Legislature passed an act designed to protect the investments made and uses established against future depletion, and established the rule of priority of right. It was under these acts that the five large irrigation canals to divert water from the Arkansas River in Finney and Kearny Counties were built, the first of which was started in 1879.

In 1917, the Legislature took action to establish an administrative agency to have control over the appropriation and use of water. This later resulted in the establishment of the Division of Water Resources of the Kansas State Board of Agriculture in 1927.

While the courts had recognized the existence of the common-law doctrine of riparian rights, several acts of the Legislature authorized the prior appropriation doctrine in Kansas, and the Supreme Court agreed that both could exist in the same state.

However, due to a 1944 court decision that severely limited the authority of the Division of Water Resources, then Governor Schoeppel appointed a committee to study the state water laws and make recommendations to the Governor and Legislature.

Based upon the committee's recommendations, the Kansas Legislature in 1945 took effective action to bring common-law water rights under public control and established an orderly system for the appropriation and use of water which would suit the needs of a developing state and be more suited to the hydrological conditions that existed in Kansas.

The purpose of the act was to strengthen the appropriation doctrine in Kansas and to reduce the advantage of location of lands riparian to surface streams and overlying ground waters as against appropriations of water for beneficial use on non riparian and non overlying lands.

The action was effective, because the validity of the legislation was sustained by the Kansas Supreme Court on all points considered in a 1949 case. The act was further upheld as constitutional by a Federal District court and the U. S. Supreme Court in 1956. The act, and subsequent amendments, has been upheld by two additional important cases by the Kansas Supreme Court in 1962 and 1981.

With the adoption of the Kansas Water Appropriation Act in 1945, all water within the State of Kansas was dedicated to the use of the people of the state subject to the control and regulation of the state in the manner provided in the statutes. The Chief Engineer, Division of Water Resources, Kansas State Board

of Agriculture, is charged by the Kansas Water Appropriation Act to enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources in the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation. Important amendments were made to the act by the 1957, 1977 and 1980 sessions of the Legislature.

The Kansas Water Appropriation Act provides for the establishment of vested rights to continue the use of water having actually been applied to any beneficial use, including domestic use, on or before June 28, 1945, to the extent of the maximum quantity and rate of diversion made thereof. These vested rights are a recognition of the common law rights that existed prior to the adoption of the Appropriation Act. These rights are considered equal in priority unless adjudicated by the courts. Except as otherwise provided by the act and subject to vested rights and water withheld from appropriation for the establishment of minimum desirable streamflows, all waters within the state may be appropriated for beneficial use. As between persons with appropriation rights, the first in time is the first in right. The priority of the appropriation right to the use of water for any beneficial purpose, except domestic purposes, shall date from the time of filing of the application in the office of the Chief Engineer. The priority of the appropriation right for domestic purposes shall date from the time of filing of the application or from the time the user makes actual use of water for domestic purposes, whichever is earlier. An application for a permit to appropriate water is approved and a permit issued if the proposed use will not impair a use under an existing right nor prejudicially and unreasonably affect the public interest and provided that the proposed use is reasonable for the intended use. In addition, the Chief

Engineer shall not approve any application for the proposed use of fresh water where other waters are available for the proposed use and the use is technologically and economically feasible. If a permit is issued for the proposed use, a water right may be perfected by completion of the diversion works and the application of water to the proposed beneficial use in accordance with the terms, conditions and limitations of the approval of application.

Since June 28, 1945, the Division of Water Resources has been primarily involved with the determination of the existence of vested rights, processing of applications for permit to appropriate water, determining the extent that rights have been perfected in accordance with permits issued, handling impairment complaints or complaints regarding waste of water and administering water rights on streams in the State of Kansas during times of shortage. Existing water rights are regulated in accordance with their relative priorities on several streams, especially in central and western Kansas, each year during periods of low flow.

While the 1945 act provided a procedure for a person to acquire the right to the use of water, it did not require a person to have a permit prior to the actual use of water. For the first time, on January 1, 1978, it became illegal in the State of Kansas, except for domestic use and other minor exceptions, for anyone to divert water for any beneficial purpose, or to threaten to do so, without the prior written approval of the Chief Engineer, Division of Water Resources. The enactment of this statute changed our role from an administrative one to a regulatory one. Since 1978, there has also been a shift in philosophy concerning the utilization of water in Kansas. Kansas has evolved from the development of new water resources to a time of conservation, management and regulation because many areas in the state have been fully developed.

The number of new applications for permit to appropriate water has fallen in recent years due to high energy costs to pump water, high interest rates, the general state of the economy, especially in agriculture, and the limited supplies of water left to be developed in many areas along with tighter regulations by the Division of Water Resources throughout many parts of the state. This has been done in conjunction with the groundwater management districts where they have been organized in the western part of the state overlying large groundwater supplies such as the Ogallala Aquifer. However, while the numbers of new applications are down, a more detailed review of new applications is necessary due to the fact that many water supplies are fully developed or are nearing full development and it is more difficult to determine the effect the proposed appropriation will have on existing water rights. In addition, minimum desirable streamflow requirements adopted as a part of the State Water Plan for various streams in Kansas, make it necessary for the Division of Water Resources to determine the effects of proposed appropriations on these streamflow requirements. Special studies conducted by our staff in the last couple of years have allowed us to develop specific policies to deal with the complex interrelationship of groundwater and surface water in many of the alluvial river valleys of the state. Thus far, policies totally prohibiting or limiting new appropriation of surface water and groundwater have been adopted for 14 stream systems in central and western Kansas and some eastern Kansas streams.

The Division of Water Resources also has responsibility to protect water releases under contract from reservoirs against unlawful diversion except for natural losses if the natural stream or river is used to transport such water to a water user downstream. This will become a much more extensive responsibility as more contracts are signed for the sale of water from state controlled storage in federal reservoirs under the water marketing program.

In addition to the provisions of the Kansas Water Appropriation Act, the Division of Water Resources has certain responsibilities that may be exercised by the establishment of intensive groundwater use control areas. Within a groundwater management district, proceedings for the designation of an intensive groundwater use control area may be initiated by the Chief Engineer upon request of the Board of Directors of the District or by petition of the eligible voters of a groundwater management district. Outside areas of groundwater management districts, such proceedings may be initiated by the Chief Engineer. After the proceedings are initiated for designation of an intensive groundwater use control area, the Chief Engineer is required to hold a hearing and determine whether or not the area should be designated as an intensive groundwater use control area and whether special control provisions are necessary to protect the public interest. The provisions for designation of an intensive groundwater use control area provides considerable latitude for the state and groundwater management districts to address problems related to water level declines or deterioration of the quality of water in a particular area. Thus far, four such areas have been designated and two more are pending.

These control areas have typically resulted in closing the areas to further appropriation of groundwater, mandatory metering, and, in some cases, more strict limits on the amount of water which may be used by existing holders of water rights.

In summary, the Kansas Water Appropriation Act provides a basic framework of water law in Kansas which allows water users the right to the use of water in accordance with the principle of the prior appropriation doctrine. The statute makes it unlawful for any person to appropriate or threaten to appropriate water for beneficial use without receiving approval of the Division of Water Resources, Kansas State Board of Agriculture. The statutes also provide for a

mechanism for administration of water rights during times of shortage. In addition, the Kansas Groundwater Management District Act has provided the mechanism for organization of groundwater management districts in Kansas to allow the local landowners and water users to determine their own destiny with respect to the use of water so long as it does not conflict with the basic laws and policies of the State of Kansas. At the current time five such groundwater management districts have been organized which cover major aquifer systems in the western and south central portions of the state. Each of these districts has adopted a management program for their district and have recommended rules and regulations to the Division of Water Resources which have been adopted for its area.

While time will not permit the detailed discussion of the many other duties of the division, I would simply point out that we do administer over 20 other statutes relating to water resources management including laws dealing with interstate river compacts, the construction of dams, channel modifications, construction of levees, drainage problems, watershed projects, floodplain management and water transfers.