

MINUTES OF THE SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES

The meeting was called to order by Senator Merrill Werts at
Chairperson

8:00 a.m./~~p.m.~~ on April 1, 1986 in room 123-S of the Capitol.

All members were present except:

Committee staff present:

Ramon Powers - Research
Don Hayward - Revisor
Nancy Jones - Secretary

Conferees appearing before the committee:

Joe Harkins - Kansas Water Office
David Pope, Chief Engineer, Board of Agriculture
Richard Simms, Special Assistant, Attorney General, Counsel of Records
John Campbell, Attorney General's Office
Lee Rolfs, Attorney, Board of Agriculture

A motion was made by Senator Gordon to approve minutes of the March 25, 26 and 27 meetings, seconded by Senator Hayden. Motion carried.

HB 3074 - Concerning weather modifications

Joe Harkins explained the purpose of the bill is to allow renewal of permits for weather modification activities without the necessity of a public hearing in the area affected. A proposed amendment for language clarification was read by Chairman Werts. (Attachment A).

Motion was made by Senator Hayden to amend HB 3074, seconded by Senator Vidricksen. Motion carried.

Motion was made by Senator Hayden to recommend favorably HB 3074 as amended, seconded by Senator Vidricksen. Motion carried.

HCR 5048 - Memorializing the Kansas Water Office

Joe Harkins stated the purpose of this legislation is initiation of association with Missouri in a compact to deal with flooding problems in the Kansas City area.

Motion was made by Senator Vidricksen to recommend HCR 5048 favorably for adoption, seconded by Senator Langworthy. Motion carried.

David Pope appeared before the committee to present a briefing on the current status of the Arkansas River controversy with Colorado. A compact was formed between the two states in 1949 for the alleviation of disputes and to insure the equitable division and apportionment of the water in the Arkansas River. A key phrase in the compact allows beneficial development provided the waters of the Arkansas River are not materially depleted in usable quantity and availability. Construction of the John Martin Reservoir was to provide conservation benefits to both states, but state line flows have diminished since the 1970's. This concern initiated correspondence between legal entities with formal investigations started in Kansas, which led to a suit being filed in the U.S. Supreme Court. This litigation is important to force the return of state line flows of the Arkansas River and to prevent further depletion of the river flow into Kansas. A resume of the legal steps and procedures on this litigation was given by Mr. Pope. Alleged violations by the state of Colorado were discussed in detail with reference to the Trinidad and Pueblo Reservoirs being part of the stream flow depletion, with questionable storage policies practiced by Colorado. Complaints by Kansas have gone unanswered and Colorado continues to operate its reservoirs and the stream flow independently. (Attachment B).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES,
room 123-S Statehouse, at 8:00 a.m./~~p.m.~~ on April 1, 1986.

Richard Simms stated the Colorado law has been defined by the Colorado Water Administrators and the Colorado Courts to favor the upstream state, although the U.S. Supreme Court ruled states cannot define the law in this manner. Relationship with the Corp of Engineers and Bureau of Reclamation with regard to water rights, storage and stream flows was clarified. Complications and problems of water transfers in the Trinidad and Model Reservoirs were outlined. Mr. Simms reviewed the procedures for the impending court trial before the Special Master to be appointed, and estimated the trial could commence in six months and take two to four months. He further stated the result of overuse of the Arkansas River water by Colorado has improved its economy which in turn demands continued overuse and creates an accelerated effect upon water supply for Kansas. Conversely there has been a depredation of water supply which could be worth an estimated 100 million dollars per year to the state. In the discussion, Mr. Pope reviewed the water flow history since the construction of the Trinidad and Pueblo Reservoirs during the '70's. Since that time, state line flow has been lowered, affecting the depletable water supply of Kansas. With enforcement of the Compact laws, streamflow would again provide a viable water supply, recharge of the alluvium will occur and there will be less reliance on wells. The renewable water source must be maintained now to avoid adverse economic problems.

Meeting adjourned. The next meeting is April 2, 1986.

Guest List
4-1-86

Richard C. Rolf	DWR- KSBA	Topeka, Ks
Wayland J. Anderson	DWR- KSBA	Topeka, Ks
Joe Harbison	KWU	TOPEKA
Ed Reinert	Ks League ^{women} voters	Topeka
RICHARD SIMMS	Hinkle, Coy, Eaton, et al.	Santa Fe, N.M.
CR Duffly	KWU	Topeka
Jan Johnson	Budget Division	Topeka

Proposed Amendment to HB 3074

On page 1, after line 19, by inserting a new section to read as follows:

"Section 1. K.S.A. 82a-1402 is hereby amended to read as follows: 82a-1402. As used in this act, unless the context otherwise requires: (a) "Board" means the Kansas water resources board office;

(b) "Director" means the executive director of the Kansas water resources-board office;

(c) "Person" means and includes a natural person, a partnership, an organization, a corporation, a municipality and any department or agency of the state;

(d) "Research and development operation" or "research and development project" means an operation which is conducted solely to advance scientific and technical knowledge; and

(e) "Weather modification activity" means any operation or experimental process which has as its objective inducing change, by artificial means, in the composition, behavior, or dynamics of the atmosphere.";

By renumbering existing sections 1 to 3, inclusive, as sections 2 to 4, respectively;

On page 3, in line 100, by striking "82a-1411 is" and inserting "82a-1402 and 82a-1411 are";

In the title, in line 17, after "K.S.A." by inserting "82a-1402 and"; in line 18, by striking "section" and inserting "sections"

4-01-86
S. ENR

(A)

Presentation by

David L. Pope, Chief Engineer-Director
Division of Water Resources
Kansas State Board of Agriculture

before

Senate Energy and Natural Resources Committee

Re:

Status of the Arkansas River Controversy with Colorado

April 1, 1986

Thank you, Chairman Werts, and members of the Committee, for extending this invitation to us to appear and brief you concerning the current status of the Arkansas River controversy with Colorado.

I have with me Mr. Richard Simms, Special Assistant Attorney General and Counsel of Record in the law suit against Colorado; Mr. John Campbell, Special Assistant Attorney General from the State of Kansas who has been assigned to this law suit; and Mr. Leland E. Rolfs, Legal Counsel and Special Assistant with my office.

I am appearing today to report to you on the status of the Arkansas River controversy as the Ex Officio Member of the Kansas Compact delegation and the Kansas representative to a committee appointed by the Compact Administration to formally investigate the alleged violations of the Compact pursuant to Article VIII H of the Compact on March 28, 1985. First, I feel a little background information concerning this law suit would be in order.

The Arkansas River Compact, entered into between the States of Kansas and Colorado on December 14, 1948, and approved by Congress on May 31, 1949, was for the purpose of settling disputes and removing causes of controversy between Colorado and Kansas concerning the waters of the Arkansas River and their control, conservation and utilization. The Compact also had as its purpose to

4-01-86
S. ENR

(B)

D

equitably divide and apportion the waters of the Arkansas River, and their utilization, as well as the benefits arising from the construction and operation of John Martin Reservoir for water conservation purposes. The States of Kansas and Colorado entered into the Arkansas River Compact after two extensive law suits before the U. S. Supreme Court during the period 1901 to 1943.

The Arkansas River Compact specifies that it is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas which may involve construction of dams, reservoirs and other works for the purposes of water utilization and control provided that the waters of the Arkansas River shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas by such future development or construction.

John Martin Reservoir was constructed during the 1940's and was viewed as providing conservation benefits that could be shared by the two states and result in more usable water for both states. Releases from conservation storage in John Martin Reservoir are based upon an apportionment of 60% to Colorado and 40% to Kansas.

The Arkansas River Compact Administration, which consists of three appointed representatives from each state and a federal nonvoting chairman, has generally been successful in providing effective utilization of John Martin Reservoir for the benefit of both states. However, in the 1970's it became apparent that Kansas was not receiving the amount of water that had normally been available prior to that time. A U.S. Geological Survey study shows that stateline flows decreased about 60% from an average of 232 cfs during 1951-69 to an average of 85 cfs during 1970-79. The Kansas Report to the Compact Administration regarding the Article VIII H Investigation, dated September 4, 1985, showed that usable stateline flows dropped from an average of 121,300 acre-feet

per year during the period 1949 to 1973 to an average of 72,600 acre-feet per year during the period 1974 to 1984.

The State of Kansas believes that some water development projects in Colorado are being operated in violation of the terms of the Compact. These include the way in which water is stored in Trinidad and Pueblo Reservoirs, both constructed since December 14, 1948, and the effect of about 1400 post compact wells pumping from the alluvium of the Arkansas River system.

These concerns were brought to the attention of the State of Colorado by the Kansas representatives on the Compact. The Kansas State Attorney General was asked to assist with the resolution of the matter. After an exchange of correspondence between the Attorneys General of Kansas and Colorado, and a meeting between them, the Attorney General of the State of Colorado insisted on documentation of how the State of Colorado was materially depleting the stream-flows of the Arkansas River.

The State of Kansas subsequently initiated an extensive preliminary engineering and hydrologic study of the extent of the depletion and the general causes therefore. This report was furnished to Colorado and after a series of special Compact meetings the matter came to a head on March 28, 1985.

On March 28, 1985, the Arkansas River Compact Administration initiated a formal administrative investigation pursuant to Article VIII H of the compact. The purpose was to promptly investigate allegations of Kansas and Colorado concerning violations of the Compact. This investigation continued throughout the remainder of calendar year 1985 involving much hydrologic and engineering study by both states and monthly meetings of the VIII H Committee Members. While the investigation did proceed into investigating some of the allegations of Compact violations by Kansas and accumulating invaluable data, Colorado effectively refused to make any meaningful investigation of most of Kansas'

complaints, including the depletion of the waters of the Arkansas River by alluvial wells drilled subsequent to the date of the Compact.

Finally, after exhausting all administrative remedies, the Attorney General of Kansas filed suit against Colorado in the United States Supreme Court on December 16, 1985. The United States Supreme Court is the only Court which can take jurisdiction of law suits between two states. The procedure for filing an original action in the United States Supreme Court is different than any other court. Instead of simply filing a complaint and having its legal sufficiency challenged by a motion to dismiss or by affirmative defenses in an answer, the initial complaint is submitted along with a motion for leave to file the complaint, pursuant to Rule 9 of the Supreme Court Rules.

The purpose of the motion for leave to file is to provide the Court with an opportunity to review its self-imposed restrictions on the acceptance of jurisdiction in an original action, one of which is that the Court will not entertain an otherwise justiciable controversy between the states when an alternative forum or an administrative remedy is available to the plaintiff state.

On February 14, 1986, Colorado filed its Brief in Opposition to Motion for Leave to File Complaint asserting that the Arkansas River Compact Administration had not had a reasonable opportunity to investigate Kansas' allegations, and the Court should decline to accept the case pending a continued investigation by the Administration.

Kansas subsequently filed two responses to Colorado. The first was a Motion for Leave to File Complaint or Alternatively to Compel Compliance with Administrative Investigation Pursuant to Article VIII H of the Arkansas River

Compact (March 3, 1986) and a Reply Brief and Brief in Support of the Alternative Motion dated March 4, 1986. The essence of these responses was that the Court should either take the case or compel Colorado to complete a thorough investigation under Article VIII H within a time certain.

On March 12, 1986, Colorado responded to Kansas' alternative motion. Because of the gross distortion of facts by Colorado, Kansas was forced to file another brief in support of its position on March 18, 1986.

The Court took up these motions and replies at its regular Friday conference on March 21, 1986. At 10:00 a.m. on Monday, March 24, 1986, the Supreme Court announced that it had granted Kansas' Motion for Leave to File. The Supreme Court will hear and decide the case. Poutin
See

What I would like to stress here is that between December 16, 1985 and March 18, 1986, about three months, the State of Kansas had to file four documents with the U.S. Supreme Court. This work was demanding, not only because of the time involved, but because of the extremely tight deadlines. In one case Colorado's brief was received on Wednesday and Kansas had 60 printed copies of its response at the United States Supreme Court the following Tuesday. The result of all this work is that we have convinced the United States Supreme Court to take the case. Now we have an even more difficult task ahead of us.

Colorado now has 60 days to answer Kansas' complaint. It is estimated that within 60 days a special master will be selected to hear the evidence in the case. The actual trial is before a special master, not the Supreme Court itself. Preliminary motions, discovery and research deadlines will probably be decided by the master within 90 days. It is anticipated that within six months, the trial will begin. Kansas' initial research, both legal and hydrologic, must be completed within that time.

To date, Kansas has retained a number of experts to assist in this matter. First, is Mr. Richard Simms, whom I introduced earlier who is the counsel of record in this action. Mr. Simms is an expert legal counsel with considerable experience in United States Supreme Court cases, including several of which have resulted in victories over Colorado.

The State of Kansas has also retained Spronk Water Engineers from Denver, Colorado, to do hydrologic and engineering research.

The State of Kansas has also recently retained the firm of S. S. Papadopoulos and Associates, Inc., from Washington, D.C. This engineering firm is nationally recognized and experienced in matters before the United States Supreme Court.

We feel we have put together an excellent team of experts with which to bring our case to the United States Supreme Court. We feel that it is important that Kansas proceed with this litigation, not only to force Colorado to return the stateline flows of the Arkansas River to the levels to which Kansas is entitled, but also to prevent further diminution of the flows of the Arkansas River at the Kansas-Colorado stateline.

After several years of extremely hard work, and expenditure of a considerable amount of money, the Supreme Court has now agreed to hear our case. We are extremely fortunate in light of the other alternatives that the United States Supreme Court could have taken. We are quite pleased and feel very positive about our efforts to date. If we do not, or can not, follow through at this time it may be many years before the State of Kansas will again have such a favorable opportunity to plead its case before the United States Supreme Court.

Thank you again for this opportunity to appear. I would be happy to answer any questions that you might have. Mr. Simms, Mr. Campbell and Mr. Rolfs are also available for any questions that you might have concerning the law suit.