

Approved Approved 2-4-1992
Date

MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources

The meeting was called to order by Senator Ross Doyen at
Chairperson

8:02 a.m./~~p.m.~~ on January 29, 1992 in room 423-S of the Capitol.

All members were present except: Quorum was present.

Committee staff present:

Pat Mah, Legislative Research Department
Raney Gilliland, Legislative Research Department
Don Hayward, Revisor of Statutes
Lila McClaflin, Committee Secretary

Conferees appearing before the committee:

Clark Duffy, Water Office
Charles Jones, Health and Environment
Bill Fuller, Kansas Farm Bureau
Dennis Schwartz, Kansas Water Authority

The meeting was called to order by the Chairman. He announced the Committee would accept requests for introduction of bills by individuals and/or organizations, and the carry over bills from the 1991 Session would be reviewed. Clark Duffy from the Water Office was called on to present a proposed bill.

Mr. Duffy introduced Dennis Schwartz, of the Kansas Water Authority to explain the proposal.

Mr. Schwartz said the proposed legislation is primarily amendatory in nature and would implement the Modification of the Water Transfers Act Sub-section of the Kansas Water Plan which was approved by the Kansas Water Authority last August (Attachment 1).

Senator Daniels moved to introduce the proposal. Senator Hayden seconded the motion. The motion carried.

Charles Jones reviewed the air contaminant emissions proposed bill

Senator Martin moved the proposed bill be introduced. Senator Walker seconded the motion. The motion carried.

Bill Fuller reviewed the uniform application bill, and requested the bill be introduced

Senator Sallee moved the proposal be introduced. Senator Frahm seconded the motion. The motion carried.

Staff distributed a memorandum regarding the 13 bills carried over. (Attachment 2). Senator Doyen said interest had been expressed in keeping SB 268, SB 430 and HB 2375 alive. He had not had any communication on the remaining bills. He asked the committee what their wishes were.

Senator Hayden moved that SB 152, SB 177, SB 185, SB 290 SB 315, Sub. for HB 2029, HB 2171, HB 2309, HB 2354 and HB 2526 be reported adversely. The motion was seconded by Senator Sallee. The motion carried.

The meeting was adjourned at 8:15 a.m.

19-91 SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

Date January 29, 1992

PLEASE PRINT

GUEST LIST

<u>NAME</u>	<u>REPRESENTING</u>
Stephen A. Hurst	Kansas Water Office
Dennis F. Schwartz	Kansas Water Authority
Clack Duffy	Kansas Water Office
Bill Miller	Kansas Farm Bureau
Charles Jones	KDHE
Don Schumaker	KILOGA -
Jake Hall	Mark Ebert, Kison
Darrell Monte	Ks. Dept W. & P.
Wendy Garwood	Ks. Termite & Pest Control Assoc.
Howard W. Lee	Ks. Ass'n of Wheat Growers
STEVE KEARNEY	PETE McCall & ASSOCIATES
Curt Carpenter	West Plains Energy
DAVE MURPHY	Green Valley Co.
BETTY DEY	KANSAS STATE BOARD OF AGRICULTURE
Don Tannahill	TRIDON Lawn Services Inc
Sharon McGrath	Ks. Natural Resource Council
Mary Ann Bradford	League of Women Voters - KS
Terry Leatherman	KCCF

Testimony of
John L. Baldwin, Chairman
Kansas Water Authority

Before the
Senate Energy and Natural Resources Committee

January 29, 1992

Presented by Dennis Schwartz
Thank you, Mr. Chairman.

I am John L. Baldwin from Hutchinson and a lifetime resident of Kansas. I have been Chairman of the Kansas Water Authority since 1987.

The Kansas Water Authority is a 22-member body of private citizens and state water-related agency directors created in 1981. Its primary responsibility is to approve the *Kansas Water Plan* and make recommendations to the Governor and Legislature on a broad spectrum of water management issues. Attached to my testimony is the membership list of the Kansas Water Authority.

The Kansas Water Authority works closely with the Kansas Water Office, 12 private citizen basin advisory committees and other public and private interests to develop the *Kansas Water Plan*. Since 1985, that Plan and the process that produced it has become the benchmark in water planning for most of the 17 western states. Our *Kansas Water Plan* is unique because it gets implemented. It is revised and updated yearly and, as a result, gets better and better each year.

This year we are proposing one legislative initiative as part of that yearly updating of the *Kansas Water Plan*. This proposed legislation is primarily amendatory in nature and would implement the Modification of the Water Transfers Act Sub-section of the *Kansas Water Plan*

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attachment 1
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which was approved by the Kansas Water Authority last August. This sub-section is attached to my testimony.

This sub-section, like all sub-sections of the *Kansas Water Plan*, was subjected to extensive public review. It was discussed at 12 public meetings and two public hearings. Four drafts were reviewed by the public and Kansas Water Authority before it was approved.

The Kansas Water Authority actually began studying this issue in November 1988. Since then, we have probably spent more time and effort on the development of this sub-section than we have on any other issue.

At this time, I would like to request introduction of this proposed legislation which is included with my testimony. This draft legislation has been reviewed and approved by the Kansas Water Authority. I urge your favorable consideration of this legislation.

Thank you.

Kansas Water Authority

Name, Address & Telephone	Occupation	Representing	Term Expires
Lowell K. Abeldt 900 NW 2nd Abilene, KS 67410 913/263-2334	Real Estate Broker & Owner of Insurance Agency	Association of Watersheds	5/1/94
John L. Baldwin 2700 East 4th Street Hutchinson, KS 67504 316/665-5511	Pres., Dillon Stores	Governor	Pleasure
Michael Conduff P.O. Box 748 Manhattan, KS 66502 913/537-0056, x-204	City Manager, City of Manhattan	Kansas League of Municipalities	5/1/93
Dr. Lee C. Gerhard Director, Kansas Geological Survey 1930 Constant Ave., Campus West, University of Kansas Lawrence, KS 66045 913/864-3965	Director, Kansas Geological Survey	Ex Officio	
Stephen A. Hurst Director, Kansas Water Office Suite 300, 109 W. 9th Street Topeka, KS 66612 913/296-3185	Director, Kansas Water Office	Ex Officio	
Byron Johnson, General Manager Water Dist. No. 1 of Johnson Co. P.O. Box 2921 Mission, KS 66201 913/722-3000	General Mgr. Water Dist. No.1 of Johnson Co.	President of Senate	7/1/93
Kenneth F. Kern, Exec. Dir. State Conservation Commission 5th Floor, 109 SW 9th St. Topeka, KS 66612 913/296-3600	Exec. Dir., State Conservation Com.	Ex Officio	
Jack Lacey, Secretary Kansas Dept. of Wildlife and Parks 5th Fl., Landon St. Off. Bldg. Topeka, KS 66612 913/296-2281	Secretary, Kansas Dept. of Wildlife and Parks	Ex Officio	
Sheila Leiker-Page Rt. 1, Box 68 Victoria, KS 67671 913/735-9242	Dairy Herd Improv. Assn.	Conservation District	5/1/92
Marsha Marshall 8560 Rik-Mar Drive DeSoto, KS 66018 913/585-3401	Co-Owner, Insurance Marketing Co.	Environmental Interests	10/31/92
James E. Mason 1145 Jackson Wichita, KS 67203 316/263-2811 316/264-8323 (message)	Interpretative Naturalist, City of Wichita	Speaker of the House	6/30/93
Jeffery Mason 224 Broadway Goodland, KS 67735 913/899-6588	Attorney	Public	5/1/93

Name, Address & Telephone	Occupation	Representing	Term Expires
Laura Nicholl Secretary, Dept. of Commerce 400 SW 8th, 5th Floor Topeka, KS 66612 913/296-3480	Secretary, Dept. of Commerce	Ex Officio	
Marvin Odgers HCR 1, Box 84 Sublette, KS 67877 316/675-2564	Farmer	GMDs #1, 3, 4	5/1/91
Larry K. Panning 500 W. 4th Ellinwood, KS 67526 316/564-2199	Farmer	GMDs #2 & #5	5/1/94
David L. Pope Chief Engineer, Division of Water Resources State Board of Agriculture 109 SW 9th Street Topeka, KS 66612-1283 913/296-3717	Chief Engineer, Div. of Water Resources	Ex Officio	
Jim Robinson, Chairman Kansas Corporation Commission 1500 SW Arrowhead Rd. Topeka, KS 66604 913/271-3233	Chairman, Kansas Corporation Commission	Ex Officio	
Dennis F. Schwartz 3260 SE Tecumseh Rd. Tecumseh, KS 66542 913/379-5553	Manager, Rural Water District	Rural Water Association	5/1/92
Myron VanGundy Rt. 2, Box 110 Reading, KS 66868 316/342-7063	Farmer	Public	6/30/92
David R. Warren 455 N. Main Wichita, KS 67202 316/268-4515	Dir., Wichita Water & Sewer	Kansas Assoc. of Commerce & Industry	5/1/95
Dr. Walter Woods Director, Agricultural Experiment Station 113 Waters Hall Kansas State University Manhattan, KS 66506 913/532-7137	Director, Ag. Exp. Station	Ex Officio	
Dr. Azzie Young, Secretary Dept. of Health and Environment Rm. 951, Landon State Off. Bldg. Topeka, KS 66612 913/296-1522	Secretary, Dept. of Health & Environment	Ex Officio	
January 1992			

Kansas Water Plan Management Section

Sub-section: Modification of the Water Transfers Act

Kansas Water Office
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***Approved
by the
Kansas Water Authority***

August 1991

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MODIFICATION OF THE WATER TRANSFERS ACT

INTRODUCTION

The Water Transfers Act, K.S.A. 82a-1501 *et seq.*, as passed by the Kansas Legislature in 1983, sets out the requirements for the diversion and transportation of water in quantities of 1,000 acre-feet or more per year for beneficial use outside a ten mile radius from the point of diversion. This act also gave the Chief Engineer the discretionary authority to impose these requirements on any application for a water right regardless of the quantity of water or the distance to the point of use.

Approval for water transfers requires an application to the Chief Engineer, Division of Water Resources, State Board of Agriculture, hearings before a water transfer hearing panel, approval by the Kansas Water Authority and review by the Kansas Legislature. This is a rather complex and involved process, made even more complex by the fact that the procedure was recently modified by the legislature and now must meet the more formal administrative law requirements set out in the Kansas Administrative Procedures Act (K.S.A. 77-501 *et seq.*).

The issue of interbasin transfers of water is addressed specifically in the *Kansas Water Plan* under the Kansas-Lower Republican Basin Section, Sub-section Water Supply. The issue is also addressed under the Water Supply Sub-section of the Lower Arkansas Basin Section of the 1990 *Kansas Water Plan*. The Kansas-Lower Republican Basin Section emphasizes the need to examine factors such as the political, economic, social and environmental impacts of any interbasin transfer before a transfer is approved. This could include a cost benefit analysis weighing benefits to the area receiving the water and potential cost or harm to the basin of origin. The Kansas-Lower Republican Basin Advisory Committee also set out in the Kansas-Lower Republican Basin Section several suggested guidelines to be considered in the application of review standards before any transfer out of the Kansas-Lower Republican Basin is approved. The Lower Arkansas Basin Section basically deals with municipal and industrial water supply shortages in their area and explores various alternatives to address the problem such as water transfers and conjunctive water use management, which would alternate periods of use between groundwater and surface waters.

While the Water Transfers Act has been in the statute book since 1983, no water transfer application has been made to the Chief Engineer, and no convening of the water transfer hearing panel has taken place to date. Despite the lack of an actual transfer application pending before the hearing

panel, potential applicants for transfers and representatives of potential basins of origin alike have raised many questions as to the soundness of the current Water Transfers Act.

Prior to the passage of the Water Transfers Act in 1983, large transfers of water were governed by the criteria set out in the Appropriation Act, K.S.A. 82a-701 *et seq.* and the State Water Plan Storage Act, K.S.A. 82a-1301 *et seq.*, also known as the Water Marketing Act.

This sub-section describes the basic concepts that point out the need for modifications to the current Water Transfers Act. Issues are discussed and several options and recommendations aimed at modifying and improving the current Water Transfers Process are presented.

CONCEPT

The Water Transfers Act sets out standards of review that must be met and an administrative procedural process, to afford protection to both the area of origin and area of use when water must be moved in large quantities from one area to another. The concept was to make sure that potential social, political, environmental and economic impacts would be considered in advance of such a transfer and that the public interest would be protected. The act also considers whether the transfer is in the best interest of the state. While the act basically sets out sound standards for review of water transfers there are a few basic issues that are in need of clarification, and these should be addressed by either amendatory legislation or new legislation.

POLICY ISSUES, OPTIONS AND RECOMMENDATIONS

There are two policy issues that must be addressed in modifying the Water Transfers Act. These issues are:

1. Clarification of Definition of a Transfer
2. Clarification of Administrative Process and Procedures

CLARIFICATION OF DEFINITION OF A TRANSFER

At the time of the drafting of the Water Transfers Act, as passed by the Kansas Legislature in 1983, the Kansas Water Authority's intent was to promote an interbasin transfers act. At that point in time the concept of basins was not clearly defined. Thus, the legislature decided to go forward with a Water Transfers Act that would apply to all water

transfers falling within the specific quantity amount of 1,000 acre-feet or more, transported outside a ten mile radius from the point of diversion. For lesser quantities of water transported over lesser distances the Chief Engineer has the discretion to determine when the act should be triggered.

Since the passage of the Water Transfers Act in 1983 the *Kansas Water Plan* has identified and set out 12 hydrologic basins that are subsets of the two major hydrologic drainage basins that divide the state in half, the Missouri River Basin and the Arkansas River Basin. These 12 basins have become generally accepted and used in the water planning process over the past six years. While the term basin is now commonly understood to mean the 12 hydrologic basins as described in the *Kansas Water Plan* and these basins generally follow watershed drainage lines, they are still subsets of the two true drainage basins, and were selected for management purposes. The definitional problem

that faced the legislature has to a large extent been eliminated, making it a much easier task to differentiate between interbasin transfers and intrabasin transfers. The options available to address this policy issue of clarification of the definition as to when the act should be automatically triggered are as follows:

The first option is to adopt the two hydrologic drainage basins that divide the state in half, the Missouri River Basin and the Arkansas River Basin as the dividing line to automatically trigger the provisions of the act. The Chief Engineer would retain his discretionary authority to impose the requirements on all water right applications. Such interbasin transfers would receive a high level of scrutiny via a detailed review process. The automatic trigger would be limited to transfers of 1,000 acre-feet or more across a basin's boundary. (See Figure 1)

Basin Boundaries

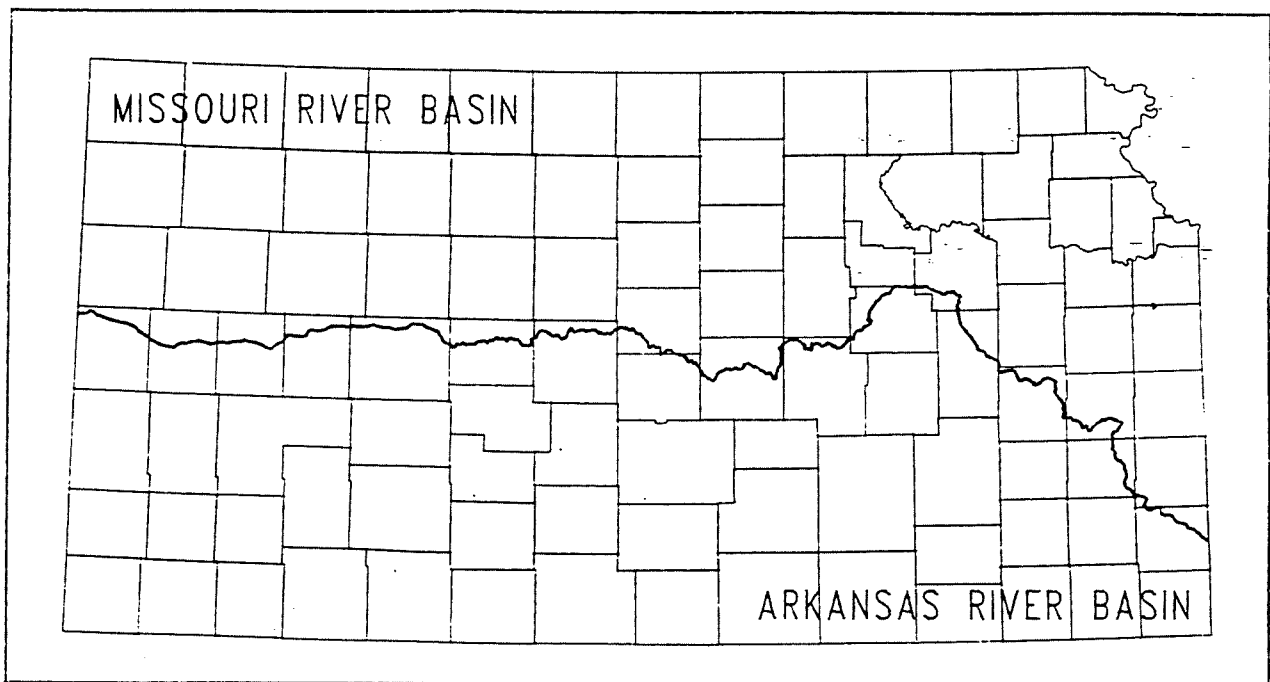


Figure 1

The second option is to continue with a Water Transfers Act that contains provisions to automatically trigger both interbasin transfers and intrabasin transfers, but that would be amended to reflect the two hydrologic drainage basins that divide the state in half, the Missouri River Basin and the Arkansas River Basin. This option would address the differing levels of protection needed for large interbasin transfers and large intrabasin transfers.

As in the first option this option would provide that an automatic trigger for an interbasin transfer would be defined as 1,000 acre-feet or more crossing the Missouri River Basin and Arkansas River Basin boundary. This option would, however, also provide for automatic protection of water from large intrabasin transfers, taking note that proposed large transfers of water from rural areas and extraordinarily managed groundwater reserves

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deserve and require governmental scrutiny. An automatic trigger for an intrabasin transfer would be defined as the transfer of water within either the Arkansas or Missouri River Basin of 1,000 acre-feet or more per year for beneficial use outside a 10 mile radius from the point of diversion. The Chief Engineer would retain his discretionary authority to impose the requirements on all water right applications. Releases from reservoirs to the natural water course made under the authority of the State Water Supply Storage Act, K.S.A. 82a-1301 *et seq.*, or the Water Assurance Program Act, K.S.A. 82a-1330 *et seq.* shall be excluded from the intrabasin transfer provisions of this act. The management and review procedures for such inter and intra basin transfer applications is discussed in the following section, Clarification of Administrative Process and Procedures.

The third option is to continue with a Water Transfers Act that is automatically triggered by the diversion and transportation of water in an amount of 1,000 acre-feet or more per year for beneficial use outside a ten-mile radius from the point of diversion of such water. Such transfers would receive a high level of scrutiny via a thorough detailed review process. The Chief Engineer would retain his discretionary authority to impose the requirements on all water right applications.

The second option is recommended because it effectively deals with both large inter and intra basin transfers which were the primary concerns of the Legislature and the Kansas Water Authority in proposing and formulating a Water Transfers Act. It does, however, differentiate between the levels of scrutiny provided interbasin transfers and intrabasin transfers, making a formal hearing mandatory for interbasin transfers and discretionary, in some instances, for intrabasin transfers. It also retains the discretionary authority of the Chief Engineer to impose the requirements of the act on any water right application when conditions warrant. (See, Clarification of Administrative Process and Procedures) This option also clears up the long standing problem of reservoir releases to the natural water course or stream under either the Marketing Program or the Assurance Program, by eliminating this activity from the intrabasin transfers requirements of the act.

CLARIFICATION OF ADMINISTRATIVE PROCESS AND PROCEDURES

There are three basic sub-issues that are components of the primary issue of clarifying the Water Transfers Act Administrative Process and Procedures. The first is the applicability of the Kansas Administrative Procedures Act to the Water Transfers Process. The second sub-issue is the potential for "conflicts of interest" of hearing panel members. The third sub-issue is the constitutionality of legislative oversight.

"Kansas Administrative Procedures Act"

The current Water Transfers Act falls under the formal requirements of the Kansas Administrative Procedures Act, K.S.A. 77-501 *et seq.* It is noted in the Kansas Administrative Procedures Act that the Act applies only to the extent that other statutes expressly provide that the provisions of this act govern proceedings under those statutes. The Kansas Administrative Procedures Act creates only procedural rights and imposes only procedural duties that are in addition to those created or imposed by other statutes. The Water Transfers Act sets out its own procedural requirements for review including review by the three person hearing panel, review by the Kansas Water Authority and Legislative review. In July 1989 the Water Transfers Act was amended to provide that "... the panel shall consider the application and determine whether to approve the proposed water transfer in accordance with provisions of the Kansas Administrative Procedures Act." The Kansas Administrative Procedures Act provides for several avenues of administrative and judicial review of decisions made by the hearing panel. As noted, the Water Transfers Act as originally written had a less formal administrative procedure but one that was basically adequate, with the exception of the legislative oversight provision. The act as originally written also provided for sound decision making in a reasonable time frame.

The available options to address this policy sub-issue of applicability of the Kansas Administrative Procedures Act are as follows:

The first option is to remove the Water Transfers Act from the purview of the Kansas Administrative Procedures Act. There would remain on the statute books a Water Transfers Act that would set out what constitutes a water transfer as defined in the recommendation in issue number one discussed above, and that would also set out a special water transfers administrative procedure, adequate to protect and safeguard the rights of both the applicant and the area origin. The statute would provide the Chief Engineer of the Division of Water Resources with the authority to review an independent hearing officer's preliminary order supported by findings of fact and conclusions of law on a proposed interbasin transfer and to approve interbasin transfers of water under a modified Water Appropriation Act type approval process. The statute would direct the Chief Engineer to consider interbasin transfers as unusually large appropriations under the Appropriations Act K.S.A. 82a-701 *et seq.*, but would also allow testimony from certain state natural resource and environmental agencies such as the Kansas Department of Health and Environment, Kansas Water Office and Kansas Department of Wildlife and Parks. The statute would also authorize the Chief Engineer to condition his approval of an interbasin transfer based on the hearing officer's preliminary order reviewing the

testimony provided by the applicant, the basin of origin and the environmental review agencies mentioned above. This modified water transfers and appropriation procedure vesting final decision making power in the Chief Engineer should be limited to only those interbasin transfers that do not involve the waters marketed under the State Water Plan Storage Act K.S.A. 82a-1301 *et seq.*

The statute would also provide for the Chief Engineer's scrutiny of intrabasin transfers that do not involve waters marketed under the State Water Plan Storage Act K.S.A. 82a-1301 *et seq.* The intrabasin transfer review process would involve the following steps: (1) Upon receipt of an application to appropriate water within one of the two drainage basins in a quantity of 1,000 acre-feet or more per year for beneficial use outside a 10 mile radius from the point of diversion, and conveyed by a means other than reservoir releases to the natural water course, the Chief Engineer will determine if the water in the area is currently available for appropriation. (2) If water is not available for appropriation the application will be denied. (3) If there is water available for appropriation, an application for a water transfer could be filed and if so notice will be published in the State Register and in local papers of the pending application and special notice will go out to certain state natural resource agencies such as the Kansas Department of Health and Environment, Kansas Department of Wildlife and Parks and Kansas Water Office. (4) Public comments and state agency comments will then be solicited and considered by the Chief Engineer to determine if a hearing is necessary. (5) If there are significant concerns raised by the public or commenting agencies, a hearing will be held at the Chief Engineer's discretion. (6) Any such hearing will establish a formal record of findings of fact and conclusions of law upon which the Chief Engineer will then make a decision to approve or deny, or approve in part the application based upon criteria set forth in the Water Transfers Act. (7) If no significant concerns are raised then the Chief Engineer would act upon the proposed transfer based upon the information provided in the application and the criteria set out in the act.

A second provision in the new or amended transfers act would provide for the Kansas Water Authority approval of interbasin transfers as described in the recommendation in issue number one above, when such waters are requested from reservoirs that fall under the State Water Plan Storage Act. This procedure would also require the Kansas Water Office and Kansas Water Authority to review the hearing officer's report on testimony received from interested parties. A provision should also be made in the State Water Plan Storage Act that if a water marketing contract involves a water transfer, at least one public hearing must be held by the hearing officer, one formal hearing must be held in the basin of origin and if deemed necessary, by the hearing officer, a public comment hearing

may be held in the basin of use. The results of these hearings should be considered by the Kansas Water Authority in making a decision as to whether to approve or disapprove of an application. Also the statute should provide that the Kansas Water Authority shall consider the testimony of the environmental review agencies and the applicant and the basin of origin in conditioning, approving or denying any water transfers application.

The statute would also provide that intrabasin transfers of water from reservoirs that fall under the purview of the State Water Plan Storage Act, K.S.A. 82a-1301 *et seq.* in quantities of 1,000 acre-feet or more per year for beneficial use outside a 10 mile radius from the point of diversion, conveyed by a means other than reservoir releases to the natural water course, shall be reviewed in accordance with the public interest finding requirements currently found under the aforementioned act.

In addition to the aforementioned provisions, the statute would also provide a mechanism for addressing the issues of acquiring water rights for future use and aggregation of small water transfers over the interbasin (Missouri/Arkansas Basin) boundary, or in amounts and distance sufficient to trigger an intrabasin transfer as follows: (1) The Chief Engineer, or the Kansas Water Authority, as appropriate, would have the authority to determine whether an aggregation of small water transfers over a period of time constitutes a transfer within the meaning of the Water Transfers Act. (2) The Chief Engineer, or the Kansas Water Authority, as appropriate, would have the authority to give final approval to a water transfer which would not physically take place for a period of up to twenty years, if the transfer was found to be in the public interest. (3) The Chief Engineer, or the Kansas Water Authority, as appropriate, could approve a water transfer of up to a total of ten thousand acre-feet from a specific geographic area from a specific source or sources of supply for use by specified water user(s) even though the specific water rights to be transferred had not yet been identified. This blanket advance water transfer approval would be subject to the condition that the applicant(s) subsequently obtain approvals of change in point of diversion, place of use, and/or type of use, as appropriate, in accordance with the provisions of the Kansas Water Appropriation Act.

The second option is to remove the current Water Transfers Act from the purview of the Kansas Administrative Procedures Act and to maintain the current procedural requirements set out in the Water Transfers Act with the possible exception of legislative oversight. This would make the Kansas Water Authority the final decision maker in any water transfer. A water transfer would be defined as in the recommended issue number one above. This option would not have the bifurcated process of the first option noted above, dividing the hearing officer report review proceedings and decision making authority between the Chief Engineer,

Division of Water Resources, for those transfers of "non marketing" water, and the Kansas Water Authority reviewing those transfers of water sold from state water supply storage.

The **third option** is to amend the current Water Transfers Act in such a way as to bring it in line with the Kansas Administrative Procedures Act. This option would provide a maximum level of formal procedural safeguards to both the applicant and the area of origin but could have the effect of delaying the approval of an application for several years due to the many formal appeals provided for. The Kansas Water Office, under a contract with the Kansas Water Resources Research Institute, has received a legal review of the Water Transfers Act that sets out some options for amending the Water Transfers Act to bring it in line with the Kansas Administrative Procedures Act. These options involve removing some of the confusing overlapping administrative provisions that were originally in the Water Transfers Act and that currently conflict with the Kansas Administrative Procedures Act requirements. Should this option be selected, the recommendations in that report should be considered.

The **fourth option** is to remove the Water Transfers Act from the purview of the Kansas Administrative Procedures Act. There would remain on the statute books a Water Transfers Act that would set out what constitutes a water transfer as defined in the recommendation in issue number one discussed above, and that would also set out a special water transfers administrative procedure, adequate to protect and safeguard the rights of both the applicant and the area origin. The statute would provide the Chief Engineer of the Division of Water Resources with the authority of review and approval of interbasin transfers of water under a modified Water Appropriation Act approval process. The statute would direct the Chief Engineer to treat these inter basin transfers as unusually large appropriations under the Appropriations Act K.S.A. 82a-701 *et seq.*, but would also allow testimony from Kansas Department of Wildlife and Parks, State and Extension Forestry, Kansas Biological Survey, Kansas Department of Health and Environment, State Historical Society, State Conservation Commission and Kansas Corporation Commission with the addition of the Kansas Water Office and Division of Water Resources as commenting agencies. The statute would also authorize the Chief Engineer to condition his approval of a transfer based on the testimony provided by the applicant, the basin of origin and the environmental review agencies mentioned above. This modified water transfers and appropriation procedure vesting power in the Chief Engineer should be limited to only those transfers that do not involve the waters marketed under the State Water Plan Storage Act K.S.A. 82a-1301 *et seq.*

A second provision in the new or amended transfers act would provide for the Kansas Water Authority approval of interbasin transfers as

described in the recommendation in issue number one above, when such waters are requested from reservoirs that fall under the State Water Plan Storage Act. This procedure would also allow the Kansas Water Office to hear or receive testimony from the Kansas Department of Wildlife and Parks, State and Extension Forestry, Kansas Biological Survey, Kansas Department of Health and Environment, State Historical Society, State Conservation Commission, Kansas Corporation Commission and from representatives of the basin of origin and the applicant and to report its findings to the Kansas Water Authority. A provision should also be made in the State Water Plan Storage Act that if a water marketing contract involves a water transfer, two public hearings must be held by the Kansas Water Office, one in the basin of origin and one in the basin of use. The results of these hearings should be considered by the Kansas Water Authority in making a decision as to whether to approve or disapprove of an application. Also, the statute should provide that the Kansas Water Authority shall consider the testimony of the Division of Water Resources, Kansas Department of Wildlife and Parks, State and Extension Forestry, Kansas Biological Survey, Kansas Department of Health and Environment, State Historical Society, State Conservation Commission, Kansas Corporation Commission, environmental review agencies and the applicant and the basin of origin in condition, in approving or denying any water transfers application.

The first option is recommended because it provides a reasonable process that differentiates between water transfers that are not out of state water supply storage reservoirs, and water transfers that are out of state water supply storage reservoirs. It provides that the Chief Engineer, Division of Water Resources, have decision making authority over those "non marketing" applications for water transfers and that the Kansas Water Authority, which currently has decision making authority over water marketing contracts, be the final decision maker for those water marketing contracts that involve a water transfer. This option also takes into consideration the traditional public input process used by the Kansas Water Authority, by providing for public hearings. One formal hearing in the basin of origin and an option for a public comment hearing in the basin of use when a marketing contract involves an interbasin transfer. Additional safeguards are provided for both hearing procedures in that both the Chief Engineer and the Kansas Water Authority are charged with reviewing the hearing officer's preliminary order, based on the formal testimony of certain state natural resources and environmental agencies set out in the Act and charged with conditioning their decision making by considering the testimony provided by these entities. Thus, the first option provides a bifurcated process with adequate input and procedural safeguards for both the applicant and the basin of origin. This option also addresses the important issue of large intrabasin

transfers and sets up a formal procedure for the Chief Engineer to review such proposed "non marketing" intrabasin transfers. This option also provides for Kansas Water Authority review and findings of public interest for proposed large intrabasin transfers from marketing storage. This option also addresses the issues of acquiring water rights for future use and aggregation of acquisitions of water. Due consideration will be given to the development of appropriate time frames for the review and approval processes when legislation is drafted.

"Hearing Panel"

The three person hearing panel that is currently set out in the Water Transfers Act consists of the Secretary of the Kansas Department of Health and Environment or the Division of Environment Director, the Chief Engineer of the Division of Water Resources and the Director of the Kansas Water Office. These various panel members in their respective positions as state agency heads and administrators often come in contact with potential applicants for transfers. In many cases these administrators may in fact encourage activities such as the interconnection of water supply systems in water short areas, and the exploration and development of alternative sources of supply for water short areas. Some of these recommendations and policies developed by these water-related agencies to address water shortage problems in various areas of the state could potentially involve a water transfer as defined in issue number one above. As a result, these administrators may have a "conflict of interest" when serving as a hearing panel member in the Water Transfers Approval Process. The current statute also increases the possibility of ex parte communications during a formal hearing, as the agency heads work with their staff and others involved in water management on a regular basis.

The first option is to eliminate potential "conflicts of interests" and ex parte communications from the Water Transfers Process by eliminating the three person hearing panel that currently exists under the Water Transfers Act, and going with the review procedure described in option number four under Clarification of Administrative Process and Procedures above, in which the Chief Engineer and the Kansas Water Authority respectively have decision making power. This would include the statutory requirement that they consider public comments coming from public hearings, one formal hearing in the area of origin and if needed a public comment hearing in the area of use, and the testimony of the environmental review agencies and the applicant and representatives of the area of origin.

The second option is to retain the hearing panel as currently designated in the Water Transfers Act in addition to the review process recommended in

the above text. A provision should be made, however, that any panel member shall be permitted to withdraw from considering an application for transfer, either on his or her motion or on a petition for disqualification if that panel member has such a "conflict of interest." The panel member could then name a substitute from his or her agency that possesses the technical knowledge needed to render an informed decision on an application for transfer.

A third option is to retain the hearing panel as currently designated in the Water Transfers Act in addition to the review process recommended in the above text. A provision should be made, however, that the hearing panel is to convene only to select an independent hearing officer knowledgeable of water law and water issues for the purpose of conducting the hearings described in the above text under Clarification of Administrative Process and Procedures. The hearing officer's preliminary order should build a record of testimony and include findings of fact and conclusions of law.

The third option is recommended because it effectively eliminates the problems of "conflict of interest" of hearing panel members by appointing an independent hearing officer to build a record including findings of fact and conclusions of law and to issue a preliminary order. It also eliminates the problem of ex parte communications during the hearing. This option also eliminates the need for three agency heads to be away from their respective agencies for potentially extended periods of time to conduct hearings. The new administrative process and procedures recommended in the preceding issue discussion affords applicants and the area of origin more than adequate safeguards, with public hearings and testimony from several natural resource and environmental review agencies and a final determination based on review of the hearing officer's preliminary order by either the Chief Engineer or the Kansas Water Authority. There is also the additional safeguard of appeals to the courts which is always available in the case of a questionable decision.

"Legislative Oversight"

An additional review issue concerns the constitutionality of the legislative oversight provisions in the Water Transfers Act. Presently, an order of the hearing panel disapproving a transfer is deemed a final order. An order of the panel approving a transfer is deemed an initial order. The Kansas Water Authority, an executive branch agency, is deemed the agency head for the purpose of reviewing the initial order of the panel. If the Kansas Water Authority approves the water transfer and there is no judicial review pending, the Chief Engineer of the Division of Water Resources then submits the proposed transfer to the legislature for review under a procedure provided for in the Water Marketing Act, K.S.A. 82a-1301 *et seq.* and amendments thereto. At this point absent legislative

disapproval, the Chief Engineer issues the order approving the transfer. The Kansas Water Office has received a formal Attorney General Opinion as to the constitutionality of the Water Transfers Act and also the related State Water Supply Storage Act. This opinion states that legislative veto or disapproval power over an executive agency decision violates the concept of separation of powers and is therefore unconstitutional. (See State ex rel. Stephan vs. Kansas House of Representatives, 236 Kan. 45 (1984).)

The available options to address this policy sub-issue of constitutionality of the Water Transfers Act are as follows:

The first option is to enact new legislation that would eliminate the legislative oversight provisions of water transfers as defined in issue number one above, and thus, eliminate the constitutional question of separation of powers. This new legislation in conjunction with the recommended options in the text above would provide more than adequate safeguards to both the applicant and the area of origin and would also avoid potential lengthy litigation on the constitutional issue.

The second option is to provide for legislative oversight in a new Water Transfers Act, but to draft it in such a way that it would meet the constitutional requirements of separation of powers. In a study contracted with the Kansas Water Resources Research Institute, the Kansas Water Office received recommendations on how the above mentioned legislative review could possibly be made in a constitutional manner. Should this option be selected, the recommendations in that study should be considered.

It is clear that a change is necessary to address this issue, but the decision should be left to the discretion of the Legislature.

SUMMARY OF POLICY RECOMMENDATIONS

The following policies are recommended:

CLARIFICATION OF DEFINITION OF A TRANSFER

Clarify the definition of a water transfer by automatically triggering the application of the Act to large interbasin and intrabasin transfers.

CLARIFICATION OF ADMINISTRATIVE PROCESS AND PROCEDURES

Clarify the administrative procedures and process by a) removing the review process from the purview of the Kansas Administrative Procedures Act, b) retaining the review panel only for purposes of selecting an independent hearing officer and substituting a review procedure in which the Chief Engineer and the Kansas Water Authority have final

decision making power, and c) eliminating or correcting legislative oversight, (should be left to discretion of the Legislature).

PLAN IMPLEMENTATION

LEGISLATIVE ACTION

Legislation is needed to:

1. Amend the Water Transfers Act to clarify the definition of a water transfer by automatically triggering the application of the act to large interbasin transfers over the Arkansas River Basin and Missouri River Basin boundary line, and to large intrabasin transfers of 1,000 acre-feet or more per year for beneficial use outside a 10 mile radius from the point of diversion. The Chief Engineer would retain his discretionary authority to impose the requirements on all water right applications. Reservoir releases to the natural water course made under the authority of the Water Supply Storage Act, K.S.A. 82a-1301 *et seq.* or the Water Assurance Program Act, K.S.A. 82a-1330 *et seq.* shall be excluded from the intrabasin transfers provisions.

Note: This would provide for automatic protection of water from intrabasin transfers, taking note that proposed large transfers of water from rural areas and extra-ordinarily managed groundwater reserves deserve and require governmental scrutiny.

2. Establish an improved administrative review procedure and process for water transfers, providing the Chief Engineer of the Division of Water Resources with the authority of review of the hearing officer's preliminary order and approval of interbasin transfers of water under a modified Water Appropriation Act approval process which would apply Water Transfers Act standards, when such transfers involve waters not marketed under the State Water Plan Storage Act, K.S.A. 82a-1301 *et seq.* Such legislation shall allow the hearing officer to obtain testimony from certain state natural resource and environmental agencies such as the Kansas Department of Health and Environment, Kansas Water Office and Kansas Department of Wildlife and Parks. Such legislation shall also provide that the hearing officer conduct public hearings, one formal hearing in the basin of origin and one public comment hearing if deemed necessary in the basin of use. This legislation shall also authorize the Chief Engineer to condition his approval of a transfer based on the testimony provided in the hearing officer's preliminary order and report by the applicant, the basin of origin, the natural resource and environmental agencies and the public.

3. Authorize the Kansas Water Authority to review the hearing officer's preliminary order and report and approve those interbasin transfers that fall under the purview of the State Water Plan Storage Act, K.S.A. 82a-1301 *et seq.* Such procedure shall require the hearing officer to receive testimony from certain state natural resource and environmental agencies such as the Kansas Department of Health and Environment, Division of Water Resources, Kansas Water Office and Kansas Department of Wildlife and Parks and hear testimony from interested parties. Such legislation shall provide the Kansas Water Authority shall consider the testimony of the state natural resource and environmental agencies, the applicant and the representatives of the area of origin as provided in the hearing officer's preliminary order and report, in conditioning, approving or denying any water transfers application.
4. Amend the Water Transfers Act to provide for the Chief Engineer's scrutiny of intrabasin transfers that do not involve water marketed water under the State Water Plan Storage Act, K.S.A. 82a-1301 *et seq.* Such review would involve the following steps: (1) Upon receipt of an application to appropriate water within one of the two drainage basins in a quantity of 1,000 acre-feet or more per year for beneficial use outside a 10 mile radius from the point of diversion, and conveyed by a means other than reservoir releases to the natural water course, the Chief Engineer will determine if the water in the area is currently available for appropriation. (2) If water is not available for appropriation the application will be denied. (3) If there is water available for appropriation an application for a water transfer could be filed and if so notice will be published in the State Register and in local papers of the pending application. (4) Public comments and state agency comments will then be solicited and considered by the Chief Engineer to determine if a hearing is necessary. (5) If there are significant concerns raised by the public or commenting agencies, a hearing will be held at the Chief Engineer's discretion. (6) Any such hearing will establish a formal record of findings of fact and conclusions of law upon which the Chief Engineer will then make a decision to approve or deny, or approve in part the application based upon the criteria set forth in the Water Transfers Act. (7) If no significant concerns are raised then the Chief Engineer would review the proposed transfer based upon the information provided in the application and the criteria set out in the act.
5. Amend the Water Transfers Act to provide for the scrutiny of intrabasin transfers of water marketed from state owned storage, under the current State Water Plan Storage Act K.S.A. 82a-1301 *et seq.* public interest findings requirements.
6. Amend the Water Transfers Act to provide a mechanism for addressing the issues of acquiring water rights for future use and aggregation of acquisition of water as follows: (a) The Chief Engineer, or the Kansas Water Authority, as appropriate, would have the authority to determine whether an aggregation of small water transfers over a period of time constitutes a transfer within the meaning of the Water Transfers Act. (2) The Chief Engineer, or the Kansas Water Authority, as appropriate, would have the authority to give final approval to a water transfer which would not physically take place for a period of up to twenty years, if the transfer was found to be in the public interest. (3) The Chief Engineer, or the Kansas Water Authority, as appropriate, could approve a water transfer of up to a total of ten thousand acre-feet from a specific geographic area from a specific source of supply for use by specified water user(s) even though the specific water rights to be transferred had not yet been identified. This blanket advance water transfer approval would be subject to the condition that the applicant(s) subsequently obtain approvals of change in point of diversion, place of use, and/or type of use, as appropriate, in accordance with the provisions of the Kansas Water Appropriation Act.
7. Retain the three person hearing panel that is currently set out in the Water Transfers Act, K.S.A. 82a-1501 *et seq.* solely for the purpose of selecting an independent hearing officer.
8. Eliminate or retain the legislative oversight provisions in both the Water Transfers Act, K.S.A. 82a-1501 *et seq.* and in the State Water Plan Storage Act, K.S.A. 82a-1301 *et seq.* also known as the Water Marketing Act.
9. Develop appropriate time frames for the review and approval processes.

ADMINISTRATIVE ACTION

The Kansas Water Office and the Division of Water Resources, State Board of Agriculture, shall develop administrative guidelines for the hearing procedures involved in the review of any water transfers applications.

FINANCIAL REQUIREMENTS

All of the policy recommendations contained in this sub-section, with the exception of the possible need to hire an independent hearing officer - from outside the ranks of state government, can be accomplished by utilizing existing staff and existing state agency financial resources. If it is determined that a suitable hearing officer can not be obtained from within the ranks of state government utilizing existing state agency resources, then one shall be hired at the expense of the applicant.

TIME SCHEDULE

The legislation needed to implement the policy recommendations in this sub-section will be developed during the 1991 calendar year for introduction during the 1992 Legislative Session. The development of administrative guidelines by the Kansas Water Office and the Division of Water Resources to address procedures for hearings on water transfer applications could be completed by the end of calendar year of 1992, after the legislation has been passed.

REFERENCES

1. Kansas Water Office, Modification of the Water Transfers Act (K.S.A. 82a-1501 *et seq.*) for the Fiscal Year 1993 State Water Plan, Background Paper No. 57, Kansas Water Office, November 1990.
2. Kansas Water Office, *Kansas Water Plan*, Kansas-Lower Republican Basin Section, Sub-section: Water Supply; Issue: Interbasin Transfer of Water, July 1990.
3. Kansas Water Office, *Kansas Water Plan*, Lower Arkansas Basin Section, Sub-section: Water Supply; Issue: Municipal and Industrial Water Supply Problems, July 1990.
4. Peck, John C., Professor of Law, University of Kansas School of Law and McLeod, Douglas P., Law Student, University of Kansas School of Law, Legal Study of Water Transfers Act, A Report to the Kansas Water Office under a contract between the Kansas Water Office and the Kansas Water Resources Research Institute, November 1989.
5. Keller, John W., Professor, and Burns, Robert E., Professor, Department of Regional and Community Planning, College of Architecture and Design, Kansas State University, Data Requirements for Water Transfer Act, A Report to the Kansas Water Office under a contract between the Kansas Water Office and the Kansas Water Resources Research Institute, November 1989.

MEMORANDUM

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January 28, 1992

**Re: 1991 Bills Currently Assigned to the Senate Committee
on Energy and Natural Resources**

There are 13 1991 bills currently in the Senate Committee on Energy and Natural Resources. They are briefly described below:

S.B. 152 would establish a beverage container deposit law with provisions for a refund on returnable containers.

S.B. 177 would remove the Department of Wildlife and Parks' authority to issue landowner and tenant hunt-on-your-own-land big game permits. The bill also would require that 50 percent of all big game permits in each management unit be issued to landowners or tenants.

S.B. 185 would establish an 11-member Environmental Resources Task Force to be advisory to the Governor and Legislature. The Task Force would review plans for the development, management, and use of the environmental resources of the state and make recommendations concerning the advisability of enacting new or amendatory legislation regarding environmental programs and policies. Final recommendations of the Task Force would be made to the 1993 Legislature.

S.B. 268 would amend the Kansas Nongame and Endangered Species Conservation Act to include plants. The Department of Wildlife and Parks would be directed to study plants, make a list of plants which are endangered, and enact conservation plans for plants through the establishment of rules and regulations. The bill also would require a new state habitat protection stamp to enter any land managed by the Department. The stamp would be in addition to any other license, permit, or stamp issued by the Department and the fee for the stamp would be set by the Secretary of the Department of Wildlife and Parks through rules and regulations.

S.B. 290 would provide that any local unit of government may establish, by action of its governing body, a plan for recycling solid waste materials. Any city or county of greater than 10,000 in population would be required to have a recycling program as part of its overall solid waste management plan. After January 1, 1993, a sanitary landfill could not accept for final disposal any truckloads composed primarily of yard waste, and after January 1, 1997, the prohibition would extend to truckloads containing substantial amounts of yard waste. Landfills that maintain composting areas would be allowed to accept yard waste provided that the materials are used by the waste facilities. In addition, the bill would require retail sellers of batteries containing acid or heavy metals to accept depleted batteries from consumers and to post signs that encourage the recycling of batteries. Sellers of more than 100 gallons of automotive oil annually in containers for use off the premises would be

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required to provide information pertaining to oil recycling. Tire retailers also would have to accept used tires for recycling and notify consumers of the need to recycle.

S.B. 315 would amend legislation relating to the recycling and disposal of waste tires. (Legislation, H.B. 2407, enacted by the 1991 Legislature, provided for changes in laws relating to the recycling and disposal of waste tires.)

S.B. 430 amends the central interstate low-level radioactive waste compact laws. The bill, among other things, would allow the host state (Nebraska) to establish fees which must provide the state with sufficient revenues to cover all anticipated present and future cost associated with the regional facility and a reasonable reserve for future contingencies which are not covered by rates charged to the users of the facility. The bill also would allow the host state, instead of one voting member for the compact like all the other party states, two at-large voting members and one nonvoting member from the county in which the facility is located.

Substitute for H.B. 2029, as amended by the House Committee of the Whole, would provide that, in the event of an acquisition of any public utility by another utility, the State Corporation Commission would be prohibited from allowing an increase in rates or charges to customers of the merged public utilities if the increase is attributable to acquisition costs not offset by savings resulting from the acquisition. This prohibition would not apply if the Commission determines that it would create an immediate danger to public health, safety, or welfare.

H.B. 2171, as amended by the House Committee on Energy and Natural Resources, would exempt certain individuals, who are on current military leave or furlough from active duty with a branch or department of the armed forces of the United States, from the requirement of purchasing a Kansas hunting or fishing license.

H.B. 2309 would prohibit oil-reclaiming facilities on and after January 1, 1992 from constructing, altering, or operating without first obtaining a permit from the Department of Health and Environment unless they are under the jurisdiction of the State Corporation Commission. Authority would be given to the Secretary of the Department of Health and Environment to establish, by rules and regulations, an annual permit fee which cannot exceed \$2,500.

H.B. 2354, as amended by the House Committee on Appropriations, requires the Director of Purchases to use commercially available sources to consider, when it is practical, the purchase of goods with recycled content for any given contract. The bill also provides that any local unit of government may join in the state purchases of goods having recycled content.

H.B. 2375, as recommended by the House Committee on Judiciary, would enact a Uniform Conservation Easement Act and repeal existing statutes governing conservation easements. A conservation easement is an agreement by which a landowner can restrict the development of his or her property. Under the bill, the natural state of the property can be protected indefinitely, regardless of who the future owners might be.

H.B. 2526, as amended by the House Committee on Energy and Natural Resources, would impose a penalty assessment on any person who is convicted of or pleads guilty or no contest to any violation of the wildlife and parks laws or any rules and regulations adopted pursuant to those laws. The payment of this penalty assessment would be in addition to any fines or court costs which might be assessed by the court. Current offenses and penalties for which a person may be issued a citation by a conservation officer or deputy conservation officer of the Department of Wildlife and

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Parks or by any other law enforcement officer, are abolished and new offenses and penalty amounts are established by the bill.

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