

Approved 2-11-92
Date

MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources

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

8:04 a.m./p.m. on February 5, 1992 in room 423-S of the Capitol.

All members were present except: Quorum was presented.

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:

Steve Hurst, Kansas Water Office
Lee Rolfs, Kansas Water Office
David Warren, City of Wichita
Mike Armstrong, Water District #1, Johnson County
R. Kent Weatherby, Kansas River Water Assurance District #1
Gerald Holman, Chamber of Commerce, Wichita, Kansas

The meeting was called to order by the Chairman. The hearing on SB 555 was opened. SB 555 - relates to water; concerning interbasin and intra-basin transfers, and providing procedures.

Steve Hurst, Director, of the Kansas Water Office, said the legislation is primarily amendatory in nature and would implement the "Modifications of the Water Transfer Act" Sub-Section of the Kansas Water Plan, which was approved by the Kansas Water Authority last August (Attachment 1).

Lee Rolfs reviewed what the current statutes are versus the changes proposed changes in SB 555 (Attachment 2).

David Warren asked that SB 555 be given favorable consideration (Attachment 3).

Mike Armstrong supported the proposal with some suggested changes (Attachment 4).

R. Kent Weatherby stated as secretary of the Kansas River Water Assurance District No. 1, and as a member of the Kansas Lower Republican Basin Advisory Committee, both of these organizations would support the proposed legislation, if the recommendations they suggested were adopted (Attachment 5).

Gerald Holman recommended several changes in SB 555, and stated if those changes were adopted they would support the bill. (Attachment 6).

A booklet The Kansas River of Opportunity was distributed and a copy is on file in the Committee office.

Information fact sheet on SB 555 was distributed by the Kansas Water Office (Attachment 7).

The conferees stood for questions.

The Chairman stated the hearings would be continued at a later date, and the conferees would be ask to return for further questioning at that time. The meeting adjourned at 9:00 a.m., and the next meeting will be, on February 11, 1992.

1991 SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

Date February 5, 1992

PLEASE PRINT

GUEST LIST

NAME

REPRESENTING

Gerald H. Holman	Chamber of Commerce - Wichita
David R. Warren	Kansas Water Authority
R. E. Polton	Kansas Water Assurance Dist #1 Topeka
Ben Johnson	W.D. #1 of Jo Co
Kent Weatherby	Kans River Water Assur Dist.
MIKE ARMSTRONG	W.D. #1 of Jo Co.
Eileen Korte	"
Mike Miller	City of Topeka
AL LeDoux	CKFO
Tom Day	KCC
Jana Mc Clell	self
Shaun McGrath	KRRC
Leah E. Rolf	DWR-KSBA

Testimony of
Stephen A. Hurst, Director
Kansas Water Office

Before the
Senate Energy and Natural Resources Committee
February 5, 1992

Re: Senate Bill No. 555

Thank you, Mr. Chairman,

I am Stephen A. Hurst, Director of the Kansas Water Office.

The legislative initiative that you have before you today is primarily amendatory in nature and would implement the "Modifications of the Water Transfer Act" Sub-Section of the *Kansas Water Plan* which was approved by the Kansas Water Authority last August.

The *Kansas Water Plan* sub-section was the subject of extensive review by the Kansas Water Authority Policy Committee and by the full Authority and was also subjected to extensive public review, being discussed at 12 public meetings and two public hearings.

The current Water Transfers Act, K.S.A. 82a-1501 *et seq.* was passed by the legislature in 1983 and sets out requirements for the diversion and transportation of water in quantities of 1,000 acre-feet or more per year for beneficial use outside a 10-mile radius from the point of diversion. The concept was to provide an extraordinary public interest review process for the movement of large quantities of water. The Act included administrative review procedures and provisions for legislative and judicial review.

Since 1983, only one water transfer application has been made under the Act and that was by Water District No. 1 of Johnson County this past fall. Final action on this application is still pending. This one water transfer application, however, has confirmed some of the concerns as to the need for changes in the Act that were set out in the *Kansas Water Plan* sub-section.

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The Kansas Water Office and Kansas Water Authority share concerns on the future viability of Kansas public water supplies. Many communities, both urban and rural, are dependant on sole source water supplies that are vulnerable during times of drought. Other communities have water supplies that are poor in quality or that are threatened by agricultural or industrial chemicals. The Water Transfers Act should not only serve as a public interest review mechanism for the movement of large quantities of water but should also be available to ensure the efficient beneficial use of surplus waters in the state to meet the people's water supply needs. The Act should not be an obstacle to the legitimate beneficial uses of surplus water by the people of Kansas once the public interest and statutory criteria are met.

While the Act basically sets out some sound standards for review of water transfers, there are several basic issues that are in need of clarification and amendment. These are addressed in S.B. 555. Included with my testimony, are copies of Kansas Water Office fact sheets reviewing these issues. In addition, Mr. Leland E. Rolfs, Attorney for the Division of Water Resources, who assisted the Kansas Water Authority in drafting this bill based on the recommendations set out in the *Kansas Water Plan* Sub-section, is prepared to walk you through the proposed changes to the Act.

I would be glad to stand for questions now or following Mr. Rolf's review of the proposed changes.

I appreciate the opportunity to testify before you here today and urge your favorable consideration of S.B. 555.

WATER TRANSFER ACT
SENATE BILL 555

	<u>SUBJECT</u>	<u>CURRENT - K.S.A. 82a-1501 et seq.</u>	<u>PROPOSED in SB 555</u>	<u>PAGE/LINE</u>
1.	Water Transfer Definition	1,000 a/ft per year and ten miles	Interbasin - Arkansas and Missouri Basins Intrabasin - 1,000 a/ft and 10 miles Exemptions - State Water Plan Storage Act Assurance Program Releases	Pg 1; 14-15 Pg 2; 4-16
2.	Discretion to Invoke	K.S.A. 82a-1503(c)	Similar	Pg 4; 13-21
3.	Panel	Holds hearing and makes initial order	Selects independent Hearing Officer only	Pg 2; 17-18 Pg 5; 16-18 Pg 6; 1
4.	Final Decision Maker	Water Transfer Panel, Kansas Water Authority and Legislature	Hearing Officer and Chief Engineer or Kansas Water Authority; no legislative oversight	Pg 4; 39-43 Pg 5; 25-32
5.	Hearings Required	All water transfers	All interbasin transfers All intrabasin transfers under K.W.A.A.* - if concerns	Pg 5; 11-15, 22-24, 43 Pg 6; 1-7
6.	Standards for Approving Transfer	K.S.A. 82a-1503(e)	Same	Pg 3; 15-41
7.	Procedural Requirements	K.A.P.A.** applies; K.S.A. 82a-1503(c)	Removed from K.A.P.A.; Internal Procedures added.	N/A
8.	Hearing Time Frames	K.S.A. 82a-1503(c) Hearing must begin in 60 days	Pre-hearing begins in 120 days	Pg 6; 23-35
9.	Advance Approvals	Not specifically authorized	Up to 20 years in advance	Pg 4; 22-25
10.	Generic Approvals	Not specifically authorized	Up to 10,000 a/ft.	Pg 4; 26-34
11.	Hearing Costs	K.S.A. 82a-1503(h) Transcript costs only	All costs including Hearing Officer	Pg 6; 15-21

* K.W.A.A. means Kansas Water Appropriation Act
** K.A.P.A. means Kansas Administrative Procedure Act

Prepared by Leland E. Rolfs
for the Kansas Water Office
February 5, 1992

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STATEMENT OF DAVID R. WARREN

Before The

Senate Committee on Energy and Natural Resources

Regarding

Senate Bill 555 - Modification of the Water Transfers Act

February 4, 1992

Senator Doyen and Honorable Members of this Senate Committee, I am David Warren. I appear before the Energy and Natural Resources Committee this morning to ask your favorable consideration of Senate Bill 555, which amends the Water Transfers Act.

I am a member of the Kansas Water Authority (KWA). Within the KWA, I serve on the Policy Committee. I was directly involved in the development of the Section of the Kansas Water Plan which led to the introduction of Senate Bill 555.

The Section of the Kansas Water Plan which led to SB 555 was developed from a consensus of the broad range of interests which are represented on the Kansas Water Authority. These interests included agricultural, environmental, municipal, commercial and industrial, regulatory and the public at large. The development of this initiative was sensitive to, first and foremost, protecting the public interests, while at the same time making waters of the state reasonably accessible for beneficial use. I believe that the KWA in SB 555 has successfully achieved the difficult task of making water transfers procedurally less complicated and maintaining the high level of public interest protection that movement of waters of the state deserve.

I believe SB 555 was well thought out and carefully developed by the men and women of the Kansas Water Authority. I believe these men and women were motivated by sincere, unselfish interests in the protection of and reasonable development of the waters of the State of Kansas. I ask you to give SB 555 your favorable consideration.

I would be glad to answer any questions regarding SB 555 which the committee may have.

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TESTIMONY TO THE KANSAS SENATE COMMITTEE
ON ENERGY AND NATURAL RESOURCES

February 5, 1992

Mr. Chairman and Senators:

My name is Mike Armstrong. I'm an attorney from Olathe, and I represent Water District No. 1 of Johnson County. The Water District is very interested in Senate Bill No. 555, the proposed changes to the Water Transfer Act. The Water District has been the only applicant under the existing Transfer Act. It recently applied for a water transfer from the Missouri River for 23,000 acre feet and that application is currently in the process of being reconsidered by the Water Transfer Panel. During this application process many ambiguities and various issues have surfaced regarding the provisions of the existing Act. Because of the problems with the existing Act, the District is happy that amendments have been proposed. We support this Bill, but there are a few suggestions that we would also like for you to consider.

The District certainly advocates the distinction which has been made in this Bill regarding intrabasin transfers as opposed to interbasin transfers. In regard to the State's interest in water movement this distinction is the key component. When water is moved between one of the two major water basins in the state that results in a complete and permanent deprivation of the exporting basin. Such a permanent deprivation clearly involves the state's interests and should be scrutinized closely before any such action is taken. On the other hand, an intrabasin transfer does not deprive the basin of origin from the benefits of the water, as the non-consumptive portion of the water and the beneficial use of the water stays within the basin boundaries.

One of the major problems with the current Transfer Act is the way the administrative procedures are designed. The Water Transfer Act was enacted in 1983 and it contained certain specific procedures. Sometime after that, the Kansas Administrative Procedures Act was enacted and subsequently made applicable to the Transfer Act. Application of the two provisions requires a meshing of the two Acts and in the practical sense proves to be very complicated and cumbersome.

Senate Bill 555 attempts to rectify those problems and clear up the situation. In doing so the reference to the Kansas Administrative Procedures Act was removed and the primary source of relevant procedures becomes the decision of the hearing officer, and the prehearing conference. This places an incredible burden on the parties and the hearing officer to develop a comprehensive list of procedures to be incorporated

into the prehearing order. In addition, it leaves a potential applicant or party with absolutely no indication, ahead of time, how those issues will be determined. I would encourage you to reconsider this void in procedural rules. Instead, I would submit to you that the reference to the Administrative Procedures Act should be reincorporated into Senate Bill 555 subject to any modifications made in the Pre-Hearing Conference. One way this could be done without bringing about the confusing mix of procedures present in the current Transfer Act would be to adopt the following language in Section 5 of the Bill:

"The Kansas Administrative Procedures Act shall apply to all procedural matters unless and to the extent modified by mutual consent of the parties in the prehearing conference held pursuant to Section 1(m), and except the following specific issues:"

Following this language you would set out in the bill all procedures which you determine to be more advantageous than those in the Administrative Procedures Act. In adopting such language it would make it clear that the provisions of the Kansas Administrative Procedures Act were to be followed except as provided by the specific Section 5 exceptions in the Act itself, and such additional exceptions as agreed upon at the Pre-Hearing Conference. This would at least give the parties involved some advance knowledge of what to expect in the way of administrative procedures, and it would make the processes of the Transfer Act more uniform with the other administrative agencies in Kansas.

As I stated earlier the District approves of the distinction between interbasin transfers and intrabasin transfers. There is a fundamental difference involved and the procedures required for them should be different. However, the definition of what constitutes an intrabasin transfer seems to be lacking any rational justification for the ten mile threshold. The District particularly protests this ten mile threshold because larger utilities, such as the District, whose service area is larger than ten miles may be required to apply for a transfer for any of its future water rights. By acquiring any future water right of over 1,000 acre feet and incorporating it into its distribution system it would automatically trigger this ten mile threshold.

In this regard, I would like to call your attention to K.S.A. 19-3511 which is a provision of the enabling statute for urban water districts such as Water District No. 1. I have attached a copy of this statute as Exhibit A. This statute clearly gives the District authority to reach up to 20 miles outside of its boundaries to obtain adequate water supplies. It is inconsistent to apply the arbitrary threshold radius of ten miles over this provision. Section 3511 clearly contemplates the situation where a water district would not have an adequate supply of water within its borders, and empowers that utility to travel up to 20

miles outside its district's boundaries to obtain water. The Kansas Department of Health and Environment and other state agencies advocate regional water utilities, but this provision of the Transfer Act creates a substantial obstacle to such a regional utility, especially when the District's boundaries encompass more than ten miles.

The rationale of the ten mile threshold was apparently calculated to designate some substantial distance which would peak the state interest in such a transfer. I would submit that this distance should not be ten miles, especially if the applicant's area of beneficial use would be larger than that ten miles. I would suggest that the definition be reconsidered and be made more consistent with the current and long standing statute which I just mentioned. One alternative would be the following definition:

"...The diversion and transportation of water in a quantity of 1,000 acre feet or more per year if the nearest point of the area in which the water is to be put to beneficial use lies outside a 20 mile radius from the point of diversion..."

Another attribute of the current Act which has been carried over into the current Senate Bill No. 555 is the Water Transfer Panel. I would encourage you to examine this bill closely and consider the limited duties of the Panel. The only duties of the Transfer Panel seem to be the choosing of an independent hearing officer. It might be more efficient to simply have the Kansas Water Authority choose a panel of competent potential hearing officers, from which the chief engineer could assign a hearing officer with no potential conflicts with that particular application, and sufficient time to proceed with the hearing process in an expeditious manner. In this regard the Water Transfer Panel could be eliminated.

Another question which the District encourages you to ask yourselves is whether this Bill may be contributing to an accumulation of too much power in the chief engineer. While the current chief engineer impresses us as objective, fair and reasonable, a successor could abuse this extensive power added by this Bill. The current Transfer Act provides multiple checks on the application to transfer water. The initial decision is the product of a three member panel which is directly reviewed by the Kansas Water Authority, and subsequently reviewed by the legislature. The District supports the removal of the final legislative oversight. That was clearly a legislative veto and as such that legislative oversight was probably unconstitutional. However, this Bill may go too far in removing the Kansas Water Authority's oversight in all but one instance - an interbasin transfer which involves water use authorized by the state water storage plan. In all other instances, the chief engineer is the "final decision-maker." If the rationale of the Act is to

consider the state's interest in water movement, it seems more appropriate that the final order be issued by an entity which represents the various state interests - the Kansas Water Authority, rather than an individual state official.

Finally, I would like to point out a few technical issues in the Senate Bill No. 555 which you may want to consider.

1. Section 1(h) defines district court as "means the District Court of Shawnee County." This seems to infer that all judicial reviews should be sought in the District Court of Shawnee County. I would submit that this is inappropriate and unneeded language in the Bill. The Kansas Judicial Review Act contains a specific provision which dictates where venue is proper in each individual case.

2. Section 1(i) defines an interbasin water transfer. I would submit that this definition is ambiguous and it may be helpful to incorporate a map of such boundaries, such as the map which was contained in the Kansas Water Plan Executive Summary for fiscal year 1994.

3. Section 1(p). The definition of person in this subsection seems to infer that other states or other state's agencies may become involved in the application process. This definition should be seriously considered as being limited to only Kansas agencies and political subdivisions of the State of Kansas which can become involved in the process.

4. Section 5(a) outlines the procedure in which the cost of the hearing officer and the court reporter is to be assessed to the applicants and parties involved. I would submit to you that this cost is actually part of a state function and accordingly should be borne by the state.

In closing once again I would like to lend the Water District's support for this new Bill, and agree that changes to the current Water Transfer Act are in order. However, at the same time I would like to caution this Committee against making amendments to the current Act without considering what implications they may have and without clearly understanding the problems which are inherent in the current Act. As the only applicants thus far under the current Transfer Act, the District has observations and experiences which it would be glad to share with this Committee if any further questions arise about the provisions in Senate Bill 555.

19-3511. Mains, waterworks and plants; eminent domain. Any water district established under this act is hereby empowered to connect with any source of water supply or to construct, operate and maintain waterworks or plants anywhere within twenty (20) miles of any boundary of such water district, either within or without the county; to lay mains from any such waterworks or plants through and under and along any street, public highway, alley, or park and across any public property to any boundary of such water district; to construct, operate, maintain, expand and extend waterworks or plants at any point along or near the lines of such water mains; and to acquire suitable grounds by purchase or by appropriate proceedings in condemnation for the construction, extension, expansion, operation or maintenance of any mains, waterworks or plants mentioned herein. Such condemnation proceedings shall be exercised in accordance with the provisions of K.S.A. 26-501 to 26-516, inclusive. Such district shall have jurisdiction over any such grounds acquired outside the water district the same as if such grounds were within the district as far as may be necessary in order to protect, maintain and operate such works.

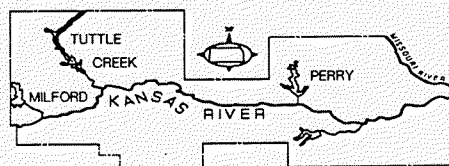
History: L. 1951, ch. 240, § 11; L. 1963, ch. 234, § 51; Jan. 1, 1964.

Research and Practice Aids:

Waters and Water Courses ⇐ 194.
C.J.S. Waters §§ 242, 257.

Emphasis Added.

The Kansas River



Water Assurance District No. 1

400 S.W. 8th Street - Suite 304 - Topeka, Kansas 66603

February 5, 1992

Mr. Chairman and Members of the Committee,

I appear before you today as Secretary of the Kansas River Water Assurance District No. 1 and as a member of the Kansas Lower Republican Basin Advisory Committee. Both organizations could support this legislative initiative with the changes we will propose.

The basin advisory committee has consistently identified interbasin water transfer at or near its highest priority as an issue since the Kansas Water Authority created the basin advisory committees 6 years ago.

The draft section to the State Water Plan which is now before you in the form of new legislation replacing the existing Water Transfers Act was exposed to a public meeting in the basin last spring at Holton, Kansas. We understand the Bill is recommended to you on the basis that it has undergone considerable public scrutiny. While I cannot speak for other public meetings I can

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assure you that not more than 20 people attended the meeting in Holton on this subject. Of the 20, there were 10 members of the basin advisory committee present and 4 employees of the Kansas Water Office.

The basin advisory committee presented written comments to the Kansas Water Office and Kansas Water Authority at their formal public hearings in the Old Supreme Court Chambers in the State House. Those comments called for changes to the proposed amendments to the State Water Plan and the Water Transfers Act. Those recommendations were accepted in part and rejected in part. The basin advisory committee recognizes that its function is advisory and for that reason does not appear before you to make formal comment on this Bill.

The Kansas River Water Assurance District No. 1, representing 16 municipalities and industries on the Kansas River, supplies water during drought to more than 600,000 Kansans. The District has contracted for 107,500 acre feet of storage in Milford, Tuttle Creek and Perry Reservoirs. It is the assurance district which makes the following recommendations to you.

- THE KANSAS ADMINISTRATIVE PROCEDURE ACT SHOULD GOVERN APPLICATIONS FOR WATER TRANSFERS. The existing Water Transfers Act, K.S.A. 82a-1501 et seq., is subject to KAPA. Section 5 of Senate Bill 555 would set up a separate

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procedural process in lieu of KAPA but nevertheless one that is essentially a paraphrase of KAPA. As with most efforts to paraphrase much is lost in the translation. KAPA was enacted by the legislature to provide a uniform procedure for the more important actions of the state government. Interbasin transfers of water have profound environmental, economic, political and social impacts. It is noteworthy that many issues of significantly less importance have been made subject to KAPA.

- THE DEFINITION OF "HEARING OFFICER" SHOULD BE STRENGTHENED. Regional disagreements over the transfer of water have been prevalent in the State for 10 years or more. The number of those disagreements appears to be rising. Provision should be made for the hearing officer to be someone outside the State of Kansas. While there are no doubt many Kansans qualified to act as a hearing office, a level playing field can best be established for both the proponents and intervenors of any proposed transfer by requiring that person to be

someone without connection to the parties or the issue.

- TRANSFER ORDERS SHOULD PROVIDE MECHANISM FOR STOPPING THE TRANSFER WHEN CONDITIONS CHANGE. Interbasin water transfers will require the expenditure of, in some cases, well over 100 million dollars. From the standpoint of planning the applicant needs to know in advance what restrictions may be placed on those transfers. The basin of origin needs to also be protected from ruinous environmental and economic consequences of a transfer which, when once authorized, cannot be stopped. By stating in the order approving a transfer the conditions under which the transfer will be automatically stopped both the basin of origin and the receiving basin can plan for the future.

- TRANSFERS SHOULD ONLY BE AUTHORIZED FOR SURPLUS WATERS DEFINED AS WATER RELEASED FROM FLOOD STORAGE IN THE FEDERAL RESERVOIRS OR HIGH FLOW OF A NATURE CONSTITUTING FLOOD WATER. The firm yield of each water source should be dedicated to the agricultural,

municipal and industrial users who in the natural consequences of events would enjoy the benefits of that resource. The "skimming" of excess or flood waters into dry lakes in a receiving basin promotes the wise and efficient use of our resources. The Kansas Water Office should be required to study and report to the Hearing Officer the availability of flood water and the historic timing of flood pool^{release} for consideration in any transfer application.

Accordingly we offer the following specific recommendations on Senate Bill 555. Due to the limited time we have had to prepare our comments and the need to coordinate those comments among the entire membership of the Assurance District, we would like to reserve the right to supplement this testimony in writing at a later date.

1) Section 1 (o), page 2, lines 33-34 should be amended to read: " 'Hearing Officer' means an independent hearing officer knowledgeable in water law, rules of pocedure and evidence, as well as water issues who is not personally or professionally connected in any way with either the applicant, intervenors or the basins of origin or transfer."

2) Section 2, page 3, lines 2-3 should be amended to read:
"(1) Unless the final decision maker determines that the benefits to the state for approving the transfer substantially outweigh the benefits to the state for not approving the transfer..."

3) Section 2, page 3, a new subsection following Section 2 (a) (3) which should read, "(4) An emergency exists when a temporary water transfer, not more than 1 year in duration, is needed to avoid significant loss of life and property or the significant endangerment of public health and safety."

4) Section 2, page 3, line 34 should be amended to read, "The plan shall be in sufficient detail to enable all parties to understand and calculate the impacts of the proposed water transfer..."

5) Section 2 (i), page 4 should be amended by the addition of the following language, "...Any approval granted under this provision shall also state, to the extent ascertainable, the conditions and circumstances under which a transfer shall be rescinded without further action by the approving authority."

6) New Section 2 (k). "Nothing in this act shall prevent any party; water right holder; or person, municipality or corporate entity in privity of contract with the State of Kansas under the provisions of 82a-1305 et seq. from petitioning the final decision

maker for reversal or modification of any order entered hereunder based upon a change in circumstances."

7) New Section 5. "All proceedings conducted hereunder shall be in conformity with the provisions of K.S.A. 77-501 et seq. and amendments thereto."

We thank you for the opportunity to be heard on this important topic.



Roger K. Weatherby
Secretary

THE CHAMBER

February 7, 1992



Senator Ross Doyen
Chairperson
Senate Energy and Natural Resources Committee
Statehouse
Room 422-S
Topeka, KS 66612

Dear Senator Doyen:

Thank you for allowing me to enter testimony in support of Senate Bill 555 during the hearing on Wednesday, February 5. My comments were made on behalf of the members of the Wichita Area Chamber of Commerce.

Attached is a written statement which is very similar to my verbal comments made during the hearing. I have additional thoughts which I would be pleased to discuss as your deliberations continue. I look forward to that opportunity. I do plan on attending other hearings you will be scheduling on the bill.

We look forward to your support of SB 555 as well as the support of the Senate Energy and Natural Resources Committee.

Sincerely,

Gerald H. Holman
Senior Vice President

c: Members of the Senate Energy
and Natural Resources Committee

We appreciate the members of the Kansas Water Authority and the staff of the Kansas Water Office and commend them for their work on behalf of all Kansans in developing and recommending needed revisions to the Water Transfers Act. Several problems were recognized within the current Water Transfers Act which are in need of resolution. SB 555 is a result of multiple discussions by members of the Authority and unanimous approval by the Authority. We encourage your full support of the bill.

The Water Transfers Act in its current form has an extremely complicated and almost prohibitive process through which to work in order to reach a final decision on any transfer application. SB 555 proposes a more reasonable approach and also provides needed safeguards for both the area of origin and the area of use. The proposed improvements are to the benefit of all Kansans.

There are three specific items within the bill on which I would like to comment. These are:

1. We support the two basin concept as proposed in SB 555. There are really only two river basins in Kansas, all others are subsets, including the twelve basins as called for under the Kansas Water Plan. We would support and recommend the 10 mile distance be increased to 20 miles to be consistent with other water law established in the early 1950's.
2. We support the removal of the Kansas Administrative Procedures Act. SB 555 proposes using the existing Water Appropriations Act and the existing State Water Plan Marketing Act processes through which to decide upon transfer applications. There are several advantages to this recommendation, including:
 - a. Proven procedures are recommended and would be utilized.
 - b. Proven lines of authority would be utilized.
 - c. Citizens of the state have accepted the application and review requirements of both decision approaches.
 - d. Separation of powers would exist between the Chief Engineer for applications under the Water Appropriations Act and the Kansas Water Authority for applications under the State Water Plan Storage Act. This helps to reduce the concentration of power under one individual, currently vested in the Chief Engineer.
 - e. Needed safeguards for all parties are included in both the Water Appropriations Act process and State Water Plan Storage Act process in reviewing and deciding upon transfer applications.
3. We support the concept of the hearing officer in order to eliminate potential conflicts of interest in lieu of the hearing panel as called for under the current Water Transfers Act.

The Wichita Area Chamber of Commerce supports the Kansas Water Authority recommendations contained in SB 555. We encourage your favorable consideration of the bill and look forward to your support.

Thank you very much.

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S.B. 555

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HIGHLIGHTS OF CLARIFYING AMENDMENTS



Fact Sheet No. 1

January 1992

Kansas Water Office

Modifications to Water Marketing Act

Clarification	Current Law	S.B. 555	Rationale
I. Definition of a Transfer			
A. Automatic Trigger	≥1,000 AF and ≥10 miles	1. ≥1,000 AF across Missouri/Arkansas Basin Boundary 2. ≥1,000 AF and ≥10 miles within the Missouri or Arkansas Basin if there is public concern	More effectively triggers act to focus on transfers that are of public concern. Eliminates automatic trigger for transfers that are of no public concern.
B. Water Sold by Contract at the Reservoir and Conveyed to User in Natural Stream	Act Applies	Exempt from Act	Currently duplication. Public interest determination is still required under Water Marketing Program (K.S.A. 82a-1301 <i>et seq.</i>).
C. Aggregation of Small Water Transfers by One User	Not Specifically Addressed	Act Would Apply	Prevents aggregation to circumvent provisions of Act.
II. Clarification of Administration			
A. Process and Procedures	Both Water Transfers Act Administrative Process and Kansas Administrative Procedures Act Apply	Water Transfers Act Administrative Process	Eliminates duplication of two administrative procedures.
B. Hearing Panel	Three Members (Chief Engineer, Division of Water Resources; Director, Kansas Water Office; Secretary, Kansas Department of Health and Environment	Some Panel Selects Independent Hearing Officer to Conduct Hearings, Fact Finding and Conclusions of Law	Eliminates problems of: - "conflict of interest" of the panel - Ex parte communication - Time demands placed on agency heads
C. Legislative Oversight	Legislature May Disapprove a Transfer	- Chief Engineer approves appropriation transfers - Kansas Water Authority approved Water Marketing transfers	Attorney General Opinion states current law is unconstitutional.



I. CLARIFICATION OF DEFINITION

A. Automatic Trigger

Fact Sheet No. 2

January 1992

Kansas Water Office

At the time of the drafting of the Water Transfers Act in 1983, the Kansas Water Authority's intent was to promote an interbasin transfers act. At that 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.

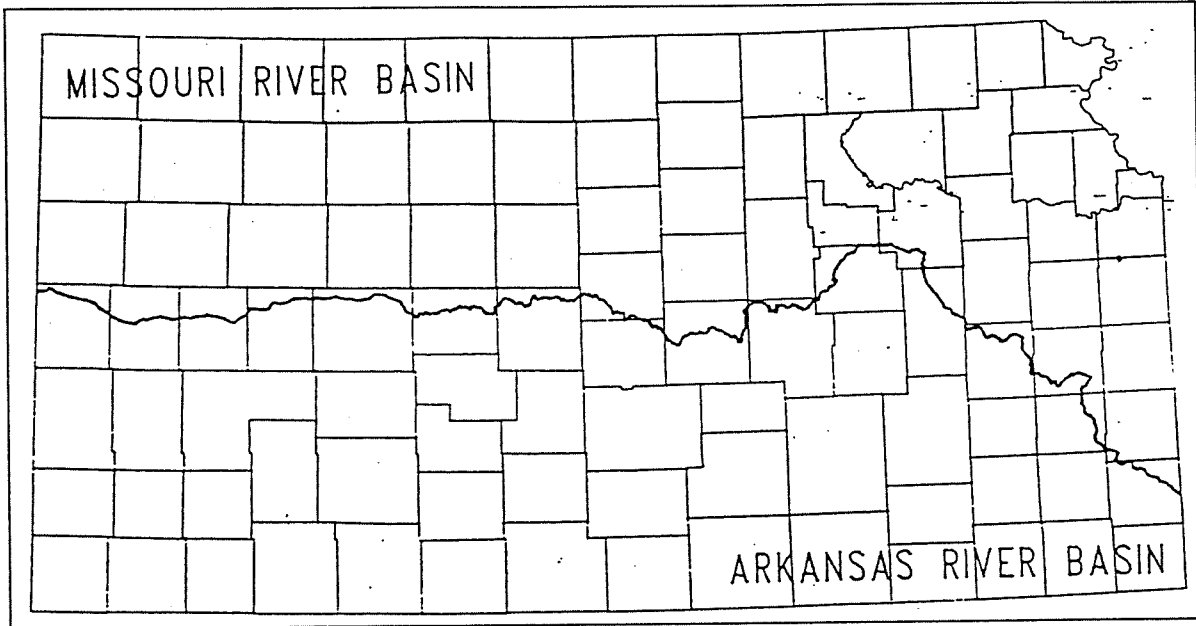
Since the passage of the Water Transfers Act in 1983, the *Kansas Water Plan* has identified and set out 12 hydrologic basins that are subsets of the two major hydrologic drainage basins that divide the state in half, the Missouri River Basin and the Arkansas River Basin. These 12 basins have become 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.

It is recommended the Water Transfers Act continue 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 amendment 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 amendment would 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 deserve and require governmental scrutiny. An automatic trigger for an interbasin transfer would be defined as the transfer of water within either the Arkansas or Missouri River basin of more than 1,000 acre-feet 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.

This amendment is recommended because it effectively deals with both large inter and intrabasin 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.

Basin Boundaries





I. CLARIFICATION OF DEFINITION

B. Reservoir Water Conveyed in the Natural Streams

Fact Sheet No. 3

January 1992

Kansas Water Office

Public Interest Determination Under Transfers Act (K.S.A. 82a-1503(e))

(e) To determine whether the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer, the panel shall consider all matters pertaining thereto, including specifically:

(1) Any current beneficial use being made of the water proposed to be diverted, including minimum desirable streamflow requirements;

(2) any reasonably foreseeable future beneficial use of the water;

(3) the economic, environmental, public health and welfare and other impacts of approving or denying the transfer of the water;

(4) alternative sources of water available to the applicant and present or future users for any beneficial use;

(5) the proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying the water from the point of diversion. The plan shall be in sufficient detail to enable all parties to understand the impacts of the proposed water transfer; and

(6) conservation plans and practices or the need for such plans and practices of persons protesting or potentially affected by the proposed transfer. Such plans and practices shall be consistent with the guidelines for conservation plans and practices developed and maintained by the Kansas water office pursuant to subsection (c) of K.S.A. 74-2608, and amendments thereto.

Public Interest Determination Under Water Marketing Act (K.S.A. 82a-1311(c))

(c) In order to determine whether a proposed contract for the sale of water from the state's conservation water supply capacity is in the interest of the people of the state of Kansas and whether the benefits to the state for approving the contract outweigh the benefits to the state for not approving the contract, the authority shall consider all matters pertaining to such questions, including:

(1) The present and future water supply needs of the applicant;

(2) any current beneficial uses being made of the noncontracted water proposed to be diverted;

(3) any reasonably foreseeable future beneficial uses of the water;

(4) the economic, environmental, public health and welfare and other benefits or adverse impact of approving the contract;

(5) alternative sources of water available to the applicant;

(6) the preliminary plan of design, construction and operation of any works or facilities used in conjunction with carrying the water to its point of use;

(7) whether the proposed purchase is consistent with the state water plan approved by the legislature;

(8) the date of receipt of the application to contract for withdrawal and use of water;

(9) minimum streamflow requirements; and

(10) whether the applicant has adopted and implemented a water conservation plan.



I. CLARIFICATION OF DEFINITION

C. Aggregation of Small Transfers

Fact Sheet No. 4

January 1992

Kansas Water Office

Current law does not address the application of the Water Transfers Act for acquiring water rights for future use or aggregation of small water transfers which, when taken as a whole, constitute a transfer of more than 1,000 acre-feet more than 10 miles.

This amendment would provide a mechanism for addressing the issues of acquiring water rights for future use and aggregation of small water transfers of 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 20 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 10,000 acre-feet from a specific geographic area from a specific source or sources of supply for use by specified water use(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.



II. CLARIFICATION OF ADMINISTRATION

A. Process and Procedures

Fact Sheet No. 5

January 1992

Kansas Water Office

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.

It is recommended the law be amended 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 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 amendment 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 amendment 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 amendment 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 amended transfers act would provide for Kansas Water Authority approval of interbasin transfers 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 is 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 amendment provides 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 amendment also provides that *intra*basin transfers of water from reservoirs that fall under the 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 State Water Plan Storage Act.

This change 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 amendment 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, a bifurcated process provides input and procedural safeguards for both the applicant and the basin of origin.



II. CLARIFICATION OF ADMINISTRATION B. Hearing Panel

Fact Sheet No. 6

January 1992

Kansas Water Office

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 short 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.

This amendment would retain the hearing panel as currently designated in the Water Transfers

Act. 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. The hearing officer's preliminary order should build a record of testimony and include findings of fact and conclusions of law.

This amendment 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 findings of fact and conclusions of law and to issue a preliminary order. It also eliminates the probable of ex parte communications during the hearing. The amendment eliminates the need for three agency heads to be away from their respective agencies for potentially extended period of time to conduct hearings. The amendment for the new administrative process and procedures affords applicants and the area of origin 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 of 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.



II. CLARIFICATION OF ADMINISTRATION

C. Legislative Oversight

Fact Sheet No. 7

January 1992

Kansas Water Office

Attorney General Opinion No. 91-12 (In Part)

By enacting K.S.A. 82a-1305 (above) and 82a-1504 (requiring water transfers be approved by the legislature as provided for in K.S.A. 82a-1301 *et seq.*), the legislature made a deliberate choice to delegate to the executive branch and specifically to the water authority the power to authorize water transfers in certain specified circumstances. It is well settled that by enacting legislation the legislature may delegate to independent agencies the ability to make policy that will bind the state. But, once the legislature has delegated by statute a function to the executive branch (or an executive agency such as the water authority), it may only revoke that authority by proper enactment of another law in accordance with the provisions of article 2, section 14 of our state constitution. A concurrent resolution disapproving or revoking the water transfers made pursuant to K.S.A. 82a-1301 *et seq.* and K.S.A. 82a-1501 *et seq.* allows the legislature total and absolute control over decisions delegated to the executive. There is no provision providing for presentment to the governor for approval and thus the executive branch is foreclosed from the shared power of enacting legislation.

The Kansas Supreme Court has found in a similar oversight provision unconstitutional in State ex rel. v. Kansas House of Representatives, 236 Kan. 45 (1984). At issue was K.S.A. 77-426(c) which allowed the legislature to adopt, modify or revoke administrative rules and regulations of the executive

branch agencies by passing a concurrent resolution. Finding that adopting regulations was executive in nature, the court held that the legislative oversight provision allowed the legislature to impede upon the executive department of its constitutional mandate to execute the laws. Additionally, the court found that the legislature, by passing a concurrent resolution that affected the legal rights, duties and regulation of persons outside the legislative branch, was enacting legislation that did not comply with article 2, section 14 of the Kansas constitution requiring bills enacted by the legislature be presented to the government. See also INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) cited and discussed in Stephan; Bowsheer v. Synar, 478 U.S. 714; 106 S.Ct. 3181; 92 L.Ed.2d 583 (1986):

In conclusion we find that a concurrent resolution pursuant to either K.S.A. 82a-1307 or 82a-1504 effectively allows the legislature to direct the exercise of agency discretion in a manner considered unachievable when the enabling statute was first passed. Because laws can be enacted, amended or repealed only in accordance with article 21, section 14 of the Kansas constitution, it is in our opinion that the legislative oversight provision that attempts to make law without the participation of the governor is unconstitutional. Foreclosing the executive branch from the law-making process offends the separation of powers doctrine and violates article 2, section 14 of the Kansas constitution.

OVERVIEW OF MODIFICATION OF THE WATER TRANSFERS ACT



Fact Sheet No. 8

January 1992

Kansas Water Office

The Water Transfers Act (82a-1501 *et seq.*) 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 need to be addressed by amendatory legislation.

CLARIFICATION OF DEFINITION OF A TRANSFER

At the time of the drafting of the Water Transfers Act in 1983, the Kansas Water Authority's intent was to promote an interbasin transfers act. At that 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 of more than 1,000 acre-feet, 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.

It is recommended the Water Transfers Act continue to automatically trigger both interbasin transfers and intrabasin transfers. This amendment 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 amendment would 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 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 more than 1,000 acre-feet outside a 10 mile radius from the point of diversion if there is a public concern. 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 provisions of this act.

These amendments 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.

These amendments are recommended because they effectively deal 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 in 1983. It does, however, differentiate between the levels of scrutiny provided interbasin transfers and intrabasin transfers.

CLARIFICATION OF ADMINISTRATIVE PROCESS AND PROCEDURES

"Kansas Administrative Procedures Act"

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."

It is recommended the act be amended 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 a special water transfers administrative procedure, to protect and safeguard the rights of both the applicant and the area origin. The amendment 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 transfer and to approve transfers of water under a modified Water Appropriation Act type approval process for applications.

The amendment would also provide for Kansas Water Authority approval of transfers of water from reservoirs that fall under the purview of the State Water Plan Storage Act.

These amendments are recommended because they provide a reasonable process that differentiates between water transfers that are out of 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. Safeguards are provided for both hearing procedures. Thus, the amendments provide a bifurcated process with appropriate input and procedural safeguards for both the applicant and the basin of origin.

"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 panel members in their respective positions as state agency heads often come in contact with potential applicants for transfers. In many cases, these administrators may in fact encourage development of alternative sources of supply that may involve a water transfer. 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.

It is recommended the law be amended so that the hearing panel convenes only to select an independent hearing officer knowledgeable of water law for the purpose of conducting the hearings. The hearing officer's preliminary order should build a record of testimony and include findings of fact and conclusions of law.

This amendment effectively eliminates the problems of "conflict of interest" of hearing panel members by appointing an independent hearing officer. It also eliminates the problem of ex parte communications during the hearing and the need for three agency heads to be away from their respective agencies for potentially extended periods of time to conduct hearings.

"Legislative Oversight"

Presently, if the Kansas Water Authority approves a water transfer and there is no judicial review pending, the proposed transfer is submitted to the legislature during the first 30 days of the legislative session for review. 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 No. 91-12, which states that legislative veto or disapproval power over an executive agency decision violates the concept of separation of powers and is therefore unconstitutional. (See also, State ex rel. Stephan vs. Kansas House of Representatives, 236 Kan. 45 (1984).)

It is recommended the Act be amended to eliminate the legislative oversight provisions of water transfers. This new amendment, in conjunction with the other recommended amendments would still provide safeguards to both the applicant and the area of origin.